

**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.)

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Prepared By: The Professional Staff of the Judiciary Committee

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BILL: SB 1918

INTRODUCER: Senator Margolis

SUBJECT: Legal and Medical Referral Service Advertisements

DATE: April 22, 2011

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	<b>Favorable</b>
2.	O'Connor	Maclure	JU	<b>Pre-meeting</b>
3.			BC	
4.				
5.				
6.				

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**I. Summary:**

This bill regulates certain lawyer referral services and medical referral services and their advertisements to prevent misleading or deceptive advertisements aimed at motor vehicle accident victims.

The bill requires advertisements by certain lawyer referral services and medical referral services to contain specific information in a certain manner and prohibits these advertisements from containing other information or representations. The bill requires advertisements for certain lawyer referral services disseminated in Florida to comply with the Supreme Court of Florida's Rules Regulating The Florida Bar pertaining to lawyer referral and advertising services as if the referral services were provided by members of The Florida Bar.

The bill provides for certain recordkeeping requirements by the lawyer referral and medical referral services. The bill prohibits a lawyer referral service or medical referral service from making recommendations based on financial or ownership interests and requires the disclosure of the referral service's financial interest in the health care provider, lawyer, or law firm to which the referral is being made.

This bill provides for certain civil, administrative, and criminal penalties.

This bill creates multiple unnumbered sections of the Florida Statutes.

## II. Present Situation:

### Deceptive and Unfair Trade Practices

#### *Federal Law*

Under 15 U.S.C. s. 45, any “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce” is unlawful. The Federal Trade Commission (FTC) is the entity responsible for enforcing this provision. Under the Federal Trade Commission Act,<sup>1</sup> the FTC is empowered, among other things, to:

- Prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce;
- Seek monetary redress and other relief for conduct injurious to consumers;
- Prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices;
- Conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and
- Make reports and legislative recommendations to Congress.

Any person, partnership, or corporation who violating an order of the FTC after it has become final, and while such order is in effect, must forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation, which may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order is a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the FTC, each day of continuance of such failure or neglect is deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and other further equitable relief as deemed appropriate in the enforcement of the final orders of the FTC.<sup>2</sup>

#### *Florida Deceptive and Unfair Trade Practices Act*

Part II of ch. 501, F.S., contains the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). Under the FDUTPA, s. 501.204, F.S., makes any “unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce” unlawful. The FDUTPA is enforced by specific “enforcing authorities.” The enforcing authority is the office of the state attorney if a violation of the FDUTPA occurs in or affects the judicial circuit under the office’s jurisdiction, or the Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.

The enforcing authority may administer oaths and affirmations, subpoena witnesses or matter, and collect evidence if, by his or her own inquiry or as a result of complaints, the enforcing

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<sup>1</sup> 15 U.S.C. ss. 41-58.

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

authority has reason to believe that a person has engaged in, or is engaging in, an act or practice that violates the FDUTPA.<sup>3</sup>

The enforcing authority may bring:

- An action to obtain a declaratory judgment that an act or practice violates the FDUTPA.
- An action to enjoin any person who has violated, is violating, or is otherwise likely to violate the FDUTPA.
- An action on behalf of one or more consumers or governmental entities for the actual damages caused by an act or practice in violation of the FDUTPA.

However, an action may not be brought by the enforcing authority more than four years after the occurrence of a violation of the FDUTPA or more than two years after the last payment in a transaction involved in a violation of the FDUTPA, whichever is later.

Any person, firm, corporation, association, or entity, or any agent or employee of the foregoing, who is willfully using, or has willfully used, a method, act, or practice that is unlawful under the FDUTPA, or who is willfully violating any administrative rules adopted under the FDUTPA, is liable for a civil penalty of not more than \$10,000 for each such violation. Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive or prohibited by rule. The civil penalty may be recovered in any action brought by the enforcing authority; or the enforcing authority may terminate any investigation or action upon agreement by the person, firm, corporation, association, or entity, or the agent or employee of the foregoing, to pay a stipulated civil penalty; or the civil penalty may be waived if the person, firm, corporation, association, or entity, or the agent or employee of the foregoing, has previously made full restitution or reimbursement or has paid actual damages to the consumers or governmental entities who have been injured by the unlawful act or practice or rule violation. If civil penalties are assessed in any litigation, the enforcing authority is entitled to reasonable attorney's fees and costs.

The Department of Legal Affairs may issue a cease and desist order if it is in the interest of the public. Any person who violates a cease and desist order of the department must pay a civil penalty of not more than \$5,000 for each violation.

Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of the FDUTPA may bring an action to obtain a declaratory judgment that an act or practice violates the FDUTPA and to enjoin a person who has violated, is violating, or is otherwise likely to violate the FDUTPA. In any action brought by a person who has suffered a loss as a result of such a violation, the person may recover actual damages, plus attorney's fees and court costs.

### ***Other Florida Laws***

Section 817.41, F.S.,<sup>4</sup> prohibits misleading advertising including the following acts:

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<sup>3</sup> Section 501.206(1), F.S.

<sup>4</sup> See also s. 817.06, F.S., which generally prohibits misleading advertising and provides that the penalty for misleading advertising is a misdemeanor of the second degree.

- Making or disseminating or causing to be made or disseminated before the general public of Florida, or any portion thereof, any misleading advertisement;
- Advertising, in any way or by any medium whatsoever, any sale as a “wholesale sale,” “below cost sale,” or terms of similar purport, unless the goods, wares, or merchandise offered for sale are offered by the seller at or below his or her delivered net cost price, or below the average wholesale price of such goods, wares, or merchandise;
- Knowingly and willfully advertising merchandise for sale at a special or wholesale price, in any way or by any medium whatsoever, if he or she does not have sufficient quantities of the advertised merchandise to meet the reasonably foreseeable demand, unless the fact of limited quantity and the approximate number of items is stated in the advertisement, or unless the retailer provides a means by which the consumer may obtain the advertised item at the advertised price within a reasonable time or a value equivalent thereto

Civil suits may be filed under s. 817.41, F.S., and any prevailing party must be awarded costs, including reasonable attorney’s fees, and may be awarded punitive damages in addition to actual damages proven.

Under s. 119.105, F.S., a person who comes into possession of exempt or confidential information contained in police reports may not use that information for any commercial solicitation of the victims or relatives of the victims of the reported crimes or accidents and may not knowingly disclose such information to any third party for the purpose of such solicitation during the period of time that information remains exempt or confidential.

Additionally, under s. 877.02, F.S., it is a misdemeanor for employees of hospitals, sanitariums, police departments, wrecker services, garages, prisons or courts, or for bail bondsmen, investigators, photographers, or insurance or public adjustors to assist an attorney in soliciting legal business. Under s. 316.066(3)(d), F.S., it is unlawful to use information from accident reports prepared by law enforcement officers for commercial solicitation.

### **Supreme Court of Florida’s Rules Regulating The Florida Bar**

The Florida Bar’s Standing Committee on Advertising (SCA) has been charged by the Supreme Court of Florida with the responsibility of evaluating all non-exempt lawyer advertisements, as well as all direct mail communications to prospective clients, for compliance with the Rules Regulating the Florida Bar. Accordingly, such advertisements and communications must be filed with The Florida Bar for review. Due to the high volume of advertisements filed by Florida lawyers, the SCA has delegated the initial review function to the staff of the Ethics and Advertising Department of The Florida Bar.<sup>5</sup>

Florida’s lawyer advertising rules apply to advertisements or direct mail solicitations of Florida Bar members for legal employment in Florida or targeted to Florida residents, or to advertisements or direct mail solicitations of out-of-state lawyers who have a regular or

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<sup>5</sup> The Florida Bar, Standing Committee on Advertising, *Handbook on Lawyer Advertising and Solicitation*, Eighth Edition 2010, available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3AC2BAA33CF257D885256B29004BDEE8/\\$FILE/Handbook%202010%20\(indexed\).pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3AC2BAA33CF257D885256B29004BDEE8/$FILE/Handbook%202010%20(indexed).pdf?OpenElement) (last visited on April 20, 2011).

permanent presence in Florida to practice as authorized by law for legal employment in Florida or targeted to Florida residents.<sup>6</sup>

Florida's lawyer advertising rules do not apply to communications between lawyers, between a lawyer and that lawyer's own family members, or between a lawyer and that lawyer's own current and former clients.<sup>7</sup> Also, Florida's lawyer advertising rules do not apply to communications made by a lawyer at a prospective client's request.<sup>8</sup>

Although the lawyer advertising rules do not apply to some communications, the rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation applies to all communications of a lawyer.<sup>9</sup>

A lawyer may not contact a prospective client in-person, by telephone, telegraph, or facsimile, or through other means of direct contact, unless the prospective client is a family member, current client, or former client.<sup>10</sup>

A lawyer may not give anything of value to a person for recommending the lawyer's services. However, this prohibition does not prevent a lawyer from paying the reasonable cost of advertising or the payment of usual charges to a lawyer referral service or other legal service organization.<sup>11</sup>

Each television and radio advertisement that is required to be filed must be filed at least 20 days before its planned broadcast. The bar must provide an opinion within 15 days from the date of receipt of a complete filing. The lawyer cannot broadcast the advertisement until the lawyer either receives an opinion on the advertisement or 20 days have elapsed from the complete filing of the advertisement. A complete filing consists of the video or audio recording of the advertisement, a printed copy of a complete transcript of the advertisement which includes any on-screen text, and a \$150 filing fee for timely filing (\$250 filing fee if late).<sup>12</sup>

For all other types of media, a lawyer or law firm disseminating information about themselves or their services to prospective clients must file a copy of such advertisement or communication for review by staff of the SCA, unless the information is specifically exempted. The advertisement or unsolicited direct mail must be filed either prior to or at the first time the advertisement is used.<sup>13</sup>

An advertisement in any public medium that contains no illustrations or information other than the following is exempt from the required filing:

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<sup>6</sup> See Rule 4-7.1(b) and (c), Florida's Rules Regulating The Florida Bar.

<sup>7</sup> See Rule 4-7.1(e)-(g), Florida's Rules Regulating The Florida Bar.

<sup>8</sup> Rule 4-7.1(h), Florida's Rules Regulating The Florida Bar.

<sup>9</sup> *Supra* note 5. See also Rules 4-7.1(i) and 4-8.4(c), Florida's Rules Regulating The Florida Bar.

<sup>10</sup> This prohibition does not extend to unsolicited direct mail communications made in compliance with Rule 4-7.4(b) or unsolicited e-mail communications made in compliance with Rule 4-7.6(c), Florida's Rules Regulating The Florida Bar.

<sup>11</sup> Rule 4-1.17, Florida's Rules Regulating The Florida Bar.

<sup>12</sup> *Supra* note 5. See also Rule 4-7.7(a)(1), Florida's Rules Regulating The Florida Bar.

<sup>13</sup> Rule 4-7.7(a)(2), Florida's Rules Regulating The Florida Bar.

- The name of the lawyer or law firm, a listing of lawyers associated with the firm, office locations and parking arrangements, disability accommodations, telephone numbers, website addresses, e-mail addresses, office and telephone service hours, and a designation such as “attorney” or “law firm”;
- Date of admission to The Florida Bar and any other bars; current membership or positions held in The Florida Bar, its sections or committees; former membership or positions held in The Florida Bar, its sections or committees, together with dates of membership; former positions or employment held in the legal profession together with the dates the positions were held; years of experience practicing law, number of lawyers in the advertising firm, and a listing of federal courts and jurisdictions other than Florida where the lawyer is licensed to practice;
- Technical and professional licenses granted by the state or other recognized licensing authorities and educational degrees received, including dates and institutions; military service, including branch and dates of service;
- Foreign language ability;
- Fields of law in which the lawyer practices, including official certification logos, subject to Rule 4-7.2(c)(6) (governing communication of specialized areas of practice);
- Prepaid or group legal service plans in which the lawyer participates;
- Acceptance of credit cards;
- Fee for initial consultation and fee schedule, subject to Rule 4-7.2(c)(7) regarding cost disclosures and (c)(8) regarding honoring advertised fees;
- Common salutary language such as “best wishes,” “good luck,” “happy holidays,” or “pleased to announce”;
- Punctuation marks and common typographical marks;
- An illustration of the scales of justice not deceptively similar to official certification logos or The Florida Bar logo, a gavel, traditional renditions of Lady Justice, the Statue of Liberty, the American flag, the American eagle, the State of Florida flag, an unadorned set of law books, the inside or outside of a courthouse, column(s), diploma(s), or a photograph of the lawyer or lawyers who are members of or employed by the firm against a plain background consisting of a single solid color or a plain unadorned set of law books.<sup>14</sup>

A lawyer referral service advertisement is exempt from filing if it contains no information or illustrations other than its name, location, telephone number, the referral fee charged, its hours of operation, the process by which referrals are made, the areas of law in which referrals are offered, the geographic area in which the referral lawyers practice, and, if applicable, the service’s nonprofit status, its status as a lawyer referral service approved by The Florida Bar, and the logo of its sponsoring bar association.<sup>15</sup>

All forms of lawyer advertising, including advertisements that are exempt from the filing requirement, must include the name of at least one lawyer, or the lawyer referral service, responsible for the advertising content and must disclose the town or city of one or more bona fide office locations of the lawyer or lawyers who will perform the services advertised. If the office is outside a city or town, the advertisement must disclose the county in which the office is located.

<sup>14</sup> Rules 4-7.8(a) and 4-7.2(b)(1), Florida’s Rules Regulating The Florida Bar.

<sup>15</sup> Rules 4-7.8(a) and 4-7.2(b)(2), Florida’s Rules Regulating The Florida Bar.

Lawyer advertisements may not include information that:

- Contains a material misrepresentation of fact or law - Rule 4-7.2(c)(1)(A).
- Is false or misleading - Rule 4-7.2(c)(1)(B).
- Fails to disclose material information necessary to prevent the information supplied from being false or misleading - Rule 4-7.2(c)(1)(C).
- Is unsubstantiated in fact - Rule 4-7.2(c)(1)(D).
- Is deceptive - Rule 4-7.2(c)(1)(E).
- Refers to past successes or results obtained - Rule 4-7.2 (c)(1)(F).
- Promises results - Rule 4-7.2(c)(1)(G).
- Compares the lawyer's services with the services of other lawyers, unless the comparison can be factually substantiated - Rule 4-7.2(c)(1)(I).
- Includes a testimonial - Rule 4-7.2(b)(1)(J).<sup>16</sup>

The majority of cases prosecuted against lawyers for advertising violations come from complaints to the Bar's Lawyer Regulation Department filed by members of the public, including other attorneys. Additionally, a lawyer may be referred to Lawyer Regulation by the Standing Committee on Advertising or The Florida Bar Board of Governors for repeated violations. Although rare, a lawyer may be referred to Lawyer Regulation by Florida Bar staff for failing to respond to inquiries by Bar staff. Complaints are prosecuted from Lawyer Regulation Headquarters in Tallahassee. If grievance committee review is necessary, the case is forwarded to the statewide advertising grievance committee. A statewide grievance committee was appointed in 2004 to hear only advertising cases for consistency.<sup>17</sup>

### III. Effect of Proposed Changes:

This bill provides certain findings by the Legislature, including that:

- There have been numerous complaints concerning misleading and deceptive advertisements directed to motor vehicle accident victims by entities who advertise they are available to refer motor vehicle accident victims to lawyers and health care providers;
- The public should not be deceived and misled by false or deceptive advertising that is for the purpose of directing motor vehicle accident victims to a specific health care provider, lawyer, or law firm; and
- Although lawyer advertisements for motor vehicle accidents are regulated by the Supreme Court of Florida's Rules Regulating The Florida Bar, those rules are not directly applicable to non-lawyer entities that advertise to motor vehicle accident victims and therefore, it is necessary to enact a law to protect the public from false and deceptive advertising to motor vehicle accident victims.

**Section 1** defines "lawyer referral service" to mean any group or pooled advertising program operated by any person, group of persons, association, organization, or entity whose legal services advertisements use a common telephone number, a uniform resource locator (URL), or

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<sup>16</sup> There are additional regulations for targeted direct mail advertisements or computer-accessed communications (e.g. websites or e-mail).

<sup>17</sup> *Supra* note 5.

other form of contact and whose clients or prospective clients are referred only to lawyers or law firms participating in the group or pooled advertising program. A not-for-profit referral program in which participating lawyers do not pay a fee or charge of any kind to receive referrals or to belong to the referral panel and undertake the referred matters without expectation of remuneration is not considered a lawyer referral service.

“Medical referral services” is defined by the bill to mean any group or pooled advertising program operated by any person, group of persons, association, organization, or entity whose legal and medical services advertisements use a common telephone number, a uniform resource locator (URL), or other form of contact and whose patients or prospective patients are referred only to medical clinics or health care providers participating in the group or pooled advertising program.

The provisions of the bill do not apply to a lawyer referral service for, or operated by, a voluntary bar association or legal aid program recognized by The Florida Bar.

**Section 2** requires all advertising by, or on behalf of, a medical or lawyer referral service to the general public for services related to injuries from a motor vehicle accident to comply with the following:

- If an advertisement includes any reference to referring a person to a health care provider, lawyer, or law firm, the advertisement must clearly disclose the county or counties in which the health care provider, lawyer, or law firm to whom the referral will be made has a bona fide office from which the services will be provided.
- Each advertisement is prohibited from including any false, misleading, or deceptive communication including a communication that:
  - Contains a material misrepresentation of fact.
  - Fails to disclose material information necessary to prevent the information supplied from being false or misleading.
  - Claims facts that cannot be substantiated.
  - Contains any reference to past successes or results obtained that would deceive the public into having unjustified expectations. The bill requires an advertisement to contain a disclaimer that “results will vary depending on the specific facts” whenever any reference to past successes or results is made, and the disclaimer must be communicated in the exact same manner as any reference to past successes or results.
  - Contains a reference to monetary amounts that create unjustified expectations, such as using deceptive statements like “Don’t make a million dollar mistake.” or “You may be entitled to \$100,000.” when there is no factual basis to suggest such monetary amounts to the general public.
  - Promises or suggests a specific result that cannot be guaranteed, including promising or suggesting a monetary result that cannot be guaranteed.
  - Contains any testimonial by an actor, unless such testimonial includes a disclaimer, communicated in the exact same manner as the testimonial, that the testimonial is not a true story and the person providing the testimonial is an actor and not a real person.
  - Contains any testimonial by a real person, unless the real person actually obtained the services of the entity advertising the services, and the testimonial is completely truthful and verifiable, and includes the disclaimer that “results may vary depending on the

- specific facts.” The disclaimer must be communicated in the exact same manner as the real person testimonial.
- Contains any verbal or visual reference to any connection between any person in public safety, or purporting to be in public safety, or any public safety entity and the person or entity advertising the services to motor vehicle accident victims. This prohibition includes the use of any visual or verbal reference to any actor purporting to be connected in any way to a public safety officer or public safety entity and includes the use of any public safety badge, emblem, uniform, hat, vehicle, or any replica of any such item. An exception to this prohibition is when the person in charge of a public safety entity gives express written consent to reference the agency in the advertisement or communication.

**Section 3** requires an advertisement or unsolicited written communication for legal services related to motor vehicle accidents disseminated in Florida by, or on behalf of, any lawyer referral service to comply with the Supreme Court of Florida’s Rules Regulating The Florida Bar pertaining to lawyer referral and advertising services as if those services were provided by members of The Florida Bar, including filing requirements.

**Section 4** requires each advertisement by, or on behalf of, a lawyer referral service related to motor vehicle accidents, which is submitted for publication in the print or electronic media or on a billboard in Florida, to be accompanied by an affidavit signed under oath by the owner, shareholder, principal, or officer of the referral service affirming under penalty of perjury<sup>18</sup> that the person:

- Has read and understands the Supreme Court of Florida’s Rules Regulating The Florida Bar, which pertain to lawyer referral and advertising services;
- Acknowledges that he or she is the person responsible for the advertisement and for the adverse consequences of any prohibited advertising;
- Affirms that the advertisement complies with the Supreme Court of Florida’s Rules Regulating The Florida Bar, which govern lawyer advertising;
- Acknowledges that a knowing violation of the Supreme Court of Florida’s Rules Regulating The Florida Bar, which govern lawyer advertising, subjects the person to a civil penalty of \$1,000 for the first offense and a civil penalty of \$5,000 for each subsequent offense; and
- Has filed, or is responsible for filing and will file, the advertisement for review with The Florida Bar in compliance with the Supreme Court of Florida’s Rules Regulating The Florida Bar, which govern lawyer advertising; or
- Has determined that the advertisement is exempt from the filing requirement as set forth in the Supreme Court of Florida’s Rules Regulating The Florida Bar, which govern lawyer advertising.

A copy of the affidavit must be submitted to The Florida Bar and maintained by the referral services for two years.

**Section 5** requires an advertisement or unsolicited written communication disseminated in Florida by, or on behalf of, a lawyer referral service relating to motor vehicle accidents to

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<sup>18</sup> The penalty of perjury under s. 837.012, F.S., is a misdemeanor of the 1st degree punishable as provided in s. 775.082 or s. 775.083, F.S. (maximum imprisonment of 1 year or maximum fine of \$1,000).

contain prominently within the body of the advertisement or unsolicited written communication the statement:

This advertisement is by a lawyer referral service. Lawyers may pay this service for referrals of prospective clients who respond to this advertisement. This lawyer referral service is not licensed to provide legal services in Florida.

**Section 6** requires a referring person or entity to provide the person being referred with a written disclosure that clearly and unambiguously states any financial interest or financial relationship that the referring person or entity has with the health care provider, lawyer, or law firm to whom a referral is made. A copy of the written disclosure must be submitted to The Florida Bar and maintained by the referral service for two years.

**Sections 7 and 8** prohibit a lawyer referral service from requiring a participating lawyer or law firm to recommend the services of a particular health care provider or other professional as a condition of participation in the referral service. Additionally, a medical referral service may not make referrals only to a medical clinic or health care provider with which the medical referral service has any financial or ownership interest.

**Section 9** provides for civil, administrative, and criminal penalties and provides that a person or entity that violates the provisions of the bill must forfeit any monetary amount received as a result of an advertisement that violates this act.

Under the bill, if any provision of the bill is violated, the person committing such violation is subject to a civil penalty of \$1,000 for the first offense and \$5,000 for each subsequent offense. Any sums collected from the civil penalty are to be deposited in the State Courts Revenue Trust Fund. Each prohibited advertisement that appears on a billboard, is published in print media, airs on radio or television, or appears on a computer website controlled by the party advertising the services constitutes a separate offense.

A person who claims a violation of any provision in this bill may file a complaint with the Department of Agriculture and Consumer Services. If the department fails to initiate legal proceedings within 90 days after receiving the complaint, the person who filed the complaint may, in a court of competent jurisdiction, seek to enforce such penalties and may seek an injunction against the person committing the violation. Only the person who first filed the complaint with the department on each individual violation is authorized to initiate an action.

A person who files a court action for a violation of any provision in this bill may recover attorney's fees and costs if he or she is successful in obtaining an injunction, penalties, or both and may recover 25 percent of all moneys paid as a civil penalty as a result of the person's action to enforce the provisions of the bill.

**Section 10** provides that after an adjudication of guilt is entered for a first offense for a violation, any subsequent knowing violation is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, F.S. (maximum imprisonment of 60 days or maximum fine of \$500). A person who violates any provision of the bill that relates to specific advertising

requirements commits an unfair or deceptive trade practice as defined in part II of ch. 501, F.S., and is subject to the penalties and remedies provided therein. Further, any person injured by a violation may bring an action for recovery of damages. A judgment in favor of the person must be for actual damages, and the losing party is liable for the person's reasonable attorney's fees and costs.

**Section 11** preserves existing law and provides that the provisions in this bill are cumulative and do not amend or repeal any other law, code, ordinance, rule, or penalty now in effect.

**Section 12** provides an effective date of July 1, 2011.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

##### **C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

##### **D. Other Constitutional Issues:**

###### ***Access to Courts***

Lines 247 through 250 of the bill provide that the right of a person to initiate court proceedings under the provisions of this bill is limited to the person who first filed the complaint with the Department of Agriculture and Consumer Services on each individual violation. This provision may be challenged as a violation of the constitutional right to have access to courts. However, the bill expressly preserves any other causes of action available under any other state or local law, ordinance, or rule, and section 10 authorizes a person to bring an action for recovery of actual damages.

Article I, Section 21 of the Florida Constitution provides, "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

### *Freedom of Speech*

Because this bill regulates advertising, and therefore a person's "speech," it may be challenged as violating the First Amendment of the U.S. Constitution<sup>19</sup> and Article I, Section 4 of the Florida Constitution.

The First Amendment of the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, Section 4 of the Florida Constitution provides:

Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

The Florida Courts have generally interpreted state constitutional provisions related to freedom of speech and freedom of the press in accordance with the federal First Amendment jurisprudence.

The First Amendment protections extend to all forms of communication including written, verbal, and nonverbal. The government can impose content-based limits on speech if it can demonstrate a compelling interest. However, regulations that burden substantially more speech than is necessary to further a compelling interest are invalid.<sup>20</sup> Pertaining to commercial speech, the government may ban speech that proposes an unlawful transaction and may also ban false advertising, misleading advertising, and other forms of fraudulent speech because such forms of expression are not protected by the First Amendment.<sup>21</sup>

For a court to determine whether the government may regulate commercial speech, the following must be considered:

- Whether the speech at issue is not misleading and concerns lawful activity;
- Whether the government has a substantial interest in restricting that speech;
- Whether the regulation directly advances the asserted governmental interest; and

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<sup>19</sup> Applicable to the states by the Fourteenth Amendment of the U.S. Constitution.

<sup>20</sup> *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

<sup>21</sup> *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376 (1973), and *Friedman v. Rogers*, 440 U.S. 1 (1979).

- Whether the regulation is narrowly tailored, but not necessarily the least restrictive means available, to serve the asserted governmental interest.<sup>22</sup>

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

The bill requires lawyer referral services to file advertisements with The Florida Bar in the same manner and under the same requirements as any lawyer submitting advertisements for approval. This would subject the referral services to a fee of \$150 for each timely filed advertisement and \$250 for a late filed advertisement.<sup>23</sup>

### B. Private Sector Impact:

Lawyer referral services and medical referral services would incur a negative fiscal impact in order to comply with the provisions of the bill.

### C. Government Sector Impact:

The Department of Agriculture and Consumer Services could incur a negative fiscal impact associated with investigating and initiating legal proceedings in response to complaints.

The Florida Bar might also incur administrative costs associated with reviewing additional filings.

## VI. Technical Deficiencies:

The phrases “and not a real person,” “by a real person,” and “real person” in lines 137, 138, 144 could be deleted as they appear to be unnecessary.

## VII. Related Issues:

The term “health care provider” is not defined in the bill. “Health care provider” is defined in other chapters of the Florida Statutes, with the definitions varying in scope. For example, under s. 766.202(4), F.S., in the medical negligence context, “health care provider” has a broad definition to encompass, among others, hospitals, certain birth centers, blood banks, plasma centers, anyone licensed to practice medicine, chiropractors, optometrists, and nurses.

Lines 114 and 115 of the bill prohibit advertisements that contain “material” misrepresentations of fact and prohibit a failure to disclose “material” information necessary to prevent the information supplied in the advertisement from being false or misleading. The term “material” is open for interpretation, and litigation may ensue in order for a court to interpret the term.

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<sup>22</sup> *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 476-81 (1989). See also *State v. Cronin*, 774 So. 2d 871 (Fla. 1st DCA 2000).

<sup>23</sup> *Supra* note 5.

Lines 232 through 234 of the bill require a person or entity that violates the provisions of the bill to forfeit any monetary amount received as a result of an advertisement that violates the provisions of the bill. It is unclear whether this, in effect, means that the referral services will be required to ask each person they are referring whether they obtained the referral services because of an advertisement versus being told about the service from a friend or family member or by other means.

Lines 235 through 237 of the bill provide that a person or entity that violates the provisions of the bill is subject to a civil penalty. It is not clear who is responsible for collecting the civil penalty. Civil penalties under ch. 501, F.S., are recovered by the Department of Legal Affairs (Attorney General's Office) or the Office of the State Attorney. Although lines 241 through 250 of the bill authorize the Department of Agriculture and Consumer Services to initiate legal proceedings after a complaint has been filed, there is no requirement that the Department of Agriculture and Consumer Services recover the civil penalty.

Lines 261 through 265 of the bill provide that, "After an adjudication of guilt is entered for a first offense of violating this act, any subsequent knowing violation of this act is a misdemeanor of the second degree." It is unclear what the penalty is for the first offense of which there is an adjudication of guilt.

#### **VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.