

Notice For Comment

Proposed Regulations of the Attorneys' Advertising Commission, pursuant to SCR 3.130-7.03 (5) (a)

As approved by the KBA Board of Governors
January 17, 2003

Publisher's Note:

Supreme Court Rule SCR 3.130 contains the Kentucky Rules of Professional Conduct (KRPC) which include rules on lawyer advertising. KRPC 7.03 establishes an Attorneys' Advertising Commission (Commission) which has general responsibilities for implementing the lawyer advertising rules. In discharging its responsibilities, the Commission is given authority to issue and promulgate regulations subject to prior approval by the Board of Governors. When proposed regulations are issued, members of the Kentucky Bar Association are entitled at least sixty (60) days advance notice and an opportunity to comment. The Commission has promulgated the following enumerated regulations which were approved by the Board of Governors on January 17, 2003 subject to review and consideration of comments from the membership. Members wishing to comment on these proposed regulations must do so in writing. Any written comments must be sent no later than June 1, 2003 to the Attorneys' Advertising Commission, c/o Bruce K. Davis, KBA Executive Director, 514 West Main Street, Frankfort, KY 40601-1883.

AAC Regulation No. 1:

FALSE, DECEPTIVE AND MISLEADING ADVERTISING

not designed in any way to limit the authority of the Inquiry Commission with regard to any of the rules of professional conduct.

A. Authority, Purpose and Scope

1. SCR 3.130-7.03(5) provides in part that the Attorneys' Advertising Commission [identified throughout these regulations as "the Commission"] has general responsibility for the implementation of Rule 7 of the Kentucky Rules of Professional Conduct (SCR 3.130-7.01 et seq.) SCR 3.130-7.03(5)(a) provides, further, that the Commission may issue and promulgate regulations to discharge its responsibility. This Regulation implements SCR 3.130-7.15, prohibiting false, deceptive or misleading communications, pursuant to the authority conferred upon the Commission in SCR 3.130-7.03(5).

2. This Regulation No. 1 identifies certain types of content that render an advertisement false, deceptive or misleading within the meaning and intent of SCR 3.130-7.15. However, this Regulation is not intended to be an exhaustive listing of all ways in which an advertisement may be false, deceptive or misleading for purposes of SCR 3.130-7.15. Accordingly, this Regulation will not be construed as limiting the provisions of that Rule or as limiting the power of the Commission to determine that a particular advertisement is false, deceptive or misleading for reasons not specified in this Regulation. Further, it is

3. This Regulation No. 1 applies only to communications by or on behalf of a lawyer or law firm that concern legal services available from the lawyer or firm and:

- a. are disseminated over electronic broadcast media, including television and radio advertisements;
- b. are published in public print media, including advertisements in newspapers, magazines and telephone directories;
- c. appear in any print or electronic publication disseminated by a third party, including advertisements that appear in programs for public events or in newsletters, directories or other publications of civic organizations, charitable entities and educational institutions;
- d. are accessible to the public on the internet, including home pages and World Wide Web sites;

- e. are issued as unsolicited electronic mail (“e-mail”) communications to one or more persons with whom the lawyer or firm has no family relationship or direct prior professional relationship;
- f. are contained in newsletters, brochures, pamphlets or other printed materials provided to prospective clients; or
- g. constitute solicitation of professional employment from a prospective client within the scope of SCR 3.130-7.09.

- 5. includes an appearance by a non-lawyer in a manner that suggests or implies that he or she is a lawyer;
- 6. includes an appearance by an actor in a manner that suggests or implies that he or she is an actual client of the advertising lawyer or law firm; or
- 7. displays any “prop” (including any motor vehicle, product or other tangible item not actually involved in a legal matter) in a manner that suggests or implies that it was actually involved in a particular legal matter.

B. Advertising That Constitutes a Material Misrepresentation of Fact or Law Under SCR 3.130-7.15(1)(a)

SCR 3.130-7.15 (1)(a) provides in part that a communication about legal services is false, deceptive or misleading if it contains a material misrepresentation of fact or law. The Commission will consider an advertisement to be misleading and to contain a material misrepresentation of fact or law, in violation of the said Rule, if the advertisement:

- 1. contains any material misrepresentation regarding the nature of the services offered in the advertisement or the restrictions imposed upon those services by the Rules of the Supreme Court of Kentucky;
- 2. contains any material misrepresentation of fact regarding a lawyer’s educational background, employment history, professional experience or other credentials;
- 3. contains any material misrepresentation of fact regarding a law firm’s collective experience in a field of practice;
- 4. contains any material misrepresentation of fact regarding the identity of the lawyer(s) who will actually perform the legal services or the location of the office where the services will be performed;

C. Information That Must Be Included in an Advertisement to Avoid a Misleading Omission Under SCR 3.130-7.15(1)(a)

SCR 3.130-7.15(1)(a) provides in part that a communication about legal services is false, deceptive or misleading if it omits a fact necessary to make the communication as a whole not materially misleading. The Commission will deem an advertisement to be misleading, within the meaning and intent of the said Rule, if the advertisement fails to include any information required by this Part C.

1. Office location; telephone number.

- a. Every advertisement must identify, by city, town or county, one or more bona fide office locations of the Kentucky lawyer or lawyers who will actually perform the services advertised. For the purposes of this requirement, a bona fide office is a physical location maintained by the lawyer or law firm where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis.
- b. An advertisement must not include a telephone number in a manner that misrepresents the geographic location of the office where the advertised legal services will be performed. If an advertisement includes a telephone number with an area code for a geographic region

in which the lawyer or law firm does not maintain a bona fide office, the advertisement must include a statement that the lawyer or firm does not maintain an office within the area code indicated by the telephone number. In the event of the use of a toll free number, the advertisement must indicate the location of the bona fide office(s) where a substantial amount of the services will be performed.

- c. The information referred to in (a) and (b) is not required on advertisements by group pre-paid legal plans or non-profit legal services agencies that utilize an intake or "hot-line" number for the purpose of screening, referral or giving limited legal advice, provided however, that the advertisement must otherwise comply with the Supreme Court Rules and these regulations, including the requirement of SCR 3.130-7.2(3) that a Kentucky lawyer, or lawyer otherwise admitted as provided in SCR 2.112, be listed.

2. Fair disclosure of legal requirements.

- a. In every case where an advertisement refers to the recovery of money, it must include an appropriate explanation of the legal requirements for such recovery. In any reference to a tort case, or other case in which monetary damages may be recovered, the advertisement must include, at a minimum, information that liability must be proven, that recovery of money is related to damages suffered by the plaintiff that are recoverable by law, and that recovery may be dependent on the ability to collect from the responsible party(ies), provided, however, that such statement must be in reasonably understandable language directed to the consumer. Failure to include that information in a prominent manner will be considered a misleading omission.
- b. In every case where an advertisement refers to the defense of a claim for the recovery of money, it must include an

appropriate explanation of the legal requirements for such defense. In any reference to a tort case, or other case in which monetary damages are sought, the advertisement must include, at a minimum, an appropriate discussion of liability and damages. Failure to include that information in a prominent manner will be considered a misleading omission.

D. Advertising That Creates Unjustified Expectations or Makes Unsubstantiated Comparisons Under SCR 3.130-7.15(1)(b) and (c)

SCR 3.130-7.15(1)(b) and (c) provide that a communication about legal services is false, deceptive or misleading: if the communication is likely to create an unjustified expectation about results the lawyer can achieve, states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law, or compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

The Commission finds that it is misleading or deceptive, and does constitute a material misrepresentation, to lead a consumer of legal services to have unrealistic expectations about those services. An advertisement violates SCR 3.130-7.15(1)(b) and (c) if it fails to comply with this Part D.

1. Testimonials. An advertisement must not contain or refer to a testimonial. For purposes of this provision, a testimonial is a statement by any person, or by an actor portraying any person, regarding any of the following:

- a. the quality of legal services rendered by the advertising lawyer or law firm in a particular legal matter,
- b. the results obtained by the lawyer or firm in a particular legal matter, or
- c. the client's level of satisfaction with the result obtained in a

particular legal matter.

2. Advertising that refers to particular matters or results. An advertisement must not state or refer to any of the following:

- a. the dollar amount of a judgment, verdict or settlement in any particular legal matter, unless the reason for doing so is to disseminate information regarding a judgment, verdict or settlement in a class action for the purpose of notifying persons who may have a right to participate in the proceeds thereof;
- b. any result that the advertising lawyer or law firm obtained in any particular legal matter; or
- c. the cumulative dollar value of claims that the advertising lawyer or law firm has prosecuted or defended.

3. Advertising that claims or implies a unique level of prior success.

- a. An advertisement must not state or imply that the advertising lawyer or law firm has been more successful than other lawyers or firms in obtaining satisfactory results for clients, unless the statement or implication is factually substantiated by information provided to the Commission by the advertising lawyer or law firm. In determining whether the statement or implication about prior success is factually substantiated, the Commission will consider all relevant factors. Factors that indicate that an advertisement does not violate this provision include:
 - (1) A showing that the statement or implication about prior success refers to an identifiable arena of legal practice in which the lawyer's or firm's actual level of success can be accurately assessed; and
 - (2) A showing that the statement or implication about prior success is

supported by objective information and a statistically meaningful volume of data, as distinguished from information that is subjective or anecdotal in nature.

- b. The following types of content do not constitute statements or implications about prior success within the meaning and intent of this regulation:
 - (1) Communications regarding fields of practice that conform to the requirements of SCR 3.130-7.40;
 - (2) Factual information regarding a lawyer's or law firm's experience in legal matters of a particular nature, as distinguished from statements or implications regarding the lawyer's or firm's level of success in those matters.

4. Advertising that suggests a likelihood of satisfactory results irrespective of the merits of the particular matter. An advertisement must not state or imply that the advertising lawyer or law firm will be able to obtain satisfactory results for a client regardless of the actual merits of the client's particular legal matter. In determining whether an advertisement violates this provision, the Commission will consider all relevant factors, including any information submitted to the Commission by the advertising lawyer or law firm. Factors that indicate an advertisement violates this provision include:

- a. Content that states, implies or suggests that potentially adverse parties will be more likely to cooperate in resolving the client's legal matter because the client is represented by the advertising lawyer or law firm; or
- b. Content that states, implies or suggests that the client will more likely prevail in a legal dispute if the client is represented by the advertising lawyer or law firm, irrespective of the merits of the client's claim or defense.

AAC Regulation No. 2:

**PERMISSIBLE CONTENT OF
ADVERTISEMENTS SUBMITTED
SIMULTANEOUSLY WITH PUBLICATION**

Pursuant to SCR 3.130-7.05(1)(a)(26) the Commission may specify additional information that may be contained in advertisements that are permitted to be simultaneously submitted. The following additional information may be included in any of these advertisements:

1. Participation by the lawyer in community groups or clubs and nonprofit charitable organizations or groups, either as a member or officer;
2. Previous employment positions, including governmental and non-governmental employment;
3. Enlargements of business cards that are not themselves advertisements under SCR 3.130-7.02(1)(a), but if the advertisement includes reference to a website, the website is considered a separate advertisement;
4. Listings of immediate family, such as spouses, children and parents;
5. Information identifying the offices of the firm in several jurisdictions or cities within or without the Commonwealth of Kentucky, if such offices meet the standards for an office contained in AAC Reg. No. 1. C. (1);
6. The length of time any particular law firm or lawyer has been in practice;
7. The types of information listed in SCR 3.130-7.05(1)(a)(6)-(13) may include both past and present participation or status, if the advertisement discloses, when necessary, that the lawyer is no longer a participant or no longer holds that status;
8. A photograph of the lawyer with no accompanying scene in the background of the photograph;

9. Words such as "congratulations" or "good luck," when used in program advertisements for charitable or educational functions;
10. Such variations on the items contained herein and in SCR 3.130-7.05(1)(a) (1-25) that are minor or technical in nature and may be reviewed and approved by the designee of the Commission named herein.

AAC Regulation No. 3:

**COMMUNICATIONS THAT REQUIRE THE
DISCLAIMER
"THIS IS AN ADVERTISEMENT"**

SCR 3.130-7.09(3) requires that certain types of advertisements contain the disclaimer "THIS IS AN ADVERTISEMENT." In addition, SCR 3.130-7.25 authorizes the Commission to require the disclaimer "THIS IS AN ADVERTISEMENT". This Regulation No. 3 clarifies the relationship between SCR 3.130-7.09(3) and SCR 3.130-7.25.

1. SCR 3.130-7.09(3) does not apply to every written, recorded or electronic communication from a lawyer. Rather, it applies only to any such communication that solicits "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." The term "particular matter" includes any identifiable type or category of legal matter as well as any specific case of that consumer. An advertisement that is within the scope of SCR 3.130-7.09(3) must include the disclaimer "THIS IS AN ADVERTISEMENT."

2. Even if an advertisement does not constitute a solicitation of professional employment within the scope of SCR 3.130-7.09, the Commission may require the disclaimer "THIS IS AN ADVERTISEMENT", pursuant to SCR 3.130-7.25, if the Commission concludes that the advertisement may not be perceived by the consumer as a quest for clients because of its format, manner of presentation or medium.

AAC Regulation No. 4:**DELEGATION OF ADMINISTRATIVE TASKS**

Supreme Court Rule 3.130-7.03 provides that the Commission may delegate to an employee of the KBA the authority to approve advertisements submitted under SCR 3.130-7.05(2). The Commission hereby delegates this function to the advertising paralegal, with the supervision of the Office of Bar Counsel and the Director, to approve such submissions in the limited circumstances as follows:

1. The Commission has granted prior approval of the advertisement subject to a condition and the lawyer is making a resubmission to comply with that condition;
2. The Commission has reached an informal resolution and the attorney is resubmitting the advertisement to determine if the advertisement complies with the terms of the informal resolution;
3. To determine if a submission is properly made as a simultaneous submission. If it is determined not to qualify, then the KBA would be authorized, through its designee, to issue a letter informing the attorney that the submission does not qualify as a simultaneous submission and should be submitted under SCR 3.130-7.05(2) to the Commission;
4. Advertisements submitted for review which, on their face, comply with the rules and regulations of this Commission and contain no issues requiring the individual attention of the Commission;
5. If its designee determines a question exists concerning compliance with these regulations or the Supreme Court rules that requires the Commission's review, the advertisement or videotape may be submitted to the Commission by the designee.

AAC Regulation No. 5:**TIME PERIOD FOR REVIEW AND APPROVAL OF VIDEO ADVERTISEMENTS**

1. SCR 3.130-7.05(2) allows the Commission a period of thirty days to consider an advertisement. The thirty-day period runs from the date of submission of the videotape, transcript and fees. If a transcript is presented without three copies of the videotape, the Commission will attempt to review and respond to the submission within thirty days, but the thirty day period set forth in SCR 3.130-7.05(2) will not begin to run and the advertisement will not be deemed approved if the Commission fails to respond within thirty days.

2. If the Commission approves a transcript subject to a review of the videotape, the thirty-day time period set forth in SCR 3.130-7.05(2) will commence upon the Commission's receipt of the three copies of the videotape.

3. If a videotape is resubmitted to the Commission with changes in order to comply with suggestions by the Commission, the advertisement will be deemed approved if no notice of proposed disapproval is issued within thirty days after the date of the re-submission.

AAC Regulation No. 6:**REQUEST FOR HEARING; INFORMAL RESOLUTION PROCEDURE**

1. If a lawyer or law firm desires a hearing pursuant to SCR 3.130-7.06(1), a written request for such a hearing must be made within fifteen days following the date of the notice of proposed disapproval. The written request for a hearing must state whether the lawyer or firm wishes to seek informal resolution of the Commission's objections to the proposed advertisement as authorized by SCR 3.130-7.06.

2. If a lawyer or law firm requests a hearing and wishes to seek informal resolution, the following procedure will apply:

- a. Within seven days after the request for hearing is received, the advertising paralegal will assign the

- file to a member of the Commission panel that reviewed the advertisement.
- b. Within fourteen days after receiving such an assignment, the member of the Commission will attempt to reach a compromise with the advertiser. If successful, that member will promptly notify the other members of the Commission (or panel thereof) of the terms of the proposed resolution.
 - c. Within fourteen days of being notified of the proposed resolution, the other members of the Commission (or panel thereof) will state any concern or objection to the proposed informal resolution.
 - d. At the end of the time period set forth in (c) above, or after an unsuccessful resolution, the Commission will notify the lawyer or law firm in writing whether an informal resolution has been reached.
 - e. Within fifteen days of the date of a notice that an informal resolution conference has not reached a successful resolution, the lawyer or law firm must notify the Commission in writing if the lawyer or firm wishes to proceed with a hearing.

AAC Regulation No. 7:

HEARING PROCEDURE

1. If a notice of proposed disapproval is not resolved through an informal resolution pursuant to Regulation No. 6, and if the lawyer or law firm wishes to proceed with a hearing, the Commission, through its designees, will appoint a hearing officer to preside over the hearing. The hearing officer will be a member of the panel of hearing officers designated by the Supreme Court for the hearing of disciplinary matters, or such other hearing officer as the Commission may select, under SCR 3.130-7.06(1) and SCR 3.130-7.03(5)(d). The appointment will be made within fifteen days after the lawyer or law firm notifies the Commission:

- a. that the lawyer or firm does not wish to pursue informal resolution, pursuant to paragraph 1 of Regulation No. 6; or
- b. that the lawyer or law firm wishes to proceed with a hearing after an attempt at informal resolution has failed, pursuant to paragraph 2(e) of Regulation No. 6.

2. In a proceeding under SCR 3.130-7.06(1), the parties will be the advertising lawyer or law firm and the Kentucky Bar Association ("KBA"). The KBA will be represented in the proceeding by the Office of Bar Counsel. Any notice to the advertiser will also be sent to the Kentucky Bar Association Office of Bar Counsel.

3. Pursuant to SCR 3.130-7.06(1) and SCR 3.130-7.07, the hearing will be held within thirty days of the date of the appointment of the hearing officer as reflected in the notice to the parties.

4. The hearing officer may provide for pre-hearing conferences, disclosures of witnesses, and proposed exhibits. The hearing officer will conduct a hearing to be recorded by a court reporter. The parties will have the rights secured to a party by the Rules of Civil Procedure and the Kentucky Rules of Evidence with respect to the introduction of evidence, the right to compel the attendance of witnesses and the production of books, papers and documents and other writings except those contained in the files of Bar Counsel, and the right to cross examination. The hearing officer may also permit the filing of simultaneous briefs by the Kentucky Bar Association Office of Bar Counsel and by the lawyer or law firm. The briefs must be filed within ten days after the hearing.

5. The hearing officer must issue written recommended findings of fact and conclusions of law to the Commission within twenty days from the last date for filing simultaneous briefs. If no briefing schedule is established, the hearing officer must issue written recommended findings of fact and conclusions of law within twenty days after the hearing.

6. Under SCR 3.130-7.07(1), the Commission will issue and serve a final decision on the parties and the hearing officer within sixty days after the issuance of the written recommended findings of fact and conclusions of law by the hearing officer.

**AAC Regulation No. 8:
TIME FOR FILING APPEAL**

An appeal pursuant to SCR 3.130-7.07(1) must be filed within thirty days after service of the Commission's final decision.

**AAC Regulation No. 9:
PUBLICATION OF REGULATIONS**

The Commission will provide copies of these regulations upon request to any attorney or member of the public.

**AAC Regulation No. 10:
COPYING AND RETRIEVAL CHARGES**

SCR 3.130-7.08 permits the records of the Commission to be inspected and copied. The Kentucky Bar Association may charge a reasonable fee for copies of any Commission records that are requested, not to exceed \$.50 per page. It may also charge a search fee

of \$25.00 per hour for staff time spent responding to requests for inspection of records or making copies in the event its designee determines such is appropriate given the time required for the assembly or copying of the records.

**AAC Regulation No. 11:
REQUIREMENT FOR COMPLETE
INFORMATION**

In submitting an advertisement the lawyer or law firm must provide sufficient information to the Commission with the submission to enable the Commission to review the advertisement, and must respond to any requests for additional information that the Commission deems necessary to the review of the advertisement.

**AAC Regulation No. 12
OTHER PROCEEDINGS**

Proceedings before the Commission do not preclude or preempt other proceedings before the Court or any of its agencies as authorized in the Supreme Court Rules.

Half Page Ad
Daniels-Head Ins. Agency, Inc.
pu/pg. 20, Jan 03 issue