

Utah Ethics Opinions

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78. USB EAOC Opinion No. 78

Utah State Bar

Ethics Advisory Opinion No. 78

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A number of questions have arisen concerning a lawyer's responsibility toward an absent client. These questions generally arise when the attorney accepts employment and embarks upon the performance of the legal service the client has requested, but is subsequently unable to locate the client to inform him of matters upon which he needs his consent and direction. What is the lawyer to do when (A) he is unable to obtain the absent client's approval of a settlement offer, or (B) to continue the pending litigation of the absent client's claim. Such a situation might arise, for example, where the client has moved from the community and possibly have abandoned his claim without informing his attorney. This is not the only situation that might give rise to absent-client problems. The absent-client problem involves a tension between the lawyer's obligation to diligently represent the client and achieve desired results, and the lawyer's obligation to communicate with the client and allow the client to direct the objectives of the representation.

A. SETTLEMENT OFFERS

Utah's Code of Professional Responsibility specifically states the general principle that "it is for the client to decide whether to accept a settlement offer." (EC 7-7) The ABA Model Rules of Professional Conduct states; "A lawyer shall abide by a client's decision concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." (Rule 1.2(a)). The above principles are not violated, however, when the lawyer accepts an appropriate settlement offer pursuant to a properly executed power of attorney. Thus, the lawyer whose client is absent, but who obtained from that client an express power of attorney, may ethically settle the client's claim within the bounds established in the power of attorney. [See Opinion No. 81-23 of the New York Bar Association and Opinion No. 84-10 of the Chicago Bar Association).

Without an express power of attorney, the general rule will usually apply to prevent the lawyer from accepting a

settlement offer on the absent client's behalf. Although that rule may at times result in a lawyer declining a very favorable offer, it is essential to safeguarding the client's control over the ultimate decisions concerning his own affairs.

B. PROSECUTING THE CLAIM

Unlike accepting a settlement offer, continuing to maintain the absent client's pending litigation, with or without procedural progress in the matter, merely preserves the client's claim rather than extinguishes it. Therefore, the absent client bears little risk for harm; if he returns and disagrees with the lawyer's actions, he may seek dismissal of the suit or other remedial steps. This relatively small risk coupled with the lawyer's affirmative duty to zealously represent his client (Canon 7), compels the conclusion that a lawyer should take reasonable measures to preserve the absent client's claim. For example, when the statutory limitation period is about to expire on the client's claim, the lawyer should file suit; when the client's presence is needed at a hearing, trial or deposition, the lawyer should seek a continuance if he can do so without affirmatively misrepresenting the facts.

C. WITHDRAWAL FROM REPRESENTATION

Withdrawal from the absent client's employment likely is inappropriate in some cases and subject to special restrictions in others. In the two situations previously discussed, i.e., the presence of an outstanding settlement offer and the existence of pending proceedings before a tribunal, withdrawal from the absent client's employment poses certain special limitations. For proceedings pending before a tribunal, permission of the tribunal will most likely be necessary. DR 2-110(A)(1) of the ABA Model Code provides:

If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment on a proceeding before that tribunal without its permission.

As to whether a request for permission to withdraw is appropriate, two other provisions of the Model Code appear somewhat in conflict. Under Utah's present Code of Professional Responsibility (patterned after the ABA Model Code), where grounds for mandatory withdrawal are absent (*See* DR 2-110(B)), a lawyer may not request permission of a tribunal to withdraw unless his client "by other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively" or unless one of the other enumerated grounds of permissive withdrawal is present. (DR 2-110(C)(1)(d)). The client's prolonged absence, for

example, because of a permanent departure from the state and the abandonment of his claim without informing his lawyer, certainly renders it more than "unreasonably difficult for the lawyer to carry out his employment effectively."

Given facts that suggest client absence of the kind just described or of some comparable sort, the permissive withdrawal provisions of the Utah Code of Professional Responsibility clearly indicate that a tribunal should permit withdrawal. But, DR 2-110(A), which speaks to withdrawal in general, would seem to qualify DR 2-110(B) and (C). DR 2-110(A) provides:

In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. (DR 2-110(A)(2)).

If there is an outstanding settlement offer or there is pending litigation, and the lawyer has no adequate explanation for his client's absence, a tribunal, whose permission for withdrawal is necessary, should satisfy itself that "reasonable steps to avoid foreseeable prejudice," including giving "due notice" to the client, have been undertaken. Even where a tribunal's permission is not required, a lawyer who desires to withdraw should take "reasonable steps" to safeguard the client's rights as set forth in DR 2-110(A)(2). If DR 2-110(A) is construed as requiring only reasonable efforts to notify the client of the attorney's decision to withdraw, rather than actual notice, sections (A) and (C) of DR 2-110 are brought into closer harmony.

With respect to some kinds of claims, the lawyer should not withdraw, but should continue to prosecute the absent client's claim to completion if such course is practicable, or keep the claim alive until the court acts to dismiss the action for lack of progress. If the court does not dismiss the claim as a result of the client's absence or for any other reason, the lawyer has the same obligation in relation to the client's funds remaining in the lawyer's trust account as he did prior to dismissal. (See DR 9-102).

There are other questions besides those pertaining to outstanding offers and pending litigation that might arise with respect to an absent client. As to the requirement and the difficulty of maintaining communication with one's client, and keeping the client informed, the Comment to Rule 1.4 of the ABA Model Rules of Professional Conduct states, "practical exigency may . . . require a lawyer to act for a client without prior consultation." (*See* Rule 1.4 and the entire Comment.) This provision, however, would seem

not to apply to settlement offers in the case of an absent client.

Rule Cited:

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