

SUPREME COURT ADVISORY COMMITTEE  
ON THE RULES OF PROFESSIONAL CONDUCT

AGENDA

May 17, 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<br>March 15 Minutes<br>April 19 Minutes                      | Fred Voros                                    |
| 2. | Emergency Amendments to Rules of<br>Lawyer Discipline and Disability<br>Rules 3(a) and 17(f) | Steve Trost<br>Fred Voros<br>Colin Winchester |
| 3. | Proposed Amendments to<br>Rules of Professional Conduct<br>Rules 1.14 and Onward             | Tom Arnett                                    |
| 4. | Other Business   | Fred Voros                                    |
| 5. | Adjournment  | Fred Voros                                    |

Approved  
6/21/94

MINUTES

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

Tuesday, May 17, 1994, 5:30 p.m.  
Administrative Office of the Courts

J. Frederic Voros, Presiding

PRESENT:

J. Frederic Voros  
Gary L. Chrystler  
Stephen A. Trost  
Stephen F. Hutchinson  
Hon. Lynn W. Davis  
Gary G. Sackett  
Danny C. Kelly  
William R. Hyde  
John K. Morris

EXCUSED:

Stuart H. Schultz  
Thomas N. Arnett, Jr.

STAFF:

Colin R. Winchester

GUEST:

Kim S. Christy

1. WELCOME AND APPROVAL OF MINUTES. Mr. Voros welcomed the Committee members to the meeting.

MOTION: Mr. Hutchinson made a motion to approve the March 15 Minutes as distributed.

SECOND: Judge Davis seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

MOTION: Mr. Hutchinson made a motion to approve the April 19 Minutes as distributed.

SECOND: Mr. Chrystler seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

2. RULE OF PROFESSIONAL CONDUCT 1.5. Mr. Voros noted that the Committee had completed its work on Rule 1.5, but requested that the subcommittee review the information provided by the Washington Legal Foundation and determine whether additional amendments should be pursued. He asked that the subcommittee report back at the next Committee meeting.

3. RULES OF LAWYER DISCIPLINE AND DISABILITY. Mr. Winchester noted that the Committee had determined, at its last Committee meeting, to send certain rules to the Supreme Court with the recommendation that they be adopted on the emergency basis, subject to a post-adoption public comment process. Mr. Winchester and Mr. Voros identified those rules as Rule 3 and Rule 17. As they prepared to send those rules to the Court, Mr. Winchester and Mr. Voros discovered some unresolved issues. Consequently, both rules were brought back to the Committee for further discussion.

Rule 17(f) discusses the appointment of a special prosecutor when an informal complaint is filed against a member of the Office of Attorney Discipline or a member of the Board of Commissioners. As proposed by the Committee, such complaints would initially be considered by the chair of a screening panel. If the screening panel chair dismisses the complaint but the chair of the Ethics and Discipline Committee reverses that decision, the chair of the Ethics and Discipline Committee must request that the Supreme Court appoint a special prosecutor. The Committee intended to also seek the appointment of a special prosecutor if the chair of the Screening Panel did not dismiss the complaint, but omitted that language. The Committee asked staff to make the appropriate change and forward the rule to the Supreme Court.

Rule 3(c), as previously approved by the Committee, states:

Vice Chair. The vice chair shall act in the event of the chair's absence or resignation. The chair may call upon the vice chair to assist in any of the chair's duties provided that the chair remains ultimately responsible.

At its meeting on January 18, 1994, Judge Davis expressed concern about the phrase "ultimately responsible." As a result of that concern, the Committee voted send Rule 3(c) back to the subcommittee. However, as of this date, the subcommittee has not yet reported back.

Mr. Trost reported that the current practice is to have the acting vice chair make a recommendation to the chair, rather than to have the vice chair make final decisions.

Mr. Hutchinson suggested that the vice chair should be allowed to make final decisions when appointed by the chair to do so.

Committee members noted that if the chair desires to retain the final decision making authority, he or she can include that limitation when assigning responsibilities to the vice chair.

MOTION: Mr. Hutchinson made a motion to amend Rule 3(c) as follows:

Vice Chair. The vice chair shall act in the event of the chair's absence or resignation. The chair may call upon the vice chair to assist in any of the chair's duties ~~provided that the chair remains ultimately responsible.~~

SECOND: Judge Davis seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Rule 3 should be sent to the Supreme Court along with Rule 17.

4. RULE OF PROFESSIONAL CONDUCT 1.4. Mr. Trost indicated that most of the complaints he receives regarding Rule 1.4 arise when an attorney's retention of the client file does not prevent the client from going forward in the action, but does make going forward more difficult. Mr. Trost expressed his opinion that a common law retaining lien causes significant problems, and that he would prefer a rule that requires lawyers to turn over the client file.

Mr. Hutchinson basically agreed. However, he would prefer a rule which allows a lawyer to retain those documents or other items for which the attorney has either paid, or is obligated to pay, and the client has not reimbursed the attorney.

Mr. Winchester reported that doctors are not allowed to retain patients' medical records contingent upon payment for medical services.

Mr. Hutchinson asked whether a client should be allowed to enter a contract with a lawyer which specifically allows the lawyer to retain any or all of the client file pending payment.

Mr. Chrystler noted that the client would not understand the rights he or she was giving away at the time the contract was entered. He also spoke against releasing the entire file. Repeal of the common law retaining lien would chill the provision of legal services to financially marginal clients.

Mr. Morris expressed concern that retaining liens are simply self help relief for attorneys who already have enormous leverage over the client.

Mr. Hyde asked the Committee to attempt to define "client file."

Mr. Morris, referring to Midvale Motors and Frandsen, indicated that the definition in case law is contradictory.

Mr. Kelly indicated that the issue is not merely a small firm problem, but that big firms deal with the same issues. Mr. Kelly favors giving the entire file to the client.

Mr. Voros suggested that the Committee adopt a general rule providing for the return of the client file and carve out exceptions for those parts of the client file that an attorney should be allowed to retain. The Committee then took a series of straw votes.

1. The Committee agreed that the rules should provide for return of the entire file, subject to exceptions.

2. The Committee agreed that attorneys should generally be allowed to retain items such as depositions, experts' reports, and other items for which the attorney has paid costs, or is obligated to pay costs, and for which the client has not reimbursed the attorney.

3. The Committee failed to reach a consensus on whether attorneys should be allowed to retain attorneys' notes, mental impressions, work product and internal memoranda.

4. On the issue of an attorney charging a reasonable fee for photocopies, three members of the Committee voted in favor of the fee and four members of the Committee opposed the fee. Mr. Morris noted that photocopying the file was done for the protection of the attorney, rather than a benefit to the client.

Mr. Voros asked the subcommittee to consider the results of the straw votes and prepare a proposal for discussion at the next Committee meeting.

Mr. Kelly suggested that the proposed rule not simply address tangible items, but also intangible items such as electronic data.

Mr. Sackett suggested that the proposed rule not use the term "client file" because it causes confusion. Rather, the proposed rule should specifically address those items must be returned and those items that may be retained.

Mr. Hyde noted that the proposal should not simply address papers or documents but also other property associated with the representation.

5. RECENT ETHICS ADVISORY COMMITTEE OPINIONS. Mr. Sackett distributed two recent Ethics Advisory Committee Opinions and a Table of Contents. He noted that when a request for an Opinion is received, it is assigned a number. Because not all requests result in issued opinions, the opinions are not numbered consecutively.

6. FUTURE MEETINGS. The Committee determined to meet again on June 21, 1994 and complete any pending business on that date. The Committee will then take a summer recess during the months of July and August while Committee proposals are being circulated for public comment.

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