

LEGAL ETHICS OPINION 1530

TERMINATION OF REPRESENTATION
— ZEALOUS REPRESENTATION:
DUTY OF REPRESENTATION OF
CRIMINAL CLIENT DURING
PENDENCY OF MOTION TO
WITHDRAW WHEN ATTORNEY
BELIEVES FURTHER MOTIONS
WOULD BE FRIVOLOUS.

You have presented a hypothetical situation in which an attorney was appointed to represent an indigent on a rape charge. The case was tried to a jury and defended on a consent theory. The defendant was convicted. The defendant instructed the attorney to file an appeal and to take the appeals as far as possible, to any court in the land. You state that in the attorney's opinion, the sole issue at trial was the credibility of the complaining witness.

You state that there were additional charges pending against the defendant and that the attorney represented the defendant on two of the additional charges which were tried together. The attorney was then "fired" by the defendant and allowed by the court to withdraw. The attorney then filed a motion to withdraw as counsel in the Virginia Court of Appeals, but the motion was denied.

You state that in accordance with *Anders v. California*, 386 U.S. 738 (1967), the attorney filed a petition for appeal, stating that the appeal was filed at the direction of the defendant and against the advice of counsel. The petition for appeal was then denied by the Court of Appeals.

You state that after receiving the order from the Court of Appeals and researching his duty to file further appeals, the attorney determined that he could not file a Motion to Rehear in the Court of Appeals due to a lack of good faith belief in the motion. The attorney then drafted the motion and mailed it to the defendant with an explanatory letter as to the procedure to be followed. The attorney then drafted and filed a motion to withdraw and closed the file.

You have asked the committee to opine whether, under the facts of the inquiry, the attorney has a duty to file further appeals for the defendant.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:2-108 which outlines the procedures for withdrawal and termination of representation; DR:7-101(A) which requires a lawyer to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules; and DR:7-102(A)(2) which proscribes a lawyer from knowingly advancing a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

Committee Opinion
May 11, 1993

The committee has consistently opined that the general rule requires a court-appointed attorney to meet his duty to file post-trial motions on behalf of his client until he is relieved, replaced, or all post-trial remedies are either barred or exhausted. In addition, however, the committee recognizes two exceptions to this general rule: (1) the attorney has no duty to file a post-trial motion that is unwarranted by existing law and which cannot be supported by a good faith argument for modification of the existing law; and (2) it is not improper for an attorney to file a motion for leave to withdraw if that withdrawal can be effected without material prejudice to the client. *See* LE Op. 1005.

In the hypothetical facts you present, the committee is without sufficient information to determine if the attorney's withdrawal may be effected without material prejudice to the defendant. In any case, the committee recognizes that that is a decision to be made by the appellate court. *See* DR:2-108(C); Rules of the Virginia Supreme Court, Rule 1:5.

You state, however, that the attorney lacks a good faith belief in the Motion to Rehear. The committee is of the opinion, then, that although ordinarily the attorney would have a duty to proceed with further post-trial remedies, that duty has been displaced by his ethical duty not to file unwarranted or frivolous motions. Thus, the committee opines that the attorney no longer has a duty to file further post-trial motions.