

SENATOR FLORENCE SHAPIRO
DISTRICT 8

COMMITTEES:
State Affairs, Chair
Criminal Justice
Administration



The Senate of
The State of Texas

DISTRICT OFFICES:
Parkway Centre I
2901 Dallas Parkway, Suite 330
Plano, Texas 75093
(972) 378-3229

8117 Preston Road, Suite 687
Dallas, Texas 75225
(214) 363-5031

AUSTIN OFFICE:
P.O. Box 12068
Austin, Texas 78711
(512) 463-0108
TDD 1-800-735-2989

RQ-0265-jc

August 9, 2000

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

RECEIVED

AUG 11 2000

OPINION COM.

FILE # ML-41556-00

I.D. # 41556

Dear Ms. Gusky:

I have been asked to request an opinion on the following issue:

Is the Texas State Board of Medical Examiners authorized to adopt rules which prohibit physician advertising containing a "testimonial" even if such "testimonial" is a true, accurate, nonmisleading and nondeceptive statement regarding services provided by the physician to a patient or a true, accurate, nonmisleading and nondeceptive statement reflecting the benefits the patient received from such medical treatment.

As a matter of background, the following information has been provided to my office. The Medical Board's rules regarding advertising are found in 22 TAC, Sections 164.1-164.5. Section 164.1 cautions the physician that his or her license may be subject to revocation or limitation for "false or deceptive advertising." Section 164.2(1) defines in broad terms the definition of "advertising and advertisement." Section 164.2(2) defines a testimonial as "an attestation or implied attestation to the competence of a physician's service or treatment." Testimonials "may also include expression of appreciation or esteem, a character reference, or a statement of benefits received." Testimonials are not limited to patient comments, but may also include comments from colleagues, friends, family, actors, models, fictional characters, or other persons or entities. Section 164.3 sets out that any advertisement shall be "deemed by the board to be false, deceptive or misleading if it ... (8) contains a testimonial; or ..."

The prohibition against testimonials has been called into question based upon the Texas Occupation Code, Section 153.002 which states the following:

- (a) The board 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.



Ms. Gusky
August 10, 2000
Page 2

- (b) The board may not include in its rules to prohibit false, misleading or deceptive practices by a person regulated by the board a rule that:
- (1) restricts the use of any advertising median;
 - (2) restricts the person's personal appearance or use of the person's voice in an advertisement;
 - (3) relates to the size or duration of an advertisement by the person; or
 - (4) restricts the person's advertisement under a trade name. (emphasis added).

I hope this information is helpful to your office as it researches this request. If you have any questions, please feel free to contact my office. Thank you for your consideration of this request.

Very truly yours,

A handwritten signature in cursive script that reads "Florence Shapiro". The signature is written in black ink and has a long, sweeping horizontal line extending to the right from the end of the name.

Florence Shapiro

FS/ses