Appellate Defenders Issues

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Notes From The Director

NOTES FROM THE DIRECTOR

by Elaine Alexander

The last few months have been busy and productive, and so I have a number of topics to cover in this issue. First the news items and alerts:

Claims

As always, the end of the fiscal year on June 30 is a critical time for compensation claims, since any claim approved by the AOC after that date must be paid from the next fiscal year's state budget. If the state budget is enacted in a timely manner, that is not a major problem, but if it gets delayed, so will claims. The energy crisis and its effect on the economy and in turn on the budget are all wild cards right now. To play it safe, get us your claim immediately.

Lead Time on Draft Briefs

Attorneys assigned to an assisted case should take to heart our policy that draft briefs should be submitted at least two weeks before their due dates. Staff attorneys have many projects labeled high-priority (not the least of which is compensation claims), and getting a draft brief with a drop-everything deadline can impose hardships not only on the staff attorney, but also on other panel attorneys and clients who are waiting for the staff attorney's action on matters involving them. Perhaps most critically, the time pressure may adversely affect the quality of the work, both because the staff attorney is rushed and because the panel attorney has little time thoughtfully to incorporate suggestions.

Dependency Training

As part of the statewide effort to provide intensive training to attorneys handling juvenile dependency appeals, this year the Judicial Council will sponsor three dependency programs organized by the appellate projects and the Administrative Office of the Courts. In June, the three Northern California projects (FDAP, CCAP, and SDAP) will present one in San Francisco, and CAP/LA will offer one in Los Angeles. ADI will offer its program in San Diego on October 3, 4, and 5. Each will be a three-day program. The curriculum and targeted audience for each day will vary to some extent among the programs; the presenting projects should be contacted for details. For ADI's program, the first day will target selected attorneys relatively inexperienced in these cases, and the next two days will be for all of our dependency panel attorneys.

Contents

DNA Testing and Innocence Investigations

As we are advising you elsewhere in this newsletter, Penal Code section 1405 now provides a procedure by which inmates may request DNA testing as a way of challenging identity findings at their previous trials. Appellate counsel should be aware of these provisions and may be able to guide trial attorneys or clients in filing a section 1405 motion. Attorneys also should be aware that DNA testing can pose some risks for clients; it is important they assess these risks in providing guidance.

Counsel may on occasion find it appropriate to refer clients to university-based innocence projects or other resources for investigating and handling factual-innocence claims. State funding may become available for this work in the next few months.

Please contact ADI if you face any of these situations.

Paul Bell Memorial Award

I am personally delighted to announce that Handy Horiye is this year's recipient of the award honoring ADI's beloved former assistant director, Paul Bell, who died in 1997 after 24 years at ADI. Handy recently retired from the panel, after about 23 years serving the appellate indigent system. He was from the very beginning an unquestioned superstar, who not only handled twice as many cases as the nearest competitor but consistently filed briefs of model quality – thorough but concise, clear, creative, vigorous, persuasive, invariably professional – and achieved enviable results. An attorney of great integrity and credibility, Handy had the unquestioning trust of the courts, clients, and his colleagues.

The many of us who know Handy have always held him in awe and have never been able to solve the simple question, "How can he do so much so well?" We'll never really know, because Handy is a self-effacing, humble person who can never be induced to talk about himself; to him, doing work at its highest level and having the chance to be of service are *the* goal and *the* reward. We do know this: we'll miss having Handy Horiye in our ranks, and we honor our profession and the memory of Paul Bell by honoring him.

Vigorous Advocacy for Each Client on Appeal: An Essential – Not Just a Nice Touch

In the last issue I talked about petitions for rehearing – when to file them and how (or how not) to do them. Staff attorneys have urged me also to address the topics of reply briefs, oral arguments, and petitions for review, with the same questions in mind. I'll discuss these topics in successive issues of the newsletter. I cannot agree more that at the very heart of our job is awareness of the tools at our disposal and the ways they should be used.

Before going on to the more specific (in later newsletters), however, I think we should confront an underlying concern: the perception that a few attorneys seem to view their responsibilities as rather de minimis – not much more than reading the record and filing a formulaic opening brief. For these few, factual analyses and arguments are often offered in a mechanical tone that fails to carry any sense of conviction. Some regularly do not provide follow-up on their cases, such as filing a reply brief, orally arguing, or petitioning for rehearing or review, where appropriate for their cases. (This happens most often in independent cases; in assisted cases, the staff attorney by definition should have much more influence over filings.) This approach to representation also appears to generate client dissatisfaction more often than average.

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

they have had their day in court, defended by an able, vigorous advocate with their interests at heart.

Advocacy also means crafting arguments with the goal of persuasion, not just filing, in mind. The writing needs to carry a sense of assurance and commitment: if you don't sound in the least persuaded yourself, how can you persuade a skeptical court? That decidedly does not mean loss of objectivity. As attorneys we need adequate detachment in order to generate credibility for the client's position, make wise judgments, and work skillfully within the system, using legal language and analysis effectively to get our audience, the court (a group of experienced professionals themselves), to follow our lead. Persuasiveness does mean: you care about your client and your client's case; you communicate that caring to the court; you consciously make an effort to get the court to care, too. Keep in mind the image of an assembly-line decisional process for "routine" cases at our overworked courts, and make it a goal to get everyone to agree *this* case really deserves special attention.

Advocacy also means crafting arguments with the goal of persuasion, not just filing, in mind.

And, apropos to the concerns that triggered this reminder, vigorous advocacy means employing all procedural tools such as reply briefs, oral arguments, and petitions that may reasonably further a given client's interests. We recognize, of course, that it is not *invariably* required or appropriate to do some or all of these things. The appellant's opening and respondent's briefs may have so completely covered the issues that no reply is possible or necessary. (I can say that in over 30 years of practice, however, I have only very rarely seen that situation.) The issues may be sufficiently well briefed and sufficiently straightforward that oral argument would not serve a useful purpose in developing the court's understanding of the case. A petition for rehearing is usually not called for if the opinion of the Court of Appeal is accurate and responsive to the briefing. A petition for review is probably not warranted if the issues are of little statewide importance and federalization is not plausibly contemplated. On any given case, therefore, the lack of certain kinds of follow-up may represent a completely defensible judgment about the needs of the case.

What concerns us, however, is when we see attorneys whose pattern of filing consistently shows much less follow-up than the average for attorneys handling the same types of cases. Since most attorneys getting independent cases have received sufficiently large number of cases from us to generate statistically significant filing profiles, it is virtually impossible under the law of averages to attribute the lack of follow-up to case-specific factors. Follow-up and other indicia of true advocacy are taken into account in evaluating attorneys' performance and panel status. We have information on every filing by every attorney in every case, and we are examining follow-up profiles in situations where staff attorneys have detected a possible problem.

While we have no interest whatever in spurring unnecessary filings or other actions, we have every interest in ensuring each attorney is fulfilling our expectations for vigorous advocacy. The clients, the legal system, and ultimately the attorneys themselves all have such an interest as well.

Disagreements with Staff Attorneys About Legal Judgments

It is a fact of life that reasonable persons disagree on occasion, and it is also inevitable that every reasonable person will make mistakes on occasion. From time to time, therefore, we see substantial, apparently intractable differences in judgment between an appointed attorney and the assigned staff attorney. This most often happens in the context of selecting issues for the AOB, but it can occur at virtually any stage of the case.

The overall guiding principles in such a situation are: (1) The staff attorney has considerable training and experience in evaluating legal issues and has had many chances firsthand to observe what works and what doesn't. The staff attorney's opinion should always be weighed carefully and as a general rule should be followed

unless your own professional judgment counsels you that such a course would not reasonably benefit the client. (2) You as the appointed attorney are counsel of record and must make the final call. Responsibility for arriving at the right judgment rests solely on you, and it is no defense that another attorney (even a project staff attorney) told you what to do.

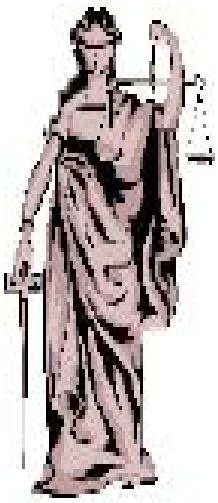
What are some constructive ways of handling honest professional differences of opinion? First, try hard to reach consensus. Offer to spell out the differences in writing, or ask the staff attorney to assist you in understanding the problem by doing so. Often the discipline of putting the other's perspective in the strongest light possible – stating their position so well they wish they'd said it like that – helps to break down the misunderstandings and mental roadblocks that generated the problem in the first place.

Second, if you both agree the differences are irreconcilable, ask the staff attorney to get a second opinion from another staff attorney. I have advised our staff attorneys they themselves should offer to get such an opinion and should be receptive if the panel attorney requests it.

Third, if you sense that a personality conflict or staff attorney intransigence is interfering with resolution of the problem, or you need further assistance in making a decision, ask our panel liaison (staff attorney Cynthia Sorman) or me for guidance.

Finally, once you have arrived at a firm decision about what is reasonably in the client's best interests, act on it. If your decision is against what the staff attorney advised, explain in writing to the extent the differences have not already been spelled out.

Please understand that no procedures are entirely bulletproof. We have professional obligations as appointed counsel administrators that cannot be avoided. We must evaluate the performance of every attorney in our system. In rare instances we must take corrective action following a decision, especially if we judge it so potentially detrimental to the client as to threaten ineffective assistance of counsel. We also have an obligation not to recommend payment for services that are indisputably unreasonable. But if you have followed the procedures laid out here, the situations in which unfavorable consequences follow differences with the staff attorney will be exceedingly rare; indeed, the vast majority of panel attorneys will *never* encounter them.



HELPING APPELLANT IN THE DNA ARENA

by Anna M. Jauregui

As many of you already are aware, last year Penal Code section 1405, also known as the Burton Law, was enacted which permits convicted felons to file a motion for DNA testing. Prior to enactment of this law, a defendant's procedural recourse was to file a motion for a new trial or a writ on the grounds of newly discovered evidence. Under the new law, what can appellate practitioners do to help the client should there be an issue of identity and (1) there was no DNA testing or (2) there was DNA testing but there is doubt as to the accuracy or reliability of the testing, or there are better DNA testing methods now available?

The new law requires the establishment of the following three factors: (1) identity was, or should have been, a significant issue; (2) the DNA testing would create a reasonable probability that the verdict would be more favorable if the results of DNA testing had been available at the time of conviction; and (3) reasonable attempts are made to identify the evidence that should be tested and the specific type of DNA testing sought. (Pen. Code, § 1405, subd. (a)(1)(A)-(C).)

The court has discretion to order a hearing and must grant the motion if certain factors, in addition to the above, have been established, such as, the evidence is available and testable; the integrity of the chain of custody has been maintained; the evidence is material to identity; the evidence was not previously tested or, if it had been, the new testing would provide results that are reasonably more discriminating and probative of identity or have a reasonable probability of contradicting prior test results; the testing method is generally accepted within the relevant scientific community; and the motion is not made solely for delay. (Pen. Code, § 1405, subd. (b) and subd. (d)(1)-(5), (6)(A)-(B), (7) and (8).)

During review of the record on appeal, the particular circumstances of the case may warrant the appellate practitioner's consideration in helping the client in pursuing this procedure. It is not expected that the practitioner undertake the preparation of the motion and the handling of the matter at the trial court level. It is better suited for trial practitioners who have the resources for gathering all the evidence necessary to meet the burden of proof. Fortunately, the statute expressly provides for appointment of counsel if the client is indigent. (Pen. Code, § 1405, subd. (c).) In most cases, the client has been represented by the public defender.

Appellate counsel can initiate the matter by alerting trial counsel of the potential issue and by providing documents from the record on appeal that are relevant and useful for the motion. Corresponding to the required statutory showings and findings, the following is suggested:

(1) Identity: Review of the record will reveal whether identity was an issue, whether that issue was significant and, if it was not an issue, whether it should have been a significant issue. If so, copy and send to trial counsel the pages from the transcript that establish this, such as witness testimony on the issue and closing arguments.

(2) Reasonable probability of a more favorable verdict: There is no case authority which explains the meaning of the phrase "reasonable probability that the . . . verdict . . . would be more favorable if the results of DNA testing had been available at the time of conviction." This would obviously be based on a case-by-case evaluation. Prejudice could be measured by comparing the strength of the prosecution's case with the strength of the defense. The record may show the defense is strong while the prosecution's evidence is weak or moderate. The weaker the prosecution evidence, the greater is the probability of a more favorable result.

Those portions of the transcripts that are relevant to the prejudice showing should be provided to trial counsel.

In a recent magazine article discussing the new DNA law and the first defendant on death row to get a chance potentially to prove his innocence under that law, there is mention that the prosecution initially objected to the DNA testing request by convicted murderer, Kevin Cooper, because there was no "reasonable probability of exoneration." (Reza, *In the DNA* (April 2001) California Lawyer 16.) In that case, Cooper was successfully linked to a 1983 multiple-murder case with evidence that he was an escapee from a nearby prison and he had taken refuge in a house that was near the victims' home, and of sole patterns of shoes issued to prisoners, prison-issued tobacco, a bloodstained button identical to buttons used on inmate jackets, telephone records, and hair samples that appeared to match Cooper. (*People v. Cooper* (1991) 53 Cal.3d 771, 795-800.) A drop of blood found at the crime scene was tested and showed type B blood, while Cooper's blood was a rare type RB, and a blood serum protein which was consistent with Cooper's blood. (*Id.* at pp. 798-799.) The California Supreme Court reviewed the case and held that the evidence of guilt was overwhelming. (*Id.* at p. 836.) During the recent DNA litigation in the *Cooper* case, the prosecution eventually agreed to work out an agreement for limited testing, apparently "'not because there's any doubt about Cooper's guilt' . . . 'but to shorten the judicial process and hasten his execution.'" (Reza, *supra.*) The above illustrates that short of negotiating some type of settlement on the DNA testing motion, the prejudice component can likely be the primary issue in dispute during post-conviction DNA litigation, particularly if a reviewing court has previously found the evidence overwhelming.

(3) Evidence to be tested and DNA testing sought: Evidence that was previously tested and admitted into evidence at trial can be retested under better, newer DNA testing methods. On the type of methods available, trial counsel would be a useful resource and would, in all practicality, be the one to determine this. The record may also reveal that there was other physical evidence available, which was not tested. This can include hair found in a beanie worn by the suspect; other bodily cells obtained from clothes worn by the suspect; saliva on a letter that was sealed by the suspect or on a drinking glass that was used by the suspect. Copies of the transcript pages that have this information should be sent to trial counsel.

In evaluating whether to pursue the new DNA procedure, always consider the possibility of any risks to the client

If the DNA motion is denied, review is only permitted by petition for writ of mandate or prohibition. The petition must be filed within 20 days after the denial. (Pen. Code, § 1405, subd. (h).)

In evaluating whether to pursue the new DNA procedure, always consider the possibility of any risks to the client. For example, the client will be required to have his DNA tested to compare with the identified physical evidence that is tested. (See Pen. Code, § 1405, subd. (j).) Will this help the prosecution connect the client to other crimes? Currently, Penal Code section 296 mandates DNA testing for inmates convicted of sex offenses and violent felonies. (See *People v. Brewer* (2001) 87 Cal.App.4th 1298 [discusses overview of the DNA Act and prerequisites to application of the Act].) This, therefore, may not be a realistic risk, depending on the crime of conviction. Penal Code section 1405, subdivision (j), also states that DNA information taken from the defendant "is exempt from any law requiring disclosure of information to the public." (See also Pen. Code, § 299.5 [exemption from disclosure] and § 299 [expungement of information based on reversal, dismissal or acquittal].)

In sum, keep a watchful eye out for possible DNA issues as the record is reviewed and contact our office, specifically, staff attorney Anna M. Jauregui, if you have any questions on the procedure.

In The News

ADI APPELLATE TRAINING COLLEGE: OUR CONTINUING BROWN BAG LUNCH SERIES

In the previous edition of *Appellate Defenders Issues*, Appellate Defenders, Inc., announced the begining of a series of monthly 1 1/2 half hour brown-bag lunches based on the lectures and materials utilized at the Appellate Training College held last spring in San Francisco. The monthly seminars have been a great success and attending attorneys have enjoyed the free MCLE credit. A seminar is offered on the Tuesday of each month at noon in the Paul E. Bell Law Library at Appellate Defenders, Inc. Upcoming seminar date confirmations will be posted on the ADI Web site and sent via e-mail to panel attorneys with registered e-mail accounts. Please call Patrick DuNah at (619) 696-0284 x 31 or Joyce Meisner at (619) 696-0284 x 61 if you have any questions.

In addition to general MCLE credits, the first four lectures previously given have been approved for Appellate Specialization. ADI has applied to become an approved provider; such that all training courses provided by ADI will be approved for Appellate Specialization. ADI anticipates approval by July 2001.

UPCOMING LECTURE TOPICS

June 12, 2001: *Jury instructions*: Howard Cohen/Diane Nichols: Discussion of elements of offense, LIO's, cautionary instructions, allocation of burden of proof; responses to jury questions; sua sponte and requested instructions.

July 10, 2001: *Issues in jury selection and misconduct*: Patrick DuNah/Leslie Rose

August 14, 2001: *Statements of appealability, case, and facts*: Anna Jauregui

September 11, 2001: *Writing an effective argument*: Ronda Norris/Cindi Mishkin: Framing of headings and issues, elements and organization of argument, order of presentation, use of authority, persuasiveness and clarity of writing.

October 9, 2001: *Review of respondent's briefs, reply briefs*: Neil Auwater

November 13, 2001: *Oral argument*: Cynthia Sorman

December 11, 2001: *Petitions for rehearing and review, certiorari*: Joyce Meisner

January 2002: *Writs*: Preparation of petitions for writ of habeas corpus, coram nobis/vobis, mandate, etc.; and raising ineffective assistance of counsel issues: Carmela Simoncini

February 2002: *Project/Panel Relations*: Elaine Alexander

ADI'S NEW SOCIAL CORNER

In the spirit of fostering new and enhancing current relationships and friendships with our panel attorneys, attorneys from other appellate projects, the defense bar, the judiciary and all other attorneys who would like to get to know us better, ADI will be hosting several social functions. Our calendar of anticipated events for 2001 is as follows:

End of Summer or Beginning of Fall:
ADI's Open House

Fall or Early Winter:
Holiday Lunch or Happy Hour at a local restaurant

2002 spring and summer
Events to be announced.

As soon as we confirm dates, we will post them on our Web site and include them in future newsletters. Invitations will be sent for the open house. RSVPs will be required for all events as space will be limited. Any questions, contact staff attorney Anna M. Jauregui.

A QUICK GUIDE TO STRUCTURING A LOGICAL ARGUMENT IN A DEPENDENCY CASE

by Carmela Simoncini and Cheryl Geyerman

If you build it, they will come. This little saying can be applied to structuring your brief. If you have a framework, the argument will fall into place. While nothing is completely foolproof, this structure will come very close to ensuring you haven't missed important facets of your argument.

1. State The Legal Error

The first step in this framework is to state the legal error. Your caption must state the legal error, why it was error, and include some significant facts supporting your claim For example:

> "The court erred in denying a hearing on the 388 petition because the mother had made a prima facie showing her circumstances had changed and that it would be in the best interests of her child to modify the order."

2. State The Thesis

The second step is to set up a thesis paragraph that asserts what happened at trial. State the findings of the trial court and any pertinent information. An example of a thesis would be:

> "While it commended mother for her progress, and found that she had proven a sufficient change of circumstances, the trial court found that the best interests of the child would not be served by holding a hearing. Specifically, the court noted the child was bonded to the foster mother, who he called "mommy," and the child did not appear to miss his mother."

If an objection was necessary to preserve the issue, note the objection of the counsel. This paragraph should end with a transition referring to the general rule.

> "As a general rule, to prevail on a request to modify an order under section 388, the parent must prove that circumstances had changed or there is new evidence, and that the best interests of the child would be served, if the prior order terminating services were modified to order additional services to the mother."

3. State The General Rule

The third step is to state the general rule pertaining to the error. Give the statute or doctrine which was referred to above as governing the discussion: "Section 388 provides . . ." The code can be summarized in the body of the brief and set out in full in a footnote. List any elements, burden of proof, and/or standard of review.

4. Define The Elements

The fourth step is to define the elements necessary to prove the case and note the specific rules that support your assertion:

> "Applying the principles of In re Hashem H. which requires a prima facie showing of changed circumstances to trigger a hearing . . . ."

Then apply the facts of your case and analyze the facts and the law. Discuss how the case law supports the facts in your case, or how the case law is distinguished from the facts of your case: "This case is not like . . . ."

5. Acknowledge Contrary Authority & Facts

Next, counsel should acknowledge contrary authority, negative facts, and anticipate the opposing party's position. Distinguish any contrary authority, mitigate negative facts, and otherwise negate the opposing position.

6. Conclusion

Finally, state your conclusion. A mere assertion that the foregoing arguments compel reversal is not as effective as restating the thesis of the argument and briefly recapping

how the thesis was proven. Remember the PRAYER, ask for a remedy. For example:

> "Mother asks for a reversal of the judgment denying a hearing on her section 388 petition and to remand for a new hearing allowing her to present evidence showing the changes in her circumstances, as well as how the best interests of her child would be served by modifying the order denying her additional services."

By structuring your argument with a tight point heading, an explicative thesis paragraph, and a conclusion that ties the body of your argument together, you will craft a persuasive argument that better presents your client's position to the court. This will improve your client's chances of prevailing, and it won't hurt you, either.

MINOR'S BRIEFS IN DIVISION TWO AND ELSEWHERE

by Dave Rankin

Unless minor's counsel is filing a pure joinder letter, the better practice in Division Two is to put a yellow cover on the letter brief. Division Two wants minor's briefs that contain *any* factual information or legal argument beyond a mere joinder to be bound and covered with a yellow cover like any other respondent's brief. As a practical matter, this means that most minor's briefs in Division Two should be bound and covered since an effective minor's brief should contain something more than a mere joinder in the position of one of the parties.

Typically a minor's brief does not contain legal argument because minor's counsel usually joins in the respondent's brief. That is certainly appropriate where the minor's brief would simply duplicate the facts and argument already contained in the respondent's brief. However, a mere joinder without explaining the basis for the joinder is usually not very helpful to the court or the minor, and it may not provide the kind of independent representation that minors are entitled to expect from their appointed counsel. A brief that highlights the facts and law most directly in support of the minor can often be effective, and in that case should be bound and covered.

The Fourth Appellate District guidelines for representing a minor on appeal require counsel to do an investigation of the current circumstances. Counsel can do more in the minor's brief than merely telling the court that the minor's position on appeal is based on visiting the minor or contacting the current guardians or social worker. The minor's brief can also explain what the current circumstances are. It is more helpful to the court for the minor's brief to explain the current circumstances so that the court can take those into account in its decision-making process. See the guidelines for the appropriate procedures.

The guidelines also require minor's counsel to take an independent look at the record before arriving at an appellate position in the case. Dependency cases, even appeals, are factually dependent. Usually, the issues on appeal are not too varied, and most involve factual determinations made by the juvenile court in deciding to assert jurisdiction, deny reunification services, or terminate parental rights. It is often not very helpful to the court for the minor's brief simply to state that counsel has reviewed the record before arriving at the position on appeal. An effective minor's brief can help the court make its decision by listing those facts in the record that support the minor's position on appeal and why they do so.

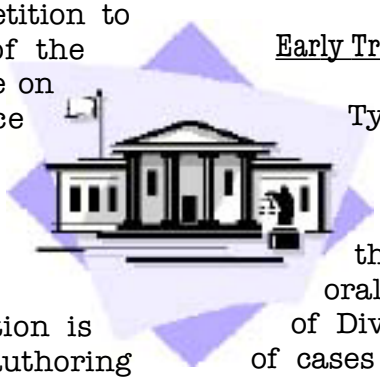
In conclusion, the most effective minor's brief is usually more than just a mere joinder. A good minor's brief can identify the issue that is most important to the minor. The brief can then briefly highlight the facts that are relevant to that issue. The brief can also explain the current circumstances, and if the minor is old enough, the minor's wishes. Finally, the brief can make a short, concise legal argument on the critical issue for the minor. Such a brief gives the minor the kind of representation he or she deserves on appeal and also assists the court in making its decision by independently presenting the minor's position.

THREE DIVISION TWO PRACTICE POINTERS: CONSOLIDATION OF HABEAS PETITIONS WITH RELATED APPEALS, SUPPLEMENTAL BRIEFS, AND TRANSMISSION OF EXHIBITS.

by Dave Rankin

Requesting Consolidation of A Habeas Petition With A Related Appeal.

The best way to ensure that a habeas petition is considered with a related appeal in Division Two is to file a *separate* motion to consolidate with the habeas petition. When the motion is filed, the motion will go with the petition to the writ department, and a copy of the motion will go to the authoring justice on the appeal. The authoring justice assigned to the appeal may then hold off issuing an opinion pending the writ department's decision on the habeas or the motion to consolidate.



If no motion is filed and consolidation is requested only in the habeas, the authoring justice on the appeal won't know about the pending habeas and may issue a tentative while the habeas is still being considered, because *all* copies of the habeas petition go to the writ department. This procedure is employed because the writ department might deny the petition outright, in which case there would be no need to send the petition to the panel assigned to the appeal. The petition only goes to the appellate panel if the writ department decides it should be decided with the appeal.

Another important consideration on writs is that they probably should be filed earlier in the appeal rather than later because Division Two works so quickly on their cases.

Motion for Leave to File Supplemental Briefs.

Division Two prefers counsel not to combine a motion for request to file a supplemental brief and the supplemental brief in one document. The court asks that counsel submit both a motion for permission to file a supplemental brief and to the supplemental brief to the court at the same time. The supplemental brief should be a separate document and should be bound with a green cover like any other appellant's opening brief.

The court will file the motion and rule on it. If the motion is granted the court will then file the supplemental brief and forward it to the panel along with the other briefs. If the motion is denied, the court will return the supplemental brief to counsel but the motion will remain filed.

Early Transmission of Exhibits.

Typically under California Rules of Court, rule 10, counsel asks for transmission of exhibits to the Court of Appeal when the court has set the case for oral argument. However, because of Division Two's early assignment of cases and their practice of issuing tentative opinions before oral argument, as a practical matter asking to have exhibits transmitted when oral argument is set may be too late. By then the court has already reviewed the record, read the briefs, and written a tentative opinion. So, in Division Two, counsel should send a letter to the Court of Appeal *along with the opening brief* asking the Court to exercise its own power under rule 10 for transmission of specific exhibits. This letter should not only list exhibits to which counsel has referred in the brief but also those that counsel believes will help the court better understand the facts or arguments. The court will exercise its own power under rule 10 to ask for the exhibits counsel has listed in the letter. This will ensure that the exhibits are reviewed timely during the appeal.