Appellate Court Procedural Rules Committee

The Appellate Court Procedural Rules Committee proposes to amend Pennsylvania Rules of Appellate Procedure 120, 907, 1925 and 2744. These amendments have been developed in conjunction with the Criminal Procedural Rules Committee, which is proposing the amendment of Pennsylvania Rules of Criminal Procedure 120, 122, and 904. These amendments are being submitted to the bench and bar for comments and suggestions. The proposed amendments have not been submitted 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 **Friday, June 3, 2011** to:

**Dean R. Phillips, Counsel**
**D. Alicia Hickok, Deputy Counsel**
**Scot Withers, Deputy Counsel**
**Appellate Court Procedural Rules Committee**
Pennsylvania Judicial Center
601 Commonwealth Ave., Suite 6200
P.O. Box 62635
Harrisburg, Pennsylvania 17106-2635
or Fax to
(717) 231-9551
or E-Mail to
**appellaterules@pacourts.us**

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

The Appellate Court Procedural Rules Committee proposes to amend Pennsylvania Rules of Appellate Procedure 120, 907, 1925 and 2744. These amendments have been developed in conjunction with the Criminal Procedural Rules Committee, which is proposing the amendment of Pennsylvania Rules of Criminal Procedure 120, 122, and 904 by publication of the same date. These amendments are being submitted to the bench and bar for comments and suggestions. The proposed amendments have not been submitted to the Supreme Court.

Both bench and bar have commented on the unwieldy (and confusing) practice that has developed around counsel's attempts to withdraw in representing defendants on direct appeal or petitioners in Post-Conviction Relief Act proceedings. After evaluation of the law in this and other jurisdictions, the two Committees are soliciting comments on the below proposal to alter significantly the procedure for withdrawal in criminal and Post-Conviction Relief Act appeals. In both cases, counsel would be obligated to remain as counsel to raise any issues that are consistent with his or her ethical obligations to be candid with the Court. For example, if a lawyer can in good faith argue for a change in the law, the lawyer may make that argument, although the lawyer would remain obligated to inform the courts as to any precedent contrary to his or her position.

The current procedure arises out of four cases, two in the United States Supreme Court and two in the Pennsylvania Supreme Court: *Anders v. California*, 386 U.S. 738 (1967), *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981) (both of which govern withdrawal on direct appeal); and *Pennsylvania v. Finley*, 481 U.S. (1987),

*Commonwealth v. Turner,* 518 Pa. 491, 544 A.2d 927 (1988) (both of which govern withdrawal during Post-Conviction Relief Act proceedings). As these cases have been construed here, counsel may move to withdraw from representing a criminal defendant if there are no non-frivolous issues to raise (on direct appeal) or if there only non-meritorious issues to raise (during Post-Conviction Relief Act proceedings). The United States Supreme Court has held that the states do not need to follow *Anders*; they *do* need to have a process that guarantees each criminal defendant counsel who satisfies the requirements of the Sixth Amendment of the United States Constitution. *See Smith v. Robbins*, 528 U.S. 259 (2000).

As the problems with following the resultant procedures have become more pronounced, other jurisdictions have recognized that there is much to be gained by having counsel brief any issue consistent with his or her duty of candor toward the courts. *First*, the burden is on counsel, rather than the courts, to conduct a thorough review of the record and identify potentially appealable issues. *Second*, and related, because when courts review applications pursuant to *Anders*/*McClendon* and *Turner*/*Finley*, several are returned for further briefing, having counsel brief the issues in the first instance promotes judicial efficiency. *Finally*, counsel is not placed in a position of appearing to argue against his or her client, a role that is unlike any other counsel fulfills. Indeed, some lawyers have reported that the process for withdrawal is so awkward that they do not consider it a viable option.

The Criminal Procedural Rules Committee has highlighted the observations of three such states in its concurrently-published Report, including Idaho (*see State v. McKenney,* 98 Idaho 551, 568 P.2d 1213, 1214 (1977)); Massachusetts (*see*

*Commonwealth v. Moffett*, 383 Mass. 201, 418 N.E.2d 585 (1981)); and New Hampshire (*see New Hampshire v. Cigic*, 138 N.H. 313, 314, 639 A.2d 251 (1994).

The proposed rules – and reports – of the two Committees should be read in tandem.

**RULE 120. Entry of Appearance.**

(a) Filing. Any counsel filing papers required or permitted to be filed in an appellate court must enter an appearance with the prothonotary of the appellate court unless that counsel has been previously noted on the docket as counsel pursuant to Rules 907(b), 1112(f), 1311(d) or 1514(d). All counsel governed by Pa.R.Crim.P. 120 or 904 in the trial court continue to be governed by those rules in the appellate court, unless an application for withdrawal is filed in the appellate court accompanied by a simultaneous entry of appearance of new counsel. Any application for withdrawal unaccompanied by a simultaneous entry of appearance of new counsel will be remanded for resolution by the trial court in accordance with the procedures set forth in Pa.R.Crim.P. 120(B).

New counsel appearing for a party after docketing pursuant to Rules 907(b), 1112(f), 1311(d), or 1514(d) shall file an entry of appearance simultaneous with or prior to the filing of any papers signed by new counsel. The entry of appearance shall specifically designate each party the attorney represents and the attorney shall file a [certificate] proof of service pursuant to Subdivision (d) of Rule 121 and Rule 122. Where new counsel enters an appearance on behalf of a party currently represented by counsel and there is no simultaneous withdrawal of appearance, new counsel shall serve the party that new counsel represents and all other counsel of record and shall file a [certificate] proof of service.

**RULE 907. Docketing of Appeal.**

* * * * *

(b) Entry of appearance. Upon the docketing of the appeal the prothonotary of the appellate court shall note on the record as counsel for the appellant the name of counsel, if any, set forth in or endorsed upon the notice of appeal, and, as counsel for other parties, counsel, if any, named in the proof of service. The prothonotary of the appellate court shall upon praecipe of any such counsel for other parties, filed within 30 days after filing of the notice of appeal, strike off or correct the record of appearances. Thereafter a counsel's appearance for a party may not be withdrawn without leave of court, unless another lawyer has entered or simultaneously enters an appearance for the party. All counsel governed by Pa.R.Crim.P. 120 or 904 in the trial court continue to be governed by those rules in the appellate court, unless an application for withdrawal is filed in the appellate court accompanied by a simultaneous entry of appearance of new counsel. Any application for withdrawal unaccompanied by a simultaneous entry of appearance of new counsel will be remanded for resolution by the trial court in accordance with the procedures set forth in Pa.R.Crim.P. 120(B).

Note: * * * * *

With regard to [s]Subdivision (b) and withdrawal of appearance without leave of the appellate court, counsel may nonetheless be subject to trial court supervision pursuant to Pa.R.Crim.P. 904 (Appointment of counsel: forma pauperis).

With respect to appearances by new counsel following the initial docketing appearances pursuant to Subdivision (b) of this rule, please note the requirements of Rule 120.

**RULE 1925. Opinion in Support of Order.**

* * * * *

(c) Remand.

(1) An appellate court may remand in either a civil or criminal case for a determination as to whether a Statement had been filed and/or served or timely filed and/or served.

(2) Upon application of the appellant and for good cause shown, the appellate court may remand in a civil case for the filing nunc pro tunc of a Statement or for the amendment or supplementation of a timely filed and served Statement and for a concurrent supplemental opinion.

(3) If an appellant in a criminal case was ordered to file a Statement and failed to do so, such that the appellate court is convinced that counsel has been per se ineffective, the appellate court shall remand for the filing of a Statement nunc pro tunc and for the preparation and filing of an opinion by the judge.

[(4) In a criminal case, counsel may file of record and serve on the judge a statement of intent to file an *Anders/McClendon* brief in lieu of filing a Statement. If, upon review of the *Anders/McClendon brief*, the appellate court believes that there are arguably meritorious issues for review, those issues will not be waived; instead, the appellate court may remand for the filing of a Statement, a supplemental opinion pursuant to Rule 1925(a), or both. Upon remand, the trial court may, but is not required to, replace appellant's counsel.]

* * * * *

*Note*.

* * * * *

[Paragraph (c)(4). This paragraph clarifies the special expectations and duties of a criminal lawyer. Even lawyers seeking to withdraw pursuant to the procedures set forth in *Anders v. California*, 386 U.S. 738 (1967) and *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981) are obligated to comply with all rules, including the filing of a Statement. *See Commonwealth v. Myers*, 897 A.2d 493, 494-96 (Pa. Super.

2006); *Commonwealth v. Ladamus*, 896 A.2d 592, 594 (Pa. Super. 2006). However, because a lawyer will not file an *Anders/McClendon* brief without concluding that there are no non-frivolous issues to raise on appeal, this amendment allows a lawyer to file, in lieu of a Statement, a representation that no errors have been raised because the lawyer is (or intends to be) seeking to withdraw under *Anders/McClendon*. At that point, the appellate court will reverse or remand for a supplemental Statement and/or opinion if it finds potentially non-frivolous issues during its constitutionally required review of the record.] Former Paragraph (c)(4) permitted lawyers to avoid filing a Statement in cases that were on direct appeal, if the lawyer sought to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981). Those procedures have been replaced. *See* Pa.R.Crim.P. 120.

**RULE 2744. Further Costs. Counsel Fees. Damages for Delay.**

In addition to other costs allowable by general rule or Act of Assembly, an appellate court may award as further costs damages as may be just, including

(1) a reasonable counsel fee and

(2) damages for delay at the rate of 6% per annum in addition to legal interest,

if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious. The appellate court may remand the case to the trial court to determine the amount of damages authorized by this rule.

*Note.* See 42 Pa.C.S. § 1726(1) and (3) relating to establishment of taxable costs and 42 Pa.C.S. § 2503(6), (7) and (9) relating to the right of participants to receive counsel fees.

[Some concern was expressed that the rule should contain an exception for criminal cases in which the defendant may have a constitutional right to appeal, whether frivolous or not. It is felt that such right will be taken into consideration, when appropriate, and that such a blanket exception should not be written into the rule.] In criminal and Post-Conviction Relief Act ("PCRA") appeals, this Rule should be construed with reference to Pa.R.Crim. P. 120. There may be circumstances, however, in criminal as well as in civil cases, in which a party takes an appeal for no purpose other than to delay a matter or engages in conduct during the appeal that is dilatory, obdurate or vexatious. In such cases, the fact that a defendant has a constitutional or statutory right of appeal will not in itself preclude an appellate court from remanding the case for a determination of the damages authorized under this rule. Nevertheless, any evaluation of the taking of an appeal or conduct during the appeal must take into account the duty of counsel in a criminal or PCRA case to be a zealous advocate, even when the position advocated for may be contrary to the factual findings of the trial court or existing law. While counsel is ethically obligated to avoid frivolous argument – *i.e.*, arguments that are advanced without any evidentiary or legal support whatsoever – it is

within the bounds of zealous advocacy to argue, for example, that a "trial court did not conduct as extensive a review of the testimony and other proofs as was necessary to fairly address" a party's claims, *see Thomas A. McElwee & Son, Inc. v. SEPTA*, 596 Pa. 654, 669, 948 A.2d 762, 771 (2008), or that changing community standards render certain forms of punishment cruel and unusual and thus in violation of the United States Constitution as to certain classes of crimes or defendants. *See, e.g., Coker v. Georgia*, 433 U.S. 584, 593-596 (1977); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).