Proposed Rule 27(e) to Amend the Rules
of the District of Columbia Court of Appeals

Submitted by:

Division 5: Criminal Law and Individual Rights
Committee on Criminal Rules and Legislation

March 7, 1984

SUMMARY

The consensus of the committee is that proposed rule 27(e) should be adopted with two modifications: 1) deletion of the words "court-appointed" so that the rule applies to all appellate counsel; and 2) application to only direct appeals. Furthermore, the committee believes that the new rule should not be adopted until the Court implements a new system to ensure that qualified counsel are appointed to represent indigent defendants on appeal.

January 11, 1984

Alan I. Herman
Clerk of the Court
District of Columbia Court of Appeals
Room 6000
500 Indiana Avenue, N.W.
Washington, D.C. 20001

Re: Proposed Rule 27(e)
M-148-83

Dear Mr. Herman:

We are writing to submit the comments of the Criminal Rules and Legislation Committee of Division V of the District of Columbia Bar regarding proposed Rule 27(e) to amend the Rules of the District of Columbia Court of Appeals. */

The consensus of the committee is that proposed Rule 27(e) should be adopted with two modifications but that it should not be enacted until the Court implements a new system to ensure that qualified counsel are appointed to represent indigent defendants on appeal. Our comments stem from our concerns about the role of attorneys who do court-appointed criminal appellate work and the need of indigent defendants to receive effective appellate representation.

First, we strongly recommend that the court delete the words "court-appointed" from the beginning of the proposed Rule. This was the first portion of the Rule that the committee discussed and it was our unanimous opinion that if Rule 27(e) is enacted that it should apply to all counsel. Although we recognize that there is little chance of retained counsel filing an Anders brief or that a defendant will want retained counsel to file an Anders brief, we feel that court-appointed counsel should not be singled out in this fashion. As it reads, we believe that the proposed Rule treats court-appointed counsel and their clients in an invidious manner which is inconsistent with the appearance of equal protection of the laws.

Second, we recommend that the Rule only apply to direct appeals, so that it would read, "On direct appeal, no counsel in a criminal appeal ...." Frequently, attorneys are appointed to represent defendants in collateral appeals that are improper or patently meritless. (E.g., appeals by defendants who plead guilty and waive their right to appeal, appeals of rulings on motions to reduce sentence, or patently frivolous ineffectiveness charges.) Appellate counsel must examine any potential collateral issue to determine whether it has merit, and if so, counsel must pursue the issue vigorously. But, when collateral appeals are improper, unethical or intellectually disingenuous exercises, we believe that counsel should not be required to prepare an appeal.

*/ The views expressed herein represent only those of Division V (Criminal Law and Individual Rights) of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

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Although the committee agreed to some extent with Judge Ferren's comments in Gale v. United States, 429 A.2d 177 (D.C. 1981), we believe very strongly that the first step is to have some mechanism by which competent counsel will be appointed to represent indigents on appeal. We understand that a part of the court's concern with the Anders process is that counsel often file brief memoranda in lieu of an Anders brief. We do not believe that the cure for this problem is to force counsel to file inadequate briefs on the merits, but to get competent counsel to prepare an appeal. Accordingly, we believe that the court should focus its attention on the heart of the problem and not its symptoms.

We would not like to see proposed Rule 27(e) enacted unless and until the need to ensure competent counsel is addressed and some appointment mechanism is implemented. To some extent, the Anders process helps protect defendants from poor appellate counsel. This safeguard should not be withdrawn without providing an alternative means to assure that competent counsel analyzes the defendant's case. We also recognize that the need for competent counsel goes beyond the Anders process. For example, we believe that something must be done to prevent appeals in which a clearly inadequate brief is filed. We also believe that, regardless of ability, counsel should not be appointed to prepare the appeal of a case in which he was trial counsel, without the express and knowing approval of the defendant. As a result of our consideration of Rule 27(e), we have decided to discuss the issue of competent appellate counsel further and would be glad to provide the court with further comment.

We hope that our comments are helpful to the court and would be happy to elaborate on our views if you or the court so desire.

Respectfully submitted,

DIVISION V COMMITTEE ON
CRIMINAL RULES & LEGISLATION

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