

American Bar Association

DUTY OF LAWYER TO FILE SUIT WHEN CLIENT HAS DISAPPEARED

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A lawyer does not have a duty to file a lawsuit (and thereby toll the statute of limitations) in the name of a client who has disappeared provided the loss of contact has not been caused by the lawyer's neglect.

A lawyer undertakes to represent a claimant in a personal injury case and they sign a contingent fee retainer agreement. The lawyer obtains the client's address and other customary information, and tells the client of the time within which the filing of a lawsuit is allowed, and tells the client of the need for communication availability. Before a lawsuit is filed, the client moves without telling the lawyer. Despite reasonable inquiry and effort the lawyer does not know the client's whereabouts or how to reach him. The ends of the limitations period for commencing a lawsuit is drawing near. The lawyer sees no likelihood that client communication will be established.

The Committee is asked whether, under the Model Code of Professional Responsibility, the lawyer has a duty to file a lawsuit in the name of the client and thereby toll the statute of limitations despite the absence of communication and expected communication with the client. In the Committee's view, the answer is no, if the problem is not cause by the lawyer's neglect.

Under the Model Code, a lawyer shall not neglect a legal matter entrusted to him. DR 6-101(A)(3). Neglect involves indifference and a consistent failure to carry out the obligations assumed to the client or a conscious disregard for the responsibility to the client. ABA Informal Opinion 1273 (1973).

The Committee emphasizes that the lawyer's ethical duties can depend upon particular facts and circumstances, and we speak here only to the limited facts submitted to us. The Committee points out that the Model Code does not undertake to define standards for civil liability of lawyers.

The Committee is also asked whether, under the Model Code, a lawyer acts improperly by including in a retainer agreement a provision to the effect that the client shall promptly notify the lawyer of any change in the client's address and that if the client fails to do so the lawyer is no longer obligated to proceed with the case. In the Committee's view, the inclusion of such a provision is not in itself a violation of the Model Code (including DR 6-102, which disapproves attempts by a lawyer to exonerate himself from malpractice liability to his client). Such a provision does not, however, relieve the lawyer from his ordinary ethical obligations of care and competence.

The Committee gives no opinion on any questions of law that may be relevant, including those relating to agency, contracts, negligence, and judicial appointment of a conservator or guardian ad litem.

ABA Informal Op. 1467

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