

TEXAS MEDICAL BOARD
BOARD RULES
Texas Administrative Code, Title 22, Part 9

Chapter 164. Physician Advertising
§§164.1-164.6

§164.1. Purpose.

These rules are promulgated under the authority of the Medical Practice Act, Texas Occupations Code Ann. §153.001 and the Health Professions Council, Texas Occupations Code Ann. §101.201, to set forth the grounds under which a physician's license may be disciplined for false and deceptive advertising. Reasonable regulation designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public. The Board permits the dissemination to the public of legitimate information, in accordance with the Board's rules, regarding the practice of medicine and where and from whom medical services may be obtained, so long as such information is in no way false, deceptive, or misleading. It is the responsibility of each physician to carefully scrutinize his advertisements and adhere to the highest ethical standards of truth in advertising.

Source Note: The provisions of this §164.1 adopted to be effective May 21, 2000, 25 TexReg 4348.

§164.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the contents clearly indicate otherwise.

(1) Advertising and advertisement - Informational communication to the public in any manner designed to attract public attention to the practice of a physician. Advertising may include oral, written, broadcast, and other types of communications disseminated by or at the behest of a physician. The communications covered include, but are not limited to, those made to patients, prospective patients, professionals or other persons who might refer patients, and to the public at large. The communications covered include signs, nameplates, professional cards, announcements, letterheads, listings in telephone directories and other directories, brochures, radio and television appearances, and information disseminated on the Internet or Web.

(2) A testimonial - An attestation or implied attestation to the competence of a physician's service or treatment. Testimonials also include expressions of appreciation or esteem, a character reference, or a statement of benefits received. Testimonials are not limited to patient comments but may also include comments from colleagues, friends, family, actors, models, fictional characters, or other persons or entities.

Source Note: The provisions of this §164.2 adopted to be effective May 21, 2000, 25 TexReg 4348.

§164.3. Misleading or Deceptive Advertising.

No physician shall disseminate or cause the dissemination of any advertisement that is in any way false, deceptive, or misleading. Any advertisement shall be deemed by the board to be false, deceptive, or misleading if it:

(1) contains material false claims or misrepresentations of material facts which cannot be substantiated;

(2) contains material implied false claims or implied misrepresentations of material fact;

(3) omits material facts;

(4) makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;

(5) advertises or assures a permanent cure for an incurable disease;

(6) compares a health care professional's services with another health care professional's services unless the comparison can be factually substantiated;

(7) advertises professional superiority or the performance of professional service in a superior manner if the advertising is not subject to verification;

(8) contains a testimonial that includes false, deceptive, or misleading statements, or fails to include disclaimers or warnings as to the credentials of the person making the testimonial;

(9) includes photographs or other representations of models or actors without explicitly identifying them as models and not actual patients;

(10) causes confusion or misunderstanding as to the credentials, education, or licensure of a health care professional;

(11) represents that health care insurance deductibles or copayments may be waived or are not applicable to health care services to be provided if the deductibles or copayments are required;

(12) represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or copayments are required;

(13) states that a service is free when it is not, or contains untruthful or deceptive claims regarding costs and fees. If other costs are frequently incurred when the advertised service is obtained then this should be disclosed. Offers of free service must indeed be free. To state that a service is free but a third party is billed is deceptive and subject to disciplinary action;

TEXAS MEDICAL BOARD RULES

Chapter 164, Physician Advertising

(14) makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of patient;

(15) advertises or represents in the use of a professional name, a title or professional identification that is expressly or commonly reserved to or used by another profession or professional;

(16) claims that a physician has a unique or exclusive skill without substantiation of such claim;

(17) involves uninvited solicitation such as "drumming" patients or conduct considered an offense under Texas Occupations Code §102.001(a) relating to the solicitation of patients; or

(18) fails to disclose the fact of giving compensation or anything of value to representatives of the press, radio, television or other communicative medium in anticipation of or in return for any advertisement, article, or infomercial, unless the nature, format or medium of such advertisement makes the fact of compensation apparent.

Source Note: The provisions of this §164.3 adopted to be effective May 21, 2000, 25 TexReg 4348; amended to be effective September 19, 2002, 27 TexReg 8769; amended to be effective May 12, 2008, 33 TexReg 3741.

§164.4. Board Certification.

(a) A physician is authorized to use the term "board certified" in any advertising for his or her practice only if the specialty board that conferred the certification and the certifying organization is a member board of the American Board of Medical Specialties (ABMS), or the American Osteopathic Association Bureau of Osteopathic Specialists (BOS), or is the American Board of Oral and Maxillofacial Surgery.

(b) Physicians who are certified by a board that does not meet the criteria of subsection (a) of this section, shall be authorized to use the term "board certified" only if the medical board determines that the physician-based certifying organization that conferred the certification has certification requirements that are substantially equivalent to the requirements of the ABMS or the BOS existing at the time of application to the medical board. Physicians, or physician-based certifying organizations on behalf of their members, must submit an application to a committee of the medical board, and demonstrate that:

(1) the organization requires all physicians who are seeking certification to successfully pass a written or an oral examination or both, which tests the applicant's knowledge and skills in the specialty or subspecialty area of medicine. All or part of the examination may be delegated to a testing organization.

All examinations require a psychometric evaluation for validation;

(2) the organization has written proof of a determination by the Internal Revenue Service that the certifying board is tax exempt under the Internal Revenue Code pursuant to Section 501(c);

(3) the organization has a permanent headquarters and staff;

(4) the organization has at least 100 duly licensed members, fellows, diplomates, or certificate holders from at least one-third of the states;

(5) the organization requires all physicians who are seeking certification to have successfully completed postgraduate training that is accredited by the Accreditation Council for Graduate Medical Education (ACGME) or the American Osteopathic Association and that provides substantial and identifiable supervised training of comprehensive scope in the specialty or subspecialty certified, and the organization utilizes appropriate peer review;

(6) the organization provides an online resource for the consumer to verify the board certification of its members; and

(7) the organization has the ability to provide a full explanation of its certification process and membership upon request by the Texas Medical Board.

(c) A physician may not authorize the use of or use the term "board certified" if the claimed board certification has expired and has not been renewed at the time the advertising in question was ordered.

(d) The terms "board eligible," "board qualified," or any similar words or phrase calculated to convey the same meaning may not be used in physician advertising.

(e) A physician's authorization of or use of the term "board certified", or any similar words or phrase calculated to convey the same meaning in any advertising for his or her practice shall constitute misleading or deceptive advertising unless the specialty board which conferred the certification and the certifying organization meet the requirements in subsection (a) or (b) of this section.

(f) A physician may advertise a field of interest if the physician is certified by, or a member, fellow, or diplomate of an organization that meets the requirements of subsection (a) or (b) of this section.

(g) A board certified physician who advertises board certification may advertise a field of interest that is different from the certified specialty only if the physician identifies the specialty for which the physician is board certified in an equal size of type or emphasis.

(h) A physician who is not board certified by, or a member, fellow, or diplomate of an organization that meets either the requirements of subsection (a) or (b) of

TEXAS MEDICAL BOARD RULES

Chapter 164, Physician Advertising

this section may not advertise a field of interest, except that the physician may advertise that his or her practice is "limited to" a certain practice area.

(i) A physician who holds a certification that was granted prior to September 1, 2010, and whose certifying board was approved by the medical board for advertising purposes prior to September 1, 2010, is considered to meet the requirements of subsection (b) of this section.

Source Note: The provisions of this §164.4 adopted to be effective March 8, 2001, 26 TexReg 1863; amended to be effective May 2, 2004, 29 TexReg 3962; amended to be effective July 3, 2007, 32 TexReg 3992; amended to be effective January 17, 2011, 36 TexReg 137

§164.5. Advertising Records and Responsibility.

(a) Any and all advertisements are presumed to have been approved by the licensee named therein.

(b) Each licensee who is a principal partner, or officer of a firm or entity identified in any advertisement, is jointly and severally responsible for the form and content of any advertisement. This provision shall also include any employees acting as an agent of such firm or entity.

(c) If photographs or other representations of actual patients are used in advertising, there must not be communication of facts, data, or information which may identify the patient without first obtaining patient consent.

(d) A recording of every advertisement communicated by electronic media, and a copy of every advertisement communicated by print media and a copy of any other form of advertisement shall be retained by the licensee for a period of two years from the last date of broadcast or publication and be made available for review upon request by the board or its designee.

(e) At the time any type of advertisement is placed, the licensee must possess and rely upon information which, when produced, would substantiate the truthfulness of any assertion, omission or representation of material fact set forth in the advertisement or public communication.

(f) It is hereby declared that the sections, clauses, sentences and parts of these rules are severable, are not matters of mutual essential inducement, and any of them shall be excised if these rules would otherwise be unconstitutional or ineffective. If any one or more sections, clauses, sentences or parts shall for any reasons be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provision or provisions so held unconstitutional or invalid, and the inapplicability or

invalidity of any section, clause, sentence or part in any one or more instances shall not be taken to affect or prejudice in any way its applicability or validity in any other instance.

Source Note: The provisions of this §164.5 adopted to be effective May 21, 2000, 25 TexReg 4348.

§164.6. Required Disclosures on Websites.

(a) Disclosure. Physician medical practice sites must clearly disclose:

- (1) ownership of the website;
- (2) specific services provided;
- (3) office address and contact information;
- (4) licensure and qualifications of physician(s) and associated health care providers;

(5) fees for online consultation and services and how payment is to be made;

(6) financial interest in any information, products, or services;

(7) appropriate uses and limitations of the site, including providing health advice and emergency health situations;

(8) uses and response times for e-mails, electronic messages, and other communications transmitted via the site;

(9) to whom patient health information may be disclosed and for what purpose;

(10) rights of patients with respect to patient health information; and

(11) information collected and any passive tracking mechanisms utilized.

(b) Accountability. Medical practice sites must provide patients with a clear mechanism to:

(1) access, supplement, and amend patient-provided personal health information;

(2) provide feedback regarding the site and the quality of information and services; and

(3) register complaints, including information regarding filing a complaint with the Texas State Board of Medical Examiners as provided for in Chapter 178 of this title (relating to Complaints).

(c) Advertising/Promotion of Goods or Products. Advertising or promotion of goods or products from which the physician receives direct remuneration or incentives is prohibited.

Source Note: The provisions of this §164.6, adopted to be effective July 1, 2010, 35 TexReg 3388