

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

February 23, 1998 - 5:15 p.m.

PRESENT

Steve Trost
Tom Kay
Karma Dixon
Billy Walker
Gary Chrystler
Earl Wunderli
Kent Roche
John Beckstead
Gary Sackett
Bill Hyde
Judge Nehring

ABSENT

Bob Burton
Commissioner Arnett

GUEST

Michael Wims

STAFF

Peggy Gentles
Matty Branch

I. WELCOME AND APPROVAL OF MINUTES

Because the minutes of the January meeting were inadvertently left out of the materials sent to the Committee, there were no minutes to approve. January's minutes will be approved in March.

II. PROPOSED RULE 4.2

Steve Trost reported he spoke with the Chief Justice concerning the proposed Rule 4.2 prepared by the Conference of Chief Justices. The Chief Justice told Mr. Trost that the Conference of Chiefs was accepting comments from all groups at this time. Mr. Trost stated it was his understanding that Rule 4.2 was not to be circulated for comment in Utah at this time. Therefore, Mr. Trost informed the Committee that the only issue was whether the Committee had any comments on the proposal. Kent Roche reported that he had seen an article stating that the Conference of Chief Justices had extended the comment period to June 1, 1998. Earl Wunderli noted that the Committee had looked extensively at Rule 4.2 a couple of years ago. Bill Hyde reported that the proposal before the Committee was the design to address the prosecutors' issues. In his opinion, the rule is not clear about how it applies to government lawyers talking to people in other governmental entities. The rule should be clarified

in the comment period. Steve Trost suggested that he write a letter to the Chief Justice and state that the Committee had deliberated extensively over the existing Rule 4.2. Gary Sackett pointed out that the focus of the Committee's work previously had not been on the "Reno Rule." Therefore, he does not think a letter to the Chief should suggest that the Committee had even addressed the issues surrounding the proposed changes before the Committee. Mr. Sackett suggested that Mr. Trost express to the Chief that the Committee would like to be able to consider the rule in the usual process and review the proposal for conformity with the other Rules of Professional Conduct. Earl Wunderli pointed out that the numbering in proposed Rule 4.2 does not fit with the conventions used in other Utah rules. Gary Sackett made a motion that Steve Trost write a letter to the Chief Justice offering the Committee's services to review the rule as the Committee does with other rules. Tom Kay seconded the motion. Earl Wunderli suggested that an additional comment about the different format be identified. For instance, Paragraph (a) of the proposed rule uses the phrase "general rule." Other Utah rules do not use titles for paragraphs within rules. The motion passed unanimously. Gary Sackett asked that a draft of Mr. Trost's letter be circulated for the next meeting.

III. ABA MODEL RULE 1.17

Gary Sackett referred the Committee to the materials faxed out at the end of the previous week. He reported that the subcommittee had began by considering two approaches to ABA Model Rule 1.17. The first approach was to add no new rule and instead amend existing rules. The second approach would be to adopt Rule 1.17 similar to the model rule. The general consensus of the subcommittee was not to adopt Rule 1.17 in its entirety. Mr. Sackett stated that the Committee ended up with an intermediate ground. The subcommittee proposes a stripped-down version of the Model Rule 1.17 focused only upon the need to notify clients and augmented with changes to existing rules. Mr. Sackett referred the Committee to the materials sent out. The subcommittee proposes the following amendments: amendment to the comment to Rule 1.5 noting that Rule 1.5 would not bar the sale of a practice; amendment to the comment to Rule 5.6 stating that Rule 5.6 was not intended to prevent the sale of a practice; amendment to Rule 7.2(c) noting that the sale of a practice would not be considered a referral fee; and a new Rule 1.17 which retains only the portions about notice from the model rule and adds a generic comment addressing the sale to more than one purchaser.

Mr. Sackett noted that the proposed Rule 1.17 does not have the aspects that many on the Committee perceived to be micro-managing. Instead, the proposed Rule 1.17 was designed to give more flexibility. Steve Trost asked about the second paragraph of the comment to Rule 1.17 that does not permit "skimming" of clients. Specifically, Mr. Trost asked why the market would not be allowed to address this concern. Mr. Sackett stated that the subcommittee thought that the rule should preclude a seller only taking the good clients. The subcommittee sought to strike a balance that would protect existing clients' interests. Judge Nehring asked what was wrong with retiring for the purpose of some clients and selling the business for purposes of others. John Beckstead pointed out that under the current system clients are not protected. In his opinion the issue was how much duty does the Bar have to protect the clients of the selling lawyer. Tom Kay stated that he thought allowing clients to be selectively sold with a practice sent the wrong message. Karma Dixon stated that she would support the ability of a lawyer to sell all the clients within certain specialities.

However, she was concerned that the rule would allow a buying lawyer to specify that the lawyer would only take clients fitting into certain groups. Tom Kay stated that the rule should only give general guidelines and allow the contract between the lawyers to deal with the specifics.

John Beckstead stated that he thought this rule could be raising a number of issues for existing law firms. The proposals would encourage partners to withdraw from the firm, take clients, and then sell the practice later. Mr. Beckstead stated, however, in his opinion most practices would not lend themselves to being sold under these rules. He also stated that as drafted the rule appeared to allow the sale of certain parts of the practice without withdrawing from the practice of law. Mr. Beckstead stated that he thinks that should not be permitted under the rules. Mr. Sackett stated that was not the intent of the proposals. Instead, the subcommittee wanted to give a clear "safe harbor" for those lawyers who are leaving the practice to sell different parts of the practice to different lawyers. Mr. Beckstead stated that he liked the subcommittee's proposed Rule 1.17 without the rest of the model rule. Earl Wunderli agreed stating that he liked the retention of the notice provisions from the model rule. Gary Chrystler asked why clients should be able to "consent to sale." Kent Roche pointed out the provision addresses a selling lawyer's ability to provide a file to a buying lawyer if the client is not responsive without breaching the client's confidentiality. Earl Wunderli asked about when clients can not be located. The Committee proposed change to Rule 1.17 that would clearly state that a selling lawyer had to attempt to give notice but if a client is unlocatable the sale could still proceed. In addition, the Committee asked for a change to the comment that would require a selling lawyer to use due diligence to give notice to all clients. Bill Hyde asked if there was any concern about an industry growing up around lawyers who are very effective at signing up clients then selling those clients and doing it again. Gary Sackett stated that he thought the Bar would be able to proceed under Rule 8.4 if a lawyer was found to be abusing the process. Tom Kay moved that the Committee approve proposed new Rule 1.17 and the amendments to the other rules as proposed by the subcommittee to be published for comment. Earl Wunderli seconded. The motion passed 7 to 2 with Judge Nehring and John Beckstead voting against.

IV. OTHER BUSINESS

Peggy Gentles reported that the Bar had filed a petition to adopt changes to Rule 6.1 requiring mandatory reporting of pro bono hours. The petition expressly requests that the Bar Commission act as the advisory committee for purposes of consideration of the proposed changes. Matty Branch added that the supporting information is in the Access to Justice Task Force Report that was sent to all members of the Bar in 1997. The Bar Commission wants to be able to respond to comments that are received. The Committee discussed the proposal and asked that a copy of the Bar Commission's petition be provided for the next meeting.

Gary Sackett stated that he thought the Committee should consider the Bar's rules of integration which contain a lot of rules that regulate lawyers but are not published anywhere. In fact, the rules are sometimes used by the Office of Professional Conduct in disciplinary proceedings. The Committee asked that Peggy Gentles get copies of the rules of integration and distribute them for the next meeting.

V. ADJOURN

The Committee scheduled its next meeting at the regularly scheduled third Monday (March 16) at 5:15. There being no further business the meeting adjourned.

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.