

16-104. Communication.

A. Status of matters. 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 Paragraph E of Terminology of the Rules of Professional Conduct, 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. Client's informed decision-making. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

C. Disclosure of professional liability insurance.

- (1) If, at the time of the client's formal engagement of a lawyer, the lawyer does not have a professional liability insurance policy with limits of at least one-hundred thousand dollars (\$100,000) per claim and three-hundred thousand dollars (\$300,000) in the aggregate, the lawyer shall inform the client in writing using the form of notice prescribed by this rule. If during the course of representation, an insurance policy in effect at the time of the client's engagement of the lawyer lapses, or is terminated, the lawyer shall provide notice to the client using the form prescribed by this rule.
- (2) The form of notice and acknowledgment required under this Paragraph shall be:

NOTICE TO CLIENT

Pursuant to Rule 16-104(C) NMRA of the New Mexico Rules of Professional Conduct, I am required to notify you that ["I" or "this Firm"] [do not][does not][no longer] maintain[s] professional liability malpractice insurance of at least one-hundred thousand dollars (\$100,000) per occurrence and three-hundred thousand dollars (\$300,000) in the aggregate.

Attorney's signature

CLIENT ACKNOWLEDGMENT

I acknowledge receipt of the notice required by Rule 16-104(C) NMRA of the New Mexico Rules of Professional Conduct that [insert attorney or firm's name] does not maintain professional liability malpractice insurance of at least one-hundred thousand dollars (\$100,000) per occurrence and three-hundred thousand dollars (\$300,000) in the aggregate.

Client's signature

(3) As used in this Paragraph, "lawyer" includes a lawyer provisionally admitted under Rule 24-106 NMRA and Rules 26-101 through 26-106 NMRA; however it does not include a lawyer who is a full-time judge, in-house corporate counsel for a single corporate entity, or a lawyer who practices exclusively as an employee of a governmental agency.

(4) A lawyer shall maintain a record of the disclosures made pursuant to this rule for six (6) years after termination of the representation of the client by the lawyer.

(5) The minimum limits of insurance specified by this rule include any deductible or self-insured retention, which must be paid as a precondition to the payment of the coverage available under the professional liability insurance policy.

(6) A lawyer is in violation of this rule if the lawyer or the firm employing the lawyer maintain a professional liability policy with a deductible or self-insured retention that the lawyer knows or has reason to know cannot be paid by the lawyer or the lawyer's firm in the event of a loss.

[Amended by Supreme Court Order No. 08-8300-29, effective November 3, 2008; by Supreme Court Order No. 09-8300-029, effective November 2, 2009.]

Compiler's notes. — The old ABA Comment has been replaced by the new 2008 Committee Commentary.

Committee Commentary. — [1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these rules require that a particular decision about the representation be made by the client, Subparagraph (1) of Paragraph A of this rule requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. 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 Paragraph A of Rule 16-102 NMRA of the Rules of Professional Conduct.

[3] Subparagraph (2) of Paragraph A requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other 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. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, Paragraph A(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. 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. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. 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. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Paragraph E of Terminology of the Rules of Professional Conduct.

[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. See Rule 16-114 NMRA of the Rules of Professional Conduct. 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 16-113 NMRA of the Rules of Professional Conduct. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[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. 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. Paragraph C of Rule 16-304 NMRA of the Rules of Professional Conduct directs compliance with such rules or orders.

Disclosure of Professional Liability Insurance

[8] Paragraph C of this rule requires a lawyer to disclose to the clients whether the lawyer has professional liability insurance satisfying the minimum limits of coverage set forth in the rule. Subparagraph (3) of Paragraph C defines "lawyer" to include lawyers provisionally admitted under Rule 24-106 NMRA and Rules 26-101 to 26-106 NMRA. Rule 24-106 NMRA applies to out-of-state lawyers who petition to be allowed to appear before the New Mexico courts. Rules 26-101 to 26-106 NMRA apply to foreign legal consultants. Subparagraph (4) of Paragraph C requires a lawyer to maintain a record of disclosures made under this rule for six (6) years after termination of the representation of the client by the lawyer. In this regard, the lawyer should note that trust account records must be kept for five (5) years but the statute of limitations for a breach of contract claim is six (6) years. Subparagraph (5) of Paragraph C provides that the minimum limits of insurance specified by the rule includes any deductible or self-insured retention. In this regard, the use of the term "deductible" includes a claims expense deductible. The professional liability insurance carrier must agree to pay, subject to exclusions set forth in the policy, all amounts that an insured becomes legally obligated to pay in excess of the deductible or self-insured retention shown on the declarations page of the policy.

[Adopted by Supreme Court Order 08-8300-26, effective November 3, 2008; amended by Supreme Court Order 09-8300-029, effective November 2, 2009.]