

IN THE SUPREME COURT OF ARKANSAS

ARKANSAS BAR ASSOCIATION

PETITIONER

**IN RE: RULES GOVERNING
PROFESSIONAL CONDUCT**

PETITION

The Arkansas Bar Association, acting through its President Thomas A. Daily, its Immediate Past President H. Murray Claycomb, and the Chair of its 2002-2003 Professional Ethics Committee, John Lile, with specific direction from its House of Delegates, and in an effort to assist the Court in discharging its responsibility under Amendment 28 to the Constitution of the State of Arkansas to regulate the practice of law, petitions the Supreme Court of Arkansas to revise the Arkansas Rules of Professional Conduct by replacing them with the proposed Rules which are attached as Exhibit A.

1. The Arkansas Rules of Professional Conduct, which were based on the 1983 American Bar Association Model Rules of Professional Conduct, were adopted by this Court in a *Per Curiam* order of December 16, 1985, and became effective on January 1, 1986, 287 Ark. 495, 702 S.W. 2d 326. The Rules have been amended from time to time by this Court since their initial adoption. The current Arkansas Rules of Professional Conduct are published in the 2003 Court

Rules Volume of the Arkansas Code of 1987, Annotated, Official Edition, starting at Page 965 under the title "Model Rules of Professional Conduct."

2. Background.

a. The American Bar Association, through its Ethics 2000 Commission and its Commission on Multijurisdictional Practice, has recently conducted an extensive review of its Model Rules of Professional Conduct, culminating with the American Bar Association House of Delegates revising and adopting the report of the Multijurisdictional Practice Commission at its August 2002 House of Delegates meeting. In essence the American Bar Association is recommending the appropriate authority in each state amend its Rules of Professional Conduct to match the latest version of the American Bar Association Model Rules of Professional Conduct.

b. The Ethics 2000 Commission summarized its changes thusly:

"1. Clarified and strengthened a lawyer's duty to communicate with the client

"2. Clarified and strengthened a lawyer's duty to clients in certain specific problem areas

"3. Responded to the changing organization and structure of modern law practice

- "4. Responded to new issues and questions raised by the influence that technological developments are having on the delivery of legal services
- "5. Clarified existing rules to provide better guidance and explanation to lawyers
- "6. Clarified and strengthened a lawyer's obligations to the tribunal and to the justice system
- "7. Responded to the need for changes in the delivery of legal services to low and middle income persons
- "8. Increased protection of third parties"

While a large number of words were changed, the work was more a fine tuning of the previous Model Rules rather than a drastic overhaul. The Comments have been expanded considerably. The American Bar Association Ethics 2000 Commission report and Commission on Multijurisdictional Practice report and a large amount of related material can be found at <http://www.abanet.org/cpr/ethics2k.html> and <http://www.abanet.org/cpr/mjp-home.html>

c. In September 2002 the Arkansas Bar Association, through its Professional Ethics Committee, Chaired by John Lile of Little Rock, started its study of the American Bar Association recommendations and compared those

recommendations with the current Arkansas Rules of Professional Conduct. Other members of the Committee were: Howard Brill, D. Price Marshall, Jr., Floyd M. Thomas, Jr., Bettina Brownstein, William A. Martin, Paul D. Waddell, Carolyn J. Clegg, Lucinda McDaniel, Eddie H. Walker, Jr., Brad Hendricks, Richard A. Reid, Bruce R. Wilson, Stark Ligon, and Michelle Strause . This Committee started with the idea it would endorse the Model Rules recommendations of the American Bar Association unless there was reason not to do so. Reasons not to follow the American Bar Association include the Arkansas Supreme Court's having recently changed or modified a Rule or inserted different Arkansas provisions (e.g. deviations in Rules 1.6 and 3.7, recent modification to Rules 7.1-7.4, and special provisions in Rules 1.4, 1.15, and 8.3), or the Committee felt a different provision was needed, was more appropriate, or was clearer. It used the American Bar Association numbering system, including numbering Comments, and left blanks for deleted sections or reserved sections. When it added a Comment it used the American Bar Association number and added an "A" to the number for the Arkansas addition. The American Bar Association made numerous Model Rules changes between 1985, when Arkansas initially adopted the Rules, and 2002 when

it approved the Ethics 2000 Report. Arkansas adopted some, but not nearly all these changes. The Committee also considered these earlier changes Arkansas has

Page 5

not yet adopted.

d. The petitioners fear that when the Arkansas Bar Association initially recommended adoption of the American Bar Association Model Rules in 1985 it did not make it clear that the term “Model” refers only to the recommended version and when a state, such as Arkansas, adopts Rules they become the “Arkansas Rules of Professional Conduct” or the “Rules of Professional Conduct.” The Arkansas Bar Association has tried to be careful to use “Model” only with the American Bar Association recommendations and urges the Arkansas Supreme Court to eliminate “Model” from the Rules it adopts.

d. On behalf of the Committee Professor Howard Brill of the University of Arkansas School of Law prepared summaries of proposed major changes to the Arkansas Rules of Professional Conduct and the Committee's deviations from the Model Rules. These summaries were provided to the Arkansas Bar Association Board of Governors and House of Delegates and were posted on the Arkansas Bar Association web site, <http://www.arkbar.com>, in April 2003 so they were available

to any person who visited the web site. These summaries are Exhibits B and C.

Page 6

f. In doing its work the Committee used a redlined version of the Arkansas Rules, showing how the present Arkansas Rules would be changed if the Committee's recommendations were to be adopted. The language to be removed is struck through and the language to be added is underlined. The Committee's final product was posted on the Arkansas Bar Association web site in April 2003, with a separate link for each of the 59 Rules. (The amended version remains there.) The Arkansas Board of Governors approved the Committee's report in principle on April 12, 2003, and forwarded it the House of Delegates. On June 14, 2003, the House of Delegates amended the fourth sentence in Comment [7] of Rule 1.5, (which makes Professor Brill's reference in Exhibit B to Rule 1.5 obsolete) and then by a substantial majority approved submitting the proposed changes to the Rules of Professional Conduct, as amended by the House of Delegates, to the Arkansas Supreme Court with the recommendation that they be adopted by the Court. The current redlined version of how the Rules would be changed is attached as Exhibit D.

3. The Arkansas Bar Association now requests:

a. The Court provide due opportunity for input from the public and the profession on the proposed Rules submitted with this petition.

Page 7

b. The Court review and evaluate the Rules submitted with this petition, the comments received from the public and the profession, and review any other information the Court deems useful,

c. Substitute the proposed Rules for the current Rules.

WHEREFORE, Petitioner requests that the Court request public input on these proposed rules, and pursuant to its power under Amendment 28 to the Arkansas Constitution, adopt these proposed Rules as replacements for the current Rules which govern Arkansas lawyers in their professional conduct.

Thomas A. Daily, President
Arkansas Bar Association

H. Murray Claycomb, Immediate Past
President , Arkansas Bar Association

John Lile, Chair 2002-2003
Professional Ethics Committee

William A. Martin, Member
Professional Ethics Committee