

# APPROVED MINUTES

## MINUTES

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

Administrative Office of the Courts  
230 South 500 East, Ste. 300  
Salt Lake City, Utah 84102

August 18, 1997 - 5:15 p.m.

#### **PRESENT**

Steve Trost  
John Beckstead  
Karma Dixon  
Robert Burton  
Gary Sackett  
Kent Roche  
Earl Wunderli  
Thomas Kay  
Bill Hyde  
Commissioner Tom Arnett  
Charles Gruber (Office of Atty Discipline)

#### **EXCUSED**

Gary Chrystler  
Judge Nehring

#### **STAFF**

Peggy Gentles

### **I. WELCOME AND APPROVAL OF MINUTES**

Steve Trost introduced the new Committee members John Beckstead and Karma Dixon. Mr. Trost also introduced Charles Gruber whom Steve Cochell had asked to attend the meeting for the Office of Attorney Discipline. Earl Wunderli moved for approval of the minutes with typographical changes. Bill Hyde seconded. The motion passed unanimously.

### **II. AMENDING RULES TO PROVIDE FOR SUSPENSION OF LICENSE FOR FAILURE TO PAY CHILD SUPPORT**

Charles Gruber discussed with the Committee Steve Cochell's memorandum that had been distributed with the meeting materials. Under the proposed Rules of Lawyer Discipline and Disability 31, the district court would suspend a lawyer's license pursuant to Utah Code Ann. § 78-32-17. Steve Trost noted that the language in Paragraph (b) "withhold, suspend, or restrict" tracks the legislative language but may not be applicable to lawyers' licenses. The district court only has the power to suspend licenses. Commissioner Arnett pointed to a practical problem with the language. The Supreme Court in the case of Boggs v. Boggs said § 78-32-10 requires evidentiary hearings to be held before someone can be found in contempt. While commissioners have contempt power, they

do not generally hold evidentiary hearings, instead taking evidence by proffer. Commissioner Arnett thinks the language in the rule should be found "not in compliance." Bill Hyde pointed out under Commissioner Arnett's proposal the matter would still have to be filed with the Office of Attorney Discipline.

Steve Trost inquired into how the court would actually raise the issue. John Beckstead pointed out that in Paragraph (c) the district court would notify the Office of Attorney Discipline of its order withholding, suspending, or restricting the lawyer's license. Gary Sackett stated that he thought that the Committee's direction at its last meeting had been that any finding of noncompliance would go back to the Office of Attorney Discipline for disciplinary action. John Beckstead stated that he thought that it would be analogous to docketing a foreign judgment. Specifically, the attorney at the disciplinary proceeding would have a limited number of defenses. Steve Trost asked what would happen if the district court's order was appealed. Charles Gruber discussed the Rule of Lawyer Discipline and Disability 10 which allows for disciplinary proceedings to be held in abeyance. Karma Dixon stated that she did not think that the rule was clear that it applied to an attorney being found in contempt in a case in which the attorney is a party.

Steve Trost suggested that the Committee should ask the Office of Attorney Discipline to amend the rule to require filing with the Office of Attorney Discipline. Robert Burton stated that the rule makes specific provisions for what would happen if the contempt order is appealed and what the authority of commissioners would be. Earl Wunderli pointed out that requiring a separate procedure in the Office of Attorney Discipline would give lawyers more protection than other professionals have under the 1997 legislation. Karma Dixon asked that if a person has notice and can respond in the district court why is an additional process needed. Robert Burton said that he was not prepared to vote for the rule in its present form.

Steve Trost asked the Committee if it wanted to recommend that the Office of Attorney Discipline work on it further. Gary Sackett stated that the Committee should recommend that the rule either allow the license to be suspended in the district court or require a separate proceeding in the Office of Attorney Discipline. Gary Sackett made a motion to require referral of an attorney who is in non-compliance to the Bar for further discipline. Tom Kay seconded. Further discussion followed. Kent Roche stated that he was not sure that "noncompliance" is the correct word. In fact the statute requires a higher standard for suspending of license based on sixty days of non-payment along with no good faith effort to pay. Robert Burton stated that the issue is really where the contempt hearing would be held. Kent Roche stated that he thought it should be done in the divorce case rather than in Bar proceedings. Charles Gruber pointed out that Bar proceedings eventually end up back in the district court. Gary Sackett stated that he thought that the discipline should be taken in the Office of Attorney Discipline. That office has the expertise in dealing with matters of professional ethics and he is not in favor of separating particular classes of violation for a different disciplinary process. Robert Burton stated that he is more in favor of the statutory scheme if finding of noncompliance leads to contempt hearing in the district court. Steve Trost pointed out that if a lawyer was suspended in the disciplinary process a petition for reinstatement would have to be filed for the lawyer to get the license back. John Beckstead expressed the concern that a lawyer would

abuse the process by paying up at the last minute. Gary Sackett stated that while he could see using an administrative process for a single time offender, a chronic abuser could be pursued through a more formal discipline process. Mr. Sackett withdrew his motion.

Karma Dixon pointed out another potential problem. If a person is found in contempt for non-payment of child support and later pays, that contempt is usually purged. If it were purged, the finding upon which further disciplinary proceeding would be based would no longer be in place. Steve Trost stated that administrative suspension may be a better vehicle because it would be quicker. Karma Dixon stated that her experience has been that by the time a matter got to district court a person has been not paying child support for a long time and large amounts of money were involved. Steve Trost asked that the Office of Attorney Discipline address the Committee's concerns and bring a proposal back to the Committee next meeting.

### **III. FURTHER CONSIDERATION OF RULE 1.17**

Commissioner Arnett, Chair of Rules Subcommittee, pointed out that the minutes from the April meeting had asked that a number of items be gathered for the Committee's consideration. However, he only received the memo from Carolyn McHugh on covenants not to compete. Commissioner Arnett stated that the Rules Subcommittee had met recently to consider Rule 1.17. The members looked at the basics of the rule. Because the subcommittee was not aware of any existing problem in Utah, the subcommittee recommends that the Committee not pursue Rule 1.17 at this time. The subcommittee was not aware of any disciplinary proceedings, any ethics advisory committee opinions or any lawyers seeking to have a rule similar to Rule 1.17 adopted. The subcommittee's feeling was that the rule would create more problems than it would solve. Just because ABA recommends the rule does not mean that the Committee should adopt it. Steve Trost stated that he had two calls within the last year from attorneys saying that they wanted to sell their practice but were not able to under the existing framework. Gary Sackett stated that in his opinion it is not clear that a law practice cannot be sold under the existing Utah rules. He said the Ethics Advisory Committee has never issued an opinion on the question. A few years ago the committee did draft an opinion which the Bar Commission rejected.

Steve Trost pointed out that if someone dies and no other members of the partnership exist, the surviving spouse may be in great difficulty. Other members of the Bar must be found quickly to deal with the deceased attorney's clients and the surviving spouse has no way to realize any value of the practice. Tom Kay stated that he did think that rule as drafted would allow an estate to sell a practice. Steve Trost noted the rule could be changed to address that. The rule should address two groups: 1) solo practitioners; and 2) attorneys who die while still practicing.

Commissioner Arnett repeated that the subcommittee could not see the need for the rule. Steve Trost stated that he thought the rule should be presented to the small firms section of the Bar to see if it had any interest. John Beckstead stated that such a rule would only be helpful in the event of the death of an attorney if an estate plan had contemplated the problem. Tom Kay pointed out that if an attorney dies quick action is necessary. Bill Hyde pointed to the Arkansas rule which has

explicitly considered the application of Rule 1.17 in a situation where an attorney has died. Gary Sackett stated that the Committee needed to address the fundamental question of selling goodwill of a law practice. Some in the Bar may think that this is getting paid for giving references which is prohibited. John Beckstead stated that he did not see a crying need for a rule similar to Rule 1.17. Bill Hyde stated that the concerns are client protection: notice, no fee increases, etc. Robert Burton stated that the client should be the concern of the Committee. Commissioner Arnett made a motion that Steve Trost send the rule to the chair of the small practice section of the Bar. After being seconded, the motion passed.

#### **IV. OTHER BUSINESS**

Steve Trost asked that Steve Cochell report to the Committee on Rule 7 series at the next meeting. Charles Gruber pointed out that Mr. Cochell had provided the Committee with accounting standards for the Committee's consideration. While the Committee discussed the standards briefly, it requested that they be put on the meeting agenda for September.

#### **V. ADJOURN**

There being no further business, the Committee adjourned at 6:40 p.m.