

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1237 Legal and Medical Referral Service Advertising

SPONSOR(S): Civil Justice Subcommittee; Kriseman and others

TIED BILLS: None **IDEN./SIM. BILLS:** SB 1918

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Billmeier	Bond
2) Business & Consumer Affairs Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Currently, advertising by lawyers is regulated by rules created by the Florida Supreme Court. Entities that may refer cases to lawyers for a fee are not subject to the same advertising restrictions. This bill creates restrictions on advertising by lawyer referral services and medical referral services in motor vehicle accident cases. This bill creates a prohibition on false, misleading, or deceptive communication. It defines false, misleading, or deceptive communications in a manner similar to the current rules that apply to lawyer advertisements. This bill requires that an advertisement by or on behalf of a lawyer referral service relating to motor vehicle accidents contain a statement explaining that the advertisement is for a lawyer referral service that is receiving a fee from attorneys for referrals.

This bill requires that advertisements for legal services related to motor vehicle accidents distributed by a lawyer referral service must comply with the Rules Regulating the Florida Bar. This bill requires lawyer referral services to submit advertisements to the Florida Bar. Attorneys are already required by Bar rule to submit advertisements to the Florida Bar for approval prior to publication.

This bill requires that a lawyer referral service or medical referral service disclose its financial relationship with any lawyers or health care providers to the persons it refers to such lawyers or health care providers. This bill prohibits a lawyer referral service from requiring a participating lawyer to recommend the services of a particular health care provider or other professional as a condition of participation in the referral service. This bill provides that a medical referral service may not make referrals only to a medical clinic or health care provider with which the medical referral service has a financial or ownership interest.

This bill requires that a person that violates the provisions of the bill to forfeit any money received as a result of an advertisement that violates the provisions of the bill. In addition, a person that violates the provisions of the bill is subject to a civil penalty of \$1,000 for the first offense and \$5,000 for each subsequent offense.

This bill creates a civil cause of action for violations of the provision of the bill. It allows a person to file a complaint with the Department of Agriculture and Consumer Services. If the department does not initiate legal proceedings within 90 days, the person who filed the complaint may seek to enforce penalties. A person who files an action may recover attorney's fees and costs, penalties, and may recover 25 percent of all moneys paid as a civil penalty. Further, any person injured by a violation of this bill may bring an action for recovery of damages. A judgment in favor of the person shall be for actual damages, and the losing party is liable for the person's reasonable attorney's fees and costs. This bill provides for misdemeanor criminal penalties for some violations.

This bill appears to have an indeterminate fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

The Florida Bar is the entity that regulates lawyers in Florida. The Florida Bar was created by the Florida Supreme Court to govern the regulation of attorneys.¹ The court has promulgated a set of rules, called the Rules Regulating the Florida Bar, to regulate attorneys. The rules include rules and procedures relating to advertising by attorneys. The rules set forth permissible forms of advertising by lawyers,² required content of advertisements, permissible content of advertisements,³ and require evaluation of advertisement by the Florida Bar staff for compliance with the rules.⁴

Lawyer referral services are defined by Florida Bar rules as:

Any person, group of persons, association, organization, or entity that receives any consideration, monetary or otherwise, given in exchange for referring or causing the direct or indirect referral of a potential client to a lawyer selected from a specific group or panel of lawyers; or

Any group or pooled advertising program operated by any person, group of persons, association, organization, or entity wherein the legal services advertisements utilize a common telephone number and potential clients are then referred only to lawyers or law firms participating in the group or pooled advertising program.⁵

A pro bono referral program is not a lawyer referral service for purposes of the rule.⁶ Some lawyer referral services refer potential clients to lawyers for fee. Others do not involve a fee and may be operated by local bar associations or legal aid organizations.

Rule 4-7.2(c), Rules Regulating the Florida Bar, provides that a lawyer may not make a false, misleading, or deceptive communication about the lawyer or the lawyer's services. The rule provides that a communication or advertisement violates the rule if it:

- Contains a material misrepresentation of fact or law;
- Is false or misleading;
- Fails to disclose material information necessary to prevent the information supplied from being false or misleading;
- Is unsubstantiated in fact;
- Is deceptive;
- Contains any reference to past successes or results obtained;
- Promises results;
- States or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;
- Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or
- Contains a testimonial.

¹ http://www.floridasupremecourt.org/pub_info/system2.shtml

² See Rule 4-7.1, Rules Regulating the Florida Bar.

³ See Rules 4.7.2(a) and (b), Rules Regulating the Florida Bar.

⁴ See Rule 4-7.7, Rules Regulating the Florida Bar.

⁵ Rule 4-7.10(c), Rules Regulating the Florida Bar.

⁶ Rule 4-7.10(c), Rules Regulating the Florida Bar.

Rule 4-7.10(a)(1), Rules Regulating the Florida Bar, requires lawyers not to accept referrals from a lawyer referral services unless the service "engages in no communication with the public... in a manner that would violate the Rules of Professional Conduct."

The Rules Regulating the Florida Bar apply to lawyers but do not apply to lawyer referral services.

Effect of this Bill

The Florida Bar rules provide restrictions on lawyer advertising. This bill imposes similar restrictions on lawyer referral and medical referral services.

This bill contains "whereas" clauses to demonstrate why the bill is necessary. This bill includes legislative findings that:

- There have been numerous complaints concerning misleading and deceptive advertisements directed to motor vehicle accident victims by lawyer and medical referral services;
- It is important for the public to have an absolute trust in public safety officers and officials it is in the best interest and welfare of the state that the image, representation, and likeness of public safety officers and officials not be used in a deceptive and misleading manner;
- The public has been misled and deceived by health care provider clinics and entities claiming to be medical referral services and lawyer referral services that advertise using catchy slogan without disclosing that they represent a specific law firm or health care provider; and
- The Rules Regulating The Florida Bar concerning lawyer advertisements are for the express purpose of protecting the public from misleading or deceptive advertising by lawyers so it is necessary to adopt a broader approach to the protection of the public from false and deceptive advertising to motor vehicle accident victims.

This bill provides that it is cumulative and does not amend or repeal any other valid law, code, ordinance, rule, or penalty.

Definitions

This bill creates new sections of law to regulate advertising by lawyer referral services and medical referral services. The bill defines "lawyer referral service" as:

Any group or pooled advertising program operated by any person, group of persons, association, organization, or entity whose legal services advertisements use a common telephone number, a uniform resource locator (URL), or other form of contact and whose clients or prospective clients are referred only to lawyers or law firms participating in the group or pooled advertising program.

This definition is substantially similar to the definition for lawyer referral service contained in Rule 4-7.10(c), Rules Regulating the Florida Bar. Certain not-for-profit lawyer referral programs, lawyer referral programs operated by voluntary bar associations, and lawyer referral programs recognized by the Florida Bar are exempt from the requirements of this bill.

This bill provides a similar definition for "medical referral service" as:

Any group or pooled advertising program operated by any person, group of persons, association, organization, or entity whose legal and medical services advertisements use a common telephone number, a uniform resource locator (URL), or other form of contact and whose patients or prospective patients are referred only to medical clinics or health care providers participating in the group or pooled advertising program.

Advertising Rules for Lawyer Referral Services and Medical Referral Services

This bill requires that all advertising on behalf of a medical or lawyer referral service relating to injuries from a motor vehicle accident must, if the advertisement includes any reference to a person as a health care provider, lawyer, or law firm, disclose the counties in which the health care provider, lawyer, or law firm has a bona fide office from which services will be provided.

This bill provides that each advertisement cannot include any false, misleading, or deceptive communication. A communication violates the provisions of this bill if it:

- Contains a material misrepresentation of fact;
- Fails to disclose material information necessary to prevent the information supplied from being false or misleading;
- Claims facts that cannot be substantiated;
- Contains any reference to past results obtained that would deceive the public into having unjustified expectations. This bill requires a disclaimer that "results will vary depending on the specific facts" for any reference to past results and requires that the disclaimer be communicated in the same manner as any reference to past results;
- Contains a reference to monetary amounts that create unjustified expectations when there is no factual basis to suggest such monetary amounts to the general public;
- Promises or suggests a specific result that cannot be guaranteed;
- Contains any testimonial by an actor, unless such testimonial includes a disclaimer, communicated in the same manner as the testimonial, that the testimonial is not a true story and the person providing the testimonial is an actor and not a real person;
- Contains any testimonial by a real person, unless such person actually obtained the services of the person or entity advertising the services, and the testimonial is completely truthful and verifiable, and includes the disclaimer that "results may vary depending on the specific facts." The disclaimer must be communicated in the same manner as the real person testimonial; and
- Contains any verbal or visual reference to any connection between any person in public safety, or purporting to be in public safety. This prohibition includes the use of any public safety badge, emblem, uniform, hat, vehicle, or any replica of any such item. An exception to this prohibition is when the person in charge of a public safety entity gives express written consent to the use of the reference to such agency in the advertisement or communication.⁷

These restrictions are similar to restrictions contained in the Rules Regulating the Florida Bar relating to lawyer advertising.

A person who violates these provisions commits an unfair or deceptive trade practice as defined in part II of chapter 501, F.S.

Advertisements Must Comply with Supreme Court Rules

This bill requires that an advertisement or unsolicited written communication for legal services related to motor vehicle accidents distributed by or on behalf of any lawyer referral service must comply with the Supreme Court of Florida's Rules Regulating The Florida Bar pertaining to lawyer referral and advertising services as if those services were provided by members of The Florida Bar. This bill provides an exception for lawyer referral services operated by a voluntary bar association or legal aid program recognized by The Florida Bar.

Certain Advertisements Must be Submitted to the Florida Bar

This bill requires that each advertisement by or on behalf of a lawyer referral service related to motor vehicle accidents be filed with The Florida Bar, accompanied by an affidavit signed under oath by the

⁷ Restrictions on advertising are sometimes challenged as a violation of the First Amendment. See III.A.2. Constitutional Issues in this analysis

owner, shareholder, principal, or officer of the referral service affirming under penalty of perjury that the person:

- Has read and understands the Supreme Court of Florida's Rules Regulating The Florida Bar, which pertain to lawyer referral and advertising services;
- Acknowledges that he or she is the person responsible for the advertisement and for the adverse consequences of any prohibited advertising, including those within this act;
- Affirms that the advertisement complies with the Supreme Court of Florida's Rules Regulating The Florida Bar, which govern lawyer advertising; and
- Acknowledges that a knowing violation of the Supreme Court Florida's Rules Regulating The Florida Bar, which govern lawyer advertising, subjects the person to potential criminal penalties and to a civil penalty of \$1,000 for the first offense and a civil penalty of \$5,000 for each subsequent offense.

The person must also affirm that he or she:

- Has filed the advertisement for review with The Florida Bar in compliance with the Supreme Court of Florida's Rules Regulating The Florida Bar, which govern lawyer advertising;
- Is responsible for filing and will file the advertisement for review with The Florida Bar in compliance with the Supreme Court of Florida's Rules Regulating The Florida Bar, which govern lawyer advertising; or
- Has determined that the advertisement is exempt from the filing requirement as set forth in the Supreme Court of Florida's Rules Regulating The Florida Bar, which govern lawyer advertising.

The affidavit must be submitted to The Florida Bar and maintained by the referral services for 2 years.

Additional Required Notices in Advertisements

This bill requires that an advertisement or unsolicited written communication by or on behalf of a lawyer referral service relating to motor vehicle accidents must contain the statement: "This advertisement is by a lawyer referral service. Lawyers may pay this service for referrals of prospective clients who respond to this advertisement. This lawyer referral service is not licensed to provide legal services in Florida."

Additional Requirements on Lawyer and Medical Referral Services

This bill requires that if a person that advertises the service of referring motor vehicle accident victims to a health care provider or lawyer refers a person to a health care provider or lawyer, the referring person must provide the person referred with a written disclosure that states any financial interest or financial relationship that the referring person has with the health care provider or lawyer.

This bill prohibits a lawyer referral service from requiring a participating lawyer to recommend the services of a particular health care provider or other professional as a condition of participation in the referral service.

This bill requires that a medical referral service may not make referrals only to a medical clinic or health care provider with which the medical referral service has any financial or ownership interest.

Civil and Criminal Penalties for Violations

This bill requires that a person who violates the provisions of the bill forfeits any money received as a result of an advertisement that violates the provisions of the bill. In addition, a person who violates the provisions of the bill is subject to a civil penalty of \$1,000 for the first offense and \$5,000 for each subsequent offense.

This bill creates a civil cause of action. A person who claims a violation may file a complaint with the Department of Agriculture and Consumer Services. If the department fails to initiate legal proceedings

within 90 days after receiving the complaint, the person who filed the complaint may seek to enforce penalties and may seek an injunction. A person who files an action may recover attorney's fees and costs, penalties, and may recover 25 percent of all moneys paid as a civil penalty as a result of such person's action. This bill provides that each prohibited advertisement is a separate offense. Further, any person injured by a violation of this bill may bring an action for recovery of damages. A judgment in favor of the person shall be for actual damages, and the losing party is liable for the person's reasonable attorney's fees and costs.

The bill also provides criminal penalties. The first violation of the provisions of the bill is a civil offense. Any subsequent knowing violation is second degree misdemeanor. A second degree misdemeanor is punishable by up to 60 days in jail and a fine of \$500.⁸

Effective Date

This bill is effective July 1, 2011.

B. SECTION DIRECTORY:

Section 1 creates definitions relating to lawyer referral services, medical referral services, and electronic media.

Section 2 provides restrictions on advertising related to motor vehicle accidents by medical and lawyer referral services.

Section 3 provides that advertising for legal services relating to motor vehicle accidents by lawyer referral services must comply with Supreme Court rules.

Section 4 provides that advertisements for lawyer referral services relating to motor vehicle accidents must be submitted to the Florida Bar.

Section 5 provides requirements for advertisements for lawyer referral services related to motor vehicle accidents.

Section 6 requires certain disclosures in advertisements relating to motor vehicle accidents by lawyer referral services or medical referral services.

Section 7 provides restrictions on referrals made by lawyer referral services.

Section 8 provides restrictions on referrals made by medical referral services.

Section 9 provides for civil penalties for violations of the provisions of the bill.

Section 10 provides for criminal penalties for violations of the provisions of the bill.

Section 11 provides that provisions of the bill are cumulative to other law.

Section 12 provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Indeterminate. See "Fiscal Comments."

⁸ See ss. 775.082, 775.083, F.S.

2. Expenditures:
None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
None.
2. Expenditures:
None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This bill imposes new requirements on advertising by lawyer referral services and medical referral services. The fiscal impact of these new requirements is not known.

This bill imposes civil and criminal penalties on offenders. Civil penalties will result in state revenues while criminal penalties will result in local government costs for jailing offenders. It is unknown how many persons would violate the provisions of this bill. It is anticipated that the revenues and expenditures of this bill would not be significant.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:
Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Freedom of Speech

The First Amendment of the United States Constitution, as applied to the states, limits the power of government to restrict speech. Article I, s. 4, Fla. Const., provides similar restrictions in the state constitution.

This bill provides for restrictions on advertising by lawyer referral services and medical referral services. If this bill is challenged, the court must determine whether the advertising at issue is protected by the free speech provisions and, if so, what level of scrutiny to apply. In case challenging restrictions on lawyer advertising, the United States Supreme Court explained:

Mindful of these concerns, we engage in “intermediate” scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the

restriction on commercial speech directly and materially advances that interest; and third, the regulation must be "narrowly drawn."⁹

This bill completely prohibits "false, misleading, or deceptive" communications. Such speech is not protected by the First Amendment.¹⁰

Other restrictions in this bill must be analyzed by a court in light of the specific restriction. This bill restricts advertising which claims facts that cannot be substantiated.¹¹ This bill restricts references to "past successes" that could deceive the public or lead to unjustified expectations and restricts advertising that suggests a result that cannot be guaranteed.¹² Some provisions of this bill require disclaimers noting, for example, that an actor in an advertisement is an actor and not a real client or requiring a disclosure that results obtained may vary depending on specific facts. Courts have looked at disclaimer requirements and noted that requirements of disclaimers could be effective at prevent deception.¹³ However, one court held a disclaimer requirement invalid because the requirement would "effectively rule out" the use of short television or radio advertisements.¹⁴

While courts have analyzed lawyer advertising provisions, the cases are fact-specific. In general, a court would apply the tests of *Central Hudson* and *Florida Bar* in determining whether these restrictions violated the First Amendment.

Commerce Clause

This bill potentially imposes regulations on lawyer referral and medical referral services that are not located in Florida. The Commerce Clause of the United States Constitution limits the ability of states to regulate commerce between the states. The United States Supreme Court describes the Commerce Clause as follows:

The Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills. It is in this light that we have interpreted the negative implication of the Commerce Clause.¹⁵

The Commerce Clause allows Congress to regulate commerce between the states. Dormant commerce clause analysis is a part of Commerce Clause analysis. The dormant commerce clause is the theory that, where Congress has not acted to regulate or deregulate a specific form of commerce between the states, it is presumed that Congress would prohibit unreasonable restrictions upon that form of interstate commerce.

Dormant Commerce Clause doctrine distinguishes between state regulations that "affirmatively discriminate" against interstate commerce and evenhanded regulations that "burden interstate transactions only incidentally."¹⁶ Regulations that "clearly discriminate against interstate commerce [are] virtually invalid per se,"¹⁷ while those that incidentally burden interstate commerce will be struck

⁹ *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623-624 (1995)(internal citations edited or omitted).

¹⁰ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

¹¹ See *Alexander v. Cahill*, 598 F.3d 79, 89 (2d Cir. 2010)(holding that speech that is "irrelevant, unverifiable, and non-informational" is not inherently false, deceptive, or misleading).

¹² See *Alexander v. Cahill*, 598 F.3d 79, 92 (2d. Cir. 2010)(noting that disclaimers may be used to prevent potential clients from believing that past successes will indicate future results).

¹³ See e.g. *Alexander v. Cahill*, 598 F.3d 79, 96 (2d. Cir. 2010)(invalidating an advertising restriction but noting that the state could have required disclaimers and nothing indicated that disclaimers would be ineffective).

¹⁴ *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212, 229 (2d Cir. 2010).

¹⁵ *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (internal citations omitted).

¹⁶ *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

¹⁷ *National Electric Manufacturers Association v. Sorrell*, 272 F.3d 104, 108 (2d Cir.2001),

down only if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."¹⁸

State regulations may burden interstate commerce "when a statute (i) shifts the costs of regulation onto other states, permitting in-state lawmakers to avoid the costs of their political decisions, (ii) has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction, or (iii) alters the interstate flow of the goods in question, as distinct from the impact on companies trading in those goods."¹⁹

If this bill were challenged as a violation of the Commerce Clause, the courts would have to consider whether any restrictions imposed by the bill are reasonable.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

The Civil Justice Subcommittee considered this bill on March 23, 2011, and adopted two amendments. The amendments require that the owner of a lawyer referral service acknowledge that violations of the bill may subject the owner to criminal penalties and provide that after a finding of violation by a court, subsequent violations may result in criminal penalties. This analysis reflects the committee substitute.

¹⁸ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁹ *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208-09 (2d Cir.2003) (citations omitted).