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August 1, 2001

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FILE # ML-42087-D1 OPINION COMMITTEE

I.D. # 42087

RQ-0411-JC

Ms. Susan Denmon Gusky  
Chair, Opinion Committee  
Office of the Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548

RE: REQUEST FOR ATTORNEY GENERAL OPINION

Dear Ms. Gusky:

I write to request a formal opinion as to whether the state's flat prohibition on testimonial advertising by health care professionals could be constitutionally enforced to preclude the use of a specific testimonial advertisement. This request explicitly does not ask your office to find any fact. It seeks only a legal conclusion with respect to a set of defined facts.

The Texas Occupational Code contains three sections addressing advertising by health care professionals that are relevant to the question posed.

Section 101.201(b)(1) and (4) prohibits false, misleading or deceptive advertising by health care professionals. This section specifically states that false, misleading or deceptive advertising or advertising not readily subject to verification includes advertising that:

- (1) makes a material misrepresentation of facts or omits a fact necessary to make the statement as a whole not materially misleading....
- (4) contains a testimonial.

Section 164.052(a)(6) and (7) provides that a physician commits a prohibited act if he or she uses an advertisement that is false, misleading, deceptive or advertises professional superiority or the performances of professional service in a superior manner if that advertisement is not readily subject to verification.

Lastly, Section 153.002(a) and (b) provides that the Board of Medical Examiners may not adopt rules restricting advertising or competitive bidding by a person regulated by the Board except to prohibit false, misleading, or deceptive practices by the person. Further, in promulgating rules to prohibit false, misleading, or deceptive practices, the Board



may not include a rule that:

- (1) restricts the use of any advertisement medium,
- (2) restricts the person's personal appearance or the use of the person's voice in any advertisement,
- (3) restricts the size or duration of an advertisement, or (4) restricts the person's advertisement under a trade name.

Pursuant to the delegation of authority by the legislature, the Board of Medical Examiners has promulgated rules related to advertising by health care professionals. These rules deem an advertisement false, deceptive, or misleading if it contains a testimonial. The Board defines testimonials as an attestation or implied attestation to the competence of a physician's services or treatment. Testimonials also include expressions of appreciation or esteem, a character reference, or a statement of benefits received. Under the rule, testimonials are not limited to patient comments but may also include comments from colleagues, friends, family, actors, models, fictional characters, or other persons or entities.

The state's prohibition on all testimonial advertising appears to conflict with the well-settled principle of First Amendment jurisprudence that states may not completely ban statements that are not actually or inherently misleading. See *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation*, 512 U.S. 136, 142 (1994), *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 111 (1990).

Faced with this apparent conflict between state law and the free-speech protections afforded by the United States Constitution, many Texas health care professionals face the task of distinguishing between commercial speech which is prohibited by state law and that which is protected by the First Amendment.

*Therefore, I request that you clarify the permissible bounds of enforcement of the testimonial ban by issuing a formal opinion on the enforceability of such a ban to preclude the use of the following patient testimonial in an advertisement by a physician:*

**Announcer:** Although individual results and experiences may vary and some results and experiences may be atypical, listen to what this patient has to say about his surgery with Dr. X.

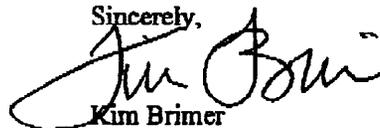
**Patient:** I'm so glad I went to Dr. X for my refractive eye surgery. For the first time in a very long time, I can see the alarm clock by my bed when I wake up in the morning. My surgery lasted less than ten minutes, and I couldn't be happier with the results. Dr. X and his staff answered all my questions and made me feel comfortable. I've already recommended Dr. X to friends and family.

In responding to this request for an opinion, I ask that you assume that the above testimonial accurately reflects the actual experience and impressions of this patient. Also, please assume that testimonial advertising by health care professionals is not inherently misleading or deceptive.

Given these facts and assumptions, could Texas Occupations Code Sections 101.201(b)(1) and (4), 164.05(a)(6)(7) and 153.002(a) and (b) be constitutionally applied to preclude use of the above testimonial in advertising by a health care professional?

Thank you for your consideration of this matter.

Sincerely,



Kim Brimer