

PROPOSED AMENDMENTS TO THE KENTUCKY RULES OF EVIDENCE

1. KRE 406 Habit; Routine Practice

Proposed adoption of KRE 406:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

COMMENT

Most jurisdictions (perhaps all but Kentucky and one other) recognize the propriety of proving that a person acted in a particular way on a given occasion by showing that he had a "habit" of so acting. At the same time, most if not all jurisdictions refuse to allow litigants to prove that a person acted in a particular way on a given occasion by showing that he had a particular trait of character (except in criminal cases pursuant to KRE 404). Evidence that a person habitually stops at a railroad crossing before moving across, offered to show that he stopped on a given occasion, is a classic illustration of the former; evidence that a person has a general disposition toward carefulness, offered to prove that he stopped at a crossing on a given occasion, is an illustration of the latter.

Rule 406 authorizes the introduction of evidence of a person's habit (and the routine practice of an organization) without opening the gates to the introduction of evidence of character or generalized disposition. The provision contains no definition of "habit" or "routine practice" but the following definition from the Advisory Committee Notes on Federal Rule 406 is both helpful and typical:

"Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic." Fed.R.Evid. 406, Advisory Committee's Note.

It is contemplated that testimony about a driver's specific behavior (such as activating turn signals) would be admissible under the provision but that testimony about a driver's general behavior (such as always driving carefully) would be inadmissible.

The provision does not attempt to address the following questions: (1) How many times does a response to a specific stimulus have to occur in order to

constitute a habit for purposes of the rule? (2) How much behavioral uniformity is required for multiple repetitive responses to qualify as habitual under the rule? With respect to these questions, drafters of the Federal Rules made the following points:

. . . The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. . . . While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated." Fed.R.Evid. 406, Advisory Committee's Note.

Evidence authorities believe that the lack of certainty on these points is insufficient reason for an exclusion of all habit evidence and that these are matters that can be resolved by the trial judge (as he/she resolves other matters of relevance) on a case-by-case basis. The same is true with respect to matters involving the methods by which habit can be proved (a single witness who has seen 50 responses or 50 witnesses who have seen 1 response). With respect to all such matters, the trial judge is well-suited to resolve issues bearing on admissibility and, of course, the trial judge has the discretion under Rule 403 to exclude such evidence when its probative value is substantially outweighed by such undesirable effects as undue delay, waste of time, confusion of the jury, and others.

Rule 406 is borrowed from the Federal Rules without modification.

Rule 406 changes Kentucky law. The Supreme Court ruled repeatedly during the last century that evidence of habit could not be used to prove conduct in conformity with habit. See e.g., Lexington R. Co. v. Herring, 96 S.W. 558 (Ky. 1906); Cincinnati, N.O. & T.P. Ry. Co. v. Hare's Adm'x, 178 S.W.2d 835 (Ky. 1944). Recently, however, a majority of the Court expressed the view that habit evidence should be admissible to prove conduct in conformity with habit, although a majority held that such evidence could not be admitted without explicit authorization for such in the Rules of Evidence. See Burchett v. Commonwealth, 98 S.W.3d 492 (Ky. 2003). Rule 406 adopts the view of the Court's majority and brings Kentucky law into line with that of nearly all other states and the Federal Rules.

2. **KRE 407 Subsequent remedial measures**

Proposed amendments to KRE 407:

When, after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence [in connection with the event.], culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures [in products liability cases or] when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

COMMENT

The objective of the amendment would be to modify the existing law to prohibit the introduction of evidence of subsequent remedial measures in products liability litigation (what some think of as strict liability litigation). The original federal rule was silent with respect to whether evidence of subsequent remedial measures was admissible or inadmissible in strict liability litigation and federal courts split over the issue, with a strong majority holding the prohibition applicable in such cases. In 1997, the federal counterpart to Rule 407 was amended to make this majority holding a part of the rule. The proposal to amend Kentucky's 407 would bring the Kentucky law into conformity with the federal law.

The following statement from a federal case decided before amendment of the federal provision describes well the rationale for the proposed amendment:

The rationale behind Rule 407 is that people in general would be less likely to take subsequent remedial measures if these repairs or improvements would be used against them in a lawsuit arising out of a prior accident. By excluding this evidence defendants are encouraged to make such improvements. It is difficult to understand why this policy should apply any differently where the complaint is based on strict liability as well as negligence. From a defendant's point of view it is the fact that the evidence may be used against him which will inhibit subsequent repairs or improvements. It makes no difference to the defendant on what theory the evidence is admitted; his inclination to make subsequent improvements will be similarly repressed. The reasoning behind this asserted distinction we believe to be hypertechnical, for the suit is against this manufacturer, not against the product. Werner v. Upjohn Co., Inc., 628 F.2d 848, 857 (4th Cir. 1980).

The argument against this position is that a mass producer of goods will not be deterred from taking subsequent remedial measures by the thought that its actions might be used against it in litigation, thereby leaving the prohibition without a rationale and having the effect of excluding relevant evidence. The difficulty of confirming or denying this claim and the very high probability of prejudice from the introduction of this kind of evidence tilts the scales in favor of exclusion of the evidence without regard to whether the case is based on a theory of negligence or a theory of strict liability.

3. **KRE 504 Husband-wife privilege**

Proposed amendments to KRE 504:

- (a) Spousal testimony. The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.
- (b) Marital communications. An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage. The privilege may be asserted only by the individual holding the privilege or by the holder's guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.

- (c) Exceptions. There is no privilege under this rule:
- (1) In any criminal proceeding in which [sufficient evidence is introduced to support a finding] the court determines that the spouses conspired or acted jointly in the commission of the crime charged;
 - (2) In any proceeding in which one (1) spouse is charged with wrongful conduct against the person or property of:
 - (A) The other;
 - (B) A minor child of either;
 - (C) An individual residing in the household of either; or
 - (D) A third person if the wrongful conduct is committed in the course of wrongful conduct against any of the individuals previously named in this sentence[. The court may refuse to allow the privilege in any other proceeding if the interests of a minor child of either spouse may be adversely affected]; or
 - (3) In any proceeding in which the spouses are adverse parties.

(d) Minor Child. The court may refuse to allow the privilege in any proceeding if the interests of a minor child of either spouse may be adversely affected.

COMMENT

The 2004 amendment to this provision of the Rules makes two modifications in the 1992 provision on husband wife privilege. The first is substantive; the second merely clarifies part of the original provision in order to eliminate ambiguity concerning one of the exceptions to the privilege.

KRE 504(c)(1) denies claims of spousal privileges in criminal proceedings when it is established that the spouses were jointly involved in the commission of crimes. (It should be noted that this exception is similar to the crime/fraud exception to the lawyer-client privilege.) The original provision of this rule provided for loss of the privilege when there was "evidence sufficient to support a finding" of joint criminal activity by the spouses. This yardstick is normally used in the evidence rules for deciding preliminary questions involving what is called "conditional relevance" (in KRE 104(b)). A greater proof requirement (preponderance of the evidence) is used for determining all other preliminary questions upon which admissibility of evidence depends (in KRE 104(a)). The preliminary question upon which loss of the spousal privilege depends under KRE 504(c)(1) is not a conditional relevance question but is instead a so-called "competency" question that needs to be resolved by the standard set forth in KRE 104(a). The proposed amendment would make this change with respect to the "joint crime" exception to spousal privileges. It should be noted that the Supreme Court adopted this same position with respect to the crime/fraud exception to the lawyer-client privilege in Stidham v. Clark, 74 S.W.3d 719 (Ky. (2002)).

KRE 504(c)(2), as originally adopted, was ambiguous, as indicated in the following statement: "The last sentence of KRE 504(c)(2)(D) is ambiguous (perhaps partly because it seems to be out of place in the provision) but seems to create an entirely separate exception to spousal privileges that would require a trial judge to deny any and all spousal privilege claims determined to be adverse "to the interests of a minor child of either spouse." Lawson, *The Kentucky Evidence Law Handbook* 376 (4th ed. 2003). The drafters of the original provision clearly indicated in their Commentary that the intent was to create a separate exception when spousal testimony was needed for determination of matters involving "the best interests of a minor child":

"The final sentence of the rule [KRE 504(c)(2)] provides that a judge may refuse to recognize the privilege in any kind of action if convinced that spousal testimony is needed to decide what is in the best interests of a minor child of either spouse." Evidence Rules Study Committee, *Kentucky Rules of Evidence—Final Draft*, p. 45 (November 1989).

The proposed amendment eliminates this ambiguity in the original provision by separating the last sentence of KRE 504(c)(2) from that provision and moving it to a new subsection of the rule, thereby clearly indicating that there is a separate exception to spousal privileges for testimony needed to determine matters involving "the best interests of a minor child." The new separate exception is now numbered KRE 504(d).

PROPOSED AMENDMENTS TO THE RULES OF THE SUPREME COURT

1. SCR 3.010 General definitions

Proposed amendments to SCR 3.010:

As used throughout this Rule 3, the following definitions shall apply unless the context clearly requires a different meaning:

"Association" is the Kentucky Bar Association.

"Attorney" is a person licensed or authorized to practice law.

"Board" is the board of governors of the association.

"Bylaws" means the bylaws of the association.

["Chairman" means the chairman of the house of delegates.]

["Chairman-elect" means the chairman-elect of the house of delegates.]

"Charge" means the pleading by which the association charges an attorney with unprofessional conduct.

"Circuit clerk" is the clerk of the court of respondent's present or last known residence.

"Clerk" is the clerk of the Supreme Court of Kentucky.

"Committee" means the committee on character and fitness defined in Rule 2.040.

"Complainant" means the party who causes to be initiated an investigation of an attorney, or who causes to be initiated a proceeding under Rule 3.160. The complainant may be a person or entity.

"Court" is the Supreme Court of Kentucky.

["Delegate" is a member of the house of delegates of the association.]

"Director" is the director of the association.

"District" means a prescribed geographical and political area of the state.

"Governor" is an elected member of the board.

["House" means the house of delegates of the association.]

"Law student" means any person enrolled in an approved law school who has successfully completed the first year therein.

"Member" means an attorney in good standing as required by the rules of the court.

"Officer" means a member elected or appointed pursuant to the rules.

"President" is the president of the association.

"President-elect" is the president-elect of the association.

"Registrar" is the registrar of the association.

"Respondent" is an attorney against whom a charge is filed.

"Rules" are the rules of the court.

"Section" means a body of members actively interested in and promoting improvements in a particular branch of law.

"Time" is computed as under the Rules of Civil Procedure.

"Treasurer" is the treasurer of the association.

"Trial commissioner" means the commissioner appointed pursuant to the provisions of Rule 3.230 and other rules governing disciplinary procedures.

["Vice-chairman" is the vice-chairman of the house of delegates.]

"Vice-president" is the vice-president of the association.

2. **SCR 3.023: Requirement of disclosure of professional liability insurance status**

Proposed adoption of new rule SCR 3.023:

1. A lawyer shall inform a client at the time the lawyer is engaged if the lawyer does not maintain professional liability insurance in the amount of at least \$100,000.00 per occurrence and \$300,000.00 in the aggregate. At any time subsequent to the engagement of the lawyer, if the lawyer's professional liability insurance is terminated or the coverage amounts fall below that amount, the lawyer shall so inform the client. The notice shall be provided to the client on a separate form which states: "I acknowledge receipt of the notice required by Supreme Court Rule 3.023 that [insert lawyer's name] does not maintain professional liability (malpractice) insurance of at least \$100,000.00 per occurrence and \$300,000.00 in the aggregate." The client shall sign and date the acknowledgement.
2. The lawyer shall maintain a copy of the acknowledgement for five (5) years after termination of representation of the client.
3. The notice required shall not apply to a lawyer engaged in rendering legal services to a governmental entity, to a lawyer employed by any organization providing pro bono services to the public, to a lawyer employed by or contracted with the Department of Public Advocacy who is appointed by a court, to a lawyer appointed directly by any court to represent the interests of a litigant, or to a lawyer rendering legal services to the entity that employs the lawyer as in house counsel.

4. Lawyers providing malpractice insurance at or above the specified amounts may so notify their clients.

3. **SCR 3.070 The board; functions and membership**

Proposed amendments to SCR 3.070:

The Board is the governing body of the Association and the agent of the Court for the purpose of administering and enforcing the Rules. It shall consist of the President, the President-Elect, the Vice President, [the Chairman of the House of Delegates, the Chairman-Elect,] the immediate Past President, the Chair[man] of the Young Lawyer's Section, and two attorneys elected from the membership of the Association in each appellate district of the state as presently existing or hereafter created.

4. **[SCR 3.110 The house; functions, membership, terms and vacancies]**

Proposed deletion of rule SCR 3.110:

[The house of delegates shall consist of a number of representatives of each judicial district equal to the number of circuit judges presiding therein. The members shall advise with the board; coordinate programs of the association calculated to improve the administration of justice; and perform such other functions and duties as may be delegated to it by the board. They shall be elected for terms of two years and no member of the house who has served three consecutive full terms after July 1, 1971, shall be eligible to again serve without at least one term of said office intervening. Officers of the house shall be selected from and by its own membership; and vacancies shall be filled in such manner as the by-laws provide. The limitation of three (3) consecutive two (2) year terms does not apply to officers of the house; however, members of the house who have served six (6) or more consecutive years, including terms as an officer of the house, shall not be eligible to serve again without an intervening term. Each past president shall be a member of the house unless he/she is a member of the board of governors or serving as a member of the inquiry commission in which event he/she shall not, during that period, be a member of the house.]

5. **SCR 3.120 (2) Fiscal provisions**

Proposed amendment to section (2) of SCR 3.120:

(2) An annual budget including all income and expenditures shall be prepared by a budget and finance committee composed of the president-elect and two members of the Board appointed by him/her; the [chairman-elect of the house and two members of the house appointed by him; and the director] vice president; two members at large appointed by the president-elect; a member of the inquiry commission; a member of the continuing legal education commission; a member of the IOLTA trustees; a member of the clients' security fund trustees; and the Director. The president-elect shall act as chair[man].

6. **SCR 3.130(7.02)(1)(g) Definitions**

Proposed amendment to subsection (g) of section (1) of SCR 3.130(7.02):

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:

(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.

7. SCR 3.130(7.03),(5),(7)and new section(8) Attorneys' Advertising Commission

Proposed amendments to sections (5), (7) and new section (8) of SCR 3.130(7.03):

(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 [approve] review advertisements on its behalf [submitted pursuant to Rule 7.05(2)].

(d) [Hold hearings] Review advertisements, issue advisory opinions concerning the compliance of an advertisement with the Advertising Rules and Regulations, conduct such proceedings or investigations [, subpoena witnesses and documents and administer oaths] 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 [these Rules] the Advertising Rules and the Advertising Regulations, [and] 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 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 [; provided, however, that one member, or a hearing officer appointed by the Commission, may conduct hearings and in an emergency where a

quorum is unavailable one member may issue a notice of proposed disapproval under Rule 7.06.] .

(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.

8. SCR 3.130(7.04) Advertising of fees

Proposed amendments to SCR 3.130(7.04):

[(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)] No advertisement shall describe a fee or fees as "reasonable."

9. SCR 3.130(7.05) [Approval] Filing of advertisements

Proposed amendments to SCR 3.130(7.05):

(1) No lawyer may advertise unless the lawyer complies with [either] SCR 3.130 [, Rule 7.05(1) or (2)] (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 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) [Simultaneously with the publication of] With regard to any advertisement [under this subsection,] containing 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 [, or if by]. 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 [. Any advertisement mailed or delivered to an individual addressee or addressees, shall be mailed to the Commission. A list of all persons or firms or groups to whom the advertisement has been sent shall be maintained in the principal office in Kentucky of the advertising lawyer or firm for a period of two (2) years and shall be made available for inspection by authorized representatives of the Commission at any reasonable time.] 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) [Three (3) copies of a fair and accurate representation of any advertisement that does not qualify under Rule 7.05(1) shall be delivered to the Commission, c/o the Director, at the Director's office, during normal office hours on a work day, at the same time the advertisement is used or published. The fair and accurate representation of a broadcast media advertisement shall include appropriate video cassette or audio cassette copies along with a typed transcript of the advertisement.] With regard to any advertisement that 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 [filing and the thirty (30) day period in which the Commission must respond shall not begin until the filing fee has been received by the Commission c/o the Director at the Director's office. In the event the Commission or any member thereof, or their designee, does not issue a notice of proposed disapproval under rule 7.06 by the end of the 30th day following receipt of such advertisement and filing fee, the advertisement shall be deemed approved. No approval so obtained shall constitute a defense against charges made under this Rule or any other Rule if the advertisement shall be subsequently determined to contain false, misleading, or deceptive information.] 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) [An advertisement which has been approved may be used so long as it contains no false, misleading or deceptive information, provided there is no change in these rules which causes the advertisement not to comply therewith, and provided there is no withdrawal of approval pursuant to Rule 7.06(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.

10. **SCR 3.130(7.06) [Disapproval of advertisements] Advisory opinions**

Proposed amendments to SCR 3.130(7.06):

(1) [In the event the Commission finds that there are reasonable grounds to believe that an advertisement, other than an advertisement which has previously been approved, and which approval has not been withdrawn, or has previously been deemed approved under Rule 7.05(2), does not comply with the requirements of this Rule, it or its designee shall immediately issue a notice in writing of proposed disapproval setting forth the factual and legal basis for the proposed disapproval. In the notice of proposed disapproval, an opportunity shall be provided for a hearing before one or more of its members or a hearing officer appointed by the Commission and for the filing of a brief. After consideration of any information submitted to it, the Commission shall issue its final decision in writing within 60 days. It shall be the duty of the Commission to seek informal resolution prior to issuing a formal decision. In arriving at such decision, the Commission shall consider modification of the advertisement or the disapproval decision.] 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 and shall be 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 will 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 Regulations, that lawyer shall not be disciplined for any use of that advertisement, except as otherwise provided in SCR 3.130(7.06)(6). [In the event the Commission has issued a notice of proposed disapproval and has further determined that the publication of the advertisement may be contrary to the public interest lawyer, it 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.]

(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. [If an advertisement is subsequently discovered to be false, misleading or deceptive, the Commission or its designee may notify the advertising lawyer and all prior approval of such advertisement shall be deemed not to apply to subsequent use thereof.]

(4) If the Commission determines that the Advertising Rules or Advertising Regulations have been violated by a lawyer, it [any advertisement either fails to meet the requirements of Rule 7.05(1) or has not been approved under Rule 7.05(2) the Commission] shall make a determination whether the violation can be dealt with administratively, or can be presumed to be intentional. The Commission may [deal with] address administrative violations. Intentional violations [are those which represent (1)] include but are not limited to: (1) a failure by a lawyer to follow these Advertising Rules, or the Advertising Regulations by 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 [these] the Advertising Rules or Advertising Regulations; or (3) a pattern of

repeated disregard for these Advertising Rules [or Advertising Regulations]. Intentional violations [shall] may be referred to the Inquiry Commission.

(5) In the event 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, it 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.

11. **SCR 3.130(7.07) [APPEAL] Review of filings**

Proposed amendments to SCR 3.130(7.07):

(1) Any person aggrieved by a notice of proposed disapproval or final decision of the Commission pursuant to Rule 7.06 may appeal to the Board by filing with the Director a notice of review accompanied by a supporting brief on the merits of the case within thirty (30) days after the date of the notice of disapproval or final decision. Filing shall be made either by deposit in the United States mail, postage prepaid, or by delivery, to the Office of the Director. The Director may file a brief within thirty (30) days thereafter in support of the Commission's decision. Review by the Board shall be on the record of the Commission, and shall be decided at the Board's next meeting after receipt of all briefs, and the decision shall be rendered within thirty (30) days thereafter.

(2) Any person aggrieved by a decision of the Board may file a notice of review with the Clerk of the Supreme Court within thirty (30) days after the Board's decision is rendered, stating reasons for review accompanied by a supporting brief on the merits of the case. The matter shall proceed as an original action and copies of all papers shall be served pursuant to Civil rule 5. The Director may file a brief within thirty (30) days thereafter in support of the Board's decision. Thereafter, the Court shall enter such orders or opinions as it deems appropriate on the entire record.

(3) The standard of review on all appeals shall be that the decision of the Commission shall be affirmed unless the Commission has erred as a matter of law, has made clearly erroneous findings on issues of material fact, or has exercised its discretion in an arbitrary or capricious manner.]

For any advertisements 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 Regulations. If it determines a violation of the Advertising Rules or 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 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 Regulations and may face disciplinary sanctions if the advertisement is found to be in violation of the Advertising Rules or Regulations.

12. **SCR 3.130(7.15) Communications concerning a lawyer's service**

Proposed amendments to SCR 3.130(7.15):

[(1)] 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.

[(2) No approval of an advertisement obtained under Rule 7.05 shall constitute a defense to charges brought under this Rule if the advertisement is used after it subsequently is found to have violated this rule.]

13. **SCR 3.130(7.60)Article III(2) Kentucky Disaster Response Plan**

Proposed amendment to subsection (2) of Article III of SCR 3.130(7.60):

(2) A unit of the Task Force shall consist of at least one member of the Board of Governors [or House of Delegates] of the Kentucky Bar Association; one member of the Court of Justice; and one or more additional designees to each unit as appointed by the Immediate Past President of the Kentucky Bar Association.

14. **SCR 3.160(1),(3), and (4) Initiation of disciplinary cases**

Proposed amendments to sections (1), (3) and (4) of SCR 3.160:

(1) After review by Bar Counsel pursuant to subparagraph (3) of this Rule, any complaint against an attorney for unprofessional conduct shall be reduced to a sworn written statement and shall be filed with the Disciplinary Clerk who shall promptly notify the attorney by certified mail, sent to the address maintained by the Director pursuant to SCR 3.175, or other means consistent with the Civil Rules, of

the complaint, and that he/she has twenty (20) days to respond to the complaint or respond to the merits. Upon [receipt] completion of the [response or]investigation by the [expiration]Office of Bar Counsel the [time to respond, whichever]matter shall [first occur, the Disciplinary Clerk shall assign the case]be assigned to an Inquiry Commission panel by rotation.

(3) If Bar Counsel deems any written complaint against a member not to state an ethical violation, he/she may submit it to the Chair of the Inquiry Commission or designee, who may decline, without investigation, to entertain it [and]. The Chair may authorize Bar Counsel to refer such complaints, if appropriate, to the Client Assistance Program Director[or]for mediation. The Client Assistance Program will report to the Chair through the Office of Bar Counsel, which will return the complaint to the complaining party with a letter of explanation[-], or proceed to file the complaint, as the Chair so directs.

(4) Neither the Kentucky Bar Association, the Board, the Director, the Inquiry Commission, the Trial Commission, the Office of Bar Counsel, nor their officers, employees, agents, delegates or members shall be liable [to any member of the bar or], to any person or entity initiating a complaint or investigation, or to any member of the bar or any other person or entity being charged or investigated by, or at the direction of, the Inquiry Commission, for any damages incident to such investigation or any complaint, charge, prosecution, proceeding or trial.

15. **SCR 3.166(1) Automatic suspension conviction of a felony**

Proposed amendments to section (1) of SCR 3.166:

(1) Any member of the Kentucky Bar Association who pleads guilty to a felony, including a no contest plea or a plea in which the member allows conviction but does not admit the commission of a crime, or is convicted by a judge or jury of a felony, in this State or in any other jurisdiction, shall be automatically suspended from the practice of law in this Commonwealth. "Felony" means an offense for which a sentence to a term of imprisonment of at least one (1) year was imposed. The imposition of probation[or], parole, diversion or any other type of discharge prior to the service of sentence, if one is imposed, shall not affect the automatic suspension. The suspension shall take effect automatically beginning on the day following the plea of guilty or finding of guilt by a judge or jury or upon the entry of judgment whichever occurs first. The suspension under this rule shall remain in effect until dissolved or superseded by order of the Court. Within thirty (30) days of the plea of guilty or finding of guilt by a judge or jury or entry of judgment whichever occurs first, the suspended attorney may file a motion with the Clerk of the Supreme Court of Kentucky setting forth any grounds which the attorney believes justify dissolution or modification of the suspension.

16. **SCR 3.170 Processing disciplinary cases**

Proposed amendments to SCR 3.170:

Upon the expiration of [thirty (30)]sixty (60) days after service upon Respondent by certified mail or other means, or receipt of a response to a complaint, whichever is later, the [Disciplinary Clerk]Office of Bar Counsel shall refer the matter, together with such investigative evidence as may have been obtained, to the Inquiry

Commission to determine whether the complaint should be dismissed or a charge should be filed. Upon motion by Bar Counsel, and with good cause shown, the Inquiry Commission may direct that the complaint be returned to Bar Counsel for further investigation[for an additional thirty (30) days].

17. SCR 3.175(1) Efficient enforcement; notice of attorney's address

Proposed amendments to section (1) of SCR 3.175:

(1) In order to facilitate the efficient enforcement of the Kentucky Rules of Professional Conduct, the rules of the Continuing Legal Education Commission, the dues obligations of attorneys, and such other communications of importance to the profession as the Supreme Court may consider appropriate, each attorney licensed by the Supreme Court to practice law in this Commonwealth shall:

(a) maintain with the Director of the Association a current address at which he or she may be communicated with by mail, the said address to be known as the member's Bar Roster address, and shall upon a change of that address notify the Director within thirty (30) days of the new address; and

(b) include his or her five (5) digit member identification number in all communications to the Association including, but not limited to, any and all communications relating to his or her membership status, membership record, dues obligations, compliance with continuing legal education requirements or disciplinary proceedings in which he or she is a respondent.

(c) in the event a post office box is provided, a current address for service of process must also be provided to the Director.

(d) Failure to maintain a current address which allows for physical service of process with the Director may be prosecuted in the same manner as a violation of the Rules of Professional Conduct.

18. SCR 3.190 Charges; form; by whom and where filed

Proposed amendments to SCR 3.190:

If a panel of or the entire Inquiry Commission determines, by a majority vote, that probable cause exists for a charge to be filed, it shall cause to be prepared such charge stating the name and present, or last known, address of the attorney and facts alleged to constitute unprofessional conduct. The charge shall be signed by a member of the panel which considers the case[and]. It shall then be filed with the Disciplinary Clerk within twenty (20) days. The Inquiry Commission may amend the charge upon its own motion, or that of the Office of Bar Counsel or the Respondent, at any time prior to hearing or submission by default.

19. SCR 3.200 Notice of filing charges; time to answer

Proposed amendments to SCR 3.200:

Upon the filing of a charge, the Disciplinary Clerk shall furnish the Respondent with a copy by certified mail, return receipt requested or other means, to the Respondent's last known address, and if none is known subsequent thereto, to the Respondent's last known bar roster address, or by[long arm]service on the Director as set forth in SCR 3.175, and notify the Respondent that he/she must within twenty (20) days after receipt of the notice file an answer and three (3) copies with the Disciplinary Clerk for transmittal to the Inquiry Commission.

20. SCR 3.225 Appointment of Trial Commission

Proposed amendments to SCR 3.225:

The Chief Justice shall appoint, subject to the approval of the Supreme Court, from among the membership of the Bar Association, [including the House of Delegates of the Kentucky Bar Association,]a Trial Commission. Members of the Trial Commission shall be lawyers licensed in the Commonwealth who possess the qualifications of a Circuit Judge. To the extent practicable, the Chief Justice shall, with the consent of the Court, appoint Trial Commissioners from each appellate district. Such Trial Commissioners shall be authorized to serve terms of two (2) years.[Such Trial Commissioners shall maintain with the Director a written schedule indicating to the Director their availability to serve as Trial Commissioners at particular times throughout the year in order to assist the office of Bar Counsel and Respondents in scheduling trials and hearings.]

21. SCR 3.240(1) and (2) Notice of appointment of Trial Commissioner and hearing

Proposed amendments to sections (1) and (2) of SCR 3.240:

(1) Upon the appointment of a Trial Commissioner, the Disciplinary Clerk shall notify the parties of his/her name and address. The Trial Commissioner shall fix the time and place of the hearing and the Disciplinary Clerk shall give notice thereof to the parties. Such hearing shall be not less than[~~twenty (20)~~thirty (30) days after the date of the notice, nor more than[~~forty-five (45)~~sixty (60) days, but for good cause shown, or by agreement, said time may be extended[.]by the Trial Commissioner.

(2) Any time, not later than ten (10) days[~~of~~]after the appointment of a Trial Commissioner or at such point in the proceeding that facts become known sufficient for such challenge, the Respondent may, by motion, challenge for cause the Trial Commissioner. If the challenge is such as might disqualify a Circuit Judge, the Chief Justice shall relieve the challenged member and direct the Clerk for disciplinary matters to immediately fill the vacancy.

22. SCR 3.285(2) Motion to reconsider or dismiss a charge

Proposed amendments to section (2) of SCR 3.285:

(2) The motion shall be verified unless filed by the Office of Bar Counsel, and shall state specifically the reasons why the matter should be reconsidered or dismissed and may be accompanied by supporting affidavits and exhibits, if any. The motion shall be filed in the office of the Disciplinary Clerk within ten (10) days

of service of the charge[s]. Any response shall be filed within twenty (20) days of service of the motion. No other [pleadings] motion to reconsider or dismiss shall be permitted in regard to the reconsideration of a charge by the Inquiry Commission, unless good cause is shown. The Commission shall rule on the motion [within fifteen (15) days of the filing of the response] at the next meeting of the issuing panel.

23. SCR 3.290(1) Filing and processing of pleadings and other papers

Proposed amendments to section (1) of SCR 3.290:

(1) Promptly after a charge is filed all further pleadings, notices, motions, orders, and briefs shall be sent to the Disciplinary Clerk, who shall file the original and forward one copy to the Inquiry Commission, through the Office of Bar Counsel, or one copy to the Trial Commissioner, if after appointment, and a copy to Respondent or Respondent's counsel of record. However, a motion to reconsider, dismiss, or amend a charge shall be sent only to the Inquiry Commission and counsel of record. All other reports, inquiries, letters and letters of transmittal, and other communications shall be sent to and processed by the Clerk, excepting, however, any communication between the parties concerning negotiations for an agreed sanction which shall not be transmitted to the Disciplinary Clerk or Trial Commissioner nor filed of record unless the sanction proposal is approved by the Court. No such paper or copy thereof shall be sent by, or on behalf of, any party to the Court, the Board, the Trial Commissioner, Inquiry Commission, or any member thereof.

24. SCR 3.320 Procedure where an attorney has been convicted of a misdemeanor or a felony

Proposed amendments to SCR 3.320:

When any member of the Association has been convicted of a felony or class["A"] misdemeanor, a copy of the judgment shall be filed by the Respondent and the attorney prosecuting the case to a plea of guilty, or conviction by judge or jury, with Bar Counsel for action under SCR 3.160. Bar Counsel shall submit copies of the judgment to the Inquiry Commission which may take action under SCR 3.165.

25. SCR 3.360 Trial Commissioner to file report with Disciplinary Clerk

Proposed amendments to SCR 3.360:

(1) When a disciplinary proceeding has been finally submitted, the Trial Commissioner shall promptly file with the Disciplinary Clerk[, within thirty (30) days after the transcript of evidence or videotape is filed with the Disciplinary Clerk, the entire transcript of the proceeding, the transcript of testimony together with such papers as may have been filed, and] a written report setting forth his/her findings of fact and conclusions of law as to whether a violation of the rules has occurred and which shall contain a concise statement of:

(a) the charges made and the defense offered by the

Respondent;

(b) the proceedings had;

(c) the facts which the Commissioner deems proved by a preponderance of the evidence, and;

(d) the sanction recommended, if any.

(2) The Trial Commissioner's report shall constitute a part of the record in the case. The report shall be advisory.

The Trial Commissioner shall file the report with the Disciplinary Clerk within thirty (30) days after the transcript of evidence or videotape has been filed with the Disciplinary Clerk, unless the parties have otherwise agreed or [shall file] the trial commissioner has filed a verified motion for an extension of time with the Disciplinary Clerk to be considered by the Board of Governors, with service on the parties, stating with particularity the grounds therefor. The [Chair] President may grant up to a sixty (60) day extension of time for the Trial Commissioner to file the report. If the Trial Commissioner fails to timely file the report or a verified motion for extension of time, the Board shall request the Supreme Court to issue a show cause order to the Trial Commissioner.

(3) Within ten (10) days after the filing of the report with the Disciplinary Clerk, either party may move to amend the findings or for additional findings of fact or conclusions of law by the Trial Commissioner. Such motion shall be ruled upon within thirty (30) days.

(4) Within thirty (30) days after the filing of the report, an order overruling a motion under SCR 3.360(3), or amended report with the Disciplinary Clerk, whichever is later, either party may file a notice of appeal with the Disciplinary Clerk. If no notice of appeal is timely filed, the entire record shall be forwarded to the Court for entry of a final order pursuant to SCR 3.370(10).

(5) Upon the report becoming final, the trial commissioner shall return the entire transcript of the proceeding, the transcript of testimony, together with such papers as may have been filed that are in his possession, to the Disciplinary Clerk.

26. **SCR 3.370(4), (8) and (12) Procedure before the Board and the Court**

Proposed amendments to sections (4), (8) and (12) of SCR 3.370:

(4) Upon the completion of briefing by the parties, the Board shall within sixty (60) days consider and act upon the entire record. Only the President, the President elect, the Vice President, the fourteen (14) duly-elected members of the Board from their respective Supreme Court Districts, and four (4) adult citizens of the Commonwealth who are not lawyers appointed by the Chief Justice as hereinafter described, shall be eligible to be present, participate in and vote on any disciplinary case. Any member, including a non-lawyer member, who has participated in any phase of a disciplinary case submitted to the Board under this rule, or has been challenged on grounds sufficient to disqualify a Circuit Judge shall be disqualified. In the event of a disqualification[,] that results in lack of a quorum the Chief Justice shall appoint a member to consider and act on the cases. Any

challenge to a member's qualifications shall be determined by the Chief Justice in accordance with KRS 26A.015, et seq.

(8) Bar Counsel or the Respondent may file a notice for the Court to review the Board's decision within thirty (30) days after the Board's decision is filed with the Disciplinary Clerk, stating reasons for review, accompanied by a brief supporting his/her position on the merits of the case. The opposing party may file a brief within thirty (30) days thereafter. Before the notice for review can be filed, the Respondent shall furnish a bond with surety acceptable to the Disciplinary Clerk, conditioned that if the principal in the bond be disciplined by the Court, he/she will promptly pay all costs incurred in the proceeding, including those certified under Rule 3.370. If Respondent files a response *in forma pauperis*, no bond shall be required.

(12) In each case to be presented to the Trial Commissioner, there shall be supplied with the Disciplinary Clerk's file a sealed envelope containing a statement of all orders of unprofessional conduct, years of membership in the association, and withdrawals from the association and reasons therefore, of the Respondent. Same will be opened only if the Trial Commissioner makes a finding of a violation and may be considered in deciding what discipline to impose. Such statement will become part of the record of the case and be transmitted with the rest of the file to the Disciplinary Clerk, Board and/or Supreme Court. Prior to the submission of a case to the Trial Commissioner or the Board a copy of said statement will be sent to the Respondent, who may review documents relative to it at the Bar Center and may comment upon and point out errors contained in the statement.

27. **SCR 3.380 Degrees of discipline**

Proposed amendments to SCR 3.380:

Upon findings of a violation of these rules, discipline may be administered by way of private reprimand, public reprimand, suspension from practice for a definite time, all of which may be with or without such conditions as the Court may impose, or permanent disbarment.

28. **SCR 3.455 Subpoena power**

Proposed amendments to SCR 3.455:

Upon application by the [Director and for good cause shown, a majority] Office of Bar Counsel or a claimant, or upon the initiation of the [t] Trustees of the [c] Client's [s] Security [f] Fund, the Director [of the Association] may [authorize the Director to] issue a subpoena to any person or legal entity to appear before it and to produce to the [t] Trustees any evidence deemed by the [t] Trustees to be material to the investigation of a claim for compensation being considered under the [c] Client's [s] Security [f] Fund [p] Plan of the Association. The Director shall mail a copy of the application to the person or legal entity to be subpoenaed, to the claimant and to the attorney [whose client has made a] against whom the claim[, who] is made, each of whom shall have twenty (20) days from the date of the application to file an objection [with the trustees]. If no objection is made, or a timely objection is overruled by the Chair of the [t] Trustees[, the person or legal entity making the

objection shall have twenty (20) days from the date of the trustee's decision to file an appeal with the Board of Governors. If an appeal is filed with the Board,] the Director shall [have twenty (20) days thereafter to file a response. The Board shall consider the appeal at its next regularly scheduled meeting and enter such orders as it deems appropriate. The decision of the Board shall be final.] issue the subpoena. The subpoenaed party shall appear or produce the documents, whichever is directed by the subpoena. Any such documents will be produced to the Clients' Security Fund Trustees by delivery to the Office of Bar Counsel, which shall provide copies to the claimant and the attorney against whom the claim is made.

29. SCR 3.665(2) Procedure for accreditation of continuing legal education activities and obligations of sponsors

Proposed amendments to section (2) of SCR 3.665:

(2) Application for accreditation of continuing legal education activities shall be made by members, former members or activity sponsors using forms provided by the Association or using uniform applications adopted by the Association. Applications must provide all information required by the form in order to be reviewed. All applications shall be accompanied by the appropriate application fee as follows:

(a) Applications submitted by sponsors for activities greater than two hours in length-~~[\$25.00]~~\$50.00 per activity. Activities repeated on different dates or at different locations are separate activities and require separate applications and separate fees.

(b) Applications submitted by sponsors for activities two hours or less in length-~~[\$10.00]~~ \$20.00 per activity. Activities repeated on different dates or at different locations are separate activities and require separate applications and separate fees.

(c) Applications submitted by members or former members, regardless of length of activity-~~[\$10.00]~~ \$20.00. Each separate activity submitted for accreditation is a separate application requiring a separate fee.

30. SCR 3.666(4), (6), (7), (8) and (9) Exemptions and removal of exemptions

Proposed amendments to sections (4), (6), (7), (8), and (9) of SCR 3.666:

(4) Exemptions granted pursuant to Rule 3.666(2)(a) shall not be effective retroactively unless the applicant certifies that he or she has not practiced law, as defined in Rule 3.020, within the Commonwealth, for all time periods covered by such exemption. Members shall not practice law as defined in Rule 3.020 while said exemption is in effect. Practice of law as defined in Rule 3.020, within the Commonwealth, during the effective period of an exemption pursuant to Rule 3.666(2)(a) shall constitute unauthorized practice. Information known by the Commission regarding the practice of law during any period for which a member has certified non-practice status pursuant to SCR 3.666(2)(a) and SCR 3.666(3) is

not confidential as provided at SCR 3.690 and shall be provided along with the member's continuing legal education transcript by the Director to the Office of Bar Counsel and the Inquiry Commission in writing.

(6) A member seeking removal of a non-practice exemption granted pursuant to Rule 3.666(2)(a) shall be required to file a written application with the Commission, addressed to the Director, for the removal of said exemption. Required as attachment to the application for removal of said exemption shall be certification of completion of sufficient continuing legal education credits to meet [complete, within six (6) months of removal of the exemption,] the minimum annual continuing legal education requirement for each educational year[,], during which he or she was exempt, excluding the current educational year. [This six month period shall commence the day the exemption is removed.] The member shall be notified in writing, via certified mail, of the Commission's action on the application for the removal of the exemption.[and the timetable attached thereto. Failure to complete and report the required continuing legal education credits within the six (6) month time period will be treated as unauthorized practice.] In no case shall a member be required to [attend] certify completion of more than twenty-five (25) credits, including applicable ethics credits, as a condition of removal of the exemption. [Continuing legal education credits for this purpose shall be claimed on forms provided by the Association, and shall be forwarded to the Director.] Timely certification shall include only continuing legal education credits earned during the current educational year and two prior educational years. This Rule in no way affects the member's responsibility to complete the current year minimum annual education requirement by June 30th. The current year minimum educational requirement must be completed as set forth at SCR 3.661.

(7) Application for removal of an exemption as provided in SCR 3.666(6) shall be made by completion of forms provided by the Association. The application shall include certification of completion of such continuing legal education activities as required by these rules, including SCR 3.661(3), SCR 3.662, SCR 3.663, SCR 3.665, or as otherwise specified by the Commission.

(8) The Commission shall approve [such] the application for removal of a non-practice exemption if it appears that the member has satisfied the requirements of this Rule. [Approval of the application shall satisfy the requirement of the applicant under Rule 3.661 for the current educational year.]

(9) Application for removal of an exemption granted pursuant to SCR 3.666(2)(a) may not be made within thirty (30) days of the granting of the exemption.

31. SCR 3.675(2) Continuing legal education requirements for restoration or reinstatement to membership: procedures

Proposed amendments to section 2 of SCR 3.675:

(2) The application or affidavit of compliance submitted for restoration or reinstatement shall include certification from the Director for CLE of completion of continuing legal education activities as required by these Rules, or otherwise specified by the Commission or Court. Applicants or affiants shall request said certification from the Director for Continuing Legal Education in writing and shall

submit with said written request a fee of \$50.00 to cover the expense of the record search and certification. Applications or affidavits of compliance submitted for restoration or reinstatement which do not include [such] the required certification of continuing legal education credits, including verification of fee payment for the certification, shall be considered incomplete and shall not be processed.

32. SCR 3.800(2), (4) and (5) Legal negligence arbitration

Proposed amendments to sections (2), (4), and (5) of SCR 3.800:

(2) Definitions.

(A) "Attorney" means an attorney-at-law who is a member in good standing of the Kentucky Bar Association.

(B) "Association" means the Kentucky Bar Association.

(C) "Director" means the Director of the Kentucky Bar Association.

(D) ["Chair" means the Chair of the House of Delegates] "Vice President" means the Vice President of the Kentucky Bar Association.

(E) "Controversy" shall mean any claim of legal negligence in the amount of ten thousand dollars (\$10,000.00) or less.

(F) "Panel" means the arbitrator or arbitrators appointed or designated to arbitrate claim of legal negligence as hereinafter provided.

(4) Institution of Proceedings.

(A) Proceedings hereunder shall be begun by completing three (3) copies of a petition. The petition must be signed by one of the parties to the dispute. The petition shall state the origin and details of the dispute, the acts or omissions deemed to be negligent, and the amount claimed due as a result of the negligence alleged. Upon the filing of the petition, the petitioner shall also sign three (3) copies of an arbitration agreement. The petition and arbitration agreement shall be on forms provided by the Association and when completed shall be filed in the office of the Association.

(B) Upon the filing of the petition, the Director of the Association shall forward a copy of the petition to the [Chair] Vice President. The [Chair] Vice President, upon receipt of the petition, shall determine whether this plan applies under these Rules. The decision of the [Chair] Vice President on that matter shall be final. The [Chair] Vice President shall have full power to require additional information from the petitioner in all disputes wherein additional information is deemed desirable or necessary.

(C) In the event the [Chair] Vice President determines that the Association shall not accept jurisdiction, the petition shall be returned to the Director, with a brief explanation as to why jurisdiction has been refused. The Director shall then notify the petitioner that the Association has not accepted jurisdiction and will not arbitrate

the claim and shall advise the petitioner why the Association has not accepted jurisdiction of the matter.

(D) In the event the [Chair] Vice President determines that the Association shall accept jurisdiction, the [Chair] Vice President shall notify the Director and shall return the petition to the Director or other designated employee of the Association. The Director shall then forward to respondent a copy of the petition and three (3) copies of the arbitration agreement signed by the petitioner and shall request the respondent to sign and return to the Director two (2) copies of the arbitration agreement and three (3) copies of the respondent's answer to the petition. The letter to the respondent shall state that respondent has twenty (20) days in which to answer and return the two (2) signed arbitration agreements, and that if respondent's answer is not received within twenty (20) days, the Association will construe such failure to answer as constituting a refusal to submit to arbitration. Upon receipt of the respondent's answer, the Director shall forthwith forward to the petitioner one (1) signed copy of the arbitration agreement and one (1) copy of the respondent's answer.

(E) In the event of the respondent's refusal to submit to arbitration, or if respondent fails to sign and return the arbitration agreement and answer within twenty (20) days, the Director shall so notify the petitioner, and the file of the Association shall be closed.

(5) Arbitration Panel.

(A) Composition.

(i) Where the amount in controversy is two thousand five hundred dollars (\$2,500.00) or less, the panel shall consist of one (1) person who shall be a practicing attorney.

(ii) Where the amount in controversy exceeds two thousand five hundred dollars (\$2,500.00), but is not in excess of ten thousand dollars (\$10,000.00), the panel shall consist of three (3) persons who shall be practicing attorneys.

(iii) The practicing attorneys referred to in paragraph (5)(A)(i) and (5)(A)(ii) above shall each:

(a) be a member in good standing of the Association;

(b) be appointed or designated for a particular controversy by the [Chair] Vice President;

(c) if engaged in the private practice of law shall maintain or carry on such practice more than fifty (50) miles from the county seat of the county where the attorney who is a party to the arbitration maintains his or her principal office for the practice of law. If the claim for negligence is between two (2) or more attorneys, then the attorney member(s) of any panel shall maintain any principal law practice and offices at a distance greater than fifty (50) miles from the county seat of the county where the attorney petitioning for arbitration maintains his or her principal office for the practice of law. Under no circumstances will any of the arbitrators be within the same county or congressional district of the parties to the arbitration.

(iv) Any attorney appointed or designated by the [Chair] Vice President may refuse to serve. Such refusal shall be by written notice to the Director within ten (10) days of the appointment.

(v) The [Chair] Vice President, in cases of a three-member panel, shall designate one member of the panel as Chair of the panel.

(B) Objections.

(i) Either party to the arbitration may object for cause to any of the panel members. Such objection shall be in writing and shall be made within twenty (20) days of written notification of the names of the panel members. Failure to object within twenty (20) days shall constitute a waiver of any objection to the composition of the panel. The following shall constitute grounds for cause to a proposed panel member serving:

(a) If the panel member is associated in any business or profession with or related in any way to any of the parties or their attorneys;

(b) If the panel member has a personal or financial interest or any bias or prejudice regarding any of the parties or the nature of the controversy;

(c) If the panel member has pending any business transactions or controversy as a party with any party to the controversy or as attorney or has then pending any business transactions or controversies as an attorney with any party to the controversy or any attorney for a party, and there is such a conflict that it would render the arbitrator incapable of fairly exercising independent judgment.

(ii) Objections to panel members shall be made to the Chair of the panel and shall be ruled upon by the Chair of the panel whose decision shall be final. Each side may have one peremptory strike.

(C) Compensation.

Members of the panel shall not be paid or compensated for their services.

(D) Vacancies.

If any arbitrator should resign, die, withdraw, refuse to act or be disqualified or unable to act, the [Chair] Vice President shall declare the office vacant and, if the matter has already been heard, it shall be reheard, unless the parties otherwise agree. In the absence of such agreement a new arbitration panel shall be selected in accordance with these Rules.

(E) Communication Between the Parties and Panel Members.

There shall be no communication between the parties and the members of the arbitration panel upon the subject matter of the arbitration other than at arbitration proceedings. Copies of any written communication between members of the panel and any party, or any attorney for a party or between parties or their attorneys and the panel shall be furnished contemporaneously to each participant in the proceeding, and filed with the Director.

33. **SCR 3.810(2), (4) and (5) Legal fee arbitration**

Proposed amendments to sections (2), (4), and (5) of SCR 3.810

(2) Definitions.

(A) "Attorney" means an attorney-at-law who is a member in good standing of the Kentucky Bar Association.

(B) "Association" means the Kentucky Bar Association.

(C) "Director" means the Director of the Kentucky Bar Association.

(D) ["Chair" means the Chair of the House of Delegates] "Vice President" means the Vice President of the Kentucky Bar Association.

(E) "Controversy" means a dispute or disagreement between an attorney and his or her client relative to the fee due the attorney for particular legal services rendered, and it may also mean a dispute or disagreement between attorneys concerning the amount of the fees due each attorney for particular legal services rendered.

(F) "Amount in controversy" means the difference between the sum of money an attorney proposes to charge for legal services and the sum of money the client offers to pay for such services.

(G) "Panel" means the arbitrator or arbitrators appointed or designated to arbitrate the fee disagreement as hereinafter provided.

(4) Institution of Proceedings.

(A) Proceedings hereunder shall be begun by completing three (3) copies of a petition. The petition must be signed by one of the parties to the dispute. The petition shall state the origin and details of the dispute, the nature and degree of legal services rendered, and the amount claimed due as a result of the dispute alleged. Upon the filing of the petition, the petitioner shall also sign three (3) copies of an arbitration agreement. The petition and arbitration agreement shall be on forms provided by the Association and when completed, shall be filed in the office of the Association.

(B) Upon the filing of the petition, the Director of the Association shall forward a copy of the petition to the [Chair] Vice President. The [Chair] Vice President, upon receipt of the petition, shall determine whether this plan applies under these Rules. The decision of the [Chair] Vice President on that matter shall be final. The [Chair] Vice President shall have full power to require additional information from the petitioner in all disputes wherein additional information is deemed desirable or necessary.

(C) In the event the [Chair] Vice President determines that the Association shall not accept jurisdiction of a fee dispute, the petition shall be returned to the Director, with a brief explanation as to why jurisdiction has been refused. The Director shall then notify the petitioner that the Association has not accepted jurisdiction and will not arbitrate the dispute and shall advise the petitioner why the Association has not

accepted jurisdiction of the matter.

(D) In the event the [Chair] Vice President determines that the Association shall accept jurisdiction, the [Chair] Vice President shall notify the Director and shall return the petition to the Director or other designated employee of the Association. The Director shall then forward to respondent a copy of the petition and three (3) copies of the arbitration agreement signed by the petitioner, and shall request the respondent to sign and return to the Director two (2) copies of the arbitration agreement and three (3) copies of the respondent's answer to the petition. The letter to the respondent shall state that respondent has twenty (20) days in which to answer and return the two (2) signed arbitration agreements, and that if respondent's answer is not received within twenty (20) days, the Association will construe such failure to answer as constituting a refusal to submit to arbitration. Upon receipt of the respondent's answer, the Director shall forthwith forward to the petitioner one (1) signed copy of the arbitration agreement and one (1) copy of the respondent's answer.

(E) In the event of the respondent's refusal to submit the fee dispute to arbitration, or if respondent fails to sign and return the arbitration agreement and answer within twenty (20) days, the Director shall so notify the petitioner and the file of the Association shall be closed.

(5) Arbitration Panel.

(A) Composition.

(i) Where the amount in controversy is two thousand five hundred dollars (\$2,500.00) or less, the panel shall consist of one (1) person who shall be a practicing attorney.

(ii) Where the amount in controversy exceeds two thousand five hundred dollars (\$2,500.00), the panel shall consist of three (3) persons, two (2) of whom shall be practicing attorneys and the third (3rd) member shall be a non-lawyer.

(iii) The practicing attorney(s) referred to in paragraph (5)(A)(i) and (5)(A)(ii) above, shall each:

(a) be a member in good standing of the Association;

(b) be appointed or designated for a particular controversy by the [Chair] Vice President;

(c) if engaged in the private practice of law shall maintain an office and carry on such practice more than fifty (50) miles from the county seat of the county where the attorney who is a party to the fee dispute maintains his or her principal office for the practice of law. If the fee dispute is between two (2) or more attorneys, then the attorney member(s) of any panel shall maintain any principal law practice and offices within fifty (50) miles of the county seat of the county where the attorney petitioning for arbitration maintains his or her principal office for the practice of law.

(iv) Any attorney appointed or designated by the [Chair] Vice President may refuse to serve. Such refusal shall be by written notice to the Director within ten (10) days of the appointment.

(v) The non-lawyer referred to in paragraph (5)(A)(i)2 shall be selected by the presiding judge or Chief Judge of the circuit court of the county where the attorney involved in the fee dispute maintains his or her principal office for the practice of law. If the dispute is between two attorneys, the selection of the non-lawyer member of the panel shall be made by the presiding judge or Chief Judge of the circuit court of the county where the attorney petitioning for arbitration maintains his or her principal office for the practice of law. If there be no presiding or Chief Judge, but more than one judge of that circuit court, then the judge of the court senior in terms of service as a circuit court judge shall select the non-lawyer member of the panel.

(vi) The [Chair] Vice President, in cases of a three-member panel, shall designate one member of the panel as Chair of the panel.

(B) Objections.

(i) Either party to a fee dispute may object for cause to any of the panel members. Such objection shall be in writing and shall be made within twenty (20) days of written notification of the names of the panel members. Failure to object within twenty (20) days shall constitute a waiver of any objection to the composition of the panel. The following shall constitute grounds for objection for cause to a proposed panel member serving:

(a) If the panel member is associated in any business or profession with or related in any way to any of the parties or their attorneys;

(b) If the panel member has a personal or financial interest or any bias or prejudice regarding any of the parties or the nature of the controversy;

(c) If the panel member has pending any business transactions or controversy as a party with any party to the controversy or as attorney or has then pending any business transactions or controversies as an attorney with any party to the controversy or any attorney for a party, and there is such a conflict that it would render the arbitrator incapable of fairly exercising independent judgment.

(ii) Objections to panel members shall be made to the Chair of the panel and shall be ruled upon by the Chair of the panel whose decision shall be final. Each side may have one peremptory strike.

(C) Compensation.

Members of the panel shall not be paid or compensated for their services.

(D) Vacancies.

If any arbitrator should resign, die, withdraw, refuse to act or be disqualified or unable to act, the [Chair] Vice President shall declare the office vacant and, if the matter has already been heard, it shall be reheard, unless the parties otherwise agree. In the absence of such agreement a new arbitration panel shall be selected in accordance with these Rules.

(E) Communication Between the Parties and Panel Members.

There shall be no communication between the parties and the members of the arbitration panel upon the subject matter of the arbitration other than at arbitration proceedings. Copies of any written communication between members of the panel and any party, or any attorney for any party or between parties or their attorneys and the panel shall be furnished contemporaneously to each participant in the proceeding, and filed with the Director.

34. **SCR 3.815(2), (4) and (5) Mediation and arbitration**

Proposed amendments to sections (2), (4), and (5) of SCR 3.815:

(2) Definitions.

(A) "Attorney" means an attorney-at-law who is a member in good standing of the Kentucky Bar Association.

(B) "Association" means the Kentucky Bar Association.

(C) "Director" means the Director of the Kentucky Bar Association.

(D) ["Chair" means the Chair of the House of Delegates] "Vice President" means Vice President of the Kentucky Bar Association.

(E) "Controversy" means a dispute or disagreement between attorneys relative to questions of representation of clients, questions arising when law firms or other legal associations between attorneys are dissolved or otherwise terminated, or other economic disputes between attorneys.

(F) "Panel" means the arbitrator or arbitrators appointed or designated to assist in resolving the controversy as hereinafter provided.

(4) Institution of Proceedings.

(A) Proceedings hereunder shall be begun by completing three copies of a petition. The petition must be signed by one of the parties to the dispute. The petition shall state the origin and details of the dispute, acts or omissions deemed to be in controversy, and the relief desired from the mediation or arbitration. Upon the filing of the petition, the petitioner shall also sign three copies of an arbitration or mediation agreement, as applicable. The petition and agreement shall be on forms provided by the Association and when completed shall be filed in the office of the Association.

(B) Upon the filing of the petition, the Director of the Association shall forward a copy of the petition to the [Chair] Vice President. The [Chair] Vice President, upon receipt of the petition, shall determine whether the plan and this rule apply, and the [Chair's] Vice President's decision on that matter shall be final. The [Chair] Vice President shall have full power to require additional information from the petition in all disputes wherein additional information is deemed desirable or necessary.

(C) In the event the [Chair] Vice President determines that the Association shall not accept jurisdiction of a controversy, the petition shall be returned to the Director, or other designated employee of the Association with a brief explanation

as to why jurisdiction has been refused. The Director shall then notify the petitioner that the Association has not accepted jurisdiction and will not arbitrate or mediate the controversy and shall advise the petitioner why the Association has not accepted jurisdiction of the matter.

(D) In the event the [Chair] Vice President determines that the Association shall accept jurisdiction, the [Chair] Vice President shall notify the Director and shall return the petition to the Director or other designated employee of the Association. The Director shall then forward to respondent a copy of the petition and three copies of the agreement signed by the petitioner, and he or she shall require the respondent to sign and return to the Director two copies of the agreement and three copies of the respondent's answer to the petition. The letter to the respondent shall state that respondent has twenty days in which to answer and return the two signed agreements, and that if respondent's answer is not received within twenty days, the Association will construe such failure to answer as constituting a refusal to submit to arbitration or mediation. Upon receipt of the respondent's answer, the Director shall forthwith forward to the petitioner one signed copy of the agreement and one copy of the respondent's answer.

(E) In the event of the respondent's refusal to submit the controversy to arbitration or mediation, or failure within twenty days following receipt of the documents described in

(4)(D) to sign and return the agreement, the Director shall so notify the petitioner and the file of the Association shall be closed.

(5) Arbitration panel.

(A) Composition.

(i) Where the matter is to be mediated, the mediator shall consist of one person who shall be a practicing attorney.

(ii) Where the matter is to be arbitrated, the arbitration panel shall consist of one practicing attorney, if the amount in controversy is \$2,500.00 or less, or if it exceeds \$2,500.00, the panel shall consist of three persons, all of whom shall be practicing attorneys.

(iii) The practicing attorney(s) referred to in paragraph (5)(A)(i) and (5)(A)(ii) above, shall each:

(a) be a member in good standing of the Association;

(b) be appointed or designated for a particular controversy by the [Chair] Vice President;

(c) if a panel member or sole arbitrator is engaged in the private practice of law shall maintain or carry on a private law practice in an office more than fifty (50) miles from the county seat of the county where the attorneys who are parties to the controversy maintain their principal offices for the practice of law.

(iv) Any attorney appointed or designated by the [Chair] Vice President may refuse to serve. Such refusal shall be by written notice to the Director within ten (10) days of the appointment.

(v) The [Chair] Vice President, in cases of a three-member panel, shall designate one member of the panel as Chairperson of the panel.

(B) Objections.

(i) Either party to a controversy may object for cause to any of the panel members. Such objection shall be in writing and shall be made within twenty (20) days of written notification of the names of the panel members. Failure to object within twenty (20) days shall constitute a waiver of any objection to the composition of the panel. The following shall constitute grounds for objection for cause to a proposed panel member serving:

(a) If the member is associated in any business or profession with or related in any way to any of the parties or their attorneys;

(b) If the member has a personal or financial interest or any bias or prejudice regarding any of the parties or the nature of the controversy;

(c) If the member has pending any business transactions or controversy as a party with any party to the controversy or their attorney or has then pending any business transactions or controversies as an attorney with any party to the controversy or any attorney for a party, and there is such a conflict that it would render the arbitrator incapable of fairly exercising independent judgment.

(ii) Objections to panel members shall be made to the Chair of the panel and shall be ruled upon by the Chair of the panel whose decision shall be final. Each side may have one preemptory strike.

(C) Compensation.

Members of the panel shall not be paid or compensated for their services.

(D) Vacancies.

If any arbitrator or mediator should resign, die, withdraw, refuse to act or be disqualified or unable to act, the [Chair] Vice President shall declare the office vacant and, if the matter has already been heard, shall be reheard, unless the parties otherwise agree. In the absence of such agreement, a new arbitration panel shall be selected in accordance with these Rules.

(E) Communication Between the Parties and Panel Members.

There shall be no communication between the parties and the members of the arbitration or mediation panel upon the subject matter of the arbitration or mediation other than at arbitration or mediation proceedings. Copies of any written communication between members of the panel and any party, or any attorney for any parties or between parties or their attorneys and the panel shall be furnished contemporaneously to each participant in the proceeding and filed with the Director.

35. SCR 3.970(1) Agency Referrals

Proposed amendments to section (1) of SCR 3.970:

(1) A member of the Kentucky legal community who is the subject of a pending admission, ~~or~~ disciplinary or continuing legal education proceeding before an agency of the Supreme Court of Kentucky may authorize that agency to make a confidential request for assistance from KYLAP in evaluating or addressing any actual or potential impairment that may be relevant to the issues which the agency is charged with considering in the proceeding. In particular:

(a) A member of the Kentucky legal community who is the subject of an application for admission, restoration or reinstatement to the practice of law in the Commonwealth may authorize the Office of Bar Admissions to communicate in confidence with KYLAP for the purpose of requesting assistance from KYLAP in evaluating and addressing any actual or potential impairment that may be relevant to the OBA's consideration or disposition of the application for admission, restoration or reinstatement.

(b) A member or former member of the Association who is the subject of a disciplinary complaint or investigation pending before the Inquiry Commission may authorize that Commission to communicate in confidence with KYLAP for the purpose of requesting assistance from KYLAP in evaluating and addressing any actual or potential impairment that may be relevant to that Commission's consideration or disposition of that complaint or investigation.

(c) A member or former member of the Association who is the subject of an investigation or prosecution by the Office of Bar Counsel may authorize OBC to communicate in confidence with KYLAP for the purpose of requesting assistance from KYLAP in evaluating and addressing any actual or potential impairment that may be relevant to OBC's recommended disposition of that investigation or prosecution.

(d) A member or former member of the Association who is the subject of a continuing legal education proceeding pursuant to Rule 3.669 by the Continuing Legal Education Commission may authorize the Director for Continuing Legal Education to communicate in confidence with KYLAP for the purpose of requesting assistance from KYLAP in evaluating and addressing any actual or potential impairment that may be relevant to the CLE Commission's recommended disposition of that proceeding.

36. SCR 3.980(3) Supreme Court Assignments to KYLAP

Proposed amendments to section (3) of SCR 3.980:

(3) When KYLAP receives a matter by assignment from the Court pursuant to paragraph (1) of this Rule:

(a) KYLAP shall proceed to provide assistance of the nature described in Rule 3.910(2) in accordance with the terms of the Court's order, and may impose additional requirements on the person who is the subject of the assignment as necessary to perform the assignment;

(b) KYLAP may provide reports to the Court, and to one or more agencies of the Court, as authorized or required by the terms of the Court's order;

(c) Any information gathered or received by KYLAP after the date of the Court's order and in the course of discharging the tasks and responsibilities assigned by the Court as part of a final disposition under paragraph (1) of this Rule may be used as evidence in any admission, disciplinary, continuing legal education, restoration or reinstatement proceeding regarding the person who is the subject of the assignment, subject to the rules of evidence and procedure in that proceeding; and

(d) One or more representatives of KYLAP may be called as witnesses in any admission, disciplinary, continuing legal education, restoration or reinstatement proceeding for the purpose of testifying about information gathered or received by KYLAP after the date of the Court's order and in the course of discharging the tasks and responsibilities assigned by the Court as part of a final disposition under paragraph (1) of this Rule, subject to the rules of evidence and procedure in that proceeding.

37. **SCR 4.035 JUDICIAL ELECTION CAMPAIGN INTERVENTION**

Proposed adoption of new rule SCR 4.035:

(1) Upon finding probable cause of a violation of Canon 5 during a campaign for judicial office, the Commission may:

(a) seek, from the complainant and/or the judge or candidate that is the subject of the complaint, such further information on the allegation of the complaint as it deems necessary;

(b) conduct such additional investigation as the Commission may deem necessary; and

(c) request a confidential written response from the judge or candidate that is subject of the complaint within 3 days of receiving such a request from the Commission.

In the event a complaint is filed within two (2) weeks before a judicial election, or if circumstances otherwise dictate, the Commission may accelerate the above schedule as it deems necessary. The identity of the complaining party will remain confidential until the Commission's decision is communicated to the judge or candidate unless that confidentiality is waived by the complaining party. Any party breaching the confidentiality of the above process shall be subject to a Public Statement as set forth in this Rule.

(d) if after a finding of probable cause and review of the response from the judge or candidate, if any, it is determined that the allegations do warrant intervention, the Commission is authorized:

(i) to immediately release to the complaining party, the judge or candidate complained against, and the opposing candidate, a non-confidential "Public Statement" setting out violations believed to exist; and/or

(ii) to take further action, including the commencement of formal proceedings, as may be appropriate under the applicable rules.

(e) if it is determined after an initial finding of probable cause and response from the judge or candidate that the allegations do not warrant intervention or further action by the Commission, the Commission shall dismiss the complaint and so notify the complaining party and the judge or candidate that was the subject of the complaint.

(2) The Commission shall act on all complaints made in the course of a judicial campaign within ten (10) days of receipt, either in person, by facsimile, by U.S. mail, or by teleconference.

(3) The proceedings under this Rule are confidential as provided in SCR 4.130, except as otherwise stated herein.

38. SCR 4.300 Kentucky Code of Judicial Conduct – Canon 5(B)(1)(c)

Proposed amendments to subsection (B), (1), (c) of Canon 5 of SCR 4.300:

Current Rule: Canon 5(B)(1)(c)

(c) shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; and shall not misrepresent any candidate's identity, qualifications, present position, or other facts.

Alternative A:

A judge or candidate for election to judicial office shall not make pledges or promises of conduct in office.

Alternative B: American Bar Association

5.01

Judges who are not currently candidates for judicial office shall not, directly or indirectly:

...

(d) attend meetings or other events sponsored by a political organization or a candidate for public office.

...

5.02

...a candidate for judicial office, including an incumbent judge, shall not , directly or indirectly:

(b) knowingly make any false or misleading statement regarding any candidate for judicial office;

(c) in the course of advancing his or her candidacy, make any comment that might reasonably be expected to affect the outcome or impair the fairness of a proceeding while it is pending or impending in any court;

(d) Shall not with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office; or knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

Alternative C:

A judge or candidate for election to judicial office shall not intentionally or recklessly make a statement that could reasonably be perceived as committing the judge or candidate to rule a certain way on a case, controversy, or issue that is likely to come before the court...

Alternative D:

A judge or candidate for judicial office shall not pledge or promise certain results in particular cases.

Alternative E:

A candidate for judicial office may state his or her general views on legal issues, but must make it clear that these views are tentative and subject to arguments of counsel and deliberation.

Alternative F:

A judge or candidate for election to judicial office shall not make pledges or promises of conduct in office inconsistent with faithful and impartial service, and shall not intentionally or recklessly misrepresent any candidate's identity, present position, or other facts.

39. SCR 5.010 Appointment

Proposed amendment to SCR 5.010:

In each county in which no district judge resides, the chief judge of the district shall appoint a trial commissioner subject to the approval of the Chief Justice. Any trial commissioner may be removed by order of the Supreme Court. Every other trial commissioner shall be appointed by the chief judge of the district upon certification of the necessity therefor by the Supreme Court, which certification shall be initiated by a request from the chief judge of the district stating the circumstances requiring the appointment.

PROPOSED AMENDMENTS TO THE BY-LAWS OF THE KENTUCKY BAR ASSOCIATION

1. Section 5(i) Officers

Proposed amendments to subsection (i) of Section 5:

The officers of the Association and of the Board, their duties, tenure, and manner of selection shall be:

(i) Executive Committee.

An Executive Committee of the Board of Governors shall consist of the following officers of the Bar: The President, who shall serve as Chair of the Executive Committee, the Immediate Past President, the President-Elect, the Vice President, [Chair of the House of Delegates] Chair of the Young Lawyers Section, and the Executive Director. The Executive Committee shall advise the President on matters concerning the operations of the Bar and provide a forum for discussion and recommendation to the Board of Governors including matters of long range planning. The Executive Committee may also act on matters of an emergency nature that may affect the Bar. When the Executive Director becomes aware of any matter that may require Executive Committee action the Executive Director shall immediately advise the President. The President shall advise the Board of any action taken or any recommendation made by the Executive Committee at the next Board meeting. The Executive Committee shall meet at such times as may be called by the President.

2. Section 6 Nomination of officers

Proposed amendments to Section 6:

(a) Nomination to the offices of Vice President and President-Elect shall be made [either by the Nominating Committee or] by written petition as herein provided. All candidates for office shall be members of the Association in good standing.

[(b) A Nominating Committee composed of one member of the House of Delegates from each Supreme Court District shall be chosen by caucus of the House members from each Supreme Court District at the annual meeting. The Recording Secretary shall certify the names and addresses of the persons chosen to the Executive Director. The Nominating Committee shall meet in executive session at the Kentucky Bar Center at Frankfort, Kentucky, prior to October 15 of each year, at a time fixed by the Chair of the House upon reasonable notice to each member of the Nominating Committee. The Nominating Committee shall nominate at least one candidate for the office of Vice President and at least one candidate for the office of President-Elect, all of whom shall be members of the Association in good standing, and the Nominating Committee shall immediately certify the names of the nominees to the Executive Director who shall promptly announce the report of said Nominating Committee.]

(b) [(c)] [Other] [n] Nominations for the offices of Vice President and President-Elect [may] shall be made by written petition signed by not less than one hundred members of the Association in good standing, with not less than ten signatures on the

written petition being from each Supreme Court District. [Any number of candidates may be nominated on a single petition and any number of petitions may be filed, but all candidates named in a petition shall be members of the Association in good standing.]—Only one candidate may be nominated on a single petition and any number of petitions may be filed for a candidate.

(c) [(d)] All nominating petitions for the office of Vice President and President-Elect shall be filed with the Executive Director between October 15 and November 15 in each year. Where only one candidate has been duly nominated for an office that candidate shall be declared elected and the Executive Director shall so certify to the Board and the nominee on or before December 15 in that year.

3. **[Section 7. House of Delegates]**

Proposed deletion of Section 7:

[(a) The House of Delegates shall be composed of members in good standing from each judicial district of the state and a Chair, Chair-Elect, Vice Chair and Recording Secretary elected from and by the body of the House. Each judicial district shall be represented by a number of Delegates equal to the number of circuit judges presiding in the district.

(b) The term of office of each member of the House of Delegates shall commence on July 1 next following his/her election and shall be for a period of two years and/or until a successor is elected and qualified. The terms of Delegates from even numbered districts shall begin in even numbered years; those from odd numbered districts in odd years.

(c) Any member of the Association in good standing shall be eligible for nomination or appointment and election to the House of Delegates from the judicial district of residence. Provided, however, that no member of the Board of Governors, while holding office, or being a candidate as such, shall be eligible for election to or appointment to the House.

(d) Nominations of candidates for the House of Delegates shall be by written petition signed by not less than five members of the Association in good standing who are residents of the judicial district wherein the candidate resides. All nominating petitions shall be filed with the Executive Director between October 15 and November 15 of each year. Where only one candidate is nominated in a judicial district that candidate shall be declared elected. Where more candidates are nominated than offices to be filled, an election shall be held as provided in Section 9, and the candidate or candidates receiving the most votes shall be declared elected.

(e) Any vacancy in the House of Delegates shall be filled for the remainder of the term by appointment by the President and Chair of the House of Delegates.

(f) The House shall hold regular annual meetings convening on the day preceding the annual convention of the Association and such other meetings as the Board may authorize.

(g) Thirty-five members of the House shall constitute a quorum, and a vote of a majority of those present and voting shall be necessary for the transaction of business.

(h) The Chair of the House shall be ineligible for nomination to become Vice President or President-Elect for two years immediately following the expiration of his/her term.

(i) The Chair shall become President in the case of concurrent vacancies in the offices of President and Vice President and shall thereupon cease to be chair. The Chair shall preside at all Board meetings from which both the President and Vice President are absent.]

4. **[Section 8. Officers of the House—duties, tenure and manner of selection]**

Proposed deletion of Section 8:

[(a) The Chair-Elect and Vice Chair of the House of Delegates shall be elected at the annual meeting of the House for a term of one year. The Chair, Chair-Elect and Vice Chair shall have the right to vote on all matters before the House.

(b) The Chair shall not be eligible for re-election and the term of office shall expire upon the election and qualification of his/her successor.

(c) The Chair-Elect shall assume the office of Chair on July 1 in the second calendar year next after his/her election and on taking the oath of office.

(d) In the case of a vacancy in the office of Chair, the Vice Chair shall become Chair. The Vice Chair shall preside at all meetings of the House in the absence of the Chair.

(e) The Recording Secretary shall be elected from and by the body of the House. The Recording Secretary shall keep minutes of the meetings of the House and furnish a copy thereof to the Executive Director. The Recording Secretary shall perform such other duties as may be required by the House.

(f) In the case of a vacancy in the office of Vice Chair or Recording Secretary, these vacancies shall be filled for the remainder of the term by appointment by the President and the Chair.]

5. **Section 9. Elections**

Proposed amendments to Section 9:

Ballots for the offices of President-Elect, Vice President, members of the Board of Governors [and members of the House of Delegates] for which there will be an election will be prepared by the Executive Director and will be mailed on December 15 with return envelopes as hereinafter provided, to each member of the Association in good standing entitled to vote in that election. Names of candidates shall be listed on the ballots in alphabetical order with each position being voted upon.

The ballot shall be sealed by the member in an unmarked inner return envelope, which, in turn shall be sealed in an outer return envelope containing the words: "Official Ballot--Not to be opened until January 16" and lines for the signature and county address of the attorney casting the ballot.

All ballots must be received not later than January 15 by the Clerk who shall keep all such ballots in a locked box. Such box shall be opened only at the meeting of the canvassing board to tabulate the votes. Not later than January 20 the canvassing board, appointed by the President, shall meet in the office of the Clerk, or at such other place as may be designated by the President, and canvass the votes. Each candidate for a position shall be entitled to have present at the meeting of the canvassing board an official observer under a written and signed designation by such candidate. No candidate may be present at the meeting of the canvassing board.

A plurality of all votes cast for each position shall be sufficient to elect. The canvassing board shall make and file with the Clerk a written certification of each election, with a copy thereof to the Executive Director who shall promptly notify each candidate of the results of the election.

6. **Section 11 Sections**

Proposed amendments to subsection (a) of Section 11:

(a) Sections. There are created the following sections within the Kentucky Bar Association:

- (1) Business Law.
- (2) Criminal Law.
- (3) Family Law.
- (4) Civil Litigation.
- (5) Labor and Employment Law.
- (6) Probate and Trust Law.
- (7) Taxation.
- (8) Young Lawyers.
- (9) Public Interest Law.
- (10) Corporate House Counsel.
- (11) Natural Resources Law.
- (12) Local Government Law.
- (13) Workers' Compensation Law.
- (14) Real Property Law.
- (15) Bankruptcy Law.
- (16) Senior Lawyers.
- (17) Equine Law.

- (18) Education Law.
- (19) Construction and Public Contract Law.
- (20) Small Firm Practice.
- (21) Health Care Law.
- (22) Alternative Dispute Resolution.

7. Section 12 Committees

Proposed amendments to Section 12:

(a) The Association shall have such committees as may be designated by the Supreme Court.

(b) The Association shall have such standing committees and special committees as the Board may from time to time authorize.

(c) Standing Committees shall include:

- (1) Ethics Committee
- (2) Unauthorized Practice of Law Committee
- [(3) Committee on Women in the Profession]
- (3) [(4) Communications/Public Relations Committee] Publications Committee

(d) Membership and Term of Service. Unless otherwise provided by Rule the following shall apply for membership and terms of service for committees. Each committee shall have at least one member from each Supreme Court District. Each year the President shall appoint a Chair for each committee and one or more members of the Board shall be appointed to each committee whose terms will be for one (1) year. Beginning July 1, 1997, terms of service for all other committee members shall be staggered with one-third appointed for three-year terms, one-third appointed for two-year terms and one-third appointed for one-year terms. A member may be reappointed to a committee but in no event shall a member serve on a committee longer than six (6) consecutive years without a break in service of at least two (2) years. The Board, by majority vote, may modify limits on terms of committees.

(e) Meetings. Each committee shall meet at least one time during the months of June, July or August, and shall meet at such other times as designated by the committee chair or the President.

8. [Section 13 Committees of the House]

Proposed deletion of Section 13:

[(a) The House of Delegates shall have a Standing Committee on Nominations.]

(b) Each Committee shall consist of at least seven members appointed by the Chair, at least one of whom shall be from each Supreme Court District. Each Committee member shall serve a term of one year.

(c) The Committee on Nominations shall be appointed by the Chair-Elect not later than January 1, preceding the regular annual meeting. The Committee shall file its report with the Executive Director by February 15 next, and the Executive Director shall notify all Delegates thereof promptly. Other nominations for any of the offices may be made by written petition signed by not less than three Delegates, which petitions must be filed with the Executive Director by March 15 next, and the Executive Director shall notify all Delegates thereof. The election of officers shall be the first order of business after the roll call at the regular annual meeting, but such officers shall not qualify and assume office until immediately prior to adjournment of such meeting. The election of a Chair shall first be held, followed by the election of a Chair-Elect and a Vice Chair, and thereafter by the election of a Recording Secretary. Any candidate for the office of Chair who is not elected to that office shall automatically stand as a candidate for the office of Vice Chair, along with those persons nominated for that office in the manner specified herein.

(d) For the purpose of furthering the consideration of a subject at any meeting of the House assembled, the Chair of the House may, in his/her discretion and in advance of such meeting, appoint a special committee of not more than five members, to consider such subject and report to the House concerning it. Unless otherwise voted by the House, any committee so appointed shall not continue beyond the adjournment of that meeting of the House.]