Bloomberg BNA

ABA/BNA
Lawyers' Manual on Professional Conduct℠

Formal Opinion 95-397
September 18, 1995

Duty to Disclose Death of Client

When a lawyer's client dies in the midst of settlement negotiations of a pending lawsuit in which the client was the claimant, the lawyer has a duty to inform opposing counsel and the court in the lawyer's first communication with either after the lawyer has learned of that fact.

The Committee has been asked whether a lawyer representing the plaintiff in a personal injury action who has received a settlement offer from the defendant and has not yet responded to it has a duty to disclose to the defendant (and the court before whom the action is pending) the fact that the plaintiff has just died.

A preliminary, but by no means minor, question that must be considered by the lawyer in this situation is the extent of her authority to respond to the offer. The general rule in most jurisdictions is that the death of the client terminates the relation of lawyer and client. The lawyer therefore may not take any further steps in connection with the matter unless and until she is authorized to do so by the deceased's duly qualified personal representative. *See* 7A C.J.S. *Attorney & Client* §224 (1980). Accordingly, unless one of the limited exceptions to this general rule is applicable (and the lawyer should check the law of her own jurisdiction on this), the lawyer cannot accept the settlement offer, or enter into any settlement agreement, without first obtaining the approval of the personal representative.

Turning to the ethical question of disclosure, the Committee notes that this issue has evoked differing responses from state bar association ethics committees. For example, in 1987, the Virginia State Bar Standing Committee on Legal Ethics opined that "the best course of action" is for the lawyer to disclose the death of his client "at the time he accepts the offer of settlement and let the opposing side know that the client authorized the range for settlement prior to his death and that the estate's administrator has also authorized the settlement." The Virginia Committee was of the view that this procedure "avoids the appearance of impropriety later when the attorney must disclose the information pursuant to DR 1-102(A)(4) when the administratrix must sign the release of liability that will be required by the insurance company upon settlement." [1]

[1] Virginia State Bar Opinion 952 (1987).

The Pennsylvania Bar Association's Legal Ethics and Professional Responsibility Committee, on the other hand, has concluded that the attorney for a claimant under the Pennsylvania Medical Professional Liability Catastrophe Loan Fund had no duty to inform the Fund of the client's death. In support of this conclusion, the Pennsylvania Committee cited the statement in the Comment to Pennsylvania Rule of Professional Conduct 4.1 [identical to Comment to Model Rule 4.1] that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts." [2]

[2] Pennsylvania Bar Association Opinion 93-51 (1993).

However, twenty-five years ago, in Informal Opinion 1169, this Committee concluded that the lawyer for a defendant in a civil case had a clear duty to make known to the court and opposing counsel that the defendant had died, citing DR 1-102(A)(4) and (5), DR 7-106(B)(2) and EC 8-5 of the Model Code of Professional Responsibility. [3] Otherwise, the opinion reasoned, "grave injustice might be done, such as the running of the statutes of limitation." In effect, the Committee now has been asked whether a different conclusion would obtain under the Model Rules of Professional Conduct (1983, as amended) when it is the plaintiff that has died. In the Committee's opinion, it would not.

[3] The provisions of the Model Code cited in Informal Opinion 1169 read as follows:

DR 1-102 MISCONDUCT.

(A) A lawyer shall not:

* * * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

DR 7-106 TRIAL CONDUCT.

* * * *

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

* * * *

(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

EC 8-5. Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

The analogs to DR 1-102(A)(4) and (5) in the Model Rules are Rules 8.4(c) and (d) (Misconduct), whose terms are identical to the two Disciplinary Rules. The Committee believes, however, that the more relevant provisions of the Model Rules are Rules 4.1 and 3.3. Rule 4.1 (Truthfulness in Statements to Others) provides:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. [4]

---

[4] The two paragraphs of Rule 4.1 had forerunners in DR 7-102(A)(5) and (3), respectively. The Committee did not invoke those provisions in Informal Opinion 1169.

Comment [1] to Rule 4.1 states:

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. *Misrepresentations can also occur by failure to act* (emphasis added).

Rule 3.3 (Candor Towards The Tribunal) states:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

* * *

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

In language similar to that of the Comment to Rule 4.1 quoted above, Comment [2] to Rule 3.3 states that there "are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

Both of the foregoing Rules were cited by a U. S. District Court in a situation similar to the instant one in *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F.Supp. 507 (E.D. Mich. 1983). In that case, the lawyer for the plaintiff in a personal injury action learned of his client's death after a mediation panel had placed an evaluation of $35,000 on the case. The District Court held that plaintiff's counsel had an absolute duty under Model Rule 3.3 to inform the court of the death of the client, and that this "same duty of candor and frankness *extended to opposing counsel* (emphasis added) even though counsel did not ask whether the client was still alive." The Court continued, "Although each lawyer has a duty to contend, with zeal, for the rights of his client, he also owes an affirmative duty of candor and frankness to the Court and to opposing counsel when such a major event as the death of the plaintiff has taken place." *Id.* at 512. "Opposing counsel," reasoned the Court, "does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure, even though it might not be in the interest of the client or his estate." [5] *Id.*

---

[5] In the context of the inquiry to us, we need not reach the question of whether the lawyer's failure to make a suggestion of death in the record or to move for a substitution of parties in accordance with Rule 25 of the Federal Rules of Civil Procedure violates Model Rule 3.4(c), which states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal." Although the court in Virzi took the plaintiff's attorney to task for failing to make a suggestion of death in the record or moving for a substitution of parties, other courts have held that the lawyer for the decedent is not the proper person to make a suggestion of death under Rule 25, unless the lawyer represents the "representative" of the deceased party—i.e., an administrator or executor. 7 Wright & Miller, *Federal Practice and Procedure* §1955; *Fehrenbacher v. Quakenbush*, 759 F.Supp. 1516 (D.Kan. 1991). State procedural rules, however, may read or be interpreted differently. Local rules and procedures may also require counsel to inform a court upon the death of a client. *Skinner v. City of Glen Cove*, 628 N.Y.S.2d 717 (A.D. 2 Dept. 1995).

Hence, a lawyer representing the plaintiff in this situation would be well-advised to consult the local rules specifying what has to be done, procedurally, after a party dies.

The Committee agrees with the court's conclusion that counsel has a duty to disclose the death of her client to opposing counsel and to the court when counsel next communicates with either. The death of a client means that the lawyer, at least for the moment, no longer has a client and, if she does thereafter continue in the matter, it will be on behalf of a different client. We therefore conclude that a failure to disclose that occurrence is tantamount to making a false statement of material fact within the meaning of Rule 4.1(a). [6] (As noted above, Comment [1] to Rule 4.1 states that misrepresentations can "occur by failure to act.") Prior to the death,the lawyer acted on behalf of an identified client. When, however, the death occurs, the lawyer ceases to represent that identified client. Accordingly, any subsequent communication to opposing counsel with respect to the matter would be the equivalent of a knowing, affirmative misrepresentation should the lawyer fail to disclose the fact that she no longer represents the previously identified client. [7]

[6] *See, e.g., In Re Jeffers*, Calif. Bar Court Review Dept. No. 90-0-17808 (12-16-94), 1994 WL 715818 (Cal.Bar. 1994), holding that the death of a defendant in a personal injury case was "a material fact in the settlement negotiations."

[7] However, absent a prior representation that has become false or other circumstances creating a duty to speak, a lawyer has no general duty to advise his adversary of useful facts or promising legal theories. *See, e.g.*, ABA Formal Opinion 94-387.

Similarly, any appearance by the lawyer before the court without disclosing the client's death would be tantamount to making a "false statement of material fact ... to a tribunal" within the meaning of Rule 3.3. Therefore, the lawyer must disclose the fact of death to the tribunal.

What this means is that the lawyer must inform her adversary of the death of her client in her first communication with the adversary after she has learned of that fact. In that same communication, the lawyer may also inform her adversary that the personal representative of her former client is accepting the outstanding settlement offer (assuming, of course, that the lawyer has been authorized by the personal representative to make that statement). However, the Committee does not express any opinion as to whether such an acceptance would create a binding contract.

ISSN 1545-9845