

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

December 18, 1995, 5:30 p.m.

PRESENT

Commissioner Tom Arnett
John Morris
William Hyde
Gary Sackett
Carolyn McHugh
Thomas Kay
Robert Burton
Earl Wunderli
Gary Chrystler
Kent Roche

ABSENT

Stephen Trost
Stephen Hutchinson
Judge Ronald Nehring

GUESTS

Anne Milne
Linda Priebe
Denise Dragoo
Holly Mahoney
Craig Smith

STAFF

Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES. Commissioner Tom Arnett chaired the meeting in Stephen Trost's absence. William Hyde moved to approve the minutes of the November 20, 1995 meeting. Thomas Kay seconded the motion. The motion carried unanimously.

II. RULE 4.2. Commissioner Arnett stated that several persons were present to comment on proposed amendments to Rule 4.2. These persons were given the opportunity to address the Committee.

Anne Milne of Utah Legal Services stated that the proposed amendments would affect Legal Services' clients in many ways. Ms. Milne stated that the phrase "pending or imminent" is ambiguous and does not give practitioners sufficient notice as to when they might be violating the rule. Utah Legal Services assists many persons in applying for governmental benefits and Legal Services repeatedly contacts government officials for clarification, etc. Much of Legal Services work is done in administrative hearings, and contacts might be prohibited under the proposed rule.

Linda Priebe from the Legal Center for People with Disabilities stated that her office is federally funded and mandated. This places the office in a unique situation. Ms. Priebe stated that 90% of the center's work implicates government programs and 90% of all cases are resolved at lower management levels. Ms. Priebe

stated that the proposed language could be construed broadly giving most cases the potential of "imminent" litigation. Ms. Priebe stated that the center works only with governmental employees who can make a difference, thus they are mostly managerial. Ms. Priebe suggested that Ethics Advisory Opinions 115 and 115R should continue to regulate conduct.

Holly Mahoney, also of the Legal Center for People with Disabilities, provided comments similar to those of Ms. Priebe.

Denise Dragoo appeared on behalf of the Bar Commission and encouraged the Committee to forego changes to Rule 4.2. Ms. Dragoo stated that the Bar Commission supports Opinions 115 and 115R. The Commission has looked at the issue and debated the opinions and approved the concepts.

Carolyn McHugh questioned Ms. Dragoo on whether the Bar had an opinion on why private practitioners should be treated differently than government practitioners. Ms. Dragoo stated that over-reaching attorneys in both areas would be subject to 4.2 and that persons should have a right to petition the government and a right of access to government.

John Morris stated that a person reading Rule 4.2 would not know about opinions 115 and 115R. Ms. Dragoo suggested incorporating the essence of these opinions into the comments to the rule.

Craig Smith stated that he represents various government agencies, including municipalities. Mr. Smith stated that the proposals would change agency proceedings, giving the example of water law cases which are largely administrative.

Commissioner Arnett thanked the visitors for their input, noting that new ideas had been expressed.

Mr. Morris noted that the proposal had generated a fair amount of opposition. William Hyde stated that he could bring in many government attorneys who are in favor of the proposed amendments, and would state that the amendments do not go far enough. Mr. Hyde noted that abuse can be just as damaging in administrative hearings as in court litigation.

Ms. McHugh suggested incorporating Opinions 115 and 115R into the comment, deleting the word "imminent", and defining litigation as a complaint being filed. Mr. Hyde noted that this still presents the problem of an attorney delaying the filing of the complaint until information can be gathered.

Gary Sackett questioned whether the Opinions, which are two years old, had been abused or if they have been workable. If they have not created problems, Mr. Sackett suggested that changes are not warranted.

Commissioner Arnett suggested having the subcommittee consider the comments that had been made and proposing changes, if any, at the January meeting. Robert Burton moved to send Rule 4.2 back to the subcommittee for review. Carolyn McHugh seconded the motion. The motion carried unanimously.

III. RULE 1.16. Commissioner Arnett noted Gary Sackett's comment to Rule 1.16, that the Bar Ethics Advisory Committee had an opinion forthcoming on the issue of the client file. Mr. Sackett noted that the opinion has not yet been issued and the Advisory Committee has not taken a position on the Committee's proposal.

Ms. McHugh stated that Mary Corporon had raised good points and that the terms "original file" and "upon request" should be included in the rule. Commissioner Arnett suggested putting "upon request" in the rule and defining "original file" in the comment.

Ms. McHugh also noted the comments concerning expense of copies. Gary Chrystler recalled that the Committee had discussed the expense issue before and agreed that the attorney should bear the cost. Commissioner Arnett recalled differently and believed that the Committee had not yet addressed this particular issue.

Ms. Sackett raised a concern that all of the work of the Committee is being sent to one subcommittee and questioned whether another subcommittee could not be given some of the comments. Professor Morris stated that he believed the subcommittee could amend Rule 1.16 with little effort.

IV. RULE 1.13. Commissioner Arnett noted that, in addition to changes made by the subcommittee, the Rule 1.13 that was published for public comment did not contain the comment to the rule. Commissioner Arnett noted that the comment to the rule addressed some of the concerns raised by David Leta. Commissioner Arnett noted that significant issues were raised by the public comments and that the rule should be reviewed by the subcommittee.

Mr. Hyde questioned whether to send 1.13 out for public comment again. After brief discussion, Mr. Hyde moved to send 1.13 back to the subcommittee to consider comments and any changes, and to again publish 1.13 for public comment during the spring comment period. Gary Sackett seconded the motion. The motion carried unanimously.

V. OTHER BUSINESS AND ADJOURN. Commissioner Arnett stated that the Committee will address the makeup of the subcommittees and subcommittee work at the January meeting. There being no further business, the meeting adjourned at 6:55 p.m.