BREAKING NEWS

Limit Plaintiffs' Attorney Drug Ads, Goodlatte Says

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By Joan C. Rogers

Bar leaders around the nation are weighing how to respond to an unprecedented letter from the House Judiciary Committee seeking changes to professional conduct rules aimed at influencing what plaintiffs' attorneys can say in commercials about prescription drugs.

The March 7 letter, signed by Chairman Bob Goodlatte (R-Va.), says the legal profession should consider immediately adopting "common sense reforms" that require legal ads to warn patients not to stop their medication without asking their doctor.

The profession should also consider requirements in ads to remind patients that "the drugs are approved by the FDA and that doctors prescribe these medications because of the overwhelming health benefits from these drugs," the letter says.

These same mandates are being pushed by the American Medical Association, which says consumers are being needlessly frightened by ads that only emphasize the negatives of prescription drugs.

But the push to regulate lawyers' drug commercials runs counter to a campaign by a group of legal ethics specialists to streamline and simplify lawyer advertising rules to block only "false or misleading" statements.

One of the ethicists leading that effort says the proposed changes, which also have the backing of big business, aren't needed. Other opponents say the changes would infringe attorneys' free speech rights.

The effort to clamp down on the commercials by plaintiffs' attorneys corresponds with a huge growth in spending on drug-related legal services advertising.

Legal services spending on prescription drug and medical device advertising is growing rapidly, fueled in part by private equity and hedge funds, Rustin Silverstein, Washington, told Bloomberg BNA. He's the founder and chief executive officer of X Ante, which provides data and analysis on mass tort litigation advertising.

Spending on this kind of advertising jumped from $129 million in 2015 to $156 million in 2016—a 20 percent increase, according to a fact sheet on trends in mass tort advertising X Ante provided to Bloomberg BNA. The analysis uses data from Kantar Media CMAG, Silverstein noted.

Letter Urges 'Common Sense Reforms.'

A March 7 press statement posted on Goodlatte's website provides the text of the letter sent to the Virginia State Bar. The same letter, which calls for a response by March 21, went out to all 50 state bars and the District of Columbia bar, according to Goodlatte's press statement.

A similar letter went to the American Bar Association, with the same deadline. It asks the ABA to "amend the Model Rules of Professional Conduct to require common sense reforms" like the suggested warnings.

The ABA is looking into the issue raised in Goodlatte's letter and intends to respond before the March 21 due date, ABA staff told Bloomberg BNA. The ABA has partnered with the AMA on other issues and works closely with the House Judiciary Committee on a range of important issues, so the letter will be taken seriously, ABA staff said.

Goodlatte's letter doesn't indicate what steps might come next if the requested changes aren't put in place.

However, Judiciary Committee staff don't believe legislative action is needed at this time, an aide told Bloomberg

BNA.

In the past the ABA has strongly resisted efforts to regulate lawyers at the federal level. For example, the bar group battled against the Federal Trade Commission's ultimately unsuccessful effort to bring attorneys within the commission's "red flags" rule on identity theft prevention programs. 27 Law. Man. Prof. Conduct 169, 3/16/11.

Process Already in Place.

State bars are taking Goodlatte's letter seriously but probably won't rush to mandate the suggested warnings.

Potential concerns include questions about the need for and value of the warnings, as well as the risk of infringing lawyers' First Amendment commercial speech rights.

"We understand the concerns that are raised, but there is a process in place to address those types of concerns," Virginia State Bar president Michael W. Robinson said in an interview with Bloomberg BNA. He's a partner at Venable LLP in Tysons Corner, Va.

Goodlatte's letter to the Virginia state bar came just two weeks after the bar approved proposed amendments to the rules that govern lawyer advertising in the Old Dominion. "We'll be in the process very shortly of petitioning our supreme court to make those revisions," Robinson said.

Virginia's draft changes reflect updates developed by the Association of Professional Responsibility Lawyers, with some modifications.

APRL wants the ABA to eliminate most of its model rules on lawyer advertising, leaving a single rule against false or misleading statements along with a refurbished rule on solicitation of clients.

The ABA Standing Committee on Ethics and Professional Responsibility convened a public forum Feb. 3 to get feedback on APRL's draft changes. 33 Law. Man. Prof. Conduct 66, 2/8/17.

The Virginia state bar is the first bar to formally embrace the substance of APRL's suggested changes.

'False or Misleading' is Linchpin.

Robinson said the regulation of lawyer advertising, which is commercial speech under the First Amendment, really has to focus on whether the particular aspects of an advertisement are false and misleading. That's the linchpin for evaluating whether there has been improper conduct outside the bounds of the rules, he said.

Virginia's proposed advertising rule changes don't alter that analysis, but they put a new emphasis on the "false or misleading" standard as the polestar, he said.

Robinson said Virginia's draft rule revisions wouldn't really change the analysis of a request for the bar to impose specific disclaimers in particular advertising.

Those types of issues are so fact specific that the bar would tend to address them through a particular complaint rather than the more general approach of developing a new regulation that would have its own First Amendment issues, Robinson said.

AMA Pushes Back on Lawyer Ads.

The push for warnings in lawyers' pharmaceutical advertising comes from the American Medical Association, which in June 2016 adopted a resolution to advocate for requiring "appropriate and conspicuous warnings" in attorney advertisements that otherwise might cause patients to discontinue medically necessary drugs.

In a press statement after adopting the resolution, the AMA said TV viewers are inundated by ads warning about the dangers of pharmaceuticals. In the statement AMA board member Russell W.H. Kridel M.D. gave this explanation, which Goodlatte quoted in his March 7 letter:

"The onslaught of attorney ads has the potential to frighten patients and place fear between them and their doctor. By emphasizing side effects while ignoring the benefits or the fact that the medication is FDA approved, these ads jeopardize patient care. For many patients, stopping a prescribed medication is far more dangerous, and we need to be looking out for them."

In addition to the letters sent to state bars and the ABA, Goodlatte sent a letter to two groups that air attorney commercials on injuries from medications. One letter went to the Relion Group Legal Network, asking more than a dozen questions about its practices and what's being done with the information gathered from potential clients.

X Ante's fact sheet shows that Relion was one of the top sponsors of mass tort TV ads for drugs and medical devices in 2016.

A similar letter went to the Sentinel Group, another lead generator for mass tort claims.

X Ante tracked about 2,600 ads broadcast by the Sentinel Group in 2016 at an estimated cost of $168,000,

Silverstein told Bloomberg BNA.

Need for Changes Questioned.

The changes requested in Goodlatte's letter seem unnecessary, according to ethics lawyer Lynda C Shely of the Shely Firm P.C. in Scottsdale, Ariz. She's spearheading APRL's initiative to streamline lawyer advertising rules, but noted that she was speaking in a personal capacity and not on APRL's behalf.

"I would simply note that as APRL learned in surveying Bar regulators in all states (34 states responded), virtually *no complaints about advertising come from consumers*, Shely said in an email to Bloomberg BNA. "Only other lawyers complain about advertising."

"In 24 years of providing ethics advice to lawyers I have never once heard of a situation where a lawyer's advertisement was *known* to cause someone to stop taking a medication," Shely said.

Shely noted that under the existing ABA Model Rules (Rule 7.1) and the APRL proposal, lawyers cannot engage in "false or misleading" communications. Regarding the statements quoted in Goodlatte's letter, she said "I'm not sure that any of the quoted statements rise to the level of 'false or misleading.'"

Also, the disclaimer mandate being requested by Chairman Goodlatte already exists in Comment [3] to Model Rule 7.1, Shely said. She noted that the comment states, in part: "The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or mislead the public."

First Amendment Implications.

There are also First Amendment concerns.

"Forcing such controversial disclaimers on attorneys is a direct violation of the lawyers' First Amendment commercial speech rights, and serves no valid governmental purpose," Bruce E.H. Johnson said. He's a partner at Davis Wright Tremaine LLP, Seattle, and recognized for his expertise in First Amendment law.

Whether Rep. Goodlatte's proposal would be constitutional depends on whether it serves a legitimate government interest and on whether it's accurate, Allison Zieve said in an e-mail to Bloomberg BNA. Zieve is the director of Public Citizen's Litigation Group. Her practice includes public health and consumer safety issues, as well as First Amendment issues in the context of federal regulation.

The second part of the request—that is, requiring ads to say that medications are FDA-approved and prescribed for health benefits—seems misleading, Zieve said. Although prescription medications have been FDA-approved, many such medications are prescribed for uses that are *unapproved*—uses that the FDA has not evaluated and determined to be safe and effective and that may not have "health benefits," Zieve said.

This part of the proposal also goes beyond the AMA recommendation that Rep. Goodlatte cites as the basis for his letters, Zieve also noted.

Chamber Backs Proposals.

The Institute for Legal Reform at the U.S. Chamber of Commerce endorses Goodlatte's call for changes in lawyer advertising rules.

"The onslaught of ads by plaintiffs' attorneys pushing lawsuits against drugs and medical devices is a growing, dangerous problem, ILR executive vice president Harold Kim said in a statement provided to Bloomberg BNA.

"Millions of dollars are spent on these ads that can *literally* scare patients to death with minimal oversight," he said.

Kim said that according to a 2016 report, 30 people suffered serious medical problems because they stopped taking Xarelto without their doctors' approval after seeing a plaintiffs' lawyer drug advertisement—and two of those patients died.

"Chairman Goodlatte's request for reform is an important step towards protecting public health. We commend his effort and hope others in Congress take action," Kim said.

Bloomberg BNA contacted the American Association for Justice asking for the views of the plaintiffs' bar, but no comment was received by publication deadline.

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