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

January 8, 2001 - 5:15 p.m.

ATTENDEES
Commissioner Thomas Arnett
John Beckstead
Matty Branch
Robert Burton
Gary Chryster
Karma Dixon
Royal Hansen
Bill Hyde
Judge Ronald Nehring
Kent Roche
Gary Sackett
Paula Smith
Billy Walker
Earl Wunderli

EXCUSED
Steve Johnson

GUESTS
Mike Blackburn, Co-chair MDP Task Force
George Harris, MDP Task Force

STAFF
Peggy Gentles

I. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the Committee members and guests to the meeting. Mr. Burton noted that Steve Johnson had asked to be excused and had provided a written response to both the MDP Task Force Report and the comments on Rule 7.3. Mr. Burton thanked Mr. Johnson for taking the time to draft such an exhaustive response. Earl Wunderli moved that the minutes of the December 11, 2000, meeting be approved with typographical changes. Gary Sackett seconded the motion. The motion passed unanimously.

II. MULTIDISCIPLINARY PRACTICE TASK FORCE REPORT

Bob Burton noted that Mike Blackburn and George Harris were attending the meeting to answer any questions that the Committee members had concerning the Task Force's recommendations. Bob Burton invited Committee members to pose any questions they had. On a preliminary matter, Earl

Wunderli asked if the Committee was going to take a position on whether multidisciplinary practice should be allowed or only on the proposed rule changes. Bob Burton replied that the Supreme Court had asked for input on the underlying policy decision as well as, if appropriate, the proposed rule changes.

Gary Sackett noted that, while most of the comments that the Bar had received on the MDP report were supportive, some comments included the opinion that small practitioners may become obsolete. Mr. Sackett asked whether the Task Force members thought that adoption of MDP would concede most law practice to the larger firms. Mike Blackburn responded that MDP arrangements have existed in European and Asian countries, and in no country have MDP firms captured more than 20% of the market. In fact, in many countries the MDP firms have less than 10% of the market. Mr. Blackburn stated that he would anticipate that MDP firms would capture some segment of the Utah market. However, he noted that small firm practitioners have also requested the ability to have more flexibility in their business arrangements. Mr. Sackett asked, if experience in other countries has shown that only a small percentage of the legal market is served by MDP firms, why is the attitude of MDP supporters that something needs to be done immediately. Mr. Blackburn responded that, in his personal opinion, without any changes to the rules MDP will not increase immediately. However, he does expect some development soon.

Earl Wunderli stated that he has thought a lot about the issues around MDP. In his opinion, the most serious concern is the nature of the practice of law. He sees the blending of the profession with other professions as problematic. He is concerned that just saying that the core values will be protected is not enough. He is worried about the independence of professional judgment, the confidentiality of information, and loyalty to clients being undermined by adoption of MDP. Mr. Blackburn noted that he originally had been opposed to the idea of MDP. However, he views the need as market-driven, and any actions by the Bar cannot slow down these developments. Judge Nehring stated that he has some questions about what implications these proposals would have on other rules. For instance, will there be a need to have two advertising rules, one for a lawyer in an MDP and another for a lawyer not in a MDP firm. Mike Blackburn stated that he did not see a lawyer in a MDP as being that different from a lawyer who works for a corporation. George Harris stated that the consensus was that the advertising rules ought to be loosened. Judge Nehring stated that he has not been persuaded that the MDP proposal will create an efficient market. George Harris responded there are significant number of protectionists rules already and the rules are not necessarily designed to provide an efficient market. Mike Blackburn noted that as the concept develops, there will be an opportunity to fine-tune the rules.

Bill Hyde asked why the Task Force viewed MDP as inevitable. Mike Blackburn responded that a Big 5 accounting firm had pursued a direct MDP arrangement in Texas. When the Texas Bar indicated it was going to challenge the arrangement, the accounting firm raised antitrust and Commerce Clause issues. He noted that already in Utah there are two forms of permitted MDP. The first is a law firm that has ancillary business professionals as paralegals or other employees. The second is free-standing professional organizations that share clients. Commissioner Arnett noted that

nothing in his experience had generated the amount of comment from the Bar that the MDP proposal had, and therefore he feels that the Committee should proceed carefully.

Royal Hansen asked if the comparisons to European and Asian countries were fair given what he understood to be significant differences between the nature and independence of practice of law in those countries. Neither Mike Blackburn nor George Harris had any responsive information about the nature of practice in those countries. Mr. Hansen asked what the effect would be if Utah did not adopt rule changes to further allow MDP but Arizona and Colorado did. Mike Blackburn responded that, in his personal opinion, the decisions of the individual Bars do not matter much to the larger entities who already have concerns about practicing over jurisdictional lines. George Harris stated that, in his personal opinion, he thought significant conflicts of laws problems may arise for multi-jurisdictional practice. However, he expected local practice not to be impacted much by other states' decisions. Mr. Hansen noted that Steve Johnson had raised the issue of the Ethics 2000 work. Specifically, why the Committee should not wait until the Ethics 2000 process is finished to make these decisions. George Harris noted that the Ethics 2000 process had avoided addressing MDP issues because of the work of the ABA Multidisciplinary Practice Commission. Judge Nehring asked if the Ethics 2000 action could be seen as an assumption by those involved that there would be no implication on other rules by adoption of MDP. Mr. Harris stated that he did not believe any such assumption was made by those involved with Ethics 2000. Mr. Harris reported that he had heard that many thought that the Utah proposal imputing conflicts to all in the MDP would cause problems for accounting firms and may be a disincentive to those types of businesses entering MDP. Bill Hyde asked whether Mr. Harris thought that the proposals in the MDP report met the core values as identified by that report. Mr. Harris responded in the affirmative.

Mr. Beckstead asked that if the Task Force is of the opinion that MDP was inevitable but the proposal would not allow the larger accounting firms, often viewed as leaders in the MDP world, to enter MDP arrangements, why should the changes be made. George Harris stated that, in his personal opinion, some other groups in Utah may want to be able to enter MDP relationships that are currently prohibited. For instance, some may want to partner with other professionals. If the Bar acknowledges the trend and makes rules to accommodate, MDPs will be easier to regulate. Mr. Blackburn stated that if the larger accounting firms are given rules with which they can attempt to comply, they are less likely to operate in defiance of the rules. Karma Dixon asked how the MDP proposal addressed concerns about unauthorized practice of law being conducted over the Internet. Mike Blackburn responded that while MDP does not offer a total solution it may allow some attorneys to provide certain services. George Harris stated that the Internet is an opportunity to provide services. By making it easier for lawyers to be involved with non-lawyers, more people will get real services.

Paula Smith asked whether this issue had been addressed at any of the Bar meetings. Mike Blackburn responded that at last year's mid-year and annual meetings the issue was discussed. It is also on the agenda for the mid-year meeting in March. Mr. Blackburn stated that he has also contacted most of the Section chairs and offered to make presentations if desired. Ms. Smith asked whether Mr. Blackburn knew what types of services MDP's were providing in Canada. Mr. Blackburn stated he

did not have enough information to give a definitive answer. However, he has had a few contacts that indicate that most services are provided to businesses rather than individual clients. Ms. Smith stated that the MDP report had identified two problems the proposal was attempting to address. The first was increased delivery of legal services; and the second was MDP's are inevitable. She asked if the Task Force viewed any other problems being addressed by the MDP proposal. Mike Blackburn stated that he did not think that the Task Force's proposal was a major solution to the issues around access to justice. However, it was an acknowledgment that the profession is changing. Mr. Harris stated that he viewed an existing problem to be the competent and efficient delivery of legal services. There is a market demand for other business organizations.

Earl Wunderli stated that having thought and read more about this issue, he is more struck by the profession of lawyering as part of the judicial system which serves an important function that may be different from other professions. Therefore, the values of independent legal advice and being an officer of the court should be protected. George Harris responded that the Task Force did not feel that the current rules were necessary to protect those significant values that Mr. Wunderli identified. Kent Roche stated that in his opinion if MDP could be allowed while preserving the core values, it should be adopted. He stated that the Task Force had obviously given a lot of thought to the issue, and therefore he would be reluctant to start from the beginning in studying this issue. He noted that in material provided to the Committee some other states had established some limits on the ownership of the firms. For instance, MDP allowed only if more than 50% is owned by the lawyers; no passive investors; or no audit clients. However, the Task Force report did not contain such a recommendation. Mike Blackburn responded that the Task Force viewed such proposals as transitory rules. The Task Force viewed the fundamental question to be whether a lawyer can be in the position to comply with the Rules of Professional Conduct rather than what percentage of the business was owned by lawyers. Mr. Harris noted that the ABA proposal would not have allowed passive investment. However, such proposals do not get at the real issue of ensuring the core values are retained. Mike Blackburn stated that the final report as written would allow only other "professions," as defined under the Utah Code, to be partners in a MDP.

Billy Walker stated that he was concerned that lawyers will have a more difficult time controlling the actions of independent professionals as compared to paralegals or other traditional employees of law firms. He asked how attorneys are going to control confidentiality and conflicts. Mike Blackburn responded that there are situations where the lawyer cannot comply with the Rules of Professional Conduct and continue in the business relationship. If that is the case, the lawyer will have an obligation to get out of the business. Billy Walker asked whether it was a fair analogy to compare being in an MDP to being corporate counsel. He noted that in the former situation the client is someone from outside of the business while in the latter the client is the organization. Mike Blackburn stated that he thought the comparison had some validity. For a corporate counsel, the boss, possibly a non-lawyer, is the client. He noted that he did not think that an MDP was any different from a large law firm. Billy Walker responded that if everybody is a lawyer, all are abiding by the same ethical rules. George Harris stated that he saw definite limits to the analogy. However, there may be economic pressures on the corporate counsel to do something that may not comply with the Rules of Professional Conduct similar to those possible in MDP.

Bob Burton asked about the comments from some of the Bar members who expressed concerns about undermining discovery and evidence privileges by being in an MDP. Mike Blackburn responded that an attorney who decides to enter an MDP needs to be very careful. He needs to know that the attorney-client privilege may not attach if information is shared with non-lawyers in the firm. He noted that a lot of clients may not be willing to be represented in that type of situation and may choose to be represented by a lawyer in a traditional law firm. John Beckstead asked if confidential information is imputed to the non-lawyer partners if it is not shared with those partners. George Harris responded in the negative. Mr. Beckstead asked if the lawyer has information which the partner does not have, the partner's services to the client are impaired by the partner's lack of that information, and the client does not consent to sharing the information with the non-lawyer partner, what are the ramifications. Mike Blackburn noted that that situation already exists when a lawyer is present with a consultation with another professional. However, Mr. Beckstead noted that in an MDP there is a sharing of the profits with possible split of loyalties between the partner and the client. George Harris responded that the resolution to that is that attorneys' duties always run to the client unless it was within one of the already existing exceptions. Bob Burton asked why the Utah Bar feels that it needs to be in the forefront of the MDP movement. Possibly, there may be some benefit to letting other states identify the pitfalls and model rules. Mike Blackburn responded that a past Bar president certainly was interested in taking a leading role. Mr. Blackburn noted that there may be some benefit to getting regulation of MDP's in place prior to large numbers of people engaging in the practice. Mr. Blackburn noted that representatives from some of the Big 5 accounting firms had stated that they would probably be able to live with the rules as proposed. George Harris noted that the imputation of conflicts to all members of the firm may be an indirect limitation on the size of a feasible MDP. Gary Chrystler asked that if the Bar does not do something, did the Task Force members expect that the Legislature would. Mr. Blackburn responded that he did not know. However, it is possible that some businesses interested in entering MDP may put pressure on the Legislature. Mr. Blackburn stated that in response to a question from Bill Hyde that in his opinion the risk of legislative involvement is less if the proposals are adopted. Bob Burton thanked Mr. Blackburn and Mr. Harris for their willingness to participate and answer the Committee members' questions.

Bob Burton asked whether the Committee was prepared to take a straw vote on whether it supported the adoption of MDP. Karma Dixon responded that she did not think the Committee was ready since it had not had much time to discuss the matter alone. Ms. Smith agreed stating that the issue was too abstract to fully respond to. Billy Walker noted that the Committee cannot start completely from scratch because the Task Force has proposed rules. Bob Burton noted that Chief Justice Howe's letter to him in November, 2000, had asked that the Committee meet with the Task Force and give recommendations to the Court on both the policy decision and the underlying proposed rule changes, if necessary. Royal Hansen asked Matty Branch if she was aware of any existing opinion on the Court. Matty Branch said that the Court had not expressed any opinion on the merits of the proposal. Judge Nehring stated that he was not persuaded that the case had been made that consumers will benefit by this proposal. He states that he would much prefer to see a proposed structure of a MDP to see what the rules would actually be expected to regulate. Paula Smith stated that she had received information that the regulating board in Arizona had recently received a petition from many of its

former Bar presidents to reconsider its decision on MDP. Gary Sackett moved that Bob Burton write a letter to the Court indicating that the Committee has met with the Task Force for two meetings and has not yet reached any conclusions. He asked that the Court be informed that the Committee felt the need to proceed very deliberately and the Committee did not see any need for expedited treatment of the proposal. Commissioner Arnett seconded the motion. The motion passed unanimously.

III. COMMENTS ON RULE 7.3

Earl Wunderli moved that the Committee use as a starting point for consideration of Rule 7.3 the version of Rule 7.3 as proposed to be amended by Gary Sackett with further amendments that the fourth from the last paragraph begin "Rule 7.3(a)" instead of "Rule 7.32(a)" and the first "which" that Mr. Sackett proposed be changed to "that" in the third to last paragraph remain "which." Judge Nehring seconded the motion. The motion passed unanimously. Earl Wunderli moved that Brent Giauque's suggestion that Rule 7.3(c) be amended to "public media including but not limited to a telephone directory. . . ." be adopted. Commissioner Arnett seconded the motion. The motion passed unanimously. Earl Wunderli moved that Mr. Giauque's suggestion that the reference in the last sentence of the comment be to "public media" rather than "media" be adopted. Commissioner Arnett seconded the motion. The motion passed unanimously. The Committee considered Mr. Giauque's suggestion that the requirement in Rule 7.3(c) that "advertising material" appear on written communications be limited to only those communications directed towards people "known to be in need of legal services in a particular matter." Judge Nehring moved that the Committee not recommend adoption of the limitation as suggested by Mr. Giauque. Karma Dixon seconded the motion. The motion passed unanimously.

IV. ADJOURN

Bob Burton noted that due to a holiday, the regularly scheduled meeting would need to be moved. The Committee decided to meet on February 12, 2001. There being no further business the meeting adjourned.