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 1718

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

SUBJECT: Telehealth

DATE: April 18, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gomez	Cannon	CJ	Fav/2 amendments
2.	Munroe	Wilson	HC	Favorable/CS
3.			FP	
4.				
5.				

I. Summary:

This bill provides for the regulation of any person who provides health care services that are delivered or provided to persons in Florida via telecommunications. The bill states legislative findings and requires any person who offers health care services to Florida residents to obtain a telehealth license. The requirements for obtaining a telehealth license are the same as the requirements for full licensure under the appropriate practice act in Florida for the applicable profession. All telehealth communications must clearly identify the practitioner's Florida license number and include a disclaimer that only Florida-licensed health care practitioners may provide health care services directly to persons located in Florida. The bill limits to Florida-licensed health care professionals or those otherwise authorized to practice in Florida, the ability to order, from a person located outside Florida, electronic communications diagnostic-imaging or treatment services for a person located in Florida. The bill provides exceptions to the telehealth licensure requirements.

The bill provides for the recovery of damages in Florida for any injury or death of a person that results from health care provided to a patient located in Florida through the means of telecommunication. The action may be brought in Florida regardless of the location of the provider.

The bill creates s. 455.5641, Florida Statutes, and amends s. 766.102, Florida Statutes.

II. Present Situation:

Telehealth or Telemedicine

Telehealth or telemedicine involves the use of electronic communications or telecommunication technologies to provide medical or health information and to deliver medical and health-related services. A number of uses have evolved for telemedicine which include the use of telecommunications to forward radiographs and specimens for diagnosis or consultation in the

practice of radiology or pathology; computer websites for medical references; computer applications to enhance the diagnosis and treatment of skin conditions in the practice of dermatology; use of advanced medical and diagnostic equipment within the home to assist in a health care provider's on-going care and treatment of patients in their homes; for purposes of psychiatric evaluations known as telepsychiatry; and numerous other applications, including medical care of astronauts while in space.

An ongoing debate among health care professionals and providers and insurers continues as to the appropriate level of regulation of health care professionals and entities that may use telecommunication technology across state or international boundaries to provide consultative, diagnostic or treatment services or medical information and advice. A recent article, "An Overview of State Laws and Approaches to Minimize Licensure Barriers" published in *Telemedicine Today* by Linda Gobis, RN, FNP, JD (http://www.telemedtoday.com/law.html) notes that since 1994, twenty states have passed legislation specifically addressing telemedicine licensure. In Florida, s. 458.3255, F.S., provides that only a physician licensed in Florida or otherwise authorized to practice medicine in Florida may order, from a person located outside Florida, electronic communications diagnostic-imaging or treatment services for a person located in Florida.

Section 175, ch. 99-397, Laws of Florida, created the Task Force on Telehealth within the Department of Health. The task force examined issues relating to the utilization of telecommunication technology, the regulation of telehealth practice, and the impact on access and quality of health care. The task force formed workgroups to study the legal implications, the licensure alternatives, the available technologies, impact on access to care, and how health care services are reimbursed. In its January, 2000 report to the Legislature, the task force outlined the benefits of telehealth and limitations to telehealth. The report recommendations address: telehealth laws; licensure issues; technology; access to telehealth care; and reimbursement for telehealth services.

Regulation of Health Care Practitioners

Part II of ch. 455, F.S., provides the general regulatory provisions for health care professions regulated by the Department of Health. The part provides definitions and defines "health care practitioner" to include: acupuncturists; medical physicians; osteopathic physicians; physician assistants; chiropractic physicians; podiatric physicians; naturopathic physicians; optometrists; nurses; pharmacists; dentists; dental hygienists; midwives; speech-language pathologists and audiologists; nursing home administrators; occupational therapists; respiratory therapists; dietitian/nutritionists; athletic trainers; orthotists, prosthetists and pedorthists; electrologists; massage therapists; clinical laboratory personnel; medical physicists; opticians; hearing aid specialists; physical therapists; psychologists and school psychologists; and clinical social workers, marriage and family therapists, and mental health counselors.

Section 455.621, F.S., provides procedures to be used for the discipline of health care practitioners. Disciplinary complaints and all information obtained by the Department of Health are confidential and exempt from the Public Records and Open Meetings Laws until 10 days after probable cause is found or the subject of the complaint waives confidentiality.

Section 455.637, F.S., provides for the Department of Health's jurisdiction over unlicensed activity. Under that section, if the department has probable cause to believe that any person not licensed by the department 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, the department may issue a notice of cease and desist to the person. 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.

The Department of Health may issue citations for the unlicensed practice of a profession. The penalty that the department may impose for the citation may not be less than $500 or greater than $5,000 and each day that the unlicensed practice continues after issuance of a citation constitutes a separate violation. When issuing a citation for unlicensed activity, the department may recover the costs of investigation, in addition to any penalty assessed. The Department of Health or the appropriate board may earmark $5 of each licensee's renewal fee to fund efforts to combat unlicensed activity.

Regulation of the Practice of Medicine

Chapter 458, F.S., provides for the regulation of the practice of medicine. The chapter defines the "practice of medicine" to mean the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition. Section 458.319(1), F.S., defines "actively practiced medicine" to mean that practice of medicine by physicians, including those employed by any governmental entity in community or public health, as defined by the chapter, including physicians practicing administrative medicine. The chapter provides various exemptions to medical licensing requirements which include: other duly licensed health care practitioners acting within their scope of practice authorized by statute; any physician lawfully licensed in another state or territory or foreign country, when meeting Florida-licensed physicians in consultation; commissioned medical officers of the Armed Forces of the United States and of the Public Health Service of the United States while on active duty and while acting within the scope of their military or public health responsibilities; any person while actually serving without salary or professional fees on the resident medical staff of a hospital in Florida. Any person practicing medicine or attempting to practice medicine in Florida without a license, unless otherwise exempt from the medical licensing requirements, is liable for a third degree felony which is punishable by imprisonment for up to 5 years and a fine of up to $5,000.

Chapter 458, F.S., provides licensing requirements, including financial responsibility requirements and exemptions. As a condition of licensure, licensure renewal, or reactivation of an inactive license, s. 458.320, F.S., requires medical licensure applicants to demonstrate financial responsibility by maintaining medical malpractice insurance, or establishing and maintaining an

escrow account, or obtaining and maintaining an unexpired, irrevocable letter of credit drawn from a United States financial institution to satisfy medical malpractice claims in amounts specified in the section. The financial responsibility law requires physicians, upon presentment of any settlement or final judgment awarding damages to a party based on the physician's malpractice, to be able to satisfy individual professional liability claims of up to $100,000 per claim and have at least $300,000 available to cover all such claims in any one-year period. If the physician has hospital privileges, the physician must be able to satisfy individual professional liability claims of up to $250,000 per claim and have at a minimum $750,000 available to cover all such claims in any one year.

Section 458.320, F.S., exempts some physicians from the financial responsibility requirements for medical licensure including: (1) a physician who is a government employee; (2) a medical school faculty member who only practices medicine in conjunction with teaching duties; (3) a physician with an inactive license who is not practicing in Florida; (4) a physician with an active license who is not practicing medicine in Florida; (5) retired physicians who have practiced in Florida or another state for more than 15 years, who maintain a part-time practice of no more than 1,000 patient contact hours annually, and who meet certain additional requirements outlined in this provision of statute; and (6) retired physicians who are practicing with a limited license. In addition to the exemptions just listed, paragraph 458.320(5)(g), F.S., allows a licensed physician to go uninsured for medical malpractice liability on the condition that such a physician gives notice of this fact to his or her patients by posting a sign prominently displayed in the reception area and clearly noticeable to all patients or by providing a written statement to any person to whom medical services are being provided. A copy of the written statement must be given to each patient to sign, acknowledging receipt thereof, and the signed copy must be maintained in the patient's file.

Uninsured physicians who do not maintain hospital privileges, must pay the entire amount of any final judgment or settlement arising from their medical malpractice or $100,000, whichever is less, within 60 days of the judgment, unless the parties agree otherwise. Uninsured physicians with hospital privileges must pay the entire amount of their medical malpractice claims or $250,000, whichever is less. If the Department of Health is notified of the existence of an unsatisfied judgment or medical malpractice claim against an uninsured physician who is exempt from the financial responsibility requirements under paragraph 458.320(5)(g), F.S., the department must notify the licensee by certified mail that he or she is subject to disciplinary action unless within 30 days the physician furnishes the department with a copy of a timely filed notice of appeal and either a copy of a bond posted in the amount required by law or a copy of an order from a court staying the execution on the final judgment pending disposition of the appeal.

If the uninsured physician fails to act within 30 days after receiving notice from the Department of Health of an unsatisfied medical malpractice claim against him or her and the probable cause panel of the Board of Medicine makes a factual determination that the licensee has not paid the lesser of $100,000 or $250,000, or the medical malpractice claim, the panel must take disciplinary action against the physician. The disciplinary action must include, at a minimum, restriction of the physician's license with the requirement that the physician make payments to the judgment creditor of the malpractice claim on a schedule determined by the board to be reasonable and within the financial capability of the physician. The section also authorizes the board to impose a disciplinary penalty which may include licensure suspension of up to 5 years.

By rule, the Board of Medicine requires physicians to carry malpractice insurance retroactive (tail coverage) for two years. The Board of Osteopathic Medicine, pursuant to ch. 459, F.S., has similar financial responsibility requirements and requires tail coverage or a letter stating the physician has no outstanding judgments against his or her license.

Florida Medical Malpractice Requirements

Florida's medical malpractice law is codified in ch. 766, F.S. The law requires a potential plaintiff to follow stringent procedures prior to filing a medical malpractice action. Section 766.203 (2), F.S., requires a plaintiff to obtain a verified written medical expert opinion (an affidavit) from a qualified expert who has determined that reasonable grounds exist to initiate a medical malpractice action. Section 766.102(2), F.S., sets forth the qualifications of the health care provider who may testify as an expert in a medical negligence action, and who, pursuant to s. 766.104(1), F.S., may provide an opinion supporting the attorney's good faith presuit belief there has been medical negligence. Under s. 766.106(2)-(3), F.S., the plaintiff must notify all potential defendants of the malpractice claim and each potential defendant must conduct an investigation of the claim within 90 days and then respond by rejecting the claim, offering a settlement, or offering to admit liability and arbitrate on the issues of damages. The parties may conduct informal discovery and obtain unsworn statements during the 90-day presuit period under s. 766.106(6)-(7), F.S.

Section 766.106(2), F.S., also requires the potential plaintiff, prior to filing a medical malpractice action, to notify the Department of Health by certified mail, return receipt requested, of the intent to initiate litigation for medical malpractice. The notice to the department must include: the full name and address of the claimant; the full names and any known addresses of any health care providers licensed as medical physicians, osteopathic physicians, physician assistants, chiropractic physicians, podiatric physicians, dentists, or dental hygienists who are prospective defendants identified at the time; the date and a summary of the occurrence giving rise to the claim; and a description of the injury to the claimant. The Department of Health must review each incident and determine whether the incident potentially involved conduct by a health care professional who is subject to disciplinary action, and the law provides that the procedures for handling disciplinary complaints under s. 455.621, F.S., apply.

Section 766.102, F.S., provides for standards of recovery in medical negligence cases. Under s. 766.102(1), F.S., in any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider, the plaintiff has the burden of proving that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider is that level of care, skill, and treatment which, in light of all relevant, surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

Under s. 766.102(2)(c), F.S., any health care provider may testify as an expert in a medical negligence case if he or she is a similar health care provider to the provider accused of negligence. If the expert is not a similar health care provider, he or she may still testify if the court determines the expert possesses sufficient training, experience and knowledge as a result of practice or teaching in the specialty of the defendant, or practice or teaching in a related field of medicine,

such that the expert can testify to the prevailing professional standard of care in a given field of medicine. The expert must have had active involvement in the practice or teaching of medicine within the 5-year period before the incident giving rise to the claim.

Paragraphs (a) and (b) of s. 766.102(2), F.S., define the term "similar health care provider" and classify health care providers as specialists and non-specialists. A specialist is one who is certified by the appropriate American board as a specialist, is trained and experienced as a medical specialist, or holds himself or herself out as a specialist. A health care provider who does not meet the requirements of paragraph (b) of s. 766.102, F.S., is characterized as a non-specialist. To qualify as a specialist, a similar health care provider is a person who is trained and experienced in the same specialty and is certified by the appropriate American board in the same specialty. For a non-specialist, a similar health care provider is one who is licensed by the appropriate regulatory agency of this state, is trained and experienced in the same discipline or school of practice, and practices in the same or similar medical community. If a health care provider provides treatment or diagnosis for a condition which is not in his or her specialty, a specialist trained in the treatment or diagnosis of that condition shall be considered a similar health care provider.

A great deal of litigation has occurred as a result of attempting to interpret and apply the provisions of s. 766.102(2), F.S. This is especially so in light of the fact that the terms "medical specialty", "specialty", "specialist", and "discipline or school of practice" are not defined. As a result, it is not uncommon for trial court judges to allow specialists to testify against non-specialists and general practitioners.

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.

Chapter 458, F.S., contains provisions which regulate the practice of medicine. The legislative intent is stated in s. 458.301, F.S.:

> The primary legislative purpose in enacting this chapter is to ensure that every physician practicing in this state meets minimum requirements for safe practice. It is the legislative intent that physicians who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state.

Criminal Penalties

Section 458.327, F.S., contains criminal penalty provisions, as follows:

> (1) Each of the following acts constitutes a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, F.S.:
>
> (a) The practice of medicine or an attempt to practice medicine without a license to practice in Florida.
> (b) The use or attempted use of a license which is suspended or revoked to practice medicine.
> (c) Attempting to obtain or obtaining a license to practice medicine by knowing misrepresentation.
> (d) 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.

The "practice of medicine" is defined as "the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition." s. 458.305, F.S.

By way of comparison, 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, F.S., 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; 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.

III. Effect of Proposed Changes:

The bill creates s. 455.5641, F.S., to provide legislative findings and intent regarding telehealth. The bill provides that there is a great and recognizable potential for harm if persons without the appropriate level of education, training, experience, supervision, and competence are allowed to provide health care services to persons within Florida. The potential for harm may occur through substandard care or fraud, or both. The bill states that there is a compelling interest in protecting the health, safety, and welfare of the public from incompetent, impaired, or unscrupulous practitioners and that no less restrictive means are available to effectively protect the public than through licensure in Florida.

Also, legislative intent is expressed that the use of untested, ineffective, and potentially harmful health care services be prohibited and the delivery of all health care services to the people of Florida be regulated through licensure of health care practitioners. Legislative intent is provided that all health care practitioners providing health care services to the people of Florida should be regulated in a similar manner regardless of the method of communication or the method of delivery of services. The bill states legislative findings that the methods for delivering health care services to the people of Florida are rapidly changing due to advances in technology and telecommunications. The bill specifies legislative findings that a compelling state interest in protecting the public health, safety, and welfare exists regardless of the method of communication or the method of delivery of services.

The bill defines "health care services" for purposes of the regulation of telehealth, to mean providing, attempting to provide, or offering to provide a diagnosis, treatment plan, prescription, examination, or any other activity limited to persons licensed or otherwise legally authorized to practice medicine, osteopathic medicine, chiropractic medicine, podiatric medicine, natureopathy or naturopathy, optometry, professional nursing, practical nursing, advanced or specialized nursing, pharmacy, dentistry, dental hygiene, midwifery, audiology, speech-language pathology, nursing home administration, occupational therapy, respiratory care, dietetics and nutrition, athletic training, orthotics, pedorthics, prosthetics, electrolysis, electrology, massage, clinical laboratory personnel, medical physics, opticianry, physical therapy, psychology, school psychology, clinical social work, marriage and family therapy, mental health counseling, or to dispense hearing aids, as defined in the practice act for each profession regulated under the Division of Medical Quality Assurance within the Department of Health.

The bill requires any person who is not licensed in Florida and who wishes to provide health care services, as defined in the bill, to patients located in Florida by means of telecommunication only, to apply to the appropriate regulatory board, or the Department of Health when there is no board,

for a Florida telehealth license and subsequently for renewal of such license. The requirements for an initial telehealth license and subsequent renewal must be identical to the requirements for full licensure as specified in the appropriate practice act in Florida for the applicable profession. The licensure requirements include any requirements for profiling, credentialing, informed consent, financial responsibility, and malpractice insurance. A telehealth licensee must comply with all Florida laws and rules regulating the practice of that profession.

The bill requires all telehealth communications, including but not limited to, Internet websites, advertisements, e-mail, and other offers to provide health care services to the people of Florida, to clearly identify the practitioner's Florida license number and include a disclaimer that clearly states that only Florida-licensed health care practitioners may provide health care services directly to persons in Florida. The disclaimer must include the Department of Health's mailing and Internet addresses. The health care practitioner must ensure the confidentiality of electronic medical records as required by the laws of Florida.

The bill prohibits a person from providing telehealth services to patients in Florida without holding an active Florida license to practice that profession and explicitly states that a person who does so may be prosecuted as engaging in unlicensed activity in accordance with part II, ch. 455, F.S. The bill provides that any act performed through telehealth communication that would constitute a criminal violation if performed physically in Florida may be prosecuted under Florida law as if the crime were physically carried out in Florida.

The bill provides exceptions to the licensure requirements for persons providing telehealth services to persons in Florida who hold a valid, active license to practice in another jurisdiction so that they may provide episodic consultative services to a Florida-licensed health professional so long as the out-of-state practitioner does not exercise primary authority for the care or diagnosis of the Florida patient. The bill limits to Florida-licensed health care professionals or those otherwise authorized to practice in Florida, the ability to order, from a person located outside Florida, electronic communications diagnostic-imaging or treatment services for a person located in Florida. The bill does not prohibit or restrict a health care practitioner who is not licensed in Florida from providing health care services through telecommunications to a patient temporarily visiting Florida with whom the health care practitioner has an established practitioner-patient relationship so long as the treatment given is for a nonacute chronic or recurrent illness previously diagnosed and treated by that practitioner and if the practitioner holds an active unrestricted license to practice in another state or in another recognized jurisdiction. The bill excludes a nonresident pharmacy and its employees when the nonresident pharmacy is registered with the Florida Board of Pharmacy.

The bill may not be interpreted to place any jurisdictional limit on the regulatory boards or the Department of Health's authority to regulate Florida licensees regardless of the location of the patient. The bill authorizes the Department of Health or regulatory board to adopt rules to administer the requirements for telehealth regulation.

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Section 766.102, F.S., is amended to create a new standard of recovery in medical negligence cases. The new standard provides for the recovery of damages in Florida for any injury or death of a person that results from health care provided to a patient located in Florida through means of telecommunication. The action may be brought in Florida regardless of the location of the provider.

The bill will take effect on July 1, 2000, if it becomes law.

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:

The bill's failure to define the terms "telehealth services" and "telehealth communication" raises some constitutional issues. Any person who performs acts which are comparable to the acts prohibited by the bill, without being licensed with a Florida telehealth license 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).

The bill also provides that the regulatory boards within the Department of Health and the department are not limited from regulating Florida licensees regardless of the location of the patient. To the extent the bill authorizes the regulatory boards within the Department of Health or the department to place restrictions on the license of a telehealth licensee or practice of such person as the board deems appropriate, by rule, it raises the question whether this provides adequate safeguards so that the Legislature's delegation to the board or

department is not in violation of Article II, Section 3 of the *Florida Constitution*. The bill does not appear to expressly provide a safeguard on the board or department's authority to place restrictions on the applicant's license or subsequent practice in the context of providing telehealth. Under s.120.536(1), F.S., each board and the department may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. Under the bill it is unclear if the appropriate board or department have the authority to define "telehealth services" within the context of its regulatory jurisdiction over the practice of a profession.

Article II, Section 3 of the *Florida Constitution* provides that the powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein. The Florida Supreme Court has acknowledged that "Where the Legislature makes the fundamental policy decision and delegates to some other body the task of implementing that policy under adequate safeguards, there is no violation of the [Delegation of Powers] doctrine." *Askew v. Cross Key Waterways*, 372 So.2d 913 at 921 (Fla.1978)

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). Case law also describes various legally recognized 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).

The Florida Supreme Court denied the adoption of proposed rules to the Florida Bar which would require lawyers, *whether or not admitted to practice law in Florida*, who solicit or advertise for legal employment in Florida or who target solicitations or advertisements for legal employment at Florida residents. *Amendments To Rules Regulating The Florida Bar-Advertising Rules*, 1999 WL 1289031, 24 Fla. L. Weekly S591 (Fla. 1999)

> [The court] den[ied] the adoption of these proposed rules, as they essentially treat lawyers admitted in other jurisdictions like members of The Florida Bar for the limited purpose of subjecting them to the Rules Regulating The Florida Bar regarding solicitation and advertising.

The court found that pursuant to art. V, sec. 15, of the State Constitution, that it has inherent jurisdiction to prohibit the unlicensed practice of law by nonlawyers and that the case law is clear that improper solicitation or advertising in Florida by lawyers admitted in other jurisdictions is prohibited as the unlicensed practice of law which may be enjoined. The court

also acknowledged that in modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States and in doing so they remain subject to the governing authority of the jurisdiction in which they are licensed to practice.

The bill requires all persons delivering health care services *via* telecommunications to be Florida-licensed and to clearly identify their license number and to provide a disclaimer. To the extent that telehealth communications may be characterized as commercial free speech which is not inaccurate or relates to a lawful activity, 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.

Any legal restrictions by Florida to limit the primary authority over the care or diagnosis of a patient located in Florida to Florida-licensed health care practitioners in Florida to the exclusion of health care practitioners not licensed in Florida who rely on telecommunications technologies regulated by the United States Federal Communications Commission or the U.S. Justice Department, the Federal Trade Commission, or the Securities and Exchange Commission, as applies to publicly-traded companies, may be subject to legal challenges under the Privileges and Immunities Clause, Article IV, Section 2 of the United States Constitution. States are not precluded from discriminating against nonresidents but under applicable case law there is a two-step inquiry when determining whether residency classifications violate the Privileges and Immunities Clause. First, the questioned activity must be sufficiently basic to the livelihood of the nation, and bear on the vitality of the nation as a single entity. Second, the challenged restriction must be closely related to the advancement of a substantial state interest, and reviewing courts may consider if there are alternative means available to further the state's purpose.

Any legal restrictions by Florida to limit the primary authority over the care or diagnosis of a patient located in Florida to Florida-licensed health care practitioners in Florida to the exclusion of health care practitioners not licensed in Florida who rely on telecommunications technologies regulated by the United States Federal Communications Commission or the U.S. Justice Department, the Federal Trade Commission, or the Securities and Exchange Commission, as applies to publicly-traded companies, may also be subject to legal challenges under the Commerce Clause of the United States Constitution. The reviewing court will inquire whether: 1) any federal legislation might supersede the state regulation or preempt the state regulation; or 2) the state regulation imposed discriminates against out-of-state entities; and 3) if any discriminating effect burdens interstate commerce; 4) the state regulation furthers an important noneconomic state interest and there are no reasonable nondiscriminatory alternatives. The reviewing court will seek to balance the burden imposed on interstate commerce and the state's interest in the action.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent the bill requires an out-of-state or out-of-country person who performs telehealth services, to obtain Florida-licensure in the appropriate health care profession, the person must incur the costs of becoming licensed as a health care practitioner in Florida. In addition, some persons must meet Florida's financial responsibility requirements applicable to his or her profession.

Persons who reside in Florida and who already hold a professional license to practice a health care profession regulated by the Department of Health's Division of Medical Quality Assurance will incur costs to provide disclaimers if they also provide *telehealth care services* to patients located in Florida.

C. Government Sector Impact:

To the extent the Department of Health and the appropriate regulatory board must administer and enforce the bill's requirements for health care professionals involved in practicing telemedicine, they will incur costs for policing unlicensed activity and regulating the practice of persons outside of Florida. The Department of Health collects a $5 unlicensed activity from each licensed health care practitioner regulated by the department.

The Department of Health has indicated that because the bill requires telehealth license applicants to comply with full licensure requirements for the appropriate health care profession regulated in Florida, there is no immediate incentive for "out-of-state" practitioners to immediately apply for a Florida telehealth license. Therefore, the department, noted that the impact is expected to initially be minimal and can be absorbed within existing resources and that any workload growth resulting from telehealth license applications will be considered in future legislative budget requests.

VI. Technical Deficiencies:

The bill does not define the term "telehealth services" or "telehealth communication."

VII. Related Issues:

It is unclear in the bill what actions, in the context of providing telehealth communications or the provision of telehealth services to persons in Florida, would trigger the Department of Health's regulatory jurisdiction over a person.

The bill requires persons who reside in Florida and who already hold a professional license to practice a health care profession regulated by the Department of Health's Division of Medical

Quality Assurance who make *telehealth* communications, including, but not limited to, Internet websites, advertisements, e-mail, and other offers to provide health care services to persons located in Florida, to clearly identify the practitioner's Florida license number and include the disclaimer as required under the bill.

In a letter (http://www.naag.org/legislation/march/letter to FTC.pdf) dated March 28, 2000, the National Association of Attorneys General responded to the United States Department of Commerce's Subgroup on Legal Barriers to Electronic Commerce's request for comments concerning laws or regulations that may adversely affect electronic commerce. The association indicated that its members strongly believe that States should retain primary enforcement authority over physicians and pharmacies that operate within their borders via the Internet but noted that recent actions to halt unlawful activities of out-of-state defendants have encountered difficulties and that States would favor legislation that would allow state attorneys general to proceed with enforcement actions in federal court and grant States federal injunctive relief.

The bill's requirements would have a significant impact on a consumer's access to health care-related information available through telecommunications. A number of consumer and patient education sites are available on the Internet: (*www.OnHealth.com*); (*www.healthfinder.gov*); (http://health.yahoo.com/health/expert/); these sites provide an online resource for consumers to obtain health care information to make decisions. In addition, to health education resources, consumers may on their own iniative seek consultations from physicians.

> CyberDocs is the only Internet site that provides a "LIVE" physician-based interaction for patients in the comfort of their own home -- a virtual housecall! Almost anyone with an Internet connection can now conveniently consult a U.S.-boarded physician. Whether at home, at school, or traveling within the country or abroad, CyberDocs provides online, confidential consultative medical care for our patients on the Internet (*www.cyberdocs.com*).

By comparison, a number of websites on the Internet allow consumers to seek other health care practitioners: for chiropractors, (http://dir.yahoo.com/Business_and_Economy/Companies/Health/Back_and_Spine/Chiropractic/By_Region/U_S__States/Florida/); for dentists, (http://dir.yahoo.com/Business_and_Economy/Companies/Health/Dentistry/By_Region/U_S__States/Florida/Complete_Listing/); for midwifery, (http://WWW.BIRTHPARTNERS.COM/USA.HTM); and for physical therapy, (http://search.yahoo.com/bin/search?p=Florida%20physical%20therapy).

The Internet also has a number of referral networks which list offers for the services of persons providing health care services (http://www.massagenet.com/therapists/index.htm); (http://www.ama-assn.org/aps/amahg.htm); and (http://www.aamft.org/faqs/DirPub.htm).

In Canada, Toronto's University Health Network which includes three public hospitals, plans to offer its staff expertise for interpreting magnetic-resonance imaging, X-ray tests or other diagnostic procedures performed in the United States by reading them through a Web hookup (*http://interactive.wsj.com/archive/retrieve.cgi?id=SB955320853140311l.djm*).