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## ETHICAL DUTIES OF LAWYER WHO CANNOT CONTACT CLIENT

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### ETHICAL DUTIES OF LAWYER WHO CANNOT CONTACT CLIENT

#### INTRODUCTION AND SCOPE

The problem of the “missing client” arises when the lawyer does not know where the client is or when the client is not responding to the lawyer’s communications. Many situations exist in which a lawyer retained to represent a client in a civil matter cannot initiate or maintain contact with that client. Perhaps the client retained the lawyer to pursue a lawsuit but then vanished during discovery or settlement discussions. A client may go missing between a lawyer’s initial meeting with the client and the expiration of the statute of limitations for the client’s claim, requiring the lawyer to consider whether to timely file a complaint to protect the client’s interests.

Alternatively, the lawyer might have been retained by the client’s insurance company to defend the client/insured in a lawsuit, but the lawyer cannot locate and communicate with the client in formulating a defense.<sup>1</sup> This typically occurs pursuant to insurance policies in which the insured gives the insurer the right and duty to defend the insured against liability claims that the policy may cover. However, the lawyer may have difficulty locating the insured after receiving the referral. This scenario has become more common in Colorado since the enactment of C.R.S. § 42-7-414, which requires a purchaser of a motor vehicle liability policy to designate an insurance carrier as the agent for service of process in the event that the insured cannot be located. Since this statute permits substitute service on the insurer for service on the insured, the fact that the defendant has gone missing does not prevent the lawsuit from moving forward. The “missing client” problem raise the following ethical questions: What happens if the lawyer is unable to make contact with a client in time to satisfy the deadline to file a

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<sup>1</sup> This opinion uses “client” to refer to the insured person whom the insurer retains the lawyer to defend. “[T]he insured is unquestionably a client to whom the attorney owes the ethical duties owed to any client. . . . [T]he carrier is not a client simply by retaining the attorney to defend its insured. . . .” CBA Op. 91, “Ethical Duties of Attorney Selected by Insurer to Represent Its Insured” (1993, Addendum 2013) (CBA Op. 91).

pleading or otherwise act? May the lawyer undertake the representation on behalf of a missing client, and if so, what actions may the lawyer take on the client's behalf? This opinion outlines the lawyer's ethical duties and limitations in these situations.

In considering these questions, the Colorado Bar Association Ethics Committee (Committee) recognizes that other jurisdictions have reached divergent conclusions on issues involving missing clients. *Compare* N.C. State Bar Formal Ethics Op. 1, "Representation of Insurance Carrier after Insured Disappears" (2010) (concluding that a lawyer retained by an automobile insurance carrier to defend its missing insured in a negligence action may not file pleadings or appear in court on the insured's behalf) *and* Utah State Bar Ethics Advisory Op. 04-01a (2004) (Utah Op. 04-01a) (opining that a lawyer representing an employer may not also represent a missing former employee because "the lawyer cannot receive any direction regarding the objectives of the representation" from the missing former employee and "the lawyer runs the risk of acting in contravention of the desires of the former employee."), *with* State Bar of Cal. Standing Comm. on Prof. Resp. and Conduct Formal Op. 1989-111, "What are the ethical responsibilities of an attorney representing the defendant in a civil action wherein a complaint has been filed and served on the defendant, an answer is now due and the client cannot be located?" (1989) (Cal. Op. 1989-111) (opining that "the attorney may file an answer to the complaint to avoid reasonably foreseeable prejudice" to a client who goes missing after a complaint is filed) *and* Ky. Bar Ass'n Ethics Op. E-433, "Ethical obligations of a lawyer who is unable to locate a client in a civil matter" (2012) (Ky. Op. E-433) (concluding that the lawyer may answer or file an "appropriate pleading to protect the client's interests" in certain "rare situations in which, prior to disappearing, the client expressly or impliedly authorized the filing of a claim or an answer, and provided the lawyer with sufficient information to do so"). The Committee believes that opinions allowing a lawyer to minimize prejudice to the client by taking actions to protect the client's interests represent the better approach. The Committee notes, however, that there may be circumstances when the lawyer cannot take such actions without implicating other ethical considerations or when acting without conferring with the client would prejudice the client. In all circumstances, a lawyer must balance various ethical factors, including the duties of diligence, communication, and confidentiality to the client; the duty of candor toward a tribunal; and the duty not to make a false statement of material fact to third parties.

This opinion does not address the limitations that may arise in the insurance defense context with regard to the lawyer's ability to inform the insurer of difficulties in locating the client. An insured client who fails to stay in contact with the retained lawyer may violate the cooperation clause typically found in liability insurance policies. *See* CBA Formal Op. 91, (discussing the lawyer's ability to inform the

insurer of information that may affect the client’s insurance coverage). This opinion does not address representation in criminal matters.

## **SYLLABUS**

When the lawyer’s client is missing from the outset of the engagement or has gone missing since the representation began, the lawyer must take reasonable steps to locate the client and, whenever possible, seek continuances of court deadlines while continuing efforts to contact the client. If the lawyer concludes that a lawyer-client relationship exists, the lawyer may ethically undertake the representation and take such action as may be necessary in order to prevent immediate prejudice to the client’s interest. If, however, the litigation continues and the client cannot be located despite a diligent search, the lawyer ultimately may be required to withdraw from the representation.

## **ANALYSIS**

### **I. Creation of the lawyer-client relationship**

Before undertaking the representation of a missing client, the lawyer must make a threshold determination of whether, in the lawyer’s professional judgment, a lawyer-client relationship exists. “[F]or purposes of determining the lawyer’s authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists . . . . Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.” Colorado Rules of Professional Conduct (Colo. RPC) Preamble, cmt. [17].

Although the existence of a lawyer-client relationship is a substantive legal issue, there are ethical considerations as well. First, the client must consent to the representation. “An attorney-client relationship is one of agency and arises only when the parties have given their consent, either express or implied, to its formation.” *Comm. on Prof’l Ethics and Grievances of Virgin Islands Bar Ass’n v. Johnson*, 447 F.2d 169, 174 (3d Cir. 1971). “The lawyer may not ethically represent a vanished former employee unless the lawyer has an existing attorney-client relationship or the former employee agreed to the representation at the company’s expense prior to vanishing . . . .” Utah Op. 04-01a. Second, if the insurance company will be paying the lawyer’s fees, the client must consent to this arrangement. “A lawyer shall not accept compensation for representing a client from one other than the client unless . . . the client gives informed consent . . . .” Colo. RPC 1.8(f).

In the insurance defense context, the matter of consent must be evaluated in light of the language of the insurance contract. “The formation of a relationship between an attorney and his or her client is based upon contract, which may be either express or implied by the conduct of the parties.” *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1311 (Colo. App. 1998). The terms of the contract may delegate to the insurer permission to form the relationship. “[T]he insurance company can, on behalf of the insured, formulate the requisite attorney-client relationship between the defense counsel and the insured until such time as the insured manifests such action by word or deed as to disavow the attorney-client relationship. The consent of the insured to the establishment of the attorney/client relationship in this manner is implied by the insurance policy which has language to the effect that ‘We will defend at our expense, with attorneys of our choice, any suit against the insured.’” Penn. Bar Ass’n Ethics Op. 97-123 (1997). Alternatively, the insured’s consent may be inferred from the decision to purchase the policy in the first instance. *See Hornberger v. Wendel*, 764 N.W. 2d 371, 376 (Minn. App. 2009) (holding that insurer’s retention of defense counsel pursuant to a liability insurance policy created a lawyer-client relationship as a matter of law); *Burke v. Lewis*, 122 P.3d 533, 542-43 (Utah 2005) (holding that “appointment of counsel” for a missing defendant “was the best means of effectuating a just process and a fair result and that [the missing client’s] consent to such representation could be fairly implied” from the circumstances and his purchase of a malpractice insurance policy). *See also* Colo. RPC 1.0, cmt. [7] (“In general, a lawyer may not assume consent from a client’s or other person’s silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.”).

A lawyer retained by an insurer should consider Colo. RPC 1.8(f), which permits a lawyer to accept payment of a legal fee from a source other than the client only if three requirements are met: (1) the client gives informed consent; (2) there is no interference with the lawyer’s independent judgment or the client-lawyer relationship; and (3) lawyer-client confidentiality is preserved. These requirements are individually defined in Colo. RPC 1.0(e) (informed consent), Colo. RPC 5.4(c) (independent judgment), and Colo. RPC 1.6 (confidentiality). As with the creation of the lawyer-client relationship, in the insurance defense context the absent client’s informed consent to third-party payment may be inferred from the terms of the insurance contract.

## **II. The lawyer’s ethical duties upon commencement of the representation**

**A. Cases in which the lawyer actually communicates with the client at the outset of the representation**

Diligence at the outset of a representation can avoid many “missing client” problems. “An attorney should be encouraged to treat most clients as though they are likely to disappear because doing so will significantly reduce the chances of it happening.” Allison Elizabeth Williams, *Missing Clients: What to Do When Your Client Has Vanished*, 28 J. LEGAL PROF. 247, 254 (2003-2004). When possible at the outset of a lawyer-client relationship, a lawyer should obtain information from the client that would enable the lawyer to make reasonable efforts to locate the client throughout the course of the representation. This could include obtaining multiple telephone numbers, physical addresses, and e-mail addresses for the client and obtaining contact information for other persons who may know the client’s whereabouts. A lawyer should direct a client to inform the lawyer if the client’s contact information changes.

When appropriate, a lawyer should advise the client at the outset of the representation that it is important for the lawyer always to be able to locate the client during the course of representation. Subject to Colo. RPC 1.2(c), the lawyer and client may agree to a course of action if the lawyer cannot locate the client, for instance, setting out the methods the lawyer will use to attempt to contact the client or actions the lawyer will take if the lawyer cannot locate the client. *See* CBA Formal Op. 95, “Funds of Missing Clients” (1993) (CBA Op. 95) (authorizing use of client funds to locate missing client). The client and lawyer may agree that if the client does not respond to the lawyer’s efforts to locate the client, the lawyer may terminate the representation. Colo. RPC 1.16(b)(5). The client also may authorize the lawyer to take some action on the client’s behalf, such as filing a complaint before a statute of limitations expires. As stated in comment [3] to Rule 1.2:

At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

Similarly, the lawyer may ask the client for advance authority to settle a claim within a certain range. *See* Ky. Op. E-433 (“There may be rare cases where, prior to the client’s disappearance, the client set specific settlement parameters and authorized the lawyer to settle on his behalf. If the lawyer

has clear authority, he or she may be able to act for the client, assuming there is no foreseeable prejudice to the client. . . .”); Williams, 28 J. LEGAL PROF. at 250 (stating that “when a client is missing, the best situation is for the attorney to have authority to consent to a settlement favorable to the missing client’s interests”); *but see* State Bar of Ariz. Ethics Op. 06-07, “Communication; Settlement Authority; Fee Agreements; Conflict of Interest” (2006) (opining that a lawyer may not use a fee agreement giving the lawyer unfettered discretion to unilaterally settle cases).

## **B. Cases in which the representation is initiated by contract without the client’s actual involvement**

When a lawyer-client relationship exists, but the lawyer has not previously received direct instruction from the client and has not received direction from the client on how to act, for instance, in the insurance defense context, then immediately upon receiving the assignment the lawyer should exercise reasonable efforts to locate the client. This may include, as appropriate, hiring a professional investigator, searching public records, and/or contacting family or friends of the client. Alaska Bar Ass’n Ethics Op. 2011-4, “Duties of an attorney in a criminal appeal when the client cannot be contacted” (2011) (Alaska Op. 2011-4) (“A ‘reasonable inquiry’ may consist of, but is not limited to, attempts to contact the client by telephone, letter to client’s last known address, personal visit to the client’s last known address, electronic mail inquiry, internet search, post office search, registry of motor vehicle search, or newspaper publication.”). “In all cases the attorney must expend a reasonable amount of time and funds so as to insure that the attorney makes a diligent effort to locate the client. Since each case is unique, the attorney should evaluate what methods of search would be reasonable to locate the client.” Cal. Op. 1989-111. “Even without such a provision in a retainer agreement, a lawyer may expend a reasonable amount of the client’s unexpended funds in order to locate the client.” CBA Op. 95.

Even if the client cannot be located, the lawyer still owes the client duties of diligence, loyalty, and communication. “A lawyer shall act with reasonable diligence and promptness in representing a client.” Colo. RPC 1.3. “Loyalty [is an] essential element[] in the lawyer’s relationship to a client.” Colo. RPC 1.7, cmt [1]. When someone other than the client retained the lawyer, the lawyer represents the client, not the third party. CBA Op. 91 (“This Committee has concluded that in the context of this tri-partite relationship, the better rule is that the lawyer’s client is the insured and not the carrier.”). The lawyer must protect the interests of the client, even though the insurer may be exercising control over,

and paying for, the defense. “The attorney’s ethical duty is to assure that the interests of the insured are protected, while at the same time fulfilling the insured’s contractual obligations to the carrier against a backdrop where the insurance company, by virtue of financing the defense, may effectively control the result and may have its own interests at stake.” CBA Op. 91.

A lawyer also has a duty to communicate with the client. “Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.” Colo. RPC 1.4, cmt [1]. However, “a standard of reasonableness under the circumstances determines the appropriate measure of consultation.” Restatement (3d) Law Governing Lawyers (Rest.) § 20, cmt. c (2000); *see also Burke*, 533 P.3d at 540 (permitting representation of a missing client and finding that “just because representation of [the missing client] will not neatly accord with the general assumptions underlying the communication requirements contained in the rules of professional conduct, it does not necessarily follow that the rules prohibit the representation entirely”). The Committee recognizes that in situations where the lawyer cannot locate the client, the lawyer’s duties of diligence and communication may be in tension. On the one hand, if the lawyer takes action without first communicating with the client, the client may be deprived of the opportunity to direct the objectives of the representation. On the other hand, if the lawyer refrains from taking action until the client can be located, the client may suffer prejudice from, for example, missing a statute of limitations or having a default judgment entered.

The Committee concludes that this tension should be resolved in favor of protecting the absent client’s interests. This conclusion is supported by the Committee’s previous statement regarding a lawyer’s duties representing clients in dependency and neglect proceedings: “An attorney may not decline to advocate on behalf of the client simply because the client does not attend court hearings or provide direction to the attorney. An attorney must still exercise professional judgment as to how to advocate for the client’s best interests.” CBA Formal Ethics Op. 114, “Responsibilities of Respondent Parents’ Attorneys in Dependency and Neglect Proceedings” (2006, modified 2010). Although that opinion addressed a different area of practice, its conclusion offers guidance with respect to a lawyer’s duty to take action to protect the client who is not available to consult about decisions.

### **III. What action may the lawyer take?**

In determining the extent of actions a lawyer may take on behalf of an absent client, the primary consideration should be avoiding prejudice to the client to the extent feasible. Cal. Op. 1989-111. This

may include filing pleadings or briefs to preserve a client's rights or delaying proceedings to allow the lawyer more time to locate the client. Alaska Op. 2004-3, "Responsibilities of an Attorney When a Client Cannot Be Contacted" (2004) (Alaska Op. 2004-3) (a lawyer may file a complaint before a statute of limitations expires "if she believes that failing to file would materially and adversely affect the client's interests"); Rest. § 134, cmt. b ("In an emergency situation in which the lawyer must take action to protect the interests of the client, as in filing an answer to avoid default, the lawyer may take such action even if a conflict appears to exist, but must also promptly take action to address the conflict."). Whether a pleading can be prepared will depend on the facts and circumstances of each case. The lawyer must consider whether the client has authorized the action and whether the lawyer has enough information to act. See Ky. Op. E-433 (lawyer may provide "temporary protection" for the client by answering or filing other pleadings if the lawyer has the express or implied authorization and sufficient information).

A lawyer may take action on behalf of a client as is impliedly authorized to carry out the representation. Colo. RPC 1.2(a). If a lawyer reasonably believes the client has authorized the lawyer to take some action and is relying on the lawyer to do so, the lawyer may act on behalf of the client. Alaska Op. 2004-3. The client's prior communications with the lawyer may provide authorization to take actions like filing pleadings or briefs. Alaska Op. 2011-4 (lawyer must file notice of appeal and may file briefs when client previously directed filing of notice of appeal). In some circumstances, when a client has previously directed a lawyer to take action and the lawyer cannot communicate with the client following this direction, the lawyer must take the directed action. Colo. RPC 1.2, cmt [3].

Consent may be determined from circumstances other than the client's communications. For instance, when an insurance policy expressly calls for the insurer to provide a defense, the client has impliedly consented to the insurance company's payment of the lawyer's fees and the lawyer's preparation of a defense simply by purchasing the policy. Colo. RPC 1.0, cmt. [7]; Colo. RPC 1.4, cmt. [2]. Rest. § 134, cmt. d ("Informed client consent may be effective with respect to many forms of direction, [including] informed consent to general direction of the lawyer by another, such as an insurer or indemnitor on whom the client has contractually conferred the power of direction.").

The lawyer may have enough information to prepare a pleading from prior consultation with the client or may obtain information from a third party, for instance, the client's insurance company, concerning the facts of the case. However, if there is not enough information available, the lawyer must

consider whether there is an adequate basis for preparing the pleading. In some circumstances, the lawyer will not have enough information to act on the client's behalf. Colo. RPC 3.1 ("What is required of lawyers ... is that they inform themselves about the facts of their clients' cases ... and determine that they can make good faith arguments in support of their clients' positions."); *see also* C.R.C.P. 11(a). The lawyer also must be careful to avoid misleading the court with false statements of fact regarding the scope of the lawyer's investigation or the client's participation in preparing the pleading. Colo. RPC 3.3. The lawyer representing an absent defendant must consider whether the client has compulsory counterclaims and, if so, must take appropriate action not to waive such counterclaims. This is pursuant to the principle that even if the lawyer's retention is limited to defending claims against the client and not to prosecute counterclaims, "[t]o avoid loss of a counterclaim, insurance defense counsel should inform the insured about potential counterclaims to the extent necessary so the insured can decide whether to seek independent counsel." CBA Op. 91.

In other circumstances, the lawyer may seek to postpone proceedings to allow additional time for the lawyer to locate the client. For example, Colo. RPC 1.2(a) mandates that "[a] lawyer shall abide by a client's decision whether to settle a matter." If mediation is scheduled but the lawyer cannot locate a client prior to mediation and the client has not authorized the lawyer to settle the case, the lawyer should postpone the mediation until the lawyer can locate the client. *See also* Williams, 28 J. LEGAL PROF. at 254 (noting that a lawyer may settle a case on behalf of a client only if the client has previously authorized the lawyer to settle).

Just as an insurance policy may provide the client's implied consent to the creation of a lawyer-client relationship, the policy may give the insurer the right to exercise the client's control of settlement of claims covered by the insurance. The lawyer should consider carefully the extent to which the insurance contract gives the insurance company authority to settle. If (1) the insurance contract clearly gives the insurer the right to settle claims without the consent of the insured, (2) the lawyer has made reasonable efforts to contact the client regarding the settlement proposal, (3) the proposal does not impose obligations on the client to the claimant beyond what the insurer is paying under the settlement, (4) the lawyer determines in the exercise of independent professional judgment that the settlement is appropriate for the client, and (5) the lawyer has not received express instructions to the contrary from the insured client, then the lawyer may settle a claim if such action is warranted. *Mitchum v. Hudgens*, 533 So.2d 194, 202 (Ala. 1988) (where an insurance policy gives the insurer the exclusive right to settle, a lawyer may follow the insurer's settlement instructions without prior approval from the client). In evaluating a settlement proposal covered by

insurance, the lawyer also should consider whether the settlement would cause negative consequences for the client, such as the reporting of the settlement to a professional licensing authority. Authority to settle claims against an insured client would not, by itself, authorize the lawyer to agree to a release or dismissal with prejudice of counterclaims that the client might have against the claiming party. Outside the context of settling a claim covered by insurance, the Committee is unaware of circumstances in which a lawyer could enter into a settlement agreement without the client's express authorization. Ky. Op. E-433 (stating it is very unlikely that a lawyer could ever negotiate a settlement on behalf of a missing client); Colo. RPC 1.2(a); *see also* Or. State Bar Ass'n, Formal Ethics Op. 2005-33, "Declining or Terminating Representation: Withdrawal When Client Not Found" (2005) (stating that a lawyer may not accept even a favorable settlement proposal for her client absent the client's consent).<sup>2</sup>

If the lawyer cannot locate a client prior to the deadline to respond to interrogatories served under C.R.C.P. 34(a), the lawyer should request an extension of time to permit the lawyer more time to locate the client. As with filing a complaint or answer without conferring with the client, the lawyer should be mindful of Colo. RPC 3.3 and Colo. RPC 4.1 and not make any false statements of material fact to a tribunal or third party regarding the client's availability or participation in the preparation of the pleading.

In preparing an answer for a missing client in the insurance defense context, the lawyer should be attentive to issues in the case relating to insurance coverage. As the Committee stated in Opinion 91, "Defense counsel must be alert to ethical duties which prohibit actions by the attorney which favor the non-coverage interests of the carrier over the interests of the insured to establish coverage . . . . The existence of a coverage question should not be allowed to interfere with the lawyer's duty to exercise independent professional judgment on behalf of the insured."

The lawyer must determine whether the lawyer's decision to undertake representation of the absent client might otherwise be detrimental to the client's interests. The lawyer should not enter an appearance for a missing client (even if the client or the insurance carrier previously authorized such

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<sup>2</sup> The Colorado Supreme Court has not addressed the issue of the client's contractual delegation of settlement decision-making authority to the insurer. However, in older cases, the Court addressed the client's express settlement authority. *Cross v. Dist. Ct.*, 643 P.2d 39 (Colo. 1982) (holding "an attorney does not have the authority to compromise and settle the claim of his client without the knowledge or consent of his client"); *Radosevich v. Pegues*, 292 P.2d 741 (Colo. 1956) (same); *Lewis v. Vache*, 20 P.2d 554 (Colo. 1933) (same); *Hallack v. Loft*, 34 P. 568 (Colo. 1893) (same).

entry) if to do so would be prejudicial to the client or would compromise the defense of the case:

Because the lawyer cannot receive any direction regarding the objectives of the representation, the lawyer runs the risk of acting in contravention to the desires of the [absent client] . . . . [I]f the lawyer took action that subjected the [absent client] to the jurisdiction of the court, then the [absent client] could be substantively prejudiced by lawyer's actions.

Utah Op. 04-01a.

### **III. Limitations on the lawyer's representation**

Because consent is predicate for many aspects of the lawyer-client relationship, the lawyer must avoid taking action that fails to fully take into account the missing client's right to give—or to deny—necessary consents. For example, an absent client is unable to provide consent to waive a concurrent conflict of interest. Colo. RPC 1.7. Therefore, in the insurance defense context, the lawyer should carefully review any reservation of rights letter before accepting the referral. Similarly, the lawyer should decline the joint defense of an employer and an absent former employee because the former employee cannot consent to the potential conflict of interest between the two clients. *See* Colo. RPC 1.7(b)(4) (requiring “informed consent, confirmed in writing” of a concurrent conflict of interest); Colo. RPC 1.7, cmt. [18] (“When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved,”); *see also* Utah Op. 04-01a (advising against joint representation of employer and absent former employee because “the attorney cannot make the explanation required by the rule, cannot obtain the [absent] client's consent to representation and would therefore violate Rule 1.7”).

After acting on behalf of the client, the lawyer should consider whether continued representation of the absent client is possible. Withdrawal or terminating the lawyer-client relationship may be required if the client cannot be located within a relatively short period of time. *People v. Silvola*, 915 P.2d 1281, 1284-85 (Colo. 1996) (sanctioning lawyer for purporting to represent absent client for 19 months). Other jurisdictions are in agreement:

[W]hat are the ethical obligations of a lawyer who, for reasons beyond his control, is

unable to communicate with or secure instructions from his client in a pending action? His duty would appear to be to protect the interests of his client to the extent that he can reasonably do so and, when the lawyer cannot reasonably carry out his employment effectively, he should relieve himself from those duties by seeking withdrawal . . . taking care to obtain permission of the court where needed . . . and to avoid foreseeable prejudice to the rights of the client.

State Bar of Ariz. Ethics Op. 80-11 (1980). *Accord* Cal. Op. 1989-111 (“Under the facts presented, the attorney is severely limited in the ability to act on behalf of the client without the client’s express authority. The attorney has a sufficient basis to withdraw . . . .”); Ky. Op. E-433 (“In most civil matters, the lawyer will have to withdraw, because the lawyer will likely be unable to meet the ethical obligations imposed by the Rules of Professional Conduct without the client’s participation.”).

As with the decision to act on behalf of an absent client, if the lawyer continues to be unable to contact the client and therefore has grounds to withdraw, the lawyer’s primary consideration in deciding when to withdraw should be minimizing the potential prejudice to the client. Generally speaking, the lawyer should stay in the case as long as it is feasible to do so. The need to obtain information from the client should be balanced against preventing prejudice to the client if possible. When withdrawing from representation due to a client’s unavailability or unresponsiveness, a lawyer “shall take steps to the extent reasonably practicable to protect a client’s interests.” Colo. RPC 1.16(d). When a lawyer has reason to believe that the client is receiving communications from the lawyer but not responding to them, the lawyer must inform the client of the lawyer’s intent to withdraw from the representation prior to withdrawing. The lawyer should pursue means similar to those previously used to locate the client to notify the client of the withdrawal and should “take care to document all steps taken to give notice to the client.” Cal. Op. 1989-111. The lawyer should be mindful of the fact that the court is under no obligation to grant a request for withdrawal.

#### **IV. Disclosure that the client is unavailable**

Ordinarily the lawyer’s pleading should not suggest that the absent client played a role in its preparation. This suggestion could violate Colo. RPC 3.3.

In discussing the propriety of the lawyer’s disclosure of the unavailability of the client to opposing counsel and the court, a California opinion states the factors to be considered:

The attorney has a duty to maintain inviolate the confidence of his client and at every peril to himself to preserve the secrets of his client. The attorney also has a duty not to mislead the judge or a judicial officer by an artifice or false statement of fact or law. The concealment of material information is as misleading as an overtly false statement. Disclosure of the inability to locate the client could be detrimental to the client's interests.

Clearly, the attorney is under no obligation to inform opposing counsel that the client cannot be located. However, the attorney may reveal such information as may be necessary to formulate the basis for a motion to withdraw.

Cal. Op. 1989-111 (citations omitted).

There may be circumstances where disclosing the client's absence will be detrimental to the client's interests. *Id.* However, if the desire to preserve the confidence of "information relating to the representation" conflicts with the lawyer's duty of candor to the court, then the lawyer must truthfully inform the court of the client's absence. Colo. RPC 1.6; *see also* CBA Op. 123. However, the lawyer should take care to reveal such information only to the extent reasonably necessary to comply with Colo. RPC 3.3 or as otherwise permitted by Colo. RPC 1.6. Colo. RPC 3.3, cmt. [15].

## **CONCLUSION**

Many missing client problems can be avoided through careful client intake procedures, including obtaining multiple means of contacting the client and obtaining the client's informed consent to methods the lawyer will employ to handle the case should the client become unavailable. Obtaining permission to file pleadings or settle the case within a predetermined range can resolve future problems. A lawyer who has formed a lawyer-client relationship with an absent client may file pleadings on the client's behalf to avoid the expiration of a statute of limitations or to prevent entry of a default judgment against the client. However, any such pleadings must not imply that the client actively participated in their preparation. If the lawyer conducts a diligent and well-documented search but remains unable to locate an absent client, and has reached the point that further representation is impossible without input from the client, the lawyer should withdraw. In preparing the withdrawal, the lawyer must again be diligent in attempting to contact the client to notify the client of the withdrawal, and may reveal to the court and

opposing counsel the minimum information necessary to support withdrawal. Even in the course of withdrawing, the lawyer must endeavor not to prejudice the interests of the absent client.