Nebraska Ethics Advisory Opinion for Lawyers
No. 08-03

IF THE STATUTE OF LIMITATIONS IS ABOUT TO RUN IN A CASE WHERE A CLIENT HAS FAILED TO MAINTAIN CONTACT, THE ATTORNEY MAY HAVE A DUTY TO FILE SUIT PRIOR TO TERMINATING AN ATTORNEY-CLIENT RELATIONSHIP, UNLESS THE FEE AGREEMENT PROVIDES FOR A LIMITATION ON THE ATTORNEY'S AUTHORITY TO FILE.

QUESTION PRESENTED

May an attorney terminate an attorney-client relationship when the client has failed to communicate with the attorney despite the attorney's attempts at communication at a time when the statute of limitations is about to run on the client's unfiled claim?

FACTS

An attorney has represented a client over a period of time in connection with a workers' compensation claim and eventually secured some compensation benefits. The attorney continued to represent the client in a related matter. Initially, the attorney had regular contact with the client, but then began to experience difficulties communicating with the client. The attorney forwarded medical authorizations to the client which were not returned until after several phone calls were made by the attorney's office. Opposing counsel contacted the attorney regarding settlement of the client's claims. The attorney left voicemails and sent correspondence regarding settlement to the client, but the attorney has not received a response.

As the statute of limitations approached, the attorney sent correspondence to the client advising the client of the need to hear from her and that the attorney may have to close the case if contact was not re-established. This correspondence was sent by certified mail to the address the attorney had sent previous correspondence. The correspondence was returned "Unclaimed Unable to Forward." The attorney has not yet received an offer of settlement from opposing counsel; however, the statute of limitations on the client's claim will run shortly.

The client signed a Contingency Fee Agreement with the attorney which provides, in part: "In consideration of the legal services to be rendered by [law firm], for any claims that the undersigned may have against the parties responsible for injuries and/or damages sustained by…on or about the day of . . . at . . . , the undersigned agrees to employ [law firm], and does assign to them a lien on all amounts received by compromise or judgment as

follows . . . ."

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE 3-501.3 DILIGENCE

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

COMMENT:

[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 . . . . If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

RULE 3-501.16 DECLINING OR TERMINATING REPRESENTATION

(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; . . . .
>
> (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 . . . .

(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 . . . .

RULE 3-503.1 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 . . . .

DISCUSSION

Rule 3-501.3 of the Nebraska Rules of Professional Conduct (the "Rules") provides that an attorney must act with diligence and promptness in representing a client. The Comment 4 to that Rule provides that "unless the relationship is terminated as provided in Rule 3-501.16, a lawyer should carry through **to conclusion** all matters undertaken for a client." (Emphasis added). A lawyer may withdraw from representation for several reasons, two of which are pertinent to the facts of this case. See Rules 3-501.16(b)(1) and 3-501.16(b)(5).

Rule 3-501.16(b)(5) allows the attorney to withdraw from representation if the client has failed to substantially fulfill an obligation that the attorney requires and if the client has given reasonable warning that the attorney will withdraw if the obligation is not met. It appears that the client has failed to substantially fulfill an obligation the attorney required because the client has failed to communicate with the attorney in any fashion for an extended period of time. As such, the attorney does not know the direction the client wishes to pursue with the client's claim and the attorney has no authority to settle the client's claim.

Also as provided by Rule 3-501.16(b)(5), before the attorney can withdraw, the attorney must give reasonable notice to the client. While the attorney has attempted to give the client notice of intention to withdraw, it appears that the client did not receive this correspondence. Whether a certified letter to the client's last known address is sufficient to give "reasonable warning" of the attorney's intentions under Rule 3-501.16 is unclear. Since our Committee has not addressed this issue previously, we start by looking to other state ethic and disciplinary opinions for guidance.

First, what constitutes a reasonable effort in locating a missing client? Arizona State Bar Opinion 2001-08 lends some guidance:

> What constitutes a reasonable effort to find the client depends on the circumstances of each case, including the extent to which the lawyer knows or has access to information which might reveal the client's current whereabouts. At a minimum, a "reasonable effort" would require the lawyer to write and telephone the client at all known addresses and telephone numbers. The lawyer should also make reasonable efforts to contact the client through the client's family, friends, or acquaintances either known to the lawyer or who may be discovered by the lawyer through the exercise of reasonable diligence. The efforts comprising a reasonably diligent search will vary depending upon the circumstances. Reasonable efforts to locate the client, his family, friends, or acquaintances include reviewing the file, including any medical files or police reports, contacting the client's medical provider(s), checking readily available public information sources such as the telephone directory, and otherwise pursuing any leads reasonably indicated by the circumstances of this particular case. The Committee encourages lawyers to obtain sufficient contact

> information from clients at the inception of the representation, such as names and addresses of family members or close friends such that the lawyer may maintain contact with the client, even if the client relocates.

As such, it appears that simply phoning and mailing correspondence to the client may not be enough to comply with the Rules. Instead, it appears that a diligent search must be made to locate the client. As suggested by the Arizona State Bar Opinion, diligence may include phoning the client, sending correspondence to the client's last known address, locating a new address for the client, or even contacting the client's medical providers or known family members and friends. Should the attorney locate the client, the attorney should give the client an express timeframe in which the attorney needs to hear from the client regarding the client's case. The client should be put on notice that if the attorney does not hear from the client, the attorney will terminate the representation.

The American Bar Association rendered an opinion on this issue in ABA Informal Opinion 1467 (1981) which concluded that an attorney does not have a duty to file suit on a client's behalf when that client has disappeared unless the loss of contact was caused by the attorney's own neglect. However, state ethics opinions are divided on this issue.

In a case with facts similar to those at hand, the Alaska bar ethics committee opined that when a lawyer is unable to locate his client, the lawyer should file suit and then move to withdraw. See Alaska Ethics Op. 2004-3, 20 Law. Man. Prof. Conduct 495 (2004). The facts in that opinion were as follows: a passenger on a cruise ship sustained injuries due to a fall. The passenger contacted a lawyer to file a lawsuit on his behalf. The lawyer declined to commit to representation until she could conduct a factual investigation. Following investigation, the lawyer determined that the claim had merit, but could not reach the client. The statute of limitations was quickly approaching. The Alaska ethics committee stated that "terminating representation is appropriate, but failing to file would 'materially and adversely affect the client's interests' within the meaning of Rule 1.16(b)." The committee concluded that a lawyer may ethically file the complaint on the client's behalf and then move to withdraw in accordance with court rules. Also in agreement with this position is South Dakota Opinion 92-6 (1992). In that opinion, the committee noted that a lawyer who has been retained to represent a client in a personal injury matter but who has lost contact with the client should file suit before the statute runs unless the retainer agreement requires the client's authorization to file suit.

The Illinois committee addressed three different scenarios based upon lost communication with a client in Illinois Opinion 03-04 (2004). In all three scenarios, the attorney was retained by a foreign citizen who subsequently disappeared without giving contact information. The attorney searched for a good address, but was unable to locate one. Under the first scenario, a client does not give the attorney authorization to file suit and the attorney does not have enough information to file a Complaint on the client's behalf. In this first scenario, the committee states that the attorney should not file suit since the client had rendered representation unreasonably difficult. In the second scenario, a client gives

authorization for the attorney to file suit and the attorney was given adequate information to file a Complaint. The committee stated that in this scenario, the attorney should file suit but that the attorney could withdraw after the suit had been filed if unable to communicate with the client. Lastly, in the third scenario, the client instructed the attorney to file suit, but the attorney did not have adequate information to file suit. In this scenario, the committee stated that the attorney could not file suit without adequate information, but that the attorney may have an obligation to ascertain the facts necessary to file suit. The committee concluded that the attorney should use due diligence in locating the missing facts so that it could follow the client's instructions and file suit.

Along these lines, in Arizona State Bar Ethics Committee Opinion 2001-08 (2001), the committee stated:

> …does the lawyer's duty to use reasonable care to protect his client's interests include a duty to file suit on his client's behalf to toll the statute of limitations? The answer to that question necessarily depends on the facts and circumstances of each case, but based upon the facts presented in this case, the answer is no. By dropping out of sight and by failing to reestablish contact with the lawyer, the client has cast serious doubt upon his intent to file suit and pursue the claim. In other words, it is no longer clear whether the lawyer has any authority to file suit on the client's behalf, if he ever had such authority to begin with.

Each ethics opinion appears to struggle with the issue and for most, the conclusion is fact sensitive. In Maryland, it is up to the attorney whether or not to file suit. Maryland Opinion 2006-22 (2006) concludes that if an attorney cannot locate his client despite diligent searches and attempts at contact and the statute of limitations is about to run, the attorney may, but is not required to, file suit. If unable to locate the client after filing suit, the lawyer may withdraw if still unable to contact his client.

Whether or not the attorney in our situation succeeds in contacting the client before the statute of limitations runs, the withdrawal may materially adversely affect the client claims and may be barred under Rule 3-501.16 under the facts presented to us. The attorney has indicated that the statute of limitations on the client's claim will run in a few months. As such, withdrawal at this time could materially adversely affect the client's interests because the client claim could be time-barred if it is not filed soon. This may be true even if the attorney is able to reach the client before the statute of limitations runs, as she may not be able to locate an attorney in time to file before the statute runs. Comment 4 to Rule 3-501.3 suggests that a client may believe that an attorney is continuing to represent the client interests even when the attorney is not and "Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so." However, under Rule 3-503.1, an attorney may not file a frivolous lawsuit, so it is

up to each attorney to make that evaluation prior to filing suit on his client's behalf.

CONCLUSION

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 believes it would be appropriate to file the lawsuit in order to comply with Rules 3-501.3 and 3-501.16, as long as the attorney has determined that the claim has merit, such that it would not be deemed frivolous.

The above conclusions are based upon the following factors which appear somewhat unique to the facts presented to us: (1) As per the fee agreement, the attorney agreed to represent the client going forward on all matters relative to the client's case; (2) the attorney did represent the client on a related matter to conclusion which could reasonably give rise to a rebuttable presumption that the attorney would continue to represent the client on the related matters, also to conclusion; (3) the attorney has been contacted by opposing counsel on several occasions asking if the client had an interest in settling this yet-to-be-filed matter, which would support a conclusion that the claim has merit; and (4) the omission of certain terms from the Contingent Fee Agreement.

The Contingent Fee Agreement is 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.

On the other hand, if the Contingent Fee Agreement included the additional provisions noted above, the attorney could withdraw and would not be required to file suit in the event that the attorney were 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.