

Appellate Court Procedural Rules Committee

The Appellate Court Procedural Rules Committee proposes to amend Pennsylvania Rule of Appellate Procedure 120. The amendment is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court.

Proposed new material is underlined while deleted material is bracketed.

All communications in reference to the proposed amendment should be sent no later than February 10, 2010 to:

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An Explanatory Comment precedes the proposed amendment and has been inserted by this Committee for the convenience of the bench and bar. It will not constitute part of the rule nor will it be officially adopted or promulgated.

By the Appellate Court Procedural Rules Committee

Honorable Maureen Lally-Green,
Chair

EXPLANATORY COMMENT

In direct appeals of a criminal conviction and in appeals of a denial of a first Post-Conviction Relief Act (“PCRA”) petition an appellant is entitled to continued and effective representation. Consequently, counsel may not withdraw without substitute counsel unless the appellate court permits the withdrawal after it has reviewed the record. Because the right to counsel on direct appeal is constitutional and for first PCRA appeals the right arises under statute and rule, the standards for seeking and granting withdrawal differ. To date, the procedures for withdrawal in such circumstances have been created only by case law, and lawyers have frequently conflated the procedures. Accordingly, the Committee concluded that it would assist the bar to have the standards set forth in a rule.

Whether an appellant is appealing directly from a criminal conviction or is appealing from the denial of a first PCRA petition, counsel must continue to represent the appellant and comply with all deadlines for filing and serving any required documents until the appellate court grants permission to withdraw.

Withdrawal in such situations has serious ramifications, because the appellate court will affirm the conviction or denial of the petition without further briefing. Moreover, if the court permits the withdrawal, the appellant will no longer have a right to appointed counsel. See *Commonwealth v. Alberta*, 974 A.2d 1158 (Pa. 2009).

As noted above, the 2009 amendment is intended to set forth the differing requirements for petitioning to withdraw from representation of an appellant who

is (1) appealing a criminal conviction directly; or (2) is appealing a denial of a first PCRA petition. Perhaps because the procedures are very different from typical motion practice, a great deal of confusion has resulted. The amendment has been drafted to set forth the requirements more clearly.

1. Procedures common to both types of withdrawal

In either case, when seeking to withdraw, counsel must file a petition to withdraw and attach the documents the court will need to complete its review of the record, including a certification that counsel has reviewed the record diligently. Counsel must also send a copy of the filed materials to the appellant, with a letter warning the appellant that if the court permits counsel to withdraw under this rule (and applicable law), the court will affirm the conviction and advising that the appellant has a right to address the court directly and to raise additional issues for the court's consideration, as well as advising that the appellant has twenty-one days to file any supplemental materials with the court. One question on which the Committee seeks input is whether the response time for the appellant should be calculated from the date on which the appellant receives the document – with the appellant responsible for demonstrating when he or she received it – or whether counsel should indicate in the certificate of service for the petition the date that the letter was sent, with the time for responding calculated from that date.

The Commonwealth may respond to the petition of counsel or the appellant's supplemental submission.

In either case, in deciding whether to permit the withdrawal, the appellate court will review the entire record.

2. Procedures for withdrawal from representation on direct appeal

On direct appeal, a criminal defendant has a constitutional right to be represented by counsel. See *Anders v. California*, 386 U.S. 738 (1967), and *Commonwealth v. McClendon*, 434 A.2d 1185 (Pa. 1981). But that right does not extend to having counsel pursue an appeal that is wholly frivolous. *Smith v. Robbins*, 528 U.S. 259, 277-78 (2000). Accordingly, counsel may seek to withdraw from representing someone who is directly appealing a criminal conviction only after undertaking a diligent search of the record – which is part of counsel’s duty of zealous advocacy that may not be avoided – and only if, after that review, counsel concludes that all issues that could potentially be raised on appeal are *wholly frivolous*.

Once counsel reaches that conclusion, the duty of candor to the tribunal and the duty not to pursue a frivolous appeal take precedence. As the Supreme Court has recently explained, when counsel seeks to withdraw under *Anders*, the lawyer must identify for the appellate court all places in the record that might arguably give rise to an appeal and all pertinent legal authorities, and must explain why counsel has concluded that the potential arguments would be wholly frivolous. See *Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009). In this way, the court can assure itself that the appellant has no non-frivolous issues to present.

3. Procedures for withdrawal from representation on appeal of a denial of a first PCRA petition

In contrast, the appeal of a denial of a first PCRA petition is governed by statute and rule. See 42 Pa.C.S. §§ 9541-9546; *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988); *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988). Accordingly, counsel must still review the record diligently, but only to determine if there are *meritorious* issues that warrant an appeal. In the explanation that accompanies the petition to withdraw, counsel will not merely *explain* what could be raised and why it has no merit but will actually *argue against the client*. *Commonwealth v. Wrecks*, 931 A.2d 717, 721-22 (Pa. Super. 2007) (characterizing *Anders* and *Turner* as “close cousins” but recognizing that under *Turner/Finley* counsel “must argue” against the client.). Moreover, because under *Turner/Finley*, the appellate court reviews the record only for *meritorious* issues, the court’s review need not be as stringent as on a request to withdraw from a direct appeal; nonetheless, the Court will still require briefing on any issues it sees – whether counsel or the appellant has raised them or not. See, e.g., *Commonwealth v. Young*, 922 A.2d 913 (Pa. Super. 2007) (recognizing that the first time the case was before it on a *Turner/Finley* request, the court’s “review of the record...revealed an issue of arguable merit that we determined should have been addressed by counsel....”).

This Recommendation is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court for

adoption. Proposed new material is underlined, while deleted material is bracketed.

Rule 120. Entry and Withdrawal of Appearance

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(b) Withdrawal of Appearance for lack of a legal basis in appeals from a direct criminal conviction or denial of a first Post-Conviction Relief Act petition. If counsel represents an appellant in the above circumstances, counsel does not have an automatic right to withdraw from the representation. Unless the court appoints or the appellant retains substitute counsel, withdrawal will be allowed only if the requirements of the appropriate section of this rule have been followed, and if the court is satisfied that withdrawal is warranted.

(1) Petition to withdraw as counsel on direct appeal of a criminal conviction. Counsel who seeks to withdraw from representation on direct appeal of a criminal conviction because counsel has concluded that all issues that could be raised on appeal are frivolous may withdraw only if the court concludes that there are no non-frivolous issues to be raised based upon the court's review of the issues identified by counsel and the appellant and its independent review of the record.

(A) To facilitate this review, counsel must file a petition seeking withdrawal with the appellate court. Counsel shall attach to the petition a statement that contains a certification that counsel has reviewed the record diligently and a thorough explanation of the law and facts pertinent to the appeal, including:

(i) a summary of the procedural history and facts, with citations to the pertinent sections of the record;

(ii) an identification of all issues that might arguably be raised on the appeal with references to anything in the record and any legal authority that could arguably support the appeal; and

(iii) the reasons for counsel's conclusion that each of the issues that could be raised would be frivolous.

(B) Counsel must provide a copy of both the petition and the attached statement to the appellant, accompanied by a letter warning the appellant that if the court permits counsel to withdraw, it will make a finding that the appeal is wholly frivolous and will affirm the conviction. In addition, counsel must set forth in the letter that appellant has the right:

(i) to address the matters raised in the petition and statement and to bring any additional points to the court's attention by filing a response with the appellate court within twenty-one (21) days of either (a) the date the letter has been marked as received by the institution with custody of the appellant; or (b) the date of the postmark of the letter if the appellant is not in custody; and

(ii) to proceed *pro se* or by retaining private counsel.

(C) Within twenty-one (21) days of the date appellant's response was filed or due to be filed, the Commonwealth may file a brief addressing the petition and statement and the appellant's response, if any.

(D) After the court has received the record, it shall conduct an independent review of the record and the submissions of counsel and of the appellant and the Commonwealth, if any. After that review,

(i) if the court determines that the appeal is wholly frivolous, the court shall grant counsel's petition to withdraw and shall affirm the judgment of sentence; or

(ii) if the court determines that there are non-frivolous claims, the court shall either deny the petition to withdraw or direct the trial court to appoint replacement counsel. In such cases, the appellate court will identify non-frivolous issues that must be briefed by counsel on their merits. The issues identified by the court are not exclusive, and counsel may raise and brief any additional issues counsel identifies as potentially non-frivolous.

(2) Petition to withdraw as counsel on appeal after denial of the first petition for post-conviction relief from a criminal conviction. Counsel who seeks to withdraw from representation after denial of a first petition for post-conviction relief of a criminal conviction may withdraw if the court concludes that there are no meritorious issues to be raised upon its review of the issues identified by counsel and the appellant and its independent review of the record.

(A) To facilitate this review, counsel must file a petition seeking withdrawal with the appellate court. Counsel shall attach to the petition a brief containing a certification that counsel has reviewed the record diligently and argument setting forth why none of the claims asserted by the appellant is meritorious. As to each claim, the brief must contain:

(i) a summary of the procedural history and facts with citations to the pertinent sections of the record;

(ii) a list of all issues that could be raised in the appeal;

(iii) a review of the facts and law that have led counsel to the conclusion that all issues that could be raised on appeal would be without merit.

(B) Counsel must provide a copy of both the petition and the attached brief to the appellant, accompanied by a letter warning the appellant that if the court permits counsel to withdraw, it will make a finding that the appeal has no merit and will affirm the denial of the petition for post-conviction relief. In addition, counsel must set forth in the letter that appellant has the right:

(i) to address the matters raised in the petition and brief and to bring any additional points to the court's attention by filing a response with the appellate court within twenty-one (21) days of either (a) the date the letter has been marked as received by the institution with custody of the appellant; or

(b) the postmark of the letter if the appellant is not in custody; and

(ii) to proceed *pro se* or by retaining private counsel.

(C) Within twenty-one (21) days of the date appellant's response was filed or due to be filed, the Commonwealth may file a brief addressing the petition and statement and the appellant's response, if any.

(D) After the court has received the record, it shall examine the petition and other submissions of counsel, appellant's response, if any, and the Commonwealth's brief, if any. In addition, the court will conduct an independent review of the record. After that review:

(i) If the appellate court determines that the appellant has not raised any meritorious claims, the appellate court shall grant counsel's petition to withdraw and shall affirm the denial of the petition for post-conviction relief; or

(ii) If the appellate court determines that there are potentially meritorious claims, the court shall either deny the request to withdraw or direct the trial court to appoint replacement counsel. In such cases, the court will identify potentially meritorious issues for counsel to brief on their merits. The issues identified by the court are not exclusive, and counsel may raise and brief any additional issues counsel identifies as potentially meritorious.

NOTE:

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On direct appeal, a criminal defendant is constitutionally entitled to zealous and effective representation, because the Sixth Amendment is binding on the states through the Fourteenth Amendment. See *Strickland v. Washington*, 466 U.S. 688 (1973) (describing counsel’s “overarching duty to advocate the defendant’s cause.”). An appellant on direct appeal from a criminal conviction thus has “the right to have an attorney, zealous for the indigent’s interests, evaluate his case and attempt to discern non-frivolous arguments.” *Smith v. Robbins*, 528 U.S. 259, 278 n.10 (2000). That right does not however extend to having counsel pursue an appeal that the lawyer concludes after review is wholly frivolous. *Id.* at 277-78.

Accordingly, a petition to withdraw on direct appeal should not be submitted until counsel has conducted a thorough review of the record and law, searching diligently for any non-frivolous issues. Compare Pennsylvania Rules of Professional Conduct Preamble and Scope (counsel’s duty is to “assert the client’s position” zealously) with Rules 3.1, 3.3 (obligation not to pursue a frivolous appeal; obligation to be candid with the tribunal). As the Supreme Court has explained, a lawyer seeking to withdraw must explain to the tribunal which issues could be raised, where in the record and the law such issues might be supported, and why the lawyer has concluded the issues are wholly frivolous. *Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009).

While “frivolous” escapes ready characterization, certain principles are clear. In *Commonwealth v. Greer*, 455 Pa. 106, 108-09, 4 A.2d 513, 514 (1974), the Supreme Court explained that “frivolous” was more than a lack of merit, and the fact that the prospects of success were “dim” did not make an appeal frivolous. *Id.* A frivolous argument is one that counsel concludes cannot be raised “without compromising professional standards.” *Id.* By way of example, an argument to reevaluate existing case law may be non-frivolous if the Supreme Court has not considered the precise issue and if the argument is “supported by a reasonable belief” that the Supreme Court might disagree with the conclusions of the lower courts. *Smith v. Commonwealth Bd. of Probation and Parole*, 524 Pa. 500, 507-08, 574 A.2d 558, 562 (1990). Likewise, issues that might have been waived could be non-frivolous. See *Commonwealth v. Lilley*, 978 A.2d 995 (Pa. Super. 2009).

Counsel’s explanation allows the appellate court to review the record to assure itself that there are no potentially non-frivolous issues. Case law commonly refers to the petition and/or the accompanying documents as an “*Anders* brief.” The term “brief” can create confusion, however, because it suggests zealous argument (either for or against the client). Instead, as *Santiago* explains, counsel is fulfilling duties both to the client (to conduct a diligent review) and to the tribunal (to report the results of that review candidly).

Under the Post-Conviction Relief Act, the right to counsel on a first post-conviction petition is statutory or by rule and the petitioner is not entitled to as much protection as an appellant directly appealing a criminal conviction. See 42

Pa.C.S. §§ 9541-9546; Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). The appellate court must review the record to assure itself only that all issues are non-meritorious before granting permission to withdraw. Id. The practice to be followed for withdrawal from representation of a petitioner who is pursuing a first PCRA petition is accordingly different, and the brief *must contain argument against the client.* See *Commonwealth v. Wrecks*, 931 A.2d 717, 721-22 (Pa. Super. 2007) (characterizing *Anders* and *Turner* as “close cousins” but recognizing that under *Turner/Finley* counsel “must argue” against the client.)

Whether on direct appeal or on appeal from the denial of a first PCRA petition, a lawyer has a responsibility to continue to meet all deadlines and to comply with all applicable law, rules, and orders of the trial and appellate court until the appellate court has granted the petition for permission to withdraw.

The rule adds specific time frames for the appellant and the Commonwealth to file responses to the petition with the court.