

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2018-1
(June 2018)

The Professional Guidance Committee of the Philadelphia Bar Association has received numerous inquiries concerning the steps to be taken when clients cannot be located. The purpose of this Opinion is to determine how and to what extent the Pennsylvania Rules of Professional Conduct (“the Rules”) govern this question and to provide advice concerning the ethical obligation under the Rules in missing client situations.

INTRODUCTION

The attorney client relationship is an agent-principal relationship. The client sets the objectives of the representation and the attorney determines the means and strategy to obtain the desired outcome. RPC 1.2(a).

What do the ethical rules provide when the client cannot be located? The actions of the lawyer may depend on the stage of the representation and/or circumstances surrounding the representation. Continuing to proceed with the matter without client contact may violate the ethical rules. However, taking no action may prejudice the rights of the client. What then, are the ethical considerations of a lawyer when the lawyer’s client is missing?

DISCUSSION

What do the ethical rules require when a client goes missing?

Duty to Conduct a Search for the Missing client

Rules 1.3 and 1.4 require the lawyer to act with reasonable diligence in trying to locate the client. What constitutes reasonable diligence depends upon the circumstances of each case. At the very least, a lawyer should attempt to contact the client at all known addresses, telephone numbers and email addresses and should contact the post office for any forwarding information. If the lawyer knows members of the client’s family, friends, employer, or acquaintances, contact with these potential sources of information as to the client’s whereabouts should be attempted. Several opinions suggest that it is necessary to engage a private investigator to try to locate the client.

A thorough review of the lawyer’s file should be undertaken to establish if any information contained in the file, such as police reports or medical records, provides any leads to the client’s whereabouts. In addition, a reasonable effort through utilization of internet search resources and social networking sites should be made.

During the search for the missing client the lawyer should be careful not to disclose any information protected by Rule 1.6(a). The attorney should limit the information disclosed to what is necessary to accomplish the search.

If the client is not located, what do the ethical rules require the lawyer to do?

Early Withdrawal

A lawyer may withdraw from representing a client if the withdrawal can be accomplished without material adverse effect on the interests of the client. Rule 1.16(b)(1). Additionally, even though a client's interests may experience material adverse effects, a lawyer may withdraw if the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client. Rule 1.16(b)(6). If the matter is in the initial stages when the lawyer discovers that the client is missing, and reasonable efforts to locate the client have been unsuccessful, the lawyer may withdraw. See Philadelphia Bar Association Ethics Opinion 98-8.

It is best practice for the lawyer to include in the Fee Agreement and/or Engagement Letter instructions to the client concerning the responsibility of the client to update any changed contact information, the potential detriment to the client's matter if the attorney cannot communicate with the client, and the actions which the lawyer may take if unable to locate or communicate with the client, including withdrawal of the representation. *See*, Comment 8 to Rule 1.16.

When withdrawing representation the lawyer must be cognizant of Rule 1.16(d). The rule provides:

Rule 1.16 Declining or Terminating Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.

If early withdrawal is not an option what do the ethical rules require a lawyer to do?

Protecting the Statute of Limitations

The Rules provide that the lawyer must act with reasonable diligence and promptness in representing a client. Comment [1] to Rule 1.3 notes that: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

If the lawyer has made a reasonably diligent effort to contact the client without success and has sufficient information to support the filing of an action, properly supported in fact and law, the Rules of Professional Conduct require the lawyer to file a summons to toll the statute of limitations while the lawyer continues to search for the missing client. See Philadelphia Bar Association Ethics Opinion 94-10 (June 1994).

After filing the summons, if no contact with the client has occurred, and a Rule to File a Complaint is served, it is the position of the Committee that the lawyer should request an extension of time from opposing counsel. When all possible extensions of time have been exhausted, it would be appropriate at that time to ask for leave of court to withdraw pursuant to Rule 1.16. See Philadelphia Bar Association Ethics Opinion 94-10 (June 1994) and Pennsylvania Bar Association Inquiry No. 93-21.

Informing Opposing Counsel

Normally, a lawyer does not have an obligation to notify opposing counsel that the whereabouts of the client are unknown to the lawyer. However, if the client's deposition is noticed, pursuant to Rule 8.4(c) a lawyer has an ethical duty not to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Therefore, an honest response is required, to the effect that the lawyer is unable to produce the client for the deposition. Per Philadelphia Bar Opinion 94-21, "the Rules of Professional Conduct prohibit affirmative misrepresentation of [a] client's unavailability [for a deposition]."

Informing the Court

A lawyer must be candid and truthful with the court. Rule 3.3. If the lawyer is asked directly by the court to disclose the whereabouts of the client, the lawyer must truthfully respond to the court that the lawyer cannot answer the question. See comment [3] to Rule 3.3, **Representations by a Lawyer ...** "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." The duty of Candor toward the Tribunal applies even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Responding to Settlement Offers

Rule 1.2(a) provides that a lawyer shall abide by a client's decisions concerning the objectives of the representation. As required by Rule 1.4(b), a lawyer shall consult with the client as to the means by which they are to be pursued. Rule 1.2(a) also provides that a lawyer may take such action on a client's behalf as is impliedly authorized to carry out the representation. However, it is clearly stated in Rule 1.2(a) that a "lawyer shall abide by a client's decision whether to settle a matter." Therefore, it is the client's, and not the lawyer's, decision whether to settle a matter.

When a lawyer receives a settlement offer, the lawyer must diligently attempt to communicate the settlement offer to the client. If the lawyer is unable to communicate with the client, the

lawyer when requested must reply that the lawyer is without authority to accept the offer, even if the lawyer deems the settlement offer to be most favorable to the client.

Guidance to Avoid Missing Client Situations

The Oregon State Bar Bulletin: November 2012 - December 2012, Ethics Implications of the Missing Client, authored by Amber Hollister, included practical steps to avoid losing contact with the client. The potential solution is for the lawyer to be proactive. At the initial intake stage, in addition to the basic information, the lawyer should ask the client for:

Email addresses;
Home, work and mobile telephone numbers;
Employer contact information;
Family member contact information;
Emergency contacts; and
Primary care physician information.

The lawyer should take the initiative to reach out to the client and establish regular contact before the client disengages. Sending clients regular updates about their cases, using multiple methods of communication, and law firm newsletters are a good way to avoid losing contact with clients and building strong attorney-client relationships.

The engagement letter should also emphasize the duty of the client to update any changed contact information, the potential detriment to the client's matter if the attorney cannot communicate with the client, and the actions which the lawyer may take if unable to locate or communicate with the client.

CONCLUSION

In summary, the ethical obligations of the attorney faced with a missing client depend upon the particular facts and circumstances of the situation. In representing the missing client the lawyer has an ongoing duty to act with reasonable diligence and promptness, but must not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. All reasonable efforts should be made by the lawyer to locate the client and establish lines of communication. If the lawyer is unable after such efforts to reach and communicate with the client, then the lawyer should take steps to withdraw from the representation consistent with Rule 1.16. If the lawyer concludes that the fact the client is missing is protected information pursuant to Rule 1.6, then the lawyer must be careful not to violate the duty of confidentiality.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

Rules to be considered involving the missing client situation:

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) ...A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of a client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

Rule 1.3 Diligence

A lawyer must act with reasonable diligence and promptness in representing a client.

Comment:

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e) is required by these Rules;

(2) reasonably consult with the client about the means by which the clients objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation....

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

Rule 1.15 Safekeeping Property

(e) Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property, including but not limited to Rule 1.15 Funds, that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding the property; ...

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.

Comment:

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous....

Rule 3.3 Candor Towards the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

Comment:

[3] ...There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

Rule 4.1 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.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

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

Ethical opinions concerning missing clients issued by the Philadelphia and Pennsylvania Bar Associations, The American Bar Association, and other jurisdictions and committees:

Philadelphia Bar Association Ethics Opinion 98-8 (March 1998) - There is no absolute obligation to file summons and then withdraw where several months remain before statute of limitations runs and the lawyer does not have sufficient information to file the summons.

Philadelphia Bar Association Ethics Opinion 94-10 (June 1994) – Reasonable diligence requires the filing of a summons. A Lawyer should then obtain as many extensions of time as possible before filing a complaint and withdraw if client contact has not been established.

Pennsylvania Bar Association Inquiry No. 93-21 (January 21, 1993) - Where a missing client signed a contingent fee agreement, the representation must continue until lawyer’s withdrawal can be accomplished without prejudice to client’s interests.

Pennsylvania Bar Association Inquiry 93-58 – Where a matter is in litigation, the lawyer must make every effort to locate the client and petition the court to withdraw; until withdrawal permitted, the lawyer must continue the representation taking whatever steps are necessary to reasonably protect the client's interest.

Pennsylvania Bar Association Inquiry 2005-150 – Even where an appearance was not filed, participation in a deposition in a case requires compliance with Rules of Civil Procedure requiring court approval for withdrawal.

Several other jurisdictions have rendered advisory opinions based on specific fact patterns involving the difficulties created when the client goes missing as the statute of limitations is about to run.

The ABA addressed this issue in an informal opinion advising that where an attorney’s reasonable efforts to locate the client had been unsuccessful and the attorney believed there was no reasonable likelihood the client would return, the attorney had no duty to file suit to toll the statute of limitations if the client’s unavailability had not been caused by the attorney's neglect. ABA Informal Opinion 1467 (1981).

Other state and local bar associations have concurred with this result. See Florida Bar July 1, 1987 Ethics Opinion, reconsidering Opinion 72-36; Wisconsin State Bar Opinion E-96-2 (the obligation to toll the statute has to be determined by the circumstances of the situation). In forming the opinions, circumstances considered included how much time has passed since the attorney’s last communication with the client, the efforts undertaken by the attorney to find the client, the nature of the client’s claim, and the attorney’s expectation that the client will return.

Nebraska Ethics Advisory Opinion for Lawyers No. 08-03 addressed the issue where the statute of limitations is about to run and the client has failed to maintain contact. The opinion concluded

that the attorney should continue efforts to locate the client and to advise the client in writing of attorney's position. If the attorney is unable to communicate with the client prior to the running of the statute of limitations, the committee felt it would be appropriate to file the lawsuit in order to comply with rules, as long as the attorney has determined that the claim has merit, such that it would not be deemed frivolous.

The Nebraska opinion discussed the provisions of the Contingent Fee Agreement in reaching the decision. The Contingent Fee Agreement in that case was silent on a number of issues: a) the client's ongoing obligation to cooperate and communicate with the attorney, (including the client whereabouts); (b) a requirement that the client authorize the filing of any suit in writing before filing; and (c) the attorney's right to withdraw from representation in the event that the attorney makes a determination that the case is without merit.

If the Contingent Fee Agreement included the additional provisions noted above, the committee opined that the attorney could withdraw and would not be required to file suit in the event that the attorney was unable to locate the client prior to the running of the statute of limitations. This assumes, however, that the attorney has made a reasonable effort to provide adequate notice to the client as outlined in this opinion.