Kentucky Law Survey: Professional Responsibility

William H. Fortune

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

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub

Part of the Legal Ethics and Professional Responsibility Commons, and the Legal Profession Commons

Recommended Citation

Professional Responsibility

BY WILLIAM H. FORTUNE

This is a survey of recent (as of December 1997) Kentucky ethics cases and Kentucky Bar Association ethics opinions. The cases and opinions selected are those of general application but special interest.

I. NON-DISCIPLINARY CASES

A. Insurance Defense Lawyers' Fees

If insurance defense lawyers were asked to name the most important case decided by the Supreme Court of Kentucky in recent years, *American Insurance Ass'n v. Kentucky Bar Association* would be the most likely answer. The Kentucky Supreme Court’s decision in *American Insurance* cut short the insurance industry’s efforts to control litigation costs by hiring law firms to handle the defense of insureds on a set-fee, rather than an hourly, basis.

This case came to the court as an appeal by the insurance industry from KBA E-368, an opinion of the Kentucky Bar Association (“KBA”) Ethics Committee and the Board of Governors. The issue in KBA E-368 was whether it was ethical for an attorney to agree to contract with an insurer to

---

* Edward T. Breathitt Professor of Law, University of Kentucky. A.B. 1961, J.D. 1964, University of Kentucky.

1 *American Ins. Ass’n v. Kentucky Bar Ass’n*, 917 S.W.2d 568 (Ky. 1996).

2 See Richard H. Underwood, *Advisory Ethics Opinions*, KY. BENCH & B., Fall 1994, at 52. Ethics and unauthorized practice (UPL) opinions issued before 1993 (through E-358 and U-45) are compiled and indexed in UNIVERSITY OF KENTUCKY COLLEGE OF LAW, OFFICE OF CONTINUING LEGAL EDUCATION, KENTUCKY LEGAL ETHICS OPINIONS AND PROFESSIONAL RESPONSIBILITY DESKBOOK (Richard H. Underwood ed., 1993) [hereinafter DESKBOOK]. References to ethics and unauthorized practice opinions before 1993 will be to the DESKBOOK. Opinions issued in 1993 and later will be cited to the KENTUCKY BENCH & BAR. Opinions issued after publication of the DESKBOOK are also found on the University of Kentucky home page: <http://www.uky.edu/Law/kyethics>.
represent its insureds on a set-fee basis—a certain sum for each case or a certain sum for all cases within a given time period. The Ethics Committee and the Board of Governors opined that set-fee arrangements in this context create an impermissible conflict with the insureds of the company.

After KBA E-368, the insurance industry apparently believed that attorneys would claim they could not ethically work on a set-fee basis, insist on being paid by the hour, and pad their bills, resulting in higher defense costs and reduced profits for the industry. The industry challenged KBA E-368 by filing an appeal with the Kentucky Supreme Court within thirty days after the opinion was published in the *Kentucky Bench & Bar.*

The industry also challenged KBA U-36, a 1981 unauthorized practice opinion stating that an insurance company may not use in-house counsel (salaried employees) to represent its insureds once suit is filed. KBA U-36 had relied on definitive statements by the Kentucky high court that a corporation cannot legally practice law. Insurance companies had complied with the mandate of the cases relied on in KBA U-36 and hired outside counsel to represent their insureds after suit was filed. By challenging KBA U-36 in the *American Insurance* case, the industry gave the Kentucky court an opportunity to take another look at the issue.

Unfortunately for the insurance industry, the Kentucky Supreme Court affirmed both KBA U-36 and KBA E-368. With regard to KBA U-36, the court rejected the holdings of cases from other jurisdictions, and approved

---

4 See DESKBOOK, supra note 2, at 11-47.
5 KBA U-36 approved in-house representation of the insured’s interest before suit is filed.
6 See Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1964) (holding that trust companies are enjoined from practicing law, including preparing and filing probate documents); Hobson v. Kentucky Trust Co. of Louisville, 197 S.W.2d 454 (Ky. 1946) (holding that trust company was prohibited from drafting wills, trusts, and other legal documents as agents or fiduciaries for compensation since such action constituted the practice of law), overruled in part by Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965); Kendall v. Beiling, 175 S.W.2d 489 (Ky. 1943) (holding that a corporation cannot be licensed to practice a learned profession).
7 See American Ins., 917 S.W.2d at 574.
8 See In re Rules Governing Conduct of Attorneys in Fla., 220 So.2d 6 (Fla. 1969) (denying approval of proposed regulation prohibiting attorneys employed by insurers from also representing insureds); In re Petition of Youngblood, 895 S.W.2d 322 (Tenn. 1995) (finding no conflict of interest existed between an insurer and attorneys representing insureds because the facts showed only a potential for
the result in KBA U-36 on grounds of both unauthorized practice of law and conflict between action as an employee of the insurer and as an advocate for the insured. The court noted that a corporation cannot practice law because it is "wholly incapable of acquiring the educational qualifications necessary to obtain such license, [and cannot] possess in its corporate name the necessary moral character required therefor." After thus impugning the insurers' moral character, the court called their argument a "Polyanna postulate that house counsel will continue to provide undivided loyalty to the insured" and held that representation by house counsel is prohibited "as a prophylactic measure not unlike the imputed disqualification rules.

With regard to KBA E-368, the court opined that set-fee arrangements between attorneys and liability insurers create impermissible conflicts with insureds (who are the attorneys' "clients"). While noting nineteen potential conflicts between insured and insurer, the court seemed most concerned with the fact that attorneys might face financial loss in time-consuming cases, which might cause the attorneys to provide inadequate representation of the insureds. The insurance companies pointed out that attorneys are obligated to represent their clients with loyalty and zeal even if the fee has been exhausted, and to do otherwise would be unethical. Furthermore, since in most cases the insurer pays the claim, there is little likelihood of an insured being damaged by the nonfeasance of the attorney selected by the insurer. In the rare case in which an insured could show damage, the insured would have a claim against the attorney or the insurer or both.

The court gave short shrift to these arguments, saying that the "mere appearance of impropriety is just as egregious as any actual or real conflict." It upheld KBA E-368 as a "prophylactic device to eliminate the potential for a conflict of interest or the compromise of an attorney's ethical and professional duties.

However, the areas of potential conflict noted by the court - coverage defenses and disagreement over settlements - have nothing to do with the conflict and not an actual conflict).

9 See American Ins., 917 S.W.2d at 571.
10 Id. (quoting Hobson, 197 S.W.2d at 460).
11 Id.
12 Id.
13 See id. at 573.
14 See id.
15 See id. at 572.
16 See id.
17 Id. at 573.
18 Id.
method by which the insurer pays defense counsel. A lawyer paid by an insurance company to represent an insured will feel conflicted whenever the interests of the insurer and insured diverge. The conflict is not affected by paying the lawyer on a set fee, as opposed to an hourly basis.

Whether by design or not, American Insurance protects lawyers from the financial loss they would incur through underestimating the time and cost of representation on a set-fee basis. In other contexts, lawyers are not protected from the consequences of underestimating the complexity of work to be done for a fee certain, and there is no logical reason why lawyers should be specifically protected in an insurance defense practice.

B. Attorneys' Apparent Authority

In Clark v. Burden, plaintiff's counsel accepted defendant's offer of $23,000 to settle plaintiff's personal injury claim. The settlement documents and check were sent to plaintiff's counsel, who then returned the documents and informed defense counsel that the settlement was off. The defendant moved to enforce the agreement.

After an evidentiary hearing, the trial court held that a settlement had been reached. Furthermore, finding it unnecessary to decide whether or not the plaintiff had given counsel actual authority to settle, the trial court held that, by virtue of the attorney-client relationship, plaintiff's counsel was clothed with apparent authority to settle. The court of appeals affirmed.

The Kentucky Supreme Court reversed. The court held that the attorney-client relationship, without more, does not vest the attorney with either actual or apparent settlement authority. The court relied on well-settled Kentucky authority to support its decision.

---

20 Clark v. Burden, 917 S.W.2d 574 (Ky. 1996).
21 See id. at 575-76.
22 See id. at 576.
23 See id.; see also DeLong v. Owsley's Ex'x, 213 S.W.2d 806 (Ky. 1948) (holding that an attorney cannot surrender a client's substantial right unless the client has granted special authority to do so); Fillhardt v. Schmidt, 165 S.W.2d 155 (Ky. 1942) (holding that an attorney does not have the implied power to compromise and settle client's claim except in the case of an emergency); Shropshire v. Shropshire, 138 S.W.2d 340 (Ky. 1940) (holding that an attorney has no power to settle a case unless specifically authorized to do so by the client); Jenkins v. City of Bowling Green, 88 S.W.2d 692 (Ky. 1935) (holding that an attorney cannot settle a case without special authority unless an emergency exists); Brown v.
The court’s decision in *Clark* is sound. Kentucky’s rules of professional conduct state that “a lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.” In negotiating with another lawyer, a lawyer is bound to know that the other lawyer’s client has the ultimate settlement authority, and it is unreasonable for a lawyer to assume otherwise.

Section 33 of the proposed *Restatement of the Law Governing Lawyers* states that it is for the client to decide whether and on what terms to settle a claim, unless the client has given the attorney settlement authority. Therefore a client is not bound by an unauthorized settlement and:

> [m]erely retaining a lawyer does not create apparent authority in the lawyer to perform acts governed by § 33. When a lawyer purports to enter a settlement binding on the client but lacks authority to do so, the burden of inconvenience resulting if the client repudiates the settlement is properly left with the opposing party, who should know that settlements are normally subject to approval by the client and who has no manifested contrary indication from the client. The opposing party can protect itself by obtaining clarification of the lawyer’s authority. Refusing to uphold a settlement reached without the client’s authority means that the case remains open, while upholding such a settlement deprives the client of the right to have the claim resolved on other terms.

However, a client is bound by an attorney’s unauthorized settlement if the client (not the attorney) leads the opposing party to reasonably believe that the attorney has settlement authority. In *Farmer’s Deposit Bank v. Ripato*, the client was actively involved in the negotiations and it was held reasonable for the opposing counsel to assume that the client endorsed the attorney’s actions. The proposed *Restatement of the Law Governing Lawyers* provides such an illustration: In open court with the clients present, the judge orders the lawyers to appear at a conference with settlement authority and the clients say

---

Bunger, 43 S.W. 714 (Ky. 1897) (holding that an attorney cannot compromise a lawsuit without his client’s approval).

24 See S.C.R. 3.130-1.2.
26 Id. § 39 cmt. d.
27 See id.; see generally FORTUNE ET AL., *supra* note 19, at 571.
28 Farmer’s Deposit Bank v. Ripato, 760 S.W.2d 396 (Ky. 1988).
nothing to indicate disagreement. The clients' apparent agreement clothes the lawyers with apparent authority.\(^29\)

In *Clark*, the court dismissed the contention that its decision would lead to unethical behavior by attorneys anxious to settle but lacking authority to do so.\(^30\) The court noted that responsible lawyers "would not think of settling a case without express client authority and certainly would not attempt to gain an advantage by unscrupulous negotiating tactics."\(^31\)

After rejecting the claim of apparent authority as a basis for enforcing an unauthorized settlement, the court opened the door to a claim of *detrimental reliance* based on apparent authority. The court said:

> At some point, however, the client must be charged with responsibility for having employed an attorney who failed to observe the requirements of fidelity to the client’s wishes. That point, we believe, is when the rights of innocent third persons are adversely affected. . . . Even if the trial court finds that no [actual] authority was given, if it should also find that appellees were substantially and adversely affected by their reliance upon the purported settlement, enforcement would be appropriate.\(^32\)

Presumably, the court had in mind the situation where a party does nothing to disavow an unauthorized settlement and the opposing party changes position in reliance on the settlement. In *Combs’ Administrator v. Virginia Iron, Coal & Coke Co.*,\(^33\) the Kentucky high court relied on the equitable doctrine of laches to hold that the client’s failure to act ratified the settlement.\(^34\) As between two parties — one who unreasonably relied on an attorney’s apparent authority, and one who did not disavow in a timely fashion — equitably, the loss should be borne by the latter.

In *Clark*, however, the court did not require the trial court on remand to find either that the plaintiff misled the defendant or that the plaintiff failed to timely disavow the settlement in order to bind the plaintiff to the settlement. The opinion in *Clark* merely directed the trial court to decide whether the defendant relied on the settlement to its detriment.\(^35\)


\(^{30}\) See *Clark v. Burden*, 917 S.W.2d 574, 577 (Ky. 1996).

\(^{31}\) *Id.*

\(^{32}\) *Id.* (emphasis added).

\(^{33}\) *Combs’ Admin’r v. Virginia Iron, Coal & Coke Co.*, 33 S.W.2d 649 (Ky. 1931).

\(^{34}\) See *Restatement of Law Governing Lawyers* § 32 cmt. f (Proposed Final Draft 1996).

\(^{35}\) See *Clark*, 917 S.W.2d at 577.
In this respect, *Clark* is subject to criticism. Detrimental reliance by the defendant, without some "fault" on the plaintiff's part, should not be enough to mandate enforcement of a settlement. Detrimental reliance should not operate retroactively to create apparent authority. The court should revisit this issue when an appropriate opportunity arises.

In another aspect of its opinion, the court directed the trial court to determine whether the client had in fact authorized or accepted the settlement. The attorney would have had actual authority (express or implied) if the client had authorized the settlement. The court noted that resolving this issue might require the attorney to testify to otherwise confidential conversations.

Justice King dissented, saying that clients do clothe their lawyers with apparent authority to settle. An attorney who settles without authority might be liable to the client, but the client should be held to the bargain. Justice King viewed the remedy for detrimental reliance to be illusory. A defendant who settles a case will rarely be able to prove that its position has worsened as a result of the settlement. In Justice King's view, attorneys should be able to rely on each others' claims of settlement authority; requiring proof of authority, in his opinion, impedes the negotiation process.

While there is respectable case law from other jurisdictions supporting the dissent, the court's opinion in *Clark* is in line with the Restatement and the Model Rules. The client normally should be present, or available by electronic communication, during negotiations. If the client cannot be available, it is not unreasonable to ask for proof of settlement authority.

Of course, attorneys often will take the word of opposing attorneys that they have settlement authority. Rarely will a lawyer intentionally mislead an opponent to believe he has authority which he knows he does not have. In those rare instances of intentional misconduct, the attorney should be liable to the opposing party for any loss reasonably incurred. Furthermore, it is

---

36 See id.
37 See id.; see also S.C.R. 3.130-1.6(b).
38 See *Clark*, 917 S.W.2d at 578 (King, J., dissenting).
39 See *id.* (King, J., dissenting).
40 See *id.* at 577-90 (King, J., dissenting).
41 See, e.g., Capital Dredge and Dock Corp. v. City of Detroit, 800 F.2d 525 (6th Cir. 1986) (Michigan law).
42 See S.C.R. 3.130-1.2, 1.4.
possible that the Kentucky courts might hold attorneys liable for negligently leading others to rely on their settlement authority.\textsuperscript{44}

C. Appearance of Impropriety

Canon 9 of the Code of Professional Responsibility\textsuperscript{45} cautioned lawyers against engaging in conduct that might give the appearance of impropriety. The Model Rules, however, do not endorse this rubric in any of the rules or comments. In the context of disqualification, the Kentucky version of the Model Rules states:

This rubric has a two-fold problem. First, the appearance of impropriety proscribed can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging.\textsuperscript{46}

In spite of the Model Rules’ rejection of an “appearances” standard, two recent Kentucky Supreme Court cases favor a “Caesar’s wife”\textsuperscript{47} standard over applicable Model Rules comments.

In Whitaker v. Commonwealth,\textsuperscript{48} a former public defender took a position with the prosecutor. She obviously could not prosecute in cases where she had represented the defendant, and she was screened from any participation in those cases. The issue was whether the entire office was disqualified.

When the issue first arose a dozen years earlier, the court refused to disqualify the entire office. In Summit v. Mudd,\textsuperscript{49} the court said that the “mere possibility” of the appearance of impropriety created by a defense lawyer joining the prosecutor’s office should not result in disqualification of the

\textsuperscript{44} Cf. Seigle v. Jasper, 867 S.W.2d 476 (Ky. Ct. App. 1993) (holding that a lawyer may be liable to property purchasers for negligence if he or she fails to exercise ordinary care in performing a title examination).

\textsuperscript{45} MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1983).

\textsuperscript{46} S.C.R. 3.130-1.10 cmt. 9.

\textsuperscript{47} PLUTARCH, THE LIVES OF THE NOBEL GRECIANS AND ROMANS 860 (John Dryden trans. & Arthur Hugh Clough rev., The Modern Library 1932) (When asked why he parted with his wife, Caesar said, “I wished my wife to be not so much as suspected.”); see FORTUNE ET AL., supra note 19, at 86.

\textsuperscript{48} Whitaker v. Commonwealth, 895 S.W.2d 953 (Ky. 1995).

\textsuperscript{49} Summit v. Mudd, 679 S.W.2d 225 (Ky. 1984).
entire prosecutor’s office. In *Summit*, the court held that the proper test was whether there was “actual prejudice as a result of a breach of the attorney/client confidentiality.”\(^5\)

*Summit* was decided before the adoption of the Model Rules. Model Rule 1.11,\(^5\) effective in 1990, is consistent with *Summit*. In the case of attorneys moving between private employment and governmental service, or between governmental agencies, the rule rejects vicarious disqualification if the personally disqualified lawyer is sufficiently screened from the case.\(^5\)

In *Whitaker*, the prosecutor stated for the record that the former defense lawyer had had no contact with the case after joining the prosecutor’s office. Because the case was virtually identical to *Summit*, the trial court denied the defense motion to disqualify the prosecutor. The Kentucky Supreme Court reversed. The court held that if the attorney had participated personally and substantially in the accused’s defense then she, and the entire office, must be disqualified.\(^5\) While the court did not acknowledge that it was overruling *Summit*, that is the effect of the decision.

In reaching this result, the court read Rule 1.11 as if the comments, but not the rule, addressed the issue of vicarious disqualification.\(^5\) The court then said that the comment disapproving disqualification could be ignored, because it is merely a comment. The court’s analysis is strained. In the first place, official comments should not be ignored. Secondly, Rule 1.11 clearly disapproves vicarious disqualification in the context of lawyers moving between government agencies or into governmental service. Rule 1.11(a) specifically allows screening as a means to avoid vicarious disqualification when a lawyer is moving from government service to private practice. It makes no sense to construe the rule to disallow screening when an employee is moving between government agencies, or from private practice to a government agency.

The *Whitaker* decision is about appearances. The court spoke not about an actual violation of an attorney-client confidence, but rather about the “potentially chilling effect” on other relationships.\(^5\) The underlying assumption in *Whitaker* is that disqualification must be ordered when someone (perhaps potential clients of public defenders) might think something is amiss, even though it is not.

\(^{50}\) *Id.*

\(^{51}\) S.C.R. 3.130-1.11.

\(^{52}\) See S.C.R. 3.130-1.11 cmts. 4 and 9.

\(^{53}\) See *Whitaker*, 895 S.W.2d at 955-56.

\(^{54}\) See *id.*

\(^{55}\) See *id.* at 956.
In *Lovell v. Winchester*, the court went one step further and stated that it will apply an appearance standard as an *independent* ground for disqualification of counsel. *Lovell* involved an attorney who met with a prospective client and received and retained the client’s documents, then rejected the case, returned the documents, and wound up representing the prospective client’s opponent. The attorney resisted disqualification by asserting that he could remember nothing about the meeting with the prospective client. The court held that the attorney must be disqualified. The court looked to the definition of “client” in the Rules of Evidence: “‘[one] who consults a lawyer with a view to obtaining professional legal services from the lawyer.’” The court then said: “After King [the attorney] retained documents pertaining to the case for a month, the presumption arises that he became knowledgeable of their contents and that he learned confidential information relevant to the case.”

The court held that the attorney must be disqualified. The result is not surprising and could have been reached by simply relying on the former client rule. Rule 1.9 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Rule 1.9 contains no exception for an attorney who has forgotten whatever he learned in the former representation. Once the court decided that King had an attorney-client relationship with the prospective client, straightforward application of Rule 1.9 required disqualification.

However, the court went on to state that, even if a rule of conduct had not been violated, the appearance of impropriety required disqualification:

> Even though the comment to Rule 1.9 specifically rejects the “appearance of impropriety” standard in favor of a fact-based test applied to determine whether the lawyer’s duty of loyalty and confidentiality to a former client will likely be compromised by the subsequent representation, the appearance of impropriety is still a useful guide for ethical decisions.

---

56 *Lovell v. Winchester*, 941 S.W.2d 466 (Ky. 1997).
57 *See id.* at 468-69.
58 *Id.* at 467 (quoting KY. R. EVID. [hereinafter K.R.E.] 503(a)(1)).
59 *Id.*
60 S.C.R. 3.130-1.9.
For these reasons, courts still retain the appearance of impropriety standard as an independent basis of assessment.\textsuperscript{61}

\textit{Lovell} creates uncertainty. The implication is that trial courts should disqualify counsel whenever counsel’s representation \textit{appears} improper. To whom, however, must the representation appear improper? The judge? The client? The press? Members of the public?

The court has not yet disciplined a lawyer on the basis of an appearance of impropriety.\textsuperscript{62} It would violate due process to rest discipline on such a vague standard.\textsuperscript{63} However, now that it is clear that the court is concerned with appearances, lawyers might assume they can be disciplined for conduct that violates no rule but doesn’t “pass the smell test.” If so, the pernicious effect of the appearances “standard” extends beyond disqualification in conflict cases.

\textbf{D. Contacting Employees of an Opponent Represented by Counsel}

In \textit{Shoney’s, Inc. v. Lewis},\textsuperscript{64} the Kentucky Supreme Court directed the trial court to disqualify an attorney who had taken statements from Lee’s\textsuperscript{65} managers before filing a sexual harassment action against Lee’s. The attorney took the statements knowing that Lee’s was represented by counsel in the matter and without the consent of that counsel. The court disqualified counsel and ordered the managers’ statements suppressed. The rule applied by the court in \textit{Shoney’s} was Rule 4.2, which says that a lawyer shall not knowingly communicate with a represented party without the consent of that party’s counsel.\textsuperscript{66} In finding that Lee’s managers were represented parties, the court turned to the Official Comment to Rule 4.2, which says that the Rule prohibits communications with “persons having a managerial responsibility on behalf of the organization.”\textsuperscript{67} The court further found that the prohibition applied

\textsuperscript{61} \textit{Lovell}, 941 S.W.2d at 468-69 (emphasis added).
\textsuperscript{62} \textit{But see} Kentucky Bar Ass’n v. Marcum, 830 S.W.2d 389 (Ky. 1992) (violation of specific rule but appearance of impropriety language also used).
\textsuperscript{63} \textit{See} Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (holding that a Nevada Supreme Court rule which prohibited extrajudicial statements likely to prejudice adjudicative proceedings was void for vagueness).
\textsuperscript{64} \textit{Shoney’s}, Inc. v. Lewis, 875 S.W.2d 514 (Ky. 1994).
\textsuperscript{65} \textit{Shoney’s} was doing business as Lee’s Famous Recipe Chicken.
\textsuperscript{66} \textit{See} S.C.R. 3.130-4.2.
\textsuperscript{67} \textit{Shoney’s}, 875 S.W.2d at 515 (quoting S.C.R. 1.130-4.2, comment 2).
before the filing of suit, since the word "party" in Rule 4.2 does not imply that the rule is limited to situations in which one has become a "party" by the filing of suit.68

The sequence of events in \textit{K-Mart Corp. v. Helton}69 was as follows: Norris was charged with shoplifting at K-Mart. He obtained counsel and the criminal charges were dismissed. Four days later, the loss manager of K-Mart requested a meeting with Norris' lawyer. They met and Norris' lawyer took the manager's statement. Norris later filed suit against K-Mart for slander, assault, and false imprisonment. K-Mart then sought to have Norris' attorney disqualified on the basis of \textit{Shoney's}, arguing that the attorney had met with a management employee of a corporate defendant without the consent of the corporation's counsel.70

The Kentucky Supreme Court affirmed the trial court's refusal to disqualify counsel.71 In distinguishing \textit{Shoney's}, the court pointed out that K-Mart had not told plaintiff's counsel that he should not talk to the loss manager without K-Mart's lawyer being present. In fact, K-Mart had not notified plaintiff's counsel that it was represented by counsel until a year after the interview of the loss manager. Plaintiff's counsel was not required to assume that the corporate defendant was represented by counsel in the shoplifting matter.72

\textit{Helton} significantly limits \textit{Shoney's}. A lawyer investigating a possible claim against a corporation may assume that the corporation is not represented in the matter — even though everyone knows that large corporations have in-house counsel or counsel on retainer to protect their interests. Proceeding on the assumption that the corporation is not represented, the attorney may interview its employees without notice to the corporation, until the corporation notifies plaintiff's counsel that it is represented in the matter.73

---

68 See id. at 515-16. In 1995, the American Bar Association House of Delegates substituted "person" for "party" in ABA Model Rule 4.2 to make it clear that the no-contact rule does not require that the represented person be a "party" to litigation. \textit{See Fortune et al., supra} note 19, at 199.

69 \textit{K-Mart Corp. v. Helton}, 894 S.W.2d 630 (Ky. 1995).

70 See id. at 630-31.

71 See id. at 631.

72 See id.

73 Two ethics opinions, E-381 and E-382, flesh out Rule 4.2 and the \textit{Shoney's} case. \textit{See infra} notes 130-137 and accompanying text; \textit{see also} Richard H. Underwood, \textit{Advisory Ethics Opinions}, KY. BENCH & B., Fall 1995, at 44.
II. DISCIPLINARY CASES

Most of the Kentucky Supreme Court's disciplinary cases in recent years fall in the usual categories and do not warrant further comment: (1) false statements to the tribunal;\textsuperscript{74} (2) dishonesty;\textsuperscript{75} (3) neglect;\textsuperscript{76} and (4) criminal conduct.\textsuperscript{77} The following cases, however, are noteworthy:

A. Substance Abuse

In Kentucky Bar Ass'n v. Rankin,\textsuperscript{78} the court dealt with an attorney who had thrice been convicted of driving under the influence. Following the recommendation of the Board of Governors, the court issued a public reprimand and a six-month suspension of the attorney's license to practice law. The court probated the suspension on the condition that the attorney not drink, attend Alcoholics Anonymous meetings, and cooperate with his AA sponsor. The court named an attorney to supervise the probationer during the two-year probation period and report quarterly to the executive director of the Kentucky Bar Association. The supervising attorney was charged with the responsibility of checking on the probationer's AA attendance, checking court records, and otherwise monitoring the probationer's compliance with the terms of probation.\textsuperscript{79}

Rankin is significant for several reasons. Since the rules do not provide for probation,\textsuperscript{80} the case demonstrates the court's belief that it has the inherent authority to probate a penalty. Secondly, the case demonstrates the court's willingness to work with Alcoholics Anonymous\textsuperscript{81} to help substance abusers while protecting the public.

\textsuperscript{74} See, e.g., Kentucky Bar Ass'n v. Jacob, 950 S.W.2d 832 (Ky. 1997); Kentucky Bar Ass'n v. Devers, 936 S.W.2d 89 (Ky. 1996).

\textsuperscript{75} See, e.g., Kentucky Bar Ass'n v. Kirk, 942 S.W.2d 908 (Ky. 1997).

\textsuperscript{76} See, e.g., Kentucky Bar Ass'n v. Clay, 932 S.W.2d 369 (Ky. 1996).

\textsuperscript{77} See, e.g., Futrell v. Kentucky Bar Ass'n, 950 S.W.2d 480 (Ky. 1997); Kentucky Bar Ass'n v. Huffman, 908 S.W.2d 347 (Ky. 1995) (uncharged criminal conduct).

\textsuperscript{78} Kentucky Bar Ass'n v. Rankin, 862 S.W.2d 894 (Ky. 1993).

\textsuperscript{79} See id. at 895.

\textsuperscript{80} See S.C.R. 3.380 (listing degrees of discipline without including probation).

\textsuperscript{81} See Rankin, 862 S.W.2d at 895-96 (limiting discipline to public reprimand and six-month suspension of license if respondent lawyer continued to attend meetings of Alcoholics Anonymous and conferences with his AA sponsor).
B. Intemperate Conduct

The attorney’s actions in *Kentucky Bar Ass’n v. Waller*\(^{82}\) were, to put it mildly, intemperate. He questioned the impartiality of the presiding judge, who recused himself. Waller then filed a motion with the special judge in which he referred to the regular judge as a “lying incompetent, ass-hole.”\(^{83}\) Waller was cited for contempt and his response to the contempt citation was bizarre. He referred to himself as an “old honkey [ ... [with] pee run[ning] down his leg in dribbles,” and ended by saying “it requires one to identify an ass hole when he sees one.”\(^{84}\) He was held in contempt, fined, and sentenced to thirty days in jail.\(^{85}\)

Disciplinary proceedings were then commenced. The supreme court rejected his First Amendment argument and found that his intemperate language violated Rule 8.2(a), which proscribes false statements about the qualifications of a judge.\(^{86}\) The court suspended the lawyer for six months because “[t]here can never be justification for a lawyer to use such scurrilous language with respect to a judge . . . in open court . . . Officers of the Court are required to uphold the dignity of the Court of Justice . . .”\(^{87}\)

*Waller* is reminiscent of *Kentucky Bar Ass’n v. Jernigan*,\(^{88}\) a case in which the lawyer, after being insulted by the judge in the hall of the courthouse, kicked the judge in the groin. The lawyer later attacked the judge in the local newspaper.\(^{89}\) In *Jernigan*, the court publicly sanctioned the attorney, though a dissenting justice would have opted for a private reprimand on the theory that the judge had provoked the attack.\(^{90}\)

Cases like *Waller* and *Jernigan* evidence the court’s understandable lack of tolerance for rude behavior. However, disciplining a lawyer for an opinion potentially implicates the lawyer’s First Amendment right to freedom of expression.\(^{91}\) In the Ninth Circuit case of *Standing Committee on Discipline*...

\(^{82}\) Kentucky Bar Ass’n v. Waller, 929 S.W.2d 181 (Ky. 1996), cert. denied, Waller v. Kentucky Bar Ass’n, 117 S. Ct. 949 (1997).

\(^{83}\) Id. at 181.

\(^{84}\) Id. at 182.

\(^{85}\) See id. at 181-82.

\(^{86}\) See S.C.R. 3.130-8.2(a).

\(^{87}\) Waller, 929 S.W.2d at 183.

\(^{88}\) Kentucky Bar Ass’n v. Jernigan, 737 S.W.2d 693 (Ky. 1987).

\(^{89}\) See id. at 694 (”The second violation occurred on December 8, 1983, when Jernigan had published in the Tompkinsville News an article referring to [Judge] Wood . . . in scurrilous language.”).

\(^{90}\) See id. at 694-95 (Leibson, J., dissenting).

\(^{91}\) See Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (reiterating First Amendment protection afforded stated opinions about public figures and public
of the United States District Court for the Central District of California v. Yagman, the court of appeals reversed a disciplinary sanction imposed on a lawyer who had called the judge "ignorant, dishonest, ill-tempered, and a bully, ... buffoon[,] ... sub-standard human[, and] ... right-wing fanatic." The court held that the First Amendment protects opinion, even rough and intemperate opinion, so long as the criticism does not state or imply false facts.

In Waller, the ground for discipline was Rule 8.2(a), which proscribes statements known to be false or made with reckless disregard for the truth. The insult in Waller can be divided into its factual ("lying") and opinion ("incompetent ass-hole") parts. The First Amendment will tolerate disciplining a lawyer for factual misstatements about a judge. On the other hand, lawyers are entitled to express their opinions about judges in a respectful manner. The unresolved question is whether a lawyer may be disciplined for expressing an opinion in a disrespectful fashion.

C. Excessive Fees

Kentucky Bar Association v. Profumo is a significant disciplinary case. The lawyer acted as executor and attorney for an estate. He paid himself $5000 for legal services to the testatrix, $101,500 as an executor's fee, and $27,000 as an attorney's fee. In addition, he collected $11,500 as a real estate commission for selling the deceased's home. These actions took place before the adoption of the Model Rules; therefore, the lawyer was cited for violating the excessive fee provision of the Code of Professional Responsibility.

Without court approval the maximum executor's fee would have been $23,225. The attorney argued that he was not subject to discipline for an

officials).

92 Standing Comm. on Discipline of the U.S. Ct. for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430 (9th Cir. 1995).
93 Id. at 1434 n.4.
94 See id. at 1444-45; see also FORTUNE ET AL., supra note 19, at 292.
95 See S.C.R. 3.130-8.2(a).
96 See Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165 (Ky. 1980) (holding that referring to a judge's behavior as "highly unethical and grossly unfair" at a press conference was unwarranted given lack of good faith and highly public forum).
97 See Kentucky Bar Ass'n v. Nall, 599 S.W.2d 899 (Ky. 1980) (disciplining lawyer for calling an administrative hearing a "kangaroo court").
98 Kentucky Bar Ass'n v. Profumo, 931 S.W.2d 149 (Ky. 1996).
99 See id. at 149-50 (citing DR 2-106(A) of the Code of Professional Conduct in effect in Kentucky at the time of the events).
100 See id.
excessive fee since he was not acting as an attorney. In response to this argument, the court pointed out that the attorney was acting as a fiduciary and was subject to discipline for abuse of his position.101

The court further held that it was improper for the lawyer to pay himself as both executor and attorney without court approval. To receive dual compensation, one must have been named in the will as both attorney and executor, and, even then, any attorney’s fee must be reasonable and documented.102

The court also found that the attorney had a conflict of interest in the sale of the house and had misrepresented certain matters to the court in the settlement statements.103 As a result of these violations, the attorney was suspended for three years.104

D. Transactions with Clients

Lawyers who might do business deals with their clients should be aware that they will be considered fiduciaries for their clients, not arms-length business partners, in the event that the business does not go well. Rule 1.8(a) states that:

a lawyer shall not enter a business transaction with a client unless: 1) the transaction is fair and reasonable to the client and the terms disclosed in writing in a manner which can be reasonably understood by the client; 2) the client has an opportunity to seek the advice of independent counsel; and 3) the client consents in writing.105

In Underhill v. Kentucky Bar Ass’n106 the attorney sold a laundromat to his client. The attorney acted as surety on the client’s bank loan. The client defaulted on the loan, the attorney was brought in as surety, and the attorney foreclosed on the client’s house, which had been pledged as collateral. The client counterclaimed against the attorney for breach of fiduciary duty and the jury found for the client. A disciplinary proceeding was then brought and the court publicly reprimanded the attorney for failing to comply with the provisions of Rule 1.8107 because there had been no opportunity for the client

101 See id. at 151 (citing comment 3 to S.C.R. 3.130-8.3).
102 See id.
103 See id. at 152-53.
104 See id. at 153.
105 S.C.R. 3.130-1.8(a).
106 Underhill v. Kentucky Bar Ass’n, 937 S.W.2d 193 (Ky. 1997).
107 See S.C.R. 3.130-1.8(a).
to consult independent counsel and no written consent was given by the client. The reprimand was given even though there was no showing that the terms of sale were unfair or that the attorney had engaged in fraud or overreaching. When the business failed, the lawyer was the loser, both financially and by injury to his reputation.

More evidence that lawyers who enter into business deals with their clients become de facto insurers of the business’s success comes from *Kentucky Bar Ass’n v. Smith,* a case decided in 1984 but not reported until 1994. The lawyer in *Smith* induced a client to loan money to a business in which the lawyer held an interest. The business failed and the client lost his money. The court suspended the lawyer for eighteen months. While there was evidence on which the court could have found misrepresentation, the court did not rest its opinion on that ground. The court said,

Respondent engaged in these activities culminating in preparing a check and, to that extent, participated in a transaction whereby one client lent money to a corporation in which respondent had a substantial interest. A lawyer simply cannot defend against a charge of unethical and unprofessional conduct in such a scenario. In placing himself in this position, respondent incurs the penalty imposed as recommended by the Kentucky Board of Bar Governors to this court. It is only for the reason that we cannot be sure from the evidence as to the actual misrepresentation that we do not impose a more severe penalty.

It is evident that the court believes that lawyers should not do business with their clients; lawyers who do must recognize that they are fiduciaries for the clients and will be held to very high standards of conduct.

**E. Failure to Communicate**

Lawyers are subject to discipline for neglecting the work they have been hired to perform. In addition, lawyers should keep their clients informed about the status of matters and respond promptly to reasonable requests for

---

108 *Kentucky Bar Ass’n v. Smith*, 878 S.W.2d 6 (Ky. 1984) (received for publication June 20, 1994).

109 The opinion states that it was received by the publisher in 1994. There is no explanation for the 10-year delay in submitting it for publication.

110 *Smith*, 878 S.W.2d at 7.

111 See S.C.R. 3.130-1.3.
Unlike the Model Rules of Professional Conduct, however, Kentucky's version does not make failure to communicate a disciplinary offense. In spite of the non-mandatory nature of Rule 3.130-1.4, the court often cites the rule as one of the bases for discipline. With one exception, however, the court has relied on other rules in addition to Rule 1.4 in disciplining attorneys. The references to Rule 1.4 in those cases might, therefore, be considered "harmless error." However, the court should not refer to Rule 1.4 as if it contained the word "shall."

III. ETHICS AND UNAUTHORIZED PRACTICE OPINIONS

Rule 3.530 furthers the educational mission of the court and bar by providing that an attorney may ask a member of the Ethics Committee (a "hot-line" member) for advice about the ethical propriety of contemplated conduct. The requesting attorney is protected from discipline if the attorney follows the advice of the hot-line member, as long as the attorney's portrayal of the problem was complete and accurate.

Hot-line members refer interesting questions to the Ethics Committee. In addition, local bar associations may ask the Committee for advisory opinions. Matters which seem to be of general importance are discussed at meetings of the Ethics Committee, and formal opinions are prepared for consideration by the Board of Governors. The Board can approve, modify, or disapprove Ethics Committee opinions. In addition, the Board can approve the opinion but direct that it be issued to the requesting attorney as an

112 Cf. Christine S. Filip & Ann E. Johnston, Misleading Message May Spark a Suit, NAT'L L.J., Nov. 10, 1997, at D1 (commenting on the large number of lawsuits sparked by lawyers' failure to keep their clients informed and the willingness of disciplinary bodies to impose harsh penalties on lawyers who do not diligently communicate with their clients).

113 S.C.R. 3.130-1.4 uses the language "should," while ABA Model Rule 1.4 says that a lawyer shall keep the client reasonably informed. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1992).

114 See supra note 113.

115 See, e.g., Kentucky Bar Ass'n v. Hatcher, 929 S.W.2d 193 (Ky. 1996); Munroe v. Kentucky Bar Ass'n, 927 S.W.2d 839 (Ky. 1996); Kentucky Bar Ass'n v. Thomas, 927 S.W.2d 838 (Ky. 1996).

116 See Kentucky Bar Ass'n v. Davenport, 855 S.W.2d 340 (Ky. 1993) (relying solely on S.C.R. 3.130-1.4 as grounds for a public reprimand).

117 See S.C.R. 3.530(1).

118 See id. 3.530(3).

119 See id. 3.530(1).
informal (i.e., private) opinion. The Unauthorized Practice Committee functions in the same way as the Ethics Committee except that most of the questions are posed by local bar associations concerned about non-lawyers practicing law. The Unauthorized Practice Committee also considers unauthorized practice questions that come to the Ethics Committee through its hot-line members. Like ethics opinions, unauthorized practice opinions are referred to the Board of Governors, which has the final say on whether and in what form opinions are released.

Formal ethics and unauthorized practice opinions approved by the Board of Governors are published – in full or synopsis form – in Kentucky Bench & Bar, the publication of the Kentucky Bar Association. Ethics and unauthorized practice opinions are not published in the Southwestern Reporter or in the annotations to the Kentucky Revised Statutes. Furthermore, the opinions in the Bench & Bar are not indexed.

The governing rule states that ethics and unauthorized practice opinions are advisory only. They do not have the force of law, and lawyers are not obligated to follow them. Nevertheless, ethics and unauthorized practice opinions shape attorney behavior and thus form part of the fabric of the law of professional responsibility. The following recent opinions are particularly significant.

A. Compensation of Witnesses

KBA E-394 disapproves paying expert witnesses on a contingent fee basis but approves payments for litigation support services (non-witnesses) on that basis. This opinion is consistent with the view that a fee arrangement should not give a witness a stake in the outcome. The expert whose fee does not depend on the outcome will presumably have less incentive to favor the side that hired him.

---

120 See id. 3.530(2).
121 See id. 3.530(1) ("Local bar associations may also request advisory opinions."). It is the author’s experience that it is generally local bars that ask about unauthorized practice.
122 The author is aware of this practice of referral from the Ethics Committee through his membership on that committee.
123 See S.C.R. 3.530(2).
124 See id. 3.530(4).
125 See id. 3.530(3).
In KBA E-400, the Board and Committee gave a qualified yes to the issue of compensating non-expert witnesses for time spent in meeting with lawyers and otherwise preparing for trial. KBA E-400 provides:

This question was thoroughly considered by the ABA Standing Committee on Professional Responsibility in ABA Formal Opinion 96-402 (1996). The question posed was whether "[a] lawyer, acting on her client's behalf, may compensate a non-expert witness for time spent in attending a deposition or trial or in a meeting with the lawyer preparatory to such testimony, provided that the payment is not conditioned on the content of the testimony and provided further that the payment does not violate the law of the jurisdiction." The Committee answered the question in the affirmative, noting that there was nothing to indicate that the drafters of the Model Rules intended to be more restrictive than the drafters of the Code. The Committee also alluded to ABA Prosecution Standard 3-3.2, which states that "it is not improper to reimburse an ordinary witness for the reasonable expenses of attendance upon court, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interview. Payments to a witness may be for transportation and loss of income provided there is no attempt to conceal the fact of reimbursement." To summarize, ABA Formal Opinion 94-402 (1996) specifically approved of compensating a non-expert witness for time spent in actually attending a deposition or a trial, and for time spent in pretrial interviews in preparation for trial, and for time spent in reviewing and researching records that are germane to his or her testimony, so long as the payment is not being made for the substance or the efficacy of the witness's testimony, and provided that such compensation is not barred by local law.

However, the opinion cautions against the payment of undocumented expenses.

KRPC 3.4(b) allows the lawyer, but does not compel the lawyer, to compensate a witness for reasonable out of pocket expenses and reasonable lost income that will actually be incurred by the witness while testifying at a trial, hearing, or deposition, or while engaging in necessary preparation with the attorney. The Committee is of the opinion that additional payments are imprudent, and may be questioned as being unethical or even illegal.

128 Id. at 53.
Obviously, no payment may be made for the substance or efficacy of the witness’s testimony.\(^{129}\)

The caveat expressed in E-400 should be adhered to. Paying a non-expert for the value of the “time” spent preparing to testify might appear to be payment for testimony, which, of course, is unethical and illegal. Lawyers are well-advised to reimburse non-experts only for lost wages and out-of-pocket expenses.

**B. Contacting Persons Represented by Counsel**

In KBA E-381\(^{130}\) and KBA E-382,\(^ {131}\) the Ethics Committee answered the following questions: (1) May a lawyer communicate with a former employee of an organization without the consent of the organization’s lawyer? (Answer: Yes);\(^ {132}\) (2) May a lawyer communicate with a manager without the consent of the organization’s lawyer? (Answer: No, citing *Shoney’s, Inc. v. Lewis*\(^ {133}\)); (3) May a lawyer communicate with a non-manager employee whose acts or omissions in connection with a matter cannot be imputed to the organization and whose statements about the matter will not constitute an admission of the organization? (Answer: Yes);\(^ {134}\) (4) May a lawyer communicate with a non-manager employee whose acts or omissions in connection with a matter may be imputed to the organization or whose statements about a matter may be admissible against the organization? (Answer: No).\(^ {135}\)

The answer to the first question is consistent with the logic and language of Model Rule 4.2,\(^ {136}\) but was not decided by *Shoney’s*. The second question was answered by *Shoney’s*, and the opinion merely restates the rule from *Shoney’s*. The third and fourth questions and answers were taken from the same comment relied on by the court in *Shoney’s*. The opinion serves, therefore, as a good prediction of what the court would do in the first, third,

---

\(^{129}\) *Id.*


\(^{132}\) *See supra* note 130.

\(^{133}\) *See supra* note 131; *Shoney’s, Inc. v. Lewis*, 875 S.W.2d 514 (Ky. 1994) (disqualifying lawyer for taking statements from two of opposing party’s senior managers without consent of opposing party).

\(^{134}\) *See supra* note 131.

\(^{135}\) *See supra* note 131.

\(^{136}\) S.C.R. 3.130-4.2.
and fourth situations. There are contrary views, however, and it is far from clear that the court would adopt the position of E-381 and E-382. The court might extend the no-contact rule to all employees; on the other hand, it might limit Shoney's to employees of managerial status. The court might even reject E-381 and hold that former employees are off-limits as well as current employees.

The question in KBA E-392 was whether corporate counsel may talk to an employee about the employee's suit against the corporation without the consent of the employee's counsel. The opinion "affirm[s] the obvious," that the corporation's counsel is obligated to follow the no-contact rule, just as would be the case if the suit were brought by a stranger.

KBA E-393 makes it clear that an insurance adjuster, even an adjuster who also is a lawyer, does not "represent" the insured for the purpose of the no-contact rule. Thus the claimant's attorney does not need the consent of the adjuster before contacting the insured. The no-contact rule does not come into play until suit is filed and an attorney is retained for the insured.

Finally, KBA E-365 opines that a lawyer does not "necessarily" violate the no-contact rule if the lawyer's client talks to a represented party without the consent of that party's lawyer. The opinion warns, however, that a lawyer who suggests that his client contact the opponent might be guilty of circumventing the no-contact rule.

C. The Misaddressed Fax

KBA E-374 states that a lawyer should refrain from examining misaddressed letters, faxes, and electronic messages, but may retain the communication and make a good faith claim that confidentiality and privilege have been waived by the sender. At the same time, the opinion cautions

137 See FORTUNE ET AL., supra note 19, at 203-07.
139 Id.
141 See id.
143 See id.
against claiming "inadvertent waiver" until the Kentucky court decides what constitutes waiver.

The Committee and the Board are in agreement with the view expressed in ABA Formal Opinion 92-368 (1992) that when a lawyer receives materials under circumstances in which it is clear that they were not intended for the receiving lawyer, the lawyer should refrain from examining the materials, notify the sender, and abide by the senders [sic] instructions regarding the disposition of the materials. See ABA Formal Op. 92-368; D.C. Op. 256 (1995).

... Lawyers are strongly urged to return such materials unread, but if the caselaw permits, a lawyer is entitled to argue a good faith claim of "waiver" before the court in which an action is pending. See KRPCs 3.1 and 3.4(c) (. . . "open refusal [to follow a rule] based on an assertion that no valid obligation exists.") Maine Op. See also Resolution Trust Corp. v. First American Bank, 10 ABA/BNA Law.Man.Prof.Con. 365 (W. D. Mich. 1994); Kusch v. Ballard, 10 ABA/BNA Law.Man.Prof.Con. 366 (Fla. App. 1994) (refusing to disqualify counsel on the facts of the case, and alluding to the possibility [unlikely perhaps] that a lawyer might deliberately "fax" something to opposing counsel to set that lawyer up for disqualification). However, the Committee and the Board caution counsel that any claim or "inadvertent waiver" is made at the risk of exclusion of evidence and disqualification. The concept of "inadvertent waiver" of attorney-client privilege has been rejected by many courts on the grounds that waiver is thought to require the voluntary relinquishment of a known right, and that only the client can waive the privilege.145

Eventually, the Kentucky Supreme Court will provide guidance on the issue of inadvertent waiver of privilege. There are three views: (1) inadvertent disclosure, even without fault, waives the privilege;146 (2) negligent disclosure waives the privilege;147 and (3) only intentional disclosure waives the privilege.148 Since Kentucky Rule of Evidence 509149 seems to require

145 Id. at 42-43.
146 See FORTUNE ET AL., supra note 19, at 194 (the Wigmore view).
147 See id. (middle-ground approach recommended by the proposed Restatement of the Law Governing Lawyers).
148 See id.
intentional disclosure,\(^\text{150}\) until the court rules on the matter, attorneys should assume that misaddressed messages do not lose their privileged character.

### D. Non-refundable Retainers

In KBA E-380,\(^\text{151}\) the Committee and Board cautiously approved the concept of a "non-refundable retainer," that is, money paid in advance for services to be rendered with no promise of a refund if the client decides to fire the lawyer. After acknowledging that there is authority to the contrary,\(^\text{152}\) the Committee said:

In determining the "reasonableness" of a lawyer's fee, the factors mentioned in Rule 1.5(a) apply, and the lawyer has the responsibility to prove the "reasonableness" of the fee applying principles of equity and fairness. Although "reasonableness" at the time of contracting is relevant, consideration is also to be given to whether events occurred after the fee agreement was made which rendered the fee agreement fair at the time it was entered into, but unfair at the time of enforcement. See *McKenzie Const., Inc. v. Maynard*, 758 F.2d 97 (3rd Cir. 1985). Hence, the client may be entitled to a return of some portion of the "non-refundable" fee retainer upon the termination of the representation, depending upon all the circumstances; that is, the "reasonableness" of the fee.

Accepting representation often precludes a lawyer from taking on other matters, at present and in the future, and the employment of a lawyer may confer immediate benefits on the client. We also note that the client does not have an absolute right to discharge counsel, rather, the client has the absolute power to do so. The lawyer-client arrangement is a contractual arrangement, and while the lawyer has obligations, the lawyer also has rights. The client who discharges a lawyer has an obligation to the lawyer for the payment of "reasonable" compensation. The question in every case is whether the compensation claimed is "reasonable" under the terms of the agreement and under the circumstances.

We agree with those authorities who hold that a "reasonable" fee may be made "non-refundable" and deposited into the lawyer's general office.

\(^{150}\) "A person upon whom these rules confer a privilege against disclosure waives the privilege if he... voluntarily discloses or consents to disclosure of any significant part of the privileged matter." *Id.*


\(^{152}\) See *In re Cooperman*, 633 N.E.2d 1069 (N.Y. 1994) (holding that nonrefundable fee agreements clash with public policy).
account as any other earned fee. Accordingly, we find that in order for a non-refundable fee retainer to be valid the arrangement must meet the following criteria:

1. The arrangement must be fully explained to the client, orally, and in a written fee agreement that is signed by the client;
2. The arrangement must specify the dollar amount of the retainer, and its application of the scope of the representation, and/or the time frame in which the agreement will exist; and
3. The total fee to be charged must be “reasonable.”

Several aspects of this opinion are worthy of comment. The opinion acknowledges that a client who discharges an attorney might be entitled to a refund of a portion of the fee, thus making the “non-refundable” retainer refundable. The opinion characterizes such action as an exercise of power, rather than an exercise of right.

Also, the opinion purports to require a written fee agreement. The Committee and Board do not have rule-making authority. Ethics opinions are advisory only, and the Committee and Board do not have the authority to require written fee agreements in matters where Kentucky’s rules of professional conduct do not require written agreements.

E. Representation of Fiduciaries

KBA E-401 is a very important opinion. The thrust of the opinion is that an attorney hired by a fiduciary represents the fiduciary, not the trust or estate or beneficiaries. The attorney may represent the beneficiaries as well so long as there is consent and no disabling conflict of interest. The opinion makes the following points:

1. In representing a fiduciary the lawyer’s client relationship is with the fiduciary and not with the trust or estate, nor with the beneficiaries of a trust or estate.
2. The fact that a fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer’s

---

153 See supra note 151, at 43-44.
154 See supra note 151, at 44.
155 See supra note 151, at 44.
156 See S.C.R. 3.530(3).
157 S.C.R. 3.130-1.5(c) requires only contingent fee agreements to be in writing.
obligations to the fiduciary under the Rules of Professional Conduct, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties.

3. The lawyer’s obligation to preserve client’s confidences under Rule 1.6 is not altered by the circumstance that the client is a fiduciary.

4. A lawyer has a duty to advise multiple parties who are involved with a decedent’s estate or trust regarding the identity of the lawyer’s client, and the lawyer’s obligations to that client. A lawyer should not imply that the lawyer represents the estate or trust or the beneficiaries of the estate or trust because of the probability of confusion. Further, in order to avoid such confusion, a lawyer should not use the term “lawyer for the estate” or the term “lawyer for the trust” on documents or correspondence or in other dealings with the fiduciary or the beneficiaries.

5. A lawyer may represent the fiduciary of a decedent’s estate or a trust and the beneficiaries of an estate or trust if the lawyer obtains the consent of the multiple clients, and explains the limitations on the lawyer’s actions in the event a conflict arises, and the consequences to the clients if a conflict occurs. Further, a lawyer may obtain the consent of multiple clients only after appropriate consultation with the multiple clients at the time of the commencement of the representation.159

Estate practitioners should follow the advice of KBA E-401. Representing only the fiduciary, and making that fact clear to the beneficiaries, will shield the lawyer from discipline160 and malpractice liability.161

---

159 Id.

160 See, e.g., Kentucky Bar Ass’n v. Hays, 937 S.W.2d 700 (Ky. 1996) (disciplining attorney for conflict and neglect in representing members of his family).