



KANSAS TRIAL LAWYERS ASSOCIATION

To: Representative Sean Tarwater, Chairman
Members of the House Commerce, Labor, & Economic Development Committee

From: Joseph McGreevy, McGreevy Law LLC, Kansas City
On behalf of the Kansas Trial Lawyers Association

Date: March 10, 2022

Re: SB 150 As Amended by the Senate - Regulation of Attorney Advertising -
Opposed

I appear today on behalf of the Kansas Trial Lawyers Association (KTLA) to testify in opposition to SB 150 As Amended by the Senate. I am an attorney in private practice in Kansas City. KTLA opposes SB 150 because there are already state and federal rules that regulate advertising by attorneys and that protect consumers. SB 150 also presents conflicts with the First Amendment and is potentially unconstitutional. On behalf of KTLA members, I respectfully request that the committee oppose SB 150.

First, Kansas has long-established rules that govern attorney conduct,¹ including communications and advertising. The Rules of Professional Conduct protect consumers by establishing clear standards and meaningful penalties. The Rules of Professional Conduct are enforced within the Judicial Branch through the Office of the Disciplinary Administrator. An attorney that violates the Rules faces a disciplinary complaint, investigation, review, and sanctions ranging from informal admonishment to discipline by the Supreme Court, such as probation, suspension, or disbarment.

¹ Kansas Rules of Professional Conduct, designated as Rule 240, January 1, 2021.

SB 150 is duplicative to Rules 7.1², 7.2³, and 7.3⁴ of the Rules of Professional Conduct. Rule 7.1 defines and prohibits false and misleading communications; 7.2 provides specific guidance about advertising content; and 7.3(c) requires that advertising material be identified.

SB 150 unnecessarily duplicates the regulatory authority of the Federal Trade Commission, which reviews advertising for compliance with the FTC Act, Section 5(a) (15 U.S.C. §45(a) – unfair/deceptive advertising by attorneys) and Section 12 (a)(2) (15 U.S.C. §52(a)(2) – deceptive attorney advertising that has an effect on drug or device sales). Letters from the FTC to attorneys regarding violations of the Act have directed ads include clear and prominent audio and visual disclosures stating people should not stop taking medications without consulting a doctor.

Another significant concern with SB 150 is that it is potentially unconstitutional. SB 150 is substantially similar to a law passed in West Virginia that has been ruled unconstitutional in the Fourth Circuit of the U.S. District Court because it violates the First Amendment.⁵ The West Virginia case, *Recht v Morrissey*, has been appealed. However, there is reason to believe SB 150 could face similar constitutional problems and challenges in Kansas, if enacted.⁶

² Rule 7.1 Communications Concerning a Lawyer’s Services. 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 the 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 lawyers’ services, unless the comparison can be factually substantiated.

³ Rule 7.2 Advertising.

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communication, including public media.
- (b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.
- (c) A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.
- (d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.
- (e) About paying for services – not relevant for the purposes of attorney advertising
- (f) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
 - (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or U.S. territory or that has been accredited by the American Bar Association; and
 - (2) the name of the certifying organization is clearly identified in the communication.
- (g) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

⁴ Rule 7.3 Solicitation of Clients. (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) [person has declined to be solicited] or (a)(2) [solicitation involves coercion, duress, or harassment].

⁵ *Recht v Morrissey*, N.D. W.Va., No. 20-cv-90, 5/7/21.

⁶ Attorneys have a right to advertise, and such advertising is protected commercial speech (*Bates v. State Bar of Arizona*, 433 U.S. 350, (1977)).

The court in the West Virginia case held that the State cannot declare through legislation that certain words are misleading or unfair. Further, the State could not justify the law's bans on advertising containing truthful, factual, and verifiable information (ex. advertisements with info on voluntary product recalls). SB 150 contains similar provisions to those held unconstitutional in West Virginia.

In addition, the West Virginia court held that the State failed to show its law was constitutional. It could not show that the law was the least restrictive alternative, or that the government had a substantial interest which justified infringing on the First Amendment. The State of Kansas would face the same burden to show no less restrictive alternatives to SB 150 and a substantial governmental interest in interfering with the First Amendment. Kansas might also be expected to face the same problems as West Virginia.

Laws like SB 150 have not been widely adopted by states. Only Texas, West Virginia, Indiana, Louisiana, and Tennessee have passed legislation related to attorney advertising and medical drugs and devices, as of 2021. Louisiana's bill was vetoed, and West Virginia's has been ruled unconstitutional. Indiana's law is unlike SB 150; it excludes attorneys and targets "lead generators." The Texas and Tennessee laws are likely to be challenged on constitutional grounds.

SB 150 is unnecessary and most likely unconstitutional. Long-standing rules regulating attorneys and the practice of law, including advertising, contain substantial penalties and are enforced by the Disciplinary Administrator and the Supreme Court. In addition, the Federal Trade Commission regulates attorney advertising that violates Federal law. A similar West Virginia law has been ruled unconstitutional and is a cautionary tale for Kansas. For these reasons, I respectfully request your opposition to SB 150 As Amended by the Senate.