

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/HB 1205 Advertisements for Legal Services

**SPONSOR(S):** Civil Justice Subcommittee, Andrade and others

**TIED BILLS:** IDEN./SIM. BILLS: SB 1246

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**FINAL HOUSE FLOOR ACTION:** 79 Y's

37 N's

**GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/HB 1205 passed the House on April 26, 2023, and subsequently passed the Senate on April 28, 2023.

Up until 1977, most states prohibited attorney advertising. In *Bates v. State Bar of Arizona*, however, the U.S. Supreme Court held that commercial speech, including attorney advertising, is protected by the First Amendment. The Supreme Court has since distinguished commercial speech that is false, deceptive, or misleading, which may be prohibited, and specified that 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 to meet that interest.

In 2019, the Federal Trade Commission ("FTC") noted that the Food and Drug Administration's ("FDA") Adverse Event Reporting System contained reports of consumers who had viewed attorney advertisements warning about the prescription medications they were taking and discontinued taking such medications, suffering adverse consequences as a result. The FTC warned that advertisements that cause, or are likely to cause, viewers to discontinue taking prescription medications may constitute an unfair or deceptive trade act or practice under federal law. Florida law also specifies that certain acts and practices may constitute a deceptive or unfair trade act or practice under the Florida Deceptive or Unfair Trade Practice Act ("FDUTPA"), which law does not currently address such attorney advertisements.

The bill:

- Prohibits a person or entity issuing a legal services advertisement from doing specified things, including presenting the advertisement as a medical alert or as offering advice from a state or federal governmental entity.
- Requires a person or entity issuing a legal services advertisement to solicit clients who may allege injury from an FDA-approved prescription drug or medical device to include specified statements and information in the advertisement, in the manner specified in the bill.
- Prohibits a person or entity from using, causing to be used, obtaining, selling, transferring, or disclosing a consumer's protected health information to another person or entity for the purpose of soliciting the consumer for legal services without the consumer's written authorization, except to an individual's legal representative under specified circumstances.
- Provides that a violation of the bill is a FDUTPA violation.
- Specifies that the bill does not limit or otherwise affect the Florida Bar's authority to regulate the practice of law, enforce its rules of professional conduct, or discipline any person admitted to the practice of law.
- Specifies that the bill does not apply to an advertisement that has been reviewed and approved by a Florida Bar ethics or disciplinary committee in accordance with its rules of professional conduct.
- Provides definitions and application.

The bill may have an indeterminate fiscal impact on the offices of the state attorney and the Department of Legal Affairs within the Office of the Attorney General.

The Governor approved the bill on June 23, 2023, ch. 2023-289, L.O.F., and it takes effect on July 1, 2023.

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

STORAGE NAME: h1205z1.DOCX

DATE: 6/27/2023

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Background

##### Attorney Advertising

Up until 1977, most states prohibited attorney advertising.<sup>1</sup> In *Bates v. State Bar of Arizona*, however, the U.S. Supreme Court held that commercial speech, including attorney advertising, is protected by the First Amendment and cannot be prohibited.<sup>2</sup> The Supreme Court has since distinguished commercial speech that is false, deceptive, or misleading, which may be prohibited, and specified that 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 to meet that interest.<sup>3</sup>

The Supreme Court has also recognized not only that states have an interest in protecting their citizens from misleading advertisements, but also that state bar associations have an interest in protecting the image of attorneys admitted to the bar and the public's perception of the judicial system.<sup>4</sup>

##### *Attorney Advertising Regulation in Florida*

The Florida Bar, as an extension of the Florida Supreme Court, approves lawyer advertising, issues advisory opinions interpreting Florida Bar rules, and investigates and prosecutes attorneys for alleged rule violations.<sup>5</sup> The Florida Bar's legal advertising rules apply to all forms of communication soliciting legal services in any print or electronic form, including newspaper, magazine, brochure, flyer, television, radio, direct mail, electronic mail, and Internet advertisements, which in turn include banners, pop-ups, websites, social media, and video sharing platforms.<sup>6</sup>

Advertisements in specified media, including print, television, radio, direct mail, and Internet advertisements, must be submitted to the Legal Division of the Florida Bar at least 20 days prior to dissemination.<sup>7</sup> The Legal Division reviews each submitted advertisement to determine whether it complies with the Florida Bar's advertising rules and issues an opinion either approving or disapproving the advertisement. Under these advertising rules, a legal advertisement must include:

- The name of the lawyer or law firm;<sup>8</sup>
- The location of the law practice;<sup>9</sup> and
- Certain disclosures, when relevant, including whether:
  - A case will be referred to another lawyer;<sup>10</sup>
  - A spokesperson in the advertisement is not an employee or member of the law firm;<sup>11</sup> or
  - A scene depicted in the advertisement is a dramatization and not an actual event.<sup>12</sup>

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<sup>1</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 May 1, 2023).

<sup>2</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

<sup>3</sup> *Central Hudson Gas & Elec. v. Public Service Commission*, 447 U.S. 557 (1980).

<sup>4</sup> *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995).

<sup>5</sup> The Florida Bar, *Frequently Asked Questions About the Florida Bar*, <https://www.floridabar.org/about/faq/> (last visited May 1, 2023).

<sup>6</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.11(a).

<sup>7</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.11.

<sup>8</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.12(a)(1).

<sup>9</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.12(a)(2).

<sup>10</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.12(b).

<sup>11</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.13(b)(5).

<sup>12</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.13(b)(6).

Such required information must be reasonably prominent and clearly legible if written and clearly audible if spoken aloud.<sup>13</sup> The Disciplinary Counsel of the Florida Bar investigates and prosecutes attorneys for alleged violations of the Bar's advertising rules.<sup>14</sup>

### *Recent Fourth Circuit Decision*

In 2020, West Virginia passed the Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medications Act (W.V. Act),<sup>15</sup> which act regulated legal advertisements soliciting clients for litigation involving medications or medical devices by:

- Requiring that such advertisements:
  - State the following: "This is a paid advertisement for legal services."
  - Include a specified warning about consulting a doctor before stopping a prescribed medication.
  - Disclose that the subject of the legal advertisement remains approved by the FDA, unless the product has been recalled or withdrawn.
- Directing that any words or statements required to appear in a legal advertisement be presented clearly and conspicuously and in a specified manner.
- Prohibiting:
  - Presenting a legal advertisement as a "consumer medical alert," "health alert," "consumer alert," "public service health announcement," or using substantially similar phrasing;
  - Displaying the logo of a federal or state government agency in a manner that suggests affiliation with the sponsorship of that agency;
  - Using the word "recall" when referring to a product that has not been recalled by a government agency or through an agreement between a manufacturer and government agency;
  - Failing to identify the legal advertisement's sponsor; and
  - Failing to identify the attorney or law firm that will represent clients, or how potential clients or cases will be referred to attorneys or law firms that will represent clients if the legal advertisement's sponsor may not represent persons responding to the advertisements.
- Specifying that a person who violates the act engages in an unfair or deceptive act or practice in violation of West Virginia law.

In 2022, the Fourth Circuit Court of Appeals upheld the W.V. Act after it was challenged on First Amendment grounds, finding that the act regulated misleading speech and thus did not violate the First Amendment.<sup>16</sup> The U.S. Supreme Court declined to hear the case on appeal, thus leaving the Fourth Circuit's decision intact.<sup>17</sup>

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<sup>13</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.12(d).

<sup>14</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.19.

<sup>15</sup> W. Va. Code ss. 47-28-1, *et seq.*

<sup>16</sup> *Recht v. Morrissey*, 32 F.4th 398 (4th Cir. 2022).

<sup>17</sup> *Recht v. Morrissey*, 143 S. Ct. 527 (2022).

## 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>18</sup> FDUTPA operates for the purposes of:<sup>19</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
- 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”) within the Office of the Attorney General if a violation occurs in or affects more than one judicial circuit, or if a state attorney defers to DLA.<sup>20</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>21</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>22</sup> DLA may also issue a cease and desist order if such order would be in the public’s interest.<sup>23</sup>

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

- Obtain a declaratory judgment 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>24</sup>

## The Health Insurance Portability and Accountability Act

The Federal Health Insurance Portability and Accountability Act (“HIPAA”) protects personal health information (“PHI”) from unlawful or unauthorized disclosure.<sup>25</sup> Privacy rules promulgated by the U.S. Department of Health and Human Services establish national standards to protect medical records and other PHI, which rules address, among other things, the use and disclosure of a person’s PHI.<sup>26</sup> Only “covered entities” are subject to HIPAA’s provisions, including:

- Health plans;

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<sup>18</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. Ss. 501.203(8) and 501.204(1), F.S.

<sup>19</sup> S. 501.202, F.S.

<sup>20</sup> Ss. 501.203(2), 501.206, and 501.207, F.S.

<sup>21</sup> S. 501.207(1) and (5), F.S.

<sup>22</sup> Ss. 501.2075, 501.2077, and 501.2105, F.S.

<sup>23</sup> S. 501.208(1), F.S.

<sup>24</sup> Ss. 501.2105 and 501.211, F.S.

<sup>25</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>26</sup> U.S. Department of Health and Human Services, *Health Information Privacy*, <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html> (last visited May 1, 2023).

- Health care providers;
- Health care clearinghouses; and
- Business associates of any of the above.<sup>27</sup>

However, 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>28</sup>

The punishment for a HIPAA violation can be either 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>29</sup> Criminal penalties for a HIPAA violation are triggered when a person obtains PHI for financial gain or under false pretenses.<sup>30</sup> The criminal penalty for such HIPAA violations may be up to 10 years imprisonment.<sup>31</sup>

### Drug-Related 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>32</sup> Nearly half of the survey respondents said they would definitely or probably stop taking the drug immediately after seeing the advertisement.<sup>33</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>34</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>35</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>36</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 trade practices under federal law.<sup>37</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>38</sup> The FTC warned that advertisements that cause, or are likely to cause, viewers to discontinue their medications may constitute an unfair or deceptive trade act or practice and

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<sup>27</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 May 1, 2023).

<sup>28</sup> *Id.*

<sup>29</sup> HIPAA Journal, *What are the penalties for HIPAA Violations?*, <https://www.hipaajournal.com/what-are-the-penalties-for-hipaa-violations-7096/> (last visited May 1, 2023).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</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 May 1, 2023).

<sup>33</sup> *Id.*

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

<sup>35</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 May 1, 2023).

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

<sup>37</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 May 1, 2023).

<sup>38</sup> *Id.*

recommended that 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>39</sup>

## Effect of the Bill

The bill creates s. 501.139, F.S., to attempt to address the dangers posed by attorney advertisements that discuss drug-related injuries, and the disclosure or use of protected health information obtained for the purpose of soliciting a person for legal services. The bill defines:

- “Advertisements for legal services” to mean any representation disseminated in any manner through a media entity for the purpose of soliciting prospective clients for legal services. The term includes such solicitation by a person with the intent to transfer data obtained from the consumer to one or more attorneys for legal services.
- “Media entity” to mean a radio broadcast station, television broadcast station, cable television company, newspaper company, periodical company, billboard company, advertising agency, digital media platform, or bona fide news or public interest website operator.
- “Protected health information” to mean individually identifiable health information that is transmitted by electronic media; maintained in electronic media; or transmitted or maintained in any other form or medium. Under this definition, protected health information excludes individually identifiable health information:
  - In education records covered by the Family Educational Rights and Privacy Act;
  - In records described at 20 U.S.C. s. 1232g(a)(4)(B)(iv);<sup>40</sup>
  - In employment records held by a covered entity in its role as an employer; and
  - Regarding a person who has been deceased for more than 50 years.
- “Solicit” to mean attempting to procure a client for legal services by initiating unsolicited personal, telephone, or real-time electronic contract or by advertising such services through print media, video or audio recorded advertisements, or electronic communication.

## Attorney Advertisements

The bill prohibits a person or entity that issues an advertisement for legal services from:

- Presenting the advertisement as a medical alert, health alert, drug alert, or public service announcement, or using any substantially similar phrase that suggests to a reasonable consumer that the advertisement is offering professional or medical advice or advice from a state or federal governmental entity or entity approved by or affiliated with a state or federal governmental entity.
- Displaying the logo of a state or federal governmental entity in a manner that suggests to a reasonable consumer that the advertisement is presented by a state or federal governmental entity or by an entity approved by or affiliated with a state or federal governmental entity.
- Using the term “recall” when referring to a product that has not been recalled in accordance with applicable state or federal regulations.

The bill also provides that a person or entity that issues an advertisement for legal services to solicit clients who may allege injury from a prescription drug or medical device approved by the FDA must include all of the following in the advertisement:

- The statement, “This is a paid advertisement for legal services,” which must appear at the beginning of the advertisement.
- The identity of the advertisement’s sponsor.

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<sup>39</sup> *Id.*

<sup>40</sup> These records include records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice.

- Either the identity of the attorney or law firm that will be primarily responsible for providing the solicited legal services to a consumer who engages the attorney or law firm in response to the advertisement or an explanation of how a responding consumer's case will be referred to an attorney or a law firm if the advertisement's sponsor is not licensed to practice law.
- A statement that the prescription drug or medical device approved by the FDA remains approved unless it has been recalled in accordance with applicable state or federal regulations.
- The statement, "Consult your physician before making any decision regarding prescribed medication or medical treatment."

Under the bill, such statements must be made in both written and verbal formats, except that:

- A print-only advertisement may include the statements in written format only.
- An audio-only advertisement may include the statements in verbal format only.

The bill further provides that required:

- Written statements must appear in a clear and conspicuous font and manner and, for visual advertisements, must appear on screen for a sufficient length of time for a reasonable consumer to read the statement. A written statement is presumed to comply with these requirements if it appears in the same font style and size and for the same duration as a printed reference to the telephone number or website that a consumer is to use to contact the entity for the advertised legal services, provided that such duration is at least ten seconds.
- Verbal statements must be audible, intelligible, and presented with equal prominence and speed as the other parts of the advertisement. A verbal statement is presumed to comply with these requirements if it is made at approximately the same volume and uses approximately the same number of words per minute as used when presenting other information in the advertisement which is not required.

### Protected Health Information

The bill prohibits a person or entity from using, causing to be used, obtaining, selling, transferring, or disclosing a consumer's protected health information to another person or entity for the purpose of soliciting the consumer for legal services without the consumer's written authorization. However, this prohibition does not apply to the use or disclosure of protected health information to an individual's legal representative in the course of any judicial or administrative proceeding or as otherwise permitted or required by law.

### Remedies and Application

The bill provides that a violation of newly-created s. 501.139, F.S., is a deceptive and unfair trade practice subject to enforcement under FDUTPA. However, under the bill, the person or entity that issues an advertisement for legal services is solely responsible for ensuring that such advertisement complies with the requirements of newly-created s. 501.139, F.S., and a media entity may not be held liable or subjected to any penalty for producing, distributing, transmitting, displaying, publishing, or otherwise disseminating another person's or entity's advertisement for legal services. Further, the bill provides that it does not:

- Apply to an advertisement that has been reviewed and approved by an ethics or disciplinary committee of the Florida Bar in accordance with its rules of professional conduct.
- Limit or otherwise affect the Florida Bar's authority to regulate the practice of law, enforce its rules of professional conduct, or discipline any person admitted to practice law in Florida.

The Governor approved the bill on June 23, 2023, ch. 2023-289, L.O.F., and it takes effect on July 1, 2023.

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

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate economic impact on the private sector to the extent that it reduces:

- An attorney's business generated from attorney advertisements prohibited or restricted by the bill; and
- The number of consumers suffering adverse medical consequences resulting from the consumer's decision to stop taking a medication or using a medical device as prescribed by his or her physician due to an attorney advertisement.

D. FISCAL COMMENTS:

The bill may have an indeterminate fiscal impact on the offices of the state attorney and on the DLA to the extent that it creates new FDUTPA claims, which may be enforced by such enforcing authorities. However, to the extent that the enforcing authorities can absorb the costs of such new FDUTPA claims within existing resources, the fiscal impact on such authorities may be insignificant.