

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 98- 9111

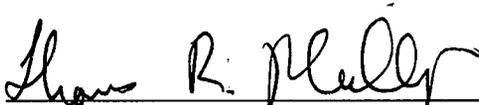
**APPROVAL OF A REFERENDUM OF THE STATE BAR OF TEXAS
MEMBERSHIP REGARDING A PROPOSED AMENDMENT TO RULE 7.04 OF THE
TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT**

ORDERED:

Pursuant to Tex. Gov. Code Ann. §81.024 (Vernon Supp. 1997) the Supreme Court of Texas approves a referendum of the Membership of the State Bar of Texas on the following:

Proposed Amendment to Rule 7.04 of the Texas Disciplinary Rules of Professional Conduct.

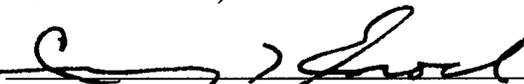
SIGNED AND ENTERED THIS 1st day of July, 1998.


Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice



Nathan L. Hecht, Justice



Craig T. Enoch, Justice



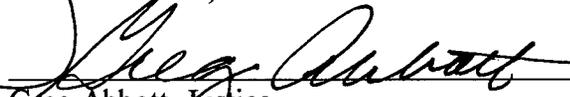
Rose Spector, Justice



Priscilla R. Owen, Justice



James A. Baker, Justice



Greg Abbott, Justice



Deborah G. Hankinson, Justice

IN THE SUPREME COURT OF TEXAS
Misc. Docket No. 98-_____

PETITION TO AMEND RULE 7.04 OF THE
TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF SAID COURT:

The State Bar of Texas hereby respectfully petitions the Court to amend Rule 7.04 of the Texas Disciplinary Rules of Professional Conduct. In support hereof, the Petitioner states as follows:

I.

The Board of Directors of the State Bar of Texas, at its meeting on April 25, 1997, resolved by a majority vote to make the recommendation and request for the referendum made herein.

II.

The Petitioner recommends and requests that pursuant to Tex. Gov. Code Ann. §81.024 (Vernon Supp. 1997) a referendum ballot be submitted to the membership of the State Bar of Texas on questions of amending Rule 7.04 of the Texas Disciplinary Rules of Professional Conduct, including deleting Rule 7.04(b)(3) in its entirety. The changes to the Rules are set forth in Exhibit "A".

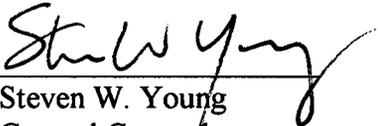
III.

WHEREFORE, the State Bar of Texas Board of Directors requests that the Supreme Court of Texas approve, adopt, and promulgate such amendments and send such amendments to the

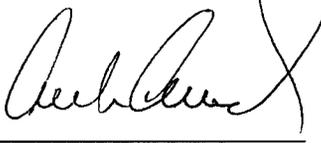
membership of the State Bar of Texas for a referendum.

Attest:

Respectfully submitted,



Steven W. Young
General Counsel



Antonio Alvarado
Executive Director

Rule 7.04 Advertisements in the Public Media

by stating or implying

(a) A lawyer shall not advertise in the public media that the lawyer is a specialist, except as permitted under Rule 7.04(b) or as follows: ^

(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms. A lawyer engaged in the trademark practice may use the designation "Trademark," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms. A lawyer engaged in patent and trademark practice may hold himself or herself out as specializing in "Intellectual Property Law," "Patent, Trademark, Copyright Law and Unfair Competition," or any of those terms.

(2) A lawyer may permit his or her name to be listed in lawyer referral service offices that meet the requirements of Article 320d, Revised Statutes, according to the areas of law in which the lawyer will accept referrals.

(3) A lawyer available to practice in a particular area of law or legal service may distribute to other lawyers and publish in legal directories and legal newspapers a listing or an announcement of such availability. The listing shall not contain a false or misleading representation of special competence or experience, but may contain the kind of information that traditionally has been included in such publications.

(b) A lawyer who advertises in the public media:

(1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement;

(2) shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

(i) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, "Board Certified, [area of specialization] — Texas Board of Legal Specialization;" and

(ii) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence, may include a factually accurate statement of such membership or may include a factually accurate statement, "Certified [area of specialization] [name of certifying organization]," but such statements may be made only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar; and

~~(3) shall state with respect to each area advertised in which the lawyer has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, "Not Certified by the Texas Board of Legal Specialization." However, if an area of law so advertised has not been designated as an area in which a lawyer may be awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, the lawyer~~

may also state, "~~No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area.~~"

(c) Separate and apart from any other statements, the statements referred to in paragraph (b) shall be displayed conspicuously with no abbreviations, changes, or additions in the quoted language set forth in paragraph (b) so as to be easily seen or understood by an ordinary consumer.

(d) Subject to the requirements of Rule 7.02 and of paragraphs (a), (b), and (c) of this Rule, a lawyer may, either directly or through a public relations or advertising representative, advertise services in the public media, such as (but not limited to) a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, or television.

(e) All advertisements in the public media for a lawyer or firm must be reviewed and approved in writing by the lawyer or a lawyer in the firm.

(f) A copy or recording of each advertisement in the public media and relevant approval referred to in paragraph (e), and a record of when and where the advertisement was used, shall be kept by the lawyer or firm for four years after its last dissemination.

(g) In advertisements utilizing video or comparable visual images, any person who portrays a lawyer whose services or whose firm's services are being advertised, or who narrates an advertisement as if he or she were such a lawyer, shall be one or more of the lawyers whose services are being advertised. In advertisements utilizing audio recordings, any person who narrates an advertisement as if he or she were a lawyer whose services or whose firm's services are being advertised, shall be one or more of the lawyers whose services are being advertised.

(h) If an advertisement in the public media by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay all or any portion of the court costs and, if a client may be liable for other expenses, this fact must be disclosed. If specific percentage fees or fee ranges of contingent fee work are disclosed in such advertisement, it must also disclose whether the percentage is computed before or after expenses are deducted from the recovery.

(i) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(j) (Editor's Note: This rule was found to be unconstitutional as applied to one plaintiff in *Texans Against Censorship, Inc., et al v. State Bar of Texas, et al*, U.S. District Court, Eastern District of Texas. The State Bar Board of Directors has approved the petitioning of the Supreme Court of Texas asking that the rule be modified. The Supreme Court will consider the following revision to the rule:

A lawyer or firm who advertises in the public media must disclose the geographic location, by city or town, of the lawyer's or firm's principal office. A lawyer or firm shall not advertise the existence of any office other than the principal office unless:

1. that other office is staffed by a lawyer at least three days a week; or
2. the advertisement discloses states:
 - (a) the days and times during which a lawyer will be present at that office, or
 - (b) that meetings with lawyers will be by appointment only.

(k) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media for a lawyer not in the same firm unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.

(l) If an advertising lawyer knows or should know at the time of an advertisement in the public media that a case or matter will likely be referred to another lawyer or firm, a statement of such fact shall be conspicuously included in such advertisement.

(m) No motto, slogan or jingle that is false or misleading may be used in any advertisement in the public media.

(n) A lawyer shall not include in any advertisement in the public media the lawyer's association with a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Article 320d, Revised Statutes.

(o) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:

- (1) states that the advertisement is paid for by the cooperating lawyers;
 - (2) names each of the cooperating lawyers;
 - (3) sets forth conspicuously the special competency requirements required by Rule 7.04(b) of lawyers who advertise in the public media;
 - (4) does not state or imply that the lawyers participating in the advertising cooperative or venture possess professional superiority, are able to perform services in a superior manner, or possess special competence in any area of law advertised, except that the advertisement may contain the information permitted by Rule 7.04(b)(2); and
 - (5) does not otherwise violate the Texas Disciplinary Rules of Professional Conduct.
- (p) Each lawyer who advertises in the public media as part of an advertising cooperative or venture shall be individually responsible for:
- (1) ensuring that each advertisement does not violate this Rule; and
 - (2) complying with the filing requirements of Rule 7.07.

Comment

1. Neither Rule 7.04 nor Rule 7.05 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Advertising Areas of Practice and Special Competence

2. Paragraphs (a) and (b) permit a lawyer, under the restrictions set forth, to indicate areas of practice in advertisements about the lawyer's services. See also paragraph (d). The restrictions are designed primarily to require that accurate information be conveyed. These restrictions recognize that a lawyer has a right protected by the United States Constitution to advertise publicly, but that the right may be regulated by reasonable restrictions designed to protect the public from false or misleading information. The restrictions contained in Rule 7.04 are based on the experience of the legal profession in

the State of Texas and are designed to curtail what experience has shown to be misleading and deceptive advertising. To ensure accountability, sub-paragraph (b)(1) requires identification of at least one lawyer responsible for the content of the advertisement.

3. Because of long-standing tradition a lawyer admitted to practice before the United States Patent Office may use the designation "patents," "patent attorney" or "patent lawyer" or any combination of those terms. As recognized by paragraph (a)(1), a lawyer engaged in patent and trademark practice may hold himself out as concentrating in "intellectual property law," "patents, or trademarks and related matters," or "patent, trademark, copyright law and unfair competition" or any combination of those terms.

4. Paragraph (a)(2) recognizes the propriety of listing a lawyer's name in legal directories according to the areas of law in which the lawyer will accept new matters. The same right is given with respect to lawyer referral service offices, but only if those services comply with statutory guidelines. The restriction in paragraph (a)(2) does not prevent a legal aid agency or prepaid legal services plan from advertising legal services provided under its auspices.

5. Paragraph (a)(3) permits advertisements by lawyers to other lawyers in legal directories and legal newspapers, subject to the same requirements of truthfulness that apply to all other forms of lawyer advertising. Such advertisements traditionally contain information about the name, location, telephone numbers, and general availability of a lawyer to work on particular legal matters. Other information may be included so long as it is not false or misleading. Because advertisements in these publications are not available to the general public, lawyers who list various areas of practice are not required to comply with paragraph (b).

6. Some advertisements, sometimes known as tombstone advertisements, mention only such matters as the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, dates of admission to bars, the acceptance of credit cards, and fees. The content of such advertisements is not the kind of information intended to be regulated by Rule 7.04 (b). However, if the advertisement in the public media mentions any area of the law in which the lawyer practices, then, because of the likelihood of misleading material, the lawyer must comply with paragraph (b).

7. Sometimes lawyers choose to advertise in the public media the fact that they have been certified or designated by a particular organization or that they are members of a particular organization. Such statements naturally lead the public to believe that the lawyer possesses special competence in the area of law mentioned. Consequently, in order to ensure that the public will not be misled by such statements, sub-paragraph (b)(2) and paragraph (c) place limited but necessary restrictions upon a lawyer's basic right to advertise those affiliations.

8. Rule 7.04(b)(2) gives lawyers who possess certificates of specialization from the Texas Board of Legal Specialization or other meritorious credentials from organizations approved by the Board the option of stating that fact. provided ~~If a lawyer mentions in an advertisement in the public media an area of the law in which the lawyer practices and that lawyer has not been awarded a Certificate in the area advertised, then the lawyer must disclaim or, where applicable, state that no certification is available. See sub-paragraph (b)(3). Sub paragraphs (b)(2) and (b)(3) require that the restrictions set forth in~~

subparagraphs (b)(2)(i) and (b)(2)(ii) are followed. ~~be complied with as to each area of law advertised.~~

9. Paragraph (c) is intended to ensure against misleading or material variations from the statements required by paragraph (b).

10. Paragraphs (e) and (f) provide the advertising lawyer, the Bar, and the public with requisite records should questions arise regarding the propriety of a public media advertisement. Paragraph (e), like paragraph (b)(1), ensures that a particular attorney accepts responsibility for the advertisement. It is in the public interest and in the interest of the legal profession that the records of those advertisements and approvals be maintained.

Examples of Prohibited Advertising

11. Paragraphs (g) through (o) regulate conduct that has been found to mislead or be likely to mislead the public. Each paragraph is designed to protect the public and to guard the legal profession against these documented misleading practices while at the same time respecting the constitutional rights of any lawyer to advertise.

12. Paragraph (g) is a limited regulation of video and audio forms of advertising. It prohibits lawyers from misleading the public into believing a non-lawyer portrayor or narrator in the advertisement is one of the lawyers prepared to perform services for the public. It does not prohibit the narration of an advertisement in the third person by an actor, as long as it is clear to those hearing or seeing the advertisement that the actor is not a lawyer prepared to perform services for the public.

13. Contingent fee contracts present unusual opportunities for deception by lawyers or for misunderstanding by the public. By requiring certain disclosures, paragraph (h) safeguards the public from misleading or potentially misleading advertisements that involve representation on a contingent fee basis. The affirmative requirements of paragraph (h) are not triggered solely by the expression of "contingent fee" or "percentage fee" in the advertisement. To the contrary, they encompass advertisements in the public media where the lawyer or firm expresses a mere willingness or potential willingness to render services for a contingent fee. Therefore, statements in an advertisement such as "no fee if no recovery" or "fees in the event of recovery only" are clearly included as a form of advertisement subject to the disclosure requirements of paragraph (h).

14. Paragraphs (i), (j), (k) and (l) jointly address the problem of advertising that experience has shown misleads the public concerning the fees that will be charged, the location where services will be provided, or the attorney who will be performing these services. Together they prohibit the same sort of "bait and switch" advertising tactics by lawyers that are universally condemned.

15. Paragraph (i) requires a lawyer who advertises a specific fee or range of fees in the public media to honor those commitments for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement itself specifies a shorter period. In no event, however, is a lawyer required to honor an advertised fee or range of fees for more than one year after publication.

16. Paragraph (j) prohibits advertising the availability of a satellite office that is not staffed by a lawyer at least on a part-time basis. Paragraph (j) does not require, however, that a lawyer or firm identify the particular office as its principal one. Experience has shown that, in the absence of such regulation, members of the public have been misled into employing a lawyer in a distant city who advertises that there is a nearby satellite office,

only to learn later that the lawyer is rarely available to the client because the nearby office is seldom open or is staffed only by lay personnel. Paragraph (k) is not intended to restrict the ability of legal services programs to advertise satellite offices in remote parts of the program's service area even if those satellite offices are staffed irregularly by attorneys. Otherwise low-income individuals in and near such communities might be denied access to the only legal services truly available to them.

17. When a lawyer or firm advertises, the public has a right to expect that lawyer or firm will perform the legal services. Experience has shown that attorneys not in the same firm may create a relationship wherein one will finance advertising for the other in return for referrals. Nondisclosure of such a referral relationship is misleading to the public. Accordingly, paragraph (k) prohibits such a relationship between an advertising lawyer and a lawyer who finances the advertising unless the advertisement discloses the nature of the financial relationship between the two lawyers. Paragraph (l) addresses the same problem from a different perspective, requiring a lawyer who advertises the availability of legal services and who knows or should know at the time that the advertisement is placed in the media that business will likely be referred to another lawyer or firm, to include a conspicuous statement of that fact in any such advertising. This requirement applies whether or not the lawyer to whom the business is referred is financing the advertisements of the referring lawyer. It does not, however, require disclosure of all possible scenarios under which a referral could occur, such as an unforeseen need to associate with a specialist in accordance with Rule 1.01(a) or the possibility of a referral if a prospective client turns out to have a conflict of interest precluding representation by the advertising lawyer.

18. Paragraph (m) protects the public by forbidding mottos, slogans, and jingles that are false or misleading. There are, however, mottos, slogans, and jingles that are informative rather than false or misleading. Accordingly, paragraph (m) recognizes an advertising lawyer's constitutional right to include appropriate mottos, slogans, and jingles in advertising.

19. Some lawyers choose to band together in a cooperative or joint venture to advertise. Although those arrangements are lawful, the fact that several independent lawyers have joined together in a single advertisement increases the risk of misrepresentation or other forms of inappropriate expression. Special care must be taken to ensure that cooperative advertisements identify each cooperating lawyer, state that each cooperating lawyer is paying for the advertisement, and accurately describe the professional qualifications of each cooperating lawyer. See paragraph (o). Furthermore, each cooperating lawyer must comply with the filing requirements of Rule 7.07. See paragraph (p).