Alliance of Specialty Medicine

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Statement of the Alliance of Specialty Medicine

Before the House of Representatives Judiciary Committee
Subcommittee on the Constitution and Civil Justice

"Examining Ethical Responsibilities Regarding Attorney Advertising"

June 23, 2017

Chairman King, Vice Chairman DeSantis, Ranking Member Cohen, and members of the Subcommittee, the Alliance of Specialty Medicine (the "Alliance") thanks you for your focus on the issue of attorney advertising related to pharmaceutical, biological, and medical device products. The Alliance represents more than 100,000 specialty physicians who are deeply committed to improving access to specialty medical care through the advancement of sound health policy. We appreciate the opportunity to submit written testimony for the record.

Aggressive and misleading advertisements about pharmaceuticals and medical devices apparently have become a worthwhile investment for trial lawyers. For example, attorney advertisement spending on one specific pharmaceutical jumped to $1.2 million in July 2014. The number of ads related to that same pharmaceutical exceeded 1,800 by that same month.[1]

Many of these advertisements do not convey risk in a reasonable or balanced way, and they are typically silent as to the potential benefits that the drug or device may offer for serious medical conditions. As a result, patients may be unduly alarmed and may cease taking their needed medication: a 2016 article in *Heart Rhythm Case Reports* found that

[1] "The Clot Thickens: Lawyers Boost Spending to Solicit Xarelto Lawsuits" by Ed Silverman, *The Wall Street Journal* (Aug. 29, 2014).

"some patients are intimidated enough by the ongoing legal campaign to stop their anticoagulant, and thus suffer an adverse event."[2] The article analyzed a series of serious medical events related to 31 individuals reported to Medwatch. Specifically, 75% of these patients experienced a stroke or transient ischemic neurological event after stopping their medications as a result of an advertisement. An additional two patients suffered persistent residual paralysis, while two patients died after stopping the drug: one of a pulmonary embolism and one of a massive stroke.

These statistics illustrate that misleading attorney advertisements affect the practice of medicine. In addition to the immeasurable impact on patient safety, this issue is related to medical liability, as the person ultimately deemed liable for the patient's treatment is often the physician – even if the patient strays from the treatment plan the physician recommended. The irony is that these attorneys whose ads are alarming patients off their treatments will then gladly sue the physician for any resulting harm.

In reaction to reports of patients stopping their treatment as a result of alarming and unbalanced advertisements, the American Medical Association (AMA) adopted a policy in 2016 calling for conspicuous warnings against discontinuation of treatment without the advice of a physician:

> *Our AMA will advocate for a requirement that attorney advertising which may cause patients to discontinue medically necessary medications have appropriate and conspicuous warnings that patients should not discontinue medications without seeking the advice of their physician.*[3]

Unfortunately, the plaintiff bar's sensationalist advertising is not limited to pharmaceuticals but also exists for other medical treatments such as devices. While patients cannot as easily decide to simply stop using a device as they can a drug, these frightening advertisements have the same effect: they "place fear between [patients]

[2] "A Medwatch review of reported events in patients who discontinued rivaroxaban (XARELTO) therapy in response to legal advertising" by Paul Burton, MD, PhD, FACC and W. Frank Peacock, MD, FACEP, 2214-0271 © 2016 Heart Rhythm Society.
[3] AMA Res. 208, A-16.

and their doctor."[4] Some law firm materials not only scare patients related to the device – they frighten patients related to the actual surgery: "Sometimes a device-related injury, even death, can occur during an implant procedure. Sometimes it is not discovered until years later." This has the effect of undermining patients' trust in their surgeons.

Some of the advertising even impugns the Food and Drug Administration (FDA). One law firm site plainly states that device manufacturers "often sell these expensive devices to patients without proper testing, and even when they discover the devices do not work or cause injury."[5] Language such as this undermines the role of FDA as the guardian of the public health when it comes to assessing the safety and efficacy of devices. Indeed, some of these websites and ads even imply that the FDA is "in on it" – in other words, these materials tell patients that the governmental entity responsible for assessing drug and device safety and efficacy cannot be trusted. One website, for example, has as its headline: "Hernia Mesh Lawsuit 2017: Who is the FDA Protecting?"[6]

The lack of concern from the association charged with governing this behavior may indicate that federal legislation or regulation is needed and appropriate. In response to a recent letter from Chairman Goodlatte to the American Bar Association (ABA) expressing concern about the lack of self-regulation of these ads, the ABA reportedly stated that, "The issue raised by the AMA appears to be not the misleading nature of advertisements, but the harmful consequences to some members of the public who may misunderstand ads and decide on their own to discontinue a course of treatment."[7]

We hope that some of the examples cited herein make it clear that the sole purpose of these ads is to make the public believe that there is something inherently wrong or dangerous with the medical treatment at issue. To state that members of the public "may misunderstand" these ads when they are taking away the exact message that the

[4] Dr. Russell W.H. Kridel, AMA Board of Trustees.
[5] https://www.levinlaw.com/practice-areas/defective-medical-devices-other-products.
[6] https://hollislawfirm.com/case/hernia-mesh-lawsuit/.
[7] "ABA President Balks at Rep's Call for More Lawyer Ad Regs," Andrew Strickler, Law360 (March 24, 2017).

ads intend to convey is at best divorced from reality and at worst a classic case of blaming the patients. We urge the Committee to consider ways to ensure that patients receive the “full story” in the context of attorney advertising, just as pharmaceutical and device manufacturers are required by law to provide fair and balanced information in promoting their products.

Thank you for your time and attention to this important issue.

American Association of Neurological Surgeons
American College of Mohs Surgery
American College of Osteopathic Surgeons
American Gastroenterological Association
American Society for Dermatologic Surgery Association
American Society of Cataract and Refractive Surgery
American Society of Echocardiography
American Society of Plastic Surgeons
American Urological Association
Coalition of State Rheumatology Organizations
Congress of Neurological Surgeons
National Association of Spine Specialists