



**New York State Bar Association
Committee on Professional Ethics**

Opinion No. 1163 (03/11/2019)

Topic: Missing client: Lawyer's Duty When Unable To Locate Client

Digest: A lawyer represented a defendant who later defaulted in making payments under a settlement agreement, who cannot be now located by the lawyer, and who is facing a motion before a court based on the failure to make such payments, may inform the court that the lawyer no longer represents the defendant if the prior representation ended and the prior action before the court had ended. If the representation of the client had not concluded or the prior matter before the court had not been closed, the lawyer will have to seek permission from the court to withdraw from the representation, after using reasonable efforts to locate the client.

Rules: Rules 1.6, 1.16

FACTS

1. The inquirer, who now practices primarily in Colorado, previously focused a law practice in New York, where the inquirer remains admitted and still maintains an office. When practicing mainly in New York, the inquirer frequently represented defendants in breach of contract and debt cases. In the event of a settlement of one of those cases, the settlement agreement would often provide for the clients to make payments over time. On occasion, the parties would file a stipulation of discontinuance upon execution of the settlement agreement; on other occasions, the settlement agreement contemplated that a stipulation of discontinuance would be filed upon the final payment by the inquiring lawyer's client. In each event, on execution of the settlement agreement, the inquiring lawyer would provide the client with the payment instructions in writing and inform the client that the representation was concluded.

2. Recently, the inquiring lawyer received an email from plaintiff's counsel in a matter in which the inquirer represented defendant. Plaintiff's lawyer asserts that defendant has defaulted on making payments under the settlement agreement and, consequently, plans to file a motion for summary judgment. Upon hearing from plaintiff's counsel, the inquiring lawyer attempted to contact defendant by email and telephone but has been unable to reach the person. Although the inquiring lawyer believes that the representation of defendant concluded when the matter was settled, the inquirer is concerned that the court may take a different view.

QUESTIONS

3. The inquirer asks two questions:

- a. May the inquiring lawyer tell plaintiff's counsel that the inquirer no longer represents defendant?

- b. If plaintiff's counsel files a motion in court, does the inquiring lawyer have to respond to the motion, or may the inquirer instead seek to be relieved as attorney for defendant?

OPINION

4. The answer to the first question is yes: No ethical rule prohibits the inquiring lawyer from informing plaintiff's lawyer that, on the inquirer's view, the inquirer no longer represents defendant. This, however, does not solve the inquirer's difficulty, because either plaintiff's lawyer may find the answer unacceptable or, more problematic, a court may. If plaintiff's lawyer files a summary judgment motion with the court, the inquiring lawyer will still need to decide whether a duty exists to respond to the motion on behalf of defendant.

5. That the inquiring lawyer sent defendant a writing terminating the representation is of some consequence: We have noted that, in some circumstances, a termination letter may be dispositive on the issue whether the attorney-client relationship has ended. N.Y. State 1008 (2014). We cautioned there, however, that whether the attorney-client relationship has ended "depends in part on questions of law beyond our jurisdiction," and so, in that opinion, we did not opine on whether the lawyer's representation of the client had concluded. *Id.* ¶¶ 9-10; *see* New York Rules of Professional Conduct (the "Rules"), Preamble ¶ 9 ("principles of substantive law external to these Rules determine whether a client-lawyer relationship exists").

6. The Rules offer some guidance on how the inquirer ought to proceed, the outcome of which depends on the terms of the settlement agreement and the import of those terms for the status of the matter in court. If both the representation of the client and the matter before the court have concluded, and the plaintiff's lawyer then takes action concerning the unpaid settlement amount against the former client, then the lawyer should inform the court that the lawyer no longer represents the defendant and is not otherwise obligated to respond on behalf of the defendant.

7. If, however, the representation has not concluded, or the matter before the court remains open, the lawyer must comply with Rule 1.16, which governs withdrawal from representation of a client. Rule 1.16(c) outlines when a lawyer may withdraw from a representation, including, in Rule 1.16(c)(7), when "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively," or in Rule 1.16(c)(12), when "the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of good cause for withdrawal." In most representations, "effective representation requires meaningful communication between a lawyer and a client." N.Y. State 1144 ¶ 10 (2018). In our view, "good cause" exists for the lawyer to seek to withdraw from representation if the lawyer cannot locate the client after taking reasonable steps to do so. *See, e.g.*, N.Y. State 787 (2005) (discussing reasonable steps a lawyer should consider when attempting to locate a missing client).

8. Rule 1.16(d) qualifies permissive withdrawal when a matter is pending before a tribunal the rules of which require the tribunal's permission to withdraw. In that circumstance, the lawyer must seek the tribunal's permission and, if the tribunal declines, "a lawyer shall continue representation notwithstanding good cause for terminating the representation."

9. In applying for withdrawal, a lawyer remains bound by Rule 1.6 governing the nondisclosure of a client's confidential information, which includes information learned during

the course of the representation that is subject to the attorney-client privilege, is “likely to be embarrassing or detrimental to the client if disclosed,” or “that the client has requested be kept confidential.” Privilege issues are questions of law beyond our purview, but we recognize that a communication is a necessary predicate to its assertion, as is a request for confidentiality. There being no communication here, the inquirer must resolve whether disclosure of the client’s unavailability would likely “be embarrassing or detrimental to the client if disclosed.” In N.Y. State 1057 (2015), we discussed disclosure in the context of a motion to withdraw as counsel. There, we noted that a lawyer may always advise a court that “professional considerations require termination of the representation.” *Id.* ¶ 12; Rule 1.16, Cmt. [3]. If the court insists on more, then Rule 1.6(b)(6) allows a lawyer to disclose confidential information if ordered to do so by a court.

CONCLUSION

9. When unable to locate a client once represented in a settled action, a lawyer’s duty to respond to a claimed default under the settlement agreement depends on whether the representation and action are concluded or not. If the representation and matter are over, the lawyer may inform the court that the lawyer no longer represents the client. If instead the representation of the client had not concluded or the prior matter before the court had not been closed, then, following reasonable efforts to locate the client, the lawyer may seek permission from the court to withdraw from the representation, sensitive to the lawyer’s ongoing duty to maintain a client’s confidential information.

(15-18)