

Utah Ethics Opinions

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49. USB EAOB Opinion No. 49

Utah State Bar

Ethics Advisory Opinion No. 49

Approved August 25, 1978

Summary: When a client has disappeared and cannot be located, an attorney may withdraw as counsel in ongoing litigation and is not obligated to pursue an appeal.

Facts: The following two questions have been presented to the Ethics Committee:

1. May an attorney ethically withdraw as counsel for a client who has disappeared after the filing of pleadings in a court action, even though there is no known address to which the notice of withdrawal can effectively be mailed?

2. Is an attorney ethically obligated to file an appeal of a case on behalf of a client who has vanished and cannot be located, where the client probably has a meritorious appeal?

Opinion: There is surprisingly little comment on these two related problems in opinions issued by the American Bar Association. Canon 2, DR 2-110(A)(2), states that an attorney "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." Under this structure, an attorney in the described situation could never withdraw because of the impossibility of providing "due notice" to his client. However, subsection (C)(1)(d) of the same disciplinary rule, offers an exception by allowing withdrawal from representation when the client "by other conduct renders it unreasonably difficult to carry out his employment effectively."

It seems quite obvious that an attorney is not going to be able to effectively represent his client in trial court litigation without the presence of that client. In Informal Decision C-780 (1964), a client had refused to proceed further with litigation based on a contingency fee arrangement. The ABA Committee found that the attorney was justified in withdrawing because he could not "conduct the case effectively without his client's cooperation." An absent client is even less able than an unwilling one to provide effective assistance in preparing for and conducting

litigation. Henry S. Drinker in his volume *Legal Ethics* (1953), states that where a lawyer "finds the client has no case and the client has disappeared, he can move fully to withdraw, advising all concerned."

Thus, it is found by this Committee that an attorney may withdraw as counsel when his client has disappeared, so long as he follows any applicable court rules and makes all reasonable efforts to so notify his client.

The question of the existence of an obligation to file an appeal for a client who has disappeared is somewhat more difficult, although governed by the same rules as the first question. It would seem reasonable to require that the attorney make diligent efforts to locate his client to notify him of his right to appeal and of the possible merits of finding an appeal. It is hoped that the client was informed, prior to the rendering of a judgment, of such appeal rights. If the disappearance of the client is discovered near the time that the appeal right terminates, the attorney may be well advised to file a notice of appeal in order to preserve the right while the search for the client is conducted. Otherwise, once an intensive search for the client has been completed unsuccessfully, the attorney has no further obligation to pursue the appeal for an unwilling and nonparticipating client.

Rule Cited:

Canon 2