

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1483 Solicitation of Non-medical Services

**SPONSOR(S):** Yarborough

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1992

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice & Public Safety Subcommittee	18 Y, 0 N	Padgett	Hall
2) Professions & Public Health Subcommittee	16 Y, 2 N	Guzzo	McElroy
3) Judiciary Committee			

### SUMMARY ANALYSIS

In 2019, the Federal Trade Commission (FTC) noted that the Food and Drug Administration's Adverse Event Reporting System contained reports of consumers who had viewed advertisements by law firms and personal injury lead generating companies about the prescription drugs they were taking. Multiple consumers reported discontinuing taking such medications and suffering adverse consequences as a result. The FTC warned that advertisements that cause, or are likely to cause, viewers to discontinue prescription medications may constitute an unfair act or practice under Federal law.

HB 1483 prohibits as a deceptive and unfair trade practice a solicitation for a non-medical professional service from containing certain terminology and requires an advertisement to contain specified disclaimers. Specifically, the bill prohibits a person who submits or approves for submittal a non-medical solicitation for professional services for publication, broadcast, or dissemination, or who pays for or otherwise sponsors such solicitation for professional services from:

- Failing to clearly disclose the nature of the message as a paid advertisement for non-medical services at the outset of the advertisement.
- Failing to disclose the sponsor of the advertisement.
- Including terminology implying that the advertisement is a "medical alert," "health alert," "consumer alert," "public service announcement," or similar public alert or announcement.
- Displaying a federal or state government agency logo in a manner that implies affiliation with that agency.
- Implying that a product has been recalled when the product has not been recalled.
- Failing to clearly and conspicuously disclose the individual or entity that will provide professional services to a person responding to the advertisement or how such person will be otherwise referred.
- Failing to clearly warn a person taking a prescribed medication or using a medical device to not stop taking the medication or using the medical device without consulting his or her doctor.
- Failing to clearly disclose that a drug or medical device referenced in the advertisement remains approved by the Food and Drug Administration, unless the product is recalled or withdrawn.

A disclosure required under the bill must be presented in a manner that makes it plainly legible or audible and presented for sufficient time that it allows the viewer to read or discern the disclosure. The Department of Legal Affairs or a state attorney may bring an action to enjoin any person who commits a violation, or may bring an action on behalf of one or more consumers or governmental entities for actual damages caused by a violation.

The bill creates a first degree misdemeanor prohibiting a person from willfully or knowingly using, obtaining, selling, transferring, or disclosing another person's protected health information to solicit non-medical professional services without such person's written authorization. A person who violates the prohibition for financial gain commits a second degree felony.

The bill may have a positive indeterminate jail bed and prison bed impact due to the creation of new felony and misdemeanor offenses.

The effective date for advertising restrictions for a non-medical solicitation is July 1, 2021. The effective date for the prohibition against the solicitation of professional services by unauthorized use of PHI is October 1, 2021.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Drug Injury Advertising

In 2017, the U.S. Chamber Institute for Legal Reform (ILR) surveyed 1,335 adults, 500 of whom were currently taking or had taken one of 12 prescription drugs frequently targeted by personal injury lawyers, and asked how they would respond if they saw an advertisement about a lawsuit for injury caused by a medication they were taking.<sup>1</sup> Nearly half of the survey respondents said they would definitely or probably stop taking the drug immediately after seeing the advertisement.<sup>2</sup> When shown an actual television legal advertisement about a drug they had taken, more than half said they would reduce the dosage to below the prescribed amount.<sup>3</sup>

A 2018 survey found that 90 percent of jurors would be somewhat or very concerned if they saw an advertisement claiming that a company's product injured people.<sup>4</sup> Additionally, 72 percent of jurors agreed that if a lawsuit alleges a company's product has injured people, then there is probably truth to the claim.<sup>5</sup>

In 2019, the Federal Trade Commission (FTC) contacted seven law firms and lead generating companies expressing concern that some television advertisements that solicit clients for personal injury lawsuits against drug manufacturers may be considered deceptive or unfair under federal law.<sup>6</sup> The FTC also noted that the Food and Drug Administration's (FDA) Adverse Event Reporting System contained reports of consumers who had viewed advertisements about the prescription drugs they were taking, discontinued those medications, and suffered adverse consequences.<sup>7</sup> The FTC warned that advertisements that cause, or are likely to cause, viewers to discontinue their medications may constitute an unfair act or practice and recommended such advertisements include clear and prominent audio and visual disclosures stating that a consumer should not stop taking medication without first consulting a doctor.<sup>8</sup>

##### Legal Advertising

Until 1977, most states prohibited attorney advertising.<sup>9</sup> In *Bates v. State Bar of Arizona*, however, the U.S. Supreme Court held that commercial speech is protected by the First Amendment and cannot be prohibited.<sup>10</sup> The Supreme Court has distinguished advertising that is false, deceptive, or misleading, which may be prohibited. Moreover, non-misleading commercial speech may be regulated when:

- There is a substantial government interest;
- The regulation directly advances the government's interest; and
- The regulation is narrowly tailored.<sup>11</sup>

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<sup>1</sup> U.S. Chamber Institute for Legal Reform, *Bad for Your Health: Lawsuit Advertising Implications and Solutions* (Oct. 2017), [https://www.instituteforlegalreform.com/uploads/sites/1/TLA\\_Advertising-Paper-WEB.pdf](https://www.instituteforlegalreform.com/uploads/sites/1/TLA_Advertising-Paper-WEB.pdf) (last visited Mar. 20, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> American Tort Reform Association, Local Legal Services Advertising (Jan. 2020), <http://www.atra.org/wp-content/uploads/2020/01/ATRA-Q3-Legal-Services-Ad-Report-FL.pdf> (last visited Mar. 16, 2021).

<sup>5</sup> *Id.*

<sup>6</sup> Federal Trade Commission, *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits* (Sept. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/ftc-flags-potentially-unlawful-tv-ads-prescription-drug-lawsuits> (last visited Mar. 20, 2021).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> JD Supra, *Remember When Lawyers Couldn't Advertise?* (Oct. 26, 2018), <https://www.jdsupra.com/legalnews/remember-when-lawyers-couldn-t-advertise-11628/> (last visited Mar. 20, 2021).

<sup>10</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

<sup>11</sup> *Central Hudson Gas & Elec. v. Public Service Commission*, 447 U.S. 557 (1980).

The U.S. Supreme Court has also recognized that states not only have an interest in protecting their citizens from misleading advertisements, but state bars also have an interest in protecting their image as a profession and the public's perception of the judicial system.<sup>12</sup>

### *Legal Advertisement Regulation*

The Florida Bar is an extension of the Florida Supreme Court and approves lawyer advertising, issues advisory opinions interpreting the Bar rules, and investigates and prosecutes attorneys for alleged violations.<sup>13</sup> Florida's legal advertising rules apply to all forms of communication soliciting legal services in any print or electronic form, including but not limited to newspapers, magazines, brochures, flyers, television, radio, direct mail, electronic mail, and Internet, including banners, pop-ups, websites, social media, and video sharing platforms.<sup>14</sup> Advertisements in specified media must be submitted to the Legal Division of the Florida Bar at least 20 days prior to dissemination, including print, television, radio, direct mail, and Internet.<sup>15</sup>

The Legal Division reviews an advertisement to determine whether it complies with the Florida Bar's advertising rules. The Legal Division issues an opinion either approving or disapproving the advertisement. The Disciplinary Counsel of the Florida Bar investigates and prosecutes attorneys for alleged violations of the Bar's advertising rules.<sup>16</sup>

Florida Bar rules require legal advertising to include:

- The name of the lawyer or law firm;<sup>17</sup>
- The location of the law practice;<sup>18</sup> and
- Certain disclosures when relevant, including whether:
  - A case will be referred to another lawyer;<sup>19</sup>
  - A spokesperson in the advertisement is not an employee or member of the law firm;<sup>20</sup> or
  - A scene depicted is a dramatization and not an actual event.<sup>21</sup>

Such required information must be reasonably prominent and clearly legible if written and clearly audible if spoken aloud.<sup>22</sup>

### Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) prohibits unfair methods of competition, and unconscionable, unfair or deceptive acts or practices in the conduct of any trade or commerce.<sup>23,24</sup> FDUTPA operates for the purposes of:<sup>25</sup>

- Simplifying, clarifying, and modernizing the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices;
- Protecting the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce; and

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<sup>12</sup> *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995).

<sup>13</sup> The Florida Bar, *Frequently Asked Questions About the Florida Bar*, <https://www.floridabar.org/about/faq/> (last visited Mar. 20, 2021).

<sup>14</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.11(a).

<sup>15</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.11.

<sup>16</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.19.

<sup>17</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.12(a)(1).

<sup>18</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.12(a)(2).

<sup>19</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.12(b).

<sup>20</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.13(b)(5).

<sup>21</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.13(b)(6).

<sup>22</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.12(d).

<sup>23</sup> The term "trade or commerce" is defined as "advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. The term includes the conduct of any trade or commerce including any nonprofit or not-for-profit person or activity. S. 501.203(8), F.S.

<sup>24</sup> S. 501.204(1), F.S.

<sup>25</sup> S. 501.202, F.S.

- Making state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.

FDUTPA provides investigative and enforcement authority to a state attorney if a violation occurs in or affects the judicial circuit under the office's jurisdiction, and to the Department of Legal Affairs (DLA) if a violation occurs in or affects more than one judicial circuit, or if a state attorney defers to DLA.<sup>26</sup> An enforcing authority may, within four years after a violation occurs or within two years after the last payment in a transaction involved in a violation, bring an action:

- To obtain a declaratory judgment that an act or practice violates FDUTPA;
- To enjoin any person who has violated, is violating, or is otherwise likely to violate FDUTPA; or
- On behalf of one or more consumers or governmental entities for the actual damages caused by an act or practice in violation of FDUTPA.<sup>27</sup>

Additionally, an enforcing authority may collect a civil penalty of up to \$10,000 per violation plus reasonable attorney fees and costs for a willful violation and up to a \$15,000 penalty plus reasonable attorney fees and costs for a willful violation involving a senior citizen, a disabled person, a military servicemember, or the spouse or dependent child of a military servicemember.<sup>28</sup> DLA may also issue a cease and desist order if such order would be in the interest of the public.<sup>29</sup>

FDUTPA authorizes a private cause of action for any person aggrieved by a violation of FDUTPA to:

- Obtain a declaratory judgement that an act or practice violates FDUTPA;
- Enjoin a person who has violated, is violating, or is otherwise likely to violate this part; and
- Recover actual damages plus reasonable attorney fees and costs.<sup>30</sup>

### The Health Insurance Portability and Accountability Act

The Federal Health Insurance Portability and Accountability Act (HIPAA), protects personal health information (PHI).<sup>31</sup> The U.S. Department of Health and Human Services privacy rules establish national standards to protect medical records and other PHI.<sup>32</sup> The rules address, among other things, the use and disclosure of a person's PHI. Only "covered entities" are subject to HIPAA's provisions, including:

- Health plans;
- Health care providers;
- Health care clearinghouses; and
- Business associates of any of the above.<sup>33</sup>

HIPAA requires the disclosure of a person's PHI to the person who is the subject of the PHI information or his or her personal representative, upon his or her request.<sup>34</sup> The punishment for a HIPAA violation can either be a civil or criminal penalty. A civil penalty varies based on the severity of the violation, the number of people affected, the nature of the data exposed, the length of time a violation was allowed to persist, the prior compliance history of the covered entity, and the knowledge the covered entity had of the violation.<sup>35</sup> Criminal penalties for a HIPAA violation are triggered when a person obtains PHI for

<sup>26</sup> Ss. 501.203(2), 501.206, and 501.207, F.S.

<sup>27</sup> S. 501.207(1) and (5), F.S.

<sup>28</sup> Ss. 501.2075, 501.2077, and 501.2105, F.S.

<sup>29</sup> S. 501.208(1), F.S.

<sup>30</sup> Ss. 501.2105 and 501.211, F.S.

<sup>31</sup> Protected health information includes all individually identifiable health information held or transmitted by a covered entity or its business associate. Pub. L. No. 104-191 (1996).

<sup>32</sup> U.S. Department of Health and Human Services, *Health Information Privacy*, <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html> (last visited Mar. 20, 2021).

<sup>33</sup> U.S. Department of Health and Human Services, Office for Civil Rights, *Summary of the HIPAA Privacy Rule*, (last rev. May 2003), <https://www.hhs.gov/sites/default/files/privacysummary.pdf> (last visited Mar. 20, 2021).

<sup>34</sup> *Id.*

<sup>35</sup> HIPAA Journal, *What are the penalties for HIPAA Violations?*, <https://www.hipaajournal.com/what-are-the-penalties-for-hipaa-violations-7096/> (last visited Mar. 20, 2021).

financial gain or under false pretenses.<sup>36</sup> The criminal penalty for such HIPAA violations are punishable by up to 10 years imprisonment.<sup>37</sup>

## Effect of Proposed Changes

HB 1483 prohibits a person who submits or approves the submittal of a non-medical solicitation for professional services which contains information about a drug or device,<sup>38</sup> for publication, broadcast, or dissemination, or who pays for or otherwise sponsors such non-medical solicitation from:

- Failing to clearly disclose, "This is a paid advertisement for non-medical services," at the outset of the advertisement.
- Including terminology implying that the advertisement is a "medical alert," "health alert," "consumer alert," "public service announcement," or similar public alert or announcement.
- Displaying a federal or state government agency logo in a manner that implies affiliation with such an agency.
- Including terminology that implies a product has been recalled when the product has not been recalled.
- Failing to clearly disclose the sponsor of the advertisement.
- Failing to clearly and conspicuously disclose the individual or entity that will provide professional services to a person who responds to the advertisement.
- Failing to clearly disclose that the drug or medical device remains approved by the Food and Drug Administration, unless the product has actually been recalled or withdrawn.
- If the advertisement solicits clients who may allege injury from a prescription drug, failing to clearly disclose the following warning:
  - "Do not stop taking a prescribed medication without first consulting your doctor. Discontinuing a prescribed medication without your doctor's advice can result in injury or death."

A disclosure required by the bill must be clearly legible, if written, and, if displayed electronically, displayed for sufficient time to enable the viewer to easily see and fully read the disclosure. A spoken disclosure must be plainly audible and clearly intelligible.

The bill defines "non-medical solicitation" as a paid solicitation for non-medical professional services which contains information about a drug or device as defined in s. 499.003, F.S., and which is directed to the public through television; radio; the Internet, including a domain name; a newspaper or other periodical; an outdoor advertising sign; or another written, electronic, or recorded communication.

Under the bill, a violation constitutes a deceptive and unfair trade practice. DLA or a state attorney may bring an action:

- To obtain a declaratory judgment that the non-medical solicitation violates FDUTPA;
- To enjoin any person who has violated these provisions from continuing to disseminate the non-medical solicitation; or
- For actual damages caused by a violation on behalf of consumers.

The bill creates a first degree misdemeanor offense prohibiting a person from willfully or knowingly using, obtaining, selling, transferring, or disclosing another person's PHI to solicit non-medical professional services without such person's written authorization. A person who violates the prohibition commits a deceptive and unfair trade practice subject to penalties and remedies under ch. 501, part II and:

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> The bill defines "device" in accordance with s. 499.003, F.S., as any instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including its components, parts, or accessories, which is:

- (a) Recognized in the current edition of the United States Pharmacopoeia and National Formulary, or any supplement thereof,
- (b) Intended for use in the diagnosis, cure, mitigation, treatment, therapy, or prevention of disease in humans or other animals, or
- (c) Intended to affect the structure or any function of the body of humans or other animals,

and that does not achieve any of its principal intended purposes through chemical action within or on the body of humans or other animals and which is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

- A first degree misdemeanor for a willful and knowing violation.<sup>39</sup>
- A second degree felony for a willful and knowing violation with the intent to sell, transfer, or use PHI for financial gain,<sup>40</sup> except the term of imprisonment may not exceed 10 years and the fine may exceed \$10,000 but may not exceed \$250,000.

The provisions of the bill relating to advertising regulations for a non-medical solicitation are effective July 1, 2021. The provisions of the bill prohibiting the solicitation of professional services by the use, sale, transfer, or disclosure of PHI without a person's written authorization are effective October 1, 2021.

**B. SECTION DIRECTORY:**

**Section 1:** Creates s. 501.2106, F.S., related to non-medical solicitation; deceptive and unfair trade practices.

**Section 2:** Creates s. 877.025, F.S., related to solicitation of non-medical services; wrongful use or disclosure of protected health information.

**Section 3:** Provides an effective date of July 1, 2021, unless otherwise provided in the bill.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate prison bed impact due to the creation of a new felony offense.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate jail bed impact due to the creation of a new misdemeanor offense.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

<sup>39</sup> A first degree misdemeanor, punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

<sup>40</sup> A second degree felony is punishable by up to 15 years imprisonment, and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

Although commercial speech enjoys protection under the First Amendment, courts have held that it is subject to greater restrictions than noncommercial speech.<sup>41</sup> As such, false or misleading advertising and other forms of fraudulent commercial speech are not protected under the First Amendment, and can be restricted by the government.<sup>42</sup> The restrictions on the solicitation of non-medical services in the bill are narrowly tailored to address a specific category of professional services on the limited subjects of drugs and medical devices. Furthermore, each advertising prohibition is a statement or omission that is intended to mislead a member of the public into believing the advertisement has been disseminated by the government, or with the approval of a government agency. Because the advertising restrictions in the bill are narrow in scope and focused on misleading statements which have no First Amendment protection, the bill likely complies with constitutional requirements.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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<sup>41</sup> *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989).

<sup>42</sup> *Friedman v. Rogers*, 440 U.S. 1 (1979).