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Eugene R. Gaetke

University of Kentucky College of Law, ggaetke@uky.edu

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Solicitation and the Uncertain Status of the Code of Professional Responsibility in Kentucky

BY EUGENE R. GAETKE*

INTRODUCTION

In 1969 the Kentucky Supreme Court adopted¹ the American Bar Association's Code of Professional Responsibility² as the disciplinary rules binding upon attorneys practicing in the state. The Court adopted the Code as an apparent attempt to provide the Kentucky bench and bar the certainty and guidance offered by a codification of the frequently subjective and occasionally nebulous body of law known as legal ethics.³ The Court used particular language in its rule⁴ adopting the Code, however, which

* Assistant Professor of Law, University of Kentucky College of Law; B.A. 1971, J.D. 1974, University of Minnesota.

¹ KY. SUP. CT. R. 3.130, adopted by order of the Supreme Court of Kentucky, November 11, 1969.

² The Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association in 1969. For a discussion of the adoption process, see Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255 (1969-70); Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1 (1970-71). The Code has been recognized as controlling authority, in full or in part, in all 50 states and the District of Columbia. A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 29 (1976).

³ That the Code was drafted with certainty and guidance as objectives is evidenced by its organization into "Disciplinary Rules" (DR), which "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action," and "Ethical Considerations" (EC), which "are aspirational in character and represent the objectives toward which every member of the profession should strive" and which "constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." Preamble and Preliminary Statement, ABA CODE OF PROFESSIONAL RESPONSIBILITY. See Sutton, *supra* note 2, at 258. In fact, the lack of certainty and guidance in the American Bar Association's Canons of Professional Ethics, initially promulgated in 1908, led to the adoption of the Code. Sutton, *Re-Evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132 (1965-66); Wright, *supra* note 2, at 3-5.

⁴ This rule provides:

Except for Ethical Considerations and Disciplinary Rules insofar as they conflict with the opinion of the United States Supreme Court in *Bates v.*

renders uncertain the precise status of the Code in Kentucky. As a result, a conscientious practitioner in Kentucky cannot confidently look to the Code for resolution of ethical problems.⁵

The area of client solicitation by attorneys illustrates the uncertainty created by the Court's ambivalent adoption of the Code. Even though the Code was drafted by the American Bar Association partially in response to the problem of solicitation⁶ and even though the Code deals with the practice quite explicitly,⁷ the Kentucky Court's peculiar language adopting the Code leaves the matter disturbingly unsettled.⁸

This Article examines the language used by the Kentucky Court in adopting the Code of Professional Responsibility⁹ and the uncertainty it creates in regulating legal ethics in the state.¹⁰

State Bar of Arizona, the court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standards of professional conduct required of members of the bar, and the Board may cause to be tried all charges brought under this Code *as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute.*

KY. SUP. CT. R. 3.130(1) (emphasis added).

See the text accompanying notes 14-26 *infra* for further discussion of this rule and the language referred to in the text.

⁵ The Code of Professional Responsibility itself is not always helpful to the attorney seeking guidance as to a specific ethical problem. The Disciplinary Rules are often vague. Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267, 276 (1969-70); Note, *Lawyer Disciplinary Standards: Broad v. Narrow Descriptions*, 65 IOWA L. REV. 1386, 1388-89 (1979-80). The problems of vagueness and occasional conflict presented by the Code's provisions, of course, are only exacerbated by the uncertainty resulting from the Kentucky Supreme Court's ambivalent adoption of them. See the text accompanying notes 16-22 *infra* for a discussion of this uncertainty.

⁶ Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497 (1978-79). Professor Sutton was the reporter for the American Bar Association committee which drafted the Code. *Id.*

⁷ The Code prohibits an attorney from recommending to a layperson the employment of himself or herself or an associate, DR 2-103(A), requesting another to recommend his or her employment except under certain circumstances, DR 2-103(C), or compensating another for having recommended his or her employment, DR 2-103(B). The Code also prohibits an attorney from accepting employment from a person after having given unsolicited advice that such person should take legal action, except under certain enumerated situations. DR 2-104(A).

⁸ The uncertainty about when solicitation is proper is further aggravated by decisions which make even the Code's treatment of the subject constitutionally suspect. See notes 98 and 110 *infra* for a discussion of these constitutional developments.

⁹ See the text accompanying notes 16-22 *infra* for a discussion of this language.

¹⁰ See the text accompanying notes 23-26 *infra* for a discussion of this principle.

It then traces the erratic pre-Code treatment of solicitation in Kentucky¹¹ to illustrate the confusion which unfortunately survives the new rule.¹² Finally, the conclusion suggests that the treatment of solicitation and the status of the Code in Kentucky can be clarified only by amending the Supreme Court's rule adopting the Code.¹³

I. THE ADOPTION OF THE CODE IN KENTUCKY

In Rule 3.130, the Kentucky Supreme Court expressly adopts the Code of Professional Responsibility as "a sound statement of the standards of professional conduct required by members of the bar" and authorizes the board of governors of the state bar association to prosecute attorneys charged with violations of the Code provisions.¹⁴ In catch-all language, however, the rule fur-

¹¹ See the text accompanying notes 27-85 *infra* for a discussion of this erratic pre-Code treatment of solicitation.

¹² See the text accompanying notes 86-98 *infra* for a discussion of this continuing confusion.

¹³ See the text accompanying notes 99-110 *infra* for a discussion of this suggestion.

¹⁴ KY. SUP. CT. R. 3.130(1). For an historical account of the regulation of legal ethics in Kentucky leading to the adoption of the Code, including the early concern with solicitation, see Huelsmann & Deener, *Legal Ethics in Kentucky: Background of the Code of Ethics*, 42 KY. BENCH & B. 10 (July 1978).

Unfortunately even the explicit language of Rule 3.130(1) has been interpreted by the state Supreme Court so as to create uncertainty for members of the practicing bar. The Court has read the rule as adopting only the Code of Professional Responsibility initially approved by the American Bar Association in 1969. *Kentucky Bar Ass'n. v. Wilkey*, No. 80-SC-671-KB (Ky. Dec. 16, 1980). The Code, however, has been amended by the American Bar Association every year from 1974 through 1980.

The Court does not interpret Rule 3.130 as authority for the adoption of these Code amendments despite amendments of Rule 3.130 itself in 1977 and 1979. Thus, an attorney who acts in accordance with a Code amendment may be disciplined in Kentucky under the original version of the Code. For example, an attorney establishing a profit-sharing compensation plan for his/her nonlawyer employees in accordance with a 1980 amendment to DR 3-102(A)(3) could be disciplined in Kentucky under the 1969 version of that rule, which prohibited such plans. Also, an attorney who fails to disclose client perjury to a court because the attorney learned of the perjury through a privileged communication would be acting in accordance with a 1974 amendment to DR-7-102(B)(1) but would be subject to discipline in Kentucky under the 1969 version of that rule.

This interpretation of Rule 3.130 is so significant that its announcement in an unpublished opinion constitutes grossly inadequate notice to the practicing bar. See *Kentucky Bar Ass'n v. Wilkey*, No. 80-SC-671-KB. An amendment to Rule 3.130 expressly designating which version of the Code is applicable in the state would be preferable. See note 101 *infra* for a discussion of such an amendment and others.

ther authorizes the board to prosecute attorneys charged with "other unprofessional or unethical conduct tending to bring the bench and bar into disrepute."¹⁵

Several interpretations of this catch-all language are possible. At one extreme, the language appears to authorize disciplinary proceedings against attorneys for conduct expressly permitted by the Code,¹⁶ although presumably it would not be so employed.¹⁷ At the other extreme, the language might be read so as to allow discipline of attorneys only for unethical conduct not mentioned in the Code, thus evidencing the Court's recognition that general ethical restraints govern novel problems. Such a reading renders the language superfluous, however, in light of the equally broad language of Disciplinary Rule (DR) 1-102,¹⁸ which already serves

¹⁵ KY. SUP. CT. R. 3.130(1). The Board of Governors of the Kentucky Bar Association is designated the agent of the state's Supreme Court for purposes of enforcing disciplinary standards. KY. SUP. CT. R. 3.070. The Board decides disciplinary cases and determines the appropriate discipline unless review by the state Supreme Court is sought by the respondent attorney or directed by the Court. *Id.*

¹⁶ Conceivably, the Court might regard conduct expressly permitted under the Code to be "unprofessional or unethical conduct tending to bring the bench and bar into disrepute." For example, while advances or guarantees of financial assistance made to clients by attorneys during pending litigation is generally prohibited by the Code, an attorney is expressly permitted to advance the expenses of that litigation as long as the client remains ultimately liable for such expenses. DR 5-103(B). An argument might well be made that such a practice is unprofessional and tends to bring the bar into disrepute because it creates at least the appearance that the attorney has acquired a personal financial stake in the outcome of the litigation and is thus unprofessional.

¹⁷ Such use would render the adoption of the Code largely meaningless, since an attorney could never rely upon even the express terms of the Code without fear of being disciplined under the catch-all language. Where the Kentucky Court has disagreed with the express requirements of the Code, it has so stated in its rules. *See, e.g.,* KY. SUP. CT. RS. 3.135, 3.475-.477 (advertisement, group plans, and prepaid legal services). Thus, the Court appears unlikely to use the catch-all language of Rule 3.130 to condemn conduct expressly permitted by the Code. *See Note, supra* note 5, at 1389-1400 for a discussion of the arguments supporting broad and narrow disciplinary standards.

¹⁸ That rule provides:

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.

that purpose within the Code itself.¹⁹

The most likely meaning of "other unprofessional or unethical conduct tending to bring the bench and bar into disrepute" is more troubling. Frequently the Code deals with a given category of conduct by expressly prohibiting certain actions, thus implicitly permitting those actions not specifically enumerated within the category.²⁰ The presence of the general language of Rule 3.130 might thus be read to allow discipline of attorneys for that conduct *implicitly permitted* by the Code.²¹ If so, the case law prior to the Code's adoption, which represents the Court's efforts to define unprofessional and unethical conduct tending to bring the bench and bar into disrepute,²² may retain some vitality in in-

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- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 1-102(A).

¹⁹ DR 1-102(A)(3)-(6), which pertain to conduct not otherwise covered by the Code's disciplinary rules, could be read to be coextensive with the catch-all language of Rule 3.130(1) ("other unprofessional or unethical conduct tending to bring the bench and bar into disrepute"). If so, the catch-all language is merely redundant. While such redundancy is plausible, it should not be presumed when a more limited and reasonable reading of the language is possible. Such a meaning is suggested in the text accompanying notes 20-21 *infra*.

²⁰ A typical example is the Code requirement of disclosure of certain information to tribunals. The Code provides:

In presenting a matter to a tribunal, a lawyer shall disclose:

- (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.
- (2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

DR 7-106(B). No mention is made in this disciplinary rule of any requirement to disclose to a tribunal facts known by an attorney to be adverse to the position of his or her client. Thus the nondisclosure of such adverse factual information by the attorney is implicitly permitted by the Code's treatment of disclosure in general.

²¹ In the example provided in note 20 *supra*, therefore, an attorney might well be disciplined under the catch-all language of Rule 3.130 for failing to disclose facts known to be adverse to the position of his or her client. Failure so to disclose arguably is unprofessional or unethical conduct tending to bring the bench and bar into disrepute because it misleads the tribunal as to the facts involved in a pending matter.

²² See, e.g., Kentucky State Bar Ass'n v. Vincent, 537 S.W.2d 171, 173 (Ky. 1976) (decided according to pre-Code law); Petition of Hubbard, 267 S.W.2d 743, 744 (Ky. 1954); Louisville Bar Ass'n v. Mazin, 139 S.W.2d 771, 772 (Ky. 1940). Until recently, the bar association's charges against attorneys were framed in language similar to the catch-all language. See, e.g., *In re Richard*, 244 S.W.2d 476 (Ky. 1951). This practice continued until 1980 when in Kentucky Bar Ass'n v. Wilkey, No. 80-SC-671-KB, the Supreme Court

interpreting Rule 3.130, particularly in instances where such case law treats specific conduct more strictly than does the Code.

The presence of the catch-all language in Rule 3.130 is indeed unfortunate. At a minimum, it provides the Court an easy avenue to avoid the difficult task of interpreting the Code itself. Its mere presence tempts the Court to rely upon this general language rather than the Code even where the Code clearly prohibits the conduct under review.²³ At worst, its wording may well be unconstitutionally vague as a disciplinary standard,²⁴ despite the Kentucky Supreme Court's conclusion otherwise.²⁵ Even if con-

urged the bar association to desist in this practice and, in the future, to present the Court with charges based on the provisions of the Code. In only one of eight disciplinary cases decided by the Kentucky Court since *Wilkey*, however, has the Court stated its objections to the attorney's conduct in terms of Code provisions.

²³ The Kentucky Supreme Court has frequently succumbed to this temptation. See, e.g., *Kentucky Bar Ass'n v. Brown*, 613 S.W.2d 418 (Ky. 1981) (attorney misappropriated client's funds, thus violating DR 9-102(B)(4), but disciplined instead under catch-all language of Rule 3.130); *Kentucky Bar Ass'n v. Marshall*, 613 S.W.2d 129 (Ky. 1981) (attorney neglected matter, violative of DR 6-101(A)(3); violated an order of court suspending him from practice, violative of DR 7-102(A)(8) and DR 3-101(B); made a false statement to a court, violative of DR 7-102(A)(5); and misled his client, violative of DR 1-102(A)(4); but disciplined instead under catch-all language of Rule 3.130); *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980) (attorney knowingly making false accusation against judge, thus violating DR 8-102(B), but disciplined instead under catch-all language of Rule 3.130); *Kentucky Bar Ass'n v. Dillman*, 554 S.W.2d 362 (Ky. 1977) (attorney neglected matter, violative of DR 6-101(A)(3); and knowingly made false statement of fact, violative of DR 7-102(A)(5); but disciplined under catch-all language of Rule 3.130). See also *Kentucky Bar Ass'n v. Clem*, 554 S.W.2d 360 (Ky. 1977); *Kentucky Bar Ass'n v. Dillman*, 539 S.W.2d 294 (Ky. 1976).

²⁴ Even the Code's catch-all provisions, DR 1-102(A)(5)-(6) quoted in note 18, *supra*, are questionable under the void for vagueness doctrine. See Weckstein, *supra* note 5, at 274-80; Note, *supra* note 5, at 1402-09; Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C. L. REV. 671 (1979). The courts, however, have not agreed. See, e.g., *In re Rook*, 556 P.2d 1351 (Or. 1976). See also Sutton, *supra* note 6, at 502 n.13. The vagueness problems presented by the Code are increased by the unfortunate use of Ethical Considerations by some states as the basis for disciplinary proceedings. See Note, *supra* note 5, at 1388. The Ethical Considerations were not intended to be so used by the drafters of the Code. See note 3 *supra* for a discussion of the purpose of the Ethical Considerations. The Kentucky Supreme Court has, on at least one occasion, based disciplinary action on a finding of violation of an Ethical Consideration. *Kentucky Bar Ass'n v. DeCamillis*, 547 S.W.2d 446, 447-48 (Ky. 1977). The catch-all language of Rule 3.130 is at least as broad as that in DR 1-102 and is, therefore, subject to the same criticism.

²⁵ *Kentucky Bar Ass'n v. Kramer*, 555 S.W.2d 245 (Ky. 1977). The Court further held in *Kramer* that it is not necessary, in order to find a violation of the catch-all language of Rule 3.130, for the Bar Association to introduce "proof of the manner in which

stitutional, however, the catch-all language is disturbing because it fails to guide attorneys as to appropriate conduct under given circumstances. Certainly such guidance is one of the major objectives underlying the codification of rules concerning legal ethics²⁶ and the adoption of that codification by the Supreme Court. However, by inserting the catch-all language in Rule 3.130, the Court has largely reclaimed with one hand that which it had given with the other. The confusion thus engendered is illustrated well by the status of the law governing attorney solicitation in Kentucky.

II. SOLICITATION IN KENTUCKY

Kentucky's past treatment of solicitation by attorneys has, at first glance, been lenient.²⁷ Even before the United States Supreme Court held certain solicitations to be protected under the first and fourteenth amendments,²⁸ Kentucky cases had declared

the . . . [conduct] . . . brought the bench and bar into disrepute." *Id.* at 246. The Court also upheld the predecessor of the Code, the Canons of Professional Ethics, against attack on grounds of vagueness, although recognizing constitutional problems in enforcing ethical generalities. *Kentucky State Bar Ass'n v. Taylor*, 482 S.W.2d 574, 582-83 (Ky. 1972) (decided after the adoption of the Code by the Kentucky Supreme Court but applying the Canons to conduct occurring before the Code's adoption).

²⁶ See note 3 *supra* for a discussion of this principle.

²⁷ For example, in his concurring opinion in *In re Primus*, 436 U.S. 412, 468-77 (1978) and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468-77 (1978) Justice Marshall refers to two Kentucky cases, *Louisville Bar Ass'n v. Hubbard*, 139 S.W.2d 773 (Ky. 1940), and *Petition of Hubbard*, 267 S.W.2d 743 (Ky. 1954), as examples of cases pronouncing solicitation rules which permit what he terms "benign" solicitation. 436 U.S. at 472 n.3. Justice Marshall's definition of "benign" solicitation is:

[S]olicitation by advice and information that is truthful and that is presented in a noncoercive, nondeceitful and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous.

Id. The Kentucky rule as paraphrased in the text appears to permit such "benign" solicitation. See the text accompanying note 29 *infra* for this paraphrased rule.

²⁸ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447; *In re Primus*, 436 U.S. 412; *United Transportation Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 216 (1967); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963). See also *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (truthful newspaper advertisement regarding availability and terms of routine legal services is speech protected by the first and fourteenth amendments). See note 98 *infra* for a discussion of these cases.

that, in general, solicitation of clients by attorneys was not a proper subject of discipline, absent any effort by the attorney to take advantage of the ignorance, weakness, suffering, or human frailties of the prospective client.²⁹

A. *The Origin of the Rule*

The precise origin³⁰ of this general rule is *Chreste v. Louisville Railway Company*,³¹ a contract action. In *Chreste* the plain-

²⁹ Petition of Hubbard, 267 S.W.2d at 744; Louisville Bar Ass'n v. Hubbard, 139 S.W.2d at 775-76.

The leniency of this Kentucky solicitation rule may surprise the first-time reader. For one thing, the rule has a certain contemporary sound to it, despite its first pronouncement in 1915. See the text accompanying notes 30-38 *infra* for a discussion of the origins of the rule. Solicitation of clients by attorneys has been regulated at least since the adoption of the Canons of Professional Ethics in 1908. See Canons 27 and 28, discussed in notes 51-52 *infra*. See also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 454 n.11. Only in recent years has there been a shift in attitude regarding the practice, largely as a result of changing notions of professionalism, the sophistication of the consuming public, and the need to make legal services available to large segments of our society. See note 27 *supra* for a discussion of benign solicitation. It is also surprising that such a liberal rule would prevail in a state which regards itself as a strict disciplinarian of its practicing attorneys. See Note, *Professional Responsibility*, 67 Ky. L.J. 757 (1978-79). Furthermore, the rule is considerably more lenient than the treatment of solicitation contained in the Code of Professional Responsibility. See note 7 *supra* for the provisions contained in the Code.

³⁰ The first Kentucky case involving solicitation is *Lenihan v. Commonwealth*, 176 S.W. 948 (Ky. 1915). The Court declared that the use of false statements and deceitful practices in the solicitation of clients was the appropriate subject of suspension or disbarment, but reversed the disbarment of the respondent attorney because the trial court had tried the matter partially on affidavits. *Id.* at 953. While the act of solicitation was involved in the case, the Court's attention instead centered on the attorney's fraudulent conduct, which understandably overshadowed any possible objection to the solicitation itself. *Id.* Thus *Lenihan* is less a solicitation case than one involving conduct evidencing a lack of that honesty and probity adequate for the continued practice of law. See the text accompanying notes 44-48 *infra* for a discussion of the historical interrelationship between prosecutions for solicitation and for lack of honesty and probity.

³¹ 180 S.W. 49 (Ky. 1915). The law on solicitation of clients by attorneys in Kentucky commenced with a flurry of cases between 1915 and 1917. These cases appear to be largely the result of efforts by Judge William H. Field of the Jefferson County Circuit Court to rid the local bar of such solicitation. Disbarment proceedings against attorneys instituted by Judge Field, based at least in part on solicitation, resulted in decisions by the state's highest court in *Chreste v. Commonwealth*, 198 S.W. 929 (Ky. 1917); *Chreste v. Commonwealth*, 186 S.W. 919 (Ky. 1916); and *Lenihan v. Commonwealth*, 176 S.W. 948. Additionally, the Court's opinion in *Chreste v. Commonwealth*, 186 S.W. 919, reveals that such proceedings had been instituted by Judge Field against other attorneys as well. 186 S.W. at 922. Judge Field's crusade appears to have continued for some time. See,

tiff attorney had a contingent fee contract with a client who was injured while as passenger on the defendant's railroad.³² In settlement with the injured passenger, the railroad agreed to pay the attorney's fee.³³ The attorney's suit to enforce this obligation was defended by the railroad on the ground that the attorney's contingent fee contract was void as against public policy because acquired through solicitation.³⁴ Although the attorney had employed a paid agent or "runner" to obtain the contract,³⁵ the railroad based its defense on the broad contention that solicitation in itself rendered the contract void as against public policy.³⁶ Agreeing with that broad theory, the trial court voided the contract upon the jury's finding that solicitation had occurred.³⁷ The state's highest court reversed, concluding that:

[m]ere solicitation on the part of an attorney, unaccompanied by fraud, misrepresentation, undue influence, or imposition of some kind, or other circumstances sufficient to invalidate the contract, is not of itself sufficient to render a contract between an attorney and client void on the ground that it is contrary to public policy.³⁸

Two aspects of the *Chreste* case, however, make it an unsound foundation for a disciplinary standard.³⁹ First, *Chreste* was a contract action, not a disciplinary proceeding.⁴⁰ The Court

e.g., *In re Carter*, 139 S.W.2d 754, 755 (Ky. 1940); *Louisville Bar Ass'n v. Hubbard*, 139 S.W.2d at 775.

³² 180 S.W. at 50.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* The use of such runners has long been regarded as the most reprehensible form of solicitation. See the text accompanying notes 56-57 *infra* for a discussion of this principle. See also Note, *Advertising, Solicitation and Legal Ethics*, 7 VAND. L. REV. 677, 685 (1953-54).

³⁶ The court noted that "the only issue submitted to the jury was whether or not the contract was obtained by solicitation." 180 S.W. at 50.

³⁷ *Id.*

³⁸ *Id.* at 53. On remand the defendant railroad's amended answer alleged that the contract of employment was secured through the use of an agent paid a contingent fee by the attorney for securing his employment and was thus void as contrary to public policy. *Chreste v. Louisville Ry. Co.*, 191 S.W. 285 (Ky. 1917). The trial court's voiding of the contract was affirmed on appeal. *Id.*

³⁹ The Court on one occasion has recognized the weakness of *Chreste* as a disciplinary precedent. See *Louisville Bar Ass'n v. Mazin*, 139 S.W.2d at 772.

⁴⁰ 180 S.W. at 50.

was confronted with the question of whether mere solicitation of a client by an attorney rendered the resulting employment contract void as against public policy.⁴¹ Such an inquiry involved more than merely passing on the propriety of the attorney's conduct in securing the contract. The Court was required to decide the additional and more difficult question of whether that conduct was so injurious to the interests of the public as to justify invalidating the contract itself.⁴² Thus the Court's refusal to hold the contract void on grounds of public policy cannot logically be read as judicial approval of the attorney's conduct.⁴³

Second, *Chreste* arose at a time when solicitation may have been frowned upon as unseemly by some members of the bar but apparently was not regarded as an appropriate subject of discipline.⁴⁴ Indeed, the Court's opinion in *Chreste* seems to have regarded solicitation as a relatively standard practice.⁴⁵ Solicitation

⁴¹ *Id.*

⁴² *Id.* at 52.

⁴³ As the Court in *Chreste* noted:

[I]t must be remembered that there is a wide difference between what is undignified or unbecoming conduct on the part of an attorney and what is clearly contrary to public policy. Such conduct may be disapproved of by the courts and by those representatives of the profession who are concerned in seeing that its standards are never lowered, and yet it may fall far short of being so injurious to the interest of the public as to invalidate a contract of employment thus obtained.

Id. at 53.

⁴⁴ See L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 7 (1980). See generally H. DRINKER, LEGAL ETHICS 210-11 (1953).

⁴⁵ The Court's opinion implies that solicitation was more acceptable in 1915 than it is today. For example, the Court notes:

There are many forms of solicitation. Some lawyers seek business by advertising in the newspapers; others by sending out announcement cards; others by asking friends to send them business; others by applying directly, or through the medium of friends, for employment by firms and corporations; others buy stock in corporations, with the understandings that they are to be employed as counsel; still others invite to their homes and frequently entertain those who are likely to require the services of an attorney. Doubtless many solicit business in person, or through young lawyers or agents employed for that purpose. Manifestly, if every kind of solicitation, regardless of the form it may take, is to be condemned, then only in rare instances would there be such a thing as a valid contract of employment between a lawyer and his client. If some forms are to be permitted, while others are to be condemned, where shall the line be drawn? . . . If it be lawful for an attorney to send out announcement cards, or insert an adver-

was not then prohibited in Kentucky by any statute or the common law.⁴⁶ In fact, the only ground at the time for disciplining an attorney was misconduct indicating a lack of "honesty, probity, and good demeanor in his professional capacity."⁴⁷ Thus the Court's lenient language as to the propriety of solicitation, perhaps appropriate under the disciplinary standards extant at the time, is of questionable validity under more modern, stricter standards.⁴⁸

The general rule in *Chreste*, therefore, was never meant as a standard for gauging the ethical conduct of attorneys. That it was cited as such a standard⁴⁹ is indeed unfortunate.⁵⁰

B. *The Pre-Code Application of the Rule*

In 1946 Kentucky's highest court adopted the American Bar Association's Canons of Professional Ethics⁵¹ which expressly pro-

tisement in the newspaper, or buy stock in a corporation, with the understanding that he is to be employed as counsel, or ask his friends to recommend him for employment by firms or corporations, how can it be said that, if he solicits business in person, or by an agent, that the public interest will be so endangered that any contract obtained under such circumstances will be contrary to public policy?

180 S.W. at 53. Currently attorneys would be subject to discipline for personally soliciting business, DR 2-103(A), employing others to solicit business, DR 2-103(B), and for requesting friends to solicit business, DR 2-103(C). Similarly, prior to *Bates v. State Bar of Arizona*, 433 U.S. 350, at least, advertisements by attorneys in newspapers were prohibited. DR 2-101. Thus the Court in *Chreste* appears to condone several forms of solicitation which were subsequently prohibited. Additionally, the Court noted that "it is difficult to perceive upon what theory [solicitation] can be said to be clearly injurious to the public good." 180 S.W. at 53.

⁴⁶ *Id.*

⁴⁷ *Chreste v. Commonwealth*, 186 S.W. at 927; *Commonwealth v. Roe*, 112 S.W. 683, 685 (Ky. 1908).

⁴⁸ See, e.g., the Canons of Professional Ethics, discussed in notes 51-52 *infra*, and the Code of Professional Responsibility, discussed in notes 2 and 7 *supra*.

⁴⁹ See, e.g., *Louisville Bar Ass'n v. Hubbard*, 139 S.W.2d at 775.

⁵⁰ Certainly it is not immediately apparent that the standard for disciplining an attorney for engaging in solicitation should be the same as that necessary to invalidate a contract on public policy grounds. See the text accompanying notes 39-43 *supra* for a discussion distinguishing these two grounds. To equate the two standards without explanation leaves open the inference that the difference between the two contexts was not perceived.

⁵¹ The Canons of Professional Ethics were the result of the first effort by the American Bar Association to formalize standards of professional ethical conduct and were ap-

hibited solicitation by attorneys.⁵² Nevertheless, the Kentucky Court continued to reiterate the *Chreste* rule,⁵³ thus signifying apparent continued approval of what might be termed "benign" solicitation.⁵⁴ The actual holdings of a number of post-*Chreste* cases, however, indicate less than strict adherence to that notion. In fact, rather than being remarkably lenient,⁵⁵ the Kentucky approach to attorney solicitation has been, in some respects, significantly more stringent than that of other jurisdictions.

One form of solicitation which the Kentucky Court has uniformly disapproved of⁵⁶ is solicitation by paid agents, or so-called "runners."⁵⁷ Moreover, the Court has disciplined attorneys em-

proved by that body in 1908. It was not until 1946, however, that Kentucky officially adopted the Canons for use in disciplinary proceedings. The Court's order provided:

The Court recognizes and accepts the principles embodied in the American Bar Association's Canons of Professional and Judicial Ethics as a sound statement of the standard of professional conduct required of members of the Bench and Bar, and *the Court regards these Canons as persuasive authority in all disciplinary proceedings* against members of the Bar.

Ky. Cr. App. R. 3.170 (May 14, 1946). (Emphasis added.)

⁵² Canon 27 provided: "It is unprofessional conduct to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations." Canon 28 also provided: "It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so."

⁵³ See, e.g., *Petition of Hubbard*, 267 S.W.2d at 744.

⁵⁴ See note 27 *supra* for a discussion of benign solicitation.

⁵⁵ See the text accompanying notes 27-29 *supra* for a discussion of the factors suggesting a lenient approach in Kentucky.

⁵⁶ See, e.g., *In re Carter*, 139 S.W.2d 754; *Louisville Bar Ass'n v. Mazin*, 139 S.W.2d 771; *Louisville Bar Ass'n v. Hubbard*, 139 S.W.2d 773; *Chreste v. Commonwealth*, 198 S.W. 929.

⁵⁷ *Louisville Bar Ass'n v. Hubbard*, 139 S.W.2d at 774; *Chreste v. Commonwealth*, 186 S.W. at 926. Such agents are also sometimes referred to as "touters." See, e.g., Canon 27, American Bar Association Canons of Professional Ethics, quoted in note 52 *supra*.

The *Chreste* case, discussed in the text accompanying notes 30-50 *supra*, involved the use of runners. Indeed, the use of runners in *Chreste* eventually resulted in the loss of the attorney's fee, see note 38 *supra*, and his disbarment as well. See *Chreste v. Commonwealth*, 186 S.W. 919 (attorney's disbarment for use of runners reversed because trial court tried matter largely by affidavits); *Chreste v. Commonwealth*, 198 S.W. 929 (attorney's disbarment for use of runners affirmed). The full panorama of the litigation involving *Chreste* reveals just how fortuitous Kentucky's general rule on solicitation was. The defendant railroad in the initial *Chreste* case did not adequately raise the issue of the use of a runner by the attorney. Thus, the general rule as pronounced in *Chreste* was the result of careless trial advocacy. See the text accompanying notes 35-36 *supra* for a description of the nature of this carelessness.

ploying such agents without regard to the benign nature of the solicitation utilized by the agent.⁵⁸ The Court's obvious distaste for such practices is evidenced by its disapproval of other types of lay solicitation, some of which traditionally have been regarded as acceptable.⁵⁹ For example, the court in *In re Richard*⁶⁰ disciplined an attorney in part because his father-in-law had solicited personal injury cases for him.⁶¹ Nowhere was it alleged that the attorney had paid his father-in-law for such solicitation⁶² or, indeed, that he had even asked his father-in-law to engage in solicitation.⁶³ The attorney's apparent acquiescence in and knowing acceptance of the results of that solicitation were deemed to be sufficient grounds for discipline.⁶⁴ Thus *Richard* indicates the pre-Code Kentucky Court's apparent disapproval of what has generally been regarded as the only acceptable way of attracting new clients, namely, unrequested and uncompensated referrals by others,⁶⁵ at least where there is a regular pattern of such referrals.

Solicitation which tends to instigate litigation is another category of otherwise benign solicitation which resulted in disci-

⁵⁸ See *In re Richard*, 244 S.W.2d 476 (Ky. 1951), discussed in the text accompanying notes 60-65 *infra*.

⁵⁹ See note 65 *infra* for a discussion of this principle.

⁶⁰ 244 S.W.2d 476.

⁶¹ *Id.* at 477.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 477-78.

⁶⁵ The Canons of Professional Ethics applicable at the time *In re Richard* was decided expressly prohibited only the use of "touters," Canon 27, and the employment of "agents or runners," Canon 28. While the Canons may be read to prohibit the use of uncompensated agents, they certainly do not appear to prohibit an attorney from accepting employment referred to him or her by one not requested to do so.

The Kentucky Supreme Court had earlier indicated its disapproval of unrequested, uncompensated solicitation by laypersons in *In re Carter*, 139 S.W.2d 754. In response to the assertion that the attorney had used an agent to solicit personal injury cases, the attorney offered proof that the so-called agent was not authorized to solicit for him nor promised any reward for doing so. *Id.* at 755. The Court responded: "In doing so he fails to consider the main portion of the . . . [prospective client's] . . . testimony, which is not impeached, and which we conclude shows that [the purported agent] . . . , at the time, was using his efforts in behalf of . . . [the attorney]" *Id.* The Court apparently thought the mere existence of lay solicitation conclusive of impropriety, despite an alleged lack of request to solicit or compensation for having done so by the attorney.

The Code does not prohibit unrequested, uncompensated lay solicitation. See note 7 *supra* and the text accompanying note 93 *infra* for discussions of Code provisions.

pline in Kentucky prior to the adoption of the Code.⁶⁶ The pre-Code Kentucky Court disciplined attorneys who engaged in non-fraudulent, non-oppressive solicitation when litigation was the subject matter of the employment sought.⁶⁷ In one case, the Court extended its prohibition to an attorney who had offered his services to other attorneys to assist in the collection of unsatisfied judgments.⁶⁸ The Kentucky Court's treatment of this kind of solicitation again has been more strict⁶⁹ than in most other jurisdic-

⁶⁶ The tendency of solicitation to instigate litigation is frequently asserted as a justification for broadly prohibiting solicitation. See Note, *supra* note 35, at 678; Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1188-89 (1971-72); Comment, *Attorney Solicitation and the Threat of Bar Sanctions: A Hindrance to Justice for All?*, 50 MISS. L.J. 419, 430-31 (1979); Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674, 675-78 (1957-58).

⁶⁷ *Kentucky State Bar Ass'n v. Stivers*, 475 S.W.2d 900 (Ky. 1971); *Petition of Hubbard*, 267 S.W.2d 743.

⁶⁸ *Petition of Hubbard*, 267 S.W.2d 743. The attorney sought an advisory opinion regarding the propriety of his plan to search the records of state courts for unsatisfied judgments and to offer his services to the attorneys of record for purposes of collecting the judgments. *Id.* The Court agreed with the Kentucky Bar Association's Board of Bar Commissioners that such conduct would violate Canon 28 of the American Bar Association's Canons of Professional Ethics. Canon 28 provides in part:

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment

The Canons were regarded as "persuasive authority" by a rule of the state's highest court. See note 51 *supra* for a discussion of the Court's treatment of the Canons. The court in *Hubbard* apparently considered irrelevant the fact that the proposed solicitation would be directed only at other attorneys. Under the currently applicable Code of Professional Responsibility in Kentucky, such solicitation of attorneys by attorneys is permissible.

A lawyer shall not recommend employment as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

DR 2-103(A) (emphasis added).

The above version of DR 2-103(A) is the original 1969 language which is still in force in Kentucky. See note 14 *supra* for a discussion of the implications of having the 1969 version still in force. In comparison, the current rule as amended by the American Bar Association reads:

A lawyer shall not, *except as authorized in DR 2-101(B)*, recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.

DR 2-103(A) (emphasis added).

⁶⁹ See, e.g., *Kentucky State Bar Ass'n v. Stivers*, 475 S.W.2d 900. The attorney had permitted a letter to be sent on his stationery to a victim of an automobile accident. The

tions, where solicitation directed at other attorneys is permissible even though the solicitation pertains to litigation.⁷⁰

Finally, in at least one pre-Code case, the Kentucky Court discarded the *Chreste* rule altogether and disciplined an attorney for personally engaging in apparently benign solicitation. In *In re Rielly*,⁷¹ the respondent attorney had drafted several codicils to a will for the testator and also represented a trust of the testator at the time of the testator's death.⁷² One of the named co-executors of the will selected the respondent attorney to represent the estate, but the other co-executor chose another attorney.⁷³ The respondent attorney then met with and telephoned the reluctant co-executor to solicit approval of his employment representing the estate.⁷⁴ The co-executors ultimately agreed to joint representation of the estate by the two attorneys separately favored by each co-executor.⁷⁵ After a satisfactory and competent conclusion of the proceedings, however, the reluctant co-executor sought disciplinary action against the respondent attorney.⁷⁶ If ever there were facts suitable for the application of the *Chreste* rule, the *Rielly* case presented them. Indeed, the Court recognized the "forceful and aggressive" personality and business experience of the solicited client,⁷⁷ and that the attorney's efforts "were in the nature of efforts to make a business arrangement at arms [sic] length, rather than attempts to exert influence upon a susceptible, inexperienced prospective client."⁷⁸ Furthermore, the Court

letter merely advised the victim that the attorney handled such cases, that he was admitted to practice in both Kentucky (where the victim resided) and Indiana (where the accident occurred), that the attorney was willing to handle this case, and that the victim should call for an appointment if she desired to avail herself of the attorney's services. *Id.* at 901. Clearly the letter contained no hint of "fraud, misrepresentation, undue influence, or imposition of some kind," as required under the *Chreste* rule. See the text accompanying note 38 *supra* for a description of the *Chreste* rule. The fact that the solicitation sought employment for the purpose of instituting litigation, however, was deemed sufficient to justify the attorney's suspension from practice for one year. *Id.* at 905.

⁷⁰ The Code makes no such distinction. See DR 2-103(A)-(C).

⁷¹ 310 S.W.2d 524 (Ky. 1957).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 524-25.

⁷⁵ *Id.* at 525.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

expressly recognized that this case presented an unusual solicitation context where an attorney, already selected by one co-executor, was merely trying to convince the other as to his employment.⁷⁹ Nevertheless, the Court publicly reprimanded the attorney for his conduct,⁸⁰ concluding that the attorney's persistence in seeking such employment warranted discipline.⁸¹ More remarkable, however, is the Court's failure even to mention *Chreste* or any of the cases reiterating the *Chreste* rule.

The pre-Code treatment of solicitation in Kentucky, therefore, was considerably different than the simple, lenient rule announced in *Chreste* and reiterated thereafter.⁸² Benign solicitation was prohibited when regularly done by a layperson⁸³ or when the subject matter of the solicitation involved litigation, even when that solicitation was directed at another attorney.⁸⁴ Moreover, even where the *Chreste* rule appeared appropriate, the Kentucky Court occasionally chose not to follow it.⁸⁵

C. *The Rule and Kentucky's Adoption of the Code*

The Kentucky Supreme Court's adoption of the Code of Professional Responsibility⁸⁶ should have largely eliminated the confusion engendered by its pre-Code treatment of solicitation.⁸⁷ The Code directly prohibits the solicitation of laypersons by attorneys or their agents.⁸⁸ Because of the catch-all language used by the Court in adopting the Code,⁸⁹ however, the confusion remains.

⁷⁹ *Id.*

⁸⁰ *Id.* at 526.

⁸¹ *Id.*

⁸² See the text accompanying notes 30-48 *supra* for a discussion of this principle.

⁸³ See the text accompanying notes 56-65 *supra* for a discussion of these cases.

⁸⁴ See the text accompanying notes 66-70 *supra* for a discussion of this treatment.

⁸⁵ See the text accompanying notes 71-81 *supra* for a discussion of a case not following the *Chreste* rule even when applicable to its facts.

⁸⁶ See note 4 *supra* for the text of the rule adopting the Code in Kentucky.

⁸⁷ See the text accompanying notes 27-85 *supra* for a discussion of the confusion created by the Kentucky court's treatment of solicitation before its adoption of the Code.

⁸⁸ DR 2-103(A)-(C). See note 7 *supra* for relevant Code provisions.

⁸⁹ See note 4 *supra* and the text accompanying notes 15-26 *supra* for a discussion of the catch-all language and the resulting confusion.

The Code does apply to the extent that it is stricter than the pre-Code treatment of solicitation in Kentucky. Thus, regardless of pre-Code leniency as to benign solicitation,⁹⁰ the Code has provided the minimum level of acceptable conduct since 1969. No case since that time indicates the survival of the lenient *Chreste* rule in the face of the stricter Code provisions.⁹¹

Kentucky's pre-Code treatment of solicitation, however, was in some respects more stringent than the Code's treatment. As noted above, prior to the Code's adoption, attorneys in Kentucky had been disciplined for engaging in solicitation directed at other attorneys when the employment sought involved litigation⁹² and

⁹⁰ See note 27 *supra* for a discussion of benign solicitation. The Code proscribes even benign solicitation. DR 2-103(A)-(C) and DR 2-104(A).

⁹¹ One case arising since Kentucky's adoption of the Code, *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933 (Ky. 1978), might be read as a reassertion of the *Chreste* rule, permitting benign solicitation, despite the stricter Code provisions. In *Stuart* two attorneys mailed letters to real estate agencies advising the recipients that the attorneys engaged in real estate practice, listing their fees for title opinions and document preparation, and making certain guarantees regarding their work. *Id.* at 933. The Board of Governors of the state bar association found such conduct violated DR 2-103(A) and recommended that the attorneys be publicly reprimanded. *Id.* at 933-34. The Court disagreed, however, and dismissed the complaint. Because the solicitation was benign, see note 27 *supra*, the Court's action might be viewed as a reaffirmation of the *Chreste* rule. The Court in *Stuart*, however, regarded the letters not as solicitations but as advertisements. *Id.* at 934. Thus, the Court reasoned, the letters fell within the rule of *Bates v. State Bar of Ariz.*, 433 U.S. 350. That is, the speech contained in the letters could only be regulated upon a showing by the state of sufficient justification exceeding the individual and societal interests in free speech. 568 S.W.2d at 934. The Bar Association, having failed to make such a showing, was thus prohibited from disciplining the attorneys by the first and fourteenth amendments. *Id.* Because of the Court's treatment of these letters as advertisements, it avoided the troubling question of the constitutionality of the solicitation provisions of the Code. See note 98 *infra* for a discussion of constitutional issues. The only other Kentucky solicitation case arising under the Code's provisions is *Kentucky Bar Ass'n v. Albert*, 549 S.W.2d 295 (Ky. 1976), where the Court summarily affirmed the public reprimand of an attorney for an undisclosed violation of DR 2-103.

In an unpublished opinion, the Supreme Court found solicitation by a legal aid attorney of a plaintiff in a civil rights action to be acceptable under DR 2-103(D)(1)(c). *Kentucky Bar Ass'n v. Wilkey*, No. 80-SC-671-KB (Ky. Dec. 16, 1980). The Court stated:

This court has extreme distaste for any kind of solicitation of business by a member of the bar, whether or not it is for personal remuneration. It is not in keeping with what we regard as respectable professionalism. Nevertheless, there is the rule in black and white, and it does not leave very much room for argument.

Id.

⁹² See the text accompanying notes 66-70 *supra* for a discussion of the practice. The Code prohibits only the solicitation of laypersons. DR 2-103(A).

for accepting employment resulting from regular, but unrequested and uncompensated solicitation by laypersons on their behalf.⁹³ Since the Court regarded such practices as unprofessional or unethical conduct prior to 1969,⁹⁴ it is possible that the catch-all language of Rule 3.130 permits disciplining attorneys for engaging in such practices, despite the Code's implicit approval of those practices.⁹⁵

Rule 3.130's catch-all language makes the Code a mere minimum below which an attorney's conduct may not ethically fall. Thus, an attorney can be sure that violating DR 2-103(A)⁹⁶ may result in discipline but cannot be sure that complying with that disciplinary rule will shield him or her from discipline.⁹⁷ Whatever certainty the Code's treatment of solicitation may have offered, therefore, is largely lost.⁹⁸

⁹³ See the text accompanying notes 60-65 *supra* for a discussion of the Court's discipline for such conduct. The Code prohibits an attorney from requesting another to recommend his or her employment except under certain circumstances, DR 2-103(C), and compensating another for having recommended his or her employment, DR 2-103(B). By implication, therefore, the Code approves of unrequested, uncompensated recommendations and referrals.

⁹⁴ See the text accompanying note 22 *supra* for a discussion of the Court's treatment of such conduct prior to 1969.

⁹⁵ See notes 92 and 93 *supra* for discussions of relevant Code provisions.

⁹⁶ The rule provides: "A lawyer shall not . . . recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer." DR 2-103(A). For the 1969 version of this rule, applicable in Kentucky, see note 68 *supra*.

⁹⁷ For example, the solicitation of employment from another attorney is permissible under DR 2-103(A), which limits its proscription to solicitation directed at laypersons. If the subject matter of such solicitation is litigation, however, that solicitation may be viewed in Kentucky as unprofessional or unethical conduct. See the text accompanying notes 67-70 and note 92 *supra* for discussions of this view. Thus conduct implicitly permissible under the Code is an appropriate subject of discipline under the catch-all language of Rule 3.130.

⁹⁸ To add to the uncertainty, the Code provisions regarding solicitation may be subject to challenge under the first and fourteenth amendments. The United States Supreme Court has upheld DR 2-103(A) and 2-104(A) as applied to in-person solicitation for pecuniary gain under circumstances likely to result in fraud, undue influence, intimidation, or overreaching. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447. Solicitation seeking litigants to further civil rights and other public interests, however, has been held to be political expression and association protected by the first and fourteenth amendments. Broad proscriptions of such solicitation were struck down in *In re Primus*, 436 U.S. 412; *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576; *United Mine Workers of*

III. THE OBVIOUS SOLUTION

The catch-all language of Rule 3.130 causes substantial, unnecessary uncertainty, not only in the area of solicitation, but throughout the regulation of legal ethics in Kentucky.⁹⁹ To allevi-

America v. Illinois State Bar Ass'n, 389 U.S. 217; *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1; *NAACP v. Button*, 371 U.S. 415.

Furthermore, the Court has held truthful newspaper advertising regarding the availability and cost of routine legal services to be protected speech, though commercial rather than political in nature, under the first and fourteenth amendments. *Bates v. State Bar of Ariz.*, 433 U.S. 350. In *Bates*, the Supreme Court expressly avoided the problem of direct solicitation. *Id.* at 366. The *Bates* decision led to the revision of DR 2-101, see *House of Delegates Adopts Advertising D.R. and Endorses a Package of Grand Jury Reforms*, 63 A.B.A. J. 1234 (1977), and to the qualifying language of the Kentucky Supreme Court's amended rule adopting the Code. See note 4 *supra* for the language of this amendment.

Thus the large question remaining is whether direct solicitation for pecuniary gain not likely to result in fraud, undue influence, intimidation, or overreaching, (that is, benign solicitation), should be treated as constitutionally protected speech, like advertising. Both solicitation and advertising are efforts seeking employment by prospective clients. They are distinguishable largely by the audience to which they are addressed. Solicitation "implies personal petition to a particular individual to do a particular thing . . . [and advertising implies] . . . the calling of information to the attention of the public" *Koffler v. Joint Bar Ass'n*, 412 N.E. 2d 927, 931 (N.Y. 1980).

While the United States Supreme Court has not addressed this issue, several state courts have, at least in the context of direct mail solicitation for pecuniary gain. Some of these states have held such solicitation is constitutionally-protected speech. See *Bishop v. Iowa State Bar Ass'n*, 521 F. Supp. 1219 (S.D. Iowa 1981); *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933; *Koffler v. Joint Bar Ass'n*, 412 N.E.2d 927. Other states have refused to do so. See *Florida Bar v. Schreiber*, 407 So.2d 595 (Fla. 1981); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1978); *Allison v. Louisiana State Bar Assn*, 362 So. 2d 489 (La. 1978).

Following its decision in *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933 (discussed in note 91 *supra*), the Kentucky Supreme Court amended its own rule on advertisement of legal services to expressly permit the direct mailing of advertising materials to potential clients. Ky. SUP. CT. R. 3.135, amended May 14, 1979, effective July 1, 1979. See note 110 *infra* for further discussion of this rule. The rule does not permit other forms of solicitation. Thus, the question remains in Kentucky whether forms of benign pecuniary solicitation other than direct mailings are protected speech under the First and Fourteenth Amendments. Until that question is resolved the Kentucky Supreme Court's treatment of solicitation under the Code and its own rule remains constitutionally questionable.

For the contention that even in-person benign solicitation is constitutionally protected speech, see Simet, *Solicitation of Public and Private Litigation Under the First Amendment*, 93 WASH. U.L.Q. 93, 108 (1978); Note, *Attorney Solicitation: The Scope of State Regulation After Primus and Ohralik*, 12 U. MICH. J.L. REF. 144, 163-65, 175-78 (1978-79); Note, *supra* note 66, at 1185-91.

⁹⁹ For example, prior to the adoption of the Code, the Kentucky Court held that an attorney's failure to file federal income tax returns was not a crime involving moral turpitude but was the appropriate subject of discipline nonetheless. *Kentucky Bar Ass'n v.*

McAfee, 301 S.W.2d 899, 900 (Ky. 1957). Under the Code, illegal conduct by an attorney is the appropriate subject of discipline if it involves moral turpitude, or if it involves "dishonesty, fraud, deceit, or misrepresentation," or if it otherwise "adversely reflects on his fitness to practice law." DR 1-102(A)(3), (4) and (6). Despite the Code provisions, the Court has used the catch-all language of Rule 3.130 to discipline attorneys who fail to file income tax returns. *Kentucky Bar Ass'n v. Kramer*, 555 S.W.2d 245; *Kentucky Bar Ass'n v. Taylor*, 549 S.W.2d at 509; *Kentucky Bar Ass'n v. Trimble*, 540 S.W.2d 599, 600 (Ky. 1976); *Kentucky State Bar Ass'n v. Vincent*, 537 S.W.2d at 173. The Kentucky Court has, therefore, continued its pre-Code practice of disciplining such attorneys merely because of the effect of such conduct on the image of the profession rather than because of the more narrow concerns of DR 1-102(A)(3), (4), and (6).

Another example of stricter pre-Code case law which may survive Kentucky's adoption of the Code is in the area of conflicts of interest. In *In re Ray*, 390 S.W.2d 899 (Ky. 1965), the Court disciplined an attorney for his conduct in assisting a client to avoid a mortgage foreclosure. The client transferred the subject real property to the attorney, as trustee, under an agreement whereby the attorney would transfer it back to the client or his designee upon payment of the attorney's fee and a charge for the use of the attorney's credit. The foreclosure was avoided, and the property was transferred to the client's designee. After payment of his fee, the attorney claimed the \$1,300 remaining from the transfer of the property. *Id.* at 900. The Court found such a result objectionable. The Court stated:

What is significant is that [the client] came to [the attorney] owning a substantial equity in a piece of real estate, and when his dealings with [the attorney] were completed he had nothing while [the attorney] had \$1,300. Obviously there was a breach of professional ethics in the achievement of such a result, and it is immaterial by what name the breach be called. We think also it is immaterial (except as regards the *degree* of the offense) that [the attorney] may have done what he did with full agreement of [the client]. It is our opinion that an attorney may not properly be permitted to switch hats, from that of an officer of the court to that of a money lender, in the middle of his dealings with a client.

Id. The attorney's conduct does not necessarily violate the subsequently adopted Code. Attorneys may engage in business transactions with clients under DR 5-104(A) so long as the client consents after full disclosure. The Code's prohibitions of attorneys acquiring proprietary interests in the subject matter of the representation are limited to matters involving litigation. DR 5-103(A). Furthermore, an attorney's fee is not objectionable under the Code unless it is "illegal or clearly excessive." DR 2-106(A). The catch-all language of Rule 3.130, however, raises the question whether the stricter pre-Code view in *In re Ray* governs rather than the more lenient Code provisions.

An excellent example of the uncertainty created by the presence of the catch-all language in Rule 3.130 is presented by *Kentucky Bar Ass'n v. Graves*, 556 S.W.2d 890 (Ky. 1977). In *Graves*, the attorney agreed to represent a claimant in a personal injury action under a 40% contingent fee agreement. The attorney also received a \$500 retainer and required the pre-payment of \$1,000 (and later an additional \$1,840.65) for litigation expenses. *Id.* at 890-91. Charges by the attorney against the expense account included several items of regular overhead (such as law clerk wages and secretarial expenses) as well as an expensive dinner with a medical expert. *Id.* at 891. The Court found this conduct to be particularly offensive, only reluctantly affirming the Bar Association's recommendation of a public reprimand rather than imposing a harsher sanction. *Id.* at 892. Apparently the Court was incensed at the amount of compensation obtained by the attorney under the arrangement. The Court chose not to review the conduct under DR 2-106(A), which pro-

ate this uncertainty, the rule¹⁰⁰ should be amended to delete that troublesome catch-all language.¹⁰¹

By limiting the discipline of attorneys to offenses committed under the Code, the Court would clarify greatly the status of the Code in the state. The general provisions of DR 1-102¹⁰² would still provide sufficiently flexible authority to discipline attorneys for offensive conduct not falling within the more specific provisions of the Code. But the bar association in making its charges¹⁰³ and the Court in deciding disciplinary cases¹⁰⁴ would be confined to the language of the Code itself. Gone would be the temptation to style violations under the catch-all language, even in the face of applicable Code provisions.¹⁰⁵ Furthermore, since the Court would be called upon to interpret only the language of the Code, gone also would be the possibility of finding ethical violations in conduct expressly or implicitly permitted by specific Code provisions.¹⁰⁶

Such an amendment need not lessen the rigor of the ethical restraints imposed upon attorneys practicing in Kentucky. It would alter the current regulation of ethics in only one significant respect. Rather than proceeding on a case-by-case basis under the present catch-all language, the Court would either apply a specific Code provision or, if it considered the provision too le-

hibits "clearly excessive" fees and DR 2-106(B), which provides the factors for determining such fees. Instead the Court responded to its visceral feeling that such a financial arrangement was unethical, stating that it was "difficult . . . to comprehend an attorney with a full-time practice to expect his clients to meet his overhead expenses." *Id.* The Kentucky Court's attitude preferring general over specific restraints on attorneys' conduct was further indicated by its statement that the attorney "needed no disciplinary regulation to tell him right from wrong." *Id.*

¹⁰⁰ See note 4 *supra* for the text of Ky. SUP. CT. R. 3.130(1).

¹⁰¹ The proposed amendment would delete the words "as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute." See note 4 *supra* for the text of the rule as it now reads.

The amendment should also expressly designate the version of the Code which the Court is adopting. See note 14 *supra* for a discussion of why such an amendment is necessary. Alternatively, the Court could have the entire Code reproduced as Supreme Court Rules rather than adopting them by reference.

¹⁰² See note 18 *supra* for the text of DR 1-102.

¹⁰³ See Ky. SUP. CT. RS. 3.070 and 3.370.

¹⁰⁴ See Ky. SUP. CT. R. 3.370(5)-(9).

¹⁰⁵ See the text accompanying note 23 *supra* for a discussion of this temptation.

¹⁰⁶ See the text accompanying notes 16-19 and 92-95 *supra* for discussions of this potential.

nient, use its rulemaking powers to adopt its own ethical rule on that subject.¹⁰⁷ The benefit of such an approach is obvious. Practicing attorneys could rely on the express provisions of the Code. When the state's Supreme Court chose to be more strict than the Code, it would publish a new rule, putting the practicing bar on adequate notice of the new standard.¹⁰⁸ At last, the benefits offered by the codification of the rules concerning legal ethics¹⁰⁹ would be available to Kentucky attorneys.¹¹⁰

CONCLUSION

The catch-all language utilized by the Kentucky Supreme Court in adopting the Code of Professional Responsibility creates unnecessary uncertainty as to solicitation by attorneys and as to legal ethics in general. It presents an easy, unfortunate alternative to careful construction of the Code and allows disciplinary actions against attorneys for conduct authorized by the Code. To clarify the presently uncertain status of the Code in Kentucky, the rule should be amended to delete the catch-all language.

¹⁰⁷ The Court has exercised this power to promulgate rules governing several areas of professional conduct. See KY. SUP. CT. RS. 3.135, 3.475, 3.476, and 3.477 (regulating advertisements, group legal services and prepaid legal services).

¹⁰⁸ When reviewing actions by administrative agencies, courts reveal a strong preference toward rulemaking over adjudication for the declaration of new regulatory principles. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 202 (1947); Bell Telephone Co. v. FCC, 503 F.2d 1250, 1265 (3d Cir. 1974); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966). While a court ordinarily is able to announce new doctrines and principles only in the context of adjudications, B. SCHWARTZ, ADMINISTRATIVE LAW 185 (1976), in the field of legal ethics the Kentucky Supreme Court, like an administrative agency, also has available its rule-making authority. See KY. SUP. CT. R. 1.010. Thus the Court in announcing new ethical restrictions is able to effectuate the general judicial preference for rule-making over adjudication for such proclamations.

¹⁰⁹ The Code itself, of course, sometimes is vague and not helpful. See note 5 *supra* for further development of this point.

¹¹⁰ Although the suggested amendment of Rule 3.130 would eliminate the uncertainty engendered by the rule's catch-all language, it would leave the constitutional uncertainty regarding the present Code prohibitions of solicitation. See note 98 *supra* for a discussion of constitutional issues in the Code. A recent amendment to the Kentucky Supreme Court's rule regarding advertisement, Rule 3.135, clarifies one ambiguity under the Code's treatment of solicitation. The amended rule permits the direct mailing of advertising to potential clients, a practice generally regarded as a form of solicitation. See L. ANDREWS, *supra* note 44, at 63-66. See also cases cited in note 98 *supra*. The rule prohibits such direct mailings, however, if they are "prompted or precipitated by a specific event or

occurrence involving or relating to the addressee or addressees as distinct from the general public." Ky. SUP. CT. R. 3.135. While the rule thus expands the category of acceptable solicitation beyond that authorized by the Code, it does not authorize in-person benign solicitation or direct mailings prompted by a specific event, such as an accident, a death, or a listing of real estate for sale. A reasonable question remains, therefore, of whether the rule as amended is constitutional under the first and fourteenth amendments. See note 98 *supra* for a discussion of these constitutional issues.