

SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF PROFESSIONAL CONDUCT

AGENDA

January 18, 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
November 23 Minutes
May 24 Minutes | Fred Voros |
| 2. | Proposed Amendments to Rules of
Lawyer Discipline and Disability | Steve Trost
Colin Winchester |
| 3. | Proposed Amendments to
Rules of Professional Conduct | Tom Arnett |
| 4. | Other Business | Fred Voros |
| 5. | Adjournment | Fred Voros |

MINUTES

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

Tuesday, January 18, 1994, 5:30 p.m.
Administrative Office of the Courts

J. Frederic Voros, Presiding

PRESENT:

J. Frederic Voros
Gary G. Sackett
Thomas N. Arnett, Jr.
Gary L. Chrystler
Stephen F. Hutchinson
Hon. Lynn W. Davis
Jo Carol Nessel-Sale
William R. Hyde

EXCUSED:

Stuart H. Schultz
Danny C. Kelly
John K. Morris
Stephen A. Trost

STAFF:

Colin R. Winchester

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

2. **MINUTES.**

MOTION: Ms. Nessel-Sale made a motion to approve the Committee's May 24, 1993 Minutes as distributed.

SECOND: Mr. Arnett seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

MOTION: Mr. Hyde made a motion to approve the Committee's November 23, 1993 Minutes as distributed.

SECOND: A Committee member seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

3. RULES OF LAWYER DISCIPLINE AND DISABILITY. Drafts of the proposed amendments to Rules 3, 10, 17 and 18, based on the Committee's discussion at its November 23 meeting, had been distributed in the Committee mailing.

MOTION: Judge Davis made a motion to amend Rule 3(a) by changing "five members of the Bar" to "six members of the Bar."

SECOND: Mr. Arnett seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Judge Davis questioned the definition of "ultimately responsible" in proposed Rule 3(c). The Committee discussed the issue.

MOTION: Judge Davis made a motion to refer proposed Rule 3(c) back to the subcommittee for further review and recommendation.

SECOND: Mr. Hutchinson seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

4. RULES OF PROFESSIONAL CONDUCT. Mr. Arnett distributed a list entitled "Potential Rule Changes." The list contains all of the Rules of Professional Conduct for which amendments are being considered. Mr. Arnett summarized each of the rules on the list as follows:

Rule 1.5. Fees. Mr. Arnett indicated that Mr. Trost is preparing a new draft of a proposal which would require written fee agreements. He also indicated that the ABA Model Rule 1.5(e), which allows lawyers who are not in the same firm to divide fees, is less stringent than the Utah version of Rule 1.5(e).

Rule 1.13. Safekeeping Property. Mr. Arnett indicated that Mr. Trost is drafting a proposed rule which would deal with the retention of lawyers' records. Also, the National Organization of Bar Counsel has proposed random audits of lawyers' trust accounts. Finally, it is proposed that lawyers be required to direct their banks to notify the Utah State Bar if their trust account is overdrawn.

Rule 1.14. Declining or Terminating Representation. This rule will be the subject of further discussion later in the meeting.

ABA Model Rules 1.13 (Organization as Client) and ABA Model Rule 1.14 (Client Under A Disability). Neither of these rules has yet been adopted in Utah. Some form of these rules should either be adopted, or Utah's Rules of Professional Conduct should be renumbered to indicate their absence.

ABA Model Rule 1.17 (Sale of Law Practice). The ABA adopted Rule 1.17 after Utah originally adopted its Rules of Professional Conduct. Mr. Sackett indicated that the Bar's Ethics Advisory Committee had distributed its Opinion No. 106 dealing with whether goodwill can be bought or sold. Mr. Sackett believes that the Board of Bar Commissioners did not approve Opinion No. 106, but will check and report back at the next Committee meeting. Mr. Hutchinson noted that the Committee should not only address the issue because of potential sales of law practices, but also because of the potential that law practices will be divided due to probate, divorce, or other legal actions.

Rule 2.1. Advisor. It is proposed that the rule be amended to require a lawyer to advise the client regarding available alternative dispute resolution procedures.

Rule 4.2. Communication With Person Represented By Counsel. Mr. Hyde noted that the Bar's Ethics Advisory Committee's Opinion No. 115, issued in May of 1993, addresses this issue. Mr. Sackett indicated that the Attorney General has requested reconsideration of that opinion, and Mr. Hyde noted that SWAP and the Bar's Government Lawyers Section have joined in that request.

Rule 4.4. Respect For Rights of Third Persons. Mr. Sackett noted that the Bar's Ethics Advisory Committee had issued an opinion regarding this rule. He will provide copies of that opinion to Committee members.

ABA Model Rule 5.7. Ancillary Business Activities. For the past several years, the ABA has been working on this rule. The subcommittee will continue to monitor the ABA's progress.

Rule 6.1. Pro Bono Publico Service. The subcommittee will recommend whether to propose a rule requiring pro bono service.

Rules 7.1 through 7.5. These rules deal with advertising, and will be the subject of discussion later in the meeting.

Rule 8.5. Jurisdiction. This rule deals with attorneys who practice in multiple states. Mr. Trost will, at a future meeting, explain his concerns and make recommendations for amendment.

Sexual Ethics. Mr. Arnett will draft and present a proposal dealing with sexual conduct between attorneys and their clients. Ms. Nasset-Sale indicated that medical practitioners either have or are developing such a rule, and that the proposal should include both sexual conduct and sexual harassment.

5. RULE OF PROFESSIONAL CONDUCT 1.14. Mr. Arnett distributed a proposed revision to Rule 1.14, a copy of the Bar's Ethics Advisory Opinion No. 91 (dated May 17, 1989), and Utah Code Ann. § 78-51-41.

Judge Davis noted that in a recent case, an attorney was intercepting child support payments by means of an attorney's lien. Because Judge Davis felt that this use of an attorney's lien was improper, he would support some amendment to Rule 1.14.

Mr. Sackett indicated that the language proposed by Mr. Arnett is too general in that it fails to indicate what client's interests must be affected before the lawyer is prohibited from retaining the client's papers.

Mr. Hyde noted that the Committee should review the caselaw citing Utah Code Ann. § 78-51-41.

Ms. Nasset-Sale suggested that the attorney should make copies of the file for the attorney's use, provide the original file to the client, and charge the client for the copies.

Mr. Hutchinson questioned what "the file" is. For example, does it include pleadings, the attorney's private notes, and government documents classified as other than public documents?

Ms. Nasset-Sale suggested that "the file" should be limited to documents essential to the client's case.

Mr. Sackett noted that the Committee should determine whether defaulting clients should be treated differently than non-defaulting clients. If so, what different treatment is appropriate?

It was the consensus of the Committee, after discussion, that it is generally wrong for an attorney to withhold the file for non-payment based on § 78-51-41. However the Committee could not reach a consensus as to what constitutes "the file."

Mr. Winchester was asked to copy and distribute caselaw citing § 78-51-41 in the next Committee mailing.

Mr. Arnett will research materials available from the ABA, and the subcommittee will attempt to define "the file" and report back in a future meeting.

6. **RULE 7.4. COMMUNICATION OF FIELDS OF PRACTICE.** Mr. Arnett distributed copies of Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S.Ct. 2281 (1990). He also distributed a proposed amendment to Rule 7.4.

Ms. Nessel-Sales suggested that the word "and" be changed to "or" at the end of paragraphs (a) and (b). She also suggested that the word "qualified" be deleted before the word "organization" in paragraph (c).

Mr. Sackett suggested that rather than require certification organizations to be approved by the Supreme Court, the rule could simply prohibit attorneys from using false, fraudulent or misleading statements. Mr. Arnett noted that following Mr. Sackett's suggestion would result in the deletion of paragraphs (a), (b), and (c). The introductory paragraph could be amended to simply include a prohibition against false, fraudulent or misleading statements.

Mr. Hutchinson noted that certification, as used in the introductory paragraph of Rule 7.4, is more than mere CLE attendance. Rather, it often involves the completion of rigid criteria.

The subcommittee will attempt to determine the ABA's reaction to Peel, and will present two proposals to the Committee. The first proposal will follow the ABA's approach, and the second proposal will follow Mr. Sackett's approach.

Mr. Sackett noted that the Bar's Ethics Advisory Committee has issued an opinion providing that it is permissible to use a "CPA" designation on an attorney's letterhead.

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