

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1993/94-8
Attorney Providing Court Coverage
June 23, 1994

RULE REFERENCES:

*Rule 1.1	*1.1(b)(5)
*Rule 1.2	*1.1(c)(4)
*Rule 1.3	*Rule 1.4
*Rule 1.1	*Rule 1.6
*Rule 1.7	*Rule 1.8
*Rule 1.9	*Rule 1.10
*Rule 1.15	*Rule 2.1
*Rule 5.1	*Rule 5.2

SUBJECTS:

- *Attorney-Client Relationship
- *Conflict of Interest
- *Consent
- *Dual Representation
- *Law Firms
- *Multiple Representation

ANNOTATION:

An attorney that provides temporary court "coverage" for another attorney's client must comply with all of the many applicable rules relating to representation of that client, and cannot do so without, at a minimum, the primary attorney first obtaining the client's consent to 1) the representation by and 2) the amount of and sharing of fees with, the coverage attorney.

While such "coverage" representation is permissible, and may be needed in certain emergency situations, the committee cautions that the inherent risks of violation of the many applicable rules may render impractical a "coverage" attorney from making a regular practice of offering such "coverage" services to many other attorneys.

QUESTIONS:

1. May a lawyer hire outside counsel pro tempore for the purpose of substituting for the lawyer at a court hearing?
2. If so may a lawyer offer such pro tempore or "coverage counsel" services to lawyers on a regular basis?

FACTS:

The inquiring attorney desires to offer "court coverage" services to lawyers in the State. According to the attorney, court coverage is a "form of practice [that] involves appearing pro tempore on behalf of law firms at basic court hearings, presenting at the hearing and reporting back to the firm with the results of the hearing". The lawyer acknowledges that, presently, court coverage is used primarily by small firms or solo practitioners in cases of emergencies and unresolvable scheduling conflicts. The inquiry suggests that the lawyer contemplates an "expanded use" of court coverage by actively soliciting court coverage work from other lawyers.

RESPONSE:

The Rules of Professional Conduct do not prohibit lawyers from either referring matters to or acting as pro tempore or coverage counsel. Indeed, an attorney's obligation of competence requires that the attorney assure that a client's interests are represented at any scheduled proceeding that the attorney will be unable to attend. Rules 1.1 (b)(5) and 1.1 (c)(4). However, both the referring attorney and the coverage attorney must remember that the relationships among the coverage counsel, the client, and the referring attorney are subject to all of the Rules of Professional Conduct. (Rule 5.2).

Any attorney who serves as coverage counsel, appears as counsel for the client in the particular proceeding. Therefore, the coverage counsel is obligated to fully understand the scope of the representation and the client's instructions concerning the means to be used to pursue the client's goals. Rule 1.2. Coverage counsel may not take a coverage matter if such counsel is not competent to handle it. Rule 1.1. Coverage counsel must provide diligent and prompt representation of the client (Rule 1.3), and must keep the client informed of all information relevant to the status of the matter and relevant to the protection of the client's interests. (Rules 1.4 and 2.1).

Coverage counsel must preserve the confidences of the client. Rule 1.6. Coverage counsel may not represent a client whose interests are adverse to those of another client of coverage counsel's firm. Rules 1.7 and 1.10. Absent appropriate consents or approvals, coverage counsel likewise may not represent a client with whom a prohibited business or personal relationship exists with any member of coverage counsel's firm (Rules 1.8 and 1.10), nor may coverage counsel represent a client against a former client of the firm. (Rules 1.9 and 1.10).

The referring attorney likewise owes the client a duty of diligence and competence in selecting coverage counsel, advising coverage counsel concerning the facts of the representation, and supervising coverage counsel's work. Rules 1.1, 1.3, 1.5, and 5.1. The referring attorney must fully inform the client concerning the purpose for employing coverage counsel. Rule 1.4. The referring attorney must obtain the client's consent prior to retaining coverage counsel and disclosing confidential information to the coverage counsel. Rule 1.6. Both the referring attorney and the coverage counsel must assure that the combined fee paid by the client to the referring attorney and to coverage counsel is not excessive, and that the client has consented to any additional fees that will result from coverage counsel's work. Rule 1.5. Likewise, both counsel must safeguard any property of the client that they hold. (Rule 1.15).

While the practice of pro tempore or court coverage is not prohibited by the Rules of Professional Conduct, the Committee questions the wisdom and the feasibility of a lawyer offering court coverage services to multiple lawyers on a regular basis. Coverage counsel must confer with the referring attorney about the case and study the client file prior to the hearing. The combined time spent by the two attorneys to transfer the file will make regular coverage economically unattractive to most clients.

Coverage counsel's conflicts clearance procedures must identify all relevant individuals and entities associated with all files in coverage counsel's regular practice, as well as all matters handled or to be handled by coverage counsel on behalf of a referring attorney. Even if coverage is limited to a particular issue or particular proceeding, the rules of conflicts of interests apply to all parties to the case. As coverage counsel handles more and more "coverage" files, the risk of the inadvertent breach of the rules of conflicts of interests increases exponentially.

The inquiry suggests that coverage counsel's services may be offered as an administrative or economic convenience to the referring lawyer rather than solely for the purpose of addressing problem situations such as emergencies or unresolvable scheduling conflicts. In such a case, the total fee charged to the client should not exceed the fee that would have been charged by the referring attorney if the services of the coverage counsel had not been used. Before proceeding with any matter, coverage counsel has a duty to verify that the client has consented both to the retention of coverage counsel and to the terms of the fee agreement with coverage counsel.

Lawyers who have a regular coverage counsel relationship should note that the definition of “firm” that appears in the ABA Comments¹ to Rule 1.10 is very broad. Coverage counsel and an attorney who regularly refers work to coverage counsel may find that they are deemed to be a “firm” for the purposes of the Rules. For instance, where coverage counsel has access to the referring attorney's other client files, coverage counsel may be deemed to be “associated” with the referring attorney and, therefore, prohibited from representing any client in a matter against a client of the referring attorney. Rule 1.10. See ABA Formal Opinion 88-356. Likewise, before coverage counsel may appear in a case against the referring attorney, both attorneys must assure themselves that they have complied with Rules 1.7 and 1.10.

The Committee feels that the inherent risks of the violation of the Rules of Professional Conduct that necessarily follow an attorney's decision to provide regular court coverage services may be too great to justify a regular practice of offering such services.

¹ The ABA Comments were expressly not adopted by the New Hampshire Supreme Court as part of the New Hampshire Rules of Professional Conduct in its order of January 16, 1986.