

MINUTES OF THE SUPREME COURT'S
ADVISORY COMMITTEE ON THE
RULES OF PROFESSIONAL CONDUCT

Law and Justice Center
645 South 200 East
Salt Lake City, UT
December 6, 2010
5:00 pm

ATTENDEES

Steve Johnson, Chair
Diane Abegglen
Nayer Honarvar
Judge Paul Maughan
Trent Nelson
Kent Roche
Judge Stephen Roth

EXCUSED

Gary Sackett
Stuart Schultz
Paula Smith
Paul Veasy
Billy Walker
Earl Wunderli

ABSENT

Judge Mark May

1. WELCOME AND APPROVAL OF MINUTES

Mr. Johnson welcomed the members of the committee and asked if there were any corrections to the minutes of the August 30, 2010 meeting. Mr. Johnson suggested that the heading "Guests" be added to the list of attendees and that the first sentence of Section 1 be revised to read: "Mr. Johnson welcomed the members of the committee **and guests** and introduced the new committee members." With this correction, Earl Wunderli moved to approve the minutes. Kent Roche seconded the motion and it passed unanimously.

Mr. Johnson informed the committee that the proposed amendment to Rule 14-802 (which permits a non-lawyer to represent a party in small claims court) has been approved by the Supreme Court.

2. DISCUSSION OF ABA'S NEW MODEL RULES FOR CLIENT TRUST ACCOUNT RECORDS

Mr. Johnson introduced the topic to committee members. The ABA House of Delegates adopted new rules for record keeping of client trust accounts when it met in August 2010 during the annual meeting. The Model Rules for Client Trust Account Records ("Model Rules") were promulgated by the ABA for potential adoption in the states as practical guidance for compliance with Rule of Professional Conduct 1.15.

Rule 1.15 of the Utah Rules of Professional Conduct requires lawyers to keep

complete records of their client trust accounts and, upon request by a client or third person, to promptly render a full accounting regarding trust account property. Rule 1.15 requires lawyers to preserve the records for a period of five years after termination of representation.

After a discussion of the Model Rules and OPC's history with client trust account problems, the committee determined that Utah's current rules are adequate and do not need to be expanded. They not only give lawyers guidance as to how they should care for client properties in their control or possession, but also provide protections for clients regarding their account funds and property. The committee also felt that the Model Rules would be a significant burden on solo and small firm attorneys.

Gary Sackett made a motion that the Model Rules not be adopted in Utah. Judge Roth seconded the motion and it passed unanimously. Mr. Johnson will prepare a letter advising the Supreme Court of the committee's recommendation.

3. SUBCOMMITTEE REPORT: DISQUALIFICATION OF COLLABORATIVE LAWYERS UNDER THE UTAH UNIFORM COLLABORATIVE LAW ACT

Mr. Johnson introduced the topic to committee members. During the 2010 legislative session, the Utah Uniform Collaborative Law Act ("the Act") was passed. Prior to its enactment, a procedural provision of the Act concerning disqualification of collaborative lawyers and their law firms under certain circumstances was removed at the recommendation of the Administrative Office of the Courts.

Specifically, the following language was removed from the Act prior to its passage:

78B-19-109. Disqualification of collaborative lawyer and lawyers in associated law firm.

(1) Except as otherwise provided in Subsection (3) a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

(2) Except as otherwise provided in Subsection (3) and Sections 78B-19-110 and 78B-19-111, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under Subsection (1).

(3) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

(a) to ask a tribunal to approve an agreement resulting from the collaborative law process; or

(b) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or designated household member if a successor lawyer is not immediately available to represent that person. In that event, Subsections (1) and

(2) apply when the party, or designated household member is represented by a

successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of that person.

In October 2010, the Supreme Court asked this committee to consider whether the Rules of Professional Conduct should be amended to include similar language (possibly as a new subsection to Rule of Professional Conduct 1.16). Mr. Johnson appointed a subcommittee, consisting of Stuart Schultz, Trent Nelson and Earl Wunderli, to consider the question and report back to the committee as a whole.

Mr. Schultz reported that the subcommittee debated whether the proposed language belongs in the Rules of Professional Conduct or some other body of rules. The subcommittee concluded that, in light of the reference in the statute to the Rules of Professional Conduct, an addition to existing Rule 1.16 was appropriate. After review of the issue, the full committee determined that the proposed disqualification rules do not fit well in the Rules of Professional Conduct and may be better placed in a body of rules which provides for disqualification of attorneys before a tribunal.

Gary Sackett made a motion that the committee recommend to the Court that the Rules of Professional Conduct not be amended to provide for disqualification of collaborative lawyers, and that disqualification rules may be better placed in a body of rules which provides for disqualification of attorneys before a tribunal. Judge Maughan seconded the motion and it passed unanimously. Mr. Johnson will prepare a letter advising the Supreme Court of the committee's recommendation.

4. OTHER BUSINESS

Mr. Johnson stated that there are no assignments or issues presently pending before the committee and that no future meeting will be scheduled at this time.

~~When is Judge Maughan's term up?~~

~~FIVE:~~

~~→ 19-802 - Small Claims Court Rule has been approved by the S. Ct.~~

~~→ [ABA Court Trust Account]~~

~~Sackett: let's start w/ a ^{general} discussion - This would be a major deal for small operations.~~

~~Billy: Most ^{small businesses} attorneys don't keep these types of records - too onerous.~~

~~General consensus: We don't need to expand our rules.~~

~~Billy:~~

~~There aren't as many problems in this area.~~

~~Theft / commingling is the problem Billy sees.~~

~~Sackett reply: ~~we recommend that~~ we do not adopt this model rule~~

~~Judge Roth seconded~~

~~unanimous~~

→ Collaborative Law Act

Trank, Earl, Stuart

Stuart: ^{give} Background of Collaborative Law Act;

Q: Should the provisions of ~~11B~~ ^{70B-17-109} be included in the ^{11B} Rules of Prof. Conduct (or maybe R. 74 of rules of Cw. Pro.)

Stuart (cont.)

78 B-19-110 (1)

78 B-19-111 (3)(c)

} If a prospective collaborator lawyer has to advise a prospective party then Rules of Professional Conduct should probably be revised as proposed

Trent: Other states are ~~still~~ discussing coll. law process; incentive to get an agreement. This ^{seems to be an} extension of an ADR-type process; everything we've seen is in the domestic arena;

Steve: I've done some domestic mediations;

~~but Steve~~: This is a facet of the "unbundling" of legal services trend.

Billy: Pursuant to rules of pro conduct, parties could consent to allowing collab. lawyers to continue to represent them - not necessarily precluded; I see no need to amend rules of prof. conduct -

Earl: Spirit of Collab. Law Act is the get things settled quickly - Disqualifying gives incentive to get an agreement

Bully
Bryan's Signed Agreement itself establishes the limitation

Judge Roth - "Spirit of the process" requires this type of disqualification;

Gary Jackett - this language doesn't belong in rules of prof. conduct; this is a rule of procedure that belongs, if anyplace, in rules of civil procedure - it's not really a rule of ethics -

Bully - 1.12 (mediator/judge) - closest thing we have to this language is

Paula - ethical rules tell you when you should disqualify yourself; * this really isn't an ethical rule -
(maybe put it in 1.12 (dumps it down))

Smart - Is troubled by language of 78B-19-111 (3)(c) if we don't add language to rule -

Rest

Gary - if this is going to be a rule, ~~that~~ should be a rule of civil procedure -

Rule 74 is a withdrawn rule; this is a disqualification rule -

Judge Maughan - Legislature may have missed the mark

Motion: Gary: We ~~recommend~~ ^{enforce the} Ct that ~~it is not~~ ^{any rule of} this kind not be in R. of Prof. Conduct of lawyer ~~take no position~~ ^{suggest that} ~~language~~ ^{should be} ~~related to a proceeding~~ ^{should be} ~~considered by another committee~~ ⁱⁿ

Judge Maughan seconded the motion -

J. Roth: "Divorce" series (100 ↑)

Stuart: Can't we just say the existing rules are sufficient?

J. Maughan -

~~Rules~~ ^{Rules} Amendment

* We suggest that a procedural rule be ~~addressing~~ ^{addressing} disqualification

it may well be an appropriate rule of procedure to be placed ~~elsewhere~~ ^{in a} body of rules that governs disqualification -

- unanimous -