OCTOBER 2012 – ADI NEWS ALERT

BY
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FOREWORD

Before getting down to new business, I want to thank the many panel attorneys who attended the September 22 Bryan Garner seminar on *The Winning Brief*. We greatly respect your concern for honing your skills and appreciate having had the chance to spend the day with you. We also are grateful to the many who have taken the time to thank ADI for this special opportunity. It was a wonderful event. Paul Bell, in whose memory it was offered, would have approved – and indeed would have had a grand time!

We also thank the *many* attorneys who returned our website survey. Your responses are invaluable in our efforts to improve the website.

ALERTS

This alert[1] covers:

- Protections for juvenile offenders:

  (a) Release from penalties and disabilities, including a sex offender registration requirement, may be available to defendants who are given an honorable discharge from the Division of Juvenile Justice.

  (b) SB 9 gives an opportunity to petition for recall of the sentence to defendants who received an LWOP sentence for an offense committed when they were minors.

- New rules that became effective this year:

  (a) Counsel may file a supplemental brief in the Court of Appeal, citing but not arguing new authority that became available only after briefing was complete.

  (b) In juvenile appeals, the first name and last initial or initials of relatives are to be used if full name would compromise the anonymity of the minor.

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[1]As always, panel attorneys are responsible for familiarizing themselves with all ADI news alerts and other resources on the ADI website.

• Good appellate practice:

(a) Routinely filing petitions for review prematurely is not an appropriate practice.

(b) Panel attorney should be in touch with the ADI staff attorney and the court if the deadline for the opening brief under a default notice is near and inform us and the court if a mailed brief will arrive after the default notice deadline.

PROTECTIONS FOR JUVENILE OFFENDERS

Sex offender registration requirement may be among the penalties and disabilities from which juveniles may be released if they earn an honorable discharge from DJJ.

We recently learned that some juvenile defendants who might otherwise have to register as sex offenders can possibly be released from that obligation if they receive an honorable discharge from the Division of Juvenile Justice. Welfare and Institutions Code sections 1179 and 1772 provide persons honorably discharged will be released from "all penalties or disabilities resulting from the offenses" for which they were committed. The sections spell out certain exceptions, such as employment as a peace officer in most capacities, firearm possession, and the use of the prior for some evidentiary purposes or enhancement if later charges are filed. Sex offender registration is not among the enumerated exceptions.

At this time, we are informed, the Attorney General accepts the position that an honorable discharge relieves the defendant of the registration requirement. We can find no appellate case, published or unpublished, ruling on the question one way or the other.

We suggest that counsel take the following steps to assist clients committed to the DJJ. Advise them:

• Behave well in custody so as to earn an honorable discharge (obviously, this is good advice generally for those seeking to rebuild their lives – see the following topic on SB 9, for example).

• Upon getting an honorable discharge, contact their trial counsel or the local Public Defender about petitioning the court to set aside the verdict and dismiss the accusatory pleading.

• After discharge, comply with any requirements officials tell them apply.[2] If told they must register, they should comply temporarily and ask for assistance from their trial counsel or the local Public Defender. Counsel may write to the Sex Offender Tracking Unit of the Department of Justice, sending proof of the honorable discharge and requesting the unit take the client off the registration rolls. If counsel is not available, the client may do so personally.

We recognize that appellate counsel may well no longer be representing the client at the time of discharge. Because the young are notorious for not giving due attention to the long-range future, there is always a danger that advice may go in one ear today and out the other tomorrow. We urge counsel to do their best to impress youthful clients with the importance of the opportunity for release from penalties and disabilities. They might consider drafting a follow-up letter, to be sent near the scheduled time of release.

SB 9 gives opportunity to petition for recall of sentence to defendants who received an LWOP sentence for an offense committed when they were minors.

The Governor has signed SB 9, which provides the right to petition for recall of the sentence under Penal Code section 1170, subdivision (d), when a defendant has been given life without possibility of parole for an offense committed when the defendant was a juvenile. It is a legislative reaction to the United States Supreme Court decisions in *Graham v. Florida* and *Miller v. Alabama,*[3] which found an LWOP sentence for a non-homicide and a mandatory LWOP for a homicide, when committed by a juvenile, to be cruel and unusual punishment.

To petition the first time, the defendant must have served at least 15 years of the sentence and not have been convicted of a crime in which the defendant tortured the victim or killed a public safety officer. He or she must show remorse, as well as evidence of rehabilitation. A number of other conditions and limitations also apply. The law is retroactive, as are decisions finding certain penalties to be cruel and unusual punishment.[4]

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[2]The DJJ is required, on discharge, to inform persons in writing of the right to release from penalties and disabilities. (Pen. Code, §§ 1179, subd. (c), 1772, subd. (c).)

[3]*Graham v. Florida* (2010) 560 U.S. __ [130 S.Ct. 2011, 176 L.Ed.2d 825] and *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455, 183 L.Ed.2d 407].

[4]*Penry v. Lynaugh* (1989) 492 U.S. 302, 330; see *Lambrix v. Singletary* (1997) 520 U.S. 518, 539; *Saffle v. Parks* (1990) 494 U.S. 484, 494-495.

The Legislature has not yet provided a similar remedy for very lengthy non-LWOP sentences for either homicides or non-homicides, which were found unconstitutional in *People v. Caballero* (2012) 55 Cal.4th 262 [110-year-to-life sentence for three attempted murders committed when defendant was a minor is cruel and unusual punishment]). Counsel should consider a *Caballero*-based argument in their pending cases with arguably similar circumstances.

We suggest attorneys review their LWOP cases where the client was a minor at the time of the offense and then notify eligible clients or former clients of the opportunity to seek recall of the sentence at the appropriate time under SB 9. For very-long-sentence, but non-LWOP former clients, counsel should consider such remedies as habeas corpus or recall of the sentence at the recommendation of the Secretary of the Department of Corrections and Rehabilitation or the Board of Parole Hearings. Analysis and possible issues arising from these authorities are on the Recent Changes in the Law page of ADI's website. We are working with the other projects and some other nonprofit organizations to facilitate some kind of assistance to clients in these categories.

NEW RULES OF COURT

Counsel may file supplemental brief in Court of Appeal, citing but not arguing new authority decided after briefing was complete.

New rule 8.254[5] of the California Rules of Court allows counsel to file a letter citing an authority that became available after briefing was complete. It may only give

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[5] **Rule 8.254. New Authorities**

(a) Letter to court
If a party learns of significant new authority, including new legislation, that was not available in time to be included in the last brief that the party filed or could have filed, the party may inform the Court of Appeal of this authority by letter.

(b) Form and content
The letter may provide only a citation to the new authority and identify, by citation to a page or pages in a brief on file, the issue on appeal to which the new authority is relevant. No argument or other discussion of the authority is permitted in the letter.

(c) Service and filing
The letter must be served and filed before the court files its opinion and as soon as possible after the party learns of the new authority. If the letter is served and filed after oral argument is heard, it may address only new authority that was not available in time to be addressed at oral argument.

(*Eff. July 1, 2012.*)

the citation and point to the page or the section or page of the brief to which the authority relates. *It may not contain argument or commentary or other discussion*. If filed after oral argument, the letter may cite only authorities not available in time to be addressed at the argument. Any letter must be served and filed before the opinion is filed.

IMPORTANT: This provision gives counsel the *right* to file the supplemental authorities, without leave of the court,[6] but under highly restrictive conditions. In contrast, rule 8.200(a)(4) still provides the option of filing a full supplemental brief with *permission* of the presiding justice. The ban on argument and other restrictions in rule 8.254 do not apply to such a discretionary brief.

If the authority becomes available after the opinion is filed but before it becomes final, and the authority is potentially dispositive, a petition for rehearing is the appropriate remedy. Further guidance is offered in ADI's article on Taking Advantage of Potentially Favorable Changes in the Law.

In juvenile appeals, use first name and last initial or initials of relatives if full name would compromise anonymity of the minor.

Rule 8.401(a),[7] on confidentiality in juvenile appeals, now imposes an obligation on counsel to protect the anonymity of minors by avoiding the use of a relative's full name, if the name would tend to reveal the minor's identity.

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[6]Other examples of supplemental briefs as of right include a brief on new authority decided after briefing in the Supreme Court (rule 8.520(d)) and a supplemental brief in the Court of Appeal after remand from the Supreme Court, limited to matters occurring after the previous Court of Appeal decision (rule 8.200(b)). The ban on argument in rule 8.254 does not apply to these briefs.

[7]**Rule 8.401. Confidentiality**

(a) References to juveniles or relatives in documents

To protect the anonymity of juveniles involved in juvenile court proceedings:

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(3) In all documents filed by the parties and in all court orders and opinions in proceedings under this chapter, if use of the full name of a juvenile's relative would defeat the objective of anonymity for the juvenile, the relative must be referred to by first name and last initial; but if the first name is unusual or other circumstances would defeat the objective of anonymity for the juvenile, the initials of the relative may be used.

(*Eff. Jan. 1, 2012.*)

A COUPLE OF POINTERS ON GOOD APPELLATE PRACTICE

Attorney should not routinely file a premature petition for review.

Some attorneys apparently have made it a practice to file a petition for review as soon as they get the opinion – or at least well before it becomes final as to the Court of Appeal (which is normally 30 days from filing). They reason that early filing is a safeguard against missing the due date. Although that is a worthy objective, we think such a practice is an inappropriate substitute for maintaining an adequate calendaring system.

Rule 8.500(e)(1) states: "A petition for review must be served and filed within 10 days after the Court of Appeal decision is final in that court." Note that the time frame is any time within the 10-day window, not any time before the window expires. True, under subdivision (e)(3), the Supreme Court clerk must accept a premature petition and then file it when ripe.[8] But that provision does not negate the fact that the filing, being premature, did not comply with the rule. The problem is more than a formal one: having to keep track of premature petitions and then file them potentially imposes a burden on the Supreme Court clerk's office. As officers of the court, we have a responsibility to present our cases in an orderly manner and help the system operate properly.

In filing early, some attorneys apparently hope to submit an immediate compensation claim. This expectation is not realistic. The projects cannot recommend payment for a "filing" until it is in fact filed. A petition for review submitted before the Court of Appeal opinion is final may never be filed. The Court of Appeal may grant rehearing, modify the opinion in relevant part, or otherwise moot the petition. Additionally, the Supreme Court may order transfer or grant review on its own motion. Until we know the submission is actually *filed*, we cannot deem it to be of true potential benefit to the client and thus recommend it be compensated. So "patience" is the watchword: file when the time is ripe.

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[8]This obligation is unusual under the rules. In most situations, the court has the option of retaining a premature filing and deeming it filed when ripe, or else rejecting it without prejudice to refiling when the proper time comes. (E.g., rules 8.104(d), 8.308(c), 8.406(d), 8.822(c), 8.853(c), 8.902(c), 8.954(c) [notices of appeal]; 8.454(f)(1) [notice of intent under Welf. & Inst. Code, § 366.28].)

Panel attorney should notify the ADI staff attorney and court if the opening brief deadline under a default notice is near or if a mailed brief will arrive after the default notice deadline.

A default notice under rule 8.360(c), 8.412(d), or 8.416(g) gives the appellant a specified period of time to file an opening brief before the court takes action, either by vacating appointment of counsel and substituting new counsel, or by dismissing the appeal.

Such a notice should be the unusual exception to meeting deadlines, not a regular practice. Allowing the notice to issue puts the client at risk of dismissal[9] and the attorney at risk of being relieved without compensation; it also generates haste and rushed, careless work. Incurring the notice, if habitual, tarnishes the attorney's reputation. ADI keeps track of these notices, and a pattern of default notices stands out in glaring relief on an attorney's profile, believe me.

We recognize, nevertheless, that incurring a default notice *occasionally* is a fact of life for appellate practitioners. Rarely is our schedule so predictable that we can avoid them altogether throughout a long and busy career. I plead guilty to getting a few, myself!

Even though default notices will sometimes be necessary, attorneys should be aware that, as the grace period closes and the drop-dead due date comes dangerously near, ADI and the court take notice and begin worrying. If the date is upon us and no one has heard from the panel attorney, we will take action. We will try to get in touch with the attorney if possible and then contact the court. If not assured the attorney has the matter under control, we must start preparing for the possibility of default. This process includes determining whether to take the ultimate step of arranging for an involuntary substitution of counsel (*without* compensation to the relieved attorney).

The most essential measures for the attorney to take in a default situation are (1) *stay in touch with ADI and the court* and (2) *strictly fulfill any promises you make to us or the court, such as when you are going to file the brief.* Specifically:

- Contact the ADI staff attorney and the court well before the deadline and explain your plan.

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[9]The provisions of rules 8.360(c), 8.412(d), and 8.416(g) on vacating the appointment and substituting counsel notwithstanding, the courts have informed us that even in an appointed case they retain the inherent power to dismiss an appeal for failure to file an opening brief.

- If you are going to ask for another extension, let us know, then file the request on time.

- If you are in an impossible dilemma and need to be relieved, let us know that, too. It is far better to ask to be relieved than to be removed from a case involuntarily. The need to get off one or more cases can happen to anyone, and a request to be relieved in itself is not at all a stigma. But an involuntary removal means the attorney has both abandoned the client and thrown us and the court into crisis mode by failing to act responsibly. Almost invariably it signals the end of the attorney's tenure on our panel. Happily, very few attorneys ever reach that point; the vast majority work cooperatively with us and the court to forestall any potential emergency.

- If you mail-file a near-default brief under rule 8.25(b)(3), promptly let the court and ADI know when you deposit it in the mail. That way, we'll understand to hold off on more drastic protective measures.

These simple steps will help protect your clients, your standing on the panel, and your professional reputation.