APPROVED MINUTES

MINUTES

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

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

January 26, 1998 - 5:15 p.m.

PRESENT
Commissioner Arnett
Robert Burton
Gary Chrystler
Karma Dixon
Thomas Kay
Judge Ronald Nehring
Kent Roche
Gary Sackett
Stephen Trost
Billy Walker
Earl Wunderli

EXCUSED
John Beckstead
William Hyde

GUESTS

Jerry Howe
Alan DeWoskin, St. Louis MO (by telephone)

STAFF
Matty Branch
Peggy Gentles

I. WELCOME AND APPROVAL OF MINUTES

Steve Trost welcomed the Committee members to the meeting and introduced Billy Walker, new senior counsel at the Office of Professional Conduct (formerly Office of Attorney Discipline). Mr. Walker stated that he came to the office after eighteen years in government practice most recently as division chief of the Child Support Division of the AG's Office. Robert Burton moved that the minutes of the December 15, 1997 meeting be approved. Earl Wunderli seconded. The motion passed unanimously. Matty Branch, Appellate Court Administrator, introduced herself to the Committee. She stated that she likes to attend as many of the Advisory Committee meetings as possible because she acts as a liaison between the Supreme Court and the Bar Commission along with duties as appellate court administrator.

II. ABA MODEL RULE 1.17

Steve Trost informed the Committee that Alan DeWoskin, an attorney in St. Louis Missouri who has been involved in the adoption of Model Rule 1.17, had asked to address the group. Mr. DeWoskin would participate by telephone. First, however, Mr. Trost asked Gary Sackett to address the

Committee concerning his letter of January 15, 1998, responding to the Committee's ethics advisory opinion request. Mr. Sackett stated that the Ethics Advisory Opinion Committee (EAOC) felt that the Model Rule 1.17 may not be was not the cleanest way to change the Rules of Professional Conduct to allow an attorney to sell the goodwill of a law practice. However, the EAOC was divided over how much change would need to be made to the existing rules to allow the sale of a law practice. Steve Trost stated that he would like to explore with Mr. DeWoskin how far other states have pursued the possibility of changing existing rules rather than adopting Model Rule 1.17. Mr. Sackett stated that the EAOC could not surmount a couple of impediments to the sale of a law practice under existing rules. While a minority of EAOC thought that the existing rules could be interpreted to allow the sale, a majority felt differently. However, the EAOC was unanimous on the policy issue. The EAOC felt that the sale of good will of a practice should be allowed. That position recognizes the economic fact that practices have value. The EAOC felt that the rules could be crafted to protect clients' interests. Mr. Sackett stated that the EAOC was concerned that certain lawyers are able to sell their practices now under the guise of entering a partnership then selling the partnership interest to the other person and retiring. Mr. Sackett concluded that the opinion letter of the EAOC had been a joint effort of many members on that committee.

Commissioner Arnett pointed out that the rules subcommittee had already considered Model Rule 1.17 and had suggested the contact with the EAOC. Commissioner Arnett said that his opinion on the policy underlying Rule 1.17 had been changed by the EAOC opinion. He was struck by the ability of attorneys in large firms to be able to get economic value for their practice while solo practitioners were prohibited currently. Mr. Sackett stated that the most troublesome issue for the EAOC was Rule 7.2(c)(referral fees). In order to sell a practice as a going concern rather than for its liquidation value, a selling lawyer would be in effect "recommending" the buying lawyer to clients and receiving value for that referral. Under the current rules, that would be prohibited. Kent Roche was concerned about disclosure of confidential client information. Mr. Sackett stated that clearly there needed to be a mechanism for clients to opt out of being represented by the buying attorney. Mr. Roche stated that the aspect that he liked best of Model Rule 1.17 was that the balance between allowing the sale and protecting the clients did not encourage the sale only allowed it. Robert Burton stated that he agreed with Mr. Roche. Mr. Sackett stated that both the EAOC and the rules subcommittee had identified problems with Rule 1.17. The rule only allows the sale of a practice as an entirety. This may limit attorneys who have disparate specialities from selling their practice due to a lack of a buyer who also has those specialities. Steve Trost asked if the Committee was in agreement that the rules should allow the sale of a law practice. Karma Dixon moved that the issue be referred to the rules subcommittee with support for changes that would allow the sale of a practice. Gary Chrystler seconded. The motion passed unanimously.

Alan DeWoskin participated in the Committee meeting by telephone. Steve Trost related the history of the Advisory Committee's work on Rule 1.17 and asked Mr. DeWoskin what had been considered when drafting Rule 1.17. Mr. DeWoskin responded that the Model Rule was a product of compromise and had been based on a California rule which had been adopted in the late 1980's. Considerable effort was put into developing a rule that would be effective and approved by the ABA Ethics Committee. There was a great concern that attorneys were unable to get value for their

practice and that clients often were unprotected when a lawyer died or became incapacitated. Currently twenty-one states have adopted a version of Model Rule 1.17, most recently Colorado, North Carolina, Idaho and Indiana. In addition seventeen states are considering adoption of the rule. In Mr. DeWoskin's opinion, the petition that is currently pending before the Arkansas Supreme Court contains the most logical rule to be adopted. Mr. DeWoskin pointed to a number of issues that have come up surrounding Rule 1.17 both in the drafting of the model rule and adoption of a version of the model rule by various states. He listed the following:

1. Once a lawyer sells the practice, where should that lawyer be prohibited from re-entering the practice of law?

2. Should client information be disclosed in negotiation? [While the attorney's representation of a client would be public information if a lawsuit had been filed, Mr. DeWoskin stated that non-public client information should be protected.]

3. Should existing attorney client contracts be honored? [In Mr. DeWoskin's opinion, the purchasing lawyer should not be able to charge the clients of the selling lawyer more than the buying lawyer charges other clients. The buying lawyer should not be able to pay for the purchase of the selling lawyer's practice by fees collected only from the selling lawyer's former clients. However, Mr. DeWoskin did not think that the buying lawyer should be forced to honor the terms of the fee agreement that the selling lawyer had with the client.]

4. What type of restrictive covenants should be allowed in the contract for the sale of the practice?

5. When should notice to clients begin to run? [Mr. DeWoskin stated that six states have notice that begins when the notice is sent; all other states' rules provide that the notice period begins when the client receives the notice. Most states have a 90 day notice period. Some rules contain a presumption of receipt by the client.]

6. What is the definition of "good will"? [According to Mr. DeWoskin, no rule contains any attempt to define that term further.]

7. Should the rule contain any provision for payment? [Mr. DeWoskin stated that in his opinion the rule should not contain any reference to payment. That issue should be addressed in the contract for the sale.]

8. Should rule allow the practice to be split or should the selling lawyer be required to sell the practice in its entirety? [Mr. DeWoskin stated that only two rules allow an attorney to split the practice when selling. Mr. DeWoskin's concern about allowing the practice to be split is that it could allow for lucrative parts of the practice to be sold while leaving those clients in the other part of the selling lawyer's practice without representation because the selling lawyer can not find a willing buyer.]

9. Who can buy a practice? [Mr. DeWoskin stated that in his opinion the rule should not allow non-lawyers to buy a practice.]

10. How should clients who do not respond to the notice of the sale be treated? [Mr. DeWoskin stated that, while the model rule provided for in camera review, he did not think that should be required. The rule should presume receipt of notice by the client.]

Steve Trost asked the difference between the model rule and the rule proposed in Arkansas. Mr. DeWoskin stated that the Arkansas rule would allow an estate to sell the practice; provides for an exception in conflict cases; has a sixty day notice period; and presumes consent to the sale by clients who did not respond to the notice. Mr. DeWoskin added that the ABA Ethics Committee would not approve the model rule without the in camera review provision. Billy Walker asked if all the clients do not want to use the buying lawyer, what would be the status of the sale. Mr. DeWoskin replied the rule contains no provision concerning that issue. Instead, it would be governed by the contract for sale between the two attorneys. Steve Trost asked if Mr. DeWoskin had heard of any problems with implementation from other states. Mr. DeWoskin responded that he had called California and they had not observed any problems. However, the only time that problems would surface would be if someone reneges on the contract or a client complains.

Mr. DeWoskin pointed out an additional issue that some states had considered. In some states, if the practice is a corporation, the state law may allow the sale of the corporation regardless of the model rules. Earl Wunderli asked if a selling lawyer decides to re-enter the practice, what prohibition would there be. Mr. DeWoskin responded that it would depend on the rule. Karma Dixon asked if it is appropriate to bind the new lawyer to the fee agreement, what would happen to client retainers that the selling lawyer had received. Mr. DeWoskin stated that any unused retainer would be returned to the client by the selling lawyer. Mr. Trost asked if Mr. DeWoskin was aware of any states that, rather than adopting a version of Model Rule 1.17, had amended its existing rules to allow the sale of a practice. Mr. DeWoskin responded that the Washington Bar in its formal ethics opinion 192, approved by the Board of Governors on May 3, 1996, has done so. Mr. DeWoskin stated that he would forward that opinion to the Administrative Office of the Courts. Judge Nehring asked what would stop a solo practitioner from forming a firm for the purposes of selling the practice. Mr. DeWoskin stated that nothing would foreclose that. However, adoption of a version of Model Rule 1.17 would alleviate the need for such a fiction. Steve Trost thanked Mr. DeWoskin for his time.

III. PROPOSED CHANGE TO RULE 1.16

Peggy Gentles referred the Committee to her memorandum that proposed a change to Rule 1.16 that would parallel the model rule. She asked that the Committee approve the rule to be published for comment. Gary Sackett stated that he had discovered a similar problem in Rule 1.12. Tom Kay moved that both Rule 1.16 and Rule 1.12 be published for comment with the word "disclosure" changed to "consultation" in Paragraph (a) of both those rules. Gary Chrystler seconded. The motion passed unanimously.

IV. OTHER BUSINESS

Steve Trost referred the Committee to the draft Rule 4.2 that had been faxed to the Committee that morning. Peggy Gentles informed the Committee that she had been contacted by members of the Attorney General's office asking that this rule be considered as soon as possible. She stated that she had been unable to contact the Chief Justice to determine what direction, if any, he had for the Committee's consideration of Rule 4.2. The Committee discussed how to proceed on Rule 4.2. Commissioner Arnett said that the rules subcommittee was planning to meet before the next meeting to consider Rule 1.17. If Steve Trost's discussions with the Chief Justice suggested that Rule 4.2 should be considered instead, the rules subcommittee could do so at that scheduled meeting. Judge Nehring pointed out that the Committee had a lot invested in Rule 4.2. The rule had been discussed extensively a few years ago. Mr. Trost stated that he would talk to the Chief as soon as possible and ask that the subcommittee presume that it would be addressing Rule 4.2.

V. ADJOURN

The Committee rescheduled its February meeting to February 23, 1998 due to a holiday. There being no further business, the meeting adjourned.