

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

**SPONSOR(S):** Brodeur and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 432

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Cunningham	Cunningham
2) Health & Human Services Committee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

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. 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. The mother, however, felt that the question invaded her privacy. 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.

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.

HB 155 creates s. 790.338, F.S., specifying that it is an invasion of privacy for a public or private physician, nurse, or other medical staff person 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 private home or other domicile of a patient or the family of a patient.

The bill does not make it a crime for a doctor to ask a patient about firearms, but does provide that doing so is an invasion of a patient's privacy.

The bill makes it a 3<sup>rd</sup> degree felony for a public or private physician, nurse, or other medical staff to:

- Condition 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.
- 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.

The bill also provides that a person who violates s. 790.338, F.S., may be assessed a fine of no more than \$5 million if the court determines that the person knew or reasonably should have known that the conduct was unlawful.

On March 2, 2011, the Criminal Justice Impact Conference met and determined that HB 155 would have an insignificant prison bed impact on the Department of Corrections. The bill could have a positive fiscal impact on state government in that it authorizes a fine of up to \$5 million if medical personnel violate s. 790.338, F.S., and the court determines that the person knew or reasonably should have known that the conduct was unlawful.

The bill is effective upon becoming a law.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0155.CRJS

DATE: 3/4/2011

# 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 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 (AAP) 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 American Medical Association (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> Florida's statutes do not currently contain any provisions that dictate when physicians and patients can terminate a doctor-patient relationship.

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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 the consent of or at the request of the patient; or 3) the health care provider withdraws from the relationship after giving the patient

## Effect of the Bill

HB 155 creates s. 790.338, F.S., entitled "Medical privacy concerning firearms." The bill specifies that a verbal or written inquiry by a public or private physician, nurse, or other medical staff person regarding the ownership of a firearm by a patient or the family of a patient or the presence of a firearm in a private home or other domicile of a patient or the family of a patient violates the privacy of the patient or the patient's family members. The bill does not make it a crime for a doctor to ask a patient about firearms, but does provide that doing so is an invasion of a patient's privacy.<sup>10</sup>

The bill makes it a 3<sup>rd</sup> degree felony<sup>11</sup> for a public or private physician, nurse, or other medical staff to:

- Condition 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.
- 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 also provides that a person who violates s. 790.338, F.S., may be assessed a fine of no more than \$5 million if the court determines that the person knew or reasonably should have known that the conduct was unlawful.

The bill requires the state attorney with jurisdiction to investigate complaints of criminal violations of s. 790.338, F.S., and, if there is probable cause to indicate that a person may have committed a violation, to prosecute the violator and notify the Attorney General. The bill requires the Attorney General to bring a civil action to enforce any fine assessed if such fine is not paid after 90 days.

## 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 authorizes a fine of up to \$5 million if a public or private physician, nurse, or other medical staff violates s. 790.338, F.S., and the court determines the person knew or reasonably should have known the conduct was unlawful. This could have a positive fiscal impact on state government.

#### 2. Expenditures:

On March 2, 2011, the Criminal Justice Impact Conference met and determined that HB 155 would have an insignificant prison bed impact on the Department of Corrections.

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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> 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).

<sup>11</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082, 775.083, and 775.084, F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill authorizes a fine of up to \$5 million if a public or private physician, nurse, or other medical staff violates s. 790.338, F.S., and the court determines that the person knew or reasonably should have known that the conduct was unlawful. This could have a negative fiscal impact on these entities.

The felony penalties imposed by the bill could negatively impact the professional licenses of physicians and nurses arrested and/or convicted of the offenses described in 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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

1. Currently, the bill is effective upon becoming a law. Generally, bills that impose criminal penalties are effective on October 1 so as to give adequate notice to the public, state attorneys, public defenders, etc.

2. The bill creates s. 790.338, F.S., to make it a crime for a *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 penalties apply to.

3. 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>12</sup> Covered entities may only use and disclose PHI as permitted by HIPAA or more protective state rules.<sup>13</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>14</sup>

The bill makes it a 3<sup>rd</sup> degree felony for a 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.

Additionally, HIPAA authorizes covered entities to disclose PHI to certain entities without a waiver or authorization (e.g., covered entities may use PHI for the purposes of treatment, payment and health care operations without any special permission from a patient). The bill prohibits disclosure of firearm information to *any other source*. If firearm information qualifies as PHI, this prohibition appears to conflict with HIPAA.

4. In certain instances, questions about gun ownership may be necessary to the treatment of a patient (e.g., psychiatrists treating suicidal patients, emergency room physicians treating gun shot victims who need to know the type, caliber, etc. of firearm and ammunition used, etc.). However, the bill does not provide any exceptions to the criminal penalties to address such instances.
5. Lines 45 – 47 provide that a person who violates s. 790.338, F.S., commits a 3<sup>rd</sup> degree felony, punishable, except as provided in paragraph (b), as provided in ss. 775.082, 775.083, or 775.084, F.S. Paragraph (b) authorizes the court to impose a fine of up to \$5 million in certain instances. If the intent is to authorize a fine of up to \$5 million *in addition to* the penalties provided for in ss. 775.082, 775.083, and 775.084, F.S., the following language could be used:

Delete lines 46-48 and insert:

of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) In addition to the penalties provided in paragraph (a), a person who violates this section may be assessed a

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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<sup>12</sup> 45 C.F.R. s. 160.103

<sup>13</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>14</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).