



New York State Bar Association
Committee on Professional Ethics

Opinion 949 (12/17/12)

Topic: Obligations of standby counsel

Digest: The ethical responsibilities of “standby counsel” vary depending on the degree to which standby counsel assumes representational obligations. If standby counsel remains on the sidelines, the *pro se* party should be treated like a prospective client. If the *pro se* party invites standby counsel’s participation on a limited basis, standby counsel may limit the scope of representation. If the *pro se* party makes demands on standby counsel that are irrelevant to the case and beyond the scope of matters for which counsel has assumed responsibility, standby counsel should reiterate the scope of representation and explain which requests and demands are beyond that scope.

Rules: 1.2, 1.3, 1.4(a), 1.14, 1.18, 3.1, 3.2, 3.3

FACTS

1. The inquirer is a private practitioner appointed by a New York State Supreme Court Justice to represent in a pending retention hearing a patient currently subject to involuntary civil commitment in a state mental hygiene facility.¹ The patient was confined following his acquittal of a crime by reason of mental disease or defect. *See* Penal Law §40.15. The inquirer describes him as an intelligent, litigious individual who has brought many actions against the state and has filed numerous complaints against actors in the court system, including the inquirer. The patient has a history of frequently compiling lengthy legal documents and demands.

2. The patient requested that the inquirer be relieved as counsel, but the court denied that request. Then the court granted the patient’s request to proceed *pro se*, but appointed the inquirer as “standby counsel.” Since the court has not defined his role as standby counsel, the inquirer seeks general guidance from us as to the scope and limits of his ethical obligations. He has also voiced specific concern about assisting the *pro se* party in bringing demands or claims that have no merit. The inquirer wishes to act diligently and professionally, but he does not want his practice to be overwhelmed by the demands of this case.

¹ A retention hearing is a hearing to determine whether a person who has been involuntarily committed to a state mental hygiene facility should be retained in the facility. *See* Mental Hyg. Law §9.33.

QUESTION

3. What are the ethical obligations of standby counsel?

OPINION

A. The Role of Standby Counsel

4. The Supreme Court, while recognizing a criminal defendant's right to self-representation, has cautioned that this right does not excuse compliance with "relevant rules of procedural and substantive law." *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). The Court indicated that "a State may – even over objection by the accused – appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Id.*; accord *People v. Sawyer*, 57 N.Y.2d 12, 22 (1982).

5. The role of standby counsel as expressed in case law may seem to vary somewhat from jurisdiction to jurisdiction.² However, that apparent variation may in part reflect that standby counsel can have different roles in different circumstances. As the discussion in *Faretta* makes evident, those roles can range from inactivated bystander (if the *pro se* party does not request help) to full-fledged counsel (if self-representation is terminated). Indeed, the relevant ABA Criminal Justice Standard sets out two different standby models, one active and one conditioned on a *pro se* party's invitation:

"When standby counsel is appointed to provide assistance to the pro se accused only when requested, the trial judge should ensure that counsel not actively participate in the conduct of the defense unless requested by the accused or directed to do so by the court. When standby counsel is appointed to actively assist the pro se accused, the trial judge should ensure that the accused is permitted to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case."

ABA Standards for Criminal Justice: Special Functions of the Trial Judge, Standard 6-3.7[c] (1999).

6. A criminal defendant has a right to representation and a right to proceed *pro se*, but has no right to "hybrid representation" in which the defendant proceeds *pro se* and is simultaneously represented by an attorney. See *People v. Mirenda*, 57 N.Y.2d 261 (1982). If, however, a trial court chooses to appoint standby counsel, the court is typically afforded broad discretion to set forth the parameters of the standby counsel's obligations. See *People v. Ivery*, 80 A.D.3d 874 (2d Dept. 2011) (trial court permissibly defined role of standby counsel as giving

² See, e.g., *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997) ("a standby counsel's duties are considerably more limited than the obligations of retained or appointed counsel"); *United States v. McDermott*, 64 F.3d 1448, 1453 (10th Cir. 1995) (standby counsel may "consult, make some objections, help with the admission and admissibility of exhibits, and make some motions"); *United States v. Mullen*, 32 F.3d 891, 894 (4th Cir. 1994) (court appointed standby counsel to sit in first row to be available for consultation, and not to offer advice unless asked).

“legal advice as to how to frame motions and frame questions” and giving procedural advice); *People v. Golden*, 270 A.D.2d 136 (1st Dept. 2000) (trial court permitted to impose limitations on role of standby counsel). However the trial court exercises that discretion, it should notify lawyers and the *pro se* party of their roles and responsibilities. See ABA Criminal Justice Standard 6-3.7(b) (trial judge “should clearly notify both the defendant and standby counsel of their respective roles and duties”).

7. Within the parameters set by the trial court, it is often up to the *pro se* party to determine the degree to which to “activate” standby counsel. See, e.g., *People v. Hilts*, 46 A.D.3d 947 (3d Dept. 2007) (standby counsel to assist *pro se* party only when requested). Counsel, however, has some say in the matter – courts have recognized that standby counsel may refuse to run errands or perform legal research as an assistant to the *pro se* party. See, e.g., *State v. Silva*, 27 P.3d 663 (Wash. Ct. App. 2001) (citing authorities in which “the role contemplated is one in which counsel acts as an advisor to the accused when requested, but does not in any respect act as an errand runner”); *State v. Fernandez*, 758 A.2d 842 (Conn. 2000) (“standby counsel serves as a legal resource to *pro se* defendants,” but “does not ... have any obligation to perform legal research for the defendant”).

8. As the above discussion illustrates, questions about the role of standby counsel in a given jurisdiction and in a given case are, to a great extent, questions of law rather than ethics. The answers to such questions must take into account broad judicial discretion, the *pro se* party’s reasonable preferences, and standby counsel’s willingness to perform services. This Committee does not answer legal questions, but it is within our purview to opine on the ethical duties attached to the different incarnations of standby counsel.³ With the above legal background in place, we turn to an analysis of those ethical duties.

B. Standby Counsel and the Rules of Professional Conduct

9. While the Rules of Professional Conduct do not expressly address the ethical obligations of standby counsel, the Rules as a whole are best read to support the conclusion that the ethical duties of standby counsel vary significantly depending on the role that standby counsel assumes, or is assigned or asked to perform, in a given case.

The “inactive” end of the standby spectrum

10. When the *pro se* party does not involve counsel in the case and the court does not independently assign other duties to counsel, then the lawyer-client relationship remains inchoate and does not trigger the full panoply of ethical duties. The ABA, in addressing the obligations of a lawyer appointed to represent someone who declines representation, has commented that some ethical rules “defining the lawyer’s obligations to a client ... make sense only after a client has accepted the client-lawyer relationship.” ABA 07-448. Specifically addressing the situation in which a *pro se* party does not accept representation by standby counsel, the ABA concluded that “[t]here is no client-lawyer relationship unless and until the defendant accepts representation.” *Id.* This Committee agrees.

³ Moreover, to give standby counsel clear guidance, a court may wish to make explicit its view of counsel’s ethical obligations to the tribunal.

11. In our view, a *pro se* party who has not yet activated standby counsel is the functional equivalent of a “prospective client” to whom counsel owes some, but limited, ethical duties. Under Rule 1.18(b), even when no client-lawyer relationship ensues, “a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.” Thus, even in the minimal version of standby representation, a *pro se* party’s confidential information is subject to protection.

12. Additionally, even though a full lawyer-client relationship has not begun in this situation, it would be untenable for a standby lawyer, who can be called upon at any moment to play a more active role, to represent simultaneously a party whose interests differ from those of the *pro se* party. Accordingly, the concurrent conflict-of-interest standards of Rule 1.7 apply even to “inactive” standby counsel.

13. At the inactive extreme of standby representation, Rule 3.3 (“Conduct Before a Tribunal”) is typically not triggered because (i) standby counsel is not the one taking action in the proceedings and (ii) a client-lawyer relationship has not been formed. *See* Rule 3.3, Cmt. [1] (“This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal.”). Of course, as discussed in ¶17 below, once standby counsel takes actions in the proceedings, those actions will be governed by Rule 3.3.

14. Rules 1.2(d) and 1.4(a)(5), which are not limited to conduct before a tribunal, apply even at the passive end of the standby spectrum. Rule 1.2(d) states that a lawyer “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent,” but it permits a lawyer to “discuss the legal consequences of any proposed course of conduct with a client.” Rule 1.4(a)(5) indicates that a lawyer shall “consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.”

The middle of the standby spectrum

15. In the middle of the representational spectrum are situations in which standby counsel assumes specific responsibilities on behalf of the *pro se* party. The *pro se* party’s activation of counsel consummates a client lawyer relationship. *See* ABA 07-488 (when *pro se* party “turns to appointed counsel and seeks advice or representation, the defendant may be found to have consented to and thereby to have created a client-lawyer relationship under the Rules”).

16. In these situations, Rule 1.2(c) best defines the scope of standby counsel’s representation. That rule provides that a lawyer “may limit the scope of representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.” This rule requires that standby counsel communicate to the *pro se* party his understanding of the specific duties he is assuming so that the *pro se* party understands the scope of the standby representation. Because standby counsel’s duties may evolve during the course of the litigation, it is important that standby counsel explain any changes in the scope of his involvement to the client (and to the

court, if required) as the litigation progresses.

17. As standby counsel assumes representational responsibilities, the obligations of Rule 3.3 will be triggered as to those aspects of the litigation in which standby counsel is involved.⁴ Similarly, while a *pro se* party is generally entitled to direct his own litigation, standby counsel may not advance or assist in advancing non-meritorious claims, or claims that are designed merely to harass another or to delay the proceedings. See Rule 3.1 (“Non-Meritorious Claims and Contentions”); Rule 3.2 (“Delay of Litigation”). If, however, standby counsel’s assistance or participation is limited to a specific issue, counsel does not assume responsibility for those aspects of the litigation in which he or she remains completely uninvolved.

The “full representation” end of the standby spectrum

18. Of course, when standby counsel steps in to assume full representation or to take on so many representational responsibilities as to be standby counsel in name only, the full panoply of ethical obligations contained in the Rules apply to counsel’s conduct.

19. The inquirer has affirmed his desire to act diligently and professionally but has expressed his concern that the demands of the *pro se* party may overwhelm his practice. Rule 1.3(a) provides that a lawyer “shall act with reasonable diligence and promptness in representing a client,” and Comment [1] to that rule explains that a lawyer must “act with commitment and dedication to the interests of the client and in advocacy upon the client’s behalf.” But, as discussed above, the lawyer-client relationship between standby counsel is typically either limited in scope or provisional. Counsel’s obligations under the Rules track the scope of his representational involvement. See Rule 1.2, Cmt. [7] (“Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”). Thus, if the *pro se* party has invoked standby counsel’s participation only on specific issues, standby counsel is not responsible for involving himself in any of the *pro se* party’s legal affairs that are unrelated to the case or outside the defined scope of standby counsel’s involvement. And, as noted, Rule 3.2 prohibits standby counsel from assisting the *pro se* party in advancing frivolous or vexatious claims. Moreover, a lawyer’s obligation to comply with client requests for information applies only to “reasonable” requests. Rule 1.4(a)(4). Thus, if a *pro se* party asks standby counsel to review prolix documents, or makes demands that are irrelevant to the matters for which counsel has assumed responsibility, standby counsel need simply reiterate the scope of his representation and explain which requests and demands are beyond that scope.

20. Given the history and circumstances of the particular *pro se* party to which the inquirer has been assigned as standby counsel, the inquirer should be continually alert to the relevance of Rule 1.14 (“Client with Diminished Capacity”). Rule 1.14(a) provides that a lawyer

⁴ Although the current inquiry relates to a civil retention proceeding, the appointment of standby counsel most commonly occurs in the context of a criminal proceeding. In that situation, “[t]he lawyer’s ethical duties under paragraphs (a) and (b) [of Rule 3.3] may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases.” Rule 3.3, Cmt. [7].

shall, “as far as reasonably possible, maintain a conventional relationship with” a client with diminished capacity, but Rule 1.14(b) authorizes counsel to take “reasonably necessary protective action” when the lawyer reasonably believes that the client (1) has diminished capacity, (2) is at risk of substantial harm unless action is taken, and (3) cannot adequately act in his or her interest. “In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client’s best interest, and the goals of minimizing intrusion into the client’s decision-making autonomy and maximizing respect for the client’s family and social connections.” Rule 1.14, Cmt. [5].

CONCLUSION

21. The ethical responsibilities of standby counsel vary depending on the degree to which standby counsel assumes representational obligations: when standby counsel remains on the sidelines, the *pro se* party should be treated in the same manner as a prospective client under Rule 1.18; when the *pro se* party invites standby counsel’s participation on a limited basis, standby counsel can limit the scope of representation pursuant to Rule 1.2(c); and if a *pro se* party makes lengthy demands on standby counsel that are irrelevant to the case or relate to matters for which counsel has not assumed responsibility, standby counsel should reiterate the scope of his representation and explain which requests and demands are beyond that scope.

(30-12)