

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 136

SENATOR SWOPE, *original sponsor*

[Passed March 7, 2020; in effect 90 days from passage]

1 AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §47-28-1, §47-28-2, §47-28-3, §47-28-4, and §47-28-5, all relating to
3 prohibiting certain deceptive legal advertising practices; defining terms; setting forth
4 prohibited legal advertising practices; requiring disclosures and warnings pertaining to
5 prescription drugs and medical devices; providing that engaging in prohibited legal
6 advertising practices or failure to provide required disclosures and warnings constitute
7 unfair and deceptive acts under the West Virginia Consumer and Credit Protection Act;
8 prohibiting the use or disclosure of protected health information for solicitation of legal
9 services; providing that the use or disclosure of protected health information constitutes a
10 violation of West Virginia health privacy laws or the West Virginia Consumer and Credit
11 Protection Act; providing criminal penalties for unauthorized use or disclosure of protected
12 health information; and clarifying that the West Virginia Supreme Court of Appeals retains
13 authority to regulate the practice of law.

Be it enacted by the Legislature of West Virginia:

**ARTICLE 28. PREVENTION OF DECEPTIVE LAWSUIT ADVERTISING AND
SOLICITATION PRACTICES REGARDING THE USE OF MEDICATIONS.**

§47-28-1. Short title.

1 This article may be known and cited as the Prevention of Deceptive Lawsuit Advertising
2 and Solicitation Practices Regarding the Use of Medications Act.

§47-28-2. Definitions.

1 As used in this article:

2 (1) "Legal advertisement" means a solicitation for legal services regarding the use of
3 medications through television, radio, newspaper or other periodical, outdoor display, or other
4 written, electronic, or recorded communications wherein the advertisement solicits clients or
5 potential clients for legal services.

6 (2) "Person" means an individual or entity, including, but not limited to: (i) Attorneys; (ii)
7 law firms; or (iii) third parties who solicit potential clients on behalf of attorneys or law firms, which
8 pays for or authorizes a legal advertisement that solicits potential clients for attorneys or law firms
9 under this article.

10 (3) "Protected health information" has the meaning given such term in 45 C.F.R. 160.103
11 (2013).

12 (4) "Solicit" means an offer to provide legal services regarding the use of medications by
13 written, recorded, or electronic communication or by in-person, telephone, or real-time electronic
14 contact.

§47-28-3. Deceptive legal advertising practices.

1 (a) *Specifically prohibited legal advertising practices.* — A person engages in an unfair or
2 deceptive act or practice if, in a legal advertisement, the person does any of the following:

3 (1) Fails to contain the statement: "This is a paid advertisement for legal services.";

4 (2) Presents a legal advertisement as a "consumer medical alert", "health alert",
5 "consumer alert", "public service health announcement", or substantially similar phrase
6 suggesting to a reasonable recipient that the advertisement is offering professional, medical, or
7 government agency advice about pharmaceuticals or medical devices rather than legal services;

8 (3) Displays the logo of a federal or state government agency in a manner that suggests
9 affiliation with the sponsorship of that agency;

10 (4) Uses the word "recall" when referring to a product that has not been recalled by a
11 government agency or through an agreement between a manufacturer and government agency;

12 (5) Fails to identify the sponsor of the legal advertisement; or

13 (6) Fails to indicate the identity of the attorney or law firm that will represent clients, or how
14 potential clients or cases will be referred to attorneys or law firms that will represent clients if the
15 sponsor of the legal advertisement may not represent persons responding to the advertisement.

16 (b) *Disclosures and warnings for protection of patients.* —

17 (1) A legal advertisement soliciting clients for legal services in connection with a
18 prescription drug or medical device approved by the U.S. Food and Drug Administration shall
19 include the following warning: “Do not stop taking a prescribed medication without first consulting
20 with your doctor. Discontinuing a prescribed medication without your doctor’s advice can result in
21 injury or death.”.

22 (2) A legal advertisement soliciting clients for legal services in connection with a
23 prescription drug or medical device approved by the U.S. Food and Drug Administration shall
24 disclose that the subject of the legal advertisement remains approved by the U.S. Food and Drug
25 Administration, unless the product has been recalled or withdrawn.

26 (c) *Appearance of required statements, disclosures, and warnings.* — Any words or
27 statements required by this section to appear in an advertisement must be presented clearly and
28 conspicuously.

29 (1) Written disclosures shall be clearly legible and, if televised or displayed electronically,
30 shall be displayed for a sufficient time to enable the viewer to easily see and fully read the
31 disclosure or disclaimer.

32 (2) Spoken disclosures shall be plainly audible and clearly intelligible.

33 (d) A person who willfully and knowingly violates this section engages in an unfair and
34 deceptive act or practice in violation of §46A-6-101 *et seq.* of this code.

**§47-28-4. Wrongful use or disclosure of protected health information for solicitation of
legal services regarding the use of medications.**

1 (a) *Use or disclosure of protected health information for legal solicitation.* — A person shall
2 not use, cause to be used, obtain, sell, transfer, or disclose to another person without written
3 authorization protected health information for the purpose of soliciting an individual for legal
4 services regarding the use of medications.

5 (b) *Enforcement.* —

6 (1) A violation of this section is a violation of West Virginia's health privacy laws or §46A-
7 6-101 *et seq.* of this code.

8 (2) In addition to any other remedy provided by law, a person who willfully and knowingly
9 violates this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not
10 more than \$5,000 or confined in jail not more than one year, or both fined and confined.

11 (c) *Construction.* — This section does not apply to the use or disclosure of protected health
12 information to an individual's legal representative, in the course of any judicial or administrative
13 proceeding, or as otherwise permitted or required by law.

14 (d) Nothing in this section creates or implies liability on behalf of a broadcaster who holds
15 a license for over-the-air terrestrial broadcasting from the federal communications commission,
16 or against a cable operator as defined in 47 U.S.C. §522(5).

§47-28-5. Authority of judiciary or State Bar to regulate practice of law.

1 This article does not limit or otherwise affect the authority of the judiciary or the Lawyer
2 Disciplinary Board to regulate the practice of law, enforce the West Virginia Rules of Professional
3 Conduct, or discipline persons admitted to the bar.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

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Day of, 2020.

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Governor