ETHICAL CONSIDERATIONS IN MARKETING AND ADVERTISING SPECIALIZATION

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QUICK REFERENCE OF AUTHORITIES

(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(3) Texas Code of Professional Responsibility (no longer in effect)
(4) Texas Canons of Ethics (no longer in effect)
(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
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.
By 1972, the Committee was conducting public hearings throughout the state to
determine which areas of law should be the first ones in which certifications were
granted. In 1974, the Supreme Court of Texas promulgated the Texas Plan for
Recognition and Regulation of Specialization in the law by administrative order,
thereby creating the Texas Board of Legal Specialization. In 1975 the first group of
lawyers was certified by TBLS.

This was very near the time when California and Florida also established certification
boards, California being just before and Florida just after, Texas. These three
programs remain the largest state sponsored attorney certification programs.

III. Basic Rule on Advertising a Lawyer’s Services – TDRPC 7.02

A. “A lawyer shall not make or sponsor a false or misleading communication about
the qualifications or services of any lawyer or firm.” This is the bedrock for all
the rules involving advertising.

B. The rule lists a number of pieces of information which are prohibited (such as
implying the ability to improperly influence a tribunal or using an actor to
portray a client) and others (such as publishing judgment amounts or comparing
advertiser’s services with those of another lawyer) which may only be used if
specific criteria are met.

C. The idea behind all the rules concerning advertising is that accurate information
is provided to potential users of legal services.

IV. Primary Rule Governing Advertising of Certification in Public Media

A. Texas Disciplinary Rule of Professional Conduct 7.04(b)(2), read in conjunction
with 7.02(a)(6), (b), and (c).
A lawyer shall not state he or she has been certified or designated by an
organization as possessing special competence or that he or she is a specialist

B. EXCEPT:
1. If certified by TBLS
2. If certified by organization accredited by TBLS

C. NOTE: Different prescribed language advertising the above certifications.
   i. Certificates of special competence awarded by TBLS are to be set
      out as follows:
      “Board Certified – XYZ Law – Texas Board of Legal Specialization”
Certificates awarded by an organization accredited by TBLS are to be worded as follows: “Certified – ABC Law – National ABC Foundation”

D. A lawyer may advertise work in a specific area of law without stating he or she is not certified as long as the lawyer is competent to handle legal matters in that area.

E. Public Media encompasses just about everything – newspapers, magazines, billboards, websites and social media.

V. Solicitation By Attorneys

A. Rules 7.03 and 7.05 set out various dos and don’ts regarding direct solicitation of clients by attorneys.

B. In general, in-person solicitation is prohibited and a written solicitation is allowed but must meet several requirements.

C. Requirements concerning advertising a certification in public media are incorporated by reference in the solicitation provisions.

VI. Filing Requirements for Advertisements

Rule 7.07 sets out a number of requirements for public advertisements and solicitations of employment. This rule also provides that an attorney can request preapproval by the Advertising Review Committee of proposed advertisements or solicitations. A finding of compliance by ARC is binding in disciplinary proceedings in favor of the submitting attorney for all materials submitted along with his or her request. Whether certified or not, you are strongly encouraged to avail yourself of this procedure to avoid future difficulties.

VII. Additional Requirements Imposed by Plan

The concept of formal certification was a new one for the legal profession. It could be described as a “clash of cultures”. On the one hand, there was a strong feeling that a lawyer was supposed to be able to answer any legal question (or at least be able to find the answer to the question) and really should be able to handle any legal task. The counterpoint was committees of both the ABA and State Bar of Texas had
determined that de facto specialization already existed and was integrated in the practice of law at that time. They concluded the best approach was to develop a system for recognizing expertise in an objective way and managing the publication of information about that expertise. These different schools of thought resulted in some specific (and unique) provisions being included in the Plan:

- Certification was voluntary
- Certification was to be granted to individuals, not to firms.
- Certification did not limit an attorney to practice in only that area
- Non-certified attorneys were free to practice in specialty areas
- A certified attorney who received a referral from another attorney was not to enlarge the scope of representation and, consistent with disciplinary rules, should encourage a referred client to return to the referring attorney for the handling of future legal needs.

VIII. TBLS Administrative Requirements

A. Use of Logo – TBLS has developed a logo for Board Certified attorneys to use. It was designed so that it could be used in variety of ways - on letterhead and business cards, websites, e-mail templates, etc. Both the TDRPC and Plan require that a certification must relate to an individual attorney and consequently require that the certification be associated (physically displayed) near the name of the individual attorney. To assist certified attorneys, TBLS collaborated with the office of Advertising Review to develop a logo for each certified attorney which is PRE-APPROVED by Advertising Review. The logo is available on the TBLS website – www.tbls.org

B. TBLS has established a usage and standards manual regarding the logo which is also available on the website. This was a very important way in which TBLS could do “branding” for certified attorneys. To maximize effectiveness, the manual provides color and font ratio requirements for using the logo.

IX. Helpful Resources

A. The office of Advertising Review at the State Bar of Texas is the administrative arm of the Advertising Review Committee. The office has a number of resources for attorneys. If you go to www.texasbar.com and click on “For Lawyers”, you will see a link on advertising requirements. You will find interpretative comments from the ARC, ethics opinions, a pdf of the advertising rules, and information about submission of advertisements or solicitation communications
for review and approval. The staff members will also be glad to assist you and can be reached at 1-800-566-4616.

B. The State Bar also operates an Ethics Helpline at 1-800-532-3947. It is offered through the office of the Chief Disciplinary Counsel and is designed to provide guidance to attorneys about ethical obligations. The service cannot issue written opinions or legal advice and cannot answer questions about pending grievances. It can provide information on applicable rules, ethics opinions and case law which can help you reach an informed decision.

C. TBLS – you can reach us at 1-855-277-8257 (TBLS). We are glad to help with information about logo reproduction, marketing information, and related questions. You can also check our website at www.tbls.org.

X. Overview of Certification Process

The goals of the certification process are to objectively measure competence, provide a path for continuing competence and inform potential consumers of those attorneys who have established that competence. The categories used by TBLS in this process are:

Experience – An applicant must have at least five years practicing law as a licensed attorney and have sufficient activity within the specialty area during the three years (at least) immediately preceding the filing of an application. Tasks and activities specific to the area are set out in the standards for certification. An application form is designed to require an applicant to “flesh out” his or her work in the area.

Continuing Legal Education – An applicant must have had at least 60 hours of CLE covering the specialty area within the three year period leading up to application.

Peer Review – Information concerning an applicant’s knowledge and abilities in the specialty area is sought from attorneys and judges who are familiar with the applicant and his or her work in the area.

Examination – An applicant must take and pass a six hour written examination. The examination consists of three essay questions each worth 100 points and 100 multiple choice questions each worth 2 points. An applicant must attain a score of 350 – 70% of the available points on the exam.
TEXAS PLAN FOR RECOGNITION AND REGULATION
OF
SPECIALIZATION IN THE LAW

(As Amended September 28, 2010)

SECTION I
PURPOSE AND OBJECTIVE

To promote the availability, accessibility and quality of the services of attorneys to the public in particular areas of the law is to serve the public interest and advance the standards of the legal profession. That is the purpose and objective of the following program for the recognition and regulation of those attorneys who have special competence in a particular area of the law.

SECTION II
TEXAS BOARD OF LEGAL SPECIALIZATION

The State Bar of Texas hereby establishes a Texas Board of Legal Specialization (hereinafter referred to as the “TBLS”). The TBLS shall be composed of twelve members appointed by the President of the State Bar of Texas, with the approval of its Board of Directors. The TBLS shall be representative of the legal profession in Texas and shall consist only of licensed attorneys, some of whom specialize and some of whom are in general practice. All members shall hold office for three years and until their successors are appointed. Members shall be appointed to three year staggered terms of office. Any vacancy shall be filled in the manner provided for original appointments. All members of the TBLS shall be eligible for reappointment but for no more than one additional term.
SECTION III
JURISDICTION OF THE BOARD

Subject to the continuing jurisdiction of the Supreme Court of Texas, the TBLS shall have general jurisdiction of all matters pertaining to specialization in the practice of law and shall have the authority and duty to:

A. Administer the program for the recognition and regulation of specialization in the law.

B. Upon appropriate petition, define and designate areas of law in which certificates of special competence may be granted and provide procedures by which such areas may be determined, redefined or eliminated.

C. Make and publish reasonable and nondiscriminatory standards concerning education, experience, proficiency, and other relevant matters for granting certificates of special competence to attorneys in defined and designated areas of law, after public hearings on due notice have been held.

D. Provide procedures for the investigation and testing of the qualifications of applicants and certificate holders and to award certificates of special competence in a form approved by the TBLS.

E. Make and publish reasonable and nondiscriminatory standards for continuing proficiency, recertification or renewal of certificates of special competence after public hearing on due notice.

F. Encourage law schools, the State Bar Committee on Continuing Legal Education, local bar associations and other agencies of continuing legal education to develop and maintain a program of legal education and continuing legal education to meet the standards prescribed by the TBLS.

G. Cooperate with other agencies of the State Bar of Texas in establishing and enforcing standards of professional conduct necessary for the recognition and regulation of specialization in the law in the manner determined by the TBLS.

H. Cooperate with the Standing Committee on Specialization of the American Bar Association and with the agencies in other states engaged in the regulation of legal specialization.

I. Make and publish standards, rules and regulations to implement this authority, all in accordance with the limitations on the power of the TBLS and the minimum standards prescribed by the TBLS.

J. Establish and publish reasonable and non-discriminatory standards for accreditation of private certifying organizations which grant certification in a manner similar to that granted by the TBLS.

SECTION IV
LIMITATIONS ON POWER OF THE TBLS

The following limitations on the power of the TBLS are established.

A. No standards shall be approved which shall in any way limit the right of a certificate holder to practice law in all areas. Any attorney, alone or in association with any other attorney, shall have
the right to practice in all areas of law, even though he or she is board certified in a particular area of law.

B. No attorney shall be required to be certified before he or she can practice law in any particular area of the law. Any attorney, alone or in association with any other attorney, shall have the right to practice in all areas of law, even though he or she is not board certified in any particular area.

C. All requirements for and all benefits to be derived from certification granted by the TBLS or from that by an organization approved by the TBLS are individual and may not be fulfilled by or attributed to a law firm of which the certified attorney may be a member.

D. Participation in the Plan shall be on an entirely voluntary basis.

E. The limit on the number of areas of law in which an attorney may be certified shall be determined by such practical limits as are imposed by the requirement of "substantial involvement" and such other standards as may be established by the TBLS.

F. No rules or standards shall be adopted in contravention of the rules of the State Bar of Texas.

SECTION V
ADVISORY COMMISSIONS

Advisory Commissions to the TBLS shall be established for each area of law in which certificates of special competence are to be issued. These Commissions shall advise and assist the TBLS in carrying out its objectives and in the conduct and development of the program for the recognition and regulation of specialization in law. Standards for the issuance of certificates of special competence shall be established by the TBLS, but it will be advised in this and other relevant matters by the Advisory Commission for each area of law. The Advisory Commission for each area of law shall be charged with actively administering the program in its particular area in cooperation with and under the general policy guidance of the TBLS.

Advisory Commission members shall be appointed by the TBLS in such number and for such terms as the TBLS shall direct.

SECTION VI
MINIMUM STANDARDS FOR CERTIFICATION

The minimum standards for certification under this program are prescribed below. Each Advisory Commission may recommend, and the TBLS may establish, additional or higher standards. An attorney (1) who is an active member in good standing of the State Bar of Texas; (2) who currently maintains an office in the State of Texas; and (3) who meets the requirements prescribed by the TBLS, shall be granted a certificate in a form approved by the TBLS which shall certify, under the name of the, TBLS the attorney’s special competence in a particular area of law designated by the TBLS as an area of law in which certificates of special competence may be granted.
A. Requirements for qualifying for certification are:
1. A minimum of five (5) years of actual practice of the law on a full time basis.
2. A satisfactory showing, as determined by the TBLS, after advice from the appropriate Advisory Commission, of a substantial involvement in the particular area of law for which certification is sought for such reasonable period of time immediately preceding certification as may be determined by the TBLS after advice from the Advisory Commission.
3. A satisfactory showing, as determined by the TBLS, after advice from the appropriate Advisory Commission, of such educational experience in the particular area of law for which certification is sought as the TBLS deems advisable.
4. Passing a written examination applied uniformly to all applicants before certification to demonstrate sufficient knowledge, proficiency and experience in the area of law for which certification is sought and in the various areas of law relating to such area as is necessary to justify the representation of special competence to the legal profession and to the public.
5. Passing an oral examination, if determined to be advisable by the TBLS, with the advice of the appropriate Advisory Commission.
6. Payment of any fee required by the TBLS.

"Substantial involvement", as used in these standards, shall be defined by the TBLS as to each particular area of law from a consideration of its complexity and distinction from other areas, and from consideration of the time and extent of necessary devotion to the particular area of practice.

SECTION VII
STANDARDS FOR RECERTIFICATION

No certificate of special competence shall be issued or renewed for a period longer than five years, and the term of any certificate shall be stated on its face.

Each Advisory Commission may recommend, and the TBLS may establish additional requirements and safeguards to insure the continued proficiency of any holder of a certificate of special competence, but recertification shall be required at least every five years under the following minimum standards:

A. A satisfactory showing, as determined by the TBLS, with the advice of the appropriate Advisory Commission, of a substantial involvement in the particular area of law for which certification was granted, during the period of certification;
B. A satisfactory showing, as determined by the TBLS, after advice from the appropriate Advisory Commission, of such continuing educational experience in the area of law for which certification was granted, during the period of certification as the TBLS deems advisable; and
C. The payment of any fee prescribed by the TBLS. In the event an attorney’s previous certificate is not effective at the time application is made for recertification or he or she fails to meet the requirements for recertification, he or she shall be entitled to seek certification by examination as provided in Section VI above.

SECTION VIII

REVOCATION OF CERTIFICATION

A. A certificate of special competence issued by the TBLS may be revoked by the TBLS:

   1. If recognition of certification in that area is terminated; or
   2. If a determination is made that the certificate holder has not complied with applicable rules and regulations of the TBLS, is no longer a member in good standing of the State Bar of Texas, has made a false representation or misstatement of material fact to the TBLS, has engaged in professional misconduct or has engaged in other conduct which constitutes good cause for revocation as determined by the TBLS.

B. A certificate of special competence shall be revoked automatically if a certificate holder is convicted of a serious crime, is disbarred or resigns from the practice of law.

C. Upon notice of the determination of the TBLS that the certificate of special competence has been revoked; the certificate holder shall return the certificate of special competence to the TBLS.

D. A certificate of accreditation issued to a private certifying organization by the TBLS may be revoked by the TBLS upon a determination that:

   1. The certifying organization has ceased to exist;
   2. The certifying organization no longer meets the TBLS standards; or
   3. The certifying organization has failed to abide by the Rules and Regulations of the TBLS.

Upon notice of the determination of the TBLS that the certificate has been revoked, the certificate holder shall return the certificate of special competence to the TBLS.

SECTION IX

RIGHT OF APPEAL

An attorney who is refused certification, recertification or whose certificate is revoked by the TBLS, or a private certifying organization which is denied accreditation by the TBLS, shall have the right to appeal the ruling of the TBLS to the Board of Directors of the State Bar of Texas under such rules and regulations as it may prescribe. The exhaustion of this right of appeal shall be a condition precedent to judicial review.
SECTION X
RESPONSIBILITIES OF CERTIFIED ATTORNEYS

A. When a client is referred to an attorney who is certified by the TBLS on a matter within the attorney’s specialty area, the attorney so certified shall not take advantage of his position to enlarge the scope of his representation. In addition to any requirements of the Texas Disciplinary Rules of Professional Conduct, the attorney so certified shall encourage a referred client to return to the referring attorney for the handling of future legal needs.

B. Special Controls

1. Each applicant and certified attorney shall agree to abide by all rules and regulations promulgated by the TBLS as amended from time to time.
2. Certification by the TBLS confers no vested rights or property rights.

C. Rules of Professional Conduct

Any attorney holding a current certificate of special competence shall be entitled to the following:

1. To state in recognized and conventional legal directories or law lists that the attorney is certified by the TBLS in a particular area in the following words: "Board Certified (e.g., Labor and Employment Law)—Texas Board of Legal Specialization". In all other respects the listing shall conform to the present rules of the State Bar of Texas, including Texas Disciplinary Rules of Professional Conduct;
2. To state in a notice mailed to attorneys, clients, former clients, personal friends and relatives that the attorney is certified by the TBLS in a particular area in the following words: "Board Certified (e.g., Family Law)—Texas Board of Legal Specialization". In all other respects the listing shall conform to the present rules of the State Bar of Texas, including Texas Disciplinary Rules of Professional Conduct;
3. To state in the classified section of telephone directories that the attorney is certified by the TBLS in a particular area in the following words: "Board Certified (e.g., Criminal Law)—Texas Board of Legal Specialization". In all other respects the listing shall conform to the present rules of the State Bar of Texas, including the Texas Disciplinary Rules of Professional Conduct;
4. To state on a professional card that the attorney is certified by the TBLS in a particular area in the following words: "Board Certified (e.g., Civil Trial Law)—Texas Board of Legal Specialization". Said information is also permitted on the letterhead under the individual listing of the attorney on the margin of the stationary, but not under the styled name of the firm at the top of the letterhead. In all other respects the listing shall conform to the present rules of the State Bar of Texas, including Texas Disciplinary Rules of Professional Conduct; and
5. To display in the attorney’s office the certificate issued by the TBLS.

No statement of certification shall be permitted other than as above specifically described unless permitted by the rules of the State Bar of Texas, including the Texas Disciplinary Rules of Professional Conduct.
SECTION XI
FINANCING OF THE PROGRAM

A fee schedule shall be established by the TBLS for certification of attorneys and legal assistants and for accreditation of attorney certifying organizations.

SECTION XII
RETAINED JURISDICTION OF SUPREME COURT

The jurisdiction of the TBLS shall be limited to eighteen areas of law: Criminal Law; Labor and Employment Law; Family Law; Estate Planning and Probate Law; Civil Trial Law; Personal Injury Trial Law; Immigration and Nationality Law; Real Estate Law; Tax Law; Bankruptcy Law; Oil, Gas and Mineral Law; Civil Appellate Law; Administrative Law; Consumer and Commercial Law, Juvenile Law, Health Law, Workers’ Compensation Law; and Criminal Appellate Law; and to the development and operation of the program in the recognition and regulation of specialization in the law, provided, however, that the number and type of areas included in the program and the jurisdiction of the TBLS may be enlarged, altered, or terminated from time to time by the Supreme Court of Texas.

SECTION XIII
LEGAL ASSISTANT CERTIFICATION

The TBLS may administer a specialty certification program for legal assistants as described in the Texas Plan for Recognition and Regulations for Legal Assistant Certification.