SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL:	CS/SB 192
SPONSOR:	Judiciary Committee and Senators Campbell and Fasano
SUBJECT:	Advertising for Legal Services
DATE:	March 11, 2005 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Maclure	JU	**Fav/CS**
2.			CM	
3.				
4.				
5.				
6.				

I. Summary:

This committee substitute requires certain legal entities located in Florida, who also advertise in-state through print or electronic media, to provide to the publisher specific affidavits with each advertisement submitted for publication.

Regarding out-of-state legal service providers or lawyer referral services advertising in-state, a signed, sworn statement must accompany all advertisements submitted for publication through print or electronic media, and these advertisements are subject to Florida Bar rules on lawyer advertising. Lawyer referral services are required to include a prominent disclosure in all advertisements.

Certain legal services advertisers and lawyer referral services are subject to $1,000 in civil fines for a first offense and $10,000 for each subsequent offense. The Florida Bar and the Attorney General are recognized as enforcing authorities, and are granted the ability to seek injunctions.

Within 30 days after acceptance for publication, a publisher is required to send a copy of the advertisement and original affidavit or statement to the Florida Bar and to retain a copy for two years, unless the affidavit states that the advertisement is exempt from filing with the Florida Bar. Where the advertisement is to be forwarded to the Florida Bar, the advertiser is required to provide the publisher with a copy of the advertisement.

Legal services that are advertised in a false, deceptive, or misleading manner are subject to unfair and deceptive trade practice penalties.

These provisions are considered cumulative and do not replace other valid laws, codes, ordinances, rules, or penalties currently in effect.

This committee substitute creates section 454.37, Florida Statutes.

II. Present Situation:

The Senate Committee on Judiciary prepared an Interim Report on the issue of attorney advertising, which was published in 2004.[1] Findings are summarized below.

History of Lawyer Advertising

Under English common law, although solicitation was considered poor etiquette, it remained largely unregulated. Informally, the practice was widely shunned within the legal profession, but standards were never codified into law. The American Bar Association (A.B.A.) did, however, codify these standards within the larger context of lawyer ethics, through its publication of the A.B.A. Canons of Professional Ethics of 1908. This action was followed by the A.B.A.'s creation of the Committee on Professional Ethics and Grievances, charged with issuing informal opinions, some opposing lawyer advertising.[2] At the state level, the Alabama Bar Association was the first to establish a statewide code of ethics in 1887, some of which the A.B.A. incorporated into its Canons in 1908. The Alabama Bar prohibited solicitation of attorney services, but authorized newspaper and circular advertising, as well as business cards.[3]

The Supreme Court in the 1942 case of *Valentine v. Chrestensen*[4] ruled that commercial speech could be restricted even when combined with political content. Other decisions affirmed this ruling, such as in *Breard v. City of Alexandria*.[5] The A.B.A. adopted the Model Code of Professional Responsibility in 1969, specifically addressing and prohibiting attorney advertising in the name of the public interest.[6] In 1983, the A.B.A. adopted the Model Rules, which were thought to provide a cleaner set of directives than did the previous Canons and Disciplinary Rules of the Model Code.

Most jurisdictions have adopted the A.B.A.'s Model Rules. Oregon, Nebraska, Ohio, New York, and Rhode Island still follow the Model Code, although Oregon is changing to a Model Rule state. A minority of states, specifically Iowa, Wyoming, Nevada, California, Texas, Kentucky, Maine, Georgia, and Florida, have adopted their own rules.

Florida Constitutional Issues

Section 3 of Article II of the Florida Constitution provides for a separation of powers among the legislative, executive, and judicial branches. Section 15 of Article V of the Florida Constitution

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[1] The Florida Senate Committee on Judiciary, *Lawyer Advertising*, Interim Project Report 2005-150, November 2004.
[2] Gregory H. Bowers & Otis H. Stephens, Jr., *Attorney Advertising and the First Amendment: The Development and Impact of a Constitutional Standard*, 17 Mem. St. U.L.Rev. 221, 230 (1987).
[3] Jack P. Sahl, *The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment*, 34 STMLJ 795, 830 (2003).
[4] 316 U.S. 52 (1942).
[5] 341 U.S. 622 (1951).
[6] Bowers and Stephens, *supra* note 1, at 232.

grants exclusive jurisdiction to the Florida Supreme Court to regulate both admission to the practice of law and the discipline of those admitted to practice. This provision has been interpreted by the courts to have a very narrow application. In *Simms v. State*,[7] the court indicated that the separation of powers clause does not categorize every governmental activity as attaching exclusively to that single branch of government. In *Pace v. State*,[8] the Florida Supreme Court specifically found that an anti-legal solicitation statute passed constitutional muster, as an appropriate subject for the Legislature to regulate, under its broad police powers.[9]

The court in *State v. Palmer*[10] similarly ruled that legislating the unlicensed practice of law is not a violation of the separation of powers doctrine. The court reiterated the position that the state constitution grants exclusive jurisdiction to the judiciary only over the admission to practice law, and not over other such areas related to practice.[11]

Case Law on Commercial Speech

In *Bates v. State Bar of Arizona*, the U.S. Supreme Court expressly classified lawyer advertising as commercial speech, serving an informational function, and afforded it significant First Amendment protection for the first time, provided it is truthful.[12] Although the appellant's speech was largely economic and could not be categorized as traditionally protected political speech, the court determined, "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."[13] Here, where the appellant's newspaper advertising referenced services provided by a "legal clinic," offered "very reasonable" prices, and did not specify that a name change can occur without legal assistance, the court held that this commercial content fell within the ambit of constitutionally protected speech.[14]

This protection did not extend to in-person solicitation, however, the court determined in *Ohralik v. Ohio State Bar Association.*[15] This case, involving direct solicitation by an attorney visiting an accident victim's hospital room, constituted impermissible overreaching, and that which could properly be prohibited by the state to prevent public harm. The court drew a clear distinction between the facts in *Bates* and those of the instant case (newspaper advertising versus in-person solicitation) in applying a lower level of scrutiny.[16]

Up to this point, the prevention of public harm was determined by the court to be a justifiable state interest. A state restriction on lawyer advertising based on a more specific perceived invasion of privacy was introduced as a plausible state interest in *In Re Primus* in 1978, which involved solicitation by mail.[17] In this case, an attorney was charged with violating disciplinary

[7] 641 So.2d 957 (Fla. 3rd DCA 1994).
[8] 368 So.2d 340 (Fla. 1979).
[9] *See* s. 877.02(1), F.S., which prohibits certain forms of legal solicitation.
[10] 791 So.2d 1181 (Fla. 1st DCA 2001).
[11] *See* s. 454.31, F.S., which provides sanctions for disbarred or suspended attorneys who continue to practice law.
[12] 433 U.S. 350 (1977).
[13] *See Bates*, 433 U.S. at 364.
[14] *See Bates*, 433 U.S. at 381.
[15] 436 U.S. 447 (1978).
[16] *See Ohralik*, 436 U.S. at 457.
[17] 436 U.S. 412 (1978).

rules for sending a woman a letter which specified that the ACLU would provide legal counsel on her behalf, where she was sterilized as a condition of receiving welfare.[18] The court found that a single letter, without subsequent contact, did not constitute overreaching or an "appreciable invasion of privacy."[19]

Central Hudson Gas and Electric Corporation v. Public Service Commission of N.Y. established a four-prong test, applicable to the court's intermediate level scrutiny for commercial speech, which is:

> (1) Whether the speech is false or misleading and if so, it can be prohibited;
> (2) Whether the state has a substantial interest in restricting the speech and if not, the inquiry ends;
> (3) Whether the regulation materially and directly advances the state interest; and
> (4) Whether the restriction is narrowly drawn.[20]

While recognizing that the federal constitution grants a lesser protection to commercial speech than to other constitutionally protected speech, the court indicates a special inquiry for regulations that entirely suppress commercial speech, in that the blanket ban could unduly screen an underlying governmental policy from the public eye.[21]

The court in *Zauderer* examined a fact situation that involved a lawyer newspaper advertisement targeted to a specific class of plaintiff, and held that this type of specific advertising, in and of itself, was constitutionally protected.[22] In so doing, the court applied and upheld the *Central Hudson* inquiry. The *Zauderer* court specifically ruled unconstitutional a state prohibition on advertisements that contained information on specific legal problems. Here the court determined the state's rationale for prophylactic restraint, that of preventing meritless lawsuits, to be unjustified: "That our citizens have access to their civil courts…is an attribute of our system of justice….The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights….It is not sufficient justification…that…truthful and nondeceptive advertising had a tendency to or did in fact encourage others to file lawsuits."[23]

The *Bates* court's more liberal approach toward finding lawyer advertising constitutionally protected was explicitly abandoned in *Florida Bar v. Went For It, Inc.*[24] The U.S. Supreme Court upheld a Florida Bar ban on plaintiff attorneys sending direct mail to victims or their relatives for 30 days after an accident or disaster. In applying the *Central Hudson* test, the court held that the state properly had a substantial interest in protecting citizens from intrusive and invasive attorney solicitation, and that the 30-day ban was reasonably drawn. As pertains specifically to Florida, the court noted, lawyer solicitation is granted a wide berth, through authorization to advertise on

[18] *Id*.
[19] *Id.* at 435.
[20] 447 U.S. 557, 566 (1980).
[21] *Central Hudson*, 447 U.S. at 566.
[22] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).
[23] *Id.* at 643.
[24] 515 U.S. 618 (1995).

prime-time television, radio, newspapers and other media, rent billboards, send unsolicited mail to the general population, and take out telephone directory ads.[25]

The *Florida Bar v. Went For It, Inc.* case is the last case, to date, that involved U.S. Supreme Court review of restrictions on lawyer advertising. Other cases that apply to non-legal types of advertising have cited *Florida Bar*, however. The Fourth Circuit Federal Court in *Ficker v. Curran* refused to apply the approach in *Florida Bar*, citing that the polling data that the court relied on as proof of public harm was not examined for accuracy, and that this case differed by virtue of involving a criminal defendant, not a grieving accident victim.[26] Other cases have cited the *Florida Bar* case as good law, but have distinguished the fact scenario, such as in *Beckwith v. Department of Business and Professional Regulation*.[27] Therefore, it remains to be seen whether courts are moving toward a more restrictive approach to lawyer advertising.

Florida Bar Rules

In general, Florida Bar Rules authorize a broad range of forms of advertising, including print media, billboard, radio, and television and computer communication.[28] Lawyers are expressly precluded from making false, misleading, deceptive, or unfair statements.[29] Testimonials are prohibited.[30] Lawyers advertising fees must honor them for 1 year after publication for yellow page ads, or at least 90 days unless otherwise specified in the ad.[31] Required language must be no smaller than one-fourth of the largest type in the ad.[32] Certain images are permitted, including the scales of justice, Lady Justice, a gavel, or a photograph of the head and shoulders of the lawyer or lawyers who are members of or employed by the firm against a plain, solid color background or a plain unadorned set of law books.[33]

Except for lawyer referral service advertisements, all ads must include the following disclosure:

> The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.[34]

Other than with family members or those with whom a prior professional relationship existed, lawyers are precluded from having direct contact with prospective clients.[35] Lawyers are also prohibited from sending direct, targeted mailings to those involved in a personal injury or wrongful death action, until 30 days have passed since the accident or disaster.[36] Written communications are subject to other provisions regarding required information and prohibited

[25] 515 U.S. 618, 633-634 (1995).
[26] 119 F.3d 1150 (4th Cir. 1997).
[27] 667 So.2d 450 (Fla. 1st DCA 1996).
[28] R. Regulating Fla. Bar, 4-7.1(a).
[29] R. Regulating Fla. Bar, 4-7.2(b).
[30] *Id.*
[31] R. Regulating Fla. Bar, 4-7.2(c)(5).
[32] R. Regulating Fla. Bar 4-7.2(c)(11).
[33] R. Regulating Fla. Bar 4-7.2(c)(12)(K).
[34] R. Regulating Fla. Bar 4-7.3(b).
[35] R. Regulating Fla. Bar 4-7.4(a).
[36] R. Regulating Fla. Bar 4-7.4(b)(1)(A).

statements.[37] A copy of each direct mailing is required to be filed with the Bar's standing committee on advertising before or concurrent to the mailing.[38] Additionally, the lawyer must retain a copy of each communication for 3 years.[39]

All electronic advertisements except for computer based ads are subject to the provisions on required information and prohibited statements.[40] Television and radio ads are precluded from containing deceptive, misleading, manipulative, or confusing information.[41] Recognizable spokespersons are prohibited from appearing in electronic ads.[42] If a spokesperson is used, a disclosure must appear identifying the person as a spokesperson.[43] Regarding computer communications, email communications are restricted, subject to the same requirements as for that of direct print mailings.[44]

All advertisements, whether through public media, direct mail, or email, are subject to review by the standing committee on advertising.[45] A lawyer is required to file a copy of each ad with the committee prior to or concurrent with its first dissemination.[46] To receive an advisory opinion by the committee, the copy must be filed at least 15 days before dissemination.[47] The committee will respond within 15 days to indicate approval or to communicate that additional time is needed; otherwise, the ad is deemed approved.[48] If the committee determines that the ad does not comply with Bar Rules, it is required to advise the lawyer that dissemination or continued dissemination may result in professional discipline.[49] Lawyers are required to maintain copies of all ads for 3 years after their final dissemination.[50] Certain ads are exempt from filing and review, including public service announcements as well as "Any advertisement in any of the public media, including the yellow pages of telephone directories, that contains neither illustrations nor information other than permissible content of advertisements set forth elsewhere in this subchapter."[51]

Public's Perception of Lawyer Advertising

Numerous studies have examined public perception toward lawyer advertising.

Florida Magid Study of 1987: This study was cited in *Florida Bar v. Went For It, Inc*. 54 percent of respondents considered contacting persons after accidents or other tragic events a violation of privacy. Among recipients of direct-mail advertising from lawyers, 45 percent

[37] R. Regulating Fla. Bar 4-7.4(b)(2)(A).
[38] R. Regulating Fla. Bar 4-7.4(b)(2)(C).
[39] *Id.*
[40] R. Regulating Fla. Bar 4-7.5(a).
[41] R. Regulating Fla. Bar 4-7.5(b)(1)(A).
[42] R. Regulating Fla. Bar 4-7.5(b)(1)(B).
[43] R. Regulating Fla. Bar 4-7.5(b)(2)(B).
[44] R. Regulating Fla. Bar 4-7.6(c).
[45] R. Regulating Fla. Bar 4-7.7(a).
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] R. Regulating Fla. Bar 4-7.7(e).
[50] R. Regulating Fla. Bar 4-7.7(h).
[51] R. Regulating Fla. Bar 4-7.8(a) and (b).

believed it to be invasive of privacy.[52] As noted above, the studies that the court relied upon have been questioned in *Ficker*, as well as in a 1997 law review article, specifically regarding a lack of information about sample size or selection.[53]

Iowa Yellow Pages Study (1988): Legal ads are not considered useful or informative, ads that list prior experience and expertise rank more favorably, and lawyers who advertise are not ranked favorably.[54]

Oklahoma Task Force Study (1994): 41 percent approved of lawyer advertising in the yellow pages, 59 percent disapproved of television ads, 86 percent disapproved of direct mail advertising, 80 percent disapproved of advertising by direct personal contact, 85 percent believed lawyers should be allowed to advertise.[55]

Florida Penn + Schoen Study (1995): Commissioned by the Florida Bar, research involved forming focus groups, along with 400 Floridians who had had contact with attorneys in the past year. Those responding favorably and unfavorably toward attorneys were removed from the sample. The 28 percent remaining who had responded that they were ambivalent toward attorneys became the key sample. Of these, 43 percent responded that advertising has negatively impacted their impressions of attorneys. Although only 26 percent would choose a lawyer who advertises, 77 percent believed lawyers should be allowed to advertise.[56]

Lawyer Advertising at the Crossroads (1995): Throughout 1994, the A.B.A. Commission on Advertising held hearings and requested written comment on lawyer advertising. In its final report, the commission expressed concern with wide disparities in previous studies. Surveys explored perceptions toward advertising generally, but did not analyze content and style. When asked open-ended questions about lawyer image, very few faulted lawyer advertising. Unlike prior research, this study incorporated a content-based analysis. After completing questionnaires rating lawyer image based on honesty, dignity, and ethics, respondents were shown different television commercials, some of which had won awards for dignity. Others showed a lawyer simply talking about a client's needs, known as the "talking heads" format. The last group of commercials was humorous and sensational. Researchers found the following:

- The public ranks lawyers higher on qualities such as intelligence and professional demeanor than for honesty, care, and greed;
- Lawyers who advertise in ways more stylish than sensational are ranked higher; and
- A correlation exists between how invasive an advertisement is and how poorly it is received by the public.[57]

Florida Bar Rules Compared to Other States

[52] Magid Associates, Inc., *Attitudes & Opinions Toward Direct Mail Advertising by Attorneys* (Dec. 1987).
[53] Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc.*, 49 Ark. L.Rev. 703, 728 (1997).
[54] Magid Associates, Inc., *Consumer Attitudes Toward Yellow Pages Advertising*, May 1988.
[55] *Preliminary Report Of Task Force On LawyerAdvertising*, Oklahoma Bar Association, November 1994.
[56] Penn + Schoen Associates, *Perceptions of Lawyers: The Client's View, A Study For The Florida Bar* (June 1995).
[57] American Bar Association Commission On Advertising, *The Impact Of Advertising On The Image Of Lawyers, A Mall Intercept Study*, 1995.

The majority of state bars base their lawyer advertising rules on the Model Rules of Professional Conduct, drafted by the A.B.A.[58] As Florida Bar Rules are considered more restrictive than the Model Rules, Florida is generally thought to have some of the most restrictive rules in the country. Rules that set it apart include its 30-day wait for direct mail in personal injury and wrongful death cases, labeling requirement, and stringent filing and screening review process.[59] Another noted feature is that the Florida Bar Rules "severely limit creative executional devices (such as dramatizations, testimonials, music, sound effects, etc.), in an effort to ensure informational as opposed to emotional advertising messages."[60]

Iowa Bar Rules

The Iowa Bar limits most ads to the format commonly known as tombstone advertising,[61] so Iowa may in fact be more restrictive than Florida, though Florida appears to follow as a close second.[62] Emotional appeals are prohibited.[63] Advertising in print media must be no smaller than a certain font, and the rules encourage informational, rather than promotional advertising. Informational language includes the lawyer's name, address, telephone number, fields of practice, birth information, bar admission information, schools attended, offices held, military service, legal authorships, legal teaching positions, memberships in bar associations and legal societies, and technical and professional licenses.[64] This is considered to be a "safe harbor" provision, and ads containing only these items are granted a presumption of approval.

Solicitation is discouraged, as is compensation for recommendations.[65] In fact, the Rules provide a blanket prohibition on in-person solicitation.[66] Iowa requires prior review and approval of direct mail solicitations,[67] and these must be clearly labeled as advertisements.[68] Specific to electronic media, narration is allowed through a single, non-dramatic voice without background sound. For television, no visual display other than that already authorized in print is allowed.[69]

All communications must contain the following disclosure:

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[58] Phone Conference with Will Hornsby, Staff Counsel with the American Bar Association Division for Legal Services, on August 19, 2004.
[59] *Id.*
[60] Dr. Cathy J. Cobb-Walgren and Dr. Kenneth L. Bernhardt, *Consumer Reactions To Legal Services Advertising In The State Of Georgia*, The State Bar Of Georgia, October 1995, 7.
[61] A tombstone format generally means a display of truthful, factual information in plain type, without adornment and unaccompanied by color, opinion, artwork, or logos.
[62] "The Iowa State Bar Association imposes the most stringent restrictions on lawyer advertising and solicitation. Iowa imposes labeling, copying, recordkeeping, support and disclaimer restrictions. It strictly enforces advertising by establishing a committee on professional ethics which reviews all advertisements before they are disseminated. The committee also decides whether advertisements are in any way false or misleading. The Florida Bar follows a close second on lawyer advertising and solicitation restrictions. Florida's bar also imposes restrictions on labeling, copying, recordkeeping, providing support and disclaimers on advertising. Florida's greatest restriction comes in the form of a direct mail restriction which imposes a thirty (30) day waiting period on direct mail advertisements to accident victims," Oklahoma Bar Association, *Preliminary Report Of Task Force On Lawyer Advertising And Solicitation*, November 1994.
[63] R. Regulating Iowa Bar DR 2-101(A).
[64] R. Regulating Iowa Bar DR 2-101(B)(2) and (C).
[65] R. Regulating Iowa Bar EC 2-9.
[66] R. Regulating Iowa Bar DR 2-101(4)(a).
[67] R. Regulating Iowa Bar DR 2-101(4)(b).
[68] R. Regulating Iowa Bar DR 2-101(4)(d).
[69] R. Regulating Iowa Bar DR 2-101(5).

> The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise.[70]

Texas Bar Rules

The Texas Bar prohibits false or misleading communications, including statements that compare the lawyer's services with other lawyer services, unless the comparison can be verified;[71] advertisements that discuss results or contain client endorsements;[72]in-person or telephone solicitation for pecuniary gain;[73] advertisements that indicate that the lawyer is a specialist;[74] and advertisements that contain actors depicting lawyers or narrators that are not actually lawyers with the firm.[75] Also, an attorney is required to keep a copy of an ad for 4 years after its last dissemination.[76] A written solicitation is required to be labeled as an advertisement.[77] Attorneys are generally required to file a copy of an ad intended for public media or written solicitation with the State Bar concurrent to its distribution.[78] Filing is not required for tombstone advertisements, including such items as firm identification and contact information, office hours, dates and admission to bars, credit card acceptance, fees, fields of practice, and firm charitable sponsorships.[79] Submission for an advance review is authorized.[80] The Lawyer Advertising and Solicitation Review Committee is required to complete its review within 25 days, or the ad is considered approved.[81]

Texas Bar Rules are considered to be on a fairly even par with those of Florida.[82]

Florida Bar Proposed Amendments to the Rules

During the summer and fall of 2004, the Florida Bar Advertising Task Force held a series of meetings to consider changes to the Florida Bar Rules, which were submitted in final form to the Florida Bar Board of Governors in January 2005. Final action is expected to be taken at the April 8, 2005, meeting of the Florida Bar Board of Governors. The Task Force recommends that the following language be approved:

- Clarifies that direct solicitation provisions do not apply to communications between lawyers, between a lawyer and the lawyer's own family members or current and former clients, between a lawyer and a person with whom the lawyer had a prior professional relationship, or to communications provided pursuant to a prospective client's request;

[70] R. Regulating Iowa Bar DR 2-101(A).
[71] R. Regulating Texas Bar 7.02(3).
[72] R. Regulating Texas Bar 7.02, Comment.
[73] R. Regulating Texas Bar 7.03(a).
[74] R. Regulating Texas Bar 7.04(a).
[75] R. Regulating Texas Bar 7.04(g).
[76] R. Regulating Texas Bar 7.04(f).
[77] R. Regulating Texas Bar 7.05(b).
[78] R. Regulating Texas Bar 7.07(a) and (b).
[79] R. Regulating Texas Bar 7.07(d).
[80] R. Regulating Texas Bar 7.07(c).
[81] R. Regulating Texas Bar 7.07, Comment.
[82] Phone Conference with Will Hornsby, *supra* note 59.

- Adds that the general prohibition against conduct involving dishonesty or misrepresentation applies to all communications by a lawyer;
- Clarifies that if the content of an advertisement is limited to those items that the Bar identifies as permissible, filing and review is not required and if the information is true, it is presumed not to be misleading or deceptive; also adds to permissible content of advertisements military service, punctuation marks and common typographical marks, Statue of Liberty, the American flag or eagle, the State of Florida flag, a courthouse, columns, and a diploma;
- Expands the definition of false, misleading, or deceptive advertising;
- Requires mandatory statements to be clearly legible and printed in the same language as the advertisement;
- Adds that types of computer-accessed communications include pop-ups and banner ads;
- Adds that filings must be made to the Florida Bar address;
- Adds commentary regarding a safe harbor to encourage lawyers to file their ads and receive approval in advance of using the ads, which provides for an immunity from grievance liability; and
- Requires lawyer referral services who advertise to affirmatively state as such.

Additionally, the Board of Governors requested that the Task Force draft rules on prior review. Two options were proposed, which would require:

- All television and radio advertisements to be filed for review at least 15 days prior to dissemination; or
- All advertisements intended to be sent unsolicited to prospective clients to be filed for review at least 15 days prior to dissemination.[83]

Florida Statutes on Solicitation

Section 877.02(1), F.S., provides:

> It shall be unlawful for any person or her or his agent, employee or any person acting on her or his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal service, or to make it a business to solicit or procure such business, retainers or agreements; provided, however, that nothing herein shall prohibit or be applicable to banks, trust companies, lawyer reference services, legal aid associations, lay collection agencies, railroad companies, insurance companies and agencies, and real estate companies and agencies, in the conduct of their lawful businesses, and in connection therewith and incidental thereto forwarding legal matters to attorneys at law when such forwarding is authorized by the customers or clients of said businesses and is done pursuant to the canons of legal ethics as pronounced by the Supreme Court of Florida.

[83] As is currently the case, the Florida Bar would contact the filer within 15 days to indicate approval or to communicate that additional time is needed; otherwise, the ad is deemed approved. These proposals for a prior review are still pending before the Florida Bar Board of Governors.

A violation constitutes a first-degree misdemeanor, punishable by up to 1 year in jail and a $1,000 fine.[84]

III. Effect of Proposed Changes:

This committee substitute requires the following entities located in Florida, who also advertise in-state through print or electronic media, including computer-accessed communications, to provide the publisher an accompanying affidavit with each advertisement:

- A member of the Florida Bar;
- A legal plan, organization, or association composed entirely of Florida Bar members and located in-state; or
- A combination of such legal plans, organizations, or associations located in-state.

The affidavit must include affirmations under oath that the lawyer signing the affidavit is a Florida Bar member in good standing; is currently practicing law in the state; has read and understands the Florida Bar rules relating to lawyer advertising; represents that if the entity is a legal plan, organization, or association, individually or as a combination, that it is composed entirely of Florida Bar members and is located in-state; acknowledges responsibility for the advertisement, including potential discipline; and states that a filing has been or will be made with the Florida Bar, or that that the advertisement is exempt from filing under the Florida Bar rules.

Regarding out-of-state legal service providers or lawyer referral services advertising in-state, a signed, sworn statement must accompany all advertisements submitted for publication through print or electronic media, and these advertisements are subject to Florida Bar rules on lawyer advertising. The statement requires affirmations that the advertiser has read and agrees to comply with Florida Bar rules, and also that the advertiser acknowledges the civil penalties for violations. Additionally, lawyer referral services are required to include a prominent disclosure in all advertisements.

Out-of-state legal service providers and lawyer referral services advertising in-state are subject to $1,000 in civil fines for a first offense and $10,000 for each subsequent offense. The Florida Bar and the Attorney General are recognized as enforcing authorities, and are granted the ability to seek injunctions. An offense is defined as a single advertisement published in a single print publication or though a single electronic media outlet, regardless of how many times it is actually published.

Within 30 days after acceptance for publication, a publisher is required to send a copy of the advertisement and original affidavit or statement to the Florida Bar and to retain a copy for two years, unless the affidavit states that the advertisement is exempt from filing with the Florida Bar. Where the advertisement is to be forwarded to the Florida Bar, the advertiser is required to provide the publisher with a copy of the advertisement.

[84] Sections 877.02(3), 775.082, and 775.083, F.S.

Legal services that are advertised in a false, deceptive, or misleading manner are now subject to unfair and deceptive trade practice penalties.

These provisions are considered cumulative and do not replace other valid laws, codes, ordinances, rules, or penalties currently in effect.

This bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Speech-Related Regulation

This committee substitute appears to be content-neutral in its approach to regulating commercial speech. If provisions are challenged, a court will likely apply the *Central Hudson* test in its analysis, and base its findings on whether regulations justify a substantial governmental interest and are narrowly drafted.

For additional information on regulation of commercial speech, see the Present Situation section of this analysis.

Commerce Clause

A long-established principle exists that the federal constitution's affirmative grant of commerce power to Congress carries with it an implicit negative, or dormant, limitation on the power of states to regulate and tax interstate commerce.[85] Regulations that interfere with free trade may be considered constitutionally suspect. Here, the provision that attaches a civil penalty to out-of-state violators may potentially be challenged on the assertion that the Federal Commerce Clause specifically precludes states from discriminating against, unduly burdening, taxing, or otherwise impeding interstate commerce or engaging in economic protectionism.[86] A court may make its decision based on differential penalties created under this legislation, or it may consider decisive that the

[85] Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 Wayne L. Rev. 173, 229 (2002).
[86] *Reinish v. Clark*, 765 So.2d 197, 211 (Fla. 1st DCA 2000).

regulation prohibits identical unlawful behavior. Critical to a court's analysis will be whether the regulation affords an undue advantage to local business.[87] Here, both in-state and out-of-state advertisers are prohibited from engaging in identical behavior, and both face sanctions. Additionally, courts have consistently recognized the broad police powers afforded to states for public protection, specifically as applied to interstate commerce. In fact, statutes that reflect the exercise of a state's police power are scrutinized less under a Commerce Clause challenge than those that are designed to raise state revenue.[88]

Equal Protection

An out-of-state entity could potentially challenge the civil penalty application also under an equal protection argument. However, "unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate interest."[89] Here, it appears that the state could show a legitimate state interest in prohibiting unlawful advertising activity by out-of-state entities for the same behavior as entities in-state. One group is not permitted to engage in behavior that the other is not. Moreover, out-of-state entities are much more difficult to regulate than in-state entities who are subject to the Florida Bar's jurisdiction over its members.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Out-of-state attorneys and lawyer referral services who commit advertising violations may face civil penalties provided in this bill of $1,000 for a first offense and $10,000 for each additional offense.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[87] *Ford Motor Credit Company v. Department of Revenue, State of Florida*, 537 So.2d 1011, 1013 (Fla. 1st DCA 1988).
[88] *Department of Banking and Finance, State of Florida v. Credicorp, Inc.*, 684 So.2d 746, 750 (Fla. 1996).
[89] *Reinish, supra* note 85, at 204.

VIII. Summary of Amendments:

None.