# Interpretive Comments

# Part 7: Information About Legal Services

To assist lawyers advertising in the public media or soliciting prospective clients by written communications, the Advertising Review Committee has adopted Internal Interpretive Comments to be used by staff. The Interpretive Comments are designed to establish objective means for staff members to review advertisements or writings and to determine whether they comply with Part 7 of the Texas Disciplinary Rules of Professional Conduct. If the statements and representations contained in advertisements or writings comply with the Interpretive Comments, staff is authorized to approve them. (Dates in parentheses indicate date of original publication in the *Texas Bar Journal*.)

- 1. Public Media Advertisement (Nov. 1995) A public media advertisement is an advertisement broadcast or made available to the general public, such as telephone Yellow Pages, newspapers or other periodicals, outdoor display, the Internet, radio or television. Publications or information disseminated primarily to lawyers, such as legal newspapers, legal directories, firm brochures mailed to other lawyers, and on-line services provided to lawyers are not considered to be in the public media.
- 2. Client Testimonials (Nov. 1995, revised June 2005) Any person appearing or speaking as though he or she were a client of the advertising lawyer or firm in a public media advertisement must be an actual client of the lawyer or law firm whose services are being advertised. A lawyer or law firm may not avoid complying with Part 7 through the use of a client spokesperson. Further, a client presenting the facts or circumstances surrounding a case or matter may only appear as a client of the lawyer or firm relative to a case or matter in which he or she was a party. The name, address and telephone number of the client appearing or speaking in a public media advertisement shall be identified to the committee. Interpretive Comment Number 25 details the requirements for factual substantiation required when an advertisement in the public media references results obtained or past successes.
- **3.** Unjustified Expectations (Nov. 1995, revised April 2000. revised March 2004, revised June 2005) When an unjustified expectation is created through use of a picture or image of cash, checks or other monetary benefit, the inclusion of a disclaimer and/or information as described in this comment will not cure the violation of Rule 7.02.
- **4. Client Advances (Nov. 1995)** An advertisement that contains statements or representations that the lawyer or law firm will loan or advance specific sums of monies to prospective clients is misleading and creates unjustified expectations in violation of Rule 7.02(a)(1) and (2). Example: "We will advance or loan up to \$2,000 to clients." A lawyer may, however, include a statement in an advertisement or writing that actual litigation expenses, court costs, and other financial assistance may be advanced to a client.
- 5. Lawyer Announcements or Advertisements in Legal Directories Need not Include 7.04 (a) or (b) Disclaimers or Statements (Nov. 1995) An announcement stating new or changed associations, offices, or other matters relating to a lawyer or law firm, or an advertisement by a lawyer or law firm in a legal directory or legal newspaper containing information about the name, location, telephone number and general availability of lawyers to work on particular legal matters or listing various areas of practice, need not include a disclaimer or statement required by Section 7.04(a) or (b). See Rule 7.04(a)(3).
- **6.** Lawyer Responsible for Content of Advertising (Nov. 1995) It is presumed that a lawyer or law firm whose name is published in an advertisement is responsible for the content of the advertisement and therefore meets the requirements of Section 7.04(b)(1). It is not necessary that the advertisement include a specific statement or tag line identifying a particular lawyer as having reviewed the content of the advertisement.
- 7. Organizations Certifying Lawyers as Possessing Special Competence (Nov. 1995, revised April 2000) No lawyer shall advertise that he has been certified by an organization that implies that its members possess special competence, as no organization has yet applied for and obtained accreditation by the Texas Board of Legal Specialization as required by Rule 7.04(b)(2)(ii).

- 8. Disclaimers and Statements must be Separate and Apart (Nov. 1995, revised Sept. 1997, withdrawn June 2005)
- **9. Portraying a Lawyer in an Advertisement (Nov. 1995)** The person who portrays 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. The inclusion of a disclaimer stating that the person is an actor does not cure the deficiency and still violates Rule 7.04(q).

In determining whether a person is portraying a lawyer whose services or whose firm's services are being advertised, the advertisement as a whole, including the surrounding setting of the video; i.e., if the setting is in a law library, courtroom, or office, as well as the statements, and whether they are in the third person versus first person, and any other matters which may imply to the consumer that the person in an advertisement is a lawyer whose services are being advertised will be considered.

10. Contingent Fees (Nov. 1995) An advertisement that discloses the willingness or potential willingness of a lawyer to render services on a contingent fee basis must comply with Rule 7.04(h). The advertisement must disclose whether the client will be obligated to pay all or a portion of court costs and whether a client may be liable for other expenses.

## **EXAMPLES:**

- A. "No fee if no recovery. Client is obligated for payment of court costs and expenses, regardless of recovery.
- B. "No attorney's fees unless you recover. Court costs, litigation expenses, and medical bills are paid from your share of the recovery. If there is no recovery, you will not be responsible for any court costs or litigation expenses, except for unpaid medical bills."
- C. "No attorney's fees, court costs, or expenses unless you recover." \*
- \*If this last statement is used, a lawyer may be obligated to pay court costs, litigation expenses and any medical expenses that might be incurred by the plaintiff.
- 11. Referral of Cases (Nov. 1995, revised June 2005) If by past experience or practice the lawyer who is advertising or disseminating a solicitation communication, routinely or frequently refers to other lawyers certain types of cases advertised for, then the advertising/soliciting lawyer is required to disclose such fact in accordance with 7.04(I). If an advertising or soliciting lawyer who by past experience or practice knows or should know that the case is likely to be referred to another lawyer, then the advertising/soliciting lawyer should disclose the fact of the anticipated referral pursuant to 7.04(I).
- **12.** Solicitation Communications and Self-Mailing Pamphlets or Brochures (Nov. 1995, revised June 2005) For a written communication solicitation letter, the requirements of Rule 7.05(b) are met if the word 'ADVERTISEMENT' is printed at least 1/4th of an inch in height vertically on the envelope and first page of the written communication solicitation letter, provided the word is separate and apart from other text.

If a self-mailing pamphlet or brochure is mailed, the word 'ADVERTISEMENT' must be printed at least 3/8ths of an inch vertically or three (3) times the vertical height of text font in the body of the communication and in a color that is in sharp contrast to background color. See Rule 7.05(b)(2-1).

If the solicitation is an electronic mail message, the word 'ADVERTISEMENT' must plainly visible, be in all caps, in the subject line of the electronic mail message and at the beginning of the message's text.

The following elements are not required in a letter or brochure, or an audio, audio-visual, digital media, recorded telephone message, or other form of electronic solicitation communication, that is disseminated only to persons or entities identified in Rule 7.05(f)(1)-(4):

- A. disclaimers or statements required by Rule 7.04(a)-(c);
- B. marking the communication 'ADVERTISEMENT'; and
- C. disclosure of how the lawyer obtained the information concerning the recipient's name.
- 13. Brochures and Pamphlets (Nov. 1995, revised June 2005) A brochure or pamphlet which is enclosed with a written solicitation letter is not required to be marked 'ADVERTISEMENT' provided the first page of the letter and the face of the envelope are marked 'ADVERTISEMENT' in compliance with the above-referenced Rule 7.05. An attachment included in an electronic mail communication is not required to be marked 'ADVERTISEMENT', provided the subject line of the electronic mail message and the beginning of the message's text, are plainly marked 'ADVERTISEMENT' in compliance with Rule 7.05.

If a brochure or pamphlet is the only item included in an envelope or electronic communication mailed to a prospective client, the brochure, pamphlet and the envelope or electronic communication must be plainly marked 'ADVERTISEMENT.'

- 14. Filing Requirements (Nov. 1995, withdrawn June 2005)
- **15.** Advertisements Referring to Other Information or Recordings (Nov. 1995, revised Mar. 1996, revised June 2005) If a public media advertisement or solicitation communication refers to additional information which may be available to prospective clients, such as a taped message, or an electronic, digital or printed pamphlet that provides information concerning a person's or entity's legal rights, the additional information need not be submitted for pre-approval or filed with the Advertising Review Committee. However, if the information contains matters designed primarily to solicit prospective clients by the lawyer or firm, then this information must be filed in accordance with Rule 7.07. A lawyer who responds to a request for information by a prospective client with an individualized letter is not subject to the Rule 7.05 governing written, electronic or digital solicitation communications and is not required to file such letter. See also Rule 7.03 regarding regulated telephone or other electronic contact.
- 16. Spanish Translation of Disclaimer (Nov. 1995, withdrawn June 2005)
- 17. The Internet and Similar Services Including Home Pages. (March 1996, revised May 2003, Revised 2010)

Part VII of the Texas Disciplinary Rules of Professional Conduct applies to information disseminated digitally via the Internet. A digitally transmitted message that addresses the availability of a Texas lawyer's services is a communication subject to Rule 7.02, and when published to the Internet, constitutes an advertisement in the public media.

# A. Websites

A website on the Internet that describes a lawyer, law firm or legal services rendered by them is an advertisement in the public media. For the purposes of Part VII of the TDRPC, "website" means a single or multiple page file, posted on a computer server, which describes a lawyer or law firm's practice or qualifications, to which public access is provided through publication of a uniform resource locator (URL).

Of the pages of a website subject to these rules, many may be accessible without use of the site's own navigational tools. Of those pages, for the purpose of this Interpretative Comment, the "intended initial access page" is the page of the file on which navigational tools are displayed or, in the case that navigational tools are displayed on several pages, the page which provides the most comprehensive index capability on the site.

The intended initial access page of a lawyer or law firm's website shall include:

- 1) the name of the lawyer or law firm responsible for the content of the site
- 2) if areas of law are advertised or claims of special competence are made on the intended initial access page or elsewhere on the site, a conspicuously displayed disclaimer regarding such claims in the language prescribed at Rule 7.04(b); and
- 3) the geographic location (city or town) in which the lawyer or law firm's principal office is located. Publication of a link to a separate page bearing the required disclaimer or information required by Rule 7.04(b) does not satisfy this requirement.

# B. Web-Based Display/Banner Ads

An image or images displayed through the vehicle of an electronic communication is an advertisement in the public

media if the ad describes a lawyer or law firm's practice or qualifications, whether viewed independently or in conjunction with the page or pages reached by a viewer through links offered by the ad ("target page"). The content of a web-based display or banner ad will be viewed in conjunction with the target page.

# C. Social Media Sites

Landing pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements. Where access is limited to existing clients and personal friends, filing with the Advertising Review Department is not required.

#### D. Blogs

Blogs or status updates considered to be educational or informational in nature are not required to be filed with the Advertising Review Department. However, attorneys should be careful to ensure that such postings do not meet the definition of an advertisement subject to the filing requirements.

# E. Compliance

Regardless of the form of the electronic communication described in this interpretive comment, the content, including words, sound and images, shall conform to the requirements of part VII of the TDRPC.

#### F. Records Retention

A printed copy of the electronic communication including, where applicable, intended initial access page, profile page, web-based display/banner ads and target page are subject to the retention requirements of Rule 7.04(f).

# G. Filing Requirements

Electronic communications described in this interpretative comment are advertisements in the public media subject to the filing requirements of Rule 7.07 unless exempt thereunder. It is the communicating attorney's responsibility to demonstrate that any particular online communication need not be filed with the Committee.

## H. Web-Based Directories

A lawyer or law firm's listing on a web-based directory that is accessible by the public shall be exempt from the filing requirements of Rule 7.07 if it meets the requirements of 7.07(e).

# **I. Internet Domain Names**

Rule 7.01 prohibits lawyers and law firms from advertising or practicing under a trade name or a name that is false and misleading. Therefore, an internet domain name or URL may not be used as the name under which a lawyer or firm does business. A domain name that is a reasonable variation of the law firm name as permitted under Rule 7.01 or that is a description of the lawyer or law firm may be used as a locater or electronic address only if such use does not violate the provisions of 7.02.

- **18.** Principal Office Disclosure (July 1996, revised Sept. 1997) A lawyer or firm with only one office will satisfy the requirement for disclosure of a principal office by including in all advertising and written solicitations the name of the city or town in which the office is located. A lawyer or firm with more than one office, regardless of the staffing of the other office(s), must include in all advertising the city or town that is the location of its principal office, but there is no requirement to designate such city or town as the principal office.
- **19.** Disclosure of Information Prompting a Written Solicitation Communication (July 1996) When making a disclosure required pursuant to Rule 7.05(b)(5), the lawyer must disclose the specific information source on which the solicitation is based. For example:
- A. If the lawyer obtained the prospective client's name from police accident reports, the solicitation should state that the name was obtained from *police accident reports* rather than simply stating that it was obtained from "public records".
- B. If the prospective client's name is obtained from a jail inmates list or booking log, that too should be specifically disclosed.

- C. When the name of a prospective client is obtained from a foreclosure list in the Daily Commercial Recorder, foreclosure lists obtained from the Daily Commercial Recorder would be appropriate language to satisfy 7.05(b)(5).
- 20. Distinctions Between "Pre-approval" and "Filing"(July 1996, revised June 2005) A request for "PRE-APPROVAL" means the submission of a public media advertisement or written, recorded, electronic or other digital solicitation to the Advertising Review Committee pursuant to Rule 7.07(d) at least thirty (30) days prior to the date the lawyer or law firm plans to disseminate the advertisement or solicitation to the public. Pre-approval is an option for the advertising lawyer, but it is not required. The purpose of a request for pre-approval is to discover any violations of the advertising rules so that they may be corrected prior to dissemination. In the case of advertisements in telephone and similar directories, the pre-approval request should be submitted at least thirty (30) days prior to the last date on which a change could be made to the advertisement before printing. Advertisements and solicitations submitted for pre-approval will be reviewed and returned to the advertising lawyer within twenty-five (25) days of the date of receipt with either an approval or a request for corrections and/or additional information. A pre-approval of an advertisement or written, recorded, electronic or other digital solicitation, under this process is an "advisory opinion" of compliance under rule 7.07(d).

"FILING," means the submission of any public media advertisement or written, recorded, electronic or other digital solicitation to the Advertising Review Committee for review pursuant to Rule 7.07(b). Rule 7.07(e) exempts certain advertisements and solicitations from the filing requirements; however, the filing of an advertisement or solicitation which is <u>not exempt</u> under Rule 7.07(e) is <u>mandatory</u>. If a filed advertisement or written, recorded, electronic or other digital solicitation contains no violations, the advertiser will be sent an approval, normally within forty-five (45) days of the date of receipt.

21. Advertisements in Telephone Directories or Similar Publications that are Initially Disseminated August 1, 1997 or thereafter (Feb. 1997) EXAMPLE ONE: An attorney files a non-exempt advertisement from a telephone directory or similar publication with the Advertising Review Committee as required by 7.07(b), and such advertisement is determined to contain a technical violation of the Lawyer Advertising Rules. (Violations that do not pose a potential risk of harm to the public are considered technical in nature, such as violations of rules 7.04(c) and 7.04(j).) The attorney cannot correct the advertisement, nor can he or she permanently end dissemination due to the nature of the directory or publication.

RESULT ONE: If the attorney has not received a disapproval from the committee on any previous advertising, the advertisement in question will not be referred to the State Bar disciplinary system based on the following conditions: The attorney certifies in writing to the Advertising Review Committee that he or she will correct the violations in any future publications of that ad, will file corrected advertising with the committee, and does so. NOTE: If an attorney has received a previous disapproval from the committee on any material for any reason, then the attorney will not have the opportunity to receive another disapproval but will be referred directly to the State Bar disciplinary system.

EXAMPLE TWO: An attorney files a non-exempt advertisement from a telephone directory or similar publication with the Advertising Review Committee as required by 7.07(b), and such advertisement is determined to contain a non-technical violation of the Lawyer Advertising Rules. The attorney cannot correct the advertisement, nor can he or she permanently end dissemination due to the nature of the directory or publication.

RESULT TWO: Regardless of the disposition of the attorney's previously filed ads, if any, the attorney in question will be referred to the State Bar disciplinary system.

22. Advertisement of Living Trusts (Jan. 1998, revised June 2005) Without objective substantiation, a lawyer may not advertise or utilize in a written, recorded, electronic or other digital solicitation that a particular approach to a legal problem utilized by that lawyer is superior in comparison to other accepted and appropriate approaches to the same problem. Such advertisements, or written, recorded, electronic or other digital solicitations are potentially misleading and may create unjustified expectations in violation of Rules 7.02(a)(1) and (3). Comparisons in advertisements, or written, recorded, electronic or other digital solicitations by lawyers for estate planning services frequently emphasize the exclusive use of revocable living trusts to transfer assets at death. In this context, a lawyer may not explicitly or implicitly advertise, for example, that:

- A. Living trusts will always save the client money.
- B. The use of a living trust in and of itself will reduce or eliminate estate taxes otherwise payable as result of the client's death.
- C. Estate tax savings can be achieved only by use of a living trust.
- D. The use of a living trust will achieve estate tax savings that cannot be achieved using a will.
- E. The probate process is always lengthy and complicated.
- F. The probate process should always be avoided.
- G. The use of a living trust will reduce the total expenses incurred compared to expenses incurred using other estate planning devices intended to address the same basic function.
- H. The use of a living trust avoids lengthy delays experienced in the use of other estate planning devices intended to address the same basic function.
- I. Lawyers use will writing as a loss leader.

These and other similar statements are potentially misleading and may create unjustified expectations in violation of Rules 7.02(a)(1) and (3). Additionally, in such advertisements, or written, recorded, electronic or other digital solicitations references to the American probate system at large should be avoided because the Texas probate system is much different and typically much simpler. A lawyer is not prohibited from conducting seminars on estate planning in general and advertising or utilizing in a written, recorded, electronic or other digital solicitation that at such seminars the advantages of revocable trusts will be discussed.

23. Notification of Death of Solo Practitioner to Practitioner's Clients (February 2004) A written communication notifying the clients of a solo practitioner of the practitioner's death may be exempt from the provisions of Rules 7.05 and 7.07 if the communication provides nothing more than notification of the death, the relationship between the author of the letter and the deceased practitioner, and the location and availability of the deceased practitioner's files.

If a written communication notifying the clients of the death of a solo practitioner also contains content designed to communicate the qualifications or the availability of legal services of any lawyer or law firm, then Part VII, Texas Disciplinary Rules of Professional Conduct apply.

- **24.** Overall Context (March 2004) When determining whether a communication concerning a lawyer's services is false or misleading or creates an unjustified expectation as prohibited by Rule 7.02(a), the communication will be viewed in its entirety.
- **25. Substantiation (June 2005)** Rule 7.02 establishes that the advertising attorney bears the burden of demonstrating that the information contained in the advertisement is substantiated by fact. The filing of a communication containing a reference to past successes or results must be accompanied by a written statement by the lawyer or an authorized representative of the law firm claiming credit for such success or result. The written statement shall include:
- A. The name of the lead counsel in the matter giving rise to the recovery or an explanation of the relationship between the lawyer claiming credit for the result and the client upon whose behalf the recovery made;

- B. The amount, in dollars, actually received by the client, whether or not the reference to the gross amount or results includes a reference to a dollar amount:
- C. The name, address and phone number of the client; and
- D. The nature of the suit or claim and damages or injuries.
- 26. Reference to Past Successes or Results Obtained in an Advertisement in the Public Media (December 2005) When making any reference to past successes or results obtained in advertisements in the public media, an attorney or law firm must comply with the general rule contained in Rule 7.02(a)(1), which prohibits communications that: (i) contain a material misrepresentation of fact or law, or (ii) omit a fact necessary to make a statement not materially misleading.

In addition, Rule 7.02(a)(2) imposes an affirmative requirement that advertising lawyers and law firms include specific information when referring to past successes or results obtained.

- 1. A lawyer or lawyer firm publishing a claim of past successes or results obtained in an advertisement in the public media must include information sufficient to provide the basis for a reasonable person to understand the nature of the case, matter or representation, and the advertising lawyer or law firm's role in it.
- a. When reference is made to past successes or results obtained by a lawyer or firm in a matter where any or all of the descriptive elements of 7.02(a)(2)(i)-(iv) apply, the applicable elements must be incorporated into that reference.
- b. When reference is made to past successes or results obtained by a lawyer or firm in a matter where one or more of the descriptive elements of 7.02(a)(2)(i)-(iv) do not apply either because of the nature of the matter or representation or for any other reason the advertising lawyer or law firm must not only comply with the applicable elements, but must also comply with the requirement that sufficient information be included to avoid misleading a reasonable person. That lawyer bears the burden of providing in the advertisement the information required by the particular facts and circumstances of that representation and that communication.
- 2. If any reference is made to a sum of money, a particular type of relief, or some other amount or value, care must be taken to make clear the nature of the result, the role of the advertising lawyer or law firm, their relationship to that result, relief, or amount, and the net effect thereof.
- 3. Claims referencing cumulative results or successes must be accompanied by information sufficient to meet the advertising lawyer or law firm's burden under 7.02 (a)(2) with regard to each individual case, matter, or representation.
- 4. A disclaimer regarding the uniqueness of client matters will not cure a failure to provide adequate information about a claim of past successes or results obtained.
- 5. If a lawyer or law firm describes his or her legal experience with reference to a specific matter without claiming responsibility for success or results obtained, that communication may not be subject to the requirements of Rule 7.02(a)(2). In that instance, however, the general rules regarding communications about qualifications and services still apply, and the burden lies with the advertising lawyer or law firm to demonstrate that a reasonable person would not conclude that a claim of responsibility for a particular result is being made.
- 27. Trade Names (February 2006, withdrawn December 2009)
- 28. Acronyms as Law Firm Names (June 2008)

When designating a law firm name, the use of the initial letter of attorneys' surnames in an acronym is permissible under Rule 7.01 only when:

- (1) Each letter in the acronym is derived from a surname:
  - (i) that is not prohibited by Rule 7.01, and
  - (ii) is otherwise permissible under the Texas Rules of Disciplinary Conduct, and
- (2) the resulting firm name:
  - (i) does not constitute a trade name,
  - (ii) is not misleading as to the lawyers practicing under that name, and
  - (iii) is not otherwise prohibited under Rule 7.01 or the Texas Rules of Disciplinary Conduct.

For example, a firm named "Jones, Smith & Miller, LLP" would be allowed to adopt the name "JSM, LLP" or "JS Miller, LLP" only if "Jones," "Smith" and "Miller" were permissible names under Rule 7.01. By contrast, a firm named "Williams, Iverson & Nelson, P.C." would not be allowed to adopt the name "WIN, P.C." because use of such name would constitute a prohibited trade name under Rule 7.01 and would create unjust expectations about the results a lawyer can achieve in violation of Rule 7.02(a)(3).