

LEGAL ETHICS OPINION 1005

COURT-APPOINTED ATTORNEY –  
DUTY TO FILE POSTCONVICTION  
MOTIONS.

You advise that you are a solo practitioner and one of the few attorneys in your area on the court-appointed list. In a large percentage of your court-appointed cases that result in felony convictions, you are requested by your clients to file numerous post-sentencing motions. You also state that it is not unusual for you to receive such requests up to six months after the sentencing.

You wish to know if you have a duty to file post-conviction motions on behalf of a court-appointed client when the request is made more than thirty days after his sentencing.

Disciplinary Rule 7-101(A) [DR:7-101] requires a lawyer to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules. This rule indicates that you do have a duty to file motions on behalf of your clients. However, this leads to a question as to whether the person you were appointed to represent at trial is still your “client” following conviction. In other words, a crucial question to be answered is when does your term of representation end.

There does not appear to be any black-letter law as to how long a court-appointed counsel's representation exists. However, Virginia Code Section 19.2-159 provides, in part, that the trial court, “shall appoint competent counsel to represent the [indigent] accused in the proceeding against him, *including an appeal, if any, until relieved or replaced by other counsel.*” (Emphasis added) The Supreme Court has construed this provision to require court-appointed counsel at any stage of the appellate process — including appeals to both the Court of Appeals and the Supreme Court. *Dodson v. Director, Department of Corrections*, 233 Va. 303, 351 S.E.2d 23 (1987).

The use of the phrase “until relieved or replaced” indicates that an individual attorney who is appointed to defend an indigent remains counsel to the indigent for purposes of any appeal unless relieved or replaced.

The Committee feels that a consistent reading of Section 19.2-159 indicates that a court-appointed counsel's term of representation extends past the date of conviction until such a time that all post-trial remedies are either exhausted or barred. Thus, you should continue to file motions on behalf of your clients until the above conditions ending representation occur.

However, the Committee notes two exceptions to this general rule. First, you have no obligation to file a motion that you feel is unwarranted by existing law and which cannot be supported by a good faith argument for modification of the existing law. In fact, DR:7-102(A)(2) places an affirmative duty on you not to file such a motion.

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The second exception to the general rule is that it is entirely proper for you to file a motion for leave to withdraw if that withdrawal can be effected without material prejudice to your client. (DR:2-108(B)(1)) Whether or not this leave to withdraw is granted is, of course, entirely within the discretion of the court. (DR:2-108(C); Rules of the Virginia Supreme Court, Rule 1:5)

Thus, in conclusion, the Committee opines as follows:

1. You have an obligation to file post-trial motions on behalf of your court-appointed client as long as you are representing the client.
2. You are deemed to be representing the client until you are relieved, replaced, or all post-trial remedies are either barred or exhausted.
3. You have an ethical duty not to file motions which are not warranted by existing law and which cannot be supported by a good faith argument for modification of the existing law.
4. You always have the option to file a motion for leave to withdraw as counsel if that withdrawal can be effected without material prejudice to your client.

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