

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

**AGENDA**

June 21, 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                                       |
|    | <u>For Action</u>                                    |  |
|    | Rule 1.14  | Retaining Liens                                  |
|    | Rule 1.5   | Fees/Washington Legal Foundation Proposal        |
|    | Model Rule 1.13                                      | Organization As Client                           |
|    | Model Rule 1.14                                      | Client Under A Disability                        |
|    | <u>For Discussion</u>                                |  |
|    | Rule 4.2   | Communication With Person Represented by Counsel |
|    | Others?  |  |
| 3. | Other Business                                       | Fred Voros                                       |
| 4. | Adjournment  | Fred Voros                                       |

MINUTES

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

Tuesday, June 21, 1994 5:30 p.m.  
Administrative Office of the Courts

Fred Voros, Presiding

PRESENT:

J. Frederick Voros  
Gary L. Sackett  
Stephen Hutchinson  
Judge Lynn Davis  
Commissioner Thomas Arnett, Jr.  
Gary L. Chrystler  
William R. Hyde  
Stephen a. Trost  
Stuart H. Schultz

EXCUSED

John K. Morris  
Danny Kelly

STAFF:

Colin Winchester

I. WELCOME AND APPROVAL OF MINUTES

Motion: Mr. Trost made a Motion to approve the minutes of the Committee's May 17 meeting as drafted.

Second: Judge Davis seconded the Motion.

Vote: The Committee voted unanimously to approve the Motion.

II. RULES OF PROFESSIONAL CONDUCT.

1. Rule 4.2. Communication With Person Represented By Counsel. Mr. Sackett explained that Opinion #115 had been approved by the Board of Bar Commissioners, and is now in effect. After its approval, certain individuals desired to be heard. The Board of Bar Commissioners has taken their positions under advisement and is considering issuing a revised Opinion.

Mr. Trost stated that this Committee should continue to discuss proposed changes to the Rule. He believes that the Board

of Bar Commissioners would defer to this Committee's actions.

Judge Davis expressed concern about further consideration of the Rule while the Board of Bar Commissioners still has the Opinion under reconsideration.

Mr. Sackett stated that the Board of Bar Commissioners won't change the language of the existing Rule, but may change the interpretation of the Rule in the revised Opinion. This Committee should therefore continue to discuss potential changes to the language of the Rule.

2. Rule 1.14. Retaining Liens. Mr. Arnett distributed a new draft of proposed amendments to Rule 1.14, explaining that the changes effect the Committee comment, rather than the language of the proposed Rule.

Motion: Mr. Sackett made a motion to strike the words "and unfiled pleadings."

Second: Judge Davis seconded the motion.

Vote: The Committee voted unanimously to approve the motion.

Mr. Voros stated that the words "generally would include" and "generally would not include" do not provide a specific standard for resolving the question of what materials should be returned to the client.

Mr. Arnett explained that the subcommittee had intentionally used "generally" because it would be too difficult to be absolutely specific.

Mr. Sackett noted that the proposed comment creates certain presumptions. A party who would argue against the presumptions has the burden of rebutting them. Mr. Voros noted that there is no standard by which the rebuttal could occur.

Mr. Hutchinson stated that the standard is this: those things necessary to proceed with the matter should be returned; those things which are not necessary to proceed with the matter need not be returned.

Motion: Mr. Sackett made a motion to approve the proposal as amended.

Second: A Committee member seconded the motion.

Vote: The Committee voted unanimously to approve the motion.

3. **Rule 1.5. Fees.** Mr. Arnett reviewed the Washington Legal Foundation's proposal to amend Rule 1.5. Briefly, the proposal is as follows:

(a) A Requirement that contingent fee agreements be in writing, and that the client exercise informed consent when entering such agreements;

(b) A requirement that contingent fee agreements include a statement of the client's rights and the lawyer's responsibilities (including a three-day rescission period, a requirement that lawyers disclose the expenditures of retainer funds, and a requirement that the lawyer inform the client of the potential adverse impacts of the litigation).

Mr. Arnett noted the following concerns with the proposal:

(a) The proposal is internally inconsistent. Although the proposal deals primarily with contingent fee agreements, it affects other fee agreements as well.

(b) The proposal purports to include informed consent as a factor in determining whether a contingent fee is reasonable. In application, informed consent would not be merely a factor of reasonableness, but a basis for sanction.

(c) The proposal would be applicable to all contingent fee agreements. The Committee has already voted to not require written agreements in cases in which it is not expected that fees will exceed \$500.

(d) The proposal places significant new requirements on lawyers:

(1) Adding a statement of client's rights and lawyer's responsibilities to the fee agreement;

(2) Filing the fee agreement with the court; and

(3) Disclosing potential adverse impacts.

(e) The three-day rescission period is contrary to existing Utah Law.

(f) The requirement that lawyers account for expenditures from the retainer is confusing. There often is no retainer in contingent fee cases. Lawyers are already required to disclose disbursements of the client's advanced costs.

(g) It would be impossible for lawyers to disclose all potentially adverse impacts of litigation.

The Committee discussed the proposal and Mr. Arnett's concerns. It was determined that the Committee should take no further action of the proposal.

**4. Model Rule 1.13. Organization as Client.** Mr. Hyde reported that he had studied the model rule from the perspective of a government lawyer, initially taking the position that the Committee should recommend its adoption. However, in the course of his study, he concluded that the model rule is not much help to government lawyers and that it should not be adopted as proposed by the ABA. For example, the model rule proposes that a lawyer may resign from representation. A government lawyer would effectively need to terminate his or her employment relationship in order to resign from representation.

Mr. Sackett stated that the attorneys in his office (in-house corporate counsel) generally thought the model rule was a good idea. There is a benefit in the lawyer being able to rely on an ethical rule to support his or her position in opposing illegal or otherwise harmful activities. Mr. Sackett expressed mild support for the model rule, not necessarily for the comments to the model rule.

Mr. Hyde noted that he had discussed the model rule with SWAPA. SWAPA voted not to support it unless changes are made to accommodate government lawyers. Consequently, Mr. Hyde drafted and distributed a proposed new paragraph (f).

The Committee reviewed Mr. Hyde's draft, asking several questions about the same. Mr. Voros summarized the Committee's discussion by noting that the Committee is generally in favor of adopting some form of the model rule and including, either in the rule or in the comment, some provisions to more fully address the concerns raised by government lawyers. Mr. Voros remanded the model rule to the subcommittee for an additional report at the next Committee meeting.

**5. Model Rule 1.14. Client Under a Disability.** Mr. Crystler reviewed the model rule, explaining the general rationale. He noted that the rule is short and general, while the comments are more lengthy and specific. He noted that the subcommittee has not yet studied the comments in depth.

Mr. Hutchinson suggested taking the model rule to the Needs of Elderly and the Needs of Children Committees of the Bar prior to further action by this Committee.

Mr. Voros remanded the model rule to the subcommittee for additional review and recommendation. The Committee will then

consider the model rule at its next meeting.

Mr. Arnett indicated that the subcommittee will get input from various groups that represent people with disabilities.

**III. Advertising Rules.** Mr. Sackett asked about the status of the advertising rules. Mr. Arnett reported that Steve Kaufmann's committee has been studying that issue and will continue to study it through the summer of 1994. Mr. Arnett's subcommittee will

keep the advertising rules under advisement and deal with them in the fall.

**IV. Next Meeting:** The Committee will next meet on Sept. 20, 1994.

**V. Adjournment.** There being no further Committee business, the Committee meeting was adjourned.