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GUIDEBOOK

APPELLATE DEFENDERS, INC.

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**GUIDEBOOK FOR APPOINTED COUNSEL
IN THE APPELLATE DEFENDERS, INC., PROGRAM**
(Revised 2022)

I. INTRODUCTION: YOUR RELATIONSHIP WITH APPELLATE DEFENDERS, INC.

Appellate Defenders, Inc. (ADI) was founded to improve the quality of representation provided to indigent clients by offering resources and hands-on assistance to panel attorneys. This guidebook, the [ADI website](#), the [Appellate Practice Manual](#), and other materials shared with the panel are intended to support the mission. In addition, we've included information on practical matters such as compensation claims, case screening, and progression to independent appointments and more complex cases. The topics are treated in greater depth in the [Appellate Practice Manual](#) and the [Statewide Claims Manual](#).

The policies, practices, and procedures set forth in this guidebook are offered as general information and guidance for panel attorneys. They are not intended to, and do not, create rights or obligations of any kind. ADI or the court may revise, delete, or supplement any policy, practice, or procedure in this guidebook at any time, in its sole discretion, with or without notice.

It is important to understand that panel membership does not create contractual rights or an employment relationship with ADI, the Court of Appeal, or the Judicial Council. We cannot guarantee a particular number of cases or continuing panel membership. We reserve the right to remove attorneys from the panel at any time, with or without cause and with or without notice, consistent with the interests of clients and our contractual obligations to the Judicial Council of California.

Appointed counsel is the sole attorney of record in the cases handled through our program. As such, appointed counsel will have full, final, and personal responsibility for handling the case. Counsel continues to bear this

responsibility when work is delegated to associate counsel or law clerks or when counsel consults with an ADI staff attorney.

ADI provides assistance and advice, and we urge appointed counsel to follow that advice unless there is a specific reason, based on the best interests of the client, to reject it. If a difference of opinion arises between appointed counsel and an ADI staff attorney, appointed counsel should listen to and give considerable weight to the staff attorney's opinion. Ultimately counsel is responsible for handling the case and must follow their own professional judgment. Appointed counsel may always seek a second opinion through our [panel liaisons](#).

II. OVERVIEW OF APPOINTED COUNSEL'S DUTIES

This topic is treated more expansively in the Appellate Practice Manual (hereafter referred to as the Manual), Chapter 1, Basic Information, § 1.0 et seq.

A. INITIAL STEPS AND APPELLANT'S OPENING BRIEF

Client and Trial Counsel Correspondence & Record. As a matter of course, ADI will email appointed counsel correspondence received from the client and trial counsel throughout the life of the case. The record will be sent to ADI or appointed counsel depending on the type and timing of the appointment. If the case is appointed as assisted or modified-assisted, the record will be sent to Appellate Defenders, Inc. (ADI).¹ If it's an independent case, ADI will send the record when the recommendation of appointment is sent to the Court of Appeal, or the superior court will mail it to counsel if the record is filed after the appointment order is filed.

¹ One exception is dependency fast-track cases where the superior court sends one copy of the record to ADI and a second copy to appointed counsel. (Cal. Rules of Court, rule 8.416(c)(2)(B).)

There are two types of assisted appointments: (1) assisted cases, and (2) modified-assisted cases. We encourage appointed counsel to take advantage of the assistance from staff attorneys. The purpose of the assistance is to help hone counsel's appellate skills and provide counsel with a strong foundation to successfully progress to independent appointments. Thus, in both assisted and modified-assisted cases, the staff attorney and appointed counsel will consult throughout the case discussing potential issues, potential adverse consequences, strategies on briefing, briefing, oral argument, and final steps. In addition, the staff attorney will review and, if necessary, edit one or more drafts of the opening brief before the filing of the final version.

Assisted Cases. The ADI staff attorney will review the transcripts to get a broad overview of the case. Those new to ADI's panel will receive an issues memo containing a list of potential issues identified by the staff attorney. As counsel gains experience, staff attorneys will ask appointed counsel to consult after appointed counsel has identified potential issues. This helps staff attorneys gauge appointed counsel's issue spotting and issue evaluation skills, a prerequisite for advancing to modified-assisted cases.

Modified-assisted cases. Some assisted cases are denominated "modified-assisted." While the ADI staff attorney will still review drafts of the opening brief, the staff attorney may elect not to review the record or may review only limited portions, as the circumstances of the case dictate. These cases are formally "assisted" cases, and are therefore paid at the "assisted" rate.

Greening program. For promotion of some panel attorneys to more serious felony cases (e.g., life cases), independent cases are selected for mentoring in a "greening program." While these cases remain formally independent, the assistance provided by the staff attorney resembles that in "modified-assisted" cases.

In all cases, counsel should track developments in their cases by accessing the [Appellate Courts Case Information Docket](#) provided by the Supreme Court

and Court of Appeal. Counsel should register for automatic e-mail notification of major developments and visit the site periodically for notifications not automatically sent by e-mail.

The following steps will give you some guidelines on how to proceed (see also chapter 1, “The ABC’s of Panel Membership: Basic Information for Appointed Counsel”, § 1.5 et seq. in the Manual):

1. Write the Client

Contact the client when you first get the case and promptly answer letters. Soliciting the client’s suggestions on the appeal is not just good client relations: it is an integral part of competent investigation of an appeal. The client may be aware of matters outside the record that trial counsel won’t think to mention, and the client often can shed valuable light on issues in the record. As previously mentioned, you will be provided with copies of all previous correspondence generated in the case.

The client is entitled to be informed of all significant developments. (Bus. & Prof. Code, § 6068, subd. (m); Cal. Rules Prof. Conduct, rule 1.4(a).) What constitutes a “significant” development will depend on the situation and case. Generally, the requirement includes providing copies of all briefs and petitions, significant motions, the opinion, and other rulings on significant matters.² The client must be informed of any potential adverse consequences on appeal.

For guidance in client relationships, see chapter 1, § 1.39 et seq. in the Manual. The appendix to that chapter has a number of sample client letters.

2. Read and Summarize the Record

Make careful notes, with some sort of conspicuous indication of possible issues (e.g., question marks in the margin of your notes), and start a list of

² An exception to this guidance is when the client expressly asks not to receive such documents. In such a case, counsel can advise the client that the documents were filed.

possible issues. You may “tab” a record for reference if you like, but marking or underlining the transcript itself is not encouraged. The record belongs to the client³ and normally will be sent to the client when the appeal is over.⁴ (If you’re able to scan the record or have an electronic transcript, Adobe Acrobat and a number of other apps offer the ability to highlight, annotate, and bookmark electronic records.)

3. Take Necessary Steps to Perfect the Record or Notice of Appeal

Missing Portions of the Record. Lack of a complete record is one of the most common reasons for delay on appeal. This subject is covered in [Chapter II](#) of the Guidebook. (See chapter 3, “Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal”, § 3.1 et seq. in the Manual.)

Notice of Appeal. ADI screens all notices of appeal for validity when they are first filed. Sometimes an error is not apparent until the record is reviewed. Be sure to confirm the notice is operative (e.g., timely filed from an appealable order).

Certificate of Probable Cause. If the appeal is from a guilty plea or an admission of probation violation and challenges the legality of the plea or admission, and there is no certificate of probable cause as required by Penal Code section 1237.5 and rule 8.304(b)(1) of the California Rules of Court, counsel may attempt to remedy the problem. Should this circumstance arise, consult with the ADI attorney as soon as possible. A writ of habeas corpus (see *People v. Mendez* (1999) 19 Cal.4th 1084), a motion or a writ of mandate may be needed. (See chapter 2, “First Things First: What Can Be Appealed and How to Get an Appeal Started,” § 2.105 et seq. in the Manual.)

³ In dependency cases, it may be necessary to redact certain confidential information contained in the record, such as the addresses of confidential caregivers, or a psychological evaluation of the non-client parent. (Welf. & Inst. Code, § 308.)

⁴ See Manual, chapter 1, Basic Information, “Client Records”, § 1.60.

Correction of Presentence Custody Credits and/or Penalties or Fees. This issue must be raised first by motion in the superior court, assuming there are no other issues for the appeal. (Pen. Code, §§ 1237.1 & 1237.2; *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428.) The request may be made informally via letter. (Pen. Code, §§ 1237.1 & 1237.2.) (See chapter 2, § 2.13 in the Manual.)

In dependency appeals filed by a non-parent relative (e.g., Grandmother, Uncle), counsel may receive a heavily redacted record. In this case, counsel will need to promptly file a petition with the juvenile court pursuant to Welfare and Institutions Code section 827, in order to obtain pertinent portions of the record which would normally be considered confidential and unavailable to a non-parent appellant.

4. Contact Trial Counsel

This is highly recommended in all cases. Trial counsel can offer valuable impressions of the case (e.g., what was the victim's demeanor on the stand, why was the judge so irate), and can inform you of things outside the record (e.g., what motions were made and reported that have not been transcribed such as during voir dire, what the jurors said about the case).

You must communicate with trial counsel before raising any type of ineffective assistance of counsel issue, whether raised in the opening brief or a writ petition.⁵ Trial counsel may have a reasonable strategic reason not apparent from the record, and it improves your relationship with trial counsel. Always feel free to consult with ADI to discuss the issue and the best approach in contacting trial counsel. The first contact will set the tone for the ongoing communication.

⁵ If trial counsel is non-communicative, it may be helpful to send trial counsel a polite certified letter requesting an explanation of trial counsel's strategic reasons for certain acts or omissions. That way, if trial counsel fails to respond, appellate counsel can attach a copy of the letter to the habeas petition, demonstrating that trial counsel was given an opportunity to provide tactical reasons, but failed to do so.

Appointed counsel must contact ADI prior to raising any ineffective assistance of counsel claim.

5. If Necessary, Look at the Superior Court File and the Exhibits

This can be helpful if you are having trouble understanding the record or if the client or trial counsel have referred to events not in the transcripts. Exhibits are already part of the appellate record. They can be transmitted to the Court of Appeal for consideration. (Cal. Rules of Court, rule 8.224.) You can cite to an exhibit as well as to a transcript. (Cal. Rules of Court, rule 8.320(e).) (Exhibits are covered in greater depth in [Chapter III](#) of this Guidebook.)

6. Write a Statement of the Case and a Statement of Facts

Drafting of the statement of case and facts is discussed in detail in [Chapter IV](#) of this Guidebook and chapter 5, § 5.15 et seq. of the Manual. Key points to remember are: (1) support every statement of fact by a reference to the part of the record where it may be found; (2) state the facts in the light most favorable to the judgment below -- inconsistencies in the prevailing party's case and facts favorable to the client may be included, but only after a complete presentation of facts presumably found true by the trier of fact; (3) don't editorialize; (4) present the facts in a chronological narrative, not a witness-by-witness recounting of testimony; and (5) tailor the facts to the arguments, selecting those facts relevant to the issues being raised. The statement of case and facts should be concise and thoughtfully tailored to the issues.

In dependency cases in which the sole issue raised is failure to comply with the ICWA, an abbreviated statement of facts may be appropriate. Counsel might not be fully compensated for a lengthy statement of facts containing a lot of irrelevant information.

7. Select Issues and Begin Preliminary Research

See chapter 4, “On the Hunt: Issue Spotting and Selection,” of the Manual for guidance in identifying, evaluating, and selecting issues. See also the ADI article on evaluating issues, “[To Brief or Not To Brief: Marginal Issues](#)” available in the Practice Articles section of the ADI website. In assisted and modified-assisted cases, we recommend discussing all potential issues with the staff attorney prior to beginning briefing. The dialogue with the staff attorney will often present new issues, and can help in vetting issues before consuming too much time. In all cases in which an ineffective assistance of counsel argument is to be raised, appointed counsel must first consult with the staff attorney. (See [part G](#), *post.*)

8. Research and Draft the Opening Brief

In assisted cases, the ADI attorney will review your draft brief prior to filing. The draft submitted to the staff attorney should represent the finished product as much as possible. The staff attorney may offer suggestions on adding, deleting, or modifying arguments, or concerning style, form, grammar, or citations. In certain cases, the staff attorney will want to see the revision (subsequent draft) before the brief is filed.

For further assistance in the substantive aspects of brief writing, refer to the article on brief preparation and advocacy in [Chapter IV](#) of this Guidebook and chapter 5, “Effective Written Advocacy: Briefing” in the Manual. For the proper procedures when counsel is unable to spot any issues, see [part H](#), *post*, and § 1.24 et seq. and § 4.73 et seq. of the Manual.

9. File, and Serve the Opening Brief

The appellant’s opening brief in most cases must be filed within 40 days after the record is filed, unless an extension of time is granted by the court. In

“fast-track” juvenile dependency and termination of parental rights cases governed by California Rules of Court, rule 8.416, the deadline is 30 days (see rule 8.416(e)), and ordinarily no extensions of time are available, unless there is a showing of exceptional showing of good cause (see rule 8.416(f)). All filings are electronic through [TrueFiling](#).

In assisted and modified-assisted cases, let the ADI staff attorney know that you’ll be seeking an extension of time. Detailed information on format, service, and distribution requirements is in [Chapter IV](#). (See also the [Judicial Council’s Extension of Time Form](#) and chapter 3, “Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal”, § 3.32 et seq, in the Manual.)⁶

10. Write the Client and Explain Why You Are Not Raising Issues in Which the Client Has Expressed an Interest

This requirement is vital to build strong client relations and avoid malpractice claims. From a diplomatic standpoint it may be a good idea to send your letter along with the client’s copy of the opening brief. Depending on circumstances, you may or may not provide explanations for rejecting issues in which the client has expressed no interest. You have no constitutional duty to raise every non-frivolous issue requested by the client. (*Jones v. Barnes* (1983) 463 U.S. 745 [103 S.Ct. 3308, 77 L.Ed.2d 987].)

B. REVIEWING RESPONDENT’S BRIEF; APPELLANT’S REPLY BRIEF

The respondent’s brief can be sent to the client immediately, or with the reply brief. Sometimes it’s helpful to send it with the reply brief because the

⁶ Additional references: California Rules of Court, rules 8.25, 8.40, 8.44, 8.200, 8.204, 8.220, 8.360, 8.412, and 8.416. Specific requirements are set out in [Chapter IV](#) of the Guidebook and in chapter 5, “Effective Written Advocacy: Briefing,” § 5.68 et seq. of the Manual.

client can immediately see the rebuttal and clarification of any point made by respondent.

In most cases, you will want to file a reply brief. See chapter 5, § 5.68 of the Manual for guidance. The California Rules of Court do not require a reply brief, but ADI's strong policy is that in general a reply brief should be filed, especially if you do not plan to orally argue the case. In those rare cases in which a reply brief is not filed, you must, of course, send the client a copy of the respondent's brief and explain your decision not to file a reply brief.⁷

A reply brief must be filed within 20 days after the respondent's brief is filed. It should be a succinct response to the Attorney General's (or other respondent's) argument and should not unnecessarily recapitulate the opening brief. It should not be used to bring up new issues; if you decide to raise an issue after the opening brief is filed, seek leave to file a supplemental opening brief.

In assisted and modified-assisted cases, you should discuss the reply brief with the assigned ADI attorney. Because of time constraints it may be impractical to submit the draft for review; however, you may be requested to do so in certain cases.⁸

C. ORAL ARGUMENT

Guidance on oral argument is provided in chapter 6, "Effective Use of the Spoken Word on Appeal: Oral Argument" of the Manual.

In Division Two, the court will issue a tentative opinion after briefing is completed. The tentative opinion is accompanied by one of two letters. The

⁷ In certain dependency cases where the only issue raised is failure to comply with the ICWA, County Counsel might concede the error or file a request for judicial notice saying the child welfare agency has remedied the error after the opening brief was filed. In these cases, appellate counsel should consult with ADI to determine the best course of action.

⁸ The general rules applicable to reply briefs are California Rules of Court, rules 8.204 and 8.360. Consult rules 8.412 and 8.416 for reply briefs and minors' briefs in "fast-track" dependency cases. Reply briefs are subject to the same format requirements as opening briefs.

more common letter inquires whether a party desires oral argument and suggests that while the panel is not unalterably bound by the tentative, the panel is set to rule as set forth in the tentative. The parties then indicate their intent to appear at oral argument or notify the court they intend to waive it. Counsel should not be deterred from requesting oral argument in these circumstances, as panels have been swayed to a different disposition with good oral argument. In a much smaller percentage of cases, where the panel may not be unanimous or where some doubt may linger in the panel's mind, the tentative will be accompanied by a letter indicating the court will set oral argument. A final opinion issues after oral argument or the waiver.

In general, oral argument is most appropriate in cases with complex or novel issues or facts, where a dialogue with the court is likely to be helpful in resolving questions raised in the briefing. The court hears argument for several days each month. If you request oral argument, it may be calendared for the next month, or not for several months, depending upon the Court of Appeal's caseload.

Feel free to consult with ADI about oral argument. The "unofficial rules" of oral argument are a matter of common sense – dress appropriately, be prepared, be on time, be polite and respectful but assertive, keep it short, don't repeat the facts or just rehash the briefs, answer questions immediately when asked, don't read your argument, admit it when you don't know the answer and if appropriate ask permission to file a supplemental letter brief, and don't "save" your best arguments or case citations for oral argument. If oral argument is virtual, counsel must ensure that they are familiar with the applicable technology platform, have a professional background, and wear professional attire.

D. THE COURT'S DECISION; ADVICE TO CLIENT

Write the client when the opinion is received. If you lost, tell the client whether you plan to petition for rehearing or review (and why). If you have

decided not to pursue the case further, be sure to advise the client of the reason and the right to petition for rehearing or review on their own, the applicable deadlines, and the place to file.⁹ Should the case result in a reversal, be sure to explain what it means.¹⁰ The client's first questions will usually be "When am I going back to court, what will happen, and will you still be my attorney?" Also, it is helpful to send a copy of the opinion to trial counsel, especially if the case is to be remanded. In assisted cases, whether you won or lost, discuss the opinion with the assigned ADI attorney so you can give accurate advice. If the judgment was affirmed, time is of the essence.

Make written arrangements with the client for the disposition of the record. The client is entitled to the appellate record at the conclusion of the case. However, there may be circumstances when the client does not want the record (e.g., a child molestation case). Communicate with your client to determine their desire as to receipt of the record or whether the client wants someone else to receive the record. It might be best to have this conversation at the outset of the case. If the client does not want it, get written permission to destroy it. Whether sending it or keeping it for disposal, always make it clear this is the client's only copy. Counsel who fail to send the record to the client or make arrangements for its disposal may have an ethical obligation to keep it.

In dependency cases in which counsel represented a minor, the record should be sent to the minor's guardian ad litem, who is usually the client's trial attorney.

⁹ The ADI website has a [petition for review information form](#) for clients.

¹⁰ In dependency cases, when the court issues a limited reversal for compliance with the ICWA, be sure to explain the limited nature of the reversal to the client.

E. PETITION FOR REHEARING

If the decision is adverse to your client, you have only 15 days to ask the Court of Appeal to hear the case again. (See chapter 7, “The End Game: Decisions by Reviewing Courts and Processes After Decision” of the Manual, § 7.33 et seq.) A petition for rehearing is generally a brief argument on why the Court of Appeal erred in deciding the case. It should not merely restate the arguments made in the briefs. If the Court of Appeal misstated the facts or law, omitted an important point, or decided the case based on an issue not briefed, a petition for rehearing must be filed if you want to file a petition for review on the point in the California Supreme Court. (Cal. Rules of Court, rule 8.500(c)(1) and (2).) In an assisted case, as soon as you get an unfavorable opinion, contact the assigned ADI attorney for advice on how to proceed.¹¹

F. PETITION FOR REVIEW

If the case presents a new question of law or one the Supreme Court is currently considering, if it presents issues on which Courts of Appeal are in conflict, if you believe the opinion was seriously off base, or if your client needs to exhaust state remedies in order to pursue a reasonable chance of relief in federal court, you may decide to petition the California Supreme Court for review. (See chapter 7, “The End Game: Decisions by Reviewing Courts and Processes After Decision” in the Manual, § 7.47 et seq.) In an assisted case, discuss this with the assigned ADI attorney. If you plan to file a petition for review, assume the petition for rehearing will be denied, and have the petition for review ready to go on the first day it can be filed, which is when the Court of Appeal decision becomes final (usually, 30 days after the opinion or other decision is filed). The

¹¹ The rules applicable to petitions for rehearing are California Rules of Court, rules 8.268, 8.366, and 8.470. Petitions are subject to the same format requirements as briefs. [Petition for Rehearing](#) templates are available on the ADI website.

petition must be filed within 10 days after that. Extensions of time are not permitted, though the Chief Justice may relieve a party for failure to file a timely petition if the time for the court to grant review on its own motion has not expired. (Cal. Rules of Court, rule 8.500(e)(2).) Obviously, counsel should file the petition in a timely manner and not be placed in a position to seek the rarely granted relief from default.¹²

G. INVESTIGATION OF COLLATERAL MATTERS AND PETITIONS FOR WRIT OF HABEAS CORPUS

The appeal itself is bound by the four corners of the record, and appellate counsel has no duty to search actively for every off-record claim that might conceivably be developed. However, you should be alert to the possibility of issues not reflected in the record. When you have reason to believe that significant facts in support of such issues exist, discuss them with the assigned ADI attorney before undertaking extensive investigation. You may need to develop those facts and file a writ petition based on them. (See chapter 8, “Putting on the Writs: California Extraordinary Remedies” of the Manual for guidance.)

¹² The general rules applicable to petitions for review are California Rules of Court, rules 8.40, 8.264, 8.368, 8.500, 8.504, and 8.508. Petitions are generally subject to the same format requirements as briefs. If produced on a computer, there is a 8,400-word limitation, including footnotes but not including the tables, the attached copy of the Court of Appeal opinion, and the word-count certificate, though for good cause the Chief Justice may permit a longer petition. (Rule 8.504(d).) A copy of the opinion of the Court of Appeal must be appended to the original petition. (Rule 8.504(b)(4).) Except as permitted by the Chief Justice for good cause, no other attachments are permitted except an order from which the party seeks relief and exhibits or orders of a trial court or Court of Appeal which the party considers “unusually significant” and do not exceed 10 pages. (Rule 8.504(e)(1).) No incorporation by reference is permitted except as to a petition, reply, or answer to another party in the same case or filed in a case that raises the same or similar issues in a petition for which a petition for review is pending or has been granted. (Rule 8.504(e)(3).) Samples are available on the [Forms & Samples](#) section of the ADI website. Check the court website for [e-filing](#) requirements.

The most common off-record claim is ineffective assistance of trial counsel; appointed counsel must discuss such a claim with the assigned ADI attorney prior to raising the issue in the opening brief. If the claim does have merit, you will have to exercise caution at every step to preserve and document the claim for your client.

To ensure payment for this work, preapproval is usually advisable before off-record investigation is undertaken. It is especially important if you need expert assistance, such as investigators or doctors, or might incur other out-of-pocket expenses. Funding for these costs is provided in the form of reimbursement to you. Consult ADI for preapproval requirements.

H. REPRESENTATION WHEN THERE ARE NO ARGUABLE ISSUES (THE WENDE/ANDERS OR SADE C. BRIEF)

An “arguable issue” is one which, in counsel’s professional opinion, has a reasonable potential for success and which, if resolved favorably to the client, will result in a reversal or modification of the judgment. (*People v. Johnson* (1981) 123 Cal.App.3d 106; see the ADI article on evaluating issues, “[To Brief or Not to Brief](#).”)

If you are appointed to a case in which you have searched diligently but have found no arguable issues, there is a specific procedure which you must follow. This procedure should be followed whether the appointment was designated as “assisted” or “independent.” (See the Manual, chapter 1, “The ABC’s of Panel Membership: Basic Information for Appointed Counsel,” § 1.24 et seq.; chapter 4, “On the Hunt: Issue Spotting and Selection,” § 4.73 et seq.)

You must advise the client that your research has found no arguable issues, and file a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493]. A *Wende/Anders* brief will set forth a summary of the proceedings and facts, with citations to the transcripts. It will mention issues raised at trial and others suggested by the

record, and related authorities the court should consider. It will not specifically urge those issues as grounds for reversal, but it also will not argue against them. It should not say, for example, that the listed issues should be rejected and that the authorities require an adverse result. The brief must include counsel's request to be relieved, made conditional on the client's so requesting.

When a *Wende/Anders* brief is filed, the Court of Appeal must conduct its own review of the entire record to determine if there are any arguable issues.¹³ However, the court has no duty to review the record in dependency *Sade C.* cases.¹⁴ It will offer the client an opportunity to file a pro per brief. If the Court of Appeal discovers an arguable issue, it will request briefing of the issue; it may but usually will not appoint new counsel to prepare the brief. If the court finds no arguable issues, it will affirm the judgment (or it may also dismiss the appeal).

Before any *Wende/Anders* brief is filed, all counsel (assisted or independent) must discuss the case with the staff attorney. The assigned staff attorney will need to reread the record. If the attorney agrees that the case is appropriate for *Wende* treatment, write to the client. Explain to the client their right to appeal and the procedures under *People v. Wende*, including the right to file a pro per brief, and provide your assessment of the case. Send the record to the client once the *Wende/Anders* brief is filed.

In dependency cases involving multiple appealing parents, counsel appointed for each parent should consider each other's viewpoint. For example, if one attorney believes a no-issue brief is warranted and another attorney believes an arguable issue exists, they should consult and carefully consider each

¹³ The California Supreme Court is currently considering whether *Wende/Anders* procedures apply to appeals from an order denying post-conviction relief. (*People v. Delgadillo* (Nov. 18, 2020, B304441) [nonpub opn.], review granted 2/17/21 (S266305).) Until this case is decided, ADI requires counsel to file a *Wende/Anders* brief when counsel cannot identify an issue in these post-sentencing appeals.

¹⁴ For this reason, statements of fact in a *Sade C.* brief should provide a fairly complete description of the most significant evidence supporting the judgment.

other's viewpoint. If counsel does not agree, please contact the assigned staff attorney.

Dismissals/Abandonments: If you are recommending the client dismiss the appeal for any reason, such as a potential adverse consequence, you must discuss the case with the staff attorney, just as in a *Wende* situation. The client has an absolute right to appeal. You cannot dismiss the appeal without the client's consent. If the client decides to pursue the appeal even after the risk of a greater sentence is addressed, it is advisable to have the client sign and date a copy of the letter sent by counsel regarding the potential risks as well as a separate paragraph indicating the client has acknowledged the risks.

Dependency no-merit cases are governed by *In re Sade C.* (1996) 13 Cal.4th 952. ADI still must review the record and determine whether there are any issues. Counsel is expected to provide the assigned staff attorney with a memorandum listing issues considered and reasons for their rejection, and a draft of the proposed *Sade C.* brief. The procedures and the document to be filed may be different from division to division.¹⁵ Check with ADI.

I. REPRESENTATION WHEN THE CLIENT MIGHT SUFFER ADVERSE CONSEQUENCES FROM APPEALING

On occasion a client may face the prospect of receiving an increased sentence or other adverse result from pursuing an appeal. For example, the court may have imposed an unauthorized sentence in the defendant's favor, or the remedy for an error might be withdrawal of an advantageous plea bargain. You must be alert to this possibility in every case. This topic is discussed extensively in the Manual, chapter 4, "On the Hunt: Issue Spotting and Selection," § 4.91 et seq.

¹⁵ Generally, Division Two will permit the client to file a *pro per* supplemental brief within 30 days. Divisions One and Three do not permit a supplemental brief.

If you identify a potential adverse consequence, you should communicate with the client, who alone can decide whether pursuing the appeal is worth the risk. Help the client by analyzing the probability and magnitude of potential benefits from appealing, versus the probability and magnitude of potential risks. Also discuss the possibility that the error might be caught by the Department of Corrections and Rehabilitation or others, even if there is no appeal. Ask the client to give you a decision in writing, and remind the client that if you receive no instructions from them, you will have no choice but to proceed since you do not have the authority to abandon a case without the client's consent.

J. REQUESTS TO BE RELIEVED

Sometimes an attorney is unable to handle a case to which the attorney has been appointed. A new job with incompatible responsibilities, a conflict of interest not discovered when the appointment began, personal or family illness, breakup of a law partnership or marriage, and many other factors may interfere with representation. In such a situation, it is important that counsel do something, as soon as possible. A request to be relieved is usually the best resolution for both the client and the attorney. We do not count such a request as a negative on the attorney's record, but on the contrary see it as a responsible and professional way of dealing with a difficult situation. Please contact ADI for guidance on how to do this.

III. INCOMPLETE RECORDS: REQUESTS TO AUGMENT OR COMPLETE THE RECORD

The topic of records is covered in the Manual, chapter 3, "Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal." Other resources are available on the ADI website including, "[Motion Practice Guide](#)" and sample motions on the [Forms and Samples](#) page.

California Rules of Court, rule 8.320 describes the normal record on appeal in a criminal case; normal records in juvenile dependency cases are discussed in [part F](#), below. Sometimes the normal record does not include the material necessary to argue an issue and needs augmentation; occasionally the prepared record will lack something that should be in the normal record and needs completion.

Requests to augment the record are governed by California Rules of Court, rule 8.155(a), *People v. Gaston* (1978) 20 Cal.3d 476, 482-484, *People v. Silva* (1978) 20 Cal.3d 489, 493, and *People v. Barton* (1978) 21 Cal.3d 513, 518-520. They should be addressed to the Court of Appeal, not the superior court, once the record has been filed. (See § 3.17 et seq. of the Manual.)

Except in most “fast-track” dependency cases (see [part F](#)), if something in the normal record is missing, a letter request to the superior court under California Rules of Court, rule 8.340(b) is appropriate. (See § 3.13 et seq. of the Manual.) Counsel should be alert that if the trial court makes any order after the record is certified, the superior clerk has the sua sponte duty to augment the record with the new or modified order or document and, if applicable, transcript. (Rule 8.340(a).) Appellate counsel should keep track of proceedings in the trial court and correct the record when necessary.

If some of the items needed are omitted parts of the normal record, but an augmentation request is necessary for other items, include all of the items in a single augmentation request to the Court of Appeal. (See [part E](#), below.) Requests to augment or complete the record should be filed as soon as possible after receiving the record and determining that the augmentation is needed; that should almost always be before the original opening brief due date.

An exception to the usual augment requirement exists when a non-parent appeals from a juvenile dependency proceeding. Under the confidentiality provisions of Welfare and Institutions Code section 827, that appellant is usually not entitled to most of the record. In such cases, appellate counsel must

promptly file a section 827 petition with the juvenile court (not the Court of Appeal), requesting those portions of the record which are necessary for meaningful appellate argument.

A. AUGMENTATIONS

Whether a reporter's transcript or documents are sought, describe the material with sufficient detail. Avoid asking for "materials relevant to [a particular issue]" or other such generalities.

1. Augmentation for Reporter's Transcript

Describe the nature of the oral proceedings. Give the date, time, judge's name, and the reporter's name. Cite the portion of the clerk's transcript and/or reporter's transcript which refers to the proceeding.

2. Augmentation for Documentary Material or Clerk's Transcript

Describe each item as specifically as possible, including the title of the document and the date it was filed. If the augmentation material is not lengthy, you may obtain a copy from the superior court clerk, attach the copy to your request to augment, and ask the Court of Appeal to order the copy be made part of the record without preparation of a supplemental clerk's transcript. Be sure to include a copy of the augmentation material with the copy of the augmentation request you serve on opposing counsel.

3. Statement of Reasons

Include a brief statement of why you think the augmentation will be necessary or relevant to the appeal. If possible, describe the issue to which the augmented record relates. Support the statement of reasons with references to the present record, when available. Remember to show that the material you want to include in the record was before the superior court judge.

4. Extensions of Time Pending Augmentation

If a supplemental transcript will have to be prepared, delay in filing the brief can be anticipated. Your request to augment the record should therefore include a request to extend time to “30 days after the supplemental record is filed.” In fast-track juvenile dependency cases, counsel typically requests no more than 20 days after the supplemental record has been filed. Be sure that the title of the combined document clearly indicates both types of requests.

5. Filing Requirements

The [Filing Rules Summary](#) page of the ADI Website details the filing requirements for an augment motion.

B. RULE 8.340 LETTERS TO COMPLETE THE RECORD

Except in most “fast-track” dependency cases (see [part F](#)), under California Rules of Court, rule 8.340, appellate counsel should notify the clerk of the superior court directly by letter when certain portions of the normal record on appeal are missing; in these cases an augmentation request in the Court of Appeal should not be filed. The appeals section of the superior court will prepare and transmit the missing portion of the normal record upon receipt of counsel’s letter. A copy of the letter should be filed with the Court of Appeal via [Truefiling](#).

While completion of the record occurs through this procedure, the time to file the opening brief is still running. The Fourth Appellate District does not automatically stay the briefing until the record is completed. If the due date approaches and the record is not yet complete, appointed counsel needs to file an extension request.

C. EXHIBITS

Exhibits are part of the normal record (Cal. Rules of Court, rule 8.320(e)) and need not be augmented into the record. (See Manual, chapter 3, § 3.25 et seq.) Some exhibits are required by rule to be made part of the clerk's transcript. (See [part F](#), *post.*) The official way to get other exhibits transmitted to the Court of Appeal is a letter to the superior court clerk within 10 days after the last respondent's brief is filed. (Rule 8.224.) But Division Two has developed its own procedure. It has prepared a form for the transmission which must be submitted to the Court of Appeal when the opening brief is filed. This letter is sent to counsel with the appointment order.

A copy of some exhibits can usually be obtained from trial counsel, or check with ADI to see if we can obtain the exhibits for you. (See "[Exhibit Review Procedures](#)", found under APPELLATE PRACTICE → Nuts and Bolts of Panel Practice.)

D. EXHIBITS REQUIRED TO BE PART OF THE CLERK'S TRANSCRIPT

California Rules of Court, rule 2.1040(a) requires that, unless otherwise ordered by the trial judge, a party offering an electronic recording must provide a written transcript of the recording which is to be included in the clerk's transcript (Rule 8.320(b)(10).) Similarly, California Rules of Court, rule 8.320(b)(13)(C), requires that any document admitted in evidence to prove a prior juvenile adjudication, criminal conviction, or prison term likewise be made part of the normal clerk's transcript. Appellate counsel can file a rule 8.340(b) letter with the superior court clerk if these documents are missing from the record.

E. COMBINED AUGMENTATION AND CORRECTION

If the record needs both augmentation and correction, combine the requests in a single augment motion filed in the Court of Appeal under California Rules of Court, rules 8.340(c) and 8.155.

F. RECORDS IN JUVENILE DEPENDENCY APPEALS

Generally, the contents of the normal record, its service, and its augmentation and correction are prescribed by California Rules of Court, rules 8.407, 8.410, and 8.416. Requests to augment or complete the record are covered by the criminal rules (preceding parts of this chapter) in non-“fast-track” dependency cases (rule 8.410), and by rule 8.416(d) in “fast-track” cases.¹⁶ The general advice offered in parts B-D of this chapter and in chapter 3 of the Manual is applicable for the most part to dependency appeals.

IV. REQUESTS FOR EXTENSION OF TIME

Requests for extension of time are governed by California Rules of Court, rules 8.50, 8.60, 8.63, and 8.412(c), except in “fast-track” dependency cases which are governed by rule 8.416(f). See treatment in chapter 3, “Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal,” of the Manual.

A. NUMBER OF EXTENSIONS

In criminal cases, in ordinary circumstances, the Fourth Appellate District courts will not grant more than two 30-day extension requests. If an extension has not been granted and no opening brief is filed on the due date, the court will issue a notice that, if the brief is not filed within 30 days, the court will relieve

¹⁶ The rule requires counsel to submit an augment or correction request within 15 days of receipt of the record; thus, counsel must be diligent in reviewing the record shortly after receipt.

appointed counsel and appoint new counsel. (Cal. Rules of Court, rule 8.360(c)(5)(A)(ii).) Rule 8.360(c)(6) allows the court to impose sanctions as specified in the notice, and a sanction typically included in the notice is the possibility of no compensation to relieved counsel.

In juvenile dependency and termination of parental rights cases, no extensions should be requested without exceptional good cause. (Cal. Rules of Court, rules 8.412(c) and 8.416(f); Code Civ. Proc, § 45.) These cases involve the custody of children and should be handled as fast as possible. Except in “fast-track” cases, and in appeals from termination of parental rights, if a party fails to timely file a brief, notice is sent that the brief must be filed in 30 days and failure to do so results in specific sanctions. (Rule 8.412(d).)¹⁷ “Fast-track”¹⁸ and termination of parental rights cases have the same sanctions but the period is limited to 15 days. (Rule 8.416(g).)

B. GROUNDS FOR EXTENSION

Extensions of time will be granted only upon a showing of good cause or an exceptional showing of good cause when required by the rules. Acceptable reasons for requiring more time are illustrated in California Rules of Court, rule 8.63(b), and include such matters as work on other appointed appeals (list the case names and numbers and stage of progress), length of the appellate record or the number and complexity of issues. A general “press of business” excuse is not acceptable. Do not give as an excuse that ADI is doing a *Wende/Anders* review, since that tends to disparage any issue you may ultimately raise. In all extension requests you should advise the court in simple terms of the progress you have made toward preparation of the brief.

¹⁷ Appointed counsel for an appellant will be warned that they may be relieved without compensation. Actual imposition of such a sanction puts the attorney’s panel status in jeopardy.

¹⁸ “Fast-track” cases include all dependency appeals in Divisions One and Three of the Fourth Appellate District and terminations of parental rights throughout the state. (Rule 8.416.)

C. EXTENSIONS PENDING AUGMENTATION OR CORRECTION OF THE RECORD

If an augmentation may delay your brief, you should combine the request to augment with a request to extend time to “30 days after the supplemental record is filed.” Be sure that the title of the combined document clearly indicates both types of requests.

If a request for correction of the record is made (see [Chapter III](#), *ante*), the court requires ongoing standard 30-day extension requests while the correction is pending.

D. CONTENTS AND FORM OF EXTENSION REQUEST

Division One requires that counsel use the Judicial Council forms, [CR-126](#) (criminal) or [JV-816](#) (juvenile delinquency). Divisions Two and Three prefer this form, but will accept other forms so long as it includes the present and proposed due dates; the number of previous requests; previous notice, if any, under California Rules of Court, rules 8.360(c)(5), 8.412(d), or 8.416(g); the dates counsel was appointed and the record was filed; and the reasons for extending time.

In juvenile dependency cases, Divisions One and Three are particularly reluctant to grant requests for extension of time.

V. PREPARATION OF APPELLATE BRIEFS

Written presentation in the form of briefs is at the heart of appellate practice. Although other modes of advocacy do have a role on appeal, that role is almost always a subordinate one. The court’s first impressions and, usually, final conclusions about a case will come directly from what is said in the briefs.

Writing a successful appellate brief requires knowledge of and compliance with formal requirements, as well as clear and effective writing, proficiency in the use of authorities, strong analytical skills, and mastery of the art of advocacy.

This chapter is intended as a practical guide to these fundamentals. For much greater detail, see chapter 5 of the Manual, “Effective Written Advocacy: Briefing.”

A. FORM OF THE BRIEF

Briefing formalities are outlined in the Manual, chapter 5, at § 5.68 et seq. and are prescribed by rule 8.204 of the California Rules of Court. (See also rules 8.360(a) and 8.412(a), making rule 8.204 applicable to criminal and juvenile cases.)

There is a 25,500-word limit in criminal and juvenile cases (Cal. Rules of Court, rules 8.360(b)(1), 8.412(a)); a longer brief may be filed only with special permission of the presiding justice (rule 8.360(b)(5)).

B. CONTENTS OF THE BRIEF

This topic is covered in the Manual, chapter 5, § 5.1 et seq. The typical client’s opening brief will consist of a brief cover page, a topical index, a table of authorities, an introduction (optional, but helpful), a statement of appealability, a statement of the case, a statement of facts, arguments with descriptive headings, a conclusion, and proof of service. (Cal. Rules of Court, rule 8.204; see also rules 8.360(a), and 8.412(a), making rule 8.204 applicable to criminal and juvenile cases.)

1. Brief Cover Page

The cover page must contain the parties’ names, the case numbers in the Court of Appeal and the lower court, the name of the document being filed, the judgment appealed from, the court from which the appeal is taken, the judge who presided at the trial level or whose order is being appealed, the attorney’s name, mailing address, telephone number, e-mail address, and State Bar number, and the name of the party on whose behalf the brief is filed. (Cal. Rules of Court,

rules 8.204(b)(10) and 8.40(b).) Appointed attorneys are also required to include the following statement regarding Appellate Defenders' participation:

By appointment of the Court of Appeal under the Appellate Defenders, Inc., case program.

If the appellant's opening brief is submitted in accordance with *People v. Wende* (1979) 25 Cal. 3d. 436 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493] or *In re Sade C.* (1996) 13 Cal.4th 952 (see chapter 1, [part H](#), *ante*), state this conspicuously on the cover of the brief. The court needs this indicator for its internal procedures.

2. *Topical Index*

An index of the contents of the brief is required by California Rules of Court, rule 8.204(a). It should list each of the major parts of the brief and should specifically repeat each argument heading in full (do not simply list as "Argument I," "Argument II," etc.). This section can be an important tool of advocacy. The reviewing justice often reads the topical index first, especially the argument headings, as a kind of "window" to the brief. (See [subpart 8\(a\)](#), *post*, on argument headings.)

3. *Table of Authorities*

The table of authorities must be divided as provided in California Rules of Court, rule 8.204(a)(1)(A) with the page of each reference in the brief noted. There is no prescribed order in which to list cases, but the normal practice is to list cases alphabetically without regard to the jurisdiction or court deciding them. Constitutions are listed as follows: (1) United States Constitution by article or amendment, numerically; (2) California Constitution by article and section, numerically; (3) other state constitutions alphabetically. California statutes should be listed first alphabetically by code and, within each code, numerically by sections. If general laws are cited, they should be listed by date. Statutes of

other states should be listed alphabetically. Rules are next listed in numerical order. Other authorities, such as treatises or law review articles, should be listed alphabetically – either by author or, if there is no author, by title.

4. Introduction

The rules do not require an introduction. However, many justices find it very helpful. It helps them immediately to become familiar with the case and focus on relevant matters. The introduction should set forth the nature of the case (e.g., conviction by jury of attempted murder), the controversy (the error), and the remedy you seek and why. It is an excellent place to introduce a “theme” – the story line you want to tell – and begin the job of persuasion.

5. Statement of Appealability

Under California Rules of Court, rule 8.204(a)(2)(B), the appellant’s opening brief must contain either a statement that the appeal is from a judgment that finally disposes of all issues between the parties or a statement explaining why the order or non-final judgment is appealable. Although the rule does not specify where in the brief this statement is to be placed, it is our recommendation that the statement be placed near the beginning of the brief.

The following examples are appropriate statements in conformance with the rule:

- a) In a criminal appeal arising after a trial, it should be sufficient to state: “This appeal is from a final judgment following a trial and is authorized by Penal Code section 1237.”
- b) In a criminal appeal following a guilty plea, the basis for appeal (sentence; search and seizure; or validity of the plea, if a certificate of probable cause has been granted¹⁹) should be indicated, and rule

¹⁹ Under Penal Code section 1237.5, a certificate of probable cause is required if the issue is the validity of the plea, or denial of a motion to withdraw the plea, or an attack on a stipulated sentence (*People v. Panizzon* (1996) 13 Cal.4th 68, 76).

8.304(b) and the applicable Penal Code section should be cited. For example:

- 1) “This appeal is from a final judgment following a guilty plea and is based on the sentence imposed within the meaning of California Rules of Court, rule 8.304(b)(4)(B). It is authorized by Penal Code section 1237.”
 - 2) “This appeal is from a final judgment following a guilty plea after denial of a Penal Code section 1538.5 motion within the meaning of California Rules of Court, rule 8.304(b)(4)(A) and is authorized by Penal Code section 1538.5, subdivision (m).”
 - 3) “This appeal is from a final judgment following a plea of guilty and issuance of a certificate of probable cause, as prescribed by California Rules of Court, rule 8.304(b)(1)-(2). It is authorized by Penal Code section 1237.5.”
 - 4) “An order after judgment affecting the substantial rights of the parties. (*Teal v. Superior Court* (2014) 60 Cal.4th 595.)”
 - 5) [Any combination of the above.]
- c) In juvenile, conservatorship, and other civil cases under the ADI program, the appropriate Welfare and Institutions Code or other code section should be cited. For example:
- 1) “This appeal is from a final judgment entered pursuant to Welfare and Institutions Code section 601[or 602] and is authorized by Welfare and Institutions Code section 800.”
 - 2) “This appeal is from an order transferring minor to a court of criminal jurisdiction and is authorized by Welfare and Institutions Code section 800, subdivision (a).”
 - 3) “This appeal is from [a judgment entered under Welfare and Institutions Code section 300] [an order under Welfare and Institutions Code section (e.g., 366.21, 366.22, 388 – specify)] and is authorized by Welfare and Institutions Code section 395.”
 - 4) “This appeal is from a judgment entered after a permanency planning hearing pursuant to Welfare and Institutions Code section 366.26 and is authorized by Welfare and Institutions Code sections 366.26, subdivision (l) and 395.”

- 5) “This appeal is from a judgment entered pursuant to Family Code section 7802 and is authorized by Family Code section 7894.”
- 6) “This appeal is from a judgment establishing a conservatorship under Welfare and Institutions Code section 5350 et seq. and is authorized by Welfare and Institutions Code section 5352.4.”
- 7) “This appeal is from an involuntary commitment following a jury trial pursuant to Welfare and Institutions Code sections 6600 et seq., the Sexually Violent Predators Act, and is appealable as a final judgment (Code Civ. Proc., § 904.1).”

6. *Statement of the Case*

This section explains the nature of the action or proceeding and gives a brief procedural history of the case. (For further guidance see chapter 5 of the Manual, § 5.15.) It will typically describe the pleadings, any relevant motions and the rulings on them, the verdict, the judgment, and the filing of the notice of appeal. It will be based largely on the clerk’s transcript. Under California Rules of Court, rule 8.204(a)(1)(C), all statements must include references to the record. (Line references are not required.)

The purpose of the statement of the case is simply to tell the Court of Appeal how the case came to it and to set up the background necessary to understand the appeal. Conciseness and materiality are essential.

7. *Statement of Facts*

California Rules of Court, rule 8.204(a)(2)(C) requires “a summary of the significant facts limited to matters in the record.” (For further guidance see chapter 5 of the Manual, § 5.16 et seq.) Like the brief in general, the statement of facts should be concise. It should be written with certain principles in mind:

First, the statement can refer only to those matters which are within the record. (Cal. Rules of Court, rule 8.204(a)(2)(C).) *Every statement of fact must be supported by a citation to the part of the record where it may be found.*

Second, the reviewing court is not a tribunal in which to relitigate general questions of fact. The findings of the trier of fact will be presumed correct, unless the evidence is inadequate as a matter of law to support the judgment. All presumptions are in favor of the judgment and the reviewing court will not assume facts which defeat the judgment.

From these principles comes the cardinal rule: *State the facts in the light most favorable to the judgment below.*²⁰ This rule is easily misunderstood. It does not mean facts favorable to the client or unfavorable to the respondent must be omitted altogether. It does not mean that inconsistencies in the prevailing party's own case must be ignored. It does mean, however, that the statement of facts should first fairly and completely present the version of facts presumably found true by the trier of fact. Do not omit a material fact even if (or especially if) it is unfavorable to your client. Evidence presented by the losing party and presumably rejected by the trier of fact should be segregated and clearly labeled.

Third, it is improper to editorialize. Do not insert your own opinion or conclusions about the evidence. For example, you should not argue that a certain witness is "unbelievable" or that testimony is "incredible." However, it is proper and indeed advisable to state the factual basis for any lack of credibility. If a witness was intoxicated, for example, or was otherwise seriously impeached by some other testimony or part of the record, that fact should be noted. But the tone should be that of the neutral reporter.

²⁰ This principle applies to the statement of facts and arguments such as insufficiency of evidence. Facts supporting arguments may be subject to different standards and must be adapted accordingly. For example, if the trial court rejected a proffered defense instruction, then the standard is to state the facts supporting the giving of the instruction most favorably to appellant. (E.g., *Henderson v. Harnischfeger* (1974) 12 Cal.3d 663, 674.)

Fourth, facts should be presented in a narrative. They should be organized, in most cases, in chronological order and should avoid a witness-by-witness recounting of the testimony. A lengthy digest of the testimony of the witnesses is not the summary of facts required by the rule. The statement of facts should be as short as possible without omitting necessary information and should not describe events that have no bearing on the outcome of the appeal.

In juvenile dependency cases, it is helpful to put facts pertaining to the ICWA in a separate section at the end of the statement of facts.

Finally, *scrupulous accuracy is essential*. Serious credibility problems will arise if you have erroneously stated any part of the facts, even minor details.

8. *Argument*

a. HEADINGS

California Rules of Court, rule 8.204(a)(1)(B) requires arguments to be organized under a separate heading or subheading summarizing the point. Preparing headings is something of an art and an extremely useful tool for both the court and the writer, since it requires counsel to condense an entire argument into a single sentence. The test of a well-done heading is whether it makes the argument comprehensible to one who has no familiarity with the case.

Judges have frequently commented on the importance of headings in giving them an initial “window” into the case. As indicated above, the headings are required to be stated in full in the topical index, and that is often the first thing a judge will focus upon in the brief. The issues as articulated in the headings can give the judge a framework for reading and assimilating everything that follows.

The headings should be descriptive. They should be in the form of a complete sentence and should actually state the argument. Headings such as “Erroneous Ruling on Motion” or “Instructional Error” give the reader no

guidance in understanding the issues. It often helps to have a “because” clause: “The Admission of the Confession Was Error Because . . .”

Subheadings are useful, especially if the argument is complex. Overuse of them, however, can be more distracting than helpful.

b. ORDER OF ARGUMENTS

Give some thought to the order of the arguments. Sometimes it is dictated by the logical relationship of the arguments; sometimes it is best to list them chronologically. Otherwise, a common rule of thumb is that they should be arranged in descending order of strength or merit.

Too-rigid adherence to this formula, however, can obviously disparage your later arguments. A broadest-to-narrowest arrangement is often more appropriate. In criminal cases, for example, issues concerning trial should normally precede sentencing issues, even though the latter may be the “strongest” in your case in terms of probability of success. Within each group of issues of equal breadth, the order usually should be strongest-to-weakest.

c. BODY OF ARGUMENT

In-depth guidance on the construction of an effective argument is offered in the Manual, chapter 5, “Effective Written Advocacy: Briefing,” § 5.22 et seq. Your argument itself should be brief and well organized. At all times keep the main points in mind.

As soon as possible, state the nature of your contention. If you are the respondent, you should state the client’s contention fairly but may formulate the issues differently from the client when you think it appropriate.

It is extremely important to set forth from the outset the particular facts giving rise to the issue. Describe any objections or motions relating to the issue in question, any pertinent evidence, and the ruling.

You should then set up the legal context in which the case must be decided by discussing the legal principles and authorities involved. You should give great care to the selection of adequate and appropriate authorities.²¹ Whenever possible, use cases that are factually as well as legally on point. For both ethical and credibility reasons, counsel must advise the court of binding adverse authority and should ordinarily confront it head-on by distinguishing or challenging it. While published opinions of any panel of the Court of Appeal are not binding on any other Court of Appeal panel, any adverse Court of Appeal opinion should likewise be cited and distinguished, if possible.

Unless it is obvious, the argument should state the applicable standard of review at an early point. This refers to the degree of deference the appellate court must give to the findings made in the lower court. “Abuse of discretion,” “de novo review,” and “substantial evidence” are among the most commonly applied standards of review. For greater detail, see § 5.28 et seq. of the Manual.

The use of quotations can be tricky. Avoid at all costs multiple, lengthy quotations from cases, treatises, and similar authorities; quotations should be brief and used for verbal precision or dramatic effect. On the other hand, they are essential when analyzing a statute or jury instruction or other material where the exact wording is critical. Be sure to quote the language in question; do not paraphrase or force the reader to look it up in an external source.

The most important part of the argument is the application of the law to the particular problems posed by your case. You’ll rarely have an authority so completely on point that no discussion is necessary. You’re going to have to argue why Case A and Case B apply and suggest the conclusion you want, and why Case C does not suggest a contrary conclusion (i.e., how it can be distinguished). You will need to deal with general principles, public policies,

²¹ “Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion.” (*People v. Ham* (1970) 7 Cal.App.3d 768, 783; *Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1163.)

rules and subtle variations of rules, and reasons behind rules. In short, you will have to analyze the law and argue what it means or should mean in your case.

You should be alert to possible problems with the reviewability of an issue. If there is any question about whether the issue was properly preserved, the appellant's opening brief should include an argument that it has indeed been preserved, or that the issue should be considered on the merits despite the failure to preserve it. If no argument to avoid the procedural default can be made, the issue itself should be re-evaluated and probably omitted from the brief.

In almost all cases the issue of prejudice will also have to be addressed. The typical standards are reversible per se because of fundamental federal constitutional error, other federal constitutional error (*Chapman v. California* (1967) 386 U.S. 18 [87 S. Ct. 824, 17 L. Ed. 2d 705] [reversible unless lack of prejudice is shown beyond a reasonable doubt]), and state error (*People v. Watson* (1956) 46 Cal.2d 818 [reasonably probable the error affected the outcome]). For greater detail, see §§ 5.39-5.41 in the Manual, chapter 5.

9. *Remember to Federalize*

Although we are appointed to represent our clients in state court, it is good practice to “federalize” issues whenever federal relief might reasonably be sought, so that the client is not precluded from raising the claim in federal court via a petition for writ of certiorari or habeas corpus. (*Duncan v. Henry* (1995) 513 U.S. 364, 365-366 [115 S.Ct. 887, 130 L.Ed.2d 865].) Federal courts will not consider a federal constitutional claim if it has not been exhausted in state court and will not deem the claim exhausted unless it was specifically identified as a federal claim in the state court proceedings. (*Ibid.*) See chapters 5 and chapter 9, §§ 5.42 et seq. and 9.66 et seq. of the Manual for the requirements of federalization.

What might be federalized: Although a number of claims directly implicate an express federal constitutional provision (e.g., right to counsel, confrontation, jury trial, privilege against self-incrimination), others are more indirect. For

example, counsel should federalize an insufficiency of the evidence argument. (*Jackson v. Virginia* (1979) 443 U.S. 307 [99 S.Ct. 278, 61 L.Ed.2d 560].) Further, the clear misapplication of a state statute or state Supreme Court decisional law may constitute a deprivation of federal due process. (*Hicks v. Oklahoma* (1980) 477 U.S. 343 [100 S.Ct. 227, 65 L.Ed.2d 175] [sentencing statute created liberty interest in right to jury sentencing].) Thus, counsel should consider federalizing Penal Code section 654 and other sentencing violations or any trial error or instructional error that “so infused the trial with unfairness as to deny due process of law.” (*Estelle v. McGuire* (1991) 502 U.S. 62 [112 S.Ct. 475, 116 L.Ed.2d 385].)

How to federalize: Federalizing for the purposes of securing federal review need not take much time or space. In some cases, it may be sufficient to merely include a sentence to the effect that the error in question has deprived the defendant of federal due process under the Fourteenth Amendment. Citation to a relevant United States Supreme Court case, if available, is important. For example, if counsel were to argue the trial court misapplied Penal Code section 654, counsel might include in the discussion the following sentence or something similar: “The court’s misapplication of Penal Code section 654 also has deprived defendant of federal due process under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343 [100 S.Ct. 227, 65 L.Ed.2d 175].)”

To preserve a federal issue and adequately exhaust state remedies, counsel should ensure the Court of Appeal opinion acknowledges and addresses it; a petition for rehearing is necessary if the opinion fails to resolve it. (See Cal. Rules of Court, rule 8.500(c)(2).) Exhaustion of state remedies also requires a petition for review to the California Supreme Court raising the federal issue. (*O’Sullivan v. Boerckel* (1999) 526 U.S. 838 [119 S.Ct. 1728, 144 L.Ed.2d 1].)

10. Conclusion

The final section of the brief should concisely summarize the arguments and set forth the precise relief sought.

C. ELECTRONIC FILING & SERVICE

Please see the [Fourth District Filing & Service](#) on ADI's website and the Electronic Filing requirements of the [Fourth Appellate District](#) and [California Supreme Court](#). Electronic filings are filed via [TrueFiling](#).

D. SOME KEYS TO EFFECTIVE WRITTEN ADVOCACY

Chapter 5 of the Manual, "Effective Written Advocacy: Briefing," § 5.83 et seq. deals with the issue of persuasiveness in depth. While effective techniques for written advocacy vary from case to case and individual to individual, certain key points should always be kept in mind:

1. Accuracy

Be scrupulous in describing and providing citations for facts and authorities. Little can hurt your case and your own reputation more than unreliability and inaccuracy in providing information to the court. Errors will be detected and commented upon, perhaps in a published opinion. For example, in *Weinfield v. Weinfield* (1958) 159 Cal.App.2d 608, 612, the court chastised counsel in strong language: "In at least four instances counsel for the appellant in her brief either deliberately or with the grossest carelessness has misquoted the authorities cited to this court. Such conduct is inexcusable upon the part of any lawyer, and places additional burdens upon this court." (See also *In re S.C.* (2011) 138 Cal.App.4th 396, 467 [Table of Authorities was inaccurate; counsel failed to explain how string citations supported the claim; and "exaggeration . . .

is not an effective tool of appellate advocacy.”, 471 [“Counsel should never misrepresent the holding of an appellate decision.”].)

2. Conciseness

Get to the heart of the issue early and keep on point. While you should be careful to include all relevant facts and authorities, do not clutter your brief with unnecessary details or collateral references.

3. Mastery of the Language

The effective advocate must have a firm command of the written word and understanding of the formal elements and structure of the English language. Write simply and clearly, and avoid legalisms. Avoid sentences so long and convoluted they must be read twice to determine the meaning. Be careful to use correct punctuation, grammar, diction, spelling, and capitalization. Proofread conscientiously.

4. Assertiveness

Write as if you expect to win. Beware of overly tentative phraseology, such as, “Appellant respectfully submits that the instruction was wrong,” or worse, “Appellant beseeches this Honorable Court to find the instruction was wrong.” Instead, assert your point positively: “The instruction was wrong.” While you should not, of course, press a manifestly weak argument so vigorously as to detract from your own credibility, you want to communicate a sense of confidence in your position.

5. Appropriate Tone and Manner

Be consistently professional in manner. Strive to maintain decorum without being overly formal or pompous. At all times be respectful to the court and opposing counsel; concentrate on the merits and resist personal attacks. If

opposing counsel's actions have been outrageous, the court will know without being told. If the conduct that offends you is not outrageous, it is not worth mentioning. (See, for example, *In re S.C.*, *supra*, 138 Cal.App.4th at p. 420 [“Spread out over 81 pages is a contemptuous attack by appellant’s counsel on the mental competence of appellant’s daughter. The attack is stunning in terms of its verbosity, needless repetition, use of offensive descriptions of the developmentally disabled minor, and misrepresentations of the record.”], 421 [comparing the intelligence of the minor to that of broccoli].)

6. Avoidance of Distractions from Your Point

In verbal communication most people know to avoid distracting the listener. Some examples of distracting items follow:

Long indented block quotations – When an overly long indented block quotation is used, the reader’s eyes tend to glaze over and jump through the single-spaced dense text. One may grab the reader’s attention to the points being made through paraphrasing or, if necessary, breaking down the quotation in to successive sentences in double-spaced text. Use of long indentations should, therefore, be kept to a minimum. If, for whatever reason, a long indentation is necessary, e.g., to avoid quoting out of context, the most essential point(s) should be highlighted with added emphasis.

Overuse of footnotes – When a footnote appears the reader must look down to the bottom of the page, read the note, then find their place in the text again. If this happens in a particularly complicated passage, there is little hope that the reader can maintain a train of thought throughout the process. Some readers will ignore footnoted material altogether. Use of footnotes should, therefore, be kept to a minimum.

Inconsistency – References should be consistent throughout the brief. For example, the parties should be designated at an early stage and referred to in the same manner thereafter. It does not really matter whether you refer to your

client as “appellant” or “defendant” or by name in the brief, but the designation should be the same throughout.

Overuse of emphasis – Use emphasis sparingly. Exaggerated use of emphasis may imply that you have little confidence in the reader’s ability to understand the point you are making.

Overdone “style” – The brief writer’s primary focus should be clarity. Attempts to impress the reader with literary knowledge, wit, knowledge of foreign languages, or vocabulary usually fall flat.

E. CITATIONS AND DEPUBLISHED CASES.

1. Citations

This topic is treated in chapter 7 of the Manual, “The End Game: Decisions by Reviewing Courts and Processes After Decision,” § 7.1 et seq. The Court of Appeal is used to the system of citation adopted by the California Reporter of Decisions and based on the California Style Manual (4th ed. 2000), but a brief that consistently follows the Harvard “Bluebook” system is acceptable. (Cal. Rules of Court, rule 1.200.) Remember to give the exact page number from which the quote or point you make is located. Full parallel citations for United States Supreme Court cases can be eliminated from the text as long as they are in the Table of Authorities.

2. Depublished Cases

Depublished opinions cannot be cited. (Cal. Rules of Court, rule 8.1115; see also chapter 7, § 7.8 et seq. of the Manual.)

F. CONCLUSION

In many respects the art of appellate briefing is much like the art of advocacy in general: it requires confidence, verbal facility, attention to detail,

and sensitivity to the audience. Appellate briefing, however, demands more specialized skills of the lawyer: familiarity with the formal requirements for briefs, mastery of the written language, in-depth research and analysis, and ability to make a coherent presentation on paper. Given the central role of briefing in the appellate process, a lawyer must command all of these skills – and command them well – to be an effective advocate on appeal.

VI. CLASSIFICATION AND MATCHING OF CASES AND ATTORNEYS

This topic is treated in chapter 1 of the Manual, “The ABC’s of Panel Membership: Basic Information for Appointed Counsel,” § 1.83 et seq.

A. CASE SCREENING AND CLASSIFICATION

Defendant’s appeals in criminal and juvenile delinquency cases are classified statewide as follows:

- A:** Sentence of less than 5 years for trials, less than 10 years for pleas.
- B:** Sentence of at least 5 but less than 10 years for trials, at least 10 but less than 20 years for pleas.
- C:** Sentence of at least 10 but less than 20 years for trials, at least 20 but less than 30 years for pleas.
- D:** Sentence of 20 years or more for trials, 30 years or more for pleas, or any with life maximum.
- E:** Life without possibility of parole.

Special classifications for other types of appeals in criminal cases or quasi-criminal cases include People’s appeals, habeas corpus, and Sexually Violent Predator. Juvenile dependency, family law, conservatorship, paternity, and other

civil cases requiring court-appointed counsel are classified by the type of proceeding.

B. ATTORNEY SCREENING AND CLASSIFICATION

Attorney classifications range from Level I (attorneys who need substantial assistance and are able to handle the simplest cases) to Level V (attorneys with the highest qualifications and extensive relevant experience, whose work indicates an ability to handle the most complex cases on an independent basis). When an attorney's application to be placed on the ADI panel is accepted, their initial classification depends not only on the level of experience (which is, of course, an important factor), but on more qualitative measures such as their training and education, writing ability (two writing samples are evaluated by ADI staff attorneys), commitment to indigent appeals, and similar factors. As we have a chance to assign cases to an attorney and see their work, the attorney's classification is reviewed.

On each case, we use an evaluation form to assess overall performance and itemize specific factors that go into the overall assessment. The evaluations form a cumulative record of performance.

The attorneys on the panel are divided by the location of their office into two geographic groups: San Diego area and Other (San Bernardino/Riverside, Orange County, and out of district – Los Angeles area, northern California). Within each geographical area the attorneys are divided into groups based on their qualifications. There are separate rotations for those who accept appointments primarily in juvenile dependency cases. (See [Appendix A](#) for the "Criteria for Attorney Classifications.")

C. SELECTION OF AN ATTORNEY FOR A PARTICULAR CASE

The matching process begins after the case is screened and classified (A, B, C, D, or E, or one of the special classifications). The first fundamental decision is

whether the case is to be “assisted” or “independent.” Sometimes a hybrid category is used, such as “modified-assisted” (for a case requiring less assistance than usual). This decision is affected by caseload and especially the availability of experienced attorneys. The classification of the case and assisted-independent choice indicate the experience level of the attorney to be selected. Assisted cases are usually assigned to attorneys with less experience on the panel. Independent cases are assigned to the three highest rankings, according to level of complexity.

Once the experience level is determined, an effort is made to choose an attorney in a convenient geographic locale. Within the set of experience level and geographic location, the appointment is offered to the first individual considered to be highly suitable for the particular case on a rotational basis. The judgment of suitability takes account of the attorney’s preferences, number of unbriefed cases outstanding, track record on timeliness, general quality of work, probable availability, special areas of strength or weakness, and numerous other factors. An attorney’s place in the rotation depends upon how recently they were assigned a case, how many unbriefed cases they have, and other factors.

Special requests for appointment outside the normal rotation should be the exception, but we recognize that attorneys may wish to let us know that they have come to a point where they can do no more work on their pending cases for several months. Counsel can email the [Request for Appointment Outside of the Normal Rotation](#) to the Executive Director. We cannot guarantee we can honor such requests, as the suitability of the attorney for a particular case remains the most important factor, and we have to consider fairness to all attorneys in offering cases.

After the attorney is selected, they are offered the case. If the attorney declines or cannot be reached reasonably promptly, we repeat the selection process. In general, criminal case offers expire after three business days and dependency case offers expire after two business days. When an attorney has accepted, we send a recommendation for the appointment to the court. Because

of the many factors considered in making the selection, we can make no representations whether an attorney will continue to receive appointments or how many case offers an attorney may receive.

D. FEEDBACK TO ATTORNEYS

Staff attorneys are always encouraged to give feedback to panel attorneys on their performance in specific cases, and panel attorneys may ask the Executive Director for an overall assessment at any time. Formal feedback is also provided on request. Simply email the [Request for Evaluation of Work](#) to ADI with the opening brief (or respondent’s brief in a People’s appeal).

The assigned project staff attorney evaluates every case handled by a panel attorney. (See [section B](#), *ante*; see also [Appendix B](#) “Attorney Evaluation Form: Explanation of Specific Factors.” These categories are approved by the judiciary for statewide use.)

VII. COMPENSATION PROCEDURES

This chapter gives an overview of the claims process and policies. For greater detail, see the [Statewide Claims Manual](#). It is an alphabetically arranged, encyclopedia-like treatment of the matters involved. See also chapter 1 of the Manual, § 1.128 et seq.

A. GUIDELINES

1. Services

The Court of Appeal has promulgated guidelines to assure the reasonableness of compensation. The guidelines can be found in the [Statewide Claims Manual](#), at Appendix B. The guidelines specify reasonable limits on time expenditures for various functions; they correspond to the items on the claim format prescribed by the Judicial Council.

The guidelines are only a guide for ADI to consider in making recommendations. Time claimed must never be premised solely on the guidelines (for example, by simply dividing the record length by the guidelines' pages per hour). Rather, only *actual* time may be claimed.

While claims in excess of the guidelines are not necessarily unreasonable, the attorney has the burden of showing why the time was needed in the particular case. Counsel should provide detailed explanations in the comments associated with the specific line items. In some cases, Appellate Defenders' staff may contact the attorney to request additional information to support the claim, but in others Appellate Defenders may simply recommend a cut to the guidelines.

Payment may be lower than the guidelines. A lower payment is often recommended, for example, when the case was simple and straightforward, or when the quality of work was substandard.

2. Expenses

All expenses are subject to a general review for reasonableness. Thus, the guidelines specify "actual cost" for postage and telephone expense, but that assumes the postage and telephone expenses are reasonable under the circumstances. The use of an express mail service to meet regular deadlines is not considered a reasonable expense. Extraordinary postage expenses are reimbursable only when the needs of the case require their use. For example, if the court ordered a supplemental brief and allowed only four days for filing, the use of express mail would be reasonable under the circumstances. By contrast, where counsel has delayed working on the brief until a few days before the due date and uses express mail to avoid default, the express service is for counsel's convenience and is not reimbursable. Expert expenses, including translators, and travel expenses have pre-approval requirements. Be sure to check with your ADI staff attorney before incurring these fees.

B. SUBMITTING CLAIMS

1. *Timing*

Counsel may seek final compensation at the conclusion of the case or may file an *interim* claim at the time the opening brief is filed and a *final* claim at the conclusion of the case. All claims should be submitted through ADI's [Case Management System Portal](#).

A final claim needs to be filed within six months of the opinion. File a final claim even if it is for a relatively small amount of money. Judicial statistics are in large part based on final claims; failure to file claims in cases with low hourly totals distorts those statistics and may hurt efforts to improve compensation for appointed attorneys.

To ensure prompt payment, counsel is encouraged to submit final claims as soon as the work is completed. The Judicial Council of California (JCC) permits payment after the opinion is filed, unless later services are anticipated. Filing a final claim waives payment for reasonably foreseeable services performed after submission of the claim.

Interim claims in *Wende/Anders* or *Sade C.* cases are not permitted; final claims may be filed after the time the court has set for filing a pro per brief has expired.

Late claim fee: Counsel who have not already submitted a final claim will be sent a reminder. After that, the file will be closed and sent to storage. Claims filed after the case has been sent to storage must be accompanied by a check for the cost of retrieving, transporting, and refileing the closed file. (Check with ADI about the current fee.) Claims submitted without this payment cannot be processed.

2. *Use of Associate Counsel, Students or Paralegals, and Lexis or Westlaw*

Appointed counsel may use associate counsel, law students, or paralegals where appropriate. Such use of others must not reflect over-delegation of the case to another attorney or to a non-attorney, as set out in ADI's policy (also that of the Appellate Indigent Defense Oversight Advisory Committee).²² (See chapter 1, § 1.79 of the Manual.) Associate counsel's time is to be *combined* with appointed counsel's and reported on the appropriate line of the claim form. (When associate counsel time exceeds a certain "trigger" amount in any particular function, the use of associate counsel time is scrutinized by ADI.) Paralegal and law clerk time is to be reported as an *expense* on the form.

In making recommendations where the claim includes expenses for these services, ADI evaluates the cost of these services as if it were an equivalent amount of attorney time. For example, 11.4 hours of law clerk time at \$25 an hour is the equivalent of 3.0 attorney hours at a \$95 rate ($\$25 \times 11.4 / \95). If with the addition of that 3.0 hours of equivalent time, the claim for the brief is still reasonable, it may be assumed the law clerk saved attorney time. But, if the time is not reasonable, the law clerk expenses may not be compensated, absent special explanation.

Ordinary use of computerized legal research (Lexis, Westlaw, etc.) is not compensable. *Special circumstances* may require the use of computerized legal research. Consultation with ADI before such use is advised. Compensation for extraordinary expenses will be considered on a case-by-case basis.

²² At its December 2015 meeting, the Appellate Indigent Defense Advisory Oversight Committee (AIDOAC) promulgated a statewide policy regarding the use of associate counsel. See [Appendix C](#) for the "AIDOAC Policy on Use of Associate Counsel".

C. PROCEDURES FOR REVIEWING CLAIMS

1. *Recommendation*

ADI policy is to review and evaluate claims expeditiously upon receipt. Claims are initially checked by a paralegal at ADI, then reviewed by a staff attorney. The attorney will evaluate the number and complexity of the issues, both briefed and unbriefed. Using the guidelines and other measures of reasonableness applicable to the particular case, the attorney will calculate a recommendation for the payment to be made for each service.

The recommendation takes into consideration the overall quality of the work. Even if the claim is within the usual guidelines and would otherwise be reasonable, a reduction may be recommended if the brief is evaluated as fair or poor. Conversely, higher payment may be recommended if the extra time was required by the nature of the case and resulted in exceptionally high-quality work. If there was anything unusual about the case that affected the time consumed in drafting the brief, appointed counsel is strongly encouraged to include an explanation with the claim so that the staff attorney can be fully informed.

If the staff attorney perceives a problem, they may make an inquiry to the appointed counsel. If the recommendation is to cut more than five hours or 10% of the claim (10% of the AOB on an interim claim), ADI policy is for the staff attorney to contact counsel.

The staff attorney's recommendation is reviewed by at least one other staff attorney. This review is done to ensure fairness, objectivity, compliance with claim policies, uniformity, and consistency in our recommendations.

2. Steps After Project Recommendation

ADI's recommendation is sent to the JCC for review and approval. Once authorized by the JCC, claims are sent to the state Controller for issuance of the check.

3. Holdback at Interim Stage

Interim claims are paid at 95% of the recommended hours and 100% of the recommended expenses. The final payment is for all approved hours and expenses not compensated at the interim stage.

4. Payment for Cases Not Completed

Sometimes an attorney is relieved prior to completion of the case. Compensation may vary from no compensation at all (e.g., no draft of anything has been written, counsel is relieved because of excessive delay) to full compensation (e.g., complete and usable work product, unavoidable need for new counsel).

5. Time Frame for Processing Claims

ADI makes an effort to complete its processing of a claim within 10 working days of the day it is received, if there are no special problems requiring additional information. Action by the JCC and the state Controller's office requires more time. If you need an estimate, call ADI.

6. More Information

Attorneys with questions concerning compensation procedures and policies are encouraged to consult the [Statewide Claims Manual](#) or talk to the assigned staff attorney.

VIII. ANSWERS TO QUESTIONS COMMONLY ASKED BY CLIENTS

A. CAN I HAVE MY TRANSCRIPTS?

The state will only pay for one copy of the transcripts. Counsel typically uses this copy (unless counsel has an electronic copy), then sends the paper copy to the client at the end of the case. If the client persists, offer to copy them at the client's expense, or tell the client that a family member could take the transcripts to a local copy service for copying at the client's expense. If these measures do not work, consult ADI.

B. CAN YOU SEE ME IN PRISON SO WE CAN DISCUSS MY CASE?

Except in unusual cases, you will not be paid for long-distance travel to visit incarcerated clients. Therefore, you will probably want to tell your client how sorry you are, but funding and time constraints do not permit travel. Suggest the client call you collect if there is something which cannot be put in a letter. Most clients are allowed to make telephone calls (unmonitored calls should be arranged through the client's counselor). Preapproval for travel can be sought when there is a demonstrable need for it. If you believe this is an unusual case, talk to the ADI attorney before you spend any time and money on travel.

C. WHEN WILL MY APPEAL BE DECIDED? CAN YOU SPEED THINGS UP?

Except for juvenile dependency fast-track cases, which usually take six months to a year, tell your client the appeal may take more than a year, and explain why. If there is a special need for speed (for example, you are raising a sentencing issue and the client will have served the sentence before the appeal is decided), you might consider such approaches as a petition for writ of habeas corpus, a motion to expedite the case, a motion for release pending appeal, etc. This topic is discussed in the Manual, § 1.30 et seq. The usual answer to the client in the ordinary case, however, is that there is no way to expedite the appeal.

D. WHEN WILL I COME TO COURT FOR THE HEARING?

Explain that your client's presence is not required for the appeal, because the appeal is based on the written record and briefs. The client will go back to the trial court only if the judgment is reversed or remanded (or, in the case of habeas corpus, an evidentiary hearing is ordered).

E. WHAT HAPPENS IF I GET A REVERSAL?

In most cases, the client will get a new trial or sentencing hearing. It's extremely important for the client to understand that except in rare cases the appeal will not "buy freedom." If you aren't sure just what the consequences of an appeal will be in a given case, discuss it with the ADI attorney so the two of you can figure it out and give the client accurate advice about all the possibilities. Also, notify the trial counsel of the reversal.

Choice of appellate objectives is one area where the client's desires dictate what you do. The most brilliant argument in the world is no good if the person you represent doesn't want the relief you can get for him or her. If there are grounds for vacating a guilty plea but the plea bargain was beneficial, discuss it with the client before proceeding further. Most of the time the client wants to keep the benefits of the bargain and not go back to square one.

APPENDIX A

CRITERIA FOR ATTORNEY CLASSIFICATIONS

Level 1. Attorneys who are fairly new to the panel and need substantial assistance.

Expected work product: Must demonstrate promising writing, research, and analytical skills and make steady progress toward skills required of higher classifications.

Typical ADI cases: Class A or B cases on an assisted basis.

Level 2. Attorneys with some relevant experience who need some but reduced assistance in cases and whose work indicates the ability to handle cases somewhat more difficult than the simplest.

Expected work product: Must produce work of at least standard quality, requiring little assistance to perform basic duties. As a general policy, attorneys at this level must demonstrate reasonable progress toward handling independent cases.

Typical ADI cases: Class A or B cases on a modified-assisted basis.

Level 3. Attorneys with a moderate amount of relevant experience, whose work indicates ability to handle cases of intermediate complexity on an independent basis.

Expected work product: Must consistently produce work of at least good to very good quality, requiring assistance only to perform more complex duties.

Typical ADI cases: Classes A through C on an independent basis.

Level 4. Attorneys of superior qualifications and considerable relevant experience, whose work indicates ability to handle complex cases on an independent basis.

Expected work product: Must consistently produce work of at least very good quality, requiring assistance only to perform very difficult and complex duties.

Typical ADI cases: Classes A through D on an independent basis.

Level 5. Attorneys with the highest qualifications and extensive relevant experience, whose work indicates ability to handle the most complex cases on an independent basis.

Expected work product: Must produce work of consistently very good to excellent quality, requiring assistance only at highly sophisticated levels.

Typical ADI cases: Cases of all classes on an independent basis.

APPENDIX B

ATTORNEY EVALUATION FORM: EXPLANATION OF SPECIFIC FACTORS

A. Issues – Selection and Definition

1. Identifies Standard Issues

Identifies standard issues which would be apparent to an attorney having knowledge of the record and a reasonable awareness of existing procedural and substantive law.

2. Identifies Subtle Issues

Shows depth of insight and analytical skill in identifying and developing issues. Identifies issues that are not obvious and perceives their implications.

3. Identifies Current Issues

Identifies current issues which would be apparent to an attorney having knowledge of the record and familiarity with recent trends and the cases then pending in the appellate courts of California and the United States.

4. Evaluates Issues Properly

Exercises sound judgment in determining the merit of each issue and treating each issue according to its merits. Gives each issue its share of the brief, but no more. Arranges issues in the brief in an appropriate order. Eliminates issues which are only marginally arguable if they detract from the remaining issues or the tone of the brief as a whole.

5. Defines Issues Clearly

Demonstrates competency in framing each issue. Defines the scope of the issue. Clearly understands and phrases the exact question to be decided by the court. Uses effective argument headings.

B. Research

1. Performs Thorough Research

Thoroughly researches all relevant aspects of each potential issue, becoming familiar with the law on related issues or “sub-issues” when necessary. Finds the most recent cases. Shows resourcefulness and knowledge of available materials.

2. Selects Appropriate Authority

Cites adequate authority for the principles relied upon, neither string-citing unnecessarily nor making statements without support. Whenever possible uses cases which are factually on point as well as legally relevant. Takes account of adverse authority.

3. Cites Authority Accurately

Cites and quotes legal authorities accurately; does not intentionally or negligently misrepresent the facts or law contained in authorities.

4. Checks Current Validity of Authority

Cites no cases which have been overruled, depublished, or granted review in the California Supreme Court.²³

C. Argumentation

1. Organizes Argument.

Presents position in a coherent manner. States facts, sets forth legal principles and authorities, argues, and summarizes in a logical, orderly progression. Keeps objective of argument in mind; does not ramble or dwell on marginal matters.

²³ Subject to California Rules of Court, rule 8.1115(e) [Citation of opinions when review of published opinion has been granted.]

2. Covers All Points Essential to Position

Is aware of and addresses all points logically or legally necessary to the argument. Applies law to facts. Argues prejudice. Anticipates and discusses failure-to-object, waiver issues.

3. Handles Authority Skillfully

Analyzes authorities accurately and perceives their implications. Argues from analogy and distinguishes or challenges adverse authority skillfully.

4. Demonstrates Proficiency in Advocacy Skills

Shows confidence in position. Presents strong arguments forcefully, weak ones credibly. Takes controversial stand where necessary. Maintains appropriate tone and balance. Handles facts sympathetic to opposition capably, without adopting defensive or insensitive posture.

5. Is Consistently Professional in Manner

Maintains decorum without being pompous or overly formal. Is respectful to the court and opposing counsel. Concentrates on merits and refrains from personal attacks.

D. Style and Form

1. Writes Fluently

Shows mastery of written language. Presents ideas clearly and concisely. Avoids legalisms.

2. Uses Correct Grammar, Diction, Spelling, Capitalization, and Punctuation

Demonstrates command of the structure and formal elements of the English language. Does not detract from professional image by displays of carelessness and illiteracy. Proofreads carefully.

3. Presents Statement of the Case Properly

Summarizes only those procedural facts relevant to the appeal itself or the specific issues to be decided. Cites to record.

4. Presents Statement of Facts Properly

Summarizes in the statement of facts only those facts supported by the record. Adequately cites to the record. Is scrupulous in presenting the facts accurately and in the light most favorable to the respondent. Clearly separates and labels the defense evidence. Writes the pertinent facts in narrative form, not a witness-by-witness account.

5. Uses Correct Citation Form

Uses correct citation form for both legal authorities and the appellate record.

6. Follows Rules and Good Practice on Form and Technical Aspects of Pleadings

Follows prescribed format and formal requirements as to typing, binding, copying, and distributing of briefs and other pleadings. Gives briefs neat, orderly, professional appearance.

E. Responsibility

1. Makes Sure Record is Adequate

Whenever necessary reviews the trial exhibits and the superior court file. Augments the record as needed.

2. Makes Use of Opportunities for Reply Briefs and/or Oral Argument

Orally argues or files a reply brief whenever necessary. Bases the decision to request or waive oral argument upon the appropriateness of argument, not upon convenience.

3. Is Reliable and Cooperative in Working with ADI

Promptly answers letters and returns phone calls. Keeps appointments. Meets informal interim deadlines within a reasonable time. Accepts reasonable recommendations and suggestions that are not in conflict with the attorney's duty to their client or the attorney's professional judgment.

4. Observes Deadlines

Files all motions, briefs, and petitions on or before the date due, requesting extensions of time if, but only if, necessary.

F. Relationship with Client

1. Communicates Reliably

Writes the client soon after appointment, answers correspondence, and provides the client with copies of all filings. When the court's opinion is issued, promptly advises the client; explains how to file their own petitions if the attorney sees no merit in proceeding further.

2. Faithfully Pursues Client's Interests

Selects issues to maximize effectiveness of appeal for client; acts zealously and conscientiously in fulfilling obligation to client, regardless of perceived rewards in case for attorney.

APPENDIX C

AIDOAC POLICY ON USE OF ASSOCIATE COUNSEL²⁴

The AIDOAC guidelines are based on principles articulated by the California Supreme Court and Courts of Appeal and reflect the appellate projects' standards for assessing the performance of appointed counsel. They are based, as well, on the broad ethical responsibilities of attorneys, recognizing that the failure adequately to supervise the work of subordinate attorney or non-attorney employees or agents is a failure to act competently on behalf of a client. (See Rules Prof. Conduct, [rule 1.1 and related annotations](#).)

Special considerations:

- *Court- or project-specific requirements:* Individual courts or projects may have additional or more specific requirements. Counsel must consult with the applicable project for such requirements.
- *Limitation for assisted cases:* AIDOAC has determined that attorneys in assisted cases may not use associate counsel, except with prior approval of the project executive director upon a showing of extraordinary circumstances.

A. Basic Principle of Personal Responsibility

The attorney of record at all times has complete, final, and personal responsibility for the case. It is acceptable for the attorney in an independent case to employ others to *assist* in any of the attorney's functions. The attorney personally, however, is fully accountable for what has or has not been done on the case. The projects use a detailed, comprehensive method of evaluating attorneys' performance and selecting them for particular cases. The projects' quality controls would be undercut if attorneys were to allow others, not subject to this system, to take over important aspects of a case. The projects examine every category for which associate counsel or law clerk time is claimed, to determine whether appointed counsel has been sufficiently engaged to fulfill expectations.

²⁴ See Chapter 1, § 1.79 in the Manual.

The projects expect the quality of an attorney's work at all stages to reflect his or her own experience and other personal qualifications. This policy of personal accountability applies, not only to final filed documents, but also to preliminary drafts, if any, submitted to the projects and discussion of cases with a project staff attorney. Appointed counsel must be prepared to communicate personally with the project on all substantive, legal, strategic, ethical, and other important matters related to the case. Drafts and communications must conform to what is reasonably expected of attorneys at the experience level of appointed counsel.

Over-delegation may negatively affect the project's evaluation of appointed counsel's performance. Any substandard work produced by associates will damage the standing of the panel attorney personally.

B. Specific Responsibilities of Appointed Counsel

The appointed counsel is responsible for the following tasks, among any others the handling of a case may require: reviewing the entire record, completing it, and selecting issues; filing appropriate briefs, motions, applications, and other pleadings; reviewing all filings; making any personal appearances that adequate representation might require, including oral argument; and ensuring prompt, proper, and thorough communication with the client, the project, counsel for all parties, trial counsel as necessary, and the court. In performing these tasks, counsel must also ensure all applicable deadlines are met. To expand on some of these areas:

1. Reviewing the entire record, completing it, and selecting issues

Review of the entire record for issue selection and mastery of essential facts is an especially critical aspect of representation. Counsel must ensure the record is adequate for performing this task and complete it if necessary. While associate counsel may assist in record completion and review by performing such functions as taking notes on the transcript or writing a summary of the case and facts, ultimate delegation of this supremely important responsibility to another is unacceptable. The time appointed counsel spends personally reviewing the record must be adequate to assure *all* potential issues in the record have been spotted and considered. Counsel must also be familiar with the details of the record to

understand nuances of fact that might affect the assessment and drafting of arguments.

2. Filing appropriate briefs and other pleadings

The opening brief is usually the pivotal document in an appeal, and counsel must put substantial personal effort into filing a product of appropriate quality. It is the attorney's own responsibility to confirm that the facts are stated appropriately, in accordance with appellate standards, and are supported by accurate citations to the record; to ensure all appropriate authorities have been considered and all citations are accurate and up to date; and to see that the document is proper and complete in both form and substance, complies with all requirements of the Rules of Court, accurately states all facts and law, and is argued intelligibly, coherently, grammatically, and persuasively. Similar responsibilities apply to reply briefs, petitions for rehearing or review, motions and applications, and any other filing.

3. Reviewing all filings by others

Other aspects of representation also require close personal attention. Decisions about reply briefs, oral argument, rehearing and review, etc., cannot be made properly unless appointed counsel reviews such filings as the respondent's brief and the opinion, plus any co-appellant's briefing, court orders, and any other filing that may affect counsel's exercise of judgment.

4. Making personal appearances

Personal appearances (such as oral arguments) require special care, because supervising another's work in a courtroom is essentially impossible. Unless advance arrangements have been made, the projects and the courts expect appointed counsel to make all appearances personally. The panel attorney must consult with the project before using associate counsel at oral argument. The court may have to pre-approve the appearance of associate counsel, as well. In certain circumstances, the court or project may also require the client's consent. Requirements may vary from one court and project to another.²⁵

²⁵ ADI note: Our courts specifically expect counsel to discuss oral argument by associate counsel with ADI ahead of time and get the court's preapproval, as well.

5. *Engaging in proper communication with the client, court, project, and others*

Counsel is personally responsible for ensuring prompt, proper, and thorough communication with the client, the court, the project, counsel for all parties, trial counsel as necessary, and any other person or entity the needs of the case may require. Counsel must fully comply with the ethical requirements of adequate client communication, including providing copies of significant documents and keeping the client informed of significant developments in the case. (Bus. & Prof. Code, § 6068, subds. (m) & (n); rule 1.4(a)(3), Cal. Rules Prof. Conduct.)

C. Compensation

Appointed counsel must report on all compensation claims any usage of associate counsel and indicate how much of that counsel's time is included in the hours claimed. These principles apply:

Meaning of "associate counsel": Associate counsel must have been an active member of the California State Bar at the time the services were performed for that individual's time to be billable as "counsel" time. If that was not the case, the time is billable only as law clerk or paralegal time – an expense not to exceed \$25 per hour.

Compensable costs of associate counsel: A claim with associate counsel time will be judged under the same guidelines and standards of reasonableness as those applicable to single-attorney claims. The use of associate counsel does not increase the time payable for any service performed.

Claiming associate counsel's time: Associate counsel time is reported as a part of appointed counsel's time for any specific task. Associate counsel time included in the claim is then itemized in the associate counsel attachment, which must state the name and California State Bar number of the associate counsel. These special rules apply:

- Counsel must first claim all of his or her own billable time and only then add any associate counsel time deemed billable on top of that: It is essential for the project to know how much time appointed counsel personally spent on the case, in order to

assess counsel's compliance with these associate counsel policies. Counsel must not cut his or her own time in order to claim associate counsel time: doing so will understate appointed counsel's own involvement and cause the project, AIDOAC, or court to question whether counsel exercised appropriate control over the case.

- *In the attachment for itemizing associate counsel's time, the hours shown must be only those actually claimed (as opposed to those spent):* In determining how much time appointed counsel personally spent on each function, the projects take the total hours reported for each function and subtract the itemized hours for associate counsel. That calculation requires that the itemized hours be only those actually included in the hours claimed. If counsel wishes to state unclaimed associate counsel time to show the extent of work performed on the case or give the attorney due credit, the comments are the appropriate place, not the itemization chart.

— End of AIDOAC Policy Statement —