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HOUSE OF REPRESENTATIVES
COUNCIL FOR HEALTHY COMMUNITIES
ANALYSIS

BILL #: CS/HB 803
RELATING TO: Criminal Offenses Involving Health Care Practitioners
SPONSOR(S): Representative Crow
TIED BILL(S): None

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

- (1) CRIME PREVENTION, CORRECTIONS & SAFETY YEAS 9 NAYS 0
 - (2) HEALTH REGULATION YEAS 7 NAYS 0
 - (3) COUNCIL FOR HEALTHY COMMUNITIES YEAS 16 NAYS 0
 - (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.

Council substitute for 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.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|-----------------------------------------|----------------------------------------|-----------------------------------------|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input 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:

Council substitute for HB 803 creates for new third-degree felony offenses.

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

According to the Department of Health (DOH), the abuse of pharmaceutical drugs is a growing problem in Florida and nationwide. Pain medications, including opioids, are common drugs of choice by drug abusers. Since the year 2000, the Florida Department of Law Enforcement (FDLE) and the Medical Examiners Commission have reported significant growth in criminal activity and deaths associated with a new opioid pain medication, Oxycontin. This drug is a very desirable and effective drug for the treatment of chronic pain, including cancer-related pain, but is also very desirable by drug addicts for the euphoric affects when misused. In response to a request from the Director of Florida's Office of Drug Control, the Florida Board of Medicine developed a comprehensive set of recommendations designed to reduce the potential for illegal diversion of controlled substances.

There are over 700,000 licensed health care providers in Florida. Law enforcement is not required to notify DOH of pending criminal proceedings that involve licensees. However, DOH is required to report to law enforcement any legally sufficient licensee complaint involving a criminal violation of any statute.

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

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 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).

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

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 or actual constructive possession for medical or scientific use or purposes.

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:

Council substitute for HB 803 addresses the issue of drug diversion. The council substitute creates four new, third-degree felony offenses (ranked at Level 3 on the offense severity ranking chart of the Criminal Punishment Code) that prohibit practitioners from:

- 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 the prescribing practitioner.

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 council substitute provides that when a health care practitioner writes a prescription or multiple prescriptions that are not medically necessary, or are in excess of what is medically necessary, then that fact may be considered with other evidence in determining whether the practitioner violated portions of section 2 of the bill, which involves assisting patients in obtaining controlled substances through tricks, schemes, or other fraudulent or deceptive means.

The council substitute 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 council substitute ranks the offense at Level 3 on the offense severity ranking chart of the Criminal Punishment Code.

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.

The council substitute 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 council substitute 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. Creates 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. Amends s. 893.13, F.S., relating to prohibited acts and penalties under the controlled substances act. This section creates four, 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. Amends s. 921.0022, F.S., to revise the offense severity ranking chart to include the new offenses created in section 2 of the council substitute.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.

Section 4. Makes technical, conforming changes to Chapter 921, F.S., to reflect changes made by the council substitute.

Section 5. Provides that the council substitute 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 council substitute would have an insignificant impact on prison beds. There was discussion, though, among conference members that the council substitute could possibly have an impact on Community Corrections. However, upon review of the council substitute, the Department of Corrections has indicated that they believe any such impact would be insignificant.

⁸ Department of Health, Bill Analysis, Economic Statement and Fiscal Note, SB 640, 2002, page 3.

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

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 council substitute 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 council substitute 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 council substitute 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 2

(s. 893.13(8)(a)1., F.S.) of the original bill. According to the bill analysis provided by the Department of Health, there was also concern that the language of subsection (8)(a)1. of the original bill may inhibit physicians from appropriately treating patients with chronic pain due to fear of prosecution.¹⁰ These concerns have been addressed by the council substitute.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 12, 2002, the Committee on Crime Prevention, Corrections & Safety adopted a strike-everything amendment without objection. The amendment, which has been incorporated into the council substitute, conformed the House bill to its Senate companion. The amendment addressed the concerns 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 decreased the number of new felonies created by the original bill from 5 to 4.

The strike-everything amendment was incorporated into a council substitute by the Council for Healthy Communities on March 1, 2002. The council substitute contains one amendment to the strike-everything amendment that was also adopted by the Council. The amendment to the amendment replaced the "permissive inference" provision in the strike-everything amendment with modified language. The modified language provides that when a health care practitioner writes a prescription or multiple prescriptions that are not medically necessary, or are in excess of what is medically necessary, then that fact may be considered along with other competent evidence when determining whether the health care practitioner knowingly assisted the patient in obtaining a controlled substance through fraudulent representations.

VII. SIGNATURES:

COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY:

Prepared by:

Staff Director:

Melinda Granlund

Trina Kramer

AS REVISED BY THE COMMITTEE ON HEALTH REGULATION:

Prepared by:

Staff Director:

Wendy Smith Hansen

Lucretia Shaw Collins

AS FURTHER REVISED BY THE COUNCIL FOR HEALTHY COMMUNITIES:

Prepared by:

Council Director:

Melinda Granlund

David DeLaPaz

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