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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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NOTICE OF PROPOSED RULES

The United States Court of Appeals for the First Circuit hereby provides notice that, with the approval of the Judicial Council of the First Circuit, it proposes to amend Local Rule 46.5(d), a portion of the court's Plan under the Criminal Justice Act for representation on appeal. See 18 U.S.C. § 3006A. The court also provides notice that it proposes to amend Local Rule 46.6. The proposed amendments to Local Rules 46.5(d) and 46.6 are shown on the attached pages. Additions are noted in *italic* print; deletions are shown in ~~strikeout~~ print.

The proposed changes to Local Rule 46.5(d) are to conform the rule more closely to present court practice.

The proposed changes to Local Rule 46.6 are to clarify counsel's responsibility to continue to represent defendant on appeal until relieved by this court and to better explain the procedure and steps counsel moving to withdraw from representing a defendant in a criminal case should follow.

The Court of Appeals invites public comment on the proposed amendments to Local Rules 46.5(d) and 46.6. Comments on the proposed rules should be received by November 1, 2002 and addressed to:

Office of the Clerk
U.S. Court for the First Circuit
John Joseph Moakley United States Courthouse
1 Courthouse Way, Suite 2500
Boston, Massachusetts 02210

September 3, 2002

Richard Cushing Donovan, Clerk

PROPOSED AMENDED LOCAL RULE 46.5 (d)
(showing ~~deletions~~; there are no additions)

(d) Payment for Representation and (e) Services other than Counsel.

The court notes sections (d) and (e) of the Act and incorporates the pertinent portions herein. Expenses described in the Act do not include overhead and such matters as secretarial expenses not ordinarily billed to clients, but a reasonable charge for ~~xeroxing or similar copying services~~ for briefs may be allowed. No other reimbursable expenses shall be incurred without prior court approval. ~~The word "necessary" as used in the act will at all times be construed in its strictest sense. The hourly rates of compensation are designated and intended to be maximum rates and will be treated as such. In fixing the rate, the chief judge or his delegate will bear in mind the qualification of attorneys and the relative difficulties encountered in presenting the case. The 1986 changes in the hourly rates were made to meet the changes in the price structure of the nation since the original Act was passed. They are not intended to change the basic and underlying philosophy of the Act that the bar of the nation owes a responsibility to represent person financially unable to retain counsel and that only in the most extraordinary case will the chief judge or his delegate consider a request for fees beyond the statutory maximum.~~

All claims, whether for compensation, or for expenditures, shall be submitted promptly after the completion of all duties, which may include preparation of a petition for writ of certiorari, at the risk of disallowance. After court approval all orders for payment shall be processed through the Administrative Office.

PROPOSED AMENDED LOCAL RULE 46.6

(showing additions; there are no deletions)

Loc. R. 46.6 Procedure for Withdrawal in Criminal Cases

(a) Trial counsel's duty to continue to represent defendant on appeal until relieved by the court of appeals.

An attorney who has represented a defendant in a criminal case in the district court will be responsible for representing the defendant on appeal, whether or not the attorney has entered an appearance in the court of appeals, until the attorney is relieved of such duty by the court of appeals. See Local Rule 12(b).

(b) Withdrawal by counsel appointed in the district court.

When a defendant has been represented in the district court by counsel appointed under the Criminal Justice Act, the clerk will usually send a "Form for Selection of Counsel on Appeal" to defendant, which asks defendant to select among the following:

- (1) representing him or herself on appeal and proceeding pro se,*
- (2) requesting trial counsel to be appointed on appeal to represent defendant on appeal,*
- (3) requesting the appointment of new counsel on appeal, and*
- (4) retaining private counsel for appeal.*

If the defendant returns the form and elects to proceed with new counsel to be appointed on appeal, then the court will ordinarily appoint new counsel and allow trial counsel to withdraw.

(c) Procedure for withdrawal in situations not governed by Local Rule 46.6(b).

Motions to withdraw as counsel on appeal in criminal cases must be accompanied by a notice of appearance of replacement counsel or, in the absence of replacement counsel, such motions must state the reasons for withdrawal and must be accompanied by one of the following:

- (1) The defendant's completed application for appointment of replacement counsel under the Criminal Justice Act or a*

showing that such application has already been filed with the court *and, if defendant has not already been determined to be financially eligible, certification of compliance with Fed. R. App. P. 24; or*

(2) An affidavit from the defendant showing that the defendant has been advised that the defendant may retain replacement counsel or apply for appointment of replacement counsel and expressly stating that the defendant does not wish to be represented by counsel but elects to appear *pro se*; or

(3) An affidavit from the defendant showing that the defendant has been advised of the defendant's rights with regard to the appeal and expressly stating that the defendant elects to withdraw the appeal; or

(4) If the reason for the motion is the frivolousness of the appeal, a brief following the procedure described in Anders v. California, 386 U.S. 738 (1967), must be filed with the court. [Counsel's attention is also directed to McCoy v. Court of Appeals, 486 U.S. 429 (1988); Penson v. Ohio, 488 U.S. 75 (1988)]. Any such brief shall be filed only after counsel has ordered and read all relevant transcripts, including trial, change of plea, and sentencing transcripts, as well as the presentence investigation report. Counsel shall serve a copy of the brief and motion on the defendant and advise the defendant that the defendant has thirty (30) days from the date of service in which to file a brief in support of reversal or modification of the judgment. The motion must be accompanied by proof of service on the defendant and certification that counsel has advised the defendant of the defendant's right to file a separate brief.

In exceptional circumstances, if counsel is unable to comply with (1), (2), or (3) and does not think it appropriate to proceed in accordance with (4), counsel may file an affidavit explaining the difficulty and move to withdraw.

An unsworn declaration under the penalty of perjury in the format set forth in 28 U.S.C. § 1746 will suffice in place of an affidavit.

(d) Service.

All motions must be accompanied by proof of service on the defendant and the Government and will be determined, without oral argument, by one or more judges.