

SESSION OF 2022

SUPPLEMENTAL NOTE ON SENATE BILL NO. 150

As Amended by House Committee on
Commerce, Labor and Economic Development

Brief*

SB 150, as amended, would create law related to legal advertising and the use of protected health information to solicit individuals for legal services, as follows.

Requirements for Legal Advertisement

The bill would create a section stating that a person engaging in legal advertisement within Kansas would be required to:

- Disclose, at the outset of the advertisement, that “This is a paid advertisement for legal services”;
- Not present an advertisement as a “medical alert,” “health alert,” “consumer alert,” “public service announcement,” or similar terms;
- Not display the logo of a federal or state governmental agency in a manner that suggests affiliation with or the sponsorship of that agency;
- Not use the word “recall” when referring to a product that has not been recalled by a governmental agency or through an agreement between a manufacturer and governmental agency;

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- Identify the sponsor of the advertisement;
- Indicate the identity of the attorney or law firm that will represent clients, or how cases will be referred to attorneys or law firms that will represent clients;
- If the advertisement is soliciting clients who may allege an injury from a U.S. Food and Drug Administration (FDA)-approved prescription drug, include the following warning: “Do not stop taking a prescribed medication without first consulting with your doctor. Discontinuing a prescribed medication without your doctor’s advice can result in injury.”; and
- If the advertisement is for a lawsuit soliciting clients who may allege an injury from a FDA-approved prescription drug or medical device or from a medical device substantially equivalent to an approved medical device, disclose that the drug or medical device remains approved by the FDA, unless the product has been recalled or withdrawn.

The bill would require any words or statements required to appear in an advertisement to be presented clearly and conspicuously, and written disclosures would have to be clearly legible. If such disclosures are televised or displayed electronically, the bill would require them to be displayed for a sufficient time to enable the viewer to easily see and fully read the disclosure or disclaimer. If an advertisement contains spoken disclosures, the bill would require such disclosures to be plainly audible and clearly intelligible.

Use of Protected Health Information

The bill would create a section stating a person could not use, cause to be used, obtain, sell, transfer, or disclose to another person without written authorization, protected health information for the purpose of soliciting an individual for legal services.

The bill would specify that nothing in this section would apply to the use or disclosure of protected health information to an individual's legal representative, in the course of any judicial or administrative proceeding, or as otherwise permitted or required by law.

Violations; Effect on Regulation of Attorneys

In both sections, the bill would provide that any violation would constitute an unlawful and deceptive trade practice under the Kansas Consumer Protection Act (KCPA), subject to the penalties provided for in that act. In addition to the penalty under the KCPA, any person who knowingly violates the section regarding protected health information would be guilty of a class A nonperson misdemeanor. The bill also would state that nothing in either section could be construed to limit or otherwise affect the authority of the Kansas Supreme Court to regulate the practice of law or enforce rules relating to attorneys.

Definitions

The bill would define "person" to mean an individual or an entity that is not an attorney or law firm and that advertises legal services or identifies potential clients for attorneys or law firms. "Legal advertisement" would mean a solicitation for legal services, other than legal services performed by a *bona fide* nonprofit provider of *pro bono* legal services, through television, radio, internet, including a domain name, newspaper or other periodical, outdoor display, or any other

written, electronic, or recorded communication. The term “protected health information” would mean any information, including genetic information, whether oral or recorded in any form or medium that relates to the past, present, or future physical or mental health or condition of an individual; or the past, present, or future payment for the provision of health care to an individual. Finally, “soliciting” would mean offering to provide legal services provided by an identified attorney or law firm through written, recorded, or electronic communication, or in-person, telephone, or real-time electronic contact.

Background

The bill was introduced by the Senate Committee on Judiciary at the request of the Kansas Chamber of Commerce.

Senate Committee on Judiciary

In the Senate Committee hearing on February 16, 2021, representatives of the Kansas Chamber of Commerce and the U.S. Chamber Institute for Legal Reform provided **proponent** testimony on the bill, expressing concerns regarding the consequences of certain advertisements soliciting lawsuits related to prescription drugs and medical devices. Representatives of the Kansas Medical Society and National Federation of Independent Business (NFIB) provided written-only proponent testimony.

Representatives of the Kansas Bar Association and Kansas Trial Lawyers Association and an attorney provided **opponent** testimony on the bill, stating the Kansas Rules of Professional Conduct governing false and misleading advertisements already addresses the concerns raised by the proponents and stated this type of statute has been enjoined by a federal district court as a constitutional violation.

Written-only opponent testimony was provided by an attorney and a representative of the Kansas Association of Broadcasters.

On January 19, 2022, the Senate Committee amended the bill to exempt legal services performed by a *bona fide* nonprofit provider of *pro bono* legal services from the definition of “legal advertisement.”

House Committee on Commerce, Labor and Economic Development

In the House Committee hearing on March 14, 2022, **proponent** testimony was provided by representatives of the Kansas Chamber and the U.S. Chamber Institute for Legal Reform, generally stating the bill would help address concerns about advertisements which solicit lawsuits regarding prescription drugs and medical devices.

Written-only proponent testimony was provided by representatives of the Kansas Justice Institute and NFIB.

Representatives of the Kansas Association of Broadcasters, Kansas Bar Association, and Kansas Trial Lawyers Association and an attorney provided **opponent** testimony, stating the Kansas Rules of Professional Conduct already govern the types of attorney conduct, including communications and advertising, about which the proponents expressed concerns. Opponents also stated this type of statute has been challenged on constitutional grounds in another state and has been enjoined by a federal district court.

Written-only opponent testimony was provided by an attorney.

Neutral testimony was provided by a representative of the Office of the Disciplinary Administrator. The representative stated the Kansas Supreme Court is charged

with regulating the legal profession, including the type of attorney advertising, communication, and solicitation of clients through the Kansas Rules of Professional Conduct.

The House Committee amended the bill to:

- Exclude attorneys and law firms from the provisions of the bill;
- Change the definition of “protected health information” to mean any information, including genetic information, whether oral or recorded in any form or medium that relates to the past, present, or future physical or mental health or condition of an individual; or the past, present, or future payment for the provision of health care to an individual; and
- Change the definition of “soliciting” to mean offering to provide legal services, to be provided by an identified attorney or law firm, by written, recorded, or electronic communication, or in-person, telephone, or real-time electronic contact.

Fiscal Information

According to the February 15, 2021, fiscal note prepared by the Division of the Budget on the bill, as introduced, the Office of Judicial Administration (OJA) states enactment of the bill could increase the number of cases filed in district court because it creates a new crime, which could result in more time spent by court employees and judges processing and hearing cases. Because the crime carries a misdemeanor penalty, there could also be more supervision of offenders required to be performed by court services officers. According to OJA, a fiscal effect cannot be estimated. OJA also estimates enactment of the bill could result in the collection of additional docket fees, supervision

fees, and fines assessed in those cases filed under the bill's provisions.

The Office of the Attorney General (OAG) states enactment of the bill could be constitutionally challenged by individual lawyers, law firms, or legal organizations. The defense could be handled by OAG; however, it is possible that outside counsel would be needed to defend any lawsuit.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2023 Governor's Budget Report*.

Legal advertising; legal services; deceptive advertising practice; protected health information; lawsuit