

MINUTES

**SUPREME COURT'S ADVISORY COMMITTEE ON
THE RULES OF PROFESSIONAL CONDUCT**

Tuesday, April 19, 1994, 5:30 p.m.
Administrative Office of the Courts

J. Frederic Voros, Presiding

PRESENT:

J. Frederic Voros
Gary L. Chrystler
Jo Carol Nessel-Sale
Stephen F. Hutchinson
Gary G. Sackett
Thomas N. Arnett, Jr.
John K. Morris

EXCUSED:

Stuart H. Schultz
Danny C. Kelly
Stephen A. Trost
Hon. Lynn W. Davis
William R. Hyde

STAFF:

Colin R. Winchester

1. WELCOME. Mr. Voros welcomed the Committee members to the meeting.
2. APPROVAL OF MINUTES. Approval of the March 15 Committee Meeting Minutes was postponed until the next Committee meeting.
3. EMERGENCY ADOPTION OF PROCEDURAL RULES. Mr. Winchester explained that Mr. Trost had requested that those Rules of Lawyer Discipline and Disability dealing with the appointment of a vice-chair to the Ethics and Discipline Committee, and the appointment of special counsel in certain situations, be forwarded to the Supreme Court with the recommendation that they be adopted on the emergency basis, subject to a post-adoption public comment process.

MOTION: Mr. Morris made a motion to forward only those rules which are necessary to alleviate Mr. Trost's concerns. Mr. Voros and Mr. Winchester were asked to identify those rules.

SECOND: A Committee member seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Mr. Winchester was asked to contact Michie Company to explore available options for inserting the emergency rules in the 1994 volume of Utah Court Rules Annotated.

4. RULES OF PROFESSIONAL CONDUCT.

a. Proposed Rule 1.13. Rule 1.13 deals with reporting of trust account overdrafts and/or random audits of lawyers' trust accounts. Mr. Arnett noted that early knowledge and intervention by the Office of Attorney Discipline may prevent further and greater problems later on. Mr. Arnett reported that his subcommittee prefers the automatic reporting of trust account overdrafts proposal over random audit proposal. Fifteen jurisdictions have adopted some form of automatic reporting, while only two jurisdictions have adopted some form of random audits. One of those two jurisdictions is considering repealing its random audit rule.

Mr. Arnett distributed a proposed amendment and supporting materials and opened the issue for discussion. He noted that the proposed language is modeled after Montana's rule, and that there is no ABA Model rule on the issue. The Committee discussed the subcommittee's proposed language at length, making several amendments to it. As amended, the proposed language reads:

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or else where with the consent of the client or third person. Each lawyer who maintains such an account shall require the financial institution with whom the account is maintained to notify the Office of Attorney Discipline whenever any instrument in properly payable form is presented against the account and the account contains insufficient funds, irrespective of whether or not the instrument is honored. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

MOTION: Mr. Arnett made a motion to approve the new provision as amended by the Committee.

SECOND: Ms. Nasset-Sale seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

It was suggested that the Committee prepare a form for the lawyer and financial institution which incorporates the notification requirement.

b. Rule 1.14. Declining or Terminating Representation.
Mr. Arnett distributed a draft of proposed Rule 1.14 and supporting documentation. The only proposed amendment to Rule 1.14 occurs in the last sentence of the rule as follows:

The lawyer may retain papers relating to the client to the extent permitted by other law, but must return to the client the client file.

Rather than attempt to define "client file" in the rule, the subcommittee proposed defining it in a Committee Note. The proposal, distributed along with the proposed amendment to the rule, follows Minnesota's definition of "client file." The Committee discussed both the proposed amendment to the rule and the Committee Note.

Mr. Hutchinson asked whether a lawyer can charge the client for copies incurred in turning the client file over to the client. He also noted that witness statements could, in appropriate circumstances, be included within attorney work product.

Ms. Nessel-Sale stated that the client should not be entitled to receive copies of depositions or expert witness statements if the client had not paid the attorney for the same. Mr. Chrystler agreed with Ms. Nessel-Sale.

Mr. Chrystler suggested that the obligation to return a client file should be limited to those situations in which the file is necessary to continue the action. Mr. Arnett disagreed, but Mr. Sackett agreed with Mr. Chrystler.

Ms. Nessel-Sale suggested that an attorney should only be required to return those papers and other items given to the attorney by the client; not other documents or items.

Mr. Voros questioned whether the Committee should ask the Supreme Court to adopt a rule that expressly overrules the common law set forth in Midvale Motors and Frandsen. He noted that Utah Code Ann. § 78-51-41 applies to proceeds of a lawsuit, but that Midvale Motors and Frandsen apply to common retaining liens.

Mr. Morris noted that because retaining liens are established by common law, and given the Supreme Court's constitutional authority to enact rules governing the practice of law, it is within the Committee's purview to request that the Supreme Court adopt a rule overruling Midvale Motors and Frandsen. Mr. Voros and Mr. Morris noted that the Committee should ensure that the Court is aware that the adoption of such a rule would overrule the case law.

Mr. Morris noted that for public perception reasons, a lawyer should not be allowed to withhold papers that inhibit a client from going forward with an action.

Ms. Nessel-Sale again expressed concern about turning over documents for which a client has not yet paid the corresponding costs.

Mr. Voros stated that perhaps a lawyer should only be able to retain the client file if there is a written agreement expressly allowing for such retention.

Ms. Nessel-Sale noted that indigent or impecunious clients, or those clients represented by the lawyer on a pro bono basis, may be unable to pay for costs or photocopy charges.

The Committee tabled further discussion on Rule 1.14 until the next Committee meeting.

5. **FUTURE MEETINGS.** At the next Committee meeting, the Committee will continue its discussion of Rule 1.14, and if time permits, will move to other Rules of Professional Conduct.

6. **FAREWELL.** Ms. Nessel-Sale informed the Committee that she had taken a position at the University of Georgia and consequently would be forced to resign from the Committee. She expressed her gratitude for the Committee members, all of whom had given many hours of service to the improvement of the practice of law in this state. Mr. Voros, on behalf of the entire Committee, thanked Ms. Nessel-Sale for her many years of service, and wished her well in her future endeavors.

7. **ADJOURNMENT.** There being no further Committee business, the Committee meeting was adjourned.