

University of Arkansas School of Law

2020 Free Winter CLE

March 7, 2020

Real Estate and Construction Law Developments and Ethical Dilemmas

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This paper highlights several developments in real estate and construction law that have caught my attention recently and that I hope attendees at the conference will also find interesting. Because my topic at our Free Winter CLE is offered for ethics credit, during the presentation I will focus on selected professional conduct aspects of these topics, even though the coverage in this paper is not limited to those matters.

Part 1: A few thoughts on the challenge real estate and construction lawyers face in keeping up
Arkansas Rule of Professional Conduct (ARPC) 1.1 provides:

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

Rule 1.1 implicitly requires a lawyer to keep up with developments in the law and trends in the fields in which the lawyer practices. As any lawyer with a busy practice knows, this can be challenging. Even for a law professor it can be hard to find enough time simply to track a modest percentage of the latest cases, legislation, and regulations in just a few legal specialties, let alone keeping up with cutting edge trends in practice. For the substantive areas in which I teach, I try to follow developments in basic aspects of property law, especially in real estate transactions, and to keep current on construction law. I rely heavily on newsletters, electronic discussion lists, conferences, and other resources that several bar organizations provide. Among my regular favorites:

- For state case law developments, the Arkansas appellate case summaries the Arkansas Bar Association regularly distributes to its members by email and, while we had it, *The Arkansas Real Estate Review*, which was, until recently, published twice each year by the Arkansas Bar Association Real Estate Section under the supervision of UALR's Prof. Lynn Foster;
- For other state law developments, including new legislation, articles in the Bar Association's magazine, *The Arkansas Lawyer*, and the Association's CLE programming, especially those offered by the Real Estate and Construction Law Sections;
- For nationwide real estate law developments, the American Bar Association's "Dirt" discussion list for real estate lawyers and the newsletters and papers that the American College of Real Estate Lawyers makes available to its members in various ways;
- For construction law and construction industry developments, the extensive resources that the American Bar Association's Forum on Construction Law provides to its

members, including *The Construction Lawyer* journal and the *Under Construction* newsletter; and

- For many aspects of business law and practice on a nationwide basis, the Arkansas Bar Association *Newsstand—Powered by Lexology*, distributed to members of the Bar Association’s Corporate & In-House Counsel Section.

While I depend heavily on the regular newsletters, announcements, conferences, and other offerings of these and many other organizations to alert me to changes in the law and emerging trends, I can never find enough time for them. I am forever behind. I suspect the same must be true of most lawyers and law professors. What follows in this paper is almost entirely based on the sources listed above, without much supplemental or original research on my part. I offer this not as a scholarly presentation but as a practical and informal summary of a few recent developments that I am currently tracking. Were I in practice, I would save these items in topically identified electronic folders for future reference should they ever be relevant to a client matter. My plan would be to use what I collect through an admittedly haphazard process as a point of departure for more comprehensive and targeted research at that later date. In other words, what you are getting in this paper is tentative and incomplete. But if you are in any way like me, you are often grateful for having saved a copy of this or that article or scrap of a note on a new development, or forever wishing you had been more careful to preserve a record of some case, statute, regulation, development, or clever idea that you just can’t seem to find when you need it.

The balance of this paper uses short overviews and compressed bullet points, often taken from recent CLE and practice materials, to highlight a few selected developments in real estate and construction law. Part 2 highlights some emerging topics I am currently tracking, while Part 3 revisits some “old favorites” that I find regularly resurfacing in interesting or surprising ways. Because some of the citations are to CLE materials I have saved that may not be easily available, I will be happy to hear from any attendees who want more information about a particular resource (subject to whatever copyright limitations might apply). As previously indicated, for my live presentation, I will draw primarily on topics that present issues of legal ethics and professional responsibility.

Part 2: Emerging topics affecting real estate and construction law practice

Legalized marijuana in the real estate and construction industries

Lawyers for clients involved in marijuana businesses that are legal under state law must recognize that federal drug laws continue to criminalize those same activities. Under these circumstances, does representing such clients violate the rule against counseling a client to engage in criminal activity or assisting a client to commit a crime? (*See* ARPC 1.2(d).) The rule reads: “(d) A lawyer shall not counsel a client to engage, or assist a client in, conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.” Some states that have legalized medical or recreational use of marijuana have modified their versions of Rule 1.2 to

provide guidance to lawyers representing clients engaged in a cannabis business. Changes to the Arkansas rule have been proposed. See Dixon, *Marijuana Business Attorneys and the Professional Deference Standards*, 71 ARK. L. REV. 789 (2019); Justice J. Brooks, *The Ethics of Representing Marijuana-Related Businesses*, ARK. LAW., Spring 2017, at 22 (noting that the Arkansas Bar Association petitioned the Arkansas Supreme Court to clarify the application of Rule 1.2 to legal representation of clients involved in marijuana-related activities that are legal under Arkansas law).

Basic considerations of special interest with respect to the ethical issues:

- The Obama era Justice Department decision generally not to pursue enforcement of federal marijuana crimes for conduct legal under state law (known as the “Cole Memo”) was repealed by the Trump administration, creating a potential dilemma for lawyers and disciplinary authorities.
- Even if representing such clients does not violate state ethics rules, doing so could still constitute aiding and abetting in the commission of a federal crime.
- Lawyers should also be aware that federal banking laws complicate matters for clients engaged in marijuana businesses that are legal under state law and for banks willing to serve those businesses.
- Lawyers should consider whether it is appropriate to use IOLTA accounts for funds relating to marijuana businesses. (See ARPC 1.15.)
- Questions concerning a client confidentiality may arise under the standard confidentiality exception permitting disclosures necessary “to prevent the commission of a criminal act” (ARPC 1.6.)

A useful overview of ethical issues appears in a recent article by New Orleans attorney Michael H. Rubin, *Smokin' Hot: Ethical Issues for Lawyers Advising Business Clients in States with Legalized Medical or Recreational Marijuana*, 79 LA. L. REV. 629 (2019). Mr. Rubin cites several other published articles relating to these concerns, including (among others): Robert T. Wright, *Ethical and Legal Risks as Counsel in Bliss Marijuana Market*, 52 GONZ. L. REV. 607 (2017); Jesse Montoya, *To Discipline Or Not To Discipline: A Framework For New Mexico To Analyze The Ethics Of Medical Marijuana Representation*, 47 N. M. L. REV. 357 (2017); Andrew King, *Navigating the Weeds of State-Legal Medical Marijuana*, 52 ARK. LAW. 18 (2017); Eric Mitchell Shumann, *Clearing the Smoke: The Ethics of Multistate Legal Practice for Recreational Marijuana Dispensaries*, 6 ST. MARY'S J. LEG. MALPRACTICE & ETHICS 332 (2016); Manuela Bowles and Amanda Connor, *Marijuana Advertising on Social Media*, NEV. LAW., June 2018, at 21; Karen J. Bernstein, *Counseling Marijuana Clients on Intellectual Property*, 90 N. Y. ST. B. J., July/August 2018, at 20; Michael L. Salad & Brittany A Bonetti, *Banking and Marijuana-Related Businesses*, 314 N. J. LAW., Feb. 2018, at 60; Jack Fersko, Lydia C. Stefanowicz, & Charles J. Wilkes, “Legal” Marijuana: The Implications for Commercial Real Estate, 314 N. J. LAW., Oct. 2018, at 54; Brian P. Sharkey and David L. Disler, *Are New Jersey Law Firms Prepared for the Legalization of Marijuana?* 314 N. J. LAW., Oct. 2018, at 32; Erica E. Flores, *Accommodating Employee Use of Medical Marijuana*, 99 MASS. L. REV. 72 (2018); Spenser Owens, *High Priorities: Land Use, Marijuana, and Meta-Values*, 10 WASH. U. JURIS. REV. 293

(2018); Lucia Moran, *Emerging from the Smoke: Does an Employer Have a Duty to Accommodate Employee's Medical Marijuana After Garcia v. Tractor Supply Company?*, 48 N. MEX. L. REV. 194 (2018).

A growing literature on legal issues relating to state laws legalizing medical or recreational use of marijuana raises a plethora of other considerations relevant to real estate and construction law practice. *See e.g.*, Frank J. Ellias, *Lease Issues for Marijuana Businesses*, 46 MICH. REAL PROP. REV. 66 (2019); Michael N. Widener, *Medicinal Cannabis Entrepreneurs as Commercial Tenants: Assessment and Treatment*, 46 REAL PROP. TR. & EST. L. J. 377 (2011). A Westlaw search discloses several articles not already cited above that appear in recent issues of *The Arkansas Lawyer* addressing a range of other topics relating to medical marijuana, and Arkansas lawyers should expect more to be written on the subject in the coming months. Among issues of special interest for real estate and construction industry practitioners:

- Whether title insurance companies will issue policies of title insurance in transactions involving marijuana businesses.
- How to address standard provisions in leases and other documents relating to violations of law and compliance with legal requirements.
- The application of zoning and land use regulations.
- The application of the law of nuisance.
- Alternative approaches to common indemnity terms in real estate and construction contracts.

State laws legalizing medical or recreational use of marijuana also raise distinct concerns for the construction industry. Of special note are employer drug testing programs and employer concerns over safety and liability for personal injury and property damage in a work environment in which the employer must anticipate marijuana use at project sites. Some of these issues are addressed in a paper by Atlanta attorney D. Albert Brannen, *Implementing a Drug Testing Policy*, presented at the American Bar Association's Forum on Construction Law 2016 Mid-Winter conference.

Emotional support animals

Under the Fair Housing Act's requirement for reasonable accommodations to be made in housing for persons with disabilities, landlords and condominium owners' associations must be prepared to adjust pet policies to allow for emotional support animals. *See* Joseph H. Hernandez, *Pet Squirrel and "Emotional Support Animal"? What Do We Do Now?*, ACREL NEWS, Nov. 2017, at 8. Note that the category of "emotional support animal," to use the popular term, or "assistance animal," to adopt the terminology of the U.S. Department of Housing and Urban Development (HUD), is distinct from that of "service animal" under the Americans with Disabilities Act. A service animal (normally a dog) is trained to do work or to perform tasks directly related to the person's disability. A dog trained to help a visually impaired person navigate hallways, sidewalks, streets, and other areas represents the classic instance of a service animal. An emotional support animal is not required to have special training and does not necessarily help a person with disabilities by doing work or performing any task related to the

disability. For example, for a person suffering from depression or anxiety, the mere companionship of an emotional support animal may provide relief from the disability even though the animal may perform no work or tasks relating to the disability.

Any landlord or community association wishing to enforce a pet restriction must be prepared to develop consistent policies or regulations allowing for reasonable exceptions for emotional support animals. While those policies or regulations may require the person seeking the accommodation to provide some information about the nature of the disability and how the animal provides a benefit related to the person's disability, a letter or certificate from a doctor or therapist will commonly serve that purpose. Commentaries by critics of the emotional support animal movement sometimes report stories of organizations that provide such certifications for a fee for practically anyone, without regard to a legitimate determination of disability or the benefit an animal provides. Therein lies a potential ethical question for lawyers. Given the ease with which emotional support animal credentials can be purchased, is it proper for counsel to assist a client who wishes to manufacture a need for an emotional support animal simply to evade a no-pet policy or to secure exemption from a pet deposit requirement? Conversely, where is the line between helping a landlord or community association craft appropriate practices and regulations to protect and promote the integrity of a pet policy versus those designed more to burden the rights of persons with disabilities? Such questions could conceivably raise ethical issues, although it would seem that only the most extreme circumstances would potentially trigger a violation. *See* ARPC 3.1, concerning meritorious claims and contentions; ARPC 4.1, concerning truthfulness in statements to others (meaning persons other than clients).

HUD has provided a *Fact Sheet on HUD's Assistance Animals Notice*, available at <https://www.hud.gov/sites/dfiles/PA/documents/AsstAnimalsGuidFS1-24-20.pdf>, which discusses a January 28, 2020 HUD notice, Notice FHEO-2020-01, sometimes referred to as the "Assistance Animals Notice." Those interested in more information will find a growing body of legal literature on this topic. *See, e.g.,* Amanda M. Foster, *Don't be Distracted by the Peacock Trying to Board an Airplane: Why Emotional Support Animals are Service Animals and Should be Regulated in the Same Manner*, 82 ALB. L. REV. 237 (2019); Paul Harpur et al., *Regulating "Fake" Assistance Animals—A Comparative Review of Disability Law in Australia and the United States*, 24 ANIMAL L. 77 (2018).

Short-term rentals

Over the past several years, short-term rental and vacation home arrangements, such as those facilitated through Airbnb, VRBO, and other online services, have increasingly raised novel questions under zoning, land use, and other regulations, as well as in connection with use restrictions for residential subdivisions and common interest communities. A core question is how to categorize short-term rentals. Are they more comparable to leases, hotel or motel accommodations, or something else? Are they residential in nature or commercial? Should they be subject to public facilities regulations, and should they be subject to special taxes that apply to hotels and motels?

Some cities aggressively seek to restrict short-term rentals on the basis that they run counter to affordable housing objectives and tend to prioritize housing for vacationers over residents. Many cities take steps to tax short-term rentals in the same way as they do hotels and motels, for example by subjecting them to occupancy taxes. Municipalities also must determine how to categorize short-term rentals for regulatory purposes, such as fire, safety, and health codes, as well as zoning and land use planning ordinances.

A recent conference paper discussing a wide range of legal and risk management issues concerning short-term rentals highlights such matters as exclusions from coverage under standard insurance policies, potential violation of lease, mortgage, and condominium association use restrictions, illegal discriminatory practices, and even privacy matters (consider, for example, whether the host must disclose to guests the presence of security cameras and other monitoring devices on the premises). *See* Dwight H. Merriam, *Short-Term Rentals: Risks and Rewards to Consider in Counseling Clients*, American College of Real Estate Lawyers Fall 2018 meeting. The author concludes with this checklist (edited slightly) for advising clients, whether hosts, guests, or public officials:

- Current zoning requirements
- Applicable codes (sanitation, health, building, etc.)
- Business licensing
- Business organization options for host (none, limited liability company, corporation, general or limited liability partnership, etc.)
- Homeowners' association covenants and restrictions
- Other easements, covenants, restrictions on the land
- Lodging to be offered (room, whole house, host-occupied, length of stay)
- Placarding of the residence (notice of occupancy limits, parking restrictions, other rules)
- Emergency notifications
- Food service (permitted? licensed?)
- Federal, state, and local taxes
- Safety inspections
- Fire, smoke, CO, and other detectors
- Fire extinguishers
- Child safety
- Parking
- Insurance
- Water and septic
- Safe hot water temperature
- Electrical and plumbing in good repair
- Pest/vermin-free, especially bed bugs
- Ventilation, heat, air conditioning adequate
- No hazards
- No mold or excessive moisture
- Working doors, windows, screens
- Adequate means of egress

- Linen sanitation
- Pool and spa maintenance

In 2018, the Arkansas Supreme Court addressed an issue that several other courts have faced recently—whether a short-term rental violates an ordinance, covenant, or restriction against using the property for commercial purposes. The court held that a private covenant restricting lots at a Lake Hamilton subdivision to non-commercial use, and expressly prohibiting “motels, tourist courts, motor hotels, hotels, garage apartments, apartments, etc.” could not be used to prevent a lot owner from renting the property through VRBO for short-term stays. *Vera Lee Angel Revocable Tr. v. Jim O'Bryant & Kay O'Bryant Joint Revocable Tr.*, 537 S.W.3d 254 (Ark. 2018). The court invoked the principle that Arkansas law does not favor land use restrictions and concluded “consistent with our duty to strictly construe the bill of assurance in favor of the unfettered use of property, we hold that the lack of a specific restriction against rentals of the property compels us to reverse and dismiss the circuit court's injunction.” *Id.* at 259.

From a professional responsibility perspective, I wonder whether we are rapidly approaching a situation in which a lawyer advising a client in connection with either short-term rental arrangements or any form of use restriction affecting real estate risks a malpractice claim for failing to anticipate some of these problems. For example, to what extent should lawyers revise standard provisions of mortgages, leases, and subdivision and condominium association declarations to cover short-term rentals expressly?

One final point, already mentioned in the reference above to the conference paper by Merriam, merits further comment. Some studies suggest that the online short-term rental market can facilitate a new form of housing discrimination because it is easy for those who list or advertise short-term rentals on internet sites to identify and exclude prospective guests who are members of racial, ethnic, or other protected groups. *See, e.g., D. Smith, Renting Diversity: Airbnb as the Modern Form of Housing Discrimination*, 67 DEPAUL L. REV. 3 (2018). This is true not only of the internet-based services for short-term rentals, but also for all kinds of residential listings and advertisements that use social media. For example, last year HUD charged Facebook with Fair Housing Act violations for practices that can encourage or enable housing discrimination through Facebook's advertising platform. *See* HUD's news release dated March 28, 2019, *available at* https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_035. Does a lawyer have an obligation to avoid assisting a client who is using a short-term rental platform to evade fair housing laws and regulations? *See* ARPC 1.2(d) (concerning assisting a client in criminal or fraudulent conduct); 4.1 (truthfulness to others); 4.4 (prohibition against using means that “have no substantial purpose other than to embarrass, delay, or burden a third person”).

Opportunity zones

The federal Tax Cuts and Jobs Act of 2017 introduced a new tax advantage for investors and real estate developers in the form of “Qualified Opportunity Zones.” One industry group offers this overview of the legislation:

For investors sitting on existing gains, there are three primary tax advantages. First, there is deferral of capital gains on an investment if those gains are used for an investment in a Qualified Opportunity Fund. If the money is kept in the Opportunity Fund, the tax on those gains will be deferred until December 31, 2026. Second, there are step-ups in basis, so that when those gains are finally recognized, the taxable amount will be lower. Finally, all gains thereafter are tax free, provided the investment is maintained for at least 10 years.

Consider, for example, an investor who sells stock, realizing a \$500,000 capital gain on August 1, 2018. If those funds are invested in a Qualified Opportunity Fund within 180 days, the capital gains tax is deferred. After five years, the investor gets a step-up in basis equal to 10% of the gain (\$50,000). After two more years, there is another 5% increase in basis (\$25,000). Assuming the investment was made before December 31, 2019, so that the full seven years have passed before the gain must be recognized on December 31, 2026, the taxpayer will then pay capital gains tax on \$425,000 (\$500,000 of invested gains, less \$75,000 in new basis).

In addition to the deferral and increased basis, however, there is a huge benefit if the investment is held for at least 10 years: from that point on, the basis will be considered to be the same as the fair market value, so none of the gain realized from the investment in the Opportunity Fund is subject to tax. So if this investment is sold after 10 years for, say, \$1.2 million, the entire additional gain of \$700,000 is tax free.

Opportunity Zones: Tax-Free Gains, MORTGAGE & REAL EST. EXEC. REP., vol. 51, issue 10, July 15, 2018. See also Michael Hirschfeld & Philip R. Hirschfeld, *Qualified Opportunity Zone Funds*, PROB. & PROP., May/June, 2019; Thomas S. Marcey, *Two Years On—How Have Opportunity Zones Been Working Out in Actual Urban Environments?*, CONSTR. BRIEFINGS, Feb. 2020.

This development offers an ideal example of just how challenging it can be for lawyers to keep up with the law. While the overview of the Opportunity Zone tax incentive legislation stated above might seem almost straightforward on first review, any lawyer familiar with the Internal Revenue Code will readily anticipate that the law is layered with complexities lying just below the surface. A few months ago, the Department of the Treasury issued regulations governing Opportunity Zones and investments in “Qualified Opportunity Funds,” which the Department announced and explained in a document running on for more than 500 pages. See December 19, 2019 Department of the Treasury Press Release, *available at* <https://home.treasury.gov/news/press-releases/sm864>. Just how much expertise should a lawyer have before undertaking to counsel clients on such an important and complex program? Must general practitioners, and even lawyers with specialized real estate and business law practices,

advise their clients who might benefit from the Opportunity Zone legislation to retain tax lawyers, or perhaps even a narrower category of tax specialists who have mastered the details of the new regulations? According to our own Visiting Assistant Professor Drew Lawson, lawyers considering dipping their toes into Opportunity Zone waters should be prepared to consult with tax experts to help learn about the most “beneficial ways to structure the investment and also pitfalls to avoid. The interaction between the QOZ rules and the partnership tax rules is particularly complicated.”

Drones

The increasing use of drones in both the construction and the real estate industries has received much attention in the legal literature recently. For construction projects, drones offer more efficient and often safer means to inspect construction progress and to verify contract performance. They can also more directly help in the construction process, substituting for cranes, lifts, or helicopters for certain especially tricky access problems in tight or otherwise physically challenging areas of a project or site. A paper delivered at a Forum on Construction Law conference notes these legal considerations concerning the use of drones on construction projects:

- Dealing with federal regulation of drones as “aircraft” and potential exemptions for drones under Federal Aviation Administration regulations, and similar state regulatory concerns.
- The development of standard endorsements to Commercial General Liability policies in connection with drone use.
- Privacy concerns, including the risk of liability for trespass and invasion of privacy claims, and even sexual harassment claims, when the use of drones on a job site is not properly managed.
- Whether the availability of drones may impose greater responsibility on contractors or others involved in a project who are contractually required to become familiar with conditions at the project site.
- Ownership of data collected by drones on a project site.
- The value of data collected by drones for discovery purposes in lawsuits and dispute resolution.
- The need to address the use of drones in construction and design contracts.

See Grant Hagen & Stephen D. Palley, Sticks, Bricks, Bytes & Drones—Opportunities and Challenges at the New Frontiers of Construction Law, American Bar Association Forum on Construction Law 2015 Annual Meeting.

Similar issues arise when real estate developers and managers use drones. In those situations, trespass, nuisance, and privacy concerns may be especially important. *See Kristen G. Juras, The Game of Drones: Federal and State Rules of Play and Their Intersect with Property Law, PRAC. REAL EST. LAW., May 2017, at 23; Michael M. Berger, Some Thoughts on Drones, PRAC. REAL EST. LAW., Sept. 2014, at 57.* Property managers considering drones for inspection,

security, or maintenance purposes should especially consider how best to address liability issues through insurance or other risk management alternatives.

Aside from raising, as do all the other topics discussed in this paper, a lawyer's obligation to maintain competence, the increasing use of drones in the construction and real estate industries would not seem to present many potential problems under the rules of professional conduct. One could imagine a situation in which a lawyer suspects that a client or a client's employee is using drones to invade privacy, for commercial espionage, or for some other illegal purpose, but the risk of such abuses are probably no greater in the case of drones than with many other emerging and expanding technologies.

Part 3: Keeping up with what's old

This concluding segment reflects that circumstances regularly conspire to remind me how little I know about the law, even among the topics and issues about which I think I know the most. For me, this recurring and humbling revelation often comes when I hear about a new case on an old standby topic. This part notes just a few Arkansas cases in this category that have caught my attention recently. While I cannot associate these developments with any distinct ethical issues, in the broadest sense, these cases once again echo the original professional responsibility theme of this paper—a lawyer's obligation to maintain competence. Thus, we end where we began.

The first case I have in mind is *Collier v. Gilmore*, 562 S.W.3d 895 (Ark. App. 2018), a decision clarifying for Arkansas lawyers one of the most troubling aspects of adverse possession law. I can't recall whether I first heard of this through the regular case updates that the Arkansas Bar Association provides via email or whether I encountered it when I finally got around to scanning an issue of *The Arkansas Real Estate Review*. The case holds special interest for me because one of the top puzzles that bothers my first-year Property students every year when we cover adverse possession is the confusion in cases throughout the country over how to understand the concepts of hostile and adverse possession under claim of right.

The case involves a relatively common version of a boundary line dispute in which a person claiming title by adverse possession was, at all relevant times, operating under a mistaken belief of having record title to the disputed area. In other words, the possession did not involve an intentional occupation of the land of another but an honest, mistaken belief about the location of the boundary line of record. A long-standing debate in the adverse possession authorities is whether the hostility requirement contemplates (1) a bad-faith state of mind (along the lines of "I know this is not mine, but I mean to claim it anyway"), which is sometimes called the aggressive trespass standard, (2) an honest statement of mind ("I believe I am using only what I rightfully own, and that is why I claim it"), sometimes called the good-faith standard, or (3) no particular state of mind other than the intentional use of property that is consistent with ownership, which is commonly labeled the objective standard. See Margaret Jan Radin, *Time, Possession, and Alienation*, 64 *WAS. U. L.Q.* 739, 746-47 (1986).

The testimony in *Collier v. Gilmore* showed that the farmer claiming the disputed property continuously occupied it under the mistaken belief that his deed included that property

and therefore that he claimed title solely by virtue of the deed. The Arkansas Court of Appeals resolved the state-of-mind problem by adopting the objective standard, holding that the “act of farming the disputed tract for decades is enough to establish an intent to hold against, and not in subordination to, the true owner's rights.” While it is great comfort to have *Collier v. Gilmore* to share with my students, I also warn them that subtle clarifications of the law of adverse possession in Arkansas continue to evolve through a surprising number of appellate cases every year.

If there is any professional ethics implication of this development in Arkansas adverse possession law, it is a happy one—the alternatives to the objective standard, by calling for evidence of the claimant's state of mind, could possibly tempt a well-informed litigant to commit perjury. Focusing the inquiry on the claimant's behavior rather than on state of mind helps avoid that problem.

The remaining cases I wish to highlight relate to what has lately become my pet topic in construction law, although the issue also extends into many other areas of the law. For shorthand purposes, I call this the text versus context debate, which I will address here primarily as an aspect of contract interpretation. At the risk of taking the concept of legal ethics a bit too far, I will venture the observation that several of the decisions noted below dealing with the interpretive process in contract disputes arguably call into question whether such old standbys as the plain meaning and parol evidence rules are more misleading than helpful. By an especially creative (ridiculous?) stretch of the imagination, I might even wonder to what extent a lawyer may ethically advance an argument that superficially comports with the considerable homage courts give to text but that actually functions as subterfuge to achieve a contextual result. While I can hardly suggest that this presents an ethical dilemma for lawyers as a practical matter, it can at least incite a legal academic to ponder the intellectual integrity of the interpretive process itself.

Over the past few years, the text versus context debate occupied my mind to such an extent that it became a central feature of my recently published book, *Contract Law in the Construction Industry Context*. There, I review a series of construction industry cases that seemingly use irreconcilable approaches to work through the interpretative process. These range from the rigidly textual framework exemplified by strict adherence to the plain meaning and parol evidence rules of classical contract law (commonly associated with Williston and the First Restatement of Contracts) to the far more contextual framework that contract theorists call neoclassical contract (commonly associated with the Uniform Commercial Code, the Restatement (Second) of Contracts, Corbin, Llewellyn, and legal realism). The ultimate goal of my research was to explore the law's apparent inability to reconcile these inconsistent interpretive approaches or, failing reconciliation, to adopt one over the other for once and for all. Depending on one's perspective on the common law process, my answer to the text versus context conundrum will sound either disturbing or a reassuring:

To this question, I offer a seemingly tautological response: the context of the dispute guides courts in identifying those cases calling for contextual interpretation. In other words, the controlling consideration, I submit, is that the cases often, although not invariably or expressly, recognize that characteristics of specific transactional

relationships matter for purposes of contract interpretation. The construction industry in particular regularly presents disputes calling for a more flexible and relationally aware approach to interpretation. If the circumstances offer no compelling reasons to use context to alter reasonably clear contractual language or to fill in contractual gaps, the old rules suffice. When, however, the party asking the court for a more activist reading of the contract shows trade customs, course of dealing, course of performance, relational factors, or some other logically compelling circumstances justifying resort to context, courts sometimes invoke the second Restatement's more flexible contract-interpretation principles. The decisions tend to be more pragmatic than theoretical.

CARL J. CIRCO, *CONTRACT LAW IN THE CONSTRUCTION INDUSTRY CONTEXT* at 153 (Routledge, 2020).

A 2019 decision from the Court of Appeals provides a classic example. The subcontract at issue provided for the subcontractor to perform concrete work on the project. One provision of the contract documents gave a detailed description of concrete work as including “curing” of all concrete. Another part of the contract documents provided a list of exclusions from the scope of the subcontractor’s work, with “sealer” being among the excluded items. The court affirmed the trial court’s conclusion that because the term “sealer” as used in the documents was ambiguous it was appropriate to consider extrinsic evidence concerning the parties’ intended meaning. The opinion upholds resorting to course of dealing, custom, and usage in the industry to interpret terms of art such as “curing” and “sealing.” Credible evidence supported the trial court’s finding that the two terms refer to the same thing. As a result, the exclusion for sealer removed curing from the scope of the subcontractor’s work. *JMD Constr. Servs., LLC v. Gen. Constr. Sols., Inc.*, 577 S.W.3d 50 (Ark. Ct. App. 2019). As discussed in detail at various points in Chapters 3 and 6 of *Contract Law in the Construction Industry Context*, similar questions frequently arise in construction industry disputes because courts must often consider customs and trade usage when interpreting plans, specifications, and descriptions of the scope of work covered by a contract.

Comparable questions of whether or to what extent a court should consider the circumstances external to the written agreement (context) in addition to the express terms of a contract (text) come up in real estate transactions as well as under construction contracts. These abbreviated notes on recent Arkansas cases illustrate:

- What details are necessary to satisfy a requirement for “reasonable notice of the essential terms of an offer” that triggers a right of first refusal, and what response is sufficient to serve as an exercise of the right? *Elder v. Elder*, 549 S.W.3d 919 (Ark. Ct. App. 2018). The case involved somewhat cryptic communications (at least some of which were by text message) of intent to sell the subject property sent by the owner of the land to the holder of the right and vague expressions of possible interest given in response by the holder.
- From a case already mentioned in the new developments portion of this paper, whether short-term rentals violate a restrictive covenant prohibiting the use of property for a “commercial purpose.” *Vera Lee Angel Rev. Tr. V. Jim O’Bryant & Kay O’Bryant Joint Rev. Tr.*, 537 S.W.3d 254 (Ark. Ct. App. 2018).

- Whether an agent’s decision to sell property pursuant to a power of attorney for nominal consideration was authorized where the power of attorney did not grant the agent the right to make a gift but did authorize a sale on whatever terms the agent deemed appropriate. In upholding the sale, the court stressed the textual analysis that the agent’s action was literally within the letter of the power of attorney, but also went on to invoke a distinctly contextual framework as well by deciding that the sale for nominal consideration in the specific circumstances was also within the spirit of the power of attorney. *Shriners Hosps. for Children v. First United Methodist Church of Ozark*, 547 S.W.3d 716 (Ark. Ct. App. 2018).
- Whether oral statements made by a seller of real estate that are not incorporated into the final, written agreement may provide the basis for a fraudulent inducement claim. *Lone’s RT 92, Inc. V. DJ Mart, LLC*, 577 S.W.3d 769 (Ark. Ct. App. 2019). At its core, the issue in this tort case was not essentially one of contract interpretation, but the court’s analysis put a contextual gloss on the express “as-is” clause of the contract involved.
- Whether an easement for ingress and egress also implicitly authorizes use of the easement area for parking. *Carroll v. Shelton*, 547 S.W.3d 94 (Ark. Ct. App. 2018). Here, the court declined to take context into account in interpreting language defining the permitted uses solely as ingress and egress, but then used context to affirm the trial court’s alternative holding in favor of a prescriptive easement for parking.
- Whether covenants and reservations imposed on one phase of a subdivision development also apply to a separate phase of the subdivision. *Mountain Crest, LLC v. Kimbro*, 567 S.W.3d 888 (Ark. Ct. App. 2018). While the court declined an invitation to take context into account as a basis for evading a strictly textual interpretation, the decision is based on a contextual principle calling for courts to construe restrictive covenants narrowly.
- Whether a tenant’s second right of refusal to purchase the leased property survives after the holder of the first right of refusal acquires title to the property through the lessor’s testamentary devise. *McCord v. Foster*, 505 S.W.3d 742 (Ark. Ct. App. 2016). The court reversed the trial court’s summary judgment on the basis that there were genuine issues of material fact concerning the intent of the original parties to the lease. In effect, the case involves the kind of special circumstances that sometimes invite a court to fill in a contractual gap. How should the court interpret the lease when the contracting parties probably never anticipated that the holders of the right of first refusal might acquire the property other than in connection with a proposed sale of the property by the lessor?

Conclusion

The topics and cases discussed in this paper confirm the ever-evolving nature of law, especially in the real estate and construction law industries. As noted, most of them also implicate questions of professional ethics and professional responsibility. There is, in effect, no clear boundary line between legal knowledge and legal ethics.