

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

2 QUESTION PRESENTED

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

5 APPLICABLE RULES AND OPINIONS

6 Rule 3.3. Candor Toward The Tribunal.

7 (a) A lawyer shall not knowingly:

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

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

11 \* \* \*

12

13 Rule 4.1. Truthfulness In Statements To Others.

14

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

16 (a) make a false statement of fact or law; or

17 (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or  
18 fraudulent act by a client.

19 Legal Ethics Opinion: 952 (1987).

20 ANSWER

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

25 ANALYSIS

26 The ethical duties begin with the legal conclusion that the death of the client terminates  
27 the representation and the lawyer’s actual authority to act for the client. Restatement (Third) of  
28 the Law Governing Lawyers, § 31 Termination of a Lawyer’s Authority, Comment *e*. Given that  
29 foundation, any act or omission that perpetuates the belief that the lawyer represents the client or

30 has any authority to act on behalf of a client violates Rule 4.1 either by affirmatively  
31 misrepresenting the lawyer’s authority or by failing to act and therefore passively  
32 misrepresenting the lawyer’s authority.

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

35 The death of a client means that the lawyer, at least for the moment, no longer has  
36 a client and, if she does thereafter continue in the matter, it will be on behalf of a  
37 different client. We therefore conclude that a failure to disclose that occurrence is  
38 tantamount to making a false statement of material fact within the meaning of Rule  
39 4.1(a). ... Prior to the death, the lawyer acted on behalf of an identified client.  
40 When, however, the death occurs, the lawyer ceases to represent that identified  
41 client. Accordingly, any subsequent communication to opposing counsel with  
42 respect to the matter would be the equivalent of a knowing, affirmative  
43 misrepresentation should the lawyer fail to disclose the fact that she no longer  
44 represents the previously identified client.

45  
46 The opinion also concludes that an appearance before a court without disclosing the  
47 client’s death would violate Rule 3.3 by making a false statement of material fact to the court.

48 Therefore, the ABA concluded, the lawyer must inform the opposing lawyer and the court of the  
49 client’s death in her first communication after learning of that fact.

50 The committee agrees that the lawyer must disclose the client’s death before any further  
51 substantive communication with opposing counsel and must disclose to the court no later than  
52 the first communication or appearance after learning of the client’s death.

53 There are also circumstances when the lawyer could misrepresent her status by failing to  
54 disclose her client’s death even without any communication with opposing counsel. For example,  
55 if a settlement has been agreed to before the client’s death, but payment has not been made to the  
56 now-deceased client, the lawyer may not simply wait as the opposing party complies with the  
57 settlement obligations, but must proactively inform the opposing party that the client has died.

58 Not only would the lawyer end up in an untenable position when she could not take any

59 necessary steps to finalize the settlement or deposit and disburse the settlement funds, but the  
60 lawyer effectively misrepresents to opposing counsel that the settlement can and should be  
61 finalized.

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

70