

**MINUTES**

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

Tuesday, November 15, 1994, 5:30 p.m.  
Administrative Office of the Courts

Fred Voros, Presiding

**PRESENT:**

Fred Voros  
Bill Hyde  
Gary Sackett  
Gary Chrystler  
Steve Hutchinson  
Tom Arnett

**EXCUSED:**

Steve Trost  
John Morris  
Danny Kelly  
Judge Lynn Davis  
~~Judge Steward~~  
Stuart Schultz

**STAFF:**

Colin Winchester

I. **WELCOME AND APPROVAL OF MINUTES.** Mr. Voros welcomed the Committee members to the meeting. The Committee reviewed the minutes of the June 21, meeting, making amendments thereto.

**Motion:** Mr. Hutchinson made a motion to approve the June 21 minutes as amended.

**Second:** Mr. Arnett seconded the motion.

**Vote:** The Committee voted unanimously to approve the motion.

The Committee reviewed and amended the minutes of the September 27, meeting, making amendments thereto.

**Motion:** Mr. Hutchinson made a motion to approve the September 27 minutes as amended.

**Second:** Mr. Sackett seconded the motion.

**Vote:** The Committee voted unanimously to approve the motion.

The Committee reviewed the minutes of the meeting October 18 meeting.

Motion: Mr. Sackett made a motion to approve the minutes of the October 18 meeting as distributed.

Second: Mr. Arnett seconded the motion.

Vote: The Committee voted unanimously to approve the motion.

II. OTHER BUSINESS. Mr. Sackett informed the Committee that he would distribute recent opinions of the Bar's Ethics Advisory Committee.

Mr. Voros reminded Mr. Winchester that he had agreed to prepare a draft form for trust account reporting in conjunction with the proposed amendments to current Rule 1.14.

III. MODEL RULE 1.13. ORGANIZATION AS CLIENT. Mr. Voros distributed an article entitled "Government Attorneys and the Ethical Rules: Good Souls in Limbo" authored by Maureen A. Sanders, and printed in the BYU Journal of Public Law. The article was given to him on the date of the meeting, and although he asked that the Committee complete its deliberations of Model Rule 1.13, he suggested that the Committee consider several of the suggestions made in the article at some point in time.

Mr. Hyde reported that Ms. Sanders' proposal is not unlike his first draft of proposed paragraph (f), and that the subcommittee and government lawyers which had worked on Model Rule 1.13 had already reviewed the article and taken its suggestions into consideration.

Mr. Voros reported that the article was given to him by Carol Clawson, and that as a representative of the Attorney General's Office, she had indicated that she was supportive of the changes recommended in the article.

Mr. Arnett reported that the subcommittee had met since the Committee's last meeting, made changes to Model Rule 1.13, and had distributed the current draft in the mailing. The changes incorporated by the subcommittee include those changes previously approved by the Committee as a whole, changes recommended by the Committee at its last meeting, and clarification of additional provisions which have not been previously addressed by the Committee.

Mr. Hyde noted that fitting all government lawyers into one rule is difficult, in that some government lawyers have very general responsibilities while others have very specific or even single-issue responsibilities. He reported that he had met with Ms. Clawson and Mr. Hendrickson prior to the subcommittee meeting and had agreed upon proposed language for paragraph (f). He reported that the proposal was also discussed at SWAP's annual business meeting in St. George the week before the Committee meeting. Finally, he noted that Ms. Sanders had recommended modifications to several rules in respect to government lawyers, not just Model

Rule 1.13.

Mr. Sackett stated that Ms. Sanders' proposed paragraph (f) was mostly a regurgitation of those remedies available for non-government lawyers, and that only paragraph (f)(4) was in addition to those remedies available for non-government lawyers.

Mr. Voros stated that he was concerned about government lawyers' duties to the public, not just to their employers. He indicated support for Ms. Sanders' proposal which includes recognition of the government lawyers' duty to the public interest. Mr. Voros asked whether there are statutes or ordinances that expressly state that a government lawyer has a duty to represent the public interest.

Mr. Hyde reported that such provisions does not exist. Not only would it be difficult to define the public interest, but equally difficult to determine who should define that term. Should it be the government lawyer, the governmental organization, or the public?

Mr. Hyde reviewed the proposed amendments to paragraph (f). Mr. Voros suggested changing "section" to "rule" in the second line of proposed paragraph (f), and the Committee agreed. Mr. Voros then questioned why the subcommittee did not recommend including reference to paragraphs (d) and (e) in the last sentence of proposed paragraph (f).

Mr. Sackett reported that while paragraphs (b) and (c) require government lawyers to take affirmative action, paragraph (f) obviates those requirements for government lawyers if the law provides otherwise. Paragraph (e) is permissive rather than mandatory, therefore, there is no need for paragraph (f) to make an exception to the rule.

**Motion:** The subcommittee made a motion to approve paragraph (f) as amended.

**Vote:** The Committee voted unanimously to approve the motion.

The Committee then reviewed the proposed comments to Model Rule 1.13, amending the first sentence under the heading "Government Agency" as follows:

The duty defined by this rule applies to governmental ~~organizations,~~ but lawyers, except to the extent that the responsibilities of government lawyers are otherwise controlled by the duties imposed upon them by law.

**Motion:** Mr. Hutchinson made a motion to approve the amendments to first sentence as indicated above.

**Second:** Mr. Hyde seconded the motion.

**Vote:** The Committee voted unanimously to approve the motion.

**Motion:** The subcommittee made a motion to approve the "Government Agency" comment as amended.

**Vote:** The Committee voted unanimously to approve the motion.

Mr. Sackett reviewed the proposed amendments to paragraph (b) of Model Rule 1.13 as recommended by the subcommittee.

Mr. Voros noted that "of" should be "to" on line five of paragraph (b). Mr. Arnett and Mr. Sackett stated that the use of "of" is appropriate. Mr. Sackett stated that the Model Rule should properly have been drafted with "of" rather than "to". Mr. Voros and Mr. Hyde expressed concern that the use of "of" limits the application of the rule beyond that provided in the Model Rule. Mr. Voros then questioned what the phrase "substantial injury" applies to. Should it apply to both legal obligations of the organization, only those legal obligations which may be imputed to the organization, or both. The Committee discussed the issue and determined that substantial injury should apply to both the organizations' legal obligations those that might be imputed to the organization. The Committee amended paragraph (b) to clarify that intent.

**Motion:** The subcommittee made a motion to approve paragraph (b) as amended.

**Vote:** The Committee voted unanimously to approve the motion.

Mr. Sackett reviewed the comments to Model Rule 1.13 other than those comments applicable to newly proposed paragraph (f). He noted that the subcommittee recommended striking the "Dual Representation" paragraph because it is merely a regurgitation of paragraph (e) of the Model Rule. The subcommittee also recommends striking the initial paragraph under the Derivative Actions paragraph because it merely states what the "prevailing law" is and is unnecessary.

**Motion:** The subcommittee made a motion to approve the remaining comments to the Model Rule 1.13, including the Model Code Comparison, as drafted and distributed.

**Vote:** The Committee voted unanimously to approve the motion.

Mr. Hyde asked how the Committee should approach the Supreme Court regarding its action on Model Rule 1.13 and the Model Rule 1.14. Mr. Arnett suggested that the Committee explain not only the history of the two Model Rules, but also the recent action by this Committee and the changes proposed by this Committee. Mr. Hyde suggested that the letter of explanation include this Committee's position on the philosophical issue of whether rules should merely

be bases for the imposition of discipline, or whether they should also include advisory, exhortive and aspirational statements.

Mr. Sackett noted that the Bar's corporate law section reviewed an early draft of Model Rule 1.13 and had no opposition to the adoption of the rule.

Mr. Voros asked Mr. Arnett to prepare the historical portion of the letter of explanation, indicating that he would prepare the portion dealing with the recent history and the explanation of the Committee's proposed changes to the two Model Rules.

**IV. OTHER RULES EFFECTING GOVERNMENT LAWYERS.** Mr. Hyde distributed a packet of other rules reviewed by SWAP at their annual business meeting. Mr. Voros asked Mr. Winchester to distribute copies of those rules to Committee members who were not present at the meeting. Mr. Voros also asked Mr. Winchester to distribute copies of Ms. Sander's article to those members.

**V. NEXT MEETING.** The Committee will next meet on December 20, 1994 at 5:30 p.m.

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