

Return To Sender; Address Unknown

by

**Craig D. Klausning, Senior Assistant Director
Minnesota Office of Lawyers Professional Responsibility**

Reprinted from *Minnesota Lawyer* (August 2, 2004)

It has become almost cliché to note that we live in a mobile society. As individuals we may relocate across town or across country. Lawyers are among the mobile, changing not just their residences, but also the location of their offices and the firms with which they practice.

This professional mobility, however, if not combined with proper notification to the tribunals in which the lawyer appears can result in legal problems for the client and ethical difficulties for the lawyer. While this is an issue that affects all lawyers, it is one that is most acutely felt by lawyers practicing immigration law. The experiences of these lawyers provide a cautionary tale to all lawyers in our mobile society.

Notifying tribunals

There are two reasons why the problem of lawyers not informing tribunals of their change of address disproportionately affects lawyers practicing immigration law. First, immigration matters can be under consideration for months, if not years. An appeal to the Board of Immigration Appeals (BIA) may be under advisement for more than a year before a decision is issued. During that time the lawyer may have changed firms or offices.

Second, in order to sustain a claim of ineffective assistance of counsel, the alien is required to file an ethics complaint with the appropriate disciplinary authority or explain the absence of such a filing. See *Matter of Lozado*, 19 I&N Dec. 637 (BIA 1988). This requirement all but guarantees that if the lawyer fails to diligently pursue an immigration matter, resulting in prejudice to the client's case, an ethics complaint will be lodged.

An example of what can happen when a lawyer fails to notify the tribunal of a change of address is illustrated by a recent ethics complaint. The lawyer represented the client in a request for asylum. After the immigration judge denied the client's application, the lawyer filed the necessary paperwork to appeal the judge's decision. The BIA did not issue its order closing the client's case until 18 months later when it sent notice of its decision to the lawyer at the address she had used when filing the appeal.

In the interim, however, the lawyer had relocated her office. She did not receive the BIA's decision and was not able to advise her client of the decision. The client missed the 30-day period in which to petition for appeal of the BIA's decision to the 8th Circuit Court of Appeals or seek other relief. The client subsequently retained new counsel who filed an appeal with the BIA (citing ineffective assistance of counsel) and also filed an ethics complaint.

The lawyer was investigated for failing to exercise reasonable diligence by not notifying the BIA tribunal in her client's pending appeal of her address change.

In response to the ethics complaint, the lawyer argued that in a second unrelated client matter before the same tribunal she had informed the BIA of her new address. However, that notice made no reference to the pending appeal and, in fact, was simply a notice of appearance provided only in the context of the second client's case. The information about the lawyer's new address never made it to the first client's BIA file.

Another matter involved a lawyer who, two years after she filed an appeal with the BIA, left the firm where she had been practicing. At the time of her departure the lawyer believed her client had retained new counsel. However, the lawyer never filed a substitution of counsel with the BIA (which had still not ruled on her client's appeal) and never provided the BIA with a new address.

Six months after she left the firm the BIA issued its determination, denying the client's appeal. The BIA then sent a copy of its decision to the lawyer's now former law firm. By the time the firm determined what the letter related to, and forwarded it on to the client, the time for the client to appeal to the federal courts had lapsed.

Write separately

In order to avoid these problems, a lawyer should file an address change notice or a substitution of counsel with every court in which the lawyer has a matter pending, identifying all representations before that court. In the above cases that meant, at a minimum, writing to the BIA and listing each case in which the lawyer was appearing and noting the lawyer's new address.

An even better solution would have been for the lawyers to write separately on each case so that there would be documentation for each file identifying the lawyer's new address. Clearly what the lawyer could not do was move while there was a matter pending with the BIA, and not provide notice of her new office address.

To protect the client's interests the lawyer must act diligently. To act diligently the lawyer must be able to receive information from the courts affecting the client's interests. In our mobile society that means the lawyer must be conscientious about notifying the courts of changes in office locations or firms. To fail to do so is to risk prejudicing the client's interests and incurring professional discipline.