

SUMMARY OF RECENT AMENDMENTS TO THE ARIZONA RULES OF PROFESSIONAL CONDUCT¹

Rule 1.1 Competence

The 2003 amendments to the Arizona Rules of Professional Conduct made no changes to the text of this Rule. There were minor changes to the Comments to the Rule, including a clarification that agreements with clients about the scope of a representation may limit matters for which the lawyer is responsible. A new Comment [7] explains that defense lawyers in capital cases, whether retained or appointed, are to comply with the standards for appointment of counsel set forth in the Arizona Rules of Criminal Procedure.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

The 2003 amendments to the Arizona Rules of Professional Conduct expanded its title to more accurately describe the subjects addressed in the Rule. The phrase “subject to paragraphs (c) and (d)” was moved to the beginning of paragraph (a) to clarify that all of the actions a lawyer is authorized to take by that paragraph are subject to the restrictions of paragraph (d), and some of them are restricted by paragraph (c). Paragraph (a) was amended to clarify that a lawyer “may take such action on behalf of the client as is impliedly authorized to carry out the representation.”

In the Comment to the Rule, a new paragraph 2 was added, addressing the resolution of disagreements with clients about the means to be used to accomplish the client’s objectives. Paragraph 8 of the Comment is also new.

Rule 1.3 Diligence

The 2003 amendments to the Arizona Rules of Professional Conduct left AZ-ER 1.3 substantively unchanged.

Rule 1.4. Communication

The 2003 amendments moved to this Rule certain of the obligations to communicate with clients previously contained in AZ-ER 1.2. Paragraph (a) was expanded to identify five specific categories of information that a lawyer must communicate to a client. A new paragraph (c) was added imposing an obligation on lawyers in criminal cases an obligation to promptly inform clients of preferred plea agreements. The Comment to the Rule was modified to reflect these changes.

¹ These materials have been extracted from the *Arizona Legal Ethics Handbook – 2003 Edition (with 2006 Cumulative Supplement)*, published by the State Bar of Arizona, with the author’s permission, solely for use in conjunction with continuing legal education program presentations. That work is subject to the protections of the copyright laws of the United States.

Rule 1.5 Fees

The 2003 amendments added to AZ-ER 1.5(b) a “writing” requirement with regard to almost every fee agreement between a lawyer and client, but it does not require that the writing be signed by the client. The intent was to eliminate, to the extent possible, misunderstandings about fee arrangements. Contingent fee agreements and fee-splitting agreements, on the other hand, must now be actually signed by the client. The imposition of a “writing” requirement with respect to fee agreements follows the recommendation of the ABA Ethics 2000 Commission, but this recommendation was not adopted as part of MR 1.5 by the ABA House of Delegates.

A new subparagraph (d)(3) was added which imposes additional requirements with regard to so-called “earned upon receipt” or “nonrefundable” fees. Lawyers who seek to enter into such arrangements must provide the client with a *written* notice that (1) the lawyer may be discharged at any time, and (2) a portion of the fee may be refundable, depending upon the value of the services provided by the lawyer. Paragraph 7 of the Comment elaborates upon this provision, and explains that it does not apply to “true retainers.”

Paragraph (e) was revised, and deviates from MR 1.5(e), by eliminating the option to avoid client consent to fee-splitting arrangements by dividing the fee among lawyers in proportion to the services performed. Under the amended Rule, any lawyer sharing a fee must assume joint responsibility for the matter, and the client must agree, in writing, to the participation of all the lawyers involved. New language was added to paragraphs 8 and 9 of the Comment to explain the restrictions on fee-splitting agreements and referral fees.

Paragraph 6 of the Comment was revised to clarify the propriety of contingent fee arrangements for post-dissolution collection matters. Previously, contingent fee agreements were not permitted in any domestic relations matter. The new language in the Comment clarifies that such fee agreements may be permitted when the engagement is simply to collect an amount of money previously awarded and in arrears.

Rule 1.6 Confidentiality of Information

The principal change made to this Rule by the 2003 amendments was the expansion of the situations where a lawyer is permitted to reveal information “relating to the representation of a client,” which the lawyer must otherwise maintain in confidence. New subparagraphs (1) and (2) of AZ-ER 1.6(d) permit the disclosure of such confidential information (1) to prevent a client from committing a crime or fraud through use of the lawyer’s services, and (2) to mitigate or rectify a substantial injury that is reasonably certain to result or has resulted to the financial interests or property of another from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services. This permissive disclosure exception was recommended by the ABA’s Ethics 2000 Commission, but has not as yet been adopted as part of the Model Rules.

New or amended subparagraphs were also added to paragraph (d) to permit a lawyer to reveal confidential client information in order to secure ethical advice or to comply with “a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.”

Rule 1.7 Conflict of Interest: Current Clients

The 2003 amendments changed the title of the Rule from “Conflict of Interest: General Rule” to “Conflict of Interest: Current Clients,” and restructured the Rule, but made only one substantive change. That was the addition of the requirement that a client’s informed consent to or waiver of a conflict of interest be confirmed in writing.

Rule 1.8. Conflict of Interest: Prohibited Transactions

In 2003, AZ-ER 1.8(e) was amended to eliminate the requirement that a client remain ultimately liable for costs and expenses of litigation advanced by the lawyer, and a lawyer is now permitted to make repayment contingent on the outcome of the matter. A provision was added to paragraph (h) to prohibit agreements in which a client agrees not to report a lawyer to appropriate professional authorities.

Existing paragraph (i), regarding lawyers in different firms who are married or related by blood, was moved to paragraph (l), and expanded to apply to “cohabitants.” This provision was eliminated from MR 1.8, and made the subject of a paragraph in the Comment to MR 1.7. Arizona determined to retain it as part of AZ-ER 1.8 due to the frequency of inquiries regarding conflicts between related lawyers.

A new paragraph (j), prohibiting sexual relations between attorneys and clients unless there was a pre-existing sexual relationship between them, was added. (Such conduct had previously been held to violate AZ-ER 1.7.) Finally, a new paragraph (k) specifies that all of the specific prohibitions of AZ-ER 1.8, except those contained in paragraphs (j) and (l), are imputed to all lawyers in the affected lawyer’s firm and specifies that the imputation of conflicts covered in AZ-ER 1.8(a)-(l) is governed by this new Rule rather than AZ-ER 1.10.

Rule 1.9 Conflict of Interest: Former Client

The principal change effected by the 2003 amendments was to move what was formerly AZ-ER 1.10(b) to this Rule as AZ-ER 1.9(b), with changes in wording for purposes of clarity. In addition, the requirement was added that the consent of a former client to a conflict covered by this Rule be confirmed in writing.

Rule 1.10 Imputed Disqualification: General Rule

The 2003 amendments added new language to paragraph (a), providing that certain personal interest conflicts of a lawyer will not be imputed to other lawyers in the firm. Former AZ-ER 1.10(b) was moved to AZ-ER 1.9 as paragraph (b). The most significant substantive change was the adoption of new AZ-ER 1.10(d), which had been recommended by the ABA Ethics 2000 Commission, but was rejected by the ABA House of Delegates. This provision permits a firm who acquires a new lawyer to avoid disqualification from certain matters as to which that lawyer would have a conflict of interest by screening that lawyer, and providing notice of having done so to that lawyer’s affected former client. The provision does not apply in situations where the matter involves a proceeding before a tribunal in which the new lawyer had a substantial role.

Rule 1.11 Successive Government and Private Employment

The 2003 amendments made only very minimal changes to this Rule, most of those occurring in the accompanying Comment. The only change made to the Rule itself was to add to paragraph the requirement that any consent by a government agency be “informed consent, confirmed in writing.”

Rule 1.12 Former Judge or Arbitrator

The 2003 amendments expanded the coverage of the Rule to include arbitrators, mediators and other third-party neutrals. In addition, the consent required from parties to a prior adjudicative proceeding to avoid the limitations imposed by the Rule must now be “informed consent confirmed in writing.”

Rule 1.13 Organization as Client

The 2003 amendments to this Rule made only minor, clarifying amendments to the Rule itself, but did add language to paragraph 6 of the accompanying Comment to make clear that a government lawyer may have the authority to represent the “public interest” in circumstances where a private lawyer would not be authorized to do so. The Rule was subsequently amended, however, effective December 1, 2004, to conform it more closely to the corresponding Model Rule.

Rule 1.14 Client With Diminished Capacity

The 2003 amendments to the Arizona Rules of Professional Conduct changed the title of this Rule, and its terminology, to refer to clients suffering from “diminished capacity,” rather than “disabled” or “impaired.” Other changes to the Rule provide additional guidance to lawyers seeking “protective action” for such a client.

Rule 1.15 Safekeeping Property

The 2003 amendments to this Rule more closely aligned a lawyer’s duties with the provisions of Rules 43 and 44, RASC, dealing with lawyer trust accounts. A new paragraph (b) permits lawyers to deposit their own funds into client trust accounts, but only to the extent necessary to pay bank service charges. A new paragraph (c) specifies that unearned fees and expenses must be deposited into a trust account.

Former paragraph (c), which was relettered as paragraph (e), was amended to clarify a lawyer’s duties when the lawyer has possession of funds or property in which two or more persons (one of which may be the lawyer) claim an interest. When a dispute arises, the Rule requires the lawyer to promptly distribute those portions of the funds or property not in dispute, attempt to resolve the dispute and, if the dispute cannot be resolved, commence an interpleader action.

The Rule was subsequently amended, effective December 1, 2004, to delete the final sentence of AZ-ER 1.15(e), which required a lawyer to file an interpleader action when efforts to resolve disputes as to the right to funds or property in the lawyer’s possession proved unsuccessful.

Rule 1.16 Declining or Terminating Representation

In 2003, paragraph (c) of the Rule was revised to make clear that lawyers must comply with applicable law or court rules when seeking to terminate a representation that involves litigation. Paragraph (d) was also revised to specify what documents must be returned to the client upon the termination of a representation, and that a lawyer may not retain documents reflecting work performed for the client, or assert a lien with respect to them, if to do so would prejudice the clients' rights.

Rule 1.17 Sale of Law Practice

This Rule, which has been in the Model Rules since 1991, was only added to the Arizona Rules of Professional Conduct by the 2003 amendments thereto.

Rule 1.18 Duties to Prospective Client

AZ-ER 1.18 is a new Rule, added to the Arizona Rules of Professional Conduct by the 2003 amendments.

Rule 2.1 Advisor

The 2003 amendments made no changes to the text of this Rule. A sentence was added to paragraph 5 of the accompanying Comment, indicating that when a lawyer is engaged to handle a matter that may involve litigation, the lawyer may have a responsibility to inform the client of reasonable alternatives to litigation for resolving the dispute.

Rule 2.2 [Reserved]

Former AZ-ER 2.2, which governed a lawyer's obligations when undertaking to mediate the actual or potential conflicting interests of present or former clients, was abrogated as unnecessary as part of the 2003 amendments. Former MR 2.2 was also removed from the Model Rules of Professional Conduct.

To the extent a lawyer undertakes to arbitrate or mediate a dispute between parties whom the lawyer does not represent, new AZ-ER 2.4 controls. To the extent a lawyer undertakes to resolve differences between two or more *clients*, this was considered a species of joint representation and the strictures of AZ-ER 1.7 apply *See Comment, AZ-ER 1.7, ¶ 31*.

Rule 2.3 Evaluation for Use by Third Persons

The Rule was amended in 2003 to reduce the number of situations where a lawyer must secure client consent to provide a third party with an evaluation of a matter being handled for that client. If the lawyer reasonably believes that providing such an evaluation is compatible with other aspects of the relationship with the client, then consent is not required. Where the lawyer knows or should know, however, that the evaluation is likely to have a material adverse effect on the client's interests, the evaluation may not be provided without the client's informed consent. Corresponding changes were also made to the Comment accompanying the Rule.

Rule 2.4 Lawyer Serving as Third-Party Neutral

AZ-ER 2.4 is a new Rule added to the Arizona Rules of Professional Conduct by the 2003 amendments.

Rule 3.1. Meritorious Claims and Contentions

The 2003 amendment added references to both “good faith” and “law and fact” to make clear that an objective standard controls the propriety of an argument for an extension, modification or reversal of existing law. A sentence was added to paragraph 2 of the Comment to clarify that a lawyer has an ethical obligation to independently verify the facts and applicable law before advancing an argument that the client desires to make. A new paragraph 3 of the Comment provides that a lawyer for a criminal defendant can conduct the defense so as to require the prosecution to prove all of the elements of the offense charged, but adds the caveat that the lawyer may not make frivolous motions. Finally, a new paragraph 4 of the Comment further explains that a lawyer’s obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal case to the assistance of counsel in presenting an appeal that would otherwise be prohibited by the Rule.

Rule 3.2 Expediting Litigation

The 2003 amendments to the Arizona Rules of Professional Conduct made no changes to AZ-ER 3.2 or the accompanying Comment.

Rule 3.3 Candor Toward the Tribunal

The 2003 amendments to this Rule made more specific the lawyer’s obligations when the lawyer becomes aware of false, fraudulent or criminal misconduct before a tribunal. Amended paragraph (a)(1) clarifies that a lawyer has an obligation to correct false statements previously made to a tribunal by the lawyer. Amended paragraph (b) addresses a lawyer’s obligation to take remedial measures, including disclosure to the tribunal where necessary, if a person is engaging, or has engaged, in criminal or fraudulent conduct in a proceeding before a tribunal.

Rule 3.4 Fairness to Opposing Party and Counsel

This Rule was not changed by the 2003 amendments. Language was added to paragraph 2 of the Comment to alert lawyers to the law governing possession of physical evidence of client crimes.

Rule 3.5 Impartiality and Decorum of the Tribunal

The 2003 amendments added paragraph (c) dealing with communications with trial jurors following discharge of the jury and made corresponding changes to the Comment to the Rule.

Rule 3.6 Trial Publicity

AZ-ER 3.6 has been rewritten in an effort to specify the proper boundaries between proper and improper extrajudicial statements in a fashion that addresses the concerns that lead the Supreme Court, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), to declare unconstitutional a Rule in Nevada that was identical to former AZ-ER 3.6.

Rule 3.7 Lawyer as Witness

Only editorial changes were made to the Rule itself in 2003. Language was added to the Comment to specify that the tribunal also may object to a lawyer serving as both advocate and witness if the tribunal believes that would cause confusion.

Rule 3.8 Special Responsibilities of a Prosecutor

The 2003 amendments added a new paragraph (e) which sets limits on when a prosecutor may subpoena a lawyer in a grand jury or other criminal proceeding to testify about a past or present client. Language was also added to paragraph (f) to limit extrajudicial statements by prosecutors except where such statements inform the public about the nature and extent of their actions and serve a legitimate law enforcement purpose.

Rule 3.9 Advocate in Nonadjudicative Proceedings

The amendments made to the Rule clarify that, if a lawyer is representing a client in a nonadjudicative proceeding, before an administrative agency or the Legislature, the lawyer must disclose the lawyer's representative capacity.

Rule 4.1 Truthfulness in Statements to Others

The 2003 amendment made only one change to the Rule itself, eliminating the phrase "to a third person" from paragraph (b). The Comment was expanded to provide additional guidance regarding the lawyer's duty of candor and the prohibition on assisting a client's crime or fraud.

Rule 4.2 Communication with Person Represented by Counsel

The text of AZ-ER 4.2 is virtually identical to that of MR 4.2, with the exception that Arizona retained the reference to communications with “a party,” while the Model Rule refers to communications with “a person.” The Comment to the Arizona Rule, however, only incorporates portions of the fourth and seventh paragraphs of the Comment that accompany MR 4.2, and adds at the end of its Comment a reworded version of the second paragraph of the Comment to the Model Rule.

Rule 4.3 Dealing with Unrepresented Person

The 2003 amendments to this Rule emphasize the lawyer’s obligation to make the lawyer’s status clear to unrepresented persons whose interests are or may be in conflict with the interests of the lawyer’s client, and to advise unrepresented persons to secure separate counsel when there is a reasonable possibility of such a conflict.

Rule 4.4 Respect for Rights of Third Persons

The 2003 amendments added a new paragraph (b) which governs what lawyers should do when documents are inadvertently transmitted to them. The amendments to AZ-ER 4.4 went further than the similar amendments to MR 4.4, in that AZ-ER 4.4(b) requires the receiving lawyer to preserve the *status quo* for a reasonable period of time after notifying opposing counsel of the receipt of the document(s).

Rule 5.1. Responsibilities of Partners, Managers and Supervisory Lawyers

The 2003 amendments changed the title and paragraph of the Rule, and the accompanying Comment, to extend the requirements of the Rule beyond partners in a private firm to those with comparable managerial authority, and to managing lawyers in corporate law departments, government agencies and legal services organizations. The basic requirement of the Rule - that such managing lawyers make reasonable efforts to insure that the conduct of lawyers in the “firm” comport with the requirements of the Rules of Professional Conduct - was unchanged.

Rule 5.2 Responsibilities of a Subordinate Lawyer

The 2003 amendments to the Arizona Rules of Professional Conduct made no changes either to this Rule or to the accompanying Comment.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

As with AZ-ER 5.1, the 2003 amendments to this Rule and the accompanying Comment similarly expanded its coverage beyond partners in a private firm to those with comparable managerial authority, as well as to managing lawyers in corporate and government law departments and legal services organizations.

Rule 5.4 Professional Independence of a Lawyer

In light of the adoption of AZ-ER 1.17, this Rule was amended to permit a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer to pay the purchase price to the estate or non-lawyer representative of the incapacitated lawyer. A new paragraph (a)(4) was added which permits a lawyer to share court-awarded fees with a non-profit organization that hired or recommended the lawyer. Paragraph (d) was amended to prevent lawyers from practicing with a professional corporation or association authorized to practice law for a profit if a nonlawyer is a corporate officer or director, or occupies a position of similar responsibility in any form of association other than a corporation.

Rule 5.5 Unauthorized Practice of Law

There were no changes proposed or made to this Rule as part of the 2003 amendments to the Arizona Rules of Professional Conduct, because the issue of what Rules to adopt to accommodate multijurisdictional practice was still under study by the State Bar's Task Force on the Multijurisdictional Practice of Law. That Task Force's recommendations were subsequently approved by the Board of Governors, with some modifications, and submitted to the Supreme Court, which adopted them, again with some modifications, effective December 1, 2004.

Rule 5.6 Restrictions on Right to Practice

The 2003 amendments expanded the coverage of this Rule, which prohibits partnership or employment agreements that restrict a lawyer's right to practice after termination of the relationship, to shareholders, operating and other similar types of agreements.

Rule 5.7 Responsibilities Regarding Law-Related Services

AZ-ER 5.7 was added as a new Rule to the Arizona Rules of Professional Conduct by the 2003 amendments. The Rule has been in the Model Rules of Professional Conduct since 1994.

Rule 6.1 Voluntary Pro Bono Public Service

There were no changes made to this Rule or the accompanying Comment by the 2003 amendments to the Arizona Rules of Professional Conduct.

Rule 6.2 Accepting Appointments

There were no changes made to this Rule or the accompanying Comment by the 2003 amendments to the Arizona Rules of Professional Conduct.

Rule 6.3 Membership in Legal Services Organization

There were no changes made to this Rule or the accompanying Comment by the 2003 amendments to the Arizona Rules of Professional Conduct.

Rule 6.4 Law Reform Activities Affecting Client Interests

There were no changes made to this Rule or the accompanying Comment by the 2003 amendments to the Arizona Rules of Professional Conduct.

Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs

AZ-ER 6.5 is a new Rule, added by the 2003 amendments to the Arizona Rules of Professional Conduct.

Rule 7.1 Communications Concerning a Lawyer's Services

The 2003 amendments effectively abandoned the approach previously taken in the Arizona Rules of Professional Conduct to lawyer advertising and communications with prospective clients in favor of a return to the structure of the Model Rules. The amendments to this Rule reduced the pages of detailed requirements for lawyer communications to a single paragraph, while retaining the core principle that lawyers may not make false or misleading communications concerning their services to prospective clients.

Rule 7.2 Advertising

The 2003 amendments changed the title of the Rule from “Legal Service Information” to “Advertising” and changed the text, following in substance and format the corresponding Model Rule, with three Arizona-specific additions. New paragraph (d) retains the disclosure requirements of former AZ-ER 7.1(d) concerning fee advertisements. New paragraph (e) establishes specific requirements for advertising on electronic media. New paragraph (f) sets forth specific requirements that must be met when a Rule requires that a disclosure or statement be “clear and conspicuous.”

Rule 7.3 Direct Contact with Prospective Client

The 2003 amendments permit lawyers to engage in direct personal or telephonic solicitation of business from another lawyer or from a person with whom the soliciting lawyer has a close personal relationship. Paragraph (b) of the Rule was amended to prohibit any solicitation of individuals who may have a personal injury or wrongful death claim for a period of thirty (30) days after the incident giving rise to the claim.

Rule 7.4 Communication of Fields of Practice

No changes were made to this Rule or the accompanying Comment by the 2003 amendments to the Arizona Rule of Professional Conduct.

Rule 7.5. Firm Names and Letterheads

The substance of this Rule was not changed by the 2003 amendments to the Arizona Rules of Professional Conduct.

Rule 8.1 Bar Admission and Disciplinary Matters

No changes were made to this Rule or the accompanying Comment by the 2003 amendments to the Arizona Rules of Professional Conduct.

Rule 8.2 Judicial and Legal Officials

No changes were made to this Rule or the accompanying Comment by the 2003 amendments to the Arizona Rules of Professional Conduct.

Rule 8.3 Reporting Professional Misconduct

The changes made to this Rule by the 2003 amendments were not substantive; the phrase “having knowledge” in paragraphs (a) and (b) was replaced with “knows.”

Rule 8.4 Misconduct

The 2003 amendments added to paragraph (e) of the Rule language making it misconduct for a lawyer to state or imply an ability to achieve results by illegal or unethical means. This is similar to language that appeared in former AZ-ER 7.1(a)(2), and it was relocated to this Rule to make clear that such a statement is misconduct regardless whether it is made in connection with the marketing of legal services.

Rule 8.5 Disciplinary Authority; Choice of Law

There were no changes proposed or made to this Rule as part of the 2003 amendments to the Arizona Rules of Professional Conduct, because the issue of what Rules to adopt to accommodate multijurisdictional practice was still under study by the State Bar’s Task Force on the Multijurisdictional Practice of Law. That Task Force’s recommendations were subsequently approved by the Board of Governors, with some modifications, and submitted to the Supreme Court, which adopted them, again with some modifications, effective December 1, 2004.