

SEPTEMBER 2014 – ADI NEWS ALERT

BY

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CONTENTS

This alert¹ covers:

- ADI panel portal will open October 1 for submission of claims. As of that date, electronic claims *must* be submitted in this manner, rather than through eClaims. Paper claims will be accepted through October 10. You may *register* for the portal now.
- *Sade C.* filings in Fourth District: (1) They may now be e-filed in Divisions One and Three. (2) All three divisions will accept them in letter form, which attorneys are expected to use. But the letter must have the contents prescribed by *Phoenix H.*
- Division Three splits on listing unbriefed (“*Anders*”) issues in *Wende* and *Sade C.* briefs — ADI continues to encourage inclusion of such issues.
- Division One encourages minor’s trial counsel to appear at oral argument and provide updated information about the child client. Counsel for other parties may take protective steps against prejudicial information introduced in this way.

PANEL PORTAL WILL OPEN FOR ADI CLAIMS ON OCTOBER 1 — No eClaims after that. Paper claims will be accepted through October 10

As we advised counsel in our [July 25 news alert](#),² ADI claims will soon have to be submitted online through our [panel portal](#).³ Starting Wednesday, October 1, we will no longer accept claims submitted through the old eClaims system, and electronic claims will be accepted only through the portal.⁴ Paper claims will be accepted through October 10.

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

²http://www.adi-sandiego.com/pdf_forms/July_2014_news_alert.pdf

³<https://cms.airsis.com/>

⁴eClaims submitted before October 1 will of course be processed.

Meanwhile, counsel may **REGISTER NOW**, so that they will be ready to go:

Registration Directions

- Go to the panel portal at <https://cms.airsis.com/>
- Click **Log On** in the upper right corner
- In the two sentences near the top, click [Register](#) if you don't have an account.
- Fill in the requested information.
 - Your user name may be of any length; it will be used for future log-ons.
 - Your password must be at least six characters. *Mixed numbers and letters are recommended.*
(ADI will not know it. If you forget it, you may contact ADI to reset it.)
- Be sure to check the box at the bottom if you would like emails from ADI notifying you when a claim is sent to the Judicial Council staff (AOC).
- Click **Register** at the bottom of the page to submit your registration. ADI will review it to ensure eligibility and send you notification when it is approved.

Help and reassurance

The new system underwent extensive tests with the AOC.⁵ It meets all standards of security and compatibility with the AOC's program.

The claims submission process has been structured to emulate eClaims, and so the transition should be easy for eClaim users. Realizing that some attorneys who use paper claims may see themselves as a bit technologically challenged, we are giving them a little more time – through October 10. We suggest paper-claim users start submitting claims electronically immediately after October 1; if they find themselves struggling, they can file a paper claim while they master the system.

⁵Technically, the Administrative Office of the Courts is now called Judicial Council staff or Appellate Court Services (ACS). We are as bemused as you and will use "AOC" for a while as we all get used to the new nomenclature.

Staff attorney Lynelle Hee has prepared step-by-step instructions for submitting claims through the portal. We will send them out before October 1.

Laura Furness, Linda Fabian, Patsy Ihara, and Leslie Rose⁶ will also be available for individualized technical assistance. We ask that you please consult the written instructions before calling and that you not contact claims processors with your questions.

SADE C. FILINGS — (1) May be e-filed in Divisions One and Three and (2) Should be in letter form in all divisions, but letter must have the same substantive contents as a brief

E-filing: Effective September 2, Divisions One and Three, Fourth District, began accepting a *Sade C.* letter brief electronically. E-filing procedures are described on the [court website](#)⁷ and on [ADI's website](#).⁸ Among other things, that means no paper copies need be sent to the court. Service copies must be provided in the usual way.

Letter form: Also effective September 2, all three divisions began accepting a *Sade C.* brief in letter form. Because a letter format is less expensive than a formal brief, ADI's policy is that counsel should use it unless case-specific reasons for a brief are approved.

Although presumably formal tables of contents and authorities are not required, the substantive contents of a *Sade C.* brief must be in the letter brief, because they were prescribed by the Supreme Court in *In re Phoenix H.* (2009) 47 Cal.4th 835, 843. ADI described these contents in an [April 19, 2011, memo](#).⁹ These include: ADI preapproval; the words "SADE C." prominently on first page; statement of case and facts; unbriefed issues described neutrally; request for discretionary review of record by court, opportunity for pro per brief and for briefing by counsel if arguable issue is found; declaration of counsel; proof of service.

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⁷<http://www.courts.ca.gov/4dca.htm>. See also <http://www.courts.ca.gov/9408.htm> and <http://www.courts.ca.gov/4dca-efile.htm>.

⁸http://www.adi-sandiego.com/practice/eservice_court.asp

⁹http://www.adi-sandiego.com/news_alerts/pdfs/2011/PROCEDURES-IN-CASES-WITH-NO-ARGUABLE-ISSUES-rev-4-11.pdf

On our [dependency forms and samples web page](#),¹⁰ we are revising the sample *Sade C.* brief by converting it into letter format, because that is what ADI and the court expect. We are also modifying some language to reflect the debate that recently emerged within Division Three on including unbriefed (“*Anders*”) issues in no-merit briefs. (Next topic.)

DIVISION THREE SPLITS ON *ANDERS* ISSUES IN *WENDE* BRIEFS — ADI continues to encourage inclusion of unbriefed issues

The debates on no-merit cases never seem to go away.¹¹ Decades after *Anders* and *Wende* and 14 years after *Smith v. Robbins*,¹² Division Three has publicly split on whether attorneys should include issues considered but not raised in no-merit submissions. On July 29 *People v. Hernandez* (2014) 228 Cal.App.4th 539 declared:

While appellant counsel’s opening brief states he could not find any arguable issues to raise, he does suggest some issues for us to consider in conducting our independent review of the record. We decline to do so and publish this opinion to reaffirm the decision of another panel in our district which, over 30 years ago, rejected *Anders/Wende* briefs presenting “‘arguable-but-unmeritorious’ issue[s].” (*People v. Johnson* (1981) 123 Cal.App.3d 106.)

On August 27, after receiving ADI’s request for modification of the opinion or withdrawal of publication,¹³ the court granted rehearing. But it refiled basically the same opinion, modified in minor, non-substantive ways, on September 4.¹⁴

¹⁰http://www.adi-sandiego.com/delinq_depend/dependency/forms_samples.asp

¹¹No-issue cases have been addressed with some frequency by both the United States Supreme Court and California Supreme Court. See partial lists in § 4.73 of the [ADI Manual](#).

¹²*Anders v. California* (1967) 386 U.S. 738; *People v. Wende* (1979) 25 Cal.3d 436; see also *Smith v. Robbins* (2000) 528 U.S. 259.

¹³ADI’s amicus curiae memo is included with this alert. We urge counsel to look at it for perspective into the history and policy concerns behind the decades-long debate.

¹⁴<http://www.courts.ca.gov/opinions/documents/G049024M.PDF>

On the same day that the *Hernandez* panel granted rehearing, another panel of Division Three filed *People v. Kent* (2014) ___ Cal.App.4th ___ [2014 WL 4229955],¹⁵ disagreeing with *Hernandez*:

In our view, the “arguable-but-unmeritorious” label does not reflect the value of these briefs in resolving *Wende* appeals while safeguarding the right to counsel for indigent criminal defendants. While an appellate court need not delve into or even pass on the merits of issues noted in a *Wende* brief, presenting those issues can ensure counsel does not discharge his or her duty in a merely summary fashion, and guides the court to pertinent legal issues and principles, thereby aiding the court in its *Wende* review. We therefore encourage counsel to continue to submit such briefs.

(Slip opn., p. 3.)

The *Hernandez-Kent* debate is highly fluid. Neither case is even at the petition for review or depublication stage. We are aware of two very recent unpublished cases in the First District going opposite ways. From our knowledge of practices around the state, it appears that courts and projects vary in their preferences. Counsel should consult the district project about the applicable court’s policies.

Obviously, counsel cannot know who will be on the panel at the time of filing a *Wende* or *Sade C.* brief in any of the Fourth District divisions. There should be no serious consequences for the client or the attorney from making a good-faith choice either way, and so ADI reiterates its long-standing advice:

A question of some disagreement is whether a *Wende* brief should describe the issues counsel considered. In *Smith v. Robbins* (2000) 528 U.S. 259, the United States Supreme Court held listing possible issues is not invariably required, if other safeguards are in place.

ADI for the most part encourages listing of issues. It is a way of stimulating and organizing counsel’s thoughts, suggesting issues to the Court of Appeal it might not otherwise consider, and demonstrating counsel's efforts to both the court and the client.

Such a listing, however, must be done properly. Counsel must not argue the merit or lack of merit of any issue listed, but must neutrally describe the issues considered and any relevant authority, without urging any conclusions. (If the

¹⁵<http://www.courts.ca.gov/opinions/documents/G049669.PDF>

brief urges relief because of the issue, it is contradicting the characterization of the case as a no-merit one. If it affirmatively argues the issue should be rejected, counsel is impermissibly arguing against the client.)

(ADI Manual, § 4.79.) This position is a recommendation, not a requirement. (But see the “Special Note on Non-Criminal Cases” below.) If counsel has a well-considered reason for not listing issues in a given case, he or she should explain that to the assigned staff attorney. ADI still must know the issues and the reasons for rejecting them in order to approve the no-merit brief.

Special Note on Non-Criminal Cases

Because the court normally will not review the record in a non-criminal case, the arguments for listing issues become urgent and imperative. If counsel does not list issues, the court will probably just dismiss the appeal upon receiving the brief or letter brief.¹⁶ That serves the client very little, if at all. At least the *Anders* issues may suggest a reason for the court to take a closer look at the case. ADI expects counsel to include unbriefed issues in these cases unless substantial reasons (such as adverse consequences) appear.

The [sample *Wende* brief](#)¹⁷ and, as noted above, the sample *Sade C.* brief on the ADI website have been modified to take account of the concerns behind the *Hernandez-Kent* debate.

¹⁶In a conservatorship case, the court must give the client a chance to file a pro per brief. (*In re Ben C.* (2007) 40 Cal.4th 529, 544; cf. *In re Phoenix H.* (2009) 47 Cal.4th 835.) Needless to say, the frequency of briefs from such clients – persons found “gravely disabled” – is extremely low.

¹⁷http://www.adi-sandiego.com/practice/forms_samples.asp

DIVISION ONE INVITES AND ENCOURAGES MINOR'S TRIAL COUNSEL TO ATTEND ORAL ARGUMENT — Parent's counsel may take protective steps if prejudicial information is elicited

At a recent educational program in the San Diego juvenile court, Presiding Justice McConnell encouraged minor's counsel to attend oral argument on their cases. They will be seated at counsel table and may be asked for a status update on the child client. This invitation reflects the court's long-standing concern to ensure appeals will aid, not hurt, the child.

Non-record information clearly may pose hazards to counsel for other parties, such as parents. (This has been a concern for a long time, because of the court's former practice of appointing minor's counsel in every case.) But many attorneys understandably feel uncomfortable objecting to questions asked by the very court about to decide their case.

We suggest counsel may respond to the situation by acknowledging the court's legitimate concern for the child but respectfully reminding it of the limitations on such evidence imposed by *In re Zeth S.* (2003) 31 Cal.4th 396. Another safeguard – especially if counsel believes there may be grounds to contest the information offered by minor's counsel – is to request that minor's counsel follow the procedures for introducing new evidence on appeal. (Rule 8.252(c); Code Civ. Proc, § 909.)