ETHICS ADVISORY OPINION

24-03

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

S.C. Rules of Professional Conduct: 1.6, 1.16(d), 3.3, 3.4(a), 4.1(a), and 8.4 (d) and (e).

Facts: Lawyer represents Client in a personal injury matter. A lawsuit has not been initiated, but Lawyer has been talking to the would-be-Defendant's insurance adjustor. Client dies of unrelated causes, and an estate has not been opened nor a personal representative appointed. Client's only child has communicated to Lawyer that they decline to open an estate or pursue the personal injury claim. The statute of limitations will soon expire.

Questions Presented:

1. What action, if any, do the South Carolina Rules of Professional Conduct require Lawyer to take regarding Lawyer's representation of the now deceased Client?
2. Do the South Carolina Rules of Professional Conduct require Lawyer to inform the would-be-opposing party in the personal injury matter that Client is deceased?

Summary: In this instance, Lawyer's representation of Client terminated upon Client's death, and Lawyer has no authority to act on behalf of Client. Rule 1.16(d) provides that, upon termination of representation, a lawyer shall act to the extent reasonably practicable to protect a client's interest. In the absence of an estate with an executor and/or personal representative, Lawyer may use their discretion to identify and notify any appropriate potential party(ies) of the existence of a personal injury claim and when the statute of limitations will run. When, as here, the only known successors in interest – *i.e.*, the family – have informed Lawyer that they will not be opening an estate and do not desire to pursue the personal injury claim, Lawyer has satisfied their ethical obligation to protect the deceased client's interest. As litigation has not commenced, affirmative disclosure of Client's death to the insurance adjustor is not required as it could possibly prejudice Client or any potential future successor in interest. However, Lawyer should be careful not to misrepresent the vital status of Client.

Opinion:

What action must Lawyer take regarding representation of the deceased Client? The South Carolina Rules of Professional Conduct provide that, "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to [the] Rules determine whether a client- lawyer relationship exists." Scope at [4], RPC, Rule 407,

SCACR. This Committee does not express opinions on questions of law, but, to address the questions raised by Lawyer, the Committee recognizes that our appellate courts have held that a lawyer's authority to act for a client generally ends with the client's death. *Bunch v. Dunning*, 106 S.C. 300, 91 S.E. 331 (1917) (any authority a lawyer has as counsel for a client ceases with the client's death such that the lawyer no longer has any power or authority to further represent the deceased client); *Hillman v. Pinion*, 347 S.C. 253, 258 at 5, 554 S.E.2d 427, 430 at 5 (Ct. App. 2001). However, the lawyer for a deceased client may continue to act in the matter if a new attorney-client relationship is entered with the deceased's duly qualified personal representative who authorizes the substitution of parties. *See, e.g. Hillman v. Pinion*, 347 S.C. 253, 258, 554 S.E.2d 427, 430 (Ct. App. 2001) (while authority of lawyer to act on behalf of client ends upon client's death, under specific facts of case – lawyer for deceased client was representing client's estate by agreement with personal representative of estate, a fact known by all parties – lawyer had authority to act for client). *See also* Va. Eth. Op. 1900 (2024) (even if a client's death is disclosed at the same time, a lawyer cannot accept or make a settlement offer on the deceased client's behalf because the lawyer has no client and authority to do so unless and until retained by the administrator of the estate or other successor in interest to pursue any remaining claim on behalf of the estate); N.Y. Eth. Op. 1211 (2020) ("If a lawyer is handling a personal injury matter for a client who dies during the case, the attorney-client relationship automatically terminates, but the lawyer may enter into a new attorney client relationship with the former client's putative personal representative."); *Restatement (Third) of the Law Governing Lawyers* §31 at Comment e (Am Law Inst. 2000) (client's death ends a lawyer's authority, and the rights of the decedent pass to others, *e.g.*, personal representatives, who can, if they choose, revive the lawyer's representation).

The basic principles underlying the Rules include the obligation of a lawyer to zealously protect a client's legitimate interest within the bounds of the law. Preamble at [9]. Rule 1.6 prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or disclosure is specifically permitted by the Rule.[1] This duty of confidentiality continues after the attorney-client relationship has terminated, Rule 1.6, Comment [22]. This Committee has previously concluded that it also extends beyond the death of the client, and there is no authority that it can be waived by third parties. S.C. Bar Eth. Adv. Op. 05-09. Rule 1.16(d) provides that, upon termination of representation, a lawyer shall act to the extent reasonably practicable to protect a client's interest. Rules 1.6 (a) and 1.16(d) can be read together to mean that, upon the death of a client, a lawyer may take steps immediately and reasonably necessary to protect and preserve the interests of the client. For example, in the absence of an estate with an executor and/or personal representative, Lawyer may, in the Lawyer's discretion, identify and notify any appropriate potential successors in interest of the existence of a personal injury claim and when the statute of limitations will run.[2]

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[1] None of the disclosures permitted under Rule 1.6(b) are applicable under the facts presented here.

[2] South Carolina substantive law contemplates that clients may die during representation. *See, e.g.*, S.C. Code Section 62-3-109 ("The running of any statute of limitations on a cause of action belonging to a decedent which had not been barred as of the date of his death is suspended during

Must Lawyer inform the would-be opposing party that Client has died or that representation has terminated? Most jurisdictions that have addressed the question whether a lawyer must disclose a client's death have done so in the context of pending litigation and court appearances. The majority have held the lawyer must disclose the client's death to avoid, either through affirmative misrepresentations or failure to make disclosure, violating Rules identical or similar to our Rules 3.3 (Candor toward the Tribunal), 4.1 (Truthfulness in Statements to Others), or 8.4 (Misconduct).

> 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. 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.

VA Legal Eth. Op. 1900 at 2 (lawyer must disclose client's death to opposing party before any further substantive communication, and if the matter is before a court, disclosure must be made to it no later than next communication with or appearance before the court). *See also, e.g.*, *Virzi v. Grand Trunk Warehouse & Cold Storage Co*., 571 F. Supp. 507 (E.D.Mich.1983) (lawyer whose client with a pending lawsuit dies owes duty of candor to court, which requires disclosure of client's death); *In the Matter of Feofanov*, IL Disp. Op. M.R. 28670 (Ill. Sup. Ct. 2017) and IL Disp. Op. 2017-PR-00009 (2017) (after lawsuit was filed, lawyer learned client had died, but continued representation without authority from estate or family and without disclosing client's death to opposing counsel or during court appearances in violation of Rules 3.3(a)(1), 4.1(a), and 8.4(c)); *Kentucky Bar Assn. v. Geisler*, (1997) (when client dies during settlement negotiations in pending lawsuit, lawyer must tell opposing counsel of such, and failure to do so is affirmative misrepresentation in violation of SCR 3.130-4.1); ABA Formal Eth. Op. 95-397 (when client-claimant dies during settlement negotiations in pending lawsuit, failure of lawyer to disclose death to opposing counsel and court in first communications with either is tantamount to making false statement of material fact within meaning of Rule 4.1(a), MRPC).

The facts presented by this inquiry indicate that discussions with the insurance adjustor have occurred, but not that litigation has commenced. Thus, they are sufficiently different than those involved in the opinions cited above to lead the Committee to conclude that affirmative disclosure at this stage is not required by the Rules as it could possibly prejudice Client or any potential successor in interest. *See* PA Eth. Op. 93-51 (1993). While Lawyer would not violate Rule 4.1(a) by avoiding any substantive communication with the adjustor (*see* Va. Eth. Op. 1900), Lawyer should be mindful of Rules 4.1(a), and 8.4(d) and (e) and

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the eight months following the decedent's death but resumes thereafter unless otherwise tolled."); Rule 265, SCACR (upon death of a party, court may allow substitution of the party); Rule 25(a), SCRCP (upon death of a party, court may allow substitution if the death does not extinguish the claim).

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