

**EXAMINING ETHICAL RESPONSIBILITIES
REGARDING ATTORNEY ADVERTISING**

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIFTEENTH CONGRESS
FIRST SESSION

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ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

- Letters Submitted by the Honorable Steve King, Iowa, Chairman, Subcommittee on the Constitution and Civil Justice. This material is available at the Committee and can be accessed on the committee repository at:
<http://docs.house.gov/meetings/JU/JU10/20170623/106162/HHRG-115-JU10-20170623-SD004.pdf>
<http://docs.house.gov/meetings/JU/JU10/20170623/106162/HHRG-115-JU10-20170623-SD005.pdf>
- Statement submitted by the Honorable Steve King, Iowa, Chairman, Subcommittee on the Constitution and Civil Justice. This material is available at the Committee and can be accessed on the committee repository at:
<http://docs.house.gov/meetings/JU/JU10/20170623/106162/HHRG-115-JU10-MState-K000362-20170623.pdf>
- Statement Submitted by the Honorable Jamie Raskin, Maryland. This material is available at the Committee and can be accessed on the committee repository at:
<http://docs.house.gov/meetings/JU/JU10/20170623/106162/HHRG-115-JU10-20170623-SD003.pdf>

EXAMINING ETHICAL RESPONSIBILITIES REGARDING ATTORNEY ADVERTISING

FRIDAY, JUNE 23, 2017

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC

The subcommittee met, pursuant to call, at 9:36 a.m., in room 2141, Rayburn House Office Building, Hon. Steve King (chairman of the subcommittee) presiding.

Present: Representatives King, Goodlatte, DeSantis, Franks, Cohen, Conyers, Nadler, and Raskin.

Staff Present: John Coleman, Counsel; Jake Glancy, Clerk; James Park, Minority Chief Counsel; Matthew Morgan, Minority Professional Staff Member; and Veronica Eligan, Minority Professional Staff Member.

Mr. KING. The Subcommittee on the Constitution and Civil Justice will come to order. Without objection, the chair is authorized to declare a recess of the committee at any time.

We welcome everyone to today's hearing on "Examining Ethical Responsibilities Regarding Attorney Advertising." And I now recognize myself for an opening statement.

Today's hearing will examine the ethical responsibilities related to attorney advertising. I'd like to start off by showing an ad by the law firm Pulaski and Middleman, L.L.C. The ad will be projected on the screens to your side and to the front for the members.

Go ahead with the ad, please.

[Video shown.]

Mr. KING. Ladies and gentlemen on the committee, anyone who has watched television in recent years has likely seen this ad or one like it. They include a toll-free number, like 1-800-BAD-DRUG, visuals of an injury, and a list of the drug's side effects.

One bit of information that is not always included is a warning to patients about talking to their doctor before discontinuing use of the medication. Indeed, even if these ads do provide a warning, it is in tiny, low-contrast text at the bottom of the TV screen.

Studies show that these ads are reaching a broad audience. A recent survey conducted by Public Opinion Strategies, for example, states that nearly three-quarters of Americans say they have seen ads by law firms about pharmaceutical lawsuits in the last year. Three-quarters of Americans, that's well over 200 million people.

The same survey found that one in four people who see an actual trial lawyer ad regarding a medicine they currently take say they would immediately stop taking the medicine without consulting the doctor.

The American Medical Association reported a similar effect. According to a press release they issued last year, patients were more likely to discontinue use of prescribed FDA-approved pharmaceuticals after seeing television advertisements that, quote, “emphasize side effects while ignoring the benefits of the fact that the medication is FDA approved,” close quote.

Unfortunately, these ads are having terrible consequences. A study published in the Heart Rhythm Journal reported that patients who were prescribed the anticoagulant Xarelto and who discontinued taking it after viewing a negative attorney advertisement suffered serious injuries or have died. According to the author, 75 percent of the patients experienced a stroke. Two patients passed away, including a 45-year-old man.

These cases only account for those that have been reported to the Food and Drug Administration’s Adverse Event Reporting System for Xarelto. There may be many more cases that have gone unreported for this drug or many other drugs and medical devices that have also been the subject of negative attorney advertisements.

Today’s hearing is intended to examine the effects of these advertisements and to explore what can be done to prevent more loss of life. I want to thank all our witnesses today for their testimony, and I look forward to your perspectives on this issue.

The chair now recognizes the ranking member of the Subcommittee on the Constitution and Civil Justice, Mr. Cohen of Tennessee, for his opening statement.

Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair.

Like our hearing last week, today’s hearing presents a new topic for us, but it’s old wine in a new bottle. It’s another attack on trial lawyers, advocates that make our country different from others, as we have advocates to argue for us in court, and the beneficiaries of this attack on the plaintiffs’ bar are well-healed corporate interests that would benefit greatly and would prefer probably not to be attorneys at all unless they were defense side.

Unfortunately, the Constitution Subcommittee has dealt too much on enriching the rich and attacking the plaintiffs’ bar, rather than doing what we should be doing, respecting and advocating for the Constitution.

Just this week, nearly 200 Members of Congress filed a legal action, which we have to resort to do for this subcommittee and our full committee have not taken up any attacks on the Constitution, such as the Emoluments Clause, Article I, section 9: And no foreign power, no king, no prince, no foreign state, shall give a gift, emolument of any kind, to somebody serving under the United States without the consent of Congress.

And we know that the current President has taken hundreds of thousands of dollars from the Saudi Government at his hotel here, and in leases at Trump Tower from the Saudis and the Chinese, and gosh knows what else, and never asked for the consent of Congress.

John Kennedy was offered an honorary citizenship by his native land, or ancestors' native land, Ireland, and he asked counsel could he accept an honorary citizenship, was that an emolument. It was deemed so, and he didn't accept it. But there's the difference. And many Presidents over the years have asked for and then been turned down, and some even just small items. But, no, we're dealing with attacking the plaintiffs' bar once again.

And last week we had the majority complain about government regulation of business and businesses' ability to communicate with the public, somewhat robocall advocacy, if you can believe we'd have robocall advocacy, maybe one of the most hated forms of communication that has been created, because attorneys were finding illegalities by robo companies in calling, and calling, and calling, and pestering people, and bothering people. So we now look to reduce that more.

Make no mistake, this hearing may be framed as one of concern by healthcare professionals about the potentially harmful effects of attorney advertising on drug cases to the public, but in reality the aim is to protect companies from being held accountable for harmful drugs. It's consistent, though, with the healthcare bill that this majority has given the country, which is not a healthcare bill and which President Obama has correctly said is more about tax breaks for the rich and less about healthcare.

It's clear why some would want to impose greater restrictions on the ability of attorneys to communicate with the public about the availability of legal services. But they would face no obstacles in doing it. Ironically, the First Amendment, which we should be concerned about as the Constitution Committee, and we should be protecting the First Amendment. And advertising is constitutionally protected free speech.

Only when the advertising is false or misleading may it? Be prohibited, and only under limited circumstances may States impose regulations on otherwise truthful, non-misleading advertising.

So far, there's been little evidence to determinate that attorney drug injury advertisements are false or misleading under current law. Therefore, attempts to restrict or further regulate these advertisements is certainly constitutionally suspect at best.

The subcommittee is once again intruding on State sovereignty—often been the mantra of the majority side—in the name of so-called tort reform. Regulation of lawyers has traditionally fallen within the authority of State supreme courts or State bars or States in general.

Surely, the Federal legislature has better use of its time than to try to supplant State bar councils, ABA, on matters traditionally left to State administration or to attempt to intimidate them to do some of its bidding. But we have done that on—are doing that on gun laws, taking that away from the province of the States when it suits the political convenience of that side.

It is a bit rich to suggest that we should seek to limit attorney advertising in the name of protecting consumers and public health given the enormous amounts that drug companies spend to influence consumer choice. Lawyer drug injury advertisements serve the vital function of educating the public about the dangers of certain

medications and the availability of legal services for those who are injured.

Yet, I note that while \$114 million may have been spent on attorney drug injury advertising in the year ending in 2016, that pales—or fiscal year 2016—that pales in comparison to the estimated \$6.4 billion spent by drug companies on advertising in 2016 alone, 114 million by attorneys, 6.4 billion by drug companies.

That's the real threat to consumers, is drug advertising, getting people to want drugs and go to their doctors and say, like Huey Lewis and the News, I need a new drug.

We shouldn't try to manipulate patient choices about what medications they should be taking. Our broadcast, print, and online media are full of pharmaceutical ads that it's impossible to escape ads for medication that address everything from erectile dysfunction and a 4-hour problem, to constipation, at any hour of the day, even when children may be watching. Those are areas more important to be looked at and screened than drug advertising.

Decisions about whether someone should take a particular medication, including the balancing of risk and benefits of doing so, should be left to the patient in consultation with a healthcare professional. They should not be influenced by advertisements and the insatiable greed of drug companies telling you, when you're in the moment, use our drug.

Truthful and constitutionally protected lawyer advertising performs an important societal function in informing people injured by drugs of the availability of legal services and legal recourse. And where ads are actually false or misleading, State bars are already equipped to take disciplinary action. Congressmen and Congresswomen should just stay out of the way and protect the First Amendment.

I yield back the balance of my time.

Mr. KING. I thank the gentleman from Tennessee for his opening statement.

I now recognize the chairman of the full committee, Mr. Goodlatte of Virginia, for his opening statement.

Mr. Goodlatte.

Chairman GOODLATTE. Thank you, Mr. Chairman.

On March 7, 2017, this committee sent a series of letters regarding the topic of today's hearing to the American Bar Association, 51 State bars, including the District of Columbia, and two companies that aggregate plaintiffs for law firms. Based on the responses that we have received so far from State bars, it appears that there are few, if any, reported complaints of lawyer misconduct regarding these commercials.

The lack of complaints, however, does not diminish the fact that severe injury and death resulting from these commercials are being reported to the Food and Drug Administration.

I would like to read from a portion of a statement submitted for today's hearing from Dr. Frank Peacock of Houston, Texas, who reported one such case.

He states: "My patient, being 66 years old, female, with a history of high blood pressure and diabetes, has a 4.8 percent risk of having a stroke within the next year that would leave her debilitated, unable to speak, wearing diapers in a nursing home for the rest of

her markedly shortened life versus taking a pill every day with a risk of a fatal bleed from anticoagulation of 0.0009 per year.

“To summarize, this patient had a 4.8 annual stroke risk versus 0.0009 annual fatal bleeding risk. In medicine, we call this a no-brainer and pick the lower of the risks.

“So I went to the patient’s bedside to have what I thought would be a relatively straightforward conversation. Usually, this is a 5-minute exchange about what atrial fibrillation is and what would be the recommended treatment. I answer some of the questions, write a prescription, move on to the next patient. That is not how it went.

I went to the bedside and told my patient that her tests showed she had atrial fibrillation, but instead of her asking me the expected question of, ‘What is atrial fibrillation?’ She said: ‘I know.’

“So if she had atrial fibrillation, the obvious next question for me was, ‘What anticoagulant are you taking?’ She couldn’t answer me as she broke down in tears.

“When she could talk, she related a story that made me so angry that it motivated me to write this testimony today. Wednesday, 4 days before coming to my ER, she had felt tired, and weak, and had a fluttering feeling in her chest. She went to her physician, who did an electrocardiogram and diagnosed atrial fibrillation.

“He found the same results as I had, that a controlled heart rate in a patient with a very high risk of having a massive debilitating stroke. He spent 30 minutes teaching her about atrial fibrillation, the risks, the benefits, the treatment options, answered her questions, and then gave her a prescription for rivaroxaban and discharged her home.

“On Wednesday afternoon, my patient filled the prescription, went home, and took rivaroxaban. All was well until Thursday evening, which, while watching television, she saw the first 1-800-BAD-DRUG commercial that implied that rivaroxaban was a dangerous drug.

“Having already taken it as instructed, with dinner, she did not know what to do. She called her doctor but got an answering service. She called the lawyer firm who was glad to take her information but offered no advice. She did not sleep that night.

“Friday came and she again called her doctor, but he didn’t have an appointment available until the following week. She called the 1-800-BAD-DRUG ad number again but got no instructions. What to do? Petrified with fear, she did not take her anticoagulant that night.

“On Saturday morning, in my ER, I spent an hour talking with this patient. This was an extremely educated, intelligent woman who absolutely felt abused by our system, her physician of many years prescribing a drug to save her life, and lawyers coming into her house, by way of her television, to destroy the doctor-patient relationship, and prompt her to engage in behavior that could be fatal.

“My patient left my ER about midday. She took her rivaroxaban before she left. Nobody will know what would have happened had she waited to take her anticoagulant. Would she be dead from a massive stroke or in a nursing home at this very minute? What if

it had been a different patient that just listened to the TV and didn't come to my ER?"

Dr. Peacock's statement shows that these attorney advertisements are having a real-world impact. Not only do they create a barrier between doctors and patients, but they are endangering these patients' lives.

I want to thank our witnesses for appearing today, and I look forward to your testimony.

Mr. KING. I thank the chairman of the full committee for his opening statement.

And the chair now recognizes the full Judiciary Committee ranking member, Mr. Conyers of Michigan, for his opening statement.

Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Top of the morning, witnesses, for coming.

My colleagues, without doubt, most prescription drugs save lives. Yet, it's also a fact that some result in injury and death. Even properly prescribed medications cause, on average, almost 2 million hospitalizations every year. Worse yet, 128,000 people die from these medications annually, making prescription drugs the fourth-leading cause of death in the United States of America.

These statistics prove that many Americans are injured as a result of taking even Food and Drug Administration-approved medications. Accordingly, attorney advertisements that truthfully inform consumers of the danger of such medications, as well as the availability of legal services for those who have been injured by such drugs, perform invaluable educational function for our society.

Nevertheless, there are those who claim that these advertisements cause some consumers to stop taking their medications and argue that they must be more aggressively regulated. But before we take any such measures, we must keep a few points in mind.

To begin with, truthful and non-misleading attorney advertising is protected under the First Amendment in the Constitution. It's well-settled law that the Constitution protects commercial speech, including attorney advertising. Only where there is a substantial government interest may regulation on attorney advertising be upheld.

Those complaining about attorney drug advertisements done the contend that such advertisements are false or misleading under current law. In light of this, proposals to limit or restrict attorney advertising may be unconstitutional.

In addition, even if attorney drug injury advertisements could be considered false or misleading, there are already mechanisms to deal with the problem. Every single State has rules of professional conduct for lawyers that prohibit false or misleading advertising; and every State has a process by which consumers may complain about attorney conduct should they come across an offending advertisement.

Ultimately, the onus is on physicians and other medical professions to be proactive in advising their patients about both the benefits and risks of medications. That burden should not be shifted to attorney advertisements that truthfully highlight the risk of those medications.

And, finally, we must view this hearing in the context of other efforts to limit or even deny access to justice for those harmed by defective medical products.

I just must note the hypocrisy of seeking to restrict advertising in the name of promoting public health and patient safety when the House will consider medical malpractice legislation next week. That bill has unjustifiably brought legal protection to healthcare providers, including complete legal immunity for such providers in any product liability lawsuit concerning the provision of drugs or medical devices. Such protections for healthcare providers will deny injured patients the ability to be made whole.

Further regulation of attorney drug injury advertisements, combined with enactment of the medical malpractice bill, would mean that consumers could potentially be denied full information about their legal rights and access to legal services concerning defective medications on the front end, and then denied their day in court on the back end. Public health, consumer welfare, and the interests of justice would not be served by such an outcome.

So I welcome the witnesses and look forward to their testimony.

And I thank the chairman.

Mr. KING. I thank the ranking member from Michigan for his statement.

And, without objection, other members' opening statements will be made part of the record.

Before I introduce the witnesses, I ask unanimous consent to introduce into the record 13 documents that we've received from various groups and individuals interested in today's hearing. And without objection, so ordered.

[The information follows:]

Letters introduced by Mr. King of Iowa. This material is available at the Committee and can be accessed on the committee repository at:

<http://docs.house.gov/meetings/JU/JU10/20170623/106162/HHRG-115-JU10-20170623-SD004.pdf>

<http://docs.house.gov/meetings/JU/JU10/20170623/106162/HHRG-115-JU10-20170623-SD005.pdf>.

Mr. KING. And now I'd like to introduce the witnesses.

Our first witness is Dr. Ilana Kutinsky. She's the director of atrial fibrillation services at William Beaumont Hospital.

The second witness is Dr. Shawn H. Fleming. And Dr. Fleming is a vascular surgeon for Novant Health Vascular Specialists.

Our third witness is Linda Shely, who is a partner at the Shely Firm.

And our fourth witness is Elizabeth Tippet, an assistant professor at the University of Oregon School of Law.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask the witnesses to summarize their testimony in 5 minutes or less. And to help you stay within that time, there's a timing light in front of you. It turns to green when you start to speak. It turns to yellow at the end of 4 minutes. And in 60 seconds we'd ask you to wrap up your testimony in a cogent way, if you could possibly.

Before I recognize the witnesses, it is the tradition of the subcommittee that the witnesses be sworn in. So I'd ask if you'd please stand to be sworn in.

Raise your right hand.

Do you swear that the testimony that you're about to give before this committee is the truth, the whole truth, and nothing but the truth, so help you God?

Thank you. You may be seated.

Let the record reflect that all the witnesses have responded in the affirmative.

And I now recognize our first witness, Dr. Kutinsky.

Please proceed shortly after you turn on your microphone, please, Dr. Kutinsky.

Dr. KUTINSKY. Okay.

Mr. KING. You are recognized.

TESTIMONY OF DR. ILANA KUTINSKY MD, DIRECTOR OF ATRIAL FIBRILLATION SERVICES, WILLIAM BEAUMONT HOSPITAL TROY; DR. SHAWN H. FLEMING MD, VASCULAR SURGEON, NOVANT HEALTH VASCULAR SPECIALISTS; LYNDIA C. SHELY, PARTNER, THE SHELY FIRM; AND ELIZABETH TIPPETT, ASSISTANT PROFESSOR, UNIVERSITY OF OREGON SCHOOL OF LAW

TESTIMONY OF ILANA KUTINSKY

Dr. KUTINSKY. Chairman King, Ranking Member Cohen, and members of the subcommittee, my name is Dr. Ilana Kutinsky. I am a cardiac electrophysiologist who has practiced medicine for nearly 2 decades. My goal today is to explain why attorney advertising related to medical treatment should be required to represent a transparent, fair, and balanced view of medical issues and should contain a clear disclaimer that the ad is not presented by a medical professional.

I am here to offer the perspective of a concerned doctor. I was not paid to be here by a legal or political organization, and I will not receive a financial benefit of any kind.

The facts that I share with you do not come from a survey or a think tank. My testimony is based on the personal experience of a doctor who has witnessed the harm caused by careless and unregulated legal advertising. I have, unfortunately, watched my own patients refuse and discontinue medical treatments and prescriptions because they were frightened by legal advertising. This is a sad phenomenon that I see on a regular basis.

The misrepresentation of facts made in mass tort ads causes fear in patients and can lead to treatment noncompliance. Irresponsible attorney advertising undermines the patient-physician relationship and completely disregards evidence-based medical based practices and recommendations from the FDA.

To offer an idea of what I have seen, I will describe an incident involving an elderly patient of mine who was diagnosed with atrial fibrillation. I have many examples like this, but this is just one.

To reduce her likelihood of a stroke, I recommend that she begin a regimen of anticoagulation medicine, commonly referred to as a blood thinner. All medicines have side effects, and it's the job of the

physician to counsel patients about the side effects and why they are outweighed by the benefits of the medicine.

This particular elderly patient was resistant to anticoagulation because of the potential bleeding effects. But after several office visits involving long discussions and one-on-one education I built a strong enough relationship with the patient that she agreed and she understood that the risk of her stroke was high and that the benefit of treatment with an anticoagulation agent significantly outweighed her bleeding risk.

She agreed to take the medicine. She did not want to have a stroke and lose her independence. Then, 3 years later, she presented to the hospital with a massive stroke. I was confused, and I spoke with her family. I was concerned that my treatment failed her.

They informed me that 2 weeks prior to her admission she had received a flyer in the mail from an attorney warning her that her anticoagulant medicine could cause massive internal bleeding and death. She didn't want to die, so she stopped her medicine. She had planned to discuss her decision with me at her next appointment.

Unfortunately, by then, it was too late. She was unable to communicate with me when I saw her at the hospital and subsequently fell into a coma and died.

She was under my care for nearly 8 years. After finally convincing her to go on anticoagulation so she would be protected from a stroke, she stopped the medicine after receiving a flyer from a solicitous attorney, who likely has no medical background.

This is just one example of something that I experience on a constant basis. It may seem implausible that a person would disregard the sound advice of a trusted physician based on a faceless advertisement from a personal injury attorney, but it is true.

Atrial fibrillation is the most common arrhythmia in the United States. There are currently over 5 million Americans with atrial fibrillation, and by 2030 that number will be over 12 million.

I know that patients with atrial fibrillation have a high morbidity and mortality that is directly related to thromboembolism. Leading medical societies, as well as the FDA, recommended countering this risk by initiating therapy with anticoagulant. That is the standard of care.

As a physician, I understand and discuss this with my patients, that the anticoagulants hold some risk of bleeding, in reality a very low risk, but that those risks are substantially outweighed by the benefits of stroke prevention. I counsel patients to take these medicines based on decades of medical education and treatment of heart patients. And because lawyers are held in high esteem, they can eradicate sound medical advice with a single advertisement, despite no medical training.

Patients often do not recognize the solicitous nature of a tort ad. They do not consider the financial motive behind the message and assume that an attorney, a licensed professional, must have their best interest in mind. They are not confident. They are easily scared into discontinuing a medicine based on a well-crafted advertisement.

I am not a lawyer, so I am not here to argue whether regulation of lawyer advertising infringes on freedom of speech or whether ad-

vertising is sufficiently regulated by the State bar association. I can only communicate the actual events that I have witnessed on a regular basis involving real people who disregard sound, medical-based advice based on misleading legal advice—advertisements.

And while I'm not a lawyer, I do understand that all constitutional rights are subject to limits, including the right to freedom of speech. Certainly, freedom of speech does not allow anyone, including lawyers, to make a misrepresentation or false and misleading ads at the expense of the American public.

In closing, I ask the committee to consider the following key issues.

First, attorney advertisements are not currently required to present a fair and balanced view. They do not have a disclaimer stating that they have no medical background.

Second, because of this lack of balance, advertisements have the potential to scare patients into stopping important therapy. These advertisements undermine the physician-patient relationship, instilling unfounded doubt and mistrust.

And, finally, these advertisements undermine current evidence-based medical practice and standard of care. They are directly advertising against medications determined by the FDA to be safe and effective without any communication as to the risk of abruptly stopping these treatments.

I urge the committee to ensure that all attorney advertising related to medical treatments represent a fair and balanced view of the medical issues and hold a clear disclaimer that the ad is not presented by a medical professional.

I thank the committee for its attention to this critical issue and for allowing me the opportunity to share my experience.

Mr. KING. Thank you, Dr. Kutinsky.

And now the Chair will recognize Dr. Fleming for your testimony.

Dr. Fleming.

TESTIMONY OF SHAWN H. FLEMING

Dr. FLEMING. Chairman King, Ranking Member Cohen, and members of the subcommittee, I thank you for the opportunity to be here. It's an honor.

My name is Shawn Fleming. I have the privilege of practicing as a board certified vascular surgeon in Winston-Salem, North Carolina. As part of my duties within the scope of my practice, I'm often asked to determine the need for initiation of anticoagulation, as well as prescribing regimens and determining risk of anticoagulation around the time of surgery. I'm also required, on occasion, to perform emergency surgery for people who are bleeding to death and perform emergency surgery on people who have suffered clots in different areas.

During the course of my training, Warfarin has always been the standard oral anticoagulant that was used for many years. Although it is cheap, it is problematic in that it requires constant monitoring and dose adjustments.

The introduction of this newer class of anticoagulants several years ago certainly has simplified the management of patients at risk for blood clots. As with Warfarin, these newer medications do

carry a small risk of bleeding that must be weighed against the benefits they provide to the patient. This is not a new phenomenon, and it's one that all prescribers take into account when they're considering the risk-and-benefit analysis for each patient.

Several years ago I became aware of these legal advertisements targeting these medications specifically when I began noticing regular, frequent, and strong resistance from patients that were prescribed these medications. When I inquired about the source of their resistance, I was frequently told about the commercial and the fears they have of dying from the drug. Not since I began training in the year 2000 have I seen patients so regularly and frequently fear recommended treatment from a medical professional.

Since these commercials first appeared, I've spent countless time in the clinic trying to convince patients of their safety. Not long ago, I encountered a patient in my surgical practice who was simultaneously under the care of another physician in the healthcare system for an unrelated medical condition, a pulmonary embolus. This is a blood clot that goes to the lungs and is life threatening. You may recall CNN reporter David Bloom died of this condition while covering the war in Iraq.

I noted that he had been recently diagnosed with this problem and was asked to be placed on Xarelto. When reviewing his medications, he told me that he was not taking the medication, nor would he ever, because of a commercial he had seen on television. I did spend some time trying to convince him otherwise, but he refused. Several weeks later, we got a note that he had died of a recurrent pulmonary embolus.

While this is the only case that I have been directly involved in that has led to death, I certainly have spent countless hours, as I've told you, trying to convince patients to take their prescribed regimen.

It's my opinion that the tone and content of these advertisements imply a qualitative judgment about these medications that are just not true. When you say call 1-800-BAD-DRUG, that clearly implies it's a bad drug, which runs counter to current medical evidence and also to the FDA's recommendations.

These advertisements imply a false choice, where patients can either decide to not take this medicine and be just fine, or take the medicine and potentially spontaneously bleed to death.

That's actually not the case. If they don't take the medications, they could die, and are more likely to die, from a thrombotic event. But that is not ever mentioned in these commercials.

While I certainly don't presume to know the intention of the commercials, based on my direct interaction with numerous patients, I can testify with confidence that patients perceive these advertisements as medical advice, and they are often in direct contradiction to that of their physicians.

This leads to conflict in the doctor-patient relationship, not just as it pertains to this drug, but if they believe that I've prescribed them a drug that may kill them, then 6 months later when I need to give them a different drug, they're resistant. When I tell them that I need to put them to sleep and do surgery on them, they're resistant, because they no longer trust me.

Ironically, when compared to the historical standard oral anticoagulant, Warfarin, each of these new medications carry a significantly lower risk of bleeding, yet I have seen no commercials targeting the generic drug Warfarin.

It is unfortunate that patients are making these decisions based on advertisements that I believe are not held to the same standards as the medical profession. Multiple levels of oversight and review led to the availability of these anticoagulants, which ultimately have saved lives over the course of my career.

In my professional opinion, the positive benefit of anticoagulants is significant. My patients have benefited from these therapies and are alive today as a result of anticoagulation being part of their plan of care. As such, creators of these commercials should be held to the same standards as physicians and drug companies.

Again, I appreciate the opportunity to speak with you today. Thank you very much.

Mr. KING. Thank you, Dr. Fleming.

And the Chair now recognizes Ms. Shely for your testimony.

Ms. Shely.

TESTIMONY OF LYNDA C. SHELY

Ms. SHELY. Thank you, Mr. Chairman, Ranking Member Cohen, Ranking Member Conyers, and members of the subcommittee. Thank you for inviting me today to talk to you about lawyer advertising and regulation of lawyer advertising.

I'm speaking today in my individual capacity. I am not representing any organizations, even though I'm a member of three State bars: Arizona, the District of Columbia, and Pennsylvania. I'm also a member of the American Bar Association and the immediate past President of the Association of Professional Responsibility Lawyers.

For the past 24 years I have practiced exclusively in lawyer ethics, advising over 1,500 law firms around the country on legal ethics matters. I did want to note for the record, I don't advise any of the firms that we'll be discussing today regarding any of these commercials. So I have not been paid for any of my testimony. I am here on my own nickel.

In regulating lawyer advertising, I know many of you on the subcommittee are lawyers, but I thought it useful just to summarize what the current status is of the regulation of lawyer advertising nationally.

As you all know, lawyers are regulated, in most jurisdictions, by the highest court in each State. We're not self-regulated. We are regulated by the judiciary. And as Ranking Member Cohen indicated in his opening remarks, we are regulated by the Rules of Professional Conduct, and those rules prohibit false and misleading advertising by lawyers. Any communication by a lawyer is prohibited if it's false and misleading.

In fact, we are so highly regulated even my pens are regulated. I have to have my name and contact information on my pens, because that's considered a form of lawyer advertising.

So in the current system that we have of State regulation of lawyer advertising, what happens is if the State regulators, whether it be a bar association or a committee of the highest judicial court,

receives a complaint about a lawyer advertisement, they investigate. They determine whether there is actually something in the ad that is false and misleading.

So what they do when they receive that ad is investigate, and then the lawyer who is responsible for that advertisement may be disciplined. They could be disciplined for violating the rules of professional conduct if the ad is deemed to be false and misleading. That discipline may be changing the ad to add a disclaimer, if appropriate, to clarify the statements, or they could be reprimanded or even suspended if there's found to be a violation.

And as Representative Conyers mentioned in his opening remarks, and Ranking Member Cohen, the First Amendment protects those ads. And next week we actually celebrate the 40th anniversary of *Bates v. the State Bar of Arizona*, which was the seminal Supreme Court case that reminded everybody that commercial speech, including lawyer ads, is protected by the First Amendment.

So when that information is protected by the First Amendment, as has been indicated already in the opening remarks, you have limited restrictions on commercial speech. Not only is it protected by the First Amendment, but you also are aware—and I believe my remarks indicate—that the Federal Trade Commission over the years has sent letters to various State bar regulators on the general topic of lawyer advertising indicating that overly broad restrictions of factually accurate commercial speech actually is anti-competitive and may have the detrimental effect of increasing the prices charged to consumers.

I have to tell you that in the 24 years that I've been advising lawyers on legal ethics matters, including 10 years at the State bar of Arizona, as the director of ethics, I've never once heard a consumer complaining about an advertisement. Actually, I've not seen any doctors submit advertisements to the State bar complaining.

And you all know that everybody has standing to complain about a lawyer ad. It does not have to be somebody who's harmed. Anyone can submit to the State bar or your appropriate regulatory authority a concern about a lawyer ad so that State regulator can determine whether additional safeguards need to be put in place.

Now, all of this information is anecdotal. The Association of Professional Responsibility Lawyers conducted a survey in 2015, which I incorporate as part of my remarks, and that survey of all State bar regulators confirmed that of the 34 responding jurisdictions of State lawyer advertising regulators or State bar regulators, virtually all also confirmed consumers don't complain about being confused about lawyer advertising.

And this is not a fact that consumers don't know that they can complain, because consumers do complain, a lot, about other types of lawyer conduct. They're not hesitant to complain if they are concerned about the conduct. And I ask that this committee simply submit any ads that you are concerned about to the appropriate State regulators so that they can take appropriate action, because the current system does work in regulating against false and misleading advertising.

And I'm happy to answer any questions that the committee may have. Thank you.

Mr. KING. Thank you for your testimony, Ms. Shely.

And the Chair would now recognize Professor Tippett for her testimony.

Professor Tippett.

TESTIMONY OF ELIZABETH TIPPETT

Ms. TIPPETT. Thank you, Chairman King, thank you, Ranking Member Cohen and members of the subcommittee, for the opportunity to testify today. My name is Elizabeth Tippett, and I'm a faculty member at the University of Oregon School of Law. It's an honor to be here today.

I want to preface my comments by saying that I'm a member of the bar in New York and California and Oregon, and I have a great deal of respect for mass tort lawyers and the public interest that they serve.

At the same time, it's my strong belief that drug injury advertising is an important issue of public health and consumer protection.

I've shared in my written testimony the scientific evidence we have to date on how these ads might be affecting the way people make medical decisions. But, first, I wanted to share a personal story with you.

The reason I'm interested in these ads is because of a phone call I received from a family member several years ago, and the family member told me that they were canceling a surgery because of an attorney ad that they saw on television. It was a drug injury ad.

And I had to explain to the family member that it was from a lawyer, and this is a lawyer who's looking for clients, and that's why they had that ad.

And I asked, "Does your doctor think you should proceed with the surgery?"

And the family member said, "Yes."

And so I said, "Look, you know, at the end of the day, you're going to have to decide whether you're going to believe this lawyer over your own doctor."

And the family member ultimately proceeded with the surgery, but I wondered, you know, are there other families who are affected by these ads too? And as lawyers, are we upholding our responsibility to communicate this important information in the most responsible possible way.

I'm also married to a doctor who treats cancer patients, and I hear from his colleagues and other doctors in the community about how these ads affect their practice and their conversations with their patients. And when the American Medical Association issues a statement saying that these ads are important and we need to pay attention to them, we need to take that seriously. As lawyers, we need to take that seriously.

I want to be clear that it is not my position that drug injury advertisements are inherently bad. I think informed consumers are better than uninformed consumers. And when individuals are harmed by a drug, they have a right to seek counsel and to bring a claim against the drug companies.

But we cannot stick our heads in the sand and act as though these ads are the same as an ad for soap or for candy bars. They're important to the decisions of the people who see them, not just peo-

ple who are harmed by the drug, but also people who might be taking the drug or eligible to take the drug in the future. These advertisements almost always involve drugs that are still on the market.

One of my studies looked at the content of these ads. Many of these advertisements were transparent about the fact that they were from a lawyer and that they were trying to find people for a legal claim.

Some of them were not. Some of the ads look, essentially, like a dystopian public service announcement and had language like “consumer alert” and “medical alert” and “warning,” and then they described all the bad things that would happen to you if you took a drug. And sometimes from these ads it was difficult to tell that they were sponsored by a lawyer.

Here’s the strange thing that I don’t understand about these ads. If you have been harmed by a drug, you don’t need a warning. You have already been harmed. Why, then, do these drugs have such cautionary language about the dangers of the drug?

I actually spoke with an advertising attorney about this and asked why we see this language. And he explained to me that these ads only have a few seconds to capture consumers’ attention and they do what it takes to try and identify someone who has been harmed by a drug and who may not be able to connect their injury with a drug they may have taken in the past.

Essentially, what he was telling me is that the effect on people’s current medical decisions is a side effect of the advertising. The point of the advertising is to help harmed consumers, and it has a side effect on everybody else who is watching it. I think we need to take these behavioral side effects seriously, understand them better, in the same way that we take seriously the medical side effects of prescription drugs.

Now, as I explained in my testimony, the drug injury advertising market is complex because the entities that sponsor the advertising are different from the lawyers that litigate these claims. And my written testimony includes a number of suggestions on how we can make the advertising market more transparent and provide better guidance to advertisers on best practices.

And part of the solution may be to have an impartial rating system for advertisers so that the lawyers who are litigating these claims can vote with their dollars and choose their referrals from advertisers that are the most ethical.

As attorneys, we have the privilege and duty of self-regulation, and I don’t think we have taken that duty seriously enough. We need to invest more time and resources to understanding and addressing this problem.

Thank you for the opportunity to testify today. I would be happy to take any questions.

Mr. KING. Thank you, Professor Tippet.

I thank all the witnesses for your testimony, and we’ll now proceed with the questions from the members of the panel. And I’ll recognize myself for 5 minutes.

VOICE. We’re voting now.

Mr. KING. Yes, we are.

VOICE. Five minutes left to vote.

Mr. KING. I didn't see that. In that case, we will recess and come back to this hearing. I didn't see that. But we're voting on the floor. So this committee will now recess, and we'll return shortly after we conclude our votes.

[Recess.]

Mr. KING. The Subcommittee on the Constitution will come back to order and resume our business.

At this point, the chair would ask unanimous consent to introduce a document produced by Professor Benjamin Barton, "Do Judges Systematically Favor the Interests of the Legal Profession." Without objection, so ordered.

[The information follows:]

This material is available at the Committee and can be accessed on the committee repository at:

<http://docs.house.gov/meetings/JU/JU10/20170623/106162/HHRG-115-JU10-MState-K000362=20170623.pdf>.

<http://docs.house.gov/meetings/JU/JU10/20170623/106162/HHRG-115-JU10-MState-K000362-20170623.pdf>.

Mr. KING. And I now recognize myself for 5 minutes in questions, and let's see if I can pick myself up to where the thought process was as I finished hearing the excellent testimony of all of our witnesses.

And one of the things that came to mind for me when I'm listening to the discussion about the ads that are affecting people's decisions was the statement—I believe it was you, Dr. Kutinsky, if I can find my note—which was one single ad can eradicate professional advice.

And the frustration that was in your voice as well as in your words that you build a long-term doctor-patient relationship, and then that patient goes home, turns on the television, it's all erased, and they decide to make a decision that's directly against their best health interest because of an ad.

And does that change as the patients get older?

Dr. KUTINSKY. I was thinking about this, and I think as patients age they get more frightened in general. They're afraid of their health. And these are drugs that they didn't want to take to begin with. Nobody really wants to be on a blood thinner or any drugs, really. And so all they need is like maybe a little nudge in that direction, and it gives them almost like an excuse to stop taking their medicine.

But they're frightened and they don't know. And so, yeah, I think that one advertisement—I mean, this was one advertisement and I had known this lady for many—I mean, over 8 years when this happened.

Mr. KING. The older people are, the more pharmaceuticals they're likely to have prescribed to them, the higher their anxiety goes as a function of age. Maybe not as a function of the pharmaceuticals, but that's also possible, I would think.

Dr. KUTINSKY. Yeah. I think that they just—as they age, they get less confident in everything. They're on 10, 11 different medicines and they get confused. And they lack trust. They can be preyed on very easily.

Mr. KING. Do you ever watch political ads?

Dr. KUTINSKY. Yes.

Mr. KING. Do you ever think of a comparison between what you describe here and political ads?

Dr. KUTINSKY. Yes.

Mr. KING. And sometimes the destiny of America turns on something that might be a thread of truth and leave out a whole ocean of information that's necessary to evaluate.

Dr. KUTINSKY. Yeah. I mean, I think that if there is a fair look at an issue—so if the ads say, there is a 0.5 percent risk of massive bleeding, but there's a, you know, 70 percent benefit of preventing a stroke, I mean that's a fair ad, right? So if you bleed, you take that risk, that 0.5 percent risk.

And so when I describe it to a patient, that's what I do. That's what these ads should do. I'm not saying that there shouldn't be ads.

Mr. KING. If you prescribe the wrong drug, are you liable?

Dr. KUTINSKY. Of course.

Mr. KING. And then your medical malpractice, professional liability insurance is supposed to cover that. What's happened to your premiums in the last 10 years?

Dr. KUTINSKY. High. I mean, they're super high. They just continue to go up.

Mr. KING. They run in proportion with my health insurance premium, probably.

Dr. KUTINSKY. Probably, yes.

Mr. KING. That's what I would think.

So I wanted to ask Professor Tippett, as you seem to encompass a lot of the knowledge base necessary here to understand this, that if doctors are liable when they prescribe the wrong drug and then attorneys can advertise and spend potentially millions of dollars to put out a thread of truth and argue that it's under First Amendment protection, that the thread of truth that counteracts 99.9 percent of what's necessary, if doctors are liable, why aren't attorneys liable?

If the misinformation from attorneys brings about death or injury and doctors are paying for their professional errors, why aren't attorneys paying for theirs?

Ms. TIPPETT. So I guess—I don't know that I agree with the position that these ads only have a thread of truth. I think attorneys are pretty careful that their statements are factually accurate. It's just the context in which they present the information is misleading.

And that's my primary concern, is the context in which they provide this medical information.

Mr. KING. Well, sure. But if a doctor, in the context of recognizing there's a tiny little percent of a bad reaction to a drug, either prescribes a drug, understanding there's a tiny percentage of a bad reaction, or fails to prescribe a drug because of a tiny percentage of a negative reaction, that doctor is liable under their malpractice. So why is there a different standard for attorneys?

Ms. TIPPETT. So my understanding is attorneys might be liable under a common law tort claim, but I would be happy to provide you with a more complex answer on the record.

Mr. KING. I would appreciate you introducing a more complex answer on the record. I know this is a very complex issue.

And so I see that my time has expired. I'd yield back the balance. And I turn and recognize the smiling gentleman from Maryland, Mr. Raskin, for his questions.

Mr. RASKIN. Mr. Chairman, thank you very much.

And thank all of you for really excellent testimony.

Let's see. Ms. Shely, let me start with you, if I could. To what extent is the problem that we're talking about just a general cost of having the First Amendment at all? I mean, assume that you've got a drug where 1 percent of the people end up with some horrific side effect. Those people, they certainly have a right to go into an interview on the Oprah Winfrey show or to be on the news or take out an ad of their own, right? They still have the right of free speech to talk about the horrific effects on them, even if it's not giving people the complete context that a doctor would. Would you agree to that?

Ms. SHELY. Yes.

Mr. RASKIN. And is there anything we can do about that problem?

Ms. SHELY. Well, thank you for the question. And we do have a system to deal with this. We do have State regulators.

Mr. RASKIN. Okay, for lawyers now.

Ms. SHELY. For lawyers.

Mr. RASKIN. Because lawyers are part of a regulated profession.

Ms. SHELY. Correct.

Mr. RASKIN. And the Supreme Court has said that lawyers do have a First Amendment right to engage in freedom of speech, including commercial speech, but it cannot be false, deceptive, or misleading, right?

Ms. SHELY. Correct.

Mr. RASKIN. Do you know of any cases where lawyers have put out ads like this that focus just on the risks and prey on people's anxieties or fear and they have then been brought up on charges that they're engaged in false, deceptive, or misleading speech?

Ms. SHELY. I can't cite you to a specific instance, because, as my testimony indicated, I'm not aware of anybody complaining to—

Mr. RASKIN. How about, Professor Tippett, are you aware of cases like this, where there have actually been complaints to a State bar or a State supreme court?

Ms. TIPPETT. My research suggests that I could not find any evidence that any State bar has ever taken any action or this, nor has the FDA, nor has the FTC, and that is problematic, from my standpoint.

Mr. RASKIN. But have there been like consumer complaints or complaints from people who say they were engaged in the course of therapy, they see, you know, a putatively terrifying ad, then they cease treatment, then they end up being injured because they cease treatment, then they make a report to the Illinois State bar or the—

Ms. TIPPETT. I have not seen—I have not access to that information, but it seems extremely unlikely that a consumer would know to complain to the State bar when they see an advertisement like this that influences their medical decisions.

Mr. RASKIN. Okay. So the chairman made an interesting point about political ads. You know, I can run for office and I can say,

“I’m going to build a wall and I guarantee you 100 percent Mexico is going to pay for it.” And I win the election and Mexico doesn’t pay for it, and nobody has any cause of action against me. I’m not kicked out of office. Nobody can go for money damages or injunction or whatever.

To what extent is this just the cost of the First Amendment? The prescription drug companies are going to put ads out that emphasize the benefits of using the drug, and then in 100 miles an hour they will say, “And there’s 50 possible side effects that we hope you’re not going to hear in the next 3 seconds.” And then the lawyers, they focus on the risks in order to find, as you were suggesting, people who have already been injured by it.

Isn’t it just like with the political market, buyer beware? We expect people to make informed choices and to try to work it out themselves. I don’t know if either of you has a thought on that.

Ms. TIPPETT. I would be happy to answer that.

First of all, pharmaceutical advertising is heavily regulated by the FDA, heavily regulated. These attorney ads are not. They are only regulated by State bars, and in that vein not enforced at all.

And so the comparison between pharmaceutical ads and attorney ads I think is apt, and I think we should be as thoughtful and nuanced and data-driven about attorney ads as we are about Pharma ads.

Mr. RASKIN. I’m with you, but who is “we”? I mean traditionally—

Ms. TIPPETT. Attorneys. The State bar.

Mr. RASKIN. Traditionally, it’s been the State bars and the State supreme courts that regulate this problem. And as far as I can tell, there have been no complaints and nobody’s brought any cases. And, you know, I get my lawyer magazines and I see hundreds of cases of complaints against lawyers. Every week lawyers are being complained about for this or that, not calling their clients back, not giving them complete information. So I’m just amazed that there’s never been a case like this.

Ms. TIPPETT. So my understanding is that most consumer-related complaints are client-driven. And this is an unusual situation, because it’s not the clients who are injured. They’re not complaining about their lawyers stealing their fee.

And so because it’s these nonclients who are affected, that’s why I think there’s way fewer complaints than the public health or consumer protection might suggest there should be.

Mr. RASKIN. Okay.

Yes, if you want to comment.

Ms. SHELY. Let me just clarify one issue with respect to regulation of the lawyer advertising. I’m not aware of any cases involving any of these ads, but I believe that’s because people have not complained to the State bars about any of these ads. And all the information that we have from State regulators, and that includes many of the responses that Chairman Goodlatte received to his letter from State bars, they’re not receiving these complaints.

And consumers do complain about lawyers all the time. They don’t complain just about their lawyer; they complain about every lawyer. And they do complain about people that they just see in court. So it’s not—

Mr. RASKIN. Do they complain about advertising, about lawyer advertising?

Ms. SHELY. Consumers—

Mr. KING. The gentleman's time has expired. The witness will be able to answer the question.

Ms. SHELY. I'm sorry?

Mr. RASKIN. Mr. Chairman, forgive me. If I could just take 1 second to introduce into the record a letter of March 23, 2017, from the ABA in response to Chairman Goodlatte's questions from Linda Klein.

Mr. KING. Hearing no objection, so ordered.

[The information follows:]

Letter introduced by the Honorable Jamie Raskin of Maryland. This material is available at the Committee and can be accessed on the committee repository at:

<http://docs.house.gov/meetings/JU/JU10/20170623/106162/HHRG-115-JU10-20170623-SD003.pdf>

Mr. KING. The Chair would now recognize the gentleman from Michigan, Mr. Conyers, for his 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

I thank the witnesses.

Lynda Shely, would any of the attorney advertisements cited by the witnesses or members here today violate the American Bar Association's Model Rules, which, of course, prohibit false or misleading advertising, or any other similar State rule which you are familiar?

Ms. SHELY. Thank you for the question.

And just to clarify for the record, the American Bar Association Model Rules are exactly that. They don't regulate anybody. They are simply models that the States then craft their own State bar regulations after.

And not looking at every single ad, but at least at the ad that the chairman showed at the beginning of the hearing, if a lawyer's name and address are not present, that absolutely would violate ABA Model Rule 7.2(c). You must have a lawyer's name and address in all communications, again, including my pens. That's a communication about a lawyer. That is regulated by the Rules of Professional Conduct. And if that's not there, then that bar that would have jurisdiction over that lawyer could subject that lawyer to discipline.

Mr. CONYERS. Does that happen much?

Ms. SHELY. Bar associations will receive complaints about lawyer advertising, and virtually all of those complaints are from other lawyers. Consumers rarely ever complain about seeing something on TV or on a billboard or in a print ad. It's always other lawyers who complain.

When a bar association does receive a complaint, they will go through the Rules of Professional Conduct adopted in that jurisdiction, and they will either ask that the lawyer put something clarifying in the ad if they think that it's confusing or creates unjustified expectations, or they may even discipline that lawyer through a reprimand, censure, or suspension.

Mr. CONYERS. Let me ask you this about the constitutionality. The American Medical Association's recent resolution recommended

that attorney advertisements should be required to include a warning that patients should not discontinue their medications without first consulting their doctor. Do you think that's constitutional?

Ms. SHELY. An appropriate disclaimer in an ad, if the ad otherwise would create an unjustified expectation, may be appropriate, and that's going to be decided on a State-by-State basis.

Mr. CONYERS. Anybody else want to—yes, please.

Dr. KUTINSKY. I think there's a difference with these ads. Like so you said that people—that the patients aren't complaining, there haven't been any complaints. The patients don't actually know that the ads are false. That's part of the problem.

So if an ad states that a drug can cause massive internal bleeding and death, they don't—the patient doesn't know that's right or wrong. The patient doesn't go and get the medical literature and do a medical literature review. The physicians know that that's wrong. The physicians are angry about it. But the patient doesn't know that it's wrong. That's why it's misleading.

The Pharma ads, you still require a visit with your physician. You need a prescription. And so there's still a physician-patient relationship. So who cares what the Pharma ads say, you still need a prescription to get the drug. You still have to go through a physician.

The lawyer ads don't necessarily make you talk to your physician to stop your drug. They're just out there saying, this is a side effect, a big side effect, warning.

Mr. CONYERS. Anybody else want to chime in? Yes, sir.

Dr. FLEMING. Yes, sir. To the earlier point, I would say about the First Amendment, if I walk into a patient's room and give them bad advice and they have a bad outcome, I can't claim the First Amendment and my ability to say whatever I want as defense.

And it's my belief that these commercials enter into the territory of making medical—giving medical advice. And when you're giving medical advice, I believe you have to be held accountable for the outcomes, because I certainly am.

Mr. CONYERS. Very good.

Let me ask this question to Ms. Shely. Professor Tippet suggests that State bars consider more deregulation of attorney referral fees, clearly allowing advertisers to receive referral fees. What do you think of that?

Ms. SHELY. The ABA Model Rules require that if a lawyer whose advertising is not going to be the one taking the case, the referral has to be disclosed. So if an ad doesn't include that disclosure, if you want to run an advertisement for a bad drug but you're not actually the lawyer who's going to handle that case, you are supposed to disclose under the ABA Model Rules how you're referring that.

The referral fee is not the driving force there as much as you have to identify who is actually going to handle that case. So that would be the disclosure that would be appropriate for these ads.

Mr. CONYERS. Any other comments?

Thank you, Mr. Chairman. I yield back.

Mr. KING. I thank the ranking member from Michigan.

The chair now recognizes the gentleman from New York for his 5 minutes of questions.

Mr. NADLER. Thank you.

I have a couple of questions and comments.

First, let me just say, Dr. Fleming commented a moment ago, there is a much heavier burden for prior restraint than there is for punishment afterwards. In other words, it's a much heavier constitutional lift to say, "You may not say that," than there is for saying, "You shouldn't have said that and, therefore, we will penalize you because some bad outcome occurred." It's a bigger First Amendment problem to prohibit speech in advance.

Professor Tippett, you write in your testimony about the state of scientific literature regarding people—what we're talking about, regarding people stopping their medication because of an ad. And you say, "I am not aware of any large-scale observational research that establishes a causal link between drug injury advertising and patient decisions. It is possible that attorney advertising has no aggregate effect on whether consumers decide to discontinue a prescribed medication. Brian Chen and I conducted a study of Medicare prescription reimbursement data over a 1-year period and did not find any evidence that increased drug injury advertising volume was associated with a decrease in prescription rates."

You then go on to cite some other studies which are suggestive, but not at all dispositive.

You are here testifying, as are some fellow witnesses, that this is a serious problem that we should deal with, and yet you're saying that you're not aware of any large-scale observational research that establishes this causal link. Until we have such large-scale observational research, why should we act?

Ms. TIPPETT. Thank you for asking about that.

It's really hard to establish a causal link as a matter of observation. As a matter of science, it's really hard. And because the research is at such an early stage, I wouldn't be surprised that we haven't yet found a causal link. But that doesn't mean there isn't one. For example, Brian Chen, our study only involved 1 year.

Mr. NADLER. Hold on. I get that point. But we should act and limit these ads on the possibility that there's a causal link?

Ms. TIPPETT. Okay. So first of all, my recommendations, as you know from my written testimony, don't say we should limit the ads. But second, we do have other evidence. I mean, large observational studies are not the only way to prove things, through scientific experiments.

So we have evidence from the Federal adverse event database, admittedly sponsored by Janssen Pharmaceuticals, that found that 31 patients did base their medical decisions on the attorney advertising and 2 of them died. I mean, in my mind—

Mr. NADLER. Thirty-one out of how many?

Ms. TIPPETT. I don't know, because the Federal adverse event database is only looking at the people who reported adverse events. But, in my mind, if anybody is dying, we should be taking that seriously as a profession.

Mr. NADLER. And what is your recommendation?

Ms. TIPPETT. My recommendation is that we need to study this further so that we actually know which content is misleading, so that we can provide good advice to the advertisers, and then make possible—make more information available to the attorneys receiv-

ing the referral so they can choose ethical advertisers over unethical advertisers, and see if we can use informational and market-based forces to improve the quality of advertising overall. I don't think that's unreasonable.

Mr. NADLER. Okay. Let me ask you a different question.

As large or perhaps much larger than advertising that says, "If you've been injured by, you know, such and such a drug, call us, we may get you a fortune," is advertising that says, "If you have restless leg syndrome, which we just invented, call your doctor and tell him to prescribe whatchamacallit." Is that harmful? Should we regulate that?

Ms. TIPPETT. Are you asking me?

Mr. NADLER. Yes.

Ms. TIPPETT. I think that's an excellent question, and I would love to provide an answer on the record.

Mr. NADLER. Go ahead.

Ms. TIPPETT. In written—

Mr. NADLER. Oh.

Ms. TIPPETT [continuing]. In writing on the record, because I want to look into it. Because those ads are called disease mongering, and they occupy a special little pocket of regulation.

Mr. NADLER. Well, not necessarily disease mongering. Let's say it's not restless leg syndrome, it's some legitimate real disease, and they tell you, "Call your doctor and ask him to prescribe such and such a drug," which may or may not be—

Ms. TIPPETT. Oh, well, those ads are already regulated by the FDA, so I'm not as worried about them, because there's substantial oversight from the FDA.

Mr. NADLER. Ms. Shely, would you comment on that?

Ms. SHELY. Well, there's also substantial regulation of lawyer advertising. If people have a concern, they need to bring it to the State bars so that they can review the ads. Because the content in the ads varies so drastically, we don't have just one bright line rule that says, "Well, you can say this and you can't say this."

In addition to the First Amendment issues of prior restraints and limiting what restrictions we have on commercial speech, there are also significant anticompetitive effects to adding additional regulation. And you want consumers to be aware of what actual risks are.

And so the only thing that I would disagree with some of the testimony that the ads are false, I don't think they're false, because they're factually accurate. Whether they create an unjustified expectation is something that each State bar needs to look at. And whether an additional disclaimer in those ads will even help is questionable.

Mr. NADLER. My time has expired. I thank you.

Mr. KING. The gentleman returns his time.

This concludes today's hearing. I thank all the witnesses for attending and for your testimony.

All members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is now adjourned.

[Whereupon, at 11:37 a.m., the subcommittee was adjourned.]

