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Ethical Considerations in Marketing and Advertising Certification

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T A B L E O F C O N T E N T S

QUICK REFERENCE OF AUTHORITIES

(1) Baylor Law Review, Volume 30, p. 689 (1978)
(2) Texas Disciplinary Rules of Professional Conduct (TDRPC)

Part VII. Information About Legal Services

Rules 7.01 through 7.07

(3) Texas Code of Professional Responsibility (no longer in effect)
(4) Texas Canons of Ethics (no longer in effect)
(5) Bates v. State Bar of Arizona, 433 U. S. 350 (1977)
(6) Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U. S. 748 (1976)
(7) Goldfarb v. Virginia State Bar, 421 U. S. 773 (1975)
(8) Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U. S. 91
(9) Texas Plan for Recognition and Regulation of Specialization in the Law

ETHICAL CONSIDERATIONS IN MARKETING AND ADVERTISING SPECIALIZATION

I. History of Lawyer Advertising

For many years, the professional conduct of Texas lawyers was governed by the Canons of Ethics. The Canons prohibited advertising by lawyers, based on the concept that it essentially constituted solicitation and would foment litigation. To replace the Canons, the State Bar of Texas implemented a slightly "Texanized" version of the Code of Professional Responsibility based on the American Bar Association model in 1971. The Code consisted of Disciplinary Rules (a violation of which could result in discipline) and Ethical Considerations which were explanatory comments regarding the rules. As of 1975, the Code still prohibited advertising for lawyers except for those involved in patent work (governed by federal statutes) and those certified by the Texas Board of Legal Specialization. The first class of lawyers was certified by TBLS in 1975 in the Areas of Family, Criminal, and Labor law. The Supreme Court of Texas amended the applicable Disciplinary Rules to allow TBLS certified attorneys to advertise their certifications COUPLED WITH a rule requiring non-certified attorneys who advertised to include a statement that they were not certified by TBLS.

Interestingly, this action predated the round of professional commercial speech cases handed down by the Supreme Court of the United States beginning in 1975. The first of those cases was Goldfarb v. Virginia State Bar, 421 U. S. 773 (1975) which prohibited Virginia from implementing a "minimum fee schedule" for the services of attorneys in the state. It was followed by Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 421 U. S. 748 (1976) providing a pharmacist could not be prohibited from advertising the prices of prescription drugs. That was followed by Bates v. State Bar of Arizona, 433 U. S. 350 (1977) holding that Arizona could not prohibit an attorney from advertising the prices of routine legal services. The Supreme Court of Texas responded by modifying the disciplinary rules to provide that an attorney who advertised in an area of law had to state he or she was not certified by TBLS; if the area advertised was not one in which TBLS conferred

certification, the disclaimer could include a statement that TBLS did not grant a certification in that area.

And then, at least with respect to advertising attorney certification, the big case, Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U. S. 91 (1990). Illinois had a disciplinary rule in effect which prohibited an attorney in that state from advertising a specialty or a certification. Gary Peel practiced law in Edwardsville, Illinois and was certified in civil litigation in 1981 by the National Board of Trial Advocacy. The administrator of the Illinois Commission, in reviewing routine correspondence from Mr. Peel, filed a complaint based on the information in his letterhead mentioning the NBTA certification. The Commission recommended a censure for Peel and that recommendation was adopted by the Illinois Supreme Court. Peel took issue with that determination arguing he had not provided any misleading information and indeed had a constitutional right to advertise his certification. The U. S. Supreme Court, in a 5-4 decision, agreed.

The Texas Disciplinary Rules of Professional Conduct were implemented by the Supreme Court of Texas in 1990 after being customized for Texas. Additional provisions concerning advertising were promulgated by the Court in 1994 and, following litigation, revision and referenda, constitute the foundation of the rules as they exist today.

II. History of Certification in Texas

The State Bar of Texas efforts on attorney certification were proceeding apace while the above referenced cases were winding their way through the judicial system. In 1969, the president of State Bar of Texas established a Special Committee on Advisability of Specialization Recognition. The American Bar Association Committee on Specialization had concluded in its report that year that some degree of specialization already existed in the practice of law by necessity and the trend was sure to continue to increase. The Texas Committee reached the same conclusion and the State Bar board in principle approved specialty recognition. Both the Committee and board felt a process of certification was the best approach to increase lawyer competency through continuing legal education, testing, peer review and involvement in the area of law and to inform consumers of attorneys of those attorneys who had established themselves as having special competence in an area.

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