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

January 29, 1996 - 5:15 p.m.

ATTENDING
Stephen Trost
Stephen Hutchinson
Gary Sackett
Professor John Morris
Kent Roche
Judge Ronald Nehring
Earl Wunderli
Tom Arnett
Gary Chrystler
William Hyde
Thomas Kay
Robert Burton

EXCUSED
Carolyn McHugh

STAFF
Brent Johnson

I. **WELCOME AND APPROVAL OF MINUTES.** Stephen Trost welcomed the Committee members to the meeting. Gary Chrystler moved to approve the minutes of the December 19, 1995 meeting. William Hyde seconded the motion. The motion carried unanimously.

II. **RULE 4.2.** Commissioner Tom Arnett presented the report from the subcommittee. Commissioner Arnett explained that the subcommittee was unable to reach a consensus on changes to proposed Rule 4.2. The subcommittee felt that the rule should go back to the full Committee to address the comments made at the last meeting. The first issue is whether to eliminate the word "imminent."

Mr. Hyde noted that the Committee had originally used the word "threatened," but decided on imminent. Mr. Hyde noted that the open meetings law also uses the word imminent. Professor John Morris stated that there is an area of uncertainty for persons dealing with government officials as to when something becomes

imminent. Professor Morris suggested eliminating the word imminent. He stated that this is not a perfect solution, but addresses some concerns.

Mr. Hyde noted that there are other qualifying phrases in the rule. Mr. Chrystler agreed that some component of imminent must be included or this will defeat what the Committee has done.

Gary Sackett noted that the disagreement from practitioners comes from determining when a line is crossed. Pending litigation provides a reasonable demarcation, but imminent is vague. Mr. Sackett also suggested limiting the rule to formal APA proceedings.

Mr. Chrystler agreed that pending litigation is an easy place to draw the line, but that does not prevent over reaching. Professor Morris suggested addressing the meaning of imminent in the comment.

Earl Wunderli stated that he had looked carefully at the rule and had concluded that the Committee can do better. Mr. Wunderli stated that there are too many exceptions to exceptions. Mr. Wunderli suggested that practitioners should be able to contact government partys if litigation has been or might soon be filed and disclosure of the representation is made. Mr. Wunderli suggested that the burden should be on the lawyer doing the contacting to advise of the representation. Mr. Wunderli stated that all contact should be permitted as long as there is disclosure. Mr. Sackett noted that this is what Opinions 115 and 115R state.

Judge Ronald Nehring stated that in light of governmental immunity and the government's heightened obligation to be accessible, he sides with the precepts of 115 and 115R. Robert Burton also stated that he supports the positions in 115 and 115R.

Kent Roche stated that he supports Rule 4.2 as proposed by the Committee. Thomas Kay stated that the rule has gone through considerable discussion to this point and he defers to the previous discussions.

Mr. Trost proceeded to conduct a straw vote on various positions that were discussed. After a brief discussion, the Committee members were offered two choices: 1) keep the status quo with current Rule 4.2 and Opinions 115 and 115R; or 2) retain Rule 4.2 as proposed and published for public comment. The straw vote resulted in 6 persons voting for proposal number two and 5 persons voting for proposal number one.

After the straw vote, Mr. Hyde moved to adopt Rule 4.2 as recommended by the Committee and as published for public comment. Professor Morris seconded the motion. The motion carried with the following casting opposing votes: Gary Sackett, Robert Burton, Judge Ronald Nehring, and Earl Wunderli. The chair was not

required to vote.

III. RULE 1.13. Commissioner Arnett stated that the subcommittee proposed sending Rule 1.13 out for public comment in the same form as distributed at the December 19, 1995 meeting. Mr. Kay seconded the motion. The motion carried unanimously.

IV. RULE 1.16. Commissioner Arnett explained that the Committee had agreed to "upon request" and a sentence stating that the attorney may retain copies at the attorney's expense. Mr. Wunderli suggested changing the word "return" to "provide" and moving the phrase "upon request" after the word "must." The Committee members agreed to these changes.

Judge Nehring questioned whether there are ever documents received by a lawyer that shouldn't go to the client. Stephen Hutchinson stated that sometimes there are psychological evaluations or other impressions of professionals that they do not want to go to the client. Mr. Hyde suggested that these situations will be covered by the phrase "to the extent permitted by other law" already found in the rule. Mr. Chrystler suggested that these situations are also covered by the last sentence in the comment because these are items paid for by the attorney for which the attorney does not seek reimbursement.

Gary Chrystler moved to adopt Rule 1.16 as amended by the Committee. Judge Nehring seconded the motion. The motion carried unanimously. Staff was instructed to prepare a transmittal letter sending Rule 4.2 and Rule 1.16 to the Supreme Court for its consideration.

V. OTHER BUSINESS AND ADJOURN. Commissioner Arnett stated that the Committee members should review materials distributed on sexual ethics and that this will be the topic at the next meeting. There being no further business, Judge Nehring moved to adjourn the meeting. The meeting adjourned at 6:50 p.m.