



Appellate Defenders Issues

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Notes From The Director
Elaine A. Alexander

I want to open this column by paying special tribute to two people who have made enormous contributions to the law and the legal community, particularly our own corner of it.

Gary Nichols: Winner of the Paul Bell Memorial Award for 2003

At the April 30 annual dinner of the defender organizations, sponsored by ADI and Federal Defenders of San Diego, Inc. (ADI's sibling organization), Gary Nichols of the San Diego County Public Defender received the Paul Bell award, for consistent excellence in the practice of appellate law and outstanding contributions to the cause of indigent defense on appeal. The award is given annually by the board of ADI-FDSDI and recognizes ADI's former assistant director Paul Bell. Paul died in 1997 after 24 years with the office; he was recently named to the San Diego County Bar Foundation's "Distinguished Lawyer Memorial" (see related story in this newsletter).

Gary is head of the writs and appeals division at the San Diego County Public Defender's office. He has labored devotedly in the trenches for many years, always producing work of high quality, providing leadership and exceptional skill to the cause of indigent defense, and offering tireless advocacy to his clients.

Gary has also handled some high-profile cases and in the process contributed greatly to the law. I need say only one word to document this statement: "Romero." At the height of the Three Strikes revolution – some might say hysteria – criminal cases were being tried

and appealed in record numbers, often overwhelming the courts, because of the unprecedentedly enormous sentences suddenly being imposed. Then Gary argued and won in the California Supreme Court *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, which recognized judges' discretion to strike a strike under their Penal Code section 1385 power. With this one decision the harsh effects and injustices of rigidly applying the Three Strikes law could be ameliorated, allowing for more flexibility and better proportionality in sentencing. It is understatement to say that Gary's advocacy hugely affected, not only numerous individual sentences, but the legal system itself.

We know Paul would be proud to have Gary's name on the award given in his memory.

Benjamin Franklin Rayborn: Jailhouse lawyer – and human being – extraordinaire

On April 21 of this year Ben Rayborn of Federal Defenders of San Diego, Inc. passed away at the age of 79. He had worked there for 33 years and had retired just a week earlier. He had already been selected to receive the E. Stanley Conant Award at the annual Defender Dinner, scheduled for April 30. The Conant Award is given annually by the ADI-FDSDI board of directors to recognize exceptional contributions to indigent trial defense and honors the memory of the former executive director of Defenders, Inc. (which used to be another sibling organization of ADI).

Ben's story was remarkable. During the 1940's he committed dozens of bank robberies and served many years in prison, including a stint at Alcatraz. He was once on the FBI's "Ten Most Wanted" list; indeed, FBI director J. Edgar Hoover pronounced him "the worst gangster to come out of World War II." (A note in mitigation: with the stolen money he bought dozens of bikes for youths in his neighborhood and helped others start businesses.) During his incarceration he turned a corner and educated himself in the law, eventually winning release for himself and helping many other inmates with their legal problems.

Upon his release he continued this work and took a job as a legal researcher at Federal Defenders in 1971. Over time he became a legend there and throughout the community because of his legal astuteness and extensive knowledge, as well as his generosity and willingness to help others. (For instance, he postponed his retirement earlier this year to help uninsured victims of last year's San Diego firestorms with their cases.)

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More about Ben can be found on the Federal Defender Web site at: <<http://www.fdsdi.com/bfr/bfr.html>>

Ben was a unique institution – an irreplaceable resource, a wonderful human being, and living proof of the possibility of redemption.

Crawford v. Washington

The United States Supreme Court decision in *Crawford v. Washington* (2004) ___U.S.___ [124 S.Ct. 1354; 158 L.Ed.2d 177] potentially may work a sea change in the law of hearsay as applied to criminal cases. It held that a “testimonial” statement made by an unavailable witness is inadmissible unless the defendant previously had an opportunity to cross-examine the witness about the statement. Although the court offered no precise definition, basically “testimonial” statements are those that the declarant would reasonably have expected to be used as evidence in a prosecution. They include, for example, *ex parte* in-court testimony, affidavits, depositions, and statements given to police officers during an interrogation. A few established hearsay exceptions may still remain. Non-testimonial statements are subject to the normal rules of hearsay, as prescribed by state law.

As always when a major decision favoring the defense is announced, appellate attorneys should be alert to its possible applicability to both present and past cases. We are posting on our Web site some memos on the *Crawford* case. It is also important to consult our memo on how to take advantage of favorable changes in the law, no matter what the stage of the case: <<http://www.adi-sandiego.com/Resources/lawchange.htm>>. ADI staff attorneys would be happy to assist counsel in deciding whether *Crawford* might apply and, if so, how the issue might be raised at the particular stage of the case.

Client Records

A panel attorney recently asked some questions about counsel’s duty with respect to the record and contents of counsel’s file. Here I’ll do a brief reprise of a few of our policies and counsel’s ethical responsibilities.

There is only one copy of the record for the defendant, and the client is not entitled to them while represented by counsel, because counsel needs them. At the conclusion of the case, however, the client is entitled to receive the transcripts, which are the client’s property. When sending the record to the client, counsel should always make it clear this is the client’s only copy and the client has the responsibility of safeguarding it. If it is lost, the client must pay the state for a replacement.

There may be circumstances (e.g., a child molestation case) where the client does not want the record coming into prison. In such a situation, counsel should ask for written directions

on whether to send it to a third party or destroy it at the end of the case. Counsel who fail to send the record to the client or make arrangements for its disposal may have an ethical obligation to keep it for the life of the client.

If the client requests counsel’s office file, he or she is entitled to it. Rules of Professional Conduct, rule 3-700(D) states:

A member whose employment has terminated shall:
(1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. “Client papers and property” includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert’s reports, and other items reasonably necessary to the client’s representation, whether the client has paid for them or not

The attorney’s work product materials – written notes, impressions, thoughts, etc. – belong to the client and must be delivered to the client or a successor attorney on request. (*Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950; see Rules Prof. Conduct, rules 2-111(A)(2), 3-700(D).) This does not include materials in the public domain, such as downloaded or photocopied cases, statutes, treatises, etc., used for reference.

Counsel need not provide duplicate copies of documents the client has already been sent – e.g., briefs, letters to the client. It may promote good client relationships to be accommodating to a reasonable extent, however, and a modest expense to replace a lost document may be compensable. Again, it is good practice for counsel to admonish the client it is the client’s responsibility to preserve documents sent to him or her. It is also good practice to obtain a receipt showing the delivery of such materials to the client.

Ineffective Assistance of Counsel Issues

Like the preceding topic, this one, too, is a reprise. But it is helpful to review previous communications once in a while, and of course new attorneys are continually being added to the panel and may never have seen the original. In addition, we have been seeing fairly common problems in the way ineffective assistance of counsel issues are presented – especially, raising the issue on appeal instead of by habeas corpus, when facts outside the record are needed to establish the claim, and failing to contact trial counsel and ADI.

Appellate counsel need to understand that these are serious issues affecting the fundamental quality of their own representation:

➔ Raising ineffective assistance of counsel on appeal when a writ petition is needed puts the client at risk of losing a valid issue altogether. (Obviously, if there is no valid issue, it shouldn’t be raised in the first place.)

➔ The issue itself is not risk-free. Trial counsel may have been protecting the client by taking or omitting a given action, even though such a purpose cannot be discerned from the record, and that situation may still apply. In addition, an allegation of ineffective assistance of counsel waives attorney-client confidentiality as to relevant information, and disclosure of such information may seriously jeopardize the client.

➔ Repeated uncritical use of ineffective assistance of counsel issues lowers the credibility (and thus the effectiveness) of the appellate attorney. Crying “wolf” too often devalues the entire issue in the eyes of the court, making it harder for all appellate attorneys to present a persuasive case when the issue is in fact valid.

➔ Failure to contact trial counsel and ADI greatly heightens these risks. It also tends to undermine the sound professional relationships that promote quality representation at all levels.

Because of what is at stake, counsel should observe conscientiously the basic principles governing this sensitive area:

Counsel must apply the appropriate legal standards; usually this means ineffective assistance of counsel must be raised by habeas corpus, not appeal.

Some attorneys seem to have the idea that if they can think of a different (and, in their minds, better) approach, they can allege ineffective assistance of counsel in the appeal. We often see such second-guessing of trial counsel, with or without lip service to the applicable appellate standards and the requirements of *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].

Especially abused or ignored is the principle that if there are conceivable reasonable grounds for counsel’s actions, and unreasonable grounds are not affirmatively shown in the record (e.g., a statement by counsel evincing ignorance or mistake of material law), then ineffective assistance of counsel is not established on the appellate record. In such a case, the lack of reasonable grounds must be established by evidence outside the record, through a petition for writ of habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

All of this suggests that, in the substantial majority of cases, ineffective assistance of counsel should be raised by habeas corpus, not appeal.

Appellate counsel must always contact trial counsel before alleging ineffective assistance of counsel.

This is the cardinal rule of an ineffective assistance of counsel investigation and flows naturally from the legal standards governing the issue. Nevertheless, appellate counsel appallingly often violate it.

It can be difficult to assess what conceivable tactical reason there may have been for any given action. Just because appellate counsel can’t think of a reason does not mean there was none. Often decisions are made on the basis of trial counsel’s past experience, sense of how the jury or judge is reacting, events outside the trial (such as pending charges against the defendant that make delving into a particular area risky), the client’s personal wishes, and other matters not on the record that appellate counsel may have no reason to suspect. Contacting trial counsel can prevent raising baseless issues that cannot help and even might hurt the client and that divert the attorney’s efforts from more fruitful approaches.

***Contacting trial
counsel promotes good
relationships and cooperation
between the trial and
appellate bars.***

Contacting trial counsel promotes good relationships and cooperation between the trial and appellate bars. This is true even when the ineffectiveness is affirmatively shown on the record; it is simple professional courtesy to give trial counsel a “heads up” on the coming issue, rather than ambushing him or her in an already-filed brief.

The contact should be done correctly – in a way, ideally, to elicit counsel’s cooperation and, if counsel is hostile or unresponsive, to make sure trial counsel is aware of the ethical obligation to cooperate with successor counsel. It should also minimize the possibility appellate counsel will end up becoming a witness should a habeas hearing be held.

Appointed appellate counsel must consult with ADI before raising an ineffective assistance of counsel issue.

Because of the widespread misunderstandings about ineffective assistance of counsel issues and because of the importance of approaching trial counsel correctly from the start, our policy is that counsel must consult with ADI before raising such an issue, whether the case is assisted or independent. This approach will help counsel assess the validity of the issue, the need for a habeas corpus investigation, and the possible ways of approaching trial counsel. It can also facilitate getting funds if they are needed for the investigation.

The constitutional doctrine of ineffective assistance of counsel is important to appellate advocacy. It should stay that way and not be devalued by uncritical allegations made in disregard of the basics, as outlined here. All appellate counsel have the obligation to apply the proper legal standards, pursue the correct remedy, adequately investigate, contact trial counsel appropriately, seek the required guidance from ADI, and most of all protect the client’s interests by not blundering into areas that offer little potential benefit and may pose unforeseen hazards.

Appellate Practice Pointers

SEX, VIOLENCE, AND DISPOSITION EVIDENCE

by Randall Bookout, Staff Attorney

The common law rule excluding evidence of criminal propensity or disposition dates back to 17th-century England. Historically, disposition evidence was excluded to prevent confusion of issues, unfair surprise, and undue prejudice. Undue prejudice resulted from the natural tendency of jurors to give excessive weight to prior offenses in considering the truth of a current allegation, or the desire to condemn a defendant for a past offense irrespective of guilt of the current allegation.

This common-law – and, many would argue, commonsense – doctrine is codified in California Evidence Code¹ section 1101, which until recently flatly prohibited disposition evidence when offered to prove current conduct. Subdivision (b) of section 1101 did, however, allow evidence of prior offenses when relevant to prove some disputed fact (e.g., intent, motive, absence of mistake) other than disposition, so that if, say, a defendant prosecuted for retail theft claimed she had merely forgotten to pay for a item at a checkout counter and thus lacked the required mens rea of theft, evidence she had committed a similar offense on a previous occasion would be relevant to establish her intent.

The California Supreme Court traditionally scrutinized other-crimes evidence, particularly in regard to the purported theory of relevance of such evidence (see generally *People v. Alcalá* (1984) 36 Cal.3d 604; *People v. Tassell* (1984) 36 Cal.3d 77; *People v. Thompson* (1980) 27 Cal.3d 303; *People v. Schader* (1969) 71 Cal.2d 761), and was continuing to do so, albeit in an arguably more relaxed manner, as late as 1994 (in *People v. Enwoldt* (1994) 7 Cal.4th 380). The next year, however, the California Legislature dispensed with the ban on disposition evidence in sex offenses by adopting Evidence Code section 1108, followed in 1996 by section 1109, which allows disposition evidence in prosecutions involving domestic violence.

Section 1108 defines sex offenses as conduct proscribed by certain Penal Code sections and other assaultive, nonconsensual sexual conduct. (Interestingly enough, though, subdivision (d)(1)(E) includes as a sexual offense, “Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person,” conduct which arguably includes voluntary participation in sadomasochistic activities or the viewing of sadomasochistic pornography.) Section 1109 defines domestic violence by reference to Penal Code section 13700, which in turn defines it as “abuse committed against . . . a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having

or has had a dating or engagement relationship.” Abuse, in turn, is defined as “intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.”

Jurors are instructed to evaluate disposition evidence by CALJIC No. 2.50.01 in sex offenses and 2.50.02 in domestic violence prosecutions. The core of these instructions contains a permissive inference: “If you find that the defendant committed a prior [sex or domestic violence offense], you may, but are not required to, infer that the defendant had a disposition to commit [sex or domestic violence offenses]. If you find that the defendant had this disposition, you may, but are not required to, infer that [the defendant] was likely to commit and did commit the crime of which he or she is accused.” In *People v. Falsetta* (1999) 21 Cal.4th 903, 917-919, the court held section 1108 survived a due process challenge because of the trial court’s discretion to exclude propensity evidence under section 352, including a court’s “broad discretion to exclude disposition evidence if its prejudicial effect . . . outweighs its probative value.” The court has also found that the permissive inference contained in CALJIC No. 2.50.01 cannot be interpreted to authorize a guilty verdict based solely on proof of uncharged conduct. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013.) Evidence Code section 1109 is subject to the same constitutional analysis as section 1108. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310.)

Just what does disposition evidence prove, anyway? *Falsetta* observed that disposition evidence has historically been excluded “not because it has no appreciable probative value, *but because it has too much.*” It also stated “the probative value of ‘other crimes’ evidence is increased by the relative similarity between the charged and uncharged offenses” (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 915, 917, original italics.) In *Reliford*, the court asserted it was not deciding whether uncharged prior sex acts had to be similar to the charged offenses to support the inference. (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1013, fn. 1.) In *People v. Harris* (1998) 60 Cal.App.4th 727, 740, original italics, on the other hand, a lower appellate court reversed where the prior conduct evidence admitted under section 1108 was completely dissimilar to the current allegations, concluding the trial court’s finding the prior conduct evidence was probative failed to answer the question, “Probative of *what?*”

The main reason it matters whether past and current offenses need be similar is that the United States Constitution arguably requires they be so to sustain the permissive inference central to CALJIC Nos. 2.50.01 and 2.50.02.² The inference is subject to an as-applied due process challenge when past and current offenses are notably dissimilar, because a permissive inference

violates the due process clause “if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.” (*Francis v. Franklin* (1985) 471 U.S. 307, 314-315 [105 S.Ct. 1965, 85 L.Ed.2d 344].) For example, in a Penal Code section 288, subdivision (a) prosecution, where it is alleged the defendant touched a 5 year old boy over his clothing with lewd intent, but where the child was unaware a sex offense was even being committed, what would the reasonable and commonsense inference be from evidence the defendant brutally raped an adult woman 15 years earlier? (By the way, section 1109 generally excludes prior acts over 10 years stale; section 1108 does not.)

Specifically in the domestic violence arena, and in addition to ensuring the logical coherence of any permissive inferences submitted to the jury, appellate counsel should make sure both prior and current offenses are properly within the ambit of Evidence Code section 1109 and Penal Code section 13700 to begin with. Is a slap across the face an attempt to cause bodily injury? Does a nonspecific threat – e.g., “If I can’t have you, nobody can” – standing alone, place someone in reasonable apprehension of imminent serious bodily injury? Consider, furthermore, the nature of the relationship between the defendant and past or present victim, particularly in “dating” relationships. A “dating relationship” is elsewhere defined in the Penal Code as “frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations.” (Pen. Code, § 243, subd. (f)(10).) One court, considering the meaning of “dating relationship” as employed in the Domestic Violence Prevention Act (see Fam. Code, § 6300, subd. (c)), has concluded “dating relationship” does not apply to casual dating but only to “serious courtship.” (*Oriola v. Thaler* (2000) 84 Cal.App.4th 397, 412.)

A corollary is what should be admissible if propensity evidence is admitted. For example, where a trial court admits propensity evidence of past sex offense(s), the court must also admit evidence of acquittal as to the offense(s). (*People v. Mullens* (June 17, 2004, No. D041452) ___ Cal.App.4th ___ [04 D.A.R. 7311].)

In addition, as with all cases on appeal, the more stringent the harmless error standard, the better for the appellant. Ordinarily, of course, the erroneous admission of evidence is subject to the *Watson* standard. (*People v. Watson* (1956) 46 Cal.2d 818, 832-838.) As indicated earlier, however, the Supreme Court in *Falsetta* concluded section 1108 survived the defendant’s due process challenge *precisely because* the trial court retained discretion to exclude propensity evidence under section 352. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) The holding in *Falsetta* is obviously premised on the assumption disposition evidence invokes constitutional questions of due process of law, and appellate counsel should not lose this opportunity to invoke *Chapman* when arguing prejudice.

Finally, counsel should preserve for federal review the very issues rejected by *Falsetta* (i.e., that disposition evidence violates the due process clause) and *Reliford* (i.e., that CALJIC Nos. 2.50.01 and 2.50.02 permit a jury to convict based entirely on evidence the defendant committed a previous sex or domestic violence offense).

Disposition evidence has the potential to sway juries unduly and thus lighten the prosecution’s burden of proof. Appellate counsel must be alert to the various ways it can be attacked and raise the issue whenever reasonable.

(Footnotes)

1 All statutory references are to the Evidence Code unless otherwise noted.

2 Thanks to panel attorney Jerry Wallingford for this argument.





**DEFERRED ENTRY
OF JUDGMENT**
by Patrick E. DuNah,
Staff Attorney

In March 2000, Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998 was enacted. The act took a two-fold approach to juvenile crime. On the one hand, it provided for tougher measures and longer prison sentences to be handed down to gang members and violent offenders, and on the other, it provided for a rehabilitative and non-custodial approach for first time non-violent offenders. (Note, *Deferred Entry of Judgment: An Overlooked and Undervalued Benefit of Proposition 21* (2004) 38 U.S.F. L.Rev. 1; Note, *Juvenile Sex Offenders: Proposition 21 - The Hope for a Better Solution* (2000) 21 J. Juv. L. 97.)

The act facilitated the process for trying violent juveniles adults, broadened the reach of gang affiliation enhancements, increased prison punishment, and enacted gang registration requirements. (*Deferred Entry of Judgment, supra*, at p. 2.) Conversely, a juvenile older than 14 who had no prior offenses and had committed a non-violent crime could be eligible for a probation program called Deferred Entry of Judgment (DEJ). Upon successful completion of the program, the juvenile would have no criminal record, and the arrest would be deemed to never have occurred. (*Id.* at pp. 2-3.)

DEJ is governed by Welfare and Institutions Code¹ sections 790 et seq. and California Rules of Court (“Rule(s)”), rule 1495. Modeled on the adult drug diversion statute (Pen. Code, §§ 1000 et seq.), DEJ is an alternative to the usual section 602 jurisdiction/disposition hearing and wardship process. (*In re Sergio R.* (2003) 106 Cal.App.4th 597, 602, fn.4, 606.) When a minor faces section 602 proceedings for a felony offense, the prosecutor must review the file to determine whether the minor meets the qualifications set out in section 790, subdivision (a). (§ 790, subd. (b).)

A minor is eligible for DEJ if all of the following circumstances apply:

- (1) The minor has not previously been declared to be a ward of the court for the commission of a felony offense.
- (2) The offense charged is not one of the offenses enumerated in subdivision (b) of section 707.
- (3) The minor has not previously been committed to the custody of the Youth Authority.
- (4) The minor’s record does not indicate probation has ever been revoked without being completed.

(5) The minor is at least 14 years of age at the time of the hearing.

(6) The minor is eligible for probation pursuant to Section 1203.06 of the Penal Code.

(§ 790, subd. (a); rule 1495(a).)

If the minor is found eligible, the prosecutor must file a declaration stating the grounds for his determination and provide written notification to the minor explaining the procedure. (§§ 790, subd. (b), 791, subd. (a); rule 1495.) The court must issue a citation to the custodial parent or other caretaker of the minor, by personal service at least 24 hours in advance of the hearing, with a notification that the caretaker’s participation in a counseling or education program might be required. (§ 792.)

If the minor consents and waives the right to a speedy jurisdictional hearing, the judge may summarily grant DEJ or refer the matter to the probation department for further evaluation:

When directed by the court, the probation department shall make an investigation and take into consideration the defendant’s age, maturity, educational background, family relationships, demonstrable motivation, treatment history, if any, and other mitigating and aggravating factors in determining whether the minor is a person who would be benefitted by education, treatment, or rehabilitation. The probation department shall also determine which programs would accept the minor. The probation department shall report its findings and recommendations to the court.

(§ 791, subd. (b); see rule 1495(d).)

The court has discretion to grant or deny DEJ after receiving the probation department’s report. (§ 791, subd. (b); *In re Sergio R., supra*, 106 Cal.App.4th at p. 605.) The fact that the minor meets the statutory criteria for eligibility is not dispositive. In this regard, “the court makes an independent determination after consideration of the ‘suitability’ factors specified in rule 1495(d)(3) and section 791, subdivision (b) with the exercise of discretion based upon the standard of whether the minor will derive benefit from ‘education, treatment, and rehabilitation’ rather than a more restrictive commitment. (§ 791, subd. (b); rule 1495(b)(2), and (f).” (*In re Sergio R., supra*, 106 Cal.App.4th at p. 607, fn. omitted.)

In *Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 562, the trial court refused to defer entry of judgment on a minor who admitted possession of marijuana for sale and transportation of marijuana, “because it wished to send a message to other potential juvenile drug smugglers that there would be permanent consequences flowing from such criminal

activity.” A panel of Division One of the Fourth Appellate District concluded this was “not an appropriate basis” for refusing to defer entry of judgment since it had nothing to do with the minor’s “potential for rehabilitation.” (*Ibid.*) Referring to a non-codified section of Proposition 21 (subdivision J) discussing the rationale underlying the act’s enactment, the *Martha C.* court concluded:

These findings express not only a strong preference for rehabilitation of first time, non-violent, juvenile offenders but suggest that under appropriate circumstances, DEJ is *required*. This strong preference for rehabilitation and the limitation on the court’s power to deny delayed entry of judgment is reflected in the procedures used in considering DEJ.

(*Id.* at p. 561, italics added.)

Unpublished holdings reflect *Martha C.*’s strong preference in favor of utilizing DEJ wherever it is appropriate. Although these cases are obviously not citable as authority, their reasoning may be of assistance in arguing in favor of DEJ. (See *In re Joseph C.* (March 19, 2004, No. A100526) [2004 Cal.App.Unpub. LEXIS 2555] [dispositional and jurisdictional orders reversed where the court failed to hold a hearing and make findings on the record concerning the minor’s eligibility for and interest in participating in DEJ where prosecutor had initially filed judicial council forms establishing eligibility]; *In re Luis B.* (November 13, 2003, No. D041325) [2003 Cal.App.Unpub. LEXIS 10651] [order denying DEJ reversed where trial court found minor unsuitable based on a lack of information concerning his performance at school, the seriousness of the crime, and the amount of restitution]; *In re Christopher C.* (September 17, 2003, No. F040670) [2003 Cal.App.Unpub. LEXIS 8819] [judgment reversed and remanded where probation report and court’s concurrence with this report addressed only rehabilitation factor but not education and treatment].)

Although the provisions governing DEJ do not make willingness to admit the petition allegations an eligibility factor (see § 790, subd. (a); rule 1495(a)), other statutory provisions make DEJ available only if and when the minor admits the allegations in the petition. (§ 791, subds. (a)(3) & (b).) Thus, it appears that DEJ is not available to minors following a contested jurisdictional hearing. (See *In re Bryant* (August 6, 2002, No. B154248) [2002 Cal.App.Unpub. LEXIS 7399 [no sua sponte duty on court’s part to raise DEJ issue where record below evidenced no willingness on minor’s part to admit the allegations against him].)

If the court grants DEJ, the minor admits the allegations in the petition and waives time for pronouncement of judgment. The court places the minor on probation. If the minor successfully completes probation, the charges must be

dismissed. The arrest leading to the charges is deemed not to have occurred, and the records of the proceeding are sealed. (§§ 791, subd. (a), 793, subd. (c), 794.)

If it appears to the court, probation department, or prosecutor that the minor is not performing satisfactorily in the assigned program, not complying with the terms of probation, or not benefitting from education, treatment, or rehabilitation, the court shall lift the DEJ and schedule a dispositional hearing. (§ 793.) A panel of the Fourth Appellate District, Division One has held in an unpublished decision that pursuant to section 791, subdivision (a), the prosecutor must provide a minor with written notification of the DEJ procedures before DEJ can be lifted. (*In re Ivan R.* (September 16, 2002, No. D036878) [2002 Cal.App.Unpub. Lexis 8638].)

(Footnotes)

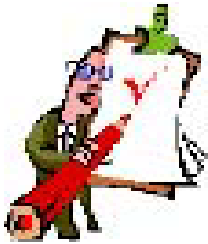
1 Unless otherwise specified, all further statutory references are to the Welfare and Institutions Code.



COLLECT TELEPHONE CALLS FROM PRISONERS by Michelle Rogers, Staff Attorney

A recent concern has been brought to ADI’s attention regarding some panel attorneys’ inability to accept collect telephone calls from clients incarcerated by the Department of Corrections (CDC). Apparently, MCI has an exclusive contract with the CDC, and all collect calls made by prisoners must be made through MCI. This contract provisions means that unless a panel attorney has a way for MCI to bill the panel attorney for the collect call, the call will be blocked. For the majority of attorneys, this limitation will not pose a problem, because even if they do not have MCI as their long distance carrier, their long distance carrier of choice has an arrangement with MCI so that MCI charges can appear on the carrier’s bill. However, ADI has become aware that some telephone carriers do not have such an arrangement with MCI, and thus counsel who use such carriers are unable to receive collect calls from their clients.

ADI’s policy is that an attorney should be able to accept collect calls from his/her clients. Unfortunately, the situation is unlikely to change in the near future, as the contract calls for a fixed annual commission payment by MCI to the State of California General Fund of \$26,106,300, and the contract does not expire until February 2, 2006.



CUMULATIVE ERROR AND EXHAUSTION

**by Howard C. Cohen,
Staff Attorney**

On occasion, we see a “cumulative error” argument included in briefing. “Cumulative error” refers to the contention that if multiple errors exist but none in and of itself is sufficient to cause prejudice, nevertheless the combination of the multiple errors does create prejudice. “[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (Citations.) ¶¶ . . . In the circumstances of this case, the sheer number of instances of prosecutorial misconduct and other errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone. (Citation.)” (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.) Cumulative error may occur when there are multiple errors of the same type, e.g., erroneous instruction, ineffective assistance of counsel, prosecutorial error or misconduct,¹ or in combination with other error. (*Id.* at pp. 844-846.)

Counsel should be alert to the possibility of arguing that multiple errors compound one another. “Consider[ing the multiple errors] together, we conclude they create a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors.” (*People v. Hill, supra*, 17 Cal.4th at p. 847.)

While counsel need not make a specific, separate “cumulative error” argument whenever there are multiple errors, counsel should argue that errors, “individually or collectively,” produced prejudice whenever such an argument is reasonably applicable. Counsel should also consider “federalizing” the claim. The failure to rely expressly on “cumulative error” may be deemed a failure to exhaust state remedies. (See 28 U.S.C. § 2245, subd. (b)(1); *Gonzales v. McKune* (10th Cir. 2002) 279 F.3d 922, 925.)

(Footnotes)

1. *Hill* dealt primarily with multiple instances of prosecutorial error sufficiently egregious to constitute “prosecutorial misconduct.” (Compare *Hill, supra*, 13 Cal.4th at p. 823, fn. 1, with pp. 844-848.) The Supreme Court noted the history of the particular prosecutor and an unpublished opinion that referred to the prosecutor’s misconduct and identified her as the prosecutor who had committed misconduct in two published cases where her identity had not been disclosed. (*Id.* at p. 847.)

The court concluded that its reference to an unpublished opinion via judicial notice did not violate the prohibitions of California Rules of Court, rule 977. (*Hill, supra*, 13 Cal.4th at p. 847, fn. 9.) Presumably, the past history or pattern of conduct of a defense counsel, judge, law enforcement agent, etc., could similarly be demonstrated by means of unpublished opinions where relevant.

EXTENSION REQUEST ADVISAL

**by Howard C. Cohen,
Staff Attorney**



For a number of years, the various divisions of our appellate district labored under a burden of not being current with their caseload. The presiding justices were fairly liberal in their policies of granting extensions, since a brief filed early could not be processed promptly.

Times have changed. Now all of the divisions are current with their caseloads, and there is less incentive for the court to grant extensions. Counsel should no longer expect the number of extensions routinely permitted in the past. Moreover, the courts will scrutinize the requested reasons with particular care, and the shorter the record or the shorter the sentence, the more stringent the court will be in granting an extension.

Also, counsel should consider requesting extensions of less than 30 days. Depending on the length and complexity of the record and the number of extensions already granted, the courts may be more receptive toward extensions of less than the standard time. Counsel should request only that amount of time reasonably necessary to complete briefing.

VICTIM ANONYMITY
by Howard C. Cohen,
Staff Attorney

The California Style Manual is “the official organ for the styles to be used in the publication of the Official Reports.” (Cal. Style Manual (4th ed. 2000) (“Manual”) p. iv.) Because the Manual is familiar to the court, ADI advises counsel to use it. One provision in the Manual some attorneys overlook concerns preserving the anonymity of various persons involved in litigation.

The Manual, § 5.9, states:

The Supreme Court has issued the following policy statement to all appellate courts: “To prevent the publication of damaging disclosures concerning living victims of sex crimes and minors innocently involved in appellate proceedings it is requested that the names of these persons be omitted from all appellate court opinions whenever their best interests would be served by anonymity. Anonymity, however, is inappropriate for homicide victims, who are to be identified whenever possible.” Thus, a homicide victim’s name is not suppressed even if a sex crime was also committed against that victim.

Individuals entitled to protective non-disclosure are described by first name and last initial, or by referring to them by their status. Do not use middle names or middle initials, street addresses, or full birth dates. The name “anonymous” and other fictitious names should be avoided absent a court order under Penal Code section 293.5 (Jane Doe or John Doe designation).

The Reporter of Decisions has also informed ADI that the policy is not limited to the current crime. If, for example, an appellant has been convicted of stalking an individual whom (s)he sexually molested in a prior crime, the same policy of anonymity should apply.

In briefing, counsel should also guard against inadvertent disclosure. For example, if a child is molested and is referred to as Jane S., anonymity would be undercut if the parents were named as John and Priscilla Smith.

**DO NOT MAIL
“WEAPONS”**
by Howard C. Cohen,
Staff Attorney

Appellate counsel should be careful as to what they send their clients in custody. While briefs and other pleadings mailed to a client may be stapled, they should *not* be fastened by paperclips or bound by velobinding. Unfortunately, paperclips and velobinding may be fashioned into rudimentary weapons. Therefore, Department of Correction personnel will remove such fastenings.

This precaution is necessary for safety and security in the prison system. Using such fasteners, which are destined to be removed, not only risks the introduction of “weaponry” into prisons but also is an unnecessary expense and depletes the confidentiality of mailings to clients. Also, recent changes in AIDOAC policy as to what is considered a reimbursable expense does *not* include velobinding of service copies whether to the client or others.

The message is simple: except for the appellate court original and copies, only use staples.



**Paul E. Bell Inducted Into
The Distinguished
Lawyer Memorial**

On May 26, 2004, our beloved friend and late colleague, Paul E. Bell, was inducted into the San Diego County Bar Association’s Distinguished Lawyer Memorial. The Memorial gives special and permanent recognition to lawyers and judges of the San Diego County Bar who demonstrated superior legal skills and high ethical standards throughout careers of significant length and whose careers demonstrated outstanding dedication to the welfare of the community and the maintenance and support of the major objectives of the San Diego County Bar Foundation, including, but not limited to, improving public awareness of the legal system in San Diego County, the administration of justice, and the delivery of legal services. Distinguished Lawyers are those who demonstrated themselves to be honest, truthful, just, fair, civil, and gently mannered throughout the course of their careers.

The plaque honoring Paul reads:

One of the architects of Appellate Defenders, Inc. (ADI), Paul’s giving of himself earned the respect and admiration of family, friends, colleagues, and the countless individuals whose lives he touched. A graduate of the UCLA School of Law, Paul distinguished himself as Assistant Director of ADI, which oversees appointed counsel in criminal and dependency cases for indigent parties on appeal. The attorney of record on 30 published appellate decisions, he argued nine cases before the California Supreme Court, winning seven of them. He is remembered first as a friend by the many persons who knew him, and he secured their respect through his integrity, knowledge, and commitment to serve the needs ADI’s clients. He enjoyed Scouting, trains, hiking, white water rafting, and country music, and was a devout member of his church. The high esteem in which he was held by his loving family, friends, and other individuals fortunate enough to have known him stands as a testament for others who strive for the best in life, and his memory will live forever in the hearts and minds of those who knew him.

Fourth Appellate District News

Introducing Justice Cynthia Aaron Associate Justice, Division One

While Justice Cynthia Aaron's chambers are furnished with the obligatory California reporters and her credenza overflows with appellate records, when one sits and speaks with her, one's attention is immediately drawn to family photographs of her spouse (attorney Craig Higgs) and son. There is no question that although she has been on the bench since 1994, she is also devoted to her role as spouse and mother.

Born in Minneapolis, she initially attended Brandeis University. However, she found the Brandeis campus less diverse than she would have liked and, finding that many of the foremost professors in her major (psychology) were at Stanford, transferred there to finish her degree. After attaining her degree (with distinction and departmental honors, Phi Beta Kappa, 1979), she took off for a couple of years before following in her attorney father's footsteps and beginning her legal education. She applied to a number of institutions and took the opportunity to attend Harvard, where she worked as a research assistant for Professor Dershowitz and graduated cum laude in 1984.

After law school, she took the opportunity to gain indigent defense experience in San Diego and joined ADI's sibling organization, Federal Defenders, Inc. In 1988, she left Federal Defenders to form the law firm Aaron & Cortez. Later, seeking a change of pace, she applied for an appointment as a federal magistrate judge. Her caseload was approximately 15-20% criminal and 80-85% civil, with an emphasis on early resolution through settlement.

A vacancy on the appellate court was brought to her attention while Governor Davis was seeking seasoned judges. The first federal magistrate judge appointed to the appellate bench (at least in recent memory), Justice Aaron found her responsibilities as a magistrate judge, which entailed much more writing than does the role of superior court judges, valuable in appellate work. Coming from the federal bench, Justice Aaron lent a new diversity to the bench of Division One. Justice Aaron firmly believes in the value of diversity for the appellate bench, not only ethnically and gender-wise, but in expertise (civil and criminal law) and experience (prior judicial service and private practice) as well.

When asked about the value of oral argument, Justice Aaron observed that many briefs are not altogether clear, and oral argument helps clarify the parties' positions in a number of

cases. Even if oral argument does not change the ultimate outcome of a case, it may cause the justices to think in a different direction or from a differing perspective.

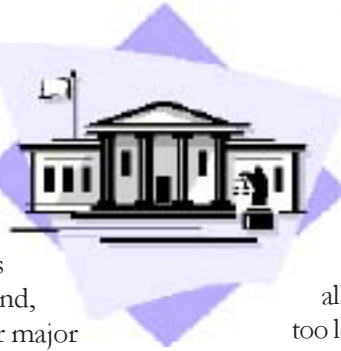
Justice Aaron has virtually no annoyances with her newest position; in fact, she describes her role as one with "no aggravation," a "dream" job. Even the most "boring" case retains her interest because it requires working through the issues to the reach the correct outcome - like "solving a puzzle. It is the process that is challenging and absorbing."

If she has any grievance, she believes – as almost all appellate judges believe – that briefs are "way too long and repetitive." She sometimes is surprised when briefing misses controlling precedent of either the California or United States Supreme Courts. She finds that briefs in the criminal arena (both appellant and respondent) are generally better, most likely because the criminal appellate practitioners are specialized and focused on appeals, whereas many civil practitioners may be trial litigators who only occasionally find themselves in the appellate arena. Her expectations are high. As a federal prosecutor reported: "She does place a premium on professionalism and punctiliousness, and anyone who doesn't respect those parameters can expect to meet with her disapproval."

As she herself has stated:

I'm toughest about [] people being unprepared when they come to court. I feel the lawyers are doing a disservice to their client or constituency if they're not prepared and it appals me. I require myself to be prepared and I always did so I expect [counsel] to be prepared as well.

Justice Aaron is indeed a welcome addition to the Fourth Appellate District.





Introducing Justice Joan Irion, Association Justice, Division One

Although born in Galveston, Texas, Justice Joan Irion's followed her father's assignments as a United States Public Health Service physician from East Coast to West Coast and back, until the family settled in Walnut Creek in the Bay Area upon his retirement. Once situated in California, the future justice resolved not to leave.

She attended UC Davis and, with an accelerated class load, graduated in three years. She then earned a Masters in Public Administration from San Diego State University. Despite her parents' occupations in medicine (her mother had been a nurse until becoming a full time homemaker), Justice Irion was not drawn in that direction. On her father's advice that a legal education offered a variety of potential careers, she returned to UC Davis, King Hall School of Law, where she became managing editor of the law review and received her J.D. in 1979. She became an associate in a San Francisco law firm, and, after practicing with two other firms, moved to Heller, Ehrman, White and McAuliffe as a shareholder.

In 1988, tragedy struck the Irion family when the justice's father was murdered by a disgruntled employee with a medical grievance who had intended to target other plant officials. In Justice Irion's words, "[B]oth families sat through [the trial]. I realized how difficult that kind of situation is, not only for the family of the victim but also for the family of the defendant. That one incident affected so many people."

The effect was far greater than the personal emotions experienced. During the trial she realized the importance of evenhanded justice and "how much impact a single judge, a single trial, has on the community." The trial judge was Douglas E. Swager, now an associate justice with the First Appellate District. Upon her appointment, Justice Irion wrote Justice Swager, "I am a judge today because of you."

Her relocation to San Diego in 1995 was in part the product of Cupid's intervention. While serving on the State Bar's Board of Governors, she met San Diego attorney John Seitman, and they were married in 1992. She became the managing partner of Heller Ehrman's La Jolla office when it opened in 1998. She had a broad-based commercial litigation practice, with an emphasis on litigation of employment, general business and insurance defense matters. Later, her practice expanded to include litigation of cases involving state and local tax issues in the trial and appellate courts throughout California. These cases typically included issues of statutory interpretation,

constitutional due process, equal protection and the commerce clause. Because of the nature of her former law practice, she feels at home in the appellate arena.

Justice Irion was appointed to the superior court in 2001 and to the Court of Appeal in 2003.

When asked what counsel can do to improve their appellate work, Justice Irion said she believes briefs could stand greater clarity. Given the great caseload an appellate justice handles, she advises appellate counsel to remain focused on the crux of the case: What is the linchpin of the appeal? Why, factually and legally, is counsel's position correct? While she and her staff are well acquainted with the case — they read the entire record — she still looks to attorneys to be teachers. She cautions that at oral argument counsel should not assume the court knows the case as well as the attorneys, and counsel should ensure that all relevant facts and law are before the court.

The justice has been very active in legal education, teaching and lecturing at a wide variety of universities, including Stanford Law School, Boalt Hall School of Law, University of San Diego School of Law, Vanderbilt University, Georgetown University, and University of Southern California. Justice Irion is a frequent presenter at educational seminars for the judiciary and members of the legal profession. She has also spoken before numerous civic and professional groups

On a more personal level, Justice Irion has an athletic bent. From age 11 through high school, she was an accomplished synchronized swimmer. When faced with the prospect of turning 40, she and a friend made a bet. The two would run a marathon in Greece; if both finished, each would pay their own way, but if one didn't, that one would pay for both. Justice Irion enjoyed — if running a marathon is enjoyable — a free trip. She also competed in and finished a charity marathon in Hawaii. For recreation and "to leave the world behind," she saddles up her retired barrel-racing horse, Cody, while John rides his mount, Spanky.

Justice Irion brings to our local appellate court a breadth of experience and an open mind. Counsel should look forward to practicing before her.

ADI'S TECHNOLOGY CORNER



Blawging Your Way To a Better Practice

by **Amanda Benedict,**
Staff Attorney

Do you blawg? If you don't, you should. Blawgs (also known as legal blogs) are a time-efficient way to stay on top of cutting legal issues and debates directly affecting our practice of law. Blawgs have even been recently cited in opinions and briefs.

What Is A Blawg?

1. It's a Law Related Web site.
That's the basis of a blawg — a law related Web site. What sets it apart from the majority of sites is the fresh content, chosen and published regularly by a trusted online source. A reliable blawg is like having a friend or colleague you can always check when you need an answer about some particular topic. Only blawgs generally offer much more detailed information, links to further information, and they are available round the clock. You can't call your trusted colleague at 2 a.m., but you can check your favorite blawg.

Most blawgs look like a "log" or "journal" with new entries placed at the top and a set of links along the side pointing to similar sites or blawgs. However, some blawgs look and function like a highly sophisticated Web site.

2. It Has A Real-Person Feel
A blawg tends to be closely identified with the person who creates it. Readers get an honest feel for the person behind the blawg and form a stronger bond with the blawg publisher than with a firm that publishes a Web site or a law professor writing for a law review article.

What Are The Benefits of Blawging?

One of the biggest benefits I derive from visiting blawgs such as CriminalAppeal is the way it keeps me informed as a lawyer. If you are not blawging, this is probably not obvious, but visiting blawgs is more effective at keeping me up to speed on developments touching appellate practice than the combination of newsletters, newspapers, and magazines that cross my desk. In fact, the quality of many blawgs is so high, reading blawgs can actually replace the need to browse various news and legal sites because good blawgs have links to articles of interest.

Also, the information on a blawg has already been filtered by people you trust to recognize what you would probably find important if you read it firsthand.

Here is a summary of the benefits of Blawging:

- An inexpensive knowledge management tool
- A way of keeping current on issues
- Free and plentiful legal research and expertise
- Tool for improving writing and analytical skills
- An antidote to the isolation of solo and small firm practice

Now that you are inspired to start blawging, where do you look? There are between 400-500 law-related blawgs on the Internet. I have found a handful of blawgs that offer quality information and content useful to my appellate practice.

Criminal Appeal <<http://www.crimblawg.com/>>

This blawg has become my "homepage" for daily reading. The blawg is the creation of Jonathon Soglin, an appellate attorney in San Francisco. Jonathan provides excellent summaries of recent rulings relevant to our practice. Each entry provides links to the opinion, the court docket, and to any other relevant information needed for further research. He also offers a list of other reputable blawgs and Web sites. A key feature of Jonathon's blawg is the fact that all of the entries are indexed by subject matter. A single click on "burglary" in his "Categories" column will direct you to all of the recent case summaries and/or commentaries on relating to that offense. This is a great issue spotting tool!

Bag and Baggage <<http://bgbg.blawgsport.com>>

This is perhaps one of the most well known and creative blawgs. Also written by a California appellate attorney, the site is the brain-child of Denise Howell. She is an appellate and intellectual property lawyer with the firm Reed Smith. She is frequently quoted in the media for her Blawging and her knowledge. She majored in English and studied computers and technological issues while earning her law degree from Boalt Hall in Berkeley (J.D. 1990). Her blawg combines legal commentary along with touches of light-hearted quips about general interest topics such as the best online source for chocolate. Interesting and entertaining.

How Appealing <<http://www.appellateblawg.com>>

Touted as the Web's first blawg devote to appellate practice and authored by Howard J. Bashman, an appellate lawyer in Fort Washington, Pennsylvania, this site has more than 10,000 visits a day. Bashman's blawg has even been cited in a recent Ninth Circuit opinion. This blawg provides an excellent

round-up of legal news and analysis, including discussions of cases, conferences, and blawging developments. If you are looking for a listing of legal blawgs, Howard provides a great list.

A Criminal Waste of Space

<<http://www.acriminalwasteofspace.net>>

Even our Fourth Appellate District justices are getting into the act. Associate Justice William W. Bedsworth of Division Three offers his own blawg. Hosted by the Williams Law Firm in Newport, Justice Bedsworth offers informative and comedic postings. Justice Bedsworth reportedly maintains the blawg as an outlet and a “safety valve.” Reader’s of Bedsworth’s blawg can even learn how to purchase his new book, “A Criminal Waste of Time.”

Other Blawgs Worth A Visit:

- CrimLaw <<http://www.criminlaw.blawgspace.com>>
- The Curmudgeonly Clerk <<http://www.curmudgeonlyclerk.com/weblawg>>
The unsolicited caveats, commentaries, and criticism of a Federal law clerk.
- FourthAmendment <<http://www.fourthamendmentlaw.com>>
- Public Defender Dude <<http://www.publicdefenderdude.blawgspace.com>>
- Supreme Court Blog <<http://scotus.blogspot.com/>>



RONALD REAGAN ***1911-2004***



Upon the passing of the former President and Governor of California, we remember a little-known act of his more than 30 years ago that had profound implications for all of us in appellate indigent defense.

In 1972, having previously vetoed the creation of a State Public Defender on the ground it would create another state bureaucracy, then-Governor Reagan signed legislation funding Appellate Defenders, Inc., as a pilot project. The original ADI was organized around a small centralized staff and a supervised panel – a system similar in concept to the current one. Because it was administered by a corporation and made extensive use of attorneys in private practice, the pilot project avoided the opprobrium of “state agency”: it was fully and genuinely “private enterprise.”

In 1983 ADI was again a pilot project – this time for the current system. By the end of the 1980’s all of the projects were in place. And the rest is history, as they say. But there wouldn’t likely be such “history” if it had not been for Ronald Reagan!