

BARROW PEACOCK
STATE SENATOR
DISTRICT 37



SENATE
STATE OF LOUISIANA

COMMITTEES
Judiciary A, Chairman
Insurance
Retirement
Transportation, Highways
and Public Works

July 20, 2021

Honorable Justices of the Louisiana Supreme Court
400 Royal Street
New Orleans, LA 70130

Re: Senate Bill 43
2021 Regular Session

Dear Honorable Justices of the Louisiana Supreme Court,

This past legislative session, I introduced SB43, which would have limited misleading advertising practices and solicitations for legal services. It would not have regulated attorneys – only advertisements specifically soliciting people to allege an injury from an FDA-approved prescription drug or medical device. Such advertisements would not be banned, but would be required to include a verbal and printed statement: “Consult your physician before making decisions regarding prescribed medication or medical treatment.”

Legal ads that warn of potential frightening effects of medications, medical devices and medical injury can cause consumers to stop use of medicines and/or devices prescribed by health care professionals without physician consultation. A 2019 FDA study found 66 reports of adverse events following patients’ discontinuing blood thinner medication after viewing such ads. The median patient age in the study was 70; only 2 percent of those who stopped medication actually spoke to a medical professional. As a result, 33 patients experienced a stroke, 24 patients experienced other serious injuries and seven people died.

Every Louisiana citizen with a television is aware there is an overwhelming number of legal advertisements on air. What many may not realize is that out-of-state marketing firms known as aggregators masquerading as law firms also spend exorbitantly on advertising and often solicit sensitive health information in an effort to recruit new clients for class action lawsuits. Aggregators sell this personal information to law firms and, unlike attorneys, are not bound by federal patient protection regulations or attorney-client privilege. This means that consumers may unknowingly provide sensitive personal health information they believe will be kept private.

SB43 passed overwhelmingly in both chambers. I carried this legislation because I believe it was necessary to improve Louisiana’s consumer protection law; my intent was not to regulate attorney advertising. Throughout the legislative process, I worked with stakeholders to include a safe harbor for


Louisiana lawyers who comply with the requirement to have their advertisements reviewed by the Louisiana State Bar Association. If the advertisements were reviewed as required, a Louisiana lawyer would not be able to be pursued under the current consumer protection law.

Gov. John Bel Edwards vetoed this legislation. In his veto message, he claimed the bill is "likely unconstitutional in that it vests regulation of attorney advertising with the legislature and the attorney general rather than the Louisiana Supreme Court."

Though I disagree with his reasoning that SB43 infringes on the Louisiana Supreme Court's jurisdiction to regulate the practice of law relative to consumer protection, I would like to request the court assure me, the supermajority of Louisiana legislators who voted for the bill and the people of Louisiana that Louisiana consumers are indeed protected by the rules and regulations of the court. I want to ensure vulnerable citizens are protected from misleading legal advertisements distributed by both Louisiana lawyers and out-of-state lawyers. It is my understanding that lawyers not admitted to the Louisiana bar are not required to follow the rules relative to legal advertising set by the court. I would like clarification as to whom will regulate individuals advertising in Louisiana not under the Court's jurisdiction.

My intent in bringing this legislation was to protect vulnerable Louisianans by improving Louisiana's consumer protection law. The veto of this measure indicates the responsibility falls under the purview of the Court, not the Legislature. I respectfully request a formal written response from the Court on this issue and invite you to appear before the Senate Committee on Judiciary A to present information as to how your rules and regulations apply to the legal advertisements under the umbrella of Louisiana consumer protection law. This would also provide a public forum for Louisiana citizens to understand how they are protected. My job as a legislator is to ensure the public is protected and has an understanding of the distinction of responsibilities that fall to the Legislature and the Louisiana Supreme Court. I respectfully ask the Court to assist me in my charge.

Sincerely,



Barrow Peacock

CC: Governor John Bel Edwards
President of the Senate
Speaker of the House of Representatives
Rep. Greg Miller, Chairman of the House Committee on Civil Law
Sen. Ronnie Johns, Chairman of the Senate Committee on Commerce
Rep. Paula Davis, Chairwoman of the House Committee on Commerce

Enclosures:

Bill as passed
Veto letter

Office of the Governor
State of Louisiana

JOHN BEL EDWARDS
GOVERNOR



P.O. Box 94004
BATON ROUGE, LOUISIANA 70804-9004
(225) 342-7015
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July 1, 2021

VIA HAND DELIVERY

Honorable Page Cortez
Louisiana Senate President
Louisiana State Senate
Post Office Box 94183
Baton Rouge, LA 70804

RE: Veto of Senate Bill 43 of the 2021 Regular Session

Dear President Cortez:

Please be advised that I have vetoed Senate Bill 43 of the 2021 Regular Session.

I have vetoed this bill for the same reasons that I vetoed Senate Bill 395 from the 2020 Regular Session, a very similar bill to Senate Bill 43 (see attached). Senate Bill 43 is likely unconstitutional in that it vests regulation of attorney advertising with the legislature and the Attorney General rather than the Louisiana Supreme Court. I did sign into law Senate Bill 115 of the 2020 Regular Session on this same issue, and the Louisiana Supreme Court published rules regarding regulation of attorney advertising just last month. Those rules can be found at [https://www.lasc.org/press room/press releases/2021/2021-14-Order Amending LA Professional Rules of Conduct Attorney Advertising Rules.pdf](https://www.lasc.org/press%20room/press%20releases/2021/2021-14-Order%20Amending%20LA%20Professional%20Rules%20of%20Conduct%20Attorney%20Advertising%20Rules.pdf). Should additional changes be needed in the area of attorney advertising, it should be done by the Louisiana Supreme Court in a manner consistent with the Louisiana and United States constitutions.

Sincerely,

A handwritten signature in black ink, appearing to read "John Bel Edwards".

John Bel Edwards
Governor

cc: Honorable Clay Schexnayder
Speaker of the House of Representatives

SENATE BILL NO. 43

BY SENATOR PEACOCK

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

AN ACT

To enact Chapter 62 of Title 51 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 51:3221 through 3223, relative to unfair and deceptive acts or practices; to provide relative to advertisement for legal services relating to prescription drugs or medical devices; to provide relative to the use of certain health information for the purpose of soliciting legal services; to provide for requirements and disclosures in an advertisement; to provide for definitions, terms, conditions, and procedures; to provide for penalties; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 62 of Title 51 of the Louisiana Revised Statutes of 1950, comprised of R.S. 51:3221 through 3223, is hereby enacted to read as follows:

CHAPTER 62. ADVERTISEMENT FOR LEGAL SERVICES

§3221. Advertisement for legal services; unfair or deceptive acts or practices

A. For the purposes of this Section:

(1) "Advertisement for legal services" means a solicitation for legal services through a media entity. "Advertisement for legal services" shall include solicitation through a media entity by a person with the intent to transfer data obtained from the consumer to one or more attorneys for legal services.

(2) "Media entity" means a radio broadcast station, television broadcast station, cable television company, newspaper company, periodical company, billboard company, advertisement agency, media platform, or bona fide news or public interest website operator.

B. An advertisement for legal services shall not do any of the following:

(1) Present the advertisement as a medical alert, health alert, drug alert, public service announcement, or substantially similar phrase that suggests to

1 a reasonable viewer the advertisement is offering professional, medical, or
2 government agency advice about any medication or medical device rather than
3 legal services.

4 (2) Display the logo of a federal or state government agency in a manner
5 that suggests to a reasonable viewer the advertisement is presented by a federal
6 or state government agency or by an entity approved by or affiliated with a
7 federal or state government agency.

8 (3) Use the term "recall" when referring to a product that has not been
9 recalled in accordance with applicable state or federal regulation.

10 C.(1) An advertisement for legal services soliciting a client who may
11 allege injury from a prescription drug or medical device approved by the
12 United States Food and Drug Administration shall state all of the following:

13 (a) "This is a paid advertisement for legal services". This statement shall
14 appear at the beginning of the advertisement.

15 (b) The identity of the sponsor of the advertisement.

16 (c) Either the identity of the attorney or law firm primarily responsible
17 for providing solicited legal services to a person who engages the attorney or law
18 firm in response to the advertisement or how a responding person's case is
19 referred to an attorney or law firm if the sponsor of the advertisement is not
20 legally authorized to provide legal services.

21 (d) The drug or medical device remains approved by the United States
22 Food and Drug Administration, unless the drug or medical device has been
23 recalled in accordance with applicable state or federal regulation.

24 (2) An advertisement for legal services soliciting a client who may allege
25 an injury from a prescription drug approved by the United States Food and
26 Drug Administration shall include the following statement: "Consult your
27 physician before making decisions regarding prescribed medication or medical
28 treatment."

29 D. The statements required to appear in an advertisement for legal
30 services pursuant to this Section shall be made in written and verbal formats,

1 except as follows:

2 (1) If the statements appear in an advertisement for legal services that
3 is in print format only, including but not limited to a newspaper or other
4 periodical advertisement, the statements shall be in writing.

5 (2) If the statements appear in an advertisement for legal services that
6 is in audible format only, including but not limited to a radio advertisement, the
7 statements shall be made verbally.

8 E.(1)(a) A written statement to appear in an advertisement for legal
9 services pursuant to this Section shall be presented clearly, conspicuously, and
10 for a sufficient length of time for a reasonable viewer to see and read the
11 statement.

12 (b) A court may determine that a written statement in an advertisement
13 for legal services is in compliance with the provisions of this Section if the
14 statement is presented in the same size and style of font and for the same
15 duration as a printed reference to the telephone number or website of the entity
16 through which a person responding to the advertisement is to contact for the
17 legal services solicited in the advertisement.

18 (2)(a) A verbal statement required to appear in an advertisement for
19 legal services pursuant to this Section shall be audible, intelligible, and
20 presented with equal prominence as the other parts of the advertisement.

21 (b) A court may determine that a verbal statement in an advertisement
22 is in compliance with the provisions of this Section if the statement is made at
23 approximately the same volume and uses approximately the same number of
24 words per minute as the voice-over of longest duration in the advertisement
25 other than information required by this Section.

26 F. A violation of this Section shall be a deceptive and unfair trade
27 practice and shall subject the violator to all penalties provided for in the Unfair
28 Trade Practices and Consumer Protection Law, R.S. 51:1401 et seq.

29 G. If the Rules of Professional Conduct Committee or any designated
30 subcommittee of the Louisiana State Bar Association reviews, in accordance

1 with the committee's procedures, an advertisement for legal services for
2 compliance before the first dissemination of the advertisement and informs the
3 sponsor of the advertisement that the advertisement is in compliance with the
4 provisions and applicable advertising standards provided in the Rules of
5 Professional Conduct, no person may pursue an action under Subsection F of
6 this Section. However, if a legal advertisement is not reviewed by the Rules of
7 Professional Conduct Committee or any designated subcommittee of the
8 Louisiana State Bar Association, a person may only pursue an action under
9 Subsection F of this Section pursuant to the provisions of R.S. 51:1409.

10 H.(1) The provisions of this Section shall not apply to any media entity
11 responsible for the production or publication of any advertisement found to be
12 in violation of this Section.

13 (2) The carriage, distribution, transmission, or display of any
14 advertisement, including but not limited to those for legal services, by a media
15 entity shall not be considered a violation of this Section.

16 §3222. Use of protected health information to solicit for legal services; unfair or
17 deceptive acts or practices

18 A. As used in this Section, the following definitions shall apply:

19 (1) "Protected health information" shall have the same meaning as
20 provided for that term in 45 CFR §160.103.

21 (2) "Solicit" means offering to provide legal services by print, video or
22 audio recording, or electronic communication, or by personal, telephone, or
23 real-time electronic contact.

24 B. A person shall not use, cause to be used, obtain, sell, transfer, or
25 disclose protected health information to another person for the purpose of
26 soliciting an individual for legal services without written authorization from the
27 individual who is the subject of the information.

28 C. Any violation of this Section shall be a deceptive and unfair trade
29 practice and shall subject the violator to all penalties provided for in the Unfair
30 Trade Practices and Consumer Protection Law, R.S. 51:1401 et seq.

1 D. This Section shall not apply to the use or disclosure of protected
2 health information to an individual's legal representative in the course of any
3 judicial or administrative proceeding or as otherwise permitted or required by
4 law.

5 §3223. Regulation of the practice of law; applicability

6 The provisions of this Chapter shall not limit or otherwise affect the
7 authority of the Louisiana Supreme Court to regulate the practice of law,
8 enforce the Louisiana Rules of Professional Conduct, or discipline any person
9 admitted to the state bar.

PRESIDENT OF THE SENATE

SPEAKER OF THE HOUSE OF REPRESENTATIVES

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____