

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 Committee on Criminal Justice

BILL: SB 788

INTRODUCER: Senator Clemens

SUBJECT: Marketing Practices for Substance Abuse Services

DATE: March 3, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Hrdlicka	CJ	Pre-meeting
2.			RI	
3.			AP	
4.			RC	

I. Summary:

SB 788 takes a comprehensive approach to the problem of fraudulent patient brokering and deceptive marketing practices in the business of substance use addiction services, particularly related to the economic relationship between service providers and “recovery residences.”

The bill creates new and amends existing criminal offenses (prohibited acts) related to patient brokering and marketing practices that create or increase fines and potential prison sentences.

The bill provides assistance to law enforcement and prosecutors by:

- Extending the jurisdiction of the Office of the Statewide Prosecutor to investigate and prosecute patient brokering offenses;
- Adding patient brokering to the list of predicate offenses that may be prosecuted as RICO offenses which could result in higher penalties; and
- Adopting federal law with regard to the timing of law enforcement giving notice to a patient regarding obtaining the patient’s records pursuant to a court order.

The bill becomes effective on July 1, 2017.

II. Present Situation:

There has been an alarming increase of deaths from drug overdoses around the country and Florida has not escaped the trend. Total drug-related deaths increased by 13.9 percent in Florida

(1,197 more) in 2015 when compared with 2014.¹ Heroin accounted for 733 deaths in Florida and increased by 79.7 percent between 2014 and 2015.²

The number of deadly heroin overdoses more than quadrupled in the United States from 2010 to 2015, as the price of heroin fell and its potency increased.³ In 2015, there were 12,989 deaths involving heroin across the country compared with 3,036 in 2010.⁴ There was a 346 percent increase in admissions nationally for opioid treatment from 2001 to 2011.⁵

In 2012, the rate of substance abuse or dependence among eighteen to twenty-five year olds was twice that of adults twenty-six and older.⁶ Florida is a destination for many young substance use addicts from all over the country who are seeking addiction treatment and recovery services.⁷

The typical model for substance addiction treatment and recovery consists of two basic stages. The length of time a patient spends in each stage varies, depending on the patient's needs and the protocol that will help the patient achieve a healthy outcome. The two stages are:

- Detoxification and services including in-patient treatment, if necessary; and
- Out-patient treatment coupled with a therapeutic residential recovery home or "sober home" environment.

A private industry has grown throughout the state to fill a void in programming, namely "recovery residences."⁸ This component of treatment services is not currently state-licensed or

¹ Florida Department of Law Enforcement, Medical Examiners Commission, *2015 Annual Medical Examiners Commission Drug Report*, page ii, September 2016.

² *2015 Annual Medical Examiners Commission Drug Report*, at pages ii and 41.

³ David Beasley, *Deadly U.S. Heroin Overdoses Quadrupled in Five Years*, Reuters, February 24, 2017, available at <http://www.reuters.com/article/us-usa-heroin-idUSKBN1630EO> (last visited March 2, 2017).

⁴ *Id.*

⁵ Substance Abuse and Mental Health Services Administration, Center for Behavioral Health Statistics and Quality (2013); Treatment Episode Data Set (TEDS): 2001-2011.

⁶ Substance Abuse and Mental Health Services Administration (2013); Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings (HHS Publication No. SMA 13-4795, NSDUH Series H-46).

⁷ 15th Judicial Circuit, Presentment of the Palm Beach County, Florida, Grand Jury, Fall Term, 2016; *Report on the Proliferation of Fraud and Abuse in Florida's Addiction Treatment Industry*, December 8, 2016, at page 5 (hereinafter referred to as the "Grand Jury Report"), citing Optum White Paper, *Young Adults and the Behavioral Health System*, 2014, page 4; and Palm Beach County Sober Homes Task Force Report, *Identification of Problems in the Substance Abuse Treatment and Recovery Residence Industries with Recommended Changes to Existing Laws and Regulations*, January 1, 2017, at page 1 (hereinafter referred to as the "Task Force Report"); these materials are available at <http://www.sa15.state.fl.us/stateattorney/SoberHomes/indexSH.htm> (last visited March 2, 2017).

⁸ Task Force Report, at page 6. "Recovery residence" is defined in s. 397.311(36), F.S., as "a residential dwelling unit, or other form of group housing, that is offered or advertised through any means, including oral, written, electronic, or printed means, by any person or entity as a residence that provides a peer-supported, alcohol-free, and drug-free living environment."

regulated.⁹ Unfortunately, fraudulent activity in the recovery residence industry has become obvious to local communities, law enforcement, and prosecutors.¹⁰

In 2016, the State Attorney from the 15th Judicial Circuit was given the following task by the Legislature in the General Appropriations Act:

Conduct a study aimed to strengthen investigation and prosecution of criminal and regulatory violations within the substance abuse treatment industry. The state attorney shall coordinate with local and state law enforcement and regulatory agencies, the Department of Children and Families, the Florida Alcohol & Drug Abuse Association, and certifying entities of recovery residences and recovery residence administrators to identify statutory clarifications and enhancements to existing law to ensure that communities remain safe and individuals with substance use disorders are protected. The state attorney shall submit the study to the Governor, President of the Senate, and Speaker of the House of Representatives by January 1, 2017.¹¹

The State Attorney's assignment resulted in the creation of a Sober Homes Task Force (Task Force), and the convening of the Grand Jury. Both the Task Force and the Grand Jury issued reports making many of the same findings and suggesting similar solutions to the problems related to fraud in the substance use addiction treatment and recovery industry in Florida.¹²

Among the findings made by the Task Force and Grand Jury:

- Persons seeking substance use treatment and, often, their families are particularly vulnerable to predatory marketing practices.¹³

⁹ Sections 397.487 and 397.4871, F.S., provide for a voluntary certification program for recovery residences and recovery residence administrators offered through a "credentialing entity" approved by the Department of Children and Families, Office of Substance Abuse and Mental Health. See office website, available at <http://www.myflfamilies.com/service-programs/substance-abuse/recovery-residence> (last visited March 2, 2017). The current credentialing entity for recovery residences is the Florida Association of Recovery Residences, which reported the existence of 257 recovery residences in Florida as of March 1, 2017. See <http://farronline.org/>.

¹⁰ Grand Jury Report, at page 5; and Task Force Report, at pages 1 and 3. See also a recent press release from the U.S. Attorney's Office in the Southern District of Florida, *Six Defendants Charged in Health Care Fraud Scheme Involving Sober Homes and Alcohol and Drug Addiction Treatment Centers*, December 21, 2016, available at <https://www.justice.gov/usao-sdfl/pr/six-defendants-charged-health-care-fraud-scheme-involving-sober-homes-and-alcohol-and> (last visited March 2, 2017).

¹¹ See Specific Appropriation 884 (proviso), ch. 2016-66, L.O.F.

¹² See footnote 7.

¹³ "Some marketers create an online presence whereby potential patients and their families are willfully misled and misdirected by unqualified individuals who offer diagnoses and placement recommendations. Often the result of these 'lead generators' is a referral to a provider in Florida." Task Force Report, page 4; "But when the person calls the number listed, the marketer silently routes the call to one of five different customers of the marketer. Some of those customers are simply other call centers or referral services. Others might be good or bad treatment centers in Florida that have paid the marketer for the referral. One of the problems with this practice is the monetary conflict of interest created once a 'lead' is already paid for. For example, when a treatment center pays \$1,000 for a lead, they are compelled to convince that caller to go to *their* treatment center, regardless of what the caller says or whether that particular treatment is in the caller's best interest. The level of care recommended will also be influenced by this monetary incentive. A person calling about outpatient treatment may be urged to get more intensive (and expensive) treatment under this scenario. The Grand Jury finds that deceptive

- Patients engaged in out-patient treatment typically need housing while in a treatment program and if the patient is far from home, unemployed, and unable to pay for basic needs, the patient may fall prey to patient brokering schemes.¹⁴
- Strengthening and modifying existing statutes, including patient brokering as a predicate RICO offense, creating new laws related to marketing practices, and amending existing law related to patient records, would be of benefit to state law enforcement and state attorneys as they investigate and prosecute these criminal enterprises.¹⁵

III. Effect of Proposed Changes:

The bill addresses two components of addiction treatment and recovery fraud, as well as law enforcement and prosecution challenges surrounding those two types of fraud.

Regulation of Marketing Practices

Although service providers are licensed through the Department of Children and Families, currently there is no real regulation or oversight of the marketing practices of service providers or of unlicensed recovery residences.¹⁶

Section 4 of the bill creates s. 397.55, F.S., which prohibits service providers, operators of recovery residences, or third parties providing any form of advertising or marketing services to either of those entities, from engaging in deceptive, false, or misleading marketing practices.

These entities cannot:

- Make or provide false or misleading statements or information about their business in marketing, advertising, media, or on their websites.
- Include on their websites false information, links, coding, or activation that provides false information or redirects to another website.

The entities also cannot enter into a contract with a marketing provider who agrees to generate referrals or leads for patient placement through a call center or website. However, the entity can enter into such a contract if the entity discloses certain information to a prospective patient.

Section 4 of the bill provides that a marketer must obtain a license from the Department of Business and Professional Regulation and maintain an office in the state of Florida for service of

marketing practices like these are detrimental to a patient's chances of receiving quality care and the appropriate level of care." Grand Jury Report, at pages 13-16.

¹⁴ "A common practice within the industry in Florida is for the treatment provider to pay a weekly fee or kickback to the recovery residence, with the understanding that the recovery residence will allow the patient to live at the residence for free or at a greatly reduced rent while attending the provider's outpatient treatment program. This practice was developed, in part, to ensure that out-of-state patients have a local place to live after they step down from inpatient to outpatient treatment. Most out-of-state patients who are attending intensive outpatient treatment are not locally employed, and while some are able to pay rent, many do not have the means. Without a local, stable address, it would be difficult, if not impossible, for a provider to treat the patient. This creates economic pressure for the provider to find a way to house the patient locally. Brokering, by providing kickbacks to the recovery residence in exchange for the delivery of a patient, is commonplace. Some treatment providers and recovery residences offer incentives such as gym memberships, scooters, weekly massages, chiropractic services, cigarettes, clothes, gift cards and more." Task Force Report, at pages 9-10. See Grand Jury Report, at pages 17-18.

¹⁵ Grand Jury Report, at pages 27-30.

¹⁶ Sections 397.401 and 397.487, F.S.

process before attempting to generate a lead or referral for placement of a patient with a service provider or recovery residence through a call center or website.

It also prohibits the entities from soliciting or receiving a commission, benefit, bonus, rebate, kickback, or bribe in exchange for a patient referral or acceptance or acknowledgement of treatment. A violation of this provision is punishable as a felony patient brokering offense under s. 817.505, F.S. All other violations created in this section of the bill are punishable as first degree misdemeanors.¹⁷

Section 5 of the bill creates s. 817.0345, F.S., a third degree felony related to fraudulent marketing practices that prohibits knowingly and willfully making a materially false or misleading statement with the intent to induce another to seek treatment with a particular service provider.¹⁸

Patient Brokering

Section 817.505, F.S., is the current law that prohibits patient brokering. Substance abuse service providers, which includes out-patient treatment service providers licensed by the Department of Children and Families under ch. 397, F.S.,¹⁹ are prohibited from engaging in patient brokering. It is unlawful to:²⁰

- Offer or pay any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, to induce the referral of patients or patronage to or from a health care provider or health care facility;
- Solicit or receive any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in return for referring patients or patronage to or from a health care provider or health care facility;
- Solicit or receive any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in return for the acceptance or acknowledgment of treatment from a health care provider or health care facility; or
- Aid, abet, advise, or otherwise participate in the conduct prohibited under any of the above.²¹

Section 6 of the bill amends s. 817.505(1), F.S., to add the term “benefit” to the list of things a person, health care provider, or health care facility may not offer, pay, solicit, or receive:

- To induce the referral of a patient or patronage to or from a health care provider or facility;
- In return for a referral of a patient or patronage to or from a health care provider or facility; or
- In return for the acceptance or acknowledgment of treatment.

¹⁷ Pursuant to the bill, the punishment is up to a \$1,000 fine or court ordered restitution. Sections 775.083 and 775.089, F.S.

¹⁸ A third degree felony is punishable by a fine of up to \$5,000, a term of imprisonment up to 5 years, or both; a habitual offender may be sentenced to a term of imprisonment of up to 10 years. Sections 775.082, 775.083, and 775.084, F.S.

¹⁹ Substance abuse service providers are included under the term “health care provider or health care facility” in s. 817.505(2)(a), F.S.

²⁰ Section 817.505(4), F.S., sets forth third degree felony penalties for patient brokering offenses.

²¹ Section 817.505(1), F.S.

Section 6 also creates the following graduated monetary penalties and new second and first degree felony offenses for violations of s. 817.505, F.S., based upon the number of patients involved in the violation:

- If fewer than 10 patients are involved, the current third degree felony penalties apply and a new \$50,000 fine is created by the bill;
- If 10-19 patients are involved, a new second degree felony²² and a \$100,000 fine is created; and
- If 20 or more patients are involved, a new first degree felony²³ and a \$500,000 fine is created by the bill.

Section 2 of the bill amends s. 397.407(11), F.S., to address the economic relationship between licensed service providers and recovery residences.²⁴

The bill prohibits a service provider from referring a prospective patient to or accepting a referral from a recovery residence that is not in compliance with the voluntary certification program set forth in ss. 397.487 and 397.4871, F.S.²⁵

The bill does not prohibit a referral from a recovery residence to a licensed service provider as long as the residence, its owners, operators, and employees do not benefit from the referral. The prohibitions also do not apply to a licensed service provider under contract with a behavioral health managing entity.

Section 7 adds “patient brokering” to the list of crimes in the RICO statute.²⁶

Related Law Enforcement and Prosecution Challenges

Patient Records

Section 397.501(7), F.S., protects a substance abuse patient’s right to confidentiality of his or her records. The records of service providers pertaining to the identity, diagnosis, prognosis, and service provision are confidential and exempt from public records disclosure requirements.²⁷

Section 397.501(7)(a)5., F.S., provides for “appropriate” disclosure without a patient’s consent “[u]pon court order based on application showing good cause for disclosure. In determining whether there is good cause for disclosure, the court shall examine whether the public interest

²² A second degree felony is punishable by a fine of up to \$10,000, a term of imprisonment up to 15 years, or both; a habitual offender may be sentenced to a term of imprisonment of up to 30 years. Sections 775.082, 775.083, and 775.084, F.S.

²³ A first degree felony is punishable by a fine of up to \$10,000, a term of imprisonment up to 30 years, or both; a habitual offender may be sentenced to a term of imprisonment for life. Sections 775.082, 775.083, and 775.084, F.S.

²⁴ According to the Grand Jury Report, there is a “strong economic motive to promote a cycle of unnecessary treatment and/or relapse.” The Grand Jury heard testimony from “countless patients who have fallen prey to this cycle of dependence and its devastating impacts on recovery. It is not uncommon for a person to be in this cycle of treatment/relapse for years.” Grand Jury Report, at page 20.

²⁵ See footnote 9.

²⁶ Sections 895.01-895.06, F.S., make up the Racketeer Influenced and Corrupt Organization (RICO) Act. Prosecution under the RICO Act may result in higher criminal penalties.

²⁷ Section 119.07(1) and s. 24(a), Art. 1 of the State Constitution.

and the need for disclosure outweigh the potential injury to the individual, to the service provider and the individual, and to the service provider itself.”

Section 397.501(7)(h), F.S., requires that “[t]he individual and the person holding the records from whom disclosure is sought must be given adequate notice in a manner which will not disclose identifying information to other persons, and an opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order.”

It is the requirement of “adequate notice...and an opportunity to file a written response to the application” for the court order that has proven somewhat problematic for law enforcement investigators.²⁸

Section 3 of the bill creates s. 397.501(7)(h)2., F.S., which adopts the federal standard for patient notice.²⁹ Federal case law interpreting the federal code reinforces the plain-reading of the code, that notice can be delayed until the order has been “implemented.”³⁰

Office of the Statewide Prosecutor

Section 1 of the bill amends s. 16.56, F.S., to expand the jurisdiction of the Statewide Prosecutor to extend to the investigation and prosecution of patient brokering. This should aid local law enforcement and prosecutors because the Statewide Prosecutor has the ability to seamlessly move from one local jurisdiction to another in a large-scale, jurisdiction-crossing investigation.

The bill becomes effective on July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

²⁸ Grand Jury Report, at pages 31-32.

²⁹ 42 C.F.R. 2.66 provides that “upon implementation” of the court order, the patient and other parties must be given an opportunity to seek revocation or amendment of the order “limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order.”

³⁰ *U.S. v. Shinderman*, 515 F.3d 5 (1st Cir., 2008).

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill creates new felony offenses and increases potential prison sentences within existing offenses. The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation providing for criminal penalties, has not yet reviewed the bill.

The Office of the Statewide Prosecutor indicates that the bill could slightly increase the workload for the office and result in the need for one to two additional prosecutors. The total cost is \$194,120 of which \$181,770 is recurring costs.³¹

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Department of Business and Professional Regulation has indicated that licensing the marketing entities addressed in this bill does not correspond with licensure programs currently within the department's purview.³²

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 16.56, 397.407, 397.501, 817.505, and 895.02.

This bill creates the following sections of the Florida Statutes: 397.55 and 817.0345.

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

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

None.

³¹ E-mail dated March 3, 2017, from Office of the Attorney General staff to Criminal Justice Committee staff, on file with Criminal Justice Committee staff.

³² E-mail dated March 1, 2017, from department staff to Criminal Justice Committee staff, on file with Criminal Justice Committee staff.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
