

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Committee Substitute

for

Senate Bill 136

SENATOR SWOPE, *original sponsor*

[Originating in the Committee on the Judiciary;

reported on February 4, 2020]

1 A BILL 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, and §47-28-4, all relating to prohibiting certain
3 misleading lawsuit advertising practices; providing civil and criminal penalties for violations
4 of this article; providing for certain disclosures and warnings in lawsuit advertising for the
5 protection of patients; and imposing criminal penalties.

Be it enacted by the Legislature of West Virginia:

**ARTICLE 28. PREVENTION OF DECEPTIVE LAWSUIT ADVERTISING AND
SOLICITATION PRACTICES.**

§47-28-1. Short title.

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

§47-28-2. Definitions.

1 (1) "Legal advertisement" means a solicitation for legal services through television, radio,
2 internet (including a domain name), newspaper or other periodical, outdoor display, or other
3 written, electronic, or recorded communications wherein the advertisement solicits clients or
4 potential clients for legal services.

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

9 (3) "Protected health information" has the meaning given such term in 45 C.F.R. 106.103
10 (2013).

11 (4) "Solicit" means an offer to provide legal services by written, recorded, or electronic
12 communication or by in-person, telephone, or real-time electronic 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 disclose at the outset of a legal advertisement: “This is a paid advertisement
4 for legal services.”;

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

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

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

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

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

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

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

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

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

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

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

35 (d) A person who willfully and knowingly violates this section engages in an unfair and
36 deceptive act or practice in violation of §46A-6-1 et seq. of this code.

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

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.

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:

10 (i) Guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail not more
11 than one year, or be fined not more than \$5,000, or both; and

12 (ii) If the offense is committed with the intent to sell, transfer, or use protected health
13 information for financial gain, guilty of a felony and, upon conviction thereof, shall be imprisoned
14 in a state correctional facility not more than five years, or be fined not more than \$100,000, or
15 both.

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

19 (d) Nothing in this section creates or implies liability on behalf of a broadcaster who holds
20 a license for over-the-air terrestrial broadcasting from the federal communications commission,
21 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.

NOTE: The purpose of this bill is to prevent the deceptive use of lawsuit advertising and solicitation by prohibiting people from engaging in those activities and providing criminal penalties.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.