



**VISION:** To improve the health of all Texans.

**MISSION:** TMA supports Texas physicians by providing distinctive solutions to the challenges they encounter in the care of patients.

## **TMA Office of the General Counsel**

# ***The Regulation of Physician Advertising***

February 2008

### **Restrictions on Advertising**

When reviewing this document a physician should keep in mind that he or she is **personally responsible** for any representation made to the public on his or her behalf. If a physician is an employee of a practice and the practice advertises improperly, the physician is held accountable. Furthermore, each physician who is a principal partner, or officer of a firm or entity identified in any advertisement, is jointly and severally responsible for the form and content of any advertisement.<sup>1</sup>

The Medical Practice Act (MPA) contains prohibitions with regard to certain types of advertisements. The MPA states that a physician commits a prohibited practice if the physician:

- uses an advertising statement that is false, misleading, or deceptive; or
- advertises professional superiority of the performance of professional service in a superior manner if that advertising is not readily subject to verification.<sup>2</sup>

Inappropriate advertising may result in discipline by the Texas Medical Board (TMB) and can include revocation, civil penalties up to \$1,000 per violation, and can result in criminal penalties (Class A misdemeanor).

There are two separate entities that may enforce statutory and regulatory restrictions on physician advertising. The Health Professions Council, a state agency comprised of representatives from 13 health licensing agencies, and the TMB. The Texas Attorney General is granted authority to file an injunction and

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<sup>1</sup> 22 Texas Administrative Code §164.5(b).

<sup>2</sup> Texas Occupations Code § 164.052(a)(6)&(7).

seek penalties for a violation of the Health Professions Council's prohibitions, while the TMB generally enforces its own prohibitions.

Three sources of information exist regarding the regulation of physician advertising. There are general statutes applying to medicine and other health "professions," specific statutes applying only to physicians, and rules promulgated by the TMB that further clarify and implement these statutes. As stated previously, all false, misleading or deceptive advertising, or advertising not readily subject to verification, is prohibited. This includes advertising that specifically:

1. contains material false claims or misrepresentations of material facts which cannot be substantiated;
2. contains material implied false claims or implied misrepresentations of material fact;
3. omits material facts;
4. makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;
5. advertises or assures a permanent cure for an incurable disease;
6. compares a health care professional's services with another health care professional's services unless the comparison can be factually substantiated;
7. advertises professional superiority or the performance of professional service in a superior manner if the advertising is not subject to verification;
8. contains a testimonial that includes false, deceptive, or misleading statements, or fails to include disclaimers or warnings as to the credentials of the person making the testimonial;
9. includes photographs or other representations of models or actors without explicitly identifying them as models and not actual patients;
10. causes confusion or misunderstanding as to the credentials, education, or licensure of a health care professional;
11. represents that health care insurance deductibles or copayments may be waived or are not applicable to health care services to be provided if the deductibles or copayments are required;
12. represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or copayments are required;
13. states that a service is free when it is not, or contains untruthful or deceptive claims regarding costs and fees. If other costs are frequently

incurred when the advertised service is obtained then this should be disclosed. Offers of free service must indeed be free. To state that a service is free but a third party is billed is deceptive and subject to disciplinary action;

14. makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of patient;
15. advertises or represents in the use of a professional name, a title or professional identification that is expressly or commonly reserved to or used by another profession or professional;
16. claims that a physician has a unique or exclusive skill without substantiation of such claim;
17. involves uninvited solicitation such as door to door solicitation of a given population or other such tactics for "drumming" patients; or
18. fails to disclose the fact of giving compensation or anything of value to representatives of the press, radio, television or other communicative medium in anticipation of or in return for any advertisement, article, or infomercial, unless the nature, format or medium of such advertisement makes the fact of compensation apparent.<sup>3</sup>

### **Board Certification**

The TMB regulates how a physician may communicate information to prospective or current patients about board certification and strictly enforces these administrative provisions. The regulations are complex and precise in the use of their language. Although the regulations are summarized below, please be aware (as with any TMA whitepaper) the touchstone for compliance is the text of the regulation, *not* the text of this summary. Please visit <http://www.tmb.state.tx.us/rules/rules/bdrules.php> to obtain regulation text.

#### *ABMS, BOS, or ABOMS Certifications – Restriction on use of “Board Certified.”*

According to TMB regulations, a physician may use the term “board certified” **only** if he is certified by an organization that is a member of the American Board of Medical Specialties, the Bureau of Osteopathic Specialists, or is the American Board of Oral and Maxillofacial Surgery.

#### *“Certified By” Non-ABMS, BOS, or ABOMS Organizations That Meet Certain Requirements.*

Further, a physician may **only** advertise that he is “certified by” a named organization if the organization meets five requirements:

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<sup>3</sup> Tex. Occ. Code §§ 101.201, 101.251 & 22 Texas Administrative Code § 164.3 (2008).

1. An exam is required for certification that tests knowledge and skill in the specialty;
2. The organization is a 501(c) nonprofit;
3. The organization has a permanent headquarters and staff;
4. The organization has at least 100 members; and
5. The organization requires all physicians seeking certification complete identifiable and substantial training in that specialty or subspecialty.

*Physicians Who are NOT Certified or Whose Certifying Bodies Do NOT Conform to the Previous Requirements.*

A physician who is not certified by an organization that meets one of the two requirements above may **not** advertise a field of interest, but may advertise that his practice is “limited to” a certain practice area. The exact phrase “limited to” must be used.

*“Board Certified” Physicians and Physicians Who are “Certified By.”*

Physicians who are members of organizations that meet one of the two requirements above may advertise a field of interest **only** if the physician identifies the specialty for which the physician is certified in equal size type and emphasis.

*Use of “Board Eligible” and “Board Qualified.”*

Finally, the phrases “board eligible” and “board qualified” or any similar phrases are not permitted by the Texas Medical Board.<sup>4</sup>

### **Advertising Record Retention**

A recording of every advertisement communicated by electronic media, a copy of every advertisement communicated by print media, and a copy of any other form of advertisement must be retained for a period of **two years from the last date of broadcast or publication.**<sup>5</sup>

Also, if photographs or other representations of actual patients are used in advertising, there must not be communication of facts, data, or information which may identify the patient without first obtaining patient consent.<sup>6</sup> Although not expressly required by the regulation, physicians may want to obtain this consent in writing and maintain a copy along with the advertisement.

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<sup>4</sup> 22 TAC §164.4.

<sup>5</sup> 22 TAC §164.5(d).

<sup>6</sup> 22 TAC §164.5(c).

## **Special Caution for Testimonials**

The TMB defines a testimonial to be “An attestation or implied attestation to the competence of a physician's service or treatment. Testimonials also include expressions of appreciation or esteem, a character reference, or a statement of benefits received. Testimonials are not limited to patient comments but may also include comments from colleagues, friends, family, actors, models, fictional characters, or other persons or entities.”

In 2001, the Texas Attorney General issued an opinion to the TMB regarding testimonials. In that opinion General Cornyn stated that his office could not predict whether a court would find the blanket statutory ban on testimonials to be constitutional. To avoid a constitutional issue, the TMB modified its regulation describing how it will enforce the law. However, the Texas Occupations Code still contains the absolute prohibition and the use of testimonials entails **substantial** legal risk. Many public relations consultants will assert that testimonials are among the best possible advertising techniques. However, medicine, unlike business entities, cannot generally guarantee outcomes.

Medicine is a science-based healing art. Thus, physicians do not and, typically, cannot promise their patient a particular outcome. Patient testimonials typically infer to prospective patients that they will obtain the same outcome as the patient making the attestation. Thus, the AMA (in Opinion 5.02) and TMA ethics policy making bodies have concluded that “testimonials of patients as to the physician’s skill or the quality of the physician’s professional services tend to be deceptive.”

Professional testimonials have similar risks in that they typically take the form of acknowledging a professional superiority or the performance of professional service in a superior manner. This representation, if not verifiable, violates the law and is unethical.

Simply as it regards testimonials, physicians should strictly limit their use and only permit representations in their advertisements that are readily subject to verification.

## **Rewards or Awards for Referrals**

Another technique some PR consultants may recommend is to offer rewards or incentives to persons for the referral of new patients. Although this is a technique utilized by general business, it is prohibited for anyone licensed by a Texas health care regulatory agency (which includes the TMB).

In Texas, a person commits an offense if the person knowingly offers to pay or agrees to accept, directly or indirectly, overtly or covertly **any remuneration** in cash or in kind to or from another for securing or soliciting a patient or patronage

for or from a person licensed, certified, or registered by a state health care regulatory agency.<sup>7</sup>

Several physicians have been disciplined by the TMB for a violation of this provision. Consider the following examples:

Dr. A was disciplined by the TMB and assessed an administrative penalty of \$500. The action was based on allegations that Dr. A violated Texas law by offering free services to patients for referrals to the practice.

The Board and Dr. N entered into an Agreed Order assessing an administrative penalty of \$3,000. The order was based on allegations that Dr. N's office manager sent out about 40 letters to other office managers and doctors stating that each person who referred someone to the practice would receive a \$50 discount on treatment from his office. According to the TMB, such an offer constitutes a reward to a person for referring patients and violates Texas law. The TMB, however, declined to impose the maximum penalty as it found, in mitigation, that an advertising firm that works with physicians recommended the use of the letter.

Offering gifts and free services to *any person* for the referral of patients (without regard to whether they are in Medicare or Medicaid) risks discipline for improper solicitation of patients.

**NOTICE:** This information is provided as a commentary on legal issues and is not intended to provide advice on any specific legal matter. This information should NOT be considered legal advice and receipt of it does not create an attorney-client relationship. This is not a substitute for the advice of an attorney. The Office of the General Counsel of the Texas Medical Association provides this information with the express understanding that 1) no attorney-client relationship exists, 2) neither TMA nor its attorneys are engaged in providing legal advice and 3) that the information is of a general character. Although TMA has attempted to present materials that are accurate and useful, some material may be outdated and TMA shall not be liable to anyone for any inaccuracy, error or omission, regardless of cause, or for any damages resulting therefrom. Any legal forms are only provided for the use of physicians in consultation with their attorneys. You should not rely on this information when dealing with personal legal matters; rather legal advice from retained legal counsel should be sought.

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<sup>7</sup> Tex. Occ. Code §102.001.

## **AMA Policy**

### CEJA Ethics E-5.02 Advertising and Publicity

There are no restrictions on advertising by physicians except those that can be specifically justified to protect the public from deceptive practices. A physician may publicize him or herself as a physician through any commercial publicity or other form of public communication (including any newspaper, magazine, telephone directory, radio, television, direct mail, or other advertising) provided that the communication shall not be misleading because of the omission of necessary material information, shall not contain any false or misleading statement, or shall not otherwise operate to deceive. Because the public can sometimes be deceived by the use of medical terms or illustrations that are difficult to understand, physicians should design the form of communication to communicate the information contained therein to the public in a readily comprehensible manner. Aggressive, high-pressure advertising and publicity should be avoided if they create unjustified medical expectations or are accompanied by deceptive claims. The key issue, however, is whether advertising or publicity, regardless of format or content, is true and not materially misleading. The communication may include (1) the educational background of the physician, (2) the basis on which fees are determined (including charges for specific services), (3) available credit or other methods of payment, and (4) any other nondeceptive information. Nothing in this opinion is intended to discourage or to limit advertising and representations which are not false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act. At the same time, however, physicians are advised that certain types of communications have a significant potential for deception and should therefore receive special attention. For example, testimonials of patients as to the physician's skill or the quality of the physician's professional services tend to be deceptive when they do not reflect the results that patients with conditions comparable to the testimoniant's condition generally receive. Objective claims regarding experience, competence, and the quality of physicians and the services they provide may be made only if they are factually supportable. Similarly, generalized statements of satisfaction with a physician's services may be made if they are representative of the experiences of that physician's patients. Because physicians have an ethical obligation to share medical advances, it is unlikely that a physician will have a truly exclusive or unique skill or remedy. Claims that imply such a skill or remedy therefore can be deceptive. Statements that a physician has an exclusive or unique skill or remedy in a particular geographic area, if true, however, are permissible. Similarly, a statement that a physician has cured or successfully treated a large number of cases involving a particular serious ailment is deceptive if it implies a certainty of result and creates unjustified and misleading expectations in prospective patients. Consistent with federal regulatory standards which apply to commercial advertising, a physician who is considering the placement of an advertisement or publicity release, whether in print, radio, or television, should determine in advance that the communication or message is explicitly and implicitly truthful and not misleading. These standards require the advertiser to have a reasonable basis for claims before they are used in advertising. The reasonable basis must be

established by those facts known to the advertiser, and those which a reasonable, prudent advertiser should have discovered. Inclusion of the physician's name in advertising may help to assure that these guidelines are being met. (II) Issued prior to April 1977; Updated June 1996.

### **TMA Policy**

**Board of Councilors Ethics Opinion. ADVERTISING.** It is not unethical for a physician to authorize the listing of his name and practice in a directory for professional or lay use. Physicians should avoid use of statements which are false, misleading, or deceptive, or which assert professional superiority or the performance of a professional service in a superior manner if the advertising is not readily subject to verification.

Advertising by physicians can benefit patients by providing information which helps patients make choices about their health care needs. Advertising should not contain false or misleading statements, and should not otherwise operate to deceive. Aggressive, high pressure advertising and publicity may create unjustified expectations.

Testimonials are anecdotal reports and may not be representative of every patient's experience or even most patient's experiences. Any inducements or payments given to persons giving testimonials should be clearly disclosed in the advertisement. Advertising containing testimonials regarding a physician's skill or the quality of the physician's professional services is unethical.

Texas law makes advertising professional superiority or the performance of professional service in a superior manner if the advertising is not readily subject to verification grounds for disciplinary action against the physician(s) responsible. Any communication, advertising, or publicity distributed on behalf of a physician, group, partnership, or professional association should include the name of at least one physician responsible for its content. **(Modified October 2007)**