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

February 12, 2001 - 5:15 p.m.

**ATTENDEES**
Commissioner Thomas Arnett
John Beckstead
Matty Branch
Robert Burton
Gary Chrystler
Karma Dixon
Royal Hansen
William Hyde
Steven Johnson
Hon. Ronald Nehring
Kent Roche
Gary Sackett
Paula Smith
Billy Walker
Earl Wunderli

**STAFF**
Peggy Gentles

## I. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the Committee members to the meeting. He noted that Karma Dixon had distributed a substitute attorney lien bill that had been introduced in the Legislature this session. He reminded Committee members that the Committee had, at Ms. Dixon's request, discussed briefly the issue of attorney liens on child support. He stated that Ms. Dixon had asked that the issue be continued until the end of the session in case any legislative changes affected the discussion. Steve Johnson noted that the Bar's Governmental Affairs Committee had been informed that the family law section was divided on the attorney lien bill and therefore the Bar had not taken a position. Billy Walker stated that he had seen a Colorado Court of Appeals opinion that said that there is a strong public policy against taking liens on child support. Earl Wunderli moved that the minutes of the January 8, 2001 meeting be approved with typographical changes. Karma Dixon seconded the

motion. The motion passed unanimously.

## II. MULTI DISCIPLINARY PRACTICE

Bob Burton stated that the Committee members had been provided a copy of the letter he sent to the Chief Justice following the last meeting. He noted that recently there had been a reply to him from the Chief Justice as well as a letter from David Nuffer to the Chief Justice in response to Mr. Burton's letter. Those had both been distributed to the Committee members at the meeting. Mr. Burton noted that the Chief Justice had requested that the Committee provide the court with its final recommendation by October 1, 2001. Judge Nehring stated that his comment at the last meeting that he did not believe that this was a matter needing urgent change was a substitute conclusion not a procedural recommendation. He thinks that there may be a better view of the issues around MDP if the Committee were to wait until more states adopt MDP. Judge Nehring stated that he had the impression that the Chief Justice interpreted the Committee's position as a request for delay for delay's sake. Matty Branch stated that since she had been at both the Court's conference and the Committee's last meeting, she did not think that Judge Nehring was interpreting the Chief Justice's response correctly. The court picked the October 1, 2001 date to give the Committee time without having an open-ended time frame for response to potential petition from the Bar. Karma Dixon stated that her feeling at the end of the last meeting was that the Committee was not prepared to reach a conclusion on the issue as it had not yet had sufficient time to discuss the matter. Robert Burton stated he viewed neither Judge Nehring's nor Karma Dixon's position as being recluded by the Chief Justice's letter. Judge Nehring suggested looking at the issue periodically rather than doing anything right now.

In response to a question, Matty Branch stated that the Bar Commission at its last meeting voted to petition the Court for changes to allow MDP. Steve Johnson suggested responding to the Chief Justice's letter with a time table for study. Matty Branch stated that she believed that the Court understood that the Committee would be taking some time to consider and the court also understood when it discussed this issue that the Bar Commission might be petitioning. Therefore, she does not think that the court will take action on the petition prior to getting a response from the Committee. Bob Burton stated he sees a number of things the Committee could do now. First, the Committee could vote right now whether to recommend adoption of MDP to the Court. Second, the Committee could decide that it is not ready to take such a vote, decide what further information it would like to have before making such a decision. Third, the Committee could decide that there are too many unresolved issues and decide to wait. Mr. Burton stated that today he would like to formulate a plan for consideration by the October 1 date. He asked if the Committee wanted to form subcommittees to look at various issues.

Mr. Sackett stated that he thought the Committee had not yet had time to discuss the issues fully. Mr. Burton asked that Peggy Gentles get more "con" reports for the Committee to consider. Peggy Gentles stated that Paula Smith had provided her with a copy of a resolution by members of the Arizona Bar asking that that Bar's decision on MDP be reconsidered. She had distributed that to each Committee member. John Beckstead noted that there was reference to a document called

"Another View" and he thought that would be helpful to have. Karma Dixon stated that the difficulty for her was she did not know what "con" material the Task Force had considered. Mr. Johnson stated that he did not think that the discussion of the opposing view point in the Task Force report was very well done. Earl Wunderli stated that he felt he had heard and read enough in favor and against MDP. However, he felt that he needed a better idea of what MDP would look like in practice. The fundamental issue to him is whether the core values of the profession can be preserved. He would suggest that several subcommittees be formed each based on one of the core values. Each subcommittee would consider the proposal as it related specifically to that value. Mr. Burton stated that he thought Kent Roche's question last meeting about whether there should be some limits on ownership of MDP firms was particularly important. Mr. Johnson stated that he did not have a philosophical difficulty with MDP. However, he was concerned that without some more constraints the core values of the profession may be threatened.

Gary Sackett stated that the fundamental assumption of the Task Force report appeared to be that MDP is market-driven. Mr. Sackett stated that Judge Nehring's comment last meeting was particularly pertinent. It is not clear where the clamor for allowing MDP comes from. He noted that the Task Force seemed to feel that it was coming from the Big Five accounting firms. However, he noted that in April 2000 ABA Journal article had stated that the SEC had taken a view that accounting firms needed to be very careful when entering relationships with attorneys. There is an inherent conflict between duties of audit clients and attorneys with respect to the disclosure of full information and duties to attorney clients of not disclosing information. Mr. Sackett stated that he thought the Committee should find out whether the SEC had resolved any of these issues yet. John Beckstead stated that he did not think he needed much more information to consider; instead the Committee needed to decide. Paula Smith stated that she felt she was leaning towards one conclusion about MDP but she may modify her view. In her opinion, the most significant problem with the proposal is there is no link articulated between the problems allegedly addressed and MDP as a solution. She noted that this is a particularly true of the area concerning services to low income people. She would be much more comfortable if the Committee was approached by a member of the Utah Bar who said, "I have looked at various arrangements and the one that is best for me cannot be done under the current rules." Steve Johnson referred the Committee to a December 2000, ABA Journal article concerning "State Hopping"- multi jurisdictional issues in large attorney firms. Judge Nehring stated that he is not satisfied that the core values can be preserved by the MDP proposal. He noted that there are probably a number of problems that cannot be identified currently without a more concrete proposal. He noted that for years the Committee's view had been that the rules should preserve the core values but that the Committee should not allow the rules to stand in the way of entrepreneurial forces. John Beckstead stated that no matter what the Committee does it should prepare a written report for the Court. Kent Roche stated that he is in favor of studying in some detail before reaching a decision. John Beckstead stated he would like to see the reports referred to in the Arizona petition as well as reread the Task Force report. Bob Burton asked that Ms. Gentles get the information the Committee has requested and send it out right away.

## III. RULE 7.3

Peggy Gentles referred the Committee to her memorandum stating that the Court, when considering the changes proposed to Rule 7.3, had asked for a specific response to the concerns in Mr. Giauque's letter that his firm would no longer be able to participate in such activities as having the firm's name appear in a Ballet West program. Steve Johnson stated he thought Mr. Giauque was reading the proposed rule as more limited than he had read it. Commissioner Arnett moved that the Court be informed that the Committee viewed such publications as a Ballet West program being covered by the last sentence of Rule 7.3(c) and the last sentence of the comment which state that such things which are clearly advertising need not be identified as "Advertising Material." Steve Johnson seconded the motion. The motion passed unanimously. Bob Burton asked that the communication to the court include a note that Rule 7.3(c) is modeled on the model rule. Peggy Gentles agreed to send a letter to the Supreme Court immediately.

## IV. RULE 7.2

Gary Sackett referred the Committee to his January 9, 2001 letter concerning Rule 7.2. Mr. Sackett stated that the Ethics Advisory Opinion Committee had considered Rule 7.2 in depth concerning referral services. He noted that the Committee had in the last few years removed the "not-for-profit" limitation on referral services and added language "but only as allowed by Rule 1.5(e)." However, Rule 1.5(e) only talks about fee splitting between lawyers and a possible interpretation would be that it only applies to the referral services run by attorneys. Mr. Sackett stated that his letter contained a proposal for restructuring the rule to make it more clear. He viewed Rule 7.2(c) as being redundant of the earlier paragraphs. Billy Walker stated that the Office of Professional Conduct does not see as many issues around referral services as it used to. Gary Sackett moved that the changes as proposed of Page 3 of his letter including the alternative language to (c)(4) and the corresponding change to the comment be published for comment. Gary Chrystler seconded the motion. The motion passed unanimously.

## V. RULE 1.7(c)

Gary Sackett stated that Rule 1.7 is one of the most often consulted rules in the Rule of Professional Conduct. He noted that the Utah Rule 1.7(c) is not in the model rule. However, the official comment to Rule 1.7 appears to be identical to the model rule comment. He stated that the Ethics Advisory Opinion Committee has at times considered what (c) does that (a) does not. Mr. Sackett noted that he had asked Commissioner Arnett if he had any background on the addition of Rule 1.7(c). Commissioner Arnett responded that he had served on the Greene Committee in the 1980's. When that Committee reported to the Bar Commission there was no paragraph (c) to in the rule. He noted that the Bar Commission had added a long version of paragraph (c). When the Supreme Court responded in July of 1986, it had prepared a list of comments including a question about why paragraph (c) had been added. Commissioner Arnett said he did not have any more information about what had happened. Billy Walker stated that he had heard of a situation where an attorney who would have not fit in (a) was sanctioned under (c). That situation was when the clients in two

separate matters that did not have directly adverse economic interest but were very hostile. Gary Sackett said that he thought the Committee could, if it wanted add a provision to the comment about what situations (c) addressed. Kent Roche noted that a conflict check would be very difficult if (c) is interpreted as Mr. Walker had stated and would require attorneys to identify clients that had hostile personal relationships with other clients. Mr. Beckstead stated that if the Committee did decide to repeal (c) it should be clear that it was not intended to reflect any change in the law governing conflicts. Judge Nehring stated that there should be a comment that the change is not intended to change the rule but to bring it into conformity with the model rule. Bill Hyde stated that he thinks as currently written the comment could be perceived as inconsistent with the current paragraph (c). Gary Sackett moved that the elimination of paragraph (c) be published for comment. When the rule is published for comment there should be a note to Bar members, not part of the official comment, that the proposal is not intended to change the rule on conflicts but is to bring the rule into conformity with the model rule. Earl Wunderli seconded the motion. The motion passed unanimously. Bob Burton asked that Mr. Sackett and Ms. Gentles draft up the appropriate note.

## V. ADJOURN

There being no further business the meeting adjourned.