

## **L.E.O. 2015-01**

### **USE OF STAND-IN COUNSEL**

#### **INTRODUCTION**

The Lawyer Disciplinary Board was alerted to the issue of stand-in counsel appearing at hearings for other attorneys. Stand-in counsel is not a member of the attorney's firm or practice and does not have any knowledge about the case. Stand-in counsel may appear at motion hearings, status conferences, depositions, and other matters. The fee paid to stand-in counsel is usually a small fee. There are companies that advertise to West Virginia attorneys to hire them to appear at local hearings for attorneys who cannot appear at that hearing. In investigating the issue, the Lawyer Disciplinary Board became aware of West Virginia attorneys who use these companies to hire West Virginia attorneys as stand-in counsel to appear for them at hearings. This Legal Ethics Opinion is to advise West Virginia attorneys of their obligations in using such companies and/or accepting representation from such companies.

#### **DISCUSSION**

- 1. Rules of the West Virginia Rules of Professional Conduct that are applicable to the use of stand-in counsel.**

The West Virginia Rules of Professional Conduct that are involved include: Rule 1.1 concerning competence; Rule 1.2 concerning scope of representation; Rule 1.4 concerning communication; Rule 1.5 concerning fees; Rule 1.6 concerning client confidentiality; Rule

1.7 and 1.9 concerning conflicts of interest; Rule 3.4 concerning fairness to the other side; and Rules 7.1 and 7.2 concerning legal advertising.

## **2. Issues with Stand-in Counsel.**

Because the amended Rules of Professional Conduct effective as of January 1, 2015 require informed client consent,<sup>1</sup> the best way for an attorney to deal with this situation is with a written engagement letter or written fee agreement at the beginning or soon after the beginning of the attorney-client relationship. Rule 1.5(b) requires “[t]he scope of representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation.” If the attorney knows from the outset that he or she will be using stand-in counsel, giving the client that information from the beginning is the best way to allow the client to make an informed decision about representation. Further, this may avoid issues that may come up in the future and that do not allow for extended time to make a decision.<sup>2</sup>

Any attorney having stand-in counsel to appear on their behalf for any court appearance has a duty under the Rules of Professional Conduct to ensure that stand-in counsel is competent, which includes legal knowledge and preparation for the representation.

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<sup>1</sup> West Virginia Rules of Professional Conduct Rule 1.0 states that “‘informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

<sup>2</sup> An attorney should contact the court in which the matter is before to determine if the court would allow an attorney to appear by telephone in order to avoid the need for stand-in counsel.

The comments<sup>3</sup> to Rule 1.1 suggest that a lawyer should obtain informed consent from the client to retain or contract an outside lawyer to assist in providing legal services. Also, the comments suggest that a lawyer has to reasonably believe that the other lawyer's services will contribute to the competent and ethical representation of a client. This applies to both attorneys regarding their obligations to their clients.

A lawyer not appearing at the hearing has a duty to ensure that he or she properly supervises any stand-in counsel handling the matter. Hiring stand-in counsel, or accepting a job as stand-in counsel for a hearing at the last moment, could lead to the stand-in counsel not having enough time to become familiar with the case to be competent at the hearing. Further, the court may ask the stand-in counsel to address additional issues or matters that the stand-in counsel may not be prepared to handle. If there is not enough time for stand-in counsel to prepare for the case, then the stand-in counsel should not appear in the case, nor should an attorney hire stand-in counsel to appear in the case. There are circumstances which may occur where there is no other choice but to have stand-in counsel appear at the hearing. In those circumstances, the attorney should seek to continue the matter or to limit the matter to issues for which the stand-in counsel can provide competent representation pursuant to Rule 1.2. Limited representation is allowed under Rule 1.2(c) if it is reasonable under the circumstances and there is informed consent from the client. Because the time frame may be

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<sup>3</sup> The Scope of the West Virginia Rules of Professional Conduct specifically state that “[c]omments provide guidance for practicing in compliance with the Rules.” Further, “[t]he Comments are sometimes used to alert lawyers to their responsibilities under such other law.”

too short to hire stand-in counsel, it would be best to address this situation at the start of the attorney-client relationship in order to obtain informed consent.

Attorneys also have duties to properly communicate with their clients so that clients have all of the information necessary for them to make informed decisions under Rule 1.4. This duty includes informing clients about hiring stand-in counsel on their behalf. This should occur before the stand-in counsel appears at the hearing. Rule 1.4(a)(1) states that an attorney shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required and Rule 1.4(a)(2) states that an attorney shall reasonably consult with a client about the means by which the client's objectives are to be accomplished. If an attorney knows that he or she will be using stand-in counsel to make appearances at hearing, it is best to address the issue early with the client to obtain informed consent through the written fee agreement. If the written fee agreement does not address this issue, the matter should be communicated to the client to obtain informed consent prior to hiring stand-in counsel.

Any possible fee or expenses paid to the stand-in counsel should be communicated to the client so the client is aware of the reasonableness of the fee under Rule 1.5. Under Rule 1.5(b), any fee or expense that the client will be responsible for must be in writing before or soon after the start of the representation. Any expense for hiring stand-in counsel that will be attributed to a client shall be in writing. Further, the comments to Rule 1.5 allow for a division of fees when the case is referred to another attorney or law firm if the client consents with the referral.

Attorneys also need to be aware of their duty to protect confidential client information. Before revealing information related to the client, attorneys should review Rule 1.6 concerning client confidentiality. While not required in every situation under Rule 1.6, obtaining informed consent from the client is recommended. To ensure competency, an attorney may have to reveal confidential client information to stand-in counsel appearing at a hearing. It is required that there should be informed consent by the client to reveal this information, and further protection should be addressed to ensure that the stand-in counsel keeps such client information confidential as well.

It is acknowledged that stand-in counsel would have an attorney client relationship with the client. The Supreme Court of Appeals of West Virginia has stated that an attorney client relationship begins “[a]s soon as the client has expressed a desire to employ an attorney, and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of the attorney and client has been established; and all dealings thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation.” Syl. Pt. 1., Keenan v. Scott, 64 W.Va. 137, 61 S.E. 806 (1908). Stand-in counsel needs to be aware that they undertake all ethical duties owed to clients. Any assertion made by a company hiring stand-in counsel to appear at hearings that there is no attorney client relationship is not true. Further, attorneys need to be aware that any company that seeks to advertise for stand-in counsel would need to make sure that their advertising is in compliance with the ethical advertising rules under Rules 7.1 and 7.2. Rule 7.2(b)(4) specifically states that “[a] lawyer shall not give anything of value to a person for

recommending the lawyer's services except that a lawyer may refer clients to another lawyer . . . pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients . . . to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement.”

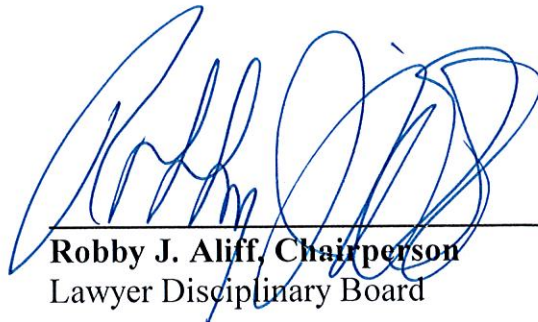
Additionally, West Virginia Trial Court Rules 4.03 and 4.04 provide that once counsel makes an appearance in a case, that counsel cannot withdraw without approval of the court. An attorney who appears as stand-in counsel should be aware that they may not be allowed to withdraw from the matter after their appearance, and they would be responsible for continued presence in the case. This also applies to substitute counsel as well. There is no exception to this rule. If a company that hires stand-in counsel indicates that notice of appearances or substitution of counsel should not be filed, this could be considered a violation of Rule 3.4(c) by knowingly disobeying an obligation under the rules of a tribunal. Also, Trial Court Rule 4.04(a) specifically states that a stipulation for substitution of counsel shall bear written approval of the client. All Trial Court Rules must be followed to be in compliance with Rule 3.4.

Attorneys accepting employment as stand-in counsel must also abide by the Rules of Professional Conduct dealing with conflicts of interest. Attorneys shall perform a thorough conflicts check to ensure that the attorney is not dealing with an adverse party or materially limited by the attorney's responsibilities to others or to a former client. Rules 1.7 and 1.9 permit representation where conflicts exist by requiring written, informed consent by affected parties.

## CONCLUSION

While the Board finds that appearing as stand-in counsel or using a company to find stand-in counsel is permissible under the Rules of Professional Conduct, the attorney must ensure that he or she is following applicable Rules. Attorneys must ensure that they and the stand-in counsel do the following: (1) provide competent representation; (2) define the scope of the representation; (3) provide proper communication, including communicating to the client of the hiring of stand-in counsel; (4) charge a reasonable fee; (5) have a written fee agreement; (6) maintain client confidentiality; (7) ensure that there are no conflicts; (8) ensure fairness to the other side; and (9) ensure proper legal advertising. The failure of stand-in counsel and attorneys hiring stand-in counsel, whether directly or indirectly, to follow all of these Rules may result in disciplinary proceedings against both attorneys. While there may be some benefits to being stand-in counsel, those accepting the role of stand-in counsel need to understand the serious consequences of taking that position.

**APPROVED** by the Lawyer Disciplinary Board on the 18<sup>th</sup> day of September, 2015, and **ENTERED** this 22<sup>nd</sup> day of September, 2015.



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**Robby J. Aliff, Chairperson**  
Lawyer Disciplinary Board