

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

December 15, 1997 - 5:15 p.m.

PRESENT

Commissioner Arnett
Robert Burton
Carol Stewart
John Beckstead
Karma Dixon
Stephen Trost
Gary Sackett
Earl Wunderli
Tom Kay
Kent Roche

ABSENT

William Hyde
Gary Chrystler
Judge Nehring

GUEST

Jerry Howe

STAFF

Peggy Gentles

I. WELCOME AND APPROVAL OF MINUTES

Upon motion by Tom Kay and second by Earl Wunderli, the minutes of the October meeting were approved with one change.

II. REQUEST TO ETHICS ADVISORY COMMITTEE - RE. SALE OF A LAW PRACTICE

Gary Sackett reported that the Bar's Ethics Advisory Committee was in the process of responding to the letter from Steve Trost asking if existing rules would permit the sale of the goodwill of a law practice. Mr. Sackett reminded the Committee this letter was sent at the recommendation of the rules subcommittee which thought that possibly an ethics advisory committee opinion would be a more efficient route than adoption of a rule similar to Model Rule 1.17. Mr. Sackett emphasized that the official response from the Ethics Advisory Committee had not yet been prepared. However, he expected that the response would not endorse the sale of a law practice under existing rules. A subcommittee of the Ethics Advisory Committee had researched the issue and determined that no state ethics advisory committee had ever found that the model rules permitted the sale of goodwill. Mr. Sackett stated that he expects that the Ethics Advisory Committee will provide a memo including references to cases and articles for the Committee meeting in January. Mr. Sackett added that he

expected the Ethics Advisory Committee to suggest that impediments to the sale of a practice could be removed by amending existing rules rather than adoption of a rule similar to Model Rule 1.17. Specifically, the Ethics Advisory Committee had identified issues surrounding fee splitting and referral fee rules that could be addressed. Mr. Sackett concluded by saying that he thought the sentiment on the Ethics Advisory Committee was that the sale of a practice was something that should be allowed under the Rules of Professional Conduct. Steve Trost stated that he expected the rules subcommittee, upon receipt of the Ethics Advisory Committee's response to consider adoption of Model Rule 1.17 or amendment of existing rules. Mr. Trost thanked Mr. Sackett for the update.

III. REQUEST FOR RULE - RE. MALPRACTICE INSURANCE

Tom Kay stated that he, Carol Stewart, and Karma Dixon had been asked by the Committee to gather information surrounding the request from Bruce Baird to require malpractice insurance or disclosure of no malpractice insurance. Mr. Kay reported that Ms. Stewart had gathered information concerning California's rules. California requires that any written fee agreement which anticipates more than \$1,000 in fees disclose if the attorney does not have insurance or met a bonding requirement. California does not prohibit attorneys from practicing if they do not have such protection. Mr. Kay reported that he and Ms. Dixon had spoken with the Chief Justice and asked if this was an appropriate area for a rules advisory committee to consider. The Chief Justice stated that if the Committee was of the opinion that such a rule should be adopted it should prepare recommendations for the Court. Mr. Kay reported that the Oregon Bar requires attorneys to carry insurance or participate in the state risk pool. Mr. Kay stated that the Oregon fund accepts all risks but can refuse to cover attorneys with problematic claims histories. Mr. Kay pointed out that the Oregon program illustrates a problem with requiring attorneys to carry malpractice insurance. Absent a fund such as the Oregon Bar has established, an attorney's ability to practice would be controlled entirely by private insurance carriers. Mr. Kay stated that he could not support mandatory coverage; however, requiring disclosure had some appeal.

Carol Stewart reported that she had also inquired at the American Bar Association concerning states' actions in this area. She found no significant movement in other states with the exception of New Jersey which is beginning to consider the issue. Karma Dixon reported that she had looked at existing Utah rules. The rules currently require "reasonable communication" with the client. If the Committee was inclined to require disclosure of malpractice coverage, this rule may be an appropriate place to put such a requirement. Ms. Dixon focused on rules concerning "scope of representation," "communication," and "fee." Peggy Gentles stated that it was her understanding that the Bar Commission had considered Mr. Baird's request at its last meeting and had asked research to be done.

Steve Trost asked if the Committee wanted to make any recommendations in this area. Karma Dixon stated that she agreed with Tom Kay that insurance should not be required but disclosure should be. Mr. Kay added that while there was no particular problem in Utah, the Committee should decide the issue on its merits rather than on whether other states are addressing the issue. Gary Sackett moved that the Committee not endorse requiring each member of the Bar to carry malpractice insurance. Robert Burton seconded the motion. The motion passed.

Steve Trost then asked if the Committee had a consensus about requiring disclosure. Gary Sackett stated that he was concerned that requiring disclosure would not address a demonstrated need. He suggested that the likely results of such a rule would be that attorneys would ignore it. John Beckstead stated that he felt like requiring disclosure was too much regulation unless a need was shown. If an attorney is doing a poor job, requiring disclosure of no malpractice insurance would not change anything. Kent Roche stated that he agreed with Mr. Beckstead. If the goal is an informed decision by a client, other information should be considered for inclusion before the lack of malpractice insurance. Carol Stewart stated that perhaps the Bar Commission should be the entity to make a recommendation on this issue because it is an elected body. She pointed out that Utah has very high number of solo practitioners because the legal market is saturated currently. The Office of Attorney Discipline sees a number of cases a year in which malpractice has been committed but the attorney has no insurance. However, requiring disclosure of no insurance may make it more difficult for solo practitioners to have a viable business. Commissioner Arnett moved that the issue be tabled until after the Bar Commission meeting. Gary Sackett seconded. The motion passed.

IV. OTHER BUSINESS

Gary Sackett stated that the Ethics Advisory Committee had recently determined that Utah Rule 1.6(a) differed from the Model Rule 1.6(a). The Utah rule provides that a lawyer shall not reveal information "unless the client consents after *disclosure*." The Model Rule states that a lawyer shall not reveal information "unless the client consents after *consultation*." Mr. Sackett stated that he had contacted Commissioner Arnett who has been a long-time member of the rules subcommittee. Commissioner Arnett's review of his materials did not disclose any reason for variance from the Model Rule. Mr. Sackett stated that he would prefer if the rule was parallel to the ABA model rule. Mr. Sackett suggested that the Committee consider proposing a change for the next rule making cycle. The Committee asked Peggy Gentles to draft a proposed rule.

V. ADJOURN

Due to a holiday, the Committee moved its regular scheduled meeting in January to January 26, 1998. There being no further business, the meeting adjourned at 6:10 p.m.