

LEO 1880:

OBLIGATIONS OF A COURT-APPOINTED ATTORNEY TO ADVISE HIS INDIGENT CLIENT OF THE RIGHT OF APPEAL FOLLOWING CONVICTION UPON A GUILTY PLEA; DUTY OF COURT-APPOINTED ATTORNEY TO FOLLOW THE INDIGENT CLIENT'S INSTRUCTION TO APPEAL FOLLOWING A GUILTY PLEA WHEN THE ATTORNEY BELIEVES THE APPEAL WOULD BE FRIVOLOUS.

QUESTIONS PRESENTED:

1. Is it ethically permissible for a court-appointed attorney¹ to file an appeal following his client's guilty plea² if the attorney believes such appeal to be frivolous?
2. Is a court-appointed attorney ethically obligated to advise his indigent client that the client has an opportunity to file an appeal under federal constitutional law to a conviction or sentence based on a plea of guilty when the attorney believes that no grounds for appeal exist?
3. Must a court-appointed attorney petition for an appeal if his client so requests when the attorney believes such appeal would be frivolous?

APPLICABLE RULES OF PROFESSIONAL CONDUCT:

Rules of Professional Conduct 1.1³, 1.2(a)⁴, 1.3(a)⁵, 1.4(b)⁶, and 3.1⁷ apply to the issues addressed in this opinion.

¹ All references to court-appointed attorneys in this Opinion shall be deemed to include public defenders.

² All references to guilty pleas in this Opinion shall be deemed to include pleas of *nolo contendere*.

³ **RULE 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

⁴ **RULE 1.2 Scope of Representation**

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

DISCUSSION:

The Committee has determined that the answer to the three questions set forth above is “yes.”

An appeal from a conviction or sentence flowing from a guilty plea will more often than not be groundless. However, a court-appointed attorney instructed by his indigent client to petition for an appeal must do so even when the attorney deems such appeal to be frivolous. The attorney does not violate Rule 3.1 by so doing. Federal constitutional and Virginia law compel such action, and deprive the court-appointed attorney of the authority to decline to follow his client’s instruction. Beyond that, as detailed hereafter, the constitutionally mandated procedures applicable to frivolous appeals provide that the indigent’s attorney assert that, in his opinion, the appeal lacks merit and move to withdraw from representation. Thus, the attorney is at no risk of violating Rule 3.1 because he is mandated by law to file a frivolous appeal if requested by the client and the relevant pleadings will contain the attorney’s candid assessment that the appeal lacks merit.

The law is well settled that when an appeal is filed on behalf of an indigent client by a court-appointed attorney who believes that his client’s appeal is frivolous, it is for the court, and not the attorney, to determine that the client’s appeal has no merit. In *Anders v. California*, 386 U.S. 738 (1967), the United States Supreme Court held that

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. *** Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. [Footnote omitted.] His role as advocate requires that he support his client's appeal to the best of his ability. Of course, **if**

⁵ **RULE 1.3. Diligence**

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

⁶ **RULE 1.4. Communication**

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

⁷ **RULE 3.1. Meritorious Claims And Contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; **the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.** If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. [386 U.S. at 744; emphasis supplied.]

The Court of Appeals of Virginia in *Akbar v. Commonwealth*, 7 Va. App. 611, 376 S.E.2d 545 (1989), embraced the constitutional requirement identified in *Anders* and set forth the very language quoted above in its own opinion. *See, Akbar, supra*, 376 S.E.2d at 546.

Anders and *Akbar* are specifically cited and the precepts of those rulings are embedded in Rule 5A:12(h) of the Rules of the Supreme Court of Virginia for appeals to the Court of Appeals of Virginia:

Rule 5A:12. Petition for Appeal.

(h) *Procedure for an Anders appeal.* –If counsel for appellant finds his client's appeal to be without merit, he must comply with the requirements of *Anders v. California*, 386 U.S. 738 (1967), and *Akbar v. Commonwealth*, 7 Va. App. 611, 376 S.E.2d 545 (1989). In compliance therewith, counsel is required to file (1) a petition for appeal which refers to anything in the record which might arguably support the appeal and which demonstrates to the Court of Appeals counsel's conscientious examination of the merits of the appeal; (2) a motion for leave to withdraw as counsel; and (3) a motion for an extension of time to allow the appellant to file a supplemental petition for appeal. The petition for appeal and the motion for leave to withdraw as counsel should specifically cite to *Anders*. All three pleadings must be served on opposing counsel and upon the client and must contain a certificate providing evidence of such service. The Court of Appeals will rule upon the

motion for extension of time upon its receipt, but will not rule on the motion to withdraw as counsel until this Court considers the case in its entirety, including any supplemental petition for appeal that may be filed.

The Supreme Court of Virginia has determined that, while not constitutionally mandated, an indigent appellant is *by statute* entitled to a court-appointed attorney beyond his first-level appeal to the Court of Appeals of Virginia *and* that the appointed attorney must discharge his duties consistent with *Anders* when faced with an appeal to the Supreme Court of Virginia which the attorney believes is wholly frivolous.⁸ The provisions of Rule 5:17(h), governing appeals to the Supreme Court of Virginia, track the provisions of the Rule set forth above regarding petitions for appeal to the Court of Appeals of Virginia.⁹

Both such Rules unquestionably and clearly anticipate the inevitable frivolous appeals filed by court-appointed attorneys for indigent clients consistent with those clients' constitutional and statutory rights. The Rules codify the method contained in *Anders* and *Akbar* by which appeals deemed non-meritorious by court-appointed appellate counsel are to be handled by those attorneys and the court.

There is, however, opportunity for confusion, occasioned by Virginia caselaw and the suggested contents of a circuit court plea colloquy, by the use of the word "right" to appeal, when reference to a waiver of "grounds" for appeal would be more appropriate in the cases of indigent defendants. For example, in *Stokes v. Slayton*, 340 F.Supp. 190 (W.D. Va., 1972) a United States District Court in Virginia held that

⁸ See, *Dodson v. Director, Dept. of Corrections*, 233 Va. 303, 355 S.E.2d 573 (1987) and *Brown v. Warden of Virginia State Penitentiary*, 238 Va. 551, 385 S.E.2d 587 (1989).

⁹ **Rule 5:17. Petition for Appeal.**

(h) *Procedure for an Anders appeal.* If counsel for appellant finds appellant's appeal to be without merit, counsel must comply with the requirements of *Anders v. California*, 386 U.S. 738 (1967), and *Brown v. Warden of Virginia State Penitentiary*, 238 Va. 551, 385 S.E.2d 587 (1989). In compliance therewith, counsel is required to file (1) a petition for appeal which refers to anything in the record which might arguably support the appeal and which demonstrates to this Court counsel's conscientious examination of the merits of the appeal; (2) a motion for leave to withdraw as counsel; and (3) a motion for an extension of time to allow the appellant to file a supplemental petition for appeal. The petition for appeal and the motion for leave to withdraw as counsel should specifically cite to *Anders*. All three pleadings must be served on opposing counsel and upon the client and must contain a certificate providing evidence of such service. This Court will rule upon the motion for extension of time upon its receipt, but will not rule on the motion to withdraw until this Court considers the case in its entirety, including any supplemental petition for appeal that may be filed.

An appeal **does not lie** from a conviction entered upon a valid plea¹⁰ of guilty, unless the trial court either lacked jurisdiction or imposed a sentence which exceeds that authorized by law. [340 F.Supp. at 192; emphasis added.]

Following Rule 3A:1 *et seq.* of the Rules of the Supreme Court of Virginia appears an “Appendix of Forms.” Form 6 contains “Suggested Questions to Be Put by the Court to an Accused Who Has Pleaded Guilty (Rule 3A:8)” Question 19 reads as follows:

19. Do you understand that, by pleading guilty, **you may waive any right to appeal** the decision of this court? [The judge may, but need not, inform the defendant that a guilty plea does not waive the right to appeal lack of jurisdiction or imposition of an impermissible sentence.] [Emphasis supplied.]

Both *Stokes* and Question 19 refer to a waiver of the *right* to appeal, when, in fact, at least with respect to an indigent defendant, the right to appeal, however hollow the right, remains intact under *Anders*. Thus, even when a court-appointed attorney believes his indigent client’s appeal would be wholly frivolous, he is not free to reject his client’s request for an appeal following a guilty plea by maintaining that the client has waived the *right* to appeal.¹¹ An appeal from a conviction and sentence following a plea of guilty may be every bit as frivolous as an appeal following an error-free trial at which the client has confessed in open court to the commission of the crime charged. The procedures called for in *Anders* and *Akbar* are applicable to an appeal on behalf of an indigent defendant of *any* conviction, regardless of how and why the final order of conviction was issued.

The right to petition for appeal in criminal cases is not reserved only for those persons convicted of a crime following trial upon a plea of not guilty. Virginia, by statute, permits *any* aggrieved party to present a petition for appeal to the Court of Appeals of Virginia from *any* final conviction of a crime entered by a circuit court.¹² The provision by its terms makes no

¹⁰ Of course, the validity of a plea, itself, may be the proper subject of an appeal when the record contains evidence to support such a challenge.

¹¹ *See, Miles v. Sheriff of Va. Beach City Jail*, 266 Va. 110, 581 S.E.2d 191 (2003):

Although the range of potential grounds for appeal following a guilty plea is limited in Virginia, a defendant who has pled guilty still retains the statutory right to file a notice of appeal and present a petition for appeal to the Court of Appeals of Virginia. See Code §§ 17.1-406 and -407.

¹² § 17.1-406. Petitions for appeal; cases over which Court of Appeals does not have jurisdiction.

A. Any aggrieved party may present a petition for appeal to the Court of Appeals from (i) any final conviction in a circuit court of a traffic infraction or a crime***.

exception for petitions for appeal from convictions which were the outgrowth of a guilty plea. It may be that the record of a case on appeal reveals that a defendant did not knowingly and voluntarily¹³ waive his constitutional rights at the time his guilty plea was accepted by the court.¹⁴ It may also reveal error occurring *after* the plea was accepted, such as with regard to the adjudication or imposition of a sentence.

In 2004, the Virginia General Assembly created the Virginia Indigent Defense Commission. The Commission oversees and supports lawyers who serve as public defenders and court-appointed attorneys representing indigent criminal defendants in Virginia state courts. The Commission has published *Standards of Practice for Indigent Defense Counsel*. The Standards are

¹³ Rule 3A:8(b) of the Rules of the Supreme Court of Virginia provides as follows:

Rule 3A:8. Pleas.

(b) *Determining Voluntariness of Pleas of Guilty or Nolo Contendere.* (1) A circuit court shall not accept a plea of guilty or nolo contendere to a felony charge without first determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea. (2) A circuit court shall not accept a plea of guilty or nolo contendere to a misdemeanor charge except in compliance with Rule 7C:6.

¹⁴ The entry of a guilty plea involves the waiver of rights guaranteed by the federal constitution. In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court held that:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. ***. Second, is the right to trial by jury. ***. Third, is the right to confront one's accusers. *** **We cannot presume a waiver of these three important federal rights from a silent record.**

What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought, and forestalls the spin-off of collateral proceedings that seek to probe murky memories. [395 U.S. at 243, 244; emphasis supplied; citations and footnotes omitted.]

legislatively mandated,¹⁵ and court-appointed attorneys who do not comply with them may be removed from the list of those eligible to serve in such capacity.

The Comment to Standard 1.0 (“The Lawyer-Client Relationship”) contains the following statement: “An indigent client is entitled to take an appeal and a lawyer must, if the client so requests, protect the client’s right to an appeal even though grounds for an appeal do not exist.” The statement, however, conflicts with the Comment to Standard 6.4 (“Entry of the Plea Before the Court”):

Counsel should inform the client and make sure that the client understands that by entering a plea of guilty, the client will be waiving the following rights and privileges:

(g) **Right to appeal.** [Emphasis supplied.]

The cited portion of the Comment is not strictly accurate, for the same reason that the contents of Question 19 are not strictly accurate: The distinction between a “right” to appeal and “grounds” for appeal is not taken into account. An indigent defendant has the federal constitutional right to file an appeal, even if meritless, reversible error may occur during the proceedings in which the guilty plea is tendered and accepted; error may be committed in proceedings which *follow* the tender and acceptance of the plea; and *Anders* and *Akbar* do not permit court-appointed attorneys for an indigent client to have the last word on whether an appeal before an appellate court is frivolous. Thus, any indigent defendant, or any defendant represented by retained counsel or acting pro se, who enters a plea of guilty or *nolo contendere* does *not* waive a “right to appeal,” even if such right is rendered hollow because the appeal would be frivolous due to a waiver of *grounds* for appeal.

Standard 9.2 also confuses “rights” and “grounds,” in connection with a court-appointed attorney’s duty to inform a client regarding his right to appeal:

Standard 9.2 Right to Appeal

¹⁵ § 19.2-163.01. Virginia Indigent Defense Commission established; powers and duties.

A. The Virginia Indigent Defense Commission (hereinafter Indigent Defense Commission or Commission) is established. The Commission shall be supervisory and shall have sole responsibility for the powers, duties, operations, and responsibilities set forth in this section.

The Commission shall have the following powers and duties:

4. To establish official standards of practice for court-appointed counsel and public defenders to follow in representing their clients, and guidelines for the removal of an attorney from the official list of those qualified to receive court appointments and to notify the Office of the Executive Secretary of the Supreme Court of any attorney whose name has been removed from the list.

Counsel shall inform the client of his or her right to appeal the judgment of the court, **unless such right has been knowingly, intelligently, and voluntarily waived**, and the action that must be taken to perfect an appeal. If the client advises counsel that he or she wishes to note an appeal, counsel shall take all necessary steps to perfect such appeal in a timely fashion pursuant to the Rules of the Supreme Court of Virginia. If trial counsel is relieved in favor of other appellate counsel, trial counsel shall cooperate in providing information to appellate counsel concerning the proceedings in the trial court. [Emphasis supplied.]

The Committee believes that as long as *Anders* and *Akbar* remain the law which sets forth the minimum constitutional standards due indigent appellants, a court-appointed attorney has a duty under Rule 1.4(b) to advise his client regarding the availability of a petition for appeal, even if it were frivolous and pertains to a conviction based on guilty plea.

Thus, the Committee further believes that Standard 9.2 should not be read to excuse a court-appointed attorney from the ethical obligation to advise the client of the availability of an appeal¹⁶. The Standards incorporate by reference the Virginia Rules of Professional Conduct. Thus, consistent with Rule 1.4(b), the Standards must be read to require that a court-appointed attorney advise his indigent client of his constitutional right to independent appellate court scrutiny under *Anders* and *Akbar*¹⁷. An indigent client's informed decision regarding an appeal requires that he know that by filing an *Anders* brief the court-appointed attorney activates an obligation of the appellate court to examine on its own the record of the client's case, affords the client himself an opportunity to present appellate issues to the court, and calls for the court to

¹⁶ An attorney's ethical obligation to advise a client of his appellate rights is not, of course, limited to court-appointed counsel. While a privately retained attorney may contract with a client to limit the scope of representation to matters in the trial court, once there is an attorney-client relationship in connection with a criminal matter, defense counsel must render appropriate advice to the client regarding his appellate rights.

¹⁷ The United States Supreme Court in *Roe v Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) comprehensively addressed the question of how a court must determine whether an attorney who failed to consult with her client regarding an appeal had rendered ineffective assistance. The Court stated:

We *** hold that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.

determine if there are any grounds for appeal upon which the court-appointed attorney should be ordered to proceed. With that said, the court-appointed attorney must go beyond merely identifying the client's constitutional right to file an appeal. He must advise his client competently as required by Rule 1.1. The court-appointed attorney should advise his client of the potentially adverse consequences of prevailing on appeal. In the case of a guilty plea, followed by conviction and imposition of an anticipated sentence, a court-appointed client would rarely choose to embark on a course to unravel his conviction and sentence via an appeal only to expose himself to a more severe outcome on retrial or resentencing. For example, an indigent federal criminal defendant who directs his court-appointed attorney to appeal a conviction following a plea wherein the "right" to appeal has been waived exposes himself to potentially grave consequences: In the federal system, when the grounds for appeal which have been waived can be shown to fall within the "right to appeal" the government may attempt to treat the appeal as a breach of the defendant's promise contained in the plea agreement, seek to reopen the case and to pursue the original charges, and use facts contained in the plea agreement in a subsequent trial. *See, e.g.*, the discussion contained in *U.S. v. Poindexter*, 492 F.3d 263 (4th Cir., 2007). A defendant in state court might be exposed to similar risks. These risks must be adequately explained to the client by the court-appointed attorney when the client is being advised of his rights under *Anders*.

After such an advisement, the court-appointed attorney must follow the client's direction to appeal because it is the client's prerogative under Rule of Professional Conduct 1.2(a) to determine the objectives of representation. The attorney must take the steps required both by Standard 9.2 and Rule of Professional Conduct 1.3(a) to perfect the client's appeal when the client requests an appeal.

Standard 10.2.1 is consonant with the obligations imposed by Standard 9.2 and Rule 1.3(a), and addresses court-appointed attorney's obligation to file a further appeal to the Supreme Court of Virginia unless the client has expressed his desire to abandon such an appeal.

Standard 10.2.1 Scope of Appellate Representation

(d) Where instructed by the client to do so, counsel must appeal a criminal conviction or revocation of a suspended sentence to the Court of Appeals of Virginia and to the Supreme Court of Virginia. If a client has not explicitly elected to appeal to the Supreme Court of Virginia after losing an appeal in the Court of Appeals of Virginia, and counsel has not learned that the client desires to abandon his appeal, counsel should continue to prosecute the client's appeal in the Supreme Court of Virginia.*** [Emphasis supplied.]

Consistent with the law, this Standard deprives the court-appointed attorney of any authority to decline the client's instruction to appeal, and makes no exception for those appeals which lack merit and follow a guilty plea¹⁸. A Comment to this provision makes this crystal clear:

¹⁸ *See, also*, **Standard 10.3.3 Presentation of Appellate Issues; Frivolous Issues**. Sections (a) and (b) of that Standard provide as follows:

COMMENT: While a guilty plea waives most appellate issues, **counsel is nevertheless obligated to appeal from a guilty plea if the client so instructs.** *Miles v. Sheriff of Va. Beach City Jail*, 266 Va. 110, 581 S.E.2d 191 (2003). Limited issues that can be raised following a guilty plea include a sentence that exceeds the statutory maximum or lack of subject matter jurisdiction. If there are no appealable issues, counsel may file an *Anders* petition. [Emphasis supplied.]

CONCLUSION:

A court-appointed attorney must file petitions for appeal to the Court of Appeals of Virginia and to the Supreme Court of Virginia, or the applicable federal appellate court, when directed to do so by an indigent client, even when such an appeal is to a conviction entered following a guilty plea, and is deemed frivolous by the attorney. A court-appointed attorney must advise his indigent client that he has a right to appeal, even under those circumstances, but must also identify to the client the risks which may attend asserting such a right. A court-appointed attorney who follows the procedure set forth in the Rules of Court which embody the constitutional requirements of *Anders* and *Akbar* does not violate the ethical prohibition regarding non-meritorious claims and contentions.

This opinion is advisory only and not binding on any court or tribunal.

Committee Opinion
July 23, 2015

(a) Appellate counsel shall identify all issues that counsel believes, in good faith, may have merit for appeal and shall litigate those issues which, in counsel's judgment, are the most promising. When counsel reasonably believes that no potentially meritorious issues exist in a case, he shall so advise the client, and shall inform the client of the costs associated with proceeding with the appeal. Counsel should advise the client that it may be in the client's best interests to withdraw the appeal. If the client nevertheless desires to proceed with the appeal, or fails to respond, counsel shall proceed to litigate the case to the best of his or her ability under the circumstances.

(b) In the alternative, when counsel determines there are no meritorious issues to support an appeal, counsel may elect to advise the court of that fact and request permission to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). Any motion to withdraw, however, must be accompanied by a petition presenting anything in the record that might arguably support the appeal, and by a motion for extension of time to allow the client to respond. The motions and petition should be promptly provided to the indigent client.