APPROVED MINUTES

MINUTES

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

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114-0241

December 11, 2000

ATTENDEES
Commissioner Tom Arnett
John Beckstead
Matty Branch
Bob Burton
Gary Chrystler
Karma Dixon
Royal Hanson
Steve Johnson
Judge Ronald Nehring
Kent Roche
Gary Sackett
Paula Smith
Billy Walker
Earl Wunderli

EXCUSED
Bill Hyde

GUESTS
Mike Blackburn, Co-Chair, MDP Task Force
Ray Westergard, Co-Chair, MDP Task Force
Val Antczak, MDP Task Force
Toby Brown, MDP Task Force
George Harris, MDP Task Force
Mark Lehman, MDP Task Force

STAFF
Peggy Gentles

I. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the Committee members and guests to the meeting. Earl Wunderli moved that the minutes of the October 16, 2000, meeting be approved. Judge Nehring seconded the motion. The motion passed unanimously. Bob Burton stated that the regularly scheduled January meeting would fall on a holiday so he asked if the Committee could meet on January 8, 2001. The Committee members agreed.

II. MULTI DISCIPLINARY PRACTICE TASK FORCE REPORT

Bob Burton welcomed the members of the Bar's Multidisciplinary Practice (MDP) Task Force who were present at the meeting. He asked each to introduce himself and asked that the Task Force members make whatever presentation they felt appropriate. Mike Blackburn, co-chair of the Task

Force, stated that about a year ago the Bar president appointed the MDP Task Force. The Task Force members were selected for their diversity of opinion on the issue of whether MDP should be allowed as well as diversity of practice. Importantly, the Task Force included non-attorneys from professions that may have interest in the issue. Mr. Blackburn stated that the Task Force recommendations were unanimous. The Task Force felt that MDP will happen regardless of the Bar's position because of market forces and changing technology. The Task Force viewed the fundamental question to be whether the Bar wanted to participate in structuring the practice or ignore the developments.

Val Antczak stated that there were two approaches to the MDP issue that could be taken. The first would be to keep the rules in the present form which regulate the business structures in which attorneys can practice by prohibiting fee splitting. The second approach is to recognize that the core values of the profession need to be protected but that attorneys should be able to form business relationships that make sense. This direction would require changing the Rules of Professional Conduct to acknowledge the changes in the market while recognizing that judgment and information are what lawyers have to sell. Toby Brown stated that the Task Force saw two external forces which encouraged change to allow multidisciplinary practice. The first is market forces in which other professionals such as accountants are providing increased numbers of legal services. Also, with the 1999 repeal of the Glass-Steagall Act, banks are looking to move into other areas. The second external force is on the technical side. Potential clients can find information and forms on the Web cheaper than they can access such services through traditional attorney-client relationships. Mr. Brown stated that the Task Force saw as an existing reality that clients are getting legal services from non-lawyers. The Task Force sees this as an undesirable outcome. The Task Force sees a move to MDP as maximizing the legal services provided to clients by attorneys or by those subscribing to attorneys' core values.

Earl Wunderli asked how the proposed rule changes addressed issues around online delivery of legal services. Toby Brown responded that rules do not directly address the delivery method but instead look at business structure issues. Steve Johnson stated that he sees the same trends as the members of the Task Force; if no fee splitting, people will continue to get their legal services from non-lawyers. Toby Brown stated that removing the fee splitting prohibition will not necessarily make lawyers more competitive but it will remove existing barriers. In response to a question from Karma Dixon, Billy Walker stated that the issues addressed by the Task Force report had not been raised with the Office of Professional Conduct. George Harris noted that the proposal would not address those people who are currently engaging, and presumably will continue to engage, in the unauthorized practice of law. However, the changes may allow more legal services to be provided by attorneys to those who need the services. Mike Blackburn agreed stating that clearly the Task Force does not condone the unauthorized practice of law. However, attorneys must be more competitive.

George Harris reviewed the history of the fee splitting prohibition in the ABA rules. He noted that the current Rule 5.4 dealing with fee sharing with non-lawyers is entitled "professional independence." Mr. Harris stated that originally the ABA canons did not have a rule similar to Rule 5.4. However, in the 1920's, largely due to what is viewed as a protectionist movement, a similar

provision was enacted in the canons. These provisions were repeated in the model code without much re-examination. However, when the Kutak Commission was formed, it took a serious look at the rule and determined that a prophylactic rule does not make sense. The Kutak Commission proposed a rule that did not contain a restriction on the form of business and instead required lawyers to preserve their actual independence. The House of Delegates rejected the proposal with a floor amendment. Mr. Harris noted that this was the only rule proposed by the Kutak Commission that was rejected entirely. The ABA formed a multidisciplinary practice committee which recommended repeal of the fee splitting prohibition with a requirement that the core values be retained. Again the House of Delegates passed a resolution rejecting the recommendation. The articulated concern has often been that the core values cannot be preserved if lawyers enter into business relationships with other professionals. Unarticulated reasons probably include economic protectionism. Steve Johnson noted that the Ethics 2000 Committee had not recommended any changes to Rule 5.4. George Harris stated that the Ethics 2000 Committee had made a conscious decision to defer to the MDP Committee on issues around Rule 5.4. Since the MDP Committee's recommendations were not adopted, the activity on this issue is now on the state level.

Dave Nuffer stated in response to a question from Earl Wunderli that his perception is that nine large eastern bar associations have a very strong anti-MDP feeling. Those states have much more statutory protection of the practice of law than in the western states. These bar associations were the forces behind the rejection of the ABA MDP Committee recommendations. Mr. Nuffer stated that the rejection at the ABA level was similar to what has happened elsewhere. Specifically, a carefully considered report was drafted recommending adoption while the rejection of that report is neither done for clearly articulated reasons nor based on a thoughtfully drafted report. Toby Brown noted that often those who reject MDP state that their concern is that it will not work. Mark Lehman stated that in his opinion the House of Delegates' action was poorly reasoned. The economic reality is that the option of doing nothing but enforcing the unauthorized practice of law regulations is cost prohibitive. Instead, the Bar should become integrated into the developing economy. Judge Nehring asked what the client base was that was being targeted by MDP groups. Specifically, is it a broad spectrum or is it a particular income group. Mr. Lehman stated that he thought it was fair to say that this will largely allow lawyers to compete for the middle-class person who wants to get a number of services at one place.

John Beckstead stated that the Committee was hearing a lot about what lawyers think and he wondered other groups such as the Legislature or others without a financial interest in this proposal. Toby Brown reported that the ABA Committee had received comments from consumer advocates, the American Association of Retired People, and others who all expressed support for the proposal. He did not have any information specifically about what Utah legislators think about the proposal. Judge Nehring asked if the MDP proposal will blur the boundaries between lawyers and other professions and therefore encourage a movement to have one entity regulate all the professions. Mike Blackburn stated that, while of course he could not predict what the Division of Occupational and Professional Licensing (DOPL) would do, the agency is currently engaged in an attempt to deregulate the professions to the extent possible and therefore probably would not currently be seeking to regulate another group. Billy Walker stated that he also wondered if there was a danger

in having the Bar appear less self-policing than it currently is. Steve Johnson asked about how the proposal would address the attorney in a business relationship who is not a supervisor or a partner who becomes aware of activity that would violate the Rules of Professional Conduct.

Bob Burton stated that he was concerned about the time frame that was expressed for these changes. He noted that, if the Committee were to recommend to the Supreme Court that it consider making the policy change, the MDP Task Force had prepared a number of proposed rule changes that would need some significant study by the Committee. Dave Nuffer responded that the Task Force went to the Supreme Court about a month ago and asked that it be allowed to approach the Advisory Committee before the Bar Commission took a position. Mr. Nuffer noted that the Bar Commission will be deciding how to proceed at its January 2001 meeting. He anticipated that a petition would be filed with the Court, which would include the comments that the Bar has received on the Task Force report, following that meeting. Mr. Burton responded that he felt the Committee would need more than one month to review the proposed changes. Gary Sackett stated he was concerned that the Committee not be left out of the discussions around this issue. Bob Burton stated that he had received a letter from the Chief Justice which asks for the Committee's response on two issues. First, is the proposed change a good idea. And second, if so, what changes to the Rules of Professional should be made. Dave Nuffer stated that the Bar is trying to track what rule changes other states are making. Gary Sackett asked if there had been some kind of movement to get Bars who were adopting MDP to coalesce around model rules rather than having each state use a different approach. Mike Blackburn stated that there are efforts to share approaches among interested Bars. In response to a question from Gary Sackett, Dave Nuffer stated that the ABA MDP Committee did propose rule changes but the rule changes were very regulatory. The Task Force did not adopt such an approach.

Paula Smith asked what the states of Arizona and Colorado had done related to the control-of-the-firm requirement. Mr. Nuffer responded that it was the same as the Utah proposal. Toby Brown said that different rules range from a requirement that 51 percent of the business organization be owned by attorneys to no prescription whatsoever. Toby Brown stated the Task Force proposes the latter. George Harris noted that the rules would impute conflicts of interest to other members and all attorneys in the firm would need to comply. Steve Johnson asked if a client suffers damages due to a non-lawyer's action, is the lawyer subject to discipline. He suggested that possibly the rules needed to include a provision more specifically outlining the duties of the non-managing attorney. Val Anczak stated that the Task Force's concern was that if the rules over-regulated MDP practice, there would be a disincentive to enter any MDP relationship. Mark Lehman noted that Rule 5.2 would continue to govern the responsibilities of a subordinate lawyer. George Harris stated that this provision is similar to the corporate counsel provisions.

Kent Roche asked about a provision of the Task Force report that states that MDP's exist already by contract. He asked for an example. Mike Blackburn responded that the ABA Committee report had identified five potential models, two of which are already permissible under the Rules of Professional Conduct. The first of these is when a firm hires all the other professions as paralegals. The second is where independent law, engineering, and accounting firms have a contract to share clients and employees, but do not split the fees. Toby Brown stated that the terminology that is being

used is "strategic alliance" and may be designed around mutual referrals. Ray Westergard stated that, the way that all professions are practicing now, boundaries are disappearing. Steve Johnson asked whether there had been any consideration of redefining the unauthorized practice of law. Dave Nuffer responded that Arizona had had a negative experience with that type of approach. Mike Blackburn stated that the Task Force had discussed the need to redefine the unauthorized practice recognizing deficiencies in existing Utah statute but the Task Force was concerned that the Legislature would not be sympathetic to such requests.

In response to a question from Bob Burton, Mike Blackburn stated that the draft rules that the Task Force had provided were solely the work of the Task Force. Mr. Blackburn stated that while Utah was a little behind the times in suggesting adoption of MDP, it was one of the first to actually articulate proposed rule changes. In response to a question from Earl Wunderli, Dave Nuffer stated that the Bar Commission is deciding what action to take in response to the report. Mr. Wunderli expressed a concern that if the report was not to be changed there were certain terms such as "ethical rules" that the Committee did not feel appropriate. Mr. Nuffer responded that he did not anticipate any further changes being made to the Task Force report. The Bar Commission may take what ever action it deems appropriate in response to the report. George Harris agreed that the term "Rules of Professional Conduct" was better than "ethical rules." Toby Brown reported that thus far approximately 70 percent of the comments from members of the Bar to the Task Force report were strongly in favor. Those who oppose the proposal were largely of the opinion that the proposal is unworkable. Bob Burton asked that the Committee be provided with the comments that the Bar has received.

Toby Brown briefly outlined the proposed rule changes. He stated that the provision for fee splitting would be eliminated; conflicts and confidentiality obligations would be extended to include MDPs; and Rule 7.3 was proposed to be amended to allow any advertisement that was not false or misleading. Bob Burton stated that he hoped that the Committee would be able to provide the Court with an initial policy decision in January. He noted that the Committee had recently spent a lot of time drafting proposed changes to Rule 7.3 and wanted to be sure that the Committee was able to work with the Task Force on issues around that rule. Mark Lehman stated that the protections in Rule 7.3 are important but the Task Force was concerned that when applied to MDPs the regulation would be prohibitive. Gary Sackett stated he liked that idea that, if the policy decision was in favor of recommending the proposal, that the Committee use the Task Force's recommended changes to rules as a starting point.

III. ADJOURN

There being no further business, the meeting adjourned.