YOUR ABA September 2010 news for members

ABA adopts new model rule for client trust account records

The ABA House of Delegates adopted new rules for record keeping of client trust accounts when it met last month during the Annual Meeting. The new rules reflect changes in banking laws and technology, and evolving methods of legal practice.

The new rules allow lawyers to maintain client trust account records in electronic, photographic, computer or other media or paper format, either at the lawyer's office or at an off-site storage facility.

The Model Rules for Client Trust Account Records, dated August 2010, will be promulgated to state high courts for potential adoption as practical guidance for compliance with ABA Model Rule of Professional Conduct 1.15, requiring lawyers to maintain complete records regarding their client trust accounts and to render a full accounting of the receipt and distribution of trust property.

The requirements of Model Rule 1.15 have been adopted in every U.S. jurisdiction, and 28 jurisdictions have adopted additional rules or comments outlining the types of records lawyers must maintain. Five other jurisdictions direct lawyers to the 1993 ABA Model Rule on Financial Recordkeeping for guidance. The new Model Rules for Client Trust Account Records supplant the 1993 model.

As explained by the Standing Committee on Client Protection, key sponsor of the new model, it responds to a number of changes in banking and business practices that may have left lawyers "inadvertently running afoul of their jurisdiction's rules of professional conduct."

One key change was congressional adoption in 2003 of the Check Clearing for the 21st Century Act, commonly referenced as Check 21, allowing banks to substitute electronic images of checks for canceled checks. The previous ABA model rule required lawyers to maintain original canceled checks.

Check 21 also addresses the increasing prevalence of electronic banking and wire transfers or electronic transfers of funds, for which banks do not routinely provide specific confirmation.

The new model acknowledges those issues, addressing record-keeping requirements after electronic transfers and clarifying who can authorize such transfers, record maintenance and safeguards required for electronic record storage systems.

They also detail minimum safeguards lawyers must implement when they allow non-lawyer employees to access client trust accounts.

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Moreover, the new rules allow lawyers to maintain client trust account records in electronic, photographic, computer or other media or paper format, either at the lawyer's office or at an off-site storage facility. But rules require that the records be readily accessible to the lawyer and that the lawyer be able to produce and print them upon request. For lawyers using third-party or Internet-based file storage, the rules require that the lawyer ensure the company has established reasonable procedures to protect client confidentiality and ensure the files can be accessed by a disciplinary authority, client or interested third party in response to a subpoena or other court demand for production.

Other aspects of the new rules address law firm partner responsibilities for storage of, and access to, client trust account records when partnerships are dissolved or when a practice is sold.

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON CLIENT PROTECTION
COMMISSION ON INTEREST ON LAWYER TRUST ACCOUNTS
SECTION OF LAW PRACTICE MANAGEMENT
STANDING COMMITTEE ON PARALEGALS
NATIONAL ORGANIZATION OF BAR COUNSEL

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the black letter *Model Rules for Client Trust Account Records*, dated August 2010, to replace the *Model Rule on Financial Recordkeeping*, adopted February 1993.

MODEL RULES FOR CLIENT TRUST ACCOUNT RECORDS
(AUGUST 2010)

RULE 1: RECORDKEEPING GENERALLY

A lawyer who practices in this jurisdiction shall maintain current financial records as provided in these Rules and required by [Rule 1.15 of the Model Rules of Professional Conduct], and shall retain the following records for a period of [five years] after termination of the representation:

(a) receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;

(b) ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;

(c) copies of retainer and compensation agreements with clients [as required by Rule 1.5 of the Model Rules of Professional Conduct];

(d) copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

(e) copies of bills for legal fees and expenses rendered to clients;

(f) copies of records showing disbursements on behalf of clients;

(g) the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;

(h) records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed;

(i) copies of [monthly] trial balances and [quarterly] reconciliations of the client trust accounts maintained by the lawyer; and

(j) copies of those portions of client files that are reasonably related to client trust account transactions.

Comment

[1] Rule 1 enumerates the basic financial records that a lawyer must maintain with regard to all trust accounts of a law firm. These include the standard books of account, and the supporting records that are necessary to safeguard and account for the receipt and disbursement of client or third person funds as required by Rule 1.15 of the Model Rules of Professional Conduct or its equivalent. Consistent with Rule 1.15, this Rule proposes that lawyers maintain client trust account records for a period of five years after termination of each particular legal engagement or representation. Although these Model Rules address the accepted use of a client trust account by a lawyer when holding client or third person funds, some jurisdictions may permit a lawyer to deposit certain advance fees for legal services into the lawyer's business or operating account. In those situations, the lawyer should still be guided by the standards contained in these Model Rules.

[2] Rule 1(g) requires that the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks be maintained for a period of five years after termination of each legal engagement or representation. The "Check Clearing for the 21st Century Act" or "Check 21 Act", codified at 12 U.S.C.§5001 *et. seq.*, recognizes "substitute checks" as the legal equivalent of an original check. A "substitute check" is defined at 12 U.S.C. §5002(16) as "paper reproduction of the original check that contains an image of the front and back of the original check; bears a magnetic ink character recognition ("MICR") line containing all the information appearing on the MICR line of the original check; conforms with generally applicable industry standards for substitute checks; and is suitable for automated processing in the same manner as the original check. Banks, as defined in 12 U.S.C. §5002(2), are not required to return to customers the original canceled checks. Most banks now provide electronic images of checks to customers who have access to their accounts on internet-based websites. It is the lawyer's responsibility to download electronic images. Electronic images shall be maintained for the requisite number of years and shall be readily available for printing upon request or shall be printed and maintained for the requisite number of years.

[3] The ACH (Automated Clearing House) Network is an electronic funds transfer or payment system that primarily provides for the inter-bank clearing of electronic payments between originating and receiving participating financial institutions. ACH transactions are payment instructions to either debit or credit a deposit account. ACH payments are used in a variety of payment environments including bill payments, business-to-business payments, and government payments (e.g. tax refunds.) In addition to the primary use of ACH transactions, retailers and third parties use the ACH system for other types of transactions including electronic check conversion (ECC). ECC is the process of transmitting MICR information from the bottom of a check, converting check payments to ACH transactions depending upon the authorization

given by the account holder at the point-of-purchase. In this type of transaction, the lawyer should be careful to comply with the requirements of Rule 1(h).

[4] There are five types of check conversions where a lawyer should be careful to comply with the requirements of Rule 1(h). First, in a "point-of-purchase conversion," a paper check is converted into a debit at the point of purchase and the paper check is returned to the issuer. Second, in a "back-office conversion," a paper check is presented at the point of purchase and is later converted into a debit and the paper check is destroyed. Third, in an "account-receivable conversion," a paper check is converted into a debit and the paper check is destroyed. Fourth, in a "telephone-initiated debit" or "check-by-phone" conversion, bank account information is provided via the telephone and the information is converted to a debit. Fifth, in a "web-initiated debit," an electronic payment is initiated through a secure web environment. Rule 1(h) applies to each of the type of electronic funds transfers described. All electronic funds transfers shall be recorded and a lawyer should not re-use a check number which has been previously used in an electronic transfer transaction.

[5] The potential of these records to serve as safeguards is realized only if the procedures set forth in Rule 1(i) are regularly performed. The trial balance is the sum of balances of each client's ledger card (or the electronic equivalent). Its value lies in comparing it on a monthly basis to a control balance. The control balance starts with the previous month's balance, then adds receipts from the Trust Receipts Journal and subtracts disbursements from the Trust Disbursements Journal. Once the total matches the trial balance, the reconciliation readily follows by adding amounts of any outstanding checks and subtracting any deposits not credited by the bank at month's end. This balance should agree with the bank statement. Quarterly reconciliation is recommended only as a minimum requirement; monthly reconciliation is the preferred practice given the difficulty of identifying an error (whether by the lawyer or the bank) among three months' transactions.

[6] In some situations, documentation in addition to that listed in paragraphs (a) through (i) of Rule 1 is necessary for a complete understanding of a trust account transaction. The type of document that a lawyer must retain under paragraph (j) because it is "reasonably related" to a client trust transaction will vary depending on the nature of the transaction and the significance of the document in shedding light on the transaction. Examples of documents that typically must be retained under this paragraph include correspondence between the client and lawyer relating to a disagreement over fees or costs or the distribution of proceeds, settlement agreements contemplating payment of funds, settlement statements issued to the client, documentation relating to sharing litigation costs and attorney fees for subrogated claims, agreements for division of fees between lawyers, guarantees of payment to third parties out of proceeds recovered on behalf of a client, and copies of bills, receipts or correspondence related to any payments to third parties on behalf of a client (whether made from the client's funds or from the lawyer's funds advanced for the benefit of the client).

RULE 2: CLIENT TRUST ACCOUNT SAFEGUARDS

With respect to client trust accounts required by [Rule 1.15 of the Model Rules of Professional Conduct]:

(a) only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a client trust account;

(b) receipts shall be deposited intact and records of deposit should be sufficiently detailed to identify each item; and

(c) withdrawals shall be made only by check payable to a named payee and not to cash, or by authorized electronic transfer.

Comment

[1] Rule 2 enumerates minimal accounting controls for client trust accounts. It also enunciates the requirement that only a lawyer admitted to the practice of law in the jurisdiction or a person who is under the direct supervision of the lawyer shall be the authorized signatory or authorize electronic transfers from a client trust account. While it is permissible to grant limited nonlawyer access to a client trust account, such access should be limited and closely monitored by the lawyer. The lawyer has a non-delegable duty to protect and preserve the funds in a client trust account and can be disciplined for failure to supervise subordinates who misappropriate client funds. See, Rules 5.1 and 5.3 of the Model Rules of Professional Conduct.

[2] Authorized electronic transfers shall be limited to (1) money required for payment to a client or third person on behalf of a client; (2) expenses properly incurred on behalf of a client, such as filing fees or payment to third persons for services rendered in connection with the representation; or (3) money transferred to the lawyer for fees that are earned in connection with the representation and are not in dispute; or (4) money transferred from one client trust account to another client trust account.

[3] The requirements in paragraph (b) that receipts shall be deposited intact mean that a lawyer cannot deposit one check or negotiable instrument into two or more accounts at the same time, a practice commonly known as a split deposit.

RULE 3: AVAILABILITY OF RECORDS

Records required by Rule 1 may be maintained by electronic, photographic, or other media provided that they otherwise comply with these Rules and that printed copies can be produced. These records shall be readily accessible to the lawyer.

Comment

[1] Rule 3 allows the use of alternative media for the maintenance of client trust account records if printed copies of necessary reports can be produced. If trust records are computerized, a system of regular and frequent (preferably daily) back-up procedures is essential. If a lawyer uses third-party electronic or internet based file storage, the lawyer must make reasonable efforts to ensure that the company has in place, or will establish reasonable procedures to protect the confidentiality of client information. See, ABA Formal Ethics Opinion 398 (1995). Records

required by Rule 1 shall be readily accessible and shall be readily available to be produced upon request by the client or third person who has an interest as provided in Model Rule 1.15, or by the official request of a disciplinary authority, including but not limited to, a subpoena duces tecum. Personally identifying information in records produced upon request by the client or third person or by disciplinary authority shall remain confidential and shall be disclosed only in a manner to ensure client confidentiality as otherwise required by law or court rule.

[2] Rule 28 of the Model Rules for Lawyer Disciplinary Enforcement provides for the preservation of a lawyer's client trust account records in the event that the lawyer is transferred to disability inactive status, suspended, disbarred, disappears, or dies.

RULE 4: DISSOLUTION OF LAW FIRM

Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of client trust account records specified in Rule 1.

Comment

[1] Rules 4 and 5 provide for the preservation of a lawyer's client trust account records in the event of dissolution or sale of a law practice. Regardless of the arrangements the partners or shareholders make among themselves for maintenance of the client trust records, each partner may be held responsible for ensuring the availability of these records. For the purposes of these Rules, the terms "law firm," "partner," and "reasonable" are defined in accordance with Rules 1.0(c),(g), and (h) of the Model Rules of Professional Conduct

RULE 5: SALE OF LAW PRACTICE

Upon the sale of a law practice, the seller shall make reasonable arrangements for the maintenance of records specified in Rule 1.

Rule 1.15. Safekeeping Property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. The account may only be maintained in a financial institution that agrees to report to the Office of Professional Conduct in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. In addition to normal monthly maintenance fees on each account, the lawyers can anticipate that financial institutions may charge additional fees for reporting overdrafts in accordance with this Rule. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client . In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

[6a] This Rule is identical to ABA Model Rule 1.15 except it incorporates two sentences that were added to the prior version of this Rule in 1997. These two sentences are the third sentence of paragraph (a) of the Rule and the corresponding fifth sentence of Comment [1].

Article 10. IOLTA.

Rule 14-1001. IOLTA.

(a) A lawyer or law firm shall create and maintain an interest or dividend-bearing trust account for client funds ("IOLTA account"). All client funds shall be placed into this account except those funds which can earn net income for the client in excess of the costs to secure such income, except as provided in paragraph (g).

(b) In determining whether a client's funds can earn net income in excess of the costs of securing that income for the benefit of the client, the lawyer or law firm shall consider the following factors:

(b)(1) the amount of the funds to be deposited;

(b)(2) the expected duration of the deposit, including the likelihood of delay in the matter for which funds are held;

(b)(3) the rates of interest or yield at financial institutions where the funds are to be deposited;

(b)(4) the costs of establishing and administering non-IOLTA accounts for the client's benefit, including service charges, and the costs of preparing any tax reports required for income accruing to the client's benefit; and

(b)(5) the capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients and any other circumstances that may affect the ability of the client's funds to earn net income.

(c) The lawyer or law firm shall review its IOLTA account at reasonable intervals, but not less than annually, to determine whether changed circumstances require further action with respect to the funds of a particular client.

(d) The lawyer or law firm shall:

(d)(1) not allow earnings from an IOLTA account to be made available to a lawyer or law firm;

(d)(2) place in the IOLTA account all client funds which cannot earn net income for the client in excess of the costs of securing that income;

(d)(3) establish an IOLTA account with an eligible financial institution that has voluntarily chosen to offer and maintain IOLTA accounts, and:

(d)(3)(A) is authorized by federal or state law to do business in Utah;

(d)(3)(B) is insured by the Federal Deposit Insurance Corporation or its equivalent;

(d)(3)(C) complies with Rule 1.15 (a) of the Utah Rules of Professional Conduct; and

(d)(4) direct the depository institution where the IOLTA account is established:

(d)(4)(A) to remit all interest or dividends, net of allowable reasonable service charges or fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard practice, at least quarterly, solely to the Utah Bar Foundation ("Foundation"). When

feasible, the depository institution shall remit the interest or dividends on all of its IOLTA accounts in a lump sum, however, the depository institution must provide, for each individual IOLTA account, the information to the Foundation required by subparagraphs (d)(4)(B) and (d)(4)(C) of this rule;

(d)(4)(B) to report in a form and through any manner of transmission approved by the Foundation showing the name of the lawyer or law firm and the amount of the remittance attributable to each, account number for each account, the rate and type of interest or dividend applied, the amount and type of allowable reasonable service charges or fees deducted, the average account balance for the reporting period and such other information as is reasonably required by the Foundation;

(d)(4)(C) to report in accordance with normal procedures for reporting to depositors;

(d)(4)(D) that allowable reasonable service charges or fees in excess of the interest earned on the account for any period shall not be taken from interest earned on other IOLTA accounts or any principal balance of the accounts; and

(d)(4)(E) to comply with all other administrative rules for IOLTA accounts as promulgated by the Foundation or the Supreme Court.

(e) The determination of whether or not an institution is an eligible institution and whether it is meeting the requirements of this rule shall be made by the Utah Bar Foundation. The Foundation shall maintain a list of participating eligible financial institutions, and shall provide a copy of the list to any Utah lawyer upon request.

(f) Lawyers may only maintain IOLTA accounts in eligible financial institutions. Eligible financial institutions are those that voluntarily offer IOLTA accounts and comply with the requirements of this rule, including maintaining IOLTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account.

(f)(1) An eligible financial institution may satisfy these comparability requirements by electing one of the following options:

(f)(1)(A) establish the IOLTA account as the comparable rate product; or

(f)(1)(B) pay the comparable rate on the IOLTA checking account in lieu of actually establishing the comparable highest interest rate or dividend product;

(f)(1)(C) pay an amount on funds that would otherwise qualify for the investment options noted at (f)(3) equal to 70% of the federal funds targeted rate as of the first business day of the month or other IOLTA remitting period, which is deemed to be already net of allowable reasonable service charges or fees. The safe harbor yield rate may be adjusted once per year by the Foundation, upon 90 days' written notice to financial institutions participating in the IOLTA program; or

(f)(1)(D) pay a yield rate specified by the Foundation, if the Foundation so chooses, which is agreed to by the financial institution. The rate would be deemed to be already net of allowable reasonable fees and would be in effect for and remain unchanged during a period of no more than twelve months from the

inception of the agreement between financial institution and the Foundation.

(f)(2) IOLTA accounts may be established as:

(f)(2)(A) a business checking account with an automated investment feature, such as an overnight and investment in repurchase agreements or money market funds invested solely in or fully collateralized by US government securities, including U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrument thereof;

(f)(2)(B) a checking account paying preferred interest rates, such as money market or indexed rates;

(f)(2)(C) a government interest-bearing checking account such as accounts used for municipal deposits;

(f)(2)(D) an interest-bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest;

(f)(2)(E) any other suitable interest-bearing deposit account offered by the institution to its non-IOLTA customers.

(f)(3) A daily financial institution repurchase agreement shall be fully collateralized by the United States Government Securities and may be established only with an eligible institution that is "well capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund shall be invested solely in the United States Government Securities or repurchase agreements fully collateralized by United States Government Securities, shall hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940 and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(f)(4) Nothing in this rule shall preclude a participating financial institution from paying a higher interest rate or dividend than described above or electing to waive any service charges or fees on IOLTA accounts.

(f)(5) Interest and dividends shall be calculated in accordance with the participating financial institution's standard practice for non-IOLTA customers.

(f)(6) "Allowable reasonable service charges or fees" for IOLTA accounts are defined as per check charges, per deposit charges, a fee in lieu of minimum balances, sweep fees, FDIC insurance fees, and a reasonable IOLTA account administrative fee.

(f)(7) Allowable reasonable service charges or fees may be deducted from interest or dividends on an IOLTA account only at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on an IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the sole responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.

(g) Any IOLTA account which has or may have the net effect of costing the IOLTA program more in fees than earned in interest over a period of any time, may at the discretion of the Foundation, be exempted from and removed from the IOLTA program. Exemption of an IOLTA account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. Exemption of such account from the IOLTA program shall not relieve the lawyer and/or law firm from the obligation to maintain the property of client funds separately, as required above, in a non-interest bearing

account and also will not relieve the lawyer of the annual IOLTA certification.

(h) In the event a lawyer determines that funds placed in an IOLTA account should have been placed in an interest bearing account for the benefit of the client, the lawyer or law firm shall:

(h)(1) make a request for a refund in writing, in a timely manner, to the Foundation on firm letterhead within a reasonable period of time after the interest was remitted to the Foundation; and

(h)(2) provide verification from the financial institution of the interest amount. In no event will the Foundation refund more than the amount of net interest it received; remittance shall be made to the financial institution for transmittal to the lawyer or law firm, after appropriate accounting and reporting.

(i) On or before September 1 of each year, any lawyer admitted to practice in Utah shall certify to the Foundation, in such form as the Foundation shall provide ("IOLTA Certification Form"), that the member is in compliance with, or is exempt from, the provisions of this rule. If the lawyer or law firm maintains an IOLTA account, the lawyer shall certify the manner in which the lawyer accounts for the interest on clients' trust accounts. The IOLTA Certification Form shall include the financial institution, account numbers, name of accounts and such other information as the Foundation shall require. If the lawyer is exempt from the IOLTA program, the lawyer must still submit an IOLTA Certification Form annually to certify to the Foundation that he or she is exempt from the provisions in this Rule. Each lawyer shall keep and maintain records supporting the information submitted in the IOLTA Certification Form. The lawyer shall maintain these records for a period of five years from the end of the period for which the IOLTA Certification Form is filed, and these records shall be submitted to the Foundation upon written request. Failure by the lawyer to produce such records within thirty days after written request by the Foundation constitutes a rebuttable presumption that the lawyer has not complied with these rules.

(i)(1) If the IOLTA Certification Form is timely filed, indicating compliance, there will be no acknowledgement. Should an IOLTA Certification Form filed by a lawyer fail to evidence compliance, the Foundation shall contact the lawyer and attempt to resolve the non-compliance administratively.

(i)(2) The Foundation shall furnish annually to the Utah Supreme Court a list of all licensed Utah lawyers who have not timely filed an IOLTA Certification Form and any lawyers with whom the Foundation has been unable to administratively resolve an impediment to the proper filing of an IOLTA Certification Form or the proper compliance with Rule 14-1001, IOLTA.

(i)(3) Any lawyer who is not in compliance with IOLTA or who has failed to complete the IOLTA Certification Form by September 1 will be sent, by certified mail, return receipt requested, a non-compliance notice. Should the attorney fail or refuse to rectify the situation within thirty (30) days of such notice, the Foundation shall petition the Utah Supreme Court for the lawyer's suspension from the practice of law.

(i)(4) A lawyer suspended by the Utah Supreme Court under the provisions of this rule may be reinstated by the Court upon motion of the Foundation showing that the lawyer has cured the noncompliance issue for which the lawyer has been suspended. If a lawyer has been suspended by the Utah Supreme Court for non-compliance with these rules, the lawyer must then comply with all applicable rules to be eligible to return to active or inactive status.

(j) A lawyer may be exempt from having to maintain an IOLTA account for the following reasons:

(j)(1) the lawyer or law firm's client trust account has been exempted and removed from the IOLTA program by the Foundation pursuant to paragraph (g) of this rule; or

(j)(2) the lawyer has certified in his or her most recent annual IOLTA Certification Form that the lawyer:

(j)(2)(A) is not engaged in the private practice of law or does not manage or handle client trust funds and does not have a client trust account (e.g. corporate counsel, judge, employed by local, state or federal government who does not handle client trust funds or in private practice but does not handle client monies and has no client trust account);

(j)(2)(B) does not have an office within Utah and has the client's permission to hold the funds out of state; or

(j)(2)(C) has been exempted by an order of general or special application of this Court which is cited in the certification;

(j)(3) the lawyer or law firm petitions for and receives a written exemption from the Foundation that compliance with this rule would create an undue hardship on the lawyer and would be extremely impractical, based on geographic distance between the lawyer's principal office and the closest depository institution which is participating in the IOLTA program.

(k) Lawyers licensed in Utah must notify the Foundation in writing within thirty (30) days of any change in IOLTA status, including the opening or closing of any IOLTA accounts.

(l) The Foundation is the only entity authorized to receive and administer IOLTA funds in Utah.

(l)(1) The Foundation shall have general supervisory authority over the administration of the IOLTA funds, subject to the continuing jurisdiction of the Supreme Court.

(l)(2) The Foundation shall receive the net earnings from all IOLTA accounts and shall make appropriate investments of IOLTA funds. The Foundation shall maintain proper records of all IOLTA receipts and disbursements, which records shall be audited or reviewed annually by a certified public accountant. The Foundation shall annually present to the Supreme Court a reviewed or audited financial statement of the IOLTA receipts and expenditures for the prior year and a summary thereof shall be made available to anyone requesting copies.

(l)(3) The Foundation shall be responsible to present annually to the Supreme Court a status report on activities of the Foundation and compliance with these rules.

(l)(4) The Foundation shall be responsible to make disbursements from the IOLTA program funds, including current and accumulated net earnings, by grants, appropriations and other appropriate measures, as outlined in the articles and by-laws for the organization.

(l)(5) The Foundation shall promulgate such other rules, procedures, reports and forms that are necessary or advisable for the proper implementation of the foregoing rules.

(m) All lawyers who maintain accounts provided for in this rule must convert their client trust account(s) to interest-bearing account(s) with the interest paid to the Foundation no later than six months from the date of order adopting this rule, unless the lawyer has been granted exemption from this Court as allowed in paragraphs (g) or (j) of this rule. Every lawyer practicing or admitted to practice in Utah shall, as a condition thereof, be conclusively deemed to have consented to the reporting requirements mandated by this rule.

Diane Abegglen - New Committee Assignment: Utah Uniform Collaborative Law Act

From: Diane Abegglen
To: Advisory Committee on Rules of Professional Conduct
Date: 10/12/2010 1:39 PM
Subject: New Committee Assignment: Utah Uniform Collaborative Law Act
Attachments: BACKGROUND (Rule 1.16 Amendments).doc; Disqualification of collaborative lawyer.wpd

Steve Johnson asked me to forward the attached information to each of you. Once you have had a chance to review the attachments, please e-mail Steve if you are willing to serve on this subcommittee.

Thanks, everyone.

Diane

BACKGROUND

When the Utah Uniform Collaborative Law Act was considered by the Utah legislature during the 2010 legislative general session, the Administrative Office of the Courts noted that some of the proposed provisions were procedural rather than substantive. The Supreme Court makes an effort to keep procedural matters out of the statutes and to include them in court rules instead, in light of the constitutional mandate for the Supreme Court to adopt rules of procedure and evidence to be used in the courts of this state (Article VIII, Section 4, Utah Constitution).

When the Administrative Office of the Courts noted the procedural sections of the proposed bill, it negotiated with the sponsor to have the provisions removed in exchange for a subsequent review of possible new rules by the Court.

One of these provisions concerns the disqualification of an attorney and his or her law firm from representing a client in subsequent litigation where the attorney represented the client during collaborative negotiations. A copy of the stricken statute is attached.

It does not appear at first glance that this provision contradicts any current rules in the Rules of Professional Conduct.

The Supreme Court has requested that our Committee consider amending our rules to include a provision that gives the client protections implied in the stricken statutory language. Disqualification language could be added as a new subsection to Utah's current Rule 1.16(a) (Declining or Terminating Representation). It could also be added to Rule 74 (Withdrawal of Counsel) of the Rules of Civil Procedure. However, the provision seems more of a fit with the more inclusive language of Rule 1.16 RPC because Rule 74 RPC relates to a situation where litigation has already been filed and is pending before the court. That is why the matter has been given to our Committee.

Questions to be considered:

1. Does the proposed rule run afoul of any current rules in the RPC?

2. Is there any reason why the Committee should not recommend an amendment of Rule 1.16(a) to include disqualification of certain collaborative law attorneys?

3. What language should be considered by the full Committee if it is recommended that the substance of the stricken statutory language is added to a rule in the RPC?

I thought we would do something a little different with this proposal. Instead of the full Committee meeting twice (once to discuss the proposal and assign a subcommittee to make a recommendation, and then meeting as a full Committee to consider the subcommittee proposal), I suggest that a subcommittee be designated to discuss this proposal and then to make a recommendation to the full Committee. That way the full Committee would only meet once. To

this end, I would ask for at least three volunteers from among the members of the full Committee to take on this subcommittee assignment. If for any reason we don't get three volunteers, I may need to appoint subcommittee members. I hope that at least three of you will be interested in this assignment. Please e-mail me ASAP with your willingness to take on this assignment. I will then designate a committee chair. The full Committee will then meet hopefully before Thanksgiving (November 22nd at 5:00 p.m. in the Law and Justice Center Board Room?) to consider any recommendations of the subcommittee.

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.

Brian Florence's agreement

12/06/2010

From: trentdnelson@hotmail.com
To: Stuart Schultz; emwunderli@msn.com
Sent: 11/05/2010 9:42AM
Subject: Sample Collaborative Law Act

Stuart and Earl,

I found the enclosed sample on the Bar website for a Collaborative Law agreement. I think it is helps flesh out some of the practical steps of the process. It was written by Brian Florence, and although it was posted on the website, we haven't gotten his permission yet to use it; I say this just so we don't publically use it without first getting his permission. Thanks, Trent

The Collaborative Law Process

Collaborative Law is a cooperative, voluntary conflict resolution process. Both attorneys and both parties acknowledge that the essence of Collaborative Law is the shared belief that it is in the best interest of the parties and their families to avoid adversarial proceedings, to commit themselves to resolving their differences with minimum conflict and to work together to create shared solutions to the issues. This process relies on an atmosphere of honesty, cooperation, integrity and professionalism geared toward the future well-being of the parties and their children.
The goal of Collaborative Law is to maximize the settlement options to both parties, to increase the abilities of the parties to communicate in a post-divorce relationship and to minimize, if not eliminate, the negative economic, social and emotional consequences to families of litigation.
choosing Collaborative Law, we commit ourselves to resolving differences justly and equitably.

No Court or Other Intervention

By electing to employ a Collaborative Law process, we commit ourselves to settle this case without adversarial court involvement. We agree to give full, honest and open disclosure of all information, whether requested or not, and to engage in informal discussions and conferences to settle all issues. We agree to provide whatever releases are necessary to obtain information from accountants, pension and profit sharing plans and about financial assets and income.
We agree that the subpoena power may be necessary to obtain information neither has in his or her possession or control or which cannot be obtained by releases. This process anticipates the preparation and filing of the necessary court pleadings to effectuate the provisions of our agreements and complete the divorce.

Cautions

We understand that there is no guarantee of success. We further understand that the process cannot eliminate concerns about the disharmony, distrust and irreconcilable differences that have led to the current conflict.
It is consistent with the Collaborative Law process that the parties act in their own best interest and a party's attorney will assist him or her in asserting his or her interests. Cooperation does not mean that a party must put the interests of the other party ahead of his or her best interests.

Participation with Integrity

We will work to protect the privacy and dignity of all involved in this process, including parties, attorneys and experts. Each participant will maintain a high standard of integrity; specifically participants shall not take advantage of the other participants, nor of the miscalculations, misperceptions or mistakes of others, but shall point them out and correct them.

Experts and Consultants

If we determine that the help of outside experts such as accountants, appraisers and mental health professionals are needed, those experts will be retained jointly, unless we otherwise agree. All such experts retained in this Collaborative Law process will be directed to work in a cooperative effort to resolve issues, and shall provide all their conclusions and results to all parties equally.

Mentoring

We understand that our attorneys may suggest the involvement of another collaborative attorney to act as a mentor. Mentoring would only occur if our attorneys recommend it and we mutually agree to that attorney's participation. It would only occur to assist us and our attorneys in overcoming issues of apparent impasse and to provide suggestions as to how all of us could more effectively reach settlement. We understand that all collaborative attorneys are committed to this process and in most instances will agree to participate as a mentor without charge but in the event a proposed mentor requires compensation and we otherwise agree, the compensation will be shared as we may agree. The mentor will be bound by the same principles of participation and confidentiality as all of us.

Issues Concerning Children

In resolving issues about sharing the enjoyment of and responsibility for children, the parties, attorneys and experts shall make every effort to reach amicable solutions that promote the children's best interest.
We agree to act quickly to resolve differences related to the children and to promote a caring, loving and involved relationship between the children and both parents.
We agree to attend the "Divorce Education for Parents" class as quickly as possible.
We will insulate the children from our disputes. We will refrain from any negative comments about the other parent and will maintain an attitude of respect and cooperation toward the other.

Negotiations in Good Faith

We understand that the process, even with full and honest disclosure, will involve vigorous good-faith negotiation. Each of us will be expected to take reasoned positions in all disputes and where such positions differ, each of us will be encouraged to use our best efforts to create proposals that meet the fundamental needs of both of the parties and if necessary, to compromise to reach settlement of all issues.
Although we may discuss the likely outcome of a litigated result and should be informed of that, none of us will use threats of going to court as a way to force capitulation and settlement by the other.

Attorneys' Role

Each party is entitled to select the attorney of his or her choice, and the parties understand their attorneys are entitled to reasonable compensation. The allocation of marital assets to compensate attorneys will be resolved in this collaborative process.
The attorneys' role is to provide an organized framework that will assist the parties in reaching agreements. The attorneys will help the parties communicate with each other, identify issues, collect and help interpret data, locate experts, ask questions, make observations, suggest options, help parties express their needs, goals and feelings, check the workability of the proposed solutions and prepare and file all written paperwork for the court. Each attorney is independent from the other attorney and has been retained by only one party in the Collaborative Process.

Abuse of the Collaborative Process

We understand that our collaborative attorney will withdraw from this case as soon as possible upon learning that either of us has withheld or misrepresented information and failed to immediately correct the problem, or otherwise acted to undermine or take unfair advantage of the Collaborative Law process. Examples of such actions include secret disposition of property, failure to disclose assets, debts or income, abuse of the minor children or planning to flee with the children.

Disqualification of Attorney and Experts as a Result of Court Intervention

The attorneys representation of the parties is limited to the Collaborative Law process. No attorney representing a party in the Collaborative Law process can represent that party in court in a proceeding against the other party.
In the event the parties desire to proceed adversarially in court, both attorneys are disqualified from representing the parties and shall immediately file a notice of withdrawal. In the event that the Collaborative Law process terminates, all experts will be disqualified as witnesses and their work product will be inadmissible as evidence unless the parties agree otherwise in writing.
We understand that if the collaborative process is terminated, we will likely incur additional retainers for new counsel and our matter may be delayed while new attorneys become familiar with our case.

Withdrawal of Attorney

We agree that our attorney may withdraw at any time during the process for any reason. The withdrawal of an attorney does not necessarily terminate the Collaborative Law process. If the attorney for either of us withdraws, either of us may continue in the collaborative process without an attorney or retain a new attorney who will agree in writing to be bound by this agreement.
Whether an attorney withdraws as a matter of right or because of disqualification because of court intervention, the attorneys agree that they will cooperate with new attorneys, and provide them with the file and all documents and information to facilitate the transfer to successor counsel.

Temporary Agreements

In order to provide each of us with a feeling of safety and security, without which full commitment to the Collaborative Law process is impossible, we understand that some temporary agreements may be

necessary and which may include mutual restraining agreements. We will work in the collaborative process to reach those agreements to allow us both to proceed with safety and security while permanent agreements are negotiated.
.. either of us feels it necessary, we agree that temporary agreements may be entered as temporary court orders.

Confidentiality

All discussions among the parties and counsel are deemed settlement discussions and may not be offered as evidence in any subsequent proceedings between the parties. We understand, however, that any statement indicating an intent to endanger the safety of the other person or the children or which constitutes a claim of child sexual abuse, is not privileged.
Any documents provided by one party to the other during the Collaborative Law process may not be introduced in litigation in the divorce action or other litigation between the parties, without the written agreement of both parties.
Information provided by one attorney to the other attorney or the other party during the Collaborative Law process shall not be deemed a waiver of any privilege in subsequent divorce litigation or litigation between the parties.

Termination of Collaborative Law Process

Either party may unilaterally and without cause terminate the Collaborative Law process by giving written notice of such election to the other party and attorneys.
The parties do not waive the right to seek the assistance of the Court. However, any resort to adversarial court action automatically terminates the Collaborative Law process.

AGREEMENT

The undersigned parties and attorneys hereby agree to treat this matter as a Collaborative Law case, and to be bound by the foregoing PRINCIPLES OF COLLABORATIVE LAW.
Dated this _____ day of _____, 2001.

Diane Abegglen - Fwd: Re: Collaborative Law follow-up

From: Rick Schwermer
To: Chief Justice Christine Durham
Date: 8/16/2010 9:09 AM
Subject: Fwd: Re: Collaborative Law follow-up
CC: Diane Abegglen; Pat Bartholomew
Attachments: Re: Collaborative Law follow-up

Chief - Attached is a back and forth I have had with Lorie Fowlke re her Collaborative Law bill. You may recall that the bill passed last session, but we asked her to take big chunks out of the first draft because it had lots of procedural stuff in it. We agreed to look during the interim at how those procedural issues could be addressed.

We have now worked out everything except for the section in the original bill that purported to regulate withdrawal of counsel and lawyer/firm conflict. Below is the stricken section of the bill in question. Where is the appropriate place to consider this? Court conference, or Professionalism Committee, or elsewhere? Thanks
- Rick

- Would this conduct be covered by an existing rule?
- If not, propose rule, or amendment to statute?

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(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.

Richard Schwermer
Assistant State Court Administrator
Utah Administrative Office of the Courts
801-578-3816 (office)
801-231-8979 (cell)

Why is this necessary? Do we need something this specific?
- Look at Collaborative Law statute (as passed).
- Look at Rules of Professional Conduct re disqualification.