APRIL 2008 – ADI NEWS ALERTS

by Elaine A. Alexander, Executive Director

The accompanying memo addresses the question of marginal issues – those that are inherently weak – and making a judgment call as to whether they are arguable or frivolous. It focuses especially on the situation where such issues are the *only* ones counsel can find. In those cases the choice comes down to raising the marginal issues or filing a no-merit brief. (E.g., *In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529 [LPS]; *In re Sade C.* (1996) 13 Cal.4th 952 [dependency]; *People v. Wende* (1979) 25 Cal.3d 436 [criminal]; see also *Smith v. Robbins* (2000) 528 U.S. 259; *Anders v. California* (1967) 386 U.S. 738.[1])

The immediate trigger for addressing this topic is that apparently some justices have perceived an increasing number of unarguable issues in certain cases. This perception has been reflected in occasional opinions expressing puzzlement or disapproval that a given issue was raised. In some such issues have been the *only* ones, and therefore the opinion has questioned whether brief should have been filed under the applicable no-issue authority, such as *Wende*, *Sade C.*, etc.[2] The rationale behind the criticism is that a brief raising only unarguable issues has no chance of helping the client and improperly draws on the court's resources.

ADI is very concerned that (a) there be no chilling effect on advocacy from such criticisms and (b) the court understands that sometimes they and attorneys have a different judgment about what constitutes an arguable issue. We have communicated these concerns to the court. We also have pointed out that in many non-criminal cases there is no strategic advantage to the client in filing a no-issue brief, because the court will not review the record for issues after receiving such a brief. The court does not dispute these points and wants to assure us it is not pressuring attorneys to take action contrary to their professional responsibilities to their clients. Rather, the court just wants attorneys to keep in mind that they also have a professional responsibility not to raise what they know to be unarguable issues.

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[1]See also *People v. Taylor* (2008) 160 Cal.App.4th 304 (Mentally Disordered Offender proceedings).

[2]In some courts, including Division Three of the Fourth Appellate District, counsel in a dependency appeal must file a letter in lieu of a brief. (Sample at http://www.adi-sandiego.com/PDFs/sade%20c%20div%203.pdf.)

A related area of concern for some time has been so-called "*Wende*-buster" briefs – those that raise only borderline frivolous issues in apparent effort to avoid filing a no-merit brief. Because such briefs have no realistic chance of achieving a benefit for the client and in criminal cases deprive the client of the right to a court review of the entire record for issues, ADI tends to treat them as quasi-*Wende*. We often will contact the attorney about possible omitted issues and may ask for the record to conduct a post-AOB *Wende*-type of review.

ADI starts with a strong sense of deference to the professional judgment of counsel. We do not want to act as "issue police" on a case-by-case basis, beyond what is necessary to discharge our responsibility to evaluate counsel's performance and ensure that a baseline for quality representation is always met.

We also see our central role as one of enforcing skillful and vigorous advocacy for clients. My newsletter article on this point says, in part:[3]

> Our program is not designed merely to feed attorneys' names into the system, so that each case can meet minimum legal requirements for "processing." We are here to promote truly effective advocacy. That means serving the clients' interests with utmost dedication and directing your professional skills and judgment and energy in every case to that end. It means remembering that you are the client's personal representative before the court, the point of intersection between the individual and the system; in that role you convey credibility and conviction on the client's behalf to the court and caring to clients, so that they sense they have had their day in court, defended by an able, vigorous advocate with their interests at heart.

That having been emphasized at the outset, it is nevertheless important for counsel to appreciate that raising unarguable issues does not even potentially benefit the client, and it imposes wasteful costs on the system, consuming the resources of opposing counsel and the court. We therefore need to ensure that counsel both know and use appropriate criteria for evaluating and selecting issues. ADI thinks a constructive approach to this recent and ongoing concern is to review these criteria and discuss their application in practice. The accompanying memo analyzes the law and relevant strategic and ethical considerations.

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[3] http://www.adi-sandiego.com/newsletters/2001_june.pdf.