

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE AMENDMENT  
OF RULE 1.4 OF THE RULES OF  
PROFESSIONAL CONDUCT (APPENDIX  
TO SDCL 16-18)

RULE 98-35

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A hearing having been held on October 23, 1998, at Sioux Falls, South Dakota, relating to the amendment of Rule 1.4 of the Rules of Professional Conduct (Appendix to SDCL 16-18), and the Court having considered the amendment, the correspondence and oral presentations relating thereto, if any, and being fully advised in the premises, now, therefore, it is

ORDERED that said rule (Appendix to SDCL 16-18) be and it is hereby amended to read in its entirety as follows:

**Rule 1.4. Communication.**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

(c) If a lawyer does not have professional liability insurance with limits of at least \$100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that:

- (1) "This lawyer is not covered by professional liability insurance;" or
- (2) "This firm is not covered by professional liability insurance."

(d) The required disclosure in 1.4(c) shall be included in every written communication with a client.

(e) This disclosure requirement does not apply to lawyers who are members of the following classes: SDCL 16-18-20.2(1), (3), (4) and full-time, in-house counsel or

government lawyers, who do not represent clients outside their official capacity or in-house employment.

**COMMENT:**

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. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, 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 might injure or coerce others. On the other hand, a lawyer ordinarily cannot 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.

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 mental disability. See Rule 1.14. 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. Practical exigency may also

require a lawyer to act for a client without prior consultation.

Withholding Information.

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. 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.

The 1998 amendments establish that the absence of professional liability insurance is a material fact which must be disclosed to clients. The disclosure shall be made at the inception of the attorney-client relationship, or promptly thereafter. Further, if a lawyer has liability insurance and allows it to lapse or if the policy is terminated, there is an affirmative duty to make the disclosure to all clients with active files. The rule provides for uniform disclosure language and mandates that the written disclosure shall be a component of the lawyer's letterhead. Since the rule mandates disclosure only to the client, it necessarily means that lawyers without malpractice insurance will have to maintain two sets of letterhead - one for communications with the client and another for all other letters. Component of the letterhead means pre-printed. In other words, when a lawyer prepares his or her letterhead for printing, the disclosure must appear on the face of the letterhead using the precise language provided in 1.4(c)(1) or (2). It should be noted that Rule 7.5 relating to a lawyer's letterhead requires that this disclosure be printed in black ink and in a type size no smaller than used for printing of the lawyer's name on the letterhead.

IT IS FURTHER ORDERED that this rule shall become effective  
January 1, 1999.

RULE 98-35

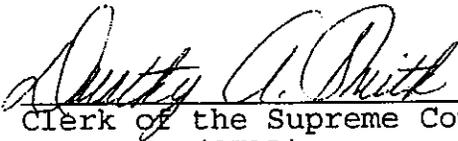
DATED at Pierre, South Dakota, this 25th day of  
November, 1998.

BY THE COURT:



Robert A. Miller, Chief Justice

ATTEST:



Clerk of the Supreme Court  
(SEAL)

SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED

NOV 25 1998

  
Clerk