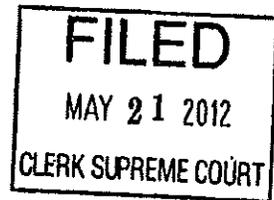


In the Supreme Court of Iowa

Amendments to Rule of)
Appellate Procedure 6.1005) **Order**
Regarding Frivolous Appeals)
and Withdrawal Of Counsel)
(Including Related Changes)
to Other Rules))



On February 10, 2012, the supreme court issued an order proposing amendments to Iowa Rule of Appellate Procedure 6.1005 (“Frivolous appeals; withdrawal of counsel”) and related rule changes. This order followed earlier discussions with the offices of the state public defender and the attorney general; in addition, the order requested public comment on the proposed changes.

The court has received seven comments on the proposed changes by the March 16 deadline. These comments come from the attorney general, the state appellate defender, two attorneys in the appellate defender’s office, and three private attorneys who practice in the area of criminal law. The court appreciates the comments and has found them helpful. The court explains below its responses to certain of the comments.

According to his comments, the attorney general does not oppose the proposed rule changes. However, he disagrees with the court’s view (as expressed in the February 10 order) that the changes will not necessarily increase the workload of the attorney general’s office. The attorney general points out that when a merits brief is filed on behalf of a criminal defendant, an assistant attorney general must review the record and prepare a responsive brief. Waiving the filing of an appellee’s brief is not an acceptable option.

The court believes the attorney general’s concerns are legitimate. The regular filing of appellee’s briefs by the attorney general’s office not only communicates the state’s position to crime victims and the public, but also assists the appellate courts in deciding criminal appeals.

On the whole, though, the court still believes that the overall impact of the proposed rule changes will be to rationalize and streamline the disposition of criminal appeals. As noted in the February 10 order, one consequence of the existing frivolous appeal procedures has been that the merits briefing of certain issues is deferred to the postconviction relief stage. Our hope is that the new procedures will enable these issues to be addressed on direct appeal instead.

Like the attorney general, the state appellate defender does not oppose the proposed changes. However, his comments raise a question about a possible internal inconsistency in the amended rule. To address the concern, the court has included an additional sentence in 6.1005(1). The state appellate defender also expresses concern about additional cost burdens on his office resulting from the amendments, although he notes that the anticipated implementation of electronic filing for appeals may partially alleviate those costs. This court is committed to bringing electronic filing to the appellate courts in the near future.

Two attorneys in the state appellate defender's office voice opposition to the proposed changes in their comments. They believe, among other things, that the amendments will result in more attempts by appellate counsel to persuade defendants to voluntarily dismiss their appeals, additional affirmances without opinion by the court of appeals, and an increased workload for appellate counsel who will have to prepare final briefs and appendices in cases in which a motion to withdraw formerly would have been granted. The comments filed by these two attorneys are thoughtful and well-presented, but the court ultimately believes that anticipated benefits of the proposed rule changes outweigh potential drawbacks.

Under the existing rule 6.1005, assuming the defendant has been convicted following a trial, appellate counsel who desires to withdraw often files a motion that is as long as, if not longer than, a typical merits brief. In order to

decide this motion, the court must then review the entire record and consider potential appellate arguments—i.e., put itself to some extent in the role of the defendant's advocate.

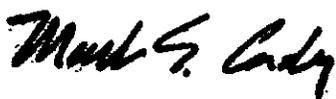
Counsel and the court do not have to shoulder these burdens when the defendant's appellate counsel proceeds with the appeal and files a regular merits brief under rule 6.903. Furthermore, the lack of a truly adversarial process can lead (and has led) to meritorious arguments not being raised. Notably, two private attorneys who handle criminal appeals, at least one of them by contract with the state public defender, comment that they support the change, referring to some of these points in their comments.

According to the data available to the court, Iowa has been allowing attorneys to withdraw from handling criminal appeals at a much higher rate than most other jurisdictions. Even under the rule change, rule 6.1005 motions can continue to be filed in direct appeals from cases in which there was a guilty plea, and in many postconviction relief appeals. Finally, the court will continue to study the issues rule 6.1005 presents in an ongoing effort to assure that the appellate process complies with constitutional requirements and remains cost-effective and fair for all Iowans.

The text of the final version of the amendments follows this notice. These amendments will take effect on Monday, May 21, 2012, and will apply to all appeals pending as of that date.

Dated this 21st day of May, 2012.

The Supreme Court of Iowa

By 
Mark S. Cady, Chief Justice

Copies to:

- ✓ Supreme Court
- ✓ Iowa State Bar Association
- ✓ Attorney General
- ✓ State Public Defender

Rule 6.1005 Frivolous appeals; withdrawal of counsel

6.1005(1) Applicability. The procedures in this rule apply when court-appointed counsel moves to withdraw on the grounds that the appeal is frivolous. These withdrawal procedures cannot be used in termination-of-parental-rights and child-in-need-of-assistance appeals under Iowa Code chapter 232, in direct criminal appeals following a trial, or in appeals from the denial of an application for postconviction relief following a reported evidentiary hearing on that application, unless the application was ultimately denied based upon the statute of limitations, law of the case, or res judicata principles. Although not permitted to withdraw from such appeals, counsel are not required to raise in such appeals claims of ineffective assistance of counsel that require the development of an additional record in a further postconviction relief proceeding.

6.1005(2) Motion to withdraw. If, after a diligent investigation of the entire record, court-appointed counsel is convinced the appeal is frivolous and that counsel cannot, in good conscience, proceed with the appeal, counsel may file a motion to withdraw. For purposes of this section, a potential claim of ineffective assistance of counsel that requires the development of an additional record in a postconviction relief proceeding may be considered frivolous. The motion must be accompanied by:

- a. A brief referring to anything in the record that might arguably support the appeal. The motion and brief shall be in the form specified in rule 6.1007.
- b. A copy of the rule 6.1005(3) notice.
- c. A certificate showing service of the motion, brief, and notice upon the client and the attorney general.

6.1005(3) Written notice to client. Counsel shall notify the client in writing of counsel's conclusion that the appeal is frivolous and that counsel is filing a motion to withdraw. The notice shall be accompanied by a copy of counsel's motion and brief. The notice shall advise the client:

- a. If the client agrees with counsel's decision and does not desire to proceed further with the appeal, the client shall within 30 days from service of the motion and brief clearly and expressly communicate such desire, in writing, to the supreme court.
- b. If the client desires to proceed with the appeal, the client shall within 30 days communicate that fact to the supreme court, raising any issues the client wants to pursue.
- c. If the client fails to file a response with the supreme court, such failure could result in the waiver of the client's claims in any subsequent postconviction action.

6.1005(4) Request to transmit record. Within 14 days after filing the motion to withdraw, counsel shall request the clerk of the district court to transmit immediately to the clerk of the supreme court the remaining record not already transmitted, including the original papers and exhibits filed in the district court and any court reporter's transcript of the proceedings.

6.1005(5) *Dismissal upon client's agreement.* When a client communicates to the court the client's agreement with counsel's decision the appeal shall be promptly dismissed.

6.1005(6) *Supreme court examination of record.* In all other cases the supreme court will, after a full examination of all the record, decide whether the appeal is wholly frivolous. If it finds the appeal is frivolous, it may grant counsel's motion to withdraw and dismiss the appeal. If however, the supreme court finds the legal points to be arguable on their merits and therefore not frivolous, it shall deny counsel's motion and may remand the matter to the district court for appointment of new counsel.

6.1005(7) *Extension of times.* The filing of a motion to withdraw pursuant to this rule shall extend the times for further proceedings on appeal until the court rules on the motion to withdraw.

. . .

Rule 6.1201 Voluntary dismissals.

6.1201(1) *Dismissal of an appeal.* An appeal may be voluntarily dismissed by the party who filed the appeal at any time before a decision is filed by either the supreme court or the court of appeals.

6.1201(2) *Dismissal of a cross-appeal.* A cross-appeal may be voluntarily dismissed by the party who filed the cross-appeal at any time before a decision is filed by either the supreme court or court of appeals.

6.1201(3) *Effect of dismissal.* The clerk shall promptly issue procedendo upon the filing of a voluntary dismissal unless another party's appeal or cross-appeal remains pending under the same appellate docketing number. If only a cross-appeal remains pending following the dismissal, the cross-appeal shall continue as the primary appeal, and the cross-appellant shall assume the role of the appellant. The issuance of procedendo shall constitute a final adjudication with prejudice. A voluntary dismissal of a direct appeal from a criminal case shall not preclude the subsequent consideration of a claim for ineffective assistance of counsel in an action for postconviction relief pursuant to chapter 822.

. . .

Rule 32:3.1 Meritorious claims and contentions. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a

proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action, defense, or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

[3] The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

[4] When an applicable rule or order prohibits an appellate attorney from withdrawing on the ground that the appeal is frivolous, the lawyer is permitted to advocate grounds on appeal that the lawyer believes are ultimately without merit. The lawyer must, of course, comply with the remaining rules of this chapter, including rule 32:3.3.