Kentucky's New Rules of Professional Conduct for Lawyers

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Recommended Citation
Kentucky's New Rules of Professional Conduct for Lawyers

BY EUGENE R. GAETKE**

INTRODUCTION

On July 12, 1989, the Kentucky Supreme Court adopted its own version of the American Bar Association's 1983 Model Rules of Professional Conduct as the body of disciplinary law applicable to lawyers practicing in the state. These new rules constitute a major improvement in the state's law of legal ethics. Their adoption should be considered a victory for Kentucky lawyers and, more importantly, a victory for the people of the state, the ultimate beneficiaries of the regulation of the legal profession.

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1 Order of the Supreme Court of Kentucky, In re Order Amending Rules of Criminal Procedure (RCr), Rules of Civil Procedure (CR), and Rules of the Supreme Court (SCR) 89-1, entered July 12, 1989 [hereinafter Order of the Kentucky Supreme Court].

2 Justice Vance dissenting. Id. at 106.


4 To the extent the adoption of the new Model Rules in the state of Kentucky is a victory for the public and the bar, much of the credit should be given my colleague, Richard H. Underwood. Professor Underwood served as the chair of the special committee of the Kentucky Bar Association assigned the task of considering the new rules for adoption in the state. In that capacity Professor Underwood persevered against all of the obstacles that characteristically arise in the face of proposed legal reform. Throughout the committee meetings, informational meetings with bar groups, discussions with the state supreme court, drafts of alternatives, and other tasks, Professor Underwood persisted with the conviction that the law of legal ethics in the state was important for the people of Kentucky, that the existing law needed improvement, and that the Model Rules were the best device for securing that improvement. The people of the state, lawyers included, owe Professor Underwood much for his tireless efforts.

The report of Professor Underwood's committee to the state bar association reflects a serious consideration of the Model Rules by the entire committee. See REPORT OF THE SPECIAL COMMITTEE TO CONSIDER ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL
As with most victories, the adoption of the new rules was not unequivocally positive. Kentucky's version of the Model Rules deviates in several substantial and detracting ways from the ABA's version. Worse, the Kentucky court deleted certain duties of lawyers that for the better part of this century have been widely accepted as fundamental components of legal ethics.

The new Kentucky rules take a large step forward in improving the law regulating lawyers in the state. At the same time, they take several significant steps backward. While the adoption of the new rules should be applauded, their shortcomings need to be remedied.

I. BACKGROUND

The 1983 Model Rules are the latest of three sets of ethical standards issued by the ABA during this century. Each set in turn has been adopted by the Kentucky Supreme Court.5

In 1946, the court adopted as "persuasive authority"6 the 1908 Canons of Professional Ethics, the ABA's first effort at codifying the ethical standards of the profession.7 The Canons consisted of thirty-two8 norms for the practice of law based on the earliest statements of legal ethics.9

Because of the difficulty in enforcing the aspirational and precatory language of the Canons,10 the ABA's House of Delegates

5 The earliest effort at codifying legal ethics in Kentucky, however, was apparently one made by the state bar association at its second annual meeting in 1903. A code of ethics [hereinafter 1903 KBA Code] consisting of 55 statements was adopted by the organization. It is reprinted in an early edition of the Kentucky Law Journal. See Code of Legal Ethics Adopted By the Kentucky State Bar Association, 3 Ky. L.J. 12 (1914).


8 Between 1908 and the adoption of the Code in 1970, 15 additional Canons were added by the ABA. T. MORGAN & R. ROTUNDA, supra note 3, at 416.

9 The 1908 Canons are generally viewed to be derived from Alabama's 1887 effort, the nation's first codification of the ethical obligations of lawyers. See C. WOLFRAM, MODERN LEGAL ETHICS 54 n.21 (1986). Alabama's code is purported to have had its origins in the work of George Sharswood in his Essay in Professional Ethics. Jones, Canons of Professional Ethics, Their Genesis and History, 7 Notre Dame Law. 483, 494 (1932).

10 Professor Wolfram notes:
The Canons were not originally adopted in order to serve as a regulatory
approved the Code of Professional Responsibility (Code) in 1969. The Kentucky Supreme Court immediately adopted the Code in its rules as "a sound statement of the standards of professional conduct required of members of the bar."

The Code was not without its problems. The ABA amended the Code every year between 1974 and 1980 in response to judicial and scholarly criticism. By 1977, dissatisfaction with the Code warranted the appointment of a committee to consider its modifi-

blueprint for enforcement through disbarment and suspension actions. Instead, they seem to have been a statement of professional solidarity - an assertion by elite lawyers in the ABA of the legitimacy of their claim to professional stature. (footnote omitted)


11 C. WOLFRAM, supra note 9, at 56.

12 The Code was adopted by the ABA's House of Delegates in August, 1969, and carried an effective date of January 1, 1970. Id. The Kentucky Supreme Court adopted the Code for use in the regulation of lawyers in the state on November 11, 1969, nearly two months before that effective date. KY. SUP. CT. R. 3.130, adopted by order of the Supreme Court of Kentucky, November 11, 1969.

13 KY. SUP. CT. R. 3.130, adopted by order of the Supreme Court of Kentucky, November 11, 1969. By 1972, all but three states (California, Illinois, and Maine) had adopted the Code. C. WOLFRAM, supra note 9, at 56. At least one author has concluded that all 50 states have based their ethical rules, at least in part, on the Code. See A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 29 (1976).

14 See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (amended 1974); DR 2-103 (amended 1975); DR 2-102 (amended 1976); DR 2-105 (amended 1977); DR 2-101 (amended 1978); DR 2-102 (amended 1979); DR 3-102 (amended 1980) [hereinafter CODE].


15 Judicial criticism of the Code occurred primarily in litigation challenging the constitutionality of restrictions on advertising and solicitation. See, e.g., In re R.M.J., 455 U.S. 191 (1982) (truthful, nondeceptive listing of areas of practice is protected speech under first and fourteenth amendments and DR 2-105's prohibition to the contrary is unconstitutional); In re Primus, 436 U.S. 412 (1978) (solicitation by mail for purposes of furthering a political or social cause is protected speech under first and fourteenth amendments and DR 2-103's prohibition to the contrary is unconstitutional); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (truthful newspaper advertising of the availability and terms of routine legal services is protected commercial speech under the first and fourteenth amendments and DR 2-101's prohibition to the contrary is unconstitutional).

Scholarly criticism of the Code is summarized in C. WOLFRAM, supra note 9, at 60-61.
cation or abandonment.\textsuperscript{16} The ABA's Kutak Commission\textsuperscript{17} labored through several years of drafts, comments, and suggested alternatives in proposing to the House of Delegates a replacement for the Code.\textsuperscript{18} The resulting Model Rules were approved by the ABA House of Delegates in 1983.\textsuperscript{19}

State reaction to the Model Rules has not been as swift or as universally positive as was reaction to the Code.\textsuperscript{20} To date, the Model Rules have been adopted in full or substantial part in thirty-three states.\textsuperscript{21} Kentucky's adoption of these rules, therefore, places the state among the majority of jurisdictions using the ABA's new product.\textsuperscript{22} An additional three jurisdictions\textsuperscript{23} have before their supreme courts bar recommendations for the adoption of the Model Rules, and another two states\textsuperscript{24} have modified their Code-based rules to incorporate concepts borrowed from the Model Rules. Four states have expressly declined adoption of the Model Rules.\textsuperscript{25}


\textsuperscript{17} The Commission was popularly named for its chairman, Robert J. Kutak, a lawyer from Omaha, Nebraska. G. Hazard & W. Hodges, \textit{supra} note 16, at xxx; C. Wolfram, \textit{supra} note 9, at 61 n.72.


\textsuperscript{19} Model Rules Legis. Hist., \textit{supra} note 18, at 1-2.

\textsuperscript{20} C. Wolfram, \textit{supra} note 9, at 62-63. The first state to adopt the Model Rules, in substantial part, was New Jersey. Law. Man. on Prof. Conduct (ABA/BNA) 1 Current Reports No. 14, at 334 (July 25, 1984) [hereinafter ABA/BNA Lawyer's Manual].

\textsuperscript{21} See ABA/BNA Lawyer's Manual at 01:3-01:4.

\textsuperscript{22} Kentucky was the thirty-first state to adopt the Model Rules. See \textit{id.} at 01:3-4; ABA/BNA Lawyer's Manual, \textit{supra} note 20, 5 Current Reports No. 14, at 240 (Aug. 2, 1989).

\textsuperscript{23} ABA/BNA Lawyer's Manual, \textit{supra} note 20, 3 Current Reports No. 14, at 247 (Aug. 5, 1987) (Ala.); \textit{Id.} 2 Current Reports No. 83, at 461 (Dec. 10, 1986) (D.C.); \textit{Id.} 1 Current Reports No. 40, at 881 (July 24, 1985) (Ill.). Additionally, the rules have been adopted for use by lawyers in the United States Army, while similar adoption is pending in the other military services. \textit{Id.}, 3 Current Reports No. 22, at 392 (Nov. 25, 1987).

\textsuperscript{24} ABA/BNA Lawyer's Manual, \textit{supra} note 20, 1 Current Reports No. 47, at 1026 (Oct. 30, 1985) (N.C.); \textit{Id.} 1 Current Reports No. 48, at 1047 (Nov. 13, 1985) (Ore.).

Thus, it is apparent that the law of legal ethics will be substantially more balkanized in the future than it was under the prior Code, which will make interstate law practice more complex.\textsuperscript{26}

The Model Rules differ from the prior Code drastically in form and significantly in substance. The troublesome Code format of Canons,\textsuperscript{27} Ethical Considerations,\textsuperscript{28} and Disciplinary Rules\textsuperscript{29} is abandoned in the Model Rules.\textsuperscript{30} Instead, the ABA uses in its new rules a form similar to that of the various Restatements produced by the American Law Institute,\textsuperscript{31} in which the rules are stated concisely, followed by comments intended to illuminate the provisions' interpretation and application.\textsuperscript{32} This format is both familiar to lawyers, who will look to the Model Rules for guidance, and easier for laypersons who might venture into the subject of legal ethics. Furthermore, the elimination of the Code's triplet of ethical statements should dissuade courts from continuing their disquieting tendency to discipline lawyers for conduct meant only to be discouraged rather than prohibited.\textsuperscript{33}

\textsuperscript{26} See C. Wolfram, supra note 9, at 62-63.

\textsuperscript{27} The Canons under the Code were "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived." CODE, Preliminary Statement 2. The Canons served primarily as the headings to the various divisions of the Code's Ethical Considerations and Disciplinary Rules.

\textsuperscript{28} The Code's Ethical Considerations [hereinafter EC] were "aspirational in character and represent the objectives toward which every member of the profession should strive." CODE, Preliminary Statement. Thus, the ABA did not intend the EC's to be standards to be utilized in the discipline of lawyers.

\textsuperscript{29} Disciplinary Rules [hereinafter DR] under the Code were "mandatory in character" and were intended to "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." CODE, Preliminary Statement.

Thus, according to the ABA's tripartite Code arrangement of ethical statements, under a given Canon pertaining to a general topic of legal ethics would be found the EC's giving guidance and the DR's providing the minimum level of expected conduct in that topic area.

\textsuperscript{30} The first action taken by the ABA House of Delegates at the January 1982 Midyear Meeting on the Kutak Commission's work was the approval of the Restatement-like format for the new rules. MODEL RULES LEGIS. HIST., supra note 18, at 1.

\textsuperscript{31} See, e.g., RESTATEMENT (SECOND) OF CONTRACTS (1979).

\textsuperscript{32} The rules are of two types. MODEL RULES, Scope. Most are mandatory in nature and define the minimum level of conduct that is required of lawyers. See, e.g., MODEL RULE 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."). These rules serve as the basis for discipline. Other rules are permissive in nature and describe areas of lawyer discretion. See, e.g., MODEL RULE 1.2(c) ("A lawyer may limit the objectives of the representation if the client consents after consultation."). The comments, on the other hand, "do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." MODEL RULES, Scope.

\textsuperscript{33} For further discussion of some courts' use of the Code's Ethical Considerations
The substantive improvement offered by the ABA's Model Rules is more significant. Most notably, the Model Rules' treatment of the difficult and subtle area of conflicts of interest is clearer and more comprehensive than that offered in the Code. The Model Rules also set forth the ethical duties of supervisory and subordinate lawyers within firms. Additionally, the new rules expressly approve of representations that are mediative rather than adversarial, a topic not broached by the Code. The Model Rules also improve the Code's treatment of referral fees, legal opinions and even its Canons as the basis for imposing discipline upon lawyers despite the contrary intent of the drafters of the Code, see infra notes 88-90 and accompanying text.


In the area of simultaneous multiple representations, Model Rule 1.7 focuses on the degree of adversity between the two clients sought to be represented and on the limitations upon the representation of either that would be caused by the multiple representation. MODEL RULES 1.7(a), (b). Exceptions to the restriction on multiple representation are confined to situations in which the lawyer reasonably concludes that the representation would not be adversely affected and the clients consent after adequate consultation. Id. The Code's treatment of simultaneous multiple representation created a broad prohibition on such employment. CODE, DR 5-105(A)-(B) (A lawyer should not accept or continue employment whenever the lawyer's "independent professional judgment in behalf of a client will be or is likely to be adversely affected" or "if it would be likely to involve him in representing differing interests."). The Code provided an exception to that broad prohibition when the lawyer secured client consent after full disclosure and it was also "obvious" that he or she could adequately represent the interest of each client. CODE, DR 5-105(C). The "obvious" standard, however, provides little guidance for a lawyer confronted with multiple representation. As one commentator has noted, it is "a standard which is both so strict and so ambiguous that in avoiding multiple representation the lawyer can never be wrong." Morgan, The Evolving Concept of Professional Responsibility, 90 HARV. L. REV. 702, 727-28 (1977). Professor Wolfram argues that the Model Rules treatment of multiple representation continues the Code treatment of the subject but does so in a clearer fashion. C. WOLFRAM, supra note 9, at 350.

The Model Rules treat a number of conflict of interest issues not covered by the Code. Model Rule 1.9 governs representations adverse to former clients, a topic not directly addressed by the Code. The problem of successive private and government employment is covered more completely in Model Rule 1.11 than in the Code's DR 9-101(B). The same can be said for the Model Rules' restrictions on former judges and arbitrators in private practice. Compare MODEL RULE 1.12 with DR 9-101(A). The Model Rules' treatment of conflicts generated by the lawyer's own interests contains several prohibitions that were not contained in the Code. See, e.g., MODEL RULE 1.8(c), (e)(2), (i).

See MODEL RULES 5.1, 5.2.

See MODEL RULE 2.2.

The Code's only express recognition of lawyers serving in the capacity of mediator is in EC 5-20, which noted that a "lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships." CODE, EC 5-20.

The Model Rules permit pure referral fees, unrelated to the work actually done by
for third parties, advertising, solicitation, and dealing with clients suffering disabilities.

The Model Rules are not without their faults. A number of states have amended the ABA's treatment of certain issues, most

the referring lawyer, if the lawyers assume joint responsibility for the work done in the representation, the client agrees to the referral in writing under those terms, and the total fee is reasonable. Model Rule 1.5(e). The Code, on the other hand, required the division to be made "in proportion to the services performed and responsibility assumed by each" lawyer. DR 2-107(A)(2) (emphasis added). Thus, the Code approves of referral fees only when the fee reflects actual work done on the matter. See C. Wolfram, supra note 9, at 512.

Model Rule 2.3 permits lawyers to render such opinions under certain circumstances. While there was no direct counterpart to this provision in the Code, DR 4-101(B)'s restrictions on the disclosure of client confidences and secrets presumably would prohibit the rendering of most opinions to third persons in the absence of client consent.

Regulation of advertising under the Model Rules is primarily focused on the truthfulness of the communication. Model Rules 7.1, 7.2. The Code's approach was to list appropriate categories of information that could be utilized in advertisements. See Code, DR 2-101(B). The Model Rules treatment of the subject is more consistent with the developing body of case law from the United States Supreme Court on the topic of lawyer advertising than is the Code's. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); In re R.M.J., 455 U.S. 191; Bates, 433 U.S. 350.

Solicitation is governed by Model Rule 7.3, which was amended by the ABA following the Supreme Court's decision in Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988). In that case the Court found mail solicitation directed to potential clients known to be in need of certain legal services to be commercial speech protected by the first amendment even when the lawyer's motive was pecuniary gain. Id. at 475-76. The Code's broad prohibition of solicitation is contained in DR 2-103.

Model Rule 1.14 pertains to the difficult problem of representing clients suffering from some type of impairment. Under the rule, lawyers are expected to maintain as normal a lawyer-client relationship as possible in such representations. Model Rule 1.14(a). The Code, on the other hand, merely recognizes that impaired clients present additional responsibilities for their lawyers without providing further guidance. Code, EC 7-12. See also EC 7-11 ("[R]esponsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client.").

The Association of Trial Lawyers of America was sufficiently disappointed by the Kutak Commission's drafts of the Model Rules that it adopted and offered as an alternative its own rules of ethics. See Association of Trial Lawyers of America, American Lawyer's Code of Conduct Preface (Revised Draft 1982) [hereinafter ATLA Code], reprinted in T. Morgan & R. Rotunda, supra note 3, at 201. The group viewed the Model Rules as too restrictive of the lawyer's duty as a zealous advocate on behalf of the client. Id.; C. Wolfram, supra note 9, at 62.

The ABA has itself amended the Model Rules since their adoption by the organization's House of Delegates in 1983. During the Kentucky Supreme Court's consideration of the rules, the ABA modified Model Rules 1.9, governing conflicts of interest with former clients, and 1.10, pertaining to imputed disqualification. The modification merely rearranged the provisions and their comments and did not change their cumulative substance. The Kentucky court adopted the ABA's original version of the two rules. Compare Model Rules 1.9, 1.10, T. Morgan & R. Rotunda, supra note 3, at 112-18, with Ky. Rules 1.9, 1.10.

Two new Model Rules were added to the ABA's mid-year meeting in February, 1990,
frequently the provision on confidentiality. A clear majority of states, Kentucky now included, however, have recognized the substantial improvement offered by the Model Rules over the previous Code.

II. Kentucky's Changes to the ABA's Model Rules

In adopting the Model Rules the Kentucky Supreme Court chose to vary the language used by the ABA in a number of instances. These changes vary from the insignificant to the pronounced.

A. The Less Significant Changes

Among the least significant changes made by the court are several in which the ABA's language was altered slightly with no apparent change in meaning. For example, the ABA's Model Rule 2.2 provides that a lawyer may serve more than one client in a

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The American Bar Association's critical role in developing ethical standards for the practice of law is less regulatory than advisory. The adoption of a collection of ethical restraints by the ABA has itself only the nebulous effect of binding that organization's membership. Those same restraints become legally enforceable, however, through their adoption by the state supreme courts in their rulemaking capacity. See C. WOLFRAM, supra note 9, at 56. As each state's highest court considers the body of regulations proposed by the ABA, it frequently makes changes to the proffered codification. Amendments to the proposed Model Rules by the states adopting them were made by virtually all states. See supra note 46 and accompanying text. Kentucky, therefore, is not unusual in that it altered the ABA's product.
mediative capacity "if" three strict conditions are met.\(^4\) Under the Kentucky court’s version of the rule, lawyers may engage in such representations "only" if the same conditions are met.\(^4\) Even under the ABA’s rule, such representations would be limited to these instances because other efforts at serving as an intermediary would violate Model Rule 1.7 on simultaneous multiple representation.\(^5\) One might be tempted to infer from the Kentucky modification that the court views such representations restrictively and as quite extraordinary. The Kentucky language, however, adds only redundancy to the ABA version.

An equally superfluous alteration was made to Rule 1.5, which lists relevant factors in determining the reasonableness of legal fees. The ABA’s version of the rule lists factors that are to be included in the determination of reasonableness.\(^5\) The Kentucky court’s version declares that the same list constitutes merely "some" of the factors relevant to that determination.\(^5\) Since the ABA list of factors is expressly declared not to be exclusive,\(^5\) the Kentucky modification was wholly unnecessary. Under either version, any information bearing on the reasonableness of a fee, whether or not it relates to one of the express factors on the list, is appropriate for consideration.

Another needless change was made to the ABA’s language in Rule 6.1 governing pro bono legal services. Despite initial efforts

\(^{48}\) **Model Rule 2.2.**

\(^{49}\) **Ky. Sup. Ct. R. 2.2** [hereinafter Ky. Rule]. The change was recommended without further comment by the Special Committee. **Report of the KBA Special Committee, supra note 4**, at 56.

\(^{50}\) The intermediary role contemplated by Model Rule 2.2 is a particularly delicate one in that the lawyer is representing all of the parties to the mediation. Obviously, such representations present problems of conflicts of interest and confidentiality. Should any of the three conditions set forth in Model Rule 2.2(a) pertaining to these problems not be met, the lawyer’s multiple representation by continuing in the mediation would violate Model Rule 1.7. **G. Hazard & W. Hodes, supra** note 15, at 309-19. Thus, when the ABA’s version of the rule provides that lawyers may engage in such representations "if" the three conditions are met, it is effectively providing that a lawyer may do so "only if" those conditions are met.

The Kentucky court also added a new paragraph to the comments to its Rule 2.2. The new comment clarifies that a lawyer is not serving as an intermediary merely because one client in a matter is unrepresented by counsel. **Ky. Rule 2.2** comment (paragraph 6).

\(^{51}\) **Model Rule 1.5(a).**

\(^{52}\) **Ky. Rule 1.5(a).** The Special Committee recommended the change. **See Report of the KBA Special Committee, supra** note 4, at 11.

\(^{53}\) The ABA rule provides that "[t]he factors to be considered in determining the reasonableness of a fee include the following" listed items. **Model Rule 1.5(a)** (emphasis added). By its use of the word "include" it is apparent that the ABA did not intend the listed factors to be exclusive.
by the Kutak Commission to make the provision of such legal services mandatory for each lawyer, the ABA’s rule as adopted provides only that lawyers “should” render pro bono services. The Kentucky court’s version of the rule declares that lawyers in the state are “encouraged to render” pro bono legal services. A cynic might conclude that the change evidences even less enthusiasm for the imposition of an obligation to render those services than shown by the ABA’s House of Delegates. Since the ABA’s language itself was merely exhortatory, however, the Kentucky change is insignificant.

An equally unnecessary change was made to Rule 1.16, which governs withdrawal of lawyers from representation of clients. The ABA version of the rule allows withdrawing lawyers to retain client papers to secure the payment of legal fees if that retention is “permitted by other law.” Such a practice is recognized in many jurisdictions as a retaining lien. Kentucky law does not provide lawyers with this lien, and the court’s version of the rule reflects this fact by deleting reference to lawyers’ retention of client papers upon withdrawal. Arguably the change offers more clarity, but the same result would have followed without altering the ABA’s version of the rule.

55 Model Rule 6.1.
56 Ky. Rule 6.1. The change was not recommended by the Special Committee. See Report of the KBA Special Committee, supra note 4, at 93.
57 Arguably the ABA’s use of the word “should” in defining the profession’s duty can be read to express what is expected of lawyers, even though the rule does not impose an enforceable obligation. The Kentucky court’s substitution of the words “are encouraged to” apparently reduces the rule to one of the court urging lawyers to do pro bono work without stating their expectation that it be done. Under either rule, however, since there is no enforceable duty to engage in such work, the practical effect likely would be the same.
58 Model Rule 1.16(d).
59 See C. Wolfram, supra note 9, at 559-61.
60 The only lien provided lawyers by the state legislature is that found in Ky. Rev. Stat. § 376.460 (Michie/Bobbs-Merrill 1972 & Supp. 1988) [hereinafter KRS], which would be categorized generally as a “charging” lien. See C. Wolfram, supra note 9, at 561-62.
61 Ky. Rule 1.16(d). The Special Committee recommended the change. See Report of the KBA Special Committee, supra note 4, at 52.
62 Since the ABA rule permits the retention of client papers only “to the extent permitted by other law,” Model Rule 1.16(d), and since Kentucky law does not provide for such retention, Ky. Rev. Stat. § 376.460, the ABA rule would protect clients against such retention as fully as the Kentucky version of the rule.
Another change that has no apparent effect on the meaning set forth by the ABA version was made by the Kentucky court to Rule 3.8 governing the conduct of prosecutors. The ABA's version is applicable to prosecutors "in a criminal case." Kentucky's version of the rule deletes that language and inserts "at all stages of a proceeding." Obviously, criminal cases are the proceedings likely to involve prosecutors, and since the ABA's wording would apparently make the duties stated in that rule mandatory throughout the entire criminal case as well, the Kentucky modification has no substantive impact.

One final change that was clearly unnecessary was made to Rule 3.3, which governs candor to tribunals. The Kentucky court added language declaring that lawyers' obligations under the rule are "subordinate to such constitutional requirements as may be announced by the courts." The modification merely states the obvious, since all other law, whether legislative or judicial, is subordinate to the dictates of the constitution.

Two changes made by the Kentucky court merely make explicit in the rules what was implicit in the ABA's version. The Kentucky court's modification of Rule 1.6, governing lawyer-client confidentiality, falls in this category. The Kentucky version of the rule adds a third exception to the general prohibition on the disclosure of information relating to the representation of a client. Kentucky's Rule 1.6(b)(3) makes it permissible to reveal that information "to comply with other law or a court order." While the ABA

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63 Model Rule 3.8.

64 Ky. Rule 3.8. The Special Committee recommended the change, Report of the KBA Special Committee, supra note 4, at 78, noting only that the amendment was "self-explanatory." Id. at 80.

65 Model Rule 3.3.

66 Ky. Rule 3.3(e). The Special Committee recommended the change, Report of the KBA Special Committee, supra note 4, at 65, indicating that several committee members had urged the addition of the new subsection (e) to the rule. Id. at 70.

67 C. Wolfram, supra note 9, at 57.

68 As noted above, the ABA rule on confidentiality was one of the most controversial of the Kutak Commission's proposed rules and continues to be controversial in the process of adoption by the state supreme courts. See supra note 46 and accompanying text.

69 The ABA's rule permits lawyers to disclose confidential information to prevent clients from committing violent crimes and in disputes regarding the lawyer's services. Model Rule 1.6(b)(1)-(2). In addition, of course, disclosure is permitted with the consent of the client. Model Rule 1.6(b).

70 Ky. Rule 1.6(b)(3). The Special Committee recommended this amendment. See Report of the KBA Special Committee, supra note 4, at 16. That committee also recommended, however, that the lawyer's permissive disclosure under the new exception be
version of the rule made no such exception, the comments to the rule cautioned lawyers that that they "must comply with the final order of a court or other tribunal" requiring them to disclose information about their clients and recognized that such disclosures also could be compelled by law other than the rules. Thus, the Kentucky version incorporates in the rule's express language the interpretation urged by the ABA's comments. The Kentucky rule is preferable, but it does not alter the likely practical effect of the ABA rule.

An additional modification by the Kentucky court merely expresses clearly what was implicit in the ABA's Model Rules. A lawyer is prohibited by the ABA's and Kentucky's Model Rule 5.4(b) from forming a "partnership" for the practice of law with a non-lawyer. The Kentucky version adds a new comment making clear that "partnership" includes other forms of business associations, such as "joint ventures, corporations, and conglomerates." Given the ABA House of Delegates' negative reaction to any form of law practice in which lay persons share in the profits and management of the enterprise, it is likely that the ABA version of the rule implicitly incorporated a similarly broad view of "part-

exercised only "after good faith efforts to challenge the law or court order have been exhausted." Id. The latter restriction, however, was not adopted by the court in its version of the rule. See Ky. Rule 1.6(b)(3).

The Kutak Commission's proposed rule on confidentiality initially contained an exception to the duty of nondisclosure "to comply with other law." See Model Rules Legis. Hist., supra note 18, at 48.

71 Model Rule 1.6 comment [19].

72 Model Rule 1.6 comment [20].

73 For further discussion of the relationship between the Model Rules and the comments, see infra note 87 and accompanying text.

74 Professor Wolfram notes that the ABA version of Model Rule 1.6 is "confusing" and "contradictory" in its treatment of confidentiality. C. Wolfram, supra note 9, at 723. He prefers the earlier version of Model Rule 1.6, which permitted disclosures when compelled by other law. Id. at 724. He criticizes the present ABA rule because it is "absurd to put a lawyer into the position of having to choose between violating a professional obligation or a duty imposed by other valid law." Id. at 672. Presumably, therefore, Professor Wolfram would view the Kentucky court's amendment to that rule as a significant improvement.

75 Model Rule 5.4(b); Ky. Rule 5.4(b).

76 Ky. Rule 5.4(b) comment [2]. The Special Committee recommended the change. See Report of the KBA Special Committee, supra note 4, at 90.

77 The rule proposed by the Kutak Commission, which permitted nonlawyer managerial authority in law firms, was the only proposed Model Rule rejected in its entirety by the ABA House of Delegates. G. Hazard & W. Hodes, supra note 16, at 469-72. The evolution of Model Rule 5.4 is set forth in Model Rules Legis. Hist., supra note 18, at 159-64.
nership” as well. The Kentucky comment adds clarity but does not change the substance of the rule.78

Finally, the Kentucky court chose not to incorporate the ABA Model Rules’ preamble when it adopted the new rules.79 While that deletion does not affect the text of the Model Rules, it could be of some importance. The preamble serves two functions. First, it describes in narrative form the ABA’s view of a lawyer’s responsibilities to clients, courts, and society.80 The description explains in broad terms the conflicting pressures on lawyers81 and offers the policy justification for self-regulation of the profession.82 It is, therefore, instructive both to the bar and to the public. Second, and more importantly for the regulation of lawyers’ conduct, the preamble describes the scope of the Model Rules.83

The preamble sets forth several important principles for the application of the rules. It indicates that while violations of the rules provide the basis for discipline, the sanction imposed, if any, should be determined by a careful consideration of all the circumstances, including mitigating factors.84 Additionally, it notes that violations of the Model Rules were not intended to be viewed as giving rise to a private cause of action,85 although understandably they have been found by several courts to be relevant to the litigation of civil duties.86

Most importantly, the preamble notes the intended relationship between the rules and comments. The language of the rules is to be viewed as authoritative while the comments are offered as “guides to interpretation.”87 If followed by the courts and disci-

78 The Kentucky court made an additional change to Model Rule 5.4. The ABA rule prohibits lawyers from practicing for profit in a professional corporation in which a nonlawyer is a corporate director or officer. MODEL RULE 5.4(d)(2). The Kentucky version of the rule deletes this provision. KY. RULE 5.4(d). The Special Committee recommended this deletion without comment. REPORT OF THE KBA SPECIAL COMMITTEE, supra note 4, at 90.

79 The preamble can be found in T. MORGAN & R. ROTUNDA, supra note 3, at 84-88.

80 The first portion of the preamble is entitled “A Lawyer’s Responsibilities.” Id. at 84.

81 Id. at 85 (paragraph 8).

82 Id. at 85 (paragraphs 9-11).

83 The second portion of the preamble is entitled “Scope.” Id. at 86.

84 Id. at 87 (paragraph 5).

85 Id. at 87 (paragraph 6). The previous Code of Professional Responsibility contained a similar disclaimer. See Code Preliminary Statement, reprinted in T. MORGAN & R. ROTUNDA, supra note 3, at 3.

86 See C. WOLFRAM, supra note 9, at 51-53.

87 Model Rules, Preamble: Scope, T. MORGAN & R. ROTUNDA, supra note 3, at 86 (paragraph 1), 88 (paragraph 9).
disciplinary bodies, this clarification would prevent the improper use of the comments. The Code’s Ethical Considerations, roughly analogous to the comments in the Model Rules, were also intended to be used for guidance only but were incorrectly relied upon by a number of courts,\textsuperscript{88} including Kentucky’s,\textsuperscript{89} as a basis for imposing discipline against lawyers.\textsuperscript{90} While the deletion of the preamble does not necessarily mean that the Kentucky courts will similarly misuse the comments, its adoption would have been comforting assurance.

B. The Significant Changes

A number of changes made by the Kentucky Supreme Court to the ABA’s Model Rules are more substantial. Regrettably, with two major exceptions, the most significant Kentucky amendments to the Model Rules are less protective of clients, the judicial system, and the public than the ABA’s original version. Cumulatively, these changes have altered the ABA’s vision of a lawyer’s responsibilities in a manner that nearly exclusively favors lawyers.

One exception to this unfortunate tendency is Kentucky’s Rule 3.4(f), which instructs a lawyer not to “present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage” in other matters.\textsuperscript{91} Although the


\textsuperscript{89} Kentucky Bar Ass’n v. DeCamillis, 547 S.W.2d 446, 447-48 (Ky. 1977) (lawyer disciplined for violation of EC 5-1 and 5-2).

\textsuperscript{90} Indeed, in at least one case the Kentucky court relied upon mere Canons under the Code as the sole legal reason for finding certain conduct to be inappropriate. See In re Advisory Opinion of Kentucky Bar Association, 613 S.W.2d 416 (Ky. 1981) (lawyer who represents police organization in grievance proceedings may not defend criminal accuseds in the same jurisdiction under Canons 7 and 9 of the Code). The Canons under the Code, it will be recalled, were mere statements of axiomatic norms used primarily as headings for the various sections of disciplinary requirements. See supra note 27. For further discussion of the use of Canons as the basis for discipline, see Sutton, How Vulnerable is the Code of Professional Responsibility?, 57 N.C. L. REV. 497, 514 (1978-79).

\textsuperscript{91} KY. RULE 3.4(f). Order of the Kentucky Supreme Court, supra note 1, at 73. The addition of this provision was recommended by the Special Committee, although the committee's addition was contained at Rule 3.4(g). See REPORT OF THE KBA SPECIAL COMMITTEE, supra note 4, at 70, 72.
rule is similar to a proscription under the prior Code,\textsuperscript{92} it has no counterpart in the ABA’s Model Rules.\textsuperscript{93} Prohibitions on such threats and actions, however, are justifiable on several grounds. To the extent a threatened prosecution is used successfully to secure a result in a civil matter, that prosecution will generally not occur. Thus, the criminal justice system will be frustrated by the bargained-for silence resulting from the civil matter.\textsuperscript{94} Furthermore, the use of threats of prosecution may well constitute an abusive use of the criminal justice process itself and may even constitute a tort in some jurisdictions.\textsuperscript{95} The Kentucky rule, therefore, serves a valuable public interest function in discouraging the misuse of criminal and disciplinary charges for private gain. Its insertion is an improvement upon the ABA’s new Model Rules.

The Kentucky court also made a commendable change to the ABA’s version of Model Rule 8.4 by deleting the general prohibition on lawyers engaging in conduct prejudicial to the administration of justice.\textsuperscript{96} That deletion may signal a welcome end to the court’s consistent reliance on general catch-all language in disciplining lawyers even when specific rules prohibited the conduct at issue.\textsuperscript{97} That practice detracted from the court’s effort at regulating

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\textsuperscript{92} Code, DR 7-105. It should be noted, however, that the Kentucky rule is broader than DR 7-105, the previous Code provision, in two respects. First, the new Kentucky rule prohibits the use or threat of use of the disciplinary process in addition to criminal process to gain an advantage. Ky. Rule 3.4(f); Order of the Kentucky Supreme Court, supra note 1, at 73. It would seem that the same rationale for restricting the abuse of the criminal justice system would apply to the disciplinary process as well. Second, however, the Kentucky court inexplicably included a prohibition on the use of criminal charges or threats to use criminal charges solely to gain an advantage in a “criminal matter.” Surely the court did not mean to prohibit the common use of criminal charges in plea bargaining and in obtaining helpful testimony against other defendants, but the court’s rule would seem to do so.

Professor Underwood, the chair of the Special Committee, noted in a comment that the new rule was “not intended to hamper the prosecution in plea bargaining by prohibiting additional charges for which there is probable cause.” See Report of the KBA Special Committee, supra note 4, at 72.

\textsuperscript{93} The ABA’s Model Rule 3.4(f) prohibits certain efforts at silencing witnesses. Model Rule 3.4(f). The Kentucky court, however, deleted this provision. See infra notes 130-32 and accompanying text. In its place was inserted the court’s prohibition on using criminal and disciplinary proceedings to gain advantage in other matters. Ky. Rule 3.4(f); Order of the Kentucky Supreme Court, supra note 1, at 73.

\textsuperscript{94} C. Wolfram, supra note 9, at 716.

\textsuperscript{95} Id.

\textsuperscript{96} Compare Ky. Rule 8.3(d) with Model Rule 8.4(d). The Special Committee did not recommend the deletion. See Report of the KBA Special Committee, supra note 4, at 111.

\textsuperscript{97} This author has on two previous occasions criticized the Kentucky court for this practice. See Gaetke, supra note 34, at 593-95; Gaetke, Solicitation and the Uncertain Status...
lawyers in two ways. It failed to offer lawyers guidance as to the court's interpretation of the applicable ethical rules. It also kept from the public information about the regulation of lawyers in the state, thus undermining public confidence in the process. Although the court's deletion of the catch-all language may be a more drastic remedy than was needed, it certainly should result in the improvement of the lawyer discipline process in Kentucky.

With these exceptions, however, the court's other significant changes to the Model Rules cannot be similarly applauded for they cannot be justified by public interest concerns. For example, the ABA's Model Rules place considerable emphasis upon the protection of clients in their relationships with lawyers. The rules particularly stress full communication with clients. This emphasis is reflected in Model Rule 1.4, which requires lawyers to keep their clients reasonably informed and to explain matters sufficiently to permit clients to make informed decisions about their representation. The Kentucky court, in contrast, eliminated these require-

of the Code of Professional Responsibility in Kentucky, 70 Ky. L.J. 707, 709-13, 722-28 (1981-82). Another author has offered the same criticism. See Van Booven, Kentucky Law Survey—Professional Responsibility, 73 Ky. L.J. 449, 454-58 (1984-85). To the extent that the court is indicating an end to this practice by its deletion of the catch-all language of the ABA's Model Rule 8.4(d), the amendment is a significant improvement.

The deletion, however, may be criticized for removing a valuable safety net for the lawyer regulatory process. Certain unethical conduct of lawyers will undoubtedly fall outside of the specific rules of professional conduct and, therefore, may go unpunished without a catch-all provision such as Model Rule 8.4(d). It should be noted, however, that the court adopted the other general misconduct provisions contained in the ABA's Model Rule 8.4, including the prohibition on any dishonest or deceitful conduct, Ky. Rule 8.3(c), and on criminal acts adversely reflecting on the lawyer's fitness to practice law, Ky. Rule 8.3(b). It is difficult to imagine misconduct that could be considered prejudicial to the administration of justice but that is not covered by a specific rule, does not involve dishonesty or deceit, and is not criminal. If there is such misconduct, it will likely not result in discipline because of the Kentucky court's deletion of the ABA's Model Rule 8.4(d). Such instances, however, should be extraordinarily rare.

For a general discussion of the limited value of broad ethical standards, see Note, supra note 88.

91 Gaetke, supra note 34, at 594; Gaetke, supra note 97, at 713.
99 Gaetke, supra note 34, at 595.
100 What has been objectionable about the Kentucky court's approach to legal ethics has been its persistent use of catch-all provisions even when specific disciplinary standards apply, not the mere presence of the catch-all provisions in the body of law governing legal ethics. All that was necessary to remedy this problem was a commitment by the court to use the specific disciplinary provisions and not to utilize the analytically easier route of disciplining lawyers through the catch-all language unless it was necessary. The court's deletion, therefore, goes further than was necessary to correct the problem.
101 MODEL RULE 1.4(a), (b).
ments and merely encouraged lawyers to communicate with their clients.102

The ABA’s Model Rules also require extensive consultation with clients regarding fees, an area obviously critical to clients and the focus of many complaints about lawyers. This duty was substantially reduced through several changes made by the Kentucky court to various fee provisions.103 Most noteworthy is the court’s change to Model Rule 1.5(b), which requires lawyers to communicate with their clients about fees at an early point in their relationship.104 The Kentucky version renders such discussions optional.105

102 The Kentucky version substitutes “should” for “shall” in both requirements of Model Rule 1.4. Ky. Rule 1.4(a), (b). The Special Committee recommended the changes. Report of the KBA Special Committee, supra note 4, at 9. The chair’s comment explaining the changes asserts that the ABA’s version “provide[s] an independent, and highly technical, ground for discipline,” and that Rules 1.1 (requiring competent representation) and 1.3 (requiring diligence in representation) “provide adequate grounds for disciplinary action.” Id. at 10 (chairman’s comment).

Certainly the ABA’s version of the rule can be violated even though a lawyer’s representation is otherwise competent and rendered diligently. This emphasizes the importance placed by the ABA upon the lawyer’s duty to keep the client informed. The Kentucky rule relegates that duty to a lesser status. Furthermore, it is difficult to understand how Rules 1.1 and 1.3 can provide adequate grounds for disciplinary action as a result of the conduct governed by Rule 1.4 when that conduct is rendered optional by that rule.

103 The Kentucky court made one change to the ABA’s treatment of fees that in most cases will be insignificant. In a rare instance, however, the change would favor the lawyer’s interests at the expense of the client’s.

The change governs nonclient payment for legal representation. The ABA’s Model Rule 1.8(f) permits such payments only when the client has agreed to them after consultation. Model Rule 1.8(f)(1). The Kentucky court, however, added that such payments are also appropriate when made “in accordance with an agreement between the client and the third party” payor. Ky. Rule 1.8(f)(1). The Special Committee recommended this change. See Report of the KBA Special Committee, supra note 4, at 27. Apparently the committee and the court felt such an amendment was necessary to indorse the common instance of insurers paying lawyers for representing insured clients. See Report of the KBA Special Committee, supra note 4, at 31 (Committee Comment) (client consent is not required “if the client previously consented in an agreement with a third party, such as an insurance contract”).

Despite the frequency and the usual acceptability of that arrangement, however, the amendment is disturbing in the rare instance of a client objecting to payment of counsel by an insurer. Surely the client should have an opportunity to object to the lawyer’s payment by another source, even if the client has previously agreed to such an arrangement through payment of insurance premiums. The ABA’s requirement of consultation and consent assures the client of that opportunity while the Kentucky version of the rule deletes it. Obviously, such an objection would be extraordinary. That does not explain, however, why the client’s control over the payment of his own lawyer should not prevail.

Because the problem is not likely to arise with any frequency, however, the change can likely be viewed as inconsequential.

104 Model Rule 1.5(b).

105 Again, the Kentucky version substitutes “should” for “shall” in this provision. Ky. Rule 1.4(a), (b). This change was not recommended by the Special Committee. See Report of the KBA Special Committee, supra note 4, at 9-11.
The lawyer’s duty of disclosure to clients regarding fees was further diminished by the Kentucky court’s amendment to the factors listed as relevant to the determination of fee reasonableness. The ABA’s Model Rules include in those factors “the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.” The requirement that this likelihood be apparent to the client to be a relevant fee-setting consideration is intended to permit clients the choice of seeking representation from another lawyer whose fee will not be enhanced by this factor. The Kentucky version of the rule deletes this requirement. Under the Kentucky rule, a client may not be aware that this factor would justify a larger fee until the work is completed and the fee charged. The deletion works against the interest of clients in full disclosure regarding fees.

106 MODEL RULE 1.5(a)(2) (emphasis added). Under certain circumstances the identity of the client or the nature of the work involved might preclude work by that lawyer for other clients due to conflict of interest rules. If other remunerative work must be forfeited in order to accept employment proffered by a client, a higher fee would be justified.

107 KY. RULE 1.5(a), (b). This change was recommended by the Special Committee. See REPORT OF THE KBA SPECIAL COMMITTEE, supra note 4, at 11. The committee viewed the deleted language as “unnecessary.” Id. at 15 (committee comment).

108 Indeed, a client might well never recognize that a fee was inflated due to this factor unless there is sufficient information to reveal the fact. In most situations the inflation of the fee would not be discernible.

109 One other change was made by the Kentucky court relative to fees. The ABA’s Model Rules prohibit the use of fees in domestic relations matters where the amount is contingent upon “the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.” MODEL RULE 1.5(d)(1). The rule clarifies the ambivalent Code treatment on the subject of contingent fees in domestic relations cases under which such fees were strongly discouraged but not prohibited. Compare Code, EC 2-20 with Code, DR 2-106(C). The ABA’s negative reaction to contingent fees in these matters, under both the Code and the Model Rules, is premised on the public policy encouraging reconciliation in divorce cases. C. WOLFRAM, supra note 9, at 539. By creating an interest in the lawyer in seeing the divorce decreed, such fees are viewed as an impediment to reconciliation. Id.

The Kentucky court provided an exception to the general prohibition on contingent fees in domestic relations matters, however, when the action is to collect “liquidated sums in arrearage.” KY. RULE 1.5(c)(1). The Special Committee did not urge this change but did opine that the ABA’s rule did not prohibit a contingent fee “to collect an amount that has been reduced to a judgment.” REPORT OF THE KBA SPECIAL COMMITTEE, supra note 4, at 12, 15. Thus, the Kentucky court’s version of the rule makes explicit the Special Committee’s reading of the ABA’s language.

In the situations covered by the Kentucky court’s exception, the rationale for the prohibition of contingent fees in domestic relations cases does not apply. That is, once a divorce has been granted and alimony and support awarded, a subsequent suit for delinquent payments would appear to be indistinguishable from any collection suit. Certainly the chances of reconciliation of the divorced spouses are not affected by the fee arrangement between the plaintiff spouse and her or his lawyer in such cases. The Kentucky change,
Several other Kentucky amendments outside of the fee area appear detrimental to clients or the public. For example, the Kentucky court added the requirement of scienter to several provisions in which the ABA had not done so. Most of the ABA’s Model Rules contain no requirement that the conduct proscribed be intentionally or knowingly committed in order to constitute a violation. Generally, the rules prohibit even negligent violations.

1. Several Kentucky changes that are facially detrimental to clients and the public may be practically insignificant. The Kentucky court amended the ABA rule on client trust accounts to permit some commingling of lawyers’ money with that of clients. Ky. RULE 1.15(d). This change was recommended by the Special Committee. See REPORT OF THE KBA SPECIAL COMMITTEE, supra note 4, at 49. Under the Kentucky rule lawyers are permitted to deposit their own funds in client trust accounts “for the limited purpose of minimizing bank charges.” Ky. RULE 1.15(d); Order of the Kentucky Supreme Court, supra note 1, at 57. The ABA version of the rule, however, does not permit such deposits of lawyer funds in trust accounts. MODEL RULE 1.15.

2. At first glance, the Kentucky approach seems innocuous. Under it, lawyers can avoid monthly account charges and check writing charges on small accounts by the deposit of a minimal amount such as $200.00, depending on the bank deposit agreement. At the extreme, however, the rule appears to permit lawyers to invest greater amounts, such as $1,000.00, to obtain other bank benefits, such as free checks or other privileges, thus resulting in substantial commingling of lawyers’ and clients’ funds.

3. More significantly, however, the Kentucky approach detracts from a primary rationale for the client trust account rules, namely the avoidance of even the implication that clients’ property is being misused by their lawyers. Surely there is nothing inherently dishonest about a lawyer maintaining only one account in which is deposited the lawyer’s funds and those of clients. As long as the funds are distributed properly and not misused while in the lawyer’s possession, there is no moral objection to such commingling. The focus of the strict Model Rules requirement of separate accounts and records, however, is on the avoidance of the mere suggestion of misappropriation. The commingling prohibitions work not only to protect clients against misuse of their funds, but to provide a unified structure negating even a hint of impropriety. The Kentucky approach is less effective than Model Rule 1.15 in accomplishing the latter objective.

4. The Kentucky rule, however, merely continues the practice under the prior Code. See Code, DR 9-102(A)(1). Furthermore, there is no evidence of abuse of the banking charge exception in the state under the Code. The change from the Model Rule, therefore, may well be insignificant in practical effect.

5. Certainly the willfulness of the violation is considered by the ABA to be relevant to the decision of whether to impose discipline and the appropriate sanction. MODEL RULES, Preamble: Scope, reprinted in T. MORGAN & R. ROTUNDA, supra note 3, at 87 (paragraph 5).

Two scholars suggest that “knowledge” is a requirement of many of the Model Rules
Kentucky's new rules, in contrast, require knowing violations to warrant discipline in several instances where the ABA's version does not. According to the definitions contained in the Model Rules' "Terminology" section, which was adopted by the Kentucky court, "knowingly" refers to "actual knowledge of the fact in question." Where the Kentucky rule prohibits only knowing misconduct, therefore, a lawyer is not subject to discipline for negligent or even grossly negligent violations. The effect of these amendments is to restrict the reach of the provisions to fewer instances of lawyer misconduct.

Most of these changes are found in Part III of the Model Rules, which governs the lawyer's conduct as an advocate. ABA Model Rule 3.1, for example, subjects lawyers to discipline for engaging in frivolous litigation. The Kentucky version only prohibits "knowingly" doing so, thus withdrawing from the rule's coverage the careless or even reckless bringing of meritless causes.

The example they choose, however, is not convincing. A lawyer-client relationship, like other contractual relationships, may be established without the lawyer's subjective knowledge. If a lawyer had given the purported client reason to believe that a lawyer-client relationship existed and then failed to act with diligence in regard to the client's matter, Model Rule 1.3 would appear to be violated. This would be true even though the lawyer did not "know" that the person was now his or her client. The carelessness of the lawyer in establishing the lawyer-client relationship might cause a disciplinary authority to forego discipline or to reduce its severity, but it should not affect the finding of a violation.

The same authors assert that the lawyer's duty to protect the information relating to the representation of a client under Model Rule 1.6 "assumes that the lawyer is aware that the information does relate to the representation, but it may not always be clear that the lawyer has such awareness." This comment also seems to miss the mark. Nothing in Model Rule 1.6 limits its application to intentional violations. Even careless, though unintentional, violations of protected information fall within the coverage of the rule. To be sure, a negligent violation of the rule is less deserving of discipline than an intentional violation. That is not to say that the rule by implication requires a knowing state of mind.

For further discussion of what a lawyer "knows" see C. Wolfram, supra note 9, at 695-97.

"2 Ky. Sup. Ct. R. 3.130(1). The Special Committee recommended the adoption of the "Terminology" section. See Report of the KBA Special Committee, supra note 4, at vi.

112 Ky. Rule 3.130(5).

113 Model Rule 3.1.

114 Ky. Rule 3.1. The Special Committee did not recommend this amendment. See Report of the KBA Special Committee, supra note 4, at 62-63.

115 In many instances such carelessness would likely violate Rule 1.1 requiring lawyers to provide competent representation for a client, and discipline might be imposed for that violation. Nevertheless, frivolous litigation, whether intentional or the product of negligence,
Given the current popular criticism of the bar for engaging in frivolous litigation, the Kentucky version sends an unfortunate message to the bar and the public by reducing the scope of Rule 3.1.

A similar objection can be made to the Kentucky court's modification of Model Rule 4.4 governing respect for the rights of third persons. The Kentucky version prohibits knowingly taking actions for the purpose of embarrassing or burdening third persons or violating their rights in gathering evidence, while the ABA version prohibits carelessly doing so as well. As with Rule 3.1, the ABA's version of Rule 4.4 more clearly expresses intolerance of such conduct and would have been preferable.

The same can be said for the Kentucky court's insertion of a scienter requirement in Rules 3.4(d) and (e). These rules prohibit frivolous discovery requests, unreasonable delay in responding to discovery requests, and, at trial, alluding to irrelevant or unsupported matters, expressing personal knowledge about facts in harms more than just the client. It also harms the judicial system and the public and thus is appropriately prohibited in the rules' section on the lawyer serving as advocate.

117 "Models that the judicial system is being overwhelmed by groundless litigation are common. See, e.g., Partridge, Wilkinson, & Krouse, A Complaint Based on Rumors: Countering Frivolous Litigation, 31 Loyola L. Rev. 221, 222 (1985); Note, The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility, 61 N.Y.U. L. Rev. 300, 300-02 (1986).

118 MODEL RULE 4.4.

119 KY. RULE 4.4. The Special Committee did not recommend this change. See REPORT OF THE KBA SPECIAL COMMITTEE, supra note 4, at 84.

120 The ABA version contains no scienter requirement. See MODEL RULE 4.4.

121 When one considers the narrow reach of the ABA rule itself, the Kentucky version seems even more inappropriate. Model Rule 4.4 prohibits conduct by lawyers only when it has "no substantial purpose other than" to impose upon the rights of third persons. MODEL RULE 4.4. Many actions taken by lawyers embarrass and burden third persons or delay proceedings, but they have other substantial purposes, such as the lawful vindication of a client's rights. Those actions are not prohibited by the ABA's rule. Model Rule 4.4, therefore, is violated only in the most egregious situations, that is, when the lawyer cannot justify his or her actions as serving a lawful purpose. The Kentucky version, however, narrows the rule's reach even further. It proscribes such abusive conduct only when the lawyer "knows" that he or she is engaging in it and excuses the lawyer when he or she is merely careless in doing so. If the court were to determine in a disciplinary proceeding that a lawyer's conduct had no legitimate substantial purpose justifying abuse of a third party, the lawyer's successful assertion of his or her own negligence as a defense would be pathetic indeed.

122 No similar requirement was included in the Special Committee's report. See REPORT OF THE KBA SPECIAL COMMITTEE, supra note 4, at 70.

123 Compare KY. RULE 3.4(d) (requiring knowing or intentional action) with MODEL RULE 3.4(d) (not requiring knowing or intentional action).

124 Id.
issue, and asserting personal opinions regarding a matter.\textsuperscript{125} Again, such conduct is clearly detrimental to the judicial process and should not be tolerated even if it is the product of carelessness. The acts prohibited by the rule are the sort frequently characterized as "Rambo" tactics\textsuperscript{126} that have caused numerous courts and bar associations to enact "rules of professionalism."\textsuperscript{127} It is ironic that the Kentucky Bar Association has approved a set of these rules of conscience\textsuperscript{128} while the state's supreme court has chosen to reduce the reach of the very disciplinary rules intended to punish and thereby deter such conduct.\textsuperscript{129}

Several other significant changes were made to the ABA's Model Rules. The Kentucky Supreme Court further restricted Model Rule 3.4's view of fairness to opposing parties and counsel by deleting the ABA rule's subsection (f).\textsuperscript{130} Under that provision,

\begin{itemize}
  \item \textsuperscript{125} Compare Ky. Rule 3.4(e) (requiring knowing or intentional action) with Model Rule 3.4(e) (not requiring knowing or intentional action).
  \item \textsuperscript{126} See Samboan, Taming the Loose Cannons: Is Incivility Plaguing the Nation's Bench and Bar?, National Law Journal, January 15, 1990, page 1. The characterization, of course, is from the motion picture that depicts a Vietnam veteran showing no mercy to his opponents. Other characterizations of aggressive lawyerly behavior, such as "playing hard-ball" or "scorched earth tactics," typically evoke images of either sports or war, two theatres of endeavor that generally value winning above other virtues.
  \item \textsuperscript{127} Several city and state bar associations have issued courtesy codes urging civility among practicing lawyers. See id. at 22; see also Dondi Properties Corporation v. Commerce Savings and Loan Assn., 121 F.R.D. 284, 287-88 (N.D. Tex. 1988) (court adopting standards of practice based on Dallas Bar Association's "Guidelines of Professional Courtesy" and "Lawyer's Creed" for lawyers appearing in civil actions before it).
  \item \textsuperscript{128} In 1988, the ABA House of Delegates issued a "Lawyer's Creed of Professionalism," which is reprinted in T. Morgan & R. Rotunda, supra note 3, at 438-39. This body of aspirational statements was not intended to supersede any of the disciplinary rules applicable to lawyers. "Professionalism" has become the subject of a movement of sorts among organized bar associations. The ABA has created a Special Coordinating Committee on Professionalism with a quarterly publication entitled "The Professional Lawyer." See The Professional Lawyer Spring, 1989, at 2.
  \item \textsuperscript{129} See Code of Professional Courtesy (Kentucky Bar Ass'n 1988).
  \item \textsuperscript{130} The insertion of the requirement of scienter in one other subsection of Rule 3.4 may be of less consequence. In the ABA's version of the rule, it is a violation to "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." Model Rule 3.4(b). The Kentucky court, however, amended the provision to apply only when such acts were done "knowingly or intentionally," Ky. Rule 3.4(b), although the Special Committee had not recommended the insertion. See Report of the KBA Special Committee, supra note 4, at 70. Presumably, however, the requirement of the lawyer's knowledge and intention is implicated by the unlawfulness of the conduct proscribed in the Model Rule. The Kentucky change, therefore, appears inconsequential.
  \item \textsuperscript{131} A new subsection (f) on another subject, however, is substituted by the Kentucky court. Ky. Rule 3.4(f). This new subsection (f) prohibits the use or the threat of the use of the criminal or disciplinary process to gain an advantage in a civil or criminal proceeding. \emph{Id.} For further discussion of this provision, see supra notes 91-95 and accompanying text.
\end{itemize}
lawyers were not to request that non-client witnesses refrain from talking to opposing parties, except under certain circumstances in which the witnesses' interests might be aligned with those of the client.\textsuperscript{131} The ABA version was an attempt to make the adversary process fairer to all participants by removing barriers to the full accessibility of facts. The restriction also serves the judicial process in facilitating the search for truth in the garnering of evidence.\textsuperscript{132} Kentucky's deletion of the ABA's subsection (f) foregoes those advantages and leaves intact the adversarial race to locate and thereafter to silence witnesses. The deletion appears to favor gamesmanship over the ultimate search for truth.

The Kentucky court also deleted another limit on a lawyer's adversariness found in the ABA's Model Rules. Under Model Rule 4.1(b), lawyers are required to disclose material facts to third persons when that disclosure is "necessary to avoid assisting a criminal or fraudulent act by a client," unless that disclosure is prohibited by Model Rule 1.6 on confidentiality.\textsuperscript{133} The rule thus furthers the prohibition in Model Rule 1.2(d) against assisting clients "in conduct that the lawyer knows is criminal or fraudulent."\textsuperscript{134} The two rules work together to require the disassociation of lawyers from the criminal and fraudulent actions of their clients. Nevertheless, the Kentucky court retained the broad prohibition on assisting clients in such activities\textsuperscript{135} while deleting the disclosure obligation.\textsuperscript{136} It is understandable, however, that the court was dissatisfied with the ABA version of the rule. That rule's disclosure obligation has been criticized as meaningless\textsuperscript{137} because it does not apply when disclosure requires the revelation of confidential information under the broad reaches of Model Rule 1.6.\textsuperscript{138} In fact, scholars have had to resort to convoluted "saving constructions" to make any sense of the ABA version of Model Rule. 4.1(b) given this broad exception.\textsuperscript{139} Despite the controversy surrounding the

\textsuperscript{131} Model Rule 3.4(f).
\textsuperscript{132} The rule thus furthers the general prohibition on obstruction of justice that is reiterated as an ethical standard by Model Rule 3.4(a).
\textsuperscript{133} Model Rule 4.1(b).
\textsuperscript{134} Model Rule 1.2(d).
\textsuperscript{135} KY. Rule 1.2(d).
\textsuperscript{136} Compare KY. Rule 4.1 with Model Rule 4.1(a), (b). The deletion was recommended by the Special Committee. See Report of the KBA Special Committee, supra note 4, at 70, 82.
\textsuperscript{137} C. Wolfram, supra note 9, at 672, 724.
\textsuperscript{138} See Model Rule 4.1(b).
\textsuperscript{139} See G. Hazard & W. Hodes, supra note 16, at 425-26, 428-31.
ABA's adoption of Model Rule 4.1(b), however, its deletion by the Kentucky court is regrettable. It would have been preferable for the court to delete the exception to the disclosure obligation rather than to abandon the obligation altogether. As it stands, the court’s action leaves unclear the proper course of conduct when a lawyer becomes aware that a client is defrauding another. The key question presented is whether the lawyer's mere silence serves to assist the known fraud of a client. The answer of the ABA version of the rule is unclear, at least without a strained interpretation of the rules. The Kentucky court’s deletion of the disclosure requirement, however, seems to answer that question in the negative. This approach unfortunately prefers the client's interests at the expense of those defrauded.

The overall public interest was further sacrificed to adversariness by the Kentucky court’s treatment of the rules governing prosecutors. Most notably, the court deleted the ABA rule’s prohibition on prosecutors seeking to obtain waivers of important rights from unrepresented defendants. Kentucky’s new rule encourages the use of prosecutorial pressure to facilitate conviction at the expense of the rights of those accused. Unfortunately, Kentucky’s deletion implies that the prosecutor’s duty as an advocate supersedes his duty to ensure the fairness of the proceeding, despite the court’s statement to the contrary in the rule’s comment. While the public might be comforted by the thought of more convictions, the court should recognize the more compelling public interest in the protection of the procedural rights of those accused of crimes.

140 See id. at 423-26, 428-31.
141 See id. at 425-26, 428-31; C. WOLFRAM, supra note 9, at 724.
142 The argument can be made, however, that the Kentucky court’s deletion of Model Rule 4.1(b) was inconsequential. The ABA’s Comment to Model Rule 4.4 indicates that subsection (b) “recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client’s crime or fraud.” Comment to MODEL RULE 4.1 (paragraph 3). If other law does require such disclosures, a Kentucky lawyer would be required to disclose without the presence of Rule 4.1(b). While this portion of the ABA’s Comment to Model Rule 4.1 was deleted by the Kentucky court, substantive law requiring disclosure would still have that effect.

143 Model Rule 3.8 is the only provision specifically addressed to the lawyer as prosecutor. Nevertheless, prosecutors, like all other lawyers, must comply with the other rules of ethical conduct to the extent they are applicable.

144 Compare KY. RULE 3.8(c) with MODEL RULE 3.8(c). The deletion was not urged by the Special Committee. See REPORT OF THE KBA SPECIAL COMMITTEE, supra note 4, at 78.
145 KY. RULE 3.8 comment (paragraph 1).
Finally, the Kentucky court also relaxed the ABA’s prohibition on lawyers seeking to avoid appointments by tribunals to represent individuals. The ABA version of Rule 6.2 prohibited lawyers from trying to avoid such appointments except for good cause. Kentucky’s new rule merely discourages lawyers from trying to avoid court appointments. While the practical effect of the change might not be great, the Kentucky rule indicates that less is expected of lawyers in this state in terms of public interest obligations than elsewhere.

The significant changes made by the Kentucky Supreme Court to the ABA’s Model Rules display an unfortunate pattern. Almost exclusively they are more lenient to lawyers at the expense of the interests of clients and the public than are the ABA’s rules. Furthermore, Kentucky’s pro-lawyer version of the rules, issued when the public’s confidence in lawyers is so low, should be an embarrassment to the profession. A more favorable reaction by the Kentucky court to the duties of lawyers adopted by the ABA in

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146 Several additional changes were made by the Kentucky court to the ABA Model Rules. In the field of advertising, the court retained its special, detailed treatment in a separate rule, SCR 3.135, Ky. Rule 7.2. This change was recommended by the Special Committee. See Report of the KBA Special Committee, supra note 4, at 98-99. Since the regulation of lawyer advertising will continue the pre-Model Rules practice, further discussion is not provided here.

The ABA’s Model Rule on solicitation, Model Rule 7.3, was not adopted by the court due to the action of the U.S. Supreme Court in Kentucky Bar Assn. v. Shapero, 486 U.S. 466 (1988), in which the ABA’s treatment was held to be an unconstitutional infringement on commercial speech. Id. at 466. The ABA has since adopted new Model Rules 7.2(a) and 7.3 to comply with Shapero. See T. Morgan & R. Rotunda, supra note 3, at 168-69. The Kentucky court notes only in its order that it is drafting a new rule in place of Model Rule 7.3. Order of the Kentucky Supreme Court, supra note 1, at 95.

The Kentucky court also chose to delete the portion of Model Rule 7.5(a) that permitted lawyers to practice under a trade name. Ky. Rule 7.5(a). The Special Committee had not recommended this deletion, although it had inserted a requirement that the trade name be filed with the state bar association. See Report of the KBA Special Committee, supra note 4, at 105, 107. For most Kentucky practitioners the deletion will not be viewed as significant, although for some the restriction will impair their marketing flair.

147 Model Rule 6.2.

148 Again, the Kentucky court substituted “should” for “shall”. Ky. Rule 6.2. The Special Committee did not recommend the change. See Report of the KBA Special Committee, supra note 4, at 94.

149 Professor Wolfram notes that court appointments frequently tend to fall to the same lawyers who have indicated a willingness to take such cases. C. Wolfram, supra note 9, at 951-52.

150 A federal judge has recently noted a poll that ranked lawyers below funeral directors in public esteem. Rymer, High Road, Low Road: Legal Profession at the Crossroads, Trial, Oct., 1989, 79, 79.
its Model Rules may have helped the public image of the state's lawyers considerably.

III. KENTUCKY'S TWO CRITICAL DELETIONS

The Kentucky Supreme Court made two critical changes to the ABA's Model Rules. Both are startling in their rejection of long-established principles of legal ethics. While the deletion of the two rules may have little impact on the actual discipline of Kentucky lawyers, their absence is of critical symbolic importance. The message that they send the public threatens to undermine the substantial gains obtained by the court in its adoption of the new rules.

A. The Duty to Disclose Adverse Law

The court chose to delete ABA Model Rule 3.3(a)(3), which requires a lawyer "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

The rule restricts the duty of the lawyer as a zealous advocate. It places the lawyer's obligation of candor to the court above the lawyer's duty of zeal on behalf of the client when it is apparent that the court may be proceeding under a misimpression regarding the controlling law. At first glance, therefore, the obligation appears to be a severe infringement on the adversary process.

Indeed, during the open hearings on the proposed rules the disclosure obligation of Model Rule 3.3(a)(3) received considerable comment to that effect from practicing lawyers in Kentucky. Many of those so commenting were surprised to learn that an identical rule had been part of the Kentucky law of legal ethics.
since the state supreme court’s adoption of the Code in 1969.\textsuperscript{155} An argument can even be made that such a disclosure obligation has existed in Kentucky since at least the turn of the century.\textsuperscript{156}

Those who criticize Model Rule 3.3(a)(3) as an unwarranted intrusion into the functioning of the adversary system generally fail to recognize how narrow its disclosure obligation really is.\textsuperscript{157} In order for a lawyer to be obligated to reveal law adverse to the client it must be from “the controlling jurisdiction.”\textsuperscript{158} Law from other jurisdictions, no matter how persuasive, is not within the

\textsuperscript{155} See \textit{supra} notes 10-13 and accompanying text.

\textsuperscript{156} The ABA’s 1908 Canons included a provision that called for “candor and fairness” in conduct before a court and with other lawyers. 1908 Canons, \textit{supra} note 7, Canon 22, reprinted in \textit{T. MORGAN \& R. ROTUNDA, supra} note 3, at 421-22. The provision did not expressly require disclosure of adverse legal authority when an opponent had failed to do so. It did, however, prohibit misquoting authorities, using invalid law, misconstruing facts, and attempting improperly to influence a jury. Canon 22 concluded with the statement that “[t]hese and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.” \textit{Id}.

In 1935 and again in 1949, the ABA issued ethics opinions that read Canon 22 as requiring a lawyer’s disclosure of legal authority adverse to the lawyer’s client when an opponent had overlooked it. Opinion 280 (June 18, 1949), 35 A.B.A. J. 876 (1949); Opinion 146 (July 17, 1935), 22 A.B.A. J. 263 (1936). In fact, the 1949 opinion interpreted that obligation as including legal authority that was not only directly adverse but that which a court should obviously consider in deciding the case. Interestingly, the Kentucky Bar Association’s first effort at codifying the subject of legal ethics, the 1903 KBA Code, \textit{supra} note 5, contained a provision remarkably similar to the ABA’s subsequent Canon 22. Rule 5 of the 1903 code also required of lawyers “candor and fairness” in dealing with courts and other lawyers. 1903 KBA Code, \textit{supra} note 5, at 12. The provision expressly prohibited the knowing use of overruled or repealed legal authority and declared that “all kindred practices are deceits and evasions unworthy of attorneys.” \textit{Id}.

If, as the ABA opinions concluded, Canon 22 of the ABA’s 1908 Canons required the disclosure of adverse legal authority when an opponent failed to note it, the argument can be made that the nearly identical Rule 5 of the 1903 KBA Code did the same. This would allow the tracing of the duty to disclose in Kentucky back to the turn of the century.

\textsuperscript{157} See \textit{Gaetke, Lawyers as Officers of the Court, 42 VAND. L. REV. 39, 57-58, 68-69 (1989)} In that article, the author maintains that the duty to reveal adverse legal authority under Model Rule 3.3(a)(3) is too narrow for a profession that calls itself officers of the court. \textit{Id} at 88. Additionally, the author argues that a similar disclosure obligation should apply to adverse facts, at least in civil litigation. \textit{Id}. at 88-89. These assertions, of course, are more controversial than the narrow disclosure obligation found in Model Rule 3.3(a)(3), and many within the legal profession would find such expansions of that obligation to be too detrimental to the lawyer’s role as zealous advocate. Nevertheless, the Kentucky court’s deletion of any disclosure obligation regarding adverse legal authority is overly protective of that role.

The arguments against an expansion of the disclosure obligation beyond the reach of Model Rule 3.3(a)(3) and DR 7-106(B)(1) are stated in Tunstall, \textit{Ethics in Citation: A Plea for Re-Interpretation of a Canon}, 35 A.B.A. J. 5 (1949) (arguing for a narrowing of ABA Opinion 146 along the lines of Model Rule 3.3(a)(3)).

\textsuperscript{158} Model Rule 3.3(a)(3).
reach of the obligation. Moreover, the law must be "directly adverse to the position of the client." A lawyer need not disclose law that is merely analogous or that only contains instructive dicta, regardless of how helpful it might be to the judge. Lawyers skilled in distinguishing authorities usually have little difficulty in perceiving law to be less than "directly adverse" unless it is obviously so. Additionally, the lawyer must know of the adverse law. No violation of Model Rule 3.3(a)(3) occurs for failing, even unreasonably, to know the law.

Finally, the obligation only applies when a matter is before a tribunal. No obligation exists to disclose adverse law to an opposing party when a matter is not before a tribunal, as in negotiations or business transactions. Taken cumulatively, the requirements for the duty to disclose under the Model Rules render the obligation quite limited. Given the further fact that most lawyers recognize that sound tactics compel an advocate to deal with adverse law directly rather than hoping for an opponent's negligent omission, it is unlikely that the rule would be the subject of discipline in many cases.

Narrow as the obligation is, it is an important component of legal ethics. From the public's standpoint, the obligation works to prevent wrong decisions in those rare cases when it is applicable. Those erroneous decisions may engender costly, unnecessary appeals or, worse, confuse the state of the law in some cases. The failure to correct a tribunal's misimpressions regarding the appli-

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159 Id.

160 As mentioned, supra note 156, the ABA interpreted the lawyer's disclosure obligation under Canon 22 of the 1908 Canons more broadly to encompass not just "controlling authorities," but also legal authority that "would reasonably be considered important by the judge sitting on the case." 35 A.B.A. J. 876 (1949). These opinions are referred to in the footnotes accompanying the Code's counterpart to Model Rule 3.3(a)(3). CODE, DR 7-106(B)(1), n.79. That broader view of the disclosure obligation was not made part of either DR 7-106(B)(1) or Model Rule 3.3(a)(3), nor was it mentioned by the ABA in its comment to the Model Rule. MODEL RULE 3.3(A)(3) Comment (paragraph 3).

161 MODEL RULE 3.3(a)(3).

162 Id.

163 For example, when an opponent has apparently overlooked some case law or statute that would be advantageous to his or her client.

164 The difficult interpretive issues of the disclosure obligation are noted in C. WOLF-RAM, supra note 9, at 681-82.

165 Id. at 682.

166 Professor Wolfram notes, however, that many occasions in which disclosure would be called for, such as evidentiary rulings, such disclosure would have little or no precedential effect. Id.
cable law could have effects beyond the outcome for the parties to the action. Further, the disclosure obligation fosters trust between the courts and lawyers appearing before them. A judge who reached an erroneous conclusion because a lawyer silently allowed him or her to apply the wrong law would legitimately feel betrayed by the lawyer.\textsuperscript{167}

Finally, the obligation to advise the court that it is about to decide a case upon a misimpression of the law, even though the court’s error will benefit the lawyer’s client, must be considered a fundamental part of the lawyer’s duty as an “officer of the court.”\textsuperscript{168} While lawyers like to refer to themselves as “officers of the court,”\textsuperscript{169} the label is surely without substantive meaning if lawyers can knowingly remain silent as a court mistakenly applies the wrong law to a case.\textsuperscript{170}

It is not likely that many Kentucky lawyers would have been disciplined for a failure to disclose adverse legal authority had the Kentucky court adopted Model Rule 3.3(a)(3). No lawyers were disciplined under the identical provision during the twenty years of

\textsuperscript{167} Indeed, the ABA’s interpretation of Canon 22 of the 1908 Canons to include a similar disclosure obligation utilized the judge’s possible sense of betrayal as a standard for determining whether disclosure was required. See ABA Opinion 280 (June 18, 1949), 35 A.B.A. J. 876 (1949) (“Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?”) (emphasis added).

To be sure, the misimpression would not be the sole fault of the lawyer failing to disclose. It would initially be the result of the opponent’s carelessness or neglect and perhaps the product of similar inattentiveness on the part of the judge or the judge’s law clerk. C. Woflam, supra note 9, at 682. In that way, the disclosure obligation operates to “punish” the innocent trial lawyer who has carefully prepared a case and now finds herself obligated to help make the case for the opposing counsel. The opposing lawyer, however, would be subject to discipline under Model Rule 1.1, which requires lawyers to provide competent representation to their clients. Model Rule 1.1.

\textsuperscript{168} For discussion of the legitimacy of the profession’s use of the characterization of lawyers as “officers of the court,” see Gaetke, supra note 157.

\textsuperscript{169} Id. at 41.

\textsuperscript{170} Id. at 88-89. It is unlikely that the Kentucky Supreme Court intended by its deletion of Model Rule 3.3(a)(3) to be redefining broadly the role of lawyers to be zealous advocates to the exclusion of their role as officers of the court. The court adopted the ABA’s version of Model Rule 3.3(a)(4), which requires disclosure of client perjury, and Model Rule 3.3(d), which mandates the disclosure of all material facts, whether adverse to the client or not, in ex parte proceedings. See Ky. Rule 3.3(a)(3), (d). Both rules expand the duty of lawyers as officers of the court beyond what it was under the Code. See T. Morgan & R. Rotunda, supra note 3, at 145 (“Model Code Comparison”). The court’s motives in deleting Model Rule 3.3(a)(3), therefore, seem rule-specific rather than a part of a broader rejection of the role of lawyers as officers of the court.
the Code’s applicability in the state. Still, the deletion of the rule sends an unfortunate message to lawyers and the public. The clear implication is that the role of officer of the court is less important to the court now than it was under the Code. While the practice of law in the state is not likely to be greatly affected by the deletion, the public’s view of lawyers will slip a bit further as a result.

B. *The Duty to Report Ethical Violations*

Even more disturbing than the deletion of Model Rule 3.3(a)(3) is the Kentucky Supreme Court’s deletion of the requirement that lawyers report serious ethical violations committed by other lawyers. Under ABA Model Rule 8.3, lawyers are to report to the appropriate disciplinary authority their knowledge of unethical conduct by another lawyer that “raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects” unless reporting would involve disclosure of con-

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171 Nationally, Professor Wolfram reaches essentially the same conclusion. C. Wolfram, supra note 9, at 681.

172 The Kentucky court deleted in its entirety Model Rule 8.3 which provides:

(a) A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.

MODEL RULE 8.3. This deletion was not recommended by the Special Committee. See REPORT OF THE KBA SPECIAL COMMITTEE, supra note 4, at 109.

Only three other jurisdictions are without provisions on reporting violations of other lawyers: California, Massachusetts, and the District of Columbia. ABA/BNA LAWYER’S MANUAL, supra note 20, at 101:201. For a discussion of other states’ variations on the reporting requirement, see id. at 101:201-02.

For a general discussion of the duty to report other lawyers’ misconduct and the scant case law on that duty, see id. at 101:201-08.

173 MODEL RULE 8.3. The prior Code, applicable in Kentucky since 1969, contained a broader mandatory reporting rule. It provided that a lawyer with unprivileged knowledge of a violation of a Code provision “shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.” DR 1-103(A). It will be noted that Model Rule 8.3(a) requires reporting only in the case of more serious ethical violations while the obligation defined by the Code provision extends to all violations.

confidential information. The Kentucky court chose to eliminate this obligation, leaving the reporting of fellow lawyers’ misconduct purely to the conscience of each lawyer.

Much like the rule on disclosing adverse legal authority, the adoption of Model Rule 8.3 would not likely have resulted in a significant change in the practice of law in Kentucky. The broader Code provision mandating reporting of other lawyers’ misconduct generated few lawyer complaints and was largely ignored in the discipline of Kentucky lawyers.

Nevertheless, the deletion is regrettable. From the public’s viewpoint, the absence of a reporting requirement undermines the effectiveness of the planned operation of the disciplinary process. Among the various participants in the legal process, lawyers are the most informed regarding legal ethics and the most likely to be aware of the misconduct of lawyers involved in a given matter. Thus, lawyers collectively are the best source of informed complaints about lawyers’ misconduct. The deletion of the reporting requirement reduces the likelihood that lawyers will file complaints, even regarding the worst unethical conduct by other lawyers. The presence of a reporting requirement causes some conscientious


Even the 1903 KBA Code of Legal Ethics included a reporting provision. It declared that lawyers “should fearlessly expose before the proper tribunals corrupt or dishonest conduct in the profession . . . .” 1903 KBA Code, supra note 5, at 13.

Model Rule 8.3(c).

One disciplinary authority in the state estimates that only 15 to 20 complaints are filed by lawyers each year. Address by Barbara Rea, Deputy Bar Counsel, Kentucky Bar Association, University of Kentucky Legal Profession Seminar (February 27, 1990). In reference to the national situation, Professor Wolfram declares that “[p]robably no other professional requirement is as widely ignored by lawyers subject to it.” C. WOLFRAM, supra note 9, at 683; see also Gressman, Inherent Judicial Power and Disciplinary Due Process, 18 SETON HALL L. REV. 541, 541 n.1 (1988) (the reluctance of lawyers to report misconduct of other lawyers has been a major problem in lawyer discipline).

No Kentucky cases indicating a violation of DR 1-103(A), the reporting requirement under that body of law, are to be found.

Not all misconduct occurs in open court. Lawyers to business transactions, negotiations, mediations, and other matters may be the only participants who recognize the misconduct of other lawyer participants involved.

In order for a client to complain about the misconduct of a lawyer, two decisions must be made. The client must conclude that the lawyer’s act was problematic and the client must decide to respond by filing a complaint. Steele & Nimmer, Lawyers, Clients, and Professional Regulation, 1976 Am. B. Found. Res. J. 919, at 948. Whether clients will make both of these decisions is determined by a number of factors. Id. Ignorance of the law of legal ethics and of the availability of the disciplinary mechanism are among those factors. In this regard, lawyers are better sources of complaints.
lawyers to file complaints when they otherwise would not. Assuming that the disciplinary process is important to the public, the Kentucky court’s action conflicts with the public interest by making the system less effective.

From the viewpoint of the profession, the deletion of the reporting requirement should be equally alarming. Lawyers generally describe themselves as being members of a self-regulating profession. Numerous commentators have referred to the presence of self-regulation as a necessary prerequisite for any field claiming to be a “profession.” Self-regulation is generally viewed as being beneficial to lawyers in insulating the profession from regulation by other, less friendly bodies, such as state legislatures or the Federal Trade Commission. To the public it must be hard to imagine the rationale for calling the practice of law a self-regulating profession when lawyers are perfectly free to remain silent even in the face of grossly unethical conduct on the part of other lawyers. The court’s deletion of the reporting requirement lends support to some critics of the legal profession who assert that self-regulation by lawyers is a myth and the profession should yield to legislative control. It would seem that lawyers’ own self-interest would cause them to be wary of changes to their code of

180 C. WOLFRAM, supra note 9, at 14-15; Powell, supra note 179, at 31-32; Watson, Canons as Guides to Action: Trustworthy or Treacherous, 33 TENN. L. REV. 162, 163-64 (1966). For a general discussion of the origin and rationale of self-regulation of the legal profession, see C. WOLFRAM, supra note 9, at 20-22; Steele & Nimmer, supra note 177, at 921-24.
181 See Testimony on the Reauthorization of the Federal Trade Commission, Hearings on S.1078m Before the Subcomm. on Commerce, Transportation and Tourism of the Comm. on Energy and Commerce, 99th Cong., 1st Sess., 1985 (Testimony of J. Chrys Dougherty, American Bar Association) (The FTC should exercise no regulation of lawyers because they are “regulated very extensively, regulated by state bars, the agency of the Supreme Court in 31 jurisdictions. This is duplicative regulation and there is no need for it . . . .”).
182 A particularly prominent organization of such critics is HALT, an Organization of Americans for Legal Reform. That organization maintains that there is an inherent conflict of interest in self-regulation by lawyers that is harmful to consumers of legal services. Ostberg, The Conflict of Interest in Lawyer Self-Regulation, 1 THE PROFESSIONAL LAWYER 6, at 6 (Summer, 1989). HALT urges that the state legislatures create the standards and the executive enforce them. Id. at 9.
ethics that call public attention to any weakness of the profession's self-regulation.

The arguments against the imposition of a reporting requirement are weak. Lawyers dislike the thought of policing their fellow practitioners. Some insist that the requirement places lawyers in the awkward position of having to judge the conduct of their opponents and even their colleagues. Yet lawyers are quite willing to "judge" other lawyers for any number of purposes as long as it serves their own private interests or those of their clients. They judge the legality of their opponents' discovery demands. They judge opposing lawyers' conduct for purposes of appeals from lower court decisions. They judge actions taken by opponents for purposes of pursuing sanctions. All these judgments involve the lawyer's evaluation of whether another lawyer's conduct comports with the law. The reporting requirement of Model Rule 8.3 merely expects such judgment to further the public interest.

The argument can be made that the Kentucky deletion of the reporting requirement simply reflects the reality of the national experience under the Code's reporting requirement. That experience, it is said, engenders cynicism among practicing lawyers because the obligation is seldom enforced by bar disciplinary authorities, and this cynicism spills over to other rules as well. Even if these assertions are accurate, surely they do not justify the deletion of the requirement. Instead, they call for a renewed

\[\text{183 A similar reluctance on the part of lawyers to report their fellow lawyers under the 1908 Canons, supra note 7, is discussed in detail in Note, supra note 173, at 347-49.}\]

\[\text{184 This point was made by Frank Haddad, a member of the Special Committee that recommended the adoption of the Model Rules in Kentucky, in defense of the Kentucky court's deletion of the reporting requirement. The Louisville Courier-Journal, February 26, 1990, at A8, col. 1. The Special Committee itself, however, did not recommend the deletion of the reporting requirement. See supra note 4, at 109.}\]

\[\text{185 Part of a lawyer's responsibility to his or her client when faced with a discovery demand is to determine whether the Rules of Civil Procedure require the disclosure of the information sought.}\]

\[\text{186 For example, appeals in criminal cases are commonly based on allegations of prosecutorial misconduct.}\]

\[\text{187 Decisions about whether to seek sanctions under Rule 11 of the Rules of Civil Procedure are based on an evaluation of the actions taken by opposing counsel.}\]

\[\text{188 See supra notes 175-76 and accompanying text.}\]

\[\text{189 This argument is noted in G. HAZARD & W. HODES, supra note 16, at 555-56; see also Note, supra note 173, at 348-49.}\]

\[\text{190 Professor Hazard has urged a broad reconsideration of the mandatory reporting rule. Hazard, "Squeal Rule" Considered for Change, THE NATIONAL LAW JOURNAL (March 26, 1990) at 14. He suggests that lawyers be granted greater discretion in reporting fellow lawyers than under the present Code and Model Rules approaches but does not favor the repeal of the requirement. Id.}\]
effort on the part of the courts to see that the rule is enforced. Certain evidence exists that just such an interest may be emerging in some states.\textsuperscript{191} Regrettably, the Kentucky court has chosen a different path.

Worst, perhaps, is the court's failure even to include in the Kentucky rules a provision simply encouraging the reporting of ethical violations known to lawyers.\textsuperscript{192} In a number of other provisions the court chose to rely upon mere exhortation where the ABA had imposed a duty.\textsuperscript{193} Two possible explanations exist for the court's failure to do so in the case of Model Rule 8.3. One is that the court views lawyers as having little responsibility for the regulation of their profession. The other is that the court feels that even exhorting the state's lawyers to report ethical violations will fail. If either explanation is accurate, perhaps the critics urging legislative regulation of the profession are right.

\textbf{CONCLUSION}

The Kentucky Supreme Court made a significant improvement in Kentucky's law of legal ethics by adopting the ABA's Model

\textsuperscript{191} See Rotunda, \textit{supra} note 178, at 992.

One indication of a possible new interest in disciplining lawyers for failing to report their fellow lawyers is the Illinois supreme court's recent decision in \textit{In re Himmel}, 533 N.E.2d 790 (Ill. 1988). In \textit{Himmel}, a client hired James H. Himmel as her attorney to try to collect money that her former attorney, John R. Casey, had converted during his prior representation of her. In reaching a settlement with Mr. Casey, the client agreed not to institute any civil, criminal, or disciplinary action against him. The client specifically instructed Mr. Himmel not to take any similar action against Mr. Casey. When the settlement agreement was not honored by Mr. Casey, Mr. Himmel brought suit and was awarded a judgment in excess of the settlement amount. Prior to the client's hiring of Mr. Himmel, she had contacted the state's disciplinary authority about the conduct of Mr. Casey, but whether the client reported Mr. Casey's name to the commission remained in question. \textit{Id.} at 791. The state supreme court held that the question of whether the client informed the state disciplinary authority was irrelevant and imposed a one-year suspension upon Mr. Himmel for his failure to report the conduct of Mr. Casey. \textit{Id.} at 796.

The \textit{Himmel} case is soundly criticized by Professor Rotunda. See Rotunda, \textit{supra} note 178, at 985-97. Professor Rotunda is particularly critical of the \textit{Himmel} case's narrow interpretation of the exception to the reporting requirement for "privileged" information. \textit{Id.} at 986-91. One can disagree with the particular outcome in \textit{Himmel}, however, and still be in favor of the proper enforcement of a reporting requirement in general.


\textsuperscript{193} See, e.g., KY. \textit{Rule} 1.4(a), (b) (ABA Model Rule's duty to communicate reasonably with a client changed to an exhortation to do so); KY. \textit{Rule} 6.2 (ABA Model Rule's duty not to seek to avoid appointment by a tribunal to represent a person except for good cause changed to an exhortation not to do so).
Rules of Professional Conduct. The new rules, for the most part, are better in form and substance than the prior Code of Professional Responsibility.

The Kentucky court’s amendments to the Model Rules, however, are not without their problems. The significant changes emphatically favor lawyers rather than clients or the public and alter the role of the ethical lawyer envisioned by the ABA in its Model Rules.

Most discouraging is the court’s deletion of two long-established principles of legal ethics, namely the duty of a lawyer to reveal certain adverse legal authority when an opponent has failed to do so and the duty of a lawyer to report serious unethical conduct by fellow lawyers. Both obligations were part of the lawyer’s duties under the prior Code, and both remain obligations in nearly all other states. Their deletion sends an unfortunate message to the profession and to the people of Kentucky. Their absence suggests that lawyers in Kentucky have fewer duties to the accomplishment of justice and to the regulation of legal ethics.

The definition of legal ethics is not a static process. The obligations of lawyers to their clients, the courts, and the public should always be subject to review, discussion, and amendment. Hopefully this process will result in a reconsideration of these two critical deletions. The public image of lawyers could only be helped by such an effort.