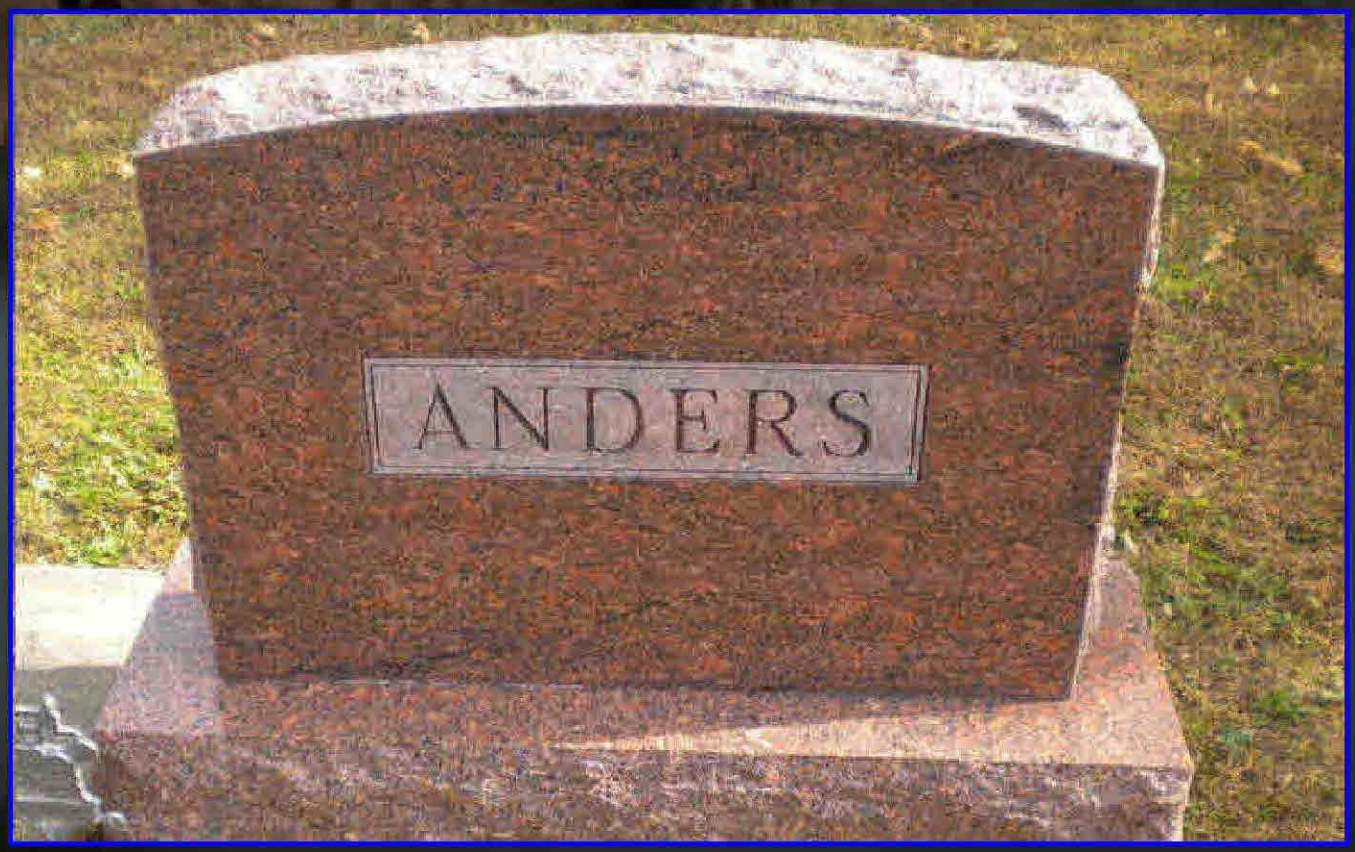
The Texas Law Reporter

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Clicking a hyperlink (such as a judge's name) will load the linked opinion or document in your web browser.

It is TIBA's policy that commentators do not summarize or comment on cases in which they were involved.

Volume 22, Number 10 ~ Monday, March 10, 2014 (No. 1002)

# Frivolous Briefs - Can't We All Just Get Along?

by David A. Schulman

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I drafted my first appellate brief in 1985, when I was a law student clerking for Chuck Lanehart. I don't remember the client's name, but I recall that he went into a local pharmacy in Lubbock and demanded the pharmacist give him "all the dilaudid." When told the pharmacy had no dilaudid, our fellow said, "then give me all your money." There were quite a few issues available for litigation.

I was licensed a little over a year later. I knew about Anders v. California, 386 U.S. 738 (1967) and I knew about "Anders" briefs. What I heard from other lawyers was that preparing an Anders brief was harder than preparing a brief with substantive issues. That was the extent of it, however, as, in the first five years I was licensed, I never had an appeal in which I had to search for an issue to raise. All told, I filed appellate briefs in 35-40 cases in that period, and never filed an Anders brief.

When I went into private practice, after working at the Court of Criminal Appeals, I soon encountered my first appeal in which finding an issue to raise was impossible -- nothing had been preserved for appeal. As I had never had a "frivolous" appeal, I had to determine how one did it, so I began researching to find out how to do an Anders brief. What I discovered was the

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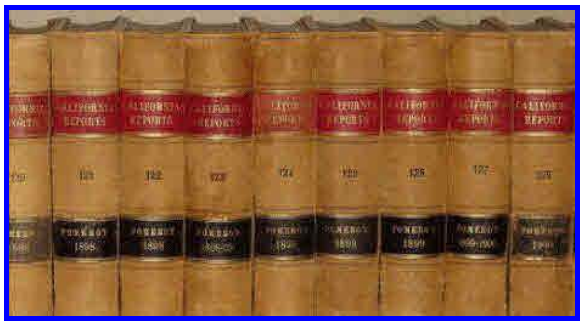
procedure set up in High v. State, 573 S.W.2d 807 (Tex.Cr.App. 1978). Under High, an attorney may comply with the requirements of Anders by submitting his or her "professional evaluation of the record showing why, in effect, there are no arguable grounds to advance."

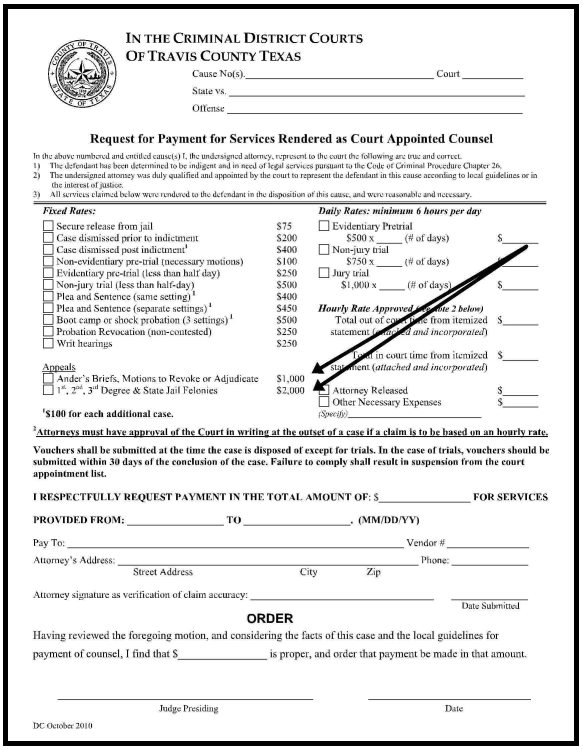
Having found High and figuring out that preparing a "frivolous" appeal brief wasn't any more difficult than preparing a regular brief, I filed my first Anders brief, included my professional evaluation, and asked to withdraw. That was in 1994.

In 2005, Fort Worth Court of Appeals Justice Lee Ann Dauphinot and I co-authored a paper on Anders briefs entitled, "Meritless Appeals, Frivolous Appeals, and Anders v. California in the 21st Century," for presentation at the University of Texas School of Law "Conference on Criminal Appeals." We covered when and how to prepare an Anders brief, and discussed some of the ethical issues involved when appellate counsel believes there is nothing he or she can do to for the client on appeal.



Between my first Anders brief and the paper I co-authored with Justice Dauphinot, was involved in more than 300 appeals all over the State. Based on that experience, I came to believe that, in approximately sixty percent (60%) of all criminal appeals in Texas, there are no issues which are not non-frivolous. Sadly, however, in at least half of those cases, the defense lawyer handling the appeal will make a substantive challenge to the conviction by raising an issue which they know can be made, but which they also know has absolutely no chance of succeeding. They should be filing an Anders brief, but, for the reasons I discuss herein, they find it more advantageous not to do so.

I believe that this occurs for two inter-related issues. First, defense lawyers generally believe the "an Anders brief is harder to do than a regular brief" mantra, and they don't want to have to resort to



IN THE CRIMINAL DISTRICT COURTS
OF TRAVIS COUNTY TEXAS

Cause No(s). _____ Court _____
State vs. _____
Offense _____

**Request for Payment for Services Rendered as Court Appointed Counsel**

In the above numbered and entitled cause(s) I, the undersigned attorney, represent to the court the following are true and correct.
1) The defendant has been determined to be indigent and in need of legal services pursuant to the Code of Criminal Procedure Chapter 26.
2) The undersigned attorney was duly qualified and appointed by the court to represent the defendant in this cause according to local guidelines or in the interest of justice.
3) All services claimed below were rendered to the defendant in the disposition of this cause, and were reasonable and necessary.

| *Fixed Rates:* | | *Daily Rates: minimum 6 hours per day* | |
|---|---|---|---|
| ☐ Secure release from jail | $75 | ☐ Evidentiary Pretrial | |
| ☐ Case dismissed prior to indictment | $200 | $500 x ____ (# of days) | $_____ |
| ☐ Case dismissed post indictment[4] | $400 | ☐ Non-jury trial | |
| ☐ Non-evidentiary pre-trial (necessary motions) | $100 | $750 x ____ (# of days) | $_____ |
| ☐ Evidentiary pre-trial (less than half day) | $250 | ☐ Jury trial | |
| ☐ Non-jury trial (less than half-day)[4] | $500 | $1,000 x ____ (# of days) | $_____ |
| ☐ Plea and Sentence (same setting)[4] | $400 | | |
| ☐ Plea and Sentence (separate settings)[4] | $450 | *Hourly Rate Approved (see note 2 below)* | |
| ☐ Boot camp or shock probation (3 settings)[4] | $500 | Total out of court time from itemized statement (*attached and incorporated*) | $_____ |
| ☐ Probation Revocation (non-contested) | $250 | | |
| ☐ Writ hearings | $250 | Total in court time from itemized statement (*attached and incorporated*) | $_____ |
| Appeals | | | |
| ☐ Ander's Briefs, Motions to Revoke or Adjudicate | $1,000 | ☐ Attorney Released | $_____ |
| ☐ 1st, 2nd, 3rd Degree & State Jail Felonies | $2,000 | ☐ Other Necessary Expenses | $_____ |
| | | (Specify): _____ | |

[4]$100 for each additional case.

[3]**Attorneys must have approval of the Court in writing at the outset of a case if a claim is to be based on an hourly rate.**

**Vouchers shall be submitted at the time the case is disposed of except for trials. In the case of trials, vouchers should be submitted within 30 days of the conclusion of the case. Failure to comply shall result in suspension from the court appointment list.**

**I RESPECTFULLY REQUEST PAYMENT IN THE TOTAL AMOUNT OF: $_____ FOR SERVICES PROVIDED FROM: _____ TO _____. (MM/DD/YY)**

Pay To: _____ Vendor # _____
Attorney's Address: _____ Phone: _____
Street Address City Zip

Attorney signature as verification of claim accuracy: _____ _____
Date Submitted

**ORDER**

Having reviewed the foregoing motion, and considering the facts of this case and the local guidelines for payment of counsel, I find that $_____ is proper, and order that payment be made in that amount.

_____ _____
Judge Presiding Date

DC October 2010

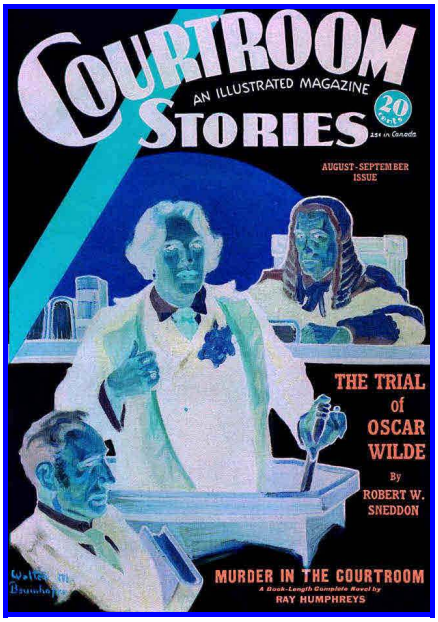
Click to See Full-Sized Image

submitting one. I have always found this particularly disturbing, as I believe that, when done correctly, writing a "regular" brief is just as difficult as writing an Anders brief. I work from a check-list[1] which covers all of the fundamental issues which should be discussed in a professional evaluation.

The second reason, and one which I find much more troubling, is that many counties are now paying less than the usual fee for representation on appeal if court-appointed counsel files an Anders brief. I believe that this is because the filing of an Anders brief causes the local clerk to have to deal directly with the defendant and, just as important to the local courts, has to pay to produce another copy of the record to send to the defendant. Most counties look at these as unnecessary expenses. So, to avoid the situation, they make it advantageous for court-appointed appellate counsel to not file an Anders brief. In Travis County, for example (see form on the left), the fee for an Anders brief is only half of the already ridiculously low $2,000 fee for a non-capital appeal.

This brings up a problem which has raised its (in my opinion) ugly head in the last year, which is the phenomena of attorneys mounting no substantive challenges to the conviction, but raising only a challenge to the imposition of court costs in the particular case. I have no problem, mind you, with an attorney making a challenge to the improper imposition of court costs. My problem is when it is done in lieu of any substantive challenge to the conviction. I echo the sentiments of First Court of Appeals' Justice Evelyn Keyes, in Hearne v. State, 415 S.W.3d 365 (Tex.App. - Houston [1st] 2013)(see G&S, Vol. 21, No. 38; 09/23/2013), in which she


[1] ❶ whether the trial court had jurisdiction over the case; ❷ whether the Clerk's Record or any discussion set out in the Reporter's Record indicates that there were any matters raised in pre-trial motions and rejected by the trial Court; ❸ whether any errors occurred during jury selection; ❹ whether the evidence presented is legally sufficient to sustain the conviction; ❺ whether, anything in the record indicates that counsel's performance was deficient; and ❻ whether there are any irregularities with the assessment of court costs as set out in the judgment.




pointed out that, "by choosing to raise this issue as [Appellant]'s sole complaint on appeal, his counsel has effectively prevented this Court from addressing any issues relating to the merits of [Appellant]'s underlying conviction and punishment and has effectively waived [Appellant]'s right to appellate review on the merits of his case." She also argued that, "counsel's failure to raise any issues addressing the merits of the underlying conviction without following the protections of the Anders procedure deprives [Appellant] of important constitutional rights." She would strike such briefs -- so would I.

There are two cases from the Waco Court of Appeals which will be summarized in next week's report -- McElwain v. State (see G&S, Vol. 22, No. 11; 03/17/2014) and Ferguson v. State (see G&S, Vol. 22, No. 11; 03/17/2014), which illuminate the problem. Both cases involve issues which are not substantive attacks on the judgment of conviction, but involve matters which require only reformation of the written judgment.

The problem in McElwain pertains to court costs. The Court of Appeals recognized an "arguable" issue which appellate counsel did not, which is that, although the defendant is indigent, the judgment assessed attorney's fees as costs of court. Because counsel had not addressed the issue and explained why it would not lead to relief, the case was abated for appointment of a new lawyer and briefing on that issue. Justice Scoggins dissented, arguing that the Court could "simply reform the trial court's judgment to eliminate the court-appointed attorney's fees and affirm the judgment as modified."

In Ferguson, although appellate counsel filed an Anders brief, she also pointed out that the judgment incorrectly reflected the age of the victim. That fact changes nothing in the case (such as guilt/innocence or punishment range), but has impact on events in the future. Because the issue was raised by appellate counsel, the judgment was reformed and

affirmed as modified. Chief Justice Gray filed a concurring opinion, noting that there is a "divergence of authority" (a polite way of saying the Courts of Appeals are all over the map on Anders rules), and that whether there is a path "which is more direct and less costly lies with the Court of Criminal Appeals."

Chief Justice Gray is correct, although I think the problems go much deeper than problems with how frivolous appeals are handled. I truly belief that, recent changes to the Rules of Appellate Procedure notwithstanding, the procedures used for handling criminal appeals in our State is absolutely broken.

Having been involved in over 500 appeals in my career in something like 60 counties, I am now of the opinion that most of the problems experienced by appellate lawyers are the direct result of a lack of uniform practices, and a lack of uniform interpretation of the rules pertaining to the appointment and compensation of counsel. It is up to the Court of Criminal Appeals to lead the way and adopting uniform rules for Anders briefs is the place to begin.