

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error

Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the Model Rules to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation.

Introduction

Even the best lawyers may err in the course of clients' representations. If a lawyer errs and the error is material, the lawyer must inform a current client of the error.¹ Recognizing that errors

¹ A lawyer's duty to inform a current client of a material error has been variously explained or grounded. For malpractice and breach of fiduciary decisions, *see, e.g.*, *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 629 (8th Cir. 2009) (predicting Minnesota law and concluding that "the lawyer must know that there is a non-frivolous malpractice claim against him such that there is a substantial risk that [his] representation of the client would be materially and adversely affected by his own interest in avoiding malpractice liability" (internal quotation marks omitted)); *Beal Bank, SSB v. Arter & Hadden, LLP*, 167 P.3d 666, 673 (Cal. 2007) (stating that "attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice"); *RFF Family P'ship, LP v. Burns & Levinson, LP*, 991 N.E.2d 1066, 1076 (Mass. 2013) (discussing the fiduciary exception to the attorney-client privilege and stating that "a client is entitled to full and fair disclosure of facts that are relevant to the representation, including any bad news"); *In re Tallon*, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.").

For disciplinary decisions, *see, e.g.*, *Fla. Bar v. Morse*, 587 So. 2d 1120, 1120–21 (Fla. 1991) (suspending a lawyer who conspired with his partner to conceal the partner's malpractice from the client); *In re Hoffman*, 700 N.E.2d 1138, 1139 (Ind. 1998) (applying Rule 1.4(b)). *See also* *Ill. State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., P.C.*, 980 N.E.2d 1120, 1129 (Ill. App. Ct. 2012) (finding that a voluntary payments provision in a professional liability insurance policy was "against public policy, since it may operate to limit an attorney's disclosure [of his potential malpractice] to his clients").

For ethics opinions, *see, e.g.*, *Cal. State Bar Comm. on Prof'l Responsibility & Conduct Op. 2009-178*, 2009 WL 3270875, at *4 (2009) [hereinafter *Cal. Eth. Op. 2009-178*] ("A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation. . . . Where the lawyer believes that he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'" (citation omitted)); *Colo. Bar Ass'n, Ethics Comm., Formal Op. 113*, at 3 (2005) [hereinafter *Colo. Op. 113*] ("Whether a particular error gives rise to an ethical duty to disclose [under Rule 1.4] depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error."); *Minn. Lawyers Prof'l Responsibility Bd. Op. 21*, 2009 WL 8396588, at *1 (2009) (imposing a duty to disclose under Rule 1.4 where "the lawyer knows the lawyer's conduct may reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client's

occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

If a material error relates to a former client's representation and the lawyer does not discover the error until after the representation has been terminated, the lawyer has no obligation under the Model Rules to inform the former client of the error. To illustrate, assume that a lawyer prepared a contract for a client in 2015. The matter is concluded, the representation has ended, and the person for whom the contract was prepared is not a client of the lawyer or law firm in any other matter. In 2018, while using that agreement as a template to prepare an agreement for a different client, the lawyer discovers a material error in the agreement. On those facts, the Model Rules do not require the lawyer to inform the former client of the error. Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules.

The Duty to Inform a Current Client of a Material Error

A lawyer's responsibility to communicate with a client is governed by Model Rule 1.4.² Several parts of Model Rule 1.4(a) potentially apply where a lawyer may have erred in the course of a current client's representation. For example, Model Rule 1.4(a)(1) requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent may be required. Model Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Model Rule 1.4(a)(3) obligates a lawyer to "keep a client reasonably informed about the status of a matter." Model Rule 1.4(a)(4), which obliges a lawyer to promptly comply with reasonable requests for information, may be implicated if the client asks about the lawyer's conduct or performance of the representation. In addition, Model Rule 1.4(b) requires a lawyer to "explain a

interests"); 2015 N.C. State Bar Formal Op. 4, 2015 WL 5927498, at *2 (2015) [hereinafter 2015 N.C. Eth. Op. 4] (applying Rule 1.4 to "material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim"; N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 684, 1998 WL 35985928, at *1 (1998) [hereinafter N.J. Eth. Op. 684] (discussing Rules 1.4 and 1.7(b) and requiring disclosure "when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Eth. Op. 734, 2000 WL 33347720, at *3 (2000) [hereinafter N.Y. Eth. Op. 734] (discussing the prior Code of Professional Responsibility and concluding that the inquirer had a duty to tell the client that it made "a significant error or omission that may give rise to a possible malpractice claim"); Sup. Ct. of Prof'l Ethics Comm. Op. 593, 2010 WL 1026287, at *1 (2010) [Tex. Eth. Op. 593] (opining that the lawyer must also terminate the representation and applying Texas Rules 1.15(d), 2.01, and 8.04(a)(3)). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (requiring disclosure where the conduct "gives the client a substantial malpractice claim against the lawyer").

² MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018) ("Communication") [hereinafter MODEL RULES].

matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” More broadly, the “guiding principle” undergirding Model Rule 1.4 is that “the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.”³ A lawyer may not withhold information from a client to serve the lawyer’s own interests or convenience.⁴

Determining whether and when a lawyer must inform a client of an error can sometimes be difficult because errors exist along a continuum. An error may be sufficiently serious that it creates a conflict of interest between the lawyer and the client. Model Rule 1.7(a)(2) provides that a concurrent conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.” Where a lawyer’s error creates a Rule 1.7(a)(2) conflict, the client needs to know this fact to make informed decisions regarding the representation, including whether to discharge the lawyer or to consent to the conflict of interest. At the other extreme, an error may be minor or easily correctable with no risk of harm or prejudice to the client.

Several state bars have addressed lawyers’ duty to disclose errors to clients.⁵ For example, in discussing the spectrum of errors that may arise in clients’ representations, the North Carolina State Bar observed that “material errors that prejudice the client’s rights or claims are at one end. These include errors that effectively undermine the achievement of the client’s primary objective for the representation, such as failing to file the complaint before the statute of limitations runs.”⁶ At the other end of the spectrum are “nonsubstantive typographical errors” or “missing a deadline that causes nothing more than delay.”⁷ “Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client’s interests.”⁸ With respect to the middle ground:

Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client’s objectives for the representation, or material disadvantage to the client’s legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing, or direction of the representation, the lawyer may not withhold information about the error.⁹

³ *Id.* cmt. 5.

⁴ *Id.* cmt. 7.

⁵ See *supra* note 1 (listing authorities).

⁶ 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Another example is contained in the Colorado Bar Association’s Ethics Committee in Formal Opinion 113, which discusses the spectrum of errors that may implicate a lawyers’ duty of disclosure. In doing so, it identified errors ranging from those plainly requiring disclosure (a missed statute of limitations or a failure to file a timely appeal) to those “that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client’s right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice.”¹⁰ Errors by lawyers between these two extremes must be analyzed individually. For example, disclosure is not required where the law on an issue is unsettled and a lawyer makes a tactical decision among “equally viable alternatives.”¹¹ On the other hand, “potential errors that may give rise to an ethical duty to disclose include the failure to request a jury in a pleading (or pay the jury fee), the failure to include an acceleration provision in a promissory note, and the failure to give timely notice under a contract or statute.”¹² Ultimately, the Colorado Bar concluded that whether a particular error gives rise to an ethical obligation to disclose depends on whether the error is “material,” which further “depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client’s right or claim.”¹³

These opinions provide helpful guidance to lawyers, but they do not—just as we do not—purport to precisely define the scope of a lawyer’s disclosure obligations. Still, the Committee believes that lawyers deserve more specific guidance in evaluating their duty to disclose errors to current clients than has previously been available.

In attempting to define the boundaries of this obligation under Model Rule 1.4, it is unreasonable to conclude that a lawyer must inform a current client of an error only if that error may support a colorable legal malpractice claim, because a lawyer’s error may impair a client’s representation even if the client will never be able to prove all of the elements of malpractice. At the same time, a lawyer should not necessarily be able to avoid disclosure of an error absent apparent harm to the client because the lawyer’s error may be of such a nature that it would cause a reasonable client to lose confidence in the lawyer’s ability to perform the representation competently, diligently, or loyally despite the absence of clear harm. Finally, client protection and the purposes of legal representation dictate that the standard for imposing an obligation to disclose must be objective.

With these considerations in mind, the Committee concludes that a lawyer must inform a current client of a material error committed by the lawyer in the representation. An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

¹⁰ Colo. Op. 113, *supra* note 1, at 3.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1, 3.

A lawyer must notify a current client of a material error promptly under the circumstances.¹⁴ Whether notification is prompt will be a case- and fact-specific inquiry. Greater urgency is required where the client could be harmed by any delay in notification. The lawyer may consult with his or her law firm's general counsel, another lawyer, or the lawyer's professional liability insurer before informing the client of the material error.¹⁵ Such consultation should also be prompt. When it is reasonable to do so, the lawyer may attempt to correct the error before informing the client. Whether it is reasonable for the lawyer to attempt to correct the error before informing the client will depend on the facts and should take into account the time needed to correct the error and the lawyer's obligation to keep the client reasonably informed about the status of the matter.

When a Current Client Becomes a Former Client

As indicated earlier, whether a lawyer must reveal a material error depends on whether the affected person or entity is a current or former client. Substantive law, rather than rules of professional conduct, controls whether an attorney-client relationship exists, or once established, whether it is ongoing or has been concluded.¹⁶ Generally speaking, a current client becomes a former client (a) at the time specified by the lawyer for the conclusion of the representation, and acknowledged by the client, such as where the lawyer's engagement letter states that the representation will conclude upon the lawyer sending a final invoice, or the lawyer sends a disengagement letter upon the completion of the matter (and thereafter acts consistently with the letter);¹⁷ (b) when the lawyer withdraws from the representation pursuant to Model Rule of Professional Conduct 1.16; (c) when the client terminates the representation;¹⁸ or (d) when overt acts inconsistent with the continuation of the attorney-client relationship indicate that the

¹⁴ See N.J. Eth. Op. 684, *supra* note 1, 1998 WL 35985928, at *1 ("Clearly, RPC 1.4 requires prompt disclosure in the interest of allowing the client to make informed decisions. Disclosure should therefore occur when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted."); 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *4 ("The error should be disclosed to the client as soon as possible after the lawyer determines that disclosure of the error to the client is required."); Tex. Eth. Op. 593, *supra* note 1, 2010 WL 1026287, at *1 (requiring disclosure "as promptly as reasonably possible").

¹⁵ See MODEL RULES R. 1.6(b)(4) (2018) (permitting a lawyer to reveal information related to a client's representation "to secure legal advice about the lawyer's compliance with these Rules").

¹⁶ *United States v. Williams*, 720 F.3d 674, 686 (8th Cir. 2013); *Rozmus v. West*, 13 Vet. App. 386, 387 (U.S. App. Vet. Cl. 2000); see also MODEL RULES Scope cmt. 17 (2018) (explaining that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists").

¹⁷ See *Artromick Int'l, Inc. v. Drustar Inc.*, 134 F.R.D. 226, 229 (S.D. Ohio 1991) (observing that "the simplest way for either the attorney or client to end the relationship is by expressly saying so"); see also, e.g., *Rusk v. Harstad*, 393 P.3d 341, 344 (Utah Ct. App. 2017) (concluding that a would-be client could not have reasonably believed that the law firm represented him where the lawyer had clearly stated in multiple e-mails that the law firm would not represent him).

¹⁸ A client may discharge a lawyer at any time for any reason, or for no reason. *White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc.*, 647 F.3d 684, 689 (7th Cir. 2011); *Nabi v. Sells*, 892 N.Y.S.2d 41, 43 (App. Div. 2009); MODEL RULES R. 1.16 cmt. 4; see also STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 77 (11th ed. 2018) ("Clients, it is said, may fire their lawyers for any reason or no reason.") (citations omitted).

relationship has ended.¹⁹ If a lawyer represents a client in more than one matter, the client is a current client if any of those matters is active or open; in other words, the termination of representation in one or more matters does not transform a client into a former client if the lawyer still represents the client in other matters.

Absent express statements or overt acts by either party, an attorney-client relationship also may be terminated when it would be objectively unreasonable to continue to bind the parties to each other.²⁰ In such cases, the parties' reasonable expectations often hinge on the scope of the lawyer's representation.²¹ In that regard, the court in *National Medical Care, Inc. v. Home Medical of America, Inc.*,²² suggested that the scope of a lawyer's representation loosely falls into one of three categories: (1) the lawyer is retained as general counsel to handle all of the client's legal matters; (2) the lawyer is retained for all matters in a specific practice area; or (3) the lawyer is retained to represent the client in a discrete matter.²³

For all three categories identified by the *National Medical Care* court, unless the client or lawyer terminates the representation, the attorney-client relationship continues as long as the lawyer is responsible for a pending matter.²⁴ With respect to categories one and two above, an attorney-client relationship continues even when the lawyer has no pending matter for the client because the parties reasonably expect that the lawyer will handle all matters for the client in the future as they arise.²⁵ In the third category, where a lawyer agrees to undertake a specific matter, the attorney-client relationship ends once the matter is concluded.²⁶

Although not identified by the *National Medical Care* court, another type of client is what might be called an episodic client, meaning a client who engages the lawyer whenever the client requires legal representation, but whose legal needs are not constant or continuous. In many such

¹⁹ See, e.g., *Artromick Int'l, Inc.*, 134 F.R.D. at 230–31 (determining that a man was a former client because he refused to pay the lawyer's bill and then retained other lawyers to replace the first lawyer); *Waterbury Garment Corp. v. Strata Prods.*, 554 F. Supp. 63, 66 (S.D.N.Y. 1982) (concluding that a person was a former client because the law firm represented him only in discrete transactions that had concluded and the person had subsequently retained different counsel).

²⁰ *Artromick Int'l, Inc.*, 134 F.R.D. at 229.

²¹ *Id.* at 229–30.

²² No. 00-1225, 2002 WL 31068413 (Mass. Super. Ct. Sept. 12, 2002).

²³ *Id.* at *4.

²⁴ *Id.*; see also MODEL RULES R. 1.3 cmt. 4 (2018) (stating that unless the relationship is terminated under Model Rule 1.16, the lawyer “should carry through to conclusion all matters undertaken for a client”).

²⁵ See *Berry v. McFarland*, 278 P.3d 407, 411 (Idaho 2012) (explaining that “[i]f the attorney agrees to handle any matters the client may have, the relationship continues until the attorney or client terminates the relationship”); see also MODEL RULES R. 1.3 cmt. 4 (2018) (advising that “[i]f a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal”).

²⁶ *Simpson v. James*, 903 F.2d 372, 376 (5th Cir. 1990); *Berry*, 278 P.3d at 411; see also *Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.*, 687 F. Supp. 2d 381, 389–90 (S.D.N.Y. 2010) (noting that an attorney-client relationship is ordinarily terminated by the accomplishment of the purpose for which it was formed); *Thayer v. Fuller & Henry Ltd.*, 503 F. Supp. 2d 887, 892 (N.D. Ohio 2007) (observing that an attorney-client relationship may terminate when the underlying action has concluded or when the attorney has exhausted all remedies and declined to provide additional legal services); MODEL RULES R. 1.16 cmt. 1 (“Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded.”).

instances, the client reasonably expects that the professional relationship will span any intervals and that the lawyer will be available when the client next needs representation.²⁷ If so, the client should be considered a current client. In other instances, it is possible that the attorney-client relationship ended when the most recent matter concluded.²⁸ Whether an episodic client is a current or former client will thus depend on the facts of the case.

The Former Client Analysis Under the Model Rules

As explained above, a lawyer must inform a current client of a material error under Model Rule 1.4. Rule 1.4 imposes no similar duty to former clients.

Four of the five subparts in Model Rule 1.4(a) expressly refer to “the client” and the one that does not—Model Rule 1.4(a), governing lawyers’ duty to respond to reasonable requests for information—is aimed at responding to requests from a current client. Model Rule 1.4(b) refers to “the client” when describing a lawyer’s obligations. Nowhere does Model Rule 1.4 impose on lawyers a duty to communicate with former clients. The comments to Model Rule 1.4 are likewise focused on current clients and are silent with respect to communications with former clients. There is nothing in the legislative history of Model Rule 1.4 to suggest that the drafters meant the duties expressed there to apply to former clients.²⁹ Had the drafters of the Model Rules intended Rule 1.4 to apply to former clients, they presumably would have referred to former clients in the language of the rule or in the comments to the rule. They did neither despite knowing how to distinguish duties owed to current clients from duties owed to former clients when appropriate, as reflected in the Model Rules regulating conflicts of interest.³⁰

²⁷ See, e.g., *Parallel Iron, LLC v. Adobe Sys. Inc.*, C.A. No. 12-874-RGA, 2013 WL 789207, at *2–3 (D. Del. Mar. 4, 2013) (concluding that Adobe was a current client in July 2012 when the law firm was doing no work for it; the firm had served as patent counsel to Adobe intermittently between 2006 and February 2012, and had not made clear to Adobe that its representation was terminated); *Jones v. Rabanco, Ltd.*, No. C03-3195P, 2006 WL 2237708, at *3 (W.D. Wash. Aug. 3, 2006) (reasoning that the law firm’s inclusion as a contact under a contract, the law firm’s work for the client after the contract was finalized, and the fact that the client matter was still open in the law firm’s files all indicated an existing attorney-client relationship); STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 78-79 (11th ed. 2018) (“Lawyers might believe that a client is no longer a client if they are doing no work for it at the moment and haven’t for a while. . . . [A] firm may have done work for a client two or three times a year for the past five years, creating a reasonable client expectation that the professional relationship continues during the intervals and that the lawyer will be available the next time the client needs her.”).

²⁸ See, e.g., *Calamar Enters., Inc. v. Blue Forest Land Grp., Inc.*, 222 F. Supp. 3d 257, 264–65 (W.D.N.Y. 2016) (rejecting the client’s claim of an attorney-client relationship where the relationship between the law firm and the client had been dormant for three years; despite the fact that the attorney-client relationship had not been formally terminated, it ended when the purpose of the parties’ retainer agreement had been completed).

²⁹ AM. BAR ASS’N CTR. FOR PROF’L RESPONSIBILITY, *A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013*, 71–78 (Arthur H. Garwin ed., 2013).

³⁰ Compare MODEL RULES R. 1.7 (2018) (addressing current client conflicts of interest), with MODEL RULES R. 1.9 (2018) (governing former client conflicts of interest).

Because Model Rule 1.4 does not impose on lawyers a duty to communicate with former clients,³¹ it is no basis for requiring lawyers to disclose material errors to former clients.

The California State Bar's Committee on Professional Responsibility and Conduct reached a similar conclusion with respect to California Rule of Professional Conduct 3-500, which states that "[a] member [of the State Bar of California] shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." In concluding that a lawyer had no duty to keep a former client informed of significant developments in the representation, and specifically the former client's possible malpractice claim against the lawyer, the Committee focused on the fact that the lawyer and the former client had "terminated their attorney-client relationship" and on Rule 3-500's reference to a "client," meaning a current client.³²

Finally, in terms of possible sources of an obligation to disclose material errors to former clients, Model Rule 1.16(d) provides in pertinent part that, upon termination of a 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[s] or expense[s] that has not been earned or incurred." This provision does not create a duty to inform former clients of material errors for at least two reasons. First, the wording of the rule demonstrates that the error would have to be discovered while the client was a current client, thereby pushing any duty to disclose back into the current client communication regime. Second, Model Rule 1.16(d) is by its terms limited to actions that may be taken upon termination of the representation or soon thereafter; it cannot reasonably be construed to apply to material errors discovered months or years after termination of the representation.

Conclusion

The Model Rules require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The lawyer

³¹ See Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline Adv. Op. 2010-2, 2010 WL 1541844, at *2 (2010) (explaining that Rule 1.4 "applies to ethical duties regarding communication *during a representation*" (emphasis added)); Va. State Bar Comm. on Legal Ethics Eth. Op. 1789, 2004 WL 436386, at *1 (2004) (stating that "[d]uring the course of the representation, an attorney's duty to provide information to his client is governed by Rule 1.4(a)") (emphasis added)).

³² Cal. Eth. Op. 2009-178, *supra* note 1, 2009 WL 3270875, at *6.

must so inform the client promptly under the circumstances. Whether notification is prompt is a case- and fact-specific inquiry.

No similar duty of disclosure exists under the Model Rules where the lawyer discovers after the termination of the attorney-client relationship that the lawyer made a material error in the former client's representation.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

CHAIR: Barbara S. Gillers, New York, NY ■ John M. Barkett, Miami, FL ■ Wendy Wen Yun Chang, Los Angeles, CA ■ Hon. Daniel J. Crothers, Bismarck, ND ■ Keith R. Fisher, Arlington, VA ■ Douglas R. Richmond, Chicago, IL ■ Michael H. Rubin, Baton Rouge, LA ■ Lynda Shely, Scottsdale, AZ ■ Elizabeth C. Tarbert, Tallahassee, FL. ■ Allison Wood, Chicago, IL

CENTER FOR PROFESSIONAL RESPONSIBILITY: Dennis A. Rendleman, Ethics Counsel; Mary McDermott, Associate Ethics Counsel

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