



**NINTH CIRCUIT RULE 4-1**  
**COUNSEL IN CRIMINAL APPEALS**

**1 January 2015**

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## **CIRCUIT RULE 4-1. COUNSEL IN CRIMINAL APPEALS**

This rule applies to appeals in categories of cases listed in 18 U.S.C. § 3006A.

### **(a) Continuity of Representation on Appeal**

Counsel in criminal cases, whether retained or appointed by the district court, shall ascertain whether the defendant wishes to appeal and file a notice of appeal upon the defendant's request. Counsel shall continue to represent the defendant on appeal until counsel is relieved and replaced by substitute counsel or by the defendant pro se in accordance with this rule. If counsel was appointed by the district court pursuant to 18 U.S.C. § 3006A and a notice of appeal has been filed, counsel's appointment automatically shall continue on appeal.

### **(b) Application for Indigent Status on Appeal**

A person for whom counsel was appointed by the district court under section 3006A of the Criminal Justice Act may appeal to this Court without prepayment of fees and costs or security therefor and without filing the affidavit required by 28 U.S.C. § 1915(a).

If the district court did not appoint counsel, but the defendant or petitioner appears to qualify for appointment of counsel on appeal, retained counsel, or the defendant if the defendant proceeded pro se before the district court, shall file on the client's behalf a financial affidavit (CJA Form 23). If the notice of appeal is filed at the time of sentencing, the motions to proceed on appeal in forma pauperis and for appointment of counsel shall be presented to the district court at that time. If the district court finds that appointment of counsel is warranted, the Court shall appoint the counsel who represented the defendant in district court, a Criminal Justice Act defender, or a panel attorney to represent the defendant or petitioner on appeal. The district court shall require appointed counsel and the court reporter to prepare the appropriate CJA form for preparation of the reporter's transcript. A copy of the order appointing counsel on appeal shall be transmitted forthwith by the Clerk of the district court to the Clerk of this Court. Substitute counsel shall within 14 days of appointment file a notice of appearance in this Court. *(Rev. 12/1/09)*

If the district court declines to appoint counsel on appeal, and if counsel below believes that the district court erred, counsel shall, within 14 days from the district court's order, file with the Clerk of this Court a motion for appointment of counsel accompanied by a financial affidavit (CJA Form 23). *(Rev. 12/1/09)*

### **(c) Withdrawal of Counsel After Filing the Notice of Appeal**

A motion to withdraw as counsel on appeal after the filing of the notice of appeal, where counsel is retained in a criminal case or appointed under the Criminal Justice Act, shall

be filed with the Clerk of this Court within 21 days after the filing of the notice of appeal and shall be accompanied by a statement of reasons and: (Rev. 12/1/09)

- (1) A substitution of counsel which indicates that new counsel has been retained to represent defendant; or
- (2) A motion by retained counsel for leave to proceed in forma pauperis and for appointment of counsel under the Criminal Justice Act, supported by a completed financial affidavit (CJA Form 23); (Rev. 7/1/06)
- (3) A motion by appointed counsel to be relieved and for appointment of substitute counsel; (Rev. 7/1/06)
- (4) A motion by defendant to proceed pro se; or
- (5) An affidavit or signed statement from the defendant showing that the defendant has been advised of his or her rights with regard to the appeal and expressly stating that the defendant wishes to dismiss the appeal voluntarily.

Any motion filed pursuant to this section shall be served on defendant; the proof of service shall include defendant's current address. (Rev. 7/1/06)

- (6) Alternatively, if after conscientious review of the record appointed counsel believes the appeal is frivolous, on or before the due date for the opening brief, appointed counsel shall file a separate motion to withdraw and an opening brief that identifies anything in the record that might arguably support the appeal, with citations to the record and applicable legal authority. The motion and brief shall be accompanied by proof of service on defendant. *See Anders v. California*, 386 U.S. 738 (1967), and *United States v. Griffy*, 895 F.2d 561 (9th Cir. 1990). The cover of the opening brief shall state that the brief is being filed pursuant to *Anders v. California*. The filing of a motion to withdraw as counsel along with a proposed *Anders* brief serves to vacate the previously established briefing schedule.

To facilitate this Court's independent review of the district court proceedings, counsel shall designate all appropriate reporter's transcripts, including but not limited to complete transcripts for the plea hearing and sentencing hearing, and shall include the transcripts in the excerpts of record. Counsel are advised to consult Circuit Rule 30-1.

When an appointed attorney has properly moved for leave to withdraw pursuant to *Anders* and has included all appropriate reporter's transcripts, this Court will establish a briefing schedule permitting the defendant to file a pro se supplemental opening brief raising any issues that defendant wishes to present. The order will also direct appellee by a date certain either to file its answering brief or notify the Court by letter that no answering brief will be filed. (New 1/1/01)

**(d) Motions for Leave to Proceed Pro Se in Direct Criminal Appeals**

The Court will permit defendants in direct criminal appeals to represent themselves if: (1) the defendant's request to proceed pro se and the waiver of the right to counsel are knowing, intelligent and unequivocal; (2) the defendant is apprised of the dangers and disadvantages of self-representation on appeal; and (3) self-representation would not undermine a just and orderly resolution of the appeal. If, after granting leave to proceed pro se the Court finds that appointment of counsel is essential to a just and orderly resolution of the appeal, leave to proceed pro se may be modified or withdrawn. (*New 7/1/01*)

**(e) Post Appeal Proceedings**

If the decision of this Court is adverse to the client, in part or in full, counsel, whether appointed or retained, shall, within 14 days after entry of judgment or denial of a petition for rehearing, advise the client of the right to initiate further review by filing a petition for a writ of certiorari in the United States Supreme Court. *See* Sup. Ct. R. 13, 14. If in counsel's considered judgment there are no grounds for seeking Supreme Court review that are non-frivolous and consistent with the standards for filing a petition, *see* Sup. Ct. R. 10, counsel shall further notify the client that counsel intends to move this Court for leave to withdraw as counsel of record if the client insists on filing a petition in violation of Sup. Ct. R. 10.

In cases in which a defendant who had retained counsel or proceeded pro se in this Court wishes to file a petition for writ of certiorari in the United States Supreme Court or wishes to file an opposition to a certiorari petition, and is financially unable to obtain representation for this purpose, this Court will entertain a motion for appointment of counsel within 21 days from judgment or the denial of rehearing. It is the duty of retained counsel to assist the client in preparing and filing a motion for appointment of counsel and a financial affidavit under this subsection.

If requested to do so by the client, appointed or retained counsel shall petition the Supreme Court for certiorari only if in counsel's considered judgment sufficient grounds exist for seeking Supreme Court review. *See* Sup. Ct. R. 10.

Any motion by appointed or retained counsel to withdraw as counsel of record shall be made within 21 days of judgment or the denial of rehearing and shall state the efforts made by counsel to notify the client. A cursory statement of frivolity is not a sufficient basis for withdrawal. *See Austin v. United States*, 513 U.S. 5 (1994) (per curiam); Sup. Ct. R. 10. Within this same period, counsel shall serve a copy of any such motion on the client. If relieved by this Court, counsel shall, within 14 days after such motion is granted, notify the client in writing and, if unable to do so, inform this Court. (*Rev. 12/1/09*)

Unless counsel is relieved of his or her appointment by this Court, counsel's appointment continues through the resolution of certiorari proceedings and includes providing representation when an opposing party files a petition for certiorari.

**(f) Counsel's Claim for Fees and Expenses**

An attorney appointed by the Court shall be compensated for services and reimbursed for expenses reasonably incurred as set forth in the Criminal Justice Act. All vouchers claiming compensation for services rendered in this Court under the Criminal Justice Act shall be submitted to the Clerk of this Court no later than 45 days after the final disposition of the case in this Court or after the filing of a petition for certiorari, whichever is later. Subsequent work on the appeal may be claimed on a supplemental voucher. A voucher for work on a petition for a writ of certiorari must be accompanied by a copy of the petition. If a party wishes interim payment, a request for such relief may be filed.

The Clerk shall refer all vouchers, including those requesting payment in excess of the statutory maximum, to the Appellate Commissioner, for approval of such compensation as the Appellate Commissioner deems reasonable and appropriate under the Criminal Justice Act. If the Appellate Commissioner concludes that an amount less than that requested by the attorney is appropriate, he or she shall communicate to the attorney the basis for reducing the claim. The Appellate Commissioner will offer the attorney an opportunity to respond regarding the propriety and reasonableness of the voucher before approving a reduction in the amount. If the amount requested is reduced, and the attorney seeks reconsideration, the Appellate Commissioner shall receive and review the request for reconsideration and may grant it in full or in part. If the Appellate Commissioner does not grant a request for reconsideration in full or in part, the request shall be referred to and decided by: (1) the authoring judge on the merits panel if the case was submitted to a merits panel; or (2) the appropriate administrative judge if the case was resolved before submission to a merits panel. (*Rev. 12/1/09*)

Whenever the Appellate Commissioner certifies payment in excess of the statutory maximum provided by the Criminal Justice Act, the Clerk shall forward the voucher to the appropriate administrative judge for review and approval. (*eff. 7/95; amended 1/1/99*)