

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1028

SPONSOR: Health, Aging and Long-Term Care Committee and Senator Campbell

SUBJECT: Unlicensed Practice of a Health Care Profession

DATE: March 29, 2000 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Munroe</u>	<u>Wilson</u>	<u>HC</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill amends the law relating to the unlicensed practice of health care professions regulated by the Department of Health or the appropriate board, to provide legislative intent, make minor technical revisions relating to funding and enforcement of prohibitions against unlicensed activity, and create criminal offenses for the unlicensed practice of a health care profession and require a minimum mandatory sentence of imprisonment and a monetary fine.

This bill amends the law to revise the offense severity ranking chart to move the offenses for unlicensed practice of medicine and unlicensed practice of dentistry or dental hygiene and previously unspecified third degree felony offenses relating to the unlicensed practice of osteopathic medicine, chiropractic medicine, podiatric medicine, naturopathy, optometry, nursing, pharmacy, midwifery, respiratory care services, clinical lab personnel, medical physics, and hearing aid specialists from level 1 to level 7. In addition, offenses created by the bill relating to the unlicensed practice of a health care profession and the unlicensed practice of a health care profession which results in bodily injury are ranked as level 7 offenses on the offense severity ranking chart.

This bill requires the text of any written or oral advertisement for surgery to include specified information.

This bill amends ss. 455.637 and 921.0022, F.S., and creates s. 455.665, F.S., and one undesignated section.

This bill repeals s. 455.641, F.S., relating to requirements for the Department of Health to collect an unlicensed activity fee.

For purposes of incorporating references to s. 455.637, F.S., the bill reenacts ss. 455.574, 468.1295, 484.014, and 484.056, F.S.

II. Present Situation:***Unlicensed Activity***

Part II, ch. 455, F.S., provides the general regulatory provisions for health care professions regulated under the Department of Health. Section 455.637, F.S., authorizes the Department of Health to issue and deliver a notice of cease and desist to any person when the department has probable cause to believe that that person is not licensed by the department or the appropriate regulatory board, and has violated any provision of part II, ch. 455, F.S., or any statute that relates to the practice of a profession regulated by the department, or any administrative rule adopted thereto. The department may issue a notice of cease and desist to any person who aids and abets the unlicensed practice of a profession by employing the unlicensed person. To enforce a cease and desist order the Department of Health may file a proceeding in the name of the state seeking issuance of an injunction or a *writ of mandamus* against any person who violates any provisions of such order. In addition, the Department of Health may impose an administrative penalty not to exceed \$5,000 per incident of unlicensed activity. The Department of Health may seek the imposition of a civil penalty through a circuit court for any violation for which the department may not issue a notice of cease and desist. The civil penalty may not be less than \$500 or greater than \$5,000 for each offense. The court may award court costs and reasonable attorney's fees to the prevailing party, and the court may award to the department reasonable costs of investigation.

Criminal Penalties

Three basic levels of regulation are used to regulate professions. The least restrictive level of occupational regulation is registration. Under registration, practitioners are only required to file certain information as it relates to services that they offer the public. An intermediate level of occupational regulation is regulation by a title act. Under a title act, the use of certain titles or descriptions is limited to a group of practitioners who have met certain minimum qualifications. A title act, however, does not prohibit anyone from offering comparable services to those offered by the practitioners licensed under the title act. A practice act limits the performance of certain activities to those licensed to practice. The practice acts for the various health care professions regulated by the Department of Health or the boards within the department contain criminal penalties. Section 458.327, F.S., provides that each of the following acts constitutes a felony of the third degree, punishable by imprisonment of up to 5 years and a fine of up to \$5,000: (1) the practice of medicine or an attempt to practice medicine without a license to practice in Florida; (2) the use or attempted use of a license which is suspended or revoked to practice medicine; (3) attempting to obtain or obtaining a license to practice medicine by knowing misrepresentation; or (4) attempting to obtain or obtaining a position as a medical practitioner or medical resident in a clinic or hospital through knowing misrepresentation of education, training, or experience.

Other health care professional practice acts contain similar provisions making the unlicensed practice of the profession a third degree felony: s. 459.013, F.S., for osteopathic medicine; s. 460.411, F.S., for chiropractic medicine; s. 461.012, F.S., for podiatric medicine; s. 462.17, F.S., for naturopathy; s. 463.015, F.S., for optometry; s. 464.016, F.S., for nursing; s. 465.015, F.S., for pharmacy; s. 466.026, F.S., for dentistry and dental hygiene; s. 467.201, F.S., for midwifery; s.

468.366, F.S., for respiratory care services; s. 468.828, F.S., for clinical lab personnel; s. 483.901, F.S., for medical physics; and s. 484.053, for hearing aid specialists.

The practice acts of the following health care professions make the unlicensed practice of the profession a first degree misdemeanor punishable by imprisonment for up to 1 year and a fine of up to \$1,000: s. 468.517, F.S., for dietetics and nutrition practice and s. 468.717, F.S., for athletic training; s. 468.53, F.S., for electrology or electrolysis; s. 468.047, F.S., for massage; s. 486.151, F.S., for physical therapy; s. 490.012, F.S., for psychology or school psychology; and s. 491.012, F.S., for clinical social work, marriage and family therapy, and mental health counseling.

The practice acts of the following health care professions make the unlicensed practice of the profession a second degree misdemeanor punishable by imprisonment of up to 60 days and a fine of up to \$500: s. 468.1285, F.S., for audiology and speech and language pathology; s. 468.1745, F.S., for nursing home administration; s. 468.223, F.S., for occupational therapy; s. 468.809, F.S., for orthotics, prosthetics, and pedorthics; and s. 484.013, F.S., for opticianry.

Section 455.634, F.S., requires the Department of Health or the appropriate board to report any criminal violation of any statute relating to the practice of a profession regulated by the department or appropriate board to the proper prosecuting authority for prompt prosecution. Under s. 455.641, F.S., the Department of Health or the appropriate board may earmark \$5 of each licensee's renewal fee to fund efforts to combat unlicensed activity.

Offense Level Ranking

Under the Criminal Punishment Code (or Code) codified in ch. 921, F.S., all felony offenders whose offenses were committed on or after October 1, 1998, must be sentenced pursuant to the Code. The Code allows the trial judge to sentence any felony offender to the statutory maximum for the offense degree. A third degree felony is punishable by a maximum prison sentence of 5 years and a maximum fine of \$5,000 under ss. 775.082 and 775.083, F.S. Section 921.0024, F.S., provides for a "lowest permissible sentence" below which the judge may not sentence an offender without providing written reasons. Section 921.0024, F.S., provides that the minimum sentence is calculated by computing various factors like victim injury and prior record. Section 921.0022, F.S., sets forth an offense severity ranking chart which ranks most felony offenses from levels 1 to 10. The severity ranking is the primary factor which is used with the minimum sentence calculation. A level 10 offense scores highest; level 1 and level "M" score lowest.

Section 921.0022(3)(a), F.S., ranks the offenses of the unlicensed practice of medicine and the unlicensed practice of dentistry or dental hygiene as level 1 offenses. A first time offender who has committed no additional offense and did not injure his or her victim, scores a "lowest permissible sentence" of any non-state prison sanction which may include probation, community control, or a county jail sentence of less than 1 year. Offenses relating to the unlicensed practice of other health care professions which constitute a third degree felony, although not specifically listed in the offense severity ranking chart, are ranked as a level 1 offense by virtue of the default provision in s. 921.0023, F.S.

Office Surgery

Chapter 458, F.S., authorizes the Board of Medicine to regulate the practice of medicine. Section 458.309, F.S., authorizes the board to adopt rules pursuant to provisions within the Administrative Procedure Act to implement the provisions of the chapter conferring duties upon it. Chapter 458, F.S., provides grounds for which a physician may be subject to disciplinary action by the board. Section 458.331(1)(g), F.S., prohibits a physician from failing to perform any statutory or legal obligation placed upon the physician. Section 458.331(1)(t), F.S., requires physicians to practice with a minimum standard of care.

Section 458.331(1)(v), F.S., prohibits a medical physician from practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities which the licensee knows or has reason to know that he or she is not competent to perform, or delegating professional responsibilities to any person that the physician has reason to know is not qualified by training, experience, or licensure to perform. Section 458.331(1)(v), F.S., also authorizes the board to establish by rule standards of practice and standards of care for particular practice settings, including, but not limited to, education and training, equipment and supplies, medications including anesthetics, assistance of and delegation to other personnel, transfer agreements, sterilization, records, performance of complex or multiple procedures, informed consent, and policy and procedure manuals.

Section 458.309, F.S., authorizes the board to adopt rules to require all physicians who perform level 2 procedures lasting more than 5 minutes and all level 3 surgical procedures in an office setting to register the office with the Department of Health, unless that office is licensed as a hospital or ambulatory surgical center. The department must inspect the physician's office annually, unless the office is accredited by a nationally recognized accrediting agency or an accrediting organization subsequently approved by the board. The actual costs for registration and inspection or accreditation must be paid by the person seeking to register and operate the office setting in which office surgery is performed.

The Board of Medicine adopted an administrative rule, 64B-8.9009, Florida Administrative Code, on January 28, 2000, and it became effective on February 17, 2000. The administrative rule establishes standards for all medical physicians who perform office surgery. The rule expands requirements: for informed consent, medical records and logs of surgical procedures; equipment and supplies; qualifications of assisting personnel; and monitoring of patients during recovery. The rule imposes limitations on liposuction procedures; requires offices to post a sign showing that the office is regulated by the Board of Medicine; and requires policy and procedure manuals. At its February 2000 meeting the board also approved new rules (64B-8.9001 and 64B-8.90092, F.A.C.) relating to incident reporting and the approval of accrediting organizations. On March 9, 2000, Rule 64B-8.9001, F.A.C., requiring Florida physicians to report any adverse incidents occurring in their offices and Rule 64B-8.90092, F.A.C., regarding the approval of accrediting organizations became effective. Rule 64B-8.90091, F.A.C., relating to inspection of physician offices was adopted by the board on March 16 and will take effect May 15, 2000.

Licensed medical physicians may perform surgery in their medical offices, ambulatory surgical centers, or hospitals. Sections 458.351 and 459.028, F.S., require any medical physician, osteopathic physician, or physician assistant to notify the Department of Health of any adverse

incident that involved the physician or physician assistant which occurred on or after January 1, 2000, in any office maintained by the physician for the practice of medicine that is not licensed under chapter 395, F.S., relating to licensure for hospitals and ambulatory surgical centers. The sections require any medical physician, osteopathic physician, or physician assistant to notify the department in writing and by certified mail of the adverse incident within 15 days after the adverse incident occurred. The notice must be postmarked within 15 days after the adverse incident occurred.

“Adverse incident” is defined under ss. 458.351 and 459.028, F.S., to mean an event over which the physician or physician assistant could exercise control and which is associated in whole or in part with a medical intervention, rather than the condition for which such intervention occurred, and which results in the following patient injuries: death of a patient; brain or spinal damage to a patient; performance of a surgical procedure on the wrong patient; any condition that required the transfer of a patient to a hospital licensed under chapter 395, F.S., from an ambulatory surgical center licensed under chapter 395, F.S., or any facility or any office maintained by a physician for the practice of medicine which is not licensed under chapter 395; or performance of a procedure to remove unplanned foreign objects remaining from a surgical procedure. Under the definition of adverse incident, a medical physician, osteopathic physician, or physician assistant must provide notice of patient injuries only if they result in death, brain or spinal damage, permanent disfigurement, fracture or dislocation of bones or joints, a limitation of neurological, physical or sensory function, or any condition that required the transfer of the patient. The Department of Health must review each adverse incident and determine whether the incident potentially involved conduct by a health care professional who is subject to disciplinary action, and provides that the procedures for handling disciplinary complaints under s. 455.621, F.S., apply.

III. Effect of Proposed Changes:

Section 1. Amends s. 455.637, F.S., relating to the unlicensed practice of health care professions regulated by the Department of Health or the appropriate board, to provide legislative intent that vigorous enforcement of licensure regulation for all health care professions is a state priority. In addition to existing administrative and civil remedies for unlicensed activity in this section and the individual practice acts for each health care profession within the Department of Health, the section creates criminal offenses for unlicensed activity in subparagraphs 1., 2., and 3. of paragraph (d) of subsection (2).

1. It is a third degree felony punishable by imprisonment of up to 5 years and a fine of up to \$5,000 to practice, attempt to practice, or offer to practice a health care profession without an active, valid Florida license to practice that profession. Practicing without an active, valid license includes practicing on a suspended, revoked, or void license but does not include practicing, attempting to practice, or offering to practice with an inactive or delinquent license for any period up to 12 months. A minimum mandatory sentence of 1 year imprisonment and a fine of \$1,000 is created for any person who violates this subparagraph.
2. It is a second degree felony punishable by imprisonment of up to 15 years and a fine of up to \$15,000 to practice, attempt to practice, or offer to practice a health care profession without an active, valid Florida license to practice when such practice results in serious bodily injury. “Serious bodily injury” is defined to mean death, brain or spinal damage, disfigurement,

fracture or dislocation of bones or joints, limitation of specified functions, or any condition that requires subsequent surgical repair. A minimum mandatory sentence of 1 year imprisonment and a fine of \$1,000 is created for any person who violates this subparagraph.

3. It is a first degree misdemeanor punishable by imprisonment of up to 1 year and a fine of up to \$1,000 to practice, attempt to practice, or offer to practice a health care profession with an inactive or delinquent license for any period of time up to 12 months. Practicing, attempting to practice or offering to practice a health care profession when that person's license has been inactive or delinquent for a period of time of 12 months or more is a third degree felony. A minimum mandatory sentence of 30 days in jail and a fine of \$500 is created for any person who violates this subparagraph.

A mechanism for the department to recover enforcement costs is created which is comparable to the provisions of s. 455.641, F.S., which is repealed in this bill.

Section 2. Creates an undesignated section, to provide that amendments to s. 455.637, F.S., by this act apply to criminal offenses committed on or after the effective date of this section.

Section 3. Repeals s. 455.641, F.S., relating to requirements for the Department of Health to collect an unlicensed activity fee.

Sections 4-7. Reenact for purposes of incorporating the amendment to s. 455.637, F.S., the following sections: 455.574, 468.1295, 484.014, and 484.056, F.S.

Section 8. Creates s. 455.665, F.S., to require that in the text of any written advertisement for a surgical procedure the following statement must appear in capital letters clearly distinguishable from the rest of the text: "MANY SURGICAL PROCEDURES CARRY RISKS OF UNINTENDED SERIOUS BODILY INJURY OR DEATH. CONSULT A LICENSED PRACTITIONER CONCERNING THESE RISKS BEFORE SUBMITTING TO ANY SURGERY." Any advertisement that has an audible component must orally contain this statement verbatim.

Section 9. Amends s. 921.0022, F.S., to revise the offense severity ranking chart to move the offenses for unlicensed practice of medicine and unlicensed practice of dentistry or dental hygiene and previously unspecified third degree felony offenses relating to the unlicensed practice of osteopathic medicine, chiropractic medicine, podiatric medicine, naturopathy, optometry, nursing, pharmacy, midwifery, respiratory care services, clinical lab personnel, medical physics, and hearing aid specialists from level 1 to level 7. In addition, offenses created by the bill relating to the unlicensed practice of a health care profession and the unlicensed practice of a health care profession which results in bodily injury are ranked as level 7 offenses on the offense severity ranking chart.

Section 10. Provides that the bill will take effect July 1, 2000.

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, Subsections 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:

Applicable case law has held that, as long as commercial speech describes lawful activity and is truthful and not fraudulent or misleading, it is entitled to the protections of the First Amendment of the United States Constitution. To regulate or ban commercial speech, the government must have substantial governmental interest which is directly advanced by the restriction, and must demonstrate that there is a reasonable fit between the legislature's ends and narrowly tailored means chosen to accomplish those ends. In enacting or enforcing a restriction on commercial speech, the government need not select the least restrictive means, but rather must tailor its restriction to meet the desired objective. See *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2243, 65 L.Ed.2d 341 (1980). Applicable caselaw describes various regulatory safeguards which the state may impose in place of the total ban on commercial speech, such as requiring a disclaimer to ensure that the consumer is not misled. See *Abramson v. Gonzalez* 949 F.2d 1567 (11th Cir. 1992).

To the extent that advertising surgical procedures may be characterized as commercial free speech which is not inaccurate or relates to a lawful activity, applicable case law provides that the restrictions imposed by the bill must have a substantial governmental interest which is directly advanced by the restriction, and must demonstrate that there is a reasonable fit between the legislature's ends and narrowly tailored means chosen to accomplish those ends.

The bill creates criminal offenses for the unlicensed practice of health care professions, some of which include a minimum mandatory sentence of imprisonment and a monetary fine. The bill does not define "health care profession" for purposes of the criminal offenses. Section 455.501, F.S., defines "profession" to mean any activity, occupation, profession, or vocation regulated by the Department of Health in the Division of Medical Quality Assurance. The section defines "health care practitioner" to mean a person licensed under specified professional practice acts. The bill's failure to define the term "health care profession" for purposes of the newly created criminal offenses raises some constitutional issues. Any person

who performs acts which are comparable to the acts prohibited by the bill, without being licensed by the appropriate regulatory board or the department if there is no board, is subject to criminal penalties. Establishing a criminal penalty for acts that are prohibited or required, but that are not clearly defined, is likely to be void for vagueness or for overbreadth under the due process clauses of the state and federal constitutions. Both constitutions prohibit a statute from forbidding or requiring the doing of an act in terms so vague that persons of common understanding must necessarily guess at its meaning and differ as to its application. *Brock v. Hardie*, 154 So. 690 (Fla. 1934). A statute is overbroad when its proscriptive language embraces not only acts properly and legally punishable, but others which are constitutionally protected or outside the police power of the state to regulate. *Locklin v. Pridgeon*, 30 So.2d 102 (Fla. 1947).

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Persons and entities that advertise surgical procedures will incur costs to comply with the bill's requirement to include specified information in each advertisement.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The title needs revision to provide adequate notice of the scope of the bill's contents. The bill contains provisions which require the text of any written or oral advertisement for surgical procedures to include specified information *and* revises criminal penalties for unlicensed activity. The title of the bill is "An act relating to the unlicensed practice of a health care profession."

VII. Related Issues:

The bill requires the text of any written advertisement for a surgical procedure to include specified information. The appropriate board within the Department of Health may discipline a health care practitioner it regulates for failing to perform a statutory or legal obligation placed upon a licensed practitioner. It is unclear how this requirement will be enforced against entities not subject to health care professional licensure.

The bill creates criminal offenses for the unlicensed practice of health care professions, some of which include a minimum mandatory sentence of imprisonment and a monetary fine. Section 921.001, F.S., requires any legislation that creates a felony offense, enhances a misdemeanor offense to a felony or reclassifies an existing felony offense to a greater felony classification to result in a net zero sum impact in the overall prison population as determined by the Criminal

Justice Estimating Conference, unless the legislation contains a sufficient funding source to accommodate the change, or the Legislature abrogates the application of s. 921.001, F.S. To the extent the bill creates a felony offense for the unlicensed practice of health care professions, it may have a fiscal impact based on its impact on the overall prison population as determined by the Criminal Justice Estimating Conference under procedures established in s. 216.136(5), F.S.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
