

SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF PROFESSIONAL CONDUCT

AGENDA

December 20, 1994
5:30 p.m.

Administrative Office of the Courts
Salt Lake City, Utah

J. Frederic Voros, Chair

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| 1. | Welcome and Approval of Minutes | Fred Voros |
| 2. | Proposed Amendments to Rules of Professional Conduct | Tom Arnett |
| | Rule 4.2 Communication With Person Represented by Counsel | |
| 3. | Other Business & Future Meetings | Fred Voros |
| 4. | Adjournment | Fred Voros |

MINUTES

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

December 20, 1994 5:30 p.m.

Fred Voros, Presiding

PRESENT:

Fred Voros
Gary Sackett
Judge Davis
Stuart Schultz
Tom Arnett
John Morris

EXCUSED:

Steve Trost
Steve Hutchinson
Bill Hyde
Gary Chrystler
Danny Kelly

STAFF:

Colin Winchester

I. **WELCOME.** Mr. Voros welcomed the Committee members to the meeting.

II. **MINUTES.** The minutes of the Committee's November 15, 1994 meeting were approved as distributed.

III. **RECENT ETHICS ADVISORY OPINIONS.** Mr. Sackett distributed copies of several recent Ethics Advisory Committee Opinions, and asked staff to distribute copies of the Opinions to the Committee members who were not present.

IV. **RULE OF PROFESSIONAL CONDUCT 4.2.** Mr. Voros introduced the discussion regarding Rule 4.2. Before the Committee votes on the draft of the Rule distributed, it will review the history of the Rule, Ethics Advisory Opinions 115 and 115R, and several alternative proposals.

Mr. Arnett noted that his subcommittee had distributed six alternatives. He also noted that both Opinions 115 and 155R have been approved by the Bar Commission, and that neither contains a prohibition against a lawyer contacting a government employee when the government organization is represented by counsel. He noted that the subcommittee could not reach a consensus on which of the six alternatives to propose.

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Mr. Morris noted that various subcommittee members felt that in some situations a lawyer should be able to approach a government employee to get information. In other situations, the lawyer should not approach the government employee. Consequently, two of the alternatives, 4A and 4B, attempt to use proprietary and governmental functions as the basis for determining whether approaching a governmental employee is proper or improper. During the subcommittee discussion, Mr. Hyde indicated that the proprietary/governmental distinction may be too difficult a standard upon which to make the decision.

Mr. Arnett noted that under Opinions 115 and 115R, a lawyer could directly approach a doctor employed by the University of Utah Medical Center, even though the medical center is represented by counsel. However, the lawyer could not directly approach a doctor employed by some non-governmental medical center which was represented by counsel.

Mr. Sackett noted that the Ethics Advisory Committee had only considered situations which would not also likely occur in the private sector. He also noted that some Ethics Advisory Committee members initially thought it might be appropriate to except "hard core litigation" situations from the scope of the Opinions. However, they could not determine where to draw the line, and the language of the Rule contains no such exceptions. Finally, he noted that the Opinions do not require the government official to converse with the lawyer. They merely state that the lawyer may approach the government official directly. The Opinions also require the lawyer to disclose to the government official the lawyer's status and reason for the approach.

Mr. Voros questioned whether the Governor could issue an order forbidding government officials from speaking with attorneys when approached. Such an order would not offend Rule 4.2, because the Rule recognizes a prohibition against direct approaches when "otherwise provided by law."

Mr. Morris noted that such an order would offend the First Amendment right to seek redress.

Mr. Voros recognized that whether Committee members agree or disagree with Opinions 115 and 115R, they are rational readings of Rule 4.2. This Committee is not faced with the task of interpreting the current Rule, but rather whether the Rule should be amended, and if so, the appropriate amendment to propose.

Judge Davis noted that the fifth option, which deletes the phrase "as otherwise required by law" would in effect over rule Opinions

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115 and 115R.

Mr. Schultz, Mr. Voros and Mr. Morris asked whether there was any case law interpreting "as otherwise required by law."

Mr. Sackett reported that the Ethics Advisory Committee had attempted to find such case law, but was unable to do so. He noted that there were advisory opinions from other states on the issue.

Mr. Voros asked Committee members why they felt it was appropriate for a lawyer to directly approach the Governor on behalf of a client.

Mr. Sackett stated that because the Governor is responsible to the people of the State he should not be insulated by legal representatives. Rather, he should be accessible to the people of State.

Mr. Voros noted that citizens who feel they are without the necessary skills of articulation should be able to use the services of a lawyer to make their concerns known to the Governor.

Mr. Sackett noted that Rule 4.2 is designed to prohibit counsel from getting information from a government employee who is a litigant or material witness in litigation. Mr. Morris agreed, but stated that the Rule reaches too far.

Mr. Morris stated that like things ought to be treated alike. To the extent government is like a private corporation, it should be treated like a private corporation. To the extent it is different, it should be treated differently. He recognized that the line would be difficult to distinguish.

Mr. Arnett suggested that the line be drawn at regulatory versus nonregulatory issues.

Mr. Voros suggested that perhaps the line should be drawn based on the "degree of adversariness" involved in the issue which is the subject of discussion.

The Committee debated the issue further, and determined that it would like to hear from a representative of the Attorney General's Office, the Salt Lake County Attorney's, the Plaintiff's Bar, a member of the Bar's litigation section, a member of the Board of Bar Commissioners, the Statewide Association of Prosecutors. Mr. Voros indicated that he would

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send letters to individuals within those organizations requesting that they come and speak to the Committee at its next meeting. Mr. Voros indicated that he would provide those individuals with a brief history of the Rule and Ethics Advisory Opinions, some background of the Committee's discussion and identify those issues which he would like them to address.

Mr. Arnett suggested that the burden should be placed on government lawyers to draft specific recommendations based on such issues as function, the type of governmental agency involved, the degree of adversarialness, private versus public information and any other appropriate factors.

V. FUTURE MEETINGS. The Committee will meet again on January 17 and February 21.

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