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.)

Prepared By: Health Care Committee

BILL: SB 972

SPONSOR: Senator Jones

SUBJECT: Financial Responsibility of Medical Physicians and Osteopathic Physicians

DATE: March 23, 2005 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HE	**Pre-meeting**
2.			BI	
3.			JU	
4.				
5.				
6.				

I. Summary:

The bill revises financial responsibility requirements that are a condition of licensure for allopathic and osteopathic physicians. The bill increases the minimum amount of coverage that allopathic and osteopathic physicians must maintain in medical malpractice insurance, an escrow account, or an unexpired, irrevocable letter of credit drawn from a United States financial institution to satisfy medical malpractice claims. The bill increases the coverage amounts from $100,000 to $250,000 per claim and from not less than $300,000 to $750,000 available to cover all claims for a physician who does not maintain hospital privileges. If a physician performs surgery in an ambulatory surgical center or has hospital privileges, the physician coverage amounts are increased from $250,000 to $500,000 per claim and from not less than $750, 000 to $1 million available to cover all claims.

The bill would require allopathic and osteopathic physicians who hold an active license and who are not otherwise exempt from the financial responsibility requirements of ss. 458.320 and 459.0085, F.S., to demonstrate financial responsibility as revised by the bill. Such physicians may no longer decide not to carry malpractice insurance.

The bill increases the amounts that allopathic and osteopathic physicians must pay for judgments or settlements arising from medical malpractice from $100,000 to $250,000 if the physician does not maintain hospital staff privileges and from $250,000 to $500,000 if the physician maintains hospital privileges.

The bill requires the Department of Health (DOH) to verify that the Florida-licensed allopathic or osteopathic physician has met the required financial responsibility before a license is granted or renewed.

This bill amends sections 458.320 and 459.0085, Florida Statutes.

II. Present Situation:

Financial Responsibility of Allopathic and Osteopathic Physicians

Chapter 458, F.S., provides for the regulation of the practice of medicine by the Board of Medicine within DOH. As a condition of licensure, licensure renewal, or reactivation of an inactive license, s. 458.320, F.S., requires applicants (allopathic physicians) 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 upon presentment of a final judgment indicating liability and awarding damages to be paid by the physician or upon presentment of a settlement agreement signed by all parties which is based on a claim arising out of the rendering of, or the failure to render, medical care and services. If the physician performs surgery in an ambulatory surgical center or 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 upon presentment of a final judgment indicating liability and awarding damages to be paid by the physician or upon presentment of a settlement agreement signed by all parties which is based on a claim arising out of the rendering of, or the failure to render, medical care and services.

Section 458.320, F.S., exempts several categories of persons from the financial responsibility requirements for licensed allopathic physicians including: a physician who is a government employee; a physician with an inactive license who is not practicing in Florida; retired professionals who are practicing with a limited license; a medical school faculty member who only practices medicine in conjunction with teaching duties; a physician with an active license who is not practicing medicine in Florida; and retired physicians who have practiced in Florida or another state for more than 15 years, maintain a part-time practice of no more than 1,000 patient contact hours annually, and meet certain additional requirements outlined in this provision of statute. In addition to the exemptions previously listed, paragraph 458.320(5)(g), F.S., allows a licensed physician to go "bare" (uninsured) for medical malpractice liability on the condition that such 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.

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 DOH 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., DOH must notify the licensee by certified mail that he is subject to disciplinary action unless, within 30 days from the date of mailing, the physician furnishes the agency with a copy of a timely filed notice of appeal and either a copy of a supersedeas bond[1] 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. The licensed physician must have completed a form supplying necessary information as required by the department.

If the uninsured physician fails to act within 30 days after receiving notice from DOH of an unsatisfied medical malpractice claim against him or her, then upon the next meeting of the probable cause panel of the Board of Medicine, the panel must determine whether probable cause exists to take disciplinary action against the licensee. If 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, it must take disciplinary action against the physician. The disciplinary action must include, at a minimum, probation of the physician's license with the restriction 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. In the event that an agreement to satisfy the judgment has been met, the board must remove any restriction on the license.

Chapter 459, F.S., provides for the regulation of osteopathic medicine by the Board of Osteopathic Medicine. The chapter also requires osteopathic physicians applying for initial licensure, licensure renewal, or reactivation of an inactive license to demonstrate financial responsibility for medical malpractice claims and provides exemptions to this requirement.[2]

Financial Responsibility of Certain Health Care Practitioners

Section 456.048, F.S., directs the Board of Acupuncture, the Board of Chiropractic, the Board of Podiatric Medicine, and the Board of Dentistry to require, by rule, that the health care practitioners they regulate, and the Board of Nursing, with respect to advanced registered nurse practitioners certified under s. 464.012, F.S., maintain malpractice insurance or provide proof of financial responsibility in an amount and in a manner determined by the respective board to be sufficient to cover claims arising out of the rendering of or failure to render professional care and services in this state. The boards are authorized to grant an exemption upon application by: a practitioner who is a government employee; a person with an inactive license who is not practicing in this state; a person holding a limited license and practicing under the scope of such limited license; a person licensed or certified as an acupuncturist, chiropractor, podiatrist, advanced registered nurse practitioner, or dentist who practices only in conjunction with teaching duties at an accredited school or in such school's main teaching hospitals; a person holding an active license or certification but who is not practicing in this state; or a person who can demonstrate to the board that he or she has no malpractice exposure in this state.

[1] A supersedeas bond is a bond required of a person who petitions to set aside a judgment or execution and from which the other party may be made whole if the action is successful.
[2] See section 459.0085, F.S.

Health Care Practitioner Disciplinary Procedures

Section 456.073, F.S., sets forth procedures DOH and regulatory boards must follow in order to conduct disciplinary proceedings against practitioners under its jurisdiction. The department, for the boards under its jurisdiction, must investigate all written complaints filed with it that are legally sufficient. Complaints are legally sufficient if they contain facts, which, if true, show that a licensee has violated any applicable regulations governing the licensee's profession or occupation. Even if the original complainant withdraws or otherwise indicates a desire that the complaint not be investigated or prosecuted to its completion, the department at its discretion may continue its investigation of the complaint. The department may investigate anonymous, written complaints or complaints filed by confidential informants if the complaints are legally sufficient and the department has reason to believe after a preliminary inquiry that the alleged violations are true. If the department has reasonable cause to believe that a licensee has violated any applicable regulations governing the licensee's profession, it may initiate an investigation on its own.

When investigations of licensees within the department's jurisdiction are determined to be complete and legally sufficient, the department is required to prepare, and submit to a probable cause panel of the appropriate board, if there is a board, an investigative report along with a recommendation of the department regarding the existence of probable cause. A board has discretion over whether to delegate the responsibility of determining probable cause to the department or to retain the responsibility to do so by appointing a probable cause panel for the board. The determination as to whether probable cause exists must be made by majority vote of a probable cause panel of the appropriate board, or by the department if there is no board or if the board has delegated the probable cause determination to the department.

The subject of the complaint must be notified regarding the department's investigation of alleged violations that may subject the licensee to disciplinary action. When the department investigates a complaint, it must provide the subject of the complaint or her or his attorney a copy of the complaint or document that resulted in the initiation of the investigation. Except for cases involving physicians, within 20 days after the service of the complaint, the subject of the complaint may submit a written response to the information contained in the complaint. The department may conduct an investigation without notification to the subject if the act under investigation is a criminal offense. If the department's secretary or her or his designee and the chair of its probable cause panel agree, in writing, that notification to the subject of the investigation would be detrimental to the investigation, then the department may withhold notification of the subject.

If the subject of the complaint makes a written request and agrees to maintain the confidentiality of the information, the subject may review the department's complete investigative file. The licensee may respond within 20 days of the licensee's review of the investigative file to information in the file before it is considered by the probable cause panel. Complaints and information obtained by the department during its investigations are exempt from the Public Records Law until 10 days after probable cause has been found to exist by the probable cause panel or the department, or until the subject of the investigation waives confidentiality. If no probable cause is found to exist, the complaints and information remain confidential in perpetuity.

When the department presents its recommendations regarding the existence of probable cause to the probable cause panel of the appropriate board, the panel may find that probable cause exists or does not exist, or it may find that additional investigative information is necessary in order to make its findings regarding probable cause. Probable cause proceedings are exempt from the noticing requirements of ch. 120, F.S. After the panel convenes and receives the department's final investigative report, the panel may make additional requests for investigative information. Section 456.073(4), F.S., specifies time limits within which the probable cause panel may request additional investigative information from the department and within which the probable cause panel must make a determination regarding the existence of probable cause. Within 30 days of receiving the final investigative report, the department or the appropriate probable cause panel must make a determination regarding the existence of probable cause. The secretary of the department may grant an extension of the 15-day and 30-day time limits outlined in s. 456.073(4), F.S. If the panel does not issue a letter of guidance or find probable cause within the 30-day time limit as extended, the department must make a determination regarding the existence of probable cause within 10 days after the time limit has elapsed.

Instead of making a finding of probable cause, the probable cause panel may issue a letter of guidance to the subject of a disciplinary complaint. Letters of guidance do not constitute discipline. If the panel finds that probable cause exists, it must direct the department to file a formal administrative complaint against the licensee under the provisions of ch. 120, F.S. The department has the option of not prosecuting the complaint if it finds that probable cause has been improvidently found by the probable cause panel. In the event the department does not prosecute the complaint on the grounds that probable cause was improvidently found, it must refer the complaint back to the board that then may independently prosecute the complaint. The department must report to the appropriate board any investigation or disciplinary proceeding not before the Division of Administrative Hearings under ch. 120, F.S., or otherwise not completed within 1 year of the filing of the complaint. The appropriate probable cause panel then has the option to retain independent legal counsel, employ investigators, and continue the investigation, as it deems necessary.

When an administrative complaint is filed against a subject based on an alleged disciplinary violation, the subject of the complaint is informed of her or his right to request an informal hearing if there are no disputed issues of material fact, or a formal hearing if there are disputed issues of material fact or the subject disputes the allegations of the complaint. The subject may waive her or his rights to object to the allegations of the complaint, which allows the department to proceed with the prosecution of the case without the licensee's involvement. Once the administrative complaint has been filed, the licensee has 21 days to respond to the department. If the subject of the complaint and the department do not agree in writing that there are no disputed issues of material fact, s. 456.073(5), F.S., requires a formal hearing before a hearing officer of the Division of Administrative Hearings under ch. 120, F.S. The hearing provides a forum for the licensee to dispute the allegations of the administrative complaint. At any point before an administrative hearing is held, the licensee and the department may reach a settlement. The settlement is prepared by the prosecuting attorney and sent to the appropriate board. The board may accept, reject, or modify the settlement offer. If accepted, the board may issue a final order to dispose of the complaint. If rejected or modified by the board, the licensee and department may renegotiate a settlement or the licensee may request a formal hearing. If a hearing is held,

the hearing officer makes findings of fact and conclusions of law that are placed in a recommended order. The licensee and the department's prosecuting attorney may file exceptions to the hearing officer's findings of facts. The boards resolve the exceptions to the hearing officer's findings of facts when they issue a final order for the disciplinary action.

The boards within DOH have the status of an agency for certain administrative actions, including licensee discipline. A board may issue an order imposing discipline on any licensee under its jurisdiction as authorized by the profession's practice act and the provisions of ch. 456, F.S. Typically, boards are authorized to impose the following disciplinary penalties against licensees: refusal to certify, or to certify with restrictions, an application for a license; suspension or permanent revocation of a license; restriction of practice or license; imposition of an administrative fine for each count or separate offense; issuance of a reprimand or letter of concern; placement of the licensee on probation for a specified period of time and subject to specified conditions; or corrective action.

Emergency Suspension of a License

Section 120.60(6), F.S., authorizes an agency to take emergency action against a license if the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license.[3] The agency may take such action by any procedure that is fair under the circumstances if: the procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution; the agency takes only that action necessary to protect the public interest under the emergency procedure; and the agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable.[4] Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding under ss. 120.569 and 120.57, F.S., must also be promptly instituted and acted upon.

III. Effect of Proposed Changes:

The bill amends ss. 458.320 and 459.0085, F.S., to revise financial responsibility requirements that are a condition of licensure for allopathic and osteopathic physicians. The bill increases the minimum amount of coverage that allopathic and osteopathic physicians must maintain in medical malpractice insurance, an escrow account, or an unexpired, irrevocable letter of credit drawn from a United States financial institution to satisfy medical malpractice claims. The bill increases the coverage amounts from $100,000 to $250,000 per claim and from not less than $300,000 to $750,000 available to cover all claims for a physician who does not maintain hospital privileges. If a physician performs surgery in an ambulatory surgical center or has hospital privileges, the physician coverage amounts are increased from $250,000 to $500,000 per claim and from not less than $750, 000 to $1 million available to cover all claims.

[3] Similar procedures are required for emergency rulemaking under the Administrative Procedure Act. See s. 120.54(4)(a), F.S.
[4] See also s. 120.68, F.S., which provides for immediate judicial review of final agency action.

The bill would require allopathic and osteopathic physicians who hold an active license and who are not otherwise exempt from the financial responsibility requirements of ss. 458.320 and 459.0085, F.S., to demonstrate financial responsibility as revised by the bill. Such physicians may no longer decide not to carry malpractice insurance.

The bill increases the amounts that allopathic and osteopathic physicians must pay for judgments or settlements arising from medical malpractice from $100,000 to $250,000 if the physician does not maintain hospital staff privileges and from $250,000 to $500,000 if the physician maintains hospital privileges.

The bill requires DOH to verify that the Florida-licensed allopathic or osteopathic physician has met the required financial responsibility before a license is granted or renewed.

The effective date of the bill is upon becoming a 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, 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.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill requires allopathic and osteopathic physicians who actively practice in Florida and who currently may go “bare” (uninsured) to now have to meet financial responsibility requirements and such physicians will incur costs to do so. Physicians will incur costs to meet the increased amounts which must be maintained to demonstrate financial responsibility requirements as a condition of licensure and licensure renewal.

C. Government Sector Impact:

DOH will incur costs to verify that Florida-licensed physicians have met the financial responsibility requirements for licensure and licensure renewal. Officials at DOH have indicated that the department will need to employ an additional 3.5 full-time positions and will incur costs during fiscal year 2005-2006 equal to $132,876 and during fiscal year 2006-2007 equal to $143,503.

VI. Technical Deficiencies:

The bill revises references to existing provisions (subparagraphs 458.320(5)(g)3., 4., and 5.) and (subparagraphs 459.0085(5)(g)3., 4., and 5.), which require DOH to suspend the license of an allopathic or osteopathic physician, as applicable, who has failed to meet the requirements of financial responsibility. On page 6, lines 26-27, and on page 18, line 7, of the bill, the references to “subparagraphs (5)(g)3., 4. and 5.” need to be changed to “subsection (6).”

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.