

Kentucky Bar Association
Attorneys' Advertising Commission
Ethics 2000 Committee Report
November 17, 2006



Attorneys' Advertising Commission

Ethics 2000 Committee report

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The KBA Ethics 2000 Committee was appointed by the KBA Board of Governors to review the American Bar Association's (ABA) revisions to the rules of professional conduct. At the commencement of its work the Committee determined to involve the Kentucky Attorneys' Advertising Commission (AAC) in the analysis of Rule 7, "Information about legal services" and all of its subparts.

Rule 7 of the model rules of the ABA contains limited advertising guidelines and is not parallel to the Kentucky rule, while the other rules of professional conduct are very similar to the ABA rules.

Certain changes in procedure were recently made to the advertising rules by Supreme Court amendments. For example, a previous rule involving appeals from decisions of the AAC was deleted, after the Supreme Court determined to delete the rule concerning prepublication submission. A new rule was created by which a lawyer could still submit an advertisement in advance of publication for the purpose of obtaining an advisory opinion. This is purely voluntary, at no additional cost, and prepublication submission will then insulate the lawyer from an ethical complaint concerning that advertisement, unless particular false statements were brought to the attention of the AAC at a later date that were not apparent on the face of the advertisement.

In any event, these procedural changes did not impact the substantive nature of the advertising rules.

With the charge of the Ethics 2000 Committee in mind, the AAC held a series of meetings in order to revisit the rules of professional conduct that the ABA uses, and compare them with the Kentucky Rules. This review necessitated amendment to the Kentucky rules. Many of the amendments are born from the experience of the AAC in its daily work, and did not directly relate to an attempt to adopt the ABA rules. The AAC does not believe the ABA rules are sufficient in their coverage of the advertising issues in the legal profession. The AAC did not address the Kentucky Disaster Response Plan rule (7.60), but dealt with all the other subparts of Rule 7.

Members of the AAC who participated were: J. David Boswell, Amy Cabbage, Larry Conley, Robert Elliott, Douglass Farnsley, Norman E. Harned, Walter A. Hawkins, Randy May, Michael O'Hara and Virginia Snell.

On behalf of the AAC these proposed amendments to the Rules of Professional Conduct as they relate to Rule 7 for attorney advertising are recommended to the Board and Kentucky Supreme Court for adoption.

Michael J. O'Hara, Chair, Attorney's Advertising Commission

1. Current Kentucky Rule with Official Comments

SCR 3.130(7.01) APPLICABILITY

Rule 7 shall apply to advertisements of legal services directed to residents of the Commonwealth of Kentucky or which originate in the Commonwealth of Kentucky.

2. Proposed Kentucky Rule with Official Comments: No change

1. Current Kentucky Rule with Official Comments:

SCR 3.130(7.02) DEFINITIONS

For the purposes of Rule 7, the following definitions shall apply:

(1) "Advertise" or "advertisement" means to furnish any information or communication containing a lawyer's name or other identifying information, except the following:

(a) A professional card of a lawyer identifying the lawyer by name and giving the lawyer's address(es), telephone number(s), fax number(s), e-mail address(es), but no other information. A professional card of a law firm may also give the names of members and associates, and jurisdictions in which the lawyers are licensed to practice.

(b) A public service broadcast announcement identifying the sponsor as a lawyer or law firm, by name, address(es), telephone number(s), but no other information.

(c) A professional announcement stating new or changed associations or addresses or change of firm name. It shall not state biographical data except to the extent necessary to identify the lawyer or to explain the change in his or her association, but it may state the immediate past position of the lawyer and jurisdictions in which the lawyer is licensed to practice. It may give the names and dates of predecessor firms in a continuing line of succession.

(d) A regularly published professional directory. Each separate office maintained by a lawyer may have a separate listing.

(e) A sign on or near the law office and in the building directory identifying the law office and containing only the information specified in subsection (a) of this section.

(f) A letterhead of a lawyer containing addresses, telephone numbers, fax numbers, e-mail addresses, the name of the law firm, associates, and the jurisdictions in which the lawyer is licensed to practice. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(g) Any communication by a lawyer to third parties that is further distributed by a third party who is not in any way controlled by the lawyer, and for which distribution the lawyer

pays no consideration, shall be exempt from all the provisions of these Rules except Rule 7.10, 7.15 and 8.3.

(h) Communication to, for or on behalf of an existing client shall not be included within the definition herein. It is not the intention of the Rules to designate such communications performed in the regular course of representation of an existing client as advertising.

(i) The inclusion of any truthful information pertaining to national certification by an organization qualifying under *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281 (1990) shall not disqualify a communication otherwise exempt under these Rules.

(2) "Legal Services" means the practice of law as defined in SCR 3.020.

(3) "Commission" when used in SCR 3.130(7) means Attorneys' Advertising Commission.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(7.02) DEFINITIONS

For the purposes of Rule 7, the following definitions shall apply:

(1) "Advertise" ["or advertisement"] means to furnish any information or communication containing a lawyer's name or other identifying information, and an "advertisement" is any information containing a lawyers name or other identify information, except the following:

(a) A professional card of a lawyer identifying the lawyer by name and giving the lawyer's address(es), telephone number(s), fax number(s), e-mail address(es), but no other information. A professional card of a law firm may also give the names of members and associates, and jurisdictions in which the lawyers are licensed to practice.

(b) A public service broadcast announcement identifying the sponsor as a lawyer or law firm, by name, address(es), telephone number(s), but no other information.

(c) A professional announcement stating new or changed associations or addresses or change of firm name. It shall not state biographical data except to the extent necessary to identify the lawyer or to explain the change in his or her association, but it may state the immediate past position of the lawyer and jurisdictions in which the lawyer is licensed to practice. It may give the names and dates of predecessor firms in a continuing line of succession.

(d) A regularly published professional directory. Each separate office maintained by a lawyer may have a separate listing.

(e) A sign on or near the law office and in the building directory identifying the law office and containing only the information specified in subsection (a) of this section.

(f) A letterhead of a lawyer containing addresses, telephone numbers, fax numbers, email addresses, the name of the law firm, associates, and the jurisdictions in which the lawyer is licensed to practice. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(g) Any communication by a lawyer to third parties that is further distributed by a third party who is not in any way controlled by the lawyer, and for which distribution the lawyer pays no consideration, shall be exempt from all the provisions of these Rules except Rule 7.10.

(h) Communication to [for or on behalf of an existing client shall not be included within the definition herein. It is not the intention of the Rules to designate such communications performed in the regular course of representation of an existing client as advertising.] prospective clients as defined in SCR 3.130(1.18) and communication to, for, or on behalf of an existing client shall not be included within the definition herein. It is not the intention of the Rules to designate such communications performed in the regular course of representation of an existing client as advertising.

(i) [The inclusion of any truthful information pertaining to national certification by an organization qualifying under *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281 (1990) shall not disqualify] A communication otherwise exempt under these Rules[.]is not disqualified by the inclusion of any truthful information pertaining to national certification by an organization that the attorney demonstrates is qualified to grant such certification, to attorneys who meet objective and consistently applied standards relevant to practice in a particular area of the law.

(j) Information and communication by a lawyer to members of the public in the format of web log journals on the internet that permit real time communication and exchanges on topics of general interest in legal issues, provided there is no reference to an offer by the lawyer to render legal services.

(2) "Legal Services" means the practice of law as defined in SCR 3.020.

(3) "Commission" when used in SCR 3.130(7) means Attorneys' Advertising Commission.

COMMENTARY

SCR 3.130(7.02)(i) adopts standards set forth and discussed in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281 (1990).

3. Discussion and Explanation of Recommendation:

Section (h): “Prospective client” is defined in the new proposed Rule 3.130-1.18(a) – Duties to Prospective Client. The exceptions here are expanded to include that definition of prospective client.

The proposed changes to 3.130-7.02 are to conform to the new proposed Rule 3.130-1.18. The term “prospective client” has also been changed in Rule 7.09, to “potential client.”

Section (i): Changes in section (i) simply remove the reference to 496 U.S. 91, 110 S.Ct. 2281 (1990) *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281 (1990) which has been moved to the Commentary.

Section (j): The list of exceptions is merely expanded to include web log journals (commonly referred to as blogs and blawgs) maintained by attorneys, as long as they do not make offers regarding legal services.

There is not an ABA Model Rule of Professional Conduct (MRPC) specifically parallel to KY SCR 3.130-7.02.

1. Current Kentucky Rule with Official Comments:

SCR 3.130(7.03) ATTORNEYS' ADVERTISING COMMISSION

(1) There shall be created an Attorneys' Advertising Commission which shall perform such functions in regulating lawyer advertising as prescribed in these Rules.

(2) The Commission shall consist of (9) persons appointed by the President and approved by the Board. Each Commission member shall be appointed for a term of three years, with terms so established that the terms of the Commission members shall be staggered. Vacancies for unexpired terms shall be filled in the same manner as original appointees, but the appointees shall hold office only to the end of the unexpired term. No member may serve more than two (2) terms in succession, and may be removed at any time by a majority vote of the Board.

(3) Each Commission member shall be a citizen of the United States and licensed to practice law in the Courts of the Commonwealth.

(4) The Commission shall be provided with sufficient administrative assistance from the Director as from time to time may be required.

(5) The Commission shall have general responsibilities for the implementation of this Rule. In discharging its responsibilities the Commission shall have authority to:

(a) Issue and promulgate regulations and such forms as may be necessary, subject to prior approval by the Board. Each member of the Association shall be given at least sixty (60) days advance notice of any proposed regulations and an opportunity to comment thereon. Notice may be given by publication in the journal of the Kentucky Bar Association.

(b) Report to the Board at its last meeting preceding the Annual Convention of the Association, and otherwise as required, on the status of advertising with such recommendations or forms as advisable.

(c) Delegate to an employee of the KBA designated by the Director of the Kentucky Bar Association the authority to review advertisements on its behalf.

(d) Review advertisements, issue advisory opinions concerning the compliance of an advertisement with the Advertising Rules and Advertising Regulations, conduct such proceedings or investigations as it deems necessary, or delegate this authority to a Commission member or a hearing officer who shall proceed in the name of the Commission.

(e) Seek out violations of the Advertising Rules and the Advertising Regulations, resolve the violations under Rule 7.06(4), or refer violations to the Inquiry Commission. Referral to the Inquiry Commission may be by any panel or by a majority of a quorum of the entire commission.

(7) The Commission shall act upon advertisements, or issue advisory opinions in panels of three (3) persons. A quorum to act upon an advertisement shall consist of not fewer than two (2) members of a panel. A quorum to do business in meetings of the entire Commission shall consist of not fewer than five of its members in attendance.

(8) Nothing in these rules shall be construed as creating any cause of action for any party or right of suit against any member of the Commission. The Kentucky Bar Association, the Board of Governors, the Attorneys' Advertising Commission, the Executive Director of the Association, the Office of Bar Counsel, all of their officers, members, employees or agents shall be immune from civil liability for all acts in the course of their official duties in regulating lawyer advertising.

2. Proposed Kentucky Rule with Official Comments: No change

1. Current Kentucky Rule with Official Comments:

SCR 3.130(7.04) ADVERTISING OF FEES

(1) A lawyer who advertises a fee for routine services and accepts the employment must perform such services for the amount advertised. In addition, a detailed description of what services are included in the "routine services" must be supplied to the Commission with each advertisement and to each prospective client who requests such a description. If the client is required to pay court costs and/or case expenses in addition to the attorney's fee, the advertisement shall state in all capital letters, "COURT COSTS AND CASE EXPENSES WILL BE THE RESPONSIBILITY OF THE CLIENT."

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(7.04) ADVERTISING OF FEES

(1) A lawyer who advertises a fee for routine services and accepts the employment must perform such services for the amount advertised. In addition, a detailed description of what services are included in the "routine services" must be supplied to the Commission with each advertisement and to each prospective client who requests such a description. [If the client is required to pay court costs and/or case expenses in addition to the attorney's fee, the advertisement shall state in all capital letters, "COURT COSTS AND CASE EXPENSES WILL BE THE RESPONSIBILITY OF THE CLIENT."]

(2) If an advertisement mentions a fee for legal services, including reference to a contingent fee, disclosure shall be made as to the responsibility for court costs and case expenses. If the client is required to pay court costs and/or case expenses in addition to the attorney's fee, the advertisement shall state in all capital letters, "COURT COSTS AND CASE EXPENSES WILL BE THE RESPONSIBILITY OF THE CLIENT."

3. Discussion and Explanation of Recommendation:

It is proposed that this Rule be split into two sections referencing the two common ways advertisements identify attorney fees. The new Rule sets forth requirements with regard to those advertisements referencing a fee for routine services (subsection 1), and those advertisements which reference contingent fees or compensation in general without stating a specific dollar amount (subsection 2).

There is not an ABA MRPC specifically parallel to KY SCR 3.130-7.04.

1. Current Kentucky Rule with Official Comments

SCR 3.130(7.05) FILING OF ADVERTISEMENTS

SCR 3.130(7.05) shall read:

No lawyer may advertise unless the lawyer complies with SCR 3.130 (7.02) - (7.50).

(1)(a) A lawyer may employ the following in an advertisement:

1. Name, including name of law firm and names of professional associates, addresses, telephone numbers, fax numbers and e-mail addresses;
2. One or more fields of law in which the lawyer or law firm practices, or a statement that practice is limited to one or more fields of law, to the extent authorized under Rule 7.40;
3. Date and place of birth;
4. Date and place of admission to the bar of state and federal courts;
5. Schools attended, with dates of graduation, degrees and other scholastic distinctions;
6. Public or quasi-public offices;
7. Military services;
8. Authorships;
9. Teaching positions;
10. Memberships, offices and committee assignments, in bar associations;
11. Membership and offices in legal fraternities and legal societies;
12. Technical and professional licenses;
13. Memberships in scientific, technical and professional associations and societies;
14. Foreign language ability;
15. Names and addresses of bank references;
16. With their written consent, names of clients regularly represented;
17. Prepaid or group legal services programs in which the lawyer participates;
18. Whether credit cards or other credit arrangements are accepted;
19. Office and telephone answering service hours;
20. Fee for an initial consultation;
21. Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
22. Contingent fee rates provided that the statement discloses whether percentages are computed before or after deduction of court costs and case expenses;
23. Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled to without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
24. Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

25. Fixed fees for specific legal services to the extent authorized under these Rules;
or

26. Any other information specified in any regulation adopted by the Commission.
Any lawyer may petition the Commission for the adoption of such a regulation in
which case the petition shall be published as provided in these Rules.

(b) If the advertisement contains only those items listed in SCR 3.130(7.05)(1)(a), the lawyer shall mail or deliver to the Commission, c/o the Director of the Kentucky Bar Association, three (3) copies of the advertisement. If the advertisement is to be published by broadcast media, including radio or television, a fair and accurate representation of the advertisement plus three (3) copies of a typed transcript of the words spoken shall be submitted. Any such advertisement is exempt from a fee for submission. Submission under this subsection shall occur no later than the publication of the advertisement.

2) If the advertisement does not qualify under SCR 3.130(7.05)(1) for submission without a fee, the lawyer shall mail or deliver to the Commission, c/o the Director of the Kentucky Bar Association, three (3) copies of the advertisement. If the advertisement is to be published by broadcast media, including radio or television, a fair and accurate representation of the advertisement plus three (3) copies of a typed transcript of the words spoken shall be submitted. A filing fee of \$50.00 for each advertisement filed under this subsection shall accompany each submission. Submission under this subsection shall occur no later than the publication of the advertisement. If an advisory opinion has been sought under SCR 3.130(7.06)(1) no additional fee is required.

(3) The fair and accurate representation of a broadcast media advertisement required in SCR 3.130 (7.05)(1) and (2) shall include three (3) copies of a video cassette (VHS), digital video disc (DVD), or audio cassette plus three (3) copies of a typed transcript of the advertisement.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(7.05) FILING OF ADVERTISEMENTS

SCR 3.130(7.05) shall read:

No lawyer may advertise unless the lawyer complies with SCR 3.130 (7.02) - (7.50).

(1)(a) A lawyer may employ the following in an advertisement:

1. Name, including name of law firm and names of professional associates, addresses, telephone numbers, fax numbers and e-mail addresses;
2. One or more fields of law in which the lawyer or law firm practices, or a statement that practice is limited to one or more fields of law, to the extent authorized under Rule 7.40;
3. Date and place of birth;
4. Date and place of admission to the bar of state and federal courts;
5. Schools attended, with dates of graduation, degrees and other scholastic distinctions;

6. Public or quasi-public offices;
7. Military services;
8. Authorships;
9. Teaching positions;
10. Memberships, offices and committee assignments, in bar associations;
11. Membership and offices in legal fraternities and legal societies;
12. Technical and professional licenses;
13. Memberships in scientific, technical and professional associations and societies;
14. Foreign language ability;
15. Names and addresses of bank references;
16. With their written consent, names of clients regularly represented;
17. Prepaid or group legal services programs in which the lawyer participates;
18. Whether credit cards or other credit arrangements are accepted;
19. Office and telephone answering service hours;
20. Fee for an initial consultation;
21. Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
22. Contingent fee rates provided that the statement discloses whether percentages are computed before or after deduction of court costs and case expenses;
23. Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled to without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
24. Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
25. Fixed fees for specific legal services to the extent authorized under these Rules; or
26. Any other information specified in any regulation adopted by the Commission. Any lawyer may petition the Commission for the adoption of such a regulation in which case the petition shall be published as provided in these Rules.

(b) If the advertisement contains only those items listed in SCR 3.130(7.05)(1)(a), the lawyer shall mail or deliver to the Commission, c/o the Director of the Kentucky Bar Association, three (3) copies of the advertisement. If the advertisement is to be published by broadcast media, including radio or television, a fair and accurate representation of the advertisement plus three (3) copies of a typed transcript of the words spoken shall be submitted. Any such advertisement is exempt from a fee for submission. Submission under this subsection shall occur no later than the publication of the advertisement.

(2) If the advertisement does not qualify under SCR 3.130(7.05)(1) for submission without a fee, the lawyer shall mail or deliver to the Commission, c/o the Director of the Kentucky Bar Association, three (3) copies of the advertisement. If the advertisement is to be published by broadcast media, including radio or television, a fair and accurate representation of the advertisement plus three (3) copies of a typed transcript of the

words spoken shall be submitted. A filing fee of [~~\$50.00~~] \$75.00 for each advertisement filed under this subsection shall accompany each submission. Submission under this subsection shall occur no later than the publication of the advertisement. An additional administrative fee of \$100.00 may be imposed for late submissions. Additionally, advertisements of more than 100 pages, or longer than 10 minutes of video or audio, will require a supplemental fee of \$100.00. The same fees are required if [lf] an advisory opinion has been sought under SCR 3.130(7.06)(1) [no additional fee is required].

(3) The fair and accurate representation of a broadcast media advertisement required in SCR 3.130 (7.05)(1) and (2) shall include three (3) copies of a video cassette (VHS), digital video disc (DVD), or audio cassette plus three (3) copies of a typed transcript of the advertisement.

3. Discussion and Explanation of Recommendation:

Section (2) increases the cost of filing an advertisement. The filing fee has not increased since 1998. Costs to administer the Attorneys' Advertising Commission program have increased with the 225 % increase in submissions over the past eight years. A new penalty fee of \$100.00 is created to supplement the increasingly rising costs and administrative time for seeking out and processing violations of the Advertising Rules and the Advertising Regulations, as required by SCR 3.130(7.03)(5)(e) and to encourage advertisers to comply.

1. Current Kentucky Rule with Official Comments

SCR 3.130(7.06) Advisory Opinions

(1) For any advertisement submitted as required by SCR 3.130(7.05)(2), a lawyer may request an advisory opinion by the Commission before the advertisement is published. Such request shall be in writing made at least 30 days before the advertisement is published. The request shall be accompanied by an administrative fee of \$50, which is in lieu of the fee required by SCR 3.130(7.05)(2). Within 30 days after such request is received, the Commission shall issue its advisory opinion as to the compliance of the advertisement with the Advertising Rules and Advertising Regulations.

(2) If a lawyer has received an advisory opinion that an advertisement complies with the Advertising Rules and Advertising Regulations, that lawyer shall not be disciplined for any use of that advertisement, except as otherwise provided in SCR 3.130 (7.06)(6).

(3) If a lawyer has requested an advisory opinion and the Commission finds that the advertisement does not comply with the requirements of the Advertising Rules or the Advertising Regulations, the Commission, or its designee, shall issue an advisory letter setting forth the factual and legal basis for the opinion. The lawyer may submit a corrected advertisement under SCR 3.130(7.05)(2) that conforms to the advice in the advisory letter with no additional fee required.

(4) If the Commission determines that the Advertising Rules or Advertising Regulations have been violated by a lawyer, it shall determine whether the violation can be dealt with administratively, or can be presumed to be intentional. The Commission may address administrative violations. Intentional violations include but are not limited to: (1) publishing the advertisement after receiving notice that the advertisement is in Violation of the Advertising Rules or the Advertising Regulations; (2) a manifest indifference to the Advertising Rules or Advertising Regulations; or (3) a pattern of repeated disregard for these Advertising Rules or Advertising Regulations. Intentional violations may be referred to the Inquiry Commission.

(5) If the Commission has notified the lawyer that the advertisement violated the Advertising Rules or Advertising Regulations, and has further determined that the publication of the advertisement may be contrary to the public interest, the Commission or its designee shall notify the lawyer whose advertisement is under Consideration and the Director of the Association. The Director may upon receiving such notification bring an action in compliance with this Rule.

(6) If an advertisement is discovered to be false, misleading or deceptive, or information provided to the Commission in connection with the submission is discovered to be false, misleading or deceptive after the Commission has issued its advisory opinion, it, or its designee, may notify the Advertising lawyer that all prior advisory opinions concerning such advertisement are withdrawn and the advisory opinion shall not constitute a defense to the subsequent use of the advertisement.

2. Proposed Kentucky Rule with Official Comments:

(1) For any advertisement submitted as required by SCR 3.130(7.05)(2), a lawyer may request an advisory opinion by the Commission before the advertisement is published. Such request shall be in writing made at least 30 days before the advertisement is published. The request shall be accompanied by the filing fee, and any required [an] administrative fees as set forth in [of \$50, which is in lieu of the fee required by] SCR 3.130(7.05)(2). Within 30 days after such request is received, the Commission shall issue its advisory opinion as to the compliance of the advertisement with the Advertising Rules and Advertising Regulations.

(2) If a lawyer has received an advisory opinion that an advertisement complies with the Advertising Rules and Advertising Regulations, that lawyer shall not be disciplined for any use of that advertisement, except as otherwise provided in SCR 3.130 (7.06)(6).

(3) If a lawyer has requested an advisory opinion and the Commission finds that the advertisement does not comply with the requirements of the Advertising Rules or the Advertising Regulations, the Commission, or its designee, shall issue an advisory letter setting forth the factual and legal basis for the opinion. The lawyer may submit a corrected advertisement under SCR 3.130(7.05)(2) that conforms to the advice in the advisory letter with no additional fee required.

[(4) If the Commission determines that the Advertising Rules or Advertising Regulations have been violated by a lawyer, it shall determine whether the violation can be dealt with administratively, or can be presumed to be intentional. The Commission may address administrative violations. Intentional violations include but are not limited to: (1) publishing the advertisement after receiving notice that the advertisement is in Violation of the Advertising Rules or the Advertising Regulations; (2) a manifest indifference to the Advertising Rules or Advertising Regulations; or(3)a pattern of repeated disregard for these Advertising Rules or Advertising Regulations. Intentional violations may be referred to the Inquiry Commission.]

[(5) If the Commission has notified the lawyer that the advertisement violated the Advertising Rules or Advertising Regulations, and has further determined that the publication of the advertisement may be contrary to the public interest, the Commission or its designee shall notify the lawyer whose advertisement is under Consideration and the Director of the Association. The Director may upon receiving such notification bring an action in compliance with this Rule.]

[(6)](4) If an advertisement is discovered to be false, misleading or deceptive, or information provided to the Commission in connection with the submission is discovered to be false, misleading or deceptive after the Commission has issued its advisory opinion, it, or its designee, may notify the Advertising lawyer that all prior advisory opinions concerning such advertisement are withdrawn and the advisory opinion shall not constitute a defense to the subsequent use of the advertisement.

3. Discussion and Explanation of Recommendation:

Section 1 is modified to reflect the filing fee increase of SCR 3.130(7.05)(2). The language change allows future fee increased without additional modification to this rule.

Sections 4 and 5 were deleted and moved to SCR 3.130(7.07) for clarification.

1. Current Kentucky Rule with Official Comments

SCR 3.130(7.07) Review of Filings

For any advertisement on which an advisory opinion has not been sought, the Commission, or its designee, shall review such filings for compliance with the Advertising Rules and Advertising Regulations. If the Commission, or its designee, determines a violation of the Advertising Rules or Advertising Regulations has occurred, it may notify the advertising attorney that a violation has occurred, or refer the matter to the Inquiry Commission.

COMMENTARY

Any advisory opinion under SCR 3.130(7.06) or any letters of notification under SCR 3.130(7.07) that an advertisement does not comply with the Advertising Rules or any Advertising Regulations of the Commission does not prohibit the lawyer from using any such advertisement. However, the lawyer, as with all other Rules of Professional conduct, is obligated to comply with the Advertising Rules and Advertising Regulations and may face disciplinary sanctions if the advertisement used is found to be in violation of the Advertising Rules or Advertising Regulations.

2. Proposed Kentucky Rule with Official Comments:

(1) For any advertisement on which an advisory opinion has not been sought, the Commission, or its designee, shall review such filings for compliance with the Advertising Rules and Advertising Regulations. If the Commission, or its designee, determines a violation of the Advertising Rules or Advertising Regulations has occurred, it may notify the advertising attorney that a violation has occurred, [or] and it may refer the matter to the Inquiry Commission.

(2) If the Commission determines that the Advertising Rules or Advertising Regulations have been violated by a lawyer, it shall determine whether the violation can be dealt with administratively, or can be presumed to be intentional. The Commission may address administrative violations. Intentional violations include but are not limited to: (1) publishing the advertisement after receiving notice that the advertisement is in Violation of the Advertising Rules or the Advertising Regulations; (2) a manifest indifference to the Advertising Rules or Advertising Regulations; or (3) a pattern of repeated disregard for these Advertising Rules or Advertising Regulations. Intentional violations may be referred to the Inquiry Commission.

(3) If the Commission has notified the lawyer that the advertisement violated the Advertising Rules or Advertising Regulations, and has further determined that the publication of the advertisement may be contrary to the public interest, the Commission

or its designee shall notify the lawyer whose advertisement is under consideration and the Director of the Association. The Director may, upon receiving such notification, bring an action in compliance with this Rule.

COMMENTARY

Any advisory opinion under SCR 3.130(7.06) or any letters of notification under SCR 3.130(7.07) that an advertisement does not comply with the Advertising Rules or any Advertising Regulations of the Commission does not prohibit the lawyer from using any such advertisement. However, the lawyer, as with all other Rules of Professional conduct, is obligated to comply with the Advertising Rules and Advertising Regulations and may face disciplinary sanctions if the advertisement used is found to be in violation of the Advertising Rules or Advertising Regulations.

3. Discussion and explanation of Recommendation:

A change to section one is required to clarify that the Commission may both notify the lawyer of his violations and refer to the Inquiry Commission in the same instance.

Sections 4 and 5 of SCR 3.130(7.06) were inserted, now sections 2 and 3, for clarification.

1. Current Kentucky Rule with Official Comments:

SCR 3.130(7.08) OPEN RECORDS

The records of the Commission shall be available for inspection and copying at the offices of the Bar Association at reasonable times and upon reasonable notice. Any expense incurred shall be borne by the requesting party.

2. Proposed Kentucky Rule with Official Comments

:

SCR 3.130(7.08) RECORDS OF THE COMMISSION [Open records]

All advertisements and the records of all actions taken by the Commission on submitted advertisements shall be available for inspection and copying at the offices of the Bar Association at reasonable times and upon reasonable notice. Any expense incurred shall be borne by the requesting party.

3. Discussion and explanation of Recommendation:

The recommended Rule change is to clarify that there are communications between the AAC and the Office of Bar Counsel, which are not available to be inspected.

There is not an ABA MRPC specifically parallel to KY SCR 3.130-7.08.

1. Current Kentucky Rule with Official Comments:

SCR 3.130(7.09) DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(1) No lawyer directly or indirectly through another person shall, in-person or by live telephone, initiate contact or solicit professional employment from a prospective client with whom the lawyer has no family or direct prior professional relationship. This Rule shall not be interpreted to prevent discussions of employment arising out of personal appearances at lectures and seminars by a lawyer which result in inquiries from prospective clients or inquiries initiated by persons who may become prospective clients at the time of any other incidental contact not designed or intended by the lawyer to solicit employment.

(2) A lawyer shall not solicit professional employment from a prospective client even when not otherwise prohibited by paragraph (1) if:

(a) The prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(b) the solicitation involves coercion, duress or harassment.

(3) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known or reasonably believed to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall conform to Rule 7.15. In addition, each written, recorded or electronic communication must contain the words "THIS IS AN ADVERTISEMENT" in all capital letters and prominently displayed in type at least as large as the type in the body of the communication. Further, in written, recorded or electronic communications, the envelope, document or electronic device in which such communication is transmitted shall contain the word "ADVERTISEMENT" in all capital letters, and in type at least as large as the name of the addressee on the same side of the envelope, document or electronic communication upon which the lawyer's name and/or address appears. In the event of recorded telephone or radio communication, the speaker must first state the language "THE FOLLOWING IS AN ADVERTISEMENT" and shall further state at the end of the communication the language "THIS RECORDED TELEPHONE CALL/RADIO ANNOUNCEMENT HAS BEEN AN ADVERTISEMENT."

(4) Any communication pursuant to Rule 7.09(3) shall be sent to those prospective clients who have been involved in a disaster as defined in SCR 3.130(7.60) Article III (1) only after thirty (30) days have elapsed from the occurrence of the disaster.

2. Proposed Kentucky Rule with Official Comments

SCR 3.130(7.09) DIRECT CONTACT WITH [PROSPECTIVE] POTENTIAL CLIENTS

(1) No lawyer shall directly or [indirectly] through another person, [shall] by in person, [or by] live telephone, or real-time electronic means, initiate contact or solicit professional employment from a potential [prospective] client [with whom the lawyer has no family or direct prior professional relationship[.] unless:

(a) the lawyer has an immediate family relationship with the potential client; or

(b) the lawyer has a current attorney-client relationship with the potential client.

This Rule shall not prohibit response to inquiries [be interpreted to prevent discussions of employment arising out of personal appearances at lectures and seminars by a lawyer which result in inquiries from prospective clients or inquiries] initiated by persons who may become [prospective] potential clients at the time of any other incidental contact not designed or intended by the lawyer to solicit employment.

(2) A lawyer shall not solicit professional employment from a potential [prospective] client even when not otherwise prohibited by paragraph (1) if:

(a) The potential [prospective] client has made known to the lawyer a desire not to be solicited by the lawyer; or

(b) the solicitation involves coercion, duress or harassment.

(3) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a potential [prospective] client known or reasonably believed to be in need of legal services in a particular matter, must contain the words "THIS IS AN ADVERTISEMENT" [and with whom the lawyer has no family or prior professional current or prior direct attorney client relationship, shall conform to Rule 7.15. In addition each written, recorded or electronic communication must contain the words "THIS IS AN ADVERTISEMENT"] in all capital letters prominently displayed in type at least as large as the type in the body of the communication[.] unless:

(a) the lawyer has an immediate family relationship with the potential client; or

(b) the lawyer has a current attorney-client relationship with the potential client.

Further,[in each such written or recorded or electronic communication] the envelope, document, or container, [or electronic device in] by which such communication is transmitted shall contain the word "ADVERTISEMENT" in all capital letters, and in type large enough to be conspicuous and placed in a conspicuous location [at least as large as the name of the addressee] on the same side of the envelope, document, or container [or electronic communication] upon which the lawyer's name and/or address appears. [In the event] if an [the event] electronic communication is sent by or on behalf

of the lawyer to a potential client in a container or on a disc or other format on which words [typed] may appear, the outside of the container, or disc, or other format shall be marked as provided in this [paragraph]rule. If a [In the event of] recorded telephone, electronic, video, or [radio] digital communication is sent under this rule, a speaker must first [state] recite the language “THE FOLLOWING IS AN ADVERTISEMENT” and shall further state at the end of the communication the language “THIS [RECORDED TELEPHONE CALL/RADIO ANNOUNCEMENT] MESSAGE HAS BEEN AN ADVERTISEMENT”.

(4) [Any] No communication pursuant to SCR 3.130(7.09)(3) shall be sent to those potential [prospective] clients who have been involved in a disaster as defined in SCR 3.130(7.60) [Article III (1) only after] Until thirty (30) days have elapsed from the occurrence of the disaster.

(5) Notwithstanding the prohibitions in SCR 3.130(7.09)(1), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular manner covered by the plan.

COMMENTARY

1. Communications to prior clients are not prohibited if the lawyer is required by the circumstances of the representation to communicate with a prior client to advise the client of changes in the law that would result in additional legal work.

2. SCR 3.130(7.04)(5) permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (5) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but should be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must make reasonable efforts to determine that the plan sponsors are in compliance with the Rules.

3. Neither this rule nor SCR 3.130(7.20) prohibits communications authorized by law, such as notice to members of a class in class action litigation.

3. Discussion and explanation of Recommendation:

The Rule is similar to ABA Rule 7.3, however it does not adopt the exception for “a lawyer” that the ABA has in (a)(1) or the “close personal or prior professional relationship’ exception in (a)(2).

The term “prospective client” was changed to “potential client” to eliminate the reference to “prospective client” because of the new definition for “prospective client” in proposed SCR 130-1.18(a) Potential clients are all clients who are not prospective or current clients. The new rule eliminates the exception for communications with prior clients contained in the current Kentucky rule.

Section 3(b) of the proposed Rule sets forth the Commission's interpretation of the requirements for positioning and recognition of the required language to be placed on direct mail solicitation materials.

The proposed changes to that subsection expand it to cover various types of advertisements, whether on computer disc, compact disc, or other formats.

Section 5: The proposed subsection is based on the current ABA MRPC 7.3(d).

Commentary 1: The proposed Commentary recognizes the possible ongoing duties an attorney may owe a prior client with regard to changes in the law.

Commentary 2: The proposed Commentary is based on the current ABA MRPC 7.3, Commentary 8.

Commentary 3: The proposed Commentary is based on the current ABA MRPC 7.2, Commentary 4.

1. Current Kentucky Rule with Official Comments:

SCR 3.130(7.10) WAIVER AND FORFEITURE OF FEES FOR PROHIBITED SOLICITATION

If a lawyer illegally or unethically solicited a client for which compensation is paid or payable, all fees arising from such transaction shall be deemed waived and forfeited and shall be returned to the client. A civil action for recovery of such fees may be brought in a court of competent jurisdiction.

[Commentary]

[Supreme Court]

[1989:]

[This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services; statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances. (Commentary from former SCR 3.130 (7.1))

This proposed Rule corrects an error in the original adoption of SCR 3.130-7.10. At that time, the Commentary listed for 7.09 was also incorrectly reprinted under 7.10.

2. Proposed Kentucky Rule with Official Comments: No Change

1. Current Kentucky Rule with Official Comments:

SCR 3.130(7.15) COMMUNICATIONS CONCERNING A LAWYER'S SERVICE

A lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's service. A communication is false, deceptive or misleading if it:

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

COMMENTARY

Supreme Court

1989: This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services; statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances. (Commentary from former SCR 3.130(7.1).)

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(7.15) COMMUNICATIONS CONCERNING A LAWYER'S SERVICE

A lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's service. A communication is false, deceptive or misleading if it:

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

COMMENTARY

Supreme Court

1. This Rule governs all communications about a lawyer's services, including advertising permitted by SCR 3.130(7.20). Whatever means are used to make known a lawyer's services; statements about them must be truthful. [The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisement about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client enforcements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances. (Commentary from former SCR 3.130(7.01.)) Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. [(Commentary from former SCR 3.130(7.01))]

2. The prohibition in SCR 3.130(7.15)(b) of statements that may create "unjustified expectations" may preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented in a manner that may lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case.

3. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading.

3. Discussion and explanation of Recommendation:

Proposed changes are to the Commentary only.

Commentary 1: This proposed Commentary sets forth in greater detail what communications are prohibited by the Rule. This proposed Commentary is based on the current ABA MRPC 7.1, Commentary 2.

Commentary 2: Language from the original Commentary has been separated to form "Commentary 2."

Commentary 3: Proposed Commentary 3 notes that unsubstantiated comparisons of services or fees may also be misleading. This proposed Commentary is based on the current ABA MRPC 7.1, Commentary 3.

1. Current Kentucky Rule with Official Comments:

SCR 3.130(7.20) ADVERTISING

(1) A lawyer may advertise legal services through communications in compliance with these Rules.

(2) A lawyer shall not give anything of value to a non-lawyer for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or communication permitted by this Rule.

(3) Any communication made pursuant to these Rules shall include the name of at least one lawyer licensed in Kentucky, or law firm any of whose members are licensed in Kentucky, responsible for its contents.

(4) Communication by a lawyer with a person or entity with whom that lawyer has a family or prior professional relationship or in response to an inquiry from any person or entity seeking information, shall be exempt from the provisions of these Rules, with the exception of Rule 7.15.

(5) If a lawyer or a law firm advertises legal services and a lawyer's name or image is used to present the advertisement, the lawyer must be the lawyer who will actually perform the service advertised unless the advertisement prominently discloses that the service may be performed by other lawyers.

COMMENTARY

Supreme Court

1989:

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information consistent with SCR 3.135.

[3] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[4] A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (b) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule. (Commentary from former SCR 3.130(7.2).)

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(7.20) ADVERTISING

(1) A lawyer may advertise legal services through communications in compliance with these Rules.

(2) A lawyer shall not give anything of value to a non-lawyer for recommending the lawyer's services, except that a lawyer may:

(a) pay the reasonable cost of advertising or communication permitted by this Rule; and,

(b) pay the usual charges of a legal service plan, not to include a division of fees, operated by an organization not owned or directed by the lawyer, or,

(c) pay the usual charges of a not-for-profit or qualified lawyer referral service that has been approved by the highest court in the jurisdiction where the service operates an agency designated by that court or by the Kentucky Bar Association.

(3) Any communication made pursuant to these Rules shall include the name of at least one lawyer licensed in Kentucky, or law firm any of whose members are licensed in Kentucky, responsible for its contents.

(4) Communication by a lawyer with a person or entity with whom that lawyer has [a]n immediate family or [prior professional] current attorney-client relationship, or [in] a communication in response to an inquiry from any person or entity seeking information, shall be exempt from the provisions of [these] the Advertising Rules and the Advertising Regulations, with the exception of SCR 3.130(7.15).

(5) If a lawyer or a law firm advertises legal services and a lawyer's name or image is used to present the advertisement, the lawyer must be the lawyer who will actually perform the service advertised unless the advertisement prominently discloses that the service may be performed by other lawyers. If the advertising lawyer or firm is advertising for clients for the purpose of referring the client to another lawyer or firm, that fact must be disclosed prominently in the advertisement.

SUPREME COURT COMMENTARY

(1) Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

[[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.]

(2) A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (b) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule. (Commentary from former SCR 3.130(7.2).

[[2] This Rule permits public dissemination of information consistent with SCR 3.135.]

(3) A lawyer may pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists potential clients to secure legal representation. This Rule only permits a lawyer to pay the usual charges of a not-for-profit qualified lawyer referral service. A not-for-profit qualified lawyer referral service is one that is approved by the highest court of the jurisdiction where the service operates or by an agency designated by the highest court in that jurisdiction to handle such approvals, or in Kentucky by the Kentucky Bar Association.

[[3] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.]

(4) A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must make reasonable efforts to determine that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with potential clients, but such communication must conform with the Advertising Rules and Advertising Regulations. For example, the plan may not engage in advertising that is false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan mislead potential clients to believe that the plan was a lawyer referral service sponsored by a state agency or bar association. Similarly, the

lawyer may not allow in-person, telephonic, or real-time contacts by the plan that would violate SCR 3.130(1.5)(e).

[Paying Others to Recommend a Lawyer]

[[4] A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (b) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule. (Commentary from former SCR 3.130(7.2).)]

(5) This Rule does not address the circumstances under which a lawyer may be permitted to share or split a fee with other lawyers. For ethical requirements applicable to fee sharing arrangements see SCR 3.130(1.5)(e).

3. Discussion and explanation of Recommendation:

The proposed Rule is expanded to include lawyer referral services as identified in ABA MRPC 7.2(b)(2), except this Rule limits those entities to groups approved by the KY Supreme Court or its designee.

This proposed Rule expands on the current Rule, which requires notice when the advertising attorney may not be the attorney that will handle the case. The proposed Rule specifically requires a disclaimer if the purpose of the advertisement is to ultimately refer clients to another attorney or firm.

Commentary 1: This proposed Commentary is based on the current ABA MRPC 7.2, Commentary 4.

This proposed Commentary addresses concerns that were raised with regard to communications authorized by law, or required under law, yet not specifically excepted in the Rules.

Commentary 2: This is the current "Commentary 4". This Commentary is based on the current ABA MRPC 7.2, Commentary 5.

Commentary 3: This proposed Commentary is based on the current ABA MRPC 7.2, Commentary 6.

Commentary 4: This proposed Commentary is based on the current ABA MRPC 7.2, Commentary 7.

Commentary 5: This proposed Commentary is based on the current ABA MRPC 7.2, Commentary 8.

1. Current Kentucky Rule with Official Comments:

SCR 3.130(7.25) IDENTIFICATION OF ADVERTISEMENTS

The Commission may require the statement "THIS IS AN ADVERTISEMENT" for any advertisement that may not be perceived as a quest for clients because of the format, manner of presentation or medium. If the statement is required, it shall be spoken in all audio advertisements at the end thereof and in all other advertisements, shall be in color and size print equal to the lawyer's or firm name and visually present for as long as the lawyer's or firm's name.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(7.25) IDENTIFICATION OF ADVERTISEMENTS

[The Commission may require the statement] All advertisements must include the words "THIS IS AN ADVERTISEMENT", unless excepted by SCR 3.130(7.09) [For any advertisement that may not be perceived as a quest for clients because of the format, manner of presentation or medium. If the statement is required, it shall be spoken in all audio advertisements at the end thereof and in all other advertisements, shall be in color and size print equal to the lawyer's or firm name and visually present] In recorded telephone, electronic, video, or digital communications, other than television, the speaker must first state "THE FOLLOWING IS AN ADVERTISEMENT" and must further state at the end of the communication "THIS MESSAGE HAS BEEN AN ADVERTISEMENT". All television communication, video recording or digital recording must prominently display the words "THIS IS AN ADVERTISEMENT" on the screen for as long as the lawyer's or firm's name[,] appears on the screen. If a television communication video recording, or digital recording is longer than 60 seconds, the words "THIS IS AN ADVERTISEMENT" must be displayed throughout the entire communication. The words "THIS IS AN ADVERTISEMENT" must be prominently displayed on every page of any advertisement in writing, and displayed without scrolling on the first screen of every page of a website.

3. Discussion and explanation of Recommendation:

The proposed Rule change sets forth that all advertisements must contain the language "This is an advertisement." Furthermore, the Rule explains how various types of advertisements should comply with this Supreme Court Rule.

In addition, the proposed Rule addresses "advertisement" wording requirements for electronic, recorded, video, web-based, and digital advertisements. Specific language on direct solicitation letters is addressed in proposed Rule 3.130-7.09.

There is not an ABA MRPC specifically parallel to KY SCR 3.130-7.25.

1. Current Kentucky Rule with Official Comments:

SCR 3.130(7.40) COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who concentrates in, limits his or her practice to, or wishes to announce a willingness to accept cases in a particular field may so advertise or publicly state in any manner otherwise permitted by these Rules. Any such advertisement or statement shall be strictly factual and shall not contain any form of the words "certified", "specialist", "expert", or "authority." A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(1) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Lawyer" or a substantially similar designation.

(2) A lawyer certified by an appropriate governmental agency in admiralty practice may use the designation "Admiralty", "Proctor in Admiralty", or a substantially similar designation.

(3) A lawyer may communicate the fact that he or she has achieved a national certificate by an organization qualifying under *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281 (1990), by clearly identifying the certification and the organization that has conferred the distinction, and such communication may occur only for so long as the lawyer remains so certified and in good standing with the organization.

COMMENTARY

Supreme Court

2001: [1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services, for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist" is not permitted. Use of that term may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice.

[2] Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts. (Commentary from former SCR 3.130(7.4).)

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(7.40) COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who concentrates in, limits his or her practice to, or wishes to announce a willingness to accept cases in a particular field may [so]advertise or publicly state that information in any manner otherwise permitted by these Rules. Any such advertisement or statement shall be strictly factual and shall not contain any form of the words “certified”, “specialist”, “expert”, or “authority”, [. A lawyer shall not sate or imply that the lawyer is a specialist] except as follows:

(1) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Lawyer" or a substantially similar designation.

(2) A lawyer certified by an appropriate governmental agency in admiralty practice may use the designation "Admiralty", "Proctor in Admiralty", or a substantially similar designation.

(3) A lawyer may [communicate the fact] state or imply that he or she [has achieved a national certificate by an organization qualifying under *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281 (1990), by clearly identifying the certification and the organization that has conferred the distinction, and such] is “certified”, a “specialist”, an “expert” or “authority” in a particular field of law only if:

(a) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or by a national organization that the attorney demonstrates is qualified to grant such certification to attorneys who meet objective and consistently applied standards relevant to practice in a particular area of the law; and,

(b) the name of the certifying organization is clearly identified in the communication; and,

(c) if the lawyer is licensed to practice law in Kentucky, the communication must state that Kentucky does not certify specialties in legal fields. The [by clearly identifying the certificate and the organization that has conferred the distinction, and such] communication may occur only for [so] as long as the lawyer remains so certified and in good standing [with the organization].

COMMENTARY

Supreme Court

2001:

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services [for example, in a telephone directory or other advertising.] If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted to so indicate. [However, stating that the lawyer is a "specialist" is not permitted. Use of that term may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice.]

[2] Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts. [Commentary from former SCR 3.130(7.4)]

[3] Certificates discussed in SCR 3.130(7.40)(3) must meet the criteria set forth in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281 (1990). Stating or implying that the lawyer is certified as a "specialist," an "expert" or "authority" is not permitted except as provided in this rule. The lawyer may state or imply that he or she is certified as a specialist, expert or authority only if the certification is granted by an organization approved by an appropriate state authority, such as a state bar association, or by an organization that qualifies under *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281 (1990). Certifying organizations are expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. To insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication about certification, and the communication must state that Kentucky does not certify specialties in legal fields. If the Commission is not satisfied that the certifying organization's standards and procedures are sufficiently meaningful and rigorous to make the communication truthful, it may disapprove the communication under SCR 3.130(7.15).

[4] Refer to SCR 3.130(702)(1)(i) for other applications of *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281 (1990).

3. Discussion and explanation of Recommendation:

This Rule broadens the scope of the existing rule to include language from ABA rule 7.4. It moves the reference to *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281 (1990), to the Commentary, as proposed above in 7.02.

Commentary 1: This change eliminates reference to the "specialist" issue, which is addressed in the proposed Commentary 3 to this proposed Rule.

Commentary 3: *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281 (1990) is further explained, and the criteria for the exception to the Rule are set forth in greater detail.

Commentary 4: Refers advertisers back to proposed Rule 7.02 if they desire further information about *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281 (1990).

1. Current Kentucky Rule with Official Comments:

SCR 3.130(7.50) FIRM NAMES AND LETTERHEADS

(1) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.15.

(2) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(3) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any period in which the lawyer is not actively and regularly practicing with the firm.

(4) Lawyers may state or imply that they practice in a legal entity only if that is the fact.

COMMENTARY

Supreme Court

1989: With regard to paragraph (d) [now (4)], lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law. (Commentary from former SCR 3.130(7.5).)

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(7.50) FIRM NAMES AND LETTERHEADS

(1) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.15.

(2) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(3) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any period in which the lawyer is not actively and regularly practicing with the firm.

(4) Lawyers may state or imply that they practice in a legal entity only if that is the fact.

(5) The name of a lawyer who is suspended by the Supreme Court from the practice of law may not be used by the law firm in any manner until the lawyer is reinstated. A lawyer who has been permanently disbarred shall not be included in a firm name, letterhead, or any other professional designation or advertisement.

COMMENTARY

Supreme Court

1989: With regard to paragraph [(d)[now 4]] (4), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

3. Discussion and explanation of Recommendation:

This proposed Rule change is an adoption of the current law regarding the use of an attorney name while that attorney is suspended or disbarred for disciplinary matters.