

UPDATED MEMORANDUM

TO: ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE
FROM: S. UHLMANN, D. REED. M. HOFFMAN
RE: RULE 44(e)(1)
DATE: MAY 17, 2019

This memo updates the memo dated March 21, 2019, in response to the full Committee's discussions at the meeting on April 19, 2019. At that meeting, members of the Committee raised two issues:

1. Whether the language in subsection (II) about "deferred prosecution" needs to be addressed, since there is no deferred prosecution anymore, and whether we should replace that language with a reference instead to "pretrial diversion"; and
2. Whether we need to add the word "timely" to the phrase "When a notice of appeal is filed" in subsection (IV).

As for "deferred prosecutions," the statute was amended to abolish them, and to relocate the concept in a new section titled "Pretrial diversion," § 18-1.3-101, et seq. The subcommittee discussed the effects of § 18-1.3-101(9)(f), which provides that diversion agreements may either be entered into between the parties privately with no up-front involvement by the court (if the diversion is not to be supervised by probation), or may be filed with the court (if it is to be supervised by probation). When filed with the court, the court must stay further proceedings.

We agreed unanimously that the intent of Rule 44(e) would encompass defense counsel's representation being terminated regardless of whether a diversion agreement is reached privately or filed with the court. The language we propose below would accomplish that.

After extensive discussions, we also agreed unanimously that the word "timely" should be added to the phrase "notice of appeal" in subsection (IV). We identified two arguments in favor of the change: 1) to make it symmetrical with subsection (I), which contains the phrase "no

timely appeal has been filed” (this refers to when the trial court dismisses the case, and the prosecution does not timely appeal) and with subsection (III), which contains the phrase “no [motion to reconsider sentence] has been **timely** filed”; and, more importantly, 2) to protect defense lawyers from having to remain on a case indefinitely after the appeal period runs. The counterargument we discussed is that trial counsel have a duty to advise their clients about their right to appeal and to timely prosecute that appeal if so directed.

In the end, the subcommittee was satisfied that the problem of defense trial lawyers remaining on un-appealed cases indefinitely—which could be a real problem, for example, if the defendant directs counsel not to file an appeal and then years later changes his mind and expects counsel to file an untimely appeal—was a bigger problem than defendants not realizing they have a right to appeal and needing lawyers to prosecute untimely appeals, especially in light of the fact that the trial court must advise a trial defendant after sentencing of his right to appeal.

So, together with the changes we recommended in our March 2019 memo, here is the final marked-up version of all our recommended changes:

(e) Termination of Representation.

(1) Unless otherwise directed by the trial court or extended by an agreement between counsel and a defendant, counsel's representation of a defendant, whether retained or appointed, shall terminate when at the conclusion of trial court proceedings have concluded. ~~and after a final determination of restitution.~~ Trial court proceedings “have concluded” when restitution is finally determined and shall conclude at the point in time:

- (I) When dismissal is granted by the court and no timely appeal has been filed;
- (II) When the parties have entered into an agreement for pretrial diversion, or when an order enters granting a deferred ~~prosecution, deferred~~ sentence, or probation if no sentence to incarceration is imposed;
- (III) After a sentence to incarceration is imposed upon conviction when no motion has been timely filed pursuant to Crim. P. 35(b) or such motion so filed is ruled on; or
- (IV) When a timely notice of appeal is filed by the defendant.