

NEW HAMPSHIRE BAR ASSOCIATION

Ethical Obligations of Stand-By Counsel

Ethics Committee Advisory Opinion #2015-16/09

ABSTRACT:

What are the ethical responsibilities of an attorney appointed as stand-by counsel in a criminal matter?

ANNOTATIONS:

“Standby counsel” is not an advocate or “counsel” in any normal sense. If stand-by counsel acts as an advocate or in any way undermines the *pro se* defendant’s control of that defendant’s own case, the defendant’s right to self-representation may be violated.

Except when the defendant consents, standby counsel is not in control of the case. Standby counsel must instead serve as a passive source of information, answering questions of law from the defendant when he or she chooses to ask such questions.

Serving as stand-by counsel is not unethical. However, stand-by counsel would be wise to seek instruction and guidance from the trial court on a case-by-case basis, define the responsibilities stand-by counsel must undertake, and outline for the defendant the consequences of self-representation.

OPINION:

BACKGROUND:

Traditionally, stand-by counsel is appointed in criminal cases when a defendant wishes to represent himself/herself, but the trial court believes that given the seriousness of the crime, the nature of the case, or other factors, the defendant should have the services of stand-by counsel available to him/her. However, in appointing counsel, the court must be sensitive to the defendant’s constitutional right to represent himself or herself and must not materially interfere with or unduly burden the exercise of that right. As a result, the ethical obligations of stand-by counsel are not well-defined. It comes as no surprise that stand-by counsel faces uncertainty about his/her obligations to the defendant, and to the justice system itself – which ultimately seeks to ensure fair trials.

If a defendant chooses self-representation, that defendant’s right to counsel is extinguished. *State v. Panzera*, 139 N.H. 235, 238 (1994); *State v. Barham*, 126 N.H. 631, 636 (1985). As a direct result, the corollary right of effective assistance of counsel is also extinguished. “A defendant who has made a knowing and voluntary decision to represent himself has no one but himself to blame for his mistakes. He cannot later claim ineffective assistance of

counsel when he has served as his own lawyer.” Faretta v. California, 95 S.Ct. 2525, 2541, n. 46 (1975).

Notwithstanding the jurisprudence saddling the defendant with full responsibility for the decision to represent himself/herself, courts have almost invariably appointed “stand-by counsel” to assist *pro se* defendants in serious criminal cases. However, “standby counsel” is not an advocate or “counsel” in any normal sense. In fact, if stand-by counsel acts as an advocate or in any way undermines the *pro se* defendant’s control of that defendant’s own case, the defendant’s right to self-representation may be violated. McKaskle v. Wiggins, 104 S.Ct. 944, 950 (1984); State v. Ayer, 150 N.H. 14, 28 (2003).

The United States Supreme Court has identified constitutional limitations on the role of standby counsel: First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. Second, participation of standby counsel without the defendant’s consent should not be allowed to destroy the jury’s perception that the defendant is representing himself. McKaskle, 104 S.Ct. at 951. In essence, except when the defendant consents, standby counsel is not in control of the case. Standby counsel must instead serve as a passive source of information, answering questions of law from the defendant when he/she chooses to ask such questions.

And yet, there are unquestionably benefits to the appointment of stand-by counsel, especially in difficult, complex criminal cases. Defendants who represent themselves almost never have any understanding of court procedure or the law. Experience shows that they do a better job of representing themselves if they have stand-by counsel available to provide information and offer guidance, on request, regarding court procedures and strategies for defending a case. Thus, stand-by counsel helps protect an important constitutional right. Additionally, courts and prosecutors are in a very difficult position when a defendant exercises the right to self-representation. The defendant is often suspicious of the court, defense counsel and prosecutors. Conducting discovery, serving pleadings, scheduling hearings, etc., are all much more difficult because the defendant is unfamiliar with these procedures and even intimidated by the prosecutor and court officials. The situation is even worse when the defendant is incarcerated pretrial. Just as stand-by counsel is able to help the defendant exercise the right to self-representation, stand-by counsel is also able to facilitate communication between the defendant and the court or prosecutor. This makes these cases less burdensome on the criminal justice system and helps move the cases towards resolution. Additionally, there is a benefit to the courts in that disruptions and delays may be reduced when stand-by counsel assists a *pro se* defendant. McKaskle, 104 S.Ct. at 954.

For these reasons, and not surprisingly, courts in New Hampshire and elsewhere appoint stand-by counsel when needed. The practice is long-standing and has been addressed by both the New Hampshire Supreme Court and the United States Supreme Court. Both courts have approved of stand-by counsel provided counsel’s conduct does not unconstitutionally interfere with the defendant’s right of self-representation.

But based on the foregoing background, a lawyer is hard-pressed to serve as stand-by counsel and still comply with his or her customary ethical duties as an advocate under New Hampshire Rule of Professional Conduct (NHRPC) 1.1. Diligent and competent counsel does not “stand-by”

passively and simply respond to the client when the client takes the initiative. Diligent and competent counsel does not leave it to the client to investigate the case, identify the applicable law, identify issues, and develop a strategy for achieving the goals sought by the client. NHRPC 1.1(c). Likewise, in the traditional attorney-client model, although a defendant normally determines the goals of representation, it is the lawyer who has both the authority and the responsibility to determine the means of attempting to achieve those goals. NHRPC 1.2(a). Yet, if standby counsel were to represent a defendant in such a manner, the *pro se* defendant's constitutional right to self-representation would be violated. The case law is clear that actions by the lawyer which interfere with the client's right to self-representation, or even the jury's perception of that right, are not permitted. *See, e.g., McKaskle*, 104 S.Ct. at 950-951. In short, the notion of "standing by," as required by the defendant's right of self-representation, and the notion of "counsel," as envisioned by the professional conduct rules, are inconsistent.

ANALYSIS

A threshold question is whether service as a stand-by counsel creates an attorney-client relationship between that counsel and the *pro se* defendant. If, for example, the relationship of stand-by counsel and the *pro se* defendant is not an attorney-client relationship, then the analysis of the lawyer's ethical duties to that defendant ends there. The Committee believes that although the ethical responsibilities of stand-by counsel substantially depart from those in a typical attorney-client relationship, as noted below, such a relationship arises despite these limitations. Recognition of this determination is important because certain fundamental duties and rights such as the preservation of client confidentiality (NHRPC 1.6) and attorney-client privilege, and the duty to avoid conflicts of interest (NHRPC 1.7) remain as part of an attorney's responsibilities to an otherwise self-represented defendant.

From there, the ethical analysis grows murkier.¹ One ABA Standard for Criminal Justice attempts to provide some guidance on the role of stand-by counsel appointed to assist a *pro se* defendant. The applicable standard notes that the role of counsel may vary from case to case depending on the role specified by the appointing court. As a result, the standard envisions two types of stand-by counsel: A stand-by counsel appointed to actively assist a defendant and stand-by counsel appointed to assist only upon request from a defendant.

- (a) Defense counsel whose duty is to actively assist a *pro se* accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.
- (b) Defense counsel whose duty is to assist a *pro se* accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed by the court.

ABA Standards for Criminal Justice, Defense Function, Standard 4-3.9.

The underlying theme within the Standard does provides some useful instruction if one is appointed as stand-by counsel. That is, the Standard envisions that the trial court should be asked

to provide guidance on the ethical responsibilities and limitations on the role of stand-by counsel in a specific case. The concept of an attorney providing limited services is not new. The existing Rules of Professional Conduct contemplate that an attorney may provide a client with “unbundled” services – that is, limited and specific services – provided those services are clearly defined. NHRPC 1.2(f) and (g).

In this vein, stand-by counsel may be wise to file a motion for instruction upon appointment as stand-by counsel. That motion may seek instruction from the trial court about whether, based on the circumstances of the case, counsel must:

1. Assist in any investigation of the case.
2. Identify or prioritize those issues on which the defendant should focus attention.
3. Develop a full understanding of the prosecution’s records, documents, reports and other investigations pertaining to the case.
4. Attend all pre-trial hearings and conferences in the case.
5. Assist in specific areas or aspects of the case (e.g. – discovery), given the facts of the case.
6. Undertake research and render advice about specific areas of the law applicable to the case.
7. Interview, research or develop knowledge about witnesses, and/or assist the defendant in locating witnesses helpful to the defense, including expert witnesses.
8. Communicate with the *pro se* defendant to offer assistance versus responding to requests for assistance, only.
9. Bring to the attention of the defendant matters beneficial to the defendant.
10. Consistent with NHRPC 3.3(a)(3), reveal that evidence offered by the defendant is false, if stand-by counsel knows such evidence is false, or to affirmatively counsel the defendant if the defendant intends to commit a fraudulent or criminal act. *See* NHRPC 1.2(d).
11. Seek more defined guidance at specific points in a case, such as competency hearings, pre-trial discovery, trial, and sentencing.

Given the constitutional principles described above, the instructions issued by the trial court will likely need to be developed through consultation between the court and the defendant, and not simply imposed. It may also be wise for stand-by counsel to seek orders (consistent with the above), including clear statements that:

1. The defendant alone is responsible for the preparation and presentation of that defendant’s defense.

2. Communications between the *pro se* defendant and stand-by counsel are privileged, and that information obtained in the limited representation of the defendant is confidential.
3. The professional conduct rules applicable to conflicts of interest govern the relationship between stand-by counsel and the defendant.
4. The rules governing frivolous claims, requests and defenses (NHRPC 3.1 and 3.4(d)) shall not apply absent advice from stand-by counsel to the defendant to undertake such conduct.
5. Stand-by counsel is not an advocate, and will play no advocacy role in hearings, pleadings, or at trial.
6. Stand-by counsel shall not assume the role of advocate should the defendant have a change of mind immediately before or during the trial. *See State v. Ayer*, 150 N.H. 14 at 28-29 (trial at which defendant proceeds *pro se* for some portions and through counsel for others constitutes “structural defect” requiring reversal).
7. The defendant does not have the option of withdrawing the request to represent himself/herself and requesting that standby counsel serve as counsel in the traditional sense, unless the court, in its discretion, grants a continuance of the trial.
8. During trial, stand-by counsel is appointed to answer the defendant’s questions of law and courtroom procedure, but may not interject himself/herself into the case without the consent of the defendant.

In conclusion, despite the limitations which face stand-by counsel, serving as stand-by counsel is not per se unethical. However, stand-by counsel would be wise to seek instruction and guidance from the trial court on a case-by-case basis, to define those responsibilities which stand-by counsel must undertake, and to outline for the defendant the consequences of self-representation.

ENDNOTES:

[1] *See, e.g., Responsibilities of Stand-By Counsel Upon the Assumption of the Defense in a Capital Case*, North Carolina State Bar Op. RPC 198 (1995); *Obligations of Stand-By Counsel*, New York State Bar Association Ethics Op. 949 (2012); *see also* Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. Law Rev. 676 (June 2000).

NH RULES OF PROFESSIONAL CONDUCT:

NHRPC 1.1

NHRPC 1.1(c)

NHRPC 1.2(a)

NHRPC 1.2(d)

NHRPC 1.2(f)

NHRPC 1.2(g)

NHRPC 1.6
NHRPC 1.7
NHRPC 3.1
NHRPC 3.3(a)(3)
NHRPC 3.4(d)

SUBJECTS:

Competence
Scope of Representation
Limited Representation
Meritorious Claims and Contentions
Candor to the Tribunal

- **By the NHBA Ethics Committee**

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