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COMMENT

ARKANSAS MODEL RULES OF PROFESSIONAL CONDUCT: AN AFFIRMATIVE APPROACH TO PROFESSIONAL RESPONSIBILITY

On December 16, 1985, the Arkansas Supreme Court granted the Arkansas Bar Association's petition for the adoption of the Model Rules of Professional Conduct,1 subject to certain modifications recommended by the Bar's Special Committee on the Model Rules.2 The Rules replace the existing Arkansas Code of Professional Responsibility,3 which had been adopted per curiam on June 21, 1976, effective July 1, 1976. The new rules are "rules of reason" to be interpreted with reference to the purposes of legal representation and the court rules, statutes, and substantive and procedural law that help shape the lawyer's role.4 "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law."5

Neither can this comment exhaust all the legal and ethical ramifications presented by the adoption of the Model Rules.6 The purpose of this comment is to alert practicing attorneys to some of the more significant changes pertaining to the lawyer-client relationship, advocacy, conduct within the firm, and the dissemination of information about legal services. In the words of the late Robert J. Kutak, chairman of

2. These changes appear as Exhibit B to the court's per curiam order. 287 Ark. at 497-98, 702 S.W.2d at 326-27.
4. In re Bar Petition, 287 Ark. at 502-03, 702 S.W.2d at 330.
5. Id. at 503, 702 S.W.2d at 330.
6. For specific ethical problems, the practitioner is strongly recommended to consult the rules and the more detailed guidance given in the comments to the rules. Other recommended references are G. Hazard & Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (1985); Lawyers' Manual on Professional Conduct (ABA/BNA).
the A.B.A. Commission on Evaluation of Professional Standards, widely known as the Kutak Commission:7

Let it be clearly understood that the Model Rules do indeed change and change fundamentally the regime of the 1969 code, the current form of our statement of professional standards. But the Model Rules are meant to work no fundamental change in the law of professional responsibility, as opposed to its particular articulation in various codes in various places. . . . Where the articulation of that law in other codes was ambiguous, or contradictory, or silent, the Rules seek to clarify, to rationalize (in the finer sense) and to guide the conscientious lawyer in what conscientious lawyers have always done: balancing competing duties in the professionally responsible representation of clients.8

Thus, the discussion of the significant “changes” presented by Arkansas’ adoption of the Model Rules will necessarily entail some analysis of existing case law.9 Further insight is provided by the many articles that have been written both in favor of, and in opposition to, the Model Rules.10 Since it is impractical to deal with the entire Model Rules in this comment, citations to related provisions and authorities will be given when appropriate without extended discussion.

It should also be noted at the outset that the Model Rules, which set forth the various rules (for disciplinary purposes) and corresponding comment are assembled under eight topics.11 The Ethical Considerations of the former Code have been abandoned entirely. The purpose of this format is “to establish clear and enforceable rules of conduct for lawyers in the various contexts in which they practice and in their relationship with the public; thus avoiding ‘the difficulty and uncertainty of attempting to legislate normative values at two levels—aspiration and

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8. Id. at 144 (emphasis in original).
9. Indeed, the great majority of cases that have discussed the impact of the Model Rules have done so in the course of applying the Model Code of Professional Responsibility. This is understandable since the Model Rules were not adopted by the ABA House of Delegates until August 2, 1983. As of February 26, 1986, only eleven states—Arizona, Arkansas, Delaware, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, and Washington—had adopted the Model Rules. See Nix v. Whiteside, 106 S. Ct. 988, 995 n.4 (1986).
11. The headings are: Client-lawyer relationship, counsel or, advocate, transactions with persons other than clients, law firms and associates, public service, information about legal services, and maintaining the integrity of the profession.
minimum conduct.' 12 In addition to enforcement under the Model Rules, lawyers should be alert to the possibility of further ethical pronouncements in the substantive areas in which the attorney practices. 13

1. Client-Lawyer Relationship

"In preparing the Final Draft [of the Model Rules], it seemed self-evident that lawyers exist and are defined primarily in their relationships with clients. Thus, the parameters of the client-lawyer relationship were the starting point. They remain the opening theme of the Model Rules." 14 While some commentators have not identified them as substantive changes in the former Code, 15 Rule 1.2, describing the scope and limitations of the attorney-client relationship at its inception, and rule 1.4, describing the lawyer's affirmative duty to communicate, are significant new provisions of the Model Rules. 16

A. Scope of Representation & Communication

Rule 1.2 establishes the respective roles of the client and lawyer in defining their relationship. The rule is generally derived from principles of agency law. 17 However, prior to the adoption of the Model Rules, the allocation of decision-making power had never been fully addressed


15. See Armstrong, supra note 12, at 494-97.

16. Although it contains no explicit cross-references, Rule 1.2 is closely linked to a number of other central rules, including Rule 1.6 (confidentiality), Rule 1.16 (declining or terminating representation), Rule 3.3 (client perjury), and rule 4.1 (truth-telling by the lawyer). G. HAZARD & W. HODES, supra note 6, at 17. Similarly, the duty to communicate with the client arises in many contexts. See, e.g., State v. Boyer, 103 N.M. Ct. App. 655, 712 P.2d 1 (1985) (defendant's appeal); Louisiana State Bar Ass'n v. Drury, 455 So.2d 1387, 1390 (La. 1984) (failure to disclose a financial conflict of interest deprived clients of "a valuable intangible interest:" i.e., negotiation of terms of employment with full knowledge of all material information).

17. ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 23 (1984) (citations omitted). See also Veasey v. Joshlin, 257 Ark. 422, 516 S.W.2d 596 (1974) (under Arkansas Law, attorney has no implied authority to settle a case); Ashworth v. Hankins, 248 Ark. 567, 452 S.W.2d. 838 (1970) (mere retainer does not authorize attorney to act beyond scope of actual or apparent authority).
in the profession's standards of conduct.\textsuperscript{18} Under Rule 1.2 "[o]bjectives are for the client, means are for the lawyer, and only 'sometimes' are they not easily distinguished."\textsuperscript{19} The duty to communicate is inherent in defining the scope of the representation since the "lawyer shall abide by the client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."\textsuperscript{20} The lawyer may limit the scope of the representation, but only if the client consents after consultation.\textsuperscript{21} Rule 1.2(a) also requires that the attorney honor the client's decisions regarding whether to accept a settlement offer, the plea to be entered, whether to waive a jury trial and whether to testify.\textsuperscript{22} Case law has recognized the client's ultimate authority to decide whether to take an appeal, but criminal defense counsel need not raise every non-frivolous issue in order to survive an ineffective assistance claim.\textsuperscript{23} The familiar rule that the attorney shall not engage, or assist a client, in conduct known to be criminal or fraudulent is contained in Rule 1.2(d).\textsuperscript{24} "Rule 1.2(e), referred to by critics and sponsors alike as the Miranda provision, requires lawyers to warn clients, in appropriate cases, that lawyers are not for hire as accomplices."\textsuperscript{25} In the litigation context, the requirements of Rule 1.2 can be found\textsuperscript{26} in the following excerpt from Fleming Sales Co. v. Bailey:\textsuperscript{27}

\begin{itemize}
  \item 19. Brown & Dauer, Professional Responsibility in Nonadversarial Lawyering: A Review of the Model Rules, A.B.F. Res. J. 519, 531 (1982). The authors assert that this separation of authority, while suitable in an advocacy context, is too simple in a non-adversarial, planning and counseling context where the client's stated objectives may only be a "means" to a more basic purpose. Id. at 532. See generally Redmount, Client Counseling and the Regulation of Professional Conduct, 26 St. Louis. U.L. Rev. 829 (1982).
  \item 21. Id. Rule 1.2 (c).
  \item 22. See also Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring).
  \item 24. For illustrative cases, see Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1208 (11th Cir. 1985); Davis v. Goodson, 276 Ark. 337, 635 S.W.2d 226 (1982).
  \item 25. G. Hazard & W. Hodes, supra note 6, at 18 (also noting that if the lawyer is drawn unwittingly into wrongful conduct, he or she may be forced to turn on the client, citing Rule 1.6).
  \item 26. Rule 1.2 was not intended to change the substantive law in this area. See Kutak, supra note 7, at 144; Armstrong, supra note 12, at 494-97.
  \item 27. 611 F. Supp. 507 (E.D. Ill. 1985).
\end{itemize}
Litigation lawyers have a broad responsibility under Rule 11 and the Code of Professional Responsibility (now the Model Rules of Professional Conduct): to confer with the client about the facts—and not to accept the client’s version on faith, but to probe the client in that respect (“reasonable inquiry”); to do the lawyers’ homework on the law; and then to counsel the client about just which claims the law reasonably supports in terms of the facts the lawyers’ proper investigation has disclosed. That often involves counseling the client—sometimes against the tide of the client’s displeasure—as to how best to vindicate the client’s interests without abusing another’s. In some instances that may involve advising a client not to pursue a claim or a theory of recovery that in a technical sense (of surviving a Rule 12(b)(6) motion) might perhaps go forward, but by rights should not. When a lawyer fails in that respect—when a lawyer accepts or even encourages the role of a “hired gun” in the worst sense—the costs to the parties and to the courts are often substantial, as they have been here. 28

In summary, Rule 1.2 requires the lawyer to defer to certain decisions of the client, but only after full disclosure of the pertinent law and the relevant limitations on the lawyer’s conduct. Representation does not constitute endorsement of the client’s views 29 and the lawyer may limit the objectives of the representation after consultation. 30 Thus, the resulting attorney-client relationship will resemble a joint undertaking guided by the lawyer’s ethics.

With regard to communication in its own right, “Rule 1.4(a) . . . is a prophylactic rule based on the judgment that lack of adequate communication is at least a contributing factor in most breakdowns of the client-lawyer relationship.” 31 Not only must the lawyer routinely volunteer information about the status of matters entrusted to him, 32 he

28. Id. at 519. The opinion further points out that the best safeguard against frivolous claims is the “integrity and good sense of practicing lawyers who, as officers of the court, have both an ethical and legal duty to screen the claims of their clients for factual veracity and legal sufficiency,” citing Rule 3.1. Id. (quoting Lepucki v. Van Wormer, 765 F.2d 86, 87 (7th Cir. 1985)).
29. AMR Rule 1.2(b), 287 Ark. at 507, 702 S.W.2d at 333.
30. Id. Rule 1.2(c)
31. G. HAZARD & W. HODES, supra note 6, at 65. In this regard, note that Rule 1.5(b) now requires that “the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation” when the lawyer has not regularly represented the client.
32. Even in the absence of an attorney-client relationship, a lawyer may have a duty to communicate. See Croce v. Kurnit, 565 F. Supp. 884 (S.D.N.Y. 1982) (holding an attorney who was an officer of subject managerial and publishing companies breached his fiduciary duty to a professional entertainer by failing to advise her to seek independent counsel. The court found Kurnit’s introduction as “the lawyer” and his explanation to the Croces of the “legal ramifications” of the
must also promptly provide requested details, so long as such requests are reasonable. Rule 1.4(b) explicitly demands communication to the extent necessary for the client to make informed decisions under Rule 1.2. The duty to communicate effectively has also been recognized as necessary to maintain the public's confidence in the legal profession.

B. Confidentiality

Another significant aspect of the attorney-client relationship, both under the Code and the model Rules, is attorney-client confidentiality, "one of the most hotly debated topics of professional ethics." Indeed, "Rule 1.6 caused the greatest controversy of the entire rule drafting process as it went through its various stages of consideration." The fact that both public and professional opinion was aroused attests to the central position of confidentiality in the representation of clients.

The general rule of confidentiality has been extended to require all information relating to the representation to be kept confidential unless the client can be said to have consented, or unless an exception applies. The modern purpose of the rule is to enhance the effectiveness of legal advice by encouraging clients and their lawyers to confer fully and frankly on all matters relating to the client's reasons for seeking such advice. Commenting on the drafting of Rule 1.6, Chairman

33. G. HAZARD & W. HODES, supra note 6, at 65.
34. "[T]he findings of . . . polls . . . suggest that the public's perception of lawyers is that . . . lawyers do not care whether their clients fully understand what needs to be done and why." Burger, The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility, 29 CLEV. ST. L. REV. 377, 379-80 (1980).
35. D'Amato & Eberle, Three Models of Legal Ethics, 27 ST. LOUIS U.L.J. 761, 763, 776 (1983). The authors give a thorough analysis of the two dominant opposing viewpoints, i.e., the "authority" model, placing prime importance on the client's interests, versus the "socialist" model, placing prime importance on serving the public, and propose a third view, the "deontological" model. The deontological model says that some acts are morally obligatory regardless of their consequences to human happiness. The authors assert that ABA Rule 1.6(b)(1) reflects this approach by allowing disclosure if that is the only way to prevent imminent death or substantial bodily harm to a third party.
36. G. HAZARD & W. HODES, supra note 6, at 88.
37. Id.
38. Note that the evidentiary privilege "exists apart from, and is not coextensive with, the ethical confidentiality precepts." United States v. Ballard, 779 F.2d 287, 293 & n.15 (5th Cir. 1986) (citing G. HAZARD & W. HODES, supra note 6, at 89-90).
39. AMR Rule 1.6, 287 Ark. at 516, 702 S.W.2d at 339.
40. AMR Rule 1.6 comment, 287 Ark. at 517, 702 S.W.2d at 339. The narrower, evidentiary privilege is also premised on encouraging full and frank disclosure. See Upjohn Co. v. United States, 449 U.S. 383 (1981) and cases cited therein; Arkansas Nat'l Bank v. Cleburne County
Kutak stated:

Like other highly valued and critically important rights, confidentiality has limits. . . . We must rightly reject any motion [sic] that the professional role should somehow turn the lawyer into a policeman. And we must also rightly reject any notion that the professional role should somehow turn lawyers into co-conspirators with their clients. Between those two poles, the bar must carve out its proper range of activity, the zone of zealous representation within the bounds of law.41

The ABA's version of Rule 1.6 struck the balance by permitting the attorney to reveal information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act likely to result in death or substantial bodily harm.42 However, the Arkansas version struck this balance by permitting disclosure to the extent reasonably believed necessary to prevent the client from committing "a criminal act,"43 thus continuing its practice under DR 4-101(c)(3).44 While a lawyer's exercise of discretion not to disclose information covered by the confidentiality rule is not subject to re-examination for disciplinary purpose,45 this discretion should not be construed as a shield from tort liability. The preamble indicates that the rules "are not designed to be a basis for civil liability" and "nothing in the rules should be deemed to augment any substantive legal duty of

Bank, 258 Ark. 329, 525 S.W.2d 82 (1975) (the privilege is designed to secure subjective peace of mind for the client).


42. Model Rules of Professional Conduct Rule 1.6(b)(1). Both the ABA and Arkansas preambles to the Model Rules state that "[t]he lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure." 287 Ark. at 504, 702 S.W.2d at 331. Even when an exception is applicable, a lawyer may disclose information only to the extent reasonably believed necessary to carry out the purpose of the exception. G. Hazard & W. Hodes, supra note 6, at 100. By the Rules' Terminology section, the requisite belief is an actual belief that comports with what a reasonably prudent and competent lawyer would believe. 287 Ark. at 504, 702 S.W.2d at 332.

43. AMR Rule 1.6(b)(1), 287 Ark. at 516, 702 S.W.2d at 339.

44. Id. at 521, 702 S.W.2d at 342. For an argument that the rule should call for mandatory disclosure to prevent significant harm, see Burke, "Truth in Lawyering": An Essay on Lying and Deceit in the Practice of Law, 38 Ark. L. REV. 1 (1984). For an interesting approach suggesting that the disclosure decision should depend on balancing the interests at stake on an ad hoc basis, see Brennan v. Brennan, 281 Pa. Super. 362, 422 A.2d 510, 518 (1980) (Hoffman, J., concurring). For an argument that the confidentiality requirement should be relaxed in non-litigation and non-adversarial settings, see Kuhn, Disclosure Versus Confidentiality, 29 Cath. L. 356 (1985).

45. See supra note 42.
lawyers or the extra-disciplinary consequences of violating such a duty." Conversely, since the Rule presuppose a larger legal context, including the substantive law that helps shape the lawyer's role, an attorney's potential tort liability would not be affected by Rule 1.6. Arkansas Rule 1.6 also has an additional provision that "[n]either 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."

The Kutak Commission had proposed another exception to the confidentiality requirement allowing disclosure if it was necessary to prevent substantial injury to the financial or property interests of another. This proposal was not included in either the Model Rules or the Arkansas version of the Model Rules. However, Rule 4.1(b) provides that "[i]n the course of representing a client a lawyer shall not knowingly . . . (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Under the Arkansas rule disclosure is required by Rule 1.6 if the client's act is defined as criminal. But for non-criminal fraudulent acts, no such disclosure is authorized. The comment to Rule 4.1 indicates that "substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud," but subjects such disclosure to Rule 1.6. Since the "substantial injury to financial or property interests" exception has not been adopted, Rule 4.1 is in tension with Rule 1.6. Hazard and Hodes argue that courts will inevitably read this exception back into Rule 1.6 in order to protect the lawyer from a potential claim by the client that the lawyer was a knowing accomplice, or that the lawyer was solely responsible for the

46. 287 Ark. at 504, 702 S.W.2d at 331.
47. Id. at 503, 702 S.W.2d at 330.
48. The reasoning of the cases imposing liability on physicians, psychiatrists, and psychologists for their failure to warn third parties of the foreseeable dangers posed by their clients appears equally applicable to attorneys. See generally Annot., 83 A.L.R.3d 1201 (1978).
49. AMR Rule 1.6(c), 287 Ark. at 516, 702 S.W.2d at 339. This provision was taken from the comment and inserted into the rule. In re Bar Petition, 287 Ark. at 497, exhibit B, 702 S.W.2d at 326-27 (1985). Thus, rather than serving as a guide to interpreting Rule 1.6, subsection (c) is authoritative. See 287 Ark. at 504, 702 S.W.2d at 331.
50. G. HAZARD & W. HODES, supra note 6, at 91.
51. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6; AMR Rule 1.6.
52. AMR Rule 4.1, 287 Ark. at 570, 702 S.W.2d at 376.
53. AMR Rule 1.6(b)(1), 287 Ark. at 516, 702 S.W.2d at 339.
54. Id.
55. AMR Rule 4.1 comment, 287 Ark. at 570, 702 S.W.2d at 376.
harm suffered.\textsuperscript{56}

\section*{C. Conflicts of Interest}

Kutak stated that the Model Rules make advances in the area of conflicts of interest in two ways.\textsuperscript{57} First, the Rules focus on actual conflict of interest situations, thus discarding the inherent vagueness in the former "appearance of impropriety" standard.\textsuperscript{58} Second, the Rules address conflicts with regard to former clients, an area in which the Code was silent.\textsuperscript{59} The general duty to avoid conflicts of interest continues under the Rules.\textsuperscript{60} The conflict may arise with regard to the receipt of confidential information,\textsuperscript{61} representing an interest adverse to a former client,\textsuperscript{62} class actions,\textsuperscript{63} financial interests in fee arrangements,\textsuperscript{64} the simultaneous negotiation of settling claims on the merits along with a settlement of costs and attorney fees,\textsuperscript{65} the hiring of a defendant's counsel by a co-defendant,\textsuperscript{66} and the sixth amendment right to effective assistance of counsel.\textsuperscript{67} In multiple representation situations, despite the clients' consent, the lawyer may not simultaneously represent more than one party if he cannot adequately represent their different inter-

\textsuperscript{56} G. HAZARD \& W. HODES, supra note 6, at 91.
\textsuperscript{57} Kutak, Model Rules: Law for Lawyers or Ethics for the Profession, 38 Rec. A.B. City N.Y. 140, 146 (1983).
\textsuperscript{58} Id. See also In re Hof, 102 A.D.2d 39, 478 N.Y.S.2d 39 (1984). Cf. United States v. Washington, 782 F.2d 807 (9th Cir. 1986) (holding mere appearance of impropriety insufficient to override defendant's sixth amendment right to retain counsel of his choice).
\textsuperscript{59} Kutak, supra note 57. But cf. Kevlik v. Goldstein, 724 F.2d 844 (1st Cir. 1984) (asserting that disqualification of a law firm for representing an interest adverse to a former client is the proper result under both the Code and the Rules).
\textsuperscript{60} See, e.g., Dunton v. County of Suffolk, 729 F.2d 903, 908 n.3 (2d Cir. 1984).
\textsuperscript{62} See Masiello v. Perini Corp., 394 Mass. 842, 477 N.E.2d 1020 (1985). Under Rule 1.9, an attorney may not represent another in the same or a substantially related matter if the new client's interests are materially adverse to the former client, unless the former client consents after consultation. See also In re Conduct of Brandsness, 299 Or. 420, 702 P.2d 1098 (1985) (refining the "significantly related" standard to two subsets: matter specific and information specific).
\textsuperscript{63} See Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985); In re Corn Derivatives Antitrust Litigation, 748 F.2d 157 (3d Cir. 1984).
\textsuperscript{64} See United States v. Marrera, 768 F.2d 201 (7th Cir. 1985).
\textsuperscript{65} See Evans v. Jeff D., 106 S. Ct. 1531 (1986), rev'd 743 F.2d 684 (9th Cir. 1984), and cases cited therein.
\textsuperscript{66} A recent Eighth Circuit case rejected an ineffective assistance claim allegedly due to the defendant's lawyer being hired and paid by his co-defendants. See United States v. Shaughnessy, 782 F.2d 118 (8th Cir. 1986) (per curiam).
\textsuperscript{67} For a thorough discussion of the sixth amendment analysis in this area, see Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985).
One jurisdiction now imposes a duty on counsel and the trial court to make a record regarding the investigation of, and consent to, multiple representation in criminal cases. Under Arkansas law, an attorney may not simultaneously represent opposing parties even in unrelated matters, and the conflict may arise from the personal interests of the lawyer and client. It has also been stated that the rule regarding disqualification of the lawyer likely to be a necessary witness is not materially different under the Model Rules.

The focus on actual conflict of interest situations is most pronounced in rule 1.8, which gives specific guidance in certain areas that inevitably involve conflicts of interest. The Rule has eliminated the requirement that the client remain ultimately liable for court costs and litigation expenses advanced by the lawyer and now expressly permits a lawyer to pay these expenses on behalf of a client. It has added the requirement that in settling a malpractice claim, an unrepresented client or former client must first be advised in writing of the propriety of independent representation. The Rule also affirmatively prohibits a lawyer from preparing an instrument giving him or her parent, child, sibling, or spouse any substantial gift from a client unless the client is related to the donee.

The propriety of lawyers related by blood or marriage representing opposing parties was not addressed in the ABA Model Code. The ABA Standing Committee on Ethics and Professional Responsibility addressed this issue in 1975. It noted that the fear of disqualification had caused many firms to avoid hiring lawyers married to a lawyer or

70. See City of Little Rock v. Cash, 277 Ark. 494, 644 S.W.2d 229 (1982) (the remedy was to deny the statutory attorneys’ fees).
71. See Sikes v. Segers, 266 Ark. 654, 587 S.W.2d 554 (1979) (representing a husband while engaging in an undisclosed meretricious relationship with his wife held a conflict of interest).
72. Optyl Eyewear Fashion Int’l Corp. v. Style Companies, 760 F.2d 1045 (9th Cir. 1985).
73. See AMR rule 1.8, 287 Ark. at 526-27, 702 S.W.2d at 346-47.
74. AMR Rule 1.8(e)(1), 287 Ark. at 526, 702 S.W.2d at 346.
75. AMR Rule 1.8(e)(2), 287 Ark. at 526, 702 S.W.2d at 346.
76. AMR Rule 1.8(h), 287 Ark. at 527, 702 S.W.2d at 346-47.
77. AMR Rule 1.8(c), 287 Ark. at 526, 702 S.W.2d at 346. It has been held that a violation of this rule in a testamentary context gives rise to a presumption of undue influence. Park v. George, 282 Ark. 155, 667 S.W.2d 644 (1984); Estate of Younger, 314 Pa. Super. 480, 461 A.2d 259 (1983).
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law student, but that no express prohibition existed against related or married lawyers representing opposing parties. Thus, it declined to interpret the Model Code as imposing a per se prohibition against such representations. Instead, it held that lawyer spouses or relatives, like any lawyer, should fully explain any situation in which a client might question the lawyer's loyalty, and should thereby leave the employment decision to the client. This logic is reflected in Rule 1.8(i). The comment further provides that any disqualification that may result is personal, and is not imputed to other members of the firm.

2. Advocacy

As a litigator, the attorney is guided by Rules 3.1—3.9. The preference under the Model Rules towards the lawyer's responsibility to the tribunal as opposed to the client's ultimate objective has been stated in the following language:

The Model Rules recognize a duty which the advocate owes to a tribunal which might require the disclosure of client confidences to the tribunal in order to avoid material misrepresentations and the presentation of evidence which the lawyer reasonably believes is false. Compare Model Rule 3.3 (Candor Toward Tribunal) which emphasizes the attorney's duty of disclosure, with CODE OF PROFESSIONAL RESPONSIBILITY EC 7-19 and 7-26 which emphasize the advocate's duty to zealously represent clients within the bounds of the law, and which prohibit the presentation of evidence only when such evidence is known to be false.

The duty of candor and fairness has been held to require the disclosure of otherwise confidential information to opposing counsel and the court. In Kath v. Western Media, Inc. the Wyoming Supreme Court held that a letter indicating the lawyer had become partisan and

81. Id. at 103-04.
82. Id. at 105.
84. AMR Rule 1.8(i) comment, 287 Ark. at 528, 702 S.W.2d at 347.
85. Id. at Rules 3.1—3.9, 287 Ark. at 555-69, 702 S.W.2d at 366-76.
86. Block & Ferris, supra note 13, at 501-02 n.5. The authors also note that the advocate's duty to advise the court of contrary controlling precedent and to avoid misleading the court remains unchanged (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3). See also Piambino v. Bailey, 757 F.2d 1112, 1131 n.44 (11th Cir. 1985) (suggesting that lead counsel would be subject to discipline for failing to apprise the district court of a dismissal, on the merits, of "virtually identical" claims in the Northern District of California).
had even contemplated suing the opposing counsel’s clients long before an eventual settlement, should have been disclosed. Furthermore, the duty of candor under the Rules resolves an ambiguity in the Code by requiring the lawyer to take reasonable remedial measures when he discovers he has already offered perjured testimony or false evidence, even if this includes disclosure of otherwise confidential information.

In *Nix v. Whiteside* the United States Supreme Court addressed the classic dilemma that occurs when a defense attorney has every reason to believe his client is about to commit perjury. The attorney informed the client that if he allowed him to testify falsely he would be suborning perjury, that it would be his duty to advise the court of what the client was doing and that the attorney felt he was committing perjury. The jury returned a verdict of second-degree murder. The Supreme Court of Iowa affirmed the conviction. The Eighth Circuit subsequently granted the defendant’s writ of habeas corpus, reasoning that the threat to disclose the client’s confidences breached the standards of effective representation set forth in *Strickland v. Washington*. The Supreme Court granted certiorari and reversed.

The five-member majority opinion analyzed the issue in terms of whether the attorney’s conduct fell within the wide range of professional responses to threatened client perjury acceptable under the sixth amendment. Writing for the majority, Chief Justice Burger reasoned that the attorney’s “duty [of loyalty] is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for the

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88. The court vacated the order confirming the settlement.
89. See AMR Rule 3.3(a)(4), (b), 287 Ark. at 556, 702 S.W.2d at 367, and code comparison. *Id.* at 560, 702 S.W.2d at 369-70. This treatment is in line with the majority of cases that have considered the issue. ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 214 (1984). See also *Nix v. Whiteside*, 106 S. Ct. 988 (1986).
91. Prior to his murder trial, the defendant had consistently told counsel that he had not seen a gun, but that he was convinced his victim had had a gun in his hand. The attorney interviewed the defendant’s companions who were present during the stabbing and none had seen a gun. During preparation for direct examination about a week before trial, the defendant told the attorney for the first time he had seen something “metallic” in the victim’s hand. When questioned about this the defendant responded that “in Howard Cook’s case there was a gun. If I don’t say I saw a gun I’m dead.” 106 S. Ct. at 991.
92. *Id.* at 992.
93. *Id.*
94. State v. Whiteside, 272 N.W.2d 468 (Iowa 1978).
98. *Id.* at 994.
His opinion traces the evolution of professional standards, noting the emphasis that has universally been placed on the lawyer’s duty to uphold the law and the exceptions to otherwise responsible conduct that arise when the client contemplates criminal activity. The majority stated, “It is universally agreed that at a minimum the attorney’s first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct.” They also noted that the Rule finally promulgated in the current Model Rules rejects any participation or passive role by counsel in allowing perjury to be presented unchallenged. All nine Justices agreed that the defendant was not denied the right to effective assistance of counsel by the attorney’s actions and thus, the issuance of the writ of habeas corpus was reversed. The appropriate caveat to the majority’s ethics analysis is emphasized in Justice Brennan’s concurring opinion. He flatly states that the Supreme Court “has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics. . . . Lawyers, judges, bar associations, students and others should understand that the problem has not now been ‘decided.’” However, the direct guidance contained in the majority opinion, applicable to

99. Id. As a circuit court judge, the Chief Justice had stated, “At the trial stage [the lawyer’s] duty is to put the prosecution to its proof, to test the case against the accused, to insist that the procedural safeguards be followed and to put forward evidence which is valid, relevant and helpful to his client. . . . In short he is to put his client’s best foot forward.” Johnson v. United States, 360 F.2d 844, 846 (D.C. Cir. 1966) (Burger, J., concurring).

100. 106 S. Ct. at 994-95.

101. Id. at 996 (citing rule 3.3 comment and Wolfram, Client Perjury, 50 S. Cal. L. Rev. 809, 846 (1977)).

102. 106 S. Ct. at 996 n.6. But cf., Whiteside v. Seurr, 744 F.2d 1323, 1331 (8th Cir. 1984) and Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978) (both approving use of the “free narrative”).

103. 106 S. Ct. at 999-1000. Model Rules provisions cited include 1.2(d), the duty not to counsel or assist the performance of known criminal or fraudulent conduct; Rule 3.3, requiring the disclosure of false evidence even if client confidences are compromised; and Rule 1.16(a)(1), permitting withdrawal if the representation will result in violating the rules of professional conduct or other law. Somewhat surprisingly, the majority opinion did not cite the Miranda provision in Rule 1.2(e), requiring the lawyer to consult with the client regarding the relevant limitations on the lawyer’s conduct when the lawyer knows the client expects assistance not permitted by the Rules. Seemingly, the attorney in Whiteside strictly complied with this provision.

104. 106 S. Ct. at 1000 (Brennan, J., concurring).

105. Id. He cites the majority’s own caveat that it must be careful not to constitutionalize particular standards of conduct acceptable under the sixth amendment and thereby intrude on the states’ proper authority to define appropriate conduct for their practitioners.

106. Id. The concurring opinion of Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens shared this view.
threatened client perjury, is likely to be given much deference from courts all over the county.

3. Conduct Within the Firm

The prevalence of law firms in today's legal practice has been recognized to a certain extent by the American Bar Association within its Model Rules. The Code has been criticized for its failure to give any guidance to "intra-firm ethics". While Rules 5.1, governing the conduct of supervisory lawyers and 5.2, governing that of subordinate lawyers, are innovations of the Model Rules, they do not represent a radical departure from current law. In particular, Rule 5.1 does not impose vicarious disciplinary liability upon a supervisor who has not participated in or ratified a violation of the Rules. Nor does Rule 5.2 give a subordinate an immunity from professional responsibility. Rule 5.1(a), however, does provide that all partners in a firm are supervisory lawyers per se. The Rules "provide that all partners have a duty to see that reasonable measures are taken by the firm" to ensure compliance with professional standards. But partners in a large firm can have a remote and indirect supervisory relationship to associates with whom they do not regularly collaborate. As the comment to Rule 5.1 indicates, the degree of responsibility, and therefore the degree of culpability, "can depend on the firm's structure and the nature of its practice." Similar duties of reasonable supervision are imposed


109. See generally AMR Rules 5.1(c) and 5.2(a), 287 Ark. at 573-74, 702 S.W.2d at 378-79.


112. Hayward & Hazard, Model Rules of Professional Conduct: A Perspective, 63 Chi. B. Rec. 290, 294 (1982). The authors also note that critics argue a duty of ethical supervision should rest only on partners directly involved in the matter in question.
on "supervisory lawyers," such as the heads of business and government departments, under Rule 5.1(b). Accordingly, practitioners should take note that Rule 5.1(a) and (b) "establish new and independent duties for supervisory lawyers and for partners in a firm."

Rule 5.2 is a companion to Rule 5.1, treating lawyers within the same firm differently according to their hierarchical status, but from the subordinate's point of view rather than the supervisor's. Simply stated, subordinates retain their professional responsibilities, regardless of whether they acted at the direction of another. The freedom to act in accordance with another's direction applies only to situations evidencing a "reasonable resolution" of an "arguable" question of professional duty.

With regard to non-lawyer assistants, Rule 5.2 substantially parallels Rule 5.1. The duty of reasonable supervision over non-lawyer assistants was recognized, albeit more narrowly, under the former Code. While the supervisory attorney is not required to guarantee that the non-lawyer will never engage in "incompatible" conduct, if no precautionary steps are taken the lawyer violates the Rule whether or not a non-lawyer associate actually misbehaves. The lawyer is also subject to disciplinary liability for a non-lawyer associate's violations of the Rules if he knowingly either ratifies the conduct or fails to take remedial action when its consequences can be avoided or mitigated.

4. Information About Legal Services

Because of the constitutional, commercial speech implications of a lawyer's dissemination of information about legal services, the rules

115. "Whether a lawyer has ... supervisory authority in particular circumstances is a question of fact." Id.
116. AMR Rule 5.1(b) comment.
117. G. HAZARD & W. HODES, supra note 6, at 454.
118. Id. at 459.
120. G. HAZARD & W. HODES, supra note 6, at 463.
121. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D) and 7-107(J).
122. Rule 5.3 uses the phrase conduct "compatible with the professional obligations of the lawyer." 287 Ark. at 575, 702 S.W.2d at 379 (emphasis added).
123. G. HAZARD & W. HODES, supra note 6, at 464.
124. AMR Rule 5.3(c)(1) and (2), 287 Ark. at 575, 702 S.W.2d at 379.
regulating advertising and solicitation¹²⁶ deal with one of the most dynamic areas of professional ethics.¹²⁷ With one possible exception, these provisions essentially either ban only false or misleading communications,¹²⁸ or impose reasonable disclosure¹²⁹ or record-keeping¹³⁰ requirements. Thus, they are consistent with the Supreme Court’s latest pronouncements in this area.¹³¹ The possible exception is contained in Rule 7.3, governing direct contact with prospective clients.¹³² The Rule excepts from its anti-solicitation rule only “letters . . . or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular mat-

¹²⁶. AMR Rules 7.1—7.5, 287 Ark. at 582-89, 702 S.W.2d at 384-89.
¹²⁸. See, e.g., Rule 7.1, 287 Ark. at 582, 702 S.W.2d at 384. Note that the rule governs all communications about legal services whether oral or written. “False or misleading” advertising is defined as a material misrepresentation, the omission of a material fact, communications likely to create an unjustified expectation of the results the lawyer can achieve or that results can be achieved by unethical or unlawful means, and comparisons with other lawyers’ services that can not be factually sustained. The Supreme Court has consistently identified these types of practices as potentially misleading in the context of advertising professional services, but has not addressed the constitutionality of the statutory definitions. See In re R.M.J., 455 U.S. 191, 201 & n.14.
¹²⁹. See Rules 7.2(d), 7.3, 7.5(b), 287 Ark. at 583, 585, and 589, 702 S.W.2d at 385-86, and 389. Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2282 (1985), held “that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”
¹³⁰. AMR Rules 7.2(b) and 7.3 require copies of written communications which are distributed directly to the consumer to be kept for five years, as opposed to the ABA’s version of two years. See In re Arkansas Bar Ass’n Petition, 287 Ark. at 497-98, Exhibit B, 702 S.W.2d at 327 (1985). In In re R.M.J., 455 U.S. 191, 206 & nn. 19-20 (1982), the Court implicitly approved of the ABA’s approach as an example of the reasonable supervision of general mailings, which is no more extensive than necessary to serve the governmental interest. Whether the Arkansas version of the Model Rules is also “no more extensive than necessary” or an unduly burdensome restriction is subject to debate.
¹³¹. See Zauderer, 105 S. Ct. 2265 (1985); R.M.J., 455 U.S. 191 (1982). The test for commercial speech is summarized and then applied to advertising for professional services in both cases.
¹³². AMR Rule 7.3, 287 Ark. at 585, 702 S.W.2d at 386.
The comment to Rule 7.3 appears to interpret this provision as permitting general mailings, but prohibiting targeted mailings. The growing number of courts that have addressed the issue of direct mail solicitation have generally concluded that the state's interest in regulating commercial speech does not justify an outright prohibition of direct mail advertising. Three courts have collectively rejected arguments in favor of an outright prohibition. The arguments are based on the potential for "ambulance chasing," stirring up litigation, deception, invasion of privacy, undue influence and over-reaching, over-commercialization, and that such regulation is a permissible time, place, and manner restriction. Also rejected were assertions that direct mailings by lawyers are likely to be treated differently by consumers, could give rise to conflicts of interest, or share the same concerns as face-to-face solicitation. In the Supreme Court's most recent opinion on lawyer advertising, Zauderer v. Office of Disciplinary Counsel, the Court found an advertisement geared toward persons injured by the Dalkon Shield intrauterine device unobjectionable. Among other things, the advertisement was not misleading and the concerns justifying the ban on in-person solicitation in Ohralik v. Ohio State Bar Association were not present. Indeed, the Court stated...

133. Id.
134. Id., 287 Ark. at 586, 702 S.W.2d at 387.
136. See Adams, Von Wiegen, and Spencer, supra note 135.
138. 436 U.S. 447 (1978). The Court in Ohralik concluded that in-person solicitation by a lawyer was a practice rife with possibilities for over-reaching, invasion of privacy, the exercise of undue influence, and outright fraud. Id. at 464-65. Significantly, the Court also noted the unique regulatory difficulties presented because in-person solicitation is "not visible or otherwise open to public scrutiny." Id. at 466, quoted in Zauderer, 106 S. Ct. at 2277. But cf. In re Primus, 436 U.S. 412 (1978) (affording full first amendment protection since political expression and association were present).
139. Zauderer, 106 S. Ct. at 2276-80. The Court noted that printed advertising is more conducive to reflection and the exercise of personal choice than personal solicitation by a trained...
that "[a]n attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and non-deceptive information and advice regarding the legal rights of potential clients." Given the Zauderer decision, if the term "solicit" as used in Rule 7.3 is construed to prohibit targeted mailings, it is doubtful it could withstand a constitutional challenge.

CONCLUSION

Perhaps too often in the past the rules of ethics have been disregarded with the justification that "that isn't the way it works in the real world." The present Rules are less susceptible to such criticisms since they contain a modern, comprehensive approach to the lawyer's role in the profession and in society. Their guidance begins with the initial attorney-client encounter by requiring the open communication conducive to informed, but ethical decision-making. They address the lawyer's relation to third parties, his role as counselor, and his paramount duty to the tribunal as an advocate. The Rules for the first time define ethical conduct within the law firm, requiring affirmative action to ensure professional responsibility. They also address the public service aspects of members of the bar and their duties to the profession.

With regard to attorney advertising and solicitation, the pitfalls of the Rules as they apply to direct mailings have been indicated in the previous discussion. However, the fact that restrictions in this area must be narrowly drawn should not be permitted to discourage the bar advocate. Id. at 2277.

140. Id. at 2280.

141. In addition to the lack of in-person solicitation concerns, the unique regulatory difficulties of in-person solicitation are not shared by direct mail solicitation. Although the comment to Rule 7.3 states that "[d]irect mail solicitation cannot be effectively regulated by means less drastic than outright prohibition," it also states that "[a]dvertising is out in public view, thus subject to scrutiny by those who know the lawyer. This informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications. . . ." AMR Rule 7.3 comment, 287 Ark. at 586, 702 S.W.2d at 387. Such advertising is also subject to scrutiny by its recipients, who need only pick up the telephone to inform the Arkansas Committee on Professional Conduct about unsubstantiated advertising. Further, the less restrictive alternative of requiring a copy of all general mailings to be filed with the Committee, proposed in R.M.J., 455 U.S. at 206, is available to the state, and Arkansas' Rule 7.3 already takes the precaution of requiring that the word "advertising" be clearly marked on all written communications. 287 Ark. at 585, 702 S.W.2d at 386.

142. However, if the rules of ethics do not work in the "real" world, we have nobody to blame but ourselves. Arkansas' teacher testing laws, Ark. Stat. Ann. §§ 80-1270 to 1270.4 (Supp. 1985), give us a "down-home" example of what can happen when a self-regulating profession fails to take appropriate action to maintain the public's confidence.

143. See supra notes 132-41 and accompanying text.
from promoting professionalism in advertising. The enhanced protection that has been given to advertising with regard to specific legal problems presents an increased potential for impermissible solicitation. Consumers who have recently experienced either financial or personal tragedies can be particularly susceptible to targeted advertisements. A proposed solution to targeting distressed consumers is presently being considered by the Massachusetts Supreme Court. The proposal would prohibit any type of solicitation directed to clients whose physical or emotional state make them particularly vulnerable to solicitation or who have made known their desire not to be solicited. Since the regulation is aimed at uncontroversible invasions of privacy and the exercise of undue influence, no constitutional objection is apparent on its face.

In contrast to the majority of its provisions, the Rules do not adopt an affirmative approach toward dealing with the special problems of the broadcast media. The comment to Rule 7.2 recognizes the power of television for getting information to the public in support of the Rule's position not to impede this flow of information by limiting the type of information that can be advertised. This approach is probably the best available at the present time, at least until the use of radio and/or television has been shown to be subject to abuse. However, because the broadcast media is such a powerful tool, with live actors, it more closely resembles in-person solicitation than does the use of direct mailings. Thus, a proposal such as the one Massachusetts is presently considering, prohibiting advertising directed at vulnerable consumers, may be a permissible solution in the event such abuses occur.

As the previous discussion indicates, the lawyer's code of ethics must necessarily change with the times and the substantive law. Arkansas' new rules are suitably structured for this purpose. In addition to the practical guidance the Rules give in the modern legal world, their division according to various aspects of the lawyer's duties makes them an easily accessible reference. In sum, the Rules should foster our own ability to maintain the integrity of our profession and the public's confidence in us. For in the final analysis,

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144. See 54 U.S.L.W. 2418 (Feb. 18, 1986).
145. Id.
146. Advertising by radio or television is subject to the same restrictions as other forms of advertising pursuant to Rule 7.2(a). 287 Ark. at 583, 702 S.W.2d at 385.
147. 287 Ark. at 584, 702 S.W.2d at 385.
148. Once experience has proven a particular content or method of advertising is subject to abuse, the states may impose appropriate restrictions. R.M.J., 455 U.S. at 203.
[we] lawyers, as officers of the law, exist not for our own sakes, but for our potential and actual clients and for all nonlawyers. To say that we serve a public role means that the public has a use for us. We more than others should act to optimize that use.149

The adoption of the Model Rules should be helpful in this endeavor. They represent an up-to-date approach to dealing with ethical problems, and are conducive to any modifications the bar may find appropriate. Thus, they should be deemed a welcome addition to professional responsibility in Arkansas.

Daniel L. Parker

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