

A Lawyer's Duty to Inform a Client of Errors Made in Representation

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Under Rule 1.4 of the Model Rules of Professional Conduct a 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.” The comments to Rule 1.4 further provide that a lawyer may not withhold information from a client to serve the lawyer’s own objectives.

The American Bar Association’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 481 on April 17, 2018. The opinion explains the circumstances under which a lawyer is required to inform an existing client of a

material error made in the client’s representation.

An error is material where a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice the 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 opinion recognizes that determining whether an error is material may be difficult due to the fact that errors exist along a continuum. The opinion provides some general guidance with respect to determining when an error rises to the level

of a material error. Errors that effectively undermine the client's primary objective, such as where a lawyer fails to file suit before the statute of limitations runs or fails to timely notice an appeal, are plainly material. Further, errors that will cause financial loss to the client or create a substantial delay in the case are likely to be considered material under most circumstances. At the other end of the spectrum, errors that are easily correctable with no risk of harm or prejudice to the client are not material, such as where a lawyer makes a non-substantive typographical error.

The opinion cautions that a lawyer's disclosure obligation is not defined by whether the error could create a colorable malpractice claim and encompasses errors that do not create a risk of professional liability for the lawyer. Even where the error does create a foreseeable risk of harm to the client, the error must still be disclosed if it would "cause a reasonable client to lose confidence in the lawyer's ability." The opinion does not precisely define the scope of a lawyer's disclosure obligations or provide bright-line rules for distinguishing between material and non-material errors. The opinion concludes that determining whether an error is material requires a case- and fact-specific inquiry.

Where the duty to disclose a material error arises, a lawyer must promptly consult with the client. A lawyer may attempt to remedy the error before informing the client, but the requirement of prompt disclosure still

applies and the fact that remedying the error may require additional time does not excuse a lawyer's obligation to disclose the error promptly.

It should be noted that the disclosure obligation only applies to existing clients. There is no such obligation to former clients. The opinion distinguishes between former and existing clients in a common sense manner that is consistent with case law related to termination of the attorney-client relationship. Episodic clients who regularly hire the same lawyer when the need arises, but whose legal needs are not continuous, should likely be treated as an existing client under most circumstances. The opinion provides, however, that whether an episodic client is a current or former client will ultimately depend on the facts of the case.