

SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF PROFESSIONAL CONDUCT

AGENDA

March 15, 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
Lawyer Discipline and Disability
- Rules 10(e) and 27(a) | Steve Trost |
| 3. | Proposed Amendments to
Rules of Professional Conduct
- Rules 1.14, 7.4 and 1.5 | Tom Arnett |
| 4. | Other Business | Fred Voros |
| 5. | Adjournment | Fred Voros |

MINUTES

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

Tuesday, March 15, 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
Stuart H. Schultz
John K. Morris

EXCUSED:

William R. Hyde
Danny C. Kelly
Stephen A. Trost

STAFF:

Brent M. Johnson

1. **WELCOME.** Mr. Voros welcomed the committee members to the meeting.
2. **MINUTES.**

MOTION: Mr. Hutchinson made a motion to approve the committee's January 18 1994 minutes as distributed.

SECOND: Ms. Nessel-Sale seconded the motion.

VOTE: The committee voted unanimously to approve the motion.

3. **RULES OF LAWYER DISCIPLINE AND DISABILITY-RULES 10(e) AND 27(a).** Mr. Hutchinson reported on the sub-committee's proposed amendments to Rules 27(a) and 10(e). Drafts of the proposed amendments had been distributed in the committee mailing.

Mr. Hutchinson noted that the proposals to Rule 10(e) provide for discovery prior to

the filing of a complaint. A five day time period has been implemented to give persons an opportunity to challenge the issuance of a subpoena. Ms. Nessel-Sale expressed a concern about protecting the confidentiality of persons for whom a complaint is not filed. Mr. Hutchinson stated that a person could get a protective order under the Utah Rules of Civil Procedure. Mr. Hutchinson noted that the Utah State Bar currently has a miscellaneous file at the District Court and a petition for a subpoena would be issued under that file number. Ms. Nessel-Sale suggested having all petitions automatically filed under seal, to presume confidentiality. Mr. Hutchinson suggested amending Rule 10(e) to include the words "under seal" after the word petition. It was noted that the rule does not set forth all of the procedures for obtaining a subpoena, but Mr. Hutchinson noted that the sub-committee did not want to launch into a discourse on how to challenge a subpoena.

MOTION: Mr. Hutchinson moved to approve Rule 10(e) as amended.

SECOND: Mr. Schultz seconded the motion.

VOTE: The committee voted unanimously to approve the motion.

After the vote, Mr. Voros questioned the exact numbering of the rule. After some discussion, the committee recognized that the proposed Rule 10(e) should actually be proposed Rule 3(e) and the proposal is intended as a total replacement of the current Rule 3(e).

Mr. Hutchinson noted that the only change involved in Rule 27(a) is that the Presiding Judge authorization is currently required for the appointment of a trustee, but the proposal will allow any Judge in the District Court to appoint.

MOTION: Mr. Hutchinson moved to approve Rule 27(a) as proposed by the subcommittee.

SECOND: Judge Davis seconded the motion.

VOTE: The committee voted unanimously to approve the motion.

After the vote, Mr. Voros noted that the word "Judge" should be inserted after the words "District Court." Mr. Hutchinson agreed that the word "Judge" had been inadvertently omitted.

4. RULES OF PROFESSIONAL CONDUCT-RULES 1.14, 7.4 AND 1.5. Mr. Arnett stated that the sub-committee was not prepared to go forward with a discussion on Rules 1.14 and 7.4, but the committee did have a proposal for Rule 1.5.

Mr. Arnett noted that there are three options for Rule 1.5:

1. Keep the rule as is, requiring written agreements for contingent fees;

2. Delete the word "preferably" from paragraph (b);
3. Deleting the word "preferably" and add a threshold to paragraph (b).

Mr. Arnett expressed a strong preference for the second option, stating that this will protect both lawyer and client. Mr. Morris questioned whether the proposals would truly solve the problem, as the proposals do not require an agreement, but merely a notice. Mr. Morris questioned whether the committee should add more specificity to the writing than is required.

Mr. Voros noted that the committee had received a letter from a Mr. Richard Samp of the Washington Legal Foundation proposing changes to Rule 1.5. Mr. Voros stated that the sub-committee should look at Mr. Samp's proposals.

Mr. Sackett expressed a concern about a client coming into an attorney and being intimidated by a three page fee agreement. Mr. Sackett expressed a concern about lawyers creating onerous contracts. He stated that the committee should ensure that this is more a notice than a contract.

Ms. Nessel-Sale stated that she likes the idea of notice. Ms. Nessel-Sale gave examples of lawyers never telling their clients what they will charge until the representation is completed. Ms. Nessel-Sale expressed support for the threshold option, putting the threshold at \$1000.

Mr. Chrystler stated that there needs to be a threshold, because many matters such as preparation of a simple will or a brief collection letter do not justify spending the time to create written notice of the fees. Mr. Chrystler stated that he believed that \$1000 is too high a threshold. Ms. Nessel-Sale suggested that a \$500 threshold may be a reasonable compromise.

Mr. Voros suggested amending the rule to state that lawyers must always communicate the basis or rate of the fee and at a certain threshold, the communication must be in writing. Mr. Schultz questioned what the word "basis" means. Mr. Sackett stated that it could mean a retainer, flat fee, or any number of fee arrangements. Mr. Hutchinson stated that it probably refers to the eight factors listed in the above paragraph.

MOTION: Ms. Nessel-Sale made a motion to approve Rule 1.5(b) as follows:

When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client before or within a reasonable time after commencing the representation; and when it is reasonably foreseeable that total attorney's fees to the client will exceed \$500, this communication shall be in writing.

SECOND: Judge Davis seconded the motion.

VOTE: The committee voted unanimously to approve the motion.

After the vote, Mr. Hutchinson expressed a concern that the committee was missing an opportunity to include language requiring written communication of the scope of the work.

Professional Conduct Minutes

March 15, 1994

Page 4

Mr. Arnett stated that such language should probably be in Rule 1.2, and the sub-committee would look at appropriate language.

Ms. Nessel-Sale noted that the term "attorney's fees" should be singular possessive.

Mr. Voros stated that the rule should be so changed.

Mr. Sackett issued to the committee copies of opinions of the ethics advisory committee. Mr. Sackett noted that opinions prior to '90 were issued under the prior code and these opinions might be reissued or reviewed. Mr. Sackett noted that the prior opinions are still valid to the extent that they are applicable under the current code. Mr. Sackett noted that opinions are effective on approval, but there is also a 60 day comment period for the committee to rethink opinions.

5. **Adjournment.** Judge Davis moved to adjourn the meeting. Mr. Hutchinson seconded the motion. The motion carried unanimously. The meeting adjourned at 6:55 p.m.