

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 Judiciary

BILL: SB 1992

INTRODUCER: Senator Harrell

SUBJECT: Solicitation of Nonmedical Services

DATE: March 26, 2021

REVISED: 03/29/21

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

I. Summary:

SB 1992 defines what a deceptive and unfair trade practice act is when it involves a paid solicitation for nonmedical professional services, including legal services, regarding a drug or medical device.

The bill creates s. 501.2106, F.S., which provides that it is a deceptive and unfair trade practice for a person to submit or approve the submittal of a solicitation for nonmedical professional services for publication, broadcast, or dissemination, or to pay for or otherwise sponsor a nonmedical solicitation if the solicitation meets or fails to meet specified criteria, including the following:

- Fails to clearly disclose the phrase, “this is a paid advertisement for nonmedical services” at the outset of the solicitation;
- Includes terminology implying that the advertisement is a public alert or announcement;
- Displays a logo in a manner implying affiliation with a governmental agency;
- Includes terminology implying that the product has been recalled when it has not been recalled;
- Fails to clearly disclose who the sponsor is of the advertisement;
- Fails to clearly disclose the individual or entity that will provide professional services to the person who responds to the advertisement; or
- Fails to include any additional required disclosures.

The bill also creates s. 877.025, F.S., which provides that a person who solicits professional services may not use, cause to be used, obtain, sell, transfer, or disclose to another person an individual’s protected health information, without the individual’s written authorization. The bill provides first degree misdemeanor and a second degree felony penalties for these violations, depending on the circumstances, and subjects the perpetrator to the penalties and remedies of the Deceptive and Unfair Trade Practices Act.

Except as otherwise provided, the bill takes effect July 1, 2021.

II. Present Situation:

Attorney Advertising Seeking Plaintiffs against Pharmaceutical Companies

The television advertisements that attorneys use to find personal injury clients has generated concerns at the federal level. In 2019, the Federal Trade Commission (FTC) contacted seven law firms and lead generating companies to express concerns 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.” The warning letters also stated that some of the ads might misrepresent the risks associated with certain medications and could lead consumers to the false conclusion that their prescribed medication had been recalled.¹

The FTC also noted that the Food and Drug Administration’s (FDA) Adverse Event Reporting System contained reports of consumers who had viewed advertisements about the prescription drugs they were taking, then discontinued those medications, and suffered harmful consequences.² 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.³

In 2020, a Congressman asked the Chairman of the FTC for a progress report on the effects of the seven warning letters issued in 2019. 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. These state laws contain provisions similar to this bill.⁴

Florida Deceptive and Unfair Trade Practices Act (FDUTPA)

History and Purpose of FDUTPA

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) became law in 1973.⁵ 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

¹ Federal Trade Commission, *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits* (September 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 Mar. 19, 2021).

² *Id.*

³ *Id.*

⁴ 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, November 17, 2020 available at <http://republicans-energycommerce.house.gov/wp-content/uploads/2020/11/2020.11.17-FTC-to-Rep.-Walden-Lawyer-Ads-.pdf>

⁵ Chapter 73-124, Laws of Fla., codified at part II of ch. 501, F.S.

commerce.⁶ 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 be given to the interpretations of the Federal Trade Commission and the federal courts relating to section 5 of the Federal Trade Commission Act.⁷

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.⁸ The Office of the State Attorney may enforce violations of the FDUTPA if the violations take place in its jurisdiction.⁹ 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.¹⁰ Consumers may also file suit through private actions.¹¹

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;
- An action for actual damages on behalf of consumers and businesses;
- Cease and desist orders; and
- Civil penalties of up to \$10,000 per willful violation.¹²

Remedies for private parties are limited to the following:

- A declaratory judgment and an injunction where a person is aggrieved by a FDUTPA violation; and
- The recovery of actual damages, attorney fees and court costs, where a person has suffered a loss due to a FDUTPA violation.¹³

⁶ See s. 501.203, 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.

⁷ See s. 501.204(2), F.S.

⁸ See ss. 501.203(2), 501.206, and 501.207, F.S.

⁹ Section 501.203(2), F.S.

¹⁰ *Id.*

¹¹ Section 501.211, F.S.

¹² Sections 501.207(1), 501.208, and 501.2075, F.S. Civil Penalties are deposited into general revenue. Enforcing authorities may also request attorney fees and costs of investigation or litigation. Section 501.2105, F.S.

¹³ Section 501.211(1) and (2), F.S.

Federal Unfair and Deceptive Trade Practices

The Federal Trade Commission's (FTC's) unfair and deceptive trade practices regulations prohibit unfair¹⁴ or deceptive¹⁵ acts or practices in or affecting commerce.¹⁶ The FTC's regulations include "Truth In Advertising" guidelines, which require advertisements to be truthful, not misleading, and when appropriate, backed by scientific evidence.¹⁷ 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.¹⁸

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. The Florida Bar approves lawyer advertising, issues advisory opinions interpreting rules, and investigates and prosecutes attorneys for alleged violations.¹⁹ Florida's legal advertising rules apply to all forms of communication soliciting legal services in any print or electronic form.²⁰ Advertisements in specified media must be submitted to the Legal Division of The Florida Bar at least 20 days prior to dissemination, including print, television, radio, direct mail, and Internet.²¹

The Legal Division reviews an advertisement to determine whether it complies with The Florida Bar's advertising rules, and issues an opinion either approving or disapproving the advertisement. The Disciplinary Counsel of The Florida Bar investigates and prosecutes attorneys for alleged violations of the advertising rules.²²

The Florida Bar rules require legal advertising to include:

- The name of the lawyer or law firm;²³
- The location of the law practice;²⁴ and

¹⁴ An "unfair" 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).

¹⁵ A "deceptive" practice involves a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances. *See* FTC Policy Statement on Deception (October 14, 1983), available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (last visited Mar. 26, 2021). *See also* Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority* (revised, October 2019), available at <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last visited Mar. 26, 2021).

¹⁶ 15 U.S.C. s. 45(a)(1).

¹⁷ Federal Trade Commission, *Truth In Advertising*, available at <https://www.ftc.gov/news-events/media-resources/truth-advertising> (last visited Mar. 26, 2021).

¹⁸ Federal Trade Commission, *Protecting Consumers from Fraud and Deception*, available at <https://www.ftc.gov/news-events/media-resources/truth-advertising/protecting-consumers> (last visited Mar. 26, 2021).

¹⁹ The Florida Bar, *Frequently Asked Questions About the Florida Bar*, available at <https://www.floridabar.org/about/faq/> (last visited Mar. 26, 2021).

²⁰ Fla. Bar Code Prof. Resp. D. R. 4-7.11(a).

²¹ Fla. Bar Code Prof. Resp. D. R. 4-7.11.

²² Fla. Bar Code Prof. Resp. D. R. 4-7.19.

²³ Fla. Bar Code Prof. Resp. D. R. 4-7.12(a)(1).

²⁴ Fla. Bar Code Prof. Resp. D. R. 4-7.12(a)(2).

- Certain disclosures when relevant, including whether a case will be referred to another lawyer;²⁵ clarification as to whether a spokesperson in the advertisement is an employee or member of the law firm;²⁶ clarification as to whether a scene depicted is a dramatization and not an actual event.²⁷

Required information must be reasonably prominent and clearly legible if written, as well as, clearly audible if spoken aloud.²⁸

Health Insurance Portability and Accountability Act²⁹ and its Related Rules

The Federal Health Insurance Portability and Accountability Act (HIPAA), protects sensitive personal health information (PHI) from being disclosed without a patient's knowledge or consent.³⁰ HIPAA's two pertinent implementing rules are the Privacy Rule and the Security Rule.³¹ The Privacy Rule addresses the use and disclosure of an individual's PHI by covered entities.³² Covered entities include the following:

- Health plans;
- Health care providers;
- Health care clearinghouses; and
- Business associates of any of the above.³³

A common example of PHI is a patient's name, address, birth date, or social security number. However, PHI does not include de-identified health information or employment-related records.

The Privacy Rule protects PHI that is held or transmitted by a covered entity or its business associate by preventing covered entities from disclosing PHI without the patient's consent or knowledge unless it is being used or shared for treatment, payment, or healthcare operations or for another exempt purpose.

The Privacy Rule also requires covered entities to prominently post an electronic notice and give notice upon a specific request to patients regarding the manner in which it may use and disclose PHI. A covered entity must also provide an accounting of disclosures it has made of a patient's PHI upon his or her request as well as a copy of his or her PHI.

²⁵ Fla. Bar Code Prof. Resp. D. R. 4-7.12(b).

²⁶ Fla. Bar Code Prof. Resp. D. R. 4-7.13(b)(5).

²⁷ Fla. Bar Code Prof. Resp. D. R. 4-7.13(b)(6).

²⁸ Fla. Bar Code Prof. Resp. D. R. 4-7.12(d).

²⁹ 42 U.S.C. s. 1320.

³⁰ Protected health information includes all individually identifiable health information held or transmitted by a covered entity or its business associate. Pub. Law No. 104-191 (1996). See also Centers for Disease Control and Prevention, *Health Insurance Portability and Accountability Act of 1996 (HIPAA)* available at <https://www.cdc.gov/php/publications/topic/hipaa.html>.

³¹ See Stephen Mulligan, Wilson Freeman, Chris Linebaugh, Congressional Research Service, *Data Protection Law: An Overview* at 10-12 (March 25, 2019), available at <https://crsreports.congress.gov/product/pdf/R/R45631> (last visited Mar 26, 2021).

³² 45 C.F.R. s.160 and 164. See also, Department of Health and Human Services, *Summary of the HIPAA Privacy Rule* (July 26, 2013), available at <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html> (last visited Mar. 26, 2021).

³³ U.S. Department of Health and Human Services, Office for Civil Rights, *Summary of the HIPAA Privacy Rule*, (last revised May 2003), available at <https://www.hhs.gov/sites/default/files/privacysummary.pdf>, (last visited Mar. 26, 2021).

The Security Rule applies to the subset of identifiable health information that a covered entity creates, receives, maintains, or transmits in electronic form called “electronic protected health information” (e-PHI).³⁴ The Security Rule does not apply to PHI that is transmitted orally or in writing. A covered entity must comply with the Security Rule by:

- Ensuring the confidentiality, integrity, and availability of all electronic protected health information;
- Detecting and safeguarding against anticipated threats to the security of the information;
- Protecting against anticipated impermissible uses or disclosures; and
- Certifying compliance by their workforce.³⁵

The Department of Health and Human Services may institute a civil enforcement under HIPAA and may seek civil penalties. A civil penalty varies based on the severity of the violation, the number of people affected, the nature of the data exposed, the length of time a violation was allowed to persist, the prior compliance history of the covered entity, and the knowledge the covered entity had of the violation.³⁶ The Department of Justice may institute criminal proceedings against a violator who knowingly obtained or disclosed PHI. Criminal penalties for a HIPAA violation are triggered when a person obtains PHI for financial gain or under false pretenses.³⁷ The criminal penalty for such HIPAA violations are punishable by up to 10 years imprisonment.³⁸ There is no private cause of action under HIPAA.

III. Effect of Proposed Changes:

The bill defines what a deceptive and unfair trade practice act is when it involves a paid solicitation for nonmedical professional services relating to a drug or medical device. The bill creates s. 501.2106, F.S., which provides that it is a deceptive and unfair trade practice for a person³⁹ to submit or approve the submittal of a solicitation for nonmedical professional services for publication, broadcast, or dissemination, or to pay for or otherwise sponsor a nonmedical solicitation if the solicitation does any of the following:

- Fails to clearly and conspicuously disclose at the outset of the solicitation the phrase, “this is a paid advertisement for nonmedical services”;
- Includes terminology implying that the advertisement is a “medical alert,” “health alert,” “consumer alert,” “public service announcement,” or similar public alert or announcement;
- Displays the logo, or a similar facsimile thereof, of a federal or state governmental agency in a manner implying affiliation with or sponsorship by, a governmental agency;
- Includes terminology, including use of the term “recall” when referring to a product, implying that the product has been recalled when, in fact, the product has not been recalled by a governmental agency or through agreement between a manufacturer and a governmental agency;

³⁴ 45 C.F.R. s. 164.302-318.

³⁵ 45 C.F.R. s. 164.306.

³⁶ HIPAA Journal, *What are the penalties for HIPAA Violations?* <https://www.hipaajournal.com/what-are-the-penalties-for-hipaa-violations-7096/> (last visited Mar. 26, 2021).

³⁷ *Id.*

³⁸ *Id.*

³⁹ A “person” includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations. *See* s. 1.01(3), F.S.

- Fails to clearly and conspicuously disclose the sponsor of the advertisement;
- Fails to clearly and conspicuously disclose the individual or entity that will provide professional services to persons responding to the advertisement or how those persons will be referred to such individual or entity;
- Solicits clients who may allege injury from a prescription drug approved or cleared by, or which is the subject of monograph authorized by, the United States (U.S.) Food and Drug Administration (FDA) and fails to clearly and conspicuously disclose, “Do not stop taking a prescribed medication without first consulting your doctor,” and “discontinuing a prescribed medication without your doctor’s advice can result in injury or death”;
- Solicits clients who may allege injury from a prescription drug or medical device approved or cleared by, or which is the subject of monograph authorized by, the U.S. FDA and fails to clearly and conspicuously disclose that the drug or medical device remains approved by the U.S. FDA, unless the product is recalled or withdrawn; and
- Fails to present a written disclosure that is clearly legible and, if televised or displayed electronically, is displayed for sufficient time to enable the viewer to easily see and fully read the disclosure, or fails to present a spoken disclosure that is plainly audible and clearly intelligible.

The bill provides the following definitions:

- “Person” means individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations;⁴⁰
- “Client” means a prospective customer, client, or patron of nonmedical professional services;
- “Nonmedical solicitation” means a paid solicitation for nonmedical professional services which contains information about a drug⁴¹ or device⁴² and which is directed to the public through television, radio, the Internet, a newspaper or other periodical, an outdoor advertising sign, or another written, electronic, or recorded communication; and
- “Solicit” means to offer to provide professional services by written, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact.

The bill creates s. 877.025, F.S., which is effective October 1, 2021, and provides that a person who is soliciting professional services may not use, cause to be used, obtain, sell, transfer, or

⁴⁰ See s. 499.003(15), F.S.

⁴¹ A “drug” is defined as recognized in the current edition of the United States Pharmacopoeia and National Formulary, official Homeopathic Pharmacopoeia of the United States, or any supplement to any of those publications, which is intended for use in the diagnosis, cure, mitigation, treatment, therapy, or prevention of disease in humans or other animals, intended to affect the structure or any function of the body of humans or other animals, or intended for use as a component of any of the aforementioned articles, and includes active pharmaceutical ingredients, but does not include devices or their nondrug components, parts, or accessories. See s. 499.003(17), F.S.

⁴² A “device” is defined as any instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including its components, parts, or accessories, which is recognized in the current edition of the United States Pharmacopoeia and National Formulary, or any supplement thereof, intended for use in the diagnosis, cure, mitigation, treatment, therapy, or prevention of disease in humans or other animals, or intended to affect the structure or any function of the body of humans or other animals, and that does not achieve any of its principal intended purposes through chemical action within or on the body of humans or other animals and which is not dependent upon being metabolized for the achievement of any of its principal intended purposes. See s. 499.003(15), F.S.

disclose to another person an individual's protected health information,⁴³ without the individual's written authorization.

The bill establishes the following:

- A person who violates s. 877.025, F.S., commits a deceptive and unfair trade practice;
- A person who willfully and knowingly violates s. 877.025, F.S., commits a misdemeanor of the first degree;⁴⁴ and
- A person who willfully and knowingly violates s. 877.025, F.S., with intent to sell, transfer, or use protected health information for financial gain commits a felony of the second degree, but the imprisonment may not exceed 10 years and the fine must be more than \$10,000 but may not exceed \$250,000.

The bill provides that s. 877.025, F.S., does not apply to the disclosure or use of protected health information to an attorney or by an attorney for use in a judicial or administrative proceeding, or any other use or disclosure otherwise authorized or required by law.

Except as otherwise provided, the bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill creates new criminal offenses relating to the unlawful use of protected health information. Criminal laws are exempt from the requirements of article VII, section 18(d) of the Florida Constitution, relating to unfunded mandates.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

⁴³ "Protected health information" means individually identifiable health information that is transmitted by electronic media, maintained in electronic media, or transmitted or maintained in any other form or medium, but excludes individually identifiable health information in education records covered by the Family Educational Rights and Privacy Act, in records described at 20 U.S.C. 1232g(a)(4)(B)(iv), in employment records held by a covered entity in its role as employer, and regarding a person who has been deceased for more the 50 years. *See* 45 C.F.R. s. 106.103.

⁴⁴ A misdemeanor of the first degree is punishable by a definite term of imprisonment not to exceed 1 year and a fine not to exceed \$1,000. *See* ss. 775.082 and 775.083, F.S.

E. Other Constitutional Issues:

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court held that commercial speech is protected under the First Amendment.⁴⁵ The Court based its opinion on the public's right to receive a free flow of commercial information. The Court also held that some forms of commercial speech regulation are surely permissible, and that untruthful speech, commercial or otherwise, has never been protected.⁴⁶ In the case of *In re R. M. J.*, the Supreme Court held that misleading advertising may be prohibited entirely under the commercial speech doctrine and when advertising is subject to abuse, states may impose appropriate restrictions.⁴⁷

In *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, the Supreme Court established a three-part test for analyzing the limitations of advertising regulations.⁴⁸ Under the *Central Hudson* test, a state must show that any commercial speech regulation aimed at regulating "non-misleading" commercial speech is in service of a substantial state interest, directly advances that interest, and is no more extensive than necessary to serve that interest.⁴⁹ Although commercial speech regulations must meet the *Central Hudson* test, in *Bates v. State Bar of Arizona*, the Supreme Court held that while the First Amendment permits the regulation of advertising by attorneys that is false, deceptive, or misleading or which concerns transaction which are themselves illegal, reasonable time, place, and manner restrictions on advertising are authorized.⁵⁰

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the official estimate of the prison bed impact created by legislation, states that the Economic and Demographic Research proposed estimate of SB 1992 is "positive indeterminate." This projection is based upon the facts that it is not known how extensive the activity outlined in the bill is or if this activity might decrease once the law goes into effect. However, because the bill creates a new second degree felony, it could impact the Department of Corrections and the new first degree misdemeanor could impact counties.

⁴⁵ See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

⁴⁶ *Id.*

⁴⁷ See *In re R.M.J.*, 455 U.S. 191 (1982).

⁴⁸ See *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

⁴⁹ *Id.*

⁵⁰ See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

The bill creates the following sections of the Florida Statutes: 501.2106 and 877.025.

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.