

1 State of Arkansas
2 80th General Assembly
3 Regular Session, 1995

A Bill

SENATE BILL 846

4 By: Senators Dowd, Gordon, Beebe, Harriman, Bell, and Everett

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For An Act To Be Entitled

8 "AN ACT TO REGULATE ADVERTISING BY ATTORNEYS; AND FOR
9 OTHER PURPOSES."

10

Subtitle

11

12 "TO REGULATE ADVERTISING BY ATTORNEYS."

13

14 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

15

16 SECTION 1. The legislature makes the following findings:

17 (a) The right to practice law is a "privilege burdened with
18 conditions". Lawyers are officers of the court whose conduct directly
19 affects how the public perceives the civil justice system.

20 (b) Lawyer advertising is a form of commercial speech, subject to
21 First Amendment protection, but also subject to regulation to protect the
22 public from false and misleading advertising.

23 (c) Advertisement by way of electronic media is uniquely pervasive and
24 intrusive. Of all forms of communication, "it is broadcasting that has
25 received the most limited First Amendment protection."

26 (d) Members of the public may be ill-informed or unaware of their
27 legal rights which if not timely exercised, may be lost.

28 (e) The public has a need for accurate and truthful information about
29 the availability of legal counsel, the nature of services lawyers offer, and
30 the prices lawyers charge for services, including routine and standardized
31 legal services.

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33 SECTION 2. As used in this article, the following definitions apply:

34 (a) "Member" means a member in good standing of the State Bar and
35 includes any agent of the member and any law firm or law corporation doing

1 business in the State of Arkansas.

2 (b) "Lawyer" means a member of the State Bar or a person who is
3 admitted in good standing and eligible to practice before the bar of any
4 United States court of the highest court of the District of Columbia or any
5 state, territory, or insular possession of the United States, or is licensed
6 to practice law in, or is admitted in good standing and eligible to practice
7 before the bar of the highest court of a foreign country or any political
8 subdivision thereof, and includes any agent of the lawyer or law firm or law
9 corporation doing business in this state.

10 (c) "Advertise" or "advertisement" means any communication,
11 disseminated by television or radio, by any print medium including, but not
12 limited to, newspapers and billboards, or by means of a mailing directed
13 generally to members of the public and not to a specific person, that
14 solicits employment of legal services provided by a member, and is directed
15 to the general public and is paid for by, or on the behalf of, an attorney.

16 (d) "Electronic medium" means television, radio or computer networks.
17

18 SECTION 3. No advertisement shall contain or refer to any of the
19 following:

20 (a) Any guarantee or warranty regarding the outcome of a legal matter
21 as a result of representation by the member.

22 (b) Statements or symbols stating that the member featured in the
23 advertisement can generally obtain immediate cash or quick settlements.

24 (c) (1) An impersonation of the name, voice, photograph, electronic
25 image of any person other than the lawyer, directly or implicitly purporting
26 to be that of a lawyer.

27 (2) An impersonation of the name, voice, photograph, or
28 electronic image of any person, directly or implicitly purporting to be a
29 client of the member featured in the advertisement, or a dramatization of
30 events, unless disclosure of the impersonation or dramatization is made in
31 the advertisement.

32 (3) A spokesperson, including a celebrity spokesperson, unless
33 there is disclosure of the spokesperson's title.

34 (d) A statement that a member offers representation on a contingent
35 basis unless the statement also advises whether a client will be held

1 responsible for any costs advanced by the member when no recovery is obtained
2 on behalf of the client. If the client will not be held responsible for
3 costs, no disclosure is required.

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5 SECTION 4. In advertising by electronic media, to comply with Section
6 3 of this act, the message as a whole may not be false, misleading, or
7 deceptive, and the message as a whole must be factually substantiated. The
8 message means the effect in combination of the spoken word, sound,
9 background, action, symbols, visual image, or any other technique employed to
10 create the message. Factually substantiated means capable of verification by
11 a credible source.

12

13 SECTION 5. There shall be a rebuttable presumption affecting the
14 burden of producing evidence that the following messages are false,
15 misleading, or deceptive within the meaning of Section 4:

16 (a) A message as to the ultimate result of a specific case or cases
17 presented out of context without adequately providing information as to the
18 facts or law giving rise to the result.

19 (b) The depiction of an event through methods such as the use of
20 displays of injuries, accident scenes, or portrayals of other injurious
21 events which may or may not be accompanied by sound effects and which may
22 give rise to a claim for compensation.

23 (c) A message referring to or implying money received by or for a
24 client in a particular case or cases, or to potential monetary recovery for a
25 prospective client. A reference to money or monetary recovery includes, but
26 is not limited to, a specific dollar amount, characterization of a sum of
27 money, monetary symbols, or the implication of wealth.

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29 SECTION 6. The following information shall be presumed to be in
30 compliance with this article for purposes of advertising by electronic media,
31 provided the message as a whole is not false, misleading, or deceptive:

32 (a) Name, including name of law firm, names of professional
33 associates, addresses, telephone numbers, and the designation "lawyer",
34 "attorney", "law firm", or the like.

35 (b) Fields of practice, limitation of practice, or specialization.

1 (c) Fees for routine legal services, subject to the requirements of
2 subdivision (d) of Section 3 and the Rules of Professional Conduct.

3 (d) Date and place of birth.

4 (e) Date and place of admission to the bar of state and federal
5 courts.

6 (f) Schools attended, with dates of graduation, degrees, and other
7 scholastic distinctions.

8 (g) Public or quasi-public offices.

9 (h) Military service.

10 (i) Legal authorship.

11 (j) Legal teaching positions.

12 (k) Memberships, offices, and committee assignments in bar
13 associations.

14 (l) Memberships and offices in legal fraternities and legal societies.

15 (m) Technical and professional licenses.

16 (n) Memberships in scientific, technical, and professional
17 associations and societies.

18 (o) Foreign language ability of the advertising lawyer or a member of
19 the lawyer_s firm.

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21 SECTION 7. In addition to any disclosure required by Section 3 of this
22 act and the Rules of Professional Conduct, the following disclosure shall
23 appear in advertising by electronic media. Use of the following disclosure
24 alone may not rebut any presumption created in Section 5 of this act. If an
25 advertisement in the electronic media conveys a message portraying a result
26 in a particular case or cases, the advertisement must state, in either an
27 oral or printed communication, either of the following disclosures: The
28 advertisement must adequately disclose the factual and legal circumstances
29 that justify the result portrayed in the message, including the basis for
30 liability and the nature of injury or damage sustained, or the advertisement
31 must state that the result portrayed in the advertisement was dependent on
32 the facts of that case, and that the results will differ if based on
33 different facts.

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35 SECTION 8. (a) Any person claiming a violation of Section 4, 5, or 7

1 of this act may file a complaint with the State Bar that states the name of
2 the advertiser, a description of the advertisement claimed to violate these
3 sections, and that specifically identifies the alleged violation. A copy of
4 the complaint shall be served simultaneously upon the advertiser. The
5 advertiser shall have nine days from the date of service of the complaint to
6 voluntarily withdraw from broadcast the advertisement that is the subject of
7 the complaint. If the advertiser elects to withdraw the advertisement, the
8 advertiser shall notify the State Bar of that fact, and no further action may
9 be taken by the complainant. The advertiser shall provide a copy of the
10 complained advertisement to the State Bar for review within seven days of
11 service of the complaint. Within twenty-one days of the delivery of the
12 complained advertisement, the State Bar shall determine whether substantial
13 evidence of a violation of these sections exists. The review shall be
14 conducted by a State Bar attorney who has expertise in the area of lawyer
15 advertising.

16 (b) (1) Upon a State Bar determination that substantial evidence of
17 a violation exists, if the member of certified lawyer referral service
18 withdraws that advertisement from broadcast within seventy-two hours, no
19 further action may be taken by the complainant.

20 (2) Upon a State Bar determination that substantial evidence of
21 a violation exists, if the member or certified lawyer referral service fails
22 to withdraw the advertisement within seventy-two hours, a civil enforcement
23 action brought pursuant to subdivision (e) may be commenced within one year
24 of the State Bar decision. If the member or certified lawyer referral
25 service withdraws an advertisement upon a State Bar determination that
26 substantial evidence of a violation exists and subsequently rebroadcasts the
27 same advertisement without a finding by the trier of fact in an action
28 brought pursuant to subdivision (c) or (e) that the advertisement does not
29 violate Section 4, 5, or 7 of this act, a civil enforcement action may be
30 commenced within one year of the rebroadcast.

31 (3) Upon a determination that substantial evidence of a
32 violation does not exist, the complainant is barred from bringing a civil
33 enforcement action pursuant to subdivision (e), but may bring an action for
34 declaratory relief pursuant to subdivision (c).

35 (c) Any member or certified lawyer referral service who was the

1 subject of a complaint and any complainant affected by the decision of the
2 State Bar may bring an action for declaratory relief in the circuit court to
3 obtain a judicial declaration of whether Section 4, 5, or 7 of this act has
4 been violated, and, if applicable, may also request injunctive relief. Any
5 defense otherwise available at law may be raised for the first time in the
6 declaratory relief action, including any constitutional challenge. Any civil
7 enforcement action filed pursuant to subdivision (e) shall be stayed pending
8 the resolution of the declaratory relief action. The action shall be
9 defended by the real party in interest. The State Bar shall not be
10 considered a party to the action unless it elects to intervene in the action.

11 (1) Upon a State Bar determination that substantial evidence of
12 a violation exists, if the complainant or the member or certified lawyer
13 referral service brings an action for declaratory relief to obtain a judicial
14 declaration of whether the advertisement violates Section 4, 5, or 7 of this
15 act, and the court declares that the advertisement violated one or more of
16 the sections, a civil enforcement action pursuant to subdivision (e) may be
17 filed or maintained if the member or certified lawyer referral service failed
18 to withdraw the advertisement within seventy-two hours of the State Bar
19 determination. The decision of the court that an advertisement violates
20 Section 4, 5, or 7 of this act shall be binding on the issue of whether the
21 advertisement is unlawful in any pending or prospective civil enforcement
22 action brought pursuant to subdivision (e) if that binding effect is
23 supported by the doctrine of collateral estoppel or res judicata.

24 If, in that declaratory relief action, the court declares that the
25 advertisement does not violate Section 4, 5, or 7 of this act, the member or
26 lawyer referral service may broadcast the advertisement. The decision of the
27 court that an advertisement does not violate Section 4, 5, or 7 of this act
28 shall bar any prospective civil enforcement action brought pursuant to
29 subdivision (e) if that prohibitive effect is supported by the doctrine of
30 collateral estoppel or res judicata.

31 (2) If, following a State Bar determination that an
32 advertisement violates Section 4, 5, or 7 the complainant or the member or
33 certified lawyer referral service brings an action for declaratory relief to
34 obtain a judicial declaration of whether the advertisement violates Section
35 4, 5, or 7, and the court declares that the advertisement violates one or

1 more of the sections, a civil enforcement action pursuant to subdivision (e)
2 may be filed or maintained if the member of certified lawyer referral service
3 broadcasts the same advertisement following the decision in the declaratory
4 relief action. The decision of the court that an advertisement violates
5 Section 4, 5, or 7 of this act shall be binding on the issue of whether the
6 advertisement is unlawful in any pending or prospective civil enforcement
7 action brought pursuant to subdivision (e) if that binding effect is supported
8 by the doctrine of collateral estoppel or res judicata.

9 If, in that declaratory relief action, the court declares that the
10 advertisement does not violate Section 4, 5, or 7 of this act, the member or
11 lawyer referral service may continue broadcast of the advertisement. The
12 decision of the court that an advertisement does not violate Section 4, 5, or
13 7 of this act shall bar any pending or prospective civil enforcement action
14 brought pursuant to subdivision (e) if that prohibitive effect is supported
15 by the doctrine of collateral estoppel or res judicata.

16 (d) The State Bar review procedure shall apply only to members and
17 certified referral services. A direct civil enforcement action for a
18 violation of Section 4, 5, or 7 of this act may be maintained against any
19 other advertiser after first giving fourteen days_ notice to the advertiser
20 of the alleged violation. If the advertiser does not withdraw from broadcast
21 the advertisement that is the subject of the notice within fourteen days of
22 service of the notice, a civil enforcement action pursuant to subdivision (e)
23 may be commenced. The civil enforcement action shall be commenced within one
24 year of the date of the last publication or broadcast of the advertisement
25 that is the subject of the action.

26 (e) Subject to Section 9, a violation of Section 4, 5, or 7 of this
27 act shall be cause for a civil enforcement action brought by any person
28 residing within the State of Arkansas for an amount up to five thousand
29 dollars (\$5,000) for each individual broadcast that violates Section 4, 5, or
30 7 of this act. Venue shall be in a county where the advertisement was
31 broadcast.

32 (f) In any civil action brought pursuant to this section, the matter
33 shall be determined according to the law and procedure relating to the trial
34 of civil actions, including trial by jury, if demanded.

35 (g) The decision of the State Bar pursuant to subdivision (a) shall be

1 admissible in the civil enforcement action brought pursuant to subdivision
2 (e). However, the State Bar shall not be a party or a witness in either a
3 declaratory relief proceeding brought pursuant to subdivision (c) or the
4 civil enforcement action brought pursuant to subdivision (e). Additionally,
5 no direct action may be filed against the State Bar challenging the State
6 Bar_s decision pursuant to subdivision (a).

7 (h) Amounts recovered pursuant to this section shall be paid into the
8 Client Security Fund maintained by the State Bar.

9 (i) In any civil action brought pursuant to this section, the court
10 shall award attorney_s fees pursuant to the Code of Civil Procedure if the
11 court finds that the action has resulted in the enforcement of an important
12 public interest or that a significant benefit has been conferred upon the
13 public.

14 (j) The State Bar shall maintain records of all complainants and
15 complaints filed pursuant to subdivision (a) for a period of seven years. If
16 a complainant files five or more unfounded complaints within seven years, the
17 complainant shall be considered a vexatious litigant for purposes of this
18 section. The State Bar shall require any person deemed a vexatious litigant
19 to post security in the minimum amount of twenty-five thousand dollars
20 (\$25,000) prior to considering any complaint filed by the person and shall
21 refrain from taking any action until the security is posted. In any civil
22 action arising from this section brought by a person deemed a vexatious
23 litigant, the defendant may advise the court and trier of fact that the
24 plaintiff is deemed to be a vexatious litigant under the provisions of this
25 section and disclose the basis for this determination.

26 (k) Nothing in this section shall restrict any other right available
27 under existing law or otherwise available to a citizen seeking redress for
28 false, misleading, or deceptive advertisements.

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30 SECTION 9. This article applies to all lawyers, members, law
31 partnerships, law corporations, entities subject to regulations under the
32 Rules of Professional Conduct, advertising collectives, cooperatives, or
33 other individuals, including nonlawyers, or groups advertising the
34 availability of legal services. Subdivisions (a) to (k), inclusive, of
35 Section 8 do not apply to qualified legal services projects and nonprofit

1 lawyer referral services. Sections 2 to 9, inclusive, do not apply to the
2 media in which the advertising is displayed or to an advertising agency that
3 prepares the contents of an advertisement and is not directly involved in the
4 formation or operation of lawyer advertising collectives or cooperatives,
5 referral services, or other groups existing primarily for the purpose of
6 advertising the availability of legal services or making referrals to
7 attorneys.

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9 SECTION 10. A violation of Section 4, 5, or 7 of this act shall be
10 cause for discipline by the State Bar. In addition to the existing grounds
11 for initiating a disciplinary proceeding set forth in a statute or in the
12 Rules of Professional Conduct, the State Bar may commence an investigation
13 based upon a complaint filed by a person pursuant to Section 8 of this act.
14 The State Bar's decision pursuant to subdivision (a) of Section 8 shall be
15 admissible, but shall not be determinative, in any disciplinary proceeding
16 brought as a result of that complaint.

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18 SECTION 11. The court shall report the name, address, and professional
19 license number of any person found in violation of this article to the
20 appropriate professional licensing agency for review and possible
21 disciplinary action.

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23 SECTION 12. A true and correct copy of any advertisement made by a
24 person or member shall be retained for one year by the person or member who
25 pays for an advertisement soliciting employment of legal services.

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27 SECTION 13. (a) Nothing in this article shall be deemed to limit or
28 preclude enforcement of any other provision of law, or of any conduct rule,
29 or of the Supreme Court Rules of Professional Conduct.

30 (b) Nothing in this article shall limit the right of advertising
31 protected under the Constitution of the State of Arkansas or of the United
32 States.

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34 SECTION 14. All provisions of this act of a general and permanent
35 nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas

1 Code Revision Commission shall incorporate the same in the Code.

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3 SECTION 15. If any provision of this act or the application thereof to
4 any person or circumstance is held invalid, such invalidity shall not affect
5 other provisions or applications of the act which can be given effect without
6 the invalid provision or application, and to this end the provisions of this
7 act are declared to be severable.

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9 SECTION 16. All laws and parts of laws in conflict with this act are
10 hereby repealed.

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