

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: SB 432

INTRODUCER: Senator Evers

SUBJECT: Privacy of Firearm Owners

DATE: February 12, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Pre-meeting
2.	_____	_____	HR	_____
3.	_____	_____	JU	_____
4.	_____	_____	BC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 432 creates a new third degree felony in circumstances where a public or private physician, nurse, or other medical staff person conditions 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 the privacy right created by the bill regarding ownership or possession of firearms.

Additionally, the bill creates a third degree felony where a public or private physician, nurse, or other medical staff person enters information concerning firearms into any record or otherwise discloses such information to any other source, whether intentionally, inadvertently or accidentally.

The bill states that an inquiry of a patient or his or her family regarding the ownership or possession of firearms in the home by a public or private physician, nurse, or other medical staff person constitutes an invasion of privacy.

The state attorney is given responsibility for investigating and prosecuting the felony offenses.

The defendant may be assessed up to a \$5 million fine if found guilty. The Attorney General is charged with filing suit to collect any fine that remains unpaid after 90 days.

This bill creates a new section of the Florida Statutes: 790.338.

II. Present 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, an Ocala 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.¹ 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.² 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.³ 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.⁴

Additionally, the American Academy of Pediatrics (AAP) recommends that pediatricians incorporate questions about guns into their patient history taking.⁵

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.⁶ 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.⁷ Once a physician-patient relationship has been established,

¹ 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).

² *Id.*

³ *Id.*

⁴ 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).

⁵ 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). See also American Academy of Pediatrics, Committee on Injury, Violence, and Poison Prevention, "TIIP (The Injury Prevention Program), A Guide to Safety Counseling in Office Practice", 1994.

⁶ See, e.g., Chapters 456, 458, 790, F.S.

⁷ 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

patients are free to terminate the relationship at any time.⁸ Generally, doctors can only terminate existing relationships after giving the patient notice and a reasonable opportunity to obtain the services of another physician.⁹ Florida's statutes do not currently contain any provisions that dictate when physicians and patients can terminate a doctor-patient relationship.

III. Effect of Proposed Changes:

Senate Bill 432 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 clearly make it a crime for a doctor to ask a patient about firearms because it does not specify that such conduct is prohibited or is a criminal act, but it does provide that doing so is an invasion of a patient's privacy.¹⁰

The bill clearly does, however, create a 3rd degree felony¹¹ if a public or private physician, nurse, or other medical staff :

- Conditions 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 in the bill.

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.

⁸ 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).

⁹ 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 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).

¹⁰ 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) where the Florida Supreme Court reaffirms the four types of claims of invasion of privacy recognized by Florida courts: "As recognized in *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 678 So.2d 1239, 1252 n. 20 (Fla.1996) (hereinafter *AHCA*), the four categories are: (1) appropriation-the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion-physically or electronically intruding into one's private quarters; (3) public disclosure of private facts-the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye-publication of facts which place a person in a false light even though the facts themselves may not be defamatory." As the dissenting opinion notes, the common law tort of invasion of privacy, or any common law tort is an area of the law that is subject to evolution. It would appear that SB 432 creates a new statutory category in the area of invasion of privacy torts.

¹¹ 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.

- Enters any intentionally, accidentally, or inadvertently disclosed information concerning firearms into any record, whether written or electronic, or discloses 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 of the prosecution. 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.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Although this bill states that inquiries by certain medical professionals about the ownership of a firearm or presence of a firearm in the home of a patient or his or her family violates the patient's or the family's privacy, it should not be forgotten that the individual's right to exercise free speech is only regulated in the most egregious of circumstances. If subsection (1)(a) of s. 790.338, F.S., as created by the bill is treated as a criminal law violation, it could be said that the State of Florida is attempting to punish the exercise of free speech by one citizen while protecting the general law-created privacy rights of another. It is highly likely that such a prosecution will result in litigation between the State and the health care professional who is prosecuted based at least in part on the constitutional issues raised by such a State action.

It should also be noted that any civil action that might ensue will likely raise issues surrounding personal, professional, and contractual obligations between the parties, and the weight given to a constitutionally-protected right (free speech) versus a right to privacy created by general law by the courts, as between the two parties.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

A public or private physician, nurse, or other medical staff person who is convicted under the law created by the bill could be assessed up to a \$5 million fine.

C. Government Sector Impact:

The Criminal Justice Impact Conference has not yet considered the potential prison bed impact of this bill.

VI. Technical Deficiencies:

The language in s. 790.338(1)(a), F.S., as created by the bill should be amended to clarify that not only is the verbal or written inquiry an invasion of privacy, but that if the inquiry is made it will be a criminal act punishable as a third degree felony, if that is the bill's intent.

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.

Also, the term "unrelated to medical treatment" on line 38 of the bill may create a loophole to prosecution in that the term invites challenge and argument as to what is or is not "unrelated."

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.