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March 13, 1984

Lynne Lester
District of Columbia Bar
1426 H Street, N.W.
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Dear Lynne:

Pursuant to D.C. Bar Division Guideline 13(c), I am pleased to submit to you for distribution to the Board of Governors and to the other Divisions of the Bar, Comments of the Committee on Court Rules of Division IV of the D.C. Bar on Proposed District of Columbia Court of Appeals Rule 27(e). These comments are in response to a notice of November 15, 1983, from the District of Columbia Court of Appeals proposing an amendment to D.C. Court of Appeals Rule 27(e). That proposed rule would eliminate the provision for the filing of motions to withdraw in criminal appeals under Anders v. California, 386 U.S. 738 (1967) on the ground that the appeal is "wholly frivolous". Instead, under the proposed rule, appointed counsel would be required to file an advocate's brief setting forth the best arguments from the record in support of the appeal.

The Division IV comments oppose the proposed elimination of Anders briefs. We recommend that the Court require Anders briefs to be comprehensive, discussing each issue that the defendant wishes raised and any other issues arguably presented by the record, but which appointed counsel believes to be "wholly frivolous".

The Steering Committee of Division IV, with one dissent, approved these comments on March 5, 1983. It is our intention to submit the comments to the Court of Appeals on March 21, 1984.

Sincerely,

NOEL ANKETELL KRAMER
Chairperson, Division IV
(Courts, Lawyers, and the
Administration of Justice)

COMMENTS OF THE COMMITTEE ON COURT RULES

OF DIVISION IV OF THE D.C. BAR ON PROPOSED

DISTRICT OF COLUMBIA COURT OF APPEALS RULE 27(e)

Noel Anketell Kramer, Chair
John P. Hume
Larry P. Polansky (Dissenting)
Claudia Ribet
John Townsend Rich
Arthur B. Spitzer

Steering Committee, Division IV

John T. Boese, Co-Chairman
Gerald P. Greiman, Co-Chairman
John Townsend Rich
Richard B. Nettler*

Committee on Court Rules

Dated: March 8, 1984

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"The views expressed herein represent only those of Division IV: Courts, Lawyers, and the Administration of Justice of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors."

*Principal Author

We are writing to submit the comments of the Court Rules Committee of Division IV of the District of Columbia Bar regarding proposed Rule 27(e) to amend the Rules of the District of Columbia Court of Appeals. The consensus of the committee is that proposed Rule 27(e) should not be adopted.

The rule pertains to criminal appeals in which a defendant's court-appointed counsel believes the appeal to be wholly frivolous. Under current practice, deriving from Anders v. California, 386 U.S. 738 (1967), counsel may file a request to withdraw, accompanied by a brief referring to anything in the record that might arguably support the appeal (the "Anders brief"). A copy of the brief is furnished to the defendant, and time is allowed him or her to raise any points that he or she chooses. Thereafter, the Court, after a full examination of all of the proceedings, decides whether the case is wholly frivolous. If the Court finds that the appeal is wholly frivolous, it may grant counsel's request to withdraw and dismiss the appeal.

In contrast, Proposed Rule 27(e) provides:

> No court-appointed counsel in a criminal appeal shall file a motion to withdraw, based on Anders v. California, 386 U.S. 738 (1967), on the ground that the appeal is "wholly frivolous." Id. at 744. Instead, counsel shall file an advocate's brief setting forth the best argument(s) from the record that might support the appeal. In doing so, counsel shall not be held to violate the Code of Professional Responsibility even though, in counsel's own judgment, the appeal lacks merit and counsel might otherwise file a motion to withdraw under Anders, supra.

Proposed Rule 27(e) apparently is a product of the Court's concern with whether indigent defendants are receiving effective appellate representation and the amount of time being spent on considering motions to withdraw. See Gale v. United States, 429 A. 2d 177 (D.C. 1981)(Ferren, J., dissenting). See also, Streater v. Jackson, 691 F.2d 1026 (D.C. Cir. 1982). We do not believe that the proposed rule will provide any more effective representation than is currently provided indigent defendants in those cases where court-appointed counsel believe that an appeal is "wholly frivolous", and indeed may result in less effective representation. Nor do we believe that the proposed rule will have any substantial effect on the amount of time spent on these particular cases. Instead, we recommend that the Court stricly require court-appointed counsel to provide Anders briefs which comport with the requirements set forth in Suggs v. United States, 391 F.2d 971, 978 (D.C. Cir. 1968), and which are also embodied in §VII(C)(3) of the D.C. Circuit's Handbook of Practice and Internal Procedures,[1/] and that the Court consider other options discussed herein.

Consistent with Anders, this Court's Internal Operating Procedures, ¶IV.D, presently provide that the Court may not dispose of an Anders motion "without review of the record on

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1/ Although the Court has adopted some of the requirements set forth in Suggs (see Bell v. United States, 457 A.2d 390 (D.C. 1983)), apparently the Court has never explicitly adopted all of the requirements.

appeal, including the reporter's transcript." In Gale v. United States, supra, 429 A.2d at 181-182, Judge Ferren described the problems the Court faces as follows:

> [A]lthough appointed counsel has a duty to make a 'conscientous examination' of the record and to brief 'anything in the record that might arguably support the appeal,' * * * Anders in practice invites counsel who sees no appellate issue to file either a short withdrawal memorandum, as he did here, or a comprehensive withdrawal brief. Either alternative presents a problem. If this court receives a routine memorandum, we feel obliged to spend a substantial amount of time studying the record for a clue 'that might arguably support the appeal.' * * * On the other hand, if we do receive a comprehensive brief, we wonder -- and surely the appellant will, too -- why counsel who found so much to discuss did not do so as an advocate instead of, in effect, as a judge ruling against the client. In short, the Anders dictum typically forces either the court to undertake the role of the lawyer, or the lawyer to undertake the role of the court. This role reversal does not well serve the administration of justice.

In the first place, we fail to see why the Court is unwilling or unable to enforce a requirement that an Anders brief be a "comprehensive" one which discusses each issue that the defendant wishes to raise and any other issue arguably presented by the record, but which appointed counsel believes to be "wholly frivolous". If members of the Bar were convinced that an inadequate Anders brief could result in their failure to receive further appointments or even, in an extreme case, in their suspension from practice before the Court, then briefs would be submitted which would in fact assist the Court and minimize the amount of time that the Court must spend.

Furthermore, a lawyer is not acting "as a judge" when he writes a comprehensive memorandum explaing why the issues that the defendant wishes to raise and other issues apparently presented by the record are frivolous. Lawyers regularly write such memoranda for clients to explain why it would be unwise for the client to press a certain argument on appeal or in another proceeding, or to explain why it would be unethical for the lawyer to press certain arguments. It has long been thought that lawyers perform a valuable function by thus screening out frivolous issues before cases reach court.

What makes the Anders memorandum anomalous, of course, is that it is not only written to advise the client, but it also advises the Court why counsel believes he or she cannot contunue to represent the defendant. Since the Court will ultimately be deciding the appeal, the requirement of a comprehensive memorandum may assist the Court but it places the counsel in conflict with the interests of his or her client. Notwithstanding this conflict, we believe that requiring a comprehensive Anders brief is preferable to the proposed rule because it ultimately benefits the Court, and, in contrast to the proposed rule, benefits the defendant.

If Anders motions are no longer accepted and appointed counsel is required to fully brief every case, particularly those which he or she believes are clearly frivolous, review of indigent appeals creates an anomaly. As noted by the court in

People v. Wende, 25 Cal. 3d 436, ___, 158 Cal. Rptr. 839, 843, 600 P.2d 1071, 1075 (1980), under a rule which allows for an Anders motion:

> counsel may ultimately be able to secure a more complete review for his client when he cannot find any arguable issues than when he raises specific issues, for a review of the entire record is not necessarily required in the latter situation.

Less effective review results where appointed counsel who believes that an appeal is frivolous is nevertheless required to file an advocate's brief, particularly since he or she may have no obligation to present all issues to the Court. Cf. Jones v. Barnes, ___ U.S. ___, 103 S.Ct. 3308 (1983).2/ "Counsel might raise only one claim of error, which the court determines does not require reversal, while other, potentially reversible, errors were not discovered." State v. Horine, 64 Or. App. 532, ___, 669 P.2d 797, 804 (1983). Moreover, where appointed counsel is obligated to brief a case he or she believes is frivolous, such may ultimately result in the filing of a brief which is against the client's interest because the advocate's brief will certainly be colored by the appointed counsel's belief that the appeal is frivolous. Compare State v. Horine, supra, with Commonwealth v. Moffett, 418 N.E. 2d 585, 590-591 (Mass. 1981). Accordingly, because full briefing does not necessarily ensure that the advocate's brief filed by court-appointed counsel will be any better than the "'thin' Anders memorandum" that some counsel now

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2/ In Jones the Supreme Court made it clear that, under the sixth amendment, the right to counsel does not require that appointed counsel present all non-frivolous issues to the appellate court.

file, and may even provide less effective review of indigent appeals, we believe that proposed Rule 27(e) should not be adopted.

With respect to the Court's workload concerns, we do not believe that the proposed rule will provide any substantial relief from that problem. As Judge Ferren recognizes in Gale, supra, 429 A.2d at 183, n.12, the Court's workload would probably remain the same or slightly increase by reviewing each case after full briefing. In any event, we believe that requiring a comprehensive Anders brief would actually assist the Court in reducing the amount of time spent on cases which the Court ultimately agrees present no non-frivolous issues.

Finally, we have serious misgivings concerning the Court's statement in the proposed rule that "counsel shall not be held to violate the Code of Professional Responsibility even though, in counsel's own judgment, the appeal lacks merit * * *." We believe that carving out an exception to counsel's normal ethical responsibilities, by allowing counsel to brief issues which he or she believes are frivolous as if that belief did not exist, is antithetical to the ethical responsibilities that counsel should be required to maintain. Moreover, we do not think that allowing counsel to contravene the principles embodied in the Code of Professional Responsibility in this fashion will ultimately further the administration of justice.

In State v. Horine, supra, the Oregon Court of Appeals reviewed other approaches to the Anders problem, including the elimination of Anders briefs, and reviewed the relevant Supreme Court decisions since Anders. The Court concluded that appointed counsel should be allowed to file a motion to withdraw if there are no non-frivolous issues to present to the Court. The Court went on to state that:

> When appointed counsel has made such a determination and has notified this court and the appellant, the appellant will be allowed to raise whatever issues he or she chooses to raise. If the appellant appropriately raises issues before this court, we will consider those issues as we would otherwise do. If the appellant pro se raises no issues, the conviction will be affirmed. We will not search the record for error any more than we do in other criminal appeals. [669 P.2d at 806].

We do not recommend that the Court adopt the abbreviated Oregon procedure because it relegates an indigent defendant to proceeding pro se on the basis of his or her counsel's unreviewed determination that the appeal is frivolous. Nevertheless, we refer the Court to the Horine decision because it discusses options which we believe are preferable to the proposed rule.

The committee has also reviewed the recommendations of the Criminal Rules and Legislation Committee of Division V. While we concur with that committee's statement that the principal problem underlying the subject matter of the proposed rule is the quality of appellate representation now being afforded indigents, we, for the reasons stated above, do not agree with that committee's conclusion that the rule should be adopted.

If, however, the Court believes that the proposed rule should be adopted, we further wish to comment on modifications of the proposed rule that have been recommended by the Criminal Rules and Legislation Committee. With respect to modifying the proposed rule to apply to all counsel, we oppose that modification. The Anders process as well as Proposed Rule 27(e) are conceptually inapplicable to retained counsel. In Anders v. California, supra, the Supreme Court was concerned solely with the duty of a court-appointed appellate counsel to prosecute an appeal after he had determined that the appeal had no merit. In fashioning a remedy where court-appointed counsel believed his client's case to be wholly frivolous, the Court stated that the procedures it outlined "will assure penniless defendants the same rights and opportunities on appeal - as nearly as practicable - as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." 386 U.S. at 744-745. Obviously, if retained counsel wishes to dismiss an appeal it will be with the consent of his or her client. Otherwise, if retained counsel no longer wishes to represent the defendant because he or she cannot ethically pursue an appeal which is believed to be without merit, the defendant can either retain other counsel or act as his or her own counsel. Proposed Rule 27(e) is not inconsistent with the appearence of equal protection of the laws. It seeks to accommodate the right of indigent defendants to an appointed counsel on appeal with the

belief that the relationship between appointed counsel and the defendant may not always be in the best interest of the defendant where the appointed counsel believes the appeal is frivolous.

We oppose the modification of the proposed rule so as to apply to retained counsel also because we believe that, from an ethical standpoint, application of the proposed rule to retained counsel is inappropriate. There is no overriding interest, as there might be with court-appointed counsel, in allowing retained counsel to brief issues that he or she believes to be frivolous. The Court simply should not be sanctioning departures from the principles embodied in the Code of Professional Responsibility.

With respect to the recommended modification of restricting proposed Rule 27(e) to direct appeals, we do not see how the purpose behind elimination of Anders briefs in direct appeals is not also relevant to collateral appeals. If counsel is appointed to represent indigents in a collateral appeal, his or her representation should not be allowed to be any less effective than the counsel who is appointed for a direct appeal. Cf. Stanford v. Iowa State Reformatory, 279 N.W. 2d 28, 34 (Iowa 1979). If the purpose of the proposed Rule is to maintain an adversary process that the court feels is both lacking and necessary in the Anders' situation, then maintanence of that adversary process should be no less important for collateral appeals. Both direct and collateral appeals may be "patently meritless," but once indigent defendants are given appointed-counsel, that counsel's obligation to his or her client should not depend on the type of appeal filed.