

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 4th day of January, 2024.

On November 8, 2023, came the Virginia State Bar, by Chidi I. James, its President, and Cameron M. Rountree, its Executive Director, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, Paragraph 10-4, and filed a Petition requesting consideration of Legal Ethics Opinion No. 1900.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1900 be approved as follows, effective immediately:

LEGAL ETHICS OPINION 1900. LAWYER'S DUTY TO DISCLOSE DEATH OF CLIENT.

QUESTION PRESENTED

When a lawyer's client dies during the representation, what duty does the lawyer have to disclose the client's death to opposing counsel or to the court?

APPLICABLE RULES AND OPINIONS

Rule 3.3. Candor Toward The Tribunal.

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal;
 - (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

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Rule 4.1. Truthfulness In Statements To Others.

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

- (a) make a false statement of fact or law; or
- (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Legal Ethics Opinion: 952 (1987).

ANSWER

The lawyer must disclose the client's death to opposing counsel or the opposing party if pro se before any further substantive communication. If the matter is before a court, the lawyer must disclose the client's death to the court no later than the next communication with, or appearance before, the court.

ANALYSIS

The ethical duties begin with the legal conclusion that the death of the client terminates the representation and the lawyer's actual authority to act for the client. Restatement (Third) of the Law Governing Lawyers, § 31 Termination of a Lawyer's Authority, Comment e. Given that foundation, any act or omission that perpetuates the belief that the lawyer represents the client or has any authority to act on behalf of a client violates Rule 4.1 either by affirmatively misrepresenting the lawyer's authority or by failing to act and therefore passively misrepresenting the lawyer's authority.

In Formal Opinion 397, the American Bar Association Standing Committee on Ethics and Professional Responsibility concluded:

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). . . . 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.

The opinion also concludes that an appearance before a court without disclosing the client's death would violate Rule 3.3 by making a false statement of material fact to the court. Therefore, the ABA concluded, the lawyer must inform the opposing lawyer and the court of the client's death in her first communication after learning of that fact.

The committee agrees that the lawyer must disclose the client's death before any further substantive communication with opposing counsel and must disclose to the court no later than the first communication or appearance after learning of the client's death. The lawyer does not violate Rule 4.1 by simply avoiding any substantive communication with opposing counsel while, for example, determining whether there is a representative of the client's estate and whether that representative wishes to hire the lawyer to continue to pursue the client's claim.

LEO 952, which concluded that a lawyer can accept a settlement offer without disclosing the client's death absent a direct inquiry about the client's health, but that the lawyer should disclose the client's death when accepting the offer to "avoid an appearance of impropriety," is overruled by this opinion. The committee concludes that a lawyer cannot accept or make an offer of settlement on behalf of a deceased client, even if the lawyer discloses the client's death at the same time. As stated above, the lawyer has no client and no authority to accept or make a settlement after the client's death unless and until the administrator of the estate or other successor in interest retains the lawyer to pursue any remaining claim on behalf of the estate.

A Copy,

Teste:

A handwritten signature in blue ink, appearing to read "Matthew P. Foley". Below the signature, the word "Clerk" is written in a smaller, printed-style font.