

SUBJECT: Regulating deceptive TV advertising of legal services for medical issues

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Leach, Krause, Meyer, Smith, White

3 nays — Farrar, Julie Johnson, Neave

1 absent — Y. Davis

SENATE VOTE: On final passage, April 11 — 20-10 (Alvarado, Hinojosa, Johnson, Menéndez, Miles, Powell, Rodríguez, Watson, West, Whitmire)

WITNESSES: *On House companion bill, HB 2251:*

For — Dennis Borel, Coalition of Texans with Disabilities; Lee Parsley, Texans for Lawsuit Reform; Tiffany Jones-Smith, Texas Kidney Foundation; Kevin Finkel; (*Registered, but did not testify:* Joe Woods, American Property Casualty Insurance Association; James Grace, Jr., CNA Insurance Companies; Lee Loftis, Independent Insurance Agents of Texas; Martha Doss, Latinos for Trump; Chris Counts, National Infusion Center Association; C.L. Matthews, Partnership to Protect Patient Health; Terry Harper, Republican Party of Texas SD21; Kinnan Golemon, Shell Oil Company; Jon Opelt, Texas Alliance for Patient Access; James Hines, Texas Association of Business; Michael Garcia, Texas Association of Manufacturers; George Christian, John W. Fainter, Jr., and Carol Sims, Texas Civil Justice League; Thomas Kowalski, THBI; Cesar Lopez, Texas Hospital Association; Darren Whitehurst, Texas Medical Association; Lucas Meyers, The Travelers Companies, Inc. and Subsidiaries; Cathy DeWitt, USAA; Cary Roberts, U.S. Chamber Institute for Legal Reform; Mark McCaig; Charlotte Owen; Denise Seibert; Jacqueline Stringer; Tiffany Young)

Against — Craig Eiland and Michael Gallagher, Texas Trial Lawyers Association; Ware Wendell, Texas Watch; Charles Herring; (*Registered, but did not testify:* James McCormack; Jason Panzer; Sean Tracey)

On — Richard Hile, State Bar of Texas; Vincent Johnson

DIGEST:

SB 1189 would prohibit certain TV advertisements for legal services regarding medical issues from using deceptive language or imagery, require such ads to include verbal and visual warnings and disclosures, and establish remedies for a violation of these provisions.

Prohibited advertisements. The bill would prohibit advertisements for legal services from presenting the advertisement as a "medical alert," "health alert," "consumer alert," "drug alert," "public service announcement," or substantially similar phrase that suggested to a reasonable viewer that the advertisement was offering professional, medical, or government agency advice about medications or medical devices rather than legal services.

The bill also would prohibit ads for legal services from displaying the logo of a federal or state government agency in a manner that suggested to a reasonable viewer that the advertisement was presented by a federal or state agency or by an entity approved by or affiliated with such an agency. An advertisement could not use the term "recall" when referring to a product that had not been recalled by a government agency or through an agreement between a manufacturer and a government agency.

Warnings and disclosures. An advertisement for legal services would have to verbally and visually state the phrase "This is a paid advertisement for legal services" at the beginning of the ad. An ad also would have to state the identity of the ad's sponsor and either:

- the identity of the attorney or law firm primarily responsible for providing solicited legal services to a person who engaged the attorney or firm in response to the advertisement; or
- the manner in which a responding person's case would be referred to an attorney or law firm if the ad's sponsor was not legally authorized to provide legal services to clients.

An advertisement for legal services soliciting clients who could allege

injury from a prescription drug approved by the U.S. Food and Drug Administration would have to include the verbal and visual statement, "Do not stop taking a prescribed medication without first consulting a physician."

A visual statement required by the bill would have to be presented clearly, conspicuously, and for a sufficient length of time for a viewer to see and read the statement. A required verbal statement would have to be audible, intelligible, and presented with equal prominence as other parts of the ad.

A court could not find that a required visual statement was noncompliant with the bill's requirements if the statement was presented in the same size and style of font and for the same duration as the telephone number or website of the entity a responding person would contact for the legal services offered or discussed in the ad.

A court also could not find that a required verbal statement was noncompliant with the bill's requirements if the statement was made at approximately the same volume and using approximately the same number of words per minute as the longest voice-over in the ad other than information required by the bill.

Enforcement. A violation of the bill's provision would constitute a deceptive act or practice actionable under the Deceptive Trade Practices-Consumer Protection Act and could be enforced by the attorney general or by a district or county attorney, as applicable. All remedies available under the Deceptive Trade Practices-Consumer Protection Act would be available for a violation of the bill's provisions.

The bill would not create a private cause of action.

Court authority. SB 1189 could not be construed to limit or otherwise affect the authority of the Texas Supreme Court to regulate the practice of law, enforce the Texas Disciplinary Rules of Professional Conduct, or discipline persons admitted to the state bar.

Applicability. The bill would apply only to an advertisement presented on or after the bill's effective date that promoted a person's provision of legal services or solicited clients to receive legal services. The bill would not apply to an advertisement by a federal, state, or local government entity.

The bill would take effect September 1, 2019.

SUPPORTERS
SAY:

SB 1189 would protect Texas consumers from misleading and confusing advertisements for legal services by prohibiting ads from making certain statements, requiring warnings and disclosures, and providing remedies and penalties for violating these rules.

Advertisements. Currently, advertisements for legal services relating to pharmaceutical drugs or medical devices can unnecessarily alarm consumers. Elderly and disabled individuals are particularly vulnerable to this kind of misleading advertising. Individuals also may stop taking needed medications due to a misleading legal ad, which can seriously endanger the person's health. The bill would remedy this problem and protect consumers by prohibiting advertisements for legal services related to medications or medical devices from making misleading or potentially harmful statements. Requiring such advertisements to state that consumers should not discontinue medication until speaking to a physician would help to ensure that individuals did not abruptly stop taking needed medications. The bill also would protect the integrity of the doctor-patient relationship by preventing the proliferation of false or misleading information that differed from a doctor's advice.

Public information. The bill would not require lawyers to give medical advice, prevent lawyers from being able to advertise, prevent lawsuits, or hinder lawyers from accepting clients. It simply would impose common-sense regulations on deceptive advertising to protect vulnerable consumers from potentially dangerous and inaccurate medical advice.

Enforcement. The bill would not duplicate the State Bar of Texas' rules governing attorney advertisements, since the bill also would apply to non-attorneys who sponsored ads. This would ensure that consumer

protections were applied more broadly to all entities making misleading claims and not just to attorneys. The bill also would allow the attorney general to take actions against violators located outside of Texas, a power the state bar does not possess.

Constitutionality. The bill would not infringe protected speech under the First Amendment because the bill specifically targets ads for legal services that provide false information on drug recalls and misleading medical statements or imagery.

OPPONENTS
SAY:

SB 1189 could remove a potentially valuable source of information about dangerous medications and medical devices from the public by prohibiting certain commercial speech. The bill also would create redundant regulations on false advertisements that could conflict with rules from the State Bar of Texas and the First Amendment.

Public information. The bill would remove a potentially valuable source of information for consumers by prohibiting advertisements warning them of pharmaceutical drugs approved by the FDA that nonetheless had significant safety warnings. The bill also would require lawyers to give medical advice to consumers, as it would require statements in advertisements instructing viewers to not cease taking a certain medication without first consulting a physician.

Enforcement. The bill would be unnecessary and redundant, since there already are adequate remedies and disciplinary rules in place for false legal advertisements. The State Bar of Texas has some of the strongest regulations on attorney ads in the country and provides for appropriate penalties for misleading ads. The Deceptive Trade Practices-Consumer Protection Act also makes it illegal to make false, misleading, or deceptive communications in commerce. By creating additional regulations and penalties that could be inconsistent with the state bar's rules and existing statute, the bill could create confusion and redundancy.

Constitutionality. The bill's restrictions could have a chilling effect on speech and raise concerns with respect to First Amendment speech rights.

OTHER
OPPONENTS
SAY:

SB 1189 would not go far enough to protect consumers because it would only impose restrictions on false advertisement by attorneys. Such advertisements by drug companies also should be prohibited.