

.....**MEMO**

May 28, 2010

FROM: Ira Mickenberg
TO: Jack Rogers

RE: Implications of proposed new appellate rules for the Public Defender Office and for the representation of indigent defendants in state appeals.

I am in agreement with almost all of what Greg said in his memo of May 25, 2010, so rather than repeat Greg's analysis, I will focus on some of the other things in the proposed rules that will have a serious impact on both the Public Defender and on our clients.

Overview

While many of the rule changes seem to be innocuous house-cleaning or procedural time saving measures for the court, most of the changes have at least one of the following serious effects on the Public Defender as an agency, and on the ability of our lawyers to do a good job representing clients on appeal:

- They shift the work of compiling the record on appeal and appendix away from the clerk's offices of the Circuit and Supreme Courts and on to the lawyer for the appellant (which in most cases means us). This will require the lawyer for appellant (or his/her staff) to do far more work gathering, assembling and transmitting the record (and dealing with various court clerk's offices, many of whom are not particularly cooperative), and spend far more time on almost every case.
- They shift the cost of compiling and filing the record and appendix away from the clerk's offices of the Circuit and Supreme Courts and on to the lawyer for the appellant (which in most cases means us). This cost will be significant, in terms of both the time lawyers will have to expend and the expense of copying, printing, binding, etc. in every case.
- They place the responsibility on the trial lawyer for choosing and defining the legal issues that will be raised on appeal, and make it far more difficult for the appellate lawyer to raise other issues

Rule 5(b) and 10(c)(3)

The new Rule 5(b), which combines the old notice of appeal and docketing statements, still requires counsel filing the notice (who almost always will be the trial attorney, not the appellate

attorney) to include a listing of all assignments of error to be raised on the appeal. The proposed new rule make two significant changes, though:

1. The Court now requires a detailed statement defining the issue and explaining why the Court should review the issue.

2. The Court includes a bold-face type warning that without Court permission, counsel for appellant cannot raise additional issues or change the substance of the issues listed in the notice of appeal.

These are the implications of the changes:

- Appellate counsel will be forced to file a motion to raise additional issues in virtually every case. As a practical matter, the trial lawyer's listing of the issues when filing a notice of appeal is usually cursory, and almost always fails to include significant issues. Trial lawyers often do not have the skill at appellate issue spotting to do this well. Moreover, if the trial lawyer did not raise an issue at trial, there is a conflict of interest in asking him to raise it in a notice of appeal, because doing so might expose the trial lawyer to a claim of IAC, or even a bar complaint. All this rule really does is create an extra layer of work for everyone (the motion, the State's response to the motion, and the Court's decision on the motion). Simply allowing appellate counsel to raise all issues would save everyone work, and would eliminate the possibility of the really serious problems that would result when the Court denies a motion to raise additional issues (See below).
- If the Court denies a motion to raise additional issues, appellate counsel will often be required to file a habeas corpus claim in state court, alleging IAC for the trial lawyer's failure to file an adequate notice of appeal. This not only creates a lot of extra litigation for everyone, but is particularly harmful to the defense because we would then be forced to litigate this under the two pronged IAC test of Strickland, which requires us to show that we would have won the appeal – a proposition that the trial court is very unlikely to accept. Furthermore, if we lost the habeas in the trial court, we will have to appeal that decision, which means that the Supreme Court of Appeals will ultimately have to decide whether we would have won the issue had it been put in the Notice of Appeal. It would save everyone a few years of litigation and a great deal of expense if the Court would just keep the old rule and let appellate counsel raise any issues.
- If a defendant is ever precluded from raising a meritorious issue because the trial lawyer did not list it in the Notice of Appeal, there might be an obligation to start federal habeas corpus litigation. Do we really want to open this can of worms?

Rule 5(d)

A scheduling order is generally a good thing because it lets everyone know what is expected of them. However, the way the Court creates scheduling orders should take into account the main reason for delay in indigent criminal appeals – that the court reporter has not provided the complete transcript in sufficient time for appellant’s counsel to read it and finish the brief. The proposed rules keep the fictions that we presently operate under – that it is realistic to set the due date for the brief at 120 days from filing of the notice of appeal; and that the court reporters will get us the record promptly enough to satisfy that mandate. What we really need is a rule that does two things:

- Requires the court reporter to get the transcripts to appellate counsel within a specified time.
- Requires counsel to file the brief within 120 days of getting the complete transcripts.

It is also notable that the proposed rule for filing an appendix will cause even greater delay in filing the brief. Because the page numbers in the appendix must be cited in the brief, the brief must first be written, then the appendix compiled and finalized, and then the appendix page cites inserted in the brief. This is going to make it much harder to meet the requirements of Rule 5(d) scheduling orders.

Rules 6(d) and 7

These rule changes, which require counsel for appellant to prepare and file an appendix in all cases (with rare exceptions in Rule 8), amount to a giant unfunded mandate on the Public Defender and on all lawyers who represent indigent appellants. Although neutral on its face, these rule changes have the potential to financially destroy the indigent defense system.

Many federal courts of appeal require an appendix in all cases. However, I do not know of any state appellate courts that require it, because it requires so much work and is so expensive that it would discourage, if not prevent, lawyers and agencies from representing indigent defendants in criminal appeals. It would be worth doing a survey to see if any states require an appendix, and if so, how they do it.

Compiling an appendix requires the following work and expenses by counsel for the appellant:

- ◆ Counsel must identify everything in the record that might be cited in the brief and that might be relevant to persuading the Court to reverse the conviction. Often this will include not just the pages or items directly cited in the brief, but the things that establish the context necessary to understand the cited items, and the things the Court must read to decide broader questions, like harmless error and prejudice, that are subsumed in the issues directly raised in the brief.
- ◆ Counsel must make copies of every one of those documents and items. This will

include transcripts of trials, hearings and court appearances, other documentary evidence, exhibits, court papers, motions, briefs, and anything else that might be created or filed in the trial court. It should be noted that in many counties, court personnel are very resistant to the notion of letting defense counsel make copies, which will make the process even slower and more expensive.

- ◆ Counsel must assemble all of those items into a coherent sequence.
- ◆ Counsel must then number (usually by hand) the items. The appendix will virtually always be several hundred pages long, and will often be over a thousand pages long.
- ◆ Counsel must prepare a detailed table of contents/index, in the appropriate sequence, of all the items.
- ◆ Counsel must make sufficient copies of the entire appendix to satisfy the Rules' service and filing requirement.
- ◆ Counsel must bind the appendix according to the Rules. Since the proposed Rules specify that no volume of an appendix may be more than two inches thick, this will sometimes require that multiple volumes of an appendix be made.

The amount of work this entails should not be underestimated. In large cases, it can take as much time to create the appendix and satisfy the formatting, printing and service requirements as it does to write the brief.

Equally important, an appendix is expensive. The proposed rules seem to place most, if not all of the cost of this on appellant. That means that Public Defenders will have to pay for it out of their own budget, and assigned counsel will have to be reimbursed (at least for the copying and binding costs, and probably for their time in assembling the appendix. To get an idea of the scope, imagine the cost of making copies of hundreds of court documents, coupled with copying, binding and serving 8 or 10 copies of a 500 - 1000 page document in every case. Not to mention the cost of paying hourly lawyers for their time doing this, or the cost of hiring additional staff in a Public Defender office to do the extra work.