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Michael R. Conner

*Indiana University School of Law*

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## WITHDRAWAL OF APPOINTED COUNSEL FROM FRIVOLOUS INDIGENT APPEALS

Frivolous indigent appeals present peculiar problems for the court-appointed attorney. An attorney confronted with an indigent appeal he believes to be frivolous is also faced with the duty to represent the indigent. The attorney has a duty not to waste the court's time with frivolous issues, yet he also has a duty to ensure that the indigent receives representation consistent with constitutional standards. Existing and proposed strategies for safeguarding both professional ethics and indigents' rights on appeal appear either unworkable or inefficacious. This note traces the development of existing procedures and suggests an alternative which would comport with the dictates of equal protection and with the attorney's ethical responsibilities of both court and client.

The number of criminal appeals to already overburdened courts has grown substantially in recent years.<sup>1</sup> A significant part of this increase is due to greater accessibility of the appellate procedure to indigents who, prior to a number of recent United States Supreme Court decisions,<sup>2</sup> were too poor to afford appellate review. Because of the "free" appeals now available to these defendants under the equal protection clause, in some cases courts have been confronted with appeals that present frivolous issues for review from indigents who have "nothing to lose"<sup>3</sup> by appealing. Indeed, Mr. Justice Clark suggested that "the overwhelming percentage of *in forma pauperis* appeals are frivolous."<sup>4</sup> If this perception is substantially correct, the problem which confronts the judicial system is how to ensure equal opportunities for indigent and nonindigent defendants

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1. AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS, pt. 1, § 1.1, at 20; pt. 1, § 1.2, at 25 (Approved Draft 1970) [hereinafter cited as ABA STANDARDS]; Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 545, 578 (1969) (approximately 200% increase in the number of criminal appeals from federal district courts from 1959-60 to 1966-67); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 97 (1972) (24.5% increase in the volume of criminal appeals between 1971 and 1972); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE DIRECTOR 102-03 (1971) (table 4) (52.4% increase in the number of criminal appeals from 1968 to 1971).

2. Most notable cases in the trend are *Entsminger v. Iowa*, 386 U.S. 748 (1967); *Swenson v. Bosler*, 386 U.S. 258 (1967); *Douglas v. California*, 372 U.S. 353 (1963); *Coppedge v. United States*, 369 U.S. 438 (1962); *Eskridge v. Washington State Bd.*, 357 U.S. 214 (1958); *Griffin v. Illinois*, 351 U.S. 12 (1956). See note 9 *infra*.

3. Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U.L. Rev. 701, 702 (1970) [hereinafter cited as Hermann].

4. *Douglas v. California*, 372 U.S. 353, 358 (1963) (Clark, J., dissenting).

without permitting or encouraging indigent defendants to use these opportunities to make frivolous<sup>5</sup> appeals.

In the middle of this tension between an indigent defendant's equal right to appellate review and the possibility of abuse and overloaded dockets stands the indigent's appointed attorney. Appointed counsel must balance the potentially conflicting duties to represent vigorously the indigent while not presenting frivolous arguments to the court. In addition, refusal to argue an appeal may deprive the indigent of an opportunity to appeal equal to that of a nonindigent; refusal to recognize an argument's frivolousness may provide the defendant another type of unequal opportunity and waste the court's time.

#### EQUAL PROTECTION

The United States Supreme Court's decisions in the area of indigent appeals mandate that "the indigent receive substantially the same assistance of counsel as one who can afford to retain an attorney of his choice."<sup>6</sup> What is required are equal opportunities, not equal strategies for achieving them. For example, few would argue that a nonindigent should receive court-appointed counsel simply because indigents can. What is required is a system for indigents which most closely approximates the opportunities of nonindigents.<sup>7</sup> In terms of access to appellate counsel, this system is easily constructed by appointing counsel. In terms of opportunity to press frivolous and nonfrivolous appeals, the considerations are more complex.

A nonindigent defendant must pay for an appeal. Thus, economics may play a role in accepting an attorney's evaluation that a potential ap-

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5. For an attempt to define the meaning of "frivolous," see Hermann, *supra* note 3, at 705-08.

6. Nickols v. Gagnon, 454 F.2d 467, 471 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972), *interpreting* Anders v. California, 386 U.S. 738 (1967).

7. The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." During the past forty years the Supreme Court has recognized, and gradually extended through the fourteenth amendment, the sixth amendment right to counsel for indigent criminal defendants in both federal and state trials. The scope of the indigent's rights on appeal likewise has been undergoing a gradual extension. Its bounds are not yet well-defined. Relying upon the due process and equal protection clauses of the fourteenth amendment, the Supreme Court, beginning in Griffin v. Illinois, 351 U.S. 12 (1956), has attempted to define the indigent's right of access to appellate courts to ensure the substantial equality of treatment of indigents with nonindigents by eliminating procedural discriminations against an appellant because of his poverty. Thus, the Court has determined that substantial equality requires states to provide free transcripts to indigents, *id.*, and to waive normal filing fees. Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959). Additionally, consistent with the line of cases beginning with Powell v. Alabama, 287 U.S. 45 (1932), recognizing the importance of counsel, the Court, in Douglas v. California, 372 U.S. 353 (1963), interpreted equal

peal is frivolous and should not be taken. An indigent has no such deterrent. A nonindigent can seek a second legal opinion when initial counsel finds the appeal frivolous. An indigent cannot. Finally, some commentators have suggested that indigents receive relatively poor representation at trial.<sup>8</sup> If this observation is correct, then indigents may find themselves represented on appeal by counsel who created the need for appeal.<sup>9</sup> Nonindigents, however, have the opportunity to select new counsel for appeal if dissatisfied with trial counsel.<sup>10</sup> Thus, in the area of frivolous appeals, the theoretical concept of equal protection poses difficulties in the construction of a system for achieving equal opportunities.

#### CODE OF PROFESSIONAL RESPONSIBILITY

The Code of Professional Responsibility recognizes a general duty of attorneys to represent indigents: it creates a presumption against allowing withdrawal of appointed counsel by providing that counsel shall be excused only for "compelling reasons."<sup>11</sup> Further, a compelling reason does not include the attorney's belief that the indigent is guilty.<sup>12</sup>

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protection to require the assistance of appointed counsel on a first appeal where the appeal was granted as of right by the state. This right was reaffirmed in *Swenson v. Bosler*, 386 U.S. 258 (1967). Similar requirements were imposed on federal courts of appeals by earlier decisions. *Coppedge v. United States*, 369 U.S. 438 (1962), and *Hardy v. United States*, 375 U.S. 277 (1964), required that the indigent be furnished a trial transcript in certain circumstances. *Johnson v. United States*, 352 U.S. 565 (1957), and *Ellis v. United States*, 356 U.S. 674 (1958), required the appointment of counsel. In *Johnson* the Court held that in federal courts an indigent must be afforded counsel on appeal when he challenges a certification that the appeal is not taken in good faith. In *Ellis* the Court held that federal courts must honor the indigent's request for assistance regardless of what they think the merits of the request may be.

In *Ellis* the Court also established standards defining the quality of representation required on appeal when it held that the indigent's attorney is to function not as a passive friend of the court, but as an active advocate for his client's cause. *Id.* at 675.

8. See, e.g., *Hermann*, *supra* note 3, at 715-16.

9. Some jurisdictions compel trial counsel to represent the indigent on appeal; others adopt procedures that strongly urge it. See *Hermann*, *supra* note 3, at 709-10. The ABA recommends that trial counsel remain through appeal. ABA STANDARDS, *supra* note 1, at § 2.2. For a discussion of the issue and a sampling of jurisdictions with court rules requiring continued representation on appeal, see *id.* at 49-51.

10. This note does not deal with the critical problem of competency of appointed counsel. Perhaps many indigent appeals could be avoided by proper representation by counsel at trial. See note 75, *infra*.

11. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-29. The oath of attorneys in Indiana contains the promise: "I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case." Admission & Discipline R. 22, IND. ANN. STAT. Ct. R. A.D. 22 (Code ed. 1973).

12. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-29. ABA CANONS OF PROFESSIONAL ETHICS No. 4 does not help in explaining what constitutes a "compelling reason." It merely provides that "[a] lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason . . ." Thus a compelling reason appears to be a reason that is not trivial.

Despite the duty to represent indigents, the Code specifically allows for withdrawal from a case when a client "[i]nsists upon presenting a claim or defense that . . . cannot be supported by good faith argument . . . ."<sup>13</sup> Additionally, the Code provides that "a lawyer is not justified in asserting a position in litigation that is frivolous."<sup>14</sup> Disciplinary rules are prescribed for attorneys who make such arguments.<sup>15</sup>

These seemingly competing interests in the Code provisions can be reconciled. A difference exists between assuring that a client whom one believes guilty is afforded a fair trial and adjudication and offering frivolous arguments on that client's behalf on appeal. The duty to represent an indigent whom the attorney believes guilty does not require advancing a frivolous argument on his<sup>16</sup> behalf. This is the same duty owed to indigents and nonindigents alike.<sup>17</sup>

To be consistent with ethical considerations the judicial system should recognize the right of an attorney to petition to withdraw when an indigent client insists upon prosecution of an appeal the attorney in good faith considers to be frivolous. However, the system must be careful in establishing a procedure for withdrawal. The established procedure must ensure representation of the indigent consistent with the demands of equal protection.

CURRENT STRATEGIES

Because of the availability of "free" appeals the likelihood is in-

13. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110(C) (1) (a). Similarly, ABA CANONS OF PROFESSIONAL ETHICS No. 44 provides that ". . . if [the client] persists over the attorney's remonstrance in presenting frivolous defenses, . . . the lawyer may be warranted in withdrawing . . . ."

14. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-4. Justice Burger, in his concurring opinion in *Johnson v. United States*, 360 F.2d 844 (D.C. Cir. 1966) agreed that the role of an advocate "does not require nor warrant . . . advancing absurd or legally frivolous contentions." *Id.* at 846. An attorney is permitted to represent a client only "so long as he does not thereby knowingly assist the client . . . to take a frivolous legal position." ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-5.

15. In his representation of a client, a lawyer shall not:  
Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument . . . .

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A) (2).

[A] lawyer may not request permission to withdraw . . . unless such request or such withdrawal is because:

- (1) His client:
  - (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument . . . .

*Id.* DR 2-110 (C) (1) (a).

16. The possessive pronoun "his" refers to the person, whether male or female.

17. All provisions of the ABA CODE OF PROFESSIONAL RESPONSIBILITY apply equally to all potential clients. See notes 12-16 *supra* & text accompanying.

creased that courts will be called upon to hear disputes in which an indigent wishes to appeal a decision on grounds the appointed counsel thinks frivolous. In response to these disputes, courts have developed a variety of methods to determine whether the attorney should be allowed to withdraw. Most of these strategies fail to provide either assurance of a fair determination of the merit of the appeal or adequate and equal representation for indigents and nonindigents.

### *No-Merit Letters*

In 1964 California adopted a "no-merit" letter procedure in *In re Nash*.<sup>18</sup> *Nash* held that if an appointed attorney thoroughly studies the trial record and concludes, after consultation with the defendant and trial counsel, there are no meritorious grounds for appeal, he should so advise the court by a short "no-merit" letter. If the appellate court is satisfied from its own review of the record that counsel's conclusion is correct, withdrawal is permitted and the appeal proceeds without appointment of another attorney and without argument. The appeal is evaluated solely on the basis of the record and the indigent's optional pro se brief.

Because the California procedure did not "comport with fair procedure and lack[ed] the equality that is required by the Fourteenth Amendment,"<sup>19</sup> the United States Supreme Court invalidated it in *Anders v. California*.<sup>20</sup> The Court declared the no-merit letter both lacked information on which the Court could rely and failed to adequately protect the

18. 61 Cal. 2d 491, 39 Cal. Rptr. 205, 393 P.2d 405 (1964).

19. 386 U.S. at 741-42. On the importance of equal treatment the Court quoted both *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. California*, 372 U.S. 353 (1963). From *Griffin* the Court reiterated that equal justice is "not afforded an indigent appellant where the nature of the review 'depends on the amount of money he has . . .'" 386 U.S. at 741, quoting *Griffin*, 351 U.S. at 19. Later, the Court recalled its statement in *Douglas* that procedures are invalid

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.

386 U.S. at 741, quoting *Douglas*, 372 U.S. at 358.

On the importance of counsel to a fair procedure the Court cited the oft-quoted phrase from *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.

20. 386 U.S. 738 (1967). In *Anders*, the petitioner was convicted of possession of marijuana. The counsel appointed on appeal concluded there was no merit to the appeal, and was permitted to withdraw after filing a no-merit letter. The petitioner then proceeded to file a pro se brief. Predictably, the District Court of Appeal affirmed the conviction. *People v. Anders*, 167 Cal. App. 2d 65, 333 P.2d 854 (1959). Six years later, petitions for habeas corpus to both the District Court of Appeal and the Supreme Court of California were denied. 386 U.S. at 740-41.

indigent in presenting only the attorney's statement that the appeal was frivolous.<sup>21</sup> No arguments were required on behalf of the client. Indeed, *Anders* noted that the requirements of *Ellis v. United States*,<sup>22</sup> concerning the duty to represent indigents, were not satisfied by the California procedure. "Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court."<sup>23</sup>

### *The Anders Brief*

In an attempt to remedy these problems, the Court in *Anders* outlined a procedure for attorney withdrawal. The procedure requires the attorney to accompany a request to withdraw with

a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires.<sup>24</sup>

Mr. Justice Stewart, in a dissenting opinion joined by Justices Black and Harlan, criticized the suggested procedure because, *inter alia*, if any arguable issues existed, the attorney would not be seeking to withdraw in the first place.<sup>25</sup> The dissenters argued:

The quixotic requirement imposed by the Court can be explained . . . only upon the cynical assumption that an appointed

21. 386 U.S. at 742-43, 745.

22. 356 U.S. 674 (1958). See note 9 *supra*. *Anders* noted:

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity.

386 U.S. at 744.

23. 386 U.S. at 744. The no-merit procedure "afford[ed] neither the client nor the court any aid," and forced the indigent to "shift entirely for himself while the court has only the cold record which it must review without the help of an advocate." *Id.* at 745.

24. 386 U.S. at 744. The requirement thus imposed on the states is similar to that recognized earlier in some federal courts. *Johnson v. United States*, 360 F.2d 844 (D.C. Cir. 1966) (Burger, J., concurring); *Tate v. United States*, 359 F.2d 245 (D.C. Cir. 1966).

25. 386 U.S. at 746 (Stewart, J., dissenting). The commentary to the ABA STANDARDS, *supra* note 1, at 78, notes that the *Anders* requirements contain an "apparent inconsistency." They require the applying attorney to "brief the unbriefable."

lawyer's professional representation . . . in a "no-merit" letter is not to be trusted.<sup>26</sup>

The majority argued that the procedure established would produce more careful scrutiny of the indigent's claim of nonfrivolousness:

It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel.<sup>27</sup>

This argument ignores the realities of the situation. The Court is left to rely on a brief prepared by an attorney who believes the appeal is frivolous. No brief actively supporting the indigent's position is submitted. Although the *Anders* brief is supposedly supportive of the defendant's interest in appeal, when the attorney requests withdrawal he is implicitly telling the court that the issues raised in the brief to support the client's position are untenable. In reality, the brief is against the attorney's client.<sup>28</sup> It is difficult to conceptualize how an attorney can be an active advocate for the reversal of his client's conviction yet simultaneously file a motion to withdraw. Moreover, an attorney anxious to withdraw might easily write a brief overlooking many potentially important arguments.<sup>29</sup> Even if the attorney chooses not to file the "schizophrenic motion to withdraw"<sup>30</sup> and remains in the case, his representation may fall short of the standard of forceful, active advocacy required by the *Ellis* decision.<sup>31</sup> Thus, *Anders* fails to provide an effective advocate for the in-

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26. 386 U.S. at 746 (Stewart, J., dissenting).

27. 386 U.S. at 745.

28. Although ostensibly the *Anders* brief is required to support the client's position, when the attorney cites facts, legal issues and authorities in a detailed brief of a frivolous case it will be tantamount to a brief against the client. Hermann, *supra* note 3, at 711. The only other alternative, a conclusory brief, is condemned by *Anders*. See also Comment, *Frivolous Appeals and the Minimum Standards Project; Solution or Surrender?*, 24 U. MIAMI L. REV. 95, 110 (1969) [hereinafter cited as *Frivolous Appeals*]; Note, *The Obligation of Appointed Legal Counsel to Represent an Indigent on Appeal*, 17 DRAKE L. REV. 210, 226 (1968) [hereinafter cited as *Obligation*]. *Anders* briefs have turned into briefs against the client in some cases. See, e.g., *Suggs v. United States*, 391 F.2d 971 (D.C. Cir. 1968); *Smith v. United States*, 384 F.2d 649 (8th Cir. 1967); *Commonwealth v. Jones*, 451 Pa. 69, 301 A.2d 811 (1973).

29. *Obligation*, *supra* note 28, at 226. The oversight could be attributable simply to lack of due diligence. More likely, it could be due to the discretionary omission of arguably supportive issues by an attorney whose discretion might be influenced by his interest in withdrawal. See note 70 *infra*.

30. Doherty, *Wolf! Wolf!—The Ramifications of Frivolous Appeals*, 59 J. CRIM. L.C. & P.S. 1, 2 (1968) [hereinafter cited as *Doherty*].

31. Doherty argues:

It is naive to expect that counsel who writes a brief will simultaneously move to withdraw. The decision invites sophistry; it offers counsel the choice of filing a schizophrenic motion to withdraw (accompanied by a formal brief opposing



digent.

Moreover, *Anders* provides no guidance for a court when it finds the appeal not frivolous.<sup>32</sup> It is possible to read in the opinion an implicit assumption that the attorney whose petition is denied must proceed with the appeal. The petitioning attorney, however, forced to prosecute an appeal he believes frivolous, naturally may not be overly enthusiastic in his representation. He probably will have forfeited the confidence of the client. The appellate court may also be prejudiced by having heard the attorney's earlier arguments on withdrawal.<sup>33</sup> Disciplining counsel, by forcing him

the motion), or the alternative of writing the brief and not moving to withdraw. Human nature will force the selection of the latter alternative. That will satisfy the form of due process without regard to substance. Thus, the decision will encourage mediocrity or default.

*Id.* at 2. See Hermann, *supra* note 3, at 715-16.

32. *Anders* may also not provide counsel guidance in determining if a petition to withdraw is warranted. Some have interpreted *Anders* as establishing a distinction between appeals which are frivolous, from which counsel is permitted to withdraw, and those which are without merit, from which counsel is not permitted to withdraw. In *Sanchez v. State*, 85 Nev. 95, 98, 450 P.2d 793, 795 (1969) the court called it a "fine distinction." The ABA Project asserts

[t]he *Anders* decision thus appears to rest narrowly on the distinction between complete frivolity and absence of merit. The latter is not enough to support either a request by counsel to withdraw, nor the granting of that request by the court.

ABA STANDARDS, *supra* note 1, at 77. Hermann, *supra* note 3, at 705 refers to it as a "rarefied distinction."

Although there is language in *Anders* that could be interpreted as having established such a distinction, 386 U.S. at 743, language later in the opinion blurs it:

[I]f [the court] finds any of the legal points arguable on their merits (and therefore not frivolous) it must . . . afford the indigent the assistance of counsel to argue the appeal.

*Id.* at 744. Thus merit and frivolity are defined in terms of the absence of the other. With no workable definition provided by *Anders* of "wholly frivolous," or how it differs from "without merit," only confusion can result from an attorney attempting to distinguish between what he thinks is a frivolous and what he thinks is a meritless appeal. The problem has led some courts to reject the distinction entirely. See, e.g., *Nickols v. Gagnon*, 454 F.2d 467, 471 (7th Cir. 1971) (the attorney concluded the appeal had "no possible merit" instead of concluding it was frivolous. The court nevertheless permitted withdrawal saying it "attach[es] no constitutional significance to the particular words [the attorney] used to express his conclusion"); *Cleghorn v. State*, 55 Wis. 2d 466, 475, 198 N.W.2d 577, 582 (1972) ("Cleghorn also argues there is a distinction between 'wholly frivolous' and 'without merit.' We think not . . . . We fail to see any distinction, and there should be none . . . ."); *People v. Sumner*, 262 Cal. App. 2d 409, 415, 69 Cal. Rptr. 15, 19-20 (1968) (the court purported to recognize a "vague" distinction but went on to note that "some appeals are frivolous for the sole reason that they simply have no merit whatever." The court concluded that the "difficulty of drawing the line" dictates "that in all but the clearest of cases it should not be used."). Other courts in attempting to define "frivolous appeal" do so by saying it is one that is devoid of merit. See, e.g., *State ex rel. State Highway Comm'n v. Sheets*, 483 S.W.2d 783, 785 (Mo. App. 1972); *Crook v. Crook*, 184 Cal. App. 2d 745, 751, 7 Cal. Rptr. 892, 896 (1960); *Treat v. State ex rel. Mitton*, 121 Fla. 509, 510, 163 So. 883 (1935).

33. See, e.g., Hermann, *supra* note 3, at 714; *Obligation*, *supra* note 28, at 225. *Doherty*, *supra* note 30, at 2 argues mediocrity will result under *Anders* because some attorneys might not choose to withdraw even though they believe the case is frivolous.

to remain, is not a satisfactory method for achieving the *Anders* goal of substantial equality for indigent and nonindigent.

Judicial reaction to the *Anders* procedure has been varied. Most courts follow it with little, if any, discussion of its merits.<sup>34</sup> Some courts criticize it, but follow it anyway.<sup>35</sup> Others vary the procedure slightly.<sup>36</sup>

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The same argument might apply where the attorney is directly forced to remain by the court after a denial of a withdrawal petition.

34. See, e.g., Alaska: McCracken v. State, 439 P.2d 448 (1968); Arizona: State v. Ferguson, 20 Ariz. App. 161, 511 P.2d 174 (1973); Connecticut: State v. Pascucci, 161 Conn. 382, 288 A.2d 408 (1971); Delaware: Smith v. State, — Del. —, 248 A.2d 146 (1968); Florida: Wright v. State, 275 So. 2d 574 (Ct. App. 1973); Georgia: Chambers v. State, 229 Ga. 648, 193 S.E.2d 816 (1972); Illinois: People v. Earl, 14 Ill. App. 3d 617, 302 N.E.2d 664 (1973); Iowa: Walker v. Brewer, — Iowa —, 189 N.W.2d 605 (1971); Kentucky: Fite v. Commonwealth, 469 S.W.2d 357 (1971); Maryland: Robinson v. State, 13 Md. App. 439, 283 A.2d 637 (1971); Nebraska: State v. Kellogg, 189 Neb. 692, 204 N.W.2d 567 (1973); New Hampshire: State v. Fleury, 111 N.H. 294, 282 A.2d 873 (1971); New Jersey: State v. Allen, 99 N.J. Super. 314, 239 A.2d 675 (1968); New Mexico: State v. Franklin, 78 N.M. 127, 428 P.2d 982 (1967); Ohio: State v. Toney, 23 Ohio App. 2d 203, 262 N.E.2d 419 (1970); Oklahoma: Jewell v. Tulsa County, 450 P.2d 833 (Ct. App. 1969); Oregon: Storms v. Cupp, 13 Ore. App. 273, 508 P.2d 450 (1973); Pennsylvania: Commonwealth v. Anderson, 224 Pa. Super. 391, 307 A.2d 387 (1973); Rhode Island: State v. Desroches, 110 R.I. 497, 293 A.2d 913 (1972); South Carolina: Williams v. State, 260 S.C. 10, 193 S.E.2d 809 (1973); Texas: Gainous v. State, 436 S.W.2d 137 (Ct. App. 1969); Vermont: State v. Kalis, 127 Vt. 311, 248 A.2d 721 (1968); Washington: State v. Haverty, 3 Wash. App. 495, 475 P.2d 887 (1970).

35. Perhaps the most recent and vehement criticism of *Anders* is from the court in State v. Romano, 29 Utah 2d 237, 507 P.2d 1025 (1973), where the court alleged: [*Anders*] seems to condemn the honorable practitioner and turns the ambulance siren on for others less scrupulous . . . . The *Anders* case seems to downgrade the capabilities of lawyers and question their intelligence.

The *Anders* case sticks in an honorable, capable lawyer's throat and its sanctions make it difficult to swallow a morsel difficult to stomach.

*Id.* at 238, 507 P.2d at 1025. Other courts have been critical as well. See, e.g., Williams v. State, 44 Ala. App. 618, 619, 217 So. 2d 830, 831 (1969) ("*Anders* . . . lays down Draconian rules as to when counsel for an indigent defendant may withdraw . . . ."); Autrey v. State, 44 Ala. App. 53, 60, 202 So. 2d 88, 95 (1967) (Cates, J., dissenting), cert. denied, 390 U.S. 1030 ("the intricate and onerous red tape laid down by the majority opinion in *Anders*"); People v. Brown, 106 Ill. App. 2d 477, 480, 245 N.E.2d 548, 549-50 (1969) (the court says "[the] unfortunate by-product [*of Anders*] has been all too frequently to engage court and counsel in a time-consuming academic exercise in a legal and a factual vacuum. Just how candor of counsel on factual or legal issues presented by the record should be condemned rather than commended escapes us."); Commonwealth v. McMillan, 212 Pa. Super. 48, 50, 240 A.2d 380, 381 (1968) (the court calls *Anders* an "extreme example of the attitude of a majority of the members of the United States Supreme Court concerning procedure and equality in appellate representation . . . .").

36. See, e.g., United States v. Camodeo, 383 F.2d 770 (D.C. Cir. 1967) (There, the affidavit accompanying appointed counsel's motion to withdraw contained an extensive summary of the record and set forth legal contentions that could be based on it, but also explained counsel's reasons for concluding that these possible contentions were without any basis. Despite this, the court held that the affidavit clearly showed that counsel had acted as advocate and not as amicus curiae. Additionally, the court held immaterial the fact that the report was in the form of an affidavit, and not a brief, saying it would serve no purpose to give to the representation the appearance of advocacy when the attorney believed the arguments to be wholly frivolous.) See also Bo-

For example, the Seventh Circuit, in *Nickols v. Gagnon*,<sup>37</sup> allowed an attorney to submit a four-page letter outlining possible legal issues, rather than a brief. The letter was said to conform to the substantive requirements of *Anders*.

### *No Withdrawal*

The American Bar Association Project on Standards for Criminal Justice has criticized *Anders*.<sup>38</sup> It tentatively recommended that attorneys not be allowed to withdraw from possibly frivolous appeals:

Counsel should not seek to withdraw from a case because of his determination that the appeal lacks merit.

- (i) Counsel should give his client his best professional estimate of the quality of the case and should endeavor to persuade the client to abandon a wholly frivolous appeal, or to eliminate particular contentions that are lacking in any substance.
- (ii) If the client wishes to proceed, it is better for counsel to present the case, so long as his advocacy does not involve deception or misleading of the court . . . .<sup>39</sup>

The Project argued that the attorney's task is to advocate, not to judge the defendant's case.<sup>40</sup> Thus, even though the attorney owes a general duty to the court not to present frivolous claims,<sup>41</sup> the Project concluded that because the attorney

is of greater aid to the court by remaining with a weak or

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lick v. State, 127 Ga. App. 542, 194 S.E.2d 302 (1972) (even though appointed counsel did not submit citations or arguments to the court of appeals, the constitutional requirements were satisfied because the court itself carefully reviewed the trial transcript and gave consideration to all the legal points; the court attempting to justify the procedure by saying the charge was not complex, and did not involve extensive research); *Sanchez v. State*, 85 Nev. 95, 450 P.2d 793 (1969) (The court professed to remove some of the circuitous requirements of the *Anders* case so that litigant, counsel and court can expeditiously get to the point of each case with a minimum of procedural steps. Appointed counsel is not required to file a withdrawal request. If he believes the appeal to be frivolous, he must file the opening brief on the merits of all arguable issues together with an acknowledgement that he does not believe there is merit.). See generally Note, *Assistance of Counsel to the Indigent Seeking Leave to Appeal Criminal Conviction—a Michigan Response to Anders v. California*, 16 WAYNE L. REV. 239, 243-44 (1969) [hereinafter cited as *Assistance*] for different procedural interpretations given *Anders*.

37. 454 F.2d 467 (7th Cir. 1971), cert. denied, 408 U.S. 925 (1972).

38. ABA STANDARDS, *supra* note 1, at 76-78.

39. *Id.* at § 3.2.

40. *Id.* at 75.

41. *Id.* at 79-80; see notes 12-16 *supra* & text accompanying.

groundless appeal than by withdrawing, the preferable position is for counsel to remain even at some cost to the concept of professional independence of the attorney.<sup>42</sup>

After further examination, however, the ABA amended the Project's tentative standards to allow withdrawal to conform with *Anders* and with stricter ethical considerations.<sup>43</sup>

However, in *Dixon v. State*<sup>44</sup> the Indiana Court of Appeals adopted the Project's rationale and joined two other jurisdictions in denying court appointed attorneys the opportunity to withdraw.<sup>45</sup> Although *Dixon* involved a post-conviction remedy appeal, the court stated that indigents are entitled to the same standard of advocacy regardless of the stage of the proceedings.<sup>46</sup> It held that the Indiana Public Defender must represent a petitioner on appeal whenever an adverse decision on a post-conviction remedy is rendered and the petitioner seeks to appeal.<sup>47</sup>

42. *Id.* at 81-82.

43. *Id.* at 6 (Supp. 1970). The specific portions of the ABA CODE OF PROFESSIONAL RESPONSIBILITY cited by the ABA are Ethical Considerations 2-31, 2-32, 7-5, 7-7, 7-8, and Disciplinary Rules 2-110 and 7-102. Section 3.2 (b) (ii) now reads:

If the client wishes to proceed, it is better for counsel to present the case, so long as his advocacy does not involve deception or misleading the court. After preparing and filing a brief on behalf of the client, counsel may appropriately suggest that the case be submitted on briefs or *request permission to withdraw*.

*Id.* at 5 (Supp. 1970) (emphasis added).

44. — Ind. App. —, 284 N.E.2d 102 (1972). Prior to *Dixon*, the *Anders* case had been discussed three times in Indiana, none of which bear upon the present discussion. *Cline v. State*, 253 Ind. 264, 252 N.E.2d 793 (1969); *Robbins v. State*, 251 Ind. 313, 241 N.E.2d 148 (1968); *State ex rel. Lawrence v. Morgan Circuit Court*, 249 Ind. 115, 234 N.E.2d 498 (1967).

45. *McClendon v. People*, 174 Colo. 7, 481 P.2d 715 (1971); *State v. Gates*, 466 S.W.2d 681 (Mo. 1971). The *Dixon* court cited the standards proposed in ABA STANDARDS, *supra* note 1, at § 3.2, by quoting them from the *McClendon* decision. These standards are reproduced at note 39 *supra* & text accompanying. The *Dixon* court incorrectly labelled these standards as being proposed in AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Tent. Draft 1970) [hereinafter cited as ABA FUNCTION].

46. — Ind. App. at —, 284 N.E.2d at 106.

47. While the court claimed only to be interpreting an existing statute, its reasoning can only be explained as an attempt to reach a result consistent with the Project's standards. Rule 1, § 9 of the Indiana Rules of Procedure for Post-Conviction Remedies states: "[T]he Public Defender shall serve as counsel for petitioner, representing him in all proceedings under this rule, including appeal, if necessary." IND. ANN. STAT. CL. R. P.C. 1, § 9 (Code ed. Supp. 1974).

The court interpreted the rule as requiring the Public Defender to represent indigents on all post-conviction appeals, no matter how frivolous. It did not have to interpret the rule in such a manner. An alternative interpretation which would be consistent with *Anders* is equally possible. The court itself recognized that the words "if necessary" in the Rule could be interpreted so as to allow the Public Defender to proceed on an appeal at his discretion. In an effort to undercut that interpretation, the court cited *Lane v. Brown*, 372 U.S. 477 (1963), where the Supreme Court held that the Indiana Public Defender's refusal of a client's request for a direct appeal to the Indiana Supreme Court,

This solution suffers from at least five problems. First, the problem in *Anders* of "brief[ing] the unbriefable"<sup>48</sup> is not avoided. It is merely changed to "communicating the uncommunicable."<sup>49</sup> If the attorney felt

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because of his belief that an appeal would be unsuccessful, violated the fourteenth amendment. The Court objected to the fact that "an indigent can, at the will of the Public Defender, be entirely cut off from any appeal at all." 372 U.S. at 481. However, even if *Lane* undercuts the secondary interpretation suggested by the court, a stronger interpretation of the words "if necessary" was neglected by the court. The Rule could be interpreted to allow withdrawal of appointed counsel when an appeal is frivolous. If an appeal is frivolous, *i.e.*, if there is no hope of success at the appellate level, an appeal is not "necessary" and appointed counsel should be allowed to withdraw. The decision on frivolousness, however, could not rest in the sole discretion of the Public Defender or the appointed counsel as it did in *Lane*.

In so interpreting Rule 1, § 9, *Dixon* not only rejected the *Anders* approach, but abrogated a long and well-established line of cases in which it had been held that the Indiana Public Defender was not required to represent indigents on appeal when the appeal had no merit. For over a century Indiana had guaranteed the assistance of counsel to every defendant in a criminal trial. *Webb v. Baird*, 6 Ind. 13, 18 (1854). Much before *Douglas*, Indiana courts had extended the guarantee to appeals from a conviction. *State ex rel. White v. Hilgemann*, 218 Ind. 572, 34 N.E.2d 129 (1941). But the *Hilgemann* case recognized that the right of an indigent to appeal did not give the indigent a right to present frivolous appeals. *Id.* at 579, 34 N.E.2d at 131. Numerous Indiana cases since *Hilgemann* had reiterated that the Public Defender is not required to represent an indigent if, in the Public Defender's opinion, the appeal has no merit. *See, e.g., In re Lawrence*, 248 Ind. 139, 224 N.E.2d 512 (1967); *In re Harvey*, 247 Ind. 23, 210 N.E.2d 859 (1965); *Willoughby v. State*, 242 Ind. 183, 177 N.E.2d 465 (1961), *cert. denied*, 374 U.S. 832 (1963); *McCrary v. State*, 24 Ind. 518, 173 N.E.2d 300 (1961); *Brown v. State*, 241 Ind. 298, 301, 171 N.E.2d 825, 827 (1961) ("The public defender is not obliged . . . to make a travesty of his office, by preparing and performing all the formal requisites of an appeal, when such an appeal would be without meritorious grounds which he could in good conscience present . . ."); *State ex rel. Casey v. Murray*, 231 Ind. 74, 106 N.E.2d 911 (1952). The reasoning centered around three points. Initially, the courts argued that the right to appointed counsel recognized in *Hilgemann* did not require the state to waste funds for meritless appeals. *See, e.g., Willoughby v. State*, 242 Ind. 183, 177 N.E.2d 465 (1961), *cert. denied*, 374 U.S. 832 (1963). Secondly, it was argued that equal protection did not require the state to pay for an appeal against the advice of counsel because a nonindigent defendant, paying for an appeal, would probably choose not to appeal if counsel so advised. *Id.* at 197, 177 N.E.2d at 472. Finally, many decisions rested partially on ethical standards and ruled that an attorney convinced of the frivolousness of the appeal should not be required to violate his lawyer's oath. *See, e.g., In re Harvey*, 247 Ind. 23, 210 N.E.2d 859 (1965) ("It is a violation of an attorney's oath and duty if he attempts to file a frivolous and non-meritorious appeal." *Id.* at 24, 210 N.E.2d at 859); *In re Stillabower*, 246 Ind. 695, 210 N.E.2d 665 (1965); *McCrary v. State*, 241 Ind. 518, 173 N.E.2d 300 (1961).

The pre-*Anders* Indiana procedure sanctioned in numerous cases would not satisfy the *Anders* requirements today. Much like the *Nash* procedure, in Indiana representation was excused when the attorney himself concluded there was no merit to the appeal. *See, e.g., In re Harvey*, 247 Ind. 23, 210 N.E.2d 859 (1965); *McCrary v. State*, 241 Ind. 518, 531, 173 N.E.2d 300, 306 (1961). This procedure was declared invalid in *Anders*, 386 U.S. at 742. The overall policy, however, of excusing representation of indigents in certain situations comports with the policy suggested in *Anders*.

48. *See* note 25 *supra* & text accompanying.

49. In attempting to solve the dilemma of appointed counsel who, on the one hand, is to vigorously represent the indigent, yet, on the other, feels any arguments that might be made are frivolous, the *Dixon* court recommended the ABA solution, instructing the attorney to

communicate to the court the issues and whatever can be said in support of

he could "communicate" to the court issues in good conscience, he would not be asking to withdraw.<sup>50</sup>

Second, the Project and *Dixon* ignore the fact that a nonindigent's attorney must represent to the court that he is making arguments worthy of the court's attention.<sup>51</sup> While an attorney does not have to "endorse his client's case,"<sup>52</sup> his arguments carry some representation that they are arguable on the merits, not "meaningless charades."<sup>53</sup> The Project, however, maintains that

appearance of counsel is not an implicit representation to the court that he believes in the legal substantiality of the contentions advanced. The court should not take absence of a request to withdraw as any indication of the lawyer's own estimate of the case.<sup>54</sup>

However, because there is an implicit representation made by the attorney that the arguments are not frivolous in nonindigent cases, if this were not also the case in indigent appeals, a double standard would develop.<sup>55</sup>

Third, the Project and *Dixon* have ignored the dictates of the Code of Professional Responsibility<sup>56</sup> and the rulings of some courts.<sup>57</sup> Under several Code provisions, attorneys are guilty of a breach of ethics if they

them without . . . advising the court that he is aware of the weakness of the position.

— Ind. App. at —, 284 N.E.2d at 106, quoting ABA FUNCTION, *supra* note 45, at 301. The same instructions are found in ABA STANDARDS, *supra* note 1, at 82.

50. See note 25 *supra* & text accompanying.

51. *Nickols v. Gagnon*, 454 F.2d 467 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972).

If retained counsel are effective advocates and attentive to their professional responsibilities, they will seldom advance contentions that are groundless. The mere fact that such a lawyer is making an argument should indicate that it has sufficient substance to merit the court's attention.

*Id.* at 472.

52. *Johnson v. United States*, 360 F.2d 844, 847 (D.C. Cir. 1966) (Burger, J., concurring).

53. *Nickols v. Gagnon*, 454 F.2d 467, 472 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972).

54. ABA STANDARDS, *supra* note 1, at 82.

55. *Nickols v. Gagnon*, 454 F.2d 467 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972). The court called the distinction "subtle but invidious," and pointed out that if such a standard developed the indigent would lose the benefit of this implicit representation. *Id.* at 472.

56. See notes 12-16, 43, *supra* & text accompanying.

57. See, e.g., *Cleghorn v. State*, 55 Wis. 2d 466, 198 N.W.2d 577 (1972).

While an indigent defendant has a constitutional right to assistance of counsel, he has no right to require an advocate to violate his professional and personal integrity and oath of office by advancing arguments which he does not honestly believe have any merit. Counsel does not have to stultify himself by arguing hopeless and nonmeritorious appeals.

*Id.* at 476, 198 N.W.2d at 582.

argue frivolous appeals for indigents or nonindigents.<sup>58</sup> Disallowing withdrawal would inevitably force an attorney to advance arguments he deems frivolous.

Fourth, by disallowing withdrawal, an important deterrent to the filing of frivolous appeals is removed. The Project maintains that the most effective deterrent is lawyer-client counselling.<sup>59</sup> However, concerning the decision as to whether an appeal should be taken, it is difficult to see how counselling will persuade an indigent not to file a frivolous appeal when the indigent knows it must be heard upon his demand.<sup>60</sup>

Fifth, and perhaps most importantly, the quality of appellate advocacy will suffer under the Project and *Dixon* approach. In an atmosphere of coercion, where the attorney is forced to argue issues he considers not arguable, in contravention of professional ethics, the possibility of a superior performance is slight. To the extent that the attorney does not meet the level of performance he would have attained had he believed in the "arguability" of the contentions, the Project and *Dixon* also fail to achieve the subsidiary goal of *Anders*, assisting the appellate courts in determining the merits of the appeal.

The Project and *Dixon* approach does not promote equal protection. Counsel representing a nonindigent is instructed to withdraw under the Code of Professional Responsibility if his client insists on a frivolous appeal. Counsel representing an indigent, however, must continue to represent him even when the client insists on an appeal which counsel considers frivolous. The indigent would be allowed to dictate the appeal and its arguments,<sup>61</sup> a power no nonindigent would possess.

#### AN ALTERNATIVE: SUBSTITUTE COUNSEL

The past, current, and proposed methods for determining the duties of counsel confronted with a frivolous appeal contain major drawbacks. Under one system, counsel is allowed to withdraw after a perfunctory

58. See notes 11-15 *supra* & text accompanying.

59. ABA STANDARDS, *supra* note 1, at 63.

60. One writer calls this solution "extremely naive." *Frivolous Appeals*, *supra* note 28, at 105. Herrmann agrees, *supra* note 3, at 720 n.81.

61. While perfecting an appeal dictated by his client, the attorney must compromise his professional independence, ABA STANDARDS, *supra* note 1, at 81-82, and use arguments the indigent seeks to use regardless of counsel's professional evaluation. To the extent paying clients would defer to the decision of counsel of their choice, the Project and *Dixon* require the attorney to use arguments for the indigent which he would not use on behalf of a paying client. The Seventh Circuit has rejected any such compulsion because it is not required by the precepts of equal protection. *Nickols v. Gagnon*, 454 F.2d 467 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972). The court agreed that indigents should receive substantially the same assistance. This, the court concluded, does not mean that *Anders* requires counsel to "make arguments that he would not consider worthy of inclusion in a brief submitted on behalf of a paying client." *Id.* at 471.

showing that the client's case is frivolous.<sup>62</sup> This method promotes hasty and careless review of the merits by counsel who wishes not to take an appeal. It promotes divisiveness between attorney and client. Under a different approach, counsel is not allowed to withdraw for any reason—no matter how frivolous he deems the appeal.<sup>63</sup> This method promotes excessive client control over the attorney. It makes the attorney the client's officer, not the court's.<sup>64</sup>

The interests of the judicial system in economy, fairness to the attorney, and equal protection to the indigent, should be more carefully balanced. A method should be developed by which courts can be more certain of their judgments as to the frivolousness of appeals and the adequacy of the indigents' representation without forcing counsel to violate ethical requirements.<sup>65</sup> Such a method might entail the use of a "second opinion" from substitute counsel.

The initial appellate counsel, before being permitted to withdraw, should be required to file a statement containing a conscientious, professional memorandum on the appeal, using case references and citations to legal authorities and theories. Such a statement has been held to meet

62. See text, *No-Merit Letters* section, *supra*.

63. See text, *No Withdrawal* section, *supra*.

64. Between these extremes lies the *Anders* brief. The difficulties inherent in that procedure are discussed in the *Anders Brief* section *supra*.

65. The solutions suggested herein assume the desirability of working within the present appellate structure. More radical changes in the appellate structure itself could be suggested to deal with the problem of frivolous appeals. Pre-appeal screening for frivolous cases is a possibility. See generally ABA STANDARDS, *supra* note 1, at 64-71; Carrington, *supra* note 1, at 574-79. Many legal writers feel such a system is undesirable as a matter of policy. See, e.g., ABA STANDARDS, *supra* note 1, at 64-71; Hermann, *supra* note 3, at 717. Such screening might be a denial of equal protection if done only in cases of indigents. The Supreme Court has hinted, however, that a procedure for screening all appeals would not be unconstitutional. *Draper v. Washington*, 372 U.S. 487, 499 (1963). In some jurisdictions, leave to appeal must be granted by the trial court. See, e.g., CAL. PENAL CODE § 1237.5 (West 1970) (appeals from judgments on pleas of guilty or nolo contendere); 28 U.S.C. § 2253 (1970) (appeals from judgments in habeas corpus).

In federal courts, in forma pauperis appeals cannot be taken if the trial court certifies such action is not in good faith. 28 U.S.C. § 1915(a) (1970). All these determinations are reviewable and seem merely to add another step to the procedure. For a general criticism, see ABA STANDARDS, *supra* note 1, at 68-69.

Penalizing frivolous appeals is another possibility. See, e.g., Hazard, *After the Trial Court—The Realities of Appellate Review*, in *THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* 60, 84 (Jones ed. 1965). Most seem to reject this approach because it is unfair to penalize petitioners for presenting frivolous appeals unless they had foreknowledge that the appeal was frivolous. See ABA STANDARDS, *supra* note 1, at 70-72; Hermann, *supra* note 3, at 717; *Frivolous Appeals*, *supra* note 28, at 105.

Appellate review of sentences is another possibility explored in several articles. See, e.g., Hermann, *supra* note 3, at 720.



the *Anders* constitutional requirements.<sup>66</sup> Additionally, the statement should contain an affirmation that the attorney petitioning to withdraw cannot continue consistent with his professional standards. The court could then appoint a substitute counsel for the indigent. After a full review of the facts and the appealable issues, the substitute would then take the appeal if he decided there were meritorious issues to be argued. If the substitute counsel agreed with the initial counsel that an appeal would be frivolous, he would then submit his own independent memorandum similar to that filed by initial counsel. The court could then conduct its own inquiry.<sup>67</sup>

After the court makes its decision on the merits, its reasons for finding the appeal frivolous or meritorious should be published in a written opinion. This would give needed instruction to counsel on the particular court's views of what constitutes a frivolous or meritorious appeal.<sup>68</sup> The court's opinion could also explain what was right and wrong with the form of the memoranda it received from counsel, thereby furnishing guidelines for the future on the type and quantity of information desired.

One of the most important aspects of this approach is that it would force the initial counsel to appraise carefully the merits of all potential arguments. Since he would be aware that another attorney would consider the same case, there would be a strong incentive to be certain and

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66. *Nickols v. Gagnon*, 454 F.2d 467 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972). *Cf. Tate v. United States*, 359 F.2d 245 (D.C. Cir. 1966); *Johnson v. United States*, 360 F.2d 844 (D.C. Cir. 1966).

67. In addition to use of substitute counsel with accompanying memoranda, judges could make greater use of their law clerks to obtain a more thorough and objective view of the appeal. Although a gross delegation of power to the clerk would be improper, the procedure could be limited so that the clerk would read the record, make a report and help determine possible merit in the appeal without making the final decision. *See, e.g., Hermann, supra* note 3, at 719. This would help satisfy the *Anders* requirement that the appellate court conduct an independent evaluation of the merits of the case, 386 U.S. at 745, and hopefully help insure completeness in that the clerks could conceivably find issues overlooked in the counsel's briefs, or aid the court in considering issues raised by counsel. Such review might also stimulate thoroughness on the part of withdrawing counsel. Use of clerks in such a fashion is already made in the courts of one state. *See Cleghorn v. State*, 55 Wis. 2d 466, 198 N.W.2d 577 (1972); Eisenberg, *No Merit Briefs in the Wisconsin Supreme Court*, 45 WIS. BAR BULL. 28 (Apr. 1972).

68. *See Hermann, supra* note 3, at 705, 707-08, 718, 721. Most appellate courts do not write lengthy opinions detailing their reasons for ruling that an appeal is or is not frivolous. Where this practice prevails, there is little possibility for an attorney to tell what the appellate court considers frivolous. Some courts, however, have recognized the need for explanatory opinions. *See, e.g., Glass v. United States*, 405 F.2d 471 (7th Cir. 1968), *cert. denied*, 394 U.S. 939 (1969); *State v. Pascucci*, 161 Conn. 382, 387, 288 A.2d 408, 410 (1971) ("while it is unnecessary for the court to state its reason for a decision that an appeal is 'wholly frivolous,' a memorandum of decision explaining the basis of the decision of the court would obviously be especially desirable."); *People v. Carter*, 92 Ill. App. 2d 120, 235 N.E.2d 382 (1968). *Cf. United States v. Minor*, 444 F.2d 521 (5th Cir. 1971) (*per curiam*); *Suggs v. United States*, 391 F.2d 971 (D.C. Cir. 1968).

thorough in his research and evaluation.<sup>69</sup> Embarrassment could result from a substitute counsel's determination that an appeal was meritorious, especially if the appellate court agreed. This approach also recognizes that attorneys' conceptions of the law and commitments to indigents may differ.<sup>70</sup> An indigent should not be penalized simply because his attorney has a certain view of the types of arguments which might be meritorious. A nonindigent can seek a second opinion, or at least has a number of attorneys from which to choose. For an indigent, substitute counsel may provide similar opportunities.

A modified substitute counsel procedure has been used in at least one instance. In a Michigan case,<sup>71</sup> after the appointed attorney had made a thorough search of the record, analyzed the issues, and determined that no meritorious grounds for appeal existed, he submitted a three page report to the court. He refused to pursue the appeal, concluding that "mindful of [his] oath . . . and . . . canons of professional ethics" it would be unethical to do so.<sup>72</sup> Substitute counsel willing to argue the appeal was appointed. The Supreme Court of Michigan acquitted the initial counsel of contempt charges, commended his adherence to what he believed was ethically compelled, and concluded that

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69. Although this pressure exists to a certain extent in an *Anders* brief, it would be stronger in a substitute counsel procedure. Because the substitute counsel may have a different perspective of or interest in a case (*see* note 70 *infra*) the review may be more complete than that given by a court which has a heavy case load and only the initial attorney's *Anders* brief to consider.

70. Many times attorneys will have different ideas about what issues are important. One attorney's "legal technicality" might be another's "cornerstone of the law without which the entire edifice would crumble." *Assistance*, *supra* note 36, at 251 n.85, where the author used this fact to argue that appellate court guidance in this area is essential. *Appellate* guidance is needed, *see* note 68 *supra* & text accompanying, but the fact that lawyers disagree on the importance of many issues is seemingly more supportive of a "substitute counsel" approach.

Mr. Justice Harlan recognized the merits of a fresh outlook in an analogous situation in *Lane v. Brown* when he wrote:

[i]t ignores the human equation not to recognize the possibility that a Public Defender . . . may decide not to appeal questions which a lawyer who has had no previous connection with the case might consider worthy of appellate review.

372 U.S. 477, 485 (1963). Unfortunately, a lawyer's workload may also affect his assessment of the merits of an indigent's case. An attorney who is heavily burdened might tend to view the merits of an indigent's cause more critically than an attorney who has more time, or who perhaps feels a stronger commitment to the indigent. To the extent an attorney's private workload or philosophical commitment influences his view of the possible merit of the indigent's case, substitute counsel might be found who could argue it in good faith and with effort.

71. *In re Hoffmann*, 382 Mich. 66, 168 N.W.2d 229 (1969). The court determined that *Anders* did not apply to the case because the action complained of had occurred prior to the decision. But, nevertheless, it discussed *Anders* and suggested the alternative procedure. For a discussion in greater detail of the factual complexities of *Hoffmann*, *see Assistance*, *supra* note 36.

72. 382 Mich. at 86, 168 N.W.2d at 237.

[a]s against that rule [*i.e.*, *Anders*] . . . we prefer our eminently superior practice; that of appointing for an indigent appellant willing or disposed counsel . . . . It provides for such an appellant a lawyer more likely to serve better than would the lawyer forced against his will to act for a cause he knows . . . is frivolous. And, unlike *Anders*, it certainly assures this in the appellate court . . . .<sup>73</sup>

Certain problems exist with the substitute counsel approach, some of which are inherent in any system of indigent representation. One writer has suggested that the substitute counsel approach might fail because the attorneys likely to attract appointment are those who will comply with the requirement for representation in form only and will not "take up the cause anew."<sup>74</sup> Why these attorneys are likely to be appointed is never explained. There are indications to the contrary. Some courts refuse to appoint young and inexperienced attorneys to represent the indigent.<sup>75</sup> Additionally, if appellate courts were to exercise their power to remove from the list of lawyers for assignment on appeal those who lack either competence or diligence, this problem could be further minimized.<sup>76</sup> Moreover, this problem is not peculiar to substitute counsel proposals, but is a weakness in all appointed counsel procedures.

Some fear a substitute counsel procedure may result in prejudice because the second counsel would be aware that his predecessor felt the case had no merit.<sup>77</sup> It is not clear why the substitute counsel need know of the initial counsel's opinion. However, if he does know, prejudice will not necessarily result. The advantage of the procedure is that it allows the court to appoint an attorney who might disagree with his predecessor

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73. *Id.* at 81-82, 168 N.W.2d at 235. For another example of dissatisfaction over a procedure which would compel an attorney to violate his ethics, see *State v. Cheelester*, 26 Utah 2d 300, 488 P.2d 1045 (1971). After receiving a short letter requesting withdrawal and subsequently granting the request, the Supreme Court of Utah commended the attorney "for his high standard of ethical and moral principles." *Id.* at 301, 488 P.2d at 1046.

74. *Assistance*, *supra* note 36, at 250.

75. *See, e.g.*, *State v. Toney*, 23 Ohio App. 2d 203, 262 N.E.2d 419 (1970). An Ohio appellate court claimed that "as a matter of policy [they] have long refrained from the practice of appointing young or inexperienced counsel to represent defendants on criminal appeals." *Id.* at 206, 262 N.E.2d at 422.

76. *See* Hermann, *supra* note 3, at 716-17.

77. *Obligation*, *supra* note 28, at 210 n.1. It might also be argued that courts would be prejudiced against either the case itself or the attorney arguing it, knowing former counsel had withdrawn to avoid transgressing ethical standards. Due to the varying conceptions of "frivolousness" among attorneys, *see* note 70 *supra*, courts could avoid such prejudice by recognizing one counsel's request to withdraw without impugning the motives of his successor. *See, e.g.*, *State v. Cheelester*, 26 Utah 2d 300, 488 P.2d 1045 (1971).

on the merits.<sup>78</sup>

#### CONCLUSION

The substitute counsel approach could benefit the attorney, the indigent, and the court. Because the initial attorney who fulfills the requirements will be allowed to withdraw, the attorney need compromise neither his duties to the court or to his client, nor his professional ethics. An intelligent, well-researched opinion is more likely if the attorney is not adverse to court and client.<sup>79</sup> Such an opinion will fulfill the requirements of both fairness and indigent representation. Moreover, the substitute counsel approach may provide the indigent with a substitute attorney who believes in the indigent's case and will vigorously argue the appeal.

MICHAEL R. CONNER

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78. See note 70 *supra* & text accompanying. It is not clear how the substitute counsel procedure could possibly be more prejudicial to the indigent than the Project and Dixon approach of forcing an attorney to represent the indigent even if he thinks the appeal is frivolous.

79. If the attorney were allowed to withdraw when continued representation would conflict with his ethical standards, the memorandum of the petitioning attorney could be more helpful to both client and court. It would be more objective and would not be written with a view toward convincing the court that the appeal is frivolous merely to facilitate the attorney's withdrawal, as have some *Anders* briefs in the past. See note 28 *supra*. Because the appellate court cannot effectively function without an attorney to present what can be said on behalf of an indigent, the procedure which allows the attorney to do so in the most objective manner is preferable to a procedure in which ulterior motives may color his appraisal. Knowing that his withdrawal petition will be granted, counsel can place before the court all possible facts and relevant authorities necessary for it to make an informed judgment, in the form of a reasoned analysis and evaluation based upon all possible points of error. This would be similar to the evaluation made by a competent retained attorney before he advises his client of the prospects for appeal. Thus the indigent receives representation substantially equivalent to that received by paying clients, and the ethical integrity of the attorney is not compromised. Although the procedure does not require a "brief" per se, it does satisfy the *Anders* requirement of "referring" to issues that arguably support the appeal.