

**STORAGE NAME:** h1579.jo.doc  
**DATE:** April 10, 2001

**HOUSE OF REPRESENTATIVES  
AS REVISED BY THE COMMITTEE ON  
JUDICIAL OVERSIGHT  
ANALYSIS**

**BILL #:** HB 1579  
**RELATING TO:** Health Care Practitioners  
**SPONSOR(S):** Representative Flanagan  
**TIED BILL(S):** None.

**ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:**

- (1) HEALTH REGULATION YEAS 8 NAYS 0
  - (2) JUDICIAL OVERSIGHT
  - (3) COUNCIL FOR HEALTHY COMMUNITIES
  - (4)
  - (5)
- 

I. SUMMARY:

This bill provides authority to take disciplinary action against a licensed health care practitioner for failure to include information about the practitioner's specialized training in advertisements and informed consent forms provided to patients. The bill also provides requirements for approval of boards that grant medical specialty certification to medical and osteopathic physicians.

According to the Department of Health, there is no fiscal impact on the agency.

**See Amendment section of this analysis for changes made by the amendments that are traveling with the bill.**

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government                      Yes       No       N/A

The Boards of Medicine and Osteopathic Medicine are directed to promulgate rules regarding disciplinary grounds.

2. Lower Taxes                              Yes       No       N/A

3. Individual Freedom                      Yes       No       N/A

4. Personal Responsibility                      Yes       No       N/A

5. Family Empowerment                      Yes       No       N/A

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Chapter 456, F.S., establishes general provisions regarding licensure and enforcement of compliance of licensed health care practitioners. Other licensure and enforcement provisions are provided elsewhere in the statutes in specific practice acts for individual professions, e.g., Chapter 458, F.S., the Florida Medical Practice Act for licensed medical physicians, and Chapter 459, F.S., the Florida Osteopathic Medicine Practice Act.

Sections 456.039 through 456.046, F.S., provide requirements for medical physicians, osteopathic physicians, chiropractic physicians, podiatric physicians, and advanced registered nurse practitioners to submit specified information to the Department of Health for compilation and publication of a "practitioner profile" for each licensee. The profiles include information about a practitioner's graduate medical education and about any specialty board certification. These practitioner profiles are published on the department's website and available through other media as public information.

Chapters 456, 458, and 459, F.S., do not contain any requirement that advertisements and informed consent forms contain information about graduate education and board certification.

Section 456.072, F.S., provides grounds for enforcement of compliance by licensees and disciplinary action for violations of law and regulatory rules. The specified grounds for disciplinary action include in s. 456.072(1)(a), F.S., a prohibition against "making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession." Section 456.072(1)(o), F.S., also prohibits "practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities the licensee knows, or has reason to know, the licensee is not competent to perform."

In addition to the grounds for discipline specified in Chapter 456, F.S., Chapters 458 and 459, F.S., governing medical physicians and osteopathic physicians, contain additional specific grounds for discipline. Sections 458.331(1)(d) and 459.015(1)(d), F.S., respectively, prohibit "false, deceptive, or misleading advertisement", and sections 458.331(1)(ll) and 459.015(1)(nn), F.S., prohibit "advertising or holding oneself out as a board-certified specialist...in violation of this chapter."

Sections 458.3312 and 459.1052, F.S., prohibit a medical physician or osteopathic physician, respectively, from holding himself or herself out as a board-certified specialist unless the physician has received formal recognition as a specialist from certain national specialty recognition and certifying agencies, or other recognizing agency approved by the Board of Medicine or Board of Osteopathic Medicine. The Board of Medicine has promulgated administrative rule 64B 8 –11.001, F.A.C., regarding the advertisement of medical specialty training. This rule prohibits a physician from advertising that the physician has received formal recognition as a specialist in any aspect of the practice of medicine unless the physician has in fact received such recognition by a recognizing agency approved by the Board of Medicine. Further, the rule provides criteria for approval of specialty recognizing agencies which criteria requires that the recognizing agency demonstrate that their criteria for board certification is comparable to the criteria established by the nationally recognized American Board of Medical Specialties. The Board of Osteopathic Medicine has promulgated administrative rule 64B8-15-14.001, F.A.C., regarding the advertisement of osteopathic specialty training. This rule contains provisions similar to those of the Board of Medicine rule.

Rulemaking authority in Chapters 458 and 459, F.S., does not contain specific reference to rulemaking related to “board certification.”

Although Chapters 456, 458 and 459, F.S., each include prohibitions against misleading representations or advertisement of a physician’s specialty training and certification, the chapters do not contain explicit grounds for discipline if advertisements by health care practitioners and informed consent forms do not include specific information about the practitioner’s type of license, specialty board certification, and post-graduate training.

Section 766.103, F.S., is the Florida Medical Consent Law. This law specifies the criteria for obtaining informed consent from a patient in order to raise a rebuttable presumption of a valid consent, in cases of medical malpractice civil suit. The criteria for informed consent does not include a requirement that the practitioner disclose the specifics of his or her graduate training or specialty board certification. However, the law does specify that the action of the practitioner in obtaining informed consent from the patient must be in accordance with an accepted standard of practice among members of the medical community with similar training and experience.

#### C. EFFECT OF PROPOSED CHANGES:

This bill establishes in s. 456.072(1)(aa), F.S., new grounds for discipline of any licensed health care practitioner for failure to include information in advertisements and informed consent forms about the practitioner’s specific type of license, specialty board certification, and post-graduate training. The bill also establishes these new grounds for discipline in Chapters 458 and 459, F.S., regarding medical physicians and osteopathic physicians.

The bill also establishes explicit rulemaking authority and requirements for the Boards of Medicine and Osteopathic Medicine regarding rules relating to “board certification.” For the Board of Medicine rules, approved certification boards may only include a board approved by the American Board of Medical Specialties or a board that provides evidence to the Board of Medicine that the certifying board’s criteria is comparable to the criteria established by the American Board of Medical Specialties. For the Board of Osteopathic Medicine rules, approved certification boards may only include a board approved by the American Board of Osteopathic Medical Specialties or a board that provides evidence to the Board of Osteopathic Medicine that the certifying board’s criteria is comparable to the criteria established by the American Board of Osteopathic Medical Specialties. The Board of Medicine’s rule 64B8-11.001, F.A.C., complies with this provision of the bill.

The effect of the bill is to provide patients with greater information about their health care practitioners upon which they may make more informed decisions about their choice in practitioners and their consent to specific treatment. Currently, information about graduate training and board certification of physicians is available to the public via the "practitioner profiles" on the Department's website. However, this bill will ensure that a health care practitioner provides each individual patient with specific information about the practitioner's training and specialty recognition prior to the patient giving informed consent to treatment by that practitioner. The bill also provides uniform criteria for representation of a physician's specialty certification, so that patients may be assured that representations of specialty certifications are legitimate and reflect a level of recognition that is approved by the regulatory boards.

D. SECTION-BY-SECTION ANALYSIS:

**Section 1.** Adds paragraph (aa) to subsection (1) of s. 456.072, F.S., to provide that failure to disclose medical training in advertisements or to patients in informed consent forms constitutes a ground for discipline of a health care practitioner. Provides penalties.

**Section 2.** Adds paragraph (d) of subsection (2) of s. 458.309, F.S., to provide requirements for approval of boards granting medical specialty certification.

**Section 3.** Amends s. 458.331(d)(1), F.S., to include failure to disclose medical training in advertisements and informed consent forms within the disciplinary ground of false, deceptive, or misleading advertising applicable to physicians. Provides penalties.

**Section 4.** Adds subsection (2) of s. 459.005, F.S., to provide requirements for approval of boards granting osteopathic medical specialty certification.

**Section 5.** Amends s. 459.015(1)(d), F.S., to include failure to disclose medical training in advertisements and informed consent forms within the disciplinary ground of false, deceptive, or misleading advertising applicable to osteopathic physicians. Provides penalties.

**Section 6.** Provides an effective date of October 1, 2001.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments section.

2. Expenditures:

See Fiscal Comments section.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Health care practitioners who are found to have violated the new provisions relating to advertisements and informed consent will be subject to disciplinary action against their license, which may include administrative fines, or restriction from practice.

D. FISCAL COMMENTS:

Current law already specifies grounds for investigating and disciplining a health care practitioner for misrepresenting the practitioner's specialized training. Although the bill expands current law relating to requirements about advertising of a practitioner's training, the bill is not expected to result in a significant increase in complaints against practitioners for violations of these requirements.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to expend funds or to take any action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The bill raises First Amendment concerns. The bill requires that the advertisements of certain professionals contain certain information. Therefore, it raises the question of what information can the state require that professionals place in advertisements. The United States Supreme Court has addressed cases involving compelled commercial speech. In Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 650 (1985), the court addressed an Ohio regulation requiring attorneys to disclose in advertisements that their clients might be liable for litigation costs even if their contingency fee case was unsuccessful. Zauderer argued that in order to impose such a requirement, the state must establish either that the advertisement, without the required disclosure, would be deceptive or false or that the disclosure requirement serves some substantial governmental interest other than preventing deception. Zauderer, 471 U.S. at 650. Further, Zauderer argued, the state must show that the disclosure requirement directly advances the relevant governmental interest and that it constitutes the least intrusive means of doing so. Id.

The court rejected Zauderer's argument:

Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. ... Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.

Zauderer, 471 U.S. at 650.

The court explained that its prior cases prohibiting compelled speech, it struck down statutes because they attempted "to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." Zauderer, 471 U.S. at 651 (quoting West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943)). The regulation in Zauderer, the court explained, was an attempt only "to prescribe what is orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information." Zauderer, 471 U.S. at 651. The court continued:

**Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [citation omitted], appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal.** Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception."

Zauderer, 471 U.S. at 651. (emphasis added).

Finally, the Zauderer court concluded:

We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. **But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.**

Id. (emphasis added).

In Harris v. Agency for Health Care Administration, 671 So. 2d 230 (Fla. 1<sup>st</sup> DCA 1996), the court, relying on Zauderer, held that a statute requiring licensed mental health counselors to include the phrase "licensed mental health counselor" or "LMHC" on advertising or promotional material did not violate the First Amendment. The court found that the requirement was reasonably related to the state's interest in preventing deception of consumers, specifically "preventing the practice of mental health counseling by non-qualified persons and assisting the public in making informed choices regarding mental health services." Harris, 671 So. 2d at 232.

In order for this bill to withstand First Amendment scrutiny, the state must show that the disclosure requirements are reasonably related to preventing deception to consumers. It can be argued that this bill's requirement that professionals provide information about their license and certifications in advertising is reasonably related to the state's interest in ensuring the patients know the qualifications of the medical personnel that might them.

B. RULE-MAKING AUTHORITY:

The Boards of Medicine and Osteopathic Medicine are directed to promulgate rules regarding disciplinary grounds.

C. OTHER COMMENTS:

Although the provisions of this rule focus on medical and osteopathic physicians, the amendments to s. 456.072, F.S., relating to all health care professions, will require all licensed health care practitioners to include the specified information in any advertisements and in all informed consent forms, if applicable to their profession and individual circumstances. Each regulatory board or council, or the department, may need to clarify through rulemaking, the applicability of the required elements for each individual health care profession governed under Chapter 456, F. S.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 3, 2001, the Committee on Health Regulation adopted four (4) amendments that are traveling with the bill. Amendments 1 –2 exempt emergency services and care from the consent form requirement and grounds for disciplinary action. Amendments 3-4 are technical amendments to correct the certifying name of the American Osteopathic Association and the Accreditation Council on Graduate Medical Education.

VII. SIGNATURES:

COMMITTEE ON HEALTH REGULATION:

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AS REVISED BY THE COMMITTEE ON JUDICIAL OVERSIGHT:

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