

VANISHED!

What To Do When A Client Goes Missing

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Vanished! Your client, that is. And at the worst possible time. Perhaps the statute of limitations or the deadline to appeal is about to expire. Perhaps your client's deposition has just been noticed, or his answers to interrogatories are overdue. Maybe after years of litigation, you finally have a settlement offer, or even a settlement check in hand. But, alas, all your calls, letters, texts, and emails to your client go unanswered. Your client has disappeared.

What's a lawyer to do?

Look, Really Look, For The Client. In some circumstances, such as when a suit has not yet been commenced, a lawyer may be tempted to cut his or her losses by simply closing the file and moving on to other matters. The lawyer's duty to the client, however, does not end when a client vanishes. *See* Mass. R. Prof. C., Rule 1.3, Comment 4 ("Unless the relationship is terminated as provided in Rule 1.16, a lawyer shall carry through to conclusion all matters undertaken for a client"). Rules 1.3 and 1.4(a) of the Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.) require that the lawyer, at a minimum, make a reasonably diligent effort to contact the client. Merely calling, texting, or writing to the client using his or her known contact information may not be enough. The lawyer should review the file for clues as to the client's whereabouts. Without revealing client confidences, the lawyer might reach out to the client's relatives, employers, and friends or visit the client's home or place of work. If it is a personal injury case, the client's treating physician or other health care providers may have current contact information. The post office may have forwarding information and social networking sites or internet database searches should be utilized. Depending on the situation, such as when the stakes are high or large sums of money are at risk, or when the lawyer's own neglect or procrastination has contributed to a client gone missing, a lawyer might be expected to hire a private investigator.

Get A Continuance, But Do Not Lie. As indicated by Comment 1 to Rule 1.2, a lawyer has implied authorization to act for the client in procedural matters. This, coupled with the lawyer's Rule 1.3 obligation to represent his or her client zealously, suggests that a lawyer not only can, but should, seek to continue or extend any looming deadline or take action to toll a statute of limitations.

In doing so, however, the lawyer must exercise caution. Disclosing to others that the client has gone missing or become incommunicado may be embarrassing to the client and perhaps detrimental to his or her legal or personal interests. Under Rule 1.6, a lawyer has a general duty not to disclose confidential information such as this. However, that rule also expressly recognizes the potential need to disclose certain information concerning the client in order to carry out the representation. *See* Mass. R. Prof. C. 1.6(a) (permitting disclosures that are "impliedly authorized to carry out the representation"). Because of this, it may be permissible to inform the court of a client's disappearance where doing so is necessary to get an extension to

preserve the client's rights. Still, a lawyer in this situation should only reveal that which is absolutely necessary to protect the client's interests.

Because of client confidentiality as well as the adverse impact the disclosure could have on the case, a lawyer should avoid revealing a client's seeming disappearance unless and until it becomes necessary to do so in order to protect the client's interests. However, the need to avoid disclosure of such potentially detrimental information does not give the lawyer license to *misinform* the court, opposing counsel, or anyone else concerning the client's whereabouts. *See* Mass. R. Prof. C. 3.3 and 4.1. The lawyer must also beware of those instances where the failure to make a disclosure may be the equivalent of an affirmative misrepresentation. *See* Mass. R. Prof. C. 3.3, Comment 3; *see also Matter of Alan Goodman*, 22 Mass. Att'y Disc. R. 352 (2006) (lawyer violated rules 5.3 and 8.4(a)(c) and (h) by instructing his office staff not to disclose to insurance adjuster that client had died.)

Protect Your Client's Interests. Because of a lawyer's implied authority to act on behalf of the client in procedural matters, a lawyer who is faced with a deadline that truly cannot be extended further is permitted to take action to preserve the client's claims. The lawyer may file a complaint or an answer, notice an appeal, or serve motions consistent with the client's objectives in order to keep the client's legitimate claims or defenses alive. Of course, the lawyer must first satisfy him or herself that the client's claim or defense has merit and is not frivolous. *See* Mass. R. Prof. C. 3.1, Comment 2 (a suit is not frivolous merely because the facts have not been fully substantiated at the time the complaint is filed).

The question arises: does a lawyer have an affirmative duty to file suit? The answer is no, so long as the lawyer has made a reasonably diligent search for the client, the lawyer believes that there is no reasonable likelihood that the client will reappear, and the lawyer's own neglect has not contributed to the client's unavailability. *See* ABA Informal Op. 1467 (1981). Here, it would be advisable for the lawyer to thoroughly document what communications there have been with the client, whether there were any expectations established with respect to the lawyer's obligation to file suit before the client went missing, the efforts undertaken by the lawyer to find the client, and why the lawyer believes that the client is unlikely to return.

Do Not Settle The Case. Our Rules are clear that a lawyer cannot settle a client's case without the client's consent regardless of how favorable to the client the terms of the settlement offer may be. Mass. R. Prof. C. 1.2(a). It is equally clear that a lawyer cannot endorse a check with the client's name, pay himself a fee, or dismiss the case without the client's approval. Mass. R. Prof. C. 1.15(b), (c).

Although uncommon, it is possible, however, for a lawyer to get a client's prior approval to settle a case. Comment 3 to Rule 1.2 provides that "At the outset of a representation and subject to Rule 1.4, the client may authorize the lawyer to take specific action on the client's behalf without further consultation." Thus, a client can give the lawyer permission to settle the case for a set amount, or within a certain range, or on certain conditions. *See* California Ethics Op. 2002-160 (lawyer could accept settlement offer for two-thirds the value of the claim after making reasonably diligent efforts to find client where retainer agreement gave lawyer authority to settle for that amount); *Cf.* State Bar of Ariz. Ethics Op. 06-07 (2006)(lawyer cannot have unfettered discretion to unilaterally settle a case). Still, a lawyer cannot rely on the client's prior approval where there has been a "material change in circumstances." *See* Mass. R. Prof. C. 1.2,

Comment 3. When a client has suddenly and inexplicably gone missing, the lawyer should consider whether a “material change in circumstance” has occurred such that he or she can no longer rely on the client’s prior approval. Should the lawyer nevertheless proceed to settle the case based on the prior authority given, he or she must make sure to keep the client’s settlement funds intact in a trust account until the client’s return.

Properly Withdraw. Once the lawyer has made all reasonable efforts to locate the client and all possible extensions have been exhausted, at some point the lawyer must consider moving to withdraw if litigation is pending. Rule 1.16(b)(6) permits withdrawal when “the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.” Even here, though, the lawyer will be confronted with the dilemma of Rule 1.16(d), which requires reasonable notice to the client of the intent to withdraw. Although actual notice may be impossible, the lawyer would be advised to document for his or her records all efforts made to locate and to provide notice to the client. Again, care should be taken not to disclose more information than is needed, the primary consideration always being to avoid prejudicing the client to the extent feasible.

Remember The Adage: An Ounce Of Prevention Is Worth A Pound Of Cure. It is not uncommon for bar counsel to receive calls from lawyers seeking advice when their clients have disappeared. While such a quandary may not always be avoidable, there are steps that a lawyer can take at the outset of the representation to reduce the risks.

First, and critically, the lawyer should gather as much identifying information about the client as possible. Just getting the client’s full name, mailing address, and a telephone number is not enough. The lawyer should ask for all email addresses (most people have more than one); all addresses, including possible vacation homes; and all telephone numbers, including cellphone and work numbers. In addition, the lawyer should ask about the client’s occupation, place of employment, and date of birth. Consider asking for the names and contact information of the client’s spouse or adult children. Having a contact person to call in case the lawyer is unable to reach the client is good; having two contacts who can help locate the client is even better.

The lawyer should impress upon all clients the need to stay in regular touch and to promptly inform the lawyer of any change in telephone numbers or of addresses. The lawyer should consider including a provision in the engagement letter or retention agreement stating that the lawyer will not be obligated to proceed with the case and will withdraw if the client fails to update their contact information. As the ABA points out, this will not exonerate the lawyer from his or her ethical obligations of care and competence. *See* ABA Informal Op. 1467 (1981). It may, however, serve as an impetus to the client to keep in touch, or aid the lawyer in moving to withdraw when the client fails to do so.

Keeping in touch is, of course, a two-way street. A lawyer who regularly communicates with the client not only satisfies the lawyer’s ethical obligations under Rule 1.4 but is also more likely not to have clients go missing. And if the client does disappear, it is certainly better to learn that earlier in the representation than later.

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