Will Texas Follow in the Footsteps of the ABA or Forge Its Own Path?

The Revised Texas Disciplinary Rules of Professional Conduct and their ABA Analogues

by

Rebecca Kimmel and Prescott W. Smith

Carrington, Coleman, Sloman & Blumenthal, LLP

200 Crescent Court, Suite 1500
Dallas, Texas 75201

1 The views expressed herein are the authors’ and not those of Carrington, Coleman, Sloman & Blumenthal, LLP or its clients. This publication is intended only for general information purposes and does not constitute legal advice.
INTRODUCTION

The American Bar Association formed the Ethics 2000 Commission (“commission”) to review the Model Rules of Professional Conduct. The commission issued a report on proposed revisions to the Model Rules, which was debated and later adopted by the ABA House of Delegates in February 2002. Since then, a few ABA Rules have been further amended, including Rules 7.2 and 7.5 regarding advertising and soliciting which are discussed further in this paper. The revised ABA Model Rules of Professional Conduct have been submitted to all the states to encourage their adoption, and are currently under consideration in Texas.

Independent of the ABA’s recent revisions of its rules, Texas was considering a revision of its own Disciplinary Rules of Professional Conduct, specifically Rule 1.04 regarding division of fees and Part 7 regarding advertising. Although the revisions to the ABA Rules were not the impetus of change in Texas, revised ABA Rule 1.5 regarding division of fees and Part 7 regarding advertising did serve as a resource upon which the Texas State Bar relied in proposing revised rules in these areas. The revisions to Texas Rule 1.04 and Part 7 proposed by the Texas State Bar Board of Directors were ultimately approved by referendum of the State Bar’s membership and adopted by Orders of the Texas Supreme Court.
RULE 1.04
OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Texas Rule 1.04 regulates, in part, the division of fees among lawyers for representation of a single client. Referral fees, in particular, are a controversial topic in Texas. The Texas Supreme Court proposed amending the Texas Rules of Civil Procedure, or alternatively the Texas Disciplinary Rules of Professional Conduct, to address this issue. But at the urging of the Texas State Bar, the Court postponed amending the Rules to allow further study of the issue.

The State Bar Board of Directors established a Referral Fee Task Force in January 2003 which conducted public hearings and received numerous written comments. In its preliminary report, the Task Force noted that Texas was the only state that still allowed the division of fees based merely on referral or forwarding a case. In its final report issued on May 24, 2004, the Task Force proposed that Rule 1.04 be revised to eliminate the pure forwarding fee and clarify obligations of a lawyer when dividing a fee with another lawyer. The State Bar Board of Directors approved this recommendation and requested the Texas Supreme Court submit the rule for referendum to the membership of the State Bar, which it did from November 5th to December 20, 2004. A majority of lawyers approved the referendum to revise Rule 1.04, and it was adopted by Order of the Texas Supreme Court dated January 28, 2005.²

The revised rule was effective March 1, 2005.³


³ Order Promulgating Amendments to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, Misc. Docket No. 05-9013, Supreme Court of Texas.
Texas Disciplinary Rule of Professional Conduct 1.04 – Fees:

A. The changes made to Rule 1.04 are limited to section (f) regarding the division of fees and the newly-added section (g).

B. Pursuant to former section (f) of Rule 1.04, a division or agreement for the division of fees between lawyers was permitted only if the division is (i) in proportion to the professional services performed by each lawyer; (ii) made with a forwarding lawyer; or (iii) made by written agreement with the client between lawyers who assume joint responsibility for the representation; and if the client is advised and does not object to the participation of all lawyers involved.

C. The revisions to the rule limit the permissible fee-dividing arrangements and increase the requirements for client consent.

1. Section (f) of Rule 1.04, which defines the circumstances in which a fee may be divided, has been revised as follows:
   
a. A division of fee made with a forwarding lawyer is no longer permitted.

b. A division of fee based on proportionate services is still permitted with the client’s consent.

   (1) **Comment:** A division of fees based on proportionate service

   (a) Assumes that each lawyer is performing “substantial legal services” on behalf of the client with respect to that matter beyond those involved in initially acquiring the client,

   (b) Requires a reasonable correlation between the amount or value of services rendered and responsibility assumed and share of fee received,

   (c) Permits an agreed division of fees even if it is not directly proportional if both lawyers perform substantial services, and

   (d) Permits deferral of the allocation of fees until the end of the representation as long as the terms of the arrangement include the basis for the future division.

   c. A division of fees based on joint responsibility is also still permitted with the client’s consent.

   (1) **Comment:** Ongoing responsibility of a referring lawyer with “joint responsibility” exceeds that of a forwarding attorney under the prior rule. It is also possible that a lawyer assuming joint
responsibility could be held liable for the actions of the other lawyer.

(2) Comment: A division of fees based on joint responsibility entails ethical and possibly financial responsibility including

(a) Ensuring adequacy of representation including a reasonable investigation into the matter and referring the matter to a lawyer the referring lawyer reasonably believes is competent to handle it, and

(b) Ensuring adequate client communication which requires the referring attorney to monitor the matter throughout representation, and ensuring the client is informed of those matters of which referring lawyer is aware and a reasonable lawyer would believe a client should be aware.

(3) Comment: Attending depositions and hearings or receiving copies of pleadings and correspondence is not necessary to meet the monitoring requirement as such attendance will likely only increase the transactional costs to the client.

d. The prior written consent of the person retaining legal services to the terms of the arrangement is required regardless of the type of fee division.

(1) The writing must contain:

(a) The identity of the lawyers or law firms who will participate;

(b) Whether fees will be divided based on proportion of services performed or by lawyers agreeing to assume joint responsibility; and

(c) The share of fees that each lawyer or law firm will receive or, if the division is based on proportion of services performed, the basis on which the division will be made.

(2) Comment: The referring lawyer has primary responsibility for ensuring the client has consented to the division of fees arrangement.

(3) Comment: By now focusing on a “person,” as opposed to a “client,” the revisions eliminate an important loophole. By requiring confirmation of every arrangement to divide fees for the representation of a person, the rule now covers conduct by a referring attorney who might not formally enter into an attorney-client relationship with the person he or she refers.
2. Newly added Section (g) provides as follows:

a. Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person or to refer a person to other counsel must be confirmed by an arrangement conforming to section (f);

(1) Consent by the client without knowledge of the items required in section (f) – the identity of lawyers, the basis of the division and the share of fees that each lawyer receives – will not constitute confirmation by the prospective client.

(2) Without such confirmation, a fee cannot be collected for the representation except for the reasonable value of legal services provided to the client and reasonable and necessary expenses incurred on behalf of the client.

(3) Quantum meruit recovery is permitted under this rule should the requirements of confirmation not be met.

c. These requirements do not apply to a former partner or associate that has separated or retired from a firm or to a lawyer referral program certified by the State Bar.

3. A sample of a Referring Fee Agreement may be found in Appendix Tab H.

D. ABA Model Rule of Professional Conduct 1.5(e) is the counterpart to Texas Rule 1.04(f).

1. The ABA Rule only contemplates two bases for dividing fees – for proportionate services or joint responsibility. Texas follows suit by prohibiting the dividing of fees with a “forwarding lawyer.”

2. The recent amendments to ABA Rule 1.5(e) require that any fee dividing arrangement be agreed to and confirmed by the client in writing including the share each lawyer will receive. The revision to Texas 1.04(f) and (g) similarly require confirmation in writing and include specific requirements for such a writing above and beyond specifying the share each lawyer will receive.

3. The revised comments to Texas Rule 1.04(f) defining a division of fees and the circumstances in which they are permitted are substantially similar to the comments to the revised ABA Rule 1.5(e).

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4 The comparisons made to the ABA Model Rules are based on the Model Rules as revised by the Ethics 2000 Commission, (see http://www.abanet.org/cpr/e2k-report_home.html), and the revisions made thereafter to Rules 7.2 and 7.5 by the Standing Committee on Ethics and Professional Responsibility, (see Rules 7.2 and 7.5 at http://www.abanet.org/cpr/mrpc/mrpc_toc.html).
4. The ethical, and possible financial, components of joint responsibility under Texas Rule 1.04(f) is rooted in a similar description in ABA Rule 1.5(e). The ABA Rule, however, likens the relationship to a partnership between lawyers. The Texas Rule does not go that far and instead gives practical examples of what joint responsibility entails for the referring attorney.

a. *Reporter’s Explanation of Changes to ABA Rules* – The revised explanation of “joint responsibility” to include ethical and possibly financial responsibility is the interpretation given to the term according to ABA Informal Opinion 85-1514, as well as several state ethics opinions.

5. Section (g) of Texas Rule 1.04 is unique in that it expressly states that collection of a fee divided with another lawyer without confirmation by the client is an ethics violation.
Revisions to Part 7 of the Texas Disciplinary Rules of Professional Conduct, which regulate advertising and solicitation of clients, have been a long time coming. In 1998, revisions to Part 7 were reportedly approved by a referendum of the State Bar membership. There was, however, a tabulation error in calculating the votes, and thus the referendum vote was voided and the project was temporarily abandoned. When the State Bar undertook the revision of Rule 1.04 at the urging of the Texas Supreme Court in January 2003, the Task Force appointed by the State Bar also recommended revisions to Part 7. The State Bar Board of Directors in turn requested the Texas Supreme Court submit such revisions for a second referendum of its membership, which the Court did, along with the revisions to Rule 1.04. The changes were approved by the State Bar membership. Unlike Rule 1.04, however, the Texas Supreme Court did not immediately adopt the revisions to Part 7, but instead held them for further consideration. By Order dated February 7, 2005, the Court adopted Part 7, with a few additional revisions, largely to the comments to further elaborate on the substantive changes to the rules made by referendum.\(^5\)

The revised Part 7 was effective as of June 1, 2005.\(^6\)

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\(^5\) See Tab A, Approval of Referendum on Proposed Changes in the Texas Disciplinary Rules of Professional Conduct, Misc. Docket No. 04-9220, Supreme Court of Texas; see also Tab B, Final Changes and Comments to TDRPC Part VII (including additional revisions and comments made before adoption).

\(^6\) Order Promulgating Amendments to Part VII of the Texas Disciplinary Rules of Professional Conduct, Misc. Docket No. 05-9013-A, Supreme Court of Texas.
Texas Disciplinary Rule of Professional Conduct 7.01 - Firm Names and Letterhead:

A. Section (e) of Texas Rule 7.01 has been revised.

B. Pursuant to former Rule 7.01

1. A lawyer is prohibited from advertising in the public media or seeking professional employment by any written communication under a trade or fictitious name except for a lawyer who practices under a firm name authorized by section (a), in which case the firm may use the name if it appears on the lawyer’s letterhead, business cards, etc;

2. The rule also contains provisions regarding the use of trade names, firm names with offices in more than one jurisdiction, and lawyer’s names who are occupying judicial or other public positions, as well as holding one’s self out as a partner or share holder – none of which have been changed.

C. The revision to Rule 7.01(e) broadens the scope of prohibited communications for advertising. Lawyers are now prohibited from advertising in the public media or seeking professional employment by any communication – written or oral – under a trade or fictitious name under which the lawyer does not practice.7

D. ABA Model Rule of Professional Conduct 7.5 is the counterpart to Texas Rule 7.01. Section (e) of the Texas Rule, however, has no analogue in the ABA Rule 7.5; thus, the changes to the Texas Rule do not arise from its ABA counterpart.

Texas Disciplinary Rule of Professional Conduct 7.02 – Communications Concerning Lawyer Services:

A. Section (a), (c) and (d) of Texas Rule 7.02, prohibiting misleading communications and solicitations, have been revised.

B. Pursuant to former Rule 7.02

1. A lawyer was prohibited from making any false or misleading communications about the qualifications or services of any lawyer or firm, and a communication was false or misleading if it

   a. Contained a material misrepresentation or omitted facts necessary to make the statement not materially misleading,

   b. Was likely to create an unjustified expectation about results the lawyer can achieve or states or implies the lawyer can achieve results that violate the disciplinary rules or other law,

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7 Section 7.01(a) was also revised by referendum to delete the designation “P.A.” as a permissible trade name for a law firm. This deletion, however, was not included in the final changes to Part VII adopted by the Texas Supreme Court.
c. Compares the lawyer’s services to another unless the comparison can be substantiated by verifiable objective data,

d. States or implies the lawyer is able to improperly influence (or influence on irrelevant grounds) any tribunal, legislative body or public official, and

e. Designates one or more specific areas of practice in advertisement or in a written solicitation unless the advertising lawyer is competent to handle the matters in such an area of practice.

2. The rule also contains provisions regarding advertising specialization and disclaimers which remain substantially the same in the revised rule.

C. The revisions to Texas Rule 7.02 expand the definition of misleading communications and the scope of prohibited advertising.

1. A lawyer is now prohibited from making or sponsoring false or misleading communications.

2. In addition to the categories listed above, a communication is false or misleading if it contains any reference in a public media advertisement to past successes or results obtained unless

   a. The communicating lawyer or a member of the law firm served as lead counsel in the matter giving rise to the recovery or was primarily responsible for the settlement or verdict;

   b. The amount involved was actually received by the client;

   c. The reference is accompanied by adequate information regarding the nature of the case or matter and the damages or injuries sustained by the client; and

   d. If the gross amount is stated, the attorney’s fees and litigation expenses withheld must be stated as well.

3. A communication is also false and misleading if it uses an actor to model or portray a client.

   a. Comment: The use of actors is prohibited because of the difficulties policing such a practice, and the likelihood of material differences between the actors and the clients.

4. The revised rule applicable to advertisements in the public media has been expanded to apply to any solicitation communications, written or oral.
a. **Comment:** This rule is now intended to apply to all advertisements regulated by Texas Rule 7.04 and all solicitation communications regulated by 7.03.

5. The comments to the revised Texas Rule 7.02 also expand on the categories of previously prohibited activity.

a. **Comment re: omissions:** An otherwise truthful statement is misleading if it omits facts necessary to make it not materially misleading or if there is a “substantial likelihood” that it would lead a reasonable person to formulate a specific conclusion about a lawyer or his services for which there is no reasonable factual foundation.

b. **Comments re: unjustified expectations:** Statements that lead to “unjustified expectations” regarding the services provided by a lawyer are misleading in that they may lead a reasonable person to form a conclusion that lacks factual foundation.

   (1) For example, if a lawyer obtains a verdict that is later overturned on appeal or compromised for a substantially reduced amount, then an advertisement that mentions the verdict but not the additional facts might lead a person to the unjustified expectation of the same initial results.

   (2) Such circumstances generally preclude advertisements or solicitations that discuss results obtained on behalf of a particular client. The revised comments have deleted the exception to this general rule allowing such advertisements or solicitations if accompanied by “appropriate, prominent qualifications and disclaimers” that the information can mislead prospective clients into believing similar results are possible for them.

   (3) The comments do recognize that a disclaimer or qualifying language might preclude a finding that a statement is likely to create unjustified expectations or mislead a prospective client, but the disclaimer or qualification must be sufficient and displayed with equal prominence to the information to which it pertains.

c. **Comment re: comparison of services:** In addition to prohibiting comparisons of lawyer’s services without substantiation, the comments prohibit unsubstantiated comparisons of fees for lawyer’s services if presented with such specificity that would lead a reasonable person to conclude that the comparison can be substantiated.

d. **Comment re: improper influence:** The practice of stating or implying that a lawyer has ability to influence a tribunal, legislative body or other public official is conduct that “brings the profession in disrepute” even if the activity is never carried out. Such statements are therefore prohibited
without any requirement that the lawyer intend to engage in the represented activities.

D. The counterpart to Texas Rule 7.02 is primarily ABA Model Rule of Professional Conduct 7.1, as well as ABA Rules 7.2 and 7.4.

1. The recently revised ABA Rule 7.1, while very similar in its general prohibition of misleading or false communications, has deleted the categories of misleading communications which Texas Rule 7.02 has expanded upon.
   a. For example, ABA Rule 7.1 deletes references to communications that create unjustified expectations or compare lawyer’s services, which Texas Rule 7.02(a) has retained.
   b. ABA Reporter Explanation of Changes: The commission deleted the categorical prohibitions regarding unjustified expectations and comparison of lawyer services from the rule and placed them in the illustrative comments due to criticisms that the rule was overly broad.
      (1) This was an effort to strike a balance between free-speech interests and consumer protection concerns.
      (2) Additionally, the prohibition of stating or implying an ability to achieve results by means that violate the rule is incorporated into Rule 8.4(e) which is not limited to advertising.

2. Texas Rule 7.02 adds comments to further explain the categories of prohibited communications, including a near verbatim adoption of a comment recently deleted from ABA Rule 7.1 regarding the type of advertisements that would ordinarily give rise to unjustified expectations.
   a. ABA Reporter Explanation of Changes: The commission deleted the comment stating that prohibition of statements creating unjustified expectations would ordinarily preclude advertisements about results obtained on behalf of a client such as a damage award or verdict record or containing client endorsements because it believed the comment was overreaching and was better supplanted by the “substantial likelihood” test. (See infra Part D.3.)

3. Texas Rule 7.02(a) has also adopted comments newly added to ABA Rule 7.1 regarding omissions, reporting a lawyer’s achievements and the comparison of services and fees, as well as the new standard to determine whether a lawyer’s truthful statement is misleading – the substantial likelihood test. (See supra Part C.5.a.)
   a. ABA Reporter Explanation of Changes: The commission adopted the substantial likelihood test again to balance the interests of free speech, fair trial and consumer protection.
4. Texas Rule 7.02 has also incorporated the comment to ABA Rule 7.1 regarding the use of disclaimers or qualifying language, and elaborates on this provision to explain the requirements and limitations of such disclaimers and qualifying language.

Texas Disciplinary Rule of Professional Conduct 7.03 – Prohibited Solicitations and Payments:

A. Section (a) of Texas Rule 7.03 prohibiting solicitation of prospective clients is the only section with substantive revisions. A new section (f), defining “regulated telephone or other electronic contact,” has also been added.

B. Pursuant to former Texas Rule 7.03(a)

1. A lawyer shall not by in-person or telephone contact seek professional employment concerning a matter arising out of a particular occurrence or event or series of occurrences or events from a prospective client or nonclient who has not sought the lawyer’s advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer doing so is pecuniary gain;

2. A lawyer for a qualified nonprofit organization may communicate with the organization’s members for the purposes of educating its members to understand the law, recognize legal problems and to make intelligent selection of counsel or to use legal services;

3. Any contact permitted by Rule 7.03(a) cannot include a
   a. Communication involving coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;
   b. Communication containing information prohibited by Rule 7.02(a) regarding false or misleading statements;
   c. Communication containing false, fraudulent, misleading or deceptive, or an unfair statement or claim.

4. The rule also contains provisions prohibiting payments to prospective clients or persons not practicing law for the solicitation of clients, as well as the collection of fees obtained in employment that violates this rule or referrals that violate Texas Occupational Code Title 5, Subtitle B, Chapter 952. None of these provisions have been substantively revised, except to update the reference to the cited Texas statute.
C. The revision and addition to Rule 7.03 expand the scope of prohibited contact.

1. In addition to in-person and telephone contact, a lawyer is now prohibited from participating in any “regulated telephone or other electronic contact” for the purpose of solicitation in violation of Rule 7.03.

   a. Comment: This rule now covers electronic communications that pose comparable dangers to face-to-face solicitations, such as “chat rooms” in which the prospective client’s access of the communication puts that person in direct contact with the soliciting lawyer. Electronic communications that do not present an immediate, interactive, “live” mode of communication are permitted, such as pre-recorded telephone messages requiring a separate return phone call to speak to or retain an attorney, or websites that must be accessed by an interested person.

2. The newly-added section (f) defines “regulated telephone or other electronic contact” as “electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.” (emphasis added).

D. ABA Model Rule of Professional Conduct 7.3 is the counterpart to Texas Rule 7.03.

1. Texas Rule 7.03 is drawn from ABA Rule 7.3 which prohibits in-person, live telephone or real-time electronic contact to solicit professional employment from a prospective client. The addition of electronic contact to the list of prohibited forms of contact in Texas Rule 7.03 is drawn from a similar revision to ABA Rule 7.3.

   a. ABA Reporter’s Explanation of Changes: The commission distinguishes between real time electronic communication, such as an internet chat room, and e-mail. The interactivity and immediacy of response in real-time electronic communication presents the same threat as those inherent in live-telephone contact.

2. Texas Rule 7.03 and ABA Rule 7.3 also have similar exceptions to the solicitation prohibition with a few material differences.

   a. Both rules except family members from the solicitation prohibition.

   b. The revised ABA Rule 7.3, however, expands the exception to include lawyers who are prospective clients and persons in a close personal relationship with the soliciting lawyer.

      (1) ABA Reporter’s Explanation of Changes: The commission concluded that lawyers did not need the special protection provided under the ABA Rule. This exemption permits solicitation
of in-house lawyers of organizations but not the non-lawyer representatives of such organizations.

(2) *ABA Reporter’s Explanation of Changes:* Approximately 10 states allow in-person contact with close personal friends. The commission adopted this exemption (previously included in the ABA Model Code of Professional Responsibility) because it found it difficult to justify prohibiting a lawyer from contacting a close friend to offer legal services.

c. The ABA Rule also refers to persons in a prior “professional relationship” with the attorney, which is arguably broader than the category of persons with whom the attorney has a past “attorney-client relationship” who are excepted from Texas Rule 7.03.

(1) *ABA Comment:* The references to “former clients” in lieu of “professional relationship” in the body of the rule denotes that “professional relationship” is limited to attorney-client relationships as in Texas Rule 7.03.

(2) Texas Rule 7.03 also excludes persons in a current attorney-client relationship; the ABA Rule does not expand its exception to current professional relationships. This may be a distinction without a difference, however, because the ABA Rule only applies to solicitation of “prospective” clients which on its face does not apply to persons with whom the attorney already has an attorney-client relationship.

3. The ABA Rule 7.3 also includes additional provisions that are not included in the Texas Rule 7.03 such as

a. A provision which prohibits solicitation that is otherwise permissible under the rule if the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;

b. A provision excepting from this rule lawyers participating in a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan who are not known to need legal services in a particular matter covered by the plan.
Texas Disciplinary Rule of Professional Conduct 7.04 – Advertisements in the Public Media:

A. Sections (a), (b), (c), (d), (g), (n), (q) and (r) regulating advertisements in the public media have been revised.

B. Pursuant to former Rule 7.04, a lawyer was required to affirmatively state that the lawyer was “Not Certified By the Texas Board of Legal Specialization” for each area advertised in which a Certificate of Special Competence was available but which had not been awarded by the Texas Board of Legal Specialization.

C. The additions and revisions to Rule 7.04:

1. Eliminate the requirement that a lawyer state that the lawyer is “Not Certified By the Texas Board of Legal Specialization” for each area of law in which the Texas Board offers a certificate that has not been awarded to the lawyer;

2. In the case of an “infomercial,” requires that the lawyer state that the presentation is an advertisement, both verbally and in writing at the beginning of the presentation, after any commercial break, and at the conclusion of the presentation and in writing, during any portion of the presentation that explains how to contact a lawyer or a law firm;

3. Expressly permits a lawyer to advertise services on the internet, or electronic or digital media, or place advertisements in legal newspapers, whether written or electronic;

4. Requires that any mandatory qualifications, disclaimers or disclosures accompanying a communication about a lawyer’s service be presented in the same manner as the communication and with equal prominence;

   a. Comment: For example, in a television ad that necessitates the use of a disclaimer, if a statement or claim is made verbally, then the disclaimer must also be made verbally. Likewise, if a claim appears in print, the accompanying disclaimer must also appear in print, and with equal prominence and legibility.

5. Expressly requires a lawyer to include all statements and disclosures required by this rule in any internet advertisement.

D. Texas Rule 7.04 is analogous to ABA Model Rule of Professional Conduct 7.4, although the Texas Rule is considerably more detailed.

1. Both the Texas Rule and the ABA Rule restrict the ability of an attorney to advertise the award of a certification of special competence. The ABA only permits reference to a certification if the certificating organization has been approved by the appropriate state authority, or has been accredited by the ABA. The Texas Rule only permits reference to a certificate of special competence if
the certificate has been awarded by the Texas Board of Legal Specialization, or an organization accredited by the Texas Board.

2. The Texas Rule formerly required an attorney not certified by the Texas Board to affirmatively state that the lawyer was “Not Certified By the Texas Board of Legal Specialization” for each area of law advertised for which such a certificate was available but not awarded. There was no such counterpart in the ABA Rule. As discussed above, Texas has now moved closer to the ABA Rule by eliminating this requirement.

Texas Disciplinary Rule of Professional Conduct 7.05 – Prohibited Written, Electronic, or Digital Solicitations:

A. Sections (a), (b), (c), (d), (e) regulating solicitations have been revised.

B. Pursuant to former Rule 7.04

1. A lawyer was generally prohibited from sending written communications that involved coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment, or that contained false, fraudulent, misleading, deceptive or unfair statements or claims;

2. Written solicitation communications had to be plainly marked “ADVERTISEMENT” in prominent and contrasting type, and lawyers were required to retain copies of such written solicitation communications for four years after their dissemination.

C. The revisions to Texas Rule 7.05

1. Expand the scope of communications that fall under the rule to include audio, audio-visual, digital media, recorded telephone messages and other electronic communications;

   a. Comment: Such communications include movies, audio or audio-visual tapes, and the internet.

2. Require that an e-mail solicitation be plainly marked “ADVERTISEMENT” in the subject portion of the electronic mail and at the beginning of the message’s text;

3. Require that a recorded audio presentation or a recorded telephone message plainly state that it is an advertisement prior to any other words being spoken and again at the conclusion of the message;

4. Require that an audio-visual or digital media presentation plainly state that the presentation is an advertisement both verbally and in writing at the outset of the presentation and again at its conclusion; and in writing during any portion of the presentation that explains how to contact a lawyer or a law firm;
5. Expand the requirement that a lawyer retain copies of solicitation communications for four years to include audio, audio visual, digital media, recorded telephone messages, or other electronic communications.

D. Texas Rule 7.05 shares some elements with ABA Model Rule of Professional Conduct 7.3.

1. Both rules include a provision requiring that any solicitation communication to a prospective client for the purpose of obtaining professional employment be labeled as an advertisement.

   a. Both rules have added electronic communications to the list of permissible solicitations that must be labeled as advertisements, and Texas has gone further to include digital communications. Texas also includes significantly more detailed requirements regarding the labeling of these advertisements.

   b. *ABA Reporter’s Explanation of Changes:* This section of ABA Rule 7.3 was revised by the commission to include “electronic” communication (as opposed to real-time communication) so as to incorporate e-mails into the requirement that permitted solicitations be appropriately marked as advertisements.

2. The revised ABA Rule 7.3 has deleted the family and prior-professional-relationship exception to the requirement that permissible solicitations be labeled as advertisements. By contrast, the Texas Rule has maintained these exceptions.

**Texas Disciplinary Rule of Professional Conduct 7.06 – Prohibited Employment:**

A. Rule 7.06 has been revised by adding sections (a), (b), and (c) regulating an attorney’s employment.

B. Former Rule 7.06 stated that a lawyer shall not “accept or continue” employment when the lawyer knows or reasonably should know that the person who seeks the lawyer’s services does so as a result of conduct prohibited by these rules (without specifying or limiting the rules at issue).

C. The revisions to Rule 7.06:

1. Specify the operative rules, and state that a lawyer may not accept or continue employment if the lawyer knows, or reasonably should know that the employment was procured by conduct prohibited by:

   a. Rule 7.01 (Firms Names and Letterheads)

   b. Rule 7.02 (Communications Concerning a Lawyer’s Services)

   c. Rule 7.03 (Prohibited Solicitations and Payments)
d. Rule 7.04 (Advertisements in the Public Media)

e. Rule 7.05 (Prohibited Written, Electronic, or Digital Solicitation)

f. Rule 8.04(a)(2) (lawyer misconduct involving a serious crime or any criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects)

g. Rule 8.04(a)(9) (lawyer engaging in conduct that constitutes barratry as defined by Texas law);

2. Expand the scope of the actors whose conduct would cause a lawyer to be prohibited from accepting or continuing employment to also include

a. any other person the lawyer ordered, encouraged, or knowingly permitted to engage in the prohibited conduct;

b. any person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer’s firm, or any other person whom any of these persons or entities ordered, encouraged, or knowingly permitted to engage in the prohibited conduct; or

c. any person procuring the lawyer’s services who has engaged in, or ordered, encouraged, or knowingly permitted another to engage in the prohibited conduct.

(1) A lawyer who has not violated any of the above-stated rules in accepting the employment to discontinue the employment once the lawyer knows or reasonably should know that the person procuring the lawyer’s services has engaged in, or ordered, encouraged, or knowingly permitted another to engage in the prohibited conduct, unless nothing of value is given thereafter in return for that employment.

(2) Comment: A lawyer who is not culpable but has become involved in a representation that was procured in violation of these rules may continue employment and collect a fee in the matter so long as nothing of value is given to the attorney or individual involved in violation of the rules.
Texas Disciplinary Rule of Professional Conduct 7.07 – Filing Requirements for Public Advertisements and Written, Recorded, Electronic, or other Digital Solicitations:

A. Sections (a), (b), (c), (d), (e), and (f) of Rule 7.07 have been revised.

B. Pursuant to former Rule 7.07

1. Lawyers were required to file written solicitation communications or written advertisements with the Lawyer Advertisement and Solicitation Advertising Review Committee of the State Bar of Texas;

2. Lawyers were permitted to obtain an advance advisory opinion from the Committee;
   a. A finding of noncompliance by the Committee was not binding in a disciplinary proceeding or action, but a finding of compliance was binding in favor of the submitting lawyer provided the representations, statements, materials, facts and written assurances were true and not misleading.

3. Certain material was not required to be filed, including advertisements in the public media that only stated the name of the lawyer or law firm, the address, telephone numbers, areas of special competence, foreign language ability, or an announcement card stating new or changed associations or offices.

D. The revisions to Rule 7.07

1. Reflect that the Committee is now known as the Advertising Review Committee of the State Bar of Texas;

2. Require the filing of not only written solicitations, but also electronic, audio, audio-visual, digital, or other electronic solicitation communications;

3. Require filings to be accompanied by a completed Lawyer Advertising and Solicitation Communication Application Form, (see App. Tab F, Application Form);

4. Require a lawyer’s or law firm’s website information to be filed with the Committee as advertisements no later than its first posting on the internet, including the intended initial access page of the website;

5. Expand the list of material that does not need to be filed with the Committee to include:
   a. Advertisements in the public media containing references to the areas of law a lawyer or law firm concentrates or to which it limits its practice (as opposed to areas of specialty);
   b. In the case of a website, links to other websites;
c. Other publicly available information concerning legal issues, **not** prepared or paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial opinions, or legal developments and events such as proposed or enacted rules, regulations, or legislation;

d. Digital or electronic information sent to existing or former clients, other lawyers or professionals, and members of certain non-profit organizations.
What Does the Future Hold?

The Texas Supreme Court Task Force on Texas Disciplinary Rules of Professional Conduct is currently engaged in a blanket review of the revisions to the Model Rules of Professional Conduct arising out of the ABA’s Ethics 2000 Commission. It is not known which, if any, of the revisions to the Model Rules have attracted the attention or interest of the members of the Task Force.

Although the Texas Supreme Court has not imposed any deadlines on the Task Force, the Task Force anticipates being able to complete its final report and recommendations by the end of 2005. The Texas Supreme Court would then review the report and recommendations.