

Appellate Obligations of Criminal Defense Counsel

By the NHBA Ethics Committee

Practical Ethics Article: February 20, 1992

RULE REFERENCES:

- *Rule 1.1(a)
- *Rule 1.1(b)
- *Rule 1.1(c)
- *Rule 1.2(a)
- *Rule 1.2(c)
- *Rule 1.3(a)
- *Rule 1.3(b)
- *Rule 1.16(a)
- *Rule 1.16(c)
- *Rule 1.16(d)
- *Rule 3.1

SUBJECTS:

- *Appeals
- *Attorney/Client Relationship
- *Competence
- *Court Appointed Lawyers
- *Criminal Representation
- *Diligence
- *Frivolous claims
- *Scope of Representation
- *Termination & Withdrawal of Attorney/Client Relationship
- *Trial Conduct

ANNOTATION:

This article is a summary of certain obligations of criminal defense counsel, including counsel's obligation to appeal a client's conviction.

Because of the interrelationship between constitutional rights, court rules and ethical rules, criminal defense counsel face special standards of diligence and competence in the representation of their clients. The ethical and legal obligations of criminal defense counsel continue after a trial has ended. Absent a waiver by the court, these obligations include the responsibility to represent the client through an appeal of a conviction.

A lawyer has a duty to provide competent and diligent representation to each and every client. New Hampshire Rules of Professional Conduct (the "Rules") Rule 1.1(a).

"(b) Legal competence requires at a minimum:

- (1) specific knowledge about the fields of law in which the lawyer practices;
- (2) performance of the techniques of practice with skills;
- (3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention: . . .

(c) In the performance of client service, a lawyer shall at a minimum: . . .

- (4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation."

Rules 1.1 (b) and 1.1 (c); *See ABA Standards Relating to the Administration of Criminal Justice, 2nd Ed. (the "standards") 4-1.1 (b) and (e).*

A lawyer's representation of a client is prompt and diligent when:

- "(1) it is carried out in the manner and within the time parameters established by the agreement between the client and the lawyer; however, the lawyer may not rely upon the terms of an agreement to excuse performance which is not prompt and diligent in light of changes in circumstances, known to the lawyer, which require adjustments to the agreed upon schedule of performance.
- (2) In all other matters of representation, it is carried out with no avoidable harm to the client's interest nor to the lawyer-client relationship." *Rule 1.3(b).*

Criminal defense counsel are also subject to constitutional obligations imposed by the Sixth Amendment. An indigent defendant's appointed counsel must represent the client with skill and expertise that satisfies the objective standard of reasonably effective assistance of counsel. A defendant's Sixth Amendment rights are violated if defense counsel's performance falls below this standard and as a result, the defendant's right to a fair trial is prejudiced.

“Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.” *Standard 4-3.9. See McCoy v. Court of Appeals, 486 US 429 (1988).*

Under Rules 1.1 and 1.3, a lawyer is expected to know the rules of the courts before which the lawyer practices. A lawyer is expected to be familiar with the principles of law that apply to a client’s problem and to discover favorable law that can be found through research.

“Competent handling of a particular matter includes inquiry into an analysis of the factual and legal elements of a problem, and the use of methods and procedures meeting the standards of competent practitioners.” *ABA Comment of Rule 1.1.*

A lawyer must perform the research on a particular issue that lawyers engaged in similar matters would perform in order to reach an intelligent and informed decision concerning the client’s case. *ABA/BNA Lawyers Manual of Professional Conduct (Manual) 31:204.*

A lawyer is expected to have the technical skills necessary to carry out the representation of a client. These skills include not only practice skills such as effective drafting and review of documents, advocacy and negotiation, but also administrative skills such as file organization, recordkeeping, scheduling and docket control. A lawyer must meet all filing deadlines for pleadings so as not to prejudice the rights of the client. *Manual, 31:204.*

In New Hampshire, a criminal defense counsel is expected to preserve a defendant’s right to appeal by objecting in a timely manner to all evidentiary matters and rulings that appear to be erroneous. Counsel must move to exclude any evidence that is inadmissible based on the Exclusionary Rule, and must advise the client concerning the benefits and drawbacks of testifying in his or her defense. Defense counsel should move to dismiss the charges at the end of the state’s case, and, if warranted, at the end of the case in chief. Counsel should object to sentencing that appears inappropriate and, where applicable, advise the client concerning the right to seek a review of a sentence by the Sentencing Review Board of the Superior Court.

A lawyer is also obligated to abide by a client’s decisions concerning the representation and to consult with the client concerning the means to pursue the client’s objectives. Absent the knowing consent of a client, a lawyer cannot limit the objectives of the representation. *Rule 1.2(a), (c).* The client has the right to decide whether to appeal an adverse trial ruling, but a lawyer has the duty, through diligent and competent representation, to preserve all of the client’s rights to an appeal. *Manual, 31:306.*

The duty of competence requires that the attorney who has undertaken to represent a client must complete the work involved. After trial, counsel for a convicted defendant should advise the client concerning the right to appeal and, if the client desires an appeal, must represent the client through the appeal process unless the client retains new counsel or the attorney is permitted to withdraw. *New Hampshire Supreme Court Rule 32; NHBA Ethics Committee Formal Opinion 1982-3/23, citing former New Hampshire Code of Professional Responsibility EC 2-31; See Standard 4-8.2.*

An attorney may withdraw from the representation of a client after a criminal trial and before an appeal only in compelling circumstances. Assuming that none of the mandatory conditions described in Rule 1.16(a) apply, a lawyer may withdraw from the representation of a client only if the lawyer complies with Supreme Court Rule 32 and Rule 1.16(b). In the event of a withdrawal, the lawyer must take reasonable steps to protect the interests of the client “such as giving reasonable notice to the client, [and] allowing time for employment of other counsel”. *Rule 1.16(d).*

The ethical and constitutional duties of defense counsel to abide by a client’s desires with respect to presenting a defense and filing an appeal are not absolute. They are tempered by the lawyer’s obligation to the court.

“Ethical considerations and rules of court prevent counsel from making dilatory motions, adducing inadmissible or perjured evidence, or advancing frivolous or improper arguments, but those constraints do not qualify the lawyer’s obligation to maintain that the stigma of guilt may not attach to the client until the presumption of innocence has been overcome by proof beyond a reasonable doubt.” . . . [however], an attorney whether appointed or paid, is . . . under an ethical obligation to refuse to prosecute a frivolous appeal.” *McCoy v. Court of Appeals, 486 US 429, 435, 436 (1988). See Rule 3.1.*

If a client insists on prosecuting what counsel feels is a frivolous appeal, the obligations created by the United State Constitution and New Hampshire Court Rules may prevent the defense attorney from withdrawing from the representation without at least filing the appeal. Supreme Court Rule 32 requires a criminal defense counsel to

prosecute an appeal unless counsel has received the Supreme Court's authorization to withdraw "for good cause shown". In addition, Rule 1.16(d) requires an attorney to give reasonable notice of intent to withdraw so that the client has time to retain new counsel.

Given the short time period within which to file the Notice of Appeal in New Hampshire and trial counsel's familiarity with the record, a trial attorney who wishes to withdraw will almost always be obligated to first take the necessary steps to perfect or preserve the defendant's right to appeal before counsel's motion to withdraw will be granted. These steps include filing a proper Notice of Appeal with the New Hampshire Supreme court that raises all issues that arguably support the defendant's appeal, a Motion to Waive Entry Fees, a current financial affidavit for the defendant, and a request that a transcript of the lawyer court proceedings be made for the defendant's appellate counsel. See *Bundy v. Wilson*, 815 F.2d 125 (1st Cir. 1987). Notwithstanding the fact that virtually all appeals by indigent criminal defendants are assigned by the New Hampshire Superior Court to the Appellate Defender's Office of Franklin Pierce Law Center, court appointed trial counsel's obligations do not end until the steps described in this paragraph have been taken on the client's behalf and the Appellate Defender's Office has been appointed.

As a matter of Constitutional Law, appointed defense counsel may also be obligated to pursue appeals for their clients even where counsel does not consider any of the arguments to have merit. The Fourteenth Amendment has been held to guarantee a defendant's right to counsel on a first appeal. *Douglas v. California*, 372 US 355 (1963). Beginning with its decision in *Douglas v. California*, 386 US 738 (1967) the United States Supreme Court has held that where a client desires to file a first appeal, a court appointed defense counsel must justify to the appellate court counsel's decision not to pursue an appeal on the client's behalf.

"[Counsel's] role as advocate requires that he support his client's appeal to the best of his ability. Of course, if 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 reference to anything in the record that might arguably support the appeal". *Anders at 744*.

Under *Anders* and succeeding decisions, court appointed defense counsel must perfect the defendant's right to appeal and then provide the appellate court with a brief that describes all of the possible issues on appeal and why the counsel feels that none of the issues have merit. Only if counsel succeeds in convincing the appellate court that there is no reasonable basis to advance an argument on appeal, may counsel be permitted to withdraw or fail to pursue the appeal. *Penson v. Ohio*, 488 US 75 (1988). It should be remembered, however, that the constitutional right to appointed appellate counsel

"does not justify the assertion of patently frivolous claims, or give counsel license to engage in dilatory, obdurate, or vexatious conduct." *Smith v. Pennsylvania Board of Probation & Parole*, 574 A.2d, 558, 563 (PA. 1990).

The *Anders* decision has never been addressed by the New Hampshire Supreme Court, and it is unclear how it is to be implemented in New Hampshire. The New Hampshire Supreme Court appears to prefer the current practice of New Hampshire Criminal appellate counsel, which practice is similar to that required in Massachusetts. See *Commonwealth v. Moffett*, 418 N.E. 2d 585, (Mass. 1981). The preferred practice consists not of filing an *Anders* brief and a request to withdraw, but rather identifying and briefing the best issues that can be raised on the defendant's behalf regardless of counsel's opinion on the merits of the appeal.

The role of criminal defense counsel involves a balancing of the lawyer's duty to the client, the client's right to effective assistance of counsel, and society's desire not to have litigants waste valuable court resources. At the present time, the weight of policy and authority requires criminal defense counsel to take all actions that are necessary to assure that the defendant's rights to a fair trial and effective assistance of counsel through a first appeal are not compromised. Defense counsel must preserve and perfect the defendant's right to appeal adverse decisions in the lower court. Unless the counsel has been authorized to withdraw from the case by the Supreme Court, if a client wants to appeal a conviction, defense counsel must pursue the appeal on behalf of a defendant.