



TO: Rep. Sean Tarwater, Chair
Members of the House Committee on Commerce, Labor
and Economic Development

FROM: Richard W. James, DeVaughn James Injury Lawyers, Wichita
Individually and on behalf of firm

DATE: March 9, 2022

RE: Attorney Advertising– SB 150 (OPPOSE)

Senate Bill 150 is unnecessary and it is contrary to the Kansas and United States Constitution. Attorney advertisements should be regulated, and they are regulated.

First, attorney advertisements are already regulated. The Kansas Disciplinary Administrator's Office effectively regulates attorney advertising. It has an office with eight attorneys and additional investigators that ensure attorneys comply with the rules including on advertising.

The American Bar Association (ABA) Model Rules. ABA Model Rules of Professional Conduct and Kansas Rules of Professional Conduct Rule 7.1¹ and Rule 7.2², prohibit an attorney from engaging in communication that is false or misleading and dictate what an advertisement must include. The issue with the advertisements appears to be not the misleading or false nature of the ads, but the consequences the ads might pose to members of the public who misunderstand the ads and make their own conscious decision to stop a course of treatment without consulting with their doctor. The regulations that are needed and have been deemed necessary by the ABA are already put in place; further regulations are unnecessary.

Second, attorney ads that comply with the rules, including those that mention the dangers of drugs or devices, are protected speech by the First Amendment. The United States Supreme Court ruled in 1977 that attorney advertisements are protected under the First Amendment. *Bates v. State Bar of Arizona*, 433 U.S. 350. Attorney advertising regulations are in many cases unconstitutional and unjustifiable under the First Amendment. The passing of this bill will almost certainly be challenged in court. To be upheld, the state must find a compelling interest to place restrictions on such advertising. Public ignorance or the potential of misunderstanding is not a compelling state interest.

Further, in June of 2020, an act parallel to the bill at issue, was deemed unconstitutional by the United States District Court in the Northern District of West Virginia. *Recht v. Justice*, No. 5:20-CV-90, 2020 WL 6109430 (N.D.W. Va. June 26, 2020). The court granted the plaintiff's preliminary injunction and prohibited the state of West Virginia from enforcing the provisions.

¹https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_1_communication_concerning_a_lawyer_s_services/

²https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising/

The case is currently pending appeal in the Fourth Circuit Court of Appeals on an analysis of constitutionality. The District Court held that the attorney ads were protected speech under the First Amendment and the restrictions violated the First Amendment as the state did not demonstrate a compelling state interest for imposing such restrictions. *Id.* The bill is unconstitutional and unjustifiable under the First Amendment.

Additionally, many people suffer or die each year from taking prescription drugs and would benefit from having an attorney assist them in determining whether they are entitled to compensation. In 2014, it was reported that around 128,000 individuals died from prescription drugs ranking 4th as a leading cause of death.³ This number is only continuing to rise. Attorney advertisements give those individuals an avenue for seeking help when they might not know where to turn. Knowing how to obtain an attorney and who to contact for help is beneficial to many. It also encourages individuals to engage in these conversations with their physicians.

The pharmaceutical companies present their advertisements about the merits of their drugs. These ads present a check and balance on pharmaceutical advertising.

This legislation is a solution in search of a problem and will find a constitutional challenge.

Best Regards,



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³ Donald Light, "New Prescription Drugs: A Major Health Risk With Few Offsetting Advantages," available at <https://ethics.harvard.edu/blog/new-prescription-drugs-major-health-risk-few-offsetting-advantages> (June 27, 2014).