



**ILLINOIS STATE  
BAR ASSOCIATION**

# **ISBA Advisory Opinion on Professional Conduct**

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**ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.**

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**This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.4, and 1.16(b)(6) and Comment [9]. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.**

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**Opinion No. 03-04  
January 2004**

Topic: Adequate representation, communication with client.

Digest: A law firm generally has no ethical obligation to file a lawsuit on behalf of a missing client to satisfy an impending statute of limitations. There may be exceptions, however, if the client specifically authorizes the filing of a lawsuit prior to the client's disappearance and provides the law firm with sufficient information with which a complaint can reasonably be prepared and filed.

Ref.: Illinois Rules of Professional Conduct 1.4, 1.16(b)(1)(D), and 1.16(d).

Facts (First Scenario): Law Firm X was retained by Client A, a foreign citizen, to pursue a personal injury claim. Law Firm X has not filed suit as yet and does not intend to. Firm X does not intend to file because they are unable to locate Client A. Client A left now forwarding address or phone numbers that are currently in operation. Phones are disconnected and mail has been returned, leading Law Firm X to believe that, apparently, Client A has gone back to his homeland, outside of the United States. Firm X has hired skip tracers to try to locate Client A, but searches have been unsuccessful. From every appearance, Client A has abandoned this case. Prior to disappearing, Client A did not

give Law Firm X authorization to file a lawsuit in this matter, nor does Law Firm X have enough information to prepare and file an adequate complaint.

Question: If Law Firm X wishes to close the file due to the client's non-cooperation, what actions, if any, are appropriate to assure that all legal and ethical obligations to the client are addressed?

Opinion: The Firm is not required to file a lawsuit on behalf of the client. This result is regardless of whether the statute of limitations bars any future lawsuits on behalf of the client as a result of the firm's decision not to file. An attorney should not take an action so substantial as filing a lawsuit without consent from the client, and in these facts the firm is unable to communicate with the client at all.

The law firm has gone so far as to hire a skip tracer to locate the client to no avail, so it can be presumed that the firm has exhausted all possible avenues of communication with the client. The client, by failing to stay in touch with the firm, has constructively severed the attorney-client relationship and made it impossible for the firm to continue any sort of realistic representation.

Rule 1.16(b)(1)(d) states that a lawyer may withdraw from a matter if "the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively." This rule would certainly allow for withdrawal by the firm. The preparation and filing of a lawsuit without adequate facts or client authorization would be unethical. If communication with the client is impossible, there is no longer an attorney-client relationship, and therefore no duty for the firm to act. However, note that Rule 1.16(d) requires a law firm to avoid harm or prejudice to a client when it withdraws.

Also, Rule 1.4 requires the following:

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.4 requires an attorney to communicate with the client and keep him/her informed, particularly of major developments. The filing of a lawsuit is a major development, and while it could be argued that the harm to the client in allowing the statute of limitations to expire is more drastic than the harm to the client in filing a lawsuit and having it dismissed later on, Rule 1.4 would seem to prohibit filing suit under these facts. Here, the client is not able to make an informed decision because the law firm cannot explain anything to him at all.

Therefore, the firm should close the file without filing suit.

Facts (second scenario): Law Firm X was retained by Client A, a foreign citizen, to pursue a personal injury claim. Law Firm X has not filed suit as yet and does not intend to. Firm X does not intend to file because they are unable to locate Client A. Client A left now forwarding address or phone numbers that are currently in operation. Phones are disconnected and mail has been returned, leading Law Firm X to believe that, apparently, Client A has gone back to his homeland, outside of the United States. Firm X has hired skip tracers to try to locate Client A, but searches have been unsuccessful. From every appearance, Client A has abandoned this case. Prior to disappearing, Client A gave to Law Firm X specific authority to file a lawsuit before the statute of limitations deadline should it be necessary. Law Firm X has enough information to prepare and file a complaint.

Question: If Law Firm X wishes to close the file due to the client's non-cooperation, what actions, if any, are appropriate to assure that all legal and ethical obligations to the client are addressed?

Opinion: Law Firm X has a duty to follow the instructions of the client and prepare and file a lawsuit before the expiration of the statute of limitations. Under these facts, preparation and filing of a lawsuit is specifically authorized by the client. The client's disappearance does not alleviate the law firm from responsibility to protect the cause of action by acting before the statute of limitations expires. Here, the Law Firm has enough information to comply with the client's reasonable requests and should do so as that is what it was hired to do. Thus, a complaint must be prepared based on the information the client had provided, and filed before the expiration of the statute of limitations in order to protect the client's cause of action from becoming time-barred.

Representation of the client's interests after the suit is filed will be difficult if the client does not reappear. The Law Firm would be allowed to withdraw its representation of the client under Rule 1.16(b)(1)(d) after filing suit on behalf of the client. It is likely that the suit would eventually be dismissed for want of prosecution if the client does not reemerge, but the Law Firm will have satisfied its ethical and legal obligations to the client.

Facts (third scenario): Law Firm X was retained by Client A, a foreign citizen, to pursue a personal injury claim. Law Firm X has not filed suit as yet and does not intend to. Firm X does not intend to file because they are unable to locate Client A. Client A left now forwarding address or phone numbers that are currently in operation. Phones are disconnected and mail has been returned, leading Law Firm X to believe that, apparently, Client A has gone back to his homeland, outside of the United States. Firm X has hired skip tracers to try to locate Client A, but searches have been unsuccessful. From every appearance, Client A has abandoned this case. Prior to disappearing, Client A gave to Law Firm X specific authority to file a lawsuit before the statute of limitations deadline should it be necessary. Law Firm X does not have enough information to prepare and file a complaint.

Question: If Law Firm X wishes to close the file due to the client's non-cooperation, what actions, if any, are appropriate to assure that all legal and ethical obligations to the client are addressed?

Opinion: Under this set of facts, it would not be in the client's best interest, and indeed impossible, for Law Firm X to prepare and file a complaint without adequate information. It would need to be determined what information would be essentially required in the particular jurisdiction to file a complaint. For example, at the bare minimum, the name of the defendant would seem to be required. If this information is not obtained by the Law Firm prior to the client's disappearance, even if there is specific authority to file the suit it would not be possible. This appears to be the most dangerous scenario for the Law Firm, and to best protect itself, it should use due diligence in conducting an investigation to find the missing facts so that it may follow the client's instructions and file the lawsuit.