

1 **16-104. Communication.**

2 A. **Status of matters.** A lawyer shall:

3 (1) promptly inform the client of any decision or circumstance with
4 respect to which the client's informed consent, as defined in Paragraph E of Terminology
5 of the Rules of Professional Conduct, is required by these rules;

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

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

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

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

13 B. **Client's informed decision-making.** A lawyer shall explain a matter to
14 the extent reasonably necessary to permit the client to make informed decisions regarding
15 the representation.

16 C. **Disclosure of professional liability insurance.**

17 (1) If, at the time of the client's formal engagement of a lawyer, the
18 lawyer does not have a professional liability insurance policy with limits of at least
19 [~~one hundred~~] one hundred thousand dollars (\$100,000) per claim and [~~three hundred~~]

RULES OF PROFESSIONAL CONDUCT
Rule 16-104

Supreme Court Approved
November 1, 2021

1 three hundred thousand dollars (\$300,000) in the aggregate, the lawyer shall inform the
2 client in writing using the form of notice prescribed by this rule. If during the course of
3 representation, an insurance policy in effect at the time of the client’s engagement of the
4 lawyer lapses, or is terminated, the lawyer shall provide notice to the client using the form
5 prescribed by this rule.

6 (2) The form of notice and acknowledgment required under this
7 Paragraph shall be:

8 NOTICE TO CLIENT

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

14 _____

15 Attorney’s signature

16 CLIENT ACKNOWLEDGMENT

17 I acknowledge receipt of the notice required by Rule 16-104(C) NMRA of the
18 New Mexico Rules of Professional Conduct that [insert attorney or firm’s name] does not
19 maintain professional liability malpractice insurance of at least [~~one hundred~~] one

**RULES OF PROFESSIONAL CONDUCT
Rule 16-104**

**Supreme Court Approved
November 1, 2021**

1 hundred thousand dollars (\$100,000) per occurrence and [~~three hundred~~] three hundred
2 thousand dollars (\$300,000) in the aggregate.

3 _____

4 Client's signature

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

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

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

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

1 (7) A lawyer in active status shall certify on the registration statement
2 required under Rule 24-102.2 NMRA whether the provisions of this paragraph apply to
3 the lawyer's practice of law and, if so, whether the lawyer has a professional liability
4 insurance policy that meets or exceeds the limits set forth in Subparagraph (C)(1) of this
5 rule. If the lawyer in active status has a professional liability insurance policy, the lawyer
6 shall also certify the name of the insurer.

7 [Amended by Supreme Court Order No. 08-8300-029, effective November 3, 2008; by
8 Supreme Court Order No. 09-8300-029, effective November 2, 2009; as amended by
9 Supreme Court Order No. _____, effective _____.]

10 **Committee commentary. —**

11 [1] Reasonable communication between the lawyer and the client is necessary for the
12 client effectively to participate in the representation.

13 **Communicating with Client**

14 [2] If these rules require that a particular decision about the representation be made by
15 the client, Subparagraph (1) of Paragraph A of this rule requires that the lawyer promptly
16 consult with and secure the client's consent prior to taking action unless prior discussions
17 with the client have resolved what action the client wants the lawyer to take. For example,
18 a lawyer who receives from opposing counsel an offer of settlement in a civil controversy
19 or a proffered plea bargain in a criminal case must promptly inform the client of its

1 substance unless the client has previously indicated that the proposal will be acceptable or
2 unacceptable or has authorized the lawyer to accept or to reject the offer. *See* Paragraph A
3 of Rule 16-102 NMRA of the Rules of Professional Conduct.

4 [3] Subparagraph (2) of Paragraph A requires the lawyer to reasonably consult with
5 the client about the means to be used to accomplish the client’s objectives. In some
6 situations – depending on both the importance of the action under consideration and the
7 feasibility of consulting with the client – this duty will require consultation prior to taking
8 action. In other circumstances, such as during a trial when an immediate decision must be
9 made, the exigency of the situation may require the lawyer to act without prior
10 consultation. In such cases the lawyer must nonetheless act reasonably to inform the
11 client of actions the lawyer has taken on the client’s behalf. Additionally, Paragraph A(3)
12 requires that the lawyer keep the client reasonably informed about the status of the matter,
13 such as significant developments affecting the timing or the substance of the
14 representation.

15 [4] A lawyer’s regular communication with clients will minimize the occasions on
16 which a client will need to request information concerning the representation. When a
17 client makes a reasonable request for information, however, Paragraph A(4) requires
18 prompt compliance with the request, or if a prompt response is not feasible, that the
19 lawyer, or a member of the lawyer’s staff, acknowledge receipt of the request and advise

1 the client when a response may be expected. A lawyer should promptly respond to or
2 acknowledge client communications.

3 **Explaining Matters**

4 [5] The client should have sufficient information to participate intelligently in
5 decisions concerning the objectives of the representation and the means by which they are
6 to be pursued, to the extent the client is willing and able to do so. Adequacy of
7 communication depends in part on the kind of advice or assistance that is involved. For
8 example, when there is time to explain a proposal made in a negotiation, the lawyer
9 should review all important provisions with the client before proceeding to an agreement.
10 In litigation a lawyer should explain the general strategy and prospects of success and
11 ordinarily should consult the client on tactics that are likely to result in significant
12 expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be
13 expected to describe trial or negotiation strategy in detail. The guiding principle is that the
14 lawyer should fulfill reasonable client expectations for information consistent with the
15 duty to act in the client's best interests, and the client's overall requirements as to the
16 character of representation. In certain circumstances, such as when a lawyer asks a client
17 to consent to a representation affected by a conflict of interest, the client must give
18 informed consent, as defined in Paragraph E of Terminology of the Rules of Professional
19 Conduct.

1 [6] Ordinarily, the information to be provided is that appropriate for a client who is a
2 comprehending and responsible adult. However, fully informing the client according to
3 this standard may be impracticable, for example, where the client is a child or suffers
4 from diminished capacity. *See* Rule 16-114 NMRA of the Rules of Professional Conduct.
5 When the client is an organization or group, it is often impossible or inappropriate to
6 inform every one of its members about its legal affairs; ordinarily, the lawyer should
7 address communications to the appropriate officials of the organization. *See* Rule 16-113
8 NMRA of the Rules of Professional Conduct. Where many routine matters are involved,
9 a system of limited or occasional reporting may be arranged with the client.

10 **Withholding Information**

11 [7] In some circumstances, a lawyer may be justified in delaying transmission of
12 information when the client would be likely to react imprudently to an immediate
13 communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when
14 the examining psychiatrist indicates that disclosure would harm the client. A lawyer may
15 not withhold information to serve the lawyer's own interest or convenience or the
16 interests or convenience of another person. Rules or court orders governing litigation may
17 provide that information supplied to a lawyer may not be disclosed to the client.
18 Paragraph C of Rule 16-304 NMRA of the Rules of Professional Conduct directs
19 compliance with such rules or orders. Disclosure of Professional Liability Insurance

RULES OF PROFESSIONAL CONDUCT
Rule 16-104

Supreme Court Approved
November 1, 2021

1 [8] Paragraph C of this rule requires a lawyer to disclose to the clients whether the
2 lawyer has professional liability insurance satisfying the minimum limits of coverage set
3 forth in the rule. Subparagraph (3) of Paragraph C defines “lawyer” to include lawyers
4 provisionally admitted under Rule 24-106 NMRA and Rules 26-101 to 26-106 NMRA.
5 Rule 24-106 NMRA applies to out-of-state lawyers who petition to be allowed to appear
6 before the New Mexico courts. Rules 26-101 to 26-106 NMRA apply to foreign legal
7 consultants. Subparagraph (4) of Paragraph C requires a lawyer to maintain a record of
8 disclosures made under this rule for six (6) years after termination of the representation of
9 the client by the lawyer. In this regard, the lawyer should note that trust account records
10 must be kept for five (5) years but the statute of limitations for a breach of contract claim
11 is six (6) years. Subparagraph (5) of Paragraph C provides that the minimum limits of
12 insurance specified by the rule includes any deductible or self-insured retention. In this
13 regard, the use of the term “deductible” includes a claims expense deductible. The
14 professional liability insurance carrier must agree to pay, subject to exclusions set forth in
15 the policy, all amounts that an insured becomes legally obligated to pay in excess of the
16 deductible or self-insured retention shown on the declarations page of the policy.

17 [Adopted by Supreme Court Order No. 08-8300-026, effective November 3, 2008;
18 amended by Supreme Court Order No. 09-8300-029, effective November 2, 2009; as
19 amended by Supreme Court Order No. 13-8300-038, effective December 31, 2013; as

RULES OF PROFESSIONAL CONDUCT
Rule 16-104

Supreme Court Approved
November 1, 2021

1 amended by Supreme Court Order No. 21-8300-030, effective December 31, 2021.]