

STATE OF KANSAS

**GAYLE B. LARKIN**  
*Disciplinary Administrator*  
**MATTHEW J. VOGELSBERG**  
*Chief Deputy Disciplinary Administrator*  
**DEBORAH L. HUGHES**  
**GARY C. WEST**  
**KATHLEEN J. SELZLER-LIPPERT**  
**ALICE L. WALKER**  
**JULIA A. HART**  
*Deputy Disciplinary Administrators*



*701 Southwest Jackson Street*  
*First Floor*  
*Topeka, Kansas 66603-3729*  
*Telephone: (785) 435-8200*  
*Fax: (785)783-8385*  
*Email: attydisc@kscourts.org*  
**W. THOMAS STRATTON**  
*Director of Investigations*

**OFFICE OF THE  
DISCIPLINARY ADMINISTRATOR**

To: House Commerce, Labor, and Economic Development Committee  
Representative Sean E. Tarwater, Chair

From: Office of the Disciplinary Administrator  
Gayle B. Larkin, Disciplinary Administrator  
Matthew J. Vogelsberg, Chief Deputy Disciplinary Administrator

Date: March 9, 2022

Re: SB 150, Neutral, Oral, In Person  
Defining and prohibiting certain deceptive lawsuit advertising practices and  
restricting the use or disclosure of protected health information to solicit  
individuals for legal services

Dear Chair Tarwater and Members of the House Commerce, Labor, and Economic  
Development Committee:

The Supreme Court regulates attorney conduct through the Rules Relating to  
Discipline of Attorneys and the Kansas Rules of Professional Conduct. *See* Supreme  
Court Rules 200 through 240. The purpose of the attorney disciplinary system is to  
protect the public.

The Office of the Disciplinary Administrator has the duty and authority under  
the Supreme Court rules to investigate and prosecute complaints made against  
attorneys licensed to or engaged in the practice law in Kansas. *See* Supreme Court Rules  
202 and 205. The office is not authorized to investigate and prosecute complaints made  
against law firms, companies, non-lawyers, or out-of-state attorneys not engaged in the  
practice of law in Kansas. If we receive a complaint against an out-of-state attorney not  
engaged in the practice of law in Kansas, we refer the complaint to the state where the  
attorney is licensed to practice.

The disciplinary administrator's office has a staff of eight attorneys who prosecute cases of attorney misconduct. Historically, the office has relied on two non-lawyer investigators and approximately 200 volunteer attorney investigators from across the state to investigate the complaints received. We are in the process of expanding the investigative staff to also include three full-time attorney investigators.

Standing is not required to file a complaint against an attorney. Thus, anyone may file a complaint with the disciplinary administrator's office about an attorney's advertising or other communication about legal services or any other matter that the person believes violates the Kansas Rules of Professional Conduct.

After the disciplinary administrator's office receives a complaint and completes the investigation, if probable cause is found and a hearing is ordered, a hearing panel of the Kansas Board for Discipline of Attorneys conducts an evidentiary hearing on behalf of the Supreme Court. Following the hearing, the hearing panel enters a report detailing the facts, law, and a recommendation for discipline. If the hearing panel concludes that the attorney violated the rules, the case is docketed in the Supreme Court for consideration. After oral argument, the Supreme Court may impose discipline on the attorney's license. Discipline imposed by the Supreme Court for violations of the Kansas Rules of Professional Conduct includes censure, probation, suspension, or disbarment. *See* Supreme Court Rules 200-240. The Supreme Court publishes attorney disciplinary decisions in the Kansas Reports.

One area regulated under the Kansas Rules of Professional Conduct is attorney advertising. There are five Supreme Court rules which regulate attorneys in this regard: KRPC 7.1 (communications concerning a lawyer's services), KRPC 7.2 (advertising), KRPC 7.3 (solicitation of clients), KRPC 7.4 (communication of fields of practice), and KRPC 7.5 (firm names and letterheads).

KRPC 7.1 covers all attorney communications and specifically prohibits false or misleading communications:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) 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 the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

Provisions of KRPC 7.2 (advertising) are also relevant to this discussion. KRPC 7.2(b) requires attorneys to maintain a copy or recording of an advertisement or communication for two years after its last dissemination along with a record of when and where it was used. KRPC 7.2(d) requires that the name of at least one lawyer responsible for the content be included within the advertisement or communication.

Further, a subsection of KRPC 7.3 (solicitation of clients) also contains a relevant provision:

(c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal service in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

The reference in KRPC 7.3(c) to "a person specified in paragraphs (a)(1) or (a)(2)" refers to a lawyer or a person who has a family, close personal, or prior professional relationship with the lawyer.

As indicated above, KRPC 7.1, KRPC 7.2, and KRPC 7.3 address the same type of false advertisements and communications that SB 150 would address. Experience has shown, however, that the Office of the Disciplinary Administrator receives few complaints regarding attorney advertising.

During the past six fiscal years, including the current fiscal year, there have been eight violations of the advertising rules, as shown in the chart below. In that same period, the disciplinary administrator's office has received and processed over 5,000 complaints.

<b>Fiscal Year</b>	<b>Complaints Received</b>	<b>Violations of KRPC 7.1 - 7.5</b>
FY 2017	987	4
FY 2018	959	3
FY 2019	849	0
FY 2020	908	0
FY 2021	1,023	0
FY 2022*	612	1
<b>TOTAL</b>	<b>5,338</b>	<b>8</b>

\*FY 2022 ends June 30, 2022. Numbers current as of February 2022.

To date, the disciplinary administrator’s office has not received any complaints which would be covered by SB 150. By way of examples, some of the advertising complaints that we have received include:

1. An attorney falsely communicated that the attorney was licensed to practice in Kansas when his license was suspended.
2. An attorney omitted important information regarding the qualifications of a mediator on the attorney’s website.
3. On the attorney’s letterhead, an attorney created an impression that the attorney had a physical office when the address was simply a box at a UPS store.
4. In communications about the attorney’s services an attorney falsely stated that the attorney was part of a “nation-wide network of attorneys” when the network consisted of two attorneys.

Our system of discipline is designed to regulate attorneys by taking action on an attorney’s license to practice law when an attorney violates the Kansas Rules of Professional Conduct. The disciplinary system is not designed to replace a civil malpractice action brought by a client; nor does the system provide compensation to a person who, in the situation contemplated by this proposed act, decided to refrain from taking medication based on an attorney advertisement.

It is important to know that even though the Supreme Court is charged with regulating the legal profession, the Legislature may enact statutes that also regulate the practice of law “when those statutes reinforce the objective of the judiciary.” *Hays v. Ruther*, 298 Kan 402, 410 (2013); *Martin v. Davis*, 187 Kan. 473, 478-479 (1960). However, in this situation, it may be unnecessary to do so as the disciplinary administrator’s office has sufficient staff and resources available to investigate and prosecute complaints involving attorney advertisements and communications.

Finally, effective June 5, 2020, West Virginia enacted a law similar to SB 150. After the West Virginia law was passed but before it was effective two attorneys and a consumer filed suit to enjoin the enforcement of the law in the United States District Court for the Northern District of West Virginia. *Steven Recht, Alesha Bailey, and Stephen New vs. Jim Justice, Governor and Patrick Morrissey, Attorney General*, case number 20-CV-00090. On June 26, 2020, the federal district court enjoined the enforcement of the law. An appeal of the district court’s decision remains pending in the United States Court of Appeals for the Fourth Circuit, case number 21-1684.

Thank you for your time and attention to this matter. I am happy to answer any questions you may have.