

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 155 Privacy of Firearms Owners

**SPONSOR(S):** Criminal Justice Subcommittee; Brodeur and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 432

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	9 Y, 6 N, As CS	Cunningham	Cunningham
2) Health & Human Services Committee		Calamas	Gormley
3) Judiciary Committee			

### SUMMARY ANALYSIS

Florida law contains numerous provisions relating to the regulation of the medical profession, regulation of medical professionals, and the sale, purchase, possession, and carrying of weapons and firearms. However, Florida law does not contain any provision that prohibits physicians or other medical staff from asking a patient whether he or she owns a firearm or whether there is a firearm in the patient's home.

CS/HB 155 creates s. 790.338, F.S., entitled "Medical privacy concerning firearms." Subsection (1) of the statute makes it a noncriminal violation, which is punishable by a \$500 fine, for any public or private physician, nurse, or other medical staff to:

- Make a verbal or written inquiry regarding the ownership of a firearm by a patient or the family of a patient or the presence of a firearm in a patient's private home or other domicile.
- Condition receipt of medical treatment or care on a person's willingness or refusal to disclose personal and private information unrelated to medical treatment.
- Enter any intentionally, accidentally, or inadvertently disclosed information concerning firearms into any record, whether written or electronic, or disclose such information to any other source.

The bill authorizes a court to assess specific fines (no less than \$10,000 for a first offense, no less than \$25,000 for a second offense, no less than \$100,000 for third and subsequent offenses) if a court determines that a violation of the above provisions was knowing and willful, or that the person committing the prohibited act, in the exercise of ordinary care, should have known that the act was a violation.

The bill specifies that it is not a violation for specified medical personnel to make an inquiry prohibited by 790.338(1), F.S., if possession of a firearm would pose an imminent danger or threat to the patient or others or if necessary to treat a patient during a medical emergency. The bill also permits medical personnel to enter information obtained from such inquiries into a patient's record, but prohibits this information from being disclosed to any third party not participating in the treatment of the patient other than a law enforcement officer.

CS/HB 155 is effective upon becoming a law and could have both a positive and negative fiscal impact on state government.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Situation

##### Physicians Inquiring About Firearms

In recent months, there has been media attention surrounding an incident in Ocala, Florida, where, during a routine doctor's visit, a pediatrician asked a patient's mother whether there were firearms in the home. When the mother refused to answer, the doctor advised her that she had 30 days to find a new pediatrician.<sup>1</sup> The doctor stated that he asked all of his patients the same question in an effort to provide safety advice in the event there was a firearm in the home.<sup>2</sup> He further stated that he asked similar questions about whether there was a pool at the home, and whether teenage drivers use their cell phone while driving for similar reasons – to give safety advice to patients. The mother, however, felt that the question invaded her privacy.<sup>3</sup> This incident has led many to question whether it should be an accepted practice for a doctor to inquire about a patient's firearm ownership.

Various professional medical groups have adopted policies that encourage or recommend that physicians ask patients about the presence of a firearm in the home. For example, the American Medical Association (AMA) encourages its members to inquire as to the presence of household firearms as a part of childproofing the home and to educate patients to the dangers of firearms to children.<sup>4</sup> Additionally, the American Academy of Pediatrics recommends that pediatricians incorporate questions about guns into their patient history taking.<sup>5</sup>

Florida law contains numerous provisions relating to the regulation of the medical profession, regulation of medical professionals, and the sale, purchase, possession, and carrying of firearms.<sup>6</sup> However, Florida law does not contain any provision that prohibits physicians or other medical staff from asking a patient whether he or she owns a firearm or whether there is a firearm in the patient's home.

##### Terminating the Doctor - Patient Relationship

The relationship between a physician and a patient is generally considered a private relationship and contractual in nature. According to the AMA, both the patient and the physician are free to enter into or decline the relationship.<sup>7</sup> Once a physician-patient relationship has been established, patients are free to terminate the relationship at any time.<sup>8</sup> Generally, doctors can only terminate existing relationships after giving the patient notice and a reasonable opportunity to obtain the services of another physician.<sup>9</sup>

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<sup>1</sup> Family and pediatrician tangle over gun question, <http://www.ocala.com/article/20100723/news/100729867/1402/news?p=1&tc=pg> (last accessed January 27, 2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> H-145.990 Prevention of Firearm Accidents in Children

<https://ssl3.ama-assn.org/apps/ecom/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fama1%2fpub%2fupload%2fmm%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-145.990.HTM> (last accessed January 28, 2011).

<sup>5</sup> American Academy of Pediatrics: Firearm-Related Injuries Affecting the Pediatric Population. *Pediatrics* Vol. 105 No. 4, April 2000, pp. 888-895. <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;105/4/888> (last accessed January 28, 2011).

<sup>6</sup> *See, e.g.*, Chapters 456, 458, 790, F.S.

<sup>7</sup> AMA Code of Medical Ethics, Opinion 9.12, *Patient-Physician Relationship: Respect for Law and Human Rights*, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion912.shtml> (last accessed February 7, 2011). Doctors who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity, or any other basis that would constitute invidious discrimination.

<sup>8</sup> AMA's Code of Medical Ethics, Opinion 9.06 *Free Choice*. <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.shtml> (last accessed February 7, 2011).

<sup>9</sup> A health care provider owes a duty to the patient to provide the necessary and appropriate medical care to the patient with due diligence and to continue providing those services until: 1) they are no longer needed by the patient; 2) the relationship is ended with

Florida's statutes do not currently contain any provisions that dictate when physicians and patients can terminate a doctor-patient relationship.

### Health Insurance Portability and Accountability Act

In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA). HIPAA contains detailed requirements for the use or disclosure of protected health information (PHI). PHI is defined as all "individually identifiable health information" which includes information relating to:

- the individual's past, present or future physical or mental health or condition,
- the provision of health care to the individual, or
- the past, present, or future payment for the provision of health care to the individual,

and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.<sup>10</sup> Covered entities may only use and disclose PHI as permitted by HIPAA or more protective state rules.<sup>11</sup> HIPAA establishes both civil monetary penalties and criminal penalties for the knowing use or disclosure of individually identifiable health information in violation of HIPAA.<sup>12</sup>

### **Effect of the Bill**

CS/HB 155 creates s. 790.338, F.S., entitled "Medical privacy concerning firearms." Subsection (1) of the statute prohibits any public or private physician, nurse, or other medical staff person from:

- Making a verbal or written inquiry regarding the ownership of a firearm by a patient or the family of a patient or the presence of a firearm in a patient's private home or other domicile. The bill specifies that such inquiries violate the privacy of the patient or the patient's family members.<sup>13</sup>
- Conditioning receipt of medical treatment or care on a person's willingness or refusal to disclose personal and private information unrelated to medical treatment in violation of an individual's privacy, as specified above.
- Entering any intentionally, accidentally, or inadvertently disclosed information concerning firearms into any record, whether written or electronic, or disclose such information to any other source.

The bill provides that a person who violates any of the above provisions commits a noncriminal violation,<sup>14</sup> which is punishable by a \$500 fine.<sup>15</sup> However, if a court determines that a violation of the

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the consent of or at the request of the patient; or 3) the health care provider withdraws from the relationship after giving the patient notice and a reasonable opportunity to obtain the services of another health care provider. The relationship typically terminates when the patient's medical condition is cured or resolved, and this often occurs at the last visit when the health care provider notes in his records that the patient is to return as needed. *See Saunders v. Lischkoff*, 188 So. 815 (Fla. 1939). *See also, Ending the Patient-Physician Relationship*, AMA White Paper <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/ending-patient-physician-relationship.shtml> (last accessed February 7, 2011); AMA's Code of Medical Ethics, Opinion 8.115 *Termination of the Physician-Patient Relationship*. <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8115.shtml> (last accessed February 7, 2011).

<sup>10</sup> 45 C.F.R. s. 160.103

<sup>11</sup> In general, covered entities may use PHI for the purposes of treatment, payment and health care operations (TPO) without any special permission from a patient. Special permission, called an authorization, must be obtained for uses and disclosures other than for TPO. For some uses and disclosures, a covered entity need not obtain an authorization but must give the patient the opportunity to agree or object (e.g., give patients the option to disclose health information to family or friends). Finally, in some situations, such as reporting to public health authorities, emergencies, or in research studies in which a waiver has been obtained from an Institutional Review Board (IRB), a covered entity does not need to obtain an authorization or provide an opportunity to agree or object. *Health Insurance Portability and Accountability Act*. <http://hipaa.yale.edu/overview/index.html> (last accessed February 4, 2011).

<sup>12</sup> *Health Insurance Portability and Accountability Act*. <http://hipaa.yale.edu/overview/index.html> (last accessed February 4, 2011). Fines range from \$100 to \$50,000 per violation with specified annual caps. Criminal penalties include fines ranging from \$50,000 to \$250,000 and imprisonment of up to 10 years. *HIPAA Violations and Enforcement*. <http://www.ama-assn.org/ama/pub/physician-resources/solutions-managing-your-practice/coding-billing-insurance/hipaahealth-insurance-portability-accountability-act/hipaa-violations-enforcement.shtml> (last accessed February 4, 2011).

<sup>13</sup> Invading someone's privacy is not a criminal act. However, there is a common law tort claim of invasion of privacy. *See Allstate Insurance Company v. Ginsberg*, 863 So.2d 156 (Fla. 2003).

above provisions was knowing and willful, or that the person committing the prohibited act, in the exercise of ordinary care, should have known that the act was a violation, the court may assess the following:

- A fine of not less than \$10,000 for the first offense.
- A fine of not less than \$25,000 for the second offense.
- A fine of not less than \$100,000 for a third or subsequent offense.

Persons found to have committed a violation are personally liable for the payment of all fines, costs, and fees assessed by the court for the noncriminal violation.

The bill requires the state attorney in the circuit where the violation is alleged to have occurred to investigate complaints of noncriminal violations of s. 790.338, F.S., and, where the state attorney determines probable cause that a violation exists, to prosecute violators in circuit court. State attorneys who fail to execute these duties may be held accountable under the appropriate rules of professional conduct. The bill prohibits public funds from being used to defend the unlawful conduct of a person charged with a knowing and willful violation of s. 790.338, F.S., except as provided in the United States and Florida Constitutions.

The bill also requires state attorneys to notify the Attorney General of any fines assessed. The Attorney General must bring a civil action to enforce any fine assessed if the fine is not paid after 90 days.

The bill specifies that it is not a violation of s. 790.338, F.S., for:

- A psychiatrist as defined in s. 394.455, psychologist as defined in s. 490.003, school psychologist as defined in s. 490.003, clinical social worker as defined in s. 491.003, or public or private physician, nurse, or other medical personnel to make an inquiry prohibited by s. 790.338(1), F.S., when the person making the inquiry in good faith believes that the possession or control of a firearm or ammunition by the patient or another member of the patient's household would pose an imminent danger or threat to the patient or others.
- Any public or private physician, nurse, or other medical personnel to make an inquiry prohibited by s. 790.338(1), F.S., if such inquiry is necessary to treat a patient during the course and scope of a medical emergency which specifically includes, but is not limited to, a mental health or psychotic episode where the patient's conduct or symptoms reasonably indicate that the patient has the capacity of causing harm to himself, herself, or others.
- Any public or private physician, nurse, or other medical staff person to enter any of the information disclosed pursuant to the above exceptions into any record, whether written or electronic.

The bill specifies that a patient's response to any inquiry permissible pursuant to the above exceptions is private and prohibits such responses from being disclosed to any third party not participating in the treatment of the patient other than a law enforcement officer conducting an active investigation involving the patient or the events giving rise to a medical emergency. The bill also specifies that the above exceptions do not apply to inquiries made due to a person's general belief that firearms or ammunition are harmful to health or safety.

Medical records created on or before the date the bill becomes law do not violate the bill's provisions, nor is it a violation of the bill's provisions to transfer such records to another health care provider.

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<sup>14</sup> Section 775.08(3), F.S., defines the term "noncriminal violation" as any offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by no other penalty than a fine, forfeiture, or other civil penalty. A noncriminal violation does not constitute a crime, and conviction for a noncriminal violation shall not give rise to any legal disability based on a criminal offense.

<sup>15</sup> See ss. 775.082(5) and 775.083(1), F.S. However, the court may impose a higher amount if specifically authorized by statute.

**B. SECTION DIRECTORY:**

**Section 1.** Creates s. 790.338, F.S., relating to medical privacy concerning firearms.

**Section 2.** The bill takes effect upon becoming a law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

The bill could have a positive fiscal impact on state government in that it authorizes fines if medical personnel violate s. 790.338, F.S.

**2. Expenditures:**

The bill requires state attorneys to investigate complaints of noncriminal violations of s. 790.338, F.S., and to prosecute violators in circuit court. The bill also requires the Attorney General to bring a civil action to enforce any fine assessed if the fine is not paid after 90 days. These requirements could have a negative fiscal impact on state government.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

None.

**2. Expenditures:**

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

There could be a negative fiscal impact on public and private physicians, nurses, and other medical staff who violate s. 790.338, F.S., due to the fines authorized by the bill.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

**1. Applicability of Municipality/County Mandates Provision:**

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

**2. Other:**

The bill makes it a noncriminal violation, punishable by a fine, for medical personnel to ask a patient whether there is a firearm in the patient's home or whether the patient or the patient's family members own a firearm. This prohibition may be subject to challenge as violating one's First Amendment right to freedom of speech.

The First Amendment to the United States Constitution provides that “Congress shall make no law ...abridging the freedom of speech.” The Florida Constitution similarly provides that “[n]o law shall be passed to restrain or abridge the liberty of speech...”<sup>16</sup> Florida courts have equated the scope of the Florida Constitution with that of the Federal Constitution in terms of the guarantees of freedom of speech.<sup>17</sup>

A regulation that abridges speech because of the content of the speech is subject to the strict scrutiny standard of judicial review.<sup>18</sup> However, the state may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.<sup>19</sup>

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

1. The bill creates s. 790.338, F.S., to make it a noncriminal violation for any *public or private physician, nurse, or other medical staff* to do certain acts. The bill does not define these terms, nor are they defined in ch. 790, F.S. Defining these terms, or using a term already defined in Florida law such as “healthcare practitioner,” would clarify who the bill’s provisions apply to.
2. The bill makes it a noncriminal violation for any public or private physician, nurse, or other medical staff to enter any intentionally, accidentally, or inadvertently disclose information concerning firearms into any record, whether written or electronic, or disclose such information to any other source. If “information concerning firearms” qualifies as PHI, it would appear that HIPAA already prohibits and penalizes such acts.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 8, 2011, the Criminal Justice Subcommittee adopted a strike-all amendment to the bill and reported the bill favorably as a Committee Substitute. The strike-all amendment:

- Specifies that verbal or written inquiries by any public or private physician, nurse, or other medical staff regarding the ownership of a firearm by a patient or the family of a patient or the presence of a firearm in a patient’s home or other domicile *are prohibited*.
- Provides that violations of s. 790.338, F.S., are noncriminal violations punishable by specified fines.
- Specifies that state attorneys who fail to investigate and prosecute complaints of violations of s. 790.338, F.S., may be held accountable under the appropriate Florida rules of professional conduct.
- Prohibits public funds from being used to defend the unlawful conduct of a person charged with a knowing and willful violation of s. 790.338, F.S., except as provided in the United States and Florida Constitutions.
- Requires state attorneys to notify the Attorney General of any fines assessed for violations of s. 790.338, F.S., and requires the Attorney General to bring a civil action to enforce any fine assessed if the fine is not paid after 90 days.
- Provides exceptions to the prohibitions in s. 790.338, F.S.
- Specifies that medical records created before the date the bill becomes law and the transfer of such records to another health care provider do not violate s. 790.338, F.S.

This analysis is drafted to the Committee Substitute.

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<sup>16</sup> Art. I, § 4, Fla. Const.

<sup>17</sup> See, *Florida Canners Ass’n v. State, Dep’t of Citrus*, 371 So.2d 503 (Fla.1979).

<sup>18</sup> See, e.g., *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Mitchell v. Moore*, 786 So.2d 521, 527 (Fla.2001).

<sup>19</sup> See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).