



**KANSAS BAR
ASSOCIATION**

TO: The Honorable Kellie Warren
And Members of the Senate Judiciary Committee

FROM: Joseph Molina
On Behalf of the Kansas Bar Association

RE: SB 150 – Defining and prohibiting certain deceptive lawsuit advertising practices and restricting the use or disclosure of protected health information to solicit individuals for legal services

DATE: February 16, 2021

Chairman Warren and Members of the Senate Judiciary Committee:

The KBA appreciates the opportunity to submit this testimony in **OPPOSITION** to **SB 150 – Defining and prohibiting certain deceptive lawsuit advertising practices and restricting the use or disclosure of protected health information to solicit individuals for legal services.**

First, the Kansas Bar Association has a long-standing policy of supporting judicial independence. Our support includes recognizing that the Supreme Court has the authority to regulate attorney conduct through the Rules of Professional Conduct. The KBA also recognizes that a violation of these rules can lead to attorney discipline which could be as severe as suspension from the practice of law and disbarment.

The Kansas Supreme Court is granted this authority under Article 3, Section 1 of the Kansas Constitution which states that the “supreme court shall have general administrative authority over all courts in the state.” **SB 150** would interfere with the Supreme Court’s authority by requiring the KS AG office to regulate legal advertisements.

Under the Kansas Constitution the proper entity to regulate the practice of law would be the Kansas Supreme Court. As such, the Kansas Supreme Court has created rules governing attorney admission, attorney discipline, continuing education programs, conflicts of interest and attorney advertisements.

Specifically, the Kansas Supreme Court prohibits “false and misleading” advertisements under Kansas Rule of Professional Conduct 7.1. This rule states that:

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. *Kan. R. Rel. Disc. Att. 7.1*

In addition, the Kansas Supreme Court has promulgated rules that prohibit a lawyer from using solicitations that involve coercion, duress, or harassment. Under this rule the advertisement must include the words "Advertising Materials" on the envelope and at the beginning and ending of any recorded or electronics communications. See; *Kan. R. Rel. Disc. Att 7.3*

Thus, the Rules of Professional Conduct is a less restrictive alternative to SB 150 while still providing protection from misleading and deceptive advertisements.

Second, SB 150 attempts to criminalize commercial speech which the U.S. Supreme Court ruled in *Bates v. State Bar of Arizona*, 433 US 350 (1977) was protected under the First Amendment. The US Supreme Court reasoned that the advertisements in *Bates* was similar to the pharmacy advertising case a year earlier. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) which established commercial speech as entitled to a degree of First Amendment protection. Justice Blackmun wrote the majority opinion for both cases and reasoned that the state's interest appeared to be paternalistic but "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open the channels of communications rather than close them."

In closing, the Kansas Constitution grants the supreme court the authority to regulate attorney conduct, the Supreme Court has promulgated rules prohibiting false and misleading advertisements and the US Supreme Court has found that legal advertisements are protected commercial speech under the First Amendment. It is for these reasons that the Kansas Bar Association OPPOSES **SB 150** – Defining and prohibiting certain deceptive lawsuit advertising practices and restricting the use or disclosure of protected health information to solicit individuals for legal services.

Thank you for your time and attention. I am happy to stand for questions when appropriate.

About the Kansas Bar Association:

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals. Its more than 7,200 members include lawyers, judges, law students, and paralegals. www.ksbar.org