Utah Supreme Court
Advisory Committee on the Rules of Professional Conduct
Meeting Agenda
Cory Talbot, Chair

Location: Virtually via Webex Link

Date: October 1, 2024

Time: 4:00 – 6:00 p.m.

Welcome and approval of minutes	Tab 1	Cory Talbot
Discussion: Rule 3.3 – Disclosures and confidentiality.	Tab 2	Beth Kennedy
Discussion: Standard 16 – Questions back from URCP Committee.	Tab 3	Stacy Haacke

Reminder: Check style guide for conformity before rules are sent to the Supreme Court.

Upcoming Items:
- Referral fees
- Rule 8.4

Rules of Professional Conduct Committee Website: Link

Meeting Schedule:
Jan 2 • Feb 6 • Mar 5 • April 2 • May 7 • June 4 • Aug 6 • Sep 3 • Oct 1 • Nov 5 • Dec 3

Tab 1

Utah Supreme Court's
Advisory Committee on the Rules of Professional Conduct

[Draft] Meeting Minutes
August 6, 2024

Virtually via Webex
4:00 pm Mountain Time

Cory Talbot, Chair

Attendees:
Cory Talbot (Co-Chair)
Jurhee Rice (Vice-Chair)
Adam Bondy
Lynda Viti
Alyson McAllister
Robert Gibbons
Mark Nickel
Judge Oliver
Judge Nelson
Ian Quiel
Beth Kennedy (ex officio)
Christine Greenwood (ex officio)
Gary Sackett (emeritus)
Christine Greenwood (ex officio)
Hon. M. Alex Natt, Recording Secretary

Excused: Ashley Gregson, Hon. Craig Hall

Staff:
Keisa Williams

Guests:
Kim Paulding
Christine Critchley
Barbara Townsend
Maribeth LeHoux

1. **Welcome, Approval of the June 4, 2024 meeting minutes (Mr. Talbot)**

Chair Talbot recognized the existence of a quorum and called the meeting to order.

Chair Talbot asked for a Motion to approve the June 4, 2024 meeting minutes. It was noted that Judge Nelson was present for the June meeting, the minutes currently state he was excused. With those corrections, Robert Gibbons moved for approval. Alyson McAllister seconded. The Motion passed unanimously.

2. **Rule 1.15 (Ms. Kim Paulding)**

Ms. Kim Paulding, executive director for the Utah Bar Foundation (UBF), presented. The Utah Bar Foundation administers the IOLTA program for the Utah Supreme Court. When an attorney sets up an IOLTA account they are the sole owner and it is their federal tax ID that shows as the owner and the only one that has access to that account. The UBF is listed as the owner of the interest on that account and that is how the bank.

Recently UBF received a phone call from the unclaimed property division regarding about 70 accounts with unclaimed amounts. These turned out to be client trust accounts that were abandoned by the attorney, or the attorney is deceased and those amounts were turned over by the financial institution to the unclaimed property division. Ms. Paulding has been working with the state agency for the unclaimed property division, the Supreme Court, and the office of professional conduct regarding reuniting accounts with clients or should those funds come to a separate entity. Not sure this will lead to a change to Rule 1.15. Interested in figuring out a way forward that lays out a process for notification and who holds the funds using administrative rules.

The Committee noted the issues she wants to address may not belong in the Rules of Professional Conduct as it may not relate to the ethical duties of an attorney, and if an attorney is deceased the attorney would not be able to violate the rule. If it is in the rule it would need to be worded as something that could be addressed immediately and not upon death. Kim will work with Maribeth LeHoux on a Bar rule draft. Kim and Maribeth may also add a requirement to the Bar licensing form requiring attorneys to designate someone who will be responsible for their IOLTA account upon their death. Kim will send a proposed draft of changes to Rule 1.15 for the Committee to review, but the Committee recommended that this may be best in a Bar rule.

3. **Other Business (Mr. Talbot)**

Subcommittee going over Rule 8.4 is working to be ready for a future meeting, as well as the subcommittee working on the referral fee rules.

The Committee has a few vacant positions, and just waiting for appointment by the Supreme Court to fill those seats. The LPP position did not receive any applicants so if any members know of an LPP what would be willing to serve it would be great to get someone in that spot.

The meeting was adjourned.

Tab 2

RPC Rule 3.3
Beth Kennedy

A rule change to consider in rule 3.3 (candor toward the tribunal). We originally modeled our rule after the model rule.

In the model rule, subsections (a) and (b) lay out the situations under which a lawyer must disclose information to a court. In the model rule, subsection (c) makes clear that the required disclosures won't violate rule 1.6 (confidentiality of information).

Utah restructured the rule to change the applicable mens rea for each kind of disclosure. In the restructure, we moved part of subsection (b) to subsection (c). But we kept the language (now in subsection (d)) that says "the duties stated in paragraphs (a) and (b)" apply even if the information is confidential. The problem is that this implies that the duty in Utah's subsection (c) does not apply if the information is confidential. I think that's a mistake.

Rule 3.3. Candor toward the Tribunal.

Effective: 5/1/2019

(a) A lawyer must~~shall~~ not knowingly or recklessly:

~~(a)~~(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; or

~~(a)~~(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction directly adverse to the position of the client and not disclosed by opposing counsel.

(b) A lawyer must~~shall~~ not offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer must~~shall~~ take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(c) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding must ~~shall~~ take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(d) The duties stated in paragraphs (a), (b), and (c)~~(b)~~ continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(e) In an ex parte proceeding, a lawyer must ~~shall~~ inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(q) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false or is reckless with respect to its truth.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] The Utah rule is different from the ABA Model Rule. In *In re Larsen*, 2016 UT 26, 379 P.3d 1209, the Utah Supreme Court held that the former rule's plain language required finding actual knowledge before an attorney could be found to have violated the rule, and that language in former Comment [3] permitted finding a violation on something less than actual knowledge. The amendments to Rule 3.3(a), and to Comments [2], [4]. [5] and [9] permit finding a violation of the rule if an attorney recklessly, as defined in Rule 1.0(n), makes a false statement of law or fact or fails to disclose controlling authority.

Legal Argument

[4] Legal argument based on a knowingly or recklessly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a

disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph(b) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false,

however, can be inferred from the circumstances. See Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (b)only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the

tribunal then to determine what should be done-making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Tab 3

Standards of Professionalism and Civility, Standard 16
From the Supreme Court Advisory Committee on the Rules of Professional Conduct

Standard 16 states:

Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

The Supreme Court Advisory Committee on the Utah Rules of Civil Procedure discussed the request regarding Standard 16 at the August 2024 meeting. The URCP Committee has questions regarding this Standard and any incorporation into the rules of procedure, including:

1. Whether this is a routine problem for other counsel to not be notified.
2. What does "unless their clients' legitimate rights could be adversely affected" mean specifically?
3. Is this an issue for pro se parties when there is counsel on the other side?
4. What type of notification must be sent to other counsel when counsel is usually notified of any docketed items electronically?
5. Is this a concern mostly in debt collection cases?

The URCP Committee has a subcommittee currently working on the default provisions found in URCP Rule 5(a)(2) and (b)(3). Any feedback from this Committee would be appreciated and will be sent to the subcommittee to see if language can be incorporated into that rule, unless this Committee has other suggestions.

[URCP Rule 5 recently underwent significant amendments regarding service and this rule will be presented to the Supreme Court for final approval in October. A draft of the rule with redlines is attached for this Committee.]

Rule 5. Service and filing of pleadings and other ~~papers~~documents.

(a) When service is required.

(1) ~~Papers~~ Documents that must be served. Unless otherwise permitted by statute, rule, or court order, ~~Except as otherwise provided in these rules or as otherwise directed by the court, the following papers~~ every document filed with the court after the original complaint must be served by the party filing it on every party to the case. Ex parte motions may be filed without serving if permitted under Rule 7.~~:~~

~~(A) a judgment;~~

~~(B) an order that states it must be served;~~

~~(C) a pleading after the original complaint;~~

~~(D) a paper relating to disclosure or discovery;~~

~~(E) a paper filed with the court other than a that may be heard ex parte; and~~

~~(F) a written notice, appearance, demand, offer of judgment, or similar paper.~~

(2) Serving parties in default. No service is required on a party who is in default except that:

(A) a party in default must be served as ordered by the court;

(B) a party in default for any reason other than for failure to file and serve a responsive pleading or otherwise appear must be served as provided in paragraph (a)(1);

(C) a party in default for any reason must be served with notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(D) a party in default for any reason must be served with notice of entry of judgment ~~under~~ as provided in Rule 58A~~(g);~~ and

(E) a party in default for any reason must be served ~~under~~ as provided in Rule 4 with pleadings asserting new or additional claims for relief against the party.

(3) Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim, or appearance must be made upon the person who had custody or possession of the property when it was seized.

(b) How service is made.

(1) Whom to serve. If a party is self-represented, service must be made upon the self-represented party. If a party is represented by an attorney, a ~~paper~~ document served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if:

(A) an attorney has filed a Notice of Limited Appearance ~~under~~ as provided in Rule 75 and the ~~papers~~ documents being served relate to a matter within the scope of the Notice; or

(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a ~~paper~~ document was last served on the attorney.

(2) When to serve. If a hearing is scheduled seven~~7~~ days or less from the date of service, a party must serve a ~~paper~~ document related to the hearing by the method most likely to be promptly received. Otherwise, a ~~paper~~ document that is filed with the court must be served before or on the same day that it is filed.

(3) Methods of service. A ~~paper~~ document is served under this rule by:

(A) **Electronic filing.** ~~except~~ Except in the juvenile court, a ~~paper~~ document is served by submitting it for electronic filing, or the court submitting it to the electronic filing service provider, if the person being served has an electronic filing account;

(B) **Email.** If the party serving or being served a document does not have an electronic filing account, emailing it to:

(i) the most recent email address the person being served has provided ~~by the person~~ to the court ~~and other parties under~~ as provided in Rule 10 or Rule 76~~,~~; or

(ii) ~~to~~ if service is to an attorney licensed in Utah, to the email address on the attorney's ~~pleading~~most recent filing~~s~~ ~~and/~~or on file with the Utah State Bar; or

(iii) if service is to an attorney not licensed in~~outside of~~ Utah, to the email address on the attorney's ~~pleading~~most recent filing~~s~~ ~~and/~~or on file with the attorney licensing entity in the state where the attorney is licensed ~~in~~.

(C) **Mail and other methods.** If the party serving or being served with a ~~paper~~document does not have an electronic filing account or email, a ~~paper~~ document may be served under this paragraph by:

(i) mailing it to the most recent address the person being served has provided to the court ~~under~~as provided in Rule 10 or Rule 76, or, if none, the person's last known address;

~~(D)~~(ii) handing it to the person;

~~(E)~~(iii) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

~~(F)~~(iv) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

~~(G)~~(v) any other method agreed to in writing by the parties.

(4) When service is effective. Service by mail or electronic means is complete upon sending.

(5) Who serves. Unless otherwise directed by the court or these rules:

(A) every ~~paper~~ document required to be served must be served by the party preparing it, including subsequently signed orders and judgments; and

(B) every ~~paper~~ document initially prepared by the court must~~will~~ be served by the court; ~~and.~~

(C) every document signed by the court that was initially prepared and filed by a ~~self-represented~~ party or attorney ~~but not prepared by the court~~must ~~will~~ be served on the other parties by the party or attorney who prepared it; and~~.~~

(D) service under this rule does not alter the effectiveness of the document.

(c) Serving numerous defendants. If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(1) a defendant's pleadings and replies to those pleadings~~them~~ do not need to be served on the other defendants;

(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(4) a copy of the order must be served ~~up~~on the parties.

(d) Certificate of service. No certificate of service is required when a ~~paper~~document is served ~~by filing it with~~through ~~the~~an ~~court's~~ electronic filing ~~system~~account under paragraph (b)(3)(A). When a ~~paper~~document that is required to be served is served by email, mail, or other ~~means~~methods of service:

(1) if the ~~paper~~document is filed with the court, a certificate of service showing the date and ~~manner~~method of service, including the email or mailing address used, unless safeguarded, must be filed with it or within a reasonable time after service; and

(2) if the ~~paper~~document is not filed with the court, a certificate of service need not be filed unless filing is required by rule or court order.~~A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served. Except in the juvenile court, this paragraph does not apply to papers required to be served under paragraph (b)(5)(B) when service to all parties is made under paragraph (b)(3)(A).~~

(e) Filing. Except as provided in Rule 7~~(j)~~ and Rule 26~~(f)~~, all ~~papers~~ documents after the complaint that are required to be served must be filed with the court. ~~Parties~~ Attorneys with an electronic filing account must file a ~~paper~~ document electronically. A self-represented party who is not an attorney ~~without an electronic filing account~~ may file a ~~paper~~document ~~by delivering it to~~ with the court ~~clerk of the court or to a judge of the court.~~using any of the following methods:

(1) email;

(2) mail;

(3) the court's MyCase interface, where applicable; or

(4) in person.

Filing is complete upon the earliest of acceptance by the electronic filing system or by ~~,~~ the court~~clerk of court or the judge~~.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code ~~S~~section 46-1-16~~(7)~~;

(2) electronically file a scanned image of the affidavit or declaration;

(3) electronically file the affidavit or declaration with a conformed signature; or

(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the court clerk ~~of the court~~, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

Effective May/November 2024

Advisory Committee Notes

~~*Note adopted 2015*~~*20* ~~-~~

Under paragraph (b)(3)(A), electronically filing a document has the effect of serving the document on ~~lawyers~~ parties who have an e-filing account. (~~Lawyers~~ Attorneys representing parties in the district court are required to have an account and electronically file documents. Code of Judicial Administration Rule 4-503.) The 2015 amendment excepts from this provision documents electronically filed in juvenile court.

Although electronic filing in the juvenile court presents to the parties the documents that have been filed, the juvenile court e-filing application (CARE), unlike that in the district court, does not deliver an email alerting the party to that fact. The Board of Juvenile Court Judges and the Advisory Committee on the Rules of Juvenile Procedure believe this difference renders electronic filing alone insufficient notice of a document having been filed. So in the juvenile court, a party electronically filing a document must serve that document by one of the other permitted methods.