

Executive Summary

The KBA Board of Governors established the KBA Ethics 2000 Committee on July 1, 2003. The Committee was charged with reviewing changes to the American Bar Association Model Rules of Professional Conduct (MR) and making recommendations to the Board of Governors for changes to the Kentucky Rules of Professional Conduct (KRPC) based on the MR changes and current practice. The Committee determined that its review did not include the KRPC on advertising under the jurisdiction of the KBA Attorneys' Advertising Commission. Accordingly, the Committee did not review MR 7.1 – 7.5.

Overall the Committee concluded that the KRPC have functioned well and should continue to adhere as closely to the MR as current practice in Kentucky permits. The Committee's recommendations mirror the results of the MR changes in that they retain the structure and organization of the KRPC; maintain the KRPC core values; do not propose radical changes or revision of the KRPC; and do not add best practice or professionalism concepts to the KRPC. What follows is a brief overview of changes made to the MR and a summary of significant Committee KRPC recommendations.

Summary of Significant Committee Recommendations

The main report contains the basis for Committee recommendations in detail. The following summary highlights the most significant recommendations.

Preamble, Scope, and Terminology

1. Preamble and Scope: The KRPC should include the MR Preamble and Scope introduction. The KRPC adopted in 1990 did not include a Preamble and Scope. The Committee found that experience with the current KRPC shows that a Preamble and Scope will serve a useful purpose in highlighting key aspects of a lawyer's professional responsibility. They provide a framework for interpreting and applying the Rules that is useful to lawyers, educators, and those responsible for enforcing them.

2. Rule 1.0 Terminology: The KRPC Terminology should adopt all MR 1.0 Terminology changes and new Comments. Significant changes are numbering Terminology as Rule 1.0 and the addition of Comments for Terminology. New definitions are:

- Paragraph (b): "Confirmed in writing"
- Paragraph (e): "Informed consent"
- Paragraph (k): "Screened"
- Paragraph (m): "Tribunal"
- Paragraph (n): "Writing" or "written"

Client-Lawyer Relationship

3. Rule 1.4 Communication: KRPC 1.4 should be changed to conform to MR 1.4. This results in changing the term "should" to the imperative "shall" in both paragraphs (a) and (b) of the Rule.

4. Rule 1.5 Fees: KRPC 1.5 should be changed to conform to MR 1.5 with one exception and two additions. In paragraph (e)(2) and Comment [7] concerning informing a client of the details of a division of fees between lawyers the MR requirement that the client be advised of "the share each lawyer will receive" is deleted. The share each lawyer will receive is properly a matter between the lawyers that does not need to be communicated to the client for any professional responsibility reasons. Regulation of non-refundable retainers is added in paragraph (f) and Comment [11]. Non-refundable fees are a much misunderstood fee issue in Kentucky. The

proposed Rule paragraphs and Comment on non-refundable fees are based on KBA Formal Ethics Opinion KBA E-380 (1995). Guidance on the management of advance fees and expenses, and the times for determining the reasonableness of a fee are added in paragraph (g) and Comment [10]. (Ed. Note: There is a dissent to this recommendation concerning paragraph (c).)

5. Rule 1.6 Confidentiality of Information: KRPC 1.6 should be changed to conform to MR 1.6 in permitting (but not requiring) disclosure to prevent death or substantial bodily harm; to prevent or rectify substantial injury to the financial interest or property of another resulting from a client's serious abuse of the lawyer's services; and to permit a lawyer to disclose confidences to obtain legal advice about the lawyer's compliance with the KRPC. (Ed. Note: There is a dissent to this recommendation.)

6. Rule 1.8 Conflict of Interest: Current Clients: Specific Rules: In addition to being substantially reorganized Rule 1.8 includes a new paragraph (j) that provides: A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. New Comments [17], [18] and [19] provide detailed guidance on client-lawyer sexual relationships. (Ed. Note: There is a dissent to this recommendation concerning paragraph (e).)

7. Rule 1.13 Organization as Client: KRPC 1.13 should be changed to conform to MR 1.13. The significant change is paragraph (c). It authorizes, but does not require, disclosures outside the organization when despite the lawyer's efforts the highest authority that can act on behalf of the organization fails to take appropriate action with regard to a matter that is a violation of law, and the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization. In these circumstances the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

8. Rule 1.15 Safekeeping Property: KRPC 1.15 should be changed to conform to MR 1.15 with additions the Committee made to clarify responsibilities when there is a claim by both a client and third party for funds held by a lawyer; and to allow a lawyer to deposit funds for restitution of conversion of client funds caused by others.

9. Rule 1.16 Declining or Terminating Representation: The Comments to KRPC 1.16 should be changed to add information about the limited right Kentucky lawyers have to withhold only uncompensated work product from returned files when the lawyer is discharged and to provide guidance on charging for copying costs.

10. Rule 1.17 Sale of Law Practice: Adoption of a new KRPC 1.17 is recommended to provide an orderly procedure for sole practitioners and firms to transition out of the practice of law or adjust the focus of their practice in a manner that fairly compensates them and protects the interest of clients.

11. Rule 1.18 Duties to Prospective Client: Adoption of a new KRPC 1.18 is recommended to provide guidance for the important events that occur in the period during which a lawyer and prospective client are considering whether to form a client-lawyer relationship.

Counselor

12. Rule 2.4 Lawyer Serving as Third-Party Neutral: Adoption of a new KRPC 2.4 is recommended to provide guidance for the increasing role of lawyers as third-party neutrals. Rule 2.4 is designed to promote dispute resolution parties' understanding of the lawyer-neutral's role.

Advocate

13. Rule 3.3 Candor Toward the Tribunal: KRPC 3.3 should be changed to conform to MR 3.3. This results in strengthening the Rule by emphasizing that the lawyer must not allow the introduction of false evidence and must take remedial steps when the lawyer comes to know that material evidence offered by the client or a witness called by the lawyer is false, regardless of the client's wishes. Added is a new paragraph (a)(2) that imposes the requirement for lawyers 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.

14. Rule 3.4 Fairness to Opposing Party and Counsel: KRPC 3.4 should be changed to include MR 3.4(f) as KRPC paragraph (g). This paragraph clearly delineates when it is permissible to request a person other than a client to refrain from voluntarily giving relevant information to another party. (Ed. Note: There is a dissent to this recommendation.)

15. Rule 3.6 Trial Publicity: KRPC 3.6 should be changed to conform to MR 3.6. The effect of this change is to bring KRPC 3.6 into compliance with current constitutional law on trial publicity.

16. Rule 3.8 Special Responsibilities of a Prosecutor: KRPC 3.8 should be changed to conform to MR 3.8 except for paragraph (c) that provides a prosecutor shall "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;" and Comment [2] that concerns paragraph (c). The Committee recommends deletion of paragraph (c) and Comment [2] because of the concern that "important pretrial rights" is too vague a phrase on which to predicate a sanctionable duty. It could compromise the ability of law enforcement officials to deal with a cooperating defendant.

Transactions With Persons Other Than Clients

17. Rule 4.1 Truthfulness in Statements to Others: Paragraph (a) of the proposed Rule is substantively the same as MR 4.1 and the current KRPC 4.1. Paragraph (b) is significantly different from paragraph (b) of MR 4.1 and is a new paragraph in proposed KRPC 4.1. See the Discussion paragraph on proposed KRPC 4.1 in the main report for a detailed explanation of this recommended addition. (Ed. Note: There is a dissent to this recommendation.)

18. Rule 4.2 Communication With Person Represented By Counsel: KRPC 4.2 should be changed to conform to MR 4.2. This results in substituting "person" for "party" thereby extending the coverage of the Rule to encompass represented persons who are not necessarily involved as a "party" in then-existing or prospective litigation; and the addition of the phrase "by a court order" that alerts lawyers to the exception permitting contact with represented persons when such contacts are otherwise "authorized by law."

19. Rule 4.3 Dealing With Unrepresented Person: KRPC 4.3 should be changed to conform to MR 4.3 except for the last sentence of the MR that in certain circumstances permits a lawyer to give legal advice to an unrepresented person. The recommended KRPC 4.3 contains a categorical prohibition against rendering legal advice to an unrepresented person and allows the lawyer only to suggest that the unrepresented person may want to secure counsel.

20. Rule 4.4 Respect for Rights of Third Persons: The recommended KRPC 4.4 differs substantially from the MR 4.4 treatment of inadvertently sent documents. The Committee recommends that KRPC 4.4 include the guidance of KBA Formal Ethics Opinion KBA E 374 (1995) that instructs lawyers to refrain from examining the materials, notify the sender, and abide by the sender's instructions regarding the disposition of the materials.

Law Firms and Associations

21. Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law: KRPC 5.5 should be changed to conform to MR 5.5 with some significant changes. MR 5.5 is a major expansion of the current KRPC 5.5 in both the Rule and Comments. The Committee concluded that, while the MR in many ways is an appropriate expansion of multijurisdictional practice, it went too far in allowing lawyers from other jurisdictions to practice temporarily in a jurisdiction for purposes of new client matters unrelated to their practice in their own jurisdiction. The changes the Committee recommends are considered a reasonable balance between the need to recognize in the Rules the realities of multijurisdictional practice as it exists today and the need to limit the circumstances in which lawyers unfamiliar with Kentucky law are permitted to provide legal services in Kentucky.

22. Rule 5.7 Responsibilities regarding Law-Related Services: MR 5.7 is not recommended for adoption. This Rule covers what is more commonly referred to as multidisciplinary practice and was rejected by the KBA after a special committee reviewed its suitability for Kentucky in 2000.

Public Service

23. Rule 6.4 Law Reform Activities Affecting Client Interests: KRPC 6.4 should be changed to conform to MR 6.4. This recommendation has the effect of changing the current Kentucky Rule by deleting “disqualify himself from the matter” and replacing it with “disclose that fact but need not identify the client.”

24. Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs: Adoption of a new KRPC 6.5 is recommended to allow short-term limited legal assistance to persons of limited means otherwise going unrepresented. This new Rule is necessary to overcome the concern that strict application of the conflict of interest Rules deters lawyers from serving as volunteers in programs where clients are provided short-term limited legal services as part of a nonprofit organization or a court-annexed program.

Information About Legal Service

25. Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges: MR 7.6 is not recommended for adoption. Regulation of political contributions by lawyers (pay to play) is better regulated by law or Supreme Court Rules other than the KRPC.

Maintaining the Integrity of the Profession

26. Rule 8.3 Reporting Professional Misconduct: A new KRPC 8.3 is recommended for adoption. It was drafted by the Committee and is not the same as MR 8.3 Reporting Professional Misconduct. (Ed. Note: There is a dissent to this recommendation.)

27. Rule 8.4 Misconduct: KRPC 8.3 should be renumbered as 8.4 and changed to conform to MR 8.4 Misconduct. This results in the addition to renumbered KRPC 8.4 of paragraph (d) “engage in conduct that is prejudicial to the administration of justice” and the related Comment [3].

28. Rule 8.5 Disciplinary Authority; Choice of Law: KRPC 8.4 should be renumbered to 8.5 and recaptioned as Disciplinary Authority; Choice of Law. It should be changed to conform to MR 8.5. For all practical purposes the proposed KRPC 8.5 is a new Rule for Kentucky.

APPENDIX

Methodology and Organization of Report

Scope of Review

The Committee determined that the scope of its review included the ABA Model Rules of Professional Conduct (MR) as changed through September 15, 2003, but not the rules on advertising under the jurisdiction of the KBA Attorneys' Advertising Commission. Accordingly, the Committee did not review MR 7.1 – 7.5. This scope included changes resulting from the work of the ABA Ethics 2000 Commission, the ABA Commission on Multijurisdictional Practice, the ABA Task Force on Corporate Responsibility, and the ABA House of Delegates.

Methodology of Review

The Committee determined that as a matter of policy the KRPC should conform to the MR whenever current practice permitted. This was considered advisable because Kentucky's KRPC are based on an earlier version of the MR and overall have been successful. The recent changes to the MR reflect almost two decades of nation-wide experience in applying them. The ABA Ethics 2000 Commission consisted of a distinguished group of ethics experts who evaluated this experience and developed a refined version of the MR with some significant additions to the Rules as well as improvements. As a result, the Committee believes that the profession is moving rapidly toward a national standard of professional responsibility based on the MR. For this reason, the Committee concluded it to be in the best interest of the Kentucky Bar to be in the mainstream of current professional responsibility policy by closely adhering to the MR, especially in light of the continuing increase in multijurisdictional practice. It should be noted, however, that the Committee was mindful that Kentucky has its own unique considerations in developing Rules of Professional Conduct and was not hesitant to modify or reject rules that were not a good fit for Kentucky.

The Committee began its work by organizing into sub-committees that were assigned specific Rules to review and report with recommendations to the Committee as a whole. After a series of meetings being informed by sub-committee reports, the Committee began going through the MR comparing and contrasting them with their KRPC counterpart, if any. On occasion subject matter experts were consulted about a Rule change. Many Rule changes were readily seen as valid and approved by consensus. A number of Rules were problematic resulting in spirited discussion that typically led to an agreed Committee recommendation. Some MR changes were rejected as is explained in the main report. It was agreed that a member could include a dissent to a recommendation if so desired. For example, there is a dissent to the Committee's recommendation on Rule 1.6 Confidentiality of Information.

Over the next series of meetings the Committee reached preliminary agreement on recommendations for the majority of the Rules and continued to evaluate Rules over which there were divergent opinions. At this point a draft report was begun and developed as further decisions on Committee recommendations were reached. Upon determining its final recommendations the Committee completed its work with the submission of this report to the Board of Governors.

Report Organization

The primary structure used to prepare this report is a Rule by Rule listing of the caption of the MR being evaluated. Under this caption the report shows the current KRPC, the proposed KRPC redlined with changes if any, and a discussion and explanation of the Committee's recommendation. For example:

Rule 1.1 Competence

1. Current Kentucky Rule with Official Comments: Plain text
2. Proposed Kentucky Rule with Official Comments: Redlined – lined through text indicates deleted language; underlined text is added language

3. Discussion and Explanation of Recommendation:

- a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.
- b. Detailed discussion of reason for variance from ABA Model Rule (if any).

The ABA Ethics 2000 Commission Reporter's Explanation of Changes to a MR often provides a useful explanation of the Committee's recommended changes to a KRPC. When this is the case some or all of the ABA Reporter's Explanation of Changes is inserted in the Discussion and Explanation of Recommendation paragraph for the Board of Governors' review.

The following terms are used in this report as a form of shorthand:

Commission: The ABA Ethics 2000 Commission

Committee: KBA Ethics 2000 Committee

KRPC: Kentucky Rule(s) of Professional Conduct (SCR 3.130)

MR: ABA Model Rule(s) of Professional Conduct