

# 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 924

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

SUBJECT: Health Care Providers/Ocular Post-operative Care

DATE: March 29, 2001 REVISED: 04/03/01 \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HC	Favorable/CS
2.	Deffenbaugh	Deffenbaugh	BI	Favorable
3.				
4.				
5.				
6.				

## I. Summary:

The bill makes it grounds for disciplinary action for a Florida-licensed medical or osteopathic physician to delegate “ocular post-operative responsibilities” to a person who is not a Florida-licensed medical or osteopathic physician.

Pursuant to Board of Medicine rule, the operating surgeon has the *responsibility* for any post-operative care. The operating surgeon may delegate discretionary postoperative *activities* to equivalently trained licensed doctors of medicine or osteopathy or to physicians practicing within Board approved postgraduate training programs. Delegation to *any other* health care practitioner is permitted only if the other practitioner is *supervised* by the operating surgeon or an equivalently trained licensed doctor of medicine or osteopathy or a physician practicing within a board-approved postgraduate training program.

However, due to provisions not amended by the bill, the bill may still allow a medical physician to delegate post-operative responsibilities to an unlicensed medical assistant, a registered nurse, or a licensed practical nurse performing services under the direct supervision and responsibility of the physician. Section 458.303(2), F.S., provides that nothing in the chapter or any other law shall be construed to prohibit services rendered by an (unlicensed) medical assistant when done under the direct supervision and responsibility of a physician. This section also provides that nothing in s. 458.331, F.S., which the bill amends, shall be construed to prohibit services rendered by registered nurses or licensed practical nurses when performed under the direct supervision and control of a physician who provides specific direction and final approval for all services performed.

Similarly, the bill may still allow an osteopathic physician to delegate post-operative responsibilities to *any person* under the direct supervision and control of the osteopathic

physician. Section 459.002, F.S., provides that nothing in chapter 459, F.S., which is being amended by the bill, shall be construed to prohibit services rendered by *any person* when performed under the direct supervision and control of a licensed osteopathic physician who must be available when needed, provide specific direction and give final approval to all services performed.

The bill's primary impact would be on optometrists, who could no longer be referred patients for ocular post-operative care, unless the law is interpreted as still allowing referral by a physician to a physician assistant (including an optometrist who meets the definition of a physician assistant) who is under the direct supervision and control of a referring physician.

This bill amends sections 458.331 and 459.015, Florida Statutes.

## **II. Present Situation:**

### ***Practice of Medicine***

Chapter 458, F.S., provides for the regulation of medical physicians by the Board of Medicine within the Department of Health. 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. Section 458.303, F.S., provides exceptions to the "practice of medicine" for: other duly licensed health care practitioners acting within their scope of practice authorized by statute; licensed out-of-state physicians when meeting in consultation with Florida licensed physicians; medical officers of the United States Armed Forces and of the United States Public Health Service; medical residents; persons furnishing emergency medical assistance; the domestic administration of recognized family remedies; the practice of the religious tenets of any church in Florida; and any person or manufacturer who, without the use of drugs or medicine, mechanically fits or sells lenses, artificial eyes or limbs, or other apparatus or appliances, or is engaged in the mechanical examination of the eyes for the purpose of constructing or adjusting spectacles, eyeglasses, or lenses.

Three basic levels of regulation are used to regulate professions. The least restrictive level of occupational regulation is registration. Under registration, practitioners are only required to file certain information as it relates to services that they offer the public. An intermediate level of occupational regulation is regulation by a title act. Under a title act, the use of certain titles or descriptions is limited to a group of practitioners who have met certain minimum qualifications. A title act, however, does not prohibit anyone from offering comparable services to those offered by the practitioners licensed under the title act. A practice act limits the performance of certain activities to those licensed to practice.

Chapter 458, F.S., the medical practice act, requires any person who performs acts which are comparable to those within the definition of the "practice of medicine" to be licensed or otherwise exempt. The medical practice act provides criminal penalties for any person who performs acts comparable to the definition of the "practice of medicine" who is not licensed or otherwise exempt from the medical licensure requirements. Under s. 458.327(1), F.S., any person who practices medicine or attempts to do so, without being licensed or otherwise exempt from the licensure requirements, is subject to a third degree felony punishable by imprisonment

of up to 5 years and a fine up to \$5,000. Subsection (2) of s. 458.327, F.S., subjects any person who leads the public to believe that person is licensed as a medical doctor, or is engaged in the licensed practice of medicine, without holding a valid active license to practice medicine, to a first degree misdemeanor punishable by imprisonment of up to 1 year and a fine up to \$1,000.

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 any act in violation of applicable standards of practice, which include gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment that is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.<sup>1</sup> A medical physician is also subject to discipline for delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified by training, experience, or licensure to perform them.<sup>2</sup> Pursuant to subsection 458.331(3), F.S., in any administrative action against a physician which does not involve revocation or suspension of his or her license, the division (Department of Health) shall have the burden, by the greater weight of the evidence, to establish the existence of grounds for disciplinary action. The division must establish grounds for revocation or suspension of a license by clear and convincing evidence. A medical physician may be subject to discipline for aiding, assisting, procuring, or advising any unlicensed person to practice medicine contrary to the medical practice act or to any administrative rule adopted by the Department of Health or the Board of Medicine.

### ***Surgical Standards of Practice--Delegation of Post surgical Care***

The Board of Medicine has adopted administrative rules interpreting the standard of care requirement of s. 458.331(1)(t), F.S., and the delegation of duties restrictions of s. 458.331(1)(w), F.S., with regard to surgery.<sup>3</sup> Under the rule, the ultimate responsibility for diagnosing medical and surgical problems is that of the licensed doctor of medicine or osteopathy who is to perform the surgery. With regard to postoperative care, the rule provides as follows, allowing delegation to non-physicians who are properly supervised:

*Management of postsurgical care is the responsibility of the operating surgeon. . . The operating surgeon can delegate discretionary postoperative activities to equivalently trained licensed doctors of medicine or osteopathy or to physicians practicing within Board [of Medicine] approved postgraduate training programs. Delegation to any other health care practitioner is permitted only if the other practitioner is supervised by the operating surgeon or an equivalently trained licensed doctor of medicine or osteopathy or a physician practicing within a board-approved postgraduate training program. [emphasis added]*

In a legal challenge to the above rule, the Hearing Officer found that “supervision” means “to critically watch or direct” as well as to “oversee, inspect, examine” the actions of another health

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<sup>1</sup> Section 458.331(1)(t), F.S.

<sup>2</sup> Section 458.331(1)(w), F.S.

<sup>3</sup> Rule 64B8-9.007, F.A.C.

care practitioner. The appellate court upheld the Hearing Officer's finding that terms in the Surgical Care Rule were not vague.<sup>4</sup>

### ***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 the Department of Health. 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, exceptions to the licensure requirements, discipline of licensed osteopathic physicians, and criminal violations for unlicensed persons, which are comparable to those in the medical practice act.

Section 459.002, F.S., provides that nothing in chapter 459, F.S., shall be construed to prohibit services rendered by *any person* when performed under the direct supervision and control of a licensed osteopathic physician who must be available when needed, provide specific direction and give final approval to all services performed.

### ***Physician Assistants***

Sections 458.347 and 459.022, F.S., provide requirements for the regulation of physician assistants by the Council on Physician Assistants, the Board of Medicine and the Board of Osteopathic Medicine under the Department of Health. Physician assistants perform medical services delegated by the supervising medical or osteopathic physician.

### ***Medical Assistants***

Section 458.3485, F.S., authorizes medical assistants to assist in all aspects of medical practice under the direct supervision and responsibility of a medical physician. Medical assistants are unlicensed persons who may perform specified tasks under the direct supervision and responsibility of a licensed physician, including the performance of clinical procedures. Section 458.303(2), F.S., provides that nothing in the medical practice act or any other law may be construed to prohibit any service rendered by a medical assistant in accordance with s. 458.3485, F.S.

### ***Practice of Optometry***

Chapter 463, F.S., provides for the regulation of the practice of optometry. Section 463.002, F.S., defines "optometry" to mean the diagnosis of conditions of the human eye and its appendages; the employment of any objective or subjective means or methods, including the administration of topical ocular pharmaceutical agents, for the purpose of determining the refractive powers of the human eyes, or any visual, muscular, neurological, or anatomic anomalies of the human eyes and their appendages; and the prescribing and employment of lenses, prisms, frames, mountings,

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<sup>4</sup> *Fla. Bd. of Optometry v. Fla. Bd. of Medicine*, 616 So.2d 581 (Fla. 1st DCA 1993)

contact lenses, orthoptic exercises, light frequencies, and any other means or methods, including topical ocular pharmaceutical agents, for the correction, remedy, or relief of any insufficiencies or abnormal conditions of the human eyes and their appendages.

Section 463.014(4), F.S., identifies certain acts that optometrists are prohibited from performing and they include surgery of any kind, including the use of lasers. Optometrists may not prescribe, order, dispense, or administer any systemic drugs.

An optometrist is subject to discipline if he or she practices or offers to practice beyond the scope permitted by law or accepts and performs professional responsibilities that she or he knows, or has reason to know, she or he is not competent to perform.

### ***Unlicensed Activity***

Chapter 456, F.S., provides the general regulatory provisions for health care professions regulated under the Department of Health. Section 456.065, F.S., authorizes the Department of Health to issue and deliver a notice of cease and desist to any person when the department has probable cause to believe that that person is not licensed by the department or the appropriate regulatory board, and has violated any provision in ch. 456, F.S., or any statute that relates to the practice of a profession regulated by the department, or any administrative rule adopted thereto. The department may issue a notice of cease and desist to any person who aids and abets the unlicensed practice of a profession by employing the unlicensed person. To enforce a cease and desist order the Department of Health may file a proceeding in the name of the state seeking issuance of an injunction or a writ of mandamus against any person who violates any provisions of such order. In addition, the Department of Health may impose an administrative penalty not to exceed \$5,000 per incident of unlicensed activity. The Department of Health may seek the imposition of a civil penalty through a circuit court for any violation for which the department may not issue a notice of cease and desist. The civil penalty may not be less than \$500 or greater than \$5,000 for each offense. The court may award court costs and reasonable attorney's fees to the prevailing party, and the court may award the department reasonable costs of investigation.

Section 456.065(2)(d)1., F.S., makes the unlicensed practice, attempt to practice, or offer to practice a health care profession without an active valid license to practice a health care profession a third degree felony. The minimum penalty for a violation of this subparagraph is a fine of \$1,000 and a minimum mandatory period of incarceration of 1 year.

Section 456.065(2)(d)2., F.S., makes the practice of a health care profession without an active, valid Florida license to practice that profession when such practice results in serious bodily harm a second degree felony. The minimum penalty for a violation of this subparagraph is a fine of \$1,000 and a minimum mandatory period of incarceration of 1 year.

Section 456.065(2)(d)3., F.S., makes practicing, attempting to practice, or offering to practice a health care profession with an inactive or delinquent license for a period of time of 12 months or more a third degree felony. Practicing without an active, valid license includes practicing on a suspended, revoked, or void license. Practicing, attempting to practice, or offering to practice with an inactive or delinquent license for a period of up to 12 months is a first degree

misdemeanor. The minimum penalty for a violation of this subparagraph is a term of imprisonment of 30 days and a fine of \$500.

### ***“Split Care” between an Ophthalmologist and Optometrist***

As described above, postsurgical care may be referred by a physician to an optometrist, if the care is supervised as required by the Standard of Practice Rule adopted by the Board of Medicine.

Under Medicare, ophthalmologists have three ways that they may bill for cataract surgery and post-operative care: 1) the ophthalmologist who performs the actual cataract surgery may perform the surgery and all post-operative care; 2) the ophthalmologist may perform the surgery and refer the beneficiary to an optometrist or another ophthalmologist for follow-up care (i.e., split care); or 3) the ophthalmologist may perform the surgery and perform part of the follow-up care himself, then refer the beneficiary to an optometrist or another ophthalmologist for the remainder of the follow-up period (i.e., split-split care). In all three scenarios, the amount reimbursed for the operative services is 80 percent of the “global” Medicare fee schedule amount, and the amount reimbursed for the follow-up care is 20 percent of the global amount. For example, in option 2, the physician/surgeon would be allowed 80 percent of the fee schedule amount and the optometrist or other ophthalmologist who provided the follow-up care would be allowed 20 percent. Under Medicare, optometrists may be reimbursed for examination services (not treatment) provided to patients with aphakia, a condition in which a cataract has been removed.

The use of laser refractive surgery has grown significantly in recent years. The surgery must be performed by a physician, but the postoperative care may be referred to an optometrist under the conditions allowed by the Standard of Practice rule of the Board of Medicine, described above. Laser procedures are not covered by Medicare or Medicaid and at least most insurance policies, since it is elective surgery.

The Florida Medical Association reports that over 90 percent of all complications for eye surgery that blind an eye or significantly reduce vision occur two to ten days after the surgery. For example the most common cause of lost vision following cataract surgery is a post-operative infection called endophthalmitis, for which symptoms develop a few days after surgery, and for which additional surgery is necessary. The FMA claims that an optometrist cannot accurately diagnose or treat this condition. Another example given is that a medical physician must determine when a patient’s anti-coagulation (blood thinners) should be resumed, which an optometrist is not trained or legally allowed to determine.

### **III. Effect of Proposed Changes:**

The bill makes it grounds for disciplinary action for a Florida-licensed medical or osteopathic physician to delegate ocular<sup>5</sup> post-operative responsibilities to a person who is not a Florida-licensed medical or osteopathic physician.

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<sup>5</sup> *The American Heritage Dictionary Second College Edition* defines “ocular” to mean of or pertaining to the eye.

However, read in conjunction with s. 458.303(2), F.S., which the bill does not amend, the bill may still allow a medical physician to delegate post-operative responsibilities to an unlicensed medical assistant, a registered nurse, or a licensed practical nurse performing services under the direct supervision and responsibility of the physician. Section 458.303(2), F.S., provides that nothing in the chapter or any other law shall be construed to prohibit services rendered by an (unlicensed) medical assistant when done under the direct supervision and responsibility of a physician. This section also provides that nothing in s. 458.331, F.S., which the bill amends, shall be construed to prohibit services rendered by registered nurses or licensed practical nurses when performed under the direct supervision and control of a physician who provides specific direction and final approval for all services performed.

Similarly, the bill may still allow an osteopathic physician to delegate post-operative responsibilities to *any person* under the direct supervision and control of the osteopathic physician. Section 459.002, F.S., provides that nothing in chapter 459, F.S., which is being amended by the bill, shall be construed to prohibit services rendered by *any person* when performed under the direct supervision and control of a licensed osteopathic physician who must be available when needed, provide specific direction and give final approval to all services performed.

The bill's primary impact would be on optometrists, who could no longer be referred patients for ocular post-operative care, unless the law is interpreted as still allowing referral by a physician to a medical assistant (including an optometrist who meets the definition of a medical assistant) who is under the direct supervision and responsibility of a referring physician.

#### **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 Art. 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 Art. 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 Art. III, s. 19(f) of the Florida Constitution.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

This bill would economically benefit ophthalmologists and other physicians who would have exclusive authority to provide postoperative ocular services. This would economically harm optometrists who could no longer be legally referred patients for follow-up (ocular postoperative) care.

Any person who delegates ocular post-operative responsibilities to a person other than a Florida-licensed medical or osteopathic physician, or any person who is rendering services under the direct supervision and control or responsibility of the delegating physician may be subject to disciplinary action.

Any person who currently provides ocular post-operative responsibilities under the delegation of a Florida-licensed medical or osteopathic physician who is not a Florida-licensed medical or osteopathic physician, or any person who is rendering services under the direct supervision and control or responsibility of the delegating physician, will incur costs to obtain Florida licensure as a medical or osteopathic physician or physician assistant unless otherwise exempt from the licensing requirements for such practitioners, to perform such acts.

The impact of this bill on health insurance costs is unknown. For those insurers who reimburse similar to Medicare, there may be no impact, because the same reimbursement amount (limit) is paid for the post-operative services (even if split from the surgical services), regardless of whether the services are provided by a physician or other practitioner acting within the scope of their practice. However, if ophthalmologists are required to perform more postoperative services than are currently provided, it may put pressure on insurers and HMOs to negotiate higher rates with such providers, which could increase costs. Also, some insurers and HMOs may have contracts with optometrists for certain services affected by this bill, at lower rates than paid to physicians, which could also be impacted by the bill and result in higher payments and costs.

For procedures, which are not typically covered by insurance, such as laser eye surgery (LASIK), patients may face increased costs due to the requirement that referral for post-surgical care be to a physician, rather than an optometrist. Also, access in rural areas may be affected due to the limited number of practitioners. This could require some patients to drive a longer distance for post-surgical care.

Proponents of the bill argue that if a patient's care is inappropriately delegated to an optometrist and an emergency transpires, the patient may be forced to go to an emergency room, which increases health insurance costs and insurance payments. If the bill reduces the likelihood of such occurrences, costs would be reduced.

**C. Government Sector Impact:**

Disciplinary complaint investigations and prosecutions are performed by the Agency for Health Care Administration (Agency) under contract with the Department of Health. The Agency reports that it has not received a significant number of disciplinary complaints



concerning ocular post surgical care by optometrists or by ophthalmologists and that the bill does not appear to have any fiscal impact on the Agency.

The impact on health insurance costs for the state and local governments is unknown, but could potentially increase costs, as discussed in Private Sector, above. Similarly, if Medicaid-HMO physicians are required to perform more postoperative services than are currently provided, it may put pressure on HMOs to negotiate higher rates with such providers, which could increase costs to the Medicaid system.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

On page 1, lines 17-18 and lines 26-27, the bill provides that any person who delegates ocular “post-operative responsibilities” to a person other than a Florida-licensed medical or osteopathic physician may be subject to disciplinary action. As used in the bill, the term, “post-operative responsibilities” may be vague. *The American Heritage Dictionary Second College Edition* defines “responsibility” to mean the state, quality, or fact of being responsible; or something for which one is responsible; duty, obligation, or burden. It is unclear as to whether the term refers to all, or a subset of, professional activities or care that a patient needs after ocular surgery which is routinely provided by a licensed health care professional other than a Florida-licensed medical or osteopathic physician, a Florida-licensed physician assistant or any person who is rendering services under the direct supervision and control or responsibility of the delegating physician. Such routine activities may include the dispensing or administration of medications, observing and reporting patients’ signs or symptoms, taking vital signs, all of which may be performed at the direction of a Florida-licensed medical or osteopathic physician.

It is unclear for what duration of time the post-operative responsibilities may not be delegated to a person other than a Florida-licensed medical or osteopathic physician or a Florida-licensed physician assistant. For illustration, *Stedman’s Medical Dictionary, 27<sup>th</sup> Edition*, defines the term “post-operative” to mean *following* an operation (emphasis added). *Dorland’s Illustrated Medical Dictionary, 28<sup>th</sup> Edition*, defines “post-operative” to mean *occurring after* a surgical operation (emphasis added). Under the bill a Florida-licensed medical or osteopathic physician is subject to disciplinary action for writing a prescription or order for his or her patient who has undergone an ocular operation for completion by any other licensed professional who is otherwise qualified and specifically trained to complete the prescription or order unless that person is a Florida-licensed medical or osteopathic physician or any person who is rendering services under the direct supervision and control or responsibility of the delegating physician.

The Board of Medicine and the Board of Osteopathic Medicine may have authority to adopt rules to define the term, “post operative responsibilities” pursuant to rulemaking authority provided by sections 458.309 and 459.005, F.S., respectively.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill’s sponsor or the Florida Senate.

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