

KENTUCKY BAR ASSOCIATION
Ethics Opinion E-433
Issued: May 19, 2012

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Subject: Ethical obligations of a lawyer who is unable to locate a client in a civil matter

Question I: What are the ethical obligations of a lawyer who has funds or property belonging to a client who cannot be located?

Answer: A lawyer must first make a reasonable effort to locate the client. If the lawyer is unsuccessful, the lawyer must follow the procedures set out in the state's unclaimed property laws.

Question II. What are the ethical obligations of a lawyer to continue to represent a client who cannot be located?

Answer: The lawyer's ethical obligations will depend upon the stage of the representation and the facts of the matter. In most civil matters, the lawyer will have to withdraw, because the lawyer will likely be unable to meet the ethical obligations imposed by the Rules of Professional Conduct without the client's participation. Nevertheless, the lawyer has an obligation to protect the client's interests to the extent reasonably possible.

Question III. What are the ethical obligations of a lawyer who receives a settlement offer on behalf of a client who cannot be located?

Answer: A lawyer must abide by the client's decision regarding settlement and, without specific settlement authority from the client, the lawyer cannot accept a settlement offer. The lawyer should, however, take whatever reasonable steps that might be available to protect the client's interests.

References: SCR 3.130 [Kentucky Rules of Professional Conduct] (1.2, 1.4, 1.6, 1.15, 1.16, 3.1, 3.3, 3.4, 4.1 and 8.4); KRS 393.010-393.099; KBA E-297 (1984); KBA E-300 (1985); ABA Informal Ethics Op. 1467 (1981); Colo. B. Assn. Formal Op. 95 (1993); Cal. Standing Comm. on Prof. Resp. & Conduct Formal Op. 2002-160(2002); Ark. Ethics Op. 2004-2 (2004); Ill. State B. Assn. Op. 03-03 (2004);

N.C. Ethics Op. 2004-2 (2004); N.Y. Ethics Op. 787 (2005) Ohio Op. 2005-10 (2005); and Tex. Eth. Op. 602 (2010);

Introduction

In recent years, the Ethics Committee has received an increasing number of inquiries about a lawyer's ethical obligations to a client who has disappeared. When a client cannot be located, the lawyer loses the ability to communicate about critical aspects of the relationship and the client loses the ability to make important decisions regarding the representation and to provide the lawyer with information necessary to competently represent the client.

The challenge for the lawyer is compounded when the lawyer is in possession of funds or other property belonging to the client or where the client's rights may be jeopardized unless the lawyer takes some action on behalf of the client. How the lawyer should handle funds belonging to an absent client and deal with other aspects of the representation is discussed below.¹

Although this opinion focuses on ethical problem that arise when a client cannot be located, the Committee recommends that lawyers make reasonable efforts to minimize these problems by obtaining detailed contact information from the client at the time of the engagement and stressing the importance of keeping the lawyer informed about any change in address and other contact information.

I. What are the ethical obligations of a lawyer who has funds or property belonging to a client who cannot be located?

Client funds may come into the lawyer's possession in a variety of ways, including settlements, hold-backs in real estate transactions and unearned retainers and advances. SCR 3.130 (1.15)²

¹ The focus of this opinion is on the representation of individual clients in civil matters. Problems related to the representation of criminal defendants, the representation of multiple clients and the representation of clients whose defense is paid for by another person or entity are not addressed.

² SCR 3.130(1.15) Safekeeping property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client, third person, or both in the event of a claim by each to the property. The separate account referred to in the preceding sentence shall be maintained in a bank which has agreed to notify the Kentucky Bar Association in the event that any overdraft occurs in the account. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client, third person, or both in the event of claims by each to the property. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, third person, or both in the event of a claim by each to the property, a lawyer shall promptly deliver to the client or third person any funds or other property that the client

addresses the lawyer's handling of client property,³ and provides that a lawyer must segregate the property and keep it safe. In addition, it provides that a lawyer must notify the client that the lawyer has property to which the client is entitled and promptly deliver the property to the client. Unfortunately, the Rules of Professional Conduct provide no specific guidance on what the lawyer should do when a client cannot be found.

As a fiduciary, the lawyer must take reasonable steps to protect the client's interests, including making a diligent search for the missing client. If the lawyer cannot locate the client based on information provided by the client, additional efforts may be required. The facts of each case will dictate what is reasonable under the circumstances.⁴

Once the lawyer has made a good faith search without success, then the lawyer must follow the procedures set out in the unclaimed property laws of the state.⁵ Although it is beyond the jurisdiction of the Committee to render opinions on the law,⁶ the lawyer must comply with the law and is directed to KRS 393.010 – 393.099 and KAR 1:080 dealing with abandoned property.⁷

We would note that even where the lawyer ultimately turns the client's funds over to the state, the lawyer has an obligation to comply with the Rules of Professional Conduct on the maintenance and retention of records on client funds and other property.⁸

or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose. (e) Except for non refundable fees as provided in 1.5(f), a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

³ Rule 1.15 imposes a duty to protect all client property in the lawyer's possession. Although the focus of this section of the opinion is on the lawyer's duty to protect client funds, the principles apply to all property, including client files. See, KBA E-300 (1985), which provides some guidance on the duty to retain client files.

⁴ Additional efforts to locate a client might include searching telephone directories, public records or the internet, or hiring an investigator. In some cases, it may be appropriate to contact the client's employer, a known relative or a friend. Normally disclosing the identity of a client would be permissible, even if client identity was considered confidential under Rule 1.6, because one of the exceptions to the rule permits disclosure that "is impliedly authorized in order to carry out the representation...."

⁵ See KRS 393.010 – 393.099. The lawyer should also consult the regulations, as the holding period varies depending on the nature of the property involved. See also Colo. B. Assn. Formal Op. 95 (1993); Tex. Eth. Op. 602 (2010); Ohio Op. 2005-10 (2005).

⁶The Committee's authority is described in SCR 3.530. The Committee cannot decide questions of law. KBA E-297 (1984).

⁷ In delivering abandoned property to the state, the holder of the property is normally required to provide certain information about the absent owner. Although the information may fall within the broad definition of confidential information under Rule 1.6, it is the Committee's opinion that ordinarily disclosure would be permitted under the exception contained in Rule 1.6(a) and (b)(4). Those exceptions apply where disclosure is impliedly authorized or where it is necessary to comply with the law or court order.

⁸ See SCR 3.130(1.15) and other accounting and recordkeeping rules that may be applicable. The Comment to Rule 1.15 notes that the lawyer must follow generally accepted accounting practices and cites the ABA Model Financial Recordkeeping Rule. See also KBA E-300 (1985) on retention and disposition of client files.

II. What are the ethical obligations of a lawyer to continue to represent a client who cannot be located?

There is no simple answer to this question, as the lawyer's obligations will depend on the stage of the representation and the facts of each matter. Several scenarios are possible. A client may have contacted the lawyer about possibly bringing a law suit, or defending one, but then disappears before any action is taken; or the lawyer may have just filed a suit on behalf of a plaintiff, or an answer on behalf of a defendant, and then the client disappears; or the client might disappear in the later stages of the representation, such as during discovery, in preparation for an imminent trial, or during the trial.

There are several ethical principles that must be considered in each of these scenarios. First, there is the matter of client autonomy. SCR 3.130(1.4) requires the lawyer to keep the client reasonably informed and to explain matters in sufficient detail so that the client can make informed decisions.⁹ The Rules of Professional Conduct vest the client with substantial decision-making authority regarding litigation, and a missing client cannot make the necessary decisions nor can the lawyer communicate with the client so that the client can effectively participate in the representation.¹⁰

Second, SCR 3.130(1.2(a))¹¹ provides that a lawyer must abide by the client's decisions with regard to the objectives of the representation and must consult with the client regarding the

⁹ SCR 3.130(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 client's objectives are to be accomplished;

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

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

¹⁰ SCR 3.130(1.4) Commentary [1].

¹¹ SCR 3.130(1.2) Scope of representation and allocation of authority between client and lawyer

(a) Subject to paragraphs (c) and (d), 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 the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and

means. Comment [1] states that the rule “confers upon the client the ultimate authority to determine the purposes to be served by the legal representation, within the limits imposed by law and the lawyer’s professional obligations.” If the client is not available to advise the lawyer about the client’s objectives, the lawyer cannot substitute his judgment for that of the client.¹² It is difficult to see how the lawyer could comply with the requirements of Rule 1.2(a) if the client has disappeared.¹³

Finally, SCR 3.130(3.1) requires a lawyer to have a sufficient basis in law and fact before bringing or defending a proceeding.¹⁴ If the client disappears before the lawyer has prepared a pleading, the lawyer may not have sufficient facts to satisfy the obligations imposed by Rule 3.1.¹⁵ The Committee agrees with those authorities concluding that a lawyer has no duty to file a claim on behalf of a missing client and may be prohibited from doing so.¹⁶ There may, however, be rare situations in which, prior to disappearing, the client expressly or impliedly authorized the filing of a claim or an answer, and provided the lawyer with sufficient information to do so. In such a case the lawyer may file the appropriate pleading in order to protect the client’s interests.¹⁷ Although this may provide temporary protection for the client, additional problems will arise down the road if the client does not return, and the lawyer ultimately may have to notify the court of the client’s absence and seek permission to withdraw.

The situation is only slightly different when the client disappears after the proceedings have commenced. While the client has presumably participated in the initial decision regarding the objectives of the representation, the absence of the client makes it impossible for the lawyer to

may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Supreme Court Commentary

Allocation of Authority between Client and Lawyer

(1) Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

¹² N.C. Ethics Op. 2004-2 (2004).

¹³ Some pleadings must be verified. The inability to obtain the client’s verification would preclude the filing of the pleading.

¹⁴ SCR 3.130(3.1) Meritorious claims and contentions

A lawyer shall not knowingly 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, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

¹⁵ See also SCR 3.130(3.4(c)) and CR 11.

¹⁶ See e.g. ABA Informal Ethics Op. 1467 (1981); N.Y. Ethics Op. 787 (2005); Ill. State Bar Assn. Op. 03-04 (2004).

¹⁷ Ark. Ethics Op. 2004-2 (2004). For example, a lawyer might need to file some type of pleading where the statute of limitations or other deadline is approaching.

consult with the client as the representation proceeds. The client will not be available to participate in discovery, assist in the preparation of the case, testify at trial or make critical decisions about the representation. It may, however, be possible for the lawyer to appear on behalf of the client in some types of proceedings, such as scheduling conferences. While trying to locate the client, the lawyer should do whatever is reasonably practicable to protect the client's interests, such as seeking an extension or a continuance. The lawyer may not, however, misrepresent the situation to the opposing party or the court, for to do so would be a violation of the Rules of Professional Conduct requiring truthfulness in statements to others and candor to the tribunal and those prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation.¹⁸ Under most circumstances, if the client cannot be located within a reasonable period of time, the lawyer will be unable to continue the representation and may have to withdraw.

If withdrawal is necessary in any of the above situations, the lawyer should consult SCR 3.130(1.16), which addresses the termination of the attorney-client relationship. In some cases, the rule requires the lawyer to withdraw, and in others it merely permits the lawyer to withdraw.¹⁹ Specifically relevant here is Rule 1.16(a)(1), which requires the lawyer to withdraw if continued representation "will result in violation of the Rules of Professional Conduct or other law." In addition, Rule 1.16(b) permits withdrawal where the representation "has been rendered unreasonably difficult by the client."

¹⁸ SCR 3.130 (4.1); (3.3); and (8.4).

¹⁹ SCR 3.130(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; or
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(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; or
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or
- (3) the client has used the lawyer's services to perpetrate a crime or fraud; or (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; or
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or
- (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.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the 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. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 1.16(c) directs the withdrawing lawyer to “comply with applicable law requiring notice to or permission of the tribunal when terminating the representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.” In every case where the attorney-client relationship is terminated, Rule 1.16(d) requires the lawyer to “take steps to the extent reasonably practicable to protect the client’s interests”

III. What are the ethical obligations of a lawyer who receives a settlement offer on behalf of a client who cannot be located?

This question raises several ethical considerations. The first has to do with the lawyer’s authority to settle. SCR 3.130(1.2)²⁰ addresses the client’s decision-making authority and specifically provides that “a lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.” The right of the client to make settlement decisions cannot be realized if the lawyer is unable to contact the client and communicate the settlement offer. Obviously, the lawyer has an obligation to make a good faith effort to locate the client, as discussed above, but once those efforts have failed there is little the lawyer can do. There is no basis in the Rules of Professional Conduct for the lawyer substituting his or her judgment for that of the missing client.²¹ There may be rare cases where, prior to the client’s disappearance, the client set specific settlement parameters and authorized the lawyer to settle on his behalf. If the lawyer has clear authority, he or she may be able to act for the client, assuming there is no foreseeable prejudice to the client²² and the other concerns raised below can be addressed.

The second issue relates to the lawyer’s duty of fairness and honesty. As noted previously, the Rules of Professional Conduct require truthfulness in statements to others²³ and candor to the tribunal²⁴ and prohibit the lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.²⁵ The lawyer cannot make false statements in order to conceal the client’s absence.

In addition, there is a practical consideration. Even if the lawyer has authority to settle and can do so without violating the rules on candor and honesty, it is unlikely that the lawyer can conclude the settlement because the client is unavailable to sign a release.

For all the reasons described about, it is the view of that Committee that it is very unlikely that a lawyer could ever negotiate a settlement on behalf of a missing client. Nevertheless, the lawyer should take whatever reasonable steps might be available to protect the client’s interests.

²⁰ *Supra* note 11.

²¹ Cal. Standing Comm. on Prof. Resp. & Conduct Formal Op. 2002-160 (2002).

²² *Id.*

²³ SCR 3.130(4.1).

²⁴ SCR 3.130(3.3).

²⁵ SCR 3.130(8.4).

Conclusion

If, after a good faith effort, a lawyer is unable to locate a client, the lawyer will, most likely, have to withdraw. If a lawyer is in possession of funds or property belonging to the missing client, the lawyer must comply with the unclaimed property laws of the state. A lawyer cannot accept a settlement offer on behalf of a missing client unless the client has given specific settlement authority. Even with such authority, a lawyer cannot make false statements in order to conceal the client's absence. Despite the client's absence, a lawyer has an obligation to protect the client's interest to the extent reasonably possible. At the outset of the representation, lawyers should counsel clients on the importance of keeping in contact with the lawyer throughout the representation.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. The Rule provides that formal opinions are advisory only.