

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2018-01
Issued February 15, 2018**

FACTS

Two inquiring attorneys serving as co-counsel in a matter seek the Panel's advice based on the following facts. In 2009, Husband retained the inquiring attorneys regarding the failure of his primary care physician to diagnose a cancerous tumor. The inquiring attorneys state that the delay in diagnosis was significant. The tumor was surgically removed and Husband appeared to be cancer free. The inquiring attorneys and Husband decided not to proceed with a claim against the primary care physician at that time. Husband followed up with a different medical provider about every six months after the surgery.

The cancer returned slightly more than three years later. Husband began treatment again and consulted with the inquiring attorneys. The inquiring attorneys met with both Husband and his wife, and both Husband and Wife retained the attorneys to pursue a negligence claim against the primary care physician. The inquiring attorneys state that both Husband and Wife signed an engagement agreement which contains a cooperation clause requiring them to assist counsel.

Husband treated for his cancer over the course of several years. The inquiring attorneys state that Husband clearly understood that he was dying, and intended to do whatever he could to preserve evidence for a lawsuit against the physician. In 2015, the inquiring attorneys filed a miscellaneous petition in Superior Court to preserve Husband's testimony. Husband underwent a discovery deposition with counsel for the primary care physician, and later a videotaped deposition to preserve his testimony for use at a future trial. Husband died in 2016.

Following Husband's death, the inquiring attorneys contacted Wife to inquire about opening an estate and commencing a wrongful death lawsuit. Wife objected to proceeding with a lawsuit. She asserted that the inquiring attorneys failed to fully explain that the claim could only be filed after her husband passed away. She stated that a lawsuit was too stressful for her at that time, and asked the inquiring attorneys to give her several months to attend to personal affairs. She also stated that she did not want the couple's children to know about the wrongful death claim. Wife's resistance to pursuing a wrongful death action has persisted over the last sixteen months since Husband's death. The inquiring attorneys state that it is apparent that she will never agree to proceed with litigation and is opposed to the estate's or the heirs' commencing a wrongful death action.

The inquiring attorneys believe Wife's decision not to proceed with a wrongful death action exposes them to malpractice liability, and also exposes her to claims of her children for failing to

protect and preserve an asset of Husband's estate. The inquiring attorneys ask what their obligations are under these facts.

The Panel has reviewed a copy of the engagement letter and the Superior Court file for the miscellaneous petition.

ISSUE PRESENTED

The inquiring attorneys ask what their obligations are when Wife no longer wants to commence a wrongful death lawsuit related to her husband's death, and also when Wife directs them not to disclose the claim to the couple's children.

OPINION

The inquiring attorneys' client has the ultimate authority to proceed or not proceed with the wrongful death claim; the inquiring attorneys are prohibited from notifying Wife's children of the claim; and the inquiring attorneys may withdraw from and terminate the representation provided they comply with Rule 1.16.

REASONING

At the outset, the Panel makes clear that its jurisdiction is limited to examining a lawyer's conduct as it applies to the Rules of Professional Conduct. Issues relating to malpractice liability require resolution of questions concerning substantive law outside the area of legal ethics and discipline.

Before Husband died, both clients, Husband and Wife, retained the inquiring attorneys to pursue a medical negligence claim against the physician who they assert failed to timely diagnose Husband's cancer. Over the last sixteen months since the death of Husband in 2016, Wife has refused to commence a wrongful death action. The inquiring attorneys believe that Wife will never agree to commence a wrongful death lawsuit.

It is not difficult to imagine what the last several years were like for this Husband and Wife and their children. Wife has explained that a lawsuit would be too stressful for her and for her children, and she has almost certainly decided not to proceed with a wrongful death claim. The Panel believes this decision is one that Wife may make, and one by which the inquiring attorneys must abide. The decision-making authority of a client is key to every representation. Rule 1.2 states in pertinent part as follows:

Rule 1.2. Scope of representation and allocation of authority between client and lawyer.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer

may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.2 gives the client ultimate authority over the objectives of the representation, and a lawyer must defer to the client on those objectives.

Basic also to the lawyer-client relationship is Rule 1.4, which, among other obligations, requires that a lawyer provide sufficient information to the client so that the client can make informed decisions. In pertinent part, Rule 1.4 states:

Rule 1.4 Communication.

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

In the instant case, it has been sixteen months since the death of Husband. The Panel presumes that the inquiring attorneys have informed Wife of, among other issues, the statute of limitations and the consequences of not filing the lawsuit within the time period required.

Wife has directed that the inquiry attorneys not disclose the wrongful death claim to her children. The inquiring attorneys are concerned about Wife's exposure to possible claims of the children for failing to preserve an asset of Husband's estate. Wife is the inquiring attorneys' client. Rule 1.6 entitled "Confidentiality of information" prohibits lawyers from disclosing information related to a client's representation without the client's consent. Therefore, under Rule 1.6, the inquiring attorneys may not notify the couple's children about a wrongful death claim.

Finally, the Panel believes that the inquiring attorneys may ethically withdraw from and terminate the representation if they are not able to obtain Wife's agreement to proceed with a

wrongful death claim. Rule 1.16 entitled “Declining or terminating representation” provides in pertinent part:

Rule 1.16 Declining or terminating representation.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or Revised June 2017

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

The client cooperation paragraph of the engagement agreement in the instant inquiry states, “Client understands that a failure to cooperate shall be ground for [the inquiring attorneys] to withdraw as the Client’s atty[s]. If such withdrawal occurs or Client decides to abandon Client’s claims against [the inquiring attorneys’] advice, Client agrees to pay [the inquiring attorneys] for services rendered....” Good cause for withdrawal exists under both Rule 1.16(b) and the client cooperation paragraph of the retainer agreement. Should the inquiring attorneys elect to withdraw from the representation of Wife, they must comply with Rule 1.16(d).

The Panel concludes that the inquiring attorneys’ client has the ultimate authority to proceed or not proceed with the wrongful death claim; the inquiring attorneys are prohibited from notifying Wife’s children of the claim; and the inquiring attorneys may withdraw from and terminate the representation provided they comply with Rule 1.16.