

Finding the Way Forward with a Missing Client

Introduction

Clients expect their attorneys to be available. A law firm that ignores client emails or phone calls will not be a law firm for long. Even in an age when most firms measure their response times in minutes, inattentiveness and inadequate communication are among the most common allegations in disciplinary and legal malpractice complaints.

But what if the *client* is failing to adequately communicate, or has disappeared entirely? What if the attorney's calls have gone unanswered while a statute of limitations approaches, a settlement offer awaits, or client funds sit idly in a trust account? Exactly what an attorney may, should, or must do in these situations can be jurisdiction and fact-specific, but taking certain precautions will help prevent "missing client" scenarios, or at least mitigate the professional risks they pose.

Taking certain precautions will help prevent "missing client" scenarios, or at least mitigate the professional risks they pose.

Duty to Search

Before concluding that a client is truly missing and prior to taking any further action in the case, including withdrawal, an attorney must make "reasonable efforts" to locate the client.¹ Whether the time and expense spent searching for a client are "reasonable" depends partly on the matter or financial sum at stake, but the attorney should consider:

- Sending certified mail, calling, and emailing the client at all known addresses and phone numbers
- Contacting friends, family members, employers, coworkers and healthcare providers
- Using internet search engines and consulting the client's social media accounts
- Searching public records including court, tax and voter records
- Visiting the client's known addresses
- Hiring a private investigator or skip tracer

In the course of searching for the client, the attorney should avoid disclosing confidential information about the representation. The attorney should document every attempt to locate the client in order to justify any subsequent request for continuance or withdrawal, and to protect the attorney if the client later alleges that the attorney's efforts were inadequate. If the search is unsuccessful, the attorney must decide what action, if any, is appropriate or necessary in the client's absence.

¹ See, e.g., DC Ethics Op. 359 (2011); NE Ethics Op. 08-03 (2008); MD Ethics Op. 2006-22 (2006).

Filing a Complaint

Where the client has expressed an intent to file a complaint with the attorney and has provided sufficient supporting facts, the attorney should file notwithstanding the client's disappearance.² Even absent express direction from the client, the attorney may be impliedly authorized to act based on the client's known objectives.³ Failing to file the complaint within the relevant statute of limitations period would cause the client materially adverse, and likely irreparable, harm, and poses a professional liability risk to the attorney should the client resurface.

State ethics opinions advising against filing a complaint consider factual scenarios where the client's intent became unclear prior to the disappearance or the attorney lacked sufficient information to act. In North Carolina RPC 223 (1996), for example, the client had last told her attorney that she "planned to see other health care providers" in connection with her car accident before breaking off contact. The client's final communication called into question her intent to proceed with the lawsuit, so the attorney was powerless to file before the statute of limitations expired. Had the client not expressed a desire to seek a second medical opinion before her disappearance, the attorney may have concluded that, based on the client's known objectives, he had the client's implied consent to file a complaint and preserve the claim even with the client's whereabouts unknown.⁴

The inverse situation was considered in Illinois Ethics Opinion 03-04 (2004), where the client directed the attorney to file before the statute of limitations ran but the attorney lacked sufficient information to prepare a complaint. In this scenario, the attorney was ethically permitted to investigate the claim and obtain additional facts, but without more information the attorney could not file the complaint.

Concurrent with filing the complaint, the attorney should file a motion to withdraw. Having fulfilled the client's objectives to the extent known and protected the client's interests, the attorney would not be obligated to and could not realistically continue to represent the client. American Bar Association ("ABA") Rule 1.16(b)(6) permits withdrawal where the representation "has been rendered unreasonably difficult by the client," and a complete breakdown in communication meets that standard. The attorney must still send notice to the client's last known address informing the client of the withdrawal, advising the client to retain other

counsel and warning of the consequences for neglecting to do so. If the client fails to reappear, the case would eventually be dismissed for want of prosecution, but the attorney would have acted ethically under the circumstances.

Whether an attorney can take other actions in the case following the client's disappearance depends on the same criteria as filing the complaint: did the client previously express an intent to carry out that action and does the attorney have enough information to do so? If both of these conditions are satisfied, the lawyer should fulfill the client's objective before seeking withdrawal.

Settlement Offers

ABA Rule 1.2(a) requires that an attorney "abide by a client's decision whether to settle a matter." If the client disappears and the attorney and client have not previously discussed settlement conditions, the attorney cannot accept a settlement, no matter how favorable, without the client's informed consent. Powers of attorney executed at the outset of the representation conferring broad settlement authority to the lawyer are consistently disallowed by courts and ethics committees as infringing on the client's decision-making autonomy.⁵

If the client provided explicit settlement instructions, after discussions concerning the merits of the case, the client's willingness to settle and an acceptable range of terms, the attorney may accept a settlement pursuant to those instructions on the client's behalf. This assumes that the circumstances in the case have not materially changed and the attorney has not received any additional communication since the client's disappearance. Even where a settlement offer falls within the client's acceptable range, unanticipated terms or conditions may render the offer outside the attorney's authority.⁶

Finalizing the settlement will require a limited power of attorney, signed by the client, permitting the attorney to sign releases and endorse settlement checks in the client's stead, as well as to deduct any previously agreed-upon fees. This power of attorney may be executed at the outset of the representation but should be narrowly tailored to the case at hand, conditioned on the client's disappearance and revocable.

² In Pennsylvania, the attorney need not file the complaint, but rather a writ of summons to preserve the claim. See Philadelphia Ethics Op. 2018-1 (2018).

³ See ABA Rule 1.2(a) ("A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.")

⁴ See Lever, Suzanne. "Where's Waldo?" *The North Carolina State Bar Journal*, vol. 16, no. 4, 2011, pp. 36-37.

⁵ See, e.g., OH Ethics Op. 2010-6 (2010); NY Ethics Op. 760 (2003); AZ Ethics Op. 94-02 (1994); IL Opinion 88-4 (1989).

⁶ See CA Ethics Op. 2002-160 (2002) (cautioning that installment terms, non-cash consideration or non-standard terms in a release may preclude settlement if not previously discussed).

Confidentiality

What if the attorney has information regarding the client's whereabouts? Are there circumstances that would permit or require the attorney to furnish such information to opposing counsel, or to the court?

Depending on the circumstances, the attorney's knowledge of the client's location, the date of their last contact or the fact that the client was aware of a conference or court date may not be protected by the attorney-client privilege. However, an attorney's duty of confidentiality as defined by ABA Rule 1.6 encompasses any "information relating to the representation." Barring an exception to Rule 1.6, information regarding the client's whereabouts cannot be disclosed without the client's express or implied consent.

In cases where the client's absence is excusable and revealing the circumstances would not harm or embarrass the client, the attorney likely has the implied consent of the client to explain why the client failed to appear. On the other hand, if the disclosure would be detrimental to the client, the attorney must decline to provide a detailed answer to questions posed by the court or opposing counsel.⁷

An attorney has ethical duties under ABA Rules 3.3 and 4.1 that require truthfulness in statements to the court and to third parties, respectively. "I don't know" is therefore an unacceptable response when the attorney in fact has knowledge related to the client's disappearance. However, unless the disclosure is court-ordered,⁸ necessary to prevent reasonably certain and substantial harm to another or falls under one of the other enumerated exceptions to Rule 1.6, the attorney may state only that the ethical rules prevent disclosure of that information.⁹

Unclaimed Funds

In addition to questions surrounding decision-making authority in a case, an attorney may be left wondering what to do with a missing client's money. Perhaps the client disappeared with part of an unearned retainer remaining in the attorney's trust account, or the case has settled but the settlement check has been returned as undeliverable.

The attorney's primary duty is to locate the client. If unsuccessful, the attorney must hold the funds in trust until the client is eventually located or until enough time passes—typically three to five years—to deem the funds "abandoned" pursuant to the state's unclaimed property statute. While most states follow some version of the Uniform Unclaimed Property Act, the dormancy period and exact procedures vary by jurisdiction, so attorneys should consult their local statute.

The attorney's primary duty is to locate the client.

An attorney cannot include a provision in the engagement letter transferring ownership of unclaimed funds, or interest earned on unclaimed funds, to the attorney in the event the client disappears.¹⁰ With prior written approval, however, the attorney may be authorized to use a reasonable portion of the funds to cover expenses associated with searching for the client, or to apply leftover retainer funds from one matter to the client's unpaid fees in another matter.¹¹

⁷ See San Diego Ethics Op. 2011-1 (2011) (advising against providing statement from client's mother to inquiring judge that he failed to appear because he was "high as a kite").

⁸ See ND Ethics Op. 15-04 (2015) (explaining that judge's question at a hearing does not amount to a "court order").

⁹ Note that most jurisdictions require disclosure where the attorney has knowledge of the client's death. See, e.g., *In re Forrest*, 158 N.J. 428 (1999) (suspending attorney for misleading court and opposing counsel as to client's death despite absence of affirmative statement to the contrary); ABA Formal Ethics Op. 95-397 (1995).

¹⁰ See, e.g., WA Ethics Op. 2176 (2009); NYC Ethics Op. 2002-2 (2002).

¹¹ See SC Ethics Op. 12-01 (2012).

Risk Control Strategies

Below are several steps a firm may consider in preparing for a client's unexpected disappearance:

Client Intake

- Broaden the contact information you collect to include aliases, healthcare providers, employment information and multiple emergency contacts, and require the client to promptly update the information as necessary.
- Watch for red flags that increase the risk of a disappearance, including clients facing criminal charges, clients suffering from addiction or mental impairment, or foreign clients.

Engagement Letter Provisions

- Securing client consent to contact family members, friends, employers and other third parties where necessary to locate the client
- Permitting the attorney to withdraw if the client fails to respond to the attorney's inquiries or fails to provide updated contact information
- Stipulating that the attorney will not file a complaint if the client fails to communicate within a reasonable period of time preceding the filing deadline
- Authorizing reasonable use of client funds to cover expenses associated with searching for the client
- Authorizing the application of unearned retainer funds to cover unpaid fees in the client's additional matter
- Authorizing a set fee for wasted time if the client fails to appear for a previously scheduled meeting or court date¹²
- Conferring revocable power of attorney to sign releases, endorse settlement checks and deduct agreed-upon fees in connection with any settlement accepted while the client is unreachable

¹² See IA Ethics Op. 99-12 (2000).



Documentation

- Communicate with the client on a consistent basis and retain detailed notes on the client's decisions and intent.
- Maintain records of all efforts taken to locate the client, including associated expenses.

By implementing these measures at your firm, almost all of which require action before a client disappears, you can avoid the frustration, confusion, and wasted time and money that accompanies a "missing client" scenario.

This article was authored for the benefit of CNA by:

Matthew Fitterer

Matthew Fitterer is a Risk Control Specialist for CNA's Lawyers Professional Liability Program. He is responsible for providing risk control guidance to CNA insureds in the form of written publications, online and live presentations, and direct consultations. Prior to joining CNA, Matt worked in the Chicago area as an attorney for a law firm specializing in criminal defense and civil rights litigation, and for a solo practitioner focusing on commercial litigation. Matt is licensed to practice law in Illinois and has been designated as a Commercial Lines Coverage Specialist (CLCS) by the National Underwriter Company.

Distributed By:



500 N. State College Boulevard, Suite 1220, Orange, CA 92868-1646
Phone: 714-769-3000 Toll Free: 800-556-0800 Fax: 714-769-3010
www.healthagencies.com info@HealthAgencies.com

The examples and information provided in this material are intended to present a general overview for illustrative purposes only and are not intended to establish any standards of care, to serve as legal advice appropriate for any particular factual situations, or to provide an acknowledgement that any given factual situation is covered under any CNA insurance policy. One or more of the CNA companies provide the products and/or services described. The material presented is not intended to constitute a binding contract. Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All products and services may not be available in all states and may be subject to change without notice. "CNA" is a registered trademark of CNA Financial Corporation. Certain CNA Financial Corporation subsidiaries use the "CNA" trademark in connection with insurance underwriting and claims activities. Copyright © 2019 CNA. All rights reserved. Published 2/19.