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Required to Report Misconduct

Grace M. Giesel



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Should Kentucky lawyers be required to report to disciplinary authorities the misdeeds of other lawyers? Lawyers in 46 states and the District of Columbia must so report. Most of these jurisdictions have required lawyers to report the misdeeds of other lawyers since at least the 1970s.

Until 1990 the ethics rules in effect in Kentucky required Kentucky lawyers to report the misdeeds of other lawyers to disciplinary authorities.¹ In contrast, the Kentucky Bar Association (KBA) Board of Governors has now recommended to the Kentucky Supreme Court that it adopt an aspirational rule, not a rule requiring lawyers to report.

Rules Revision Process

In 1997, the American Bar Association (ABA) created a commission to evaluate the ABA's Model Rules of Professional Conduct in light of the constantly changing landscape of law practice. The work of this group, known as the Ethics 2000 Commission, resulted in many suggested modifications to the Model Rules. The ABA adopted these modifications in 2002.

At about the same time, two other ABA commissions were studying the issues of multijurisdictional practice and lawyer involvement in corporate responsibility. The suggestions of these commissions resulted in additional modifications to the Model Rules in 2003. While the result of this process was not a completely new set of rules, the number of modifications was large and some of the changes were significant.

Because Kentucky, like almost all other United States jurisdictions, bases its own Rules of Professional Conduct on the ABA's Model Rules, Kentucky began the process of evaluating the revised Model Rules to determine whether to adopt the revisions. The KBA Board of Governors appointed the Ethics 2000 Committee in July 2003. This group evaluated each ABA Model Rule and issued a lengthy report stating the changes the Committee recommended, explaining how these changes modify Kentucky's present rules and explaining how the changes relate to the ABA Model Rules.

Recommendations on Lawyer Reporting

With regard to lawyer reporting, the Ethics 2000 Committee recommended that Kentucky have a rule, similar but not the same as Model Rule 8.3, which would require lawyer reporting. The Committee's suggested standard for reporting lawyer misdeeds was as follows:

A lawyer who knows that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud or deceit that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer *shall* report such act or conduct to the Association's Bar Counsel.² (emphasis added)

The Committee's recommended rule on lawyer reporting also included a provision dealing with the reporting of misdeeds

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by a judge, a provision excusing a lawyer from the duty to report if the reporting would disclose confidential information or information learned in a lawyer assistance program, a provision for immunity for the lawyer who reports in good faith, a provision requiring a lawyer to report any discipline he or she receives from other authorities and a provision requiring a lawyer prosecuting a case against a member of the KBA to report the matter if there is a plea of guilty or a conviction or entry of a judgment.³

The Committee's suggested rule differs from the ABA's Model Rule 8.3. Said rule requires reporting when a lawyer "knows 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."⁴ In its report the Committee explained, "a reporting requirement based on a violation of the Rules of Professional Conduct is simply too general and ambiguous and will prove to be unenforceable."⁵ The KBA Committee's suggested rule omitted this problematic concept.

KBA Board of Governors Recommendation

The KBA Board of Governors evaluated the Committee's suggestions and has made its own recommendations to the Kentucky Su-

preme Court. While the Board of Governors adopted the vast majority of modifications suggested by the Committee, it rejected the Committee's recommendation that Kentucky have a rule requiring lawyers to report misdeeds of other lawyers. Instead, the KBA Board of Governors has recommended that the professional conduct rule for Kentucky lawyers should state:

A lawyer who knows that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud or deceit that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer *should* report such act[s] or conduct to the Association's Bar Counsel.⁶ (emphasis added)

Justifications

One justification for a mandatory reporting rule is that such a rule is the foundation for lawyers as a profession to claim the right to self-regulate. As the Louisiana Supreme Court stated in *In re Riehlmann*:

Reporting another lawyer's misconduct to disciplinary authorities is an important duty of every lawyer. ... [T]he lawyer's duty to report professional misconduct is the foundation for the claim that we can be trusted to regulate ourselves as a profession.

If we fail in our duty, we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public.⁷

A more utilitarian justification tied to the concept of the self-regulation framework is that lawyers should be required to report other lawyers' misdeeds because they are in the best position to know of such misdeeds. Clients often know of their own attorney's misconduct and occasionally know of the misconduct of opposing counsel. However, clients are woefully lacking in knowledge of the law and professional responsibility expectations and often do not have access to the factual information that would indicate lawyer misbehavior. Lawyers are simply in the best position to become aware of the misdeeds of other lawyers and thus assist the system in policing professional behavior.

Also, a mandatory reporting rule provides one more incentive for lawyers to behave ethically. Most lawyers are exceedingly ethical people. Some, however, are not. As recent local headlines about legal malpractice verdicts,⁸ inappropriate treatment of settlement proceeds⁹ and missing funds¹⁰ makes obvious, some lawyers may not be conducting themselves ethically. A reporting requirement increases the probability that unethical lawyers come to the attention of the authorities and at the same time discourages a tempted lawyer from inappropriate conduct.

Recent editorials in local print media¹¹ illustrate an additional justification: the positive image effect. Even if having a mandatory reporting rule does not improve the quality of the Kentucky Bar, having the mandatory rule improves *their image*. The lack of a mandatory reporting rule suggests to the public that lawyers condone improper behavior.

I have felt this effect for years in teaching each new crop of potential Kentucky lawyers. Every year we study the reporting requirement in the Model Rules. Each year there comes

a point near the end of the conversation when I have to tell these students that Kentucky does not require lawyers to report the misdeeds of other lawyers. Sarcastic remarks abound.

Criticisms

One criticism of the reporting requirement of the ABA's Model Rule 8.3 is that the rule is too vague. Note, however, that the Ethics 2000 Committee has not recommended that Kentucky adopt the Model Rule. Rather, the recommendation of the Committee is that a lawyer be required to report when the lawyer "knows that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud or deceit that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." While this is a rule of narrower scope, it is also a more precise rule.

Another criticism is that states that have such a rule rarely use it to discipline lawyers. The fact that there is no discipline based on the rule really says nothing about the value of the rule for purposes of deterrence, enforcement or image. Kentucky has a professional responsibility rule, Kentucky Supreme Court Rule 3.130(1.5)(d), which forbids a contingent fee in a domestic relations or criminal matter. A Westlaw search for Kentucky discipline cases involving that rule yielded no cases of reported discipline. Yet, no one has disputed the value of the rule.

A third criticism of a mandatory reporting rule is that lawyers will report or threaten to report opposing counsel as a way to gain a strategic advantage or to obtain an agreement to settle. Lawyers could act in this manner even without a mandatory reporting rule. Courts and discipline entities have held that such action in itself is unethical.¹²

As added protection against such conduct, Kentucky has Kentucky Supreme Court Rule 3.130(3.4)(f), which states:

A lawyer shall not: ...

- (f) Present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in any civil or criminal matter.¹³

Both the Ethics 2000 Committee and the KBA Board of Governors have recommended that Kentucky continue to have this rule without substantial change.

Reporting is Hard to Do

The real reason some lawyers are uncomfortable with a mandatory reporting rule is that reporting is hard to do; it is an uncomfortable

task. We have all been taught in elementary school if not earlier in life that “tattling” is somehow offensive. But that is what a mandatory reporting rule requires.

In addition, the situations in which a lawyer might have a duty to report can make performing in accordance with the duty harder still. A good example of this is *In re Riehlmann*.¹⁴ In 1994, Riehlmann met a lawyer friend at a bar. Riehlmann had known this friend since law school. The two lawyers had both been prosecutors and both had become defense attorneys. On this night Riehlmann’s friend disclosed that he suffered from colon cancer and was dying. He also disclosed that he had once, as a prosecutor, suppressed exculpatory blood evidence.

The reporting rule in effect in Louisiana required a lawyer to report any unprivileged knowledge of an ethical violation of any kind. Louisiana’s rule was thus broader than Model Rule 8.3 and much broader than the rule proposed by the Ethics 2000 Committee. Riehlmann did not report his friend’s suppression of exculpatory blood evidence though he was aware that such conduct was a violation of ethical rules and constitutional requirements.

Riehlmann’s friend died in 1994. Five years later in 1999, Riehlmann heard that the lawyers of a man sentenced to death and scheduled to be executed in one month had discovered a crime lab report that had never been shared with the defense team. The crime lab results showed that the blood type of the perpetrator of the crime did not match the blood type of the man scheduled to be executed for the crime. Riehlmann realized that this was the evidence his dead friend had mentioned to him. Riehlmann contacted the lawyers for the improperly convicted man and provided an affidavit about his conversation with his friend about the suppressed evidence. Riehlmann later testified on behalf of the condemned man.

Riehlmann eventually reported the conversation with his friend to the disciplinary authorities but over five years had passed since he first became aware of the problem. Riehlmann explained why he had not reported his friend in 1994 by noting that the friend was dying and he was “like a brother” to Riehlmann.

None of us would have wanted to be in the position of Riehlmann and be required to report. Everyone can understand Riehlmann’s angst. To add to Riehlmann’s discomfort, he and his wife had separated, he had three kids with one child recently having open-heart surgery and he was under the care of a psychiatrist and was taking antidepressants.

We must recognize, too, the price paid by the man who was convicted of the crime and served years of time behind bars having been sentenced to death. While Riehlmann kept silent, this man sat in a cell under the tremendous weight of the death penalty.

The Louisiana Supreme Court concluded that Riehlmann violated the mandatory reporting rule and publicly reprimanded him.

The Court Must Decide

The Kentucky Supreme Court must decide. Will the Court conclude that the benefits of a mandatory reporting rule outweigh the costs such that Kentucky lawyers should be required to report the misdeeds of other lawyers? Or will the Court decide, contrary to the conclusion in 46 states, that a mandatory reporting rule is just too demanding or carries with it too many costs?

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End Notes

¹ The rule in effect was Disciplinary Rule 1-103(A), which stated: “A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.” Disciplinary Rule 1-102 stated:

A lawyer shall not (1) Violate a Disciplinary Rule. (2) Circumvent a Disciplinary Rule through actions of another. (3) Engage in illegal conduct involving moral turpitude. (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Two Kentucky Bar Association Ethics Opinions of the time discussed the duty to report. KBA Ethics Opinion E-276 (1983) stated, “Any attorney dealing with such an agency with knowledge of this infraction or any other violation of such a disciplinary rule would be under a duty per DR 1-103(A) to report such conduct or else be liable himself for violating this section.” KBA Ethics Opinion E-265 (1982) stated, “The Rules are clear that when a lawyer receives information that is “unprivileged” that a fellow member of the Bar has committed a violation of the Disciplinary Rules, that the lawyer has an obligation to report such information to the appropriate investigative body for proper action.”

² KBA Ethics 2000 Committee Report, p. 8-6. The Report can be accessed from a link on the KBA’s website www.kybar.org

³ See KBA Ethics 2000 Committee Report, p. 8-6

⁴ The Model Rules can be found at www.abanet.org/cpr/mrpc_toc.html

⁵ See KBA Ethics 2000 Committee Report, p. 8-9

⁶ See Ethics 2000 Board of Governors Action Summary, p. 5. The Ethics 2000 Board of Governors Action Summary can be accessed from the Kentucky Bar Association’s website, www.kybar.org

⁷ 891 So. 2d 1239, 1249 (La. 2005)

⁸ See Andrew Wolfson, “Lawyer Hit with \$5 Million Verdict,” *The Courier-Journal*, Aug. 28, 2007

⁹ See Andrew Wolfson, “Diet-drug Lawyers to Pay \$42 Million,” *The Courier-Journal*, Aug. 30, 2007

¹⁰ See Andrew Wolfson, “Ex-KBA President Disbarred for Life,” *The Courier-Journal*, Aug. 28, 2007

¹¹ See Editorial, “Lawyers Should have to Report Misconduct,” *Louisville Business First*, July 13, 2007; Editorial, “Lawyers’ Code of Silence,” *The Courier-Journal*, July 10, 2007

¹² See *In re Discipline of Eicher*, 661 N.W.2d 354 (S.D. 2003) (threat violated Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 8.3 (Reporting Professional Conduct), and Rule 8.4(d), which deals with conduct prejudicial to the administration of justice). See also *Hecht v. Levin*, 613 N.E.2d 585, 589 (Ohio 1993) (“Lest an attorney involved in litigation be tempted to initiate a disciplinary proceeding to gain a tactical advantage over opposing counsel in litigation, we note that such conduct itself is a disciplinary violation.”); ABA Formal Op. 94-383 (1994) (it is unethical to threaten to report in an effort to gain an advantage)

¹³ Kentucky Supreme Court Rule 3.130 (3.4(f))

¹⁴ 891 So.2d 1239 (La. 2005)