

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1357 w/CS Attorney Practices
SPONSOR(S): Simmons
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	19 Y, 0 N w/CS	Jaroslav	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

This bill first states a number of legislative findings, namely that, after careful study, the Legislature has determined that legal advertising that solicits business, or incites a person to file suit, destroys personal responsibility, fosters frivolous litigation, and demeans the practice of law. The findings further specify that, by creating these problems, such solicitation creates a crisis in the state's judicial system, fostering a compelling state interest in the regulation of attorney advertising set forth in the rest of the bill.

This bill provides that it is unlawful to advertise using any form of electronic or other media, in a manner that solicits legal business for a profit. It then defines "solicit" to mean entreating, requesting or inciting another to use the services of an attorney or law firm. However, the bill provides that this term specifically does not mean, include, or prohibit a statement in such advertisement of:

- the name of an attorney or law firm;
- the type of practice of such attorney or law firm;
- the right of an injured or aggrieved person to seek redress if such person's rights have been violated;
- a public service type announcement, so long as it does not entreat, request, or incite another to use the services of an attorney or law firm; or
- matters or information specifically permitted by the Florida Bar's rule relating to advertising.

This bill then specifies that all forms of electronic or other media advertising by attorneys or law firms not permitted by the solicitation of legal business statute is prohibited. This bill provides that a single instance of such advertising shall be the basis for a civil penalty of \$1000 for the first offense and \$10,000 for each subsequent offense, defining an offense as a single advertisement published in a single print publication or through a single electronic media outlet, regardless of the number of times or in how many issues it is republished in the same publication or through the same media outlet. This bill also provides that such unlawful attorney advertising may be the basis for an injunction based on a presumption that no legal remedy is sufficient. Under this bill, the Attorney General and the Florida Bar have standing to pursue these enforcement mechanisms.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1357a.ju.doc
DATE: March 19, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

Because this bill criminalizes currently legal activity, it could be described as diminishing individual freedom.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Current law provides that solicitation of legal business can be punished both as a first-degree misdemeanor and as a violation of an attorney's professional ethics.¹ Under Rule 4-7.4(a) of the Rules Regulating the Florida Bar:

The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of rule 4-7.6 [governing e-mail communications].

There is no analogous definition of the term "solicit" in s. 877.02, F.S., the statute making solicitation of legal business a second-degree misdemeanor and thus subject to criminal prosecution as well as professional discipline. That section provides, in pertinent part:

(1) It shall be unlawful for any person or her or his agent, employee or any person acting on her or his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal service, or to make it a business to solicit or procure such business, retainers or agreements; provided, however, that nothing herein shall prohibit or be applicable to banks, trust companies, lawyer reference services, legal aid associations, lay collection agencies, railroad companies, insurance companies and agencies, and real estate companies and agencies, in the conduct of their lawful businesses, and in connection therewith and incidental thereto forwarding legal matters to attorneys at law when such forwarding is authorized by the customers or clients of said businesses and is done pursuant to the canons of legal ethics as pronounced by the Supreme Court of Florida.

(2) It shall be unlawful for any person in the employ of or in any capacity attached to any hospital, sanitarium, police department, wrecker service or garage, prison or court, or for a person authorized to furnish bail bonds, investigators, photographers, insurance or public adjusters, to communicate directly or indirectly with any attorney or person acting on said attorney's behalf for the purpose of aiding, assisting or abetting such attorney in the solicitation

¹ See s. 877.02, F.S.; FLA. BAR R. 4-7.4(a). Of course, by making solicitation of legal business a crime, the statute applies to non-lawyers, while the Bar rule, by its own terms, does not.

of legal business or the procurement through solicitation of a retainer, written or oral, or any agreement authorizing the attorney to perform or render legal services.

The Florida Supreme Court has held that, despite leaving "solicitation" undefined, this statute is not unconstitutionally vague or overbroad.² Nor does it intrude on the court's exclusive authority under the state constitution to promulgate rules of procedure and to regulate the practice of law.³

Additionally, the Supreme Court of the United States has examined the area of attorney advertising fairly frequently in its First Amendment jurisprudence. The Court has held that attorneys may be prohibited from directly soliciting clients for pecuniary gain,⁴ although they may not be prohibited from volunteering to provide legal services free of charge.⁵ A state cannot impose a blanket prohibition on attorney advertisements,⁶ restrict attorneys from advertising the nature and price of their services or from advertising for particular types of cases,⁷ or prohibit targeted mailings directed at potential clients.⁸ It may, however, require a reasonable delay in such mailings following a tort or disaster.⁹

Proposed Changes

This bill amends s. 877.02, F.S., the statute criminalizing solicitation of legal business. This bill first states a number of legislative findings, namely that, after careful study, the Legislature has determined that legal advertising that solicits business, or incites a person to file suit, destroys personal responsibility, fosters frivolous litigation, and demeans the practice of law. The findings further specify that, by creating these problems, such solicitation creates a crisis in the state's judicial system, fostering a compelling state interest in the regulation of attorney advertising set forth in the rest of the bill.

This bill provides that it is unlawful to advertise using any form of electronic or other media, in a manner that solicits legal business for a profit. It then defines "solicit" to mean entreating, requesting or inciting another to use the services of an attorney or law firm. However, the bill provides that this term specifically does not mean, include, or prohibit a statement in such advertisement of:

- the name of an attorney or law firm;
- the type of practice of such attorney or law firm;
- the right of an injured or aggrieved person to seek redress if such person's rights have been violated;
- a public service type announcement, so long as it does not entreat, request, or incite another to use the services of an attorney or law firm; or
- those matters expressly permitted by Rule 4-7.2(c)(11) of the Rules Regulating the Florida Bar.¹⁰

This bill then specifies that all forms of electronic or other media advertising by attorneys or law firms not permitted by s. 877.02, F.S., the solicitation of legal business statute, is prohibited. This bill provides that a single instance of such advertising shall be the basis for a civil penalty of \$1000 for the first offense and \$10,000 for each subsequent offense, defining an offense as a single advertisement published in a single print publication or through a single electronic media outlet, regardless of the number of times or in how many issues it is republished in the same publication or through the same

² See *Carricarte v. State*, 384 So.2d 1261 (Fla. 1980); *State ex rel. Farber v. Williams*, 183 So.2d 537 (Fla. 1966).

³ See *Pace v. State*, 368 So.2d 340 (Fla. 1979) (citing Art. V, ss. 2 and 15, Fla. Const.).

⁴ See *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978).

⁵ See *In re Primus*, 436 U.S. 412 (1978).

⁶ See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

⁷ See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

⁸ See *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988).

⁹ See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding the 30-day delay of FLA. BAR R. 4-7.4(b)(1)(A)).

¹⁰ This rule provides a number of matters which may be included in advertising and presumed not to be solicitous.

media outlet. This bill also provides that such unlawful attorney advertising may be the basis for an injunction based on a presumption that no legal remedy is sufficient. Under this bill, the Attorney General and the Florida Bar have standing to pursue these enforcement mechanisms.

C. SECTION DIRECTORY:

Section 1. Amends s. 877.02, F.S., providing legislative findings, defining "solicitation" of legal business and prohibiting attorney advertising except as provided.

Section 2. Provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Since this bill creates new criminal offenses, it is possible that it could impose additional prosecution costs on the state attorneys and require additional judicial resources. The fiscal impact, if any, is uncertain.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Since this bill creates new criminal offenses, it is possible that it could impose additional costs on local law enforcement. The fiscal impact, if any, is unknown.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

It is possible that this bill could reduce income to media outlets and producers of advertising. The economic impact, if any, is uncertain.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

Regulation of Commercial Speech

Both the First Amendment to the Constitution of the United States and Article I, Section 4 of the Florida Constitution protect freedom of speech.¹¹ Florida courts, and federal courts applying Florida law, have interpreted the state constitutional provision to accord with the protections of the First Amendment: i.e., the state constitution guarantees no more protection than does the federal constitution, and Florida regards federal case law interpreting the First Amendment's protection of free speech as authoritative with respect to its own free-speech provision.¹² It is possible that this bill may raise concerns under these provisions.

The Supreme Court of the United States has held that the First Amendment protects commercial speech.¹³ However, the Court has also recognized that there is a "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.¹⁴ Therefore, while commercial speech is protected to an extent, regulation of commercial speech is subject to a lower standard of judicial scrutiny than is regulation of other forms of speech.¹⁵

The basic framework for analyzing any regulation of commercial speech was laid out by the Court in *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*.¹⁶ Under *Central Hudson*, government may ban commercial speech that is deliberately misleading or relates to unlawful activity,¹⁷ but if the speech does neither of these things, the regulation in question must meet a three-prong test:

- a. the government must have a substantial interest in restricting the speech;
- b. the regulation must directly advance the asserted interest; and
- c. the regulation must be narrowly tailored to serving the asserted interest.¹⁸

In 2001, the Florida Supreme Court had the opportunity to apply *Central Hudson* to a statute similar to the one amended by this bill, namely the prohibition on unlawful insurance solicitation provided in s. 817.234(8), F.S. In *State v. Bradford*,¹⁹ a licensed chiropractor was convicted of insurance solicitation, and contended that the statutory prohibition was an unconstitutional restriction of commercial speech. The court agreed, finding that although the state's interest in preventing insurance fraud was substantial enough to meet the first prong of the *Central Hudson* test, the fact that intent to defraud was not an element of the crime made the statute fall fatally short of either of the other two prongs.²⁰

Thus, it is possible that, applying *Bradford*, a court could find that some or all of this bill's provisions do not meet the *Central Hudson* test and are thus unconstitutional restrictions on commercial

¹¹ The Free Speech Clause of the First Amendment applies to the states through incorporation in the Due Process Clause of the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652 (1925).

¹² See, e.g., *University Books and Videos, Inc. v. Metropolitan Dade County*, 78 F.Supp.2d 1327 (S.D. Fla. 1999); *Cafe Erotica v. Department of Transportation*, 830 So.2d 181 (Fla. 1st DCA 2002); *State v. Globe Communications Corp.*, 622 So.2d 1066 (Fla. 4th DCA 1993); *Florida Cannery Assn. v. Department of Citrus*, 371 So.2d 503 (Fla. 2d DCA 1979).

¹³ See *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

¹⁴ *Ohralik* at 455-56 (1978).

¹⁵ See *id.*

¹⁶ 447 U.S. 557 (1980).

¹⁷ This part of commercial-speech doctrine predates *Central Hudson*. See, e.g., *Friedman v. Rogers*, 440 U.S. 1 (1979) (false or misleading advertising); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376 (1973) (speech promoting an unlawful transaction).

¹⁸ See *id.* See also *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989).

¹⁹ 787 So.2d 811 (Fla. 2001).

²⁰ See *id.* at 821-27. The court also found that, even if the statute met the second prong, it would not meet the third.

speech. It is also possible, however, that the broader interests asserted in this bill's legislative findings could make it distinguishable from the statute at issue in *Bradford*, thus requiring more sweeping regulation that could be regarded as narrowly-tailored for lack of any more narrowly-tailored alternative that would actually remedy the asserted problems.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The exemption of a "public service type announcement" from this bill's definition of "solicit" may be redundant, since such an announcement, as qualified in the exception, would not fit under the definition anyway.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

This bill, as originally drafted, would have made unlawfully solicitous attorney advertising a first-degree misdemeanor, just as is any other violation of s. 877.02, F.S.

On March 18, 2004, the House Committee on Judiciary adopted one strike-all amendment to this bill. This amendment provides that a single instance of prohibited shall be the basis for a civil penalty of \$1000 for the first offense and \$10,000 for each subsequent offense, defining an offense as a single advertisement published in a single print publication or through a single electronic media outlet, regardless of the number of times or in how many issues it is republished in the same publication or through the same media outlet. This amendment provides that such unlawful attorney advertising may be the basis for an injunction based on a presumption that no legal remedy is sufficient. Under this amendment, the Attorney General and the Florida Bar have standing to pursue these enforcement mechanisms.

The Committee then reported this bill favorably with a committee substitute.

This analysis is drafted to the bill as amended.