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Missing in Action: When Clients Disappear During Settlement Negotiations

**By Mark J. Fucile
Fucile & Reising LLP**

Imagine this scenario:

You are a plaintiff's lawyer who has done a great job for your client. Through your hard work, you have convinced the defendant to offer an excellent settlement proposal. One problem: your client has disappeared before you could discuss your authority to accept the defendant's offer. Despite your best efforts, you can't find or otherwise reach the client. Can you accept the proposal on the client's behalf? If not, could you have avoided this unpleasant situation by having the client vest you with unrestricted settlement authority at the outset in your fee agreement?

Although relatively rare, this scenario is common enough that two Oregon State Bar ethics opinions address its variants. In this column, we'll look at both questions posed by our opening hypothetical through the guidance offered by the Oregon State Bar opinions.

Can You Accept the Proposal?

OSB Formal Opinion 2005-33 (rev 2016) concludes that, under facts similar to our opening example, the answer is "no." Formal Opinion 2005-33 reasons that, as an agent, a lawyer cannot agree to a settlement proposal in the absence of authority from the principal—the client.

The approach taken by the Bar is consistent with Oregon's substantive law of agency applied to lawyer settlement authority. In *Grudzien v. Rogers*, 294 Or App 673, 679, 432 P3d 1169 (2018), for example, the Court of Appeals noted in discussing lawyer settlement authority: "Agency principles govern the

attorney-client relationship.” *Grudzien* turned on a lawyer’s apparent authority and relied on the Court’s earlier extended discussion of lawyer settlement authority in *Kaiser Foundation Health Plan of the Northwest v. Doe*, 136 Or App 566, 903 P2d 375 (1995), *adhered to as modified*, 138 Or App 428, 908 P2d 850 (1996). The Court of Appeals in *Grudzien* (citing *Kaiser*) also made a basic observation applicable to lawyer settlement authority generally (at 680): “[A]n attorney’s authority to engage in settlement negotiations is not enough, standing alone, . . . to enter into a binding settlement agreement on the client’s behalf.”

In our opening example, the client had not specifically given the lawyer a range of authority for which the lawyer was authorized to conclude a settlement. Because lawyers are only agents who are ultimately dependent in the settlement context on the authority granted by their principals, the lawyer in our opening example could not accept the settlement proposal because the lawyer lacked the requisite authority as a matter of substantive law.

Although authority is governed by agency law, RPC 1.2(a) mirrors substantive law in this regard by vesting the client rather than the lawyer with settlement authority: “A lawyer shall abide by a client’s decision whether to settle a matter.” RPC 1.2(a) sharpens the issue for the lawyer involved. Lack of authority will likely have substantive legal consequences for the enforceability of

any agreement involved if the lawyer proceeds without client consent. It can also have disciplinary consequences. *In re Bailey*, 25 DB Rptr 19 (Or 2011), for example, involved a lawyer who was disciplined under RPC 1.2(a) for accepting a settlement proposal for a client who had not given the lawyer the corresponding authority.

Formal Opinion 2005-33 also counsels that the lawyer in this unhappy scenario would ordinarily have grounds to withdraw under several provisions of the “withdrawal rule”—RPC 1.16. Depending on what are inherently very fact-specific circumstances, this may make practical sense as well because there will likely be other decisions and deadlines in the case involved that require client input that cannot be obtained when the client has truly disappeared.

Blanket Settlement Authority Up Front?

OSB Formal Opinion 2019-195 (2019) concludes that, under facts similar to our opening example, the answer is again “no.” Formal Opinion 2019-195 relies primarily on RPC 1.2(a)—which, as noted earlier, vests the client with ultimate settlement authority in very clear terms.

Formal Opinion 2019-195 reasons that in light of RPC 1.2(a), a lawyer cannot seek blanket advance settlement authority from a client:

“An attorney may not ethically obtain from a client an advance *blanket* authorization over all settlement decisions. Under Oregon RPC 1.2(a), a decision to settle must be made by the client, not the lawyer . . . An agreement between a lawyer and a client to delegate all settlement authority, regardless of the circumstances, to the lawyer would violate Oregon RPC 1.2(a) . . .

“Nor can Lawyer resolve the ethical problem by merely asking Client to waive his right to control settlement decisions. Unlike other Oregon RPCs . . . Oregon RPC 1.2(a) contains no language allowing a lawyer to seek a client’s consent to a waiver of the client’s right to make settlement decisions.”
(*Id.* at 2; emphasis in original.)

Formal Opinion 2019-195 notes (at 3) that after a matter is underway a client can assign a lawyer a range of settlement authority “as long as . . . [the] . . . client places some outer limit on the lawyer’s discretion and the client has sufficient information available at the time to make an informed decision about providing such authorization[.]” Even in this situation, however, a lawyer may still not be able to complete a settlement with a missing client. Therefore, withdrawal may remain the only practical option.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management 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 a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column

for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* 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.