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When Your Client Goes Missing

What is the lawyer's obligation to communicate with his missing client? While it is clear the issues are attorney-clier communication and authorization to act, the answers are not so simple.

By **Chris McDonough and Joel R. Brandes** | February 19, 2020 at 11:45 AM

A New York attorney was retained by a disabled New York resident to bring a civil action in federal court to obtain an injunction compelling a place of public accommodation, without a wheelchair ramp, to make it wheelchair accessible. See ADA Title III, Reg 28 CFR §36.501 Private suits; §36.501. (b). The client could only travel out of his house in a wheelchair, with the help of his daughter. The attorney was retained, without a written retainer agreement, after a telephone conversation during which he obtained the clients' name, address, telephone number, and email address. The attorney agreed to represent the client without fees, willing to rely solely on an anticipated court award of legal fees from the defendant. The Americans with Disabilities Act (ADA) provides that the court may allow the prevailing party reasonable attorney fee, including litigation expenses and costs. See 42 U.S.C.A. §12188 (a)(2).

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After the attorney served the verified complaint and issue was joined, the client informed the attorney that he would be going with his daughter to Florida for the winter and would be in touch with him to let him know where he will be staying. The attorney was then served with discovery demands, and when he attempted to contact the client by telephone to obtain his HIPPA authorization, he discovered that the telephone number he had been given was temporarily out of service. When he attempted to contact the client by email, the email was returned as undeliverable. The defendant moved to dismiss the case for failure to comply with the discovery demand. What is the lawyer's obligation to communicate with his missing client? Must he oppose the motion? *Can* he oppose the motion? Can he protect the client by settlement where he consents to the dismissal?

These hypothetical questions pose an ethical dilemma that can occur when a client goes missing. Of course, the attorney wants to protect the client and the client's right of action. While it is clear the issues are attorney-client communication and authorization to act, the answers are not so simple.

Rule 1.4 of the Rules of Professional Conduct (RPC) requires that a lawyer must promptly inform the client of "material developments in the matter including settlement or plea offers. ... [and] keep the client reasonably informed about the status of the matter. Rule 1.2 of the RPC provides that subject to its provisions, 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 how they are to be pursued. A lawyer must abide by a client's decision whether to settle a matter. RPC 1.2(a).

It is a certainty that the lawyer cannot submit opposition to the motion without client authorization. Indeed, without the client's involvement and affidavit support, such a motion would be valueless. Can the lawyer then consent to settle the matter by withdrawing the action on the client's behalf without prejudice, thus preserving the client's rights should he reappear?

As a general rule, the decision to settle a matter is reserved for the client. *Hallock v. State of New York*, 64 N.Y.2d 224, 230 (1984). A stipulation of settlement entered into by attorney without the consent of the client is not ordinarily binding on the client. Without a grant of authority from the client, an attorney cannot compromise or settle a claim, and settlements negotiated by attorneys without authority from their clients have usually not been binding. Id.

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However, if the lawyer exceeds the authority granted by the client and settles a matter, the client can be bound by the settlement if she has cloaked the lawyer with apparent authority. Id. Any such action, without the client's subsequent ratification, is a nullity and unenforceable. *Katzen v. Twin Pines Fuel*, 16 A.D.3d 133 (1st Dept. 2005); *Slavin v. Polyak*, 99 A.D.2d 466 (2d Dept. 1984).

If the lawyer settles the matter without client consent and authority, the client has the right to pursue a legal malpractice claim against the lawyer for any damages caused by this unauthorized action. Similarly, if a lawyer fails to act on a client's directive to settle a matter, the lawyer may also be liable to the client for any damages sustained because of the omission. *Leslie E. v. Van Vranken*, 24 A.D.2d 658 (3d Dept. 1965).

However, it has been held that a settlement is considered binding even where a client is not present at the time it is entered and where the attorney does not have *actual* authority but the court concludes that counsel's actions indicate *apparent* authority to act on his or her client's behalf. *Clark v. Bristol-Myers Squibb and Co.*, 306 A.D.2d 82 (1st Dept. 2003).

In a recent ethics opinion, the New York State Bar Association Professional Ethics Committee (Committee) opined that when unable to locate a client once represented in a settled action, a lawyer's duty to respond to a claimed default under the settlement agreement depends on whether the representation and action are "concluded or not." NY Eth. Op. 1163 (N.Y. St. Bar. Assn. Comm. Prof. Eth.), 2019 WL 1270788. If the representation and matter are over, the lawyer may inform the court that the lawyer no longer represents the client. If the representation of the client had not concluded, or the prior matter before the court had not been closed, then, following reasonable efforts to locate the client, the lawyer may seek permission from the court to withdraw from the representation, sensitive to the lawyer's ongoing duty to maintain a client's confidential information.

We note that Opinion 1163 does not define when an action is concluded, which is a matter of law. However, the Opinion references the important fact that the inquiring lawyer had sent the client a letter terminating the attorney-client relationship when the matter settled. This action by the attorney is highly laudable and should serve as an example to all attorneys as to the importance of closing the attorney-client relationship in writing. This is an important protection device that all lawyers should use.

Rule 1.2(a) of the Rules of Professional Conduct requires lawyers to abide by their client's decisions (unless doing so would violate the RPC or the law), while Rule 1.4 obligates lawyers to communicate with their clients promptly. Rule 1.3 requires a lawyer to pursue a client's matter with diligence. Rule 1.16(b) provides, in pertinent part, that a lawyer *shall withdraw* from the representation of a client when the lawyer knows or reasonably should know that the representation will result in a violation of the RPC or law. An attorney *may withdraw* when the client fails to

cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out the employment effectively (RPC 1.16(c)(7)); and/or when the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal **(**RPC 1.16(c)(12)).

A lawyer cannot comply with Rules 1.2, 1.3 and 1.4 when a client disappears. Based on these three rules, it would seem that our lawyer has no choice but to terminate his or her representation of the missing client according to Rule 1.16(b), which states that a lawyer must withdraw if "the representation will result in [a] violation of the Rules of Professional Conduct or law." Moreover, "good cause" exists for the lawyer to move to withdraw from representation if the lawyer cannot locate the client after making reasonable efforts to do so. See NY Eth. Op. 787 (N.Y. St. Bar. Assn. Comm. Prof. Eth.), 2005 WL 3046317.

What are reasonable efforts?

In Opinion 787, the Committee concluded that before withdrawing, a lawyer must take all reasonable steps to locate a missing client. Such steps might include sending a letter via certified mail to the last known address, a personal visit to the last known address, or a search of telephone directories, public records or the Internet to determine the client's current address. If the lawyer has exhausted all reasonable steps and decides to withdraw, the lawyer must send written notice of intent to withdraw to the client's last known address, warning the client that the client's claim may be prejudiced by the delay, and suggesting that the client obtain other counsel.

Other jurisdictions are in accord. An Alaska ethics opinion has stated that reasonable efforts to locate the client may consist of, but are not limited to, attempts to contact the client by telephone, letter to client's last known address, personal visit to the client's last known address, electronic mail inquiry, internet search, post office search, registry of motor vehicle search, or newspaper publication." Alaska Bar Ass'n Ethics Op. 2011-4, (2011) (Alaska Op. 2011-4). A California ethics opinion has noted that in all cases the attorney must expend a reasonabl[e] amount of time and funds to ensure that the attorney makes a diligent effort to locate the client. Since each case is unique, the attorney should evaluate what methods of search would be reasonable to locate the client. Cal. Op. 1989-111.

Conclusion

Based upon all of the above, it appears to us that after exerting *reasonable efforts* to locate and communicate with his missing client, the attorney in our hypothetical has no alternative but to move to withdraw as counsel, as continued representation is without authority and would result in a violation of Rules 1.2, 1.3 and 1.4.

A decision to make a motion to be relieved as counsel under these circumstances presents its own problems. CPLR 321(b)(2), which prescribes the procedure by which an attorney of record may withdraw his representation of a client, provides that the attorney's application for such relief must be made "on such notice to the client of the withdrawing attorney * * * as the court may direct." If the attorney cannot locate the client, how can he or she be served with an order to show cause to be relieved? The complexity of this question is illustrated by the Appellate Division decision in *Wong v. Wong*, 213 A.D.2d 399, 400 (2d Dept. 1995), where plaintiff's counsel

appealed from an order of the Supreme Court, which denied his application to be relieved as counsel. In that case, the plaintiff's counsel sought to withdraw his representation because he had not been in communication with the plaintiff for approximately four years and all of his efforts to locate her had been unavailing. The order to show cause and accompanying affirmation which the attorney submitted to the court in support of his application specified that the plaintiff was to be served with the required notice by certified mail, return receipt requested. A copy of the papers submitted by the attorney was to be sent to the plaintiff's last-known address, as well as to her parents' residence. The attorney's affirmation recounted the efforts which he had expended in attempting to locate the plaintiff. The Appellate Division held that the judge who signed the order to show cause acted within his broad discretion in permitting the attorney to proceed via service by certified mail, return receipt requested. However, the Appellate Division reversed the lower court's eventual decision on the motion, which denied withdrawal on the ground that it was not satisfied that the plaintiff actually received notice of counsel's application.

Our missing client hypothetical highlights the need for attorneys to always enter into a written retainer agreement containing a provision for alternate methods of contacting the client. At a minimum, the retainer should contain specific addresses and telephone numbers for purposes of reasonable attempts at communication with the client. Another provision of the retainer should set out the circumstances under which the client will be deemed missing, and authorize the attorney to act on behalf of the client, making such decisions as the attorney believes are necessary and in the best interest of the client, after those reasonable attempts at communication. But note, any such decisions must, in the lawyer's mind, be consistent with the goals of the client. If uncertain, the lawyer should not substitute his or her decision for that of the client and should consider withdrawal.

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