Use of Coverage Counsel
By: Jonathan Broder, Esq. and CEO of MyMotionCalendar

The use of coverage counsel is nothing new and the concept of splitting legal responsibilities between different attorneys is older than the American judicial system itself.

In Britain and many other common law countries, the legal profession is split between two types of lawyers; barristers and solicitors. The barrister specializes in litigation and in-court representation, whereas a solicitor is the lawyer that interacts with the client, handles transactional work and if litigation arises, they, not the client, hire a barrister.

The use of barristers acts as a checks and balance on the solicitor; if the case has not been handled properly, the barrister has a duty to advise the client of a separate possible claim for legal malpractice against the solicitor. Can you imagine if coverage counsel had the ability (and duty) to report back to the client about the hiring attorney's work product!

In modern times, the coverage counsel business can be separated into two groups; (1) individual attorneys and small law firms that provide coverage services, and (2) companies like MyMotionCalendar that manage a network of coverage attorneys.

Coverage counsel has existed for years and thousands of attorneys across the nation participate in this business daily. Some attorneys use coverage counsel on an as-needed basis while others use it regularly and have incorporated it into their business model.

Coverage attorneys come from every aspect of life. Some are semi-retired or stay-at-home moms or dads. Some are in-between jobs or have started their own practice. Some supplement their income with coverage work and for others it's their primary income.

Both law firms and corporate legal departments hire coverage counsel. Law firms in almost all practice areas use coverage counsel and many corporate legal departments, especially insurance companies, have embraced the Association of Corporate Counsel's Value Challenge and either use coverage counsel services directly or require their law firms to do so.

Law firms benefit too. Like using a contract attorney, the use of coverage counsel is a billable service so law firms can increase revenues and effective hourly rates while allocating their personnel to higher priority tasks; keeping attorneys working on substantive, important work instead of billing for lower level, administrative-like work.

The recent recession, layoffs, price pressures, and reluctance of law firm's to hire associates has also contributed to the increase use of coverage counsel. Coverage counsel is the newest LPO (Legal Process Outsourcing) and it is good for U.S. lawyers; we can't outsource hearing coverage to India.

The use of local counsel can trace its roots back to the use of solicitors and barristers in British common law and it continues to thrive as a growing business within the legal industry today. The use of coverage counsel is not problematic in-and-of itself. Just like anything, it depends on how it is executed by those who hire and those who provide the services.

The same requirements and standards that a lawyer follows when hiring contract attorneys to do substantive legal work and perform document review apply equally to attorneys appearing at hearings. In all of these circumstances, the hiring lawyer has a duty to supervise the work of the contractors. This means it is the hiring lawyer's responsibility to make sure that coverage counsel has all of the information, documents and instructions needed to properly handle the matter. Coverage counsel is also responsible for providing competent representation and adhering to all ethical obligations and rules.

The Bankruptcy court for the S.D. of Florida's recent adoption of Local Rule 2090-1(C) which prohibits coverage counsel appearances at 341 hearings is an unfortunate example of "just killing the messenger." The rule fails to address the other half of the issue: the responsibilities of the law firm hiring the coverage counsel.

The Local Rule advances a legitimate government interest; ensuring a debtor is properly represented at a 341 hearing. Local rules, however, are intended to "govern the practice and procedure in all cases and proceedings."[i] This Local Rule goes well beyond governing a "case or proceeding" and regulates how a law firm operates. The rule goes so far as to deny an attorney admitted in Florida, who is also admitted in the Southern District, and who is further admitted to the Bankruptcy Bar from appearing at a 341 hearing. The rule also conflicts with and attempts to supersede Local Rule 11.1(D) governing the appearance of an attorney.

Law firms should be free to deliver legal services as it sees fit without the court or Bar's interference so long as the lawyers adhere to Bar rules and their ethical responsibilities. If an attorney violates any ethical canons there is recourse; they should be referred to the Bar to be disciplined.

Rules like this that prohibit the use of coverage counsel pose other serious problems.

The Local Rule has the unintended consequence of violating a debtor's constitutional rights under the Equal Protection clause of the 14th Amendment. The Rule discriminates against debtors by trying to govern how their attorney practices law on their behalf. It restricts a debtor's access to courts by increasing the cost of hiring an attorney and restricting how those services are delivered.

The Local Rule is also treacherous for pro se litigants and attorneys who provide unbundled legal services. If a debtor is pro se, a consumer bankruptcy is one of the most important times in which the unbundling of legal services should be encouraged and the use of coverage counsel's assistance at a hearing permitted.

There are less restrictive alternatives that should also be considered. For example, the Court could require coverage counsel to (1) file a notice of appearance, and (2) require client consent, (3) require an affidavit that coverage counsel has met and conferred with the debtor and that coverage counsel is familiar with the facts and schedules.

Rules like this spawn other questionable practices. Law firms are adopting the use of "of counsel" relationships to circumvent the rule. Many ethics opinions state that an attorney who is "of counsel" should practice through one law firm exclusively, not maintain an independent practice or have relationships with multiple law firms.

Clearly there needs to be a better framework that permits the use of coverage counsel and upholds the professionalism of our profession. One solution that is being considered in Florida is the Judicial Rule's Committee's proposed revision to Rule 2.505(e).

Under the current Rule 2.505(e) an attorney can appear in a case in one of three ways:

- By serving and filing the first pleading or paper in the proceeding.
- By substitution of counsel
- By filing a notice of appearance as counsel for a party that has already appeared in a proceeding pro se or as co-counsel

As far as the rule is concerned, there is no difference between an associate, partner, "of counsel" or coverage counsel; none of them can appear at a hearing unless they've complied with the rule. Despite this, attorneys from the same law firm and coverage counsel appear at hearings all the time on behalf of the attorney of record.

Subcomittee "A" of the RJA is proposing new language to Rule 2.505 to permit "other attorneys" to appear under section (f) "at the request or direction of the attorney of record." The proposed rule should include language that allows any attorney who is a member of the same firm as the attorney of record to appear without filing a Notice of Appearance, while an attorney not a member of the law firm should be required to file an NOA before appearing.

Coverage counsel should be required to file a notice of appearance to prevent the unethical practices of "it's not my case" and "hot potato", as well as to ensure their appearance is recorded. The "It's not mine" excuse occurs when coverage counsel states "I am just covering this hearing, it's not my case." "Hot potato" refers to the practice of a coverage counsel handing off a case to another coverage counsel to handle. Without court reporters and case files there's no other way to document their appearance. If coverage counsel efiled an NOA and two minutes later filed a Notice of Withdrawal, when did they "appear"? Filing an NOA beforehand ensures that coverage counsel is fully bound by their ethical obligations as an attorney while they "appear" in the case, defines the duration of their appearance, and ensures there is privity between the hiring party and the coverage counsel.

There is proper protocol for hiring and providing coverage services and we need to have more conversations about the coverage counsel business as well as the responsibilities, obligations, and requirements for all parties. This is a worthy discussion we should be having. But the discussion should address the full picture instead of just shooting the messenger.

I also strongly urge the U.S. Bankruptcy Trustee to evaluate the importance of allowing the unbundling of legal services in bankruptcy matters. A consumer bankruptcy is truly one of the most important times in which the unbundling of legal services should be encouraged and the use of coverage counsel's assistance at a hearing permitted.

[i] Federal Rules of Bankruptcy Procedure, Rule 9029, "Local Bankruptcy Rules; Procedure Where There is No Controlling Law" http://www.law.cornell.edu/rules/frbp/rule_9029