



The Lawyer's Lawyer

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Ethical Obligations Representing a Missing Client

It is not uncommon for an insured client to be less than responsive to his/her attorney in today's practice. When a client goes missing in the middle of litigation, a lawyer is faced with the difficult task of reconciling the two main legal principles that govern a lawyer's ethical duties to a client: the attorney-client privilege and the duty of confidentiality. As insurance defense practitioners, we have the additional challenge of appropriately communicating with our claim's clients on the status of the litigation while respecting these two separate duties to our insured client. Lastly, the missing client scenario also tests an attorney's duty of candor to the court. This article examines the potential ethical pitfalls in dealing with the situation and provides some advice to the practitioner.

Under the attorney-client communication privilege (Evid. Code sections 950 – 962), the client has the right to prevent the disclosure of "confidential communications," which are defined as information exchange between the client and the lawyer in connection with the representation. Clearly, we cannot disclose communications from the client protected by this privilege. The more difficult issue to resolve is whether informing the court, opposing counsel, or your client's insurer of a missing client violates the duty of confidentiality.

The duty of confidentiality owed to a client protects information learned from any source and requires attorneys to "maintain

inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, of his or her client." "Confidence" and "secret" are not specifically defined by statute. However, these terms have been interpreted as follows:

- "Confidence" means lawyer may not do anything to breach the trust reposed in him or her by the client. "The phrase 'maintain inviolate the confidence' ... is not confined merely to noncommunication of facts learned in the course of professional employment; for this section separately imposes the duty to 'preserve the secrets of his client.'" (*In re Soale* (1916) 31 Cal app 144, 153, 159.)
- "Secrets" include information gained in the professional relationship the client has requested be held inviolate or the disclosure of which would be embarrassing or likely detrimental to the client. (*In re Mortgage & Realty Trust*, 195 B.R. 740, n. 12 (1996).) *The duty to protect client secrets is not limited to information communicated in confidence by the client; it applies to all information relating to client representation, whatever its source.* (Cal. State Bar Form. Opn. 2016-195.)

Although there is no legal authority that clearly outlines the duties of an attorney when a client is missing, the California State Bar Standing Committee on Professional

Responsibility and Conduct suggests that, at a minimum, the attorney must expend a reasonable amount of time and funds to make a "diligent effort" to locate the client. (Cal. State Bar Form. Opn. 1989-111.) While this State Bar opinion focused on an attorney's proposed withdrawal from representation due to the inability to communicate with the client, the text of the Opinion provides some guidance on how to deal with the situation.

First, the attorney must take steps to avoid reasonably foreseeable prejudice to the client and the client's cause of action. The most basic example of protecting a missing client's interest would be filing an answer to prevent a default judgment from being taken against the client. The attorney who determines to file an answer to the complaint must take care to ensure that the facts are as stated in the answer to avoid misleading the court as to a statement of fact. (Cal. State Bar Form. Opn. 1989-111.) Another example of protecting the missing client's interest would be preserving objections to written discovery by serving objections without responses prior to the statutory deadline. Prior to taking either of these steps the attorney must expend a reasonable amount of time and funds to make a diligent effort to locate the client. The attorney would need to retain the services of a private investigator to attempt to locate the client prior to taking either of the steps.

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Second, the attorney may be prohibited from disclosing to the insurer that the client is missing or no longer communicating with the law firm. Although insurance defense counsel's representation of divergent interest can be attempted "provided there is full disclosure and consent," this dual role cannot diminish counsel's responsibility to the insured. *Betts v Allstate Ins. Co.* (1984) 154 Cal. App.3d 688, 715.) The attorney is obligated at all times to protect the insured/client and may not act in a way which prevents "devoting his entire energies to his client's interest." (Id.) As the failure to cooperate with defense counsel may lead to a denial of coverage, the attorney may be taking a position antagonistic to his client by disclosing the fact that the client is missing. At the very least, the attorney should take reasonable efforts to locate the missing client before contemplating notification of the insurer.

Third, the attorney is under no obligation to inform opposing counsel or the court that the client cannot be located, but the attorney cannot conceal the information if asked directly by the court. The attorney also has a duty not to mislead the judge or a judicial officer by an artifice or false statement of fact or law. (Bus. & Prof. Code section 6068, subdivision (e).) The concealment of material information is as misleading as an overtly false statement. (See *Griffis v. SS Kresge* (1984) 150 Cal. App.3d 491, 499.) As the disclosure of the inability to locate the client could be detrimental to the client interests (see Cal. State Bar Form. Opns. 1980 – 82 and 1983 – 74), the attorney cannot volunteer this information to opposing counsel or the court without potentially running afoul of the duty of confidentiality.

The attorney-client privilege protects disclosure of confidences or secrets of the clients. The duty to maintain client

secrets requires attorneys to prevent them from being disclosed. When an attorney is faced with a missing client, the attorney must take reasonable steps to locate the client in order to protect the client from reasonably foreseeable prejudice including the potential loss of insurance coverage if the insurer is notified of the missing client. ☐



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Mr. Plummer is an experienced trial lawyer who has tried numerous cases to jury verdict. After his admission to the California State Bar in 2005, Mr. Plummer worked for a civil litigation firm in central California before going to work as trial counsel for a large Fortune 150 company in the Sacramento area for nearly ten years. His past experience in handling both Plaintiffs and Defendants allows Mr. Plummer to approach and evaluate cases from a well-rounded perspective.

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