

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1991-92/16
Attorney's Duty to Obtain Trial Record
June 11, 1992

RULE REFERENCES:

- *Rule 1.1(b)(5)
- *Rule 1.2(a)
- *Rule 1.2(c)
- *Rule 1.3(b)(2)

SUBJECTS:

- *Attorney-Client Relationship
- *Competence
- *Criminal Representation
- *Trial Conduct

STATUTORY REFERENCES:

- *RSA 599:1-c

ANNOTATION:

In a criminal matter tried in District court, where there is no de novo review in Superior court, the attorney has an ethical obligation to obtain a record of the trial. (Rule 1.1(b)(5); Rule 1.2(a) and (c); and Rule 1.3(b)(2)).

QUESTION:

Is it ethical for an attorney to try a class B misdemeanor in District court without a record, knowing that there is no *de novo* appeal available?

RESPONSE:

In the Practical Ethics article entitled *Appellate Obligations of Criminal Defense Counsel*, responding to Inquiry #1991-1992/3, it was the opinion of the Committee that: "Absent the knowing consent of a client, a lawyer cannot limit the objectives of the representation". Rule 1.2(a), (c). The client has a right to decide whether to appeal an adverse trial ruling, but a lawyer has the duty, through diligent and competent representation, to preserve all the client's rights to an appeal. ABA/BNA Lawyers Manual on Professional Conduct, 31:306. Both Rules 1.1(b)(5) and 1.3(b)(2) indicate that an attorney, in matters of representation, should carry out said representation with "no avoidable harm to the client's interests".

The New Hampshire Supreme Court typically will reject an appeal when there is no record of the proceedings in the lower court. Under new legislation, a certain category of misdemeanor, known as a Class B misdemeanor, will not be subject to an appeal for de novo hearing in Superior Court. If an attorney tries a Class B misdemeanor case, without a record, it may be difficult, if not impossible, to create a sufficient record on which to appeal issues of fact and/or law to the Supreme Court. Pursuant to RSA 599:1-c, a taped recording of proceedings will only take place if an attorney makes a request of the court prior to the hearing date.

In a criminal matter tried in District Court, where there is no de novo review in Superior Court, the attorney has an ethical obligation to request and preserve a record.

This inquiry does not address the issue of civil actions brought in District Court or criminal actions where a de novo right to an appeal exists.