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The Ethics of Practice
Development Strategies

by

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The Ethics of Practice Development Strategies

Charles R. B. Stowe

I. Introduction

A. SCOPE OF THIS ARTICLE. The purpose of this article is to provide a survey of sources of ethical constraints on attorney practice development strategies and to serve as a review of how those constraints might influence different practice development strategies. This paper is aimed toward the practitioner who is in the process of developing practice development programs. It is not a substitute for independent investigation of how those programs might be altered in view of new developments affecting attorney marketing activities. You will see that references to cases are placed within the narrative so that footnotes are not used. Hopefully, you will find this format both easy to follow and more enjoyable reading. This research was done in preparation for "Marketing in a Competitive Environment" program sponsored by the Professional Development Program and the Professional Efficiency and Economic Research (PEER) Committee of the State Bar of Texas.

B. PRACTICE DEVELOPMENT STRATEGIES DEFINED. While the focus of the session is "Marketing in a Competitive Environment", I have used the term practice development strategies because too often the term marketing is equated with advertising. Advertising is but one element of marketing as you have discovered through the program. Most attorneys who claim to have no formalized "marketing" plan do concede that they engage in practice development. The ethical constraints on practice development strategies range from presentation of a firm's letterhead to cold calls on prospective clients, to firm brochures, to referring cases to other law firms, to direct mail solicitation. None of those activities are advertising as such since they do not involve the purchase of space to convey a message. However, they are all practice development tools or marketing activities and within the scope of this article.
At a recent meeting of the PEER Committee, I was specifically asked to address practice development activities that are NOT advertising programs. So, you will see that the emphasis of this paper is on the more "traditional" methods of practice development. I might add that not only is advertising expense, but the results of advertising receive a mixed review for reasons discussed later.

II. Ethical Boundaries

A. SOURCES OF ETHICS. The boundaries of ethical practice development activities are not precisely defined or codified. Many of the standards set somewhat subjective and perhaps even "idealistic" standards. The area of practice development or marketing strategies is one that is relatively new to the legal profession and as in any area of "new" law, changes occur rather frequently. One other difficulty in defining what are acceptable practice development activities from an ethical perspective is the fact that ethical limitations are found in different sources. And the different sources each carry somewhat of a different authority in terms of compliance. For example, the consequences of not following a guideline issued by the State Bar of Texas Lawyer Advertising Committee may be different than the failure to comply with legislative restrictions that result in criminal prosecution, fines and possible jail. The failure to comply with Texas Disciplinary Rules of Professional Conduct can result in Grievance Committee hearings and possible censure, suspension or disbarment. For most attorneys the issue of compliance is simply avoiding the time and negative publicity from dealing with a grievance or law suit. As a result, there are not many cases that test the boundaries of where freedom of speech touch the state's right to regulate marketing practices.

Some of the sources of ethical standards include:

- Common law cases.
- Certain statutes including the Texas Deceptive Trade Practices Act, a recent amendment to the Business & Commerce Code, section 35.54 (which I understand is currently being challenged on constitutional grounds).
• American Bar Association Guidelines for Advertising
• Texas Disciplinary Rules of Professional Conduct
• Texas Lawyers Creed
• Guidelines promulgated by the State Bar Committee on Lawyer Advertising.

B. ABA Aspirational Goals The American Bar Association House of Delegates adopted Aspirational Goals in August 1988. The Board of Directors of the State Bar of Texas adopted the same goals in January 1990. No doubt these Aspirational Goals have influenced the drafters of the Texas Disciplinary Rules of Professional Conduct and will continue to influence local Grievance Committees. When faced with determining appropriate behavior, local Grievance Committees tend to consult Aspirational Goals according to attorneys on the staff of the State Bar of Texas General Counsel's office.

The aspirational goals are as follows:
1. Lawyer advertising should encourage and support the public's confidence in the individual lawyer's competence and integrity as well as the commitment of the legal profession to serve the public's legal needs in the tradition of the law as a learned profession.
2. Since advertising may be the only contact many people have with lawyers, advertising by lawyers should help the public understand its legal rights and the judicial process and should uphold the dignity of the legal profession.
3. While "dignity" and "good taste" are terms open to subjective interpretation, lawyers should consider that advertising which reflects the ideals stated in these Aspirational Goals is likely to be dignified and suitable to the profession.
4. Since advertising must be truthful and accurate, and not false or misleading, lawyers should realize that ambiguous or confusing advertising can be misleading.
5. Particular care should be taken in describing fees and costs in advertisements. If an advertisement states a specific fee for a particular service, it should make clear whether or not all problems of that type can be handled for that specific fee. Similar care should be taken in describing the lawyers' area of practice.
6. Lawyers should consider that the use of inappropriately dramatic music, unseemly slogans, hawkish spokespersons, premium offers, slapstick routines or outlandish settings in advertising does not instill confidence in the lawyer or the legal profession and undermines the serious purpose of legal services and the judicial system.
7. Advertising developed with a clear identification of its potential audience is more likely to be understandable, respectful and appropriate to that audience, and, therefore, more effective. Lawyers should consider using advertising and marketing professionals to assist in identifying and reaching an appropriate audience.

8. How advertising conveys its message is as important as the message itself. Again, lawyers should consider using professional consultants to help them develop and present a clear message to the audience in an effective and appropriate way.

9. Lawyers should design their advertising to attract legal matters which they are competent to handle.

10. Lawyers should be concerned with making legal services more affordable to the public. Lawyer advertising may be designed to build up client cases so that efficiencies of scale may be achieved that will translate into more affordable legal services.

The primary emphasis of the Aspirational Goals is on attorney advertising. The implications for attorney-advertisers is addressed later in this article.

C. **TEXAS DISCIPLINARY RULES.** The Texas Disciplinary Rules of Professional Conduct sets the "minimum standards of conduct ... which no lawyer can fall without being subject to disciplinary action." (TEX. RULES Preamble: A Lawyer's Responsibilities, para 7.). Unlike the ABA Model Rules, the Texas Rules carry the weight of law. Rather than presenting the relevant portions of the Code in this section, they will be presented in the context of specific practice development activities.

D. **TEXAS LAWYERS CREED.** While not often cited in articles dealing with ethics and attorney marketing strategies, the Creed is an important consideration in building a practice. The existence of the Creed and its requirement that it be communicated to existing clients affords attorneys an opportunity to create "goodwill" among existing clients. In so much as marketing studies reveal that the legal profession is primarily a "referral-driven" profession, any tools which can foster positive communications should be added to the attorney arsenal of practice development tools.

On November 7, 1989, The Supreme Court of Texas and the Court of Criminal Appeals promulgated "The Texas Lawyers Creed - a Mandate for Professionalism." In reading the Order of the Supreme Court of Texas and the Court of Criminal Appeals, the following
comments were offered: "These rules are designed to be primarily aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon re-enforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence."

While designed to address "rambo-like" trial litigation tactics, the Creed serves as another source of authority defining the ethical boundaries of attorney practice development strategies in that the Creed requires attorneys to communicate the Creed to existing clients. In that communication with existing clients is part of the process of practice development, the nature of the required communication is worthy of consideration.

E. Section 35.54 Business & Commerce Code. This House Bill No. 922 was designed to end direct mail solicitations to motor vehicle accident victims and victims of crime. The bill reads:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 35.54, Business and Commerce Code, is amended to read as follows: Sec. 35.54. USE OF CRIME VICTIM (OR MOTOR VEHICLE ACCIDENT) INFORMATION FOR CERTAIN PURPOSES PROHIBITED.

(a) In this section:

(1) "Crime victim information" means information that is collected or prepared by a law enforcement agency that identifies or serves to identify a personal whig, according to the records of the law enforcement agency, may have been the victim of a crime in which physical injury to the person occurred or was attempted or in which the offender entered or attempted to enter the dwelling of the person.

(2) "Motor vehicle accident information" means information that is collected or prepared by a who enforcement agency that identifies or serves to identify a person who, according to the records of the law enforcement agency, may have been involved in a motor vehicle accident.
(b) A person who has possession of crime victim (or motor vehicle accident) information that the person obtained or knows was obtained from a law enforcement agency may not use the information to contact directly a person who is a crime victim (or who was) involved in a motor vehicle accident or a member of the person's family for the purpose of soliciting business from the person (victim) or family member and may not sell the information to another person for financial gain.

(c) The attorney general may bring an action against a person who violates subsection (b) of this section pursuant to Section 17.47 of this code.

(d) A person who violates Subsection (b) of this section commits an offense. An offense under this subsection is a Class C misdemeanor unless the defendant has been previously convicted under this subsection more than two times, in which event the offense is a felony of the third degree.

SECTION 2. This Act takes effect September 1, 1991, and applies only to information collected or prepared about a motor vehicle accident occurring on or after that date.

F. State Bar of Texas Lawyer Committee Guidelines on Advertising. In December 1989, the Lawyer Advertising Committee of the State Bar of Texas proposed guidelines to the State Bar of Texas. The Board of Directors adopted the guidelines June 1990. These guidelines prohibit the following behavior:

1. To advertise that the lawyer is "fully" licensed or licensed "in all areas of law," thereby implying that the lawyer has special competence and/or that a Board Certified lawyer is somehow inferior or has less competence.

2. To advertise that the lawyer is one of the best, or more experienced, or especially diligent or hardworking, since such make a misleading comparison with such traits in all other lawyers.

3. To advertise with the image or voice of an actor or other person impersonating the advertising lawyer.
4. To advertise using the image or voice of a celebrity, or the imitation of a celebrity's voice or image, in a manner which implies that the lawyer represents the celebrity or is known to the celebrity.

5. To advertise the amount of damages recovered in other cases.

6. To use a testimonial or endorsement by a former client, or one pretending to be a former client, in a manner which implies that a particular result may be achieved.

7. To advertise a law firm as an "academy" or "institute."

8. To advertise using terms such as "legal clinic" unless the practice is primarily the delivery of routine legal services at prices below those prevailing in the community for like services.

In 1991, the Advertising Committee of the State Bar of Texas made one other recommending concerning direct mail solicitations. The proposed guideline is as follows:

A lawyer sending a written communication to a prospective client who has not sought his advice regarding employment or with whom the lawyer has no family or a prior attorney-client relationship, and which communication is precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinguished from the general public, and has the general intention of soliciting employment pertaining to that specific event or occurrence which include the words "THIS IS AN ADVERTISEMENT" standing alone at the bottom of the page.

While presenting a workshop on "Ethics in Marketing" with Charles Scarborough, Chairman of the Lawyer Advertising Committee and partner of Scarborough, Blake, Tarpley & Boone, an Abilene firm, I used the occasion to ask him what the legal significance of these guidelines was. While not having the force of law, the proposed guidelines might serve to help local grievance committees define what behavior complies with Texas Disciplinary Rules. The guidelines may help to define whether communication/advertising is misleading, for example. Whether this requirement would withstand a constitutional challenge is beyond the scope of this article. And, whether any complaint would arise from failure to follow this guideline is uncertain. Satisfied clients do not tend to report minor violations of such standards because they lack both the incentive and the knowledge of what standards attorneys are required to comply with! However, competing attorneys who learn of such communication efforts have reported violations and remain
the largest source of complaints for communication/advertising violations according to State Bar of
Texas General Counsel staff attorneys.

III. PRACTICE DEVELOPMENT ACTIVITIES AND ETHICS

A. SOLICITATION AND ETHICS.

1. Different Standards for Different Clientele. In attempting to define the boundaries of
acceptable behavior from an ethical viewpoint, the following should be noted. First,
there are really two types of practices: a "street" practice in which the firm is serving
"ordinary members of the general public for traditional legal services: personal injury,
workers compensation, torts, defense of criminal activities (particularly traffic
violations, etc.) and wills, trust, probate. The other type of practice, "institutional" or
"commercial law" practice is oriented toward serving business organizations, trade
associations, union organizations, and non-profits. The services provided for these
organizations includes, but is not limited to (how's that for legal jargon!): civil
litigation, contract negotiation, business structure planning, mergers, securities law,
corporate bankruptcy, environmental law, pension planning law, advanced tax issues,
etc. Both in theory and in practice, the ethical boundaries on solicitation vary
depending on your targeted client base.

Law firms designing programs to solicit individuals are subject to more scrutiny than
those targeting efforts toward businesses. This increased scrutiny is reflected by
comments by personal injury attorneys who complain that the rules permit an insurance
adjuster to contact accident victims at or near the scene of a tragedy, while attorneys are
not permitted to hire "runners" to solicit these same victims. Another observation is
that in business it is perfectly permissible to take another attorneys client out to dinner
or lunch, but knowingly communicating with an individual known to have another
attorney representing him or her in a divorce action is unacceptable behavior.

The justification for the discrepancy between law firm solicitation directed at
organizations rests on two observations. First is that when a business person is invited
out to lunch by a large firm "prospecting" for new business, there is usually no specific event putting the individual under stress. However, visiting an individual in a hospital who has just survived a plane crash is not the equivalent in terms of the emotional stress encountered between a casual lunch with an officer of a bank.

2. In person solicitation. Rule 7.02 addresses the issue of "In-Person or Telephone Contact with Prospective Clients". The rule states:

A lawyer shall not seek professional employment from a prospective client who has not sought his advice regarding employment or with whom the lawyer has no family or prior attorney-client relationship by in-person or telephone contact, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

When the Texas committee wrote this rule, they must have anticipated the U.S. Supreme Court ruling in Shapero v. Kentucky Bar Association, because there is no ban on direct mail solicitation. Shapero v. Kentucky Bar Association 486 U.S. 466 (1988) overturned the Kentucky Bar Association's total ban on direct mail solicitation on first amendment grounds so long as the solicitation is not false or misleading.

This rule raises the very real question of what activities can a law firm use to solicit new clients? Among the activities that would not invoke Rule 7.02 is simply attending meetings and passing out business cards. Again, even an act as innocent as passing out a business card may violate the rules if done under improper circumstances. Remember the movie THE VERDICT starring Paul Newman? In one scene, the attorney attends a funeral of a stranger and passes out a business card to the grieving family! However, in social settings, it is perfectly permissible to introduce yourself and offer a business card. (Always ask for a card from the individual!). This very basic form of solicitation – striking up a conversation and asking a person what they do for a living... is fundamental to developing more clients. I am amazed at how often I ask attorneys for a business card, and they answer that they don't have one or aren't carrying one!
Public speaking opportunities provide another traditional way of gaining exposure to prospective clients. Social service groups are always looking for interesting programs. If you have a deadpan, monotone delivery, then join Toastmasters first!

Of equal importance are the ethical issues relating to the content of in-person solicitation. These issues are covered by Rule 7.01 Communications Concerning a Lawyer Services:

(a) A lawyer shall not make a false or misleading communication about the qualifications or the services of any lawyer or law firm. A statement is false or misleading if it:

1. Contains a material misrepresentation of fact of law, or omits a fact necessary to make the statement considered as a whole not materially misleading. Any statement about fees must include the amount of the fee, whether contingent or otherwise, and must state whether the client may be obligated for all or for some portion of the costs involved:

2. Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;

3. Compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated; or

4. States or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

(f) A lawyer shall not send a written communication to a prospective client for the purpose of obtaining professional employment if:

1. The lawyer knows or reasonably should know the person could not exercise reasonable judgment in employing a lawyer;

2. The person has made known to the lawyer a desire not to receive communications from the lawyer;

3. The communication involves coercion, duress or harassment;
(4) The communication contains information prohibited by paragraphs (a) or (b); or
(5) The communication fails to comply with the requirements of paragraphs (c) and (d)...

(which describe the Texas rules on negative disclaimers on Board Certification).

There are several ethical issues suggested by the above quoted rules. First, examine the situation where you are attending a social function and you have been introduced to an individual who pulls you aside to tell you what a lousy job his attorney is doing. He asks if you practice that type of law - let's use divorce, for example. If you respond that his lawyer is an obvious incompetent who doesn't know the law and no client rapport, aren't you violating the rules?

More serious to the profession is the fact that if you respond by concurring with the prospect that they are receiving less than good service you may be confirming the individual's already low opinion of attorneys as a group. The best strategy is to explain that you are not in a position to comment about another professional's handling of their case, that if they want a "second opinion" that is their option. And go on to advise them that you conduct your business strictly above board and explain the proper means of obtaining a second opinion. As a practice development strategy, you win twofold. First, you destroy the individual's image of attorneys as all being "sharks", and second, you earn the respect of the other attorney who may very well have a difficult client! Goodwill among other attorneys is an invaluable asset and too often is not a formal part of a law firm's practice development strategies. While increased competition due to an oversupply of attorneys has eliminated the days when a new lawyer could start their practice simply on established attorneys' overload work, client conflicts and a desire to specialize does result in attorney referrals.

3. Use of Third Parties in Solicitation. Rule 7.01 (i) bars attorneys from paying third parties for client referrals:

A lawyer shall not give or promise to give anything of value to a lay person for referring clients or potential clients to any lawyer or law firm; however, a lawyer may pay reasonable fees for advertising and public relations service rendered in accordance with this Rule and may pay the usual charges and otherwise cooperate with organizations that refer clients if the organization does not profit from the rendition of legal services by lawyers.
Grievance committees seem willing to respond to lawyer complaints against paid "runners". Interestingly, these cases arise when an attorney has promised a payment for a referral and then backed out by citing the rules against such payments with the result that the aggrieved runner files a complaint! How then can attorneys develop people who will refer cases without paying them?

One strategy is to maintain communication with previous clients. Since I have started consulting for law firms, I have been amazed to find out that few firms maintain communication with past clients. When an individual has been through the trauma of a serious accident and all the emotional stress of therapy and recuperation, they will carry that experience for their entire life. These former clients who have received satisfactory service are the best "runners" available. They know your firm. They understand something of the process. And, if you continue to maintain some form of communication, as they encounter others going through the same "life crisis", they will refer clients to you. Many personal injury attorneys question whether such a strategy will pay off. The answer lies in whether the individual maintains connection with those in the industry or place of their injury. When people have a "life crisis" they tend to become aware and seek out others who have had the experience. That is why the client who is still going through therapy is quite capable of referring others to the firm.

Another strategy is to mobilize your support staff. Do they have business cards bearing your firm's name? Again, their card must not be misleading. But if you give them a set of cards, you can bet that they will be passing them out to friends. "But will that result in referrals?" Yes, but only if your support staff feels respected, well-treated and proud to be part of the firm!

Why else would your past clients refer a client to you? The answer is that they want to see that their friend gets the best possible legal help available. This suggests that efforts to keep your clients informed of your professional growth and achievements is important. A San Antonio lawyer who is a voluntary member of the State Bar of Texas Professional Development Program writes to clients in the city where he is lecturing to let them know that he is going to be in their neighborhood. The real message that this attorney is conveying is that he is current in his profession and well respected enough to be invited to teach other attorneys. An attorney with a
medium size firm suggested that one way to impress clients is to involve them in your continuing education. This firm represents small, but they hope "growing" businesses, and surveys their clients for suggestions on topics of interest. Their letter informs clients that they take the continuing legal education requirements seriously and ask clients to check off areas that they would consider of potential interest. This strategy tells clients: "We are keeping up!" Business clients like to feel that their law firm is keeping up with law at the firm's expense and not at their expense!

The same is true of those that know of your firm but have never been clients. A firm's reputation in a community is a crucial asset. American Bar Association studies still show that a majority of a firm's new business arises from referrals. While a minority of those referrals come from strangers, a firm that has impressed a client has probably also impressed that client's friends and family. When you discover such a referral, it is only a courtesy and great PR to acknowledge the referral! Such a simple response will build a basis for future referrals.

B. PUBLIC RELATIONS AND ETHICS.

1. Public relations strategies. Practice development activities all have their public relations dimensions. The objective is to publicize a law firm's reputation and develop name recognition in the targeted market. Here are some public relations strategies and their ethical implications:

(a.) Firm Names and Letterheads. Texas Rule 7.04 places important restrictions on the design and use of firm names:

(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the names of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Nothing herein shall prohibit a married woman from practicing under her maiden name.
(b) A law firm with office in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitation on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) A lawyer shall not hold himself out as being a partner or associate with one or more other lawyers unless they are in fact partners or associates.

One practice development implication of the above rules is that firms can not keep a "public official" on their firm letterhead once the individual is elected or appointed to office. Another important restriction from a marketing standpoint is the restriction against the use of any trade name like "Quality Legal Services, P.C." From a practice development perspective the selection of a name carries more implications than lawyers usually consider when forming a firm. For firms attempting to convey size, prestige, depth of talent, the use of multiple names on a letterhead may be a useful strategy. However, it would clearly be a violation of the Rules to "invent" partners! For firms attempting to build name recognition to attract the "average" individual, a better strategy is to select one name which can be easily remembered. The rules do not require that the "senior" partner's name be used. Realistically, the "senior" partner's ego may make the use of his/her name mandatory! The name of a firm is just as important to a law firm as a political candidate's name is to getting elected!

Another ethical issue concerns the use of "P.C." or "P.A." While the rules permit the abbreviation, if the firm is dealing with the public, it may be a better strategy to spell out "professional corporation" simply to avoid confusion.

(b) Announcement Cards: Covered by Rule 7.02, announcement cards announcing a new member of a firm should convey the proper disclosures concerning an
individual's certification if appropriate. Remember the rule is that if no reference is made to a particular area of practice, no "negative disclaimer" is required. The negative disclaimer normally used is the phrase "Not Certified by the Texas Board of Legal Specialization". Both in announcement cards and other forms of communication, the issue of what to do if an area of law is mentioned that is not covered by the Board. The simple rule from a public relations standpoint is that if the disclosure is going to require a negative disclaimer, it is probably better to just announce the individual and save the details for later! In terms of sending the announcements, the real issue is not whether a law firm may send them out to every one in Texas, but what is effective.

(c) Firm brochures. Yes, firm brochures are also covered by Rule 7.02 (b), (c) and (d):

(b) A lawyer shall not advertise publicly that the lawyer is a specialist, except as permitted under Rule 7.01 (c) or as follows:


2. A lawyer may permit his name to be listed in lawyer referral service offices according to the areas of law in which he will accept referrals.

3. A lawyer available to practice in a particular area of law or legal service may distribute to lawyers and publish in legal directories a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience.
(c) A lawyer who advertises through public media with regard to any area of the law in which the lawyer practices shall:

(1) With respect to each area of law so advertised, publish or broadcast the name of the lawyer licensed to practice in Texas, who shall be responsible for the performance of the legal services so advertised.

(2) If the lawyer has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, state with respect to each area, "Board Certified, (area of specialization) - Texas Board of Legal Specialization.

(3) If the lawyer has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, state with respect to each area, "Not Certified by the Texas Board of Legal Specialization," but if the area of law so advertised has not been designed 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 but he Texas Board of Legal Specialization for a Certificate of Special Competence in this area."

(d) The statements referred to in paragraph (c) shall be displayed conspicuously so as to be easily seen or understood by any consumer.

The Texas rules requiring negative disclosure when a communication deals with a specific area of law is controversial. However, it is the law and there are plenty of District Court cases that have upheld sanctions against attorneys who refused to comply. One possible practice development strategy, for attorneys or firms that do not have Board Certified members, is to fashion the communication to avoid the necessity of the negative disclaimer. This strategy avoids a possible adverse implication of not being Board Certified to a layperson who does not understand the certification process.
Certainly most firm brochures should be reviewed carefully for compliance with this requirement. From a practice development standpoint, what is done with the firm brochures? Most firms I have visited have them piled up in a closet! Those that use firm brochures tend to use them for recruiting attorneys. One innovative strategy is to do what one enterprising medium size firm did. They joined their Chamber of Commerce, and whenever a new company joined the Chamber, they would send them a firm brochure as a means of introduction and welcome to the community. Under proposed guidelines from the State Bar Committee on Lawyer Advertising, there is the issue of whether the letter forwarding the brochure has to bear the statement: THIS IS AN ADVERTISEMENT standing alone at the bottom of the page.

(d) Collaborative Marketing Efforts. A collaborative marketing effort is a marketing program that combines different organizations. For example, a financial planner or insurance agency might sponsor a seminar on estate planning and invite a member of a law firm to talk about trusts and wills. Other speakers might include an accountant or tax specialist.

One of my professional marketing service clients, The Planning Group of Houston, is a financial planning organization that sponsors "collaborative marketing programs." These programs can be a very effective practice development strategy for all parties. The advantage to law firms is the opportunity to work with a sponsor that is a sophisticated marketing organization. The host organization has the expertise in conducting seminars, arranging publicity, logistics, invitations and countless details that would distract a normal legal office. Secondly, the law firm benefits by having their representative participate in an educational program attended by people who have a need for legal, accounting and financial planning services. Third, the effort in creating a presentation on a specific topic can be used for other presentations. If the seminar is professionally organized the law firm benefits by having an opportunity to meet individuals who might not otherwise be aware of or ever come into contact with the firm.

The insurance company benefits from the opportunity to earn a commission and the financial planning company may either earn a commission or a fee depending on the arrangement.
One aspect of a collaborative marketing effort is that all participants are expected to contribute to the "guest" list. Accountants, lawyers and other professionals therefore have the opportunity to leverage their client lists. While the sharing of client lists may seem objectionable, there are a number of marketing benefits. Some law firms worry that they find it awkward to initiate conversations on estate planning. By participating in a collaborative marketing effort, the law firm is merely inviting clients to attend a program that might be of interest. The client decides whether they have an interest or not so there is no opportunity for an awkward discussion of financial planning needs. Secondly, the opportunity to network with other non-competing professionals is a very important aspect of collaborative marketing. Most accountants and insurance organizations have no desire to practice law. On the contrary, legitimate firms go out of their way to advise clients to have their attorneys draft living trusts or whatever. For the attorney interested in estate planning, for example, participation in a collaborative marketing effort may mean that their clients obtain the proper vehicle for guaranteeing the liquidity of the estate. Front end involvement with other professionals may also combining names from participating organizations each organization can leverage their client list. These sponsored seminars raise several ethical issues.

(1) Solicitation of Clients. Usually the sponsoring organization is seeking to invite the attorneys clients. The outright sale of attorney client lists may well violate client confidentiality unless the clients have signed or given permission for their name to be used. However, there is no problem if the invitation is forwarded by the attorney to the firm's clients. The nature of the relationship should be properly revealed. In most cases, the arrangement is simply that one of the firm's attorneys is going to be a speaker at a seminar sponsored by (name of the organization) and that no charge is collected...". One advantage of a collaborative marketing effort is that with the right organizations involved, the law firm benefits from professional marketing organizations.
(2) Due Diligence. Another ethical consideration is whether the law firm's due diligence standard is jeopardized by participation with a financial planner or particular insurance company. Generally, if the law firm is receiving no compensation from the sponsor, and there is no obligation for the attorney to "sell" the sponsor's financial product, there is little basis for a conflict of interest. With ever increasingly complex tax laws, the integrated effort of an individual's accountant, lawyer and financial planner is almost a necessity for large estates. The issue for the law firm is to retain neutrality and avoid conflict of interest. So long as each professional confines their activities to their profession, collaborative marketing programs are likely to increase.

If the collaborative marketing effort is done carefully, it is not much different than accepting an invitation to speak before a private organization. The fact that guests are invited by a financial planning organization should not cause ethical problems so long as the law firm's presentation is not misleading and so long as the presentation and conduct of the program conforms to Disciplinary Rules.

2. Publicity. There are many legitimate avenues to creating positive publicity. Law firm participation in community projects, participation in civic organizations (which are publicized either by the media or by the organization's own publications), or press releases on attorney's public speaking engagements are all legitimate means to build a firm's reputation through publicity. The danger in publicity is that the Texas Rules apply so that any law firm generated press releases must be reviewed by attorneys just as advertisements must be reviewed by attorneys. The obligation for truthful and not misleading communications rests with the lawyers and not hired publicists.

The issue of publicity during trials raises serious ethical questions that go beyond the scope of this paper. Attempts to generate press conferences or "demonstrations" at the courthouse can result in serious ethical violations. Violations of "gag" orders carry fairly serious consequences.

The best strategy is to have the sponsoring organization do the press releases with the law firm merely providing the facts. The further the law firm's control over the content, the less responsibility the law firm has for its publication. Interviews do need to be handled carefully in that if a lawyer misleads the reporter into reporting that "Your
name", Texas's leading expert on (subject area)" ...., you may face complaints filed by competing law firms! Seriously, the opportunity to be interviewed on special topics by a member of the media can be good publicity, but it is important to keep comments short, factual, and accurate.

3. **Client Communications.** We have already discussed the ethical considerations of several forms of communication that law firms can use to generate a positive reputation, loyalty and hopefully referrals. There are aspects of client communications that are required as part of our ethical responsibilities.

1. **Texas Lawyers Creed.** Charles Herring Jr., an attorney with Jones, Day, Reavis and Pogue, in an article titled "Special Disciplinary Hazards for Trial Lawyers" prepared for the Advanced Civil Trial Litigation program sponsored by the State Bar, Houston, September 1991, offers the following "practice tip":

A lawyer must advise clients of the contents of the Creed when undertaking representation. Perhaps the simplest method to communicate such advice is in an engagement letter provided when you initially undertake representation. Advice concerning the contents of the Creed should be part of your standard client-intake procedure.

For example, your initial engagement letter might include a statement similar to the following: "In an effort to reduce unnecessary delay, expense and abusive tactics in litigation, the Texas Supreme Court and the Texas Court of Criminal Appeals have jointly adopted a professionalism creed for Texas lawyers. I have enclosed a copy of the Creed, which is known as 'The Texas Lawyers Creed -- A Mandate for Professionalism.' As you will see, the four parts of the Creed set out duties that lawyers owe to clients, to the legal system itself, to other lawyers, and to judges. Please review the Creed and feel free to ask us any questions you have about the Creed. Texas lawyers and judges sincerely help that the Creed will reduce expense and inconvenience for clients and will make the litigation process more efficient and productive for all concerned.

Some law firms have posted the Texas Creed in their offices, others provide a separate letter with a copy of the Creed during the sometimes long period in between normal client communications. Used properly, even a mandatory communication can be utilized as a positive practice development strategy.

2. **Communication on fees and engagement letters.** Rule 1.04 requires communication on fees:
(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

One of the most frequent causes of client-attorney disputes is over fees. Several State Bar of Texas General Counsel staff members reported that the single largest category of grievances relates to either lack of communication with the client or client-attorney fee disputes. While some may consider this merely a preventive law gesture, time spent explaining the fee structure to clients is extremely important. One law firm in California has told me that they have a videotape explaining the fee structure to new clients which not only explains how the clients are charged but explains some of the costs of practicing law in an effort to convince the client that they are being treated fairly. At the end of the videotape, the client is afforded an opportunity to ask questions before being asked to sign a client representation letter.

Another practice development strategy is to develop a more comprehensive billing statement other than "Fee for Professional Services". The higher the quality of communication between clients and attorneys the less future problems, but most important the more likely the client is going to feel that their case received proper attention from the attorney.

Another way to avoid problems created by late pay clients is to have the "office manager" make the call or sign the letter asking for payment on an overdue bill. If there is a problem with that client, you are more likely to hear about it if a "neutral" but tactful individual makes the call. Be sure to fully brief the individual on collection practices and procedures.

What if you are a solo practitioner and have no "office manager"? One solution is to consider hiring an MBA or paralegal who is looking for part time work. While the rate per hour might be higher than a temporary agency, you may be pleasantly surprised by the number and quality of applicants if you schedule the individual for 10 - 15 hours per week that are convenient for someone raising a family. There is one other advantage to hiring such an individual and that is that they become a possible referral center!
4. Unsolicited communication with third parties/prospective clients. Such unsolicited communication may take the form of direct mail solicitation. Direct mail is an effective method of promoting a practice but there are several ethical issues that should be reviewed:

(a) Restrictions on use of mailing lists. I have previously quoted the Texas law on the use of lists of accident and crime victims. It is my understanding that a case challenging the restriction on the use of such lists for direct mail solicitation is in progress. Whether the use of such lists and the letters that are sent are effective in generating new clients is debatable. There are several organizations that were set up to "sell" word-processed letters for a certain fee. The result in some locations was that accident victims found themselves receiving four or five similarly worded letters from different law firms!

(b) Texas Rule 7.01 (f) states that "A lawyer shall not send a written communication to a prospective client for the purpose of obtaining professional employment if: (1) The lawyer knows or reasonably should know the person could not exercise reasonable judgment in employing the lawyer." The United States Supreme Court case, Ohralik v. Ohio State Bar Association, 436 U.S. 447, 462 recognized the state's interest in protecting the public from harassment, intimidation, etc.

(c) The issue of content of direct mail solicitations. Not only should the letters be reviewed from the standpoint of the Texas rules, but compliance with the Texas Deceptive Trade Practices Act should also be addressed. The applicability of the Texas Deceptive Trade Practices Act to the practice of law is a topic best dealt with in a law review article. The need to avoid giving the prospective client a false expectation through the direct mail solicitation or the creation of promises or warranties is a very practical issue in drafting direct mail pieces.

Here again, the level of sophistication of the targets of direct mail pieces and the issue of whether there is any specific event that is related to the solicitation may bear on the issue of whether there is an ethical violation. Sending letters to individuals whose homes have been posted
for foreclosure offering legal assistance is one thing. Sending letters to spouses being sued for divorce who are currently represented by counsel is another! Sending a letter to new businesses coming into the community, to new parents of children (advising them of the need to consider a new will), or to parents who are registering their children for school, are some of the more legitimate direct mail promotional opportunities. However, sending letters that appear to contain a summons "ordering" an individual to visit their attorney, is clearly overreaching ethical boundaries.

IV. Advertising

The entire issue of attorney advertising touches three dimensions: what is in good taste, what is permitted under ethical standards, and what is effective. This discussion focuses on the ethical dimension with a few comments about taste and advertising cost-benefit.

During my talk, I provided several examples of advertising and solicitation campaigns for discussion purposes. If you would like to share your experiences with advertising, please let me know as this is an area of continuing academic research!

Probably the most basic form of advertising that attorneys seldom use, but which can be very effective is the use of "specialty" advertising. Insurance agents frequently use specialty advertising: calendars with their name and address on them, notebooks, appointment books, and matchbooks. The distribution of such items can keep your name in front of prospective clients. Law firms that have institutional clients where different levels of management are free to recommend or hire law firms are good targets; for example, some banks permit lending officers to recommend firms to handle closings, collections, etc. The use of specialty advertising should conform to several ethical standards: 1) The need to place a negative disclaimer if you identify any particular area of practice. However, such specialty items are best worded with the phrase: "Compliments of " and the name, address and phone number of your firm. 2) Such items should be relatively inexpensive to avoid any possibility of conflict with the prohibition against payment for referrals. Fortunately, this should not be a problem since most specialty items are relatively inexpensive items.
Certainly in the view of most practitioners, the most common form of advertising is the Yellow Pages (TM) or some other commercial directory. Many directories refuse to accept any advertisements that give prices to protect themselves from any liability. So, the other major ethical consideration is the negative disclaimer. If your advertisement names an area of law or even alludes to a restricted practice, then you need to comply with Texas Rule 7.01. Again, the largest source of complaints is from competing lawyers so that it is important to insure that the negative disclaimer is easily read (if one is required).

The State Bar of Texas Advertising Guidelines while not mandatory should factor into the design of any paid advertising such as television, magazines, or billboards. Advertisements that suggest that other law firms are lazy or incompetent violate Texas Disciplinary rules and the State Bar of Texas Advertising Guidelines.

To review the Texas Disciplinary rules on advertising with specific examples. It is a violation to advertise that "your law firm" wins more cases than any other firm in the county. This message runs counter to the rule prohibiting unjustified expectations and may even be misleading if not completely false. A better, safer strategy would be to say that "Your firm" is the oldest law firm in the county, or has tried over (give a number) cases in county courts, or has (certain number) of attorneys. Such statements can be verified and do not provide a subjective comparison with other firms which could result in a grievance. The State Bar of Texas guidelines on lawyer advertising go a step further by suggesting that advertising that a lawyer or law firm is one of the best, or more experienced, or especially diligent or hardworking invites a misleading comparison with "such traits in all other lawyers."

Some attorneys have attempted to blunt the negative impact of the statement "Not Certified by the Texas Board of Legal Specialization" by adding the phrase "Fully licensed in all areas of law." The State Bar of Texas Lawyer Advertising Committee and the State Bar Board of Directors by accepting their recommendations on attorney advertising guidelines have specifically prohibit explanatory language fearing that the phrase "fully licensed..." suggests that Board Certified attorneys are somehow inferior. While this conclusion is debatable, such phrases should be
avoided until either litigation resolves the issue or the State Bar concludes research on the issue. Attached to this article is a one page survey on Board Certification and negative disclaimers which I hope you will complete and return during my presentation or mail to my office as instructed on the survey.

The Texas guidelines also ban the use of celebrities or testimonials in attorney advertising. According to the current chairman of the committee, these guidelines were hotly debated before submission to the State Bar of Texas Board of Directors. It is interesting to note that half the attorneys on the lawyer advertising committee use advertising extensively to promote their practices and half the committee does not use advertising. While the limits of protected speech have not been tested on the issue of whether the use of a celebrity or actor impersonating an attorney is protected commercial speech or not, most firms wanting to avoid litigation should avoid that approach to advertising.

Some firms are joining "group advertising" programs. These are arrangements where large media buyers sponsor generic advertisements featuring an attorney who informs the viewer of their legal rights in certain situations. "If you have a question or legal problem on (specific area, like "your rights after being injured in an accident" please call 1-800-999-9999. When the individual responds and calls the 800 number, the company gets their name and number and provides the caller with a name and number of a law firm. The assignments are usually based on the area code or zip code of the law firm. The law firm is charged a monthly fee under a six or twelve month contract for providing names of prospective clients. If you are going to use this type of service, there are several ethical considerations you should consider. First, your firm is liable for compliance with Texas Rules even though your firm did not write the script. You need to review the advertisements (and the legitimate operators all provide demo films) for compliance with Texas rules. Second, you incur a liability to respond to the phone calls and to keep careful documentation on who called so that a follow up call may be made where warranted. There should be no ambiguity as to whether the firm is accepting the engagement or declining to provide legal service in order to avoid ethical conflicts.
After reading the rules on what is prohibited, a normal response is to wonder how law firms might utilize advertising to differentiate themselves from their competitors and gain name recognition among the public. Both the American Bar Association and State Bar Directors have gone on record advocating the use of public relations/advertising professionals to formulate advertising strategies. Unfortunately, in many areas of Texas, those marketing professionals have no more understanding of ethical requirements than you do and may have clauses in their contracts disclaiming liability for compliance with "professional codes or standards". Professional services marketing is still in its earliest stages of development in many parts of Texas.

In my opinion, the key to successful advertising for firms trying to increase their clientele from the general public, is to define the target market, attempt to develop name recognition, and instill a connection between the firm and its telephone number! Afterall, law firms are selling intangible services. Taking into account studies sponsored by the American Bar Association on attorney-client relations and what the public wants from their attorneys, effective advertising conveys integrity, competence and compassion. A second tip is to always tie advertising tools together: billboards, radio and Yellow Page advertising should all carry the same theme; use the same type face; and be timed so that the community gets an even exposure to the message. Advertising a law firm may be a little like promoting a political campaign for a candidate running for a position where there are no pressing issues!

V. Conclusions

The emphasis of this treatment of the ethics of practice development strategies was on the more traditional referral-generating strategies as opposed to paid advertising. This reflects the reality that while attorney advertising has increased dramatically over the past ten years, only a small percentage of Texas law firms advertise on television and radio. And that the expense of such advertising must be weighed carefully against the anticipated benefits.

Particularly in the area of Board Certification claims and direct mail solicitation, the ethical boundaries are technical and failure to comply may well result in unproductive time spent on
answering the complaint not to mention dealing with the potential of suspension or disbarment. Careful review of the Texas Disciplinary Rules of Professional Conduct and the State Bar of Texas Guidelines is warranted before funds are spent on expensive firm letterhead, brochures, and direct mail pieces.

The area of attorney marketing/practice development is evolving. Challenges to laws and Disciplinary Rules may result in changing standards. There is no doubt that as law firms continue to expand their practice development efforts in the face of increased competition, new strategies will result in a consideration of what are tolerable limits. Plus, new technology may well offer new advertising, media promotional opportunities. Like advertising over FAX machines?

This paper was designed to provide an overview of some of the sources of law and guidance on ethical aspects of practice development strategies. If you come across articles, cases, examples of practice development strategies that you would be willing to share, please send them to me. As members of a profession, we all benefit when practice development strategies are effective and serve to enhance the public's appreciation of our legal system.
SURVEY

Please take a moment and share your thoughts on Board Certification disclosures.

1. I ___ am ___ am NOT certified by the Texas Board of Legal Specialization.
   if so, my area of specialization: ______________________________________________________

2. I practice law:
   ___________ solo or small firm (less than five attorneys)
   ___________ medium size firm (6 - 35 attorneys)
   ___________ large size firm over 35 attorneys
   ___________ in corporate law department
   ___________ in a governmental agency (D.A., City, County, State, or Federal)
   ___________ teaching law either law school or university
   ___________ actually earn a living in some other field but maintain my license

Please indicate your opinion on the following statements by selecting:

1 for strongly agree, 2 for agree, 3 for no opinion, 4 for disagree, and 5 for strongly disagree.

3. If no currently certified by the Texas Board of Legal Specialization, I plan on becoming certified as soon as possible.
   
   1  2  3  4  5

4. The disclaimer "Not Certified by the Texas Board of Legal Specialization" is confusing to the public.
   
   1  2  3  4  5

5. Attorneys who are Board Certified will get more results from their advertising than those who must use the "negative disclaimer" as required by The Texas Disciplinary Rules of Professional Conduct.
   
   1  2  3  4  5

6. The profession and the public would be better served by requiring non-certified attorneys to state "General Practice Licensed Attorney - No Board Certification in a Legal Specialty."
   
   1  2  3  4  5
7. The Boards of Specialization should undertake a campaign to educate the public that attorneys with the credential are better than those who do not have the credential.

8. I would like to see the following changes concerning Texas rules on certification disclosures: (Please describe)