KANSAS
TRIAL LAWYERS
ASSOCIATION

To: Senator Kellie Warren, Chairman
Members of the Senate Judiciary Committee

From: Jason Roth
Roth Davies Trial Lawyers LLC, Kansas City
On behalf of the Kansas Trial Lawyers Association

Date: February 16, 2021

Re: SB 150 Regulation of Attorney Advertising - Opposed

I appear today on behalf of the Kansas Trial Lawyers Association to testify in opposition to SB 150. Kansas already has rules and a disciplinary process for regulating advertising by attorneys. SB 150 is redundant to the current rules, and potentially unconstitutional based on a ruling on a similar law enacted in West Virginia. On behalf of KTLA members, I respectfully request that the committee oppose SB 150.

KTLA supports consumer protection laws that deter and punish deceptive advertising. Prohibitions on deception and misleading advertising should not be limited to one profession or industry. SB 150 is a flawed attempt to create special laws targeting advertising by the legal profession.

First, Kansas has long-established rules that govern attorney conduct,[1] including communications and advertising. The Rules of Professional Conduct are enforced within the Judicial Branch through the Office of the Disciplinary Administrator. The applicable rules are

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

7.1[2], 7.2[3], and 7.3[4]: 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 as such.

The Rules of Professional Conduct protect consumers by establishing clear standards and meaningful penalties. 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.

The Federal Trade Commission also may also review 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 possible violations of the Act have directed that ads include clear and prominent audio and visual disclosures stating people should not stop taking medications without consulting a doctor.

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[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 aw, 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].

In addition to overlapping with current laws, SB 150 has an even bigger problem: constitutionality. Attorneys have a right to advertise and such advertising is protected commercial speech (*Bates v. State Bar of Arizona*, 433 U.S. 350, (1977)). SB 150 attempts to control the content of advertising and it is a governmental intrusion on the First Amendment.

A 2020 federal court decision supports the conclusion that SB 150 could be found unconstitutional. The federal District Court in the 4th Circuit granted an injunction preventing enforcement of a nearly identical West Virginia law, finding that it likely violated the First Amendment. *Recht v Justice*, 2020 WL 6109430, US District Court, N.D. West Virginia, Wheeling.

The court in *Recht* held that West Virginia's law was content-based and the burden was on the State to show its restrictions were narrowly tailored to serve a compelling state interest. The court determined that under either strict scrutiny or intermediate scrutiny, the West Virginia law failed. "State cannot legislate certain words or logos to be unfair or misleading any more than the Legislature can make a rock into a pillow by means of a statute," *Recht,* p. 5. The Fourth Circuit also cited the U.S. Supreme Court in holding that the State cannot limit speech in order to control the public debate[5], and it is the speaker and the audience that determine the value of information—not the government[6].

The Fourth Circuit's holding in *Recht* must serve as a cautionary tale against SB 150 and its likely violation of the First Amendment which protects attorney advertising. SB 150 is unnecessary because the Rules of Professional Conduct and their enforcement within the Judicial Branch is appropriate, effective, and protects consumers. On behalf of the members of KTLA, I respectfully request your opposition to SB 150.

[5] *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 578-579 (2011).
[6] *Sorrell*, at 578-579 (quoting *Edenfield v. Fane*, 507 U.S. 761,767 (1993)).