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Yellow Pages Legal Ads in Texas: The Complexities of DR 2-101(B) & (and) (C).

Vincent Robert Johnson

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ARTICLES

YELLOW PAGES LEGAL ADS IN TEXAS: THE COMPLEXITIES OF DR 2-101(B) & (C)

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I. INTRODUCTION

A Texas lawyer desiring to place an advertisement in the Yellow Pages to offer legal services within a particular area of the law faces significant obstacles. Not only must he ensure that the ad conveys the correct image of the firm to prospective clients and does not unduly subject him or his colleagues to professional opprobrium for being too "commercial," he must also comply with a number of specific requirements imposed by the Texas Code of Professional Responsibility.¹ Two of the more dogging Code provisions — and the only two upon which this article will focus — are subsections (B) and (C) of Disciplinary Rule (DR) 2-101,² which apply to all forms of advertising media, including printed media, radio, and television.³ Pursuant to these provisions, several attorneys placing Yellow Pages ads have recently been issued private reprimands.⁴ One attorney, placing a newspaper

1. See SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, § 9 (Code of Professional Responsibility) DR 2-101(B),(C) (1984) [hereinafter cited as TEXAS CODE OF PROFESSIONAL RESPONSIBILITY]. All references to Disciplinary Rules (DRs) or Ethical Considerations (ECs) refer to those contained in the Texas Code of Professional Responsibility unless otherwise noted. Ethical Considerations are non-binding, aspirational statements of objectives toward which each member of the profession should strive. Disciplinary Rules, in contrast, are mandatory in character, and define minimum standards of conduct which must be adhered to by all attorneys.

2. See TEXAS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1982) (lawyer publicity and advertising).

3. See *id.* DR 2-101(B) (applies to publishing, advertising, or broadcasting); STATE BAR OF TEXAS, ETHICAL CONSIDERATIONS ON CODE OF PROFESSIONAL RESPONSIBILITY EC 2-10 (1982) [hereinafter cited as STATE BAR OF TEXAS ETHICAL CONSIDERATIONS] (listing and detailing affected media).

4. Most of the cases have emanated from the Tenth Bar District, which covers the San Antonio area. See 48 TEX. B. J. 80, 80 (1985) (attorney privately reprimanded for violation of DR 2-101(C)(2)); *id.* at 207 (attorney privately reprimanded for violation of DR 2-101(B) and (C)(2)); *id.* at 582 (attorney privately reprimanded for violation of DR 2-101(C)(2)); see also 47 TEX. B.J. 1253, 1253 (1984) (15 attorneys privately reprimanded for violations of DR 2-101(C)(2)); *id.* at 1368-69 (two attorneys privately reprimanded for violations of DR 2-101(C)(2)); *id.* at 1368-69 (attorney privately reprimanded for violation of DR 2-101(B) and 2-101(C)(2)); *id.* at 1368-69 (12 attorneys privately reprimanded for violations of DR 2-101(C)(2)); *id.* at 1368-69 (attorney privately reprimanded for violation of DR 2-101(B) and (C)(1) and (2)).

In addition, at least two other recent cases from District 6, covering the Dallas area, appear to have involved the same provisions, though it is unclear whether the ads were placed in the Yellow Pages as opposed to other print media. See 47 TEX. B.J. 169, 169 (1984) (attorney

ad, has been subjected to a judicial proceeding which would have resulted in suspension from practice for six months if the initial trial court judgment had been upheld, and another attorney has been suspended for four months for a violation of DR 2-101(C).⁵ Conceivably in more aggravated cases, particularly ones involving repeated violations or other unethical conduct, more stringent penalties might be imposed.

Subsection (B) provides that:

A lawyer who publishes, advertises, or broadcasts with regard to any area of the law in which he practices must, *with respect to each area of the law so advertised, publish or broadcast the name of the lawyer, licensed to practice law in Texas, who shall be responsible for the performance of the legal service* in the area of the law so advertised.

Presumably, in some instances, this requirement may be easy to satisfy. For example, in the case of a solo practitioner, all that seems necessary is to list the name of the attorney. As the size of the firm increases and the areas of practice multiply, however, the task takes on ever more formidable proportions, until at some point compliance seems virtually impossible. Where, for example, there are no rigid lines demarcating areas of practice, and lawyers within a firm move from field to field as the demands for particular types of work ebb and flow — one day litigating a personal injury claim and the next writing a will — how is it possible to state with certainty before clients come into the office “who shall be responsible for the performance of the legal service” in a given area? This perplexing situation is compounded further by the requirements of subsection (C), which mandate that detailed statements be included concerning whether the individuals named in compliance with subsection (B) are certified by the Texas Board of Legal Specialization. The likely result is that the Yellow Pages ad will be a tangle of disclaimers, provisos, and foot-

privately reprimanded, apparently under DR 2-101(C), for failing to disclaim criminal law certification in ad offering “\$250 Misdemeanor DWI”); *id.* at 169 (attorney privately reprimanded, presumably under DR 2-101(B) and (C), for failing to disclaim family law certification in ad stating “Divorce \$75” and for failing to name “who shall be responsible for the performance of the legal services in the area of family law which was advertised”).

5. See *State Bar of Texas v. Daves*, No. 84-504190 (Dist. Ct. of Lubbock County, 237th Judicial District of Texas, July 12, 1984) (violating DR 2-101(C)(2), six month suspension), *rev'd and rem.*, 691 S.W.2d 784 (Tex. App. — Amarillo 1985, writ ref'd n.r.e.); *State Bar of Texas v. Looney*, No. 84-504318 (Dist. Ct. of Lubbock County, 237th Judicial District of Texas, April 30, 1985) (violation of DR 2-101(C), four month suspension).

notes,⁶ if the project is not entirely abandoned.

A practitioner's attempt to comply with the subsections is especially perilous in view of the fact that there is virtually no scholarship or precedent on how subsection (B) should be interpreted and only limited guidance bearing upon subsection (C).⁷ In response to these predicaments, this article will attempt to chart, from an academic's perspective, a safe course between the Scylla and Charybdis of DR 2-101(B) and (C), which it is hoped may assist both practicing attorneys and those charged with enforcing these requirements.

6. In some instances, the results have verged on the ridiculous. For example, one ad published in a recent edition of the Southwestern Bell Yellow Pages for the San Antonio Area (August 1983-84, p. 84) employed a barrage of symbols (including asterisks, dots, single crosses, and double crosses) in an attempt (likely unsuccessful) to guide the dazed reader through a maze of qualifications and clarifications indicating which of three attorneys practiced in which of seven areas of the law, whether certification was available in those areas, and if so which attorneys were certified.

7. No written guidance for practitioners was generated by the cases from the Tenth Bar District. See 48 Tex. B.J. 80, 207, 582 (1985); 47 TEX. B.J. 1253, 1368-69 (1984). In each proceeding, the local Grievance Committee apparently made an initial determination that the ads violated the Code and then notified the attorneys involved of that assessment, without venturing any advisory opinion concerning code requirements and compliance. Rather than contest the Committee's interpretation, which could have led to the initiation of court proceedings, all of the attorneys agreed to accept private reprimands. At no point was any writing issued by the local Committee that would indicate precisely why it believed the ads were not in compliance with the Disciplinary Rules. Telephone interview with Arch Adams, Chairman of the Tenth District Grievance Committee (Feb. 15, 1985); cf. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, § 14(B) (1984) (detailing grievance committee judgment); *id.* art. X, § 14(B) (trial de novo in district court where attorney does not accept proposed judgment). Unfortunately, the brief reports of the private reprimands printed in the Texas Bar Journal fail to illuminate the Committee's construction of the disputed provisions.

It is not evident whether similar procedures were followed in the cases from District 6, though the structure of the State Bar Rules makes that likely. As to the District 6 proceedings, the disciplinary action summaries published in the Texas Bar Journal are again very short and only slightly more helpful.

The *Daves* case was decided at the trial level without opinion. *Daves'* early procedural history and selected contentions of counsel have been briefly discussed in an outside article. See *Lawyers' Ads Fray Lingers in Court*, THE TEX. LAW. Apr. 10, 1985, at 8. The appellate court decision in *Daves* did issue an opinion. See *State Bar of Texas v. Daves*, 691 S.W.2d 784, 784 (Tex. App.—Amarillo 1985, writ ref'd n.r.e.). The opinion dealt, however, more with procedural matters and the constitutionality of the lawyer advertising rules, than with interpreting the provision in question, subsection (C). See *id.* at 789-90 (contested ad contained no language complying with subsection (C); no occasion for court to interpret provision).

II. SUBSECTION (B): NAMING THE RESPONSIBLE ATTORNEY

A. *Background and Preliminaries*

Subsection (B), adopted by the Texas Supreme Court on July 21, 1982 and effective September 1 of that year,⁸ appears to be unique to the Texas Code. No similar provision is to be found in the code of any other state,⁹ and none is contained in either the old Model Code

8. Following the landmark decision by the United States Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350, 372 (1977), which held that non-misleading, truthful advertising concerning the prices of routine legal services was constitutionally protected, referenda were twice put before the members of the State Bar of Texas to revise the rules on lawyer advertising that had been in effect since 1971. See 41 TEX. B.J. 760, 760 (1978) (referendum put before the bar in 1978); 43 TEX. B.J. 689, 689 (1980) (referendum on lawyer advertising again placed before the bar in 1980). Both failed because on each occasion ballots were cast by less than 51% of those eligible to vote. See 41 TEX. B.J. 760, 760 (1978) (only 12,470 of 30,522 voted); 43 TEX. B.J. 689, 689 (1980) (41% of eligible attorneys voted). After the first defeat, the Supreme Court suspended DR 2-101 and 2-102 to the extent that they conflicted with *Bates*. See Zunker, *Lawyer Advertising, Solicitation and Trade Names Since Bates*, 43 TEX. B.J. 321, 321 (1980). Following the second defeat, a State Bar committee drafted yet another proposed revision of the Code, which took into account relevant developments since *Bates*. See Cunningham, *Lawyer Advertising and Solicitation*, 45 TEX. B.J. 938, 938 (1982). After slight modifications of the new draft by the Board of Directors, the State Bar presented the draft to the Supreme Court and petitioned the court to hold a third referendum or alternatively exercise its inherent nomothetic powers over the practice of law and judicially promulgate new advertising rules. See *id.* at 938. The Supreme Court chose the latter course, repealing former Disciplinary Rules 2-101 through 2-105, and enacting Disciplinary Rules 2-101 through 2-104 as they are presently worded. See *Lawyer Advertising Guidelines*, 45 TEX. B.J. between 1110 and 1111 (special tear-out section) (1982). The provisions adopted by the Court varied in several respects from those proposed by the State Bar. As to DR 2-101(B), the difference is essentially insignificant: whereas the State Bar version referred to "A lawyer who publishes or broadcasts," the provision enacted by the Supreme Court speaks of "A lawyer who publishes, *advertises*, or broadcasts" (emphasis added). The variation between the proposed and adopted versions of DR 2-101(C) is more extensive and is discussed in subsection C of this paper. There is no legislative history or commentary to illuminate the meaning of either the provisions submitted to the Court or those promulgated. Telephone interview with Jerry Zunker, General Counsel, State Bar of Texas (Feb. 19, 1985). A constitutional challenge to the manner in which the advertising rules were adopted was raised and rejected in *State Bar of Texas v. Daves*, 691 S.W.2d 784, 788-89 (Tex. App.—Amarillo 1985, writ ref'd n.r.e.) (defendant's claim that court was without rule making power was negated by statutes).

9. The most comprehensive compilation of state rules governing the practice of law appears to be the NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, published by University Publications of America (1984). It contains the codes of all states plus the District of Columbia. A review of the advertising provisions for each jurisdiction, as updated with supplements made available to subscribers through early 1985, fails to disclose any requirements paralleling the dictates of DR 2-101(B) of the Texas Code. At least one state provides that a firm may not advertise an area of practice unless that designation is properly attributable to all attorneys in the firm. See CONNECTICUT CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A)(4)(b). Another state, while allowing a firm to advertise a specialized

of Professional Responsibility¹⁰ (on which the current codes of Texas and most other jurisdictions are based) or the new Model Rules of Professional Conduct¹¹ (adopted by the American Bar Association (ABA) House of Delegates in August 1983 and now under consideration in numerous jurisdictions).¹² Further, no judicial precedent or scholarly guidance is to be found. No state or federal decision has ever discussed the subsection,¹³ and no reference to it has been made in periodic literature¹⁴ or in the ethics opinions of the State Bar of Texas or the Dallas County Bar Association that would significantly

area of practice when fewer than all attorneys meet stated requirements for specialization, provides that the firm's Yellow Pages advertisement cannot list the names of those who do not qualify as specialists. *See* NEW MEXICO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(B)(7). But by their very terms, these rules are clearly distinguishable from DR 2-101(B) of the Texas Code. *See* TEXAS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (advertisement must state name of attorney responsible for legal service); *cf. id.* DR 2-101(C)(2) (Texas specialization rules).

A caveat is in order: as supplemented through early 1985, the National Reporter failed to include the Texas advertising rules adopted in July 1982. Consequently, the compilation does not appear to be fully up-to-date.

10. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 01:301-347 (1985).

11. *See* MODEL RULES OF PROFESSIONAL CONDUCT, *reprinted in* VII MARTINDALE-HUBBELL LAW DIRECTORY Part VIII, at 1-41 (1985). Rule 7.2, which pertains to advertising, provides in subsection (b) that "Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content." *See id.* Rule 7.2. The official Comment to Rule 7.2 does not elaborate on that requirement. The language employed in the subsection seems clearly distinguishable in terms of objectives from that used in DR 2-101(B) of the Texas Code of Professional Responsibility. Logically it would tend to ensure that an attorney, rather than an office assistant, be responsible for the correctness of the ad, and in addition would readily identify who might be subjected to disciplinary action in case the ad violated applicable provisions. A requirement necessitating that the attorney responsible for the provision of services be named would not necessarily advance these same objectives, for it says nothing about responsibility for the placement of the ad. The Model Code Comparison annotation accompanying Rule 7.2 indicates that there was no counterpart to Rule 7.2(d) in the old Model Code of Professional Responsibility.

12. *See* STATUS REPORT ON CONSIDERATION OF MODEL RULES OF PROFESSIONAL CONDUCT, ABA (July 4, 1985).

13. The annotations for DR 2-101 contained in Vernon's 1985 pocketpart reveal no cases referring to subsection (B). *See* TEXAS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1984). Similarly, no precedent citing this provision was revealed by a search of the Texas and federal databases for Lexis and Westlaw on July 15, 1985.

14. The Vernon's supplement to DR 2-101, reveals only one law review article written after the adoption of the provisions in question in 1982: Galton, *The New Advertising Rules: Accentuating the Negative?*, 45 TEX. B.J. 1420, 1420 (1982). The article makes no reference to subsection B. A search of the Index to Legal Periodicals, through Vol. 78, No. 7, April 1985, failed to disclose any other scholarly writings on the subject.

illuminate its meaning.¹⁵ Finally, because the provisions were promulgated by the Supreme Court of Texas, rather than enacted by the legislature, there is no legislative history to which resort can be had.¹⁶

In the absence of such authority, it is best to interpret the subsection reasonably, based on its plain language, in light of abundant constitutional precedent on lawyer advertising, which generally holds that truthful information is entitled to First Amendment protection and may not be unnecessarily impeded or suppressed.¹⁷

At the outset, it seems possible to set aside certain potential constructions of subsection (B) as unreasonable and without merit. First, it seems unlikely that by referring to advertisements made by a "lawyer," rather than by a law firm, the drafters meant to exempt from its provisions ads placed on behalf of an entire firm, as opposed to an individual. No plausible purpose would be served by allowing attorneys to escape the force of the subsection's requirements merely by placing the ad in the firm's name instead of their own.¹⁸ Conversely,

15. The Dallas County Bar Association is the only local Texas Bar whose ethics opinions are summarized, along with those of the State Bar of Texas, in the *LAWYERS' MANUAL ON PROFESSIONAL CONDUCT* published by ABA/BNA. The weekly updates of this looseleaf service through May 15, 1985 disclose only one ethics opinion discussing subsection (B). See Dallas County Bar Ass'n. Legal Ethics Comm., Op. 6 (1983), summarized in *THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT* ¶ 801:2075 (1985). The opinion held that the provisions of DR 2-101(B) and (C) apply to listings of areas of practice which appear on stationary, but failed to otherwise interpret these subsections. The opinion states that it is "strictly advisory in nature" and that the "Dallas Bar Association can assume no liability . . . for any damage, loss or detriment suffered or incurred as a result of reliance" thereon. See *id.* ¶ 801:2075. The full text of the opinion is available at the Southern Methodist University School of Law Library.

16. Telephone conversation with Jerry Zunker, General Counsel, State Bar of Texas, (Feb. 19, 1985) (confirming no legislative history compiled by State Bar of Texas).

17. See *e.g.*, *Zauderer v. Office of Disciplinary Counsel*, ___ U.S. ___, ___, 105 S. Ct. 2265, 2283, 85 L.Ed.2d 652, 673 (1985) (non-deceptive illustration is constitutionally protected; state may require attorney offering contingent fees to disclose that client shall be liable for costs even when there is no recovery); *In re R.M.J.*, 455 U.S. 191, 203 (1982) ("[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment"); *In re Primus*, 436 U.S. 412, 435, 439 (1978) (state bar rule forbidding solicitation by mail violates First Amendment); see also *Bates v. State Bar of Arizona*, 433 U.S. 350, 364, 383 (1977) (advertising by attorney not subject to blanket suppression, but rather, entitled to First Amendment protections).

18. Some other jurisdictions have seen fit to expressly differentiate the types of ads which may be placed by individual attorneys and firms. See *NEW MEXICO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(B)*, reprinted in 3 NAT'L. REP. LEGAL ETHICS AND PROF. RESPON. V2:NM8 (1978). No such differentiation is found in the Texas Code.

it would impose an unduly strained reading on the language in question to conclude (in misreliance on the Latin maxim *expressio unis est exclusio alterius*)¹⁹ that the drafters meant to permit individual practitioners to advertise areas of practice, but to prohibit such statements on behalf of law firms. Such a reading might well raise serious doubts about the constitutional validity of the provision, particularly in light of First Amendment guarantees of freedom of expression and association,²⁰ and should not be indulged in the absence of clear support in the text. Finally, it is reasonable to conclude that the section, by asking for disclosure of who will be responsible, is seeking more than a listing of who would be subject to civil liability — presumably at least the partners in the firm — in the case of malpractice. Had such been the objective, more direct language could easily have been found, and indeed, it is difficult to imagine what important interest would be advanced by imposing such a requirement. The subsection's reference to “*the*” attorney “who shall be responsible for the performance of the legal service” is probably directed at eliciting just that, disclosure of who will be *responsible for the performance* of the services.²¹

Assuming then that a firm can advertise areas of practice and must comply with the terms of subsection (B), what must be done? Are the firm's only options to, on the one hand, state with specificity who will be responsible or, on the other, remain silent if that is not possible? While the subsection is susceptible to such rigid interpretation, it should be rejected on several grounds.

19. “Expression of one thing is the exclusion of another.” BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

20. See n.27 & accompanying text *infra*.

21. See SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1984) (“If the language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject the court cannot give it a different meaning”); *id.* at § 46.06 (“effect must be given, if possible to every word, clause and sentence of a statute”); see also *City of El Paso v. Public Utility Comm'n*, 609 S.W.2d 574, 579 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (where clear and unambiguous statute, court gives words common meaning); *cf.* *Wessberg v. Beckman*, 194 N.Y.S.2d 205, 206 (1959) (Meyer, J.) (quoting Lord Mildew in *Bluff v. Father Gray* (A.P. Herbert, *Uncommon Law* 192), “‘If Parliament does not mean what it says, it must say so.’”).

Notwithstanding the fact that the Texas Code of Professional Responsibility is of judicial rather than legislative origin, it is appropriate to apply standard rules of statutory construction to the interpretation of its provisions. See *Touchy v. Houston Legal Foundation*, 417 S.W.2d 625, 629 (Tex. Civ. App.—Waco 1967) (Code “subject to rules of statutory construction”); *rev'd on other grounds*, 432 S.W.2d 690 (Tex. 1968); see also *State Bar of Texas v. Edwards*, 646 S.W.2d 543, 544 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (“State Bar Rules have the same effect as statutes”).

As noted above, solo practitioners would likely have no difficulty complying with such a construction. So too, the requirements might easily be satisfied in the case of a small firm where each attorney predictably practices in a given field and does not, even from time to time, work in other advertised areas of the law which are normally handled by different attorneys.²² For example, if at the three-person law firm of A, B & C, A practices only personal injury law, B only corporate law, and C only decedents' estates, presumably the ad could satisfy the statute by indicating that A is responsible for providing services to personal injury clients, B services to corporate clients, and so forth. The difficulties with which we are concerned — namely, the demands of complying with the Code in a way that does not compromise the visual effectiveness of the advertisement — will therefore arise primarily when the number of attorneys is not so small and the lines between multiple areas of practice not so clearly drawn. In such instances, it may be impossible to state far in advance of the prospective client's walking in the door who will be responsible for providing legal services in a particular area of the law. For example, in a nine-person firm, it may fall to attorney G, who normally performs business law services for commercial clients, to arrange a testamentary disposition, simply because no one else is available. The question then is whether firms without clearly defined areas of practice (particularly middle-sized firms of that variety — firms that are not so small that the problems of compliance are *de minimis* nor so large as to be likely to eschew advertising in favor of more subtle forms of public relations)²³ should be precluded from advertising areas of practice merely

22. Yet even small firms may run into problems which, though technically capable of resolution, may destroy the visual appeal, and thus the effectiveness, of the ad. The ability of the ad to convey the right information efficiently and effectively is of course a matter of great concern in view of the high cost of Yellow Pages advertising. In Spring 1985, Southwestern Bell Telephone, covering the San Antonio area, charged attorneys \$201.25 per month to place a 2" x 2" ad in their forthcoming annual edition of the Yellow Pages. A half page ad cost \$1475.25 per month.

23. According to one survey, most of the attorneys who advertised came from firms with three or fewer lawyers, whereas public relations activity was concentrated among firms of ten or more lawyers. See *Big Firms Favor P.R.; Little Firms Like Ads*, 69 A.B.A.J. 892, 892 (July 1983). There are, of course, exceptions to the rule. Thus, Robert Habush, recently described as "the head of [Wisconsin's] largest personal injury law firm" and "winner of the largest jury verdict in [state] history," has gained national prominence for his "Knowing the Law" television "informercial" series. See Middleton, *The Right Way to Advertise on TV*, 69 A.B.A.J. 893, 893-95 (July 1983). According to one consulting firm executive: "[A]n ad in television guides, Yellow Pages or on matchbook covers is best for law firms that deal mainly with

because of their inability to comply with a strict reading of the Code?

Clearly, the answer should be no. It is lawful, professionally appropriate, and indeed commonplace for attorneys, whatever the size of firm, to occasionally be primarily responsible for performing work for clients in areas other than those in which they normally practice.²⁴ Despite various trends toward specialization, this willingness to reach beyond a narrow area of expertise remains a robust and vital part of the legacy passed down from a day when all attorneys were general practitioners.²⁵ Indeed, it may be argued, and not unconvincingly, that a result of non-specialized practice is a higher calibre of legal services in general, on the premise that lawyers do a better job to the extent that they have a more complete view of the legal landscape — the type of view which results from broad exposure rather than selected specialization.

It is also lawful, professionally appropriate, and again commonplace for attorneys to elect to practice not on their own, but collectively in partnerships or professional corporations,²⁶ and it is at least arguable that the public interest is in fact best served by the resulting economies of scale. No one suggests that participation in such multi-attorney units should be barred or otherwise penalized. Indeed, were such a suggestion made, it might well be challenged on the ground

individuals. Law firms that have mainly corporate clients might do best to concentrate on taking clients to lunch or providing other entertainment." See Bivens, *Doctor, Lawyer Ads Controversial*, San Antonio Sunday Express-News Sept. 2, 1984, at 1-N, col. 6.

24. The profession's willingness to permit attorneys to practice in areas other than those in which they normally specialize is evidenced by Section 5.2 of the American Bar Association Model Plan of Specialization (1979), reprinted as an appendix to Mindes, *Proliferation, Specialization and Certification: The Splitting of the Bar*, 11 TOLEDO L. REV. 273, 296 (1980):

5.2 No lawyer shall be required to be recognized as a specialist in order to practice in the field of law covered by the specialty. Any lawyer, alone, or in association with any other lawyer, shall have the right to practice in any field of law, even though he is or she is not recognized as a specialist in that field.

Similarly, Section 5.1 states:

5.1 No standard shall be approved which shall in any way limit the right of a recognized specialist to practice in all fields of law. Any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is recognized as a specialist in a particular field of law.

Id.

25. See FRIEDMAN, *A HISTORY OF AMERICAN LAW* 145, 557-558 (1973) (discussing generalist lawyers on the frontier).

26. A recent survey of those finishing law school in 1983 indicated that "[s]olo practitioners constituted only 4.3 percent of the graduates employed in private practice . . . [23.2 percent of those graduates however] work[ed] in firms having two to 10 lawyers." See Silas, *No Bread Lines*, 71 A.B.A.J. 19, 19 (May 1985).

that it tended unnecessarily to impinge upon the individual attorney's right to work and constitutional freedom of association.²⁷

The chief interest at stake with regard to lawyer advertising — namely, the need on the part of the public for information as to the availability and cost of legal services²⁸ — is just as great with respect to middle and large size firms as it is with regard to solo practitioners and small collectives. An arrangement under which correct information is available with respect to the services available from lawyers in the latter categories in no way obviates the need for data concerning other alternatives for securing legal services.

Finally, and of great significance, a rigid reading of subsection (B) should be eschewed because a more plausible and functional interpretation is readily available. It is possible to conceive of at least two important objectives which the drafters may have intended to advance, and these objectives may be harmonized into a coherent interpretation of the "name the responsible attorney" provision.

B. *Policy: Prevent "Client Baiting"*

First, the drafters may well have intended to address what might be referred to as the problem of "client baiting." Simply put, client baiting occurs when a firm prominently promotes the name or credentials of one or more of its partners in the hope of attracting clients for whom services are likely to be rendered by other, less experienced, less qualified, less noted attorneys. To posit an extreme case, assume

27. As de Tocqueville wrote more than a century ago the "most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them." See DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 196 (P. Bradley ed. 1945). See generally *N.A.A.C.P. v. Button*, 371 U.S. 415, 428-29 (1963) (group legal practice protected by freedom of association); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 702 (3d ed. 1978) ("Freedom of expression embraces more than the right of the individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective.").

28. As Judge Milton Shadur has written:
 [T]he public interest lies in being informed in a way that will assist people in locating and choosing a lawyer. Anything that informs the potential consumer about lawyers' qualifications has to rank high in what the public wants and is entitled to know.
 Shadur, *The Impact of Advertising and Specialization on Professional Responsibility*, 61-6 *CHICAGO BAR RECORD* 324, 328 (1980), quoted in, 67 *WOMEN'S L.J.* 23, 23 (1981); see also *Zauderer v. Office of Disciplinary Counsel*, ___ U.S. ___, ___, 105 S. Ct. 2265, 2282, 85 L.Ed.2d 652, 673 (1985) ("The extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.").

that F. Lee Bailey is a member of a firm which styles itself "The Law Offices of F. Lee Bailey," under which name it widely advertises its criminal law practice. Many clients may be drawn to the firm in the expectation that the famous Mr. Bailey will handle their cases. In fact, because of the size of the firm and the extent of its practice, it is virtually certain that most clients will never meet the man, let alone that he will be directly responsible for their representation. To the extent that this is the case, the public, arguably, should be given a more accurate representation of what they can expect. In particular, it may be important for the firm to disclose not only the possibility that the client is not certain to secure Mr. Bailey's services, but also the names or at least the number of the other attorneys who might in fact be chiefly responsible for serving the client. As their number varies the probability will increase or decrease that the named luminary will ever be consulted by the attorney directly responsible and also that the client will be shunted from one lawyer to another during the period of his representation.

Similar problems of client baiting may of course arise with regard to specialty certification. If, as under the Code,²⁹ the firm is permitted to advertise the fact that one or more attorneys are board certified in particular areas when in fact services may be rendered by non-certified members of the firm, there is potential for misleading the public. By adopting DR 2-101(B), the court may well have intended to prevent this type of deception.

C. *Policy: Deter Unnecessary Brokering of Legal Services*

Second, the provision can arguably be read as at least a partial attempt to prevent the unnecessary brokering of legal services. The profession as a whole tends to recognize that, on appropriate occasions, it is desirable for an attorney who is not sufficiently familiar with a given field of law to refer clients to another lawyer possessing a greater degree of expertise. The assumption is that the referral normally will result in the rendition of a higher quality of legal services and thus greater client satisfaction.³⁰ To facilitate the process and

29. Cf. TEXAS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(C) (1984).

30. See, e.g., R. ARONSON & D. WECKSTEIN, PROFESSIONAL RESPONSIBILITY 242-243 (1980) (rule against referral fees unrealistic because of practice to contrary and may discourage lesser qualified lawyers from parting with the case); G. HAZARD, ETHICS IN THE PRACTICE OF LAW 99 (1978) ("the effect . . . is to steer claimants to specialists, which is advantageous to

ease the economic penalty that inevitably results from sending business elsewhere, some states ethically permit referring attorneys to recover some fee merely for making the referral.³¹ Indicative of this willingness, DR 2-107(A) (2) of the Texas Code of Professional Responsibility expressly provides that a fee may be shared with an attorney outside the firm without regard to the proportion of services performed or responsibility assumed. The fact that the profession is willing to permit such payments in appropriate cases, however, does not inevitably mean that it is willing to tolerate the unnecessary brokering of legal services.³²

Where an attorney seeks to make a steady business of attracting clients merely for the purpose of sending them elsewhere so that he may collect referral fees, it may be in the best interest of both society and the profession for the Bar to police its ranks. To the extent that forwarding arrangements add an unnecessary layer of middlemen to the provision of legal services, they exacerbate a critical problem besetting those who need the assistance of the profession, namely, unaf-

the client"); Note, *Attorneys: The Referral Fee: A Split of Opinion*, 33 OKLA. L. REV. 628, 633 (1980) (overall effect may help client by encouraging referral to attorney most likely to gain largest recovery); see also Halstrom, *Referral Fees are a Necessary Evil*, 71 A.B.A. J. 40, 42 (Feb. 1985) ("Clients benefit because their claims are placed in the hands of a competent expert with the financial integrity to prosecute the claim.").

31. For example, in 1979 California deleted from its Code a provision requiring that a division of fees with a referring attorney must be "made in proportion to the services performed or responsibility assumed by each [lawyer]." See *Moran v. Harris*, 131 Cal. App. 3d 913, 916 n.2, 182 Cal. Rptr. 519, 520 n.2 (1982) (holding that in absence of an express disciplinary prohibition a forwarding fee arrangement was not contrary to public policy). The only other states permitting straight referral fees are Massachusetts, Maine, and Texas. See *Referral Fees: Everybody Does It But Is It Okay*, 71 A.B.A. J. 40, 40 (Feb. 1985) (straight referral fees allowed only in California, Maine, Massachusetts, and Texas). In the remaining jurisdictions, the referral fee must generally be based on the amount of work performed or responsibility assumed by the referring attorney. See Franck, *No Referral Fee for No Work*, 71 A.B.A. J. 40, 42 (Feb. 1985) (lawyer shouldn't accept fee for not working on legal matter that he or she realizes he or she shouldn't accept).

32. This problem has been the subject of recent comment. See Franck, *No Referral Fee for No Work*, 71 A.B.A. J. 40, 42 n.29 (Feb. 1985) ("potential for profit has spawned private for-profit referral enterprises in the few states [including Texas] that impose no constraints on referral fees"). One commentator has stated:

The advent of the TV broker attorney presents an offensive situation in which a well-funded lawyer can solicit cases by the airwaves and forward the resulting case to qualified attorneys for handling. A law degree and an advertising scheme are all that are required to share in a percentage of the resulting fees.

Halstrom, *Referral Fees Are a Necessary Evil*, 71 A.B.A. J. 40, 43 n.28 (Feb. 1985).

fordability.³³ While one may colorably contend that "referral specialists" can perform a valuable service by directing laymen to firms well suited to meeting their particular needs, it is also likely that many referring attorneys will be actuated not by the clients' best interests but by who is likely to pay the highest referral fee.³⁴

Any interpretation of subsection (B) must take into account those provisions in the Code which expressly permit the occasional payment of referral fees, for in statutory construction, meaning must be given to each portion of the statute³⁵ and each section must be construed in light of the overall context in which it appears.³⁶ In addition, a proper interpretation of subsection (B) should not be blind to the potential abuses in referral arrangements if there is opportunity to take such matters into account. The relevant question to ask with regard to the interplay of subsection (B) and DR 2-107(A)(2) is whether it is a violation of the Code for an attorney, who has advertised an area of practice and named himself as the responsible attorney, to forward the case to another lawyer upon finding that it involves special difficulties beyond his expertise. Strictly speaking, where such referrals occur, the ad has failed to disclose the name of the attorney ultimately responsible for providing legal services.

Clearly, nothing in the Code forbids a finding that such conduct violates the Code, for there is no express guarantee that one can both advertise areas of practice *and* refer clients. Yet, on the other hand,

33. The president of Harvard University recently wrote as follows regarding unaffordability of legal services:

[T]he cost of hiring a lawyer and the mysteries of the legal process discourage most people of modest means from trying to enforce their rights The blunt, inexcusable fact is that this nation, which prides itself on efficiency and justice, has developed a legal system that is the most expensive in the world, yet cannot manage to protect the rights of most of its citizens.

Bok, *A Flawed System*, HARV. MAG. 38, 40 (May-June 1983).

34. The amounts involved are not insubstantial. Writing in 1978, one authority on legal ethics stated as follows: "In personal injury referrals in many parts of the country, the standard arrangement is that the entire fee is a contingent one-third of the claimant's recovery and that this fee is divided one-third to the referring lawyer and two-thirds to the specialist." HAZARD, *ETHICS IN THE PRACTICE OF LAW* 98-99 (1978). Other scholars have placed the referral percentages at varying amounts. See Franck, *No Referral Fee for No Work*, 71 A.B.A. J. 40, 44 n.29 (Feb. 1985) (20% to 33 1/3%); Halstrom, *Referral Fees Are a Necessary Evil*, 71 A.B.A. J. 40, 43 n.28 (Feb. 1985) (25% to 50%).

35. See SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 46.0-6 (4th ed. 1984).

36. See *id.* § 46.05 (construe each section with all other sections in order to produce harmonious whole).

there is no scholarly or judicial support for such a view, and indeed the view seems to run counter to the policies underlying the constitutional protection of lawyer advertising and the policies which favor the making of referrals in appropriate cases. Put differently, if there are important interests to be advanced by advertising areas of legal practice and by referring clients to lawyers possessing greater expertise, then the relevant provisions should be interpreted in a manner which does not unduly handicap either of these interests.

A reasonable course for determining when the referral of clients gives rise to a violation of the "name the responsible attorney" provision would be to read into Subsection (B) a requirement of good faith. It would tend to single out for discipline the most egregious cases and to disregard the others. Specifically, if an attorney has previously practiced in an area of the law and intends to continue the same, or if he plans to become competent therein, or even if he intends to associate with a more experienced attorney who will be able to assist him in meeting clients' needs, then the statement in his advertisement that he will be the responsible attorney is made in good faith and there is no violation.³⁷ If, however, the attorney has no experience in the field and no plans to become proficient in the area or otherwise meet the clients' needs, and merely intends to refer to others the clients he attracts, then good faith has not been shown and different treatment is appropriate. That is, at some point there is simply no factual basis for an attorney to assert that *he will be* the responsible attorney. In such instances, the attorney's abuse of the referral system should be discouraged at least to the point of prohibiting him from attracting clients by advertising areas of practice, and if he persists in so doing, he should be subject to discipline. Under this view, the provision does not so much provide bright-line guidance for those placing ads as furnish a standard for case-by-case review once the ad is *fait accompli*. It

37. An interesting comparison is comment [2] to Rule 1.1 of the Model Rules of Professional Conduct, which in addressing the attorney's duty to provide competent representation states:

"A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. . . . A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question."

MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.1, comment (2) (1983), *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1:101 (1985).

relates more to whether one has colorably stated an honest intention of accepting clients in the advertised area than to whether one has precisely predicted who would perform the work for each client.

D. *A Proposal for Compliance*

Mindful of the foregoing considerations concerning lack of precedent and plausible lines of interpretation, the question still remains as to what statements a practitioner should include in a Yellow Pages ad to comply with subsection (B). In particular, if it cannot be stated in advance, in good faith and with specificity, who will provide the legal services in the advertised area, what information should be sufficient to comply with the Code?

Until there is controlling precedent to the contrary, it would seem to be adequate and appropriate for an ad to seek to satisfy the Code's requirements by naming each of the attorneys in the firm, then including a statement along the following lines: "The attorneys responsible for providing legal services to a particular client are designated on an individual case basis." By so doing, the ad would be sure to have literally named the responsible attorney. Moreover, it will have fully apprised potential clients of the fact that there is no advance guarantee that they will be served by a particular attorney — which, as noted above, is especially important in view of the problems of client baiting and the fact that subsection (C) mandates that information be included indicating whether each named attorney is or is not board certified in the advertised area of practice.

Obviously, it will be rather cumbersome in some cases to list all of the attorneys in a firm with their respective certification credentials in a relatively small Yellow Pages advertisement.³⁸ Rather than so doing, would it be sufficient to simply include the statement quoted above and then state how many attorneys there are in the firm?

38. Presumably, the typeface employed in the ad must be sufficiently large to be discernible by those interested in reading it. With respect to subsection (B)'s sister provision, subsection (C), the Texas Code states that "Such statements [concerning disclaimer of certification] must be displayed conspicuously so as to be easily seen or understood by any consumer. See TEXAS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(C)(2). Of course, context must be taken into account, and phone book typeface is typically very small. A sense of how a statement such as the one suggested in the text concerning assignment of attorneys on an individual case basis might be undistractingly placed in a Yellow Pages ad may be gained by analogizing to the Surgeon General's warnings contained in cigarette advertisements. Typically the warnings are placed in smaller than usual print in the limbic portions of the layout.

Would this not be sufficient to inform clients of what to expect? To these questions, there is no simple answer. Subsection (B) expressly requires the lawyer placing the ad to “publish or broadcast *the name of the lawyer . . . who shall be responsible.*” (Emphasis added). Strickly speaking, listing only the number of lawyers in the firm would not comply with this mandate, even if their certification credentials could otherwise be made clear. While the subsection might be challenged as unconstitutionally broad on the ground that United States Supreme Court precedent generally provides that the government may regulate commercial speech by lawyers only where there is a substantial interest at stake and that “restrictions upon such advertising may be no broader than reasonably necessary,”³⁹ it is uncertain whether such an argument would be successful. The Court has recently held that provisions requiring the *inclusion* (rather than *exclusion*) of information stand on different footing and normally are not subject to the least restrictive means test,⁴⁰ but has reserved the question of whether a different rule should apply when disclosure requirements are unreasonably burdensome.⁴¹ Where such burden can be shown, it could plausibly be maintained that the language of the provision is excessively broad, that the proposed disclosures are sufficient to prevent client baiting or deter unnecessary brokering of legal services, and that in going further the Code is, to that extent, unconstitutional. Presumably, an attorney who in the absence of any precedent on the question takes this position would be unlikely to be subjected to serious disciplinary sanctions, for even if the subsection were found to advance other goals sufficient to justify a literal reading of the statute, it could be argued that until so interpreted the provision was unenforceably vague. As Justice William Brennan has written for the Court in a different, albeit analogous, context, “[s]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be

39. See *In re R.M.J.*, 455 U.S. 191, 203-04 & n.15 (1982).

40. *Zauderer v. Office of Disciplinary Counsel*, ___ U.S. ___, ___, 105 S. Ct. 2265, 2282-83, 85 L.Ed. 2d 652, 672-73 (1985) (disclosure requirements need only be reasonably related to state's interest in preventing deception of consumers).

41. See *id.* at ___ & n.15, 105 S. Ct. at 2282 & n.15, 85 L.Ed. 2d at 673 & n.15 (holding attorney failed to show that disclosure requirement was intrinsically burdensome and unreasonable).

the loser."⁴² To hold otherwise would be to risk chilling important First Amendment rights.⁴³

III. SUBSECTION C: DISCLOSING CERTIFICATION OR THE LACK THEREOF

Subsection (C) of DR 2-101 provides as follows:

Each lawyer whose name is published, advertised, or broadcast pursuant to DR 2-101(B):

(1) *Who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised must state with respect to each area, "Board Certified, (area of specialization) — Texas Board of Legal Specialization."*

(2) *Who has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised must state with respect to each area, "Not Certified by the Texas Board of Legal Specialization."* Where the area 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." Such statements must be displayed conspicuously so as to be easily seen or understood by any consumer. (emphasis added)

These provisions were promulgated by the Texas Supreme Court in 1982 at the same time and in the same manner as subsection (B).⁴⁴

42. See *Smith v. California*, 361 U.S. 147, 151 (1959) (sales of allegedly obscene literature).

43. The same constitutional considerations are applicable to another aspect of lawyer advertising. Many firms, apparently in a good faith attempt to comply with the terms of subsection (B), presently run ads which name all of the attorneys in the firm. Arguably, as suggested above, it would be preferable to also indicate who precisely will provide services in each advertised area or to state the attorney who will be assigned on an individual case basis. In the absence of such additional statements, should such firms now be subject to disciplinary action? It would clearly seem that to the extent that they have reasonably endeavored to interpret and comply with the applicable provision, and in the absence of guiding precedent, scholarship, or statutory history, the answer should be no.

44. As adopted, subsection (C) differs from the version of that rule proposed to the Supreme Court by the State Bar in three respects: (1) the word "advertised," set off by commas, was added to the first sentence by the Supreme Court; (2) in the second sentence of subdivision (C)(2) the words "The naming of an area of practice does not necessarily imply expertise in such an area of practice" were deleted and the words "Not certified by the Texas Board of Legal Specialization" were substituted; and (3) the final sentence of subdivision (C)(2), not contained in the proposed draft, was added by the Supreme Court. Because there is no judicial history behind the Court's adoption of the present provisions, it is impossible to

Although there is no interpretive judicial history of subsection (C), it is fair to conclude that the language was intended to minimize confusion in the eyes of the public that might result when an attorney advertises an area of practice. Absent further explanation, such a statement could be read as suggesting that the attorney has special expertise, or at least prior experience, in the designated area — neither of which is necessarily true.⁴⁵ By mandating the inclusion of further information, the subsection makes at least a partial attempt to address these problems, though whether it is successful is of course open to debate. The argument has been made that because certification does not necessarily establish superiority of legal skill, nor lack of certification inevitably signal inferior ability, the provisions create as much confusion as they dispel,⁴⁶ and thus some attorneys have raised constitutional doubts as to their validity.⁴⁷ Assuming, however, that there is a rational basis to support the means embraced by the court for dealing with the problem,⁴⁸ and setting any other constitutional

state, other than on the basis of conjecture, why these changes were made. It is worth noting that if the original wording of the second sentence of subsection (C)(2) had been retained, many of the problems discussed in the text would not arise. The difficulties presently encountered in resolving those problems strongly suggests that it might well be a ferocious course for that portion of the subsection to be amended so as to comport with the original proposal.

45. *Cf.* State Bar of Texas, Comm. on Interpretation of Code of Professional Responsibility Op. 424 (1985), reprinted in 48 TEX. B.J. 577, 577 (1985) (statement in ad that lawyer was formerly a military attorney held to imply expertise in field of military law).

46. *See* Galton, *The New Advertising Rules: Accentuating the Negative?*, 45 TEX. B.J. 1420, 1420 (1982) (specialization or nonspecialization does not always denote lawyer competency).

47. *See id.* at 1421 (constitutionality of specialization advertising requirement remains open). In *State Bar of Texas v. Daves*, 691 S.W.2d 784 (Tex. App.—Amarillo 1985, writ ref'd n.r.e.), the court declined to rule on various constitutional challenges to DR 2-101, stating simply:

Accepting the Supreme Court's inherent power to adopt the rule, it is not our function as an intermediate appellate court to nullify or alter it, for once the Court decides upon a rule of law, the decision is, in the absence of a controlling decision by the United States Supreme Court, binding on lower courts, until the Court changes the rule.

Id. at 789 (citations omitted).

48. To the extent that an argument of unconstitutionality is based on traditional equal protection analysis, it would seem likely to fail, for it is well established that where there is any rational basis for the rule adopted, courts will normally defer to executive and legislative expertise and the provision will be found enonomic. *See Zauderer v. Office of Disciplinary Counsel*, ___ U.S. ___, ___, 105 S. Ct. 2265, 2282, 85 L. Ed.2d 652, 673 (1985) ("Advertisers' rights are adequately protected so long as disclosure requirements are reasonably related to the states' interest in preventing deception of consumers."); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973) (if classification rationally related to legitimate interest, classification stands); *cf. Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("[t]he Constitution does not

doubts aside, it is possible to ask other questions more immediately relevant to the practitioner:

(1) Must some statement concerning certification be made each time there is any mention of an area of practice?

(2) Must the language concerning certification track verbatim the terms quoted in the statute?

(3) Under what circumstances will a single statement concerning an area of certification (e.g., "Personal Injury Trial Law") be deemed to adequately encompass, for purposes of complying with the statute, the advertisement of various subspecialties arguably within the larger category (e.g., "auto accidents," "worker's compensation" and "defective products")?

A. *When Must a "Disclaimer" Be Included*

Although the language of the subsection is clear, both the frequency with which recent Yellow Pages ads have failed to comply with its terms and the seriousness with which some disciplinary authorities have treated such violations⁴⁹ make the point worth bel-

empower this Court to second-guess state officials"). *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-2 (3d ed. 1978) (courts have generally been deferential to legislature, either due to appreciation of difficulty of legislature's job or out of inherent bias toward judicial restraint). The statute, therefore, is upheld notwithstanding the fact that a more effective means for dealing with the problem might be posited by the court or litigant. Inasmuch as some scholars have urged that the establishment of certification requirements tends to ensure greater proficiency in the rendition of legal services, there appears to be a rational predicate for the enactment of subsection (C). *See generally* M. PIRSIG AND K. KIRWIN, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 47 (4th ed. 1984).

Since 1971, a number of states, including California, Florida, New Jersey, New Mexico, South Carolina and Texas, have adopted specialty certification programs. In addition, supporters of the trend have urged that specialty certification will improve competency, help clients to select lawyers in a more informed manner and, by increasing efficiency, reduce the cost of legal services.

M. PIRSIG AND K. KIRWIN, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 49 (4th ed. 1984).

In cases involving state prosecution of commercial speech, the United States Supreme Court has held that the government must employ the "least restrictive means" capable of achieving the desired objective. *See In re R.M.J.*, 455 U.S. 191, 203-04 n.15 (1982) (*quoting* Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 566, 577 (1980)). This requirement is not applicable, however, where the issue is one of requiring additional disclosure, rather than protecting the dissemination of information, for "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *See Zauderer v. Office of Disciplinary Counsel*, ___ U.S. ___, ___ n.14, 105 S. Ct. 2265, 2282 n.14, 85 L. Ed.2d 652, 673 n.14 (1985).

49. *See State Bar of Texas v. Daves*, No. 84-504190 (Dist. Ct. of Lubbock County, 237th

boring: *Anytime there is any mention of an area of practice, some statement concerning certification MUST be included, regardless of whether certification is available in that particular area.* The mandatory language of the subsection explicitly states that a statement “must” be included both when the attorney is certified in the “area so advertised” and when he is not. The attorney placing the ad has an *option of additionally stating* that certification is not available in the area, if such is the case, but there is no option to completely fail to include some type of statement if a field of law is mentioned. Thus, in *State Bar of Texas v. Daves*,⁵⁰ — the first reported case involving subsection (C) — the Amarillo Court of Appeals upheld a summary judgment against an attorney who advertised uncontested divorces.⁵¹ Judicial admissions conclusively established that the attorney was not certified as a family law specialist, and he had failed to include any disclaimer of certification in his newspaper advertisement.⁵²

It should be noted that certain expressions which might not necessarily be thought of as defining bona fide areas of practice may be treated as calling into play the disclaimer requirements of subsection (C). Thus, a recent Ethics Opinion of the State Bar of Texas⁵³ has held that because an ad that stated an attorney was a “military attorney”⁵⁴ while in the armed forces would leave both a civilian and a member of the military with the “undeniable impression”⁵⁵ that the “attorney ha[d] expertise in the area of the law involving military personnel,”⁵⁶ the ad must include proper disclaimers to comply with subsection (C) (2).

Judicial District of Texas, July 12, 1984) (violating DR 2-101(C)(2), six month suspension), *rev'd and rem.*, 691 S.W.2d 784 (Tex. App.—Amarillo 1985, writ *ref'd n.r.e.*).

50. 691 S.W.2d 784 (Tex. App.—Amarillo 1985, writ requested).

51. The *Daves* court was concerned mainly with the constitutionality of the rules governing lawyer advertising and the propriety of granting summary judgment on the record made in the district court. *See id.* at 788-89. In view of the fact that the contested ad contained no language of any sort purporting to comply with subsection (C), there was no occasion for the court to extensively consider how that provision should be interpreted or what type form of statement is sufficient to comply with its requirements.

52. *See id.* 790.

53. *See* State Bar of Texas, Comm. on Interpretation of Code of Professional Responsibility Op. 424 (1985), *reprinted in* 48 TEX. B.J. 577, 577 (1985).

54. *See id.* at 577.

55. *See id.* at 577.

56. *See id.* at 577. The opinion concluded that military job titles may be included in an advertisement, but titles which imply on area of expertise must contain proper disclaimers. *See id.* at 577.

B. *What Language May Be Used*

At face value, the statute mandates with emphatic certainty that precise wording — contained therein in quotation marks — be used to claim or disclaim certification or to state that certification is not available. Were layout space not expensive,⁵⁷ were the visual appeal and clarity of the ad not critical concerns, there might not be any valid reason to attempt to avoid strict compliance or to ask whether other terms could do as well. But these *are* very relevant considerations for *any* practitioner electing to advertise in the Yellow Pages. Thus, the question arises as to whether language other than that quoted in the statute may suffice to protect the public interest.

For example, suppose that a solo practitioner advertises the availability of legal services in five areas — personal injury, criminal law, military law, family law, and wills and probate. Suppose further that he is board certified in the two areas last mentioned and that no certification is available in military law. Strict tracking of the language of the subsection would seem to require the inclusion of a bulky statement something akin to the following:

Board Certified, Family Law — Texas Board of Legal Specialization.
Board Certified, Estate Planning and Probate — Texas Board of Legal Specialization. Not certified by the Texas Board of Legal Specialization in Personal Injury Trial Law, Criminal Law or Military Law.⁵⁸

Would it not be equally effective, from a public interest/informational standpoint, for the ad to state simply:

Board Certified by the Texas Board of Legal Specialization in Family Law and Estate Planning and Probate Law only.

Similarly, rather than drop a footnote to the listing of “Military Law” stating “No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this Area,” would it be just as clear and be more readable for the ad to state, “The State Bar of Texas Offers No Certification in Military Law”? Or what about a simple “Certification Not Available”? Moreover, if these problems arise for the solo practitioner, one can easily

57. As an example, a 2"x2" ad in the 1985 San Antonio Yellow Pages would cost an attorney \$201.25 per month and a half page ad would cost \$1,475.25 per month.

58. Perhaps the first two sentences of the proposed entry could be merged to read “Board Certified, Family Law and Estate Planning, and Probate—Texas Board of Legal Specialization,” and yet still strictly comply with subsection (C). There is no precedent on the question.

imagine the complexity of strict compliance where an ad is placed on behalf of two or more attorneys who practice in multiple areas, in which some are certified and others are not. Nothing less than an exceptionally long, detailed series of statements would seem to be required.

Fortunately, a strong argument can be made, based on the United States Supreme Court's decision in *In re R.M.J.*⁵⁹, that strict adherence to the terminology set forth in the statute cannot be enforced. In *R.M.J.*, the State of Missouri required that when advertising areas of practice, an attorney had to select from an approved list of category designations, including the words "tort law" and "property law."⁶⁰ Instead of employing the designated terms, the attorney advertised that he engaged in a "personal injury" and "real estate" practice, and used other words having no direct counterparts on the approved list, because he believed the undesignated terms were more readily understood by the general public.⁶¹ Recognizing that the terms used "present[ed] no apparent danger of deception,"⁶² "could scarcely mislead the public,"⁶³ and were "[i]ndeed . . . more informative,"⁶⁴ the Court held that a state may not mandate the use of particular language where the words in fact used are true and not misleading.⁶⁵ In view of

59. 455 U.S. 191 (1982).

60. *See id.* at 195 n.6. The Missouri law allowed a lawyer to advertise his practice in one of two ways. The attorney could opt for a general description of "General Civil Practice," "General Criminal Practice," or "General Civil and Criminal Practice." In the alternative, a lawyer or law firm could use one or more of twenty-three specialty categories. *See id.* at 195 n.6. If, however, a general description was used, the attorney could not, in addition, use any of the more specified descriptions. Furthermore, if a specialty description was advertised, the attorney was forbidden to state any limitation of practice. Finally, the attorney or firm was forbidden to deviate from the approved list. *See id.* at 195 n.6.

61. *See id.* at 196-97 n.8. The charged attorney advertised twenty-three areas of practice, four of which conformed with the approved rule and eight descriptions not provided for by the rule: ("contract," "aviation," "securities-bonds," "pension & profit sharing plans," "zoning and land use," "entertainment/sports," "food, drug & cosmetic," and "communication"). Additionally, eleven areas advertised were in non-comformance with the rule: "tax," (taxation law), "corporate" (corporation law and business organizations), "real estate" (property law), "probate" and "wills & estate planning" (probate & trust law), "personal injury" (tort law), "trials & appeals" (trial practice, appellate practice), "workmen's compensation" (workers' compensation law), and "divorce-separation" and "custody-adoption" (family law).

62. *See id.* at 206.

63. *See id.* at 206.

64. *See id.* at 206.

65. *See id.* at 206-07. The Court emphasized that "the states retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice." *See id.* at 207.

this holding, it seems likely that, if the argument is raised, a court construing subsection (C) would hold that an attorney may deviate from the language quoted in the subsection, so long as he accurately sets forth, in a way that is not misleading, all of the information that the Code seeks to elicit.

For the practitioner seeking to travel this route, caution and clarity are the apposite watchwords. There should not be any unnecessary doubt left in the mind of the reader of the ad as to the statements' meanings or to whom the statements pertain. The language used must be at least as clear as that which it replaces. For example, suppose that a firm wishes its ad to name six attorneys (A, B, C, D, E, and F) and four areas of practice, including family law, in which A is certified. The ad states: "A is certified by the Texas Board of Legal Specialization in Family Law only. The other attorneys in the firm are not board certified in any area." Is this sufficient to comply with subsection (C)? Presumably so. There is no doubt as to who is or is not certified in which areas or who confers the certification. In contrast, if none of the attorneys in the example were certified in any area, would it be sufficient to concisely state: "Not Board Certified"? Here an affirmative answer would seem far less certain. At a minimum the ad leaves unclear the fact that it is individuals, not firms, who can be certified and the fact that certification is conferred by a particular board. Because the First Amendment tends to favor the dissemination of more information, not less, where there is potential for misleading the public,⁶⁶ the practitioner would do better to err on the side of completeness.

C. *How Should Subcategories Be Treated*

The Texas Board of Legal Specialization confers certification in ten specific areas: Civil Trial Law, Consumer Bankruptcy, Criminal Law, Estate Planning & Probate, Family Law, Immigration & Nationality Law, Labor Law, Personal Injury Trial Law, Real Estate Law, and Tax Law. Predictably, however, attorneys placing Yellow Pages ads wish to attract the eye of the public by departing from the strict rubric of these titles and referring to types of cases covered by

66. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 374-75 (1977). The Court stated: "[a]lthough, of course, the bar retains the power to correct omissions [in lawyer advertising] that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less." See *id.* at 374-75.

each general category. For example, under a heading in an ad entitled "Family Law," or perhaps in lieu of such words altogether, the practitioner may desire to list such designations as "divorce," "annulment," "custody," "support," "visitation," "paternity," and "adoption," as well as many others. Are such listing permissible? Clearly yes.⁶⁷ The Texas Code does not purport to confine attorneys to an approved list of words. Such references do, however, create problems for complying with subsection (C).

Although the naming of subcategories may enable the reader to better understand what services the attorney offers, the variation between those terms and the language used to express the disclaimer may leave him unclear as to whether or not the attorney has been certified in a particular area. For example, where an ad refers to worker's compensation, automobile accidents, defective products, and aviation crashes, then states that the attorney is board certified in Personal Injury Trial Law, will the average layman understand that certification has been granted covering all of the named subcategories, or will he assume that the statement refers to something else?

Mindful of these problems, the Professional Ethics Committee of the State Bar of Texas has offered pertinent guidance in a recent ethics opinion.⁶⁸ Unfortunately, their recommendations⁶⁹ tend toward even greater complexity in Yellow Pages legal advertising by suggesting the inclusion of disclaimers more lengthy than those already discussed. Where, for example, an attorney who is board certified in Personal Injury Trial Law advertises that he handles worker's compensation cases, the committee states that the ad must disclose his board certification and, in addition, "should also include the caveat":

67. See State Bar of Texas, Comm. on Interpretation of the Code of Professional Responsibility, Op. 418 (1984) (permissible to subdefine broad headings), reprinted in 47 TEX. B.J. 1118, 1118 (1984).

68. See *id.* at 1118.

69. Opinions of the Professional Ethics Committee are not binding on the Texas Supreme Court. See TEX. REV. CIV. STAT. ANN. art. 320a-1, § 18(b) (Vernon's Supp. 1985). In addition, no decision has yet precisely defined their precedential force when cited to lower courts or local grievance committees. Telephone interview between Christopher Warren and Dell Wynn, Office of the General Counsel, State Bar of Texas (May 21, 1985). Inasmuch as the members of the Committee are appointed by the Texas Supreme Court, and presumably are well-qualified to hold such positions, it may reasonably be assumed that the opinions of the Committee will normally be entitled to significant weight. For a brief overview of the operation of the Committee, see generally, J. Zunker, *The Professional Ethics Committee*, 46 TEX. B.J. 720 (1983) (Professional Ethics Committee passes on proposed conduct).

Workers' Compensation (or whatever the sub-area) is included in Personal Injury Trial Law. However, no designation has been made in Workers' Compensation law as such."⁷⁰

Further, if the attorney placing the ad is not board certified in Personal Injury Trial Law, the committee says that the ad "must state that he is" not certified "in Personal Injury Trial Law, which would include Worker's Compensation."⁷¹

Adherence to these suggested guidelines could technically clarify many lawyer advertisements. And to the extent that such is reasonably possible without unduly impairing the visual appeal of the ad, that undoubtedly is the preferred course for the practitioner. Yet in many instances, the proposed method of clarification would exact a high cost. Lawyer ads often list more than a half dozen sub-areas of practice. Listing ten or a dozen is not uncommon, and some ads have specified upwards of twenty.⁷² Presumably, this information is of use to consumers who are in need of legal services. If, however, one requires practitioners to in effect "double-list" each sub-area — once in the body of the ad and once in the disclaimer — it seems inevitable that at some point the space required will become prohibitively expensive or the ad so visually unappealing, as to discourage the dissemination of this information. If board certification of an attorney did in fact ensure that the client would obtain a higher quality of legal services, the trouble and risks inherent in this line of compliance might be worth bearing. But as mentioned earlier, that proposition is at least open to question.⁷³

A better alternative might be to require attorneys to clearly list any sub-areas beneath a general category heading, at least to the extent that the areas are subsumed by one of the certification fields.⁷⁴ If this

70. See State Bar of Texas, Comm. on Interpretation of the Code of Professional Responsibility, Op. 418 (1984), reprinted in, 47 TEX. B.J. 1118, 1118 (1984).

71. See *id.* at 1118.

72. For example, one advertisement on page 95 of the Southwestern Bell Yellow Pages for the San Antonio area (August 1984) lists, in a readable, tasteful format, 22 subareas of practice.

73. See Galton, *The New Advertising Rules: Accentuating The Negative?*, 45 TEX. B.J. 1420, 1420 (1982) (specialization or nonspecialization does not always denote lawyer competency).

74. Very difficult problems can arise concerning whether or not a particular field is a subcategory of an area in which certification is available. For example, is Real Estate Litigation a sub-area of Civil Trial Law? Or is it too closely related to the Real Estate Law certification that to allow one not certified in that area to so advertise might run a risk of confusion in

suggestion is followed, it would then be possible to avoid a duplicative recitation of that information in the disclaimer statements, without risk of confusion. That is, if the ad listed five types of cases under the heading "Civil Trial Law," then clearly stated that the attorney was board certified in Civil Trial Law, it would seem to be pellucidly certain that the certification covered all of the sub-areas. Many attorneys presently employ this format in their ads. So long as what the attorneys do is clear, it would appear that they might reasonably continue the practice without fear of discipline. The recommendations of the Professional Ethics Committee, while entitled to significant weight, are not binding on the Texas Supreme Court⁷⁵, nor presumably on lower courts or grievance committees.

IV. CONCLUSION

In the absence of guiding precedent on subsection (B), the best course for the practitioner is to attempt in good faith to furnish prospective clients with the most accurate picture possible as to who will likely provide legal services or how that decision will be made. If the attorney paints such a picture, he will probably be safe from disciplinary action, for to fault him from failing to divine any other interpretation of this vague provision would unconstitutionally chill the exercise of his First Amendment rights.

As to subsection (C), it is clear that any time an ad names an area of practice or otherwise conveys the impression that the attorney has special expertise in a given field, an appropriate disclaimer must be included. Applicable decisions of the United States Supreme Court strongly suggest that the attorney need not precisely track the disclaimer language set forth in the statute, but to the extent that he fails to do so, great care should be exercised to insure that prospective clients are fully and accurately apprised as to the certification credentials of those who are named. Where the ad refers to particular types of cases or sub-areas, it should make clear, through wording or format, whether certification encompasses those fields.

Until such time as the relevant language is authoritatively interpreted or, perhaps better, revised, this is all that one can reasonably be

the eyes of the public. Full consideration of this and similar questions is beyond the scope of this article.

75. See TEX. REV. CIV. STAT. ANN. art. 320a-1, § 18(b) (Vernon's Supp. 1985).

expected to do in navigating the trouble-fraught waters of subsections (B) and (C).