

Professional and Ethical Considerations
Relating to
Volunteer Election Day Lawyering

By

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Next Tuesday, election day, hundreds of New Hampshire lawyers working with the Bush/Cheney and Kerry/Edwards campaigns will set aside busy practices and volunteer their time, judgment and professional skills at polling places across the state. This volunteer, election day effort will not be limited to New Hampshire. This state is one of approximately ten, hotly-contested "battleground" states in the 2004 presidential election, and with most polls now too close to call - - and the 2000 Florida recount battle still fresh in the minds of both campaigns - - lawyers here and across the country are being asked to join poll monitoring efforts organized by the two major campaigns in the remaining key states.

Lawyers joining in this effort will act in a variety of roles and situations. In Florida, where voting has been in progress for some time, preliminary and anecdotal reports indicate that attorneys have come to this state from "non-battleground" jurisdictions as disparate as New York, Georgia, Texas, Massachusetts, Oklahoma, Mississippi and North Carolina. Conceivably, New Hampshire will host the same variety of legal visitors. Tasks undertaken by attorneys in Florida have included providing information to voters, acting as go-betweens between voters and election officials, monitoring the conduct of the "other side" and reporting concerns to election officials or to the affiliated party, assisting voters with paperwork and affidavits, interacting with election officials, and resolving questions of local law with, and without, the help of voting officials.

In many cases, these lawyers simply observe and report. However, unlike the typical foreign observer tasked with ensuring the fairness of an election process in which he or she has no stake, most of the lawyers working with the Democratic and Republican campaigns are deeply committed to the values and

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programs of "their" candidate, and equally deeply opposed to the values and programs of the other. The tension between their personal commitments to the success of a candidate and their obligations under the professional rules will often be substantial.

This guidance is being written because feelings on both sides in this election are intense; and because hundreds of politically-energized New Hampshire lawyers and an array of campaign representatives will subject polling place activity to microscopic scrutiny. Under these circumstances, it makes sense for all who will work with the competing candidates to take time prior to next Tuesday to consider laws and professional conduct rules that may regulate a lawyer's activity on election day.²

A. Unauthorized Practice of Law

Among professional responsibility lawyers, one of the issues of greatest concern currently is that attorneys volunteering for a campaign in a state in which he or she is not licensed may be engaged in the unauthorized practice of law ("UPL"). Presumably, New Hampshire's continued status as a closely-contested state will ensure that most New Hampshire lawyers will stay home. However, for those who may be considering volunteer work in larger battlegrounds where they are not licensed, the UPL issue requires closer analysis.

Every jurisdiction prohibits the unauthorized practice of law. See Model Rule 5.5.³ For New Hampshire lawyers who choose to travel, the issue of whether the lawyer is engaged in the unauthorized practice of law will be determined in accordance with that state's laws, and the definition of "practice of law" varies from jurisdiction to jurisdiction. See Model Rule 5.5 cmt (2002). To further muddy the waters, "practice of law" is not always well defined within a given jurisdiction. The New Hampshire Supreme Court, for example, has declined to define the term. Appeal of Campaign for Ratepayers' Rights, 137

² The availability of malpractice coverage adds one further complexity. Depending on policy language, this may depend, in part, on whether poll watching activities are the practice of law, or occur in the context of an attorney-client relationship.

³ The Ethics Committee of the New Hampshire Bar Association is reviewing the New Hampshire Rules and has proposed an expanded Rule 5.5 to more closely coincide with the current Model Rules. The new rule provides safe harbors for lawyers with multijurisdictional practices. For more information, see <http://www.nhbar.org/NHRules.asp>.

N.H. 707, 715 (1993). Rather, whether one is engaged in the practice of law is determined on a case-by-case basis, Bilodeau v. Antal, 123 N.H. 39, 44 (1983), and “depends upon the character of acts performed and not the place where he or she performs them,” Appeal of Campaign for Ratepayers’ Rights, 137 N.H. at 715.

With this in mind, the poll watcher should be mindful of some general principles. First, giving legal advice is generally acknowledged to be the practice of law. See ABA/BNA Lawyers’ Manual on Professional Conduct § 21:8001 (1999). Further, use of professional judgment is considered an important element to the practice of law. See id. at § 21:8005. Courts have found that the following activities constitute the practice of law: agreeing to represent a client; acting as intermediary; representing another in court; holding oneself out as a lawyer; preparing, filing or signing documents in legal proceedings; threatening to file suit on behalf of a client; and negotiating settlement. See id. at § 21:8005-8006.

It is important to note, moreover, that activities can constitute the practice of law when performed by lawyers even though nonlawyers are legally permitted to undertake them. See Columbus Bar Ass’n v. Agee, 196 N.E.2d 98 (Ohio 1964). Furthermore, it is not determinative that the service is performed without receiving compensation, as will be the case with volunteer, election day lawyers. See The Florida Bar v. Keehley, 190 So. 2d 173, 175 (Fla. 1966).

Although the rule also prohibits assisting others in engaging in the unauthorized practice of law (including out-of-state lawyers), many jurisdictions permit the practice of law by a non-licensed attorney if carried out under the guidance of a local lawyer, providing the local lawyer actively participates and assumes responsibility in the matter. See Model Rule 5.5(c)(1). In addition, an attorney can practice, at least in a limited fashion, outside of his or her resident jurisdiction if the legal issues involved are federal in nature. Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966) (applying New York law) (holding that an out-of-state attorney did not engage in the unauthorized practice of law when he came to the state to work with in-state attorneys on a single federal claim).

Finally, it needs to be emphasized that the consequences for a New Hampshire attorney engaged in the unauthorized practice of law in another jurisdiction could go beyond disciplinary sanctions – one could also be susceptible to civil or criminal sanctions. See, e.g., Neb. RSA 7-101; NJ RSA 2C:21-22; 42 Pa.C.S.A. § 2524; RI G.L. § 11-27-14.

Because licensure to practice law is generally within the province of individual states, lawyers called upon to travel to another state in which they are not licensed should consider the ethical and legal constraints on the unauthorized practice of law. In undertaking these assignments, the lawyers should proceed cautiously and research the law of the jurisdiction where they will be working.

B. Professional Obligations to Prospective Voters

1. *No Attorney-Client Relationship Established*

While lawyers volunteering at polling places will typically not enter into an attorney-client relationship with a prospective voter, our professional rules nevertheless establish values and constraints that will regulate the conduct of lawyers during these brief, election day encounters.

Most fundamentally, Rule 8.4(c) reads:

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

This rule applies both when the attorney is acting on behalf of a client and when acting in a personal capacity. Accordingly, whether volunteer lawyers are determined to be acting on behalf of the campaign or party that recruited them, or purely in a personal capacity, false statements made to voters - - regardless of motive - - will implicate the rule.

2. *Lawyer Deemed to be Representing a Client*

Lawyers providing volunteer services at the request of a campaign must consider whether they will be deemed to be representing a client. If so, Rules 4.1, 4.3 and 4.4 will apply. These rules require a greater degree of candor and disclosure than does Rule 8.4.

Rule 4.1(a) states:

Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person . . .

Interactions with voters at polling places will frequently involve issues of law or fact. To use one example only, New Hampshire allows same-day-registration at polling places for voters who meet certain statutory requirements. With a record turn out expected, it is certain that issues regarding prospective voter qualifications, as well as other legal or factual issues, will arise throughout the day. Attorneys who become involved in these discussions must seek to ensure the accuracy of factual and legal input that they provide.

Rule 4.3 sets forth additional professional duties for attorneys dealing with unrepresented, sometimes unsophisticated persons:

Rule 4.3: Dealing with Unrepresented Persons

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

It bears repeating that most lawyers volunteering for polling place duty have been asked to participate by one or the other party not because the lawyer is "disinterested", but because they care, sometimes with great intensity, about the outcome of the election (and necessarily about the individual decisions of voters on election day). Attorneys working at the request of individual campaigns should be open about this relationship. They can not conceal their association with a campaign in order to present a deceptively neutral front.

Finally, Rule 4.4 mandates respect for the rights of third persons:

Rule 4.4: Respect for Rights of Third Persons

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person

This rule would appear applicable to systematic and purposeful efforts to obstruct or hinder the smooth functioning of the voting process on election day.

C. Allegations of Polling Place Misconduct

One of the primary reasons for the recruitment of attorneys by competing campaigns is to provide each candidate with a cadre of election place "observers". Understandably, the focus of this scrutiny will be the conduct of representatives of the other side and its impact on the voting process itself. In the minds of many, the involvement of hordes of lawyers committed to the success of only one of the candidates is an unfortunate result of the 2000 Florida recount that will guarantee endless allegations, controversy, and litigation in 2004. An equally cynical but more optimistic prognosis is that the existence of partisan observers will deter overt misconduct and allow the election process to proceed without serious problems.

On election day, however, both sides will be prepared for litigation. Accordingly, one of the core responsibilities of attorneys charged with monitoring polling place activities will be to ensure, to the extent it is within their control, that their observations and reports are accurate, rather than speculative, and free of the hyperbole and inaccuracies that frequently characterize politically-charged discourse.⁴

Despite widespread and cynical expectations, attorneys volunteering for election day work will be of enormous value if they can work with election officials and their counterparts on the other side to resolve issues at the polling place, minimize controversy, and facilitate the smooth working of the election process.

⁴ For attorneys who may be involved in the pursuit or defense of litigation (typically not the volunteer poll monitors) the full array of professional duties set forth in Rule 3 (attorneys acting as "Advocate") will be triggered - - including the duty to avoid frivolous litigation (Rule 3.1); various duties to the tribunal (Rule 3.3); various duties to the opposing party (Rule 3.4); standards applicable to courtroom decorum (Rule 3.5), ex-parte communications, *i.d.*, and trial publicity (Rule 3.6); and the lawyer/witness rule (Rule 3.7). These exceed the scope of this piece.