



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1229 (09/21/2021)

Topic: Lawyer's Rights and Duties after Death of a Client

Digest: A lawyer may not settle a claim for a client after the client has died absent authorization from a duly qualified representative of the decedent.

Rules: 1.2(a), 1.16(d)

FACTS

1. The inquirer is a New York lawyer who practices personal injury law in New York. Some years ago, a client retained the inquirer on a contingency-fee basis to pursue a claim arising out of a vehicular accident. With the client's approval, the inquirer opted not to commence an action but instead to engage in negotiations directly with the alleged tortfeasor's insurer to achieve an out-of-court resolution of the dispute. The inquirer characterizes the client's claim as weak, an assessment apparently shared by the insurer, whose initial very modest settlement offers the client rejected.

2. More recently, the inquirer negotiated a somewhat higher albeit still modest settlement sum from the insurer, which the inquirer considers both fair and the maximum the insurer is likely to tender. In seeking to obtain the client's approval of the deal, the inquirer learned, for the first time, that the client had passed away from causes unrelated to the accident animating the claim, and that the client had died before the lawyer received the most recent settlement offer. The inquirer notified the insurer of the client's demise. At the time of this notice, the insurer had already forwarded a release to the inquirer for the client's signature with the amount of consideration set forth in the release. Upon learning of the client's death, the insurer did not rescind the offer; according to the inquirer, the insurer said that the coronavirus pandemic has occasioned other similar circumstances. Nevertheless, no binding commitment exists that the insurer will pay the offered amount, and no money has yet been exchanged.

3. As far as the inquirer has been able to ascertain, the client died intestate and with little if any assets. The inquirer retained an investigator in an effort to locate the client. This effort resulted in the discovery of a companion who confirmed both the client's death and the client's lack of meaningful assets. Neither the late client's companion nor the lawyer's investigator have been able to produce a death certificate, which the inquirer sought as a prerequisite for a possible petition to the Surrogate's Court. To the best of the inquirer's knowledge, no probate or like proceedings have been started to dispose of the deceased client's assets.

4. The inquirer holds a power of attorney authorizing the lawyer "to execute documents necessary for the prosecution of the [client's] legal affairs," including such documents as "pleadings," "releases," and "settlement drafts," but this authorization requires that the client be notified "in advance of each such document that is being executed on [the client's] behalf and

consent orally to the execution of said documents.”

5. The inquirer’s contingency-fee agreement with the client entitles the inquirer to a third of the client’s recovery after deduction of expenses. Had the client survived and accepted the offer, this agreement would entitle the client to at least half the tendered settlement amount. The inquirer wishes to abandon the matter based on the client’s death.

QUESTION:

5. May a lawyer cease to pursue a client’s matter, which was never the subject of a judicial proceeding, when the client dies before conclusion of the matter?

OPINION:

6. Our answer is yes. The N.Y. Rules of Professional Conduct (“Rules”) say that whether an attorney-client relationship exists is a question of law not ethics. Rules, Preamble ¶ [9]. Nevertheless, we have said that “the death of the client terminates the attorney-client relationship.” N.Y. State 1211 ¶ 4 (2020) (citing cases). “As a consequence, ‘[t]he lawyer . . . may not take any further steps in connection with the matter unless and until [the lawyer] is authorized to do so by the deceased’s duly qualified personal representative.’” *Id.* (quoting ABA 95-397). “A client’s death terminates a lawyer’s actual authority,” and any “rights of the deceased client pass to other persons – executors, for example, who can, if they wish, revive the representation.” Restatement (Third) of the Law Governing Lawyers § 31 cmt. e (2000).

7. Rule 1.2(a) allocates to the client the sole decision on whether to settle a matter. Without a client, the inquiring lawyer has no right to accept the proposed settlement offer, no matter whether the counterparty is prepared to proceed. Here, the inquirer’s power of attorney only reinforces this conclusion, because, while interpretation of such documents are issues of law not ethics, the document unambiguously invests the client with the power to decide whether to settle. Accordingly, in our judgment, the lawyer has no right to effect the settlement, and as a result is not only free but also ethically obligated to forbear from further steps to obtain the settlement proceeds in the absence of a duly qualified personal representative of the client to instruct the lawyer otherwise.

8. A lawyer in the inquirer’s position may, but need not, attempt, as the inquirer did, to identify a personal representative to act on the deceased client’s behalf in furtherance of judicial proceedings in an appropriate court to effect the proposed settlement. We note the absence of any pending court proceedings – that the personal injury matter never matured into an action – only to make clear that the lawyer here required no judicial permission to terminate the attorney-client relationship because there was no tribunal involved. Rule 1.16(d) prohibits a lawyer from withdrawing without tribunal permission where required by a tribunal’s rules.

CONCLUSION:

9. When a client dies before conclusion of the matter, the lawyer has no right to proceed with the matter and may not accept a settlement offer, made after the client died and without the deceased client’s approval, absent the separate endorsement of the decedent’s duly qualified personal representative.

(22-21)