

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB CJS 20-02 Legal Advertising

**SPONSOR(S):** Civil Justice Subcommittee

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Rochester	Luczynski

### SUMMARY ANALYSIS

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. Nearly half of the survey respondents said they would definitely or probably stop taking the drug immediately after seeing the advertisement. 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. Since survey respondents were willing to discontinue or reduce their medication without consulting a doctor, the survey results show that certain types of legal advertising could have severe consequences for patients.

In September 2019, the Federal Trade Commission (FTC) contacted seven legal practitioners and lead generating companies expressing concerns that some television advertisements that solicit clients for personal injury lawsuits against drug manufacturers may be considered deceptive or unfair under the federal law. The FTC also noted that the Food and Drug Administration's (FDA) Adverse Event Reporting System contains reports of consumers who saw advertisements about the prescription drugs they were taking, discontinued those medications, and suffered adverse consequences. 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 that advertisements include clear and prominent audio and visual disclosures stating that consumers should not stop taking their medications without first consulting their doctors.

PCB CJS 20-02 prohibits legal advertisements from containing certain terminology and prohibits certain use, sale, or transfer of protected health information without specified authorization for purposes of soliciting legal services. Specifically, the proposed bill:

- Prohibits a person who submits a legal advertisement for publication, broadcast, or dissemination, or who pays for or otherwise sponsors a legal advertisement from:
  - Failing to clearly and conspicuously disclose the sponsor of the advertisement;
  - Displaying federal or state government agency logos in a manner implying affiliation with a that agency;
  - Including terminology implying that the product has been recalled when it has not been;
- Requires a legal advertisement to clearly disclose the warning, "Do not stop taking a prescribed medication without first consulting your doctor," if the advertisement solicits clients who may allege injury from a prescription drug; and
- Prohibits a person from using, obtaining, selling, transferring, or disclosing to another person without written authorization protected health information to solicit legal services.

The proposed bill also creates a cause of action for a person who suffers a physical injury as a result of a legal advertisement's violation of these provisions and authorizes compensatory damages, attorney fees, and court costs. Additionally, the Department of Legal Affairs or a state attorney may bring an action to enjoin any person who has violated these provisions, or may bring an action on behalf of one or more consumers or governmental entities for actual damages caused by a violation of these provisions.

The proposed bill does not appear to have a fiscal impact on state or local governments.

The proposed bill provides an effective date of July 1, 2020.

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

**STORAGE NAME:** pcb02.CJS

**DATE:** 2/1/2020

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Legal Advertising

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 is protected by the First Amendment and cannot be prohibited.<sup>2</sup> The Supreme Court has distinguished advertising that is false, deceptive, or misleading, which may be prohibited. Moreover, non-misleading commercial 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>3</sup>

The U.S. Supreme Court has also recognized that states not only have an interest in protecting their citizens from misleading advertisement, but state bars also have an interest in protecting their image as a profession and the public's perception of the judicial system.<sup>4</sup>

##### *Regulation of Legal Advertisement*

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>5</sup> The legal advertising rules in Florida 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>6</sup> Advertisements that are required to be filed must be filed with the Legal Division of the Florida Bar at least 20 days prior to dissemination and include:

- Print;
- Television
- Radio;
- Direct mail; and
- Internet.<sup>7</sup>

When the ads are submitted to the Legal Division, the ad is reviewed to determine whether it complies with the advertising rules. The Legal Division will then issue opinions either approving or disapproving of the advertisement. The Disciplinary Counsel of the Florida Bar investigates and prosecutes attorneys for alleged violations of the restrictions.<sup>8</sup>

Florida Bar rules require legal advertising to include:

- The name of the lawyer or law firm;<sup>9</sup>
- The location of the law practice; and<sup>10</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 Feb 1., 2020).

<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 Feb. 1, 2020).

<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. 4-7.19.

<sup>9</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.12(a)(1).

<sup>10</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.12(a)(2).

- Certain disclosures, including if:
  - Cases will be referred to another lawyer;<sup>11</sup>
  - The spokesperson in the advertisement is not an employee or member of the law firm;<sup>12</sup> or
  - The scene depicted is a dramatization and not an actual event.<sup>13</sup>

All required information in an advertisement must be reasonably prominent and clearly legible if written and clearly audible if spoken aloud.<sup>14</sup>

### Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) became law in 1973.<sup>15</sup> The purpose<sup>16</sup> of FDUTPA is to:

- Simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices;
- Protect 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
- Make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.

FDUTPA prohibits unfair methods of competition, and unconscionable, unfair or deceptive acts or practices in the conduct of any trade or commerce.<sup>17,18</sup>

Investigative and enforcement authority under FDUTPA is given 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 (Department) if a violation occurs in or affects more than one judicial circuit or if the state attorney defers to the Department.<sup>19</sup> These enforcing authorities may, within four years after the occurrence of a violation 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>20</sup>

Additionally, these enforcing authorities may collect a civil penalty of up to \$10,000 per violation plus reasonable attorney's fees and costs for willful violations of FDUTPA and up to \$15,000 plus reasonable attorney's fees and costs for willful violations of FDUTPA involving a senior citizen, a person who has a disability, a military servicemember, or the spouse or dependent child of a military servicemember.<sup>21</sup> The Department also has authority to issue a cease and desist order if it would be in the interest of the public.<sup>22</sup>

FDUTPA provides a private cause of action for anyone aggrieved by a violation of FDUTPA to obtain a declaratory judgement that an act or practice violates FDUTPA; to enjoin a person who has violated, is

<sup>11</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.12(b).

<sup>12</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.13(b)(5).

<sup>13</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.13(b)(6).

<sup>14</sup> Fla. Bar Code Prof. Resp. D. R. 4-7.12(d).

<sup>15</sup> Ch. 73-124, Laws of Fla.; codified at Part II of Ch. 501, F.S.

<sup>16</sup> S. 501.202, F.S.

<sup>17</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>18</sup> S. 501.204(1), F.S.

<sup>19</sup> Ss. 501.203(2), 501.206, and 501.207, F.S.

<sup>20</sup> S. 501.207(1) and (5), F.S.

<sup>21</sup> Ss. 501.2075, 501.2077, and 501.2105, F.S.

<sup>22</sup> S. 501.208(1), F.S.

violating, or is otherwise likely to violate this part; and to recover actual damages plus reasonable attorney's fees and costs.<sup>23</sup>

### 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>24</sup> Nearly half of the survey respondents said they would definitely or probably stop taking the drug immediately after seeing the advertisement.<sup>25</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>26</sup>

In addition, 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>27</sup> Additionally, 72 percent of jurors agreed that if there are lawsuits against a company claiming its products have injured people then there is probably truth to the claim.<sup>28</sup>

In September 2019, the Federal Trade Commission (FTC) contacted seven law firms and lead generating companies expressing concerns that some television advertisements that solicit clients for personal injury lawsuits against drug manufacturers may be considered deceptive or unfair under the federal law.<sup>29</sup> The FTC also noted that the Food and Drug Administration's (FDA) Adverse Event Reporting System contained reports of consumers who saw advertisements about the prescription drugs they were taking, discontinued those medications, and suffered adverse consequences.<sup>30</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 that advertisements include clear and prominent audio and visual disclosures stating that consumers should not stop taking their medications without first consulting their doctors.<sup>31</sup>

### **Effect of Proposed Changes**

PCB CJS 20-02 prohibits a person who submits a legal advertisement for publication, broadcast, or dissemination, or who pays for or otherwise sponsors a legal advertisement from:

- Failing to clearly disclose at the outset of the advertisement, "This is a paid advertisement for legal services;"
- Failing to clearly and conspicuously disclose the award amount the client received after paying for legal services and costs if the advertisement includes information regarding the amount of a damage award obtained on behalf of a client;
- Displaying federal or state government agency logos in a manner implying affiliation with that agency;
- Including terminology implying that the product has been recalled when the product has not been; or
- Failing to clearly disclose the advertisement's sponsor or who will represent persons responding to the advertisement.

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<sup>23</sup> Ss. 501.2105 and 501.211, F.S.

<sup>24</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 Feb. 1, 2020).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</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 Feb. 1, 2020).

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

<sup>29</sup> Federal Trade Commission, *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits* (Sep. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/ftc-flags-potentially-unlawful-tv-ads-prescription-drug-lawsuits> (last visited Feb. 1, 2020).

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

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

Moreover, the proposed bill prohibits a person who submits a legal advertisement or sponsors a legal advertisement from:

- 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" if the advertisement solicits clients who may allege injury from a prescription drug; or
- Failing to clearly disclose that the drug or medical device remains approved by the Food and Drug Administration, unless the product is recalled or withdrawn.

Any disclosure required by this proposed bill must be:

- Clearly legible and, if displayed electronically, displayed for sufficient time to enable the viewer to easily see and fully read the disclosure, if written; and
- Plainly audible and clearly intelligible, if spoken.

A person who violates the provisions under the proposed bill commits a deceptive and unfair trade practice if the advertisement is published, broadcast, or disseminated. The bill creates a cause of action for a person who suffers a physical injury as a result of a legal advertisement's violation of these provisions and authorizes compensatory damages, attorney fees, and court costs. Additionally, the Department of Legal Affairs or a state attorney may bring an action:

- To obtain a declaratory judgment that an act or practice violates FDUTPA;
- To enjoin any person who has violated these provisions; or
- On behalf of one or more consumers or governmental entities for actual damages caused by a violation of these provisions.

Lastly, the proposed bill prohibits a person from using, obtaining, selling, transferring, or disclosing to another person without written authorization protected health information to solicit legal services.

The proposed bill provides that:

- A person who violates this provision commits a deceptive and unfair trade practice.
- A person who willfully and knowingly violates this provision commits a first degree misdemeanor.<sup>32</sup>
- A person who willfully and knowingly violates this provision with intent to sell, transfer, or use protected health information for financial gain commits a second degree felony,<sup>33</sup> except the term of imprisonment may not exceed 10 years and the fine may exceed \$10,000 but may not exceed \$250,000.

#### B. SECTION DIRECTORY:

**Section 1:** Creates s. 501.2106, F.S., relating to legal advertising, deceptive and unfair trade practices.

**Section 2:** Creates s. 877.025, F.S., relating to solicitation of legal services; wrongful use or disclosure of protected health information.

**Section 3:** Provides an effective date of July 1, 2020.

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<sup>32</sup> A first degree misdemeanor, punishable by up to one year in county jail and a fine up to \$1,000.

<sup>33</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.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

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:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

Not applicable.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES