

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: SB 1246

INTRODUCER: Senator Yarborough

SUBJECT: Truth in Legal Advertising

DATE: April 3, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Collazo</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>McMillan</u>	<u>McKay</u>	<u>CM</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 1246 creates s. 501.139, F.S., to regulate certain legal advertisements soliciting clients for personal injury lawsuits against drug manufacturers. These regulations prohibit advertisements for legal services from appearing to offer professional medical advice or advice from a government entity. Moreover, advertisements soliciting clients who may allege an injury from a prescription drug or medical device approved by the Food and Drug Administration must advise such persons to consult with their physicians before making decisions regarding their medications or medical treatment.

The bill takes effect on July 1, 2023.

II. Present Situation:

Potentially Deceptive Legal Advertising

In 2017, the U.S. Chamber Institute for Legal Reform commissioned an online survey of 1,335 adults, 500 of whom were currently taking, or had taken, one or more of 12 prescription drugs frequently targeted in lawsuits against drug manufacturers. Nearly half (46%) of the survey respondents said they would definitely or probably stop taking the drug immediately after seeing the advertisement. More than half (58%) said they would definitely or probably reduce the dosage to below the prescribed amount.¹

Because 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, which has generated concern at the federal level.

¹U.S. Chamber Institute for Legal Reform, *Bad for Your Health: Lawsuit Advertising Implications and Solutions*, at 20-22 (Oct. 2017), available at https://instituteforlegalreform.com/wp-content/uploads/2020/10/TLA_Advertising-Paper-WEB.pdf (last visited April 3, 2023).

In 2019, the Federal Trade Commission (FTC) contacted seven legal practitioners and lead generating companies to express concern that some of their television advertisements that solicit clients for personal injury lawsuits against drug manufacturers may be deceptive or unfair under the FTC Act. Specifically, the warning letters stated that some of the advertisements might:

- Misrepresent the risks associated with certain medications and could lead consumers to the false conclusion that their prescribed medication had been recalled.
- Make deceptive or unsubstantiated claims about the risks of taking blood thinners and drugs for diabetes, acid reflux, and high blood pressure, among other conditions; advertisers must have competent and reliable scientific evidence to substantiate their claims about these purported risks.²
- May mislead consumers into thinking that they are watching a government-sanctioned announcement, with some of the advertisements going so far as to include the U.S. Food and Drug Administration (FDA) logo or text reading “FDA Warning,” suggesting that the advertisements had been approved by the agency.³

The FTC also noted that the FDA’s Adverse Event Reporting System contained reports of consumers who had viewed advertisements about the prescription drugs they were taking, then discontinued those medications, and suffered harmful consequences.⁴ The FTC warned that advertisements that cause, or are likely to cause, viewers to discontinue their prescribed medications might create an unfair act or practice. As a remedial step, the FTC recommended those advertisements “include clear and prominent audio and visual disclosures” stating that a consumer should not stop taking prescribed medication without first consulting a doctor.⁵

In 2020, several Congressional representatives asked the Chairman of the FTC for a progress report on the effects of the seven warning letters issued in 2019.⁶ The Chairman replied that each recipient committed to heed the FTC warnings for future lawsuit advertising. When asked if various renditions of the lawsuit advertisements violated the FTC Act, the Chairman essentially said that it depended on the actual claim involved. The Chairman did note that FTC staff had reviewed state laws enacted in West Virginia, Texas, and Tennessee to address deceptive lawsuit advertisements but has not taken a position on federal legislation on the topic.⁷

² Federal Trade Commission, *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits* (Sept. 24, 2019), available at <https://www.ftc.gov/news-events/press-releases/2019/09/ftc-flags-potentially-unlawful-tv-ads-prescription-drug-lawsuits> (last visited April 3, 2023).

³ Correspondence from The Honorable Greg Walden et al., Committee on Energy and Commerce, U.S. House of Representatives, to Joseph J. Simons, Chairman of the Federal Trade Commission, at 1-2 (Nov. 2, 2020) [Walden Letter], available at <https://d1dth6e84htgma.cloudfront.net/legacy/uploads/2020/11/2020.11.02-Letter-to-the-FTC.pdf> (last visited April 3, 2023).

⁴ FTC, *supra* note 2.

⁵ *Id.*

⁶ *See generally* Walden Letter, *supra* note 3.

⁷ Correspondence from Joseph J. Simons, Chairman of the Federal Trade Commission, to The Honorable Greg Walden, Committee on Energy and Commerce, U.S. House of Representatives (Nov. 17, 2020), available at <https://d1dth6e84htgma.cloudfront.net/legacy/uploads/2020/11/2020.11.17-FTC-to-Rep.-Walden-Lawyer-Ads-.pdf> (last visited April 3, 2023).

The referenced laws in West Virginia,⁸ Texas,⁹ and Tennessee¹⁰ contain provisions that are similar to the ones in this bill. Notably, the West Virginia law was recently challenged in federal court and determined to be constitutional.¹¹

Regulation of Legal Advertising

Article V, Section 15 of the Florida Constitution vests exclusive jurisdiction in the Florida Supreme Court to regulate admissions to the bar and to discipline admitted attorneys.¹² The Florida Bar, as an official arm of the Florida Supreme Court, is charged with the duty of enforcing the rules governing lawyer advertising and solicitation, and with assisting members of The Florida Bar to advertise their services in a manner beneficial to both the public and the legal profession.¹³

Florida's legal advertising rules apply to all forms of communication soliciting legal services in any print or electronic forum.¹⁴ Any lawyer who advertises services must file with The Florida Bar a copy of each advertisement at least 20 days prior to the lawyer's first dissemination of the advertisement.¹⁵ The Florida Bar evaluates all advertisements filed with it to determine compliance with its advertising rules, and issues an opinion either approving or disapproving the advertisement.¹⁶ Lawyers who do not comply with the applicable rules are subject to professional discipline.¹⁷

All advertisements for legal employment must include name and office location information.¹⁸ If the case or matter will be referred to another lawyer or law firm, the advertisement must include a statement to this effect.¹⁹ If more than one language is used in an advertisement, then any words or statements required by the advertising rules must appear in each language used in the advertisement.²⁰ Moreover, any information required by the rules to appear in an advertisement must be reasonably prominent and clearly legible if written, or intelligible if spoken.²¹

Additionally, a lawyer may not engage in deceptive or inherently misleading advertisements. For example, an advertisement cannot use a voice or image that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the

⁸ See W. VA. CODE s. 47-28-3, available at <https://code.wvlegislature.gov/47-28-3/> (last visited April 3, 2023).

⁹ See TEX. GOV'T CODE ss. 81.151-156, available at https://texas.public.law/statutes/tex._gov't_code_section_81.151 (last visited April 3, 2023).

¹⁰ See TENN. CODE. ANN. ss. 47-18-5601-5606, available at <https://legiscan.com/TN/text/SB0352/id/1998216> (last visited April 3, 2023).

¹¹ See *Recht v. Morrissey*, 32 F.4th 398 (4th Cir. 2022) (evaluating various provisions of the West Virginia law that are similar to provisions in SB 1246 and concluding that they permissibly regulate commercial speech).

¹² The Florida Bar, *Frequently Asked Questions About the Florida Bar*, available at <https://www.floridabar.org/about/faq/> (last visited April 3, 2023).

¹³ R. Regulating Fla. Bar 15-1.1.

¹⁴ R. Regulating Fla. Bar 4-7.11(a).

¹⁵ R. Regulating Fla. Bar 4-7.19(a).

¹⁶ R. Regulating Fla. Bar 4-7.19(b).

¹⁷ R. Regulating Fla. Bar 4-7.19(f)-(g).

¹⁸ R. Regulating Fla. Bar 4-7.12(a)(1)-(2).

¹⁹ R. Regulating Fla. Bar 4-7.12(b).

²⁰ R. Regulating Fla. Bar 4-7.12(c).

²¹ R. Regulating Fla. Bar 4-7.12(d).

advertising firm, or use a dramatization of an actual or fictitious event, unless certain clarifying disclosures are made.²²

Florida Deceptive and Unfair Trade Practices Act

History and Purpose

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) became law in 1973.²³ The FDUTPA is a consumer and business protection measure that prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in trade or commerce.²⁴ The FDUTPA is based on federal law, and s. 501.204(2), F.S., provides that it is the intent of the Legislature that due consideration and great weight must be given to the interpretations of the Federal Trade Commission and the federal courts relating to section 5 of the Federal Trade Commission Act.²⁵

The State Attorney or the Department of Legal Affairs may bring actions when it is in the public interest on behalf of consumers or governmental entities.²⁶ The Office of the State Attorney may enforce violations of the FDUTPA if the violations take place in its jurisdiction.²⁷ The Department of Legal Affairs has enforcement authority if the violation is multi-jurisdictional, the state attorney defers in writing, or the state attorney fails to act within 90 days after a written complaint is filed.²⁸ Consumers may also file suit through private actions.²⁹

Remedies under the FDUTPA

The Department of Legal Affairs and the State Attorney, as enforcing authorities, may seek the following remedies:

- Declaratory judgments.
- Injunctive relief.
- Actual damages on behalf of consumers and businesses.
- Cease and desist orders.
- Civil penalties of up to \$10,000 per willful violation.³⁰

Remedies for private parties are limited to the following:

- A declaratory judgment and an injunction where a person is aggrieved by a FDUTPA violation.

²² R. Regulating Fla. Bar 4-7.13(b)(5)-(g).

²³ Ch. 73-124, Laws of Fla.; codified at part II of ch. 501, F.S.

²⁴ See s. 501.202, F.S. Trade or commerce means the 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. "Trade or commerce" shall include the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity. See s. 501.203(8), F.S.

²⁵ See s 501.204(2), F.S.

²⁶ See ss. 501.203(2), 501.206, and 501.207, F.S.

²⁷ Section 501.203(2), F.S.

²⁸ *Id.*

²⁹ Section 501.211, F.S.

³⁰ Sections 501.207(1), 501.208, and 501.2075, F.S. Civil Penalties are deposited into general revenue. Section 501.2075, F.S. Enforcing authorities may also request attorney fees and costs of investigation or litigation. Section 501.2105, F.S.

- Actual damages, attorney fees, and court costs, where a person has suffered a loss due to a FDUTPA violation.³¹

Federal Unfair and Deceptive Trade Practices

The Federal Trade Commission’s unfair and deceptive trade practices regulations prohibit unfair³² or deceptive³³ acts or practices in or affecting commerce.³⁴ The FTC’s regulations include “Truth In Advertising” guidelines, which require advertisements to be truthful, not misleading, and when appropriate, backed by scientific evidence.³⁵ To enforce these regulations, the FTC takes law enforcement actions, provides consumer and business education, issues reports and policy guidance, leads workshops, and participates in other forums.³⁶

III. Effect of Proposed Changes:

SB 1246 creates s. 501.139, F.S., to regulate certain advertisements soliciting clients for personal injury lawsuits against drug manufacturers. The bill contains provisions that are similar to ones already enacted in West Virginia, Texas, and Tennessee to combat misleading advertisements for legal services.

Definitions

The bill defines “advertisement 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.

The bill defines “media entity” to mean a radio broadcast station, a television broadcast station, a cable television company, a newspaper company, a periodical company, a billboard company, an advertising agency, a digital media platform, or a bona fide news or public interest website operator.

³¹ Section 501.211(1) and (2), F.S.

³² A practice is “unfair” if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” *See* 15 U.S.C. s. 45(n).

³³ A practice is “deceptive” if there is a “representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.” FTC Policy Statement on Deception (Oct. 14, 1983), available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf; (last visited April 3, 2023) *see also* Federal Trade Commission, *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority* (rev. May 2021), available at <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (citing the FTC’s Policy Statement on Deception) (last visited April 3, 2023).

³⁴ 15 U.S.C. s. 45(a)(1).

³⁵ Federal Trade Commission, *Truth In Advertising*, available at <https://www.ftc.gov/news-events/media-resources/truth-advertising> (last visited April 3, 2023).

³⁶ Federal Trade Commission, *Protecting Consumers*, available at <https://www.ftc.gov/news-events/media-resources/truth-advertising/protecting-consumers> (last visited April 3, 2023).

The bill defines “protected health information”³⁷ as meaning individually identifiable health information transmitted by, or maintained in, electronic media, or transmitted or maintained in any other form or medium, except for information:

- In education records covered by the Family Educational Rights and Privacy Act, as amended.³⁸
- In records described in federal law.³⁹
- In employment records held by a covered entity in its role as employer.
- Regarding a person who has been deceased for more than 50 years.

The bill defines “solicit” to mean attempting to procure a client for legal services by initiating unsolicited personal, telephone, or real-time electronic contact or by advertising such services through print media, video or audio recorded advertisements, or electronic communications.

Prohibitions

The bill provides that a person or an entity that issues an advertisement for legal services may not do any of the following:

- Present the advertisement as a medical alert, health alert, drug alert, or public service announcement or use 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 an entity approved by or affiliated with a state or federal governmental entity.
- Display 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.
- Use the term “recall” when referring to a product that has not been recalled in accordance with applicable state or federal regulations.

Requirements

For Legal Advertisements Soliciting Clients Alleging Injury from Prescription Drugs or Medical Devices approved by the FDA

The bill provides that a person or an 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 sponsor of the advertisement.
- Either the identity of the attorney or the 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 sponsor of the advertisement is not licensed to practice law.

³⁷ The bill incorporates by reference the definition of “protected health information” found in 45 C.F.R. s. 160.103.

³⁸ 20 U.S.C. s. 1232g.

³⁹ 20 U.S.C. s. 1232g(a)(4)(B)(iv).

- A statement that a prescription drug or medical device approved by the FDA remains approved unless it has been recalled in accordance with the applicable state or federal regulations.
- The statement, “Consult your physician before making any decision regarding prescribed medication or medical treatment.”

For Written and Verbal Statements in Legal Advertisements

The bill provides that statements required to appear in an advertisement under the new statute must be made in both written and verbal formats, except that a print-only advertisement may include the statements in written format only, and an audio-only advertisement may include the statements in verbal format only.

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 the requirements of this subsection 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 such duration is at least 10 seconds.

Required 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 the requirements of this subsection 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 under this section.

Responsibility for Compliance

The bill provides that a person or entity that issues an advertisement for legal services is solely responsible for ensuring that such advertisement complies with the new statute, 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 which violates the new statute.

Consumer Protected Health Information

The bill provides that a person or an entity may not use, cause to be used, obtain, sell, transfer, or disclose a consumer’s protected health information to another person or entity for the purpose of soliciting the consumer for legal services without written authorization from that consumer. This provision 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.

Enforcement

The bill provides that a violation of the new statute is deemed a deceptive and unfair trade practice subject to enforcement under part II of chapter 501, F.S., known as the “Florida Deceptive and Unfair Trade Practices Act.”⁴⁰

Florida Bar Exemption and Authority

The bill provides that the new statute 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.

Additionally, the bill provides that the new statute does not limit or otherwise affect the authority of The Florida Bar to regulate the practice of law, enforce its rules of professional conduct, or discipline any person admitted to practice law in this state.

Effective Date

The bill takes effect on July 1, 2023.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Article II, s. 3 of the State Constitution divides the powers of state government into legislative, executive, and judicial branches, and provides that no person belonging to one branch may exercise any powers belonging to either of the other branches unless expressly provided otherwise in the constitution. Additionally, article V, s. 15 of the State Constitution vests exclusive jurisdiction to regulate admissions to the bar and to discipline admitted attorneys in the Florida Supreme Court.

⁴⁰ See s. 501.201, F.S. (providing this short title).

The Florida Bar, as an official arm of the Florida Supreme Court, is charged with the duty of enforcing the rules governing lawyer advertising and solicitation, and with assisting members of The Florida Bar to advertise their services in a manner beneficial to both the public and the legal profession.

The bill provides that the new statute 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. It also provides that the new statute does not limit or otherwise affect the authority of The Florida Bar to regulate the practice of law, enforce its rules of professional conduct, or discipline any person admitted to practice law in this state.

Because the new statute will not prohibit dissemination of a legal advertisement that has been reviewed and approved by an ethics or disciplinary committee of The Florida Bar, and will not limit or otherwise affect the authority of The Florida Bar to regulate the practice of law, enforce its rules of professional conduct, or discipline any person admitted to practice law, the bill appears to be consistent with art. II, s. 3 of the State Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill prohibits the use, acquisition, sale, transfer, or disclosure of consumers' protected health information for the purpose of soliciting clients without their written authorization. To the extent persons or entities currently profit from such activities, the bill will eliminate such profits.

Advertisers may incur new or additional costs to ensure compliance with the bill's technical and formatting requirements for legal advertisements.

C. Government Sector Impact:

Violations of the new statute created by the bill will be subject to enforcement as deceptive and unfair trade practices under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The bill may result in an increase of FDUTPA enforcement actions, and therefore incur additional costs to enforcement authorities.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 501.139, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
