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Going Dark: When Clients Disappear

By Mark J. Fucile
Fucile & Reising LLP

Although not an everyday occurrence, lawyers occasionally have clients who disappear mid-matter. The reasons are many. In some instances, a client who owes the lawyer a significant receivable intentionally fails to respond to the lawyer's continuing efforts to communicate. In others, health problems may lead the client to move and not leave the lawyer with any forwarding information. Especially with litigation matters and their inexorable deadlines, clients who disappear—whether intentionally or not—can put the lawyer in a very uncomfortable position. In this column, we'll look at three related questions when clients "go dark": (1) does the lawyer have continuing authority to act for the client? (2) does the lawyer need to maintain the client's file? and (3) what should the lawyer do if the client still has an advance fee deposit in trust?

Authority to Act

Lawyers are described as their client's agents by appellate decisions (see, e.g., *Sekermestrovich v. SAIF*, 28 Or App 901, 904, 561 P2d 1043 (1977) ("A lawyer acts as an agent of the client.")), statutes (see, e.g., ORS 9.310 ("An attorney is a person authorized to represent a party[.]")) and ethics opinions (see, e.g., OSB Formal Op. 2005-26 at 1 (rev 2016) ("The lawyer-client relationship is based on the law of agency[.]")). As such, lawyers generally have authority to act

for a client—if the matter is within the scope of the authority granted to the lawyer by the client. In *Kaiser Foundation Health Plan of the Northwest v. Doe*, 136 Or App 566, 903 P2d 375 (1995), *modified*, 138 Or App 428, 908 P2d 850 (1996), for example, the Court of Appeals found that a client had vested her attorney with the requisite authority to settle her case and enforced the resulting settlement agreement. By contrast, in *Johnson v. Tesky*, 57 Or App 133, 643 P2d 1344 (1982), the Court of Appeals refused to enforce a settlement where the evidence was that although a claimant had authorized her attorney to conduct negotiations, she had not authorized acceptance of the amount the defendant offered.

When a client disappears, the lawyer is often effectively left with no authority to act on the central elements of the representation. OSB Formal Opinion 2005-26, for example, discusses a situation in which a lawyer—with the client’s permission—has settled a case and then receives the resulting settlement check payable jointly to the lawyer and the client. The opinion reasons that if the client has authorized the lawyer to negotiate the check the lawyer may do so. If the client has not authorized the lawyer to endorse the check on the client’s behalf, however, the opinion concludes that the lawyer cannot. If the client is accessible, the opinion implies that the lawyer should

contact the client and obtain the client's authority to sign. But, if the client has disappeared, the lawyer may need to seek the assistance of the court under RPC 1.15-1(e) and OSB Formal Opinion 2005-68 that address disposition of property in a lawyer's possession in which two or more persons (including the lawyer) may have an interest.

Especially in litigation where impending court deadlines may effectively force a lawyer's hand, if, despite the lawyer's best efforts, a client cannot be located, the only practical avenue available to the lawyer in light of the lack of authority is usually to withdraw. OSB Formal Opinion 2011-185 contains very practical guidance on withdrawal in litigation and what a lawyer can—and can't—include in public court filings or proceedings. The opinion also addresses how *in camera* review can be structured to protect the client in the event the judge wants more information on the reasons for withdrawal.

The File

In the not too distant past, "the file" was a physical folder or set of pouches. Today, "the file" is more often electronic. That change doesn't alter the ethical and risk management considerations involved, but it usually makes file storage much easier. Under RPC 1.15-1(a) and (d), lawyers have continuing obligations to protect client original documents that have legal significance in and

of themselves—such as original wills. Therefore, OSB Formal Opinion 2005-43 counsels that lawyers must preserve wills and similar original documents of comparable legal import even if they cannot locate the client concerned. The opinion also notes in the case of wills in particular that Oregon statutory law governs the destruction of original wills. By contrast, other paper documents may generally be scanned into electronic form for storage under OSB Formal Opinion 2016-191. Although the RPCs do not suggest a specific period for retaining documents beyond those, like wills, having independent legal significance, the PLF generally recommends at least 10 years with most to align with Oregon’s statute of ultimate repose. The PLF’s guidelines are available on its web site at www.osbplf.org.

Funds in Trust

If a client disappears with funds in trust, OSB Formal Opinion 2005-48 counsels that the lawyer first needs to undertake reasonable efforts to locate the client. Assuming those do not result in locating the client, then under RPC 1.15-1 the lawyer must continue to hold the funds in trust until they are deemed “abandoned” under the Uniform Disposition of Unclaimed Property Act. The opinion then discusses in detail the procedures for reporting the abandonment and forwarding the amount involved to the Bar.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.