THE *ANDERS* BRIEF, *STATE V. CIGIC*, AND DOES *CIGIC* DELIVER WHAT IT PROMISES?[1]

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What is a court-appointed lawyer supposed to do when a criminal defendant insists on pressing an issue the lawyer believes has a low chance of success or may be frivolous?

On one side is fidelity to the client and the duty of "zealous appellate advocacy."[2] On the other is the duty to refrain from frivolous arguments.[3] "Representing the defendant at trial, the attorney violates no obligation of professional responsibility in forcing the state to prove its case, no matter how clear the defendant's guilt. . . . On appeal, on the other hand, the defendant is presenting a challenge and the lawyer has an ethical obligation not to assert frivolous claims."[4] While a privately retained lawyer may have the luxury to refuse the representation, an indigent client has a right to counsel on appeal.[5] Nonetheless, "the line between a frivolous appeal and one which simply has no merit is fine"[6] "if indeed it exists at all."[7]

New Hampshire and other states have largely resolved the procedural aspects, but many substantive questions remain: Whose rules apply in federal appellate courts? What constitutes "frivolous," both in the context of a jury already having found the client guilty beyond a reasonable doubt, and also in the context of plausible but unlikely constitutional arguments? How many arguably frivolous arguments can a lawyer make in one case? What level of risk do criminal defense lawyers face, especially in light of precedent suggesting they will be treated deferentially in these matters? There are answers to some of these questions, but others are frustratingly ambiguous.

I. ANDERS V. CALIFORNIA

In *Anders v. California*,[8] the United States Supreme Court set forth its preferred procedure for appeals that do not state any meritorious issues,[9] reduced here to the procedural essentials:

- Appellate counsel makes a "conscientious examination" of the record;
- If the lawyer determines the appeal is "wholly frivolous," s/he moves to withdraw;
- Counsel also files an "Anders brief" referring to anything in the record that might arguably support the appeal;
- The defendant gets a copy of the Anders brief and has an opportunity to submit a *pro se* brief;
- The appellate court independently examines the entire record;
- If the court determines the appeal is wholly frivolous, it grants counsel's motion to withdraw and dismisses the appeal;
- If in its review of the record the court finds any arguable issues, it appoints new counsel to brief them.

II. PROBLEMS WITH ANDERS

Although it has its defenders,[10] *Anders* been widely criticized[11] because it creates conflicts for all actors in the criminal justice system. It requires defense lawyers to "assume contradictory roles,"[12] argue against their own clients,[13] and to "brief the unbriefable."[14] It flips the role of prosecutors by relieving them of their duty to defend the trial court's judgment, and instead requires them to concur with the defendant's appointed lawyer.[15]

For defendants, it makes them feel alienated, abandoned, and frustrated. It looks to them like their lawyer is in league with the government,[16] and reinforces the unfortunate view that public defenders are not fully on their side.[17] It inherently causes defendants prejudice because requiring the lawyer to withdraw and file an *Anders* brief "sends a tacit message that [the lawyer] considers the issues meritless."[18] It then requires the defendant, who presumably is not expert in criminal representation,[19] to carry an appellate "double burden" – first to convince the court there is enough merit to warrant appointment of a second lawyer, and then to convince the court to reverse the conviction.[20] Courts have even suggested the *Anders* procedure does not adequately protect rights.[21]

For courts, *Anders* puts them in the role of advocate rather than judge.[22] It causes additional work, as they are required to make a frivolousness determination,[23] and also review the entire record to search for

issues, rather than just those portions referred to the court by counsel.[24] It also requires courts to review a *pro se* filing, which is often more laborious than lawyer-written work, despite the availability of an attorney already familiar with the case. Moreover, the review is inefficiently "fragmented" because the court must first consider the withdrawal motion, later the *pro se* brief, then later the record, and then possibly the brief by second appointed counsel.[25]

For the public, the *Anders* procedure is less efficient and therefore more costly.[26] It potentially requires appointment of two lawyers when one, already familiar with the case, would have served the purpose or protecting the defendant's rights.[27] It also mandates review of the entire record, rather than just the portion relevant to the argued issues which would normally occur.[28]

In short, the *Anders* procedure does not serve anyone well, prompting the Idaho Supreme Court to call it an "impractical and illogical procedure."[29]

III. STATES REJECT ANDERS

Anders at first appeared to be the mandated procedure,[30] but the United States Supreme Court has since held that it is a floor, not a ceiling, and that states are free to create alternatives.[31]

In 1977 Idaho announced it would not follow *Anders*, but rather would require counsel choose the strongest argument, however weak, and argue it as forcefully as possible. This preserves "the integrity of the attorney-client relationship"[32] and the adversarial nature of criminal appeals, which "is much to be preferred over a process in which the appellate judge feels obliged to act as a lawyer and the appellate lawyer feels constrained to rule as a judge."[33] Since then many jurisdictions have rejected *Anders*[34] and adopted some formulation of the "Idaho rule."

IV. NEW HAMPSHIRE RESOLVES ANDERS PROCEDURE - STATE V. CIGIC

In 1994 New Hampshire Supreme Court joined that trend in *State v. Cigic*,[35] writing that "the efficiency and integrity of the appellate process are better ensured by the adoption of a modified Idaho rule."[36]

The court recognized that rejecting Anders would require tolerating occasional frivolous appeals.[37] It suggested however they would be "extremely rare" because it is not frivolous to merely believe one's position will not win, it is not frivolous to make "a good faith argument for an extension, modification or reversal of existing law," and it is not frivolous to challenge the sufficiency of evidence used to convict.[38]

For reasons that have been thoroughly discussed on these pages,[39] and drawing largely from ABA standards, the New Hampshire Supreme Court set forth in detail what must be done when the lawyer thinks a criminal appeal may be frivolous:

- Counsel tries to talk defendant out of the appeal;
- If defendant decides to pursue it, counsel files a notice of appeal including all arguable issues;
- A transcript is prepared with a copy to the defendant;
- Counsel reviews the complete record and again determines whether the case has merit;
- If the lawyer still thinks the appeal is frivolous, counsel again tries to talk the defendant out of it;
- If the client nonetheless wants to go forward, the lawyer files a brief arguing the issues as well as possible[40];
- The court reviews in the normal course.

The New Hampshire Supreme Court acknowledged that "our adoption of this procedure may, on rare occasions, require appellate counsel to assert a frivolous issue before this court. Accordingly, we create an exception to New Hampshire Rule of Professional Conduct 3.1 for such conduct."[41]

The *Cigic* court "caution[ed], however, that under the procedure . . ., appellate counsel is still otherwise absolutely obliged not to deceive or mislead the court. Such deception would include a misstatement of the facts of the case, or a misapplication of the law to those facts. In addition, counsel must not deliberately omit facts or authority that directly contradict the argument."[42]

Thus *Cigic* appears to give criminal defense lawyers a free pass on frivolous arguments. But a review of files at the New Hampshire Supreme Court Attorney Discipline System reveals that over the last decade, New Hampshire lawyers have from time to time been cited on Rule 3.1 grounds, with at least two in a criminal defense representation.

V. WHOSE RULES APPLY TO APPEALS IN THE FIRST CIRCUIT

For appeals in the First Circuit, a New Hampshire lawyer can reasonably expect New Hampshire's ethics rules – and therefore *Cigic* – applies, if the lawyer's principal office is in New Hampshire, and especially if the case originated in the New Hampshire District.[43]

VI. SUFFICIENCY ARGUMENTS RARELY FRIVOLOUS

The ethics rule barring frivolous arguments largely carves out criminal defense. It provides that although "[a] lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous, . . . [a] lawyer for the defendant in a criminal proceeding . . .may nevertheless so defend the proceeding as to require that every element of the case be established."[44] *Cigic* nearly reiterates this, but adds a caveat. *Cigic* says: "Provided that appellate counsel has a good faith basis for doing so, it would . . . not be frivolous . . . to challenge the sufficiency of the evidence used to convict the defendant."[45] Thus, as long as there is a "good fath basis," a criminal defense lawyer may make a frivolous argument. This standard begs the question, however, because if "good faith" means the lawyer's sufficiency argument has even a little merit, than it probably is not frivolous.

VII. PRECEDENT EVOLVES, BUT DON'T DUCK BAD LAW

There appear to be three types of potentially frivolous issues: 1)

the ridiculously implausible,[46] 2) the claim controlled by clear contrary precedent,[47] and 3) the effort to extend, modify, or reverse current law.

As to the implausible, the United States Supreme Court wrote that "[a] lawyer … has no duty, indeed no right, to pester a court with frivolous arguments, which is to say arguments that cannot conceivably persuade the court."[48]

An effort to extend, modify, or reverse current law, however, necessarily means the lawyer has already identified controlling or potentially controlling precedent. If the argument is that the precedent should not apply to the present case, the precedent must be cited and distinguished. If the argument is that the precedent should be extended, modified, or reversed, still the precedent must be identified and distinguished. A clear lesson: Don't duck bad law.[49]

What about when clear and controlling precedent nonetheless looks to a foresighted lawyer that it might someday be ripe for overturning? An example is presently occurring.

In 2000 the United States Supreme Court stated in *Apprendi* that a judge cannot constitutionally enhance a sentence using a "sentencing fact" that was not found by a jury beyond a reasonable doubt.[50] *Apprendi* let stand *Almendarez-Torres*, a 1998 case holding that prior convictions were "sentencing facts" that could be found by a judge and based on a mere preponderance of the evidence.[51] Thus, the ability for a sentencing court to sentence in light of prior convictions is an exception predating the rule. Moreover, combining the justices in Monge in 1998 and the justices in Jones a year later,[52] a total of five members of the Court have joined opinions holding that the *Almendarez-Torres* exception is probably unconstitutional after *Apprendi*. Given this, thousands of convicts have challenged their sentences, and still do, arguing that *Almendarez-Torres* has been practically overruled. The supreme court, however, has so far declined[53] opportunities to explicitly overrule.

This has lead at least one court to issue a warning to lawyers thinking about raising the constitutionality of the exception, even if only to preserve[54] the issue for the client in the event the matter is someday favorably resolved.[55]

Depending on the evolution of a particular legal issue over time, an extremely fine and ever-shifting line can exist between what is legally "frivolous" (and, thus, unethical to include in a brief) and what a defendant's counsel ethically is obliged to raise on appeal. Some legal issues are considered frivolous at a particular point in time because extant appellate precedent unequivocally forecloses them; yet, as a result of subsequent jurisprudential developments, the same issues later become nonfrivolous or even meritorious. The uncertainty that can result from such a thin, changing demarcation between ethically prescribed and ethically proscribed only exacerbates the dilemma for counsel.[56]

Given this, one suspects that once upon a time, it may have been deemed frivolous to advance claims of right to corporate political speech,[57] private gun possession,[58] abortions,[59] pornography,[60] or having your rights read to you.[61] Precedent moves slowly and it is thus possible that some "frivolous" arguments are merely decades premature.

VIII. WHETHER CIGIC APPLIES TO CASES OR ISSUES

Anders and the federal cases following it appear to start from the premise that counsel was unable to locate a single non-frivolous issue.[62] But what about when counsel seeks to append an arguably frivolous issue to an otherwise standard appeal? The question is whether the *Anders/Cigic* procedures apply to whole cases or to individual issues. *Cigic* appears hopelessly ambiguous on the matter, in that it uses the phrases "frivolous appeal" and "frivolous issue" seemingly interchangeably.[63] The Court wrote, for instance: "We agree with the State that, on occasion, adherence to the Idaho rule may require appellate counsel to bring a frivolous *appeal*."[64] A few paragraphs later it explained: "As we have noted, our adoption of this procedure may, on rare occasions, require appellate counsel to assert a frivolous *issue*."[65] In setting forth the procedure, the Court instructed: "If the defendant chooses, notwithstanding counsel's advice, to proceed with the appeal, counsel must prepare and file the notice of appeal, including all arguable *issues*."[66]

Although the plain language of *Cigic* may be silent on whether raising a single frivolous issue among other non-frivolous issues is permissible, in the two known PCC cases involving *Cigic* questions, the PCC appears to have taken the position that it is a violation. Given the tolerance *Cigic* suggests, adding a frivolous issue or two to an otherwise standard criminal appeal might seem harmless and within what the Court intended. Until the matter is resolved, however, criminal defense attorneys should beware.

IX. GUIDANCE ON WHAT IS A FRIVOLOUS ARGUMENT IN A CRIMINAL APPEAL

At least five contexts have been identified in which courts discuss what "frivolous" means. Given their contextual variation from criminal defense appeals, however, none of them are particularly helpful in guiding appellate criminal defense lawyers between sanctionable frivolous and ethically safe meritless.

A. "Frivolous" Meaning "Unmeritorious"

Some cases purporting to involve frivolous issues are merely misnamed. Courts sometimes use the word "frivolous" somewhat carelessly when probably more accurately the meaning is that an argument lacks merit and thus does not prevail. The New Hampshire Supreme Court has made clear that to alleviate confusion for *Anders/Cigic* purposes, the terms "wholly frivolous" and "without merit" have been unified to mean "lacks any basis in law or fact."[67]

B. Attorney Discipline of Criminal Defense Lawyers

Out of reported lawyer disciplinary cases generally, fortunately few are for filing frivolous suits, and apparently none are against criminal defense lawyers. Discipline cases involving allegations of frivolous claims seem to often arise in lawyers' own divorce and child custody cases,[68] or when they seek payment from their clients.[69] Most are civil cases[70] and many deal with abusive litigation techniques sometimes involving discovery,[71] harassment,[72] and delay.[73] Some accompany other often more serious ethical misdeeds.[74] Some are for repeatedly suing for the same relief,[75] or appear to involve inexplicable, ideological, or political interests.[76] Because they do not involve criminal defense, however, their

facts generally do not enlighten the Anders issue.[77]

C. Federal Rules of Civil Procedure, Rule 11 Sanctions

Rule 11 of the Federal Rules of Civil Procedure requires that pleadings be nonfrivolous.[78] It provides that an attorney's signature on a pleading represents to the court that:

> "(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information."[79]

Cigic requires that a lawyer have a "good faith" belief in the nonfrivolousness of a contention. Rule 11 on the other hand, "imposes an objective standard of reasonable inquiry which does not mandate a finding of bad faith,"[80] and explicitly rejects an "empty head, pure heart"[81] approach. Thus lawyers are required to make both a "reasonable inquiry into the governing law," and a "reasonable inquiry into the facts of the case."[82]

There are thousands of cases imposing Rule 11 sanctions against lawyers. Not only because it applies only to federal non-appellate[83] civil pleadings, but because of its differing standard, Rule 11 is not particularly instructive for defining the parameters of *Cigic* for New Hampshire indigent criminal defense lawyers.

D. Federal Rules of Appellate Procedure, Rule 38 Sanctions

The Federal Rules of Appellate Procedure also has a provision regarding frivolous appeals. Rule 38 provides that "[i]f a court of appeals determines that an appeal is frivolous," it can "award just damages and single or double costs." There are hundreds of cases pursuant to the rule,[84] but only one criminal case is known. In 1986 a Wisconsin man purported to disencumber his acre of land by registering a "land patent" signed by President Fillmore in 1851. As the claim had been repeatedly deemed frivolous, when the proceeding was removed to federal court, the Seventh Circuit called it "frivolity on stilts."[85]

Because it perhaps explains why attorneys fees are rarely assessed in criminal cases, a long quotation from the opinion of Judge Easterbrook is instructive:

> We have been unable to find an award of attorneys' fees, or damages in lieu of attorneys' fees, against the defendant in any criminal case. Several considerations support a general reluctance to award attorneys' fees in criminal cases. First, most rules and statutes authorizing awards of fees apply only to civil litigation. Second, courts have tolerated arguments on behalf of criminal defendants that would be inappropriate on behalf of civil litigants. Many rules, starting with the special burden to show guilt "beyond a reasonable doubt," recognize the social interest in having a bias against conviction. Novel arguments that may keep people out of jail ought not to be discouraged by the threat of attorneys' fees. Third, the statute authorizing the imposition of costs against criminal defendants implies that the costs are to be part of the sentence (if the defendant is convicted), and an appellate court therefore cannot use this grant of power. Fourth, when a defendant seriously misbehaves in the trial court, the judge may take the misconduct into account in imposing sentence. This reduces the need for a separate penalty in the form of attorneys' fees. Finally, there are practical and constitutional limits on the monetary sanctions that may be employed against indigent criminal defendants.

Although it is therefore no surprise that courts do not award attorneys' fees against criminal defendants who assert frivolous positions, we have not found any case suggesting that an award of fees, or of damages under Rule 38 in lieu of fees, is prohibited. Criminal defen-

dants and their lawyers must abide by the rules that apply to other litigants, including the principle that litigating positions must have some foundation in existing law or be supported by reasoned, colorable arguments for change in the law. An argument in the teeth of the law is vexatious, and a criminal defendant who chooses to harass his prosecutor may not do so with impunity. The time of prosecutors is valuable. If a defendant multiplies the proceedings, this takes time that could more usefully be devoted to other prosecutions. When a defendant makes an argument so empty that no responsible lawyer could think the argument supportable by any plausible plea for a change in the law the court may reply with a penalty.

We need not consider whether and when a court should impose sanctions on a criminal defendant who simply makes unsupportable arguments during the regular course of trial and appeal. These appellants have wrenched their cases from the regular course. Wisconsin filed simple criminal complaints. Instead of arguing their positions in the courts of Wisconsin, these appellants removed the cases, imposing costs on a new set of courts. These removals have distracted judges from serious cases and delayed the consideration of more substantial claims. The prosecutors must deal not only with three levels of review in state court but also with two (so far, and potentially three) tiers of federal courts.

These removals vexatiously multiplied the proceedings in the original sense of that phrase. And federal courts lack the principal weapons available to the state courts to prevent harassing litigation. Because the appellants will not be sentenced in federal court, the court cannot impose the costs of prosecution as part of the sentence or augment any sentence of incarceration . . . .It is attorneys' fees and damages under Rule 38 or nothing.

An award of damages under Rule 38 in these cases will not stifle the vigorous defense of criminal charges. It will, however, ensure that the appellants and others like them think twice before removing to federal court criminal prosecutions that belong in state court. These petitions for removal had no conceivable foundation. Each defendant therefore is assessed $500 in damages under [Rule] 38, in addition to double costs.[86]

E. New Hampshire Attorneys Fees Litigation

In *Harkeem v. Adams* the New Hampshire Supreme Court held in 1977 that "a party who has instituted or prolonged litigation through bad faith or obstinate, unjust, vexatious, wanton, or oppressive conduct" may be ordered to pay opponent's counsel fees.[87] The court later explained that "it was the 'unnecessary' character of the judicial proceeding that justified the fee award"[88] and that "a litigant's unjustifiable belligerence or obstinacy" is a "variety of bad faith."[89] Because the "bad faith" standards are similar, attorneys fees litigation might help to clarify frivolousness in the *Anders/Cigic* context. But while there are many bad-faith attorneys fees cases in New Hampshire, few appear applicable to criminal representation. Rather they tend to involve internecine and neighbor disputes.[90]

The only known reported criminal case in which *Harkeem* attorneys fees have been applied did not address whether an issue was frivolous. In *State v. Dexter*,[91] the defendant was acquitted of negligent homicide, but found guilty of the lesser included offense of driving while intoxicated. After trial the defendant requested attorneys fees, alleging the prosecutor had violated discovery rules, participated in the investigation to the point of becoming a potential witness, and "grant[ed] an eve-of-trial interview with the press"[92] which resulted in the prosecutor being disqualified. The Court held that prosecutors and their employers have immunity for actions that are "functionally related to the prosecution of the defendant's case,"[93] and also deferred to the trial court's finding that although the prosecutor's tactics were "aggressive" they did not meet the Harkeem standard.[94] Accordingly, *Dexter* did not reach the issue of whether the conduct itself was sanctionable. As above, attorneys fees cases do not help answer *Cigic* questions.

X. PROCEDURAL ASPECTS RESOLVED, BUT AMBIGUITY REMAINS REGARDING WHAT CONSTITUTES A FRIVOLOUS ISSUE

Although Anders is often unworkable, Cigic largely resolved the procedural issues for New Hampshire appointed criminal defense lawyers practicing both in state and probably also federal appellate courts. Although *Cigic* clearly states that the New Hampshire courts will tolerate frivolous arguments, there are areas of ambiguity. A lawyer generally can make a sufficiency claim, and can make unpopular legal arguments as long as contrary precedent is squarely confronted. It is unclear whether *Cigic's* tolerance applies only to an entirely frivolous appeal, or also to one frivolous issue tacked onto an otherwise standard criminal appeal. There is frustratingly little guidance about what constitutes a frivolous issue, but that is unlikely to be easily resolved, as "the line between a frivolous appeal and one which simply has no merit is fine,"[95] "if indeed it exists at all."[96]

ENDNOTES

1. by Joshua Gordon, www.AppealsLawyer.net.

2. *State v. Cigic*, 138 N.H. 313, 314, 318 (1994); N.H.R.PROF.CONDUCT 1.2 ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation, and … shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."); *State v. Lovely*, 124 N.H. 690 (1984) (prosecutor's duty to press State's position).

3. "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact 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 or institutionalization, may nevertheless so defend the proceeding as to require that every element of the case be established." N.H.R.PROF.CONDUCT 3.1.

4. *Wayne R. LaFave*, 3 CRIMINAL PROCEDURE § 11.2(c) (3d ed.).

5. *Douglas v. California*, 372 U.S. 353 (1963).

6. *Price v. Price,* 654 P.2d 46, 48 (Ariz. App. 1982).

7. Hermann*, Frivolous Criminal Appeals*, 47 N.Y.U. L. REV. 701, 718 (1972).

8. *Anders v. California*, 386 U.S. 738 (1967) (California's "no-merit" letter insufficient). *See also, McCoy v. Wisconsin*, 486 U.S. 429 (1988) (approving requirement that attorney explain why appeal is frivolous); *Penson v. Ohio*, 488 U.S. 75 (1988) (disapproving failure to appoint new counsel after non-frivolous argument located by court); *Smith v. Robbins*, 528 U.S. 259 (2000) (explaining Anders is not sole acceptable procedure).

9. Prior to Anders, "once the court has 'gone through' the record and denied counsel, the indigent has no recourse but to prosecute his appeal on his own, as best he can, no matter

how meritorious his case may turn out to be. The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas v. California*, 372 U.S. 353, 357-58 (1963).

10. Frederick D. Junkin, *The Right to Counsel in "Frivolous' Criminal Appeals: A Reevaluation of the Guarantees of Anders v. California*, 67 TEX. L. REV. 181, 183 (1988) (canvassing many criticisms, calling alternatives undesirable, and defending Anders procedure); Conner, *Withdrawal of Appointed Counsel from Frivolous Indigent Appeals*, 49 Ind.L.J. 740 (1974) (arguing that for appellate counsel who feels appeal is frivolous, Cigic-type rule exacerbates conflict).

11. "[T]he Anders procedure entails serious drawbacks that warrant our review of alternative proposals, such as the so-called "Idaho rule." State v. Cigic, 138 N.H. 313, 316 (1994). See e.g., Frederick D. Junkin, The Right to Counsel in *'Frivolous' Criminal Appeals: A Reevaluation of the Guarantees of Anders v. California*, 67 TEX. L. REV. 181, 183 (1988); Eric B. Schmidt, *A Call to Abandon the Anders Procedure That Allows Appointed Appellate Criminal Counsel to Withdraw on Grounds of Frivolity*, 47 GONZ. L. REV. 199 (2012).

12. *Commonwealth v. Moffett*, 418 N.E.2d 585, 590 (Mass. 1981) (if appellant counsel "wishes to withdraw on the grounds that the appeal lacks merit … he must file a schizophrenic motion to withdraw accompanied by a formal brief opposing the motion") (quotations and citations omitted).

13. *State v. Cigic*, 138 N.H. 313, 315 (1994) ("the Anders approach puts counsel at odds with the client, forcing counsel into the awkward position of arguing against the client before the reviewing court"); State v. Gates, 466 S.W.2d 681, 684 (Mo. 1971) (Anders procedures "put defense counsel in the awkward position of arguing against his client").

14. ABA Standards for Criminal Justice, Criminal Appeals, Introduction at 2, 73-74 (approved draft 1970), cited in James E. Duggan and Andrew W. Moeller, *Make Way for the ABA: Smith v. Robbins Clears A Path for Anders Alternatives*, 3 J. APP. PRAC. & PROCESS 65, 106 n. 188 (2001).

15. Eric B. Schmidt, *A Call to Abandon the Anders Procedure That Allows Appointed Appellate Criminal Counsel to Withdraw on Grounds of Frivolity*, 47 GONZ. L. REV. 199 (2012).

16. *Commonwealth v. Moffett*, 418 N.E.2d 585, 590 (Mass. 1981) ("This Janus-faced approach not only runs the risk of alienating and frustrating his client, who can scarcely be blamed for feeling abandoned and betrayed."); *State v. Cigic*, 138 N.H. 313, 315 (1994) ("leading the defendant to conclude that his or her interests have been compromised"); *State v. Gates*, 466 S.W.2d 681, 684 (Mo.1971) (citing ABA Advisory Committee commentary).

17. Eric B. Schmidt, *A Call to Abandon the Anders Procedure That Allows Appointed Appellate Criminal Counsel to Withdraw on Grounds of Frivolity*, 47 GONZ. L. REV. 199 (2012) (*Anders* procedure "needlessly encourages the beliefs of some appellants that appointed counsel are not as desirable as privately retained counsel because they may be cooperating with the State.").

18. Eric B. Schmidt, *A Call to Abandon the Anders Procedure That Allows Appointed Appellate Criminal Counsel to Withdraw on Grounds of Frivolity*, 47 GONZ. L. REV. 199, 217 (2012); *State v. McKenney*, 568 P.2d 1213, 1214 (Idaho 1977) ("[W]e deem it clear that the mere submission of such a motion [to withdraw] by appellate counsel cannot but result in prejudice.").

19. Mendelson, *Frivolous Criminal Appeals: The Anders Brief or the Idaho Rule?*, 19 CRIM. L. BULL. 22, 26-30 (1983) (arguing Anders wrongly assumes defendant possesses education, experience, and training necessary to succeed after counsel has withdrawn).

20. *State v. Lewis*, 291 N.W.2d 735, 738 (N.D. 1980) (pointing out "the double burden of first convincing this court that the appeal has some degree of merit warranting an attorney's counsel and later coming back to this court to convince us that the degree of merit which warranted an attorney's counsel also supports a reversal of his conviction").

21. *Huguley v. State*, 324 S.E.2d 729 (Ga. 1985); *State v. Lewis*, 291 N.W.2d 735, 738 (N.D. 1980) ("If we were to fashion a North Dakota procedure in strict compliance with Anders and initially determine, after the court-appointed defense attorney found no merit in an appeal, whether or not an appeal was frivolous and only in the event that we found some semblance of appellate merit appoint another attorney to prosecute the appeal for the indigent, we would be acting contrary to … the North Dakota Constitution."

22. *State v. Cigic*, 138 N.H. 313, 315 (1994) ("[T]he Anders procedure places the appellate court in the inappropriate role of defense counsel, forcing the court to devise and recommend viable legal arguments for subsequent appellate counsel. In making such recommendations, the appellate court may appear to have lost its impartiality, displaying a potential bias in favor of any arguments it recommends.").

23. *State v. Lewis*, 291 N.W.2d 735, 738 (N.D. 1980) ("We also are aware of the substantial saving of appellate court time due to the elimination of the initial supreme court determination of whether or not the appeal is frivolous.").

24. *Huguley v. State*, 324 S.E.2d 729, 731 (Ga. 1985) ("We conclude that the Anders motion is unduly burdensome in that it tends to force the court to assume the role of counsel for the appellant.").

25. *State v. McKenney*, 568 P.2d 1213, 1214 (Idaho 1977).

26. *State v. Lewis*, 291 N.W.2d 735, 738 (N.D. 1980) ("The elimination of the double procedure will also conserve county funds.").

27. *Commonwealth v. Moffett*, 418 N.E.2d 585, 590 (Mass. 1981) ("As long as counsel must research and prepare an advocate's brief, he or she may as well submit it for the purposes of an ordinary appeal. Even if the appeal is frivolous, less time and energy will be spent directly reviewing the case on the merits. If the appeal is not frivolous, but rather arguable on the merits, refusing to permit withdrawal would also obviate any need to substitute counsel to argue the appeal.").

28. *State v. Cigic*, 138 N.H. 313, 317 (1994) ("[T]he appellate process is better served by prohibiting the withdrawal of appellate counsel because the court will spend 'less time and energy … directly reviewing the case on the merits.").

29. *State v. McKenney*, 568 P.2d 1213, 1214 (Idaho 1977) ("These two cases and motions and circumstances therein demonstrate the inability of this Court to follow the impractical and illogical procedure outlined in the Anders dictum. We therefore hold today that once counsel is appointed to represent an indigent client during appeal on a criminal case, no withdrawal will thereafter be permitted on the basis that the appeal is frivolous or lacks merit.").

30. Shortly before he was appointed to the New Hampshire Supreme Court and while still on the faculty of the Franklin Peirce Law Center/UNH School of Law, James Duggan published a comprehensive explanation regarding how states are free to improve upon the Anders procedure. James E. Duggan and Andrew W. Moeller, *Make Way for the ABA: Smith v. Robbins Clears A Path for Anders Alternatives*, 3 J. APP. PRAC. & PROCESS 65, 87-88 (2001) ("As for the historical context of Anders, around the time Anders was announced, the United States Supreme Court was routinely imposing new rules of criminal procedure on the states. The new rules included broad mandates that certain provisions in the Bill of Rights be enforced in state criminal cases, *e.g.*, the privilege against self-incrimination, the right to a speedy trial, the right to confront witnesses, and the right to compulsory process. There were also cases that spelled out specific rules that states had to follow as a matter of federal constitutional law, *e.g.*, the content of the harmless error rule, specific procedural requirements in juvenile cases, and a specific rule extending the right to counsel to a defendant facing a lineup. Given this context,

Anders could easily be read as yet another mandated procedure."). It should be noted also that as Chief Appellate Defender in 1994, James Duggan argued *State v. Cigic*, and it represents an important victory.

31. "[A]ny view of the procedure described in Anders … that converted it from a suggestion into a straitjacket would contravene this Court's established practice of allowing the States wide discretion … to experiment with solutions to difficult policy problems.… Accordingly, we hold that the Anders procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals. States may – and, we are confident, will – craft procedures that, in terms of policy, are superior to, or at least as good as, that in Anders. The Constitution erects no barrier to their doing so." *Smith v. Robbins*, 528 U.S. 259, 260-61, 276 (2000).

32. *State v. Cigic*, 138 N.H. 313, 317 (1994).

33. *Gale v. United States*, 429 A.2d 177, 178-81 (D.C.App.) (Ferren, J., dissenting), cert. denied, 454 U.S. 893 (1981).

34. Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection Is More Than Others*, 23 FLA. ST. U. L. REV. 625 (1996); Wayne R. LaFave, 3 CRIMINAL PROCEDURE §11.2(c) (3d ed.) ("[R]oughly a dozen states have responded to Anders by prohibiting withdrawal by appointed counsel, insisting that counsel file a brief even though regarding the appeal as frivolous."); 75B AM. JUR. 2d Trial § 1656 (up-to-date list of states following and not following *Anders*).

35. *State v. Cigic*, 138 N.H. 313 (1994).

36. *State v. Cigic*, 138 N.H. 313, 314 (1994).

37. *In re Richard A.*, 146 N.H. 295 (2001) (declining to extend Cigic procedure to non-criminal cases).

38. *State v. Cigic*, 138 N.H. 313, 317 (1994).

39. Sharon L. Demmerlé, *State v. Cigic: New Hampshire Mandates a Higher Standard of Appellate Advocacy for Indigent Criminal Defendants*, 36 N.H. B.J 42 (Sept. 1995).

40. *State v. Cigic*, 138 N.H. 313, 318 (1994) ("Counsel cannot concede that the appeal is frivolous. If an appeal is truly frivolous, counsel's accurate summary of the facts and law will make that obvious.").

41. *State v. Cigic*, 138 N.H. 313, 318 (1994).

42. *State v. Cigic*, 138 N.H. 313, 317 (1994) (citations omitted).

43. New Hampshire's Rules of Professional Conduct choice-of-law provision says a court may apply the rules where the tribunal sits or where the conduct occurred, although the court's own rules may adjust this. N.H. R. PROF. CONDUCT 8.5.

The First Circuit's rules provide that attorneys practicing there are governed by the ethics rules "either of the state … in which the attorney maintains his principal office," the state … in which the attorney is acting at the time of the misconduct," or of the state in which the circuit maintains its Clerk's Office."

> Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility, either of the state, territory, commonwealth or possession of the United States in which the attorney maintains his principal office; or of the state, territory, commonwealth or possession of the United States in which the attorney is acting at the time of the misconduct; or of the state in which the circuit maintains its Clerk's Office, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of the attorney-client relationship. The Code of Professional Responsibility means that code adopted by the highest court of the state, territory, commonwealth or possession of the United States, as amended from time to time by that court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state, territory, commonwealth or possession of the United States. Failure to comply with the Federal Rules of Appellate Procedure, the Local Rules of this Court, or the orders of this Court may also constitute misconduct and be grounds for discipline.

RULES OF ATTORNEY DISCIPLINARY ENFORCEMENT FOR THE COURT OF APPEALS FOR THE FIRST CIRCUIT, Rule IV (Aug. 1, 2002), currently available as part of the Court's rulebook, <http://www.ca1.uscourts.gov/files/rules/rulebook.pdf>.

As a practical matter, the First Circuit may employ the ethics rules of the state from which the case originated. Under Local Rule 4(d) of the United States District Court for the District of Rhode Island, the Rules of Professional Conduct of the Rhode Island Supreme Court are the standard of conduct for all attorneys practicing before the federal district court in Rhode Island." *Obert v. Republic W. Ins. Co.*, 398 F.3d 138, 143, 145 n. 4 (1st Cir. 2005) ("'Untruthful' in the context of the Rhode Island ethical rules means knowingly false."). It should be noted that the rules of the New Hampshire District Court contain a similar re-reference as the Rhode Island rules quoted by the First Circuit:

> The Standards for Professional Conduct adopted by [the New Hampshire District] court are the Rules of Professional Conduct as adopted by the New Hampshire Supreme Court, as the same may from time to time be amended by that court, and any standards of conduct set forth in these rules. Attorneys who are admitted or permitted to practice before this court shall comply with the Standards for Professional Conduct, and the court expects attorneys to be thoroughly familiar with such standards before appearing in any matter. Attorneys prosecuting criminal cases are also held to the standards of conduct established by law for prosecutors.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE, LOCAL RULES, Rule 83.5 *Disciplinary Rules, Standards for Professional Conduct* DR-1.

See also, State v. Balfour, 814 P.2d 1069, 1078 (Or. 1991) (en banc) ("[T]he [United States] Supreme Court is not the arbiter of ordinary questions of ethical practices for attorneys in state court, except where those ethical practices implicate federal constitutional concerns."); *State v. Clark*, 2 P.3d 89, 96 (Ariz. App. 1999) ("[I]t is up to the states to determine the proper ethical rules for attorneys practicing within their jurisdiction.").

44. N.H.R.PROF.CONDUCT 3.1.

45. *State v. Cigic*, 138 N.H. 313, 317 (1994).

46. *Wisconsin v. Glick*, 782 F.2d 670, 672 (7th Cir. 1986).

47. *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972) (contrary law "is unambiguous and unwaivering").

48. *McCoy v. Wisconsin*, 486 U.S. 429 (1988) (quoting *United States v. Edwards*, 777 F.2d 364, 365 (7th Cir. 1985).

49. *State v. Cigic*, 138 N.H. 313, 318 (1994) ("[C]ounsel must not deliberately omit facts or authority that directly contradict the argument.").

50. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

51. *Almendarez-Torres v. United States,* 523 U.S. 224 (1998).

52. *Monge v. California,* 524 U.S. 721 (1998) and *Jones v. United States*, 526 U.S. 227 (1999). See also, Dretke v. Haley, 541 U.S. 386 (2004) (majority noting the continuing viability of the *Almendarez-Torres* exception posed "difficult constitutional questions").

53. *Rangel-Reyes v. United States*, 547 U.S. 1200 (2006).

54. *United States v. Pineda-Arrellano*, 492 F.3d 624, 626 (5th Cir. 2007) ("No matter what the underlying rationale may have been for challenging *Almendarez-Torres* 'to preserve the issue for further review,' it is time to admit that the Supreme Court has spoken. In the future, barring new developments in Supreme Court jurisprudence, arguments seeking reconsideration of *Almendarez-Torres* will be viewed with skepticism, much like arguments challenging the constitutionality of the federal income tax.").

55. Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 HOUS. L. REV. 747, 769 *et seq.* (2008) (thoroughly exploring the dilemma *Almendarez-Torres* presents for appellate criminal defense lawyers, especially in the context of preserving issues for the client in the event a law is someday overturned).

56. Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 HOUS. L. REV. 747, 749-50 (2008).

57. *Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

58. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

59. *Roe v. Wade*, 410 U.S. 113 (1973).

60. *Miller v. California*, 413 U.S. 15 (1973).

61. *Miranda v. Arizona*, 384 U.S. 436 (1966).

62. *Anders v. California*, 386 U.S. 738, 744 (1967) ("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.").

63. Other states appear to have the same interchangeability. *See e.g., Commonwealth v. Moffett*, 418 N.E.2d 585, 596 (Mass. 1981) (appearing to interchange frivolous appeal with "unsupportable contentions").

64. *State v. Cigic*, 138 N.H. 313, 317 (1994) (emphasis added).

65. *State v. Cigic*, 138 N.H. 313, 318 (1994) (emphasis added).

66. *State v. Cigic*, 138 N.H. 313, 317 (1994) (emphasis added).

67. *McCoy v. Wisconsin*, 486 U.S. 429, 438 n. 10 (1988) ("The terms 'wholly frivolous' and 'without merit' are often used interchangeably in the Anders brief context. Whatever term is used to describe the conclusion an attorney must reach as to the appeal before requesting to withdraw and the court must reach before granting the request, what is required is a determination that the appeal lacks any basis in law or fact."); *State v. Cigic*, 138 N.H. 313, 318 (1994) (citing *McCoy* to mean: "unifying the terms 'wholly frivolous' and 'without merit' under the rubric 'lacks any basis in law or fact'"); Wayne R. LaFave, 3 CRIMINAL PROCEDURE § 11.2(c) at n. 87 (3d ed.) (discussing confusion in language and resolution); Frederick D. Junkin, T*he Right*

to Counsel in "Frivolous" Criminal Appeals: A Reevaluation of the Guarantees of Anders v. California, 67 TEX. L. REV. 181, 188 (1988) (concluding that McCoy "used the terms 'meritless' and 'frivolous' interchangeably").

68. *Bruzga's Case*, 145 N.H. 62 (2000); *Discipline of Tieso*, 396 N.W. 2d 32, (Minn. 1986); *Matter of Shapiro*, 664 N.Y.S.2d 59 (App.Div. 1997).

69. *People v Fitzgibbons*, 909 P.2d 1098 (Colo. 1996); *In Re Sarelas*, 277 N.E.2d 313 (Ill. 1971); *In re Disciplinary Action Against Selmer*, 568 N.W.2d 702 (Minn. 1997); *In re Richards*, 986 P.2d 1117 (N.M. 1999); *In re Conduct of Huffman*, 983 P.2d 534 (Or. 1999).

70. *People v. Maynard*, 238 P.3d 672 (Colo. 2009); *Florida Bar v Graves*, 541 So. 2d 608 (Fla. 1989); *Visoly v. Security Pacific Credit Corp.*, 768 So. 2d 482 (Fla.App. 2000); *Nissenson v. Bradley*, 738 N.E.2d 586 (Ill.App. 2000); *Walsh v. Capital Engineering and Mfg. Co.*, 728 N.E.2d 575 (Ill. App. 2000); *In re Oliver*, 729 N.E.2d 582 (Ind. 2000); *In re Humphrey*, 725 N.E.2d 70 (Ind. 2000); *In re Hackett*, 701 So. 2d 920 (La. 1997); *Parler & Wobber v. Miles & Stockbridge*, 756 A.2d 526 (Md. 2000); *Attorney Grievance Com'n of Maryland v. Brown*, 725 A.2d 1069 (Md. 1999); *In re Kerlinsky*, 704 N.E.2d 503 (Mass. 1999); *Disciplinary Action Against Thedens*, 602 N.W.2d 863 (Minn. 1999); *Disciplinary Action against Pinotti*, 585 N.W.2d 55 (Minn. 1998); *In re Caranchini*, 956 S.W.2d 910 (Mo. 1997); *In re Capoccia*, 712 N.Y.S.2d 699 (App. Div. 2000); *United Capital Corp. v. 183 Lorraine Street Associates*, 712 N.Y.S.2d 43 (App. Div. 2000); *Matter of Babigian*, 669 N.Y.S.2d 686 (App.Div. 1998); *Cleveland Bar Assn. v. Wishnosky*, 726 N.E.2d 996 (Ohio 2000); *Oklahoma Bar Ass'n v. Braswell*, 975 P.2d 401 (Okla. 1998); *Disciplinary Proceedings against Ratzel*, 487 N.W.2d 38 (Wis. 1992); *In Re Lauer*, 324 N.W.2d 432 (Wis. 1982).

71. *Robertson's Case*, 137 N.H. 113 (1993); *Disciplinary Action Against Thedens*, 602 N.W.2d 863 (Minn. 1999).

72. *Florida Bar v. Richardson*, 591 So. 2d 908 (Fla. 1991); *Florida Bar v. Thomas*, 582 So. 2d 1177 (Fla. 1991); *In re Haasze*, 336 So. 2d 76 (Fla. 1976); *Banderas v. Advance Petroleum*, Inc., 16 So. 2d 876 (Fla. App. 1998); *In Re Jafree*, 444 N.E. 2d 143 (Ill. 1982); *Re Phelps*, 303 N.E. 2d 13 (Ill. 1972); *In Re Sarelas*, 277 N.E. 2d 313 (Ill. 1971); *Attorney Grievance Com'n v. Alison*, 709 A.2d 1212 (Md. 1998); *Disciplinary Action Against Jensen*, 542 N.W.2d 627 (Minn. 1996); *Disciplinary Action against Weiblen*, 439 N.W.2d 7 (Minn. 1989); *Discipline of Tieso*, 396 N.W.2d 32 (Minn. 1986); *In Re Avallone*, 490 P2d 235 (N.M. 1971); *In re Capoccia*, 709 N.Y.S.2d 640 (App. Div. 2000); *Oklahoma Bar Ass'n v. Bedford*, 956 P.2d 148 (Okla. 1997); *Disciplinary Proceedings against Caldwell*, 491 N.W.2d 482 (Wis. 1992).

73. *In Re Bithoney*, 486 F.2d 319 (1st Cir. 1973); *United Capital Corp. v. 183 Lorraine Street Associates*, 712 N.Y.S.2d 43 (App. Div. 2000); *In re Capoccia*, 709 N.Y.S.2d 640 (App. Div. 2000); *In Re Tinney*, 176 N.Y.S. 102, (App.Div. 1919).

74. *Florida Bar v. Graves*, 541 So 2d 608 (Fla. 1989); *In re Lober*, 969 P.2d 885 (Kan. 1998); *Turner v. Kentucky Bar Ass'n*, 955 S.W.2d 926 (Ky. 1997); *In re Brough*, 709 So. 2d 210 (La. 1998); *In re Kerlinsky*, 704 N.E.2d 503 (Mass. 1999); *In re Disciplinary Action Against Gant*, 615 N.W.2d 271 (Minn. 2000); *Disciplinary Action Against Thedens*, 602 N.W.2d 863 (Minn. 1999); *In re Caranchini*, 956 S.W.2d 910 (Mo. 1997) (attorney committed crime as part of course of conduct involving ethics issues); *In re Capoccia*, 709 N.Y.S.2d 640 (App. Div. 2000); *In re Brooks*, 708 N.Y.S.2d 22 (App. Div. 2000); In re Conlon, 688 N.Y.S.2d 730 (App. Div. 1999); *Matter of Marin*, 673 N.Y.S.2d 247 (App. Div. 1998); *Matter of Yao*, 680 N.Y.S.2d 546 (App. Div. 1998); *Matter of Shapiro*, 664 N.Y.S.2d 59 (App.Div. 1997); *Cuyahoga County Bar Ass'n v. Chandler*, 692 N.E.2d 568 (Ohio 1998).

75. *In re Solerwitz*, 848 F.2d 1573 (Fed. Cir. 1988) (over 100 appeals on behalf of former air traffic controllers after the federal court ruled adversely in 12 representative cases); *People v. Maynard*, 238 P.3d 672 (Colo. 2009); In Re Sarelas, 277 N.E. 2d 313 (Ill. 1971); *In re Oliver*, 729 N.E.2d 582 (Ind. 2000); *Disciplinary Action against Nora*, 450 N.W.2d 328 (Minn. 1990); *United Capital Corp. v. 183 Lorraine Street Associates*, 712 N.Y.S.2d 43 (App. Div. 2000); *Disciplinary Proceedings against Ratze*l, 487 NW2d 38 (Wis. 1992).

76. *People v Hartman*, 744 P.2d 482 (Colo. 1987) (repeatedly claiming wages were not taxable, in face of clear precedent); *In Re Jafree*, 444 N.E.2d 143 (Ill. 1982) (attorney brought 40 frivolous suits including on behalf of all trees in United States, federal *in forma pauperis* forms declared unconstitutional, suits against law schools seeking to have law degrees awarded to him *nunc pro tunc*, against individuals for breaching the United States Treaty of Friendship with Pakistan, suit alleging pollution of the mind and contamination of the air with character assassination); *In re Boone*, 7 P.3d 270 (Kan. 2000) (attorney filing action alleging violations of Americans with Disabilities Act based on conduct which occurred before effective date); *Disciplinary Action Against Selmer*, 568 N.W.2d 702 (Minn. 1997); *Disciplinary Action against Nor*a, 450 N.W. 2d 328 (Minn. 1990); *Office of Disciplinary Counsel v. Price*, 732 A.2d 599 (Pa. 1999) (local political motivations); *Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.*, 597 N.W.2d 744 (Wis. 1999); *Committee on Legal Ethics of the West Virginia State Bar v. Douglas*, 370 S.E.2d 325 (W.Va. 1988).

77. The only known reported criminal case involving frivolousness is from New Hampshire. *State v. Hynes*, 159 N.H. 187 (2009). Hynes was a male lawyer convicted of extortion for threatening to sue a hair solon, of which he was not a customer, for sex discrimination on the grounds it charged more for women's haircuts. Whether Attorney Hynes was guilty of extortion turned on whether he was an "aggrieved" party with standing under the discrimination statute to bring the threatened lawsuit. The majority wrote: "In the abstract, the word "aggrieved" may leave room for advocacy regarding its intended meaning, but no reasonable attorney would construe the term in a vacuum. The defendant, who lacked a client and did not personally patronize the salon, could not reasonably conclude that he was "aggrieved" by virtue of his general interest in ending sex discrimination and its distressing effect upon him." *State v. Hynes*, 159 N.H. 187, 197 (2009). But citing New Hampshire Rule of Professional Conduct 3.1., which says that a "'lawyer may assert [an] issue when there is [a] good faith argument for extension, modification or reversal of existing law,'" the dissent suggested the lawyer's threatened suit might not be objectively baseless, and therefore he would be not guilty of the extortion. *State v. Hynes*, 159 N.H. 187, 206 (2009) (Dalianis, J., dissenting). Although Hynes involves frivolousness connected with a criminal case, the lawyer's conduct did not occur in the course of criminal defense representation, and therefore does not provide much guidance for criminal defense attorneys.

78. FED. R. CIV. P. 11.

79. FED. R. CIV. P. 11(b).

80. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991).

81. *Thorpe v. Alber's, Inc.*, 922 F. Supp. 84, 94 (E.D. Tenn. 1996).

82. *Ridge v. U.S. Postal Service*, 154 F.R.D. 182, 184 (N.D.Ill.1992).

83. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990) ("On its face, Rule 11 does not apply to appellate proceedings.").

84. *See e.g.*, Annotation, What Circumstances Justify Award of Damages and/or Double Costs Against Appellant's Attorney under 28 U.S.C.A. § 1912, or Rule 38 of the Federal Rules of Appellate Procedure, 50 A.L.R. Fed. 652.

85. *Wisconsin v. Glick*, 782 F.2d 670, 672 (7th Cir. 1986).

86. *Wisconsin v. Glick*, 782 F.2d 670, 673-74 (7th Cir. 1986) (citations omitted).

87. *Harkeem v. Adams*, 117 N.H. 687, 688 (1977).

88. *Keenan v. Fearon*, 130 N.H. 494, 501 (1988).

89. *Keenan v. Fearon*, 130 N.H. 494, 502 (1988).

90. *See e.g., Kukene v. Genualdo*, 145 N.H. 1 (2000) (abutting sisters disputing ownership of strip of land); *Glick v. Naess*, 143 N.H. 172 (1998) (former spouses disputing custody of child); *King v. Mosher*, 137 N.H. 453 (1993) (co-executors of father's estate disputing personal property).

91. *State v. Dexter*, 136 N.H. 669 (1993).

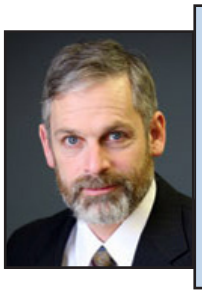
92. *State v. Dexter*, 136 N.H. 669, 671 (1993).

93. *State v. Dexter*, 136 N.H. 669, 673 (1993).

94. *State v. Dexter*, 136 N.H. 669, 671 (1993).

95. Price v. Price, 654 P.2d 46, 48 (Ariz. App. 1982).

96. Hermann, Frivolous Criminal Appeals, 47 N.Y.U. L. REV. 701, 718 (1972).



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