



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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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 1.13, 4.1, and 8.4. 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.

**Opinion No. 96-3
July, 1996**

Topic: Death of a client; truthfulness in statements to others; corporate affiliation.

Digest: A lawyer must make timely disclosure of a client's death in a pending personal injury matter. Where the lawyer represents a corporation in a claim against a third party, the deaths of principal officers or shareholders need not be disclosed unless the information is material to the matter.

Ref.: Illinois Rules of Professional Conduct, Rules 1.13, 4.1 and 8.4
ISBA Advisory Opinion Nos. 95-15 and 95-01
American Bar Association Formal Opinion No. 95-397 (1995).
735 ILCS 5/13-209(a)
735 ILCS 5/2-1008(b)
740 ILCS 180/1

FACTS

The inquiring lawyer has for several years represented a corporation in which a husband and wife were the principal officers and shareholders. Both the husband and wife have recently died. At the time of their deaths, the lawyer was handling a complaint to determine the dischargeability of a debt against a debtor of the corporation who had filed for bankruptcy. The lawyer also represented the

wife in a personal injury claim. The personal injury claim had not proceeded to suit at the time of the wife's death.

QUESTIONS

The inquiring lawyer has asked whether the Rules of Professional Conduct require the lawyer to disclose to the court and opposing counsel in the bankruptcy proceedings, or to the insurance company against whom the personal injury claim has been presented, the deaths of either the wife (as personal injury claimant) or the husband and wife (as principals of the corporation).

OPINION

In the bankruptcy matter, the lawyer's client appears to be the corporation rather than the individual officers or shareholders. Under Rule 1.13(a), the "lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." See ISBA Opinion No. 95-15 (March, 1996) and Opinion No. 95-01 (July, 1995). Generally, a corporation's existence is perpetual, and therefore the death of a principal officer or shareholder would not effect its existence.

The Committee assumes that someone qualifying as a "duly authorized constituent" has authorized the lawyer to continue the representation of the corporation in the bankruptcy matter. If that is so, and because the corporation is the client, the Committee believes that the lawyer has no duty under the Rules of Professional Conduct to disclose the deaths of any principal officers or shareholders unless the unique circumstances of the particular matter make the death of the individual officers or shareholders material to the matter. In addition, in responding to discovery requests or to court orders, the lawyer may be required, in accordance with applicable procedural rules, to disclose the deaths of the former shareholders and officers.

The pending personal injury claim involves other considerations. An action for personal injuries survives the death of the claimant and may be commenced by his or her representative. See 735 ILCS 5/13-209(a). If an action had already been filed, the action could be continued only by a personal representative or special administrator. See 735 ILCS 5/2-1008(b). In any event, such a claim generally can not be settled without a release executed by a person having authority to bind the claimant's estate.

If the wife's death resulted from the injuries relating to the subject of the pending claim, a cause of action for wrongful death, in addition to the surviving personal injury action, would accrue to the representative. See 740 ILCS 180/1. If the death were unrelated to the injuries, then recoverable damages would be limited, excluding, for example, such items as future medical expense and future pain and suffering. In either event, the death of the claimant materially alters the nature of the claim existing at her death.

Illinois Rule 4.1 deals with "truthfulness in statements to others" and provides, in pertinent part, that a lawyer in the course of representing a client shall not make a statement of material fact to a third person that the lawyer knows or reasonably should know is false (Rule 4.1(a)) and shall not 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 (Rule 4.1(b)). The Rule dealing with "misconduct," Illinois Rule 8.4(a)(4), states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

In Formal Opinion 95-397 (September 18, 1995), the American Bar Association concluded that a lawyer has a duty to disclose the death of a client that occurs during the course of settlement negotiations in a pending personal injury action. The ABA reasoned that because the lawyer was taking part in negotiations pursuant to authorization of the client, continued settlement discussions without disclosure constituted an implied representation that the lawyer still had a living client. Such conduct would be a false statement of material fact contrary to ABA Model Rule 4.1(a), which is substantially similar to Illinois Rule 4.1(a). The ABA also opined that the lawyer must disclose the client's death the next time the lawyer communicates with opposing counsel.

The Committee believes that the ABA's conclusion regarding the lawyer's duty under ABA Model Rule 4.1(a) would be the same under Illinois Rule 4.1(a). In addition, if the lawyer is authorized to continue the prosecution of whatever claim or claims exist on behalf of the decedent's estate, the Committee believes that the death of the claimant is a "material fact" within the meaning of Illinois Rule 4.1(b) as well. Therefore, disclosure to the adverse party is necessary to avoid assisting a fraudulent act on the part of the lawyer's new client, the executor or administrator of the decedent's estate. Finally, the failure to make such disclosure might well be considered conduct involving "deceit or misrepresentation" within the meaning of Rule 8.4(a)(4). For these reasons, the lawyer must make timely disclosure of the client's death with respect to the pending personal injury matter.

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