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OPINION COMMITTEE



Susan D. Reed
Criminal District Attorney
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RQ-1118-GA

March 28, 2013

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OPEN RECORDS DIVISION

Honorable Greg Abbott
Attorney General of Texas
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML 47246-13
I.D. # 47246

Dear Attorney General Abbott:

RE: Request for opinion interpreting Texas Government Code § 1704.304(c)

Dear General Abbott:

This is to request that the Attorney General of Texas issue an opinion pursuant to Section 402.042 of the Texas Government Code.

SUMMARY OF REQUEST

A publisher ("Publisher") seeks to distribute his publication Crime, Justice & America, ("CJA") in Bexar County detention facilities (See Attachment "A."). CJA offers "Exclusive Bail Agent Advertising Space(s)." (See Attachment "B."). This marketing initiative is an apparent departure from prior publications featuring advertisements by multiple bail bond licensees and attorneys, as distributed in other states. Purchase of exclusive bail bond licensee advertising space affords the licensee the sole right to advertise in CJA for all of Bexar County generally and particularly within the Bexar County Detention Facility through distribution of CJA there.

While we understand that in GA-0502, your Office determined that there is functional difference between "advertising" and "solicitation" for purposes of Section § 1704.304(c) of the Texas Occupations Code under the facts of that opinion, the Bexar County Bail Bond Board (the

“Board”) seeks to confirm that the reasoning set forth in that opinion would apply to the facts as further set out in this opinion request.

QUESTION PRESENTED

Could advertising by a bail bond licensee through an exclusive arrangement between a the licensee and a magazine (which arrangement would exclude all other licensees in a particular geographic area) which is then distributed directly to pretrial detainees being held in the county jail ever constitute unlawful “solicitation” in violation of Section 1704.304(c) of the Texas Occupations Code?

ARGUMENT AND AUTHORITIES

CJA addresses criminal justice topics relevant to jail inmates and includes advertisements for bail bond licensees and lawyers, with the option of one exclusive bail bond licensee advertising arrangement for each specific area in which CJA is distributed. The advertisements (whether generally or through the exclusive advertising option) fund most of CJA’s publication costs. CJA can be delivered by several means, depending upon the internal operations of the specific facility. For example, if the jail accepts delivery, CJA can be disseminated by general distribution in common areas or, if the jail declines general distribution, CJA could then be individually addressed to specific inmates.

In Tex. Att’y Gen. Op. No. GA-0502, your Office was asked to render an opinion on whether a jail parking lot was included within the meaning of “jail” for purposes of Section 1704(c) and its concomitant ban on solicitation within the jail. Tex. Att’y Gen. Op. No. JC-0502 at 1. Your Office found it unnecessary to address that particular issue, focusing instead on whether a bail bond licensee’s general display of advertising on his vehicle constituted activity prohibited by Section 1704(c). *Id.*

Under the facts there presented, your Office had little difficulty concluding that general advertising did not constitute solicitation for purposes of Section 1704(c):

“Advertising” is not tantamount to “solicitation.” Although no Texas case has squarely confronted this issue, the courts of a number of other states have done so. The New York Court of Appeals held that, for purposes of the statutes governing attorney conduct,

“‘solicit’ means to move to action, to endeavor to obtain by asking, and implies personal petition to a particular individual to do a particular thing while ‘advertising’ is the calling of information to the attention of the public.” *Kofler v. Joint Bar Ass’n*, 412N.E.2d 927,931 (N.Y. 1980), cert. denied, 450 U.S. 1026 (1981) (citing BLACK’S LAW DICTIONARY 124849 (5th ed. 1979)). Likewise, the Arkansas Supreme Court distinguished the two terms in stating that “soliciting is a well-known and defined action, and advertising is an equally well-known and defined action, and they are not identical.” *Carter v. State*, 98 S.W. 704,704 (Ark. 1906); see also *Smith, Waters, Kuehn, Burnett & Hughes, Ltd. v. Burnett*, 548 N.E.2d 1331, 1336 (Ill. App. 3d 1989) (“Solicitation of legal services, as opposed to advertising, connotes a private communication directed at a person or category of persons known by an attorney to have an immediate potential need for legal services.”); *Akron Pest Control v. Rudar Exterminating Co., Inc.*, 455 S.E.2d601,603 (Ga. App. 1995) (“The term [‘solicit’] implies personal petition and importunity addressed to a particular individual to do some particular thing.”). In addition, another provision of chapter 1704 of the Occupations Code indicates a distinction between “solicitation” and “advertisement.” Section 1704.109(a) provides that “[a bail bond] board by rule may regulate solicitations or advertisements by or on behalf of bail bond sureties.” TEX. OCC. CODE ANN. § 1704.109(a) (Vernon 2004) (emphasis added).”

Tex. Att’y Gen. Op. No. GA-0502 at 2. Despite the issuance of a clear and well-reasoned opinion, the issue resolved by your Office could be read very narrowly to only address general advertising outside of the jail: “[w]e conclude...that section 1704.304(c) does not prohibit *a bail bond licensee’s display of advertising or licensee information on a vehicle in the parking lot of a county jail.*” Tex. Att’y Gen. Op. No. GA-0502 at 2 (emphasis added).

On the other hand, GA-0502 could be read to interpret “solicitation” narrowly to preclude advertising from ever constituting “solicitation” for purposes of Section 1704.304 in all instances, even if occurring within the jail. However, at least one appellate court in Texas has taken a much more expansive interpretation of “solicitation” under Section 1704.304(c). See *Webb v. State*, No. 02-02-00432-CR, 2003 Tex. App. LEXIS 6219, 2003 WL 21666630, at *1 (Tex. App.--Fort Worth July 17, 2003, pet. ref’d) (mem. op., not designated for publication).¹

In *Webb*, the court addressed whether a bail bond surety had violated the anti-solicitation prohibitions of Section 1704.304(c) by the use of a telephone. *Id.* at 1. In reviewing the

¹ Opinion included as Attachment “C.”

statutory language, that court noted that the statute did not include a definition of the term “solicit” and looked to the plain meaning of the word:

“Solicit” is defined as to make a “petition” or “to strongly urge.” WEBSTER'S THIRD NEW INT'L DICTIONARY at 2169 (1981). No specific mode of communication is necessarily required “to strongly urge” someone to use a specific bonding business, nor does the statute require that a transaction be completed, but only requires the solicitation of business...

Id. at 2. That court was careful to point out that neither a *specific method of communication* nor a completed transaction were requirements of Section 1704.304(c). *Id.* at 2 (emphasis added). The statute’s only requirement was that “solicitation of business” had to occur. *Id.* at 2-3. Use of a telephone in that instance was merely the manner and means. *Id.* at 3.

The Board’s concern arises from the possibility of an exclusive advertising arrangement between one bail bond licensee and CJA, which would then be distributed within the jail. Such an exclusive arrangement with a bail bond licensee reduces available competition and works to the disadvantage of pretrial detainees who are often unsophisticated and under extreme stress, circumstances conducive to uninformed decision-making. Read in the context of the reasoning of *Webb*, an exclusive arrangement for advertising within the confines of the county jail under those circumstances could arguably be construed as a “petition” to solicit business within the jail in violation of Section 1704.304(c).

Because a violation of 1704.304 could result in criminal prosecution, the Bexar County Bail Bond Board seeks an opinion finally and fully resolving this matter.

Thank you for your assistance on this matter,

Sincerely,

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