

## Rule 1.4: Communication

### 1. Current Kentucky Rule with Official Comments:

#### SCR 3.130(1.4) Communication

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

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

#### Supreme Court Commentary

[1] 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.

[2] 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.

[3] 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

[4] In some very unusual 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.

## 2. Proposed Kentucky Rule with Official Comments:

### SCR 3.130(1.4) Communication

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

(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;

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

### **Supreme Court Commentary Comment**

[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, paragraph (a)(1) 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 communicated to the lawyer 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).

[3] Paragraph (a)(2) 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

[1] [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. ~~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.~~ [2] Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, ~~in negotiations where~~ 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 ~~might~~ are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily ~~cannot~~ 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 Rule 1.0(e).

~~[3]~~ [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 ~~mental disability~~ diminished capacity. 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

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

### 3. Discussion and Explanation of Recommendation:

#### a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) In recommending that MR 1.4 be adopted without change the Committee is recommending a significant change to KRPC 1.4. This Rule uses the ambivalent term “should” in indicating the force and effect of the Rule. This weakened operative term induces lawyers to believe they have more latitude in complying with this Rule than is desired and makes enforcement of the Rule in disciplinary proceedings problematic. The proposed Rule changes “should” to the imperative “shall” in both paragraphs (a) and (b) of the Rule.

(2) The ABA Reporter's Explanation of Changes to MR 1.4 expresses the Committee's

view on all other recommended changes to KRPC 1.4. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

#### **ABA Reporter's Explanation of Changes -- Model Rule 1.4**

TEXT:

##### 1. Paragraph (a): Clarify lawyer's duty to communicate with client

Two aspects of the lawyer's duty to communicate with the client were previously contained in Rule 1.2. The Commission is recommending that all Rules imposing a general duty to communicate with a client be located in Rule 1.4. To clarify the lawyer's important duties to communicate with a client, the Commission has modified paragraph (a) to specifically identify five different aspects of the duty to communicate.

##### 2. Paragraph (a)(1): Add duty to communicate about decisions that require client consent

Paragraph (a)(1) is new and addresses the lawyer's duty to communicate with the client about decisions that require the client's consent. To the extent that current Rule 1.2(a) and paragraph (b) of this Rule implicitly require such communication, no change in substance is intended.

##### 3. Paragraph (a)(2): Add duty to consult about means to accomplish client's objectives

Paragraph (a)(2) is taken from Model Rule 1.2(a), which now contains a textual cross reference to this Rule. The word "reasonably" has been added to preclude a reading of the Rule that would always require consultation in advance of the lawyer taking any action on behalf of the client, even when such action is impliedly authorized under Rule 1.2(a). The Commission believes that lawyers have commonly understood current Rule 1.2(a) to require only reasonable consultation; therefore, no change in substance is intended.

##### 4. Paragraph (a)(3): Relocate duty to keep client reasonably informed about status of matter

Paragraph (a)(3) is the same as the first half of current Rule 1.4(a). No change in substance is intended.

##### 5. Paragraph (a)(4): Relocate duty to comply with reasonable requests for information

Paragraph (a)(4) is the same as the second half of current Rule 1.4(a). No change in

substance is intended.

6. Paragraph (a)(5): Add duty to consult with the client about limitations on the lawyer's conduct

Paragraph (a)(5) contains the substance of current Rule 1.2(e). The Commission deleted Rule 1.2(e) and added paragraph (a)(5) to Rule 1.4 so that all Rules imposing general duties to communicate with a client will be located in Rule 1.4. No change in substance is intended.

COMMENT:

[1] This new Comment describes in very general terms the reason for the various duties in Rule 1.4.

Caption: A new caption, "Communicating with Client," has been added to distinguish the issue discussed in Comments [2] through [4] when the lawyer must communicate with the client from the subsequent discussion in Comments [5] and [6] about the adequacy of the information provided to the client.

[2] This new Comment refers to decisions where the client's consent is required by the Rules and explains the application of paragraph (a)(1) in such circumstances. The Comment also explains that prior communications with the client or a grant of authority by the client may make it unnecessary for the lawyer to communicate with the client prior to taking an action that requires client consent.

[3] This new Comment explains the paragraph (a)(2) duty to reasonably consult with the client about the means used to accomplish the client's objectives. The key issue is whether consultation is required before or after the lawyer takes action on behalf of the client. To call attention to the difference between the duty to reasonably consult about means and the duty in paragraph (a)(3) to keep the client reasonably informed about the status of the matter, the last sentence provides an example of the latter duty.

[4] This new Comment discusses the paragraph (a)(4) requirement that a lawyer promptly reply to reasonable requests for information. The Commission thought that emphasis should be given to promptly returning or at least acknowledging receipt of phone calls.

Caption: The new caption "Explaining Matters" alerts lawyers that Comments [5] and [6] relate to the adequacy of the information provided to the client. [5] This Comment includes points made in current Comments [1] and [2]. The deleted text relates to matters now discussed in Comment [2]. Language has been added to alert lawyers to keep the client advised about the cost implications of tactical decisions made by the lawyer. The final sentence alerts lawyers that in some cases they will be required to secure the client's informed consent, as defined in Rule 1.0(e).

[6] This Comment is the same as current Comment [3], except that the last sentence has been deleted because its point is made in proposed Comment [3].

[7] This Comment is the same as current Comment [4] except that the third sentence has been broadened to more comprehensively alert lawyers that decisions to withhold information are subject to the lawyer's duty of loyalty.

**b. Detailed discussion of reason for variance from ABA Model Rule (if any).**

There is no variance in proposed KRPC 1.4 from MR 1.4.