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THE ROLE OF ETHICS AND UNAUTHORIZED PRACTICE OPINIONS IN REGULATING THE PRACTICE OF LAW IN KENTUCKY

BY WILLIAM H. FORTUNE

INTRODUCTION

The purpose of this article is to discuss the role of ethics and unauthorized practice opinions in regulating the practice of law, with suggestions for clarification and improvement.

The Kentucky Bench and Bar, the quarterly journal of the Kentucky Bar Association ("KBA"), prints "Advisory Ethics Opinions" and "Unauthorized Practice Opinions" over the signatures of the respective chairs of the Ethics and Unauthorized Practice of Law ("UPL") Committees. This article describes: 1) how ethics and unauthorized practice opinions are generated; 2) the legal effect of the opinions; 3) the relationship of ethics opinions to attorney discipline; 4) the Board of Bar Governors' role in shaping the opinions; and 5) the role of the Kentucky Supreme Court. The article concludes by suggesting that the Kentucky Supreme Court appoint the members of the Ethics and UPL Committees and that the court have the power to review opinions on the court's own motion.

1. Professor of Law, University of Kentucky. Member of the committee that drafted Kentucky's Rules of Professional Conduct, member of the Kentucky Bar Association Ethics Committee. Thanks to Sheldon Gilman, of Lynch, Cox, Gilman and Mahan in Louisville, and to Richard Underwood, Professor of Law at the University of Kentucky for their comments on this article. Mr. Gilman and Professor Underwood have served the bar and the Commonwealth admirably as member and chair, respectively, of the KBA Ethics Committee. Professor Underwood and I have worked on a number of projects over the years, notably on books we have co-authored (Trial Ethics (1988) and Modern Litigation and Professional Responsibility Handbook (1996)). He is a wise counselor and an excellent colleague. I am responsible for the wording of some of the opinions criticized in this article, notably E-382 (note 95).
I. HOW OPINIONS ARE GENERATED AND THEIR LEGAL EFFECT

Section 116 of the Kentucky Constitution provides that "the Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar." The KBA helps the court admit, educate, and discipline Kentucky attorneys. The KBA, through its Board of Governors, executive director, bar counsel, and membership, functions as the court's agent in these matters.

Supreme Court Rule 3.530, one of the rules adopted by the court pursuant to Section 116, furthers the educational mission of the court and bar by providing that an attorney may ask a member of the Ethics Committee (a "hot-line" member) for advice about the ethical propriety of contemplated conduct. The requesting attorney is protected from discipline if the attorney follows the advice of the hot-line member (and if the attorney's portrayal of the problem is complete and accurate).

Hot-line members refer questions to the Ethics Committee when they are unsure of the correct answer, or feel that the question is one that needs to be answered for the benefit of the entire bar — i.e., by a formal opinion. In addition, local bar associations may ask the Committee for advisory opinions. Matters which seem to be of general importance are discussed at meetings of the Ethics Committee and formal opinions are prepared for consideration by the Board of Governors. The Board can approve, modify, or disapprove Ethics Committee opinions. In addition, the Board can approve the opinion but direct that it be issued to the requesting attorney as an informal (i.e. private) opinion. The UPL Committee functions in the same way as the Ethics Committee, except that most of the questions are posed by local bar associations concerned about non-lawyers practicing law. The UPL Committee takes unauthorized practice questions which come to the Ethics Committee through its hot-line members. Like ethics opinions, unauthorized practice opinions are referred to the

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3. Ex Parte Auditor of Public Accounts, 609 S.W.2d 682, 689 (Ky. 1980).
Board of Governors, which has the final say on whether, and in what form, opinions are released.

Formal ethics and unauthorized practice opinions approved by the Board of Governors are published — in full or in synopsis form — in the *Kentucky Bench and Bar*, the publication of the KBA. The publication does not reflect the supervisory role of the Board of Governors. Ethics and unauthorized practice opinions are not published in the Southwestern Reporter or in the annotations to the Kentucky Revised Statutes. The opinions in the *Bench and Bar* are not indexed.

The governing rule states that ethics and unauthorized practice opinions are *advisory only*. They do not have the force of law and lawyers are not obligated to follow them. However, the rule provides for review of an opinion by the Supreme Court of Kentucky upon petition by any person or entity "aggrieved or affected" thereby, a provision which appears to acknowledge that ethics and UPL opinions, though advisory, might affect a person or entity adversely. In *American Insurance Association v. Kentucky Bar Association*, for example, the insurance industry sought review of Ethics Opinion E-368 and Unauthorized Practice Opinion U-36. In E-368, the Ethics Committee and Board of Governors stated that a lawyer may not enter into a contract with a liability insurer in which the lawyer or his firm agrees to do all of the insurer's defense work for a set fee. The insurance industry obviously believed that after E-368 attorneys would claim they could not ethically work on a set fee basis, would insist on being paid by the hour, and pad their bills. Thus, the net effect would be higher defense costs and reduced profits for the industry. The industry challenged E-368 by filing an appeal with the Kentucky Supreme Court within thirty days after the opinion was published.

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9. Opinions issued prior to 1993 (through E-358 and U-45) are compiled and indexed in *University of Kentucky College of Law, Office of Continuing Legal Education, Kentucky Legal Ethics Opinions and Professional Responsibility Deskbook* (Richard Underwood, ed. 1993) (hereinafter "DESKBOOK"). References to ethics and unauthorized practice opinions before 1993 will be to the DESKBOOK.
12. 917 S.W.2d 568 (Ky. 1996).
13. Id.
15. Id.
in the *Kentucky Bench and Bar*.

The industry also challenged U-36, a 1982 unauthorized practice opinion stating that an insurance company may not use house counsel (salaried employees) to represent its insureds once suit is filed. U-36 had relied on definitive statements by the Kentucky high court that a corporation cannot legally practice law. The industry had complied with the mandate of the cases relied on in U-36 and hired outside counsel to represent its insureds after suit was filed. By challenging U-36 in the *American Insurance* case, the industry gave the Kentucky court an opportunity to take another look at the issue.

Unfortunately for the insurance industry, the Kentucky Supreme Court affirmed both U-36 and E-368. With regard to U-36, the court rejected cases from other jurisdictions and approved the result in U-36, though primarily on grounds of conflict rather than unauthorized practice. In the view of the court, house counsel might be conflicted by representation of an insured after suit is filed. "[A]s a prophylactic measure not unlike the imputed disqualification rules," the court held that such representation is prohibited.

With regard to E-368, the court opined that set fee arrangements between attorneys and liability insurers create impermissible conflicts with insureds (who are the attorneys' "clients"). While noting nineteen potential conflicts between insured and insurer, the court seemed most concerned with the fact that attorneys might face financial loss in time-consuming cases, which might cause the attorneys to provide inadequate representation of the insureds. However, the court did not explain how an insured might be harmed by inadequate

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17. *Id.* U-36 approved in-house representation of the insured's interest before suit is filed. *Id.*
18. *Frazee v. Citizens Fidelity Bank & Trust Co.*, 393 S.W.2d 778 (Ky. 1965); *Hobson v. Kentucky Trust Co. of Louisville*, 197 S.W.2d 454 (Ky. 1946); *Kendall v. Beiling*, 175 S.W.2d 489 (Ky. 1943).
19. *American Ins.*, 917 S.W.2d at 574.
20. *Id.*
21. *Id.*
22. *Id.* at 571.
23. *Id.* at 573.
24. *Id.*
25. *Id.* at 572.
representation, since the insurer pays the claim.

While the logic of American Insurance is debatable, there is no question but that E-368 is now the law of the Commonwealth. What had been merely advisory became a legal mandate. Even before affirmance, however, E-368 likely had inhibited attorneys otherwise willing to handle defense work on a set fee basis, and thereby affected the insurance industry.

II. WHAT LEGAL SCHOLARS HAVE SAID ABOUT ETHICS COMMITTEES AND THEIR OPINIONS

In 1982 Professors Finman and Schneyer evaluated the work of the American Bar Association's Committee on Ethics and Professional Responsibility ("CEPR"). By their standards CEPR failed miserably. They examined the twenty-one formal opinions issued by CEPR since the adoption of the Code of Professional Responsibility; the twenty-one opinions contained forty-eight holdings. They graded the holdings by two criteria: "correctness" (i.e., is the holding logical and is it based on a value judgment likely to be accepted?), and "reasoning." They considered the attributes of good reasoning to be: 1) identification of a tenable rule-based rationale, 2) identification of relevant authorities, 3) identification of problems of interpretive choice, 4) careful analysis of problems of interpretive choice, and 5) clarity.

According to Finman and Schneyer, only twenty-one of CEPR's forty-eight holdings were correct, and fourteen of the twenty-one correct holdings added nothing to conclusions that lawyers would draw on their own from reading the Code. By their analysis, CEPR's reasoning fared even worse. "[E]ight opinions fail to identify a tenable rationale; eleven opinions fail to identify relevant authority; thirteen overlook problems of interpretive choice; eight fail to analyze such problems adequately; and many opinions suffer from serious ambiguity."

27. Id. at 95.
28. Id.
29. Id.
30. Id. at 97-98.
31. Id. at 114.
After dissecting each of CEPR's twenty-one opinions and exposing the shallow and illogical reasoning therein, the authors advanced their solution: to make the process adversarial by appointing lawyers to research and argue contrary positions on the questions before the Committee.

Charles Wolfram wrote the "book" on ethics and professional responsibility, and he found little good to say about ethics opinions. According to Wolfram, the influence of ethics opinions has waned. Courts rarely rely on them, and they are often dogmatic, poorly reasoned, and badly written. In generalizing about ethics committees and their work, Wolfram focused on ABA opinions and tracked Finman and Schneyer's critical analysis of those opinions.

In 1991 Professor Richard Underwood, chair of the Ethics Committee of the Kentucky Bar Association, deflected the criticism of Finman, Schneyer and Wolfram by focusing on the role of ethics committees in issuing private opinions to requesting lawyers. Underwood pointed out that ethics committees are not courts and do not decide cases; thus, analogies to judicial systems are not well-taken.

If there is one point to be made in responding to critics of ethics committees... it is that complex advocacy models complete with "the usual" appellate review are fiscally profligate and delay creating, and may defeat the very purpose of having bar sponsored committees and "hot-lines." As a prime corollary, I would suggest that a cult of precedent and methodology of priestly casuistry are likewise undesirable. The ethics rules can and should be applied as rules of reason.

According to Underwood, the principal value of an ethics committee is to keep the honest practitioner on track. A practi-
tioner, unsure of the propriety of anticipated conduct, can obtain an advisory opinion which, if followed, will protect him from discipline. The practitioner is thus kept on the right track and the public well served.

Underwood did not focus on the role of formal opinions, other than to say that they serve the purpose of educating the bar, "assuming that lawyers will read them."41

In a 1992 article, Professor Jorge Carro studied the impact of ethics opinions on judicial decisions.42 By computerized search he found 1194 opinions cited in 639 state and federal cases between 1924 and 1990.43 He found ethics opinions cited in a variety of contexts, most often in cases dealing with conflict of interest.44 Not surprisingly, he concluded that ABA formal opinions are more influential than state opinions.45 He found that some state courts (New York for example) cite ethics opinions frequently, while other state courts (California for example) rarely do so.46 Contrary to Wolfram's dismissive analysis, Carro concluded that courts treat ethics opinions with deference, almost as if they were judicial opinions.47

The courts treat these opinions with great deference, and, in fact, attribute to them a degree of attention similar to that usually found in the treatment of judicial opinions. In discussing the ethics opinions of the bar, courts follow, distinguish, criticize, parallel, and harmonize them just as courts do with judicial opinions.48 However, Carro agreed with Finman and Schneyer that ethics opinions are not always well reasoned and well written. While not advocating Finman and Schneyer's adversarial solution, Carro urged ethics committees to recognize their impact on judges and lawyers and to strive to improve the quality of formal opinions.49

William Hunt, then disciplinary counsel for the Tennessee

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41. Id.
43. Id. at 16-17.
44. Id. at 22.
45. Id. at 23-26.
46. Id. at 38-39 (New York courts cited ethics opinions 73 times during the study period; California courts only 11 times). Id.
47. Id. at 35.
48. Id.
49. Id. at 36.
Board of Professional Responsibility, analyzed Tennessee ethics opinions issued between 1980 and 1988. In Tennessee, formal opinions are issued by ethics committees of the Board of Professional Responsibility, the body charged with disciplining attorneys. The members of the board are appointed by the Tennessee Supreme Court and the board operates as an arm of the court. The rule refers to the board as the Supreme Court Board of Professional Responsibility and to the ethics committees as the Supreme Court Ethics Committees. The committees are empowered to issue formal opinions which "shall bind the Committee, the person requesting, and the Supreme Court Board of Professional Responsibility, and shall constitute a body of principles and objectives upon which members of the bar can rely."

Thus, the ethics committees function as an arm of the supreme court, rather than the Tennessee Bar Association. While the opinions are not binding on courts, two factors give the opinions more significance than opinions issued by a bar committee: the close relationship between the board and the Tennessee Supreme Court and the fact that the board is charged with both discipline and the issuance of ethics opinions. The official status of Tennessee opinions may be to cause them to be treated as one would treat regulations of an administrative agency — as binding until successfully challenged. The disciplinary counsel's description of the opinions uses language one would associate with legal rules. After describing the 100 plus opinions as if they were a body of law, he concludes by saying that a "significant body of precedent has already been created to guide Tennessee...

51. Id.
52. TENN. SUP. CT. R. 9, sec. 26.5(a) (1996) (there are three ethics committees, one for each geographical area of the state).
53. Id.
54. State v. Jones, 726 S.W.2d 515, 519 (Tenn. 1987).
56. E.g., Hunt, supra note 50, at 307 ("The Board later applied this reasoning to bar an attorney from representing a client in a case contesting a will that he had signed as a witness."); id. at 311 ("In its next opinion on this issue, the Board required attorneys to comply with a 'Kentucky' rule in addition to the aforementioned 'New Jersey' rule"); id. at 313 ("[T]he Board later found that a juvenile court judge was unable in his part-time practice to bring an action against the County Commission. . . .") (emphasis added in all quotes).
attorneys."\textsuperscript{57}

According to Professors Little and Rush, the close relationship between the Tennessee board and the Tennessee Supreme Court might serve to shield the board from liability for anti-trust violations.\textsuperscript{58} The "state action" exemption\textsuperscript{59} from the Sherman Act requires the challenged restraint to be both clearly articulated as state policy and actively supervised by the state.\textsuperscript{60} Since some state ethics and unauthorized practice opinions might be regarded as anti-competitive,\textsuperscript{61} it is important to shield the issuing body from anti-trust liability.

III. DUE PROCESS IN THE DISCIPLINARY PROCESS

Attorneys are entitled to know what they may be disciplined for. They should not have to guess what a disciplinary committee or court might find to be "conduct tending to bring the bench and bar into disrepute,"\textsuperscript{62} or have the "appearance of impropriety."\textsuperscript{63} While it is probably true that rules for attorneys cannot be drafted with the precision of criminal codes,\textsuperscript{64} vague rules should be avoided if possible and attorneys who attempt to follow the rules should have safe passage in the disciplinary process.

In \textit{Gentile v. State Bar of Nevada},\textsuperscript{65} the United States Supreme Court set aside a state disciplinary action on due process grounds, holding that the attorney had been led by the "safe harbor" provision of Nevada Supreme Court Rule 177\textsuperscript{66} to believe that his

\begin{itemize}
\item[57.] Id. at 325.
\item[60.] California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).
\item[61.] See discussion \textit{infra} note 148.
\item[62.] This was the standard in former Kentucky Supreme Court Rule 3.140 (now changed); see Kentucky State Bar Ass'n v. Vincent, 537 S.W.2d 171 (Ky. 1976) for a defense of this vague standard.
\item[64.] Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Durham, 279 N.W.2d 280, 283-84 (Iowa 1979) (stating that it is impossible to draft a set of rules covering all professional activity warranting discipline).
\item[66.] \textit{NEV. SUP. CT. R.} 177 (1997) (substantially the same as Kentucky Rule of
\end{itemize}
description of his defense in a criminal case\textsuperscript{67} to the media was permitted by the rules of conduct.\textsuperscript{68} The Court held that the safe harbor provision, as interpreted by the Nevada Supreme Court, was void for vagueness because it did not give fair notice of what was permitted and what was prohibited.\textsuperscript{69}

_Gentile_ stands broadly for the proposition that attorneys are entitled to fair notice of what they may be disciplined for. Attorneys are entitled to assume that the "disciplinary code" consists of Supreme Court rules, which include the Model Rules of Professional Conduct,\textsuperscript{70} and decisions of the Kentucky Supreme Court interpreting the rules.

In a variety of contexts, the Kentucky Supreme Court opines on attorneys' ethics.\textsuperscript{71} If the context is disciplinary, the court applies specific rules of conduct.\textsuperscript{72} In one instance, however the court, perhaps inadvertently, has violated this principle by relying on a rule which does not impose a duty. Rule 1.4 says that an attorney should keep a client reasonably informed, and should explain matters to a client to enable the client to make reasonable decisions.\textsuperscript{73} The Model Rules Committee made Rule 1.4 non-mandatory out of concern that failure to communicate was too vague to serve as a basis for discipline.\textsuperscript{74} Other rules, except Rule 6.2,\textsuperscript{75} use the mandatory "shall" or "shall not." In spite of the non-mandatory nature of Rule 1.4, the court often cites the rule as one

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\textsuperscript{67} 501 U.S. 1030 (1991) (stating that the police, rather than his client, had stolen money and drugs from a storage facility).

\textsuperscript{68} _Id._ at 1049-53; see also William Fortune et al., _Modern Litigation and Professional Responsibility Handbook: The Limits of Zealous Advocacy_, 383 (1996) (hereinafter "Handbook").

\textsuperscript{69} _Id._ at 1048.

\textsuperscript{70} The Model Rules are subsections of Kentucky Supreme Court Rule 3.130.

\textsuperscript{71} _E.g._ Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997) (disqualification); Whitaker v. Commonwealth, 895 S.W.2d 953 (Ky. 1995) (criminal appeal); Hubble v. Johnson, 841 S.W.2d 169 (Ky. 1992) (fee dispute).

\textsuperscript{72} But see Kentucky State Bar Ass'n v. Vincent, 537 S.W.2d 171, 173 (Ky. 1976) (disciplining an attorney for "bringing the bench and bar into disrepute," and defending that vague standard. The attorney had been convicted of failure to file income tax returns, which he argued was not a crime of moral turpitude. The bench-and-bar-into-disrepute rule, Kentucky Supreme Court Rule 3.140, has been repealed).

\textsuperscript{73} KY. SUP. CT. R. 3.130(1.4) (Banks-Baldwin 1997).

\textsuperscript{74} The author served on the Model Rules Committee.

\textsuperscript{75} KY. SUP. CT. R. 3.130(6.2) (stating "A lawyer should not seek to avoid appointment by a tribunal except for good cause.")
of the bases for discipline.\textsuperscript{76} With one exception,\textsuperscript{77} however, the court has relied on other rules, in addition to Rule 1.4, in disciplining attorneys. The references to Rule 1.4 in those cases might, therefore, be considered "harmless error." However, the court should quit referring to Rule 1.4 as if the verb form was "shall."

In non-disciplinary contexts the court is not confined by the rules of conduct. The court may draw on general principles to decide the case at bar, and in so doing, establish and modify legal relationships between attorneys and other persons.\textsuperscript{78} Unfortunately, in two recent conflicts cases, the court deliberately resurrected the discredited phrase "appearance of impropriety" as a yardstick by which to judge attorneys' behavior in conflict of interest cases. The first was the \textit{American Insurance} case, in which Justice Stumbo justified the affirmance of E-368 by saying, "[w]e dispose of these arguments by first stressing that the mere appearance of impropriety is just as egregious as any actual or real conflict."\textsuperscript{79}

The second case was \textit{Lovell v. Winchester},\textsuperscript{80} a mandamus action to require the trial court to disqualify an attorney who allegedly had obtained confidential information from a prospective client, rejected the case, and then represented the client's opponent.\textsuperscript{81} The court held that the attorney must be disqualified.\textsuperscript{82} The result is not surprising and could have been reached by simply relying on Rule 1.9.\textsuperscript{83} However, the court went out of its way to embrace the "appearance of impropriety" standard:

Even though the comment to Rule 1.9 specifically rejects the "appearance of impropriety" standard in favor of a fact-based test applied to determine whether the lawyer's duty

\textsuperscript{76} E.g. Kentucky Bar Ass'n v. Hatcher, 929 S.W.2d 193 (Ky. 1996); Monroe v. Kentucky Bar Ass'n, 927 S.W.2d 839 (Ky. 1996); Kentucky Bar Ass'n v. Thomas, 927 S.W.2d 838 (Ky. 1996).
\textsuperscript{77} Kentucky Bar Ass'n v. Davenport, 855 S.W.2d 340 (Ky. 1993).
\textsuperscript{78} E.g. Clark v. Burden, 917 S.W.2d 574 (Ky. 1996) (stating that the doctrine of apparent authority does not ordinarily vest an attorney with authority to settle a client's case).
\textsuperscript{79} American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 573 (Ky. 1996).
\textsuperscript{80} 941 S.W.2d 466 (Ky. 1997).
\textsuperscript{81} \textit{Id}.
\textsuperscript{82} \textit{Id.} at 469.
\textsuperscript{83} KY. SUP. CT. R. 3.130(1.9) (Banks-Baldwin 1997).
of loyalty and confidentiality to a former client will likely be compromised by the subsequent representation, the appearance of impropriety is still a useful guide for ethical decisions. For these reasons, courts still retain the appearance of impropriety standard as an independent basis of assessment.\textsuperscript{84}

To this point, the court has not disciplined a lawyer because the lawyer's conduct gave the appearance of impropriety.\textsuperscript{85} It would violate due process to rest discipline on such a vague standard. However, now that it is clear that the court is concerned with appearances, lawyers might assume they can be disciplined for conduct which violates no rule but does not "pass the smell test." If so, the appearances "standard" creates uncertainty and causes unwarranted concern over conduct which is consistent with the letter and spirit of the rules of conduct.

\textbf{IV. THE EFFECT OF ETHICS OPINIONS ON ATTORNEY BEHAVIOR}

If an attorney recognizes an ethical issue, the attorney presumably will turn first to the Rules of Professional Conduct. If the attorney does not find the answer in the rules, the attorney might attempt to find the answer in the KBA Ethics Opinions — a difficult task since the opinions are not compiled or indexed in a common source. If the attorney is aware of the Ethics Committee's hot-line service, the attorney might call a hot-line member and "run it by" that member. The hot-line member would consult the rules and ethics opinions and opine whether the contemplated conduct is "ethical" or not. An attorney who follows the advice is thereby shielded from discipline — but not from other adverse consequences, notably disqualification.

This description of the process exposes a number of flaws: 1) no compilation or indexing of ethics and unauthorized practice opinions; 2) different answers by different hot-line members (though Professor Underwood checks hot-line responses that are copied to him); and 3) the limited protection afforded to one who follows the advice of a hot-line member.

\textsuperscript{84} Love\textit{v}, 941 S.W.2d at 468-69 (emphasis added).
\textsuperscript{85} But see Kentucky Bar Ass'n v. Marcum, 830 S.W.2d 839 (Ky. 1992) (discussing violation of specific rule; appearance of impropriety language also used).
The major flaw in the process, however, is more subtle. Formal ethics opinions are advisory only. They do not operate as rules and one cannot be disciplined for violation of an ethics opinion. However, most formal opinions have been written in terms which grant ("may") or deny ("may not") permission. Inquiring attorneys and ethics committee members tend to think of the opinions as equal in authority to court rules. The result is, that when known, the opinions tend to shape conduct to the same degree as the rules. Attorneys are afraid to engage in conduct when told by the Ethics Committee and Board of Governors that they may not engage in such conduct.

There is scant evidence, however, that the Supreme Court of Kentucky looks to ethics opinions in disciplinary cases. In recent years, only Kentucky Bar Association v. Geisler\(^6\) cited an ethics opinion, and the opinion relied on in Geisler was an opinion of the American Bar Association, not the KBA.\(^7\) That is not to say that the court might not cite an ethics opinion as support, or even adopt the reasoning of an ethics opinion. In Geisler, the attorney was charged with violation of Rule 4.1\(^8\) for settling a case without telling her opponent that her client had died.\(^9\) In ABA Formal Opinion 95-397,\(^10\) the ABA Committee had opined that failing to make such disclosure amounted to a false statement of material fact.\(^11\) The court in Geisler relied on the opinion, not as the source of authority, but rather for its reasoning.\(^12\)

Geisler can be compared to In re A,\(^13\) in which the Oregon Supreme Court declined to discipline an attorney who failed to disclose the death of his client.\(^14\) The Oregon court looked at the Disciplinary Rules, and ABA and Oregon ethics opinions construing the rules, and concluded that disciplining the attorney

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\(^6\) 938 S.W.2d 578 (Ky. 1997).
\(^7\) Id. at 579 (The attorney in Geisler did not tell her opponent that her client had died; the court relied on ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-397 (1995) in publicly reprimanding the attorney).
\(^8\) KY. SUP. CR. R. 3.130(4.1) (Banks-Baldwin 1997) (stating "In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.").
\(^9\) Geisler, 938 S.W.2d at 579.
\(^11\) Id.
\(^12\) Id. (This opinion was issued after the relevant facts in Geisler.)
\(^13\) 554 P.2d 479 (Or. 1976).
\(^14\) Id. at 481 (During a deposition the client said his mother was in Salem, but neglected to say she was buried in Salem).
would be unfair, since there was substantial disagreement over the proper course of conduct.\textsuperscript{95}

Ethics and unauthorized practice opinions which interpret rules should be respected as persuasive — though non-binding — interpretations. The appropriate caveat to such an opinion might be, "We believe the rule should be interpreted to allow (or disallow as the case may be) the following conduct." That differs, of course, from the language which has been generally used, "May a lawyer engage in the contemplated conduct?" Answer "yes" or "no". The "no" response implies that discipline will be imposed for a violation of the opinion (not the rule supporting the opinion). On occasion, the committee has flatly stated that conduct violates the Rules of Professional Conduct.\textsuperscript{96}

For example, take the issue of interviewing employees of an organization without the consent of the organization's lawyer. In \textit{Shoney's, Inc. v. Lewis},\textsuperscript{97} the court directed the trial court to disqualify an attorney who had taken statements from a restaurant's manager prior to filing a sexual harassment action.\textsuperscript{98} The attorney took the statements knowing that the restaurant was represented by counsel in the matter and without the consent of that counsel.\textsuperscript{99} The court disqualified counsel and ordered the managers' statements suppressed.\textsuperscript{100} The \textit{rule} applied by the court in \textit{Shoney's} was Rule 4.2, stating that a lawyer shall not knowingly communicate with a represented \textit{party} without the consent of that party's counsel.\textsuperscript{101} In finding that Lee's managers were represented parties, the court turned to the Official Comment to Rule 4.2, which says that the Rule prohibits communications with \textit{persons having a managerial responsibility on behalf of an organization}.\textsuperscript{102} The court further found that the prohibition applied prior to the filing of suit; i.e., that the word "party" in Rule 4.2 does not imply that the rule is limited to situations in which one has become a "party" by the filing of

\begin{itemize}
\item \textsuperscript{95} Id. at 487.
\item \textsuperscript{96} \textit{Advisory Ethics Opinion} E-356, 57 KY. BENCH & B. 43, 47-48 (Summer 1993).
\item \textsuperscript{97} 875 S.W.2d 514 (Ky. 1994).
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Id. at 514-15.
\item \textsuperscript{100} Id. at 516.
\item \textsuperscript{101} KY. SUP. CT. R. 3.130(4.2) (Banks-Baldwin 1997).
\item \textsuperscript{102} KY. SUP. CT. R. 3.130(4.2) cmt. (Banks-Baldwin 1997).
\end{itemize}
In E-381 and E-382 the Committee answered the following questions: 1) May a lawyer communicate with a former employee of an organization without the consent of the organization's lawyer? (Answer: Yes); 2) May a lawyer communicate with a manager without the consent of the organization's lawyer? (Answer: No, citing Shoney's); 3) May a lawyer communicate with a non-manager employee whose acts or omissions in connection with a matter cannot be imputed to the organization and whose statements about the matter will not constitute an admission of the organization? (Answer: Yes); 4) May a lawyer communicate with a non-manager employee whose acts or omissions in connection with a matter may be imputed to the organization or whose statements about a matter may be admissible against the organization? (Answer: No).

The first question, answered by E-381, is consistent with the logic and language of Rule 4.2, but was not decided by the court in Shoney's. The second question was answered by the court in Shoney's. The opinion merely restates the rule from that decision. The third and fourth questions and answers were taken from the same comment relied on by the court in Shoney's. The opinion serves, therefore, as a good prediction of what the court would do in the first, third and fourth situations. There are contrary views, however, and it is far from clear whether the court would adopt the position of E-381 and E-382. The court might extend the no-contact rule to all employees, or on the other hand, it might limit Shoney's to employees of managerial status. Further, the court might reject E-381 and hold that former employees, as well as current employees, are off-limits.

The point is that E-381 and E-382 are reasonable predictions of what the court would do in an appropriate case; they do not establish rules which bind the court. The only way in which the court might deem that it is bound by E-381 and E-382 is that a lawyer who acts in reliance on those opinions (for example by

103. In 1995, the ABA House of Delegates substituted "person" for "party" in ABA Model Rule 4.2 to make it clear that the no-contact rule does not require that the represented person be a "party" to litigation. HANDBOOK, supra note 68, at 199.
106. Shoney's, Inc. v. Lewis, 875 S.W.2d 514 (Ky. 1994).
107. HANDBOOK, supra note 68, at 203-07.
interviewing a former employee in reliance on E-381) should have a due process defense to disciplinary charges even if the court disagrees with the ethics opinion relied on.\textsuperscript{108}

E-381 and E-382 are reasonable interpretations of Rule 4.2. Occasionally, however, an opinion purports to establish new rules of conduct. The best recent example is E-380,\textsuperscript{109} which interprets Rule 1.5\textsuperscript{110} (the rule which requires that fees be reasonable) as permitting a lawyer to designate a fee as a "non-refundable retainer" so long as the overall fee is reasonable.\textsuperscript{111} The opinion goes on to say, however, that for the retainer to be "valid" the arrangement must be in writing and state the time frame in which the arrangement exists.\textsuperscript{112} By purporting to impose a writing requirement, E-380 goes beyond that which is required by Rule 1.5.\textsuperscript{113} It can be predicted that a client will rely on E-380 and sue for return of a non-refundable retainer on the ground that the agreement, not being in writing, is unenforceable.

Similarly, in E-379\textsuperscript{114} the Committee opined that a lawyer may not report a non-paying client to a credit bureau.\textsuperscript{115} The Committee relied on an Alaska opinion which stated that referral to a credit bureau would result in unauthorized disclosure of confidential information.\textsuperscript{116} The Committee contrasted referrals to a collection agency, which are directly related to the collection of a fee and are thus permissible,\textsuperscript{117} The Committee's reasoning is defensible but the distinction is subtle and the conclusion — that it is unethical to report a non-paying client to a credit bureau — is not obvious. An attorney unaware of E-379 might innocently turn over delinquent accounts to a credit bureau.

Many ethics opinions speak to relationships between lawyers and identified groups. Some opinions reach non-obvious

\textsuperscript{108} Cf. Kentucky Bar Ass'n v. An Unnamed Attorney, 769 S.W.2d 45 (Ky. 1989) (explaining that attorney had a right to rely on reported case, even though case was wrongly decided; no discipline imposed).
\textsuperscript{109} Advisory Ethics Opinion E-380, 59 KY. BENCH & B. 43, 43-44 (Fall 1995).
\textsuperscript{110} Ky. Sup. Ct. R. 3.130(1.5) (Banks-Baldwin 1997).
\textsuperscript{111} Advisory Ethics Opinion E-380, 59 KY. BENCH & B. 43, 43-44 (Fall 1995).
\textsuperscript{112} Id.
\textsuperscript{113} Id. (requiring only that contingent fee arrangements be in writing).
\textsuperscript{114} Advisory Ethics Opinion E-379, 59 KY. BENCH & B. 53, 56 (Summer 1995).
\textsuperscript{115} Id.
\textsuperscript{117} Id.
conclusions:

— **Attorneys and charities:** E-388 — an attorney may not advertise that he will donate a portion of his fee to the client's favorite charity; rules cited: 5.4 (sharing fees with a non-lawyer) and 7.20 (giving something of value to someone for recommending the lawyer).\(^{118}\) E-391 — an attorney may not enter into an agreement with a charity whereby he charges a reduced fee for estate planning services to persons making bequests to the charity; rule cited: 7.20 (giving something of value to someone for recommending the lawyer).\(^ {119}\)

— **Attorneys and other professionals:** E-390 — an attorney may not accept a referral fee from an investment counselor; rules cited: 1.7 (conflicts), 1.8 (business relations with client), 2.1 (attorney as independent advisor), and 5.4 (sharing fees with non-lawyer).\(^ {120}\) E-367 — an attorney may not offer gifts to realtors to encourage the realtors to refer clients to him; rule cited: 7.20(2) (offering something of value to a non-lawyer for recommending the lawyer's services).\(^ {121}\)

— **Attorneys and insurance companies:** E-378 — an attorney may not defend both an insured in a personal injury action and the insurer sued under the Unfair Claims Settlement Practices statute;\(^ {122}\) rules cited: 1.2 (obligation to client), 1.6 (client confidences), 1.7 (conflicts), and 1.8 (payment by third party).\(^ {123}\) E-368 — an attorney may not enter into an arrangement with a liability insurer whereby the attorney agrees to handle all of the liability claims against insureds for a set fee; rules cited: 1.7 (conflicts) and 1.8 (payment by third party).\(^ {124}\)

— **Attorneys and unions:** E-358 — an attorney may not pay for union officials' meals or lodging or pay to become

\(^{118}\) Advisory Ethics Opinion E-388, 60 KY. BENCH & B. 56 (Summer 1996).

\(^{119}\) Advisory Ethics Opinion E-391, 60 KY. BENCH & B. 45, 45-46 (Fall 1996).

\(^{120}\) Advisory Ethics Opinion E-390, 60 KY. BENCH & B. 45, 45 (Fall 1996).

\(^{121}\) Advisory Ethics Opinion E-367, 58 KY. BENCH & B. 40, 41 (Summer 1994).

\(^{122}\) KY. REV. STAT. ANN. §§ 304.12-230 (Banks-Baldwin 1997).


\(^{124}\) Advisory Ethics Opinion E-368, 58 KY. BENCH & B. 52, 52-53 (Fall 1994), opinion aff'd, American Ins. Co. v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky. 1996).
members of a Designated Counsel Group;\textsuperscript{125} rule cited: 7.20(2) (giving something of value to a non-lawyer to recommend the lawyer's services).

To the extent that attorneys aware of these opinions treat them as rules, the opinions shape attorney behavior. To the extent that attorneys are unaware of the opinions, the opinions serve as potential traps which might snare an attorney who engages in behavior "prohibited" by the opinions.

V. THE EFFECT OF UNAUTHORIZED PRACTICE OPINIONS

The UPL Committee interprets Kentucky Supreme Court Rule 3.020, which states that: "The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel, or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services."\textsuperscript{126} This is a sweeping definition, which, if applied broadly, would subject CPAs, financial advisors, real estate salesman, trust officers, and others to charges of unauthorized practice.\textsuperscript{127} However, UPL opinions by and large are applications of two Kentucky cases: Frazee v. Citizens Fidelity Bank\textsuperscript{128} and Kentucky State Bar Association v. Henry Vogt Machine Company, Inc.\textsuperscript{129}

Henry Vogt is the easier case to understand and apply. In that case, Henry Vogt's personnel director questioned witnesses and made arguments in an administrative hearing.\textsuperscript{130} The court held such activity to be the practice of law.\textsuperscript{131} Henry Vogt stands for the proposition that any activity on behalf of a client in a judicial or quasi-judicial hearing is the practice of law.

In Frazee, contempt citations were sought against five trust

\begin{thebibliography}{131}
\bibitem{125} Advisory Ethics Opinion E-358, 57 KY. BENCH & B. 43, 48-49 (Summer 1993).
\bibitem{126} KY. SUP. CT. R. 3.020 (Banks-Baldwin 1997).
\bibitem{127} KY. REV. STAT. ANN. § 524.130 (Banks-Baldwin 1997) (making the unauthorized practice of law a Class B misdemeanor; unauthorized practice cases more commonly reach the high court on citations brought by the Kentucky Bar Association charging the "practitioners" with contempt of the Supreme Court by willfully disobeying its rules against unauthorized practice).
\bibitem{128} 393 S.W.2d 778 (Ky. 1965); Frazee builds on Hobson v. Kentucky Trust Co., 197 S.W.2d 454 (Ky. 1946).
\bibitem{129} 416 S.W.2d 727 (Ky. 1967).
\bibitem{130} \textit{Id.}
\bibitem{131} \textit{Id.}
\end{thebibliography}
companies for their activities in preparing wills and trusts and administering trusts and estates. Starting from the position that a corporation cannot practice law, the court examined the defendants' activities and declared off-limits activities involving interpretation of the law, drafting of pleadings, court appearances, and drafting of legal documents. Other trust activities — twenty-eight enumerated items — were approved. In Frazee, the court attempted to deprive trust companies of all but their ministerial and business activities.

Applying Henry Vogt, the UPL Committee has forbidden laymen from representing others in a number of trial like hearings: civil service commissions, Board of Tax Appeals, faculty and student grievance committees, Board of Claims, zoning boards, and Department of Workers' Claims. In the opinion declaring lay representation before the Department of Worker Claims to be the unauthorized practice of law, the UPL Committee recognized that the General Assembly had authorized lay representation of injured workers. Relying on Section 116 of the Constitution, Henry Vogt, and its own opinions, the Committee declared lay representation to be the unauthorized practice of law, notwithstanding its approval by the legislature.

Frazee has proved more difficult to apply. While acknowledging that preparation of tax returns involves legal advice and legal instruments, the UPL Committee recognized that it was impractical to declare such to be the practice of law. The Committee declared the pension and profit sharing field to be the practice of law, but approved real estate agents' completion of

132. Frazee, 393 S.W.2d at 781.
133. Id. at 784.
134. Id.
135. U-12 (1975), DESKBOOK, supra note 9, at 11-16.
141. KY. REV. STAT. ANN. § 342.320(9) (Banks-Baldwin 1997) "Notwithstanding any provisions of law to the contrary, the provisions of this chapter shall not be construed or interpreted to prohibit non-attorney representation of injured workers covered by this chapter."
143. U-25 (1979), DESKBOOK, supra note 8, at 11-30.
purchase contracts and other documents. In 1981, the Committee approved real estate closings by laymen, but in 1997 the Board of Governors considered (but later rejected) an opinion that would require a lawyer at closings.

VI. ANTI-TRUST IMPLICATIONS

Some ethics and unauthorized practice opinions might be viewed as anti-competitive and in restraint of trade. In Goldfarb v. Virginia State Bar, the United States Supreme Court held that the Virginia State Bar Association violated the Sherman Antitrust Act. The State Bar Association had stated that it was unethical to cut fees, which caused Fairfax County lawyers to refuse to do a title examination for less than the minimum fee set by the defendant, Fairfax County Bar Association. The Court rejected the bar associations' contention that they were agents of the state of Virginia and were therefore not subject to the Sherman Act. The Court pointed out that the Virginia Supreme Court had not mandated minimum fee schedules; to the contrary the court had declared that a lawyer should not permit himself to be controlled by a minimum fee schedule. While the Virginia Supreme Court had granted the State Bar the authority to issue ethical opinions, there was no indication that the Virginia Supreme Court approved the content of the opinions. In order to qualify for the state-action exemption, the Court said it was not enough that the "anti-competitive conduct is prompted by state action; rather anti-competitive activities must be compelled by the State acting as sovereign."

Two years later the Supreme Court decided Bates v. State Bar

148. Little and Rush, supra note 58, at 356.
150. Id.
151. Id. at 777-78.
152. Parker v. Brown, 317 U.S. 341 (1943) (explaining that the Sherman Act was not intended to apply to state action).
153. 421 U.S. at 789.
154. Id. at 791.
155. Id.
of Arizona. While famous as the case which extended First Amendment protection to attorney advertising, Bates is also an anti-trust case. The Court held that the Arizona State Bar was entitled to the state-action exemption because, in prosecuting Bates and O'Steen for ethical violations, the Bar was acting as the Arizona court's agent, enforcing a rule adopted by the court.

In California Retail Liquor Dealer's Association v. Midcal Aluminum, Inc. the Court held that wine "fair trade" contracts, established pursuant to California's price-fixing statute, were not entitled to the state-action exemption. The Court set down a two-part test for the exemption: 1) the restraint must reflect state policy; and 2) the state must actively enforce the restraint. The Court held that the fair trade contracts passed the first part of the test, since the California legislature clearly intended wine producers to be able to control retail prices, but that the program flunked the second part of the test, since the state took no active role in setting prices. Making the courts available to private enforcement actions did not, said the Court, constitute active supervision.

In Hoover v. Ronwin, the Court applied Goldfarb, Bates and Midcal to state bar examiners, appointed by the Arizona Supreme Court and authorized by that court to administer and grade the state bar examination. The Court held that Bates controlled and the examiners were entitled to the state-action exemption. The Arizona Supreme Court had authorized the bar examination process and had the ultimate say in passing on candidates' applications for admission.

In a 1981 article, Professors Little and Rush analyzed the antitrust implications of state ethics opinions. They opined that the potential for antitrust liability could be minimized by steps to

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157. Id. at 360 (Disciplinary Rule 2-101(B); the ABA Code of Professional Responsibility had been adopted in Arizona by court rule).
159. Id. at 113-14.
160. Id. at 105.
161. Id. at 105-06.
162. Id.
164. Id.
165. Id. at 572.
166. Little & Rush, supra note 58.
satisfy the two-part Midcal test. They suggested: 1) having the state supreme court appoint the members of the ethics committee; 2) providing for review of ethics opinions by the state supreme court on petition of an aggrieved member of the bar, a bar association, or the ethics committee itself; and 3) providing that ethics opinions be binding on the committee. In Bates and Hoover, the state supreme court both set policy and actively supervised the complained-of activities. Clearly, the closer the ties between the ethics committee and the state supreme court, the more likely it is that the activities of the committee will fall within the state-action exemption.

The activities of the Kentucky Ethics and UPL Committees fall within the state-action exemption. There are several reasons for this. First, Section 116 of the Kentucky Constitution gives the supreme court plenary power over rules of procedure and attorney discipline. Second, the court adopted the procedural rule creating the Ethics and UPL Committees. Third, the court has declared that the KBA (which appoints the committee members) "exists solely by virtue of rules of this court . . . [and] their accountability is to this court only, of which they are an integral part." Fourth, aggrieved persons have a right to appeal an adverse decision of the Ethics or UPL Committee to the supreme court. Thus, the Kentucky process appears to be within the state-action exemption as exemplified by the Bates and Hoover decisions. On the other hand, direct appointment of committee members by the court would remove all doubt on this issue.

VII. RECOMMENDATIONS

1) By court rule, ethics opinions are advisory. Therefore, in disapproving conduct the Ethics Committee and the UPL Committee should use words of caution rather than words denying

167. Id.
168. Id. at 368-69.
170. Kentucky has a "little Sherman Act." Kentucky Revised Statutes section 367.175 has been given the same construction as the Sherman Act. Mendell v. Golden-Farley of Hopkinsville, Inc., 573 S.W.2d 346 (Ky. Ct. App. 1978). Presumably the courts would constrict the statute as not intended to apply to state action.
171. Ex parte Auditor of Public Accounts, 609 S.W.2d 682, 687 (Ky. 1980) (emphasis added).
permission. While lawyers who choose to adhere to the opinions' advice should be shielded from discipline, lawyers (and others) who choose otherwise cannot be disciplined for "violation of an opinion."

Questions posed as they were in E-353\textsuperscript{172} reflect the proper role of ethics opinions — to approve conduct and to caution against, but not prohibit, conduct. In E-353, the questions were framed as follows:

1) \textit{Should} a lawyer who represents the Transportation Cabinet (under contract, retainer, or otherwise) at the same time represent another client against the Transportation Cabinet? Answer: "No."

3) \textit{May} a lawyer who represents the Transportation Cabinet (under contract, retainer, or otherwise) represent a client against another agency of the Commonwealth of Kentucky (i.e. The Revenue Cabinet)? Answer: "Yes."\textsuperscript{173}

The answers to the posed questions thus cautioned lawyers against the conduct described in the first question but approved the conduct described in the third question.\textsuperscript{174} Opinions approving conduct should bear the caveat that courts are not obligated to follow ethics opinions in non-disciplinary contexts.

2) Under the present rule, ethics and UPL opinions are not released as formal opinions without the affirmative vote of three fourths of the Board of Governors.\textsuperscript{175} Therefore, formal opinions should reflect the action of the Board of Governors. They should be prefaced with the statement that the opinion was "approved without change," or "modified," as the case may be. The Board should also use cautionary and permissive language, rather than

\begin{footnotesize}
\footnote{172. \textit{Advisory Ethics Opinion E-353}, 57 KY. BENCH & B. 43, 43-45 (Summer 1993); cf. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-405 (1997) (applying Rule 1.7 to representation of governmental clients; suggestions for identification of the "client" for conflict purposes).}

\footnote{173. \textit{Id.}}

\footnote{174. In the body of the opinion, however, the Committee used mandatory language in discussing the conduct which was the subject of the first question. Turning to the specific questions, we note that in KBA E-281 (1984) \ldots, decided under the Code, the Committee opined that a private lawyer representing a state agency on a personal service contract could not represent a private client against the same agency in a different, unrelated matter. This view is consistent with the Rules, and to this extent we see no reason to depart from E-281.}

\footnote{175. KY. SUP. CT. R. 3.530(2) (Banks-Baldwin 1997).}
\end{footnotesize}
words of prohibition ("may not").

3) Supreme Court Rule 3.530 should be amended to provide that the Kentucky Supreme Court appoints the members of the Ethics and UPL committees. That would make it clear beyond doubt that those who serve on those committees are within the state-action exemption.

4) Supreme Court Rule 3.530 should be amended to provide for the Kentucky Supreme Court to review formal opinions on the court's own motion, as well as on appeal by an aggrieved party. If the court should decline review, the opinion would be published in the Kentucky Bench and Bar as an advisory opinion of the Ethics Committee or UPL Committee, and the Board of Governors. If the court accepted review it could affirm, modify, or republish the opinion as it saw fit. An ethics opinion of the court would appear in the Southwestern Reporter, and would have the same effect as a rule of court. Clearly separating the advisory (opinions of the committees and board) from the mandatory (opinions of the court) would accomplish the following:

- adequate notice to attorneys of mandatory (court) opinions;
- minimize the regulatory effect of advisory opinions;
- bring the advisory opinion system clearly within the state-action exemption to the anti-trust laws;
- give the court the means to review negative opinions in situations where no person feels sufficiently aggrieved to take an appeal;
- give the court the means to review permissive ("you may") opinions in cases where the court feels the Committee was wrong.

It is entirely consistent with the court's role as promulgator of rules and regulator of the profession for the court to have the power to review ethics opinions sua sponte.

5) The court should quit citing Rule 1.4 as a basis for discipline, since that rule does not purport to require communication. The court should cease and desist from further use of the term "appearance of impropriety," since an appearances standard does not adequately advise attorneys of what is impermissible conduct.