

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.)

Date: April 8, 1998 Revised: _____

Subject: Regulation of Health Care Professionals; Sexual Misconduct

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Munroe</u>	<u>Wilson</u>	<u>HC</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The committee substitute creates s. 455.569, F.S., to require each board within the Department of Health or the department, if there is no board, to permanently revoke the license, certificate, or registration of any health care professional who has been found by his or her regulatory board or the department, as appropriate, to have been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, to a felony in any jurisdiction which directly relates to sexual misconduct in the practice of that profession. The committee substitute provides an effective date of July 1, 1998.

II. Present Situation:

General Regulatory Provisions (ss. 455.624 & 455.567, F.S.)

Part II, ch. 455, F.S., provides the general regulatory provisions for the health care professions under the Department of Health. Section 455.624, F.S., provides grounds for which licensed health care professionals may be subject to discipline by the Department of Health or the appropriate regulatory board. Health care professionals are subject to the following penalties specified in s. 455.624(2), F.S.: refusal to certify, or to certify with restrictions, an application for a license; suspension or permanent revocation of a license; restriction of practice; imposition of an administrative fine no greater than \$5,000 for each count or separate offense; issuance of a reprimand; placement of the licensee on probation for a period of time and subject to specified conditions such as undergoing treatment, attending continuing education courses, submission to reexamination, working under supervision of another licensee, and assessment of investigation and prosecution costs; or the Department of Health may seek issuance of an injunction or a writ of mandamus. In addition to the general regulatory provisions in ch. 455, F.S., each health care profession is subject to requirements contained in their practice acts.

Section 455.567, F.S., requires the Department of Health and each board within the department to refuse to admit a candidate to any licensure examination and to refuse to issue a license to any candidate who has had any license to practice any profession revoked or surrendered based on a violation of sexual misconduct in the practice of that profession under the laws of any other state or any territory or possession of the United States. The licensure disqualification also applies to any person who has committed any act in any other state or any territory or possession of the United States which if committed in this state would constitute sexual misconduct. The licensure disqualification is restricted to examination candidates or license applicants whose license has not been reinstated by the licensing authority of the jurisdiction that revoked the license based on a violation of sexual misconduct. The section provides that a licensing authority's acceptance of a candidate's relinquishment of a license that is offered in response to or in anticipation of the filing of administrative charges against the candidate's license constitutes the surrender of the candidate's license.

There is considerable variation in the practice acts and rules for health care professions with regard to the definition of sexual misconduct and the penalties for violations relating to sexual misconduct. The following sections describe the current laws and regulations about sexual misconduct under the various practice acts.

Acupuncture (s. 457.109, F.S.)

Section 457.109(1)(j), F.S., provides a ground for which an acupuncturist is subject to discipline by the Board of Acupuncture for exercising influence within a patient-acupuncturist relationship for purposes of engaging a patient in sexual activity and provides that a patient is presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her acupuncturist. Rule 64B1-9.001, Florida Administrative Code, provides disciplinary guidelines that specify the range of recommended penalties for specific violations. The rule specifies that for a violation of exercising influence to engage a patient in sex, a recommended penalty of an administrative fine of \$1,000 and a 6 month suspension immediately, followed by a 2 year probation with such terms and conditions as set forth by the Board of Acupuncture.

Medicine (ss. 458.329 & 458.331(1)(j), F.S.)

Section 458.329, F.S., prohibits sexual misconduct in the practice of medicine and defines sexual misconduct in the practice of medicine to mean a violation of the physician-patient relationship through which the physician uses the relationship to induce or attempt to induce the patient to engage, or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Section 458.331(1)(j), F.S., provides a ground for which a physician is subject to discipline by the Board of Medicine for exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity and provides that the patient is presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician. Rule 64B8-9.008, F.A.C., provides that sexual contact with a patient is sexual misconduct and is a violation of ss. 458.329 and 458.331(1)(j), F.S. The rule defines sexual misconduct between a physician and a patient to

include: 1) sexual behavior or involvement with a patient including verbal or physical behavior which may reasonably be interpreted as romantic involvement with a patient regardless of whether such involvement occurs in the professional setting or outside of it; 2) acts that may reasonably be interpreted as intended for the sexual arousal or gratification of the physician, the patient or any third party; or 3) acts that may reasonably be interpreted by the patient as being sexual. Under the rule, sexual misconduct is sexual behavior or involvement with a patient not actively receiving treatment from the physician and any sexual behavior or involvement with the patient that: 1) results from the use or exploitation of trust, knowledge, influence or emotions derived from the professional relationship; 2) misuses privileged information or access to privileged information to meet the physician's personal or sexual need; or 3) abuses or reasonably appears to be an abuse of authority or power. The determination of when a person is a patient for purposes of the administrative rule is made on a case by case basis with consideration given to the nature, extent, and context of the professional relationship between the physician and the person. Upon a finding that physician has committed unprofessional conduct by engaging in sexual misconduct, the Board of Medicine will impose discipline that it deems necessary to protect the public. The sanctions available to the board include restriction or limitation of the physician's practice, and revocation or suspension of the physician's license. Rule 64B8-8.001, F.A.C., provides disciplinary guidelines that specify the range of recommended penalties for specific violations. The rule specifies a recommended penalty ranging from a 1 year suspension to revocation, and an administrative fine from \$250 to \$5,000 if a physician is found to have exercised his or her influence to engage a patient in sex.

Osteopathic Medicine (ss. 459.0141 & 459.015(1)(I), F.S.)

Section 459.0141, F.S., prohibits sexual misconduct in the practice of osteopathic medicine and defines sexual misconduct in the practice of osteopathic medicine to mean a violation of the physician-patient relationship through which the physician uses the relationship to induce or attempt to induce the patient to engage, or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Section 459.015(1)(I), F.S., provides a ground for which an osteopathic physician is subject to discipline by the Board of Osteopathic Medicine for exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity and provides that the patient is presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician. Rule 64B15-19.001, F.A.C., provides disciplinary guidelines that specify the range of recommended penalties for specific violations. The rule specifies a recommended penalty for a violation involving sexual misconduct within the patient-physician relationship: if it is a first offense and if the sexual relationship develops outside the physician's professional practice, no penalty; for all other cases, up to six months suspension and a fine up to \$5,000 and probation. Under the rule, the recommended penalty for a violation involving sexual misconduct within the patient-physician relationship where there has been prior disciplinary action is an administrative fine up to \$5,000 and a minimum 6 month suspension of license up to revocation.

Chiropractic (s. 460.412)

Section 460.412, F.S., prohibits sexual misconduct in the practice of chiropractic and defines sexual misconduct in the practice of chiropractic to mean a violation of the chiropractic physician-patient relationship through which the chiropractic physician uses the relationship to induce or attempt to induce the patient to engage, or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Rule 64B2-17.0021, F.A.C., prohibits sexual misconduct by a chiropractic physician and recommends, for the protection of both the chiropractic physician and the patient, that a chiropractic physician should have the presence of a third person during examination and treatment of any patient. The rule defines sexual misconduct to mean any direct or indirect physical contact by any person or between persons which is intended or which is likely to cause to either person stimulation of a sexual nature. Sexual misconduct includes sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse. The rule provides that sexual misconduct includes: 1) a licensee's failure to inform a patient when the licensee must touch the patient's breasts or genitalia for diagnostic or therapeutic purposes or disregard for a patient's request that the licensee not touch the patient's breasts or genitalia; 2) a licensee's intentional touching of a patient's breasts or sexual organs for non-diagnostic or non-therapeutic purposes; 3) a licensee who makes intentional contact with or who penetrates a patient's oral, anal, or vaginal orifice with the licensee's own sexual organ or any object for any purpose other than a professionally recognized diagnostic or therapeutic purpose. The rule defines patient as any person who is being examined or who was under the care or treatment of the chiropractic physician when the incident or incidents of misconduct occurred. Under the rule, a patient is considered a patient until one year has elapsed since the last date on which the chiropractic physician examined or treated the person. A patient's consent may not be used by the chiropractic physician in defense against an allegation of sexual misconduct. Rule 64B2-16.003, F.A.C., provides disciplinary guidelines that specify the range of recommended penalties for specific violations. The rule specifies that for a violation of sexual misconduct by a chiropractic physician a recommended penalty of a minimum of 1 year suspension followed by 2 years of probation under terms and conditions set by the Board of Chiropractic to include supervision and a fine of not less than \$1,000 per violation, up to permanent revocation.

Naturopathy (s. 462.14, F.S.)

Section 462.14(1)(k), F.S., provides a ground for which a physician is subject to discipline by the Department of Health for exercising influence within a patient-physician relationship for purposes of engaging the patient in sexual activity and provides that a patient is presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician.

Nursing (ss. 464.017 & 464.018(1)(h), F.S.)

Section 464.017, F.S., prohibits sexual misconduct in the practice of nursing and defines sexual misconduct in the practice of nursing to mean a violation of the nursing-patient relationship through which the nurse uses the relationship to induce or attempt to induce the patient to

engage, or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Section 464.018(1)(h), F.S., provides a ground for which a nurse is subject to discipline by the Board of Nursing for unprofessional conduct. Section 464.018(1)(d)4., F.S., provides a ground for which a nurse is subject to discipline for a violation of ch. 800, relating to lewdness and indecent exposure. Rule 64B9-8.006, F.A.C., provides disciplinary guidelines that specify the range of recommended penalties for specific violations. The rule specifies that for a violation of sexual misconduct by a nurse a recommended penalty of an administrative fine of \$500 to \$1,000, referral to the Intervention Project for Nurses, and 1 year probation with conditions to revocation. The rule specifies that for a violation of ch. 800, F.S., relating to lewdness and indecent exposure by a nurse (s. 464.018(1)(d)4., F.S.) a recommended penalty, if the violation is a misdemeanor, is from a reprimand and a minimum administrative fine of \$200 to probation with conditions. The recommended penalty for a violation of s. 464.018(1)(d)4., F.S., if the violation is a felony or substance abuse is involved, is a minimum administrative fine of \$250, referral to and participation in the Intervention Project for Nurses up to denial of licensure or suspension for a term of years.

Dentistry (ss. 466.027 & 466.028(1)(k), F.S.)

Section 466.027, F.S., prohibits sexual misconduct in the practice of dentistry and defines sexual misconduct in the practice of dentistry to mean a violation of the dentist-patient relationship through which the dentist uses the relationship to induce or attempt to induce the patient to engage, or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Section 466.028(1)(k), F.S., provides a ground for which a dentist is subject to discipline for committing any act which would constitute sexual battery, as defined in ch. 794, F.S., upon a patient or intentionally touching the sexual organ of a patient. Rule 64B5-13.005, F.A.C., provides disciplinary guidelines that specify the range of recommended penalties for specific violations. The rule specifies a recommended penalty of a period of probation, restriction of practice, suspension, and/or revocation for a violation committed by a dentist for any act which would constitute sexual battery upon a patient or intentionally touching the sexual organ of a patient. In the case of an applicant, the Board of Dentistry shall deny the application.

Midwifery (s. 467.203, F.S.)

Section 467.203, F.S., provides a ground for which a midwife is subject to discipline by the Department of Health for unprofessional conduct. Rule 64B24-8.002, F.A.C., provides disciplinary guidelines that specify the range of recommended penalties for numerous violations of midwifery practice but does not specifically have a recommended penalty for the violation of unprofessional conduct by a midwife.

Speech-Language Pathology & Audiology (ss. 468.1295 & 468.1296, F.S.)

Section 468.1296, F.S., prohibits sexual misconduct in the practice of speech-language pathology and audiology and defines sexual misconduct, for purposes of the practice of a speech-language pathologist, to mean to induce or attempt to induce the patient to engage, or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Section 468.1295(1)(aa), F.S., provides a ground for which a speech-language pathologist or audiologist is subject to disciplinary action for committing any act which would constitute sexual battery or sexual misconduct upon a patient or client.

Occupational Therapy (s. 468. 217(1)(k), F.S.)

Section 468.217, F.S., provides a ground for which an occupational therapist or occupational therapy assistant is subject to discipline for exercising influence within a patient-therapist relationship for purposes of engaging a patient in sexual activity. A patient is presumed to be incapable of giving free, full, and informed consent to sexual activity with the patient's occupational therapist or occupational therapy assistant. Rule 64B11-4.003, F.A.C., provides disciplinary guidelines that specify the range of recommended penalties for specific violations. The rule specifies a recommended penalty of a 1 year suspension followed by at least a 1 year probation with conditions and possible referral to the Physician's Recovery Network up to licensure revocation or denial, and an administrative fine from \$500 to \$1,000 for imposition on an occupational therapist who has exercised influence to engage a patient in sex.

Respiratory Therapy (s. 468.365(1)(r), F.S.)

Section 468.365, F.S., provides a ground for which a respiratory therapist or respiratory care practitioner is subject to discipline for exercising influence within a patient-therapist relationship for purposes of engaging a patient in sexual activity. A patient is presumed to be incapable of giving free, full, and informed consent to sexual activity with the patient's respiratory therapist or respiratory care practitioner. Rule 64B8-74.001, F.A.C., provides disciplinary guidelines that specify the range of recommended penalties for specific violations. The rule specifies a recommended penalty of a 1 year suspension followed by at least a 1 year probation with conditions and possible referral to the Physician's Recovery Network up to revocation or denial, and an administrative fine from \$500 to \$1,000 for imposition on a respiratory therapist or respiratory care practitioner who has exercised influence to engage a patient in sex.

Athletic Trainers (s. 468.715, F.S.)

Section 468.715, F.S., prohibits sexual misconduct in the practice of athletic training and defines sexual misconduct, for purposes of the practice of athletic training, to mean to induce or attempt to induce the athlete to engage, or attempt to engage the athlete, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the athlete.

Massage Therapy (s. 480.0485, F.S.)

Section 480.0485, F.S., prohibits sexual misconduct in the practice of massage therapy and defines sexual misconduct, for purposes of the practice of massage therapy, to mean to induce or attempt to induce the patient to engage, or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient.

Physical Therapy (s. 486.123, F.S.)

Section 486.123, F.S., prohibits sexual misconduct in the practice of physical therapy defines sexual misconduct, for purposes of the practice of physical therapy, to mean to induce or attempt to induce the patient to engage, or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient.

Psychology (ss. 490.0111 & 490.009, F.S.) See also s. 491.0112, F.S., relating to sexual misconduct by psychotherapists.

Section 490.0111, F.S., prohibits sexual misconduct in the practice of psychology and the practice of school psychology and authorizes the Department of Health to define sexual misconduct by rule for school psychologists and authorizes the Board of Psychology to define sexual misconduct by rule for psychologists. Section 490.009(2)(k), F.S., provides a ground for which a psychologist is subject to disciplinary action for committing any act which would constitute sexual battery or sexual misconduct as defined in s. 490.0111, F.S., upon a patient or client. Rule 64B19-16.003, F.A.C., provides that the client of a psychologist is presumed to be incapable of giving valid, informed, free consent to sexual activity involving the psychologist and provides that the assertion of consent by the client may not constitute a defense by the psychologist against charges of sexual misconduct. The rule provides that it is sexual misconduct for a psychologist who is involved in a psychologist-client relationship: 1) To engage, attempt to engage, or offer to engage the client in sexual intercourse or other sexual behavior that includes kissing or the touching by either the psychologist or the client of the other's breasts or genitals; 2) To engage the client in verbal or physical behavior which is sexually arousing or demeaning to the client unless the behavior is for the treatment of psycho-sexual disorders or dysfunctions and it complies with accepted professional standards; 3) To use influence inherent in the psychologist-client relationship to induce the client to engage in sexual conduct with a third party unless it is consistent with the planned psychological treatment of the client's dysfunctions and the treatment complies with generally accepted professional standards. The rule provides that a psychologist-client relationship exists whenever a psychologist has rendered, or purports to have rendered, psychological services including psychotherapy, counseling, assessment or treatment to a person. The psychologist-client relationship is deemed to continue in perpetuity for purposes of determining the existence of sexual misconduct. Rule 64B19-17.002, F.A.C., provides disciplinary guidelines that specify the range of recommended penalties for specific violations. The rule specifies a recommended penalty of an administrative fine of \$1,000 and revocation of license for a violation committed by a psychologist which would constitute sexual battery or sexual misconduct upon a patient or client.

Psychotherapy (s. 491.0112, F.S.)

Section 491.0112, F.S., provides criminal penalties for sexual misconduct committed by psychotherapists. The section defines sexual misconduct to mean the oral, anal, or vaginal penetration of another by, or contact with, the sexual organ of another or the anal or vaginal penetration of another by any object. Psychotherapists are defined to mean any licensed medical physician, osteopathic physician, nurse, mental health professional licensed under ch. 491, psychologist, or any other person who provides or purports to provide treatment, diagnosis, assessment, evaluation, or counseling for a mental or emotional illness, symptom, or condition. Mental health professionals who commit sexual misconduct with a client or former client, when the professional relationship was terminated primarily for the purpose of engaging in sexual conduct, may be subject to disciplinary action by the board having regulatory jurisdiction over the professional and may be liable for a third degree felony punishable by imprisonment of up to 5 years and a \$5,000 fine. Psychotherapists who commit sexual misconduct by means of therapeutic deception may be liable for a second degree felony punishable by imprisonment of up to 15 years and a \$10,000 fine. Therapeutic deception is defined to mean a representation to the client that sexual contact by the psychotherapist is consistent with or part of the treatment of the client.

Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling (ss. 491.0111 & 491.009, F.S.) See also s. 491.0112, F.S., relating to sexual misconduct by psychotherapists.

Section 491.0111, F.S., prohibits sexual misconduct in the practice of clinical social work, marriage and family therapy, and mental health counseling and authorizes the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling to define sexual misconduct by rule. Section 491.009(2)(k), F.S., provides a ground for which a clinical social worker, marriage and family therapist, or mental health counselor (psychotherapist) is subject to disciplinary action for committing any act which would constitute sexual battery or sexual misconduct as defined in s. 491.0111, F.S., upon a patient or client. Rule 64B4-10.001, F.A.C., provides that the client of a clinical social worker, marriage and family therapist, or clinical social worker is presumed to be incapable of giving valid, informed, free consent to sexual activity involving the professional and provides that the assertion of consent by the client may not constitute a defense by the professional against charges of sexual misconduct. Rule 64B4-10.002, F.A.C., provides that it is sexual misconduct for a psychotherapist: 1) To engage, attempt to engage, or offer to engage a client in sexual behavior regardless of whether the client consents to such behavior and it includes kissing, sexual intercourse or the touching by either the psychotherapist or the client of the other's breasts or genitals; 2) To engage the client in verbal or physical behavior which is sexually arousing or demeaning to the client unless the psychotherapist meets the requirements to hold himself out as a sex therapist, the behavior is treatment of psycho-sexual disorders or dysfunctions limited to paraphilia, sexual desire disorders, disorder of sexual arousal, and compulsive hyperactive sexual behaviors, and the behavior complies with accepted professional standards. Rule 64B4-10.003, F.A.C., provides that a psychotherapist-client relationship exists whenever a psychotherapist has rendered, or purports to have rendered, clinical social work, marriage and family therapy, or mental health services including psychotherapy, counseling, assessment or treatment to a person. The psychotherapist-client relationship is deemed to continue in perpetuity for purposes of determining the existence of sexual misconduct.

Rule 64B4-5.001, F.A.C., provides disciplinary guidelines that specify the range of recommended penalties for specific violations. The rule specifies a recommended penalty of an administrative fine of \$1,000 and revocation of license for a violation committed by a psychotherapist which would constitute sexual battery or sexual misconduct upon a patient or client.

The following professions have no regulation specifically prohibiting sexual misconduct: podiatry, optometry, pharmacy, midwifery, nursing home administration, dietetics and nutrition, clinical laboratory personnel, medical physicists, opticians, and hearing aid specialists.

III. Effect of Proposed Changes:

The committee substitute creates s. 455.569, F.S., to require each board within the Department of Health or the department, if there is no board, to permanently revoke the license, certificate, or registration of any health care professional who has been found by his or her regulatory board or the department, as appropriate, to have been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, to a felony in any jurisdiction which directly relates to sexual misconduct in the practice of that profession. The committee substitute provides an effective date of July 1, 1998.

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.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Any health care professionals who have been found by their regulatory board or the Department of Health, as appropriate, to have been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a felony which directly relates to sexual misconduct in the practice of their profession will be subject to permanent revocation and may not seek reinstatement of their license and will need to support themselves in another professional activity.

C. Government Sector Impact:

The Department of Health will incur costs to enforce the provisions of the bill which require the permanent revocation of the license, certificate, or registration of any health care professional who is disciplined for the commission of sexual misconduct in the practice of his or her profession.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.