

Understanding the Anders Briefing Process

Presentation of:

**Child Protection Law Section
of the State Bar of Texas**

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MCLE Credit: 1 hr. .25 ethics



Objectives

- 1. History/purpose
- 2. Application
- 3. Evaluation
- 4. Necessary Communication
- 5. Associated Processes
- 6. Preparation in Court of Appeals
- 7. Preparation in Supreme Court



History

1998: Applied to civil juvenile case.

In re DAS, 973 S.W.2d 296 (Tex. 1998)
- considering use in criminal law

2016: Applied to child protection case

In re PM, 520 S.W.3d 24, 27 (Tex. 2016).
- considering duty of appointed attorney

"Counsel's obligation to the client may ... be satisfied by filing an appellate brief meeting the standards set in *Anders...* and its progeny."

PURPOSE

Criminal law:

strikes balance between D's 6th amendment right to counsel & duty not to prosecute frivolous appeals

Child protection:

Fulfill duties under 107.013(a)/107.016(2)(b)

PM held once appointed, attorney can **WITHDRAW** only for (1) good cause and (2) appropriate terms/conditions

NOT good cause:

- (1) dissatisfaction of atty or client
- (2) belief no good grounds –

Appropriate terms/conditions: See e.g. Disc. Rule 1.15(d)

BUT Anders process **MAY** satisfy duty

Duration Appointment- TFC 107.016(3)

attorney appointed for parent/alleged father continues ...until earliest of
(1) suit dismissed; (2) appeals exhausted/waived (3) relieved/replaced after
court finds **good cause** “on the record”

Disciplinary Rule 1.15: Terminating Representation

(a) lawyer shall withdraw except as stated in (c) if:

- (1) representation violates professional conduct/law
- (2) lawyer fitness
- (3) discharged (even if w/o good cause)

...

(c) When ordered to do so by a tribunal, a lawyer shall continue representation **notwithstanding good cause** for terminating the representation

APPLICATION OF ANDERS PROCESS

1. What if retained attorney?

Not directly answered

-BUT see In re D.T., 625 S.W.3d 62 (2021) (pc) (authorized claim ineffective assistance against retained atty)

DT noted in criminal cases no distinction between appointed/retained because of constitutional right to counsel.

And though no constitutional right, TFC 107.013(a-1)(1) requires court to tell parents they have the "right to be represented by an attorney" (regardless of indigence status).

2. Is detailed analysis required by court of appeals when D/E involved per N.G. 577 S.W.3d at 232?

In re E.K., 608 S.W.3d 815 (Tex. 2020) (petition for review denied but pc discussed)

3. What if only claim is managing conservatorship?

-TFC 107.013 requires appointments of atty in suits for **termination or conservatorship** on conditions stated.
-TFC 107.016(2)(A) refers to continuation until SAPCR dismissed;
-107.016(2)(B) refers to continuation until appeal in **terminating parental rights are exhausted/waived** and
-TFC 107.016(2)(C) refers to continuation until relieved / replaced on finding good cause.

4. What if child wants appellate claim/defense?

TFC 107.013(a-1)(1): Child not advised right counsel.
BUT

TFC 107.012 requires appointment AAL for child
TFC 107.004: appointed atty "represents ..child's expressed objectives [except when competence issue involved]
TFC 107.003(1)(F)/G: "participate in ... the litigation to the same extent as an attorney for a party."
TFC 107.016: if order appoints Dept MC, it SHALL provide to continue attorney ad litem or guardian ad litem as long as child in Dept MC; or MAY continue both while child in Dept conservatorship. - Note *Cahill v. Lyda*, 826 S.w.2d 932 (TX '92)



Evaluation issues

1. Who must evaluate?

NOTE:

TRCP 8: party whose *signature first appears* shall be attorney unless another designated.

TRAP 6.1(a): appellant's lead counsel is one whose *signature appears on notice of appeal*.

TRAP 6.1(c): *new lead counsel may be designated* by filing notice w/new atty's contact info and State Bar number and both old and new attorney must sign notice.

TRAP 6.5: *appellate court may permit withdrawal lead counsel* on appropriate term/conditions with motion. If attorney substitutes for withdrawing counsel, withdrawing attorney deliver motion to party.

2. If jury trial v. bench trial

3. Post judgment issues

4. When evaluation concluded





Communication Issues

With Client: WHEN/HOW

Disc. Rule 1.03: Keep client reasonably informed of status and explain matter to permit client to make informed decisions.

Disc. Rule 1.01(b): don't neglect legal matter

With Trial Attorney and Trial Judge: WHEN/HOW

Trial attorney's duty to promptly provide necessary information to appellate attorney upon appointment relates to duty to protect client's interests at point of termination per Disc. Rule 1.1(d)

Judge's timely notice of appointment relates to judge's duty to properly accord all parties right to be heard per Judicial Code, Cannon 3, B(8)

Associated Processes

1. The Hand-off:

1.1(d): terminating lawyer shall take steps to protect client's interests

Comment 9: **"In every instance of withdrawal..., a lawyer must take all reasonable steps to mitigate the consequences to the client."**

2. Post Judgment Processes: TRAP 26.1; TRCP 329b; TFC 109.002(a-1)

3. Motions and notices in Anders process: motion to withdraw with appropriate notices to parent

4. Process in Court of Appeals *"full examination* of all proceedings to decide whether the case is wholly frivolous"... *"independent review* of the record to determine whether there are any arguable issues on appeal" DAS 973 S.W.2d 296 (Tex. 1998) (emphasis added)

Preparation in Court of Appeals

1. Brief

Generally: Professional evaluation of record and demonstrates no arguable grounds to be advanced. That is: discusses record, elements of cause of action, standard of review, and basis for conclusion that no arguable grounds for appeal and appeal wholly frivolous. *Anders v. California*, 386 U.S. 738, 744 (1967)

Specifically: Texas Rules of Appellate Procedure apply - including Tex. R. App. P. 38.1 .

TIP for Samples:

on State Bar of Texas website - go to **Fastcase**; TYPE: "anders parental termination;" CHOSE: jurisdiction -Texas; Chose: Briefs and Motions

2. Motion and Notices:

Notices: Certify to court that parent given copy of brief and parent advised of right to examine record and file brief.

Letter to client giving notices: provide copy to court of appeals

Motion to Withdraw

Anders process requires motion to withdraw but *PM commented* motion to withdraw might not be appropriate unless motion confirms ground for withdrawal that explains good cause consistent with 107.016. *PM*, 520 S.W.3d at 27 ("an *Anders motion to withdraw brought in the court of appeals, in the absence of additional grounds for withdrawal, may be premature.*") (emphasis added); *TFC 107.016* (attorney continues unless appeal dismissed, appeal exhausted/waived or atty duty relieved or replaced with another attorney on finding of good cause on record).

3. Parent afforded opportunity to file own brief: NOTE see FORM accompanying presentation wherein court of appeals requires attorney certify that parent received copy of record

Preparation in Supreme Court

- **1. Brief requirements**

- Not discussed in *PM*. Appellate rules of procedures apply, including, *Tex. R. App. P. 53.2*.

- *Jurisdiction for Petition for Review governed by Tex. Gov. Code Sec. 22.001.*

court determines appeal presents question of law that is important to the jurisprudence of the state.

Jurisdiction does not include matters made final by statute. Tex. Gov. Code 22.225 provides judgment of court of appeals conclusive on facts of the case and Tex. Const. Art. 5, sec. 6 provides appellate courts decisions conclusive on all questions of fact brought before them. Therefore, factual insufficiency claim will not be subject for petition for review.

- Professional evaluation of record demonstrates no arguable basis to request review of a question of law important to the jurisprudence of the State.

- **2. Motion and Notices:**

- Because Texas Supreme Court is final court in this State, motion to withdraw not needed. However, certification that parent given copy of brief with notice to parent of right to examine record and file brief would be applicable process under Anders.

- **3. Parent afforded opportunity to file own brief**



Thank you
