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:	CS/SB 416
INTRODUCER:	Health Care Committee and Senator Bennett
SUBJECT:	Health Care
DATE:	April 26, 2006
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HE	**Fav/CS**
2.				
3.				
4.				
5.				
6.				

I. Summary:

The bill provides legislative findings regarding a compelling state interest in patients being informed of the credentials of the health care practitioners who treat them and in the public being protected from misleading health care advertising.

The bill creates a ground for discipline for health care practitioners regulated under the Division of Medical Quality Assurance within the Department of Health *for failing to identify through written notice, which may include the wearing of a name tag, or orally to a patient, the type of license* under which the practitioner is practicing. Health care practitioners must also identify the type of license that the practitioner holds in any advertisement for health care services naming the practitioner. These requirements do not apply to a health care practitioner while the health care practitioner is providing services in a licensed mental health facility, hospital, ambulatory surgical center, mobile surgical facility, nursing home, or assisted living facility. Each board, or the Department of Health where there is no board, may by rule determine how its practitioners may comply with the disclosure requirements under the bill.

The bill provides that, for purposes of the doctrine of incorporation by reference, a cross-reference to s. 456.072, F.S., constitutes a general reference so that future changes to s. 456.072, F.S., will automatically apply to any laws which are amended with a specific reference to s. 456.072, F.S.

This bill amends section 456.072, Florida Statutes, and creates one undesignated section of law.

II. Present Situation:

Definition of Health Care Practitioner

Chapter 456, F.S., provides the general regulatory provisions for health care professions within the Division of Medical Quality Assurance in the Department of Health. Section 456.001, F.S., defines "health care practitioner" to mean any person licensed under: ch. 457, F.S., (acupuncture); ch. 458, F.S., (medicine); ch. 459, F.S., (osteopathic medicine); ch. 460, F.S., (chiropractic medicine); ch. 461, F.S., (podiatric medicine); ch. 462, F.S., (naturopathic medicine); ch. 463, F.S., (optometry); ch. 464, F.S., (nursing); ch. 465, F.S., (pharmacy); ch. 466, F.S., (dentistry and dental hygiene); ch. 467, F.S., (midwifery); parts I, II, III, V, X, XIII, and XIV of ch. 468, F.S., (speech-language pathology and audiology, nursing home administration, occupational therapy, respiratory therapy, dietetics and nutrition practice, athletic trainers, and orthotics, prosthetics, and pedorthics); ch. 478, F.S., (electrology or electrolysis); ch. 480, F.S., (massage therapy); parts III and IV of ch. 483, F.S., (clinical laboratory personnel or medical physics); ch. 484, F.S., (opticianry and hearing aid specialists); ch. 486, F.S., (physical therapy); ch. 490, F.S., (psychology); and ch. 491, F.S. (psychotherapy).

Disciplinary Procedures for Health Care Practitioners in the Department of Health

Section 456.072, F.S., specifies grounds for which licensed health care practitioners under the Division of Medical Quality Assurance in the Department of Health 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 the Department of Health 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, the department may initiate an investigation on its own.

[1] Section 456.072(1)(a), Florida Statutes.

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. 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 the Department of Health 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.

Disciplinary Guidelines

Section 456.079, F.S., requires each board, or the Department of Health, if there is no board, to adopt by rule and periodically review the disciplinary guidelines applicable to each ground for disciplinary action which may be imposed by the board, or the department if there is no board, pursuant to this chapter, the respective practice acts, and any rule of the board or department. The disciplinary guidelines must specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses, it being the legislative intent that minor violations be distinguished from those which endanger the public health, safety, or welfare; that such guidelines provide reasonable and meaningful notice to the public of likely penalties which may be imposed for proscribed conduct; and that such penalties be consistently applied by the board. A specific finding in the final order of mitigating or aggravating circumstances must allow the board to impose a penalty other than that provided for in such guidelines. If applicable, the board, or the department if there is no board, must adopt by rule disciplinary guidelines to designate possible mitigating and aggravating circumstances and the variation and range of penalties permitted for such circumstances. The department must review such disciplinary guidelines for compliance with the legislative intent as set forth herein to determine whether the guidelines establish a meaningful range of penalties and may also challenge such rules pursuant to s. 120.56, F.S. The administrative law judge, in recommending penalties in any recommended order, must follow the penalty guidelines established by the board or department and must state in writing the mitigating or aggravating circumstances upon which the recommended penalty is based.

Florida Patient's Bill of Rights and Responsibilities

Section 381.026, F.S., creates the Florida Patient's Bill of Rights and Responsibilities. The rights apply to patients being treated by a physician licensed under chapter 458, 459, or 461, F.S., in a facility licensed under chapter 395, F.S. (hospitals, ambulatory surgical centers, and mobile surgical facilities). One of the enumerated patient's rights is:

> A patient has a right to know the name, function, and qualifications of each health care provider (physicians licensed under ch. 458, 459, or 461, F.S.) who is providing medical services to the patient. 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.

The Agency for Health Care Administration is authorized in s. 381.0261(4)(a), F.S., to levy a fine against a health care provider or health care facility that fails to provide patients a summary of their rights and responsibilities.

III. Effect of Proposed Changes:

The bill specifies legislative findings regarding a compelling state interest in patients being informed of the credentials of the health care practitioners who treat them and in the public being protected from misleading health care advertising. Additional legislative findings and intent are stated that the most direct and effective manner to protect patients from harm or confusion

regarding the qualifications of health care practitioners is to ensure that patients and the public are informed of the training of health care practitioners.

The bill creates a ground for discipline for health care practitioners regulated under the Division of Medical Quality Assurance within the Department of Health *for failing to identify through written notice, which may include the wearing of a name tag, or orally to a patient, the type of license* under which the practitioner is practicing. Health care practitioners must also identify the type of license that the practitioner holds in any advertisement for health care services naming the practitioner. These requirements do not apply to a health care practitioner while the health care practitioner is providing services in a licensed mental health facility, hospital, ambulatory surgical center, mobile surgical facility, nursing home, or assisted living facility. Each board, or the Department of Health where there is no board, may by rule determine how its practitioners may comply with the disclosure requirements under the bill.

The bill provides that, for purposes of the doctrine of incorporation by reference, a cross-reference to s. 456.072, F.S., constitutes a general reference so that future changes to s. 456.072, F.S., will automatically apply to any laws which are amended with a specific reference to s. 456.072, F.S.[2]

The effective date of the bill is July 1, 2006.

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 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 Article III, Subsection 19(f) of the Florida Constitution.

[2] The preface to the Florida Statutes provides that legislative enactments frequently incorporate portions of the Florida Statutes by reference. A cross-reference to a general body of law (without reference to a specific statute) incorporates the referenced law and any subsequent amendments to or repeal of the referenced law. See *Williams v. State ex rel. Newberger*, 100 Fla. 1567, 125 So. 358 (1930), rev'd on other grounds on rehearing, 100 Fla. 1570, 131 So. 864 (1930); *State ex rel. Springer v. Smith*, 189 So.2d 846 (Fla. 4th D.C.A. 1966); *Reino v. State*, 352 So.2d 853 (Fla. 1977). In contrast, as a general rule, a cross-reference to a specific statute incorporates the language of the referenced statute as it existed at the time the reference was enacted, unaffected by any subsequent amendments to or repeal of the incorporated statute. See *Overstreet v. Blum*, 227 So.2d 197 (Fla. 1969); *Hecht v. Shaw*, 112 Fla. 762, 151 So. 333 (1933); *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693 (1918); and *State ex rel. Springer v. Smith*, ibid.

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.[3]

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill uses the term "practitioner" when it is referring to a "health care practitioner." The term "health care" should be inserted before "practitioner" to correct references to "health care practitioner" which is defined under ch. 456, F.S., to refer to licensed health care practitioners regulated by the Department of Health.

VII. Related Issues:

None.

[3] See *Abramson v. Gonzalez* 949 F.2d 1567 (11th Cir. 1992), *Parker v. Commonwealth of Ky.* 818 F.2d 504 (6th Cir.1987), and *Borgner v. Brooks*, 284 F.3d 1208 (11th Cir. 2002), cert. denied sub nom. *Borgner v. Florida Board of Dentistry*, 537 U.S. 1080 (2002).

VIII. Summary of Amendments:

None.