March 29, 2010

Texas Medical Board
P.O. Box 2018
Austin, TX 78768-2018

Re: Texas Medical Board Regarding Rule 164.4.

Dear Committee Members:

Thank you for allowing me to offer comments regarding Rule 164.4. As you may recall, I represent the American Board of Physician Specialties (ABPS).

The Texas Medical Board appropriately regulates physician advertising. The Texas Medical Board Rules (Texas Administrative Code, Title 22, Part 9, Chapter 164: Physician Advertising) state in Rule 164.1 that: “…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…” The Texas Medical Board fulfills this legitimate state function on behalf of the state of Texas in order to serve the public interest. As the public is entitled to useful, meaningful and relevant information, it is my opinion that Rule 164.4 is well written to fairly accomplish this goal.

Pursuant to its obligation and function on behalf of the state of Texas, the Texas Medical Board further adopted Rule 164.4 regarding whether a physician is authorized to use the term “Board Certified” in any advertising. It is important to remember that advertising for the purposes of the Texas Medical Board rules is any communication with the public designed to attract attention to the practice of the physician and includes routine items such as name plates,
business cards, announcements, letterheads, listings in telephone and other directories, as well as traditional broadcast advertisement.

Because the First Amendment to the U.S. Constitution guarantees the right of free speech, including commercial speech, states may only constitutionally regulate professional advertising to the extent necessary to prevent false, deceptive or misleading information. This purpose is clearly stated in Rule 164.1.

As the Texas Medical Board now considers what, if any, changes it may make to Rule 164.4, it is important to look at the analogous situation regarding attorney advertising. In 1977, the United States Supreme Court in the case of Bates and O’Steene v. State Bar of Arizona, 433 U.S. 350 (1977) said that lawyer advertising was commercial speech protected by the First Amendment. The United States Supreme Court reaffirmed its earlier decision in a case in which a lawyer advertised he was “Board Certified” in the case of Peel v. Attorney Registration and Discipline Commission of Illinois, 496 U.S. 91 (1990). In that case, the court held that states could not impose a blanket prohibition on truthful communication concerning certification by a bonafide specialty organization. As a result of this ruling, states changed their disciplinary rules to allow attorney’s specialty advertising. Today, there are 14 specialty certification programs conducted by 7 national organizations in addition to various State Bar sponsored legal certifications. For example, I am Board Certified in Civil Trial Law by the Texas Board of Legal Specialization and I am authorized to state that on my letterhead and business cards, in firm directory listings, the phone book and in other public dissemination of information regarding my practice.

The Texas Medical Board Rule 164.4 both protects the free speech guarantees of the First Amendment and the public’s right to be protected from false, misleading or deceptive information. Remember, the Texas Medical Board does not determine board certification for any physician; rather, it regulates when the terms Board Certified, Board Eligible, Board Qualified Member, Fellow, Diplomate, or Certified may be used in relation to a physician’s practice.
Because of the long standing and nationally recognized validity of the American Board of Medical Specialties (ABMS), the Bureau of Osteopathic Specialties and the American Board of Oral and Maxillofacial Surgery, physicians who are conferred certification by those organizations may advertise that fact pursuant to Rule 164.4(a).

Physicians who are not board certified by those named organizations in Rule 164.4(a), but are board certified by another valid organization, may use the term "Board Certified" when using the name of the specialty board which conferred the certification, as long as the organization meets the requirements set out in Rule 164.4(b)(1-5).

As determined by two separate Texas Medical Board reviews and with indisputable evidence submitted at the Texas Medical Board hearing on February 5, 2010, the ABPS meets the requirements of Rule 164.4(b)(1-5). The discussion was not about whether ABPS met the requirements of Rule 164.4(b)(1-5). You may remember, the discussion mostly involved whether board certification in emergency medicine should be granted by any organization other than ABMS.

It appears as if the only remaining issue is whether a physician board certified by ABPS in emergency medicine should be allowed to advertise that fact. Objections were made because ABPS board certified physicians in emergency medicine may have completed residencies in either primary care or anesthesiology instead of emergency medicine. Physicians applying under option 8(b) must include a copy of their completed Primary Care or Anesthesiology residency certificate and/or a copy of their board certificate in a Primary Care specialty or Anesthesiology. (Primary Care specialties include Family Practice, Internal Medicine, Pediatrics, and General Surgery.) In the event a physician's residency was in primary care or anesthesiology, and not emergency medicine, ABPS requires those physicians to have practiced Emergency Medicine on a full-time basis for five (5) years AND accumulated a minimum of 7,000 hours of emergency room experience before they sit for the board certification exam, in addition to the completion of a family practice or internal medicine residency.
It is understood and appreciated that physicians board certified in emergency medicine by ABMS are now required (but not originally required) to complete a residency in emergency medicine.

If the Board seeks to change Rule 164.4(b) regarding advertising for emergency medicine board certified physicians to limit advertising to only those physicians who have completed a residency in emergency medicine, several legal issues will arise.

An alteration to Rule 164.4(b)(1-5) by the Texas Medical Board is an act of the State of Texas which would alter the right of free speech for those physicians who currently have that right to publicly state they are board certified by ABPS in emergency medicine. Any limitation of free speech is subject to strict scrutiny in the courts and will only be upheld if a compelling state interest is clearly documented.

As there is absolutely no evidence to suggest that a physician board certified in emergency medicine by ABPS is a danger to the public through the dissemination of false, misleading or deceptive information, the strict scrutiny test cannot be met. In fact, there was discussion at the February board meeting that many physicians not board certified in emergency medicine are working in Texas emergency rooms. No one suggested that only ABMS emergency medicine board certified physicians should be allowed to practice in emergency departments. Accordingly, a change in Rule 164.4(b) will necessarily fail constitutional scrutiny and be declared invalid.

Additionally, a Texas Medical Board rule which provides that only one organization of certifying physicians can be used in the state is a state sponsored grant of monopolistic authority in violation of federal anti-trust regulations and laws.

Finally, an effort to alter the Rule 164.4(b) to prohibit the use of the term "Board Certified" by ABPS diplomates in emergency medicine would essentially create two classes of physicians: one grandfathered group which now meets the requirements of Rule 164.4(b) and a
second group which may not meet the requirements of the new rule. Those physicians who currently meet the requirements of Rule 164.4(b) have a vested property right which the state may not take away. A future rule change which would affect only those physicians who become board certified in emergency medicine by ABPS after the date of a rule change would create two separate classes of physicians, one who may advertise and one who may not, without a factual distinction between the two groups. Such a rule change would also be unconstitutional on its face.

In summary, the State of Texas, through the Texas Medical Board Rule 164.4, has created a model Rule which protects both the public from false, misleading, or deceptive information as well as protects the constitutional rights of the physician to commercial free speech. The Board has a good and workable rule. I recommend that you not change Rule 164.4.

I look forward to seeing you at both the Ad Hoc Committee hearing and the next Texas Medical Board hearing and I will be available to answer any questions you may have. Thank you for your consideration of my comments.

Very truly yours,

Joseph M. Nixon

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