

# CLIENT-LAWYER RELATIONSHIP

MODEL RULE 1.2

## 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.

## RULE 1.2 – SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

### 1.2(a) continued:

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.

## RULE 1.2 – SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

1.2(a) continued:

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**.

# NEW SUP. CT. CASE 2018

**McCOY v. LOUISIANA, 2018 WL 2186174  
(2018)**

Attorney told jury in his opening argument at trial (and again at sentencing) that his client had in fact committed the three murders, over his client's strenuous objection in open court. Client testified at trial and presented an alibi.

Attorney felt the evidence was overwhelming and that the only way to avoid the death penalty was to concede guilt and argue for mental illness as a mitigating factor at sentencing.

# NEW SUP. CT. CASE 2018

## **McCOY v. LOUISIANA (2018)**

(Client tried to fire the attorney two days before trial over a disagreement on this strategy, and the judge forced the defendant to proceed with the appointed counsel.) Attorney also said he was afraid of suborning perjury, but the client had never admitted guilt, he merely had an implausible alibi. The judge allowed all this.

Supreme Court held this was a “structural error” requiring automatic reversal (no showing of prejudice required, unlike *Strickland*).

# NEW SUP. CT. CASE 2018

## **McCOY v. LOUISIANA (2018)**

NOTE THAT THIS WAS NOT AN INEFFECTIVE ASSISTANCE OF COUNSEL HOLDING.

Supreme Court held this was a Sixth-Amendment “structural error” requiring automatic reversal (no showing of prejudice required, unlike *Strickland*). **A defendant has an absolute right to maintain his own innocence, to decided whether to admit guilt.** If the lawyer does not abide by the client’s decision about this, it requires automatic reversal and new trial.

## COMPARE: FLORIDA V. NIXON, 543 U. S. 175 (2004)

Nixon's attorney thought their best strategy was to concede guilt – the client was unresponsive every time the attorney suggested this, so the attorney went ahead. There, the Court said this **does NOT require reversal**.

*McCoy* distinguished *Nixon* because *McCoy* strenuously objected to his lawyer's strategy and even tried to fire his lawyer before trial, while *Nixon* did not object.

## RULE 1.2 – COMMENT 1

Paragraph (a) confers upon the **client the ultimate authority** to determine the **purposes** to be served by **legal representation**, within the limits imposed by law and the lawyer's professional obligations.

## RULE 1.2 – COMMENT 2

On occasion, however, a lawyer and a client **may disagree** about the means to be used to accomplish the client's objectives.

Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.

## RULE 1.2 – COMMENT 2

Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this **Rule does not prescribe how such disagreements are to be resolved.**

## RULE 1.2 – COMMENT 2

Other law, however, may be applicable and should be consulted by the lawyer.

**The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement.**

## RULE 1.2 – COMMENT 3

At the outset of a representation, the **client** may **authorize the lawyer** to take specific action on the client's behalf **without further consultation.**

Absent a material change in circumstances and subject to Rule 1.4, a **lawyer may rely on such an advance authorization.** The **client may, however, revoke** such authority **at any time.**

# RULE 1.2

**(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.**

# RULE 1.2

(c) A lawyer may **limit** the **scope** of the representation if the limitation is **reasonable** under the circumstances **and** the **client gives informed consent**.

## RULE 1.2 – COMMENT 6

When a lawyer has been **retained by an insurer to represent an insured**, for example, the representation may be limited to matters related to the insurance coverage.

**A limited representation may be appropriate** because the client has limited objectives for the representation.

## RULE 1.2 – COMMENT 6

In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives.

Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as **repugnant** or imprudent.

## RULE 1.2 – COMMENT 7

If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the **lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation.**

Such a limitation, however, would **not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.**

## RULE 1.2 – COMMENT 7

Although an **agreement for a limited representation does not exempt a lawyer from the duty** to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

# RULE 1.2 – COMMENT 9

This prohibition, does **not preclude the lawyer from giving an honest opinion** about the **actual** consequences that appear likely to result from a client's conduct.

**Nor** does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself **make a lawyer a party to the course of action.**

# RULE 1.2 – COMMENT 9

There is a **critical distinction** between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity

## RULE 1.2 – COMMENT 10

**The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed.**

## RULE 1.2 – COMMENT 10

A lawyer may **not** continue assisting a client in conduct that the lawyer **originally** supposed was **legally** proper but **then discovers is criminal or fraudulent.**

The lawyer **must**, therefore, **withdraw** from the representation of the client in the matter.

## RULE 1.2 – COMMENT 10

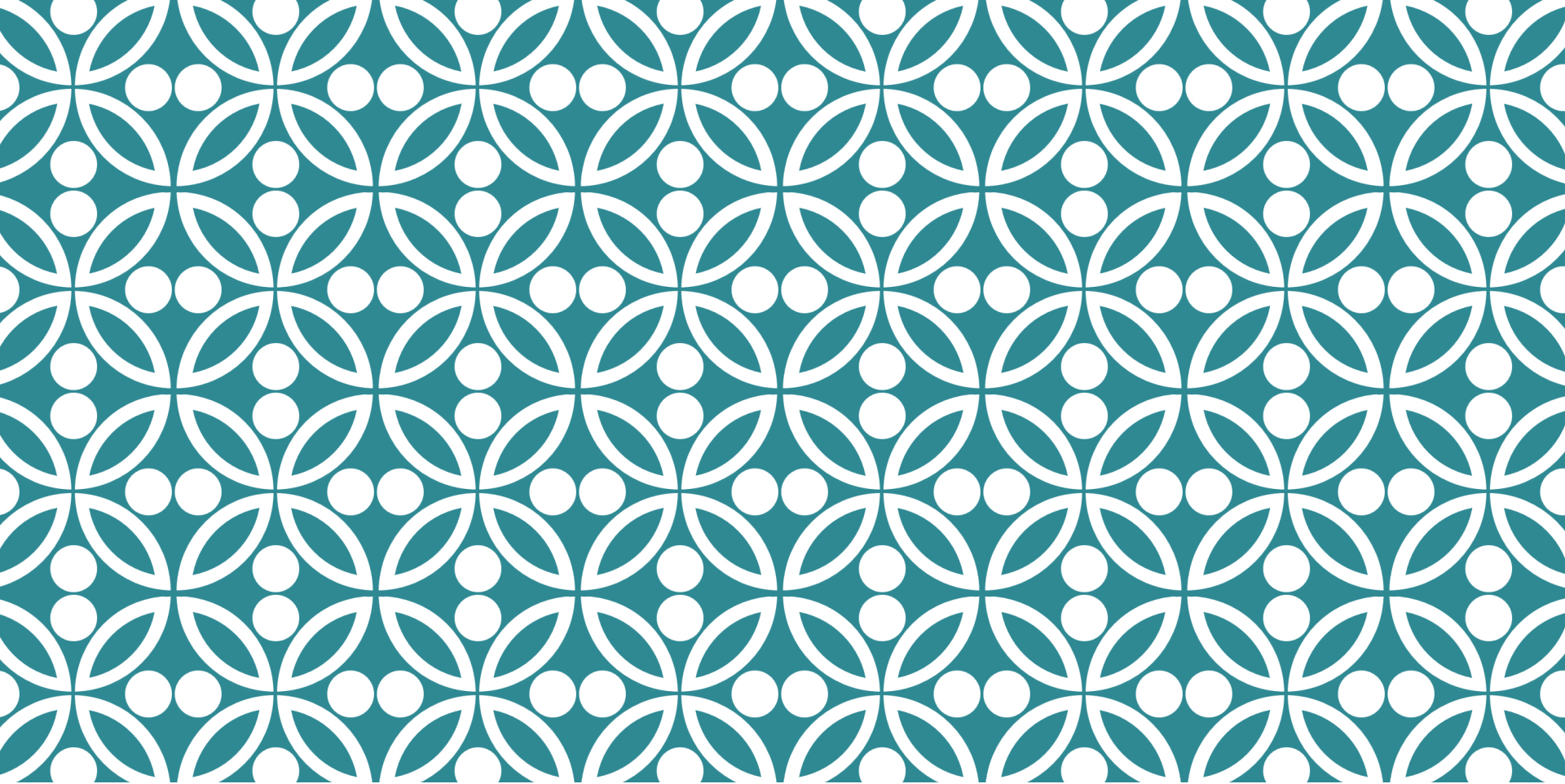
In some cases, **withdrawal alone** might be **insufficient**.

It **may** be necessary for the lawyer to **give notice** of the fact of withdrawal and to **disaffirm** any opinion, document, affirmation or the like. See Rule 4.1.

## RULE 1.2 – COMMENT 12

Paragraph (d) applies whether or not the defrauded party is a party to the transaction.

Hence, a lawyer **must not participate** in a transaction to effectuate criminal or fraudulent avoidance of tax liability.



# COMMUNICATION

Rule 1.4

## 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;

## RULE 1.4 – COMMENT 2

For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case **must promptly** inform the client of its substance **unless** the client has **previously** indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

## RULE 1.4 – COMMUNICATION

- (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

## RULE 1.4 – COMMENT 3

In certain circumstances, such as **during a trial** when an immediate decision must be made, the **exigency** of the situation **may require the lawyer to act without prior consultation.**

## RULE 1.4 – COMMENT 4

When a **client** makes a **reasonable request** for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, **acknowledge receipt of the request and advise the client when a response may be expected.**

## RULE 1.4 – COMMUNICATION

(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.

## RULE 1.4 – COMMUNICATION

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

**For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement.**

In litigation, a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others.

**On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail.**

The guiding principle 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.

## RULE 1.4 – COMMENT 6

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult.

However, fully informing the client according to this standard **may be impracticable**, for example, **where the client is a child or suffers from diminished capacity.**

## RULE 1.4 – COMMENT 6

When the client is an **organization or group**, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13.

Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

## RULE 1.4 – COMMENT 7

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication.

**Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.**

## RULE 1.4 – COMMENT 7

A lawyer may **not** withhold information to serve the **lawyer's own interest or convenience** or the interests or convenience of another person.

Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client.

Rule 3.4(c) directs compliance with such rules or orders.

## ABA FORMAL OP. 481 (APRIL 2018)

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

Rule 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.

# ABA FORMAL OP. 481 (APRIL 2018)

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.

## ABA FORMAL OP. 481 (APRIL 2018)

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.

## ABA FORMAL OP. 481 (APRIL 2018)

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.

## ABA FORMAL OP. 481 (APRIL 2018)

**NOTE:** 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.

## ABA FORMAL OP. 481 (APRIL 2018)

**EXAMPLE:** An attorney 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 attorney or law firm in any other matter.

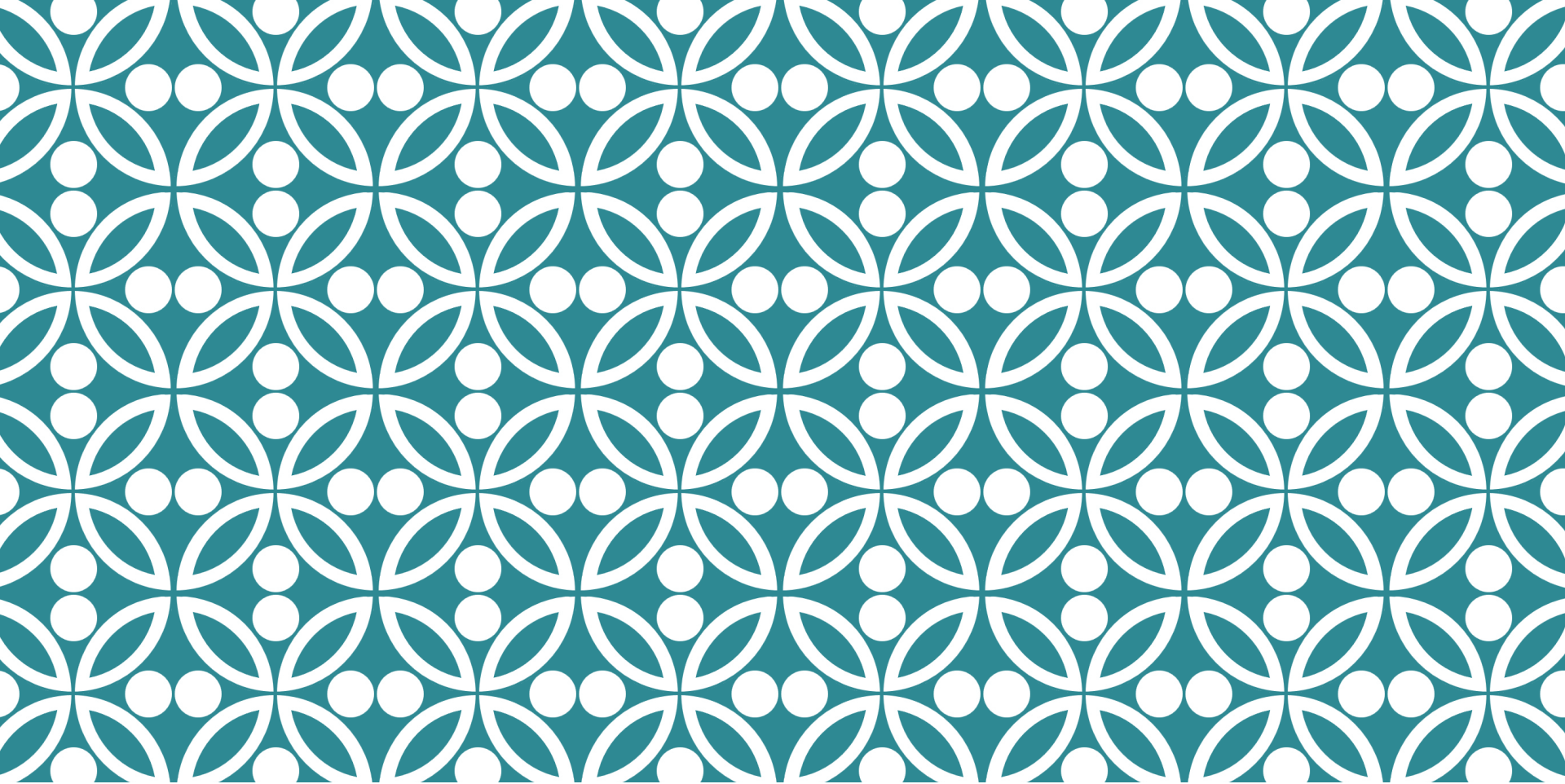
In 2018, while using that agreement as a template to prepare an agreement for a different client, the attorney discovers a material error in the agreement. On those facts, do the Model Rules require the lawyer to inform the former client of the error?

# ABA FORMAL OP. 481 (APRIL 2018)

- a) Yes, because Rule 1.4 requires that lawyers disclose material errors made during the representation to the clients.
- b) Yes, because without the disclosure the attorney is essentially waiving a malpractice claim on behalf of the former client without the disclosures required under Rule 1.8(h).
- c) No, because the Model Rules do not require disclosure of material errors to former clients after the representation has ended.
- d) No, because it is not clear on these facts that the former client has suffered any actual injury or prejudice, even if the error was material.

# ABA FORMAL OP. 481 (APRIL 2018)

- a) Yes, because Rule 1.4 requires that lawyers disclose material errors made during the representation to the clients.
- b) Yes, because without the disclosure the attorney is essentially waiving a malpractice claim on behalf of the former client without the disclosures required under Rule 1.8(h).
- c) No, because the Model Rules do not require disclosure of material errors to former clients after the representation has ended.**
- d) No, because it is not clear on these facts that the former client has suffered any actual injury or prejudice, even if the error was material.



**CLIENT-LAWYER RELATIONSHIP:  
CLIENT WITH  
DIMINISHED CAPACITY** | **MRPR  
1.14**

## RULE 1.14: GENERAL RULE

(a) When a client's capacity to make adequately considered decisions in connection with a representation is **diminished**, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

# RULE 1.14 : LAWYER'S DUTIES TO CLIENTS WITH DIMINISHED CAPACITY

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm

(unless action is taken and cannot adequately act in the client's own interest)

the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

## RULE 1.14 : DISCLOSURE OF PRIVILEGE INFORMATION

(c) When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, **but only** to the extent reasonably necessary to protect the client's interests.

## 1.14 COMMENTS: NORMAL CLIENT-LAWYER RELATIONSHIP

[1] The normal client-lawyer relationship is based on the assumption that the client is capable of making decisions about important matters.

When the client is a minor or suffers from a diminished mental capacity maintaining the relationship may not be possible.

A client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.

## 1.14 COMMENTS: NORMAL CLIENT-LAWYER RELATIONSHIP EXAMPLE...

**For example**, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.

So also, it is recognized that some persons of **advanced age** can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

## 1.14 COMMENTS: REPRESENTATION OF CLIENTS WITH DIMINISHED CAPACITY

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

## 1.14 COMMENTS: 3<sup>RD</sup> PARTIES

[3] The client may wish to have family members or other persons participate in discussions with the lawyer.

When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege.

## 1.14 COMMENTS: 3<sup>RD</sup> PARTIES

[3] ... Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under (b), must look to the client, and not family members, to make decisions on the client's behalf.

## 1.14 COMMENTS:

### APPOINTED LEGAL REPRESENTATIVE

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client.

In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

## 1.14 COMMENTS: PREVENTING GUARDIAN'S MISCONDUCT

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

## 1.14 COMMENTS: PROTECTIVE MEASURES

[5] Protective measures could include:

1. consulting with family members,
2. using a reconsideration period to permit clarification or improvement of circumstances,
3. using voluntary surrogate decision making tools **such as** durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.

## 1.14 COMMENTS: FACTORS FOR TAKING PROTECTIVE ACTION

In taking any protective action, the lawyer should be guided by such factors:

1. The wishes and values of the client to the extent known,
2. The client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible,
3. Maximizing client capacities and
4. Respecting the client's family and social connections.

## 1.14 COMMENTS:

### EXTENT OF CLIENT'S DIMINISHED CAPACITY

[6] In determining the extent of the client's diminished capacity, the lawyer should balance such factors as:

## 1.14 COMMENTS: FACTORS FOR DETERMINING EXTENT OF CLIENT'S DIMINISHED CAPACITY

1. the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision;
2. the substantive fairness of a decision; and
3. the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

## 1.14 COMMENTS: WHETHER TO APPOINT OF A LEGAL REPRESENTATIVE

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer.

## 1.14 COMMENTS: WHETHER TO APPOINT OF A LEGAL REPRESENTATIVE CONTINUED...

**Thus**, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. **In addition**, rules in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. **In many circumstances**, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require.

## 1.14 COMMENTS: DISCLOSURE OF CLIENT'S DIMINISHED CAPACITY

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests.

**For example**, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information.

## 1.14 COMMENTS: IMPLIED AUTHORITY TO MAKE NECESSARY DISCLOSURE

When taking protective action pursuant to (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.

## 1.14 COMMENTS:

### SCOPE AND DECISION OF DISCLOSURE

Given the risks of disclosure, (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. The lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client.

## 1.14 COMMENTS: EMERGENCY LEGAL ASSISTANCE

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer **MAY** take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer.

## 1.14 COMMENTS: EMERGENCY LEGAL ASSISTANT...

Even in such an emergency the lawyer should not act **UNLESS** the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm.

## 1.14 COMMENTS: EMERGENCY AND SERIOUSLY DIMINISHED CAPACITY

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person.

## COMMENT 1.14: EMERGENCY AND SERIOUSLY DIMINISHED CAPACITY

The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.