RECENT AND NOTEWORTHY DEVELOPMENTS IN LEGAL ETHICS

Presented By

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And

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I. WHAT DUTIES ARE OWED TO A PROSPECTIVE CLIENT?

Arkansas Rule of Professional Conduct 1.18: Duties To Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Mays v. Reassure America Life Insurance Company, 293 F. Supp. 2d 954 (E.D. Ark. 2003) (disqualification not warranted; no confidential information conveyed).

Sturdivant v. Sturdivant, 367 Ark. 514, 241 S.W. 3d 740 (2006) (husband consulted with associate in law firm; partner and law firm disqualified from representing wife).

II. WHAT ARE THE GUIDELINES ON "GHOST-WRITING" COMPLAINT, MOTION, OR BRIEF FOR A SELF-REPRESENTED PERSON?

Arkansas Rule of Civil Procedure 87 (adopted December 2017): Limited Scope Representation

(a) ***Permitted***. In accordance with Rule 1.2(c) of the Arkansas Rules of Professional Conduct, an attorney may provide limited scope representation to a person involved in a court proceeding.

(b) ***Notice***. An attorney's role may be limited as set forth in a notice of limited scope representation filed and served prior to or simultaneously with the initiation of a proceeding or initiation of representation, as applicable. Such notice shall not be required in matters where an attorney's representation consists solely of the drafting of pleadings, motions, or other papers for an otherwise self-represented person as provided in subdivision (c) of this rule.

(c) ***Drafting of Pleadings, Motions, and Other Papers***.

(1) An attorney may draft or help to draft a pleading, motion, or other paper filed by an otherwise self-represented person. The attorney shall include a notation at the end of the prepared document stating: "This document was prepared with the assistance of [insert name of attorney], a licensed Arkansas lawyer, pursuant to Arkansas Rule of Professional Conduct 1.2(c)." The attorney need not sign that pleading, motion, or other paper.

(2) An attorney who provides drafting assistance to an otherwise self-represented person may rely on the self-represented person's representation of facts, unless the attorney has reason to believe that such a representation is false or materially insufficient.

(d) ***Termination***. The attorney's role terminates without the necessity of leave of court upon the attorney's filing a notice of completion of limited scope representation with a certification of service on the client.

(e) ***Service***. Service on an attorney providing limited scope representation is required only for matters within the scope of the representation as set forth in the notice.

American Bar Association Formal Opinion 07-446
May 5, 2007

Undisclosed Legal Assistance to Pro Se Litigants

A lawyer may provide legal assistance to litigants appearing before tribunals "pro se" and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance.

III. WHEN MAY A NON-RESIDENT ATTORNEY BE ADMITTED TO PRACTICE IN ARKANSAS?

Admission to Practice Rule XIV: Practice By Comity. Pro Hac Vice Appearance. Requirements for Participation in Arkansas Proceedings by a Non-Resident Attorney, not licensed to practice law in Arkansas by the Arkansas Supreme Court (effective January 2017)

(a) For purpose of this specific rule, the term "Non-Resident Attorney" refers specifically to an attorney admitted to practice law in another State, District of Columbia, or territory, which would allow an Arkansas attorney to seek permission to participate in the proceedings of any particular case in the other courts of the State of licensure of the "Non-Resident Attorney."

(b) A non-resident attorney requesting permission to participate in proceedings in a court in this State shall pay a fee of $200 for each case in which the attorney is requesting to participate. Fees under this Rule shall be collected in the same manner as the annual attorney license fee collected by the Clerk of the Arkansas Supreme Court. The Clerk shall cause the fees received pursuant to this Rule to be allocated to the Bar of Arkansas. A nonresident attorney who files a motion requesting permission to participate in proceedings in a court in this State shall provide to that court accompanying proof of payment of the fee required herein. Proof shall be provided to the non-resident attorney by the Clerk of the Arkansas Supreme Court. Except as otherwise provided by this rule, the non-resident attorney fee is a mandatory initial requirement. Upon completion of this requirement and receipt of payment issued by the Clerk of the Supreme Court, the non-resident attorney shall file with the applicable Arkansas court a written, sworn motion requesting permission to participate in a particular case. The motion shall contain: (1) the office address, telephone number, fax number, and email address of the non-resident attorney

movant; (2) the name and Arkansas Bar ID number of an attorney licensed in Arkansas, with whom the non-resident attorney will be associated in the Arkansas proceedings, and that attorney's office address, telephone number, fax number, and email address; (3) a list of all cases, including case number and caption, in Arkansas courts in which the non-resident attorney has participated or served as counsel or sought leave to appear or participate within the two years preceding the filing of the Motion; (4) a list of jurisdictions in which the non-resident attorney is licensed, including federal courts, and a statement that the non-resident attorney is or is not an active member in good standing in each of those jurisdictions; (5) a statement that the non-resident attorney has or has not been the subject of disciplinary action by the Bar or courts of any jurisdiction in which the attorney is licensed and a description of any such disciplinary actions; (6) a statement that the non-resident attorney has or has not been denied admission, including admission pro hac vice, to the courts of any State or to any federal court; (7) a statement that the non-resident attorney is familiar with the Arkansas Supreme Court Rules of Professional Conduct governing the conduct of members of the Bar of Arkansas, and will at all times abide by and comply with the same so long as such Arkansas proceeding is pending and said Applicant has not withdrawn as counsel therein.

(c) Except as otherwise provided by this rule, the motion of the non-resident attorney seeking permission to participate in Arkansas proceedings must be accompanied by an affidavit of the resident practicing Arkansas attorney with whom the non-resident attorney will be associated in the proceeding of a particular case. The affidavit must contain a statement that the resident attorney recommends the non-resident attorney applicant be granted permission to participate in the particular proceeding before the court. In addition, the resident practicing Arkansas attorney must sign the Motion filed by the non-resident attorney.

(d) In the case of a non-resident attorney who seeks to represent an indigent person in proceedings in a court of this state as provided in Administrative Order No. 15.2, the fee required by this rule shall be waived. For purposes of this rule, a motion of the non-admitted attorney stating that the requirements of Administrative Order No. 15.2 have been satisfied, along with a letter from the sponsoring entity to that effect, shall be sufficient to satisfy the requirements of (b) and (c) of this rule.

(e) The court may examine the non-resident attorney to determine that the non-resident attorney is aware of and will observe the ethical standards required of attorneys licensed

in Arkansas. If the court determines that the non-resident attorney is not a reputable attorney who will observe the ethical standards required of Arkansas attorneys, that the non-resident attorney has been engaging in the unauthorized practice of law in the state of Arkansas, or that other good cause exists, the court may deny the motion.

(f) The court shall deny the pro hac vice motion of a non-resident attorney when the non-resident resident attorney has participated, served as counsel, or entered an appearance pro hac vice in three (3) cases in the State of Arkansas during the twelve months prior to the filing of the motion.

(g) If, after being granted permission to participate in the proceedings of any particular case in Arkansas, the non-resident attorney engages in professional misconduct as that term is defined by the Arkansas Supreme Court Rules of Professional Conduct, the court may revoke the non-resident attorney's permission to participate in the Arkansas proceedings and may cite the non-resident attorney for contempt. In addition, the court may refer the matter to the Arkansas Supreme Court Office of Professional Conduct.

(h) The filing of any motion under this Rule constitutes submission to the jurisdiction of the Arkansas Supreme Court Committee on Professional Conduct.

Pavan v. Smith, CV-15-988; Motions of Amy Whelan, Jonathan Weisslass, and Andrew Kushner For Permission to Appear Pro Hac Vice Are Denied. Kemp, Goodson and Wynne would grant. (January 11, 2018)

IV. IS A PLEADING OR MOTION LACKING IN MERIT?

Arkansas Rule of Professional Conduct 3.1: Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT:

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Arkansas Rule of Civil Procedure: Signing of Pleadings, Motions, And Other Papers; Sanctions (as amended in 2015 and 2017)

(a) ***Signature***. Except as provided in Rule 87 of these rules, every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his or her individual name, whose address shall be stated. A self-represented person shall sign his or her pleading, motion, or other paper and state his or her address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit.

(b) ***Certificate***. The signature of an attorney or party constitutes a certificate by the signatory that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) the pleading, motion, or other paper is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support;

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information;

(5) when a party's claim or affirmative defense may only be established in whole or in part by expert testimony, the party has consulted with at least one expert, or has learned in discovery of the opinion of at least one expert, who (i) is believed to be competent under Ark. R. Evid. 702 to express an opinion in the action and (ii) concludes on the basis of the available information that there is a reasonable basis to assert the claim or affirmative defense; and

(6) the pleading, motion, or other paper complies with the requirements of Rule 5(c)(2) regarding redaction of confidential information from case records submitted to the court.

(c) ***Sanctions***.

(1) If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon any attorney or party who violated this rule an appropriate sanction.

(2) Sanctions that may be imposed for violations of this rule include, but are not limited to:

(A) an order dismissing a claim or action;

(B) an order striking a pleading or motion;

(C) an order entering judgment by default;

(D) an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee;

(E) an order to pay a penalty to the court;

(F) an order awarding damages attributable to the delay or misconduct;

(G) an order referring an attorney to the Supreme Court Committee on Professional Conduct or the appropriate disciplinary body of another state.

(3) The court's order imposing a sanction shall describe the sanctioned conduct and explain the basis for the sanction. If a monetary sanction is imposed, the order shall explain how it was determined.

(4) The court shall not impose a monetary sanction against a represented party for violating subdivision (b)(2), on its own initiative, unless it issued the show-cause order under subdivision (c)(6) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(5) A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5 but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(6) On its own initiative, the court may order an attorney or party to show cause why conduct specifically described in the order has not violated subdivision (b). The order shall afford the attorney or party a reasonable time to respond, but not less than 14 days.

Arkansas Rules of Appellate Procedure – Civil, Rule 11. Certification By Parties And Attorneys; Frivolous Appeals; Sanctions.

(a) The filing of a brief, motion or other paper in the Supreme Court or the Court of Appeals constitutes a certification of the party or attorney that, to the best of his knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact; is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; is not filed for an improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and that the document complies with the requirements of Rule of Civil Procedure 5(c)(2) regarding redaction of confidential information. A party or an attorney who files a paper in violation of this rule, or party on whose behalf the paper is filed, is subject to a sanction in accordance with this rule.

(b) The Supreme Court or the Court of Appeals shall impose a sanction upon a party or attorney or both for (l) taking or continuing a frivolous appeal or initiating a frivolous proceeding, (2) filing a brief, motion, or other paper in violation of subdivision (a) of this rule, (3) prosecuting an appeal for purposes of delay in violation of Rule 6-2 of the Rules of the Supreme Court and Court of Appeals, and (4) any act of commission or omission that has an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. For purposes of this rule, a frivolous appeal or proceeding is one that has no reasonable legal or factual basis.

(c) Sanctions that may be imposed for violations of this rule include, but are not limited to, dismissal of the appeal; striking a brief, motion, or other paper; awarding actual costs and expenses, including reasonable attorneys' fees; imposing a penalty payable to the court; awarding damages attributable to the delay or misconduct; and, where there has been delay, advancing the case on the docket and affirming.

(d) A party may by motion request that a sanction be imposed upon another party or attorney pursuant to this rule, or the court may impose a sanction on its own initiative. A motion shall be in the form required by Rule 2-1 of the Rules of the Supreme Court and Court of Appeals, with citations to the record where appropriate, and will be called for submission three weeks after filing. The opposing party may file a response within 21 days of the filing of the motion. If the court on its own initiative determines that a sanction may be appropriate, the court

shall order the party or attorney to show cause in writing why a sanction should not be imposed on the party or attorney or both.

American Bar Association Formal Opinion 94-387
September 26, 1994

Disclosure to Opposing Party and Court That Statute of Limitations Has Run

A lawyer has no ethical duty to inform an opposing party in negotiations that the statute of limitations has run on her client's claim; to the contrary, it would violate Rules 1.3 and 1.6 to reveal such information without the client's consent. It follows that where the opposing party and his counsel appear to be unaware that the limitations period has expired, the lawyer may not discontinue negotiations over the claim simply on this ground, in the absence of agreement by her client that she do so. Nor is the lawyer constrained by the rules of ethics from filing suit to enforce a time-barred claim, unless the rules of the jurisdiction preclude it. There is no basis in the ethics rules for holding a lawyer representing a government agency to a different standard in these circumstances than that applicable to a lawyer representing a private client.

Cases of note:

Wizsche v. Jaeger & Haines, Inc., 707 F. Supp. 407 (W.D. Ark. 1989) (attorney sanctioned for filing a baseless lawsuit).

Chris & Todd, Inc. v. Ark. Dept. of Fin. & Admin.,125 F.R.D. 491 (E.D. Ark. 1991) (sanctions awarded against attorney for filing a counterclaim that "appears to be nothing more than a gratuitous, irrelevant assertion intended to embarrass or harass").

Eads v. Hall, 340 Ark. 375, 10 S.W. 3d 441 (2000) (appellants' motion for a rule on the clerk was frivolous, not well grounded in fact or law, and caused a needless increase in the court of litigation; award of attorney fees and costs under Ark. R. App. P. – Civ. 11).

Whaley v. Kroger Co., 352 Ark. 122, 98 S.W. 3d 824 (2003) (appeal had no factual or legal basis to support charges of ethical violations by opposing counsel; appellee's counsel awarded $1500 in attorney fees).

Reeve v. Carroll County, 373 Ark. 584, 285 S.W. 3d 242 (2008) (sanctions against attorney for taxpayers; "motion filed was frivolous and has resulted in a needed increase in the cost of this litigation").

Courier v. Woodruff, 2011 Ark. App. 659 (plaintiff's attorney sanctioned; "does not appear that he made any effort, other than talking to his client," to determine whether the complaint was well-grounded in fact).

Swindle v. Southern Farm Bur. Cas. Ins. Co., 2014 Ark. App. 157 (plaintiff's attorney sanctioned; "appears to have filed suit out of anger rather than any need to do so").

V. HOW DOES THE LAWYER MAINTAIN CONFIDENTIALITY?

Arkansas Rule of Professional Conduct 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT: Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

Arkansas Rule of Professional Conduct 1.6: Confidentiality Of Information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the commission of a criminal act;

(2) to prevent the client from committing a fraud that is reasonably certain to result in injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal

charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client or,

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest between lawyers in different firms, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(d) Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like.

American Bar Association Formal Opinion 11-459
August 4, 2011

Duty to Protect the Confidentiality of E-mail Communications with One's Client

A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.

American Bar Association Formal Opinion 477
May 11, 2017

Securing Communication of Protected Client Information

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or

unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

American Bar Association Formal Opinion 480
March 6, 2018

Confidentiality Obligations for Lawyer Blogging and Other Public Commentary

Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.

VI. WHAT IS THE RESPONSIBILITY OF AN ATTORNEY AFTER MAKING A MISTAKE IN REPRESENTING A CLIENT?

Arkansas Rule of Professional Conduct 1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall promptly notify a client in writing of the actual or constructive receipt by the attorney of a check or other payment received from an insurance company, an opposing party, or from any other source which constitutes the payment of a settlement, judgment, or other monies to which the client is entitled.

American Bar Association Formal Opinion 481
April 17, 2018

A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error

Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the Model Rules to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation.

VII. HOW TO ADVISE A CLIENT WHO MAY BE ENGAGING IN CRIMINAL OR FRAUDULENT ACTIVITY?

Arkansas Rule of Professional Conduct 1.2: Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(1) The client's informed consent must be confirmed in writing unless:

(A) the representation of the client consists solely of a telephone consultation;

(B) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a program authorized by Rule 6.5 and the lawyer's representation consists solely of providing information and advice or the preparation of legal documents; or

(C) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent as required by this rule, there shall be a presumption that:

(A) the representation is limited to the attorney and the services as agreed upon; and

(B) the attorney does not represent the client generally or in matters other than those as agreed upon.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

COMMENT:

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be

necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

Proposed Comment to Rule 1.2:

A lawyer may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of Arkansas law, and regarding conduct expressly permitted by Arkansas law, provided that the lawyer shall also counsel and inform the client in writing about the legal consequences of the client's proposed course of conduct under other applicable state or federal statutory law, rule, regulatory agency policy, or case law when such law, rule or regulation may make the conduct criminal or fraudulent.

Rejected by Arkansas Supreme Court (June 2017)

See Justice J. Brooks, I, "The Ethics of Representing Marijuana-Related Businesses", Arkansas Lawyer (Spring 2017) 22.

Case of note:

The Firestone Tire & Rubber Company v. Little, 269 Ark. 636, 599 S.W. 3d 756 (1980) (misnomer argument; summons directed to "Firestone Tire and Rubber Company.")

VIII. WHAT IS THE ADVOCATE'S DUTY WHEN OPPOSING COUNSEL INNOCENTLY BLUNDERS WITH CONFIDENTIAL DOCUMENTS?

Arkansas Rule of Professional Conduct 4.4: Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

COMMENT:

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalog all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning or deleting the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

American Bar Association Formal Opinion 05-437
October 1, 2005

Inadvertent Disclosure of Confidential Materials

A lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender in order to permit the sender to take protective measures.

Arkansas Rule of Civil Procedure 26: General Provisions Governing Discovery

(b)(5) Inadvertent Disclosure.

(A) A party who discloses or produces material or information without intending to waive a claim of privilege or attorney work product shall be presumed not to have waived under these rules and the Arkansas Rules of Evidence if the party takes the following steps: (i) within fourteen calendar days of discovering the inadvertent disclosure, the producing party must notify the receiving party by specifically identifying the material or information and asserting the privilege or doctrine protecting it; and (ii) if responses to written discovery are involved, then the producing party must amend them as part of this notice.

(B) Within fourteen calendar days of receiving notice of an inadvertent disclosure, a receiving party must return, sequester, or destroy the specified materials and all copies. After receiving this notice, the receiving party may not use or disclose the materials in any way.

(C) A receiving party may challenge a disclosing party's claim of privilege or protection and inadvertent disclosure. The reason for such a challenge may include, but is not limited to, the timeliness of the notice of inadvertent disclosure or whether all the surrounding circumstances show waiver.

(D) In deciding whether the privilege or protection has been waived, the circuit court shall consider all the material circumstances, including: (i) the reasonableness of the precautions taken to prevent inadvertent disclosure; (ii) the scope of the discovery; (iii) the extent of disclosure; and (iv) the interests of justice. Notwithstanding Model Rule of Professional Conduct 3.7, and without having to terminate representation in the matter, an attorney for the disclosing

party may testify about the circumstances of disclosure and the procedures in place to protect against inadvertent disclosure.

Arkansas Rule of Evidence 502: Lawyer-Client Privilege

(e) Inadvertent disclosure. A disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine does not operate as a waiver if the disclosing party follows the procedure specified in Rule 26(b)(5) of the Arkansas Rules of Civil Procedure and, in the event of a challenge by a receiving party, the circuit court finds in accordance with Rule 26(b)(5)(D) that there was no waiver.

IX. WHAT IS THE ATTORNEY'S OBLIGATION WHEN THE CLIENT WANTS THE FILE?

Arkansas Rule of Professional Conduct 1.16: Declining or Terminating Representation

(a) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Arkansas Rule of Professional Conduct 1.19 (adopted December 2016) Client Files: Definition, Retention & Destruction

(a) Client file - Definition and duty to provide copies of client-file documents to the client. The use of the term "client" refers to both current and former clients.

(1) For purposes of these rules, the client file shall consist of any writings or property provided by the client to the lawyer and any documents, in paper or electronic format, that are the product of the lawyer's representation, including pleadings, correspondence, and other documents prepared or received by the lawyer in furtherance

of the representation. Documents that have not been filed with a tribunal, delivered or served, or other documents drafted but unexecuted or undelivered that the client has explicitly paid for the drafting, creation, or obtaining thereof, including such items as transcripts, depositions, medical records, and reports of experts, shall be provided to the client as part of the file.

(2) The following records are not included in the client file, even if they are maintained by the lawyer in association with the representation and the client file, and such records are not ones to which the client is entitled to review or receive a copy:

(A) The lawyer's work product, which includes the documents the lawyer used to reach an end product of the lawyer's representation, the lawyer's notes, and preliminary drafts of pleadings and legal instruments;

(B) Internal memoranda prepared by or for the lawyer;

(C) Legal research materials prepared by or for the lawyer and factual research materials, including investigative reports prepared by or for the lawyer for use in the representation, unless the material has been specifically paid for by the client or procured by the lawyer for the client's use;

(D) Documents such as internal conflict checks, firm assignments, notes regarding any ethics consultation, or records that might reveal the confidences of other clients.

(E) Items not included in the list of excluded items shall be considered to be part of the client file to which the client is entitled.

(3) Upon the client's written request in any format, the lawyer shall surrender the client's original file or a copy of the file, in paper or electronic format, to the client. Upon written authorization of the client, the lawyer shall surrender such file to the client's new lawyer. The lawyer may deliver a statement for costs of production to the client but may not withhold delivery of the client file pending payment.

(4) The cost of copying the file shall be the responsibility of the client. If the lawyer has in his or her possession client funds to be reimbursed for such copying cost, the lawyer may be reimbursed for such cost from the client funds held by the lawyer. A lawyer who has previously provided the client a copy of any part of the client file may charge the client for additional copies of the same documents. The client shall be

responsible for the reasonable costs incurred in delivery, by mail or commercial-delivery service, of the client-file materials outside the lawyer's office. After delivery of the client file to the client or the client's new lawyer, the lawyer may deliver a statement of costs of copying of the file to the client but may not withhold delivery of the client file pending payment.

(5) If the lawyer provides the original client file to the client, the lawyer may, at no cost to the client, retain copies of all documents within the lawyer's file for the lawyer's purposes.

(6) The terms and conditions of the allocation of copying and delivery costs involved in the client file may be fixed by a written agreement between the client and the lawyer at the inception of the representation.

(b) Client file retention and destruction.

(1) A lawyer shall take reasonable steps to maintain the client's file in paper or electronic format for five (5) years after the conclusion of the representation in a matter.

(2) At any time following the expiration of five (5) years following the conclusion of the representation in a matter, a lawyer may destroy the client's files related to the matter.

(3) The providing to the client of the lawyer's file-retention-and-destruction policy in any writing, including an engagement letter or agreement or termination of representation letter, shall satisfy the notice requirement of this rule.

(4) Notwithstanding subparagraphs (1), (2), and (3), a lawyer in a criminal matter shall maintain the client's file for the life of the client if the matter resulted in a conviction, by plea or trial, and sentence of death, natural life, or life without parole, unless the client's file is turned over to some appropriate, permanent central-file repository that maintains such criminal case files in compliance with this rule.

(5) This rule does not supersede or limit a lawyer's obligations to retain or destroy contents of a client's file as otherwise imposed by law, court order, or rules of a tribunal.

American Bar Association Formal Opinion 471
July 1, 2015

Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled

Upon the termination of a representation, a lawyer is required under Model Rules 1.15 and 1.16(d) to take steps to the extent reasonably practicable to protect a client's interest, and such steps include surrendering to the former client papers and property to which the former client is entitled. A client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter. However, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client.

Travis v. Committee on Professional Conduct, 2009 Ark. 188, 306 S.W. 3d 3 (attorney disciplined for not surrendering file to client).

Geatches v. State of Arkansas, 2016 Ark. 452, 505 S.W. 3d 691 (inmate seeks files from public defender and private attorney in civil case).

X. WHAT IS THE LAWYER'S DUTY TO A FORMER CLIENT?

Arkansas Rule of Professional Conduct 1.9: Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

American Bar Association Formal Opinion 479
December 15, 2017

The "Generally Known" Exception to Former-Client Confidentiality

A lawyer's duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client's disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become "generally known."

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

Martindale v. Richmond, 301 Ark. 162, 782 S.W. 2d 582 (1990)

First Am. Carriers, Inc. v. Kroger Co., 302 Ark. 86, 787 S.W. 2d 669 (1990)

Burnette v. Morgan, 303 Ark. 150, 794 S.W. 2d 148 (1990)

Cobb v.Estate of Keown, 53 Ark. App. 171, 920 S.W. 2d 501 (1996)

McAdams v. Ellington, 331 S.W. 363, 970 S.W. 2d 203 (1998)

Norman v. Norman, 333 Ark. 644, 970 S.W. 2d 270 (1998)

Avery v. State, 93 Ark. App. 112, 217 S.W. 3d 162 (2005) (prosecutor had represented the defendants three years earlier; but the matters were not substantially related).

The "Appearance of Impropriety" in the Arkansas Rules of Professional Conduct*:*

Preamble:

[13A] A lawyer owes a solemn duty to uphold the integrity and honor of the profession; to encourage respect for the law and for the courts; to act as a member of a learned profession; to conduct affairs so as to reflect credit on the legal profession; and to inspire the confidence, respect and trust of clients and the public. To accomplish those objectives, the lawyer must strive to avoid not only professional impropriety, but also the appearance of impropriety. The duty to avoid the appearance of impropriety is not a mere phrase. It is part of the foundation upon which are built the rules that guide lawyers in their moral and ethical conduct. This obligation should be considered in any instance where a violation of the rules of professional conduct are at issue. The principle pervades these Rules and embodies their spirit.

Rule 1.7

COMMENT [37]: As an integral part of the lawyer's duty to prevent conflict of interests, the lawyer must strive to avoid not only professional impropriety, but also the appearance of impropriety. The duty to avoid the appearance of impropriety is not a mere phrase. It is part of the foundation upon which are built the rules that guide lawyers in their moral and ethical conduct. This obligation should be considered in any instance where a violation of the Rules of Professional Conduct are at issue. The principle pervades these Rules and embodies their spirit.

Rule 1.9

COMMENT[10]: The duty to avoid the appearance of impropriety discussed in Comment [37] to Rule 1.7 is likewise applicable to Rule 1.9 and Rule 1.10.

XI. RECENT CASE LAW ON THE UNAUTHORIZED PRACTICE OF LAW

Arkansas Rule of Professional Conduct 5.5: Unauthorized Practice of Law, Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

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A: Unauthorized Practice by an attorney:

Arkansas Bar Association v. Union National Bank, 224 Ark. 48, 273 S.W. 2d 408 (1954) (Arkansas attorney assisting bank in the practice of law).

Willett v. State, 334 Ark. 40, 970 S.W. 2d 804 (1980) (Texas attorney, teaching at Arkansas law school, not entitled to pro hac vice admission to argue before Supreme Court).

Preston v. University of Arkansas Medical School, 354 Ark. 666, 128 S.W. 3d 430 (2003) (complaint filed by Oklahoma attorney, not admitted in Arkansas pro hac vice).

Brown v. Kelton, 2011 Ark. 93, 380 S.W. 3d 361 (attorney employed by insurance company prohibited from representing the insured).

B: Unauthorized Practice by a non-attorney:

Nisha, LLC v. Tribuilt Const. Group, LLC, 2012 Ark. 130, 388 S.W. 3d 444 (non-lawyer president prohibited from representing corporation in arbitration).

SMG 1054, Inc. v. Thompson, 2014 Ark. App. 524, 443 S.W. 3d 574) (representative of corporate creditor appeared in court to represent creditor and to seek continuance to obtain an attorney).

Stephens Production Company v. Bennett, 2015 Ark. App. 617 (tax accounting manager filed an appeal from the Board of Equalization to the County Court; subsequent action initiated in Circuit Court; appeal dismissed, as initial appeal to County Court was null and void, in violation of prohibition against the unauthorized practice of law).

DeSoto Gathering Company, LLC v. Hill, 2017 Ark. 326, 531 S.W. 3d 396 (non-attorney tax manager filed tax assessment appeal from the Board of Equalization to the County Court; six weeks later attorney filed amended, but untimely, petition of appeal; an issue of the unauthorized practice of law goes to subject matter jurisdiction, and can be raised at any time, even sua sponte; the appeal was a nullity).

DeSoto Gathering Co, LLC v. Hill, 2017 Ark. 324 (valuation appeal dismissed for lack of subject matter jurisdiction).

USAC Leasing, LLC v. Hill, 2017 Ark. 329 (taxpayer's challenge to assessments to county court filed by a non-attorney; dismissed for being the unauthorized practice of law).

USAC Leasing, LLC v. Hill, 2017 Ark. 335 (challenge filed by non-attorney representative of taxpayer; dismissed).

DeSoto Gathering Company, LLC v. Hill, 2018 Ark. 103 (dismissal of valuation appeal did not bar a subsequent tax refund suit).

Miesner v. Estate of Allred, 2017 Ark. App. 390, 525 S.W. 3d 498 (petition seeking the appointment of personal representative must be filed by attorney).

5/7/2018