

Ethical Dilemmas New Attorneys Face: By Examining the Situations of Two New Memphis Lawyers

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I. INTRODUCTION

“Every lawyer, at least once in every case, feels himself crossing a line that he doesn’t really mean to cross. It just happens. And if you cross it enough times, it disappears forever. And then you’re nothing but another lawyer joke. Just another shark in the dirty water.”¹ For this reason, the American Bar Association (“ABA”) first adopted its Model Code of Professional Responsibility in 1969.² However, it was not until 1983 that the ABA produced the Model Rules of Professional Conduct “that are central to [today’s] study of legal ethics.”³ Although the ABA’s Model Rules are only “*proposed law*,” they have become law in the many states whose supreme courts have adopted them,⁴ including Arkansas.⁵ In more recent years, law students have been required to take Professional Responsibility,⁶ and most states require students to pass the Multistate Professional Responsibility Examination (“MPRE”) in order to

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1. THE RAINMAKER (Constellation Entertainment 1997).

2. See THOMAS D. MORGAN ET AL., PROFESSIONAL RESPONSIBILITY 17 (Saul Levmore et al. eds., abr. 13th ed. 2018).

3. *Id.* Even so, since this time the Model Rules have continued to be revised, some portions significantly so. See *id.* at 17–18.

4. *Id.* at 19.

5. HOWARD W. BRILL, ARKANSAS PROFESSIONAL AND JUDICIAL ETHICS 1–2 (9th ed. 2018). In large, Arkansas has adopted the Model Rules, albeit with certain modifications. See *id.* at 2–4.

6. Peter A. Joy, *Monroe Freedman’s Influence on Legal Education*, 44 HOFSTRA L. REV. 649, 654 (2016) (“In 1974 . . . the ABA adopted an accreditation standard that ABA-accredited law schools require of all students ‘instruction in the duties and responsibilities of the legal profession,’ which must encompass . . . ‘the ABA Code of Professional Responsibility.’”).

ensure high standards in the legal field.⁷ This article uses the Arkansas Rules of Professional Conduct⁸ to examine the ethical dilemmas new lawyers will potentially encounter and how they should be handled by examining two movies: *The Rainmaker*⁹ and *The Firm*.¹⁰

II. BACKGROUND

Although new lawyers, generally, emerge from law school having taken a professional responsibility course and the MPRE,¹¹ and, therefore, know what is ethically required, these movies suggest compliance with the Rules of Professional Conduct proves more difficult in the real world.¹² Each movie stars a young lawyer just beginning his legal career in Memphis, Tennessee.¹³ Rudy Baylor in *The Rainmaker* and Mitch McDeere in *The Firm* both started their law careers working for criminals.¹⁴ Both exited law school having just taken Professional Responsibility, both knowing their ethical duties, and both struggling with crossing that line neither really wished to cross. But they did. Both Baylor and McDeere crossed the line at different times during their new legal careers; sometimes

7. Leslie C. Levin, *The MPRE Reconsidered*, 86 KY. L. J. 395, 399 (1998) (stating the MPRE was invented “in response to concerns about lawyers’ ethical conduct and the public’s perception of lawyers”); *Multistate Professional Responsibility Examination*, NAT’L CONF. OF BAR EXAMINERS, [https://perma.cc/4YLN-AR8K] (last visited Sept. 12, 2019) (providing the MPRE “is required for admission to the bars of all but three U.S. jurisdictions.”).

8. ARK. RULES PROF’L CONDUCT (ARK. BAR ASS’N 1986).

9. *THE RAINMAKER*, *supra* note 1.

10. *THE FIRM* (Paramount Pictures 1993).

11. *See Joy*, *supra* note 6; Levin, *supra* note 7.

12. *See THE FIRM*, *supra* note 10; *see also THE RAINMAKER*, *supra* note 1.

13. *THE FIRM*, *supra* note 10; *THE RAINMAKER*, *supra* note 1.

14. In *The Rainmaker*, Rudy Baker started his career working for J. Lyman Stone who hired Deck Shifflet, a non-licensed attorney, to do work that required a license in violation of Rule 5.5 of the Arkansas Rules of Professional Conduct. *THE RAINMAKER*, *supra* note 1. Rule 5.5 prohibits the unauthorized practice of law and a lawyer from “assist[ing] a person in practicing law in violation of the rules governing professional conduct in that person’s jurisdiction.” ARK. RULES PROF’L CONDUCT r. 5.5 cmt. 1 (ARK. BAR ASS’N 1986). Stone was also under investigation for tax evasion and money skimming. *THE RAINMAKER*, *supra* note 1; *see* ARK. RULES PROF’L CONDUCT r. 8.4(b) (“It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”). In *The Firm*, Mitch McDeere started his law career working for a well-paying Memphis law firm, Bendini, Lambert, & Locke, which had anyone who tried to leave the firm murdered and habitually overbilled its clients. *THE FIRM*, *supra* note 10.

clearly, sometimes less so. Part III of this article examines whether Baylor made unethical decisions when he (A) continued working for a boss he thought might be engaging in criminal activity and (B) conducted a million-dollar wrongful-death jury trial as a new lawyer. Similarly, Part IV of this article examines whether McDeere made an unethical decision by (A) representing members of a mob.

III. ETHICAL DILEMMAS THROUGH THE EYES OF RUDY BAYLOR

The Rainmaker presents many ethical dilemmas, some of which are obviously unethical, such as when: (1) Baylor did not explain a contract between himself and the client,¹⁵ (2) he helped solicit clients at a hospital,¹⁶ (3) he attempted to argue a motion in court without a license,¹⁷ (4) he did not find and

15. THE RAINMAKER, *supra* note 1. In one of *The Rainmaker*'s early scenes, Baylor had just begun working for Stone, who told Baylor to have his clients sign a contract agreeing to Baylor and Stone's representation of them. *Id.* When Baylor took the contract to the Blacks to sign it, Dot Black asked him what the contract included, and Baylor responded, "oh it's just standard language." *Id.* This response violates the Arkansas Rules of Professional Conduct's Preamble, which states "[a]s advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." ARK. RULES PROF'L CONDUCT pmbl. Rule 1.4 also mandates lawyers to keep clients "reasonably informed" and to "promptly comply with reasonable requests for information." *Id.* r. 1.4(a)(3)-(4). Although the comments indicate this rule concerns keeping clients informed regarding a specific matter, entering a contract agreeing to representation, undoubtedly, requires the lawyer to inform the client. *See id.* r. 1.4. Additionally, Rule 1.2 requires lawyers to consult with the client regarding how their objectives will be pursued and what decisions they will need to make. *Id.* r. 1.2(a). Lastly, Rule 1.5(b) requires a lawyer communicate the scope of representation. *Id.* r. 1.5(b).

16. THE RAINMAKER, *supra* note 1. A lawyer may not solicit a client in person when his "significant motive" is "pecuniary gain." ARK. RULES PROF'L CONDUCT r. 7.3. In *The Rainmaker*, Shifflet took Baylor to a hospital to solicit clients. THE RAINMAKER, *supra* note 1. When Baylor announced "they did not teach [him] how to chase ambulances in law school" and Shifflet responds, "well you better learn or you'll starve," the conversation indicated their significant motive was pecuniary gain. *See id.* After this exchange, Baylor continued to solicit hospital patients with Shifflet, even having one patient, who was incapacitated in a fully-body cast, sign a contract. *Id.* Even if Baylor technically did not solicit the person himself, Arkansas Rule of Professional Conduct 8.4 states that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the rules of professional conduct, [and] knowingly assist . . . another to do so." ARK. RULES PROF'L CONDUCT r. 8.4(a).

17. Arkansas Rule of Professional Conduct 5.5 prohibits the unauthorized practice of law by a lawyer not admitted to practice in that jurisdiction. Although exceptions apply when a lawyer is admitted in another jurisdiction and is only temporary practicing in a state he is not admitted, *see* ARK. RULES PROF'L CONDUCT r. 5.5(c), this exception did not

depose key witnesses prior to trial,¹⁸ (5) he told the jury if they did not punish the insurer they could be its next victim,¹⁹ (6) Baylor left his client at *his own* crime scene,²⁰ and (7) he partnered with Shifflet.²¹ However, this article primarily

apply to Baylor, who told Shifflet right before appearing in court to argue a motion “I don’t even have my license” to which Shifflet responded “you don’t need a license.” See THE RAINMAKER, *supra* note 1. Baylor then entered the courtroom and told the judge he was prepared to argue the motion. *Id.*

18. Rule 1.1 requires that a lawyer be able to provide a client with “competent representation,” requiring “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” ARK. RULES PROF’L CONDUCT r. 1.1. Baylor failed to competently represent the Blacks when he failed to depose key witnesses prior to trial. After he arrived at Great Benefit to take those depositions, he found several key witnesses he intended to depose had been fired; however, he did not later attempt to find or contact those witnesses. See THE RAINMAKER, *supra* note 1. Similarly, this lack of action violated Arkansas Rule of Professional Conduct 1.3, which requires a lawyer “act with reasonable diligence and promptness in representing a client.” ARK. RULES PROF’L CONDUCT r. 1.3. Although the comment explains a lawyer has discretion in determining how to pursue the matter, he must “pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.” *Id.* r. 1.3 cmt. 1.

19. In his closing argument, Baylor stated “I’m asking you the jury . . . Just do what you think is right, in your hearts. If you don’t punish Great Benefit, you could be their next victim.” See THE RAINMAKER, *supra* note 1. Arkansas Rule of Professional Conduct 3.4(e), however, prohibits a lawyer from alluding to a matter he does not reasonably believe “will [] be supported by admissible evidence” and from stating “a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.” ARK. RULES PROF’L CONDUCT r. 3.4(e). Although the trial, *Black v. Great Benefit*, involved only a civil matter, this closing statement was Baylor’s opinion about the culpability of Great Benefit—they did something wrong and if not found liable they would continue doing such wrong—to the jury members, as well as a statement not reasonably likely to be supported by admissible evidence. THE RAINMAKER, *supra* note 1.

20. Baylor also represented Kelly Riker, the physically abused wife of Cliff Riker. THE RAINMAKER, *supra* note 1. When she finally decided to leave her husband, Baylor accompanied her to the Rikers’ home to retrieve her things. *Id.* However, Cliff Riker returned home during the escapade and turned extremely violent. *Id.* In self-defense, Baylor killed him using a baseball bat. *Id.* Instead of staying at the scene when the police came, however, Baylor fled, leaving his client to take the fall and falsely confess to killing her husband. *Id.* Baylor’s actions were unethical under Arkansas Rule of Professional Conduct 1.7 because representation of Kelly Riker in this situation involved a concurrent conflict of interest. “[T]here [was] a significant risk” that his representation of her was “materially limited” by his personal interest when he fled the scene, believing she would be found innocent due to self-defense but was unsure he would get off as easy. See ARK. RULES PROF’L CONDUCT r. 1.7(a)(2).

21. Baylor partnered with Shifflet, a law school graduate although not admitted to practice, in violation of Arkansas Rule of Professional Conduct 5.5, which prohibits a lawyer from assisting another in the unauthorized practice of law. *Id.* r. 5.5(a); see THE RAINMAKER, *supra* note 1. Additionally, both agreed to split the profits “50/50,” therefore violating Arkansas Rule of Professional Conduct 5.4(a), which prohibits splitting legal fees

analyzes those dilemmas that fall in the Rules' grey area by considering whether Rudy Baylor violated the Rules of Professional Conduct: (A) by continuing to work for an employer under criminal investigation without investigating further and (B) by representing a client for a multi-million-dollar insurance claim. Both issues are considered under the specific context of Baylor being new to the legal field.

A. Is It Unethical to Continue Working for a Boss that Might Be Engaging in Criminal Acts?

The Rainmaker begins with Rudy Baylor preparing to graduate law school, looking for a job, and finding one—working for J. Lyman Stone, a successful, ambulance-chasing plaintiff's attorney.²² However, shortly after Baylor begins working for Stone, he sees a newspaper article discussing a criminal investigation involving Stone.²³ Instead of investigating those allegations, Baylor continued working for Stone without a word.²⁴ Although the only indication that his employer was engaged in criminal conduct was from a newspaper story, was this not enough information to require Baylor to at least investigate the claims, and possibly quit if substantiated? There are multiple relevant rules to this analysis.²⁵ Of great importance is Rule 8.3, which places a duty on a lawyer, who has knowledge of another lawyer's violation of the Rules of Professional Conduct, to “inform the appropriate professional authority.”²⁶ Under this rule, “[k]nowledge means less than actual certainty, but more than mere suspicion” and can be “inferred from circumstances.”²⁷ Although an attorney does

with non-licensed lawyers. ARK. RULES PROF'L CONDUCT r. 5.4(a); *see* THE RAINMAKER, *supra* note 1.

22. THE RAINMAKER, *supra* note 1 (“Some of my classmates knew they'd be going from school to top law firms, thanks mostly to family connections. My only connections were made in the bars I worked in to pay my tuition. I still had plans to shine the light of justice into every dark corner, but I needed a job, badly.”).

23. *Id.*

24. *See id.* Baylor continues working for Stone until Shifflet tells him at lunch that they both need to leave Stone's firm because one of his partners “cut a deal” and testified against Stone. *Id.*

25. *See* ARK. RULES PROF'L CONDUCT r. 3.5, 5.5, 8.3, 8.4.

26. *See id.* r. 8.3(a). The requirement is only triggered when violation of one of the rules “raises a *substantial* question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.” *Id.* (emphasis added).

27. BRILL, *supra* note 5, at 228.

not have to report the misconduct of a lawyer he is representing “whose professional conduct is in question,”²⁸ this exception does not apply simply because lawyers are in the same firm.²⁹ Lawyers in the same firm are still required to report those who are guilty of substantial violation of the Rules.³⁰ “[F]ailure to report is itself a violation of Rule 8.4(a).”³¹

The issue, here, is whether Baylor had knowledge that required him to report Stone. When Baylor saw the newspaper article he almost certainly lacked “actual certainty” because he had no other evidence besides what the newspaper alleged.³² However, as long as he had more than “mere suspicion” a duty would have been placed on him, which by the end of the relationship, Baylor very likely did.³³ Stone had given him and Shifflet a huge bonus,³⁴ and Shifflet confirmed the newspaper article’s allegations.³⁵ Also, the violations were substantial.³⁶ Therefore, Baylor should have at least reported Stone.³⁷

Although Baylor should have reported Stone, should he have also quit working for him? Despite no rule existing that requires an attorney to quit working at a firm, without quitting Baylor’s continued employment would have likely caused him

28. ARK. RULES PROF’L CONDUCT r. 8.3 cmt. 4.

29. See generally *Ligon v. Newman*, 365 Ark. 510, 231 S.W.3d 662 (2006).

30. See *id.*; see BRILL, *supra* note 5, at 228.

31. BRILL, *supra* note 5, at 228.

32. THE RAINMAKER, *supra* note 1.

33. See *id.*

34. See *id.* After receiving the money, Shifflet told Baylor that “something [was] about to go down,” that Stone “never split money like that before.” *Id.*

35. *Id.* Shifflet also told Baylor he was “gonna have to make a move,” that “things might get a little hot because of Stone’s jury tampering, money skimming, tax evasion . . .” See *id.*

36. “The term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.” ARK. RULES PROF’L CONDUCT r. 8.3 cmt. 3 (ARK. BAR ASS’N 1986). The offense must “raise[] a *substantial* question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” *Id.* r. 8.3(a) (emphasis added). In *The Rainmaker*, the offense substantially called into question Stone’s honesty, trustworthiness, and overall fitness as a lawyer because his actions could have detrimentally affected his trials and clients, especially considering clients entrusted Stone with their funds. Examples of a “substantial breach” are “[t]he conversion of client funds, the forgery of a signature, or the conviction for a felony offense.” Thomas M. Carpenter, *A Question of Duty and Honor*, ARK. LAWYER at 16, 18 (Winter 1995).

37. Even though it is likely the Board of Professional Conduct would have already known and started investigating the matter themselves after such a newspaper article was published, this did not relieve Baylor of his own duty to report. See ARK. RULES PROF’L CONDUCT r. 8.3.

to violate the Rules himself, and at times already had.³⁸ If Stone practiced jury tampering and worked with Baylor on his cases, Stone would likely continue tampering in Baylor's cases, which would cause him to violate Rules 3.5 and 8.4.³⁹ If Stone mishandled clients' funds, then the clients' funds brought by Baylor would also be at risk.⁴⁰ Although there is no definitive answer, all new lawyers who decide to practice law for a firm after graduating could face a similar situation. Those lawyers must (1) report substantial misconduct, even that of a superior; and (2) decide whether continuing with the firm could end in their violation of the Rules and, thus, whether their employment should continue.

B. Is It Unethical to Conduct a Million-Dollar Trial as a New Lawyer?

The Rules of Professional Conduct do not specify at what time a new attorney is competent to handle a trial.⁴¹ However, they do provide some guidance on the issue. For example, Rule 1.1 requires all lawyers "provide competent representation to a client."⁴² Lawyers must have the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁴³ Factors may be employed in determining whether a lawyer has "the requisite knowledge and skill in a particular matter."⁴⁴

Even "[a] newly admitted lawyer can be as competent as a practitioner with long experience" because with adequate study many lawyers may be able to provide adequate representation though they may have no prior knowledge of the subject.⁴⁵

38. See THE RAINMAKER, *supra* note 1. Stone had already encouraged, if not mandated, Baylor to violate some of the Rules. See *supra* note 16 and accompanying text. Baylor's working with Shifflet, a non-licensed attorney practicing law, also violated the Rules. See ARK. RULES PROF'L CONDUCT r. 5.5.

39. See ARK. RULES PROF'L CONDUCT r. 3.5, 8.4.

40. See *id.* r. 8.3.

41. See generally ARK. RULES PROF'L CONDUCT r. 1.1.

42. *Id.*

43. *Id.*

44. *Id.* r. 1.1 cmt. 1. The relevant factors are: "the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." *Id.*

45. See ARK. RULES PROF'L CONDUCT r. 1.1 cmt. 2, 6.

Determining whether a matter is handled competently includes inquiry into “the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners . . . includ[ing] adequate preparation.”⁴⁶ When a lawyer feels incompetent to handle a particular matter alone, he may bring in outside help.⁴⁷

In *The Rainmaker*, one of Baylor’s first clients as a recent law-school graduate was the Black family.⁴⁸ The Blacks had purchased an insurance plan through Great Benefit, but when their son Donny Ray was dying of leukemia Great Benefit denied their claim on eight occasions to provide for Donny Ray’s medical treatment.⁴⁹ Great Benefit denied coverage on the grounds that his leukemia was a pre-existing condition.⁵⁰ After the lawsuit against Great Benefit was filed and Baylor was working with Stone on the case, Great Benefit moved to dismiss the suit.⁵¹ Stone planned to argue against the motion but when he did not show up to court, Baylor, not licensed and accompanied by Shifflet, took his place and was sworn in by the judge.⁵²

At this point in *The Rainmaker*, Baylor’s representation of the Blacks unlikely violated Rule 1.1’s requirements—he was working with an experienced attorney and experienced law-school graduate,⁵³ and insurance claims, generally, are not necessarily of such a complex, specialized nature that Baylor could not participate in the case. Additionally, the proceeding, arguing a motion, required less experience than other types of proceedings such as a trial.⁵⁴

When the attorneys met in the judge’s chambers after the motion, and the judge and Great Benefit’s attorney tried to

46. *Id.* r. 1.1 cmt. 5.

47. *See id.* 1.1 cmt. 6–7.

48. THE RAINMAKER, *supra* note 1.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Despite this violating Rule 5.5, this does not negate Baylor’s competence at this point. Arkansas Rule of Professional Conduct Rule 1.1 Comment 2 provides that “[c]ompetent representation can also be provided through the association of a lawyer of established competence in the field in question.” In *The Rainmaker*, Baylor associated with Stone, “a lawyer of established competence.” *See* ARK. RULES PROF’L CONDUCT r. 1.1 cmt. 1 (ARK. BAR ASS’N 1986); THE RAINMAKER, *supra* note 1.

54. *See* THE RAINMAKER, *supra* note 1.

“ambush” Baylor into settling, Baylor recognized the scheme.⁵⁵ This reveals some of Baylor’s competence in handling the matter.⁵⁶ However, more importantly, Baylor conducted a multi-million-dollar jury trial for wrongful death.⁵⁷ The trial revealed that 9,141 of Great Benefit’s 11,462 total clients had also been denied claims.⁵⁸ Additionally, Baylor never deposed, or even tried to find prior to trial, Jackie Lemanczyk—a key witness who handled the Blacks’ insurance claim.⁵⁹ During the trial, Baylor struggled to make objections, not knowing what to say or how to say it.⁶⁰ He also struggled to introduce crucial evidence, although ultimately finding a way.⁶¹

At some point, every litigation lawyer must have his first trial. Therefore, it cannot be that whenever a lawyer has never tried a lawsuit, he is consequently incompetent to do so because he lacks experience. However, in this case Baylor: did not depose a key witness; did not know how to object to opposing counsel and, thus, protect his client and his witnesses; did not have any trial experience, let alone specific insurance experience; and did not have any help from an experienced attorney.⁶² An experienced attorney also would have strongly considered turning the Blacks’ case into a class-action lawsuit. Additionally, simply because every litigation lawyer will at one point litigate his first trial does not mean that the first one should be a multi-million-dollar lawsuit.⁶³ For all these reasons, Baylor was more than likely not competent under Rule 1.1 to handle this case when it evolved from a simple insurance claim case to a multi-million-dollar-wrongful-death case.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. THE RAINMAKER, *supra* note 1; *see supra* note 18.

60. THE RAINMAKER, *supra* note 1.

61. *Id.* Of critical importance was an employee handbook Lemanczyk had taken with her which included a section, damning Great Benefit, that was not provided during discovery. *Id.*

62. *Id.*

63. *Cf.* Christopher Sabis & Daniel Webert, *Understanding the “Knowledge” Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 *Geo. J. Legal Ethics* 915, 927–28 (2002).

IV. ETHICAL DILEMMAS THROUGH THE EYES OF MITCH MCDEERE

Similar to Rudy Baylor, in the movie *The Firm* Mitch McDeere began his law career working for criminals.⁶⁴ *The Firm*, like *The Rainmaker*, presented obvious examples of unethical behavior such as when: (1) the Firm had employees, who tried to leave the Firm, murdered;⁶⁵ (2) the Firm blackmailed McDeere;⁶⁶ (3) the Firm habitually overbilled its clients;⁶⁷ and (4) McDeere planned to copy client files and provide them to the FBI.⁶⁸ In contrast, one less obvious example of unethical conduct is McDeere's solution to being free from the Firm. Although he gave the FBI information about the Firm's corrupt billing practices (without actually yielding confidential client information), he also decided to become the Chicago Mob family's lawyer, telling the Mob that the Firm outrageously overbilled them.⁶⁹

New lawyers may face a similar question—can I or should I represent a criminal specifically in transactional matters? Joining a firm for the first time, new lawyers will be asked to do work for pre-existing clients, rarely leaving law school with their own client base. But what happens when a new lawyer is

64. THE FIRM, *supra* note 10.

65. An employer commits a criminal act “that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer” in violation of Rule 8.4(b) of Professional Conduct by murdering its employees. See ARK. RULES PROF’L CONDUCT r. 8.4(b) (ARK. BAR ASS’N 1986).

66. See John Freeman, *Blackmail and You*, 17-JUL S.C. LAW. at 9 (July 2005). “The underlying philosophy of the firm, simply stated, was that blackmail helps ensure loyalty to the cause.” Robert P. Perry, *College Savings Accounts: Golden Handcuffs for the Entire Family?*, 79 MICH. B. J. 205, 205 (Feb. 2000).

67. Overbilling violates Rule 8.4(c), which prohibits a lawyer from “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.” ARK. RULES PROF’L CONDUCT r. 8.4(c). The Arkansas Annotation to Rule 1.5 of the Arkansas Rules of Professional Conduct states, “[b]illing on an hourly basis requires discipline to properly bill the client and self-control to prevent abuse of the client.” BRILL, *supra* note 5, at 41.

68. Providing client files to anyone outside of a lawyer’s firm violates Rule 1.6(a), which prohibits a lawyer from “reveal[ing] information relating to representation of a client unless the client gives informed consent” ARK. RULES PROF’L CONDUCT r. 1.6(a). Although the plan to release confidential information itself is not necessarily unethical, had McDeere actually carried out his plan he would have violated the Rules. Even though his purpose was “to prevent the commission of a criminal act,” McDeere was, nevertheless, required to limit the scope of the information revealed to what he believed was reasonably necessary to prevent the act. *Id.* r. 1.6(b)(1).

69. THE FIRM, *supra* note 10.

given a case to work on for a client he knows is a criminal who profits from illegal enterprises?

A. Was McDeere's Decision to Represent a Mob Boss Unethical?

The last focus of this article is whether it is ethical for a lawyer to perform transactional work for a client he knows to be engaging in criminal activity. In order for McDeere to escape the Firm, he told the Chicago Mob family that he is now their lawyer.⁷⁰ Although lawyers may, of course, represent clients who are criminal defendants or being sued for wrongdoing, the transactional representation of a criminal client may be different.⁷¹

Per Rule 1.2(d), “[a] lawyer shall not counsel a client to engage, or assist a client in, conduct that the lawyer knows is criminal or fraudulent,” however “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.”⁷² A lawyer’s representation of a client, however, “does not constitute approval of the client’s views or activities.”⁷³ Although a lawyer is prohibited from “knowingly counseling or assisting a client to commit a crime or fraud,” the lawyer is not precluded “from giving an honest opinion about the actual consequences that appear likely to result from a client’s conduct.”⁷⁴ Furthermore, “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” because “[t]here 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.”⁷⁵

Additionally, once the attorney-client relationship has begun, “the lawyer’s responsibility is especially delicate.”⁷⁶ The

70. *See id.*

71. *Cf.* ARK. RULES PROF’L CONDUCT r. 1.2(d).

72. *Id.*

73. *Id.* r. 1.2 cmt. 5.

74. *Id.* r. 1.2 cmt. 9.

75. *Id.*

76. ARK. RULES PROF’L CONDUCT r. 1.2 cmt. 10.

lawyer must “avoid assisting the client” in “drafting or delivering documents that the lawyer knows are fraudulent.”⁷⁷ Lawyers also cannot provide a client advice as to how “wrongdoing might be concealed.”⁷⁸ Neither can they continue assisting clients in conduct they “originally supposed was legally proper but then discovers is criminal or fraudulent.”⁷⁹

Specifically in Arkansas, an attorney may be liable to a third party when engaging in acts that are injurious to that party.⁸⁰ Rule 8.4(b) states that it is unethical for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer”⁸¹ Similarly, Rule 8.4(c) holds it is unethical for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation,” while Rule 8.4(d) provides that a lawyer shall not “engage in conduct that is prejudicial to the administration of justice.”⁸² In addition, lawyers have a duty to avoid “the appearance of impropriety.”⁸³

All of these rules must be considered in understanding whether McDeere’s decision was ethical or not. Although *The Firm* did not explain what McDeere’s representation of the mob consisted of, mob families generally engage in organized crime for profit.⁸⁴ And transactional representation of the mob could include things such as: (1) creating legal entities; (2) drafting and negotiating contracts; (3) “advis[ing] on general governance, commercial, and compliance matters”; (4) completing “tax exemption applications”; (5) “counsel[ing] on real estate, regulatory, intellectual property and licensing

77. *Id.*

78. *See id.*

79. *See id.* In that case, the lawyer is required to “withdraw from the representation of the client in the matter.” *Id.*

80. *See* Peterson v. Worthen Bank & Trust Co., 296 Ark. 201, 204, 753 S.W.2d 278, 280 (1988).

81. ARK. RULES PROF’L CONDUCT r. 8.4(b).

82. *Id.* r. 8.4(c), (d).

83. *Id.* r. 1.7 cmt. 37 (“This obligation should be considered in any instance where a violation of the Rules of Professional Conduct [is] at issue. The principle pervades these Rules and embodies their spirit.”).

84. *See Mafia*, BLACK’S LAW DICTIONARY (11th ed. 2019). Black’s Law dictionary defines “organized crime” as “[w]idespread criminal activities that are coordinated and controlled through a central syndicate . . . of criminals who rely on their unlawful activities for income.” *Organized Crime*, BLACK’S LAW DICTIONARY.

matters”); and (6) drafting estate planning documents.⁸⁵ The creation of legal entities and drafting and negotiating contracts could especially pose ethical issues for an attorney representing mob members. Even if the actual contracts are legal, the attorney, nevertheless, seems to be assisting the mob in its criminal organization. Therefore, the best duty to consider may be the lawyer’s duty to avoid impropriety.⁸⁶ Representation of members of a mob ultimately looks improper. Additionally, because it is likely that an attorney for a mob family will assist in clients’ criminal conduct, an attorney should not handle a client’s transactional work when the source of the client’s income is from organized crime.⁸⁷

V. CONCLUSION

Although these movies may be extreme examples, both exemplify issues new lawyers may encounter. Primarily, all new lawyers will have to decide who to work for, be it a firm, corporation, or themselves and may encounter well-established unethical practices at that firm and have to decide what to do about it, if anything.⁸⁸ New lawyers will, especially if joining an established firm, also have to consider their representation of pre-existing clients and whether they can ethically represent them.⁸⁹

85. *Transactional Law*, HARVARD LAW SCHOOL, [<https://perma.cc/837A-BJHQ>] (last visited Nov. 18, 2018).

86. ARK. RULES PROF’L CONDUCT pmb. 13A; MODEL RULES OF PROF’L CONDUCT pmb. 5 (AM. BAR ASS’N 1983).

87. However, this article in no way suggests a lawyer is precluded from representing members of the mob on trial for criminal conduct.

88. *See supra* Part III.

89. *See supra* Part IV.