

ORIGINAL

**MONTANA SUPREME COURT PUBLIC MEETING
MINUTES**

FILED

Tuesday, August 6, 2019, 1:00pm
Joseph P. Mazurek Justice Building
215 North Sanders, Helena
Attorney's Lounge, 4th Floor

SEP 25 2019

Bowen Greenwood
Clerk of Supreme Court
State of Montana

Chief Justice McGrath called the meeting to order at 1:00 p.m. In attendance were the Chief Justice and Justices Baker, McKinnon, Rice, Shea, and Gustafson.

Also in attendance were: Carin McClain, Montana Justice Foundation; Jeanine Blaner, Supreme Court Staff Attorney; Mark Fowler, State Bar Ethics Committee/Assistant Attorney General; Peter Habein, State Bar Ethics Committee Chair; Betsy Brandborg, Montana State Bar Counsel; Kate McGrath Ellis, State Bar Board of Trustees Chair; Dave Steele, Individually and as State Bar Trustee; Kristen Blom, Supreme Court intern; John Nesbitt, Supreme Court Law Clerk; Molly McCarty, Supreme Court Law Clerk; and Madelyn Krezowski, Supreme Court Law Clerk

Item 1: Approval of the Minutes from May 28, 2019 Public Meeting

- The Justices unanimously approved the minutes from the last public meeting.

Item 2: AF 09-0688 Revisions to the Montana Rules of Professional Conduct

- The Chief Justice explained that Justice Sandefur is unavailable to attend the meeting, but he has read the proposals and is fine with all of the recommendations that have been submitted.
- The Chief opened the discussion with thanking the committee for its efforts and its work putting together this proposal suggesting which ABA revisions to adopt. The Chief opened discussion to public comment
- Justice Baker asks for a member of the Ethics Committee to respond to the two public comments suggesting changes to the proposal
 - Peter Habein first addressed the comments submitted by Benjamin Tiller suggesting that Rule 1.16 should be amended to require mandatory withdrawal if an attorney discloses confidential information under the amended exceptions to Rule 1.6. Mr. Habein explained that revisions to Rule 1.6 arose out of scandals like Enron when attorneys working for the company were bound by Rule 1.6 not to disclose wrong-doing at the company that caused serious financial injury to others. He clarified that serious financial injury rises to the same critical level as death or serious bodily injury. He explained that disclosure under Rule 1.6 and withdrawal under Rule 1.16 are not creating an election of remedies: a party may disclose and also may withdraw. This change recognizes that an attorney may disclose confidences to prevent serious financial injury, just as an attorney may disclose confidences to prevent serious bodily injury.

- Justice McKinnon asked for clarification regarding the concern Mr. Tiller raised in his comment that once an attorney discloses under an exception to Rule 1.6 there is an automatic conflict of interest that requires withdrawal.
 - Mr. Habein stated that under certain circumstances that may be the case, but that there are many scenarios. The classic scenario is a trustee who is self-dealing. The attorney can remonstrate the client, but if the trustee refuses to disclose, now the attorney may disclose. An attorney may need to withdraw in this scenario, but whether an attorney would need to withdraw would depend on the facts of the individual case. It is possible that an attorney could continue to represent a client under certain facts.
- Justice McKinnon asked whether the existing conflict of interest rules would cover these situations.
 - Mr. Habein replied yes.
- Justice Baker stated that the purpose of the proposed revisions is to be more consistent with the ABA model rules, but there are still some differences. She asked Mr. Habein to address Sarah Clerget’s public comment and if there were reasons her suggestions should not be incorporated.
 - Mr. Habein did not have specific objections to Ms. Clerget’s comment but responded that more consistency with the ABA model rules is beneficial to Montana because Montana will get the benefit of the ABA comments. Plus, Montana is now part of the UBE, which includes thirty-plus states. More consistency in the geography of the UBE states makes the bar more hospitable.
- Justice Baker asked how a subordinate attorney can handle the situation of a supervisor attorney engaging in ethically questionable behavior under the existing rules.
 - Mr. Habein responded that the Ethics Committee has not taken up a discussion of the language Ms. Clerget proposed. If the Court is considering this language, Mr. Habein would want the committee, which has great diversity of practice and experience, to vet it first.
 - Ms. Brandborg responded that she has advised attorneys to handle this situation under Rule 8.3. She suggests mentoring younger attorneys to work within existing rules and that the structure of COP and ODC has protections for subordinate attorneys.
 - Mr. Habein added that the existing Rule 8.3 is misunderstood. It is a fairly high bar to have a duty to report a violation—only if the violation is significant to raise substantial doubt as to fitness or honesty. Further, the duty to report is to a “responsible authority,” which the rule does not define. The responsible authority may be a managing partner, and the duty to report would be discharged by reporting up the chain within the firm.
 - Ms. Brandborg explained that Rule 1.13 governs working within an organization and how to report up the chain. Rule 1.13 and confidentiality rules would kick in.
- Justice Rice raised Mr. Tiller’s comment regarding the change in the preamble to recognize counseling clients engaged in the cannabis industry. Justice Rice commented that it was odd to mention a specific substantive area of law and not provide a more generalized rule.
 - Mr. Habein responded that the Committee was faced with addressing an area of practice where there is substantial need for legal advice and fear in the legal community of providing that legal advice because it may violate the ethics rules

that prohibit attorneys from advising clients in violating the law. Members of the public need advice in this area, and the Committee wanted to create a safe harbor for attorneys to provide this advice. The Committee could not find a place in the rules for general language to provide a clear safe harbor in this area and determined that the preamble was the best place to add the language.

- Mr. Dave Steele spoke in his individual capacity. He explained that he has received a number of calls from people engaged in the cannabis industry. Under the existing rules, he did not know if could take on the client without violating professional rules. Fifteen states have changed ethics rules and directly state that advising a client in the cannabis industry is exempted if the attorney advises the client on federal implications of their activities. Further, Mr. Tiller's comments critiquing the proposed change to the preamble highlight why Montanans should have access to legal advice to deal with complex statutes regulating cannabis. Mr. Tiller wrote that "compliance with state law is not defense to violation of federal law," but this statement is incorrect. In an appropriations bill, Congress removed the authority of federal prosecutors to prosecute federal cannabis violations if the individual was complying with state law. Because of the complexities in this area, people working in the cannabis industry, as well as those providing ancillary services such as accountants, need access to legal advice.
- The Chief Justice led discussion of each proposed change.
 - Rule 1.6
 - The Chief Justice agrees that the amendments to Rule 1.6 would not require mandatory withdrawal in all circumstance.
 - Rule 1.3 – no further discussion
 - Rule 1.20 – no further discussion
 - Rule 3.8
 - Justice Shea asked whether the changes would apply to prosecutors who have moved to new positions or to a prosecutor who makes an appearance in an already ongoing case.
 - Ms. Brandborg responded yes.
 - Justice Baker asked Mr. Fowler whether there has been discussion among prosecutors in the State regarding these changes.
 - Mr. Fowler answered no, not to his knowledge.
 - Ms. Brandborg responded that the changes follow the ABA model rule and any concerns have been allayed.
 - Mr. Habein added that the rule had been vetted by prosecutors and that Mr. Fowler chaired the subcommittee on the changes to rule 3.8.
 - Rule 1.2
 - The Chief Justice commented that the current rule guiding limited scope is very detailed, but that such detail is no longer needed because limited scope is now better understood in the legal community. The Chief Justice commented that he agrees with the recommendations, including deleting portions and rewriting the rule.
 - Justice Baker asked about how the changes will affect the requirements for informed consent in limited representation situations such as responding to

online questions through askkarla.org or MLSA phone clinics and whether the amendments will protect attorneys in those situations.

- Ms. Brandborg responded that ODC is disciplining more people in the limited scope setting, but that in clinics through MTLA the clients have signed releases before talking to the attorney. The issue is with limited scope in the for-profit arena. The Bar is trying to educate lawyers on the need for releases and written fee agreements and has free models for people to use, but the increased number of disciplinary actions from ODC in this arena shows that some practitioners may be taking advantage of limited scope rules
- Mr. Habein added that the written requirement is met if an attorney signs and sends a written scope of representation to the client. Mr. Habein added that attorneys are not required to write multiple letters with repeat clients. It is therefore important to identify who the client is and whether the client relationship is actually with the entity that provides the service.
- Ms. Brandborg stated that Rule 1.4(2)(b) requires that the attorney provide the client with the information needed to make a decision regarding limited representation.
- Justice Baker endorsed the changes but emphasized that the court is in no way diminishing its encouragement of limited scope, only recognizing the practice has caught up.

○ Rule 5.5

- Justice Baker asked whether the changes to subsection 4(d)(1) mean that in-house counsel working in Montana, but not admitted here, do not have to be admitted unless they appear in court.
 - Ms. Brandborg answered yes
- Justice Baker asked how the changes will affect when a lawyer has to be admitted pro hac vice
 - Mr. Habein responded that the change permits certain activities by non-Montana attorneys, such as mediations, arbitrations, and depositions without seeking pro hac vice admission. The rule requires systematic and continuous contact before a non-Montana attorney is required to apply for pro hac vice admission, such as actually prosecuting a case. The rule creates a bright line in areas that were previously gray areas.
- Justice Rice stated that the proposed language of Rule 5.5(c)(2), which allows a non-Montana attorney to provide services on a limited basis, is vague.
 - Mr. Habein responded that the key word is temporary, not systematic and continuous. The language is general in order not to be too limiting.
- Justice McKinnon asked about the exception as “authorized by law or order.”
 - Ms. Brandborg explained that is the pro hac vice process. Ms. Brandborg explained that she fields calls every day about matters

such as whether a non-Montana attorney can send a demand letter in Montana. She gave the example of a vehicle accident in Gardiner with a tourist from Texas. A Texas attorney currently cannot send the letter under the rules, but there is not an attorney in Gardiner to refer them to, so you have to refer them to someone in Bozeman. This change would allow the Texas attorney to send the demand letter. Consumer Protection is not doing anything with unauthorized practice of law, and they agreed allowing this would be a good idea.

- Mr. Habein added that the changes are consistent with other states.
- Rule 7.2
 - Justice Baker asked for a response on Mr. Tiller's comment to add subsection (e)
 - Mr. Habein and Ms. Brandborg explained that the suggested addition is already included in the structure of the rules
- The Chief continued on with proposed changes to Montana specific rules
 - Rule 1.0—no further discussion
 - Rule 1.5—no further discussion
 - Rule 1.8—no further discussion
 - Rule 1.10—no further discussion
 - Rule 1.15—no further discussion
 - Justice Baker commented that the proposed changes to the IOLTA accounts is something the Justice Foundation worked on with the State Bar. The changes were vetted by the Boards of both organizations.
 - Rule 8.5—no further discussion
 - Adding language regarding the cannabis industry to the Preamble.
 - The Chief Justice commented that he had been thinking that adding specific language to address cannabis in the preamble was unnecessary, but there was good comment on the need for it.
 - Justice Rice stated that this is a hot point issue now, but in twenty years the Court can take the language out. He doesn't like the language in the preamble, but it serves a good purpose,
- The Chief Justice took a vote to adopt the rules as proposed. All justices voted in favor.
- The Chief Justice stated the rules will be effective January 1, 2020. The Chief Justice stated that the Supreme Court's staff attorney will format the changes for publication in the attorney deskbook and online, including a version showing what is new and what has been taken out. The chart outlining the changes included as Exhibit B of the petition proposing the changes should be published online.

Item 3: AF 06-0090 Appointments to the Commission on Practice

- The Court signed the order reappointing Patricia DeVries and Lois Menzies and appointing Rich Ochsner to the Commission on Practice to four-year terms as non-attorney members of the Commission on Practice.

Item 4: AF 11-0765 Appointments to Access to Justice Commission

- The Court signed the order reappointing all five of the members of the Access to Justice Commission whose terms are expiring to new, three-year terms. The reappointed members of the Commission are Georgette Boggio, Katy Lovell, Daniel McLean, Kyle Nelson, and Alison Paul.

The Chief Justice adjourned the meeting at 2:00 p.m.

Duly submitted,
Madelyn Krezowski
Molly McCarty
Law Clerks