

Ethics/Professional Responsibility-When to Withdraw

What do you do if your client doesn't come to a hearing? Many hearings in a row? Can't be found? As with most questions involving legal ethics, there are as many answers as there are scenarios. This paper is intended to give you the resources that you need to analyze your client's situation and make the best decision(s) possible.

I. Be familiar with available resources:

1. American Bar Association's Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases <http://www.abanet.org/child/clp/ParentStds.pdf>

Text of Rule 16 attached.

2. NC Rules of Professional Conduct; <http://www.ncbar.com/rules/rpcsearch.asp>

Text of Rule 1.16 attached. Declining or Terminating Representation

3. NC Formal Ethics Opinions; <http://www.ncbar.com/ethics/>

Text of 2003 Formal Ethics Opinion 16 July 16, 2004 attached. Representation of Absent Respondent in Dependency Proceeding

Text of RPC 223 January 12, 1996 attached. Responsibility to Client Who Has Disappeared

4. NC Case law; <http://www.aoc.state.nc.us/www/public/html/opinions.htm>

Dunkley v. Shoemate, 350 N.C. 573, 551 S.E.2d 442 (1999)

5. The North Carolina State Bar, (919) 828-4620

Suzanne Lever

Nichole McLaughlin

Alice Neece Mine, Ethics Counsel

Tom Lunsford

slever@ncbar.gov

nmclaughlin@ncbar.gov

amine@ncbar.gov

tlunsford@ncbar.gov

Wendy C. Sotolongo
Parent Representation Coordinator
Office of Indigent Services
123 West Main Street, Suite 500
Durham, NC 27701
919-560-3334 x 273
919-560-3288 fax
Wendy.C.Sotolongo@nccourts.org

American Bar Association's Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases

16. Take diligent steps to locate and communicate with a missing parent and decide representation strategies based on that communication.

Action: Upon accepting an appointment, the parent's attorney should communicate to the client the importance of staying in contact with the attorney. While the attorney must communicate regularly with the client, and be informed of the client's wishes before a hearing, the client also must keep in contact with the attorney. At the beginning of the representation, the attorney should tell the client how to contact the attorney, and discuss the importance of the client keeping the attorney informed of changes in address, phone numbers, and the client's current whereabouts.

The parent's attorney should attempt to locate and communicate with missing parents to formulate what positions the attorney should take at hearings, and to understand what information the client wishes the attorney to share with the child welfare agency and the court. If, after diligent steps, the attorney is unable to communicate with the client, the attorney should assess whether the client's interests are better served by advocating for the client's last clearly articulated position, or declining to participate in further court proceedings, and should act accordingly. After a prolonged period without contact with the client, the attorney should consider withdrawing from representation.

Commentary:

Diligent Steps to Locate: To represent a client adequately, the attorney must know what the client wishes. It is, therefore, important for parents' attorneys to take diligent steps to locate missing clients. Diligent steps can include speaking with the client's family, the caseworker, the foster care provider and other service providers. It should include contacting the State Department of Corrections, Social Security Administration, and Child Support Office, and sending letters by regular and certified mail to the client's last known address. The attorney should also visit the client's last known address and asking anyone who lives there for information about the client's whereabouts. Additionally, the attorney should leave business cards with contact information with anyone who might have contact with the client as long as this does not compromise confidentiality.

Unsuccessful Efforts to Locate: If the attorney is unable to find and communicate with the client after initial consultation, the attorney should assess what action would best serve the client's interests. This decision must be made on a case-by-case basis. In some cases, the attorney may decide to take a position consistent with the client's last clearly articulated position. In other cases the client's interests may be better served by the attorney declining to participate in the court proceedings in the absence of the client because that may better protect the client's right to vacate orders made in the client's absence.

NC Rules of Professional Conduct.

Client-Lawyer Relationship

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of law or the Rules of Professional Conduct;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client; or
- (2) the client knowingly and freely assents to the termination of the representation; or
- (3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or
- (4) the client insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or
- (5) the client has used the lawyer's services to perpetrate a crime or fraud; or
- (6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or
- (7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (8) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or
- (9) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer

shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. *See* Rules 1.2(c) and 6.5. *See also* Rule 1.3, Comment [4].

Mandatory withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to

discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Forfeiture by the client of a substantial financial investment in the representation may have such effect on the client's interests. withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or imprudent or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

[10] The lawyer may never retain papers to secure a fee. Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

[11] A lawyer who represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the state for use in preparing the appeal, must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

ETHICS OPINION NOTES

[CPR 3](#). A client is entitled to his file upon withdrawal of his attorney.

CPR 24. withdrawing partners and remaining partners should send clients a common announcement of the firm's dissolution so that the client may elect whom he wishes to handle his legal business.

CPR 61. It is improper for a senior member of a law firm who is employed to represent a client to refer a case to a junior partner or associate without the client's consent.

CPR 269. An attorney whose motion to withdraw from representation of a corporation is denied must continue to represent the corporation.

[CPR 315](#). An attorney must give an indigent client the transcript provided by the state after disposition of the appeal.

CPR 322. After completion of custody litigation, an attorney must release a "home study" report to a client unless such is precluded by statute or court order.

[RPC 8](#). An attorney employed by an insurer to represent an uninsured motorist may not withdraw after settlement between insurer and the claimant until the court gives permission and the attorney takes steps to minimize prejudice to his client.

[RPC 48](#). Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

[RPC 58](#). Another member of a lawyer's firm may substitute for the lawyer in defending a criminal case if there is no prejudice to the client and the client and the court consent.

[RPC 79](#). A lawyer who advances the cost of obtaining medical records before deciding whether to accept a case may not condition the release of the records to the client upon reimbursement of the cost.

[RPC 106](#). Opinion discusses circumstances under which a refund of a prepaid fee is required.

[RPC 153](#). In cases of multiple representation, a lawyer who has been discharged by one client must deliver to that client, as part of that client's file, information entrusted to the lawyer by the other client.

[RPC 157](#). A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

[RPC 158](#). Any portion of a sum of money paid by a client in advance to secure payment of a fee that is unearned at the time the lawyer is discharged must be refunded to the client.

[RPC 169](#). A lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.

[RPC 178](#). Opinion examines the obligation to deliver the file to the client upon the termination of the representation when a lawyer represents multiple clients in a single matter.

[RPC 223](#). When a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

[RPC 227](#). A former residential real estate client is not entitled to the lawyer's title notes or abstracts regardless of whether such information is stored in the client's file. However, a lawyer formerly associated with a firm may be entitled to examine the title notes made by the lawyer to provide further representation to the same client.

[RPC 234](#). An inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.

[RPC 245](#). A lawyer in possession of the legal file relating to the prior representation of co-parties in an action must provide the co-party the lawyer does not represent with access to the file and a reasonable opportunity to copy the contents of the file.

[98 Formal Ethics Opinion 9](#). Opinion rules that a lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

[2002 Formal Ethics Opinion 5](#). Opinion rules that whether electronic mail should be retained as a part of a client's file is a legal decision to be made by the lawyer.

[2005 Formal Ethics Opinion 13](#). Opinion rules that a minimum fee that will be billed against at an hourly rate and is collected at the beginning of representation belongs to the client and must be deposited into the trust account until earned and, upon termination of representation, the unearned portion of the fee must be returned to the client.

CASE NOTES

Inadequate Notice of withdrawal. - An attorney did not withdraw from representation when he sent his client a letter stating that he believed he could not handle the client's case and that the client should visit the office for further discussion. *North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 326 S.E.2d 320, cert. denied, 474 U.S. 981, 106 S. Ct. 385, 88 L. Ed. 2d. 338 (1985).

Duty of Attorney to withdraw. - Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. The right of a client to effective counsel in any case (civil or criminal) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. *In re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979).

NC Formal Ethics Opinions

2003 Formal Ethics Opinion 16

July 16, 2004

Representation of Absent Respondent in Dependency Proceeding

Opinion rules that a lawyer who is appointed to represent a parent in a proceeding to determine whether the parent's child is abused, neglected, or dependent, must seek to withdraw if the client disappears without communicating her objectives for the representation, and, if the motion is denied, must refrain from advocating for a particular outcome.

Inquiry:

At an initial non-secure custody proceeding, Attorney is appointed by the court to represent Mother who is a respondent in a proceeding brought by the local department of social services to determine whether Mother's minor son is an abused, neglected, or dependent juvenile. Another lawyer is appointed to represent Father. Although Mother is present at the time of the appointment, she and Father subsequently disappear. At the time of the appointment, Attorney had minimal conversation with Mother and he does not know what position she would take in the proceedings.

"Dependent juvenile" is defined in the Juvenile Code, G.S. 7B-101(9), as "[a] juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement."

Attorney knows that the parents are missing and, therefore, there is no parent responsible for the son's care. May Attorney advocate for an adjudication of dependency in the proceeding?

Opinion:

No. As stated in Rule 1.2(a) of the Rules of Professional Conduct, "...a lawyer shall abide by a client's decisions concerning the objectives of representation..." Comment [1] adds that the rule "confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." If the client is not present to give instructions to the lawyer as to the objectives of the representation, the lawyer may not substitute his own objectives even if the facts appear to support a particular position.

A lawyer is required to make a motion to withdraw when the client has disappeared and the lawyer is ignorant of the client's objectives for the litigation. RPC 223. Such a motion is appropriate only after the lawyer has used reasonable diligence to locate the client but is unsuccessful. *Id.*

If Attorney's motion to withdraw is denied, Attorney may participate in the proceedings to the limited extent that such participation is consistent with the known objectives of the missing client and the court's order of appointment. However, Attorney may not advocate for any particular position or outcome in the proceeding and Attorney does not have a duty to file an appeal.

RPC 223

January 12, 1996

Responsibility to Client Who Has Disappeared

Opinion rules that when a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

Inquiry:

On July 7, 1993, Attorney A entered into an agreement to represent Client A in regard to minor injuries she sustained in an automobile accident. Attorney A met with Client A on that date and subsequently spoke with her by telephone on a couple of occasions. In these phone conversations, Client A informed Attorney A that she planned to see other health care providers.

Attorney A has not heard from Client A since 1993 although she has tried on numerous occasions and by a variety of methods to contact Client A. Initially, Attorney A called Client A but Client A did not return her phone calls. Last year, Attorney A wrote to Client A but the letters were returned without a forwarding address. Client A's telephone number was disconnected and there is no new listing for her. She no longer works for the company that employed her in July 1993. Attorney A asked Client A's former employer to forward a letter to Client A at the last address the employer had on file for Client A. She received no response to this letter. Attorney A tried to get Client A's new address from one of the doctors Client A was seeing in 1993. The doctor's office had her old address. The insurance company for the prospective defendant in the automobile accident has not heard from Client A and has closed its file. Client A's own automobile insurance policy was canceled in April 1994. The company does not have a new address for Client A. Finally, Attorney A checked the county property listings. The last listing for Client A was in 1993.

The statute of limitations on Client A's claim will expire in ten months. A complaint has not been filed. A representative of Attorney A's malpractice insurance carrier recommended that she file a complaint on behalf of Client A and then immediately make a motion to withdraw. What is Attorney A's ethical responsibility to Client A?

Opinion:

When a client stops communicating with his or her lawyer, the lawyer must take reasonable steps to locate and communicate with the client. In the present inquiry, Attorney A's efforts to locate Client A were more than reasonable. However, if the lawyer is still unable to locate the client and the client has made no effort to contact the lawyer, the client's failure to contact the lawyer within a reasonable period of time after the lawyer's last contact with the client must be considered a constructive discharge of the lawyer. Rule 2.8(b)(4) of the Rules of Professional Conduct requires a lawyer to withdraw from the representation of a client if the lawyer is discharged by the client. Therefore, Attorney A must withdraw from the representation.

Attorney A may not file a complaint on behalf of Client A although filing suit might stop the running of the statute of limitations. The determination of the objective of legal representation is the client's prerogative. As the comment to Rule 7.1 observes, "[t]he client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer's professional obligation." If a client disappears, the lawyer cannot know whether the client wanted to

proceed with the lawsuit, who the client was prepared to sue, and whether the allegations in the complaint are accurate. Therefore, if a client disappears and the lawyer is unable to locate the client after reasonable efforts to do so, the lawyer should withdraw from the representation without taking further action on behalf of the client.