

**MOTION PRACTICE IN THE FOURTH APPELLATE DISTRICT  
PERTAINING TO CRIMINAL AND JUVENILE CASES**

**BY**

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# MOTION PRACTICE IN THE FOURTH APPELLATE DISTRICT PERTAINING TO CRIMINAL AND JUVENILE CASES

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This guide serves to provide the appointed appellate attorney with a comprehensive overview of the various motions<sup>1</sup> that are used in appellate defense practice,<sup>2</sup> including habeas proceedings, in the Fourth Appellate District and to offer useful resources and practical tips. The guide also serves as a checklist, setting forth the governing rules, policies, practices, and procedures. Hyperlinks are in blue font.

The [Fourth Appellate District](#)<sup>3</sup> is divided into three geographical divisions. Division One is located in San Diego and has jurisdiction over appeals from the superior courts of San Diego and Imperial Counties. Division Two is located in Riverside and has jurisdiction over appeals from the superior courts of Riverside, San Bernardino, and Inyo Counties. Division Three is located in Santa Ana and has jurisdiction over appeals from the superior court of Orange County.

The court practices and procedures and the links outlined in this guide are current as of publication. Counsel should check for any changes. See also ADI's [Fourth Appellate District Practice](#)<sup>4</sup> pages.

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<sup>1</sup> For purposes of this guide and ease of reference, motion practice includes applications, motions, notices, and requests, as well as certain petitions. Attorneys should keep in mind that different rules may apply to these different kinds of filings.

<sup>2</sup> For purposes of this guide, appellate defense practice encompasses criminal and juvenile delinquency appeals, juvenile dependency appeals, conservatorships, and civil commitments.

<sup>3</sup> <http://www.courts.ca.gov/4dca.htm>

<sup>4</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist.asp](http://www.adi-sandiego.com/practice/fourth_dist.asp)

## I. INTRODUCTION

Effective motion practice takes some finesse. The foundation begins with a review of the relevant [California Rules of Court](#),<sup>5</sup> which govern motion practice, and the supplements to the rules. These supplements consist of the [Court of Appeal Fourth District Local Rules of Court](#),<sup>6</sup> the District's published [Practices & Procedures](#),<sup>7</sup> and the specific [practices and procedures](#)<sup>8</sup> of Divisions One, Two, and Three, which are either published or informally communicated to Appellate Defenders, Inc. (ADI).<sup>9</sup> Unless specifically noted otherwise, the practice or procedure will be considered unpublished.

Further resources to assist counsel and promote cost savings include:

- Appellate Defenders, Inc. [California Appellate Practice Manual](#) (hereinafter ADI Manual)<sup>10</sup>
- ADI [news alerts](#)<sup>11</sup>

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<sup>5</sup> <http://www.courts.ca.gov/rules.htm>

<sup>6</sup> Hereinafter "Fourth District Local Rules, rule." <http://www.courts.ca.gov/documents/4dca-local-rules.pdf>

<sup>7</sup> <http://www.courts.ca.gov/2834.htm>; see also Internal Operating Practices and Procedures (IOPP) of Division One ([http://www.courts.ca.gov/documents/IOP\\_District4\\_division1.pdf](http://www.courts.ca.gov/documents/IOP_District4_division1.pdf)) and Division Three ([http://www.courts.ca.gov/documents/IOP\\_District4\\_division3.pdf](http://www.courts.ca.gov/documents/IOP_District4_division3.pdf)) Division Two does not publish its IOPPs on the court website because they are not kept current. The IOPPs may be found in hard copy publications containing the California Rules of Court. [ADI's Fourth District Practice page for Division Two](#) describes a number of current practices.

<sup>8</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist.asp](http://www.adi-sandiego.com/practice/fourth_dist.asp)

<sup>9</sup> See, e.g., Fourth District Practices and Procedures relating to augment requests [checklist of documents requested to facilitate the clerk's preparation and reduce errors is an unpublished procedure], *ante*, footnote 8.

<sup>10</sup> <http://www.adi-sandiego.com/panel/manual.asp>

<sup>11</sup> [http://www.adi-sandiego.com/news\\_alerts/index.asp](http://www.adi-sandiego.com/news_alerts/index.asp)

- ADI practice articles: [criminal](#),<sup>12</sup> [delinquency](#),<sup>13</sup> and [dependency](#).<sup>14</sup>
- ADI sources on filing and service requirements: [general requirements](#),<sup>15</sup> [TrueFiling](#),<sup>16</sup> and [e-service](#) on other counsel and the superior court<sup>17</sup> (See [Dec. 28, 2015, ADI news alert: Expanded Email Service Starting January 1, 2016 -- “Cheat Sheet” is the key.](#))<sup>18</sup>
- ADI sample motions: [general](#)<sup>19</sup> and [dependency](#)<sup>20</sup>
- [Other project sample motions](#)<sup>21</sup>
- ADI in-house sample motions: ask the staff attorney assigned to the particular case.

*Practice Tip:* ADI expects you as counsel to sign up with the Court of Appeal for [email notifications](#)<sup>22</sup> for each case to which you are appointed, so that you can be promptly informed of case activity.

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<sup>12</sup> [http://www.adi-sandiego.com/practice/pract\\_articles.asp](http://www.adi-sandiego.com/practice/pract_articles.asp)

<sup>13</sup> [http://www.adi-sandiego.com/delinq\\_depend/delinquency/index.asp](http://www.adi-sandiego.com/delinq_depend/delinquency/index.asp)

<sup>14</sup> [http://www.adi-sandiego.com/delinq\\_depend/dependency/dep\\_articles.asp](http://www.adi-sandiego.com/delinq_depend/dependency/dep_articles.asp)

<sup>15</sup> [http://www.adi-sandiego.com/practice/filing\\_service\\_chart.asp](http://www.adi-sandiego.com/practice/filing_service_chart.asp)

<sup>16</sup> <http://www.adi-sandiego.com/index.asp> (home page, left column)

<sup>17</sup> [http://www.adi-sandiego.com/practice/eservice\\_adi.asp](http://www.adi-sandiego.com/practice/eservice_adi.asp)

<sup>18</sup> [http://www.adi-sandiego.com/pdf\\_forms/Dec\\_2015\\_special\\_alert.pdf](http://www.adi-sandiego.com/pdf_forms/Dec_2015_special_alert.pdf)

<sup>19</sup> [http://www.adi-sandiego.com/practice/forms\\_samples.asp](http://www.adi-sandiego.com/practice/forms_samples.asp)

<sup>20</sup> [http://www.adi-sandiego.com/delinq\\_depend/dependency/forms\\_samples.asp](http://www.adi-sandiego.com/delinq_depend/dependency/forms_samples.asp)

<sup>21</sup> [http://www.adi-sandiego.com/panel/ca\\_legal\\_projects.asp](http://www.adi-sandiego.com/panel/ca_legal_projects.asp)

<sup>22</sup> <http://appellatecases.courtinfo.ca.gov/>

## A. California Rules of Court

The rules governing motion practice in the Court of Appeal and Supreme Court<sup>23</sup> include not only the specific rules that govern a particular motion, but also general rules. The general appellate rules are:

- 8.1-8.68 [general provisions covering service, filing, form, number of documents; applications and motions; extending and shortening time]
- 8.4 [rules 8.1-8.642 relating to the Supreme Court and Courts of Appeal apply to original proceedings, motions, applications, and petitions]
- 8.50 [applications filed in the reviewing court]
- 8.54 [motions filed in a reviewing court]
- 8.366 and 8.470 [general rules 8.252-8.272, which concern judicial notice, new authorities, oral argument, submission of the cause, the opinion, rehearing, and remittitur, govern the hearing and decision in the Court of Appeal of an appeal in a criminal or juvenile case]

Counsel should also be familiar with the general rules applicable to all courts:

- 1.1-1.200 [preliminary rules, timing and holidays, service and filing, Judicial Council forms, accommodations, public access, citations, and form and format of papers]

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<sup>23</sup> Special rules apply for petitioning and briefing in the California Supreme Court. (See rules 8.500-8.508 and 8.520.) The specifics of those rules are not spelled out here, because this guide is intended to cover motion practice in the Courts of Appeal. This guide will cover some rules, for example, that concern relief for failure to file a timely petition for review, a motion to permit oversized briefing or attachment, and a motion for judicial notice, which are motions filed in the Supreme Court. See ADI's Filing and Service Summary ([http://www.adi-sandiego.com/practice/filing\\_service\\_chart.asp](http://www.adi-sandiego.com/practice/filing_service_chart.asp)), rule 8.500 et seq., the Supreme Court website (<http://www.courts.ca.gov/supremecourt.htm>), and ADI's Supreme Court Practice page ([http://www.adi-sandiego.com/practice/supreme\\_court\\_pract.asp](http://www.adi-sandiego.com/practice/supreme_court_pract.asp)) for further guidance.

Some motions do not have specific governing rules – for example, a motion to consolidate multiple appeals. Some rules and motions may apply at different stages of the appeal – for example, a motion for extension of time. Some of the criminal and juvenile appellate rules incorporate by reference certain provisions relating to civil appeals – for example, rules 8.366(a) and 8.470 on hearing and decision in the Court of Appeal.

## **B. Local Rules and Practices**

Some Fourth District [Local Rules, miscellaneous orders, and forms](#)<sup>24</sup> and specific [practices and procedures](#)<sup>25</sup> are also applicable to motion practice. Specific local rules include rule 1(a) [writ proceeding – immediate stay to preserve the status quo or the court’s jurisdiction or immediate relief sought] and rule 2 [covers on documents]. The relevant [practices and procedures](#)<sup>26</sup> specific to motions in the Fourth District or some of its divisions include:

- adding a document exhibit to the clerk’s transcript
- augmentation and correction of the record
- constructive notice of appeal/request for certificate of probable cause
- court file review
- exhibit review and obtaining copy of exhibit
- extensions of time
- missing record pages
- oral argument
- settlement
- supplemental briefing and striking of opening brief and
- transmission of exhibits to Court of Appeal.

Attorneys are referred to ADI’s [Fourth District Practice](#)<sup>27</sup> pages.

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<sup>24</sup> <http://www.courts.ca.gov/2746.htm>

<sup>25</sup> <http://www.courts.ca.gov/2834.htm>

<sup>26</sup> <http://www.courts.ca.gov/2834.htm>

<sup>27</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist.asp](http://www.adi-sandiego.com/practice/fourth_dist.asp)



## II. MOTION PRACTICE

### A. General

Motions should be filed *separately* from a related brief or petition. Separate rules apply regarding filing and service<sup>28</sup> of motions and of the opposition to the motion, which are different from those pertaining to the briefs. If the motion is buried in a brief or petition, the opponent may not have adequate notice to file a timely response. If the opponent does not separately respond, the Court of Appeal will not be aware of the motion until much later, when it begins its review of all the briefing. That point may be too late, and the court could simply choose not to address it.

Do not, for example, include a motion for judicial notice or a motion to consolidate an appeal with a habeas petition either within the appellant's opening brief or within the writ petition itself. (See rules 8.54(a)(1), (2) & (3) [party must file a written motion with memorandum and supporting documents and opposition is to be filed within 15 days]; 8.252(a)(1) [judicial notice motion must be filed separately]; see also [Orange County Appeals: A Detailed Guide](#),<sup>29</sup> p. 57; ADI [January 1998 Newsletter](#),<sup>30</sup> p. 11; [ADI Manual](#),<sup>31</sup> § 8.121.)

The majority of the motions outlined below are available as samples on the [Forms & Samples](#)<sup>32</sup> and [Dependency Forms & Samples](#)<sup>33</sup> pages of the ADI website.

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<sup>28</sup> (See [Dec. 28, 2015, ADI news alert: Expanded Email Service Starting January 1, 2016 -- "Cheat Sheet" is the key](#) ([http://www.adi-sandiego.com/pdf\\_forms/Dec\\_2015\\_special\\_alert.pdf](http://www.adi-sandiego.com/pdf_forms/Dec_2015_special_alert.pdf)).

Electronic filing through the California courts' TrueFiling system is mandatory in all three divisions of the Fourth Appellate District.

(<http://www.courts.ca.gov/4dca-efile.htm>.) In the California Supreme Court, it is mandatory for petitions for review and pre-OSC habeas corpus petitions and related filings. (<http://www.courts.ca.gov/24590.htm>.)

<sup>29</sup> [http://www.courts.ca.gov/documents/4DCA3\\_Guide-Detailed.pdf](http://www.courts.ca.gov/documents/4DCA3_Guide-Detailed.pdf)

<sup>30</sup> [http://www.adi-sandiego.com/news\\_alerts/pdfs/bef2005/1998\\_january.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/bef2005/1998_january.pdf)

<sup>31</sup> <http://www.adi-sandiego.com/panel/manual.asp>

<sup>32</sup> [http://www.adi-sandiego.com/practice/forms\\_samples.asp](http://www.adi-sandiego.com/practice/forms_samples.asp)

<sup>33</sup> [http://www.adi-sandiego.com/delinq\\_depend/dependency/forms\\_samples.asp](http://www.adi-sandiego.com/delinq_depend/dependency/forms_samples.asp)

## **B. Motions at Pre-Briefing Stage**

### **1. Completing the record**

#### **Normal record**

The starting point for determining whether counsel has a complete record upon its receipt is either rule 8.320 [criminal] or rule 8.407 [juvenile].<sup>34</sup> Those rules define what is in the normal record on appeal. The description below helps guide the attorney in seeking completion of the normal record, correction of the normal record, and augmentation to include matters not falling within the definition of rules 8.320 and 8.407.

*Practice tip:* Sometimes the normal record has portions that are sealed or deemed confidential, and there is no notice of this in the clerk's or reporter's transcript. Hence, as a matter of good practice, appointed counsel should review the Court of Appeal [online docket](#),<sup>35</sup> which will disclose whether a confidential or sealed transcript was filed but not provided to counsel.

*Practice Tip:* The rules concerning sealed<sup>36</sup> and confidential<sup>37</sup> records in the Supreme Court and Court of Appeal have been rewritten to create more comprehensive and internally consistent provisions, effective January 2014. They

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<sup>34</sup> Division One has issued a miscellaneous order requiring dependency transcripts to include additional matters. (See <http://www.courts.ca.gov/2746.htm> [miscellaneous orders/juvenile transcripts] and [http://www.adi-sandiego.com/practice/fourth\\_dist\\_div1.asp](http://www.adi-sandiego.com/practice/fourth_dist_div1.asp).) As a general matter, the rules that apply in juvenile delinquency appeals (rules 8.403-8.412) apply to juvenile dependency appeals unless otherwise provided for in rule 8.416 [dependency appeals].

<sup>35</sup> <http://appellatecases.courtinfo.ca.gov/>

<sup>36</sup> “A ‘sealed’ record is a record that is closed to inspection by the public or a party by order of a court under rules 2.550-2.551 or rule 8.46.” (Rule 8.45(b)(3).)

<sup>37</sup> “A ‘confidential’ record is a record that, in court proceedings, is required by statute, rule of court, or other authority except a court order under rules 2.550-2.551 or rule 8.46 to be closed to inspection by the public or party.” (Rule 8.45(b)(5).) Examples are records pertaining to a hearing under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), confidential informants, probation reports, all juvenile cases, defense request for expert, etc.

clarify procedure for transmission to the reviewing court, who can receive copies of these records, and how a party can discuss these records in a brief, petition, or other filing in a particular appellate court proceeding. The new provisions are set forth at rules 8.45 to 8.47 and cover appeal and writ proceedings. For more detailed guidance, see [Changes to California Rules of Court, effective January 2014](#).<sup>38</sup> The new rules are incorporated below where relevant.

*Practice Tip:* The Court of Appeal will not automatically provide an extension of time upon being served with any of the below motions. Counsel must file a request for an extension of time in the Court of Appeal if more time is needed.

### **Correcting incomplete record**

*Letter seeking missing parts of record:* If part of the normal record is missing, such as a document or transcript required to be included in the record on appeal, counsel may send a letter to the superior court to correct the record.<sup>39</sup> (Rules 8.340(b) [criminal], 8.410(a) [juvenile delinquency], 8.416(d)(1) [juvenile dependency<sup>40</sup>]; ADI Manual, §§ 3.12-3.16.)

*Practice Tip:* Attorneys who find pages missing should call the Court of Appeal (Divisions One and Two) before filing a record correction (completion) letter. Sometimes the court’s copy will have the missing pages, and the court can copy those pages for the attorney without need of a formal letter. See the [Fourth District Page](#)<sup>41</sup> for each division’s preference and contact information.

*Practice Tip:* If the document that was filed with the superior court cannot be located by the superior court or the document was not filed but the record indicates the court reviewed the document in ruling on a matter, then a motion to augment or settle the record should be pursued. See “Adding material not in normal record” and “Settled and agreed statements” sections, *post*.

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[http://www.adi-sandiego.com/pdf\\_forms/SELECTED\\_CHANGES\\_TO\\_CALIFORNIA\\_RULES\\_OF\\_COURT\\_EFFECTIVE\\_JANUARY.pdf](http://www.adi-sandiego.com/pdf_forms/SELECTED_CHANGES_TO_CALIFORNIA_RULES_OF_COURT_EFFECTIVE_JANUARY.pdf); see also <http://www.courts.ca.gov/rules.htm>

<sup>39</sup> [Forms & Samples](#): “Correction of Record - Rule 8.340(b).”

<sup>40</sup> [http://www.courts.ca.gov/documents/not\\_inc\\_juv\\_rec.pdf](http://www.courts.ca.gov/documents/not_inc_juv_rec.pdf)

<sup>41</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist.asp](http://www.adi-sandiego.com/practice/fourth_dist.asp)

*Practice Tip:* If an appeal was transferred to another Division of the Court of Appeal, send the letter to the original county superior court in which the case arose, because that superior court will continue to have custody of the superior court file, and send a copy of the request to the new county superior court and the Court of Appeal. Sometimes case transfers occur at the superior court level prior to an appeal. For example, in juvenile cases a minor may have moved to another county. All matters arising before the transfer should be addressed to the first county superior court, and all matters arising after should be addressed to the second county superior court. It is also prudent to call the respective superior courts because there is no uniform established practice or procedure in the differing counties.

*Practice Tip:* In Division Two, the record on appeal must include any *Benoit*<sup>42</sup> order where the court has allowed a late filing of a notice of appeal and the police report in guilty plea cases.<sup>43</sup>

*Practice Tip:* If counsel needs to request both augmentation and correction of the normal record on appeal, counsel should file a combined augmentation request for all the needed records, instead of submitting separate augment and correction requests. (See [Dec. 18, 2015, ADI news alert](#).<sup>44</sup>)

*Practice Tip:* In dependency fast-track cases, all record changes should go through the Court of Appeal as augmentations, whether the change involves normal record materials or not.

*Letter to superior court seeking post-judgment orders:* If the clerk fails to certify and send subsequent (post-judgment) trial court orders in a criminal case, as required by rule 8.340(a), counsel may send a letter reminding the superior court of the need for an augmentation.<sup>45</sup> (See ADI Manual, §§ 3.16, 3.23.) In juvenile cases, the superior court must notify the reviewing court of the change. (Rule 8.410(b)(2).) A motion for augmentation in the Court of Appeal would be required if the superior court fails to comply.

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<sup>42</sup> *In re Benoit* (1973) 10 Cal.3d 72, 86-89.

<sup>43</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist\\_div2.asp](http://www.adi-sandiego.com/practice/fourth_dist_div2.asp)

<sup>44</sup> [http://www.adi-sandiego.com/pdf\\_forms/Dec\\_2015\\_news\\_alert.pdf](http://www.adi-sandiego.com/pdf_forms/Dec_2015_news_alert.pdf)

<sup>45</sup> [Forms & Samples](#): “Correction of Record - Later Order in Trial Court.”

## **Adding material not in normal record**

Counsel should file a motion in the Court of Appeal to augment for materials not part of the normal record on appeal.<sup>46</sup> Such a motion should include related corrections of the record, as noted in the *Practice Tip, ante*, and a request for an extension of time. (Rules 8.155(a) [what can be augmented] and (c)(1) [corrections] [civil], 8.340(c) [augmentation or correction by reviewing court] [criminal], 8.410(b)(1) [augmentation or correction by reviewing court] [juvenile delinquency and non-fast-track dependency cases], 8.416(d) [augmenting or correcting the record] [juvenile dependency fast-track cases]; ADI Manual, §§ 3.17-3.23.)

## **Access to confidential records**

Counsel may send a motion<sup>47</sup> to the Court of Appeal requesting a copy of a confidential record filed with the appellate court be sent to appellate counsel, if counsel is allowed access to that record. (Rules 8.45(d)(1) [general], (d)(2) [in camera proceedings], (d)(3) [documents concerning confidential informants] & (d)(4) [probation report], 8.47(b) [*Marsden* hearings and other in camera proceedings], 8.47(c) [other confidential records].)

*Practice Tip:* Rule 8.45(d)(1) requires that the confidential or sealed record be transmitted to the Court of Appeal and to the party or parties who had access to the record in the trial court or other proceedings under review. If a party's attorney had access to the record in the trial court but not the party, only the attorney has access to the record on appeal. (Rule 8.45(d)(1).) If the record pertains to an in camera hearing from which a party was excluded in the trial court, the record must be transmitted to the Court of Appeal and the party or parties who participated in the in camera hearing. (Rule 8.45(d)(2).) Records related to an in camera proceeding concerning confidential informants are transmitted only to the reviewing court. (Rule 8.45(d)(3).) Probation reports must be transmitted only to the Court of Appeal, counsel for the People, and counsel for the defendant who is the subject of the report. (Rule 8.45(d)(4).) Under rule 8.10(3), "'Party' includes any attorney of

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<sup>46</sup> [Forms & Samples](#): "Augment Request." [Dependency Forms & Samples](#): "Augment Request."

<sup>47</sup> [Forms & Samples](#): "Confidential or sealed transcript - motion to provide to appellate counsel."

record for that party.” Before sending a request, counsel should check the court website to see if the record has already been filed with the court.<sup>48</sup>

*Practice Tip:* If counsel is not allowed access to the record under law – e.g., information related to a *Pitchess* motion or a confidential informant – counsel should request the Court of Appeal to examine the record for error without the benefit of briefing.<sup>49</sup> Note, the record of *Pitchess* proceedings is not automatically part of the normal record and must be requested by augmentation under rules 8.340 and 8.155 (see *People v. Rodriguez* (2011) 193 Cal.App.4th 360, 366) in order for the Court of Appeal to examine the record and make a ruling without receiving briefing. (*People v. Prince* (2007) 40 Cal.4th 1179, 1284-1286; *People v. Hughes* (2002) 27 Cal.4th 287, 330 (*Hughes*); see *People v. Price* (1991) 1 Cal.4th 324, 493 [when appeal challenges trial court order withholding evidence as privileged or non-discoverable, court will fill gap caused by party’s lack of access to record by reviewing it objectively] (*Price*).)<sup>50</sup> To request the complete *Pitchess* proceedings, the motion to augment should delineate two separate requests: (1) the reporter’s transcript of the superior court proceedings, and (2) the documents the court reviewed at that proceeding. The motion can also request that, if it turns out the superior court did not

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<sup>48</sup> The rules also provide **authority for ADI’s receipt of confidential records**. Rule 8.300 provides the framework for ADI’s role in the appointment counsel program and empowers it to step into the shoes of the judiciary to fulfill the duties of the court that are outlined in that rule. In order to fulfill those duties, ADI must have access to the same records that the court and appointed counsel would have access to. In this capacity, we are also acting as supervisory counsel on all cases to insure quality representation which fulfills the constitutional mandate of providing adequate representation for indigent appellants. (See <http://www.courts.ca.gov/4201.htm> [“The Court-Appointed Counsel (CAC) Program fulfills the constitutional mandate of providing adequate representation for indigent appellants in the Court of Appeal on noncapital cases”].) Further, rules 8.336(g)(1)(c) [criminal appeals], 8.409(e)(2) [juvenile appeals], 8.416(c)(2)(B) [dependency appeals], and 8.416(c)(3) [dependency appeals] instruct on the circumstances when the record is to be sent to the district appellate project. Additionally, there is Division Two’s miscellaneous order 17-4 ([http://www.adi-sandiego.com/practice/fourth\\_dist\\_div2.asp](http://www.adi-sandiego.com/practice/fourth_dist_div2.asp)) which gives ADI access to confidential superior court files.

<sup>49</sup> See, e.g., *People v. Yearwood* (2013) 213 Cal.App.4th 161, 179-182.

<sup>50</sup> See ADI Manual, § 3.9 and [http://www.adi-sandiego.com/practice/conf\\_records.asp#pitchess](http://www.adi-sandiego.com/practice/conf_records.asp#pitchess)

properly preserve the material it reviewed pursuant to *People v. Mooc* (2001) 26 Cal.4th 1216, the Court of Appeal review the sealed reporter's transcripts to determine whether the trial court has described the documents it reviewed for an adequate appellate review of the proceedings under *Price* and *Hughes*. (See *People v. Mooc, supra*, at pp. 1228-1229.) Finally, the motion can request that, if the court's review demonstrates the trial court did not preserve an adequate record, a settled record of the reviewed materials be prepared and transmitted to the Court of Appeal. (Rule 8.346.)<sup>51</sup>

*Practice Tip:* Unlike Division Two,<sup>52</sup> Divisions One and Three do not make police reports a part of the normal record on appeal in guilty plea cases. But there may be circumstances in which the report is relevant in these type of cases or in other cases. For example, the parties stipulated to the police report as the factual basis of the plea and defendant later brings a motion to withdraw the guilty plea and there is reference to the police report orally and/or in the motion which is relevant to the claims raised in the motion, but the report was not included as an attachment to the motion. Or, the report is verbally referred to at a pre-trial hearing addressing an in-limine motion which is relevant to an evidentiary issue, and the report is not filed with the court. Because police reports are fraught with hearsay, which raises concerns over trustworthiness and reliability, a request to augment the record with the police report should be pursued only if appellate counsel has previously reviewed the report and deems it or a portion of it relevant and helpful to an issue that is appealable and arguable. Consistent with Division Two's handling of police reports, the report should be maintained in confidential form (see rules 8.45-8.47), because some of the information contained in it is confidential. (See Pen. Code, §§ 964 [police reports; protection of confidential, personal information], 841.2 [confidentiality of specified victim and witness information], 1054.2 [disclosure of address or telephone number of victim or witness; prohibition; exception]; see also Gov. Code, § 6250 [Calif. Public Records Act] et. seq.) If the briefing cites to information in the police report that is not confidential as referenced, *ante*, then it is not necessary to file the briefing in redacted and unredacted versions.

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<sup>51</sup> [Forms & Samples](#): "Pitchess Augment."

<sup>52</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist\\_div2.asp](http://www.adi-sandiego.com/practice/fourth_dist_div2.asp)



## Sealed records

- Motion to Court of Appeal to file record under seal: If a record was not sealed in the trial court but needs to be sealed in the reviewing court, counsel may move to seal it. (Rules 2.551(a)-(d) [civil], 8.46(d)(1)-(4) [general].)

*Practice Tip:* Rule 8.46(d)(6) states that the court may order a record filed under seal only if it makes the findings required by rule 2.550(d)-(e). The motion should therefore address the factual findings outlined in that rule.

*Practice Tip:* It may be necessary to file the motion to seal and related documents in redacted and unredacted versions.<sup>53</sup>

- Motion to unseal record.<sup>54</sup> (Rules 2.551(h) [civil], 8.46(e)(1), (2), (4) & (f) [general].)

*Practice Tip:* This motion is filed when, for example, the reason for sealing by the trial court no longer applies.

*Practice Tip:* When a record was ordered sealed by the trial court, rule 8.46(f)(2) “requires” a party to file redacted and unredacted versions of any filing (i.e., the motion) that discloses material from the sealed record. The public redacted version and unredacted version must comply with the specific cover and identification specifications in rule 8.46(f)(2)(A) and (B).

*Practice Tip:* Rule 8.46(e)(5) states that the court must consider the matters addressed in rule 2.550(c)-(e) in determining whether to unseal a record. The motion should therefore address the factual findings outlined in that rule.

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<sup>53</sup> [Forms & Samples](#): “Seal - Motion to File Document Under Seal - Not Previously Sealed.” See rule 8.45(b)(6) & (7) for definitions of a “redacted version” and “unredacted version.”

<sup>54</sup> [Forms & Samples](#): “Unseal Record.”



## Notice of improper material in record

- Notice to Court of Appeal concerning record improperly containing confidential identification information (e.g., juror, juvenile, or victim names).<sup>55</sup> (Rules 8.155(c)(1) [civil], 8.332(b) [criminal], 8.340(c) [criminal]; 8.401 [juvenile]; Code Civil Proc., § 237, subd. (a)(2); Pen. Code, § 293.5; ADI Manual, §§ 3.7-3.10.)<sup>56</sup>
- Motion to remove other confidential or sealed information from public record (e.g., confidential medical records or sealed records pertaining to informant).<sup>57</sup> (Rules 8.155(c)(1) [civil], 8.45(c) [criminal], 8.46(c) [criminal], 8.47 [criminal], 8.340(c) [criminal]; ADI Manual, §§ 3.7-3.10.)<sup>58</sup>

## Settled and agreed statements

- Application to superior court for permission to prepare settled statement.<sup>59</sup> (Rules 8.137 [civil], 8.346 [criminal], 8.407(d) [juvenile]; ADI Manual, § 3.30.)

*Practice Tip:* Chapter 3 of the ADI Manual at section 3.30 describes the process for filing in the superior court and the alternative route available in the Court of Appeal (see motion to Court of Appeal, *post*). See also the ADI website [Fourth District](#) page for Division-specific preferences.

- Agreed statement filed in superior court. (Rules 8.134 [civil], 8.344 [criminal], 8.407(d) [juvenile]; ADI Manual, § 3.29.)

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<sup>55</sup> [Forms & Samples](#): “Juror Information Improperly in Record - Notice to Court” and “Victims or Other’s Protected Identity - Notice to Court.”

<sup>56</sup> See [http://www.adi-sandiego.com/practice/conf\\_records.asp](http://www.adi-sandiego.com/practice/conf_records.asp)

<sup>57</sup> [Forms & Samples](#): “Remove Confidential or Sealed Record.”

<sup>58</sup> See [http://www.adi-sandiego.com/practice/conf\\_records.asp](http://www.adi-sandiego.com/practice/conf_records.asp)

<sup>59</sup> [Forms & Samples](#): “Settled Statement Request.”

- Motion to Court of Appeal for order to superior court to settle disputes about omissions or errors in the record and to augment the record.<sup>60</sup> (Rules 8.155(c)(2) [civil], 8.340(c) [criminal], 8.410(b)(1) [juvenile delinquency], 8.416(d)(1) [juvenile dependency].)

### **Letters to superior court to correct record**

- Motion or letter to superior court to correct pre-sentence custody credits.<sup>61</sup> (Pen. Code, § 1237.1; ADI Manual, §§ 2.13, 4.42; see [Jan. 21, 2016, ADI news alert](#).<sup>62</sup>)

*Practice Tip:* This is required only when it pertains to minor ministerial corrections, such as mathematical or clerical errors, not legal errors, and only when it is the sole issue on appeal.

- Motion or letter to superior court to correct error in the imposition or calculation of monetary penalties.<sup>63</sup> (Pen. Code, § 1237.2; ADI Manual, §§ 2.13, 4.42; see [Recent Changes in the Law on § 1237.2](#).<sup>64</sup>)

*Practice Tip:* This is required only if the error is the sole issue on appeal.

- Letter to superior court to correct clerical errors in minute order or abstract.<sup>65</sup>

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<sup>60</sup> [Forms & Samples](#): “Settled Statement Augment.”

<sup>61</sup> [Forms & Samples](#): “Credits Modification.”

<sup>62</sup> [http://www.adi-sandiego.com/pdf\\_forms/Jan\\_2016.pdf](http://www.adi-sandiego.com/pdf_forms/Jan_2016.pdf)

<sup>63</sup> [Forms & Samples](#): “Fines or Fees Modification.”

<sup>64</sup> [http://www.adi-sandiego.com/news\\_alerts/recent\\_changes\\_statutes.asp#1237.2](http://www.adi-sandiego.com/news_alerts/recent_changes_statutes.asp#1237.2)

<sup>65</sup> [Forms & Samples](#): “Clerical Error - Letter to Superior Court.”

## Special Fourth District practices and procedures relating to the record

- Augment motion<sup>66</sup> - The motion should include a checklist of documents requested to facilitate the clerk’s preparation and reduce errors. The augment motion should not include a request for exhibits; a request for exhibits has separate requirements. See *post*.

*Practice Tip:* If the motion includes multiple attached documents, [Division Two’s Miscellaneous Orders](#)<sup>67</sup> requires a specific format which concerns the arrangement of the documents, the numbering of the pages, and the requirement of two indices. These requirements are good general practice, and ADI recommends them for all Divisions.

*Practice Tip:* Exhibits are part of the normal record on appeal (rule 8.320(e)), and no augment is necessary. Counsel can go to the court to see the exhibits. If counsel is from out-of-county, seek approval from ADI to travel to the court. (See ADI’s exhibit review article, [De-Mystifying the Exhibit Review Process in Criminal Cases](#).<sup>68</sup>) Exhibits pertaining to documents admitted to prove a prior conviction, prison term, or juvenile adjudication must be included in the clerk’s transcript (rule 8.320(b)(13)(C)) and can be obtained through a letter to the superior court seeking missing parts of the record.

- Augment and correction of normal record - If counsel plans to augment *and* correct the record, counsel should file one motion in the Court of Appeal covering both. (ADI Manual, § 3.24.)
- Timing of augment requests - The Fourth District courts expect augment motions in criminal and delinquency cases to be filed within 40 days or less of the filing of the record or the appointment order, whichever is later. In

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<sup>66</sup> [Forms & Samples](#): “Augment Request.” [Dependency Forms & Samples](#): “Augment Request.”

<sup>67</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist\\_div2.asp](http://www.adi-sandiego.com/practice/fourth_dist_div2.asp)

<sup>68</sup> Despite the “2010” reference in the URL, the following links to the 2017 updated article:  
[http://www.adi-sandiego.com/news\\_alerts/pdfs/2010/EXHIBIT-REVIEW-UPDATED-2010.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/2010/EXHIBIT-REVIEW-UPDATED-2010.pdf)

dependency cases,<sup>69</sup> the court expects motions to be filed within 15 days or less of the filing of the record or the appointment order, whichever is later. (See rule 8.416(d)(2).) If the deadline is missed, counsel should provide good cause why it could not be filed earlier.<sup>70</sup> Division One has issued a formal order on these matters;<sup>71</sup> but Divisions Two and Three likewise expect augments to be filed within the same time period. (See [Feb. 4, 2011 ADI news alert - criminal and delinquency cases](#)<sup>72</sup> and [Feb. 4, 2011 ADI news alert - dependency cases](#).<sup>73</sup>)

- Letter to correct record under rule 8.340(b):<sup>74</sup>

*Division One* advises attorneys to call the Court of Appeal before filing a letter. If the court has the missing pages in its transcript, it can send counsel a copy. If a letter is to be sent to the superior court, see the [Fourth District](#)<sup>75</sup> page, Division One, for the addresses. For dependency cases, Division One has a [Notification of Incomplete Juvenile Dependency Record](#)<sup>76</sup> form that can be used.

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<sup>69</sup> <http://www.courts.ca.gov/2746.htm> and <http://www.courts.ca.gov/documents/4dca-div1-020411A-Juvenile-Augment-Order.pdf>

<sup>70</sup> Good cause can be included in the augment motion. In dependency cases, see [Dependency Forms & Samples](#): “Relief from Default for Failure To Timely File an Augment Request.”

<sup>71</sup> <http://www.courts.ca.gov/2746.htm> and <http://www.courts.ca.gov/documents/4dca-div1-020411B-Criminal-Augment-Order.pdf>

<sup>72</sup> [http://www.adi-sandiego.com/news\\_alerts/pdfs/2011/Augment-expectations-criminal-and-delinquency.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/2011/Augment-expectations-criminal-and-delinquency.pdf)

<sup>73</sup> [http://www.adi-sandiego.com/news\\_alerts/pdfs/2011/Augment-expectations-dependency.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/2011/Augment-expectations-dependency.pdf)

<sup>74</sup> [Forms & Samples](#): “Correction of Record - Rule 8.340(b).”

<sup>75</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist.asp](http://www.adi-sandiego.com/practice/fourth_dist.asp)

<sup>76</sup> [http://www.courts.ca.gov/documents/not\\_inc\\_juv\\_rec.pdf](http://www.courts.ca.gov/documents/not_inc_juv_rec.pdf)

*Division Two* also advises that counsel should send the letter to the main court branch of the applicable county, not to the outlying branch court. *Division Two* requests counsel to call its clerk's office before filing the letter with the superior court. If the court has the missing pages in its transcript, it can send counsel a copy. See the [Fourth District](#)<sup>77</sup> page, *Division Two*, for contact information.

*Division Three* has not taken a position yet on whether attorneys should contact the Court of Appeal before seeking correction for missing documents. If a letter is to be sent to the superior court, see the [Fourth District](#)<sup>78</sup> page, *Division Three*, for the addresses.

- **Exhibit review in the Fourth District.** Guidance is also set forth in ADI's exhibit review article, [De-Mystifying the Exhibit Review Process in Criminal Cases](#),<sup>79</sup> which includes contact information for the exhibit custodians. Consult the [Fourth District Page](#)<sup>80</sup> for Division-specific preferences. Some highlights include:

*Division One* - If the appointed San Diego attorney plans on personally viewing the exhibits, the San Diego County Superior Courts require the attorney to bring a copy of the appointment order and a picture identification. The exhibit custodian can make a copy of paper documents up to 10 pages. It has equipment for an attorney to view media exhibits but not to make copies. If a copy request is for greater than 10 pages or the size is larger than standard or the attorney needs a copy of a media exhibit and the attorney does not have his or her own device to make copies, a superior court order to have a copy service come to the exhibit room and make the copies is required.<sup>81</sup>

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<sup>77</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist.asp](http://www.adi-sandiego.com/practice/fourth_dist.asp)

<sup>78</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist.asp](http://www.adi-sandiego.com/practice/fourth_dist.asp)

<sup>79</sup> Despite the 2010 title, the following links to the 2017 updated article:  
[http://www.adi-sandiego.com/news\\_alerts/pdfs/2010/EXHIBIT-REVIEW-UPDATED-2010.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/2010/EXHIBIT-REVIEW-UPDATED-2010.pdf)

<sup>80</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist.asp](http://www.adi-sandiego.com/practice/fourth_dist.asp)

<sup>81</sup> [Forms & Samples](#): “Copy Service - Superior Court motion to permit.”

To save time and reduce expenses for out-of-county attorneys, a Division One order<sup>82</sup> permits an ADI representative to view court files and exhibits and make copies, including sealed and confidential exhibits, for the attorney. Division One's order describes access to court file "materials," which includes exhibits pursuant to established procedure. The attorney should request the assigned staff attorney to make arrangements.

To obtain copies, counsel has the following options, keeping in mind the least expensive route and seeking input from the ADI staff attorney: (1) contact trial counsel to see if he or she has a copy; (2) ascertain whether an ADI staff member is able to obtain the exhibit; (3) obtain a superior court order allowing a copy service access to copy the exhibits,<sup>83</sup> or (4) travel to and from the branch court to personally view and obtain the copy.

For Imperial County cases, a request for a copy of a media exhibit requires a superior court order. The request would be for an order allowing either the attorney to bring his or her own equipment to make a copy or, if necessary, a copy service to make a copy.<sup>84</sup>

*Division Two* - A Division Two order<sup>85</sup> gives ADI representatives access to and authority to obtain a copy of "court files," including sealed and confidential "documents"; this includes exhibits such as media exhibits. Division Two's order states that if the superior court clerk is considering denying access, the clerk is to call the Court of Appeal. *The Court of Appeal prefers that appointed counsel try to obtain a copy of court records and exhibits through ADI first.* However, for media exhibits in San Bernardino County cases, counsel must file a motion in

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<sup>82</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist\\_div1.asp](http://www.adi-sandiego.com/practice/fourth_dist_div1.asp) and <http://www.courts.ca.gov/documents/4dca-div1-112812-ADI-access-to-superior-court-records.pdf>

<sup>83</sup> See footnote 81, *ante*.

<sup>84</sup> See, for example, footnote 81, *ante*.

<sup>85</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist\\_div2.asp](http://www.adi-sandiego.com/practice/fourth_dist_div2.asp)

the Court of Appeal for an order directing the superior court to transmit media exhibits to the Court of Appeal for copying.<sup>86</sup>

*Division Three* - Unless the exhibit is sealed, the ADI ambassador can obtain copies of documentary exhibits for appointed counsel. However, ADI does not have authority to obtain sealed and confidential exhibits. Media exhibits can be obtained by the appointed attorney by contacting the exhibit technician directly.

- Confidential or sealed exhibits - The appointed attorney can view and obtain confidential or sealed exhibits without a court order under rule 8.45. The rule governs access to sealed and confidential records. Rule 8.45(b)(1) defines the “[r]ecord” to include an “exhibit.” Although rule 8.45(d)(1) requires that the record be transmitted to the Court of Appeal and to the party or parties who had access to the record in the trial court, an exhibit would not be initially transmitted to the Court of Appeal when the record (transcripts) on appeal are filed with that court. Contact the superior court exhibit custodian to make arrangements to view and obtain a copy of the exhibit. If there is a disagreement about your right to access without a court order, refer the custodian to rules 8.45 and 8.10(3) and, if unsuccessful, contact the ADI staff attorney.

## **2. Perfecting an appeal**

- If the notice of appeal is timely but defective and the defect can be corrected, counsel may move to amend the notice of appeal. For example, the notice of appeal in a guilty plea case checks off only one ground for appeal - a challenge to the validity of the guilty plea, but the request for certificate of probable cause was later denied, rendering the notice inoperative. A motion to amend to include the sentence as a ground for appeal could be sought.
- Request to file a late notice of appeal or to construe timely filed notice of appeal to include request for certificate of probable cause under the constructive filing doctrine (*In re Benoit, supra*, 10 Cal.3d 72; *Roe v. Flores-Ortega* (2000) 528 U.S. 470 [120 S.Ct. 1029, 145 L.Ed.2d 985]) and a request

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<sup>86</sup> [Forms & Samples](#): “Exhibits - Transmit for Copying.”

for stay of appeal.<sup>87</sup> ADI Manual,<sup>88</sup> § 2.113 et seq., gives guidance on “Remedies for Untimely or Defective Filing of Notice of Appeal and Failure To Obtain Certificate of Probable Cause.”

- This remedy requires a motion in Division One cases and a petition for writ of habeas corpus in Division-Three cases.<sup>89</sup> Division Two prefers a petition if no Court of Appeal number has been assigned and a motion after a number has been assigned.
- The constructive filing doctrine is often not recognized in dependency appeals.<sup>90</sup>

### **3. Motions relating to time**

- Motion for extension of time.<sup>91</sup> (Rules 8.50 [general], 8.60 [general], 8.63 [general], 8.360(c)(4) [criminal], 8.412(c) [juvenile delinquency], 8.416(f) [juvenile dependency]; ADI Manual, §§ 3.32-3.36.)

*Practice Tip:* Use of Judicial Council forms for extension requests is strongly encouraged — CR-126<sup>92</sup> (criminal appeals), JV-816<sup>93</sup> (delinquency appeals), and JV-817<sup>94</sup> (dependency appeals) — to request more time to file a brief. It is not required when impractical, for example, when the extension is part of a motion to augment. The ADI website only

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<sup>87</sup> [Forms & Samples](#): “Certificate of Probable Cause - Benoit.” See ADI Manual, § 2.115: “Constructive Filing Doctrine.”

<sup>88</sup> <http://www.adi-sandiego.com/panel/manual.asp>

<sup>89</sup> Contact the ADI oversight attorney for a sample.

<sup>90</sup> See *In re Z.S.* (2015) 235 Cal.App.4th 754, 769.

<sup>91</sup> [Forms & Samples](#): “Extension of Time.” Dependency Forms & Samples: “Extension of Time Request.”

<sup>92</sup> <http://www.courts.ca.gov/documents/cr126.pdf>

<sup>93</sup> <http://www.courts.ca.gov/documents/jv816.pdf>

<sup>94</sup> <http://www.courts.ca.gov/documents/jv817.pdf>



provides for the Judicial Council forms.<sup>95</sup> The [May 2017 ADI news alert](#) discusses the importance of using these forms and their proper use.<sup>96</sup>

*Practice Tip:* On occasion, an attorney is not able to file an extension request due to a personal emergency (e.g., serious illness or no access to a computer). The proper procedure is to ask the ADI staff attorney assigned to your case to file the request and explain the circumstances to the court. If you are unable to communicate, ask someone else to contact the staff attorney. *Do not ask a non-ADI attorney to file the request for you.*

- Relief from default for failure to file brief and extension request. (Rules 8.60(d) [general], 8.360(c)(5) [criminal], 8.412(b)(5), (d)(1)&(3) [juvenile delinquency], 8.416(g) [juvenile dependency]; ADI Manual, § 5.80.)<sup>97</sup>
- Post-augment extensions of time - Fourth District Courts of Appeal do not stay an appeal or automatically issue a time extension upon granting an augment request; it must be specifically requested within the augment.
- Post-record correction extensions of time - Courts of Appeal do not automatically issue an extension of time upon notice that a record correction letter was filed in the superior court (letter filed because certified record omits document or transcript that is considered part of the normal record or where superior court fails to certify and send a post-judgment order) or upon the filing of corresponding supplemental transcripts. Counsel must separately request an extension in the Court of Appeal.

*Practice Tip:* If the correction is substantial and will take some time, counsel can explain that and request a time of 30 days after the filing of the correction.

- Extension after a “No Further Extensions” notice - counsel may still be granted a further extension of time if there is good cause for it.

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<sup>95</sup> [http://www.adi-sandiego.com/practice/forms\\_samples.asp](http://www.adi-sandiego.com/practice/forms_samples.asp)

<sup>96</sup> [http://www.adi-sandiego.com/pdf\\_forms/2017\\_5\\_May\\_news\\_alert.pdf](http://www.adi-sandiego.com/pdf_forms/2017_5_May_news_alert.pdf)

<sup>97</sup> [Forms & Samples](#): “Brief Untimely - Criminal, Other Nonjuvenile” and “Brief Untimely - Delinquency.” Dependency Forms & Samples: “Brief Untimely.”

#### 4. Miscellaneous motions

##### **Motions relating to consolidation**

- Motion to consolidate multiple appeals.<sup>98</sup>
- Motion to consolidate a habeas petition and an appeal.<sup>99</sup>

##### **Motion relating to release of defendant**

- Release or bail pending appeal motion must initially be filed in superior court (Pen. Code, §§ 1272, 1272.1); if denied, file in Court of Appeal (rule 8.312 [criminal]).<sup>100</sup>

##### **Motions relating to abandonment or abatement of appeal**

- Abandonment of appeal.<sup>101</sup> (Rules 8.316 [criminal], 8.411 [juvenile]; ADI Manual, §§ 1.53, 1.58, 2.4, 4.91, 4.111, 4.120.)
- Motion to abate the appeal due to client's death.<sup>102</sup> (ADI Manual, § 1.38.)

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<sup>98</sup> [Forms & Samples](#): “Consolidate Multiple Appeals.” Dependency Forms & Samples: “Consolidate Multiple Cases.”

<sup>99</sup> [Forms & Samples](#): “Consolidate Habeas and Appeal.”

<sup>100</sup> [Forms & Samples](#): “Bail Motions.”

<sup>101</sup> [Forms & Samples](#): “Abandonment of Appeal Request.” Dependency Forms & Samples: “Abandonment.”

<sup>102</sup> [Forms & Samples](#): “Abatement Request (client death).”

## Motions relating to potential habeas or other writ

Where a potential habeas petition or other writ petition is being investigated, a petition is being filed, or an order to show cause has issued, the following motions may apply:

- Confidential motion to Court of Appeal for expert fees.<sup>103</sup> (Rules 8.50 [general], 8.54(a) [general], Pen. Code, § 1241; ADI Manual, § 8.4.)
- Motion in superior court to release juror information.<sup>104</sup> (Code of Civ. Proc., § 237.)
- Stay appeal pending resolution of habeas.<sup>105</sup> (Rule 8.54 [general].)
- Request for immediate stay to preserve the status quo or the court’s jurisdiction and/or relief. (Rule 8.486(a)(7) [criminal]; Fourth District Local Rules, rule 1(a); ADI Manual, §§ 8.77, 8.92.)
- Motion to consolidate a habeas petition and an appeal.<sup>106</sup>
- Motion to file a brief, or parts of it, under seal - **not** previously sealed by trial court. (Rules 2.550 [general sealed records], 2.551 [procedures for filing records under seal], 8.46(d) [motion or application to file under seal], 8.384(b)(4) [habeas supporting documents - sealed or confidential].)<sup>107</sup> See section C.1., *post.*)
- Motion to file a brief, or parts of it, under seal - previously sealed by trial court. (Rules 2.550 [general sealed records], 2.551 [procedures for filing records under seal], 8.46(d) [motion or application to file under seal],

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<sup>103</sup> [Forms & Samples](#): “Expert Fee Request.”

<sup>104</sup> [Forms & Samples](#): “Juror ID - Motion to Disclose - Superior Court.”

<sup>105</sup> [Forms & Samples](#): “Stay Appeal.”

<sup>106</sup> [Forms & Samples](#): “Consolidate Habeas and Appeal.”

<sup>107</sup> [Forms & Samples](#): “Seal-Motion to File Document under Seal - Not Previously Sealed by Trial Court.”

8.384(b)(4) [habeas supporting documents - sealed or confidential].)<sup>108</sup> See section C.1., *post.*)

- Counsel - Superior Court motion to appoint<sup>109</sup>

*Practice Tip:* This motion is filed when, after a petition for writ of habeas corpus has been filed in the Court of Appeal, the court issues an order to show cause hearing in the superior court, without ordering the case returnable to the Court of Appeal, and the Office of the Public Defender, the Alternate Public Defender, or the Conflicts Panel is unable to represent the defendant due to a conflict and appointed appellate counsel does not have the experience in the handling of evidentiary hearings. If counsel does have experience and wishes to represent the client in the superior court, counsel must seek appointment by the superior court in order to be compensated. Motions filed in the superior court must comply with rule 2.100 et. seq. and should be on pleading paper.

## C. Motions at Briefing Stage

### 1. Motions relating to the brief

- Brief oversize motion.<sup>110</sup> (Rules 8.50 [general], 8.360(b)(1) & (b)(5) [criminal], 8.412(a)(3) [juvenile delinquency], 8.416(a)(2) [juvenile dependency]; ADI Manual, § 5.77.)
- Motion to permit attachment to brief greater than 10 pages. (Rules 8.204(d) [civil], 8.360(a) [criminal], 8.412(a)(2) [juvenile delinquency], 8.416(a)(2) [juvenile dependency]; ADI Manual, § 5.77.)

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<sup>108</sup> [Forms & Samples](#): “Seal-Motion to File Document under Seal - Previously Sealed by Trial Court.”

<sup>109</sup> [Forms & Samples](#): “Counsel - Superior Court motion to appoint.”

<sup>110</sup> [Forms & Samples](#): “Brief - Oversize.” [Dependency Forms & Samples](#): “Oversize Brief Request.”

- Judicial notice.<sup>111</sup> (Rule 8.252 [civil], 8.366(a) [criminal], 8.470 [juvenile]; Evid. Code, §§ 452, 453, 459.)

*Practice Tip:* Division Two’s, [Division Two’s Miscellaneous Orders](#)<sup>112</sup> requires a specific format of the multiple documents that may be attached to a motion for judicial notice concerning the arrangement of the documents, the numbering of the pages, and the requirement of two indices. (See [Jan. 21, 2016, ADI news alert](#).<sup>113</sup>) These requirements are good general practice, and ADI recommends them for all Divisions.

- Relief from default for failure to file brief and extension request. (Rules 8.50(b) [general], 8.60(d) [general], 8.360(c)(5) [criminal], 8.412(b)(5) and (d)(1) & (3) [juvenile delinquency and non-fast-track dependency], 8.416(g) [fast-track dependency]; ADI Manual, § 5.80.)<sup>114</sup>
- Joinder by appellant in argument briefed by co-appellant. (Rule 8.200(a)(5) [general]; ADI Manual, § 5.45B; [Oct. 15, 2014 ADI news alert](#);<sup>115</sup> *People v. Bryant* (2014) 60 Cal.4th 335, 363-364.)<sup>116</sup>

*Practice Tip:* After the first defendant files an appellant’s opening brief, counsel for remaining defendants should assess thoughtfully whether joinder with some or all of those claims is appropriate and how to individualize the argument for the particular client. The first defendant to file an appellant’s opening brief has the opportunity to also join any new

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<sup>111</sup> [Forms & Samples](#): “Judicial Notice.” [Dependency Forms & Samples](#): “Judicial Notice.”

<sup>112</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist\\_div2.asp](http://www.adi-sandiego.com/practice/fourth_dist_div2.asp)

<sup>113</sup> [http://www.adi-sandiego.com/pdf\\_forms/Jan\\_2016.pdf](http://www.adi-sandiego.com/pdf_forms/Jan_2016.pdf)

<sup>114</sup> [Forms & Samples](#): “Brief Untimely - Criminal, Other Nonjuvenile” and “Brief Untimely - Delinquency.” [Dependency Forms & Samples](#): “Brief Untimely.”

<sup>115</sup> [http://www.adi-sandiego.com/news\\_alerts/pdfs/2014/News\\_Alert\\_October\\_2014.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/2014/News_Alert_October_2014.pdf)

<sup>116</sup> [Forms & Samples](#): “Joinder by Appellant in Argument briefed by Co-Appellant.”

claims raised by a co-defendant. To facilitate this, all Fourth Appellate District divisions have informed ADI that a joinder letter is acceptable.

- Motion to file a brief, or parts of it, under seal - **not** previously sealed by trial court. (Rules 2.550, 2.551, 8.46(d).)<sup>117</sup>.

*Practice Tip:* Counsel must take care not to disclose confidential information potentially damaging, life threatening or embarrassing to the client or his or her family. If a party wants to file a brief, or parts of it, under seal, the party must file a redacted public version and an unredacted version, along with a motion to file the unredacted brief under seal. Rules 8.45 to 8.47 establish the requirements governing sealed and confidential records in appeals and original proceedings in the Court of Appeal and the Supreme Court. (Rule 8.45(a).)<sup>118</sup> It may also be necessary to file, conditionally under seal, counsel’s unredacted motion and any attachment if they state facts in support of sealing that should not be revealed to the public. (Rules 2.551(b)(5) & 8.46(f)(3).)

*Practice Tip:* An example of a case justifying pursuing sealing would be where the client, who is awaiting sentencing, has agreed to provide favorable information and testimony against a defendant in another case in exchange for the prosecutor’s agreement to seek a reduced sentence. At client’s sentencing, there is a dispute about the quality of the information and testimony provided by the client, and the prosecutor declines to recommend a reduced sentence. A sealed record detailing the agreement from the other case is examined by the trial court, which agrees with the prosecutor. Appellate counsel intends to refer to that other sealed record in the appellant’s opening brief.

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<sup>117</sup> [Forms & Samples](#): “Seal-Motion to File Document under Seal - Not Previously Sealed by Trial Court.”

<sup>118</sup> See also [http://www.adi-sandiego.com/practice/conf\\_records.asp](http://www.adi-sandiego.com/practice/conf_records.asp); [Redaction of Filings Containing Confidential or Sealed Information and Removing Metadata](#); [2014 revisions to the rules on confidentiality](#).

- Motion to file a brief, or parts of it, under seal - previously sealed by trial court. (Rules 2.550, 2.551, 8.46(d).)<sup>119</sup>

*Practice Tip:* “A ‘sealed’ record is a record that is closed to inspection by the public or a party by order of a court under rules 2.550-2.551 or rule 8.46.” (Rule 8.45(b)(3).) Rule 8.46 governs records sealed by the trial court and does not apply to confidential records. Rule 8.47 governs confidential records.

- Motion to file a brief, or parts of it, under seal - *Marsden* or other in camera hearing (Rule 8.47.)

*Practice Tip:* Where a *Marsden* issue or an issue related to another in camera hearing is being raised, rule 8.47 governs, which concerns confidential records. “A ‘confidential’ record is a record that, in court proceedings, is required by statute, rule of court, or other authority except a court order under rules 2.550-2.551 or rule 8.46 to be closed to inspection by the public or party.” (Rule 8.45(b)(5).) Rule 8.47 gives the appointed attorney the option to file the *Marsden* or other in camera briefing publicly (rule 8.47(b)(2)) or, with the Court of Appeal’s permission, under seal when necessary to protect confidential matters in the record (rule 8.47 (b)(3)). This option makes sense because there may be nothing of current concern that is contained in the confidential hearing transcript that needs sealing.

- Opposition to the respondent’s application requesting transcript and documents in connection with a *Marsden* hearing or other in camera hearing. (Rule 8.47(b)(2)(C) [criminal].)<sup>120</sup>

*Practice Tip:* If appellant raises a *Marsden* issue or other issue related to an in camera hearing in the appellant’s opening brief, the respondent can request the confidential transcript or documents relating to that issue. If counsel plans on filing an opposition, it must specify what material is not relevant to the issue to preclude its release.

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<sup>119</sup> [Forms & Samples](#): “Seal-Motion to File Document under Seal - Previously Sealed.” See also, footnote 118, *ante*.

<sup>120</sup> [Forms & Samples](#): “*Marsden* Transcript - Notice of Irrelevant Confidential Material.”

## 2. Motions relating to substitute and supplemental briefing

- Motion to strike brief and file new brief.<sup>121</sup> (Rule 8.200(a)(4) & 8.204(e)(2)(B) [civil], 8.360(a) [criminal], 8.412(a) [juvenile].)

*Practice Tip:* A motion to strike and file new brief is required even for minimal corrections to the brief, because the policy of Fourth District courts is to no longer accept errata filings. The courts are unable to alter TrueFiling or other documents to reflect desired changes. (See [Aug. 29, 2016, ADI news alert.](#))<sup>122</sup> If counsel is simply withdrawing an issue, a letter to the court may suffice. Contact the court to confirm.

- Motion to file supplemental brief.<sup>123</sup> (Rule 8.200(a)(4) [civil], 8.360(a) [criminal], 8.412(a)(1) [juvenile].)

### **Fourth District practice**

- Division One - advises that if counsel plans on adding another argument to the filed opening brief and the respondent's brief has not yet been filed, move to strike the opening brief and file a combined brief. If the respondent's brief has already been filed, file a motion to permit the filing of a supplemental brief, along with the brief.
- Division Two - advises counsel to move to file a supplemental brief, unless there are multiple corrections on different pages. If there are, then move to strike the opening brief and file a combined brief.
- Division Three - does not accept supplemental briefs. It advises counsel to move to strike the brief and file a combined brief.

*Practice Tip:* If the circumstances in your case warrant a different procedure, call the court for its preference.

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<sup>121</sup> [Forms & Samples](#): “Strike Brief and File New Brief Request.”

<sup>122</sup> [http://www.adi-sandiego.com/pdf\\_forms/2016\\_Aug\\_29\\_alert.pdf](http://www.adi-sandiego.com/pdf_forms/2016_Aug_29_alert.pdf)

<sup>123</sup> [Forms & Samples](#): “Supplemental Briefing Request.”



### **3. Motion relating to time**

- Expedite appeal, shorten time, and calendar preference.<sup>124</sup> (Rules 8.54 [general], 8.68 [general - shortening time], 8.240 [civil - calendar preference]; ADI Manual, § 1.32 [motion to expedite appeal].)

### **4. Motions relating to exhibits**

- Motion for transmission of exhibits filed in superior court within 10 days of the filing of the respondent's brief.<sup>125</sup> (Rules 8.224(a) [civil], 8.320(e) [criminal], 8.407(e) [juvenile delinquency], 8.416(a)(2) [juvenile dependency].)
- Motion for late transmission of exhibits filed in Court of Appeal.<sup>126</sup> (Rules 8.224(c) [civil], 8.320(e) [criminal].)

*Division Two practices and procedures relating to transmittal of exhibits:* Division Two has a different procedure. Upon appointment, counsel will receive a form where she/he must list all exhibits referred to in the opening brief. The form must be filed in the Court of Appeal with the opening brief. The court then arranges for the transfer from the superior court. If counsel fails to file this on time, counsel can still use this form with an added explanation regarding the delay.

### **5. Motion relating to consolidation**

- Motion to consolidate a habeas petition and an appeal.<sup>127</sup>

*Practice Tip:* There is no express rule governing the procedure to consolidate appeals. Rule 8.147(b) refers to use of records from prior appeals on subsequent appeals in the same case and has been interpreted in

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<sup>124</sup> [Forms & Samples](#): “Expediting Appeal, Shortening Time, Calendar Preference.”

<sup>125</sup> [Forms & Samples](#): “Exhibits - Transmission Request Superior Court.”

<sup>126</sup> [Forms & Samples](#): “Exhibits - Late Transmission Court of Appeal.”

<sup>127</sup> [Forms & Samples](#): “Consolidate Habeas and Appeal.”

a manner to promote consolidation of appeals, unless it can be shown that a party would be prejudiced by consolidation. (*General Elec. Co. v. Fed. Emp. Distributing Co.* (1954) 122 Cal.App.2d 509, 511.)

## **D. Post-Briefing Stage**

### **1. Motions relating to oral argument**

See the court's published [practices and procedures](#).<sup>128</sup>

- Request for oral argument
- Division One – Oral argument must be requested in the time the court notice indicates. The Division has a [form for requesting argument](#).<sup>129</sup>
- Division Two - A tentative opinion is sent to counsel which includes either a letter that the court believes oral argument will assist the court and will schedule oral argument or that the court will not schedule argument on its own and instead invites counsel to request oral argument if counsel so wishes. Oral argument must be requested as the court notice indicates.
- Division Three - Oral argument must be requested within 10 days of filing of the respondent's brief (the court sends out a notice to this effect). Division Three's [request form](#) is available online.<sup>130</sup>
- Request for permission to use associate counsel for oral argument.<sup>131</sup> (See [Apr. 10, 2012, ADI news alert](#).<sup>132</sup>)

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<sup>128</sup> <http://www.courts.ca.gov/2834.htm>

<sup>129</sup> <http://www.courts.ca.gov/documents/ltrlweb.pdf>

<sup>130</sup> <http://www.courts.ca.gov/2746.htm#tab7889>

<sup>131</sup> [Forms & Samples](#): "Oral Argument - Associate Counsel Request."

<sup>132</sup>

[http://www.adi-sandiego.com/news\\_alerts/pdfs/2012/APRIL\\_2012\\_ADI\\_NEWS\\_ALERT.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/2012/APRIL_2012_ADI_NEWS_ALERT.pdf)

*Practice Tip:* Courts request that if counsel intends to use associate counsel for oral argument, she/he notify the court as soon as possible. Preapproval by the Court of Appeal and ADI is required for use of associate counsel. The written request must identify the attorney associated and include a brief statement that associate counsel is qualified and will be adequately prepared for oral argument. Request permission, state the reason for the last minute change, identify the attorney being associated, and include a statement that the attorney is qualified and will be adequately prepared for oral argument.

- Late request for oral argument. If the attorney decides to orally argue after the period for requesting oral argument has expired, she/he may file a late request with a cover letter briefly explaining the delay.
- Time for oral argument. Divisions One and Two have a 15-minute default time limit for oral argument.<sup>133</sup> Permission for a longer time must be specially requested. Division Three follows the time limit set forth in rule 8.256(c)(2) [30 minutes], but permits more time upon request.<sup>134</sup>
- Request for additional time at oral argument.<sup>135</sup> (Rule 8.256(c) [civil]; ADI Manual, § 6.22.)
- Request for oral argument recording.  
See the District’s published Practices & Procedures.<sup>136</sup>  
Division Three’s request form is available online.<sup>137</sup>
- Request for a change in calendar position. Divisions One and Three may be able to accommodate requests to move oral argument from the morning to the afternoon calendar and vice-versa. Or it might grant a request to trail a case to

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<sup>133</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist\\_div1.asp](http://www.adi-sandiego.com/practice/fourth_dist_div1.asp) and [http://www.adi-sandiego.com/practice/fourth\\_dist\\_div2.asp](http://www.adi-sandiego.com/practice/fourth_dist_div2.asp)

<sup>134</sup> [http://www.adi-sandiego.com/practice/fourth\\_dist\\_div3.asp](http://www.adi-sandiego.com/practice/fourth_dist_div3.asp)

<sup>135</sup> [Forms & Samples: “Oral Argument - Additional Time.”](#)

<sup>136</sup> <http://www.courts.ca.gov/2834.htm>

<sup>137</sup> <http://www.courts.ca.gov/2746.htm#tab7889>

later in the calendar. Division Two is unable to accommodate requests to move oral argument from the morning to the afternoon calendar and vice-versa.

- Subsequent waiver. A request for oral argument may be cancelled (the earlier the better). Attorneys unsure that oral argument will be necessary may choose to file a request within the time limit and later cancel it on deciding not to orally argue.

## **2. Motion relating to submission of case**

- Motion to vacate submission of case. (Rules 8.54 (general), 8.256(d) [civil] [when a cause is submitted] & (e) [vacating submission].)

## **3. Notice of new authorities**

- Letter to court of new authority decided after briefing completed.<sup>138</sup> (Rule 8.254(a)-(c) [civil] [letter may provide only citation to case and to the part of the brief it relates to].)

*Practice Tip:* If counsel wishes to present *argument* based on the new authority, then the proper procedure is to file a motion requesting permission to file a supplemental brief (rules 8.200(a)(4), 8.360(a)), accompanied by the supplemental brief.

## **4. Motions relating to publication or depublication**

- Publication request.<sup>139</sup> (Rule 8.1120(a); ADI Manual, §§ 7.19-7.21.)

*Practice Tip:* In evaluating whether to seek publication, see [January 21, 2016, ADI news alert](#),<sup>140</sup> pages 2-3.

- Depublication request.<sup>141</sup> (Rule 8.1125(a); ADI Manual, §§ 7.22-7.27.)

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<sup>138</sup> [Forms & Samples](#): “New Authority - Letter After Briefing Complete.”

<sup>139</sup> [Forms & Samples](#): “Publication Request.”

<sup>140</sup> [http://www.adi-sandiego.com/pdf\\_forms/Jan\\_2016.pdf](http://www.adi-sandiego.com/pdf_forms/Jan_2016.pdf)

<sup>141</sup> [Forms & Samples](#): “Depublication Request.”

- Opposition to Request for Publication.<sup>142</sup>

*Practice Tip:* There is no rule of court that governs an opposition to a request for publication. However, rule 8.1125 of the California Rules of Court, which governs a request for depublishation of opinions, may be useful for preparing an opposition to a request for publication. Rule 8.1125(b) permits a response supporting or opposing the request for depublishation. The rule provides that, within 10 days of the court’s receipt of the request, a response may be submitted. It must state the person’s interest and not exceed 10 pages.

## 5. **Motion relating to rehearing**<sup>143</sup>

- Request to be relieved from failure to file a timely petition for rehearing.<sup>144</sup> (Rules 8.268(b)(4) [civil], 8.366(a) [criminal], 8.470 [juvenile], 8.536 [Supreme Court]; ADI Manual, §§ 7.33-7.42.)
- Answer to petition for rehearing. On court request only. Normally petition will not be granted without opportunity to answer. (Rules 8.268(b) [civil], 8.366(a), 8.470.)

## 6. **Motions relating to seeking review**<sup>145</sup>

- Late petition for review: The time to file a petition for review may not be extended. The Chief Justice may nevertheless grant relief from failure to file on time, provided the Supreme Court still has jurisdiction. (Rules 8.500(e)(2); 8.512(c)(1); ADI Manual, § 7.58.)

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<sup>142</sup> [Forms & Samples](#): “Opposition to Request for Publication.”

<sup>143</sup> [Forms & Samples](#): “Petition for Rehearing - Untimely.”

<sup>144</sup> [Forms & Samples](#): “Petition for Rehearing - Untimely.”

<sup>145</sup> [Forms & Samples](#): “Petition for Review Template” and “Petition for Review To Exhaust State Remedies - Template.” See also “Petition for Review Information Forms,” for clients and attorneys. Dependency Forms & Samples: “Petition For Review Information Forms.”

- If there is time, counsel may file a request for relief from failure to meet rule time.<sup>146</sup>
- If the remittitur (rule 8.272) has issued, the California Supreme Court has no appellate jurisdiction. One remedy might be a motion in the Court of Appeal seeking to recall the remittitur (rules 8.272(c)(2) & (3), 8.366(a), 8.470; ADI Manual, § 7.45) and refile the opinion, in order to permit a petition for review.<sup>147</sup> Another remedy would be habeas corpus, alleging ineffective assistance of appellate counsel for negligence in missing the deadline. Contact the oversight staff attorney for guidance.
- Regardless of the Supreme Court’s appellate jurisdiction, counsel may file a petition for writ of habeas corpus in the Supreme Court.
- Motion to permit longer petition for review, answer, reply, or attachment.<sup>148</sup> (Rule 8.504(d)(4); ADI Manual, § 7.60.)

## **7. Motions relating to the remittitur**

- Motion for immediate issuance of remittitur (by stipulation of all parties only).<sup>149</sup> (Rules 8.272(c)(1) [civil], 8.366(a) [criminal], 8.387(f) [habeas corpus], 8.470 [juvenile], cf. rule 8.540(c) [Supreme Court; with stipulation of parties or on court’s own motion]; ADI Manual, §§ 7.43-7.44.)

*Practice Tip:* If a document requires the signature of multiple parties, like a stipulation, the original signature of at least one party must appear on the document filed in the Court of Appeal. Other signatures may be on copies of the signature page. (Rule 8.42.) Electronically filed documents must comply with the relevant sections in rule 8.77. (Rule 8.42.)

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<sup>146</sup> [Forms & Samples](#): “Petition for Review - Untimely.”

<sup>147</sup> This is most likely to succeed if the reason the petition was late is the fault of the court – e.g., failure to send a copy of the opinion.

<sup>148</sup> [Forms & Samples](#): “Petition for Review - Oversize.”

<sup>149</sup> [Forms & Samples](#): “Immediate Issuance of Remittitur.”

- Motion (or writ petition) to recall remittitur and reinstate appeal.<sup>150</sup> (Rules 8.272(c)(2) & (3) [civil], 8.366(a) [criminal], 8.387(f) [habeas corpus], 8.470 [juvenile], 8.450(c) [Supreme Court]; ADI Manual, §§ 7.43, 7.45.)

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<sup>150</sup> [Forms & Samples](#): “Recall Remittitur and Reinstatement Appeal.”