

**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 Health Regulation Committee

**BILL:** CS/CS/SB 432

**INTRODUCER:** Health Regulation Committee; Criminal Justice Committee; and Senator Evers

**SUBJECT:** Privacy of Firearm Owners

**DATE:** March 29, 2011      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	<b>Fav/CS</b>
2.	O'Callaghan	Stovall	HR	<b>Fav/CS</b>
3.			JU	
4.			BC	
5.				
6.				

**Please see Section VIII. for Additional Information:**

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

The bill specifies that a health care provider or health care facility may not intentionally enter disclosed information concerning firearm ownership into a patient's medical record if the provider knows that the information is not relevant to the patient's medical care or safety. Furthermore, the bill provides that a health care provider or health care facility should refrain from inquiring about ownership of a firearm or ammunition by the patient or a family member of the patient or the presence of a firearm in a home or domicile of the patient or a family member of the patient, unless the provider or facility believes in good faith that the information is relevant to the patient's medical care or safety.

The bill provides that a patient may decline to answer questions about ownership of a firearm or the presence of a firearm in the home of the patient or a patient's family member and the patient's refusal to answer does not alter existing law regarding a physician's authorization to choose his or her patients. The bill prohibits discrimination by a provider or facility based on a patient's exercise of the constitutional right to own or possess a firearm or ammunition.

The bill requires a provider or facility to respect a patient's legal right to own or possess a firearm and provides that the health care provider or health care facility should refrain from unnecessarily harassing a patient about such ownership.

The bill provides that certain violations under the bill constitute grounds for certain disciplinary actions.

The bill 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.

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.

This bill substantially amends the following sections of the Florida Statutes: 381.026 and 456.072.

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

This bill creates an undesignated section of the Florida Statutes.

## **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.<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>

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<sup>1</sup> Fred Hiers, *Family and pediatrician tangle over gun question*, available at: <http://www.ocala.com/article/20100723/news/100729867/1402/news?p=1&tc=pg> (last accessed March 9, 2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> American Medical Association, *H-145.990 Prevention of Firearm Accidents in Children*, available at:

Additionally, the American Academy of Pediatrics (AAP) 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.

### **Florida Firearms Safety Regulations Concerning Minors**

Section 790.001, F.S., defines the term "firearm" to mean any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime.

Section 790.174, F.S., requires a person who stores or leaves, on a premise under his or her control, a loaded firearm and who knows (or reasonably should know) that a minor<sup>7</sup> is likely to gain access to the firearm without the lawful permission of the minor's parent or the person having charge of the minor, or without the supervision required by law, to keep the firearm in a securely locked box or container or in a location which a reasonable person would believe to be secure. Otherwise the person shall secure the firearm with a trigger lock, except when the person is carrying the firearm on his or her body or within such close proximity thereto that he or she can retrieve and use it as easily and quickly as if he or she carried it on his or her body.

It is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, if a person fails to store or leave a firearm in the manner required by law and as a result thereof a minor gains access to the firearm, without the lawful permission of the minor's parent or the person having charge of the minor, and possesses or exhibits it, without the supervision required by law in a public place; or in a rude, careless, angry, or threatening manner in violation of s. 790.10. However, a person is not guilty of such an act if the minor obtains the firearm as a result of an unlawful entry by any person.

Section 790.175, F.S., requires that upon the retail commercial sale or retail transfer of any firearm, the seller or transferor is required to deliver a written warning to the purchaser or transferee, which must state, in block letters not less than 1/4 inch in height:

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<https://ssl3.ama-assn.org/apps/ecommm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fama1%2fpub%2fupload%2fmm%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-145.990.HTM> (last accessed March 9, 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, available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;105/4/888> (last accessed March 9, 2011). See also American Academy of Pediatrics, Committee on Injury, Violence, and Poison Prevention, TIPP (The Injury Prevention Program), *A Guide to Safety Counseling in Office Practice*, 1994, available at: <http://www.aap.org/family/TIPPGuide.pdf> (last accessed March 9, 2011).

<sup>6</sup> See, e.g., chs. 456, 458, and 790, F.S., respectively.

<sup>7</sup> A minor is any person under the age of 16. See 790.174(3), F.S.

It is unlawful, and punishable by imprisonment and fine, for any adult to store or leave a firearm in any place within the reach or easy access of a minor under 18 years of age or to knowingly sell or otherwise transfer ownership or possession of a firearm to a minor or a person of unsound mind.

Additionally, any retail or wholesale store, shop, or sales outlet which sells firearms must conspicuously post at each purchase counter the following warning in block letters not less than 1 inch in height:

It is unlawful to store or leave a firearm in any place within the reach or easy access of a minor under 18 years of age or to knowingly sell or otherwise transfer ownership or possession of a firearm to a minor or a person of unsound mind.

Any person or business knowingly violating a requirement to provide warning under this s. 790.175, F.S., commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

### **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 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.

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<sup>8</sup> American Medical Association, Code of Medical Ethics, Opinion 9.12, *Patient-Physician Relationship: Respect for Law and Human Rights*, available at: <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion912.shtml> (last accessed March 9, 2011). However, 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> American Medical Association, Code of Medical Ethics, Opinion 9.06, *Free Choice*, available at: <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.shtml> (last accessed March 9, 2011).

<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: 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, available at: <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/ending-patient-physician-relationship.shtml> (last accessed March 9, 2011); American Medical Association, Code of Medical Ethics, Opinion 8.115 *Termination of the Physician-Patient Relationship*, available at: <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8115.shtml> (last accessed March 9, 2011).

## Health Insurance Portability and Accountability Act

In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA). The 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<sup>12</sup> may only use and disclose PHI as permitted by the HIPAA or more protective state rules.<sup>13</sup> The HIPAA establishes both civil monetary penalties and criminal penalties for the knowing use or disclosure of individually identifiable health information in violation of the HIPAA.<sup>14</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:

- 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>11</sup> 45 C.F.R. s. 160.103

<sup>12</sup> A “covered entity” is a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered under the HIPAA. *See id.*

<sup>13</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. Yale University, *Health Insurance Portability and Accountability Act*, available at: <http://hipaa.yale.edu/overview/index.html> (last accessed March 9, 2011).

<sup>14</sup> Yale University, *Health Insurance Portability and Accountability Act*, available at: <http://hipaa.yale.edu/overview/index.html> (last accessed March 9, 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. *See American Medical Association, HIPAA Violations and Enforcement*, available at: <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 March 9, 2011).

- 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.

### III. Effect of Proposed Changes:

The bill specifies that a health care provider or a health care facility<sup>15</sup> may not intentionally enter disclosed information concerning firearm ownership into a patient's medical record if the provider knows that the information is not relevant to the patient's medical care or safety.

The bill also provides that a health care provider or health care facility must respect a patient's right to privacy and should refrain from making a written or verbal inquiry about the ownership of a firearm or ammunition by the patient or the patient's family members or the presence of a firearm in a home or domicile of the patient or the patient's family members, unless the provider or facility in good faith believes that the information is relevant to the patient's medical care or safety.

The bill provides that a patient may decline to answer questions about ownership of a firearm by the patient or the patient's family members or the presence of a firearm in the home of the patient or a patient's family member. The patient's refusal to answer does not alter existing law regarding a physician's authorization to choose his or her patients. The bill prohibits discrimination by a provider or facility based solely on a patient's exercise of the constitutional right to own or possess a firearm or ammunition.

The bill requires a provider or facility to respect a patient's legal right to own or possess a firearm and provides that a health care provider or health care facility should refrain from unnecessarily harassing a patient about such ownership.

The bill provides that the following violations constitute grounds for disciplinary actions under s. 456.072(2) and s. 395.1055, F.S.:<sup>16</sup>

- Entering disclosed information concerning firearm ownership into the patient's medical record, if the information is not relevant to the patient's medical care or safety.

<sup>15</sup> Health care facilities licensed under ch. 395, F.S., include hospitals, ambulatory surgical centers, and mobile surgical facilities.

<sup>16</sup> The appropriate board within the DOH, or the DOH if there is no board may impose the following disciplinary actions: (1) Refusal to certify, or to certify with restrictions, an application for a license; (2) Suspension or permanent revocation of a license. (3) Restriction of practice or license. (4) Imposition of an administrative fine not to exceed \$10,000 for each count or separate offense. (5) Issuance of a reprimand or letter of concern. (6) Placement of the licensee on probation for a period of time and subject to such conditions as the board or the DOH may specify. (7) Corrective action. (8) Imposition of an administrative fine in accordance with s. 381.0261, F.S., for violations regarding patient rights. (9) Refund of fees billed and collected from the patient or a third party on behalf of the patient. (10) Requirement that the practitioner undergo remedial education.

- Making a written or verbal inquiry as to the ownership of a firearm or ammunition by a patient or the patient's family members or the presence of a firearm in the home of the patient or the patient's family members and the information is not relevant to the patient's medical care or safety.
- Requiring a patient to answer information regarding the ownership of a firearm by the patient or a family member or the presence of a firearm in the home of the patient or a family member.
- Discriminating against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition.<sup>17</sup>

The bill 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.

The bill provides the following under the Florida Patient's Bill of Rights and Responsibilities:

- A health care provider or health care facility must respect a patient's right to privacy and should refrain from making a written or verbal inquiry about the ownership of a firearm or ammunition by the patient or the patient's family members or the presence of a firearm in a home or domicile of the patient or the patient's family members, unless the provider or facility in good faith believes that the information is relevant to the patient's medical care or safety.
- A patient may decline to answer questions about ownership of a firearm by the patient or the patient's family members or the presence of a firearm in the home of the patient or a patient's family member and the patient's refusal to answer does not alter existing law regarding a physician's authorization to choose his or her patients.
- A health care provider or health care facility may not discriminate against a patient based solely on the patient's exercise of the constitutional right to own or possess a firearm or ammunition.
- A health care provider or health care facility must respect a patient's legal right to own or possess a firearm and a health care provider or health care facility should refrain from unnecessarily harassing a patient about such ownership.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

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<sup>17</sup> However, the bill contains an internal conflict because it also provides that any violation of s. 790.338, F.S., constitutes grounds for disciplinary action. *See* explanation under the subheading "Technical Deficiencies."

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**D. Other Constitutional Issues:**

Although this bill states that a health care provider or health care facility should refrain from making a written or verbal inquiry about the ownership of a firearm or ammunition or presence of a firearm in the home of a patient or his or her family, it should be noted that the individual's right to exercise free speech is only regulated in the most egregious of circumstances.

The First Amendment to the United States Constitution provides that "Congress shall make no law ...abridging the freedom of speech."<sup>18</sup> The Florida Constitution similarly provides that "[n]o law shall be passed to restrain or abridge the liberty of speech..."<sup>19</sup> Florida courts have equated the scope of the Florida Constitution with that of the Federal Constitution in terms of the guarantees of freedom of speech.<sup>20</sup>

A regulation that abridges speech because of the content of the speech is subject to the strict scrutiny standard of judicial review.<sup>21</sup> However, the state may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.<sup>22</sup>

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; physician-patient privileges of confidentiality; and the weight given to the right to exercise free speech versus a right to privacy.

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

None.

**B. Private Sector Impact:**

A person who violates certain provisions of the bill may be subject to disciplinary action, including, but not limited to, the imposition of an administrative fine not to exceed \$10,000 for each count or separate offense and the suspension or permanent revocation of a license.<sup>23</sup>

<sup>18</sup> U.S. CONST. amend. I.

<sup>19</sup> FLA. CONST. art. I, s. 4.

<sup>20</sup> See, *Florida Cannery Ass'n v. State, Dep't of Citrus*, 371 So.2d 503 (Fla.1979).

<sup>21</sup> See, e.g., *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Mitchell v. Moore*, 786 So.2d 521, 527 (Fla.2001).

<sup>22</sup> See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>23</sup> See s. 456.072, F.S.

C. **Government Sector Impact:**

Additional regulatory and enforcement action may occur for the boards and agencies with oversight responsibilities of the health care professionals and health care facilities due to patient complaints.

VI. **Technical Deficiencies:**

Lines 53, 59, 78, and 83 refer to health care providers licensed under ch. 456, F.S. Health care providers are not licensed under that chapter, although certain health care practitioners are subject to the general provisions of ch. 456, F.S.

Line 90 of the bill provides that certain violations constitute grounds for disciplinary action under ss. 456.072 and 395.1055, F.S. However, s. 395.1055, F.S., does not provide for any disciplinary action and instead requires the Agency for Health Care Administration to adopt rules that relate to standards of care, among other things.

Lines 88 through 89 of the bill provide that a violation of certain provisions within s. 790.338, F.S., constitutes grounds for disciplinary action under s. 456.072(2), F.S. This appears to be redundant because line 163 provides that *any* violation under s. 790.338, F.S., constitutes grounds for which disciplinary actions may be taken under s. 456.072(2), F.S.

VII. **Related Issues:**

Lines 164 through 170 of the bill may affect an insurer's current insurance policy pertaining to the insuring of firearms.

Because the provision of the bill that prohibits an insurer from discriminating against an insured or applicant for insurance on the basis of his or her lawful ownership, possession, use, or storage of a firearm or ammunition is in an undesignated section of the Florida Statutes, it is unclear what penalty, if any, the insurer would be subject to if the insurer committed this violation.

VIII. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Health Regulation on March 28, 2011:**

- Specifies that a health care provider or health care facility may not intentionally enter disclosed information concerning firearm ownership into a patient's medical record if the provider knows the information is not relevant to the patient's medical care or safety.
- Provides that a health care provider or health care facility should refrain from inquiring about ownership of a firearm or ammunition by the patient or a family member of the patient or the presence of a firearm in a home or domicile of the patient or a family member of the patient, unless the provider or facility believes in good faith that the information is relevant to the patient's medical care or safety.

- Permits a patient to decline to answer questions about ownership of a firearm or the presence of a firearm in the home of the patient or a family member of the patient and a patient's refusal to answer does not alter existing law regarding a physician's authorization to choose his or her patients.
- Prohibits discrimination by a provider or facility based on a patient's constitutional right to own or possess a firearm or ammunition.
- Requires a provider or facility to respect a patient's legal right to own or possess a firearm and to refrain from unnecessarily harassing a patient about such ownership.
- Provides for certain patient rights concerning the ownership of firearms or ammunition in the Florida Patient's Bill of Rights and Responsibilities.
- Provides that any violations related to disclosures, inquiries, discrimination, and harassment constitutes grounds for certain disciplinary actions.
- 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.

**CS by Criminal Justice on February 22, 2011:**

- Removes the criminal penalties from the bill and instead provides for noncriminal violations which could result in graduated fines for each successive violation of the prohibitions in the bill.
- Provides limited exemptions from the prohibitions in the bill in the course of emergency treatment, including mental health emergencies, and where certain mental health professionals believe it is necessary to inquire about firearm possession. The patient's response is only to be disclosed to others participating in the patient's treatment or to law enforcement conducting an active investigation of the events giving rise to a medical emergency.
- Provides an exemption for medical records created on or before the effective date of the bill.

**B. Amendments:**

None.