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DATE: February 12, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME PREVENTION, CORRECTIONS & SAFETY
ANALYSIS**

BILL #: HB 803

RELATING TO: Criminal Offenses Involving Health Care Practitioners or Controlled Substances

SPONSOR(S): Representative(s) Crow

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME PREVENTION, CORRECTIONS & SAFETY YEAS 9 NAYS 0
- (2) HEALTH REGULATION
- (3) COUNCIL FOR HEALTHY COMMUNITIES
- (4)
- (5)

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

HB 803 addresses the issue of drug diversion through the assignment and enhancement of criminal penalties to acts of practitioner or patient fraud in relation to the prescribing, dispensing, or obtaining of controlled substances.

The bill also authorizes representatives from the Department of Health to participate (either voluntarily or by court order) in criminal proceedings that relate to health care professionals.

The bill has an effective date of July 1, 2002.

NOTE: A strike-everything amendment was adopted without objection by the Committee on Crime Prevention, Corrections & Safety on February 12, 2002. The amendment, which is traveling with the bill, conformed the House bill to its Senate companion. Please refer to the Amendment section of this analysis for further detail on the amendment.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Drug Diversion

The "diversion" of pharmaceutical drugs occurs when prescription drugs are illegally obtained by a variety of methods and a variety of offenders.¹ The diversion may be accomplished by deception, or an outright theft of the drugs. Diversion cases involve, but are not limited to, physicians who sell prescriptions to drug dealers or abusers; pharmacists who falsify records and subsequently sell the drugs; employees who steal from inventory; executives who falsify orders to cover illicit sales; prescription forgers, and individuals who commit armed robbery of pharmacies and drug distributors.² At present, the largest problem results from the criminal activity of physicians and pharmacy personnel.³

Although Florida statutes provide for the offenses of trafficking in controlled, prescription drugs (which can involve practitioners), there are currently no provisions in the statutes that specifically denote a criminal penalty for health care practitioners participating in drug diversion.

Practitioners

Chapter 893, F.S., defines "practitioner" to mean a licensed medical physician, a licensed dentist, a licensed veterinarian, a licensed osteopathic physician, a licensed naturopathic physician, or a licensed podiatric physician, provided that all such practitioners hold a valid federal controlled substance registry number.⁴ The federal Drug Enforcement Administration is responsible for issuing controlled substance registry numbers.

Drug Schedules

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act. The chapter classifies controlled substances into five schedules (ranging from Schedule I to Schedule V) in order to regulate the manufacture, distribution, preparation, and dispensing of the substances. Schedule placement is based upon the substance's medicinal value, harmfulness, and potential for abuse or addiction. A Schedule I drug is considered to be very addictive and to have

¹ Information obtained from the "Welcome to Pharmaceutical Diversion Education" website, <http://www.rxdiversion.com/scope.htm>

² Information obtained from the Drug Enforcement Administration website, office of Diversion Control, http://www.deadiversion.usdoj.gov/prog_dscrpt/index.html

³ http://www.deadiversion.usdoj.gov/prog_dscrpt/index.html

⁴ Holding such a registry number allows physicians to prescribe drugs.

no medicinal purposes, while a Schedule V drug has relatively low potential for abuse (compared to the other Schedule levels) and is recognized for its accepted medicinal purposes.

Current Law

Under current law (s. 893.13(7)(a)1.-8., F.S.), the following activities are considered criminal and constitute a first-degree misdemeanor:^{5 6}

- distributing or dispensing a controlled substance in violation of Chapter 893, F.S.;
- refusing or failing to make, keep, or furnish any record, notification, order-form, statement, invoice, or information required by Chapter 893, F.S.;
- refusing entry into any premises for inspection or refusing to allow an inspection;
- distributing a controlled substance named or described in Schedule I or Schedule II except pursuant to an order form;
- keeping or maintaining any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, other structure, or place which is resorted to by persons using controlled substances in violation of Chapter, 893, F.S.;
- withholding information from a practitioner from whom the person seeks to obtain a controlled substance or a prescription for a controlled substance that the person has already received a controlled substance or a prescription for a controlled substance from another practitioner within the last 30 days; and
- possessing a prescription form which has not been completed and signed by the practitioner whose name appears printed thereon (unless the person is that practitioner, is a pharmacist, or is a supplier of prescription forms who is authorized to possess the forms).

Section 893.13(7)(a)9.-11., F.S., specifies that the following offenses are punishable as a third-degree felony:

- acquiring or obtaining, or attempting to acquire or obtain, possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;
- affixing any false or forged label to a package or receptacle containing a controlled substance; and
- furnishing false or fraudulent material information in, or omit any material information from, any report or other document required to be kept or filed under Chapter 893, F.S.

C. EFFECT OF PROPOSED CHANGES:

House Bill 803 addresses the issue of drug diversion. The bill creates five new, third-degree felony offenses (ranked at Level 3 on the offense severity ranking chart of the Criminal Punishment Code) that prohibit practitioners from:

- writing a prescription or multiple prescriptions for a controlled substance that the practitioner knew was excessive or inappropriate to treat the patient (or animal);
- knowingly assisting a patient or owner of an animal in obtaining a controlled substance through deceptive, untrue, or fraudulent representations;
- employing a trick or scheme in the practice of the practitioner's professional work to assist a patient, or the owner of an animal, in obtaining a controlled substance;
- knowingly writing a prescription for a controlled substance for a fictitious person; and
- writing a prescription for a controlled substance for a patient, or an animal, if the sole purpose of writing the prescription is to provide a monetary benefit to prescribing practitioner.

⁵ Any second or subsequent violation is currently punishable as a third degree felony.

⁶ Section 893.13(8), F.S., provides that the criminal provisions in s. 893.13(1)-(7), F.S., are not applicable to the delivery to, or actual constructive possession for medical or scientific use or purposes.

The aforementioned offenses are reclassified as second-degree felonies (with Level 4 rankings on the offense severity ranking chart) if:

- the practitioner committed any of the offenses *and* received \$1,000 or more in payment for writing one or more prescriptions, or
- the practitioner has written one or more prescriptions for a quantity of a controlled substance that, individually or in the aggregate, meets the threshold for the offense of trafficking in a controlled substance under s. 893.15, F.S.

The bill enhances the penalty from a first-degree misdemeanor to a third-degree felony for the offense of seeking to obtain controlled substances, or prescriptions for controlled substances, from multiple health care practitioners within a 30-day period, without disclosing such information to the practitioner from whom the person is seeking the substance or prescription.⁷ The bill ranks the offense at Level 3 on the offense severity ranking chart of the Criminal Punishment Code.

The bill increases the ranking level on the offense severity ranking chart of the Criminal Punishment Code from Level 1 to Level 3 for the offense of affixing a false or forged label to a package of controlled substances.

The bill will allow representatives of the Department of Health (DOH) to appear before the court in criminal proceedings involving practitioners licensed by DOH for the purpose of the providing the court with pertinent information, making recommendations regarding specific conditions of probation, or providing any other assistance required by the court. According to the DOH, there are currently no provisions in law that allow representatives of the department to appear voluntarily to furnish such information. According to a staff analysis provided by the DOH, it is believed that this change may help to increase coordination of investigations and prosecutions between criminal and professional regulation investigators,⁸ and it may also help to shorten the amount of time between hearings and the emergency suspension of a practitioner's license.

D. SECTION-BY-SECTION ANALYSIS:

Section 1

This section creates new statute language (s. 456.075, F.S.) specifically allowing representatives of the Department of Health to participate in criminal proceedings that relate to health care professionals.

Section 2

This section amends s. 893.13, F.S., relating to prohibited acts and penalties under the controlled substances act. This section creates five, third-degree felony offenses in relation to health care practitioners and enhances a current first-degree misdemeanor offense to a third-degree felony.

Section 3

This section amends s. 921.0022, F.S., to revise the offense severity ranking chart to include the new offenses created in section 2 of the bill.⁹ The chart is also amended to reflect the move from Level 1 to Level 3 for the offense of affixing a false or forged label to a package of controlled substances.

⁷ This is an attempt to control the practice of "doctor-shopping," in which a person visits numerous doctors in an attempt to receive multiple prescriptions for the same substance.

⁸ Department of Health, Bill Analysis, Economic Statement and Fiscal Note, 2002, page 3.

⁹ All the new offenses are ranked as Level 3 offenses on the ranking chart.

Section 4

This section makes technical, conforming changes to Chapter 921, F.S., to reflect changes made by the bill.

Section 5

This section provides that the bill shall take effect on July 1, 2002.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference determined that passage of this bill would have an insignificant impact on prison beds. There was discussion, though, among conference members that the bill could possibly have an impact on Community Corrections. However, upon review of the bill, the Department of Corrections has indicated that they believe any such impact would be insignificant.

The State Attorneys may experience an increased workload due to the addition of criminal offenses.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The Florida Board of Medicine expressed concerns with the criminal justice system determining what is excessive or inappropriate in the practice of medicine as outlined in section 8(a)1 of the bill. According to the bill analysis provided by the Department of Health, there was also concern that the language of section 8(a)1 may inhibit physicians from appropriately treating patients with chronic pain due to fear of prosecution.¹⁰ However, it is expected that these concerns will be addressed by an amendment being offered by the bill's sponsor.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Crime Prevention, Corrections & Safety adopted a strike-everything amendment, without objection, on February 12, 2002. The amendment, which is traveling with the bill, conformed the House bill to its Senate companion. The amendment addresses the concern of the Board of Medicine by deleting (8)(a)1. of the original bill, which created a felony for writing prescriptions that would be considered excessive or inappropriate. This change decreases the number of new felonies created by the bill from 5 to 4. The bill also creates a permissive inference with relation to knowingly assisting a patient in obtaining a controlled substance through deception, fraudulent, or untrue practices (as described in (8)(a)1. of the strike-everything amendment).¹¹ The permissive inference allows a trier of fact to conclude that if a doctor writes a prescription (or multiple prescriptions) for a patient and there was no medical necessity to write the prescriptions, or the prescriptions were written in excess of what would be necessary to treat the patient, that the doctor can be found to have violated the provisions of (8)(a)1. of the strike-everything amendment (knowingly assisting a patient in obtaining a controlled substance through deception, fraudulent, or untrue practices).

¹⁰ Department of Health, Bill Analysis, Economic Statement and Fiscal Note, SB 640, January 11, 2002

¹¹ Black's Law Dictionary, Sixth Edition, provides the following definition for the term "inference:"

In the law of evidence, a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. A logical and reasonable conclusion of a fact not present by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts.

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VII. SIGNATURES:

COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY:

Prepared by:

Staff Director:

Melinda Granlund

Trina Kramer