

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2011-4**

**Duties of an Attorney in a Criminal Appeal
When the Client Cannot be Contacted**

Question Presented

The Committee has been asked to define the scope of an attorney's duties in a criminal appeal when the client cannot be contacted.

Conclusion

The Committee concludes that an attorney representing a client in a criminal appeal, regardless of whether the attorney is in private practice or a Public Defender, is obligated to conduct a reasonable inquiry as to the whereabouts of the client and to take reasonable efforts to contact the client where the client previously has directed that an appeal be filed.¹

¹ 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. *See, e.g.*, Ala. Ethics Comm., Op. RO-87-98 (Oct. 7, 1987) (referencing two prior ethics opinions, RO-84-26 and RO-84-106, suggesting that notice of impending action in client's case be made known by publication where client's location unknown); N.C. Eth. Op. RPC 223 (N.C. State Bar 1996) (involving case where attorney attempted to contact client through several methods such as the telephone, a letter sent to client's last known address, a request to client's former employer to forward letter to client at last known address on file, contacting one of client's treating physicians, contacting client's insurance company, and checking county property listings); R.I. Supr. Ct. Ethics Advisory Panel Op. 93-1 (Mar. 31, 1993) (suggesting, when attempting to locate the missing client, a personal visit to client's last known address, and search of post office or motor vehicle registry records); and Va. Bar Assn. Standing Comm. on Legal Ethics Informal Op. 1088 (June 8, 1988) (involving case where attorney attempted to contact client via first-class mail and certified mail return receipt requested). *See also* N.Y. Eth. Op. 787, *Conflict of Interest; Missing Client*, at *2 n.8 (N.Y. St. Bar Assn. Comm. Prof. Eth. June 9, 2005) (stating that, before withdrawing, lawyer "must take all reasonable steps to locate the client," and that these steps "might include sending a letter via certified mail to the last known address, a personal visit to last known address, or a search of telephone directories, public records or the Internet"); Allison Elizabeth Williams, *Missing Clients: What To Do When Your Client Has Vanished*, 28 J. LEGAL PROF. 247 (2003-2004) (providing overview of attorney's obligations to missing client and suggesting anticipatory measures in the event client goes

If, after conducting a reasonable inquiry, the client cannot be contacted, then the attorney must file the notice of appeal and points on appeal where the client previously has directed that an appeal be filed.

The attorney, after filing the notice of appeal and points on appeal, ethically may file appellate briefs on behalf of the client even if the client, despite reasonable efforts, cannot be contacted.

Finally, the Committee concludes that the attorney, either simultaneously with the filing of the notice of appeal and points on appeal or subsequently, may file a motion to withdraw where the attorney shows that he or she has made reasonable efforts to contact the client, who, despite those reasonable efforts, cannot be contacted, and that withdrawal is appropriate.²

Applicable Rules and Analysis

Although the Committee previously addressed a somewhat similar question with regard to the obligation of an attorney to file suit when the statute of limitations is about to expire and the client cannot be contacted,³ the provisions of several associated ethical rules once again must be considered in order to determine the attorney's ethical obligations under the specific question presented here.

First, there is the provision regarding the scope of representation and allocation of authority between the client and the lawyer. Under the ethics rules, the lawyer in a criminal case "shall abide by the client's decision, after consultation with the lawyer, as to . . . whether to take an appeal."⁴

missing and cannot be located); Karen J. Dilibert, *The Mysterious Case of the Missing Client*, 89 ILL. B.J. 663 (2001) (suggesting preventative measures to avoid "missing client" issues).

² See Alaska Rules of Professional Conduct 1.3, 1.16; Alaska Appellate Rule 517(b).

³ See Alaska Bar Association Ethics Op. 2004-3 (2004) (concluding that lawyer may file complaint if the lawyer reasonably believes that the client has authorized the attorney to file complaint and is relying on the attorney to do so, or if the attorney believes that failure to file would materially and adversely affect the client's interest). Cf. American Bar Association Comm. On Ethics and Prof. Resp., Informal Op. 1467 (1981) (concluding that a lawyer does not have a duty to file a lawsuit and toll the statute of limitations on behalf of the client who has disappeared, provided that the loss of contact was not caused by the lawyer's neglect).

⁴ See Alaska Bar Association Ethics Op. 2004-3 (2004); *Coffman v. State*, 172 P.3d 804, 807 (Alaska App. 2007) (citing Rule 1.2(a)).

Second, a lawyer, in accordance with Alaska Rule of Professional Conduct 1.3, “shall act with reasonable diligence and promptness in representing a client.” The Comment to Rule 1.3 explains that “[w]hether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client.” The Comment further explains that the lawyer should carry through to conclusion all matters undertaken for a client “[u]nless the relationship is terminated as provided in Rule 1.16,” or, where the lawyer’s employment is limited to a specific matter the resolution of which terminates the lawyer-client relationship (*e.g.*, where either the retainer agreement or court appointment provides that the attorney shall represent the client only through conclusion of the trial).⁵

Finally, the lawyer’s obligation under Rule 1.3 to act with reasonable diligence in representing a client dovetails with the requirements of Rule 1.4, which provides that “[a] lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client’s behalf.”

Against this backdrop, the Committee concludes that, even if the client cannot be contacted, an attorney who has been directed by the client to file a criminal appeal must file the notice of appeal and points on appeal and make reasonable inquiry as to the client’s whereabouts and reasonable efforts to contact the client in order to inform the client as to the status of the appeal. Notwithstanding the dearth of opinions that directly address the issue here, the Committee believes that both the language of the applicable rules and analysis reflected in several analogous opinions and articles from other jurisdictions cited in this opinion support the Committee’s conclusion.⁶

⁵ See Comment, AK Professional Conduct Rule 1.3 ¶ 4. See also Alaska R. App. P. 209(b)(4) (“Counsel appointed to represent a defendant in the trial court pursuant to Criminal Rule 39 shall remain as appointed counsel throughout an appeal or petition for review at public expense authorized under this paragraph and shall not be permitted to withdraw except upon the grounds authorized in Administrative Rule 12. . . . If an appeal is to be taken, trial counsel will not be permitted to withdraw until the notice of appeal and the documents required to be filed with the appeal by Rule 204 have been accepted for filing by the clerk of the appellate courts.”)

⁶ See note 3, *supra*. Although the overwhelming majority of the opinions and articles listed in note 3 address the issue of contacting the missing client with respect to civil matters, the recommended methods of inquiry are no less apt in the criminal context.

For example, the Oregon State Bar Association addressed the issue of whether an attorney may refuse to continue with an appeal unless and until the attorney had heard from the client.⁷ In that case, the lawyer who represented the defendant in litigation that resulted in a judgment against the defendant was directed by the defendant to file an appeal and complied with the defendant's directive. While the appeal was pending, the defendant left the country and the lawyer was unable to contact the client despite several attempts. The Oregon Committee concluded that, because the applicable rules of professional conduct required the lawyer to provide competent representation, act with reasonable diligence and not neglect any matter entrusted to the lawyer by the client, the lawyer must continue to handle the appeal.⁸ The Committee also concluded, however, that the lawyer could withdraw from representation of the client under certain circumstances where the lawyer properly sought and obtained leave to withdraw.⁹

The same approach is in order under Alaska's rules of professional conduct. Where the client has directed that the attorney file a criminal appeal, the attorney must file the notice of appeal and points on appeal. By timely filing the notice of appeal and points on appeal, the attorney will have provided competent representation and acted with reasonable diligence.¹⁰ The attorney also will have prevented prejudice to the client.

⁷ See Oregon State Bar Association Formal Op. No. 2005-33, "*Conflicts of Interest, Current Clients: Withdrawal When Client Not Found*" (Aug. 2005).

⁸ *Id.* (citing Oregon Rules of Professional Conduct 1.16(b)(1) (providing for withdrawal if it can be accomplished without material adverse effect on the interests of the client), (5)(providing for withdrawal if client fails substantially to fulfill an obligation to lawyer regarding lawyer's services and has been given reasonable warning that lawyer will withdraw unless client's obligation(s) is fulfilled), (6)(providing for withdrawal if continued representation will result in unreasonable financial burden on lawyer or has been rendered unreasonably difficult by client), and (7)(providing for withdrawal if other good cause exists).

⁹ *Id.* Compare Alaska R. Prof. Conduct 1.16(b)(1), (5)-(7) (providing for withdrawal from representation if the same criteria are met).

¹⁰ The attorney also may file a motion for extension of time to file the notice of appeal. See also Alaska App. R. 502(b) (providing for extensions of time); Alaska App. R. 521(1) (providing that the appellate rules "are designed to facilitate business and advance justice" and that in a matter involving the validity of a criminal conviction or sentence, the rule does not authorize an appellate court to allow the notice of appeal to be filed more than 60 days late); *Ozena v. State*, 921 P.2d 640 (Alaska App. 1996) (affirming by full court a single-judge order granting motion to accept late notice of appeal).

The Committee further concludes that, once the notice of appeal and points on appeal are filed and reasonable efforts to locate and contact the client have proven futile, the attorney ethically may file the appellate briefs, or alternatively may file a motion to withdraw where it can be shown that withdrawal is appropriate under Alaska Appellate Rule 517(b) and Alaska Rule of Professional Conduct 1.16. The Committee's conclusion is based, primarily, upon its previous Opinion 2004-3, "Responsibilities of an Attorney When a Client Cannot be Contacted."¹¹

In that opinion, the Committee was asked whether a lawyer may file a lawsuit where the statute of limitations is expiring and the client cannot be contacted. That situation involved a cruise ship passenger who was injured in a fall from the gangway to the 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 that he wanted to file a lawsuit. The lawyer interviewed the passenger and explained that an investigation would need to be conducted before the attorney would decide whether to take the case.

The investigation revealed that the passenger had a colorable claim and if liability was proved damages would be substantial, despite some facts that indicated comparative negligence. The lawyer, however, was not in contact with the passenger during the lawyer's investigation and shortly before the statute of limitations ran sent the passenger a letter with questions about the problematic facts together with a proposed contingent fee agreement for signature. The lawyer tried to contact the passenger by telephone several times without success.

The Committee, in reliance upon Rules 1.3 and 1.16, concluded that the lawyer should file the complaint if the lawyer reasonably believes that the client has authorized the attorney to file suit and is relying upon the attorney to do so, or if the attorney believes that failing to file would materially and adversely affect the client's interests. Further, the

¹¹ See, e.g., *People v. Brown*, ___ P.3d ___, 2010 WL 726038 (Colo. Ct. App. 2010 (stating that defendant had no right to have counsel pursue his appeal while remaining a fugitive); *Hall v. State*, 609 S.E.2d 653, 654 (Ga. App. 2004) (concluding that defendant waived right to appeal, and therefore dismissing the same, where notice of appeal, although timely, was filed while defendant was a fugitive). See also *Katz v. United States*, 920 F.3d 610, 613-14 (9th Cir. 1990); *Dziurgot v. Luther*, 897 F.2d 1222, 1223-24 (1st Cir. 1990); *Wayne v. Wyrick*, 646 F.2d 1268, 1270-71 (8th Cir. 1981); *Johnson v. Caldwell*, 458 F.2d 505, 505 (5th Cir. 1972) (all explaining that prejudice cannot be established where defendant complains of attorney's failure to perfect an appeal while defendant was a fugitive).

Committee concluded that “if, after considering all the facts and the factors listed in Rule 1.16(b), the lawyer concludes that withdrawal is appropriate, [the lawyer] may terminate the representation.”

The Committee emphasizes that the lawyer’s ethical duties can depend upon the particular facts and circumstances and it does not undertake to define standards for the civil liability of attorneys when representing a client in a criminal appeal where the client cannot be contacted.¹² Each case is driven by its own peculiar set of circumstances. And, although the decision as to how to proceed with respect to briefing a criminal appeal, like any appeal, must be made by the lawyer (with some direction from the client), the Committee recommends that the lawyer at the outset of the attorney-client relationship consider the preventative measures discussed in some of the articles previously mentioned¹³ in order to better prepare for the possibility – however slight – of a client who cannot be contacted.

Approved by the Alaska Bar Association Ethics Committee
on April 7, 2011.

Adopted by the Board of Governors on May 3, 2011.

G:\Ds\COMM\ETHICS\OPINIONS\2011-4.doc

¹² See, e.g., American Bar Association Comm. On Ethics and Prof. Resp., Informal Op. 1467.

¹³ Examples of some of the preventative measures an attorney may consider taking at the outset of the representation range from obtaining from the client the name, address, telephone number, electronic mail address of one or more responsible persons who will always know how to reach the client, the name of the client’s employer, to obtaining from the client their nickname(s), birthdate, Social Security number, or driver’s license number. See, e.g., Dilibert, *The Mysterious Case of the Missing Client*, note 1, *supra*.