SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 560

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

SUBJECT: Health Care

DATE: April 13, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HC	Fav/CS
2.			AHS	
3.			AP	
4.				
5.				
6.				

I. Summary:

The bill makes health care practitioners regulated under the Division of Medical Quality Assurance within the Department of Health (DOH) subject to discipline by the department or the appropriate board if, in any advertisement and during the first in-person patient encounter, the practitioner fails to disclose the type of license under which the practitioner is operating. This does not apply to a practitioner while the practitioner is providing services in a licensed mental health or substance abuse treatment facility, hospital, ambulatory surgical center, mobile surgical facility, or in a nursing home, hospice, or any other facility licensed under chapter 400, F.S. The bill provides legislative findings that there exists a compelling state interest for patients to be informed of the credentials of the health care practitioners who treat them and for the public to be protected from misleading health care advertising.

This bill amends section 456.072, Florida Statutes.

The bill creates one undesignated section of law.

II. Present Situation:

Disciplinary Procedures for Health Care Practitioners in the Department of Health

Chapter 456, F.S., provides the general regulatory provisions for health care professions within the Division of Medical Quality Assurance in DOH. Section 456.001, F.S., defines "health care practitioner" to mean any person licensed under chapter 457, F.S., (acupuncture), chapter 458, F.S., (medicine), chapter 459, F.S., (osteopathic medicine), chapter 460, F.S., (chiropractic medicine), chapter 461, F.S., (podiatric medicine), chapter 462, F.S., (naturopathic medicine), chapter 463, F.S., (optometry), chapter 464, (nursing), chapter 465, F.S., (pharmacy),

chapter 466 (dentistry and dental hygiene), chapter 467 (midwifery), parts I, II, III, V, X, XIII, or XIV of chapter 468 (speech-language pathology and audiology, nursing home administration, occupational therapy, respiratory therapy, dietetics and nutrition practice, athletic trainers, and orthotics, prosthetics, and pedorthics), chapter 478, F.S., (electrology or electrolysis), chapter 480, F.S., (massage therapy), part III or IV of chapter 483, F.S., (clinical laboratory personnel or medical physics), chapter 484, F.S., (opticianry and hearing aid specialists), chapter 486 (physical therapy), chapter 490 (psychology), and chapter 491, F.S. (psychotherapy).

Section 456.072, F.S., specifies grounds for which licensed health care practitioners under the Division of Medical Quality Assurance in DOH may be disciplined by the department or board as appropriate. The specified grounds for disciplinary action include a prohibition against making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession.[1] Health care practitioners are also prohibited from 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 specified in s. 456.072, F.S., health care practitioners are subject to discipline for grounds specified in their own practice acts. Section 456.073, F.S., sets forth procedures DOH must follow in order to conduct disciplinary proceedings against practitioners under its jurisdiction.

The Practice of Medicine

Chapter 458, Florida Statutes, governs the regulation of the practice of medicine by the Board of Medicine. Section 458.305, F.S., 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. The Board of Medicine within DOH regulates the practice of medical physicians. Section 458.331, F.S., specifies grounds for which a medical physician may be subject to discipline by the Board of Medicine. A medical physician is subject to discipline for advertising or holding oneself out as a board-certified specialist, if not qualified under s. 458.3312, in violation of chapter 458, F.S.[2] A medical physician is also subject to discipline for practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities that the licensee knows or has reason to know she or he is not competent to perform.[3] Medical physicians are prohibited from providing false, deceptive, or misleading advertising.[4]

Section 458.3312, F.S., prohibits a Florida-licensed medical physician from holding herself or himself out as a board-certified specialist unless the physician has received formal recognition as a specialist from a specialty board of the American Board of American Medical Specialties or other recognizing agency approved by the Board of Medicine. However, a physician may indicate the services offered and may state that her or his practice is limited to one or more types of services when this accurately reflects the scope of practice of the physician.

[1] Section 456.072(1)(a), Florida Statutes.
[2] Section 458.331(1)(mm), F.S.
[3] Section 458.331(1)(v), F.S.
[4] Section 458.331(1)(d), F.S.

The Board of Medicine has adopted an administrative rule on advertising that must be followed by licensed medical physicians.[5] The board rule prohibits any medical physician from stating or implying that she or he has received specialty recognition in any aspect of the practice of medicine unless she or he has received specialty recognition from the specialty boards of the American Board of Medical Specialties (ABMS) or such other recognizing agencies as may request and receive future approval from the board if they have met the requirements of a board-approved recognizing agency. Under the rule, the recognizing agency must be a national medical physician credentialing agency that certifies members as having advanced qualifications through peer-reviewed demonstrations of competence and specialty recognition and must require completion of a medical residency program approved by the Accreditation Council of Graduate Medical Education or the Royal College of Physicians and Surgeons of Canada and successful completion of a comprehensive examination. The recognizing agency must have full time administrative staff, have 501(c) status as a not-for-profit entity under the Internal Revenue Code, and have written by-laws and a code of ethics for its members. Any recognizing agency that is not an ABMS board must require each of its members receiving certification to be currently certified by a specialty board of the ABMS.

The Practice of Osteopathic Medicine

Chapter 459, F.S., the osteopathic medical practice act, similarly provides for the regulation of osteopathic physicians by the Board of Osteopathic Medicine in DOH. Section 459.003, F.S., defines the "practice of osteopathic medicine" to mean the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition, which practice is based in part upon educational standards and requirements which emphasize the importance of the musculoskeletal structure and manipulative therapy in the maintenance and restoration of health. Chapter 459, F.S., contains provisions relating to the definition of practice and discipline of licensed osteopathic physicians, which are comparable to those in the medical practice act.[6]

Section 459.0152, F.S., prohibits a Florida-licensed osteopathic physician from holding herself or himself out as a board-certified specialist unless the osteopathic physician has successfully completed the requirements for certification by the American Osteopathic Association (AOA) or the Accreditation Council on Graduate Medical Education (ACGME). In addition the osteopathic physician must be certified as a specialist by a certifying agency approved by the Board of Osteopathic Medicine. Under s. 459.0152, F.S., an osteopathic physician may indicate the services offered and may state that her or his practice is limited to one or more types of services when this accurately reflects the scope of practice of the osteopathic physician.

[5] Rule 64B8-11.001, Florida Administrative Code.

[6] See s. 459.015 (1)(nn), F.S. An osteopathic physician is subject to discipline for advertising or holding oneself out as a board-certified specialist, if not qualified under s. 459.0152, in violation of chapter 459, F.S. Under s. 459.015(1)(z), F.S., an osteopathic physician is also subject to discipline for 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 she or he is not competent to perform. Section 459.015(1)(d), F.S., prohibits osteopathic physicians from providing false, deceptive, or misleading advertising.

The Board of Osteopathic Medicine has adopted an administrative rule on advertising that must be followed by licensed osteopathic physicians.[7] The board rule prohibits any osteopathic physician from stating or implying that he or she is a specialist in any aspect of the practice of osteopathic medicine unless she or he has met one of the following: (1) completed post-doctoral training in the recognized specialty field including internship, residency, fellowship, or alternate training requirements, which is accredited by either the AOA or the ACGME for the number of years contemplated for the completion of the specialty program; or (2) completed board-approved post-doctoral training and met requirements of a board-approved certifying agency. Under the rule, the certifying agency must be a national physician credentialing organization, have 501(c) status under the Internal Revenue Code, maintain a full-time administrative staff, have by-laws and a code of ethics for its members, and have adequate testing and recertification procedures that include documentation of continuing medical education hours for continued practice in the field of certification. Any licensed osteopathic physician who advertises as a board-certified specialist must prove to the board that the certifying agency that granted her or his credentials meets the board requirements specified in its advertising rule.

Dentistry

The Board of Dentistry within DOH, pursuant to chapter 466, Florida Statutes, has regulatory jurisdiction over the practice of dentistry. Section 466.0282, F.S., prohibits dentists from advertising membership in, or specialty recognition by, an accrediting organization, or advertising that the dentist's practice is limited to a specific area of dentistry that is not recognized or accredited by the American Dental Association. The section provides legislative findings and intent, including intent that the findings of the American Dental Association's accreditation process for dental specialties be relied on by the Board of Dentistry to the exclusion of similarly situated entities.

Section 466.0282, F.S., provides requirements for an organization that is not recognized by the American Dental Association to be recognized by the Florida Board of Dentistry as a bona fide organization for a specific area of dental practice. To be recognized by the board as a bona fide organization for a specific area of dental practice, the organization must condition membership or credentialing of its members upon all of the following: successful completion of a 12-month formal, full-time advanced education program that is affiliated with or sponsored by a university-based dental school and is beyond the dental degree, at the graduate or postgraduate level; completion of prior didactic training and clinical experience in the specific area of dentistry that is greater than that of other dentists; and successful completion of oral and written examinations based on psychometric principles.

The section permits any dentist who lacks membership in or certification, diplomate status, or other similar credentials from an accrediting organization approved as bona fide by either the American Dental Association or the Florida Board of Dentistry to announce a practice emphasis in any other area of dental practice, if the dentist incorporates in his or her announcement, solicitation, or advertisement the following statement: "... (NAME OF ANNOUNCED AREA OF DENTAL PRACTICE)... IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY." The

[7] Rule 64B15-14.001, Florida Administrative Code.

bill requires any dentist who lacks membership in or certification, diplomate status, or other similar credentials from an accrediting organization approved as bona fide by either the American Dental Association or the Florida Board of Dentistry and whose area of practice is officially recognized by an organization that the dentist wants to acknowledge or otherwise reference in an announcement, solicitation, or advertisement to also state prominently "...(NAME OF REFERENCED ORGANIZATION)... IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY."

The Florida Patient's Bill of Rights and Responsibilities

Section 381.026, F.S., establishes the Florida Patient's Bill of Rights and Responsibilities. Section 381.026(4)(b)1., specifies that a patient has the right to know the name, function, and qualifications of each health care provider who is providing medical services to the patient. For purposes of this section, health care provider includes physicians licensed under chapters 458, 459 and 461, F.S. A patient may request such information from his or her responsible provider or the health care facility in which he or she is receiving medical services.

III. Effect of Proposed Changes:

Section 1. Creates an undesignated section of law, to express legislative findings that there exists a compelling state interest for patients to be informed of the credentials of the health care practitioners who treat them and for the public to be protected from misleading health care advertising. Areas of health care practice licensure can be extremely confusing for patients and health care practitioners can easily mislead patients into believing that the practitioner is better qualified than other health care practitioners simply by creating a sham practice designation. The Legislature has determined that the most direct and effective manner in which to protect patients from this identifiable harm is to ensure that patients and the public be informed of the training of health care practitioners and intends by this act to require the provision of such information.

Section 2. Amends s. 456.072, F.S., to make a licensed health care practitioner subject to discipline by DOH or the appropriate board if in any advertisement and during the first in-person patient encounter, the practitioner fails to disclose the type of license under which the practitioner is operating. This does not apply to a practitioner while the practitioner is providing services in a licensed mental health or substance abuse treatment facility, hospital, ambulatory surgical center, mobile surgical facility, or in a nursing home, hospice, or any other facility licensed under chapter 400, F.S.

The bill provides that the purpose of s. 456.072, F.S., is to facilitate uniform discipline for those actions that are made punishable under this section and to this end; any reference to this section of law constitutes a general reference under the doctrine of incorporation by reference. In effect, when a general cross-reference to s. 456.072, F.S., appears in a statute, courts will treat the cross reference as incorporating any future amendments to that section.[8]

Section 3. Provides an effective date of July 1, 2004.

[8] See *Reino v. State*, 352 So.2d 853, at 859 (Fla. 1977).

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, s. 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, s. 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 that 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. Applicable case law describes various regulatory safeguards that 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) and *Parker v. Commonwealth of Ky.* 818 F.2d 504 (6th Cir.1987).

On March 21, 2001, Senior United States District Judge, William Stafford, of the United States District Court, Northern District of Florida, Tallahassee Division, entered a Judgment and Order Granting Plaintiffs' Motion for Summary Judgment in Richard A. Borgner, D.D.S., et.al. v. Robert G. Brooks, M.D., et.al, Case No. 4:99cv211-WS, (N.D. Fla. filed Mar. 21, 2001), declaring unconstitutional a provision in the Dental Practice Act, Chapter 466, F.S., that restricted advertising membership in, or specialty recognition by, organizations not recognized by the American Dental Association. The order granting plaintiffs' motion for summary judgment, cited *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), in which the United States Supreme Court articulated a four-pronged test for determining the constitutionality of a restriction on commercial speech: Under the test, (1) the expression must concern a lawful activity and not be misleading; (2) the asserted governmental interest must be substantial; (3) the regulation must directly advance the governmental interest asserted; and (4) the regulation must not be more extensive than is necessary to serve that interest.

In declaring s. 466.0282, F.S., unconstitutional, the court relied upon a series of cases interpreting and applying the Central Hudson test. Relying upon the holding of *Mason v. The Florida Bar*, 208 F.3d 952 (11th Cir. 2000), the court found that the state must "bear the substantial burden of demonstrating that the restrictions placed on a dentist's speech by section 466.0282, F.S., both target an identifiable harm and mitigate against such harm in a direct and effective manner." The court held that the state has not satisfied such a burden. The State of Florida appealed. The Court of Appeals held that the state had a substantial interest in regulating a dentist's advertisement, the state demonstrated identifiable harm, and the statute was not more extensive than necessary to serve the State's interest. *Borgner v. Brooks*, C.A.11 (Fla.) 2002, 284 F.3d 1204, certiorari denied 123 S.Ct. 688, 154 L.Ed.2d 580.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Health care practitioners will be subject to discipline for violating the bill's requirements for the inclusion of specified information with every advertisement. Health care practitioners will incur costs to maintain written evidence of disclosure.

C. Government Sector Impact:

The Department of Health may incur costs to enforce the bill's requirements expanding disciplinary violations against licensed health care practitioners.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not specify to whom this information must be communicated, or in what manner this information must be provided. It is unclear whether the information needs to be given to the patient or the patient's legal representative.

The bill requires health care practitioners to provide specified information during the first in-person patient encounter. This requirement may not be clear for some of the licensed health care practitioners who work under practice models where informed consent is implied within a health care setting, such as an agent of pharmacist who accepts prescriptions and physically delivers prescription drugs to a consumer who may or may not actually be the patient. It is also unclear whether such provision of information during the first in-person patient encounter is meaningful if the patient is unconscious or lacks the ability to understand and appreciate the information. In some instances, such as emergencies, the disclosure requirement may be impractical before a

practitioner renders her or his services, such as a paramedic or emergency medical technician while working under the direction of a Florida-licensed medical physician.

VIII. Amendments:

None.