

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

**SPONSOR(S):** Health & Human Services Committee; 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	13 Y, 3 N, As CS	Holt	Gormley
3) Judiciary Committee			

### SUMMARY ANALYSIS

CS/CS/HB 155 creates s. 790.338, F.S., entitled "Medical privacy concerning firearms," that prohibits a licensed health care practitioner or licensed health care facility from intentionally entering any disclosed information concerning firearm ownership into a patient's health record if the information is not relevant to the patient's medical care or safety, or the safety of others. Additionally, licensed health care providers and health care facilities are:

- To refrain from inquiring, whether oral or written, about the ownership of firearms or ammunition unless the information is relevant to the patient's medical care or safety, or the safety of others.
- Prohibited from discriminating against a patient based upon whether patient exercises his or her constitutional right to own and possess firearms or ammunition.
- To respect a patient's right to own or possess a firearm and refrain from harassing a patient about firearm ownership during an examination.

Patients are permitted to decline to answer or provide any information concerning the ownership of a firearm and a decision not to answer does not alter existing law regarding a physician's authority to choose patients.

The bill provides an emergency medical technician (EMT) or paramedic the authority to inquire in good faith, about the possession or presence of a firearm if they believe that it is relevant to the treatment of a patient during course and scope of a medical emergency or if the presence or possession of a firearm poses a threat of imminent danger to the patient or others.

The bill provides for certain patient's rights concerning the ownership of firearms or ammunition under the Florida Patient's Bill of Rights and Responsibilities. The bill provides for disciplinary action for non-compliance by licensed health care practitioners and health care facilities.

The bill provides that insurers issuing the types of policies regulated pursuant to Chapter 627 are prohibited from discriminating, denying coverage, or increase premiums on the basis that an insured or applicant possesses or owns a firearm or ammunition. However, insurers are allowed to consider the fair market value of firearms or ammunition when setting premiums for scheduled personal property coverage.

The bill appears to have an indeterminate, but likely insignificant negative fiscal impact on the Medical Quality Assurance Trust Fund within the Department of Health and no fiscal impact to local governments. (See Fiscal Comments.)

The bill takes effect upon becoming a law.

# 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.

##### Health Care Practitioners and Licensed Facilities

The Department of Health (DOH) and the relevant boards<sup>7</sup> within DOH regulate health care practitioners. Section 456.001(4), F.S., defines the term "health care practitioner" to include any individual licensed under the following chapters:

- Acupuncture (ch. 457, F.S.)
- Medical Practice (ch. 458, F.S.)
- Osteopathic Medicine (ch. 459, F.S.)
- Chiropractic Medicine (ch. 460, F.S.)
- Podiatric Medicine (ch. 461, F.S.)
- Naturopathy (ch. 462, F.S.)
- Optometry (ch. 463, F.S.)

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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> "Board" is a statutorily created entity that is authorized to exercise regulatory or rulemaking functions within the Department of Health, Division of Medical Quality Assurance. *See s. 456.001(1), F.S.*

- Nursing (ch. 464, F.S.)
- Pharmacy (ch. 465, F.S.)
- Dentistry, Dental Hygiene, and Dental Laboratories (ch. 466, F.S.)
- Midwifery (ch. 467, F.S.)
- Speech-Language Pathology and Audiology (Part I of ch. 468, F.S.)
- Nursing Home Administration (Part II of ch. 468, F.S.)
- Occupational Therapy (Part III of ch. 468, F.S.)
- Respiratory Therapy (Part V of ch. 468, F.S.)
- Dietetics and Nutrition Practice (X of ch. 468, F.S.)
- Athletic Trainers (Part XIII of ch. 468, F.S.)
- Orthotic, Prosthetics, and Pedorthics (Part XIV of ch. 468, F.S.)
- Electrolysis (ch. 478, F.S.)
- Massage Practice (ch. 480, F.S.)
- Clinical Laboratory Personnel (Part III of ch. 483, F.S.)
- Medical Physicists (Part IV of ch. 483, F.S.)
- Dispensing of Optical Devices and Hearing Aids (ch. 484, F.S.)
- Physical Therapy Practice (ch. 486, F.S.)
- Psychological Services (ch. 490, F.S.)
- Clinical, Counseling, and Psychotherapy Services (ch. 491, F.S.)

Section 456.072(2), F.S., provides various grounds for disciplinary action against health care practitioners. Penalties include:

- 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 not to exceed \$10,000 for each count or separate offense.
- Issuance of a reprimand or letter of concern.
- Placement of the licensee on probation for a period of time and subject to such conditions as the board or the DOH may specify.
- Corrective action.
- Imposition of an administrative fine in accordance with s. 381.0261, F.S., for violations regarding patient rights.
- Refund of fees billed and collected from the patient or a third party on behalf of the patient.
- Requirement that the practitioner undergo remedial education.

The Agency for Health Care Administration (AHCA) regulates health care facilities under chapter 408 and chapter 395. Section 395.002(16), F.S., defines the term “licensed facility” as a licensed hospital, ambulatory surgical center, or mobile surgical facility. Section 395.1055, F.S., authorizes AHCA to adopt rules for these facilities, but does not expressly address disciplinary action. Section 395.003, F.S., authorizes AHCA to take the agency is authorized to deny, modify, suspend, and revoke licenses for violations of applicable provisions of chapters 408 and 395.

### 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>8</sup> Once a physician-patient relationship has been established, patients are free to terminate the relationship at any time.<sup>9</sup> Generally, doctors can only terminate existing relationships after giving the patient notice and a reasonable opportunity to obtain the services of another

<sup>8</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>9</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).

physician.<sup>10</sup> 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>11</sup> Covered entities may only use and disclose PHI as permitted by HIPAA or more protective state rules.<sup>12</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>13</sup>

### Confidentiality of Medical Records in Florida

Under s. 456.057(7), F.S., medical records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, medical records may be released without written authorization in the following circumstances:<sup>14</sup>

- When any person, firm, or corporation has procured or furnished such examination or treatment with the patient's consent.
- When compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff.
- In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.

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<sup>10</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: they are no longer needed by the patient; the relationship is ended with the consent of or at the request of the patient; or 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>11</sup> 45 C.F.R. s. 160.103

<sup>12</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>13</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>14</sup> S. 456.057(7)(a), F.S.

- For statistical and scientific research, provided the information is abstracted in such a way as to protect the identity of the patient or provided written permission is received from the patient or the patient's legal representative.
- To a regional poison control center for purposes of treating a poison episode under evaluation, case management of poison cases, or compliance with data collection and reporting requirements of s. 395.1027, F.S., and the professional organization that certifies poison control centers in accordance with federal law.

The Florida Supreme Court has addressed the issue of whether a health care provider, absent any of the above-referenced circumstances, can disclose confidential information contained in a patient's medical records as part of a medical malpractice action.<sup>15</sup> The Florida Supreme Court ruled that, pursuant to s. 455.241, F.S. (the predecessor to current s. 456.057(7)(a), F.S.), only a health care provider who is a defendant, or reasonably expects to become a defendant, in a medical malpractice action can discuss a patient's medical condition.<sup>16</sup> The Court also held that the health care provider can only discuss the patient's medical condition with his or her attorney in conjunction with the defense of the action.<sup>17</sup> The Court determined that a defendant's attorney cannot have ex parte discussions about the patient's medical condition with any other treating health care provider.

### Regulation of Insurance

Florida's Insurance Code consists of Chapters 624 through 651, F.S. Chapter 627, F.S. specifies rate and contract requirements for the following types of insurance:

- Life
- Annuity Contracts
- Health
- Medicare Supplements
- Credit Life
- Disability
- Property
- Motor Vehicle
- Surety
- Title
- Long-term Care

Chapter 641 provides requirements for Health Maintenance Organizations and Prepaid Health Clinic Plans.

Section 626.9541, F.S., prohibits unfair methods of competition and deceptive acts or practices in the sale of insurance policies and the operation of insurance companies. Examples of prohibited acts include:

- Unlawful rebates.
- Misrepresentations and false advertising of insurance policies.
- Defamation.
- Boycott, coercion and intimidation.
- Unfair claim settlement practices.
- Illegal dealings in premiums, including excess or reduced charges for insurance.
- Refusal to insure on the basis of race, color, creed, marital status, or sex.
- Misrepresentation of agent qualifications.

Section 626.9541(1)(g), F.S., specifically prohibits unfair discrimination between individuals of the same actuarially supportable class for life, disability, and health insurance. Additionally, a health insurer, life insurer, disability insurer, property and casualty insurer, automobile insurer, or managed

<sup>15</sup> *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

care provider may not discriminate against a person who sought medical or psychological treatment for abuse.

The penalty for violations of s. 626.9541, F.S.,<sup>18</sup> is a fine not greater than \$5,000 for each nonwillful violation and not greater than \$40,000 for each willful violation. Fines imposed against an insurer may not exceed an aggregate amount of \$20,000 for all nonwillful violations arising out of the same action or an aggregate amount of \$200,000 for all willful violations arising out of the same action.

### **Effect of the Bill**

The bill creates s. 790.338, F.S., entitled “Medical privacy concerning firearms,” which prohibits licensed health care practitioners and health care facilities from intentionally entering any disclosed information concerning firearm ownership into a patient’s health record if the information is not relevant to the patient’s medical care or safety, or the safety of others. Additionally, licensed health care providers and health care facilities are:

- To refrain from inquiring, whether oral or written, about the ownership of firearms or ammunition unless the information is relevant to the patient’s medical care or safety, or the safety of others.
- Prohibited from discriminating against a patient based upon whether patient exercises his or her constitutional right to own and possess firearms or ammunition.
- To respect a patient’s right to own or possess a firearm and refrain from harassing a patient about firearm ownership during an examination.

The bill specifies that non-compliance by licensed health care practitioners and health care facilities constitutes grounds for disciplinary action under s. 456.072 (2), F.S.

Patients are permitted to decline to answer or provide any information concerning the ownership of a firearm and a decision not to answer does not alter existing law regarding a physician’s authority to choose patients.

The bill provides an EMT or paramedic the authority to inquire in good faith, about the possession or presence of a firearm if they believe that it is relevant to the treatment of a patient during course and scope of a medical emergency or if the presence or possession of a firearm poses a threat of imminent danger to the patient or others.

Insurers issuing the types of policies regulated pursuant to Chapter 627 are prohibited from discriminating, denying coverage, or increase premiums on the basis that an insured or applicant possesses or owns a firearm or ammunition. However, insurers are allowed to consider the fair market value of firearms or ammunition when setting premiums for scheduled personal property coverage.

Amends the Florida’s Patient’s Bill of Rights and Responsibilities specifying that:

- Health care providers and health care facilities should refrain from inquiring, whether oral or written, about the ownership of firearms or ammunition unless the information is relevant to the patient’s medical care or safety, or the safety of others.
- Patients have the right to decline to answer or provide any information concerning the ownership of a firearm and a decision not to answer does not alter existing law regarding a physician’s authority to choose patients.
- Health care providers and health care facilities are prohibited from discriminating against a patient based upon whether patient exercises his or her constitutional right to own and possess firearms or ammunition.
- Health care provider and health care facilities are to respect a patient’s right to own or possess a firearm and refrain from harassing a patient about firearm ownership during an examination.

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<sup>18</sup> Section 624.9541, F.S., contains enhanced penalties for specific violations of s. 626.9541, F.S. that are deemed fraudulent.

**B. SECTION DIRECTORY:**

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

**Section 2.** Amends s. 381.026, F.S., relating to Florida's Patient's Bill of Rights and Responsibilities.

**Section 3.** Amends s. 456.072, F.S., relating to health care practitioner grounds for discipline.

**Section 4.** The bill takes effect upon becoming a law.

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

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

1. Revenues:

None identified.

2. Expenditures:

See Fiscal Comments.

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

1. Revenues:

None identified.

2. Expenditures:

None identified.

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

None.

**D. FISCAL COMMENTS:**

DOH may see an increase in disciplinary cases of licensed health care practitioners who do not comply with s. 790.338, F.S. The increase in workload is unknown at this time, but most likely insignificant and could be handled within existing resources.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

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

The bill specifies that violations of s. 790.338(1)-(4), F.S. constitute disciplinary action under ss. 456.072(2) and 395.1055, F.S. However, no express grounds for disciplinary action are found in s. 395.1055, F.S., so the effect of the bill is unclear.

Additionally, the bill creates s. 456.072(1)(mm), F.S., which states that violations of any subsection of s. 790.338, F.S., is grounds for discipline. This is in conflict with s. 790.338(8), F.S., which states that only violations of sections (1)–(4) are grounds for discipline.

Section 790.338, F.S., is entitled “Medical privacy concerning firearms.” Section 790.338(7), F.S., prohibits an insurer from denying coverage or increasing a premium, or otherwise discriminating against an insured or applicant for insurance, based on the lawful ownership, possession, use, or storage of a firearm or ammunition. This provision concerns firearms, but not medical privacy. Since this provision is part of s. 790.338, F.S., a literal reading would be that a violation of the section is grounds for discipline of a health care provider. Otherwise, the bill does not contain any penalties for violation of the provision. Since the provision applies only to policies pursuant to Ch. 627, it applies to health insurance policies, but not to health maintenance organization contracts.

#### 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.

On April 4, 2011, the Health and Family Services Committee adopted a strike-all amendment to CS/HB 155 and reported the bill favorably. CS/HB 155:

- Specified 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.
- Provided that violations of s. 790.338, F.S., are noncriminal violations punishable by specified fines.
- Specified 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.
- Prohibited 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.
- Required 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.
- Provided exceptions to the prohibitions in s. 790.338, F.S.
- Specified 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 for Committee Substitute.