ALASKA BAR ASSOCIATION
ETHICS OPINION 2004-3

Responsibilities of an Attorney When a Client Cannot be Contacted.

Question Presented

The Committee has been asked whether a lawyer may file a lawsuit where the statute of limitations is expiring and the client cannot be contacted. The facts presented are these:

A cruise ship passenger was injured in a fall from the gangway to the Juneau dock. A year after the injury, and a year before the statute of limitations expired, the passenger telephoned an Alaska personal injury lawyer and said he wanted to file a lawsuit. The lawyer interviewed the passenger, and told him that she would need to conduct an investigation before deciding whether to take the case.

The lawyer pursued the investigation and decided that the passenger has a colorable claim. Certain facts indicate comparative negligence, but if liability is proved damages will be substantial. The lawyer was not in contact with the passenger during her investigation. Shortly before the statute of limitations ran, the lawyer sent the passenger a letter with questions about the problematic facts together with a proposed contingent fee agreement for signature. The lawyer has tried to reach the passenger by phone several times without success.

The statute of limitations is about to expire. The lawyer is reluctant to file suit without the client's authorization and a signed engagement letter in the file, and is concerned that she may not do so under the ethical rules. May the lawyer file a lawsuit under these circumstances?

Conclusion

The Committee concludes that that the lawyer may file the complaint if the lawyer reasonably believes that the passenger has authorized her to file suit and is relying on her to do so, or if she believes that failing to file would materially and adversely affect the client's interests. See, Alaska Rules of Professional Conduct 1.3 and 1.16.

Analysis

There are several closely interrelated ethical issues that led to the lawyer's dilemma.

1. No Written Agreement. To start with, there is a lack of certainty about the scope of representation. It is not clear whether the client understands the lawyer limited her activities to an initial investigation. The client may believe the lawyer is going to file suit if she decides the case has merit, and may be relying on her to do so. The lawyer, on the other hand, seems uncertain whether an attorney-client relationship has been established at all. There is no written engagement agreement or letter describing the parties' understanding.

Alaska Rule of Professional Conduct 1.2(c) allows a lawyer to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation."[1] The Committee believes that, when a lawyer agrees to investigate a case without charge, but has not agreed to take it, the lawyer has undertaken a limited representation. Although this type of limited representation is possible without a signed fee agreement,[2] the Committee's view is that the better practice would have been for the lawyer to have memorialized what she agreed to do in a letter. [3]

2. Diligence. The next issue relates to Alaska Rule of Professional Conduct 1.3 ("Diligence"), which states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client," and to Rule 1.4

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[1] Alaska Rule of Professional Conduct 1.2(c), am. SCO 1544 (eff. 10/15/04).

[2] Alaska Rule of Professional Conduct 1.5 requires a written fee agreement where the fee is expected to exceed $500 or where the fee is contingent on the outcome of the matter.

[3] The most exemplary practice would have been a limited representation agreement signed by both parties. The Comment to Alaska RPC 1.16 notes, "A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concern[ing] fees or court costs or an agreement limiting the objectives of the representation." The Committee observes that many Alaska engagement agreements require the client to remain in contact with the lawyer as an express condition of continued representation. A client's unexplained disappearance or failure to communicate as agreed will then provide a basis for withdrawal. A limited representation agreement could have such a provision, which under these circumstances would have been prudent.

("Communication"), which provides that "[a] lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client's behalf …."

In this instance, the lawyer apparently did not finish her investigation until the statute of limitations was about to expire. There may be circumstances beyond her control that caused the investigation to take this amount of time. The Committee recognizes that even the most diligent lawyer can encounter difficulties and delays. Nonetheless, completion of the investigation just before the statute expires indicates a potential lack of "reasonable diligence and promptness."

Then, at that very late date, the lawyer requested additional information about the problematic facts and presented a contingency fee agreement for signature. Contacting the client when the statute of limitations is about to expire is not conducive to a reasoned discussion of the costs and benefits of any lawsuit, especially when it appears there are factual issues that might dissuade the client from proceeding. The Alaska Comment to Rule 1.4 notes that the "client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so." Communication as the investigation proceeded would have provided the client with a better opportunity "to participate intelligently in decisions concerning the objectives of the representation," and also might have provided the lawyer with timely information about whether the client still wanted to file a lawsuit.

3. Protection of the client's interest. Given these circumstances, the lawyer is faced with either filing a suit without the express consent of the client or abandoning the matter. Protection of the client's interests is the paramount concern. Either course is potentially to the client's detriment. If the suit is filed, the client may be exposed to defense fees and costs, and may have personal medical information disclosed in the public record. If the suit is abandoned, the claim will be barred.

The scope of representation issue remains central. Comment to Rule 1.3 notes that "[u]nless the [attorney-client] relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter is resolved." The scope of the "matters undertaken for [the] client" here is poorly defined. The Committee cannot say with certainty that the lawyer has "carried through to completion all

matters undertaken" for this client, nor that the client has acted in such a manner as to justify termination of representation.[4]

The lawyer needs to carefully consider her dealings with the client. If the lawyer reasonably believes that the passenger has authorized her to file suit and is relying on her to do so, nothing in the ethical rules to bars her from proceeding. Indeed, she may be obligated to file by Rule 1.3. On the other hand, if, after considering all the facts and the factors listed in Rule 1.16(b), the lawyer concludes that withdrawal is appropriate, she may terminate the representation.[5]

The second route does not completely resolve her dilemma. Termination under Rule 1.16 is permitted only if it "can be accomplished without material adverse effect on the interests of the client …" When terminating representation, the lawyer is obligated by Rule 1.16(d) to "take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client…." The Comment to Rule 1.16 emphasizes that "[e]ven if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client."

The lawyer may conclude that terminating representation is appropriate, but that failing to file would "materially and adversely affect the client's interests" within the meaning of Rule 1.16(b). If those are her conclusions, the lawyer may ethically file a complaint and then proceed to withdraw as counsel of record in accordance with the rules of court. The complaint should be drafted so as not to unnecessarily disclose any confidential information otherwise protected by Rule 1.6.

The decision as to how to proceed must be made by the lawyer. In future matters, the Committee recommends that the lawyer memorialize her

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[4] Rule 1.16(b)(5) provides that a lawyer need not continue representation when "the representation has been rendered unreasonably difficult by the client." At least one other Bar Ethics Committee relied on this rule to conclude that a lawyer hired on a contingency fee basis in a personal injury matter who is unable to locate her client, despite diligent efforts to do so, can assume that the representation has been terminated and is not obligated to file suit on the client's behalf. South Carolina Ethics Op. 98-07; http://www.scbar.org/opinions/9807.htm. That opinion is distinguishable, since in this instance there is no signed fee agreement, and it is an open question whether "the representation has been rendered unreasonably difficult by the client" or by the lawyer herself.

[5] Withdrawal under Rule 1.16(b)(4), (5) or (6) is potentially appropriate in these circumstances.

agreements with clients in writing, that she make every effort to complete pre-complaint investigations promptly, and that she communicate with her clients as regularly and diligently as circumstances warrant.

Approved by the Alaska Bar Association Ethics Committee on May 6, 2004.

Adopted by the Board of Governors on September 13, 2004.

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