UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 1:11-cv-22026-MGC

DR. BERND WOLLSCHLAEGER, et al.,
Plaintiffs,

v.

FRANK FARMER, et al.,
Defendants.
_____/

RESPONSE OF DEFENDANTS TO MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs facially challenge and seek to enjoin portions of Chapter 2011-112, Laws of Florida, an act "relating to the privacy of firearm owners." Plaintiffs have misconstrued the plain text of the act, hyperbolically labeling it a physician "gag" law that entirely stifles the flow of information between physicians and patients about firearm safety. They read the act to punish them "simply for asking questions of, and providing information to, their patients about firearm safety." Am. Comp. p.1.

Plaintiffs' reading of the act is in error. The act does not target speech about firearm safety. Instead, it is narrowly written and directed at prohibiting the forced disclosure of firearm ownership by patients during the course of the provision of medical care, as well as the prevention of harassment and discrimination by health care providers against patients based on their ownership of firearms.

Nothing in the act precludes the flow of relevant information on any topic from physicians to patients who wish to receive it; nothing in the act penalizes a physician who asks about firearm ownership, or who records firearm ownership in medical records, in good faith; and nothing in the act prohibits the provision of firearm safety information. The act instructs physicians only to respect the rights of patients who decline to disclose their ownership or possession of firearms, and prohibits practitioners from harassing or discriminating against patients who exercise their fundamental right under Florida's constitution (and its federal

counterpart) to "keep" a firearm, a right that is supported by Florida's long-standing statutory protection of firearm owners' privacy rights under state public records laws. A controversy exists only because the plaintiffs misconstrue the act.

Because the act does not prevent physicians from conveying information about firearm safety, does not impede the ability of patients to receive such information, and does not prevent inquiry about firearm ownership and recording such information where relevant, the court should deny the request for a preliminary injunction.

BACKGROUND

A. Florida's Constitutional and Statutory Rights to "Keep" Firearms.

For over 170 years, Floridians have had the fundamental constitutional right *to keep*[1] and bear arms. This right appears in some form of every version of the Florida Constitution from 1838 to its present form in article 1, section 8, which provides that "[t]he right of the people *to keep* and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." Art. I, § 8(a), Fla. Const. (2008) (emphasis added).

Florida also has a long-standing history of protecting the rights of owners of firearms including the right to privately possess (i.e., keep) firearms[2] as well as the right against

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[1] The right "to keep" arms is highlighted because it is the primary constitutional right at issue in this litigation.

[2] For example, Floridians have had the specific statutory right for over forty years to possess a securely encased firearm in their private vehicles. In 1965, the Legislature determined that persons (with certain exceptions) have the right to own, possess and lawfully use firearms and other weapons (including ammunition and supplies) — without the need for a concealed weapons permit — in a broad range of activities set forth in fifteen different categories. *See* § 790.25(3), Fla. Stat. Among the fifteen categories, the Legislature specifically made it lawful for "[a] person traveling by private conveyance when the weapon is securely encased or in a public conveyance when the weapon is securely encased and not in the person's manual possession" § 790.25(3)(l), Fla. Stat. These rights are to be liberally construed "in favor of the constitutional right *to keep* and bear arms for lawful purposes." § 790.25(4), Fla. Stat. (emphasis added). In 1982, the Legislature reinforced Florida's policy of allowing possession of firearms in their vehicles for self defense and other lawful purposes via an amendment to section 790.25, which states:

> (5) Notwithstanding subsection (2) of this section, it shall be lawful, and shall not be a violation of s. 790.01 for a person 18 years of age or older to possess a

(Continued …)

disclosure of information necessary to obtain firearms. As to non-disclosure, section 790.0601 of the Florida Statutes provides that the personal information of individuals who have applied for or received a license to carry a concealed weapon or firearm is confidential. Section 790.065(4) provides that "*[a]ny* records containing information [from the licensed sale and delivery of firearms] *shall be confidential* and exempt from [the public disclosure provisions contained in section 119.07, Florida Statutes] and *may not* be disclosed to the Department of Law Enforcement or any officer or employee thereof to any person or to another agency."(Emphasis added). In fact, the Department of Law Enforcement is ordered to *destroy* such records after it communicates the approval or nonapproval to the licensee and, "in any event, *such records shall be destroyed* within 48 hours" after the day the Department responds to the licensee's request. § 790.065(4), Fla. Stat. (emphasis added). Concealed carry information can *only* be obtained with the applicant's permission, by a court order, or by a law enforcement agency. *Id.* § 790.0601(2). And the State should not "maintain records containing the names of purchases or transferees who receive unique approval

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> concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use. Nothing herein contained shall prohibit the carrying of a legal firearm other than a handgun anywhere in a private conveyance when such firearm is being carried for lawful use. Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person. This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense, as provided in s. 776.012.

§ 790.25(5), Fla. Stat. The Florida Supreme Court upheld this statutory right to possess a firearm in a case where an employee "was sitting in the driver's seat of his car which was parked in the [employer's] parking lot." Alexander v. State, 477 So. 2d 557, 558 (Fla. 1985). The court held that the employee's possession of a zippered bag containing a firearm while seated in a car in the employer's parking lot was protected under the statute, and that the statute was "reasonably related to the legislative purposes of promoting firearms safety and preventing the use of firearms in crimes." Id. at 560; *see also Florida Retail Federation Inc. v. Attorney General of Florida*, 576 F. Supp. 2d 1281 (N.D. Fla. 2008) (on motion for preliminary injunction), *final judgment entered*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008) (denying injunction as to law requiring that businesses allow workers with concealed-carry permits to carry and secure firearms in their motor vehicles in employers' parking lots).

numbers or to maintain records of firearm transactions." *Id.* § 790.065(4)(c). Violations of these provisions constitute a third degree felony. *Id.* § 790.065(4)(d).

In 2008, the Legislature further acted to protect firearm privacy rights and the right to "keep" firearms by adopting section 790.251, Florida Statutes, which, in relevant part, states:

> No public or private employer may violate the *privacy rights* of a customer, employee, or invitee by verbal or written inquiry regarding the presence of a firearm inside or locked to a private motor vehicle in a parking lot or by an actual search of a private motor vehicle in a parking lot to ascertain the presence of a firearm within the vehicle. Further, no public or private employer may take any action against a customer, employee, or invitee based upon verbal or written statements of any party concerning possession of a firearm stored inside a private motor vehicle in a parking lot for lawful purposes.

§ 790.251(4)(b), Fla. Stat. (emphasis added). The provisions of the act regarding the privacy rights of employees, and inquiries to employees about the presence of firearms, was upheld (the portion related to customers was enjoined). *Florida Retail Federation Inc. v. Attorney General of Florida*, 576 F. Supp. 2d 1281 (N.D. Fla. 2008) (on motion for preliminary injunction), *final judgment entered*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008). The policy of preventing employers from discriminating against employees on the basis of gun ownership has likewise been upheld. *See id.*

B. Plaintiffs' Constitutional Challenge.

Plaintiffs are physicians, and associations of physicians, who assert – based upon their erroneous reading of the text of Chapter 2011-112 – that it: prohibits them from asking their patients (or minor patients' parents) about firearm ownership; prohibits and chills the flow of information about firearm safety; and prevents them from recording in a patient's record the status of firearm ownership. They also challenge three terms in the enforcement provisions ("harassment" "discrimination" and "relevance") as void for vagueness. No other portion of the act is challenged.

C. The Act: Its Text and History.

Plaintiffs claim that the challenged portions of the act operate as a "gag" on their right to convey firearm safety information and violate their patients' right to receive such information. The act, however, creates no barrier to the provision (or receipt) of firearms safety information. Instead, the sole focus of the act is the protection of patients who own firearms from the

compelled disclosure of the fact they are exercising the constitutional right to possess (i.e., keep) firearms.

1. *The Statutory Text*.

First, nothing in the act prevents physicians from providing information about firearm safety; if physicians wish to provide this information, nothing in the Act prevents them from doing so. Under the Act, the plaintiffs are free to have conversations with patients about firearm safety. Likewise, the act does not prevent patients from receiving information from their physicians. The act does not prohibit physicians from providing firearm safety information to patients by, for example, providing a pamphlet (or other written information) or giving verbal advice explaining the risks associated with firearms and the safety precautions persons who own or possess firearms should take.

Second, the act does not categorically prohibit the plaintiffs from asking patients about firearm ownership. Instead, the act – when its provisions are read together as a whole – provides that, although physicians should refrain from asking about firearm ownership,[3] they may do so in good faith and a patient may answer the question. The statutes states:

> (2) A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 *shall respect a patient's right to privacy* and *should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient* or by a family member of the patient, or the presence of a firearm in a private home or other domicile of the patient or a family member of the patient. Notwithstanding this provision, a health care practitioner or health care facility that in *good faith* believes that this information is relevant to the patient's medical care or safety, or the safety of others, *may make such a verbal or written inquiry*.

§ 790.338(2), Fla. Stat. (emphasis added). While the act provides that a patient's privacy must be respected, and that a physician should "refrain" from inquiring about firearm ownership or possession, it makes emphatically clear that physicians may ask about firearm ownership/possession if they have a good faith belief that the information is relevant to medical health or safety. In so doing, the act essentially codifies what is a standard and accepted practice, i.e., physicians may ask any questions that they in good faith believe are relevant to

[3] The word "firearm" is used herein to include ammunition as well.

their patient's care. No categorical bar exists. Instead, the act explicitly permits physicians to ask about firearm ownership if a good faith basis exists for doing so.

Similarly, the act does not categorically prohibit the plaintiffs from recording in a patient's medical record information about the ownership of firearms. The act states:

> (1) A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 may not intentionally enter any disclosed information concerning firearm ownership into the patient's medical record if the practitioner knows that such information is not relevant to the patient's medical care or safety, or the safety of others.

Id. § 790.338(1). This language establishes that recordation of firearm ownership is proper except when no relevant basis exists for doing so.

Third, the only prohibition in the act against communicating or receiving information arises when *patients* exercise their right *to decline* to answer questions about their ownership/possession of firearms. The act codifies the right of patients to decline to answer such questions:

> (4) A patient *may decline* to answer or provide any information regarding ownership of a firearm by the patient or a family member of the patient, or the presence of a firearm in the domicile of the patient or a family member of the patient. A patient's decision not to answer a question relating to the presence or ownership of a firearm does not alter existing law regarding a physician's authorization to choose his or her patients.

(Emphasis added). The act's use of the highlighted phrase "may decline" implies two things: one, that physicians are free to ask about firearm ownership, and two, that patients may choose whether to answer an inquiry about firearm ownership.[4] Nothing in this section precludes the provision of firearm safety information to a patient; instead, it relates solely to the right to not disclose the exercise of the legal right to possess a firearm.

As a basis for discipline, the act provides that physicians must not harass patients if the patients decline to answer a question about their firearm ownership. The act protects the patient's right of refusal by requiring practitioners to refrain from "unnecessarily harassing" patients who

[4] The Legislature also amended the patient's bill of rights to reemphasize the patient's right to refuse to answer a question about firearm ownership and to be free from unreasonable repercussions as the result of any answer. *See* § 2, ch. 2011-112, Laws of Florida.

refuse to answer, or from discriminating against them "solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition."[5]

Read as a whole, the act envisions that its disciplinary provisions (as to harassing inquiries about firearms ownership and discrimination) would not apply in the ordinary course of events; instead, it would only apply in situations (such as those that animated the passage of the act, discussed below) where no relevant basis for the question exists, or where the patient refuses to answer and the physician continues to make inquiry in bad faith to harass or discriminate.

2. The Statute's Legislative History.

The act was prompted by recent incidents, including one last year in Ocala, Florida, where a physician terminated a physician-patient relationship with a young mother solely because she declined to answer a question about firearm ownership. *See* Final Bill Analysis, CS/CS/HB 155 at 2 (June 28, 2011) (attached); Manheim Aff., Ex. 2 & 3 p.1. The incident sparked debate about unreasonable discrimination against, and harassment of, patients by licensed health care providers based on the exercise of the fundamental constitutional right to firearm ownership.

During legislative hearings on the proposed bill, a Florida state representative spoke about an appointment for his daughter at which a pediatrician asked him if he owned a firearm and was instructed to remove it from his home.[6] Another state representative related that he heard from citizens about a mother who was separated from her children during an office visit while a pediatrician interrogated them about firearm ownership; he also heard about a family receiving treatment under Medicaid who was told by a physician that answering questions about

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[5] Subsection (5) and (6) of the Act state:

> (5) A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 may not discriminate against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition.
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> (6) A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 shall respect a patient's legal right to own or possess a firearm and should refrain from unnecessarily harassing a patient about firearm ownership during an examination.

[6] Audio CD: Regular Session House Floor Debate on HB 155, held by the Florida House of Representatives (Apr. 26, 2011) at 26:20 (remarks of Rep. Artiles) ("House Floor Debate") (on file with the Florida House of Representatives Office of the Clerk).

firearms was mandatory for those receiving government-subsidized health care.[7] A state senator reported multiple incidents, including cases of doctors refusing to provide medical care to children unless their parents answered questions about guns.[8] Another incident occurred in a state representative's home town, where his constituents urged him to take up the issue with the Florida Legislature.[9]

The plaintiffs' amended complaint confirms that these types of incidents occur and that while some patients welcome questions about firearm ownership and a discussion of firearm safety, others find it unreasonable and intrusive. Am. Comp. pp. 26-27, 30, 33. Plaintiffs assert that it is their regular practice to ask about firearm ownership as a component of their efforts to educate patients/parents about a variety of environmental hazards, including the dangers posed by firearms. [10] At least one plaintiff, Dr. Schaechter, admits to asking children about firearms in the home. Am. Comp. p. 27. She states that some patients refuse to answer such questions or are hostile to them; prior to the act's passage, she would continue to press patients for information about firearm ownership despite their unwillingness to discuss the subject. Am. Comp. pp. 26-27. Dr. Schechtman also questioned children about firearms and persisted when patients declined to answer. Am. Comp. p. 28; *see also id.* at 32 (Dr. Gutierrez would now stop engaging in "further discussion with a patient who is not initially inclined to answer the question . . .").

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[7] *Id*. at 13:40 (remarks of Rep. Brodeur).

[8] Audio CD: Regular Session Senate Floor Debate, held by the Florida Senate (Apr. 27-28, 2011) at 4:33, 9:44 (remarks of Sen. Evers)(discussing incidents in Orlando, Pace, and elsewhere) ("Senate Floor Debate") (on file with the Florida Senate Office of the Secretary). *See also* Committee Hearing on HB155, held by the Health & Human Services Committee (Apr. 5, 2011) (Remarks of Rep. Brodeur) at 37:37 (discussing incidents in Ocala and elsewhere) ("House H&HS Comm. Hearing") (available at http://www.myfloridahouse.gov/sections/Committees/-committeesdetail.aspx?SessionId=70&CommitteeId=2593); Committee Hearing on HB155, held by the Criminal Justice Subcommittee (Mar. 8, 2011) (testimony of Marion Hammer, NRA) at 1:27:55 (family with a foster child was told by doctor that Medicaid would not pay for treatment if parents didn't answer gun questions) ("House Crim. Justice Subcomm. Hearing") (available at http://www.myfloridahouse.gov/sections/Committees/-committeesdetail.aspx?SessionId=70&CommitteeId=2614); *id*. at 1:29:00 (parents feared that doctor would report them to social services if they admitted to owning a gun).

[9] Audio CD: Regular Session House Floor Debate on HB 155, held by the Florida House of Representatives at 28:15 (Apr. 26, 2011).

[10] The institutional plaintiffs claim that they regularly recommend that their members ask such questions as well. Am. Comp. pp. 13-15.

The physician-patient relationship is a private, contractual one that either party is free to enter into, decline, or terminate at any time, subject to the obligation of physicians to provide reasonable notice to the patient and a reasonable opportunity to obtain services elsewhere. Final Bill Analysis, CS/CS/HB 155 at 4 (June 28, 2011) (citing AMA standards). Consistent with the existing standards, the act does not contain any provision prohibiting the severing of a physician-patient relationship based on a refusal to answer. *See* § 1(4), Ch. 2011-112, Laws of Florida. The thrust of the act reaffirms the patient's right to refuse to answer about firearm ownership and requires practitioners to accept that choice.

MEMORANDUM OF LAW

A preliminary injunction is unwarranted because plaintiffs fail to meet all four requirements for this extraordinary and drastic remedy: (1) a substantial likelihood of success on the merits; (2) irreparable injury absent an injunction; (3) threatened injury to the plaintiff outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318. 1326 (11th Cir. 2001); *see also American Civil Liberties Union of Fla., Inc. v. Miami–Dade County Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir.2009) (the "failure to show any [one] of the four factors is fatal.").

I. Plaintiffs Are Not Likely to Succeed on the Merits

Plaintiffs are unlikely to succeed on the merits because the act (A) is not facially unconstitutional, (B) permissively regulates professional speech, (C) properly balances conflicting rights, (D) is not vague or overbroad. As a preliminary matter, however, defendants do not agree that plaintiffs have asserted any recognized constitutional right of their own that is at stake under the act. Plaintiffs claim a First Amendment right in the provision of information to their patients about firearm safety. As discussed below, they have misread the statute and are thus mistaken that the act is an unconstitutional intrusion on their alleged right. Moreover, any claimed First Amendment right – even if assumed to exist – applies to the professional conduct of regulated health care practitioners, has merely an incidental effect on speech, and is thereby not violated. *See Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011).

A. Plaintiffs' facial constitutional attack is fatally flawed.

To succeed on a facial challenge, plaintiffs generally must show that the act can *never* be applied in a constitutional manner, *D.A. Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254 (11th Cir. 2007), or that when First Amendment concerns are involved, " a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." *U.S. v. Williams*, 553 U.S. 285, 304 (2008).

Here, Plaintiffs' facial challenge is meritless due to their flawed reading of the act. The plaintiffs contend that the act stifles speech about firearms safety. But the act is narrowly drawn and only addresses the privacy of firearm ownership by patients. Thus, contrary to plaintiffs' view, the act does not preclude the exchange of relevant information between physician and patient including information on firearm safety; indeed, it contains absolutely no prohibition whatsoever on the provision or discussion of information about firearm safety in the physician-patient context. Physicians are free to initiate a discussion of firearms safety and may provide any information on that topic they deem relevant, either orally or via written materials. The act does nothing to preclude this information flow between physician and patient. On this basis alone, the plaintiffs' claim that the act "chills" and "punishes" physicians for merely providing information about firearm safety (Am. Comp. p.1) is so seriously in error as to deny relief on purported First Amendment grounds.

To the extent Plaintiffs claim a right to ask patients about firearm ownership/possession, and a First Amendment entitlement to pursue their inquiry when their patients decline, they are seriously wrong. Read in a reasonable fashion, the act does not categorically prohibit asking patients about firearm ownership; instead, physicians are told they should generally "refrain" from asking about firearm ownership, but that they may do so in good faith if they believe it is relevant. A physician who has no relevant basis for the inquiry, or who does so in bad faith under the circumstances, cannot be said to be engaging in constitutionally protected speech. Instead, a physician who does so is engaging in conduct beyond the parameters of professional norms. The relevant/good faith standard cannot be said to chill or prohibit any protected speech, even assuming the inquiry of firearm ownership is a constitutionally protected one.

Moreover, the act is narrowly drawn and focuses *solely* on conduct respecting a patient's right to decline to answer a question about *firearm ownership*; physicians must respect that decision and refrain from harassing patients or discriminating against them on that basis. The

act, as its title suggests, focuses on situations where patients *decline* to respond to questions about *ownership* of firearms. That the act provides that patients "may decline" to answer such questions, contemplates that the questions may be asked in the first instance. Plaintiffs' reading of the act, which would entirely prohibit the asking of the question, is an extreme misconstruction of the act's language.

Plaintiffs attempt to assert their patients' constitutional right to receive information, claiming the act interferes with that right. Nothing in the act, however, precludes patients from receiving any medical or other relevant information from their physicians. Instead, physicians are free to provide firearm safety information to their patients, orally or in written form, in any way they choose. Physicians have no constitutionally protected right to unilaterally compel their patients to answer a question about firearm ownership; instead, it can be fairly said that patients have a right not to disclose such information. As the act recognizes, of course, the physician-patient relationship is a private, contractual one that, for example, physicians can terminate; it is also one that patients may terminate if they choose to do so. It would be unfortunate for physician-patient relationships to terminate due to physicians who insist on compelling patients to disclose firearm ownership when the Act leaves open *all* available avenues of providing firearm safety information.

In sum, all the act requires is that physicians who have legitimate grounds for inquiring about firearm *ownership* must respect the right of their patients who choose to decline to answer; those who engage in harassment or discrimination against their patients on this basis are subject to discipline. No discipline, however, is permitted under the act for relevant good faith inquiries about firearm ownership (and recordation); nor is discipline permitted for the provision of information on the topic of firearm safety. Because the act can operate constitutionally, plaintiffs' facial challenge fails.

B. The act is not subject to strict scrutiny because it permissibly regulates the professional speech of licensed practitioners in the delivery of medical care.

As a part of their challenge, plaintiffs assert that questioning their patients about gun ownership is part of their delivery of medical care. They assert that this question is subject to the "compelling state interest" test, and that therefore, because the act neither furthers a compelling state interest nor is the least restrictive means of doing so, it fails.

The plaintiffs' reliance upon the compelling state interest test is misplaced. The plaintiffs' speech in the context of the delivery of medical care is a form of "professional speech" which can be abridged as long as "any inhibition of the right is merely the incidental effect of observing an otherwise legitimate regulation.'" *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011); *Wilson v. State Bar of Georgia*, 132 F.3d 1422, 1429-1430 (11th Cir. 1998); *Accountant's Society of Virginia v. Bowman*, 860 F.2d 601, 603-604 (4th Cir. 1998); *Schultz v. Wells*, 2010 WL 1141425 *9 (M.D. Ala. 2010); *see also Lowe v. Securities & Exchange Comm*., 472 U.S. 181 (1985) (White, J., concurring). If a statute regulates "occupational conduct" and does not affect "a substantial amount of protected speech," the regulation is constitutional. *See Wilson*, 132 F.3d at 1429-1430 (stating "[a]ny abridgement of the right of free speech is merely the incidental effect of observing another legitimate [occupational] regulation").

Physicians can be required to give patients certain medical information even if the physician does not wish to do so. *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992)[11]; *Planned Parenthood Minnesota, v. Rounds*, 530 F.3d 724, 734-735 (8th Cir. 2008).[12] If the state can require physicians to provide certain medical information, the state can certainly restrict the collection of certain "medical" information as well, particularly where the information is not clearly "medical" in nature but instead regards firearm ownership. Even if the act entirely prohibited a question about firearm ownership by a physician, a prohibition of such a question would be constitutional. *See Florida Retail Federation Inc. v. Attorney General of Florida*, 576 F.Supp.2d 1281, 1293 (N.D. Fla 2008) (upholding statute prohibiting defined businesses "from asking a worker with a concealed-carry permit or a customer whether he or she has a gun in a vehicle in a parking lot, taking action

[11] No constitutional violation "when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus . . . If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible."

[12] Supreme Court precedents "establish that, while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion " without violating a physician's right not to speak.

against such a worker or customer based on any statement about whether there is a gun in a vehicle in a parking lot …").

Here, the act addresses only the collection and recording of a single piece of personal and highly confidential information: the ownership of a firearm. It does not stifle the transmission of any firearm safety message; plaintiffs are free to provide the full range of gun safety information whether they record such information or not. Similarly, the act's prohibitions against harassment, and discrimination if the patient declines to answer are merely incidental and arise from the state's reasonable regulation of professional speech.

The plaintiffs claim the act does not expressly provide for a patient's waiver of confidentiality in firearm ownership information. The plaintiffs' memorandum of law, however, undermines their position by acknowledging that "[t]o the extent gun owners wish to maintain their privacy, they may decline to *answer* any such 'inquiries' put to them. And, of course, if patients decline to answer such inquiries, their medical records will not reflect whether or not they own firearms." Mot. Prelim. Inj. p. 11. The Legislature's use of the phrase "may decline" clearly contemplates that practitioners may ask such questions and patients can answer if they choose, as plaintiffs' own memorandum reflects.

C. The act permissibly balances conflicting constitutional rights.

Plaintiffs are concerned primarily with their own alleged constitutional right to compel disclosure of firearm ownership by their patients and the right to record such information in medical records. Even assuming they have such rights (which defendants contest), their rights are not viewed in isolation and must be balanced against those of their patients. Situations where rights must be balanced arise in many legislative contexts; when alleged constitutional rights conflict, the state may balance the interests of those involved, even if the result burdens the rights of one of the groups in some way. *Frazier v. Winn*, 535 F.3d 1279, 1284-1285 (11th Cir. 2008); *Florida Retail Federation Inc. v. Attorney General of Florida*, 576 F.Supp.2d 1281 (N.D. Fla 2008) (on motion for preliminary injunction), final judgment entered, 576 F.Supp.2d 1301 (N.D. Fla. 2008).

Here, even assuming that the statute contains a prohibition on some aspect of physicians' speech (i.e., the alleged right to compel disclosure of firearm ownership by patients), which it does not, the constitutional rights of physicians conflict with the constitutional rights of their patients to freely exercise their right to keep and bear arms under the state and federal

constitutions,[13] their right to refuse medical treatment,[14] and privacy interests under Florida laws that make firearm ownership information confidential. The act's limitations on physicians, such as not harassing a patient if they refuse to answer a question about gun ownership, or recording firearm ownership information in bad faith, are the acceptable result of the state's effort to balance competing constitutional interests, even if the balance favors the rights of patients in the exercise of their constitutional right to keep firearms and to have their privacy of that right respected.

D. The Firearm Privacy Act is Not Impermissibly Vague or Overbroad.

Plaintiffs claim that the firearm privacy act is unconstitutional because it contains "ambiguous provisions regarding 'relevance' " and "undefined prohibitions against 'harassment' and 'discrimination'." Am. Comp. pp. 22-23. Plaintiffs further allege that the act's "provisions and prohibitions are so vague, overbroad, and ambiguous, and its penalties are so harsh, that prudent practitioners are limiting their efforts to counsel patients about firearms." *Id*. Yet vagueness only arises "when a statute is so unclear as to what conduct is applicable that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.' " *Wilson v. State Bar of Georgia*, 132 F.3d 1422, 1429 (11th Cir 1988) (quoting *United States v. Gilbert*, 130 F.3d 1458, 1462 (11th Cir. 1997). Here the act includes only terms with ordinary meanings that do not require any person of common intelligence to guess as to their significance.

While harassment, discrimination, and relevance are not expressly defined in the act, these terms have ordinary meanings that are readily clear to persons of common intelligence. Regarding "harassment," the act provides that a "health care practitioner … shall respect a patient's legal right to own or possess a firearm and should refrain from unnecessarily harassing a patient about firearm ownership during an examination." § 790.338(6), Fla. Stat. (2011). Harassment is defined by *Black's Law Dictionary*, 721 (7th ed. 1999), as "[w]ords, conduct or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or

[13] The right of individuals to keep and bear arms for personal defense is protected under the Second Amendment. *McDonald v. City of Chicago,* 130 S. Ct. 3020, 3036-3037 (2010); and Art. I, s. 8, Fla. Const.

[14] *Washington v. Harper*, 494 U.S. 210 (1990). Given the plaintiffs contention that they ask about gun ownership in the context of providing medical treatment, a refusal to answer such a question constitutes a refusal of treatment.

causes substantial emotional distress in that person and serves no legitimate purpose." Harassment is virtually identically defined in several sections of the Florida Statutes. To name just two, section 843.20 (2)(a) (a) states that "Harass" means "to engage in a course of conduct directed at a specific person which causes substantial emotional distress in that person and serves no legitimate purpose." And section 817.568 (1)(c) states that "Harass" means "to engage in conduct directed at a specific person that is *intended* to cause substantial emotional distress to such person and serves no legitimate purpose." (Emphasis added).

Adopting these common definitions renders the Act's prohibition of harassment clear: "A health care practitioner . . . should respect a patient's legal right to own or possess a firearm and should refrain from [engaging in repeated or persistent words conduct or action, directed at his patient that annoys, alarms or causes substantial emotional distress in his patient, or is intended to do so, and that serves no legitimate purpose] during an examination." *See* Ch. 2011-112, Laws of. Fla.

Plaintiffs also assert that the term "discriminate" is vague. The act provides that "A health care practitioner … may not discriminate against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition." Ch. 2011-112, Laws. of Fla. This claim is equally meritless. The act of discrimination is defined by *Black's Law Dictionary*, 479-80 (7th ed. 1999), as a "law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or handicap." *Webster's Ninth New Collegiate Dictionary*, 362 (1983), further defines "discriminate" as "to make a difference in treatment or favor on a basis other than individual merit." The Florida Legislature has devoted entire sections of the Florida Statutes to prohibiting discrimination.[15]

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[15] *See, e.g.,* § 112.044, Fla. Stat. (prohibiting public employers from discriminating against employees by failing to hire, discharging, segregating, reclassifying, demoting, shortchanging, or otherwise harmfully altering the conditions of an employee's job status based solely on the fact that the employee has aged); § 760.23, Fla. Stat. (making it unlawful refuse to sell or rent property, assess different terms and conditions, or refuse to permit reasonable modifications to real property based solely on a person's race, color, national origin, sex, handicap, familial status, or religion); § 760.50, Fla. Stat. (making it unlawful to discriminate on the basis of AIDS in hiring, promotion or continued employment, housing, public accommodations or services; and requiring that no employer may discharge, segregate, or classify an individual "in any way which (Continued …)

In sum, the Legislature has repeatedly defined areas where certain classes of persons are protected from discrimination. It has done so here. And although the act does not specifically define the specific acts or conduct that would constitute discrimination by a physician based solely on the fact that his patient has exercised the right to own a firearm, the act is not rendered vague. Discrimination by definition means treating a person differently based on a specific factor—in this case gun ownership. Reasonable persons of common intelligence could conclude that, in this context, the common definition of discrimination would apply.

Plaintiffs also claim that the act does not "specify what constitutes a [good faith belief that the information is relevant] to the patient's medical care or safety, or the safety of others." Am. Comp., pp. 18, 20. But "good faith" is not a new concept in the law. The phrase "good faith belief" is used throughout Florida's statutes in a variety of contexts and does not require explanation. Here, the legislature used "good faith belief" to modify what is relevant to a patient's health care or safety. This term undermines the argument that providers are left to guess at what is relevant to a patient's medical care or safety. Furthermore, it is not a novel concept to make distinctions between whether conduct is done in good faith versus with a malicious purpose. Accordingly, Plaintiff's vagueness claim should be rejected.

Plaintiffs claim that that the act is overbroad should also be rejected. In order to state an overbreadth claim, plaintiffs must show that the act prohibits a substantial amount of protected speech. *U.S. v. Williams*, 553 U.S. at 304. Here, however, no speech is prohibited or chilled. Instead, the act is narrowly focused on the acquisition of a single fact: ownership or possession of a firearm. Plaintiffs are free to pose this question and receive an answer if the patient is willing to provide the information. Moreover, nothing in the act prohibits the plaintiffs from providing firearm safety information. Consequently, the plaintiffs' overbreadth argument fails.

II. No Irreparable Harm Exists.

Plaintiffs will not suffer irreparable harm because the act does not prohibit protected speech. It does not prohibit the provision of firearm safety information or questions about gun ownership in medically appropriate circumstances. Any effect, if any, on the plaintiffs' asserted

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would deprive or tend to deprive that individual of employment opportunities or adversely affect his or her status as an employee, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment.").

free speech rights is minimal. Given the means available to convey information about firearm safety, orally or in writing, the act cannot be said to inhibit the transmission of any safety message plaintiffs may wish to send.

Assuming that the act has the effects the plaintiffs articulate, they would not be harmed to any greater degree than the minimal harm found acceptable in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Planned Parenthood Minnesota, v. Rounds*, 530 F.3d 724 (8th Cir. 2008). At worse, the act only applies when physicians acquire or record a single, discrete piece of information about patients' firearm ownership when they have no good faith basis for doing so (or when they discriminate or unnecessarily harass on the basis of firearm ownership). Under these circumstances, the act poses no material interference with the provision of medical care.

The harm plaintiffs fear from potential professional discipline is a subjective concern based on a serious misreading of the act, which does nothing to prevent conversations with patients about firearm safety. The act does not permit disciplinary proceedings against health care professionals who merely engaged in a conversation with patients about firearm safety. As such, no objective basis exists for the harm plaintiffs assert.

III. Harm From An Injunction Outweighs Plaintiffs' Alleged Injury.

This Court should deny plaintiff's motion for preliminary injunction because the balance of equities weighs in the State's favor. *See Yakus v. United States*, 321 U.S. 414, 440 (1944) (holding that in considering a motion for preliminary injunction, the court must balance the equities).

As discussed above, Floridians have a constitutional right to keep and bear arms. And the Legislature has a long-standing history of protecting this right through privacy laws and confidentiality procedures. Granting plaintiffs' motion would effectively impair the right of citizens who own firearms to exercise their constitutional right to privacy, and it would subject them to possible harassment and discrimination by their treating physicians.

On the other hand, plaintiffs will not be injured by the denial of a preliminary injunction because the act does not prohibit them from continuing to provide the information they allege they would like to give their patients concerning gun safety. It simply reminds physicians to respect their patient's right to refuse such information.

Moreover, the citizens the act is intended to protect will be adversely affected by entry of a preliminary injunction in that the plaintiffs will remain free to ignore the wishes of their patients as to privacy in the ownership of firearms and to discriminate against them for firearm ownership, while the impact of denial of the motion on the plaintiffs is slight.

IV. The Injunction Would Disserve the Public Interest

The Legislature acted to prevent undue intrusions on the rights of its citizens and to protect their fundamental constitutional rights in the context of firearm ownership. A ruling for plaintiffs will permit physicians to continue to make inquiries about these constitutional rights, despite having the full range of existing means for discussing and providing information about firearm safety. Absent an injunction, no burden is placed on the plaintiffs other than to refrain from engaging in harassment or discrimination based on their patients' constitutional right to keep firearms; any burden is de minimis and does not justify enjoining the act.

CONCLUSION

For all the reasons stated above, the Court should deny plaintiff's motion for a preliminary injunction.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to counsel of record through use of the Court's CM/ECF system on July 5, 2011.

s/ *Jason Vail*

FINAL BILL ANALYSIS

BILL #: CS/CS/HB 155

FINAL HOUSE FLOOR ACTION:
88 Y's 30 N's

SPONSOR: Rep. Brodeur

GOVERNOR'S ACTION: Approved

COMPANION BILLS: CS/CS/CS/SB 432

SUMMARY ANALYSIS

CS/CS/HB 155 passed the House on April 26, 2011, and subsequently passed the Senate on April 28, 2011. The bill was approved by the Governor on June 2, 2011, chapter 2011-112, Laws of Florida, and became effective on that date.

The bill 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 the 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 ch. 627, F.S., are prohibited from discriminating, denying coverage, or increasing 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 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.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF 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.[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 recommends that pediatricians incorporate questions about guns into their taking of patient history.[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.

Health Care Practitioners and Licensed Facilities

The Department of Health (DOH) and the relevant boards[7] 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.)

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[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/ecomm/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).
[6] *See, e.g.*, chapters 456, 458 and 790, F.S.
[7] "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.

- 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.)
- 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 deny, modify, suspend, and revoke licenses for violations of applicable provisions of chapters 408 and 395, F.S.

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.[8] Once a physician-patient relationship has been established, patients are free to terminate the relationship at any time.[9] Generally, doctors can only terminate existing relationships after giving the patient notice and a reasonable opportunity to obtain the services of another physician.[10] 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.[11] Covered entities may only use and disclose PHI as permitted by HIPAA or more protective state rules.[12] HIPAA establishes both civil monetary penalties and criminal penalties for the knowing use or disclosure of individually identifiable health information in violation of HIPAA.[13]

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[8] 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.

[9] 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).

[10] 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).

[11] 45 C.F.R. s. 160.103

[12] 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).

[13] *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-

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:[14]

- 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.
- 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.[15] 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.[16] 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.[17] 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

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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).

[14] Section 456.057(7)(a), F.S.

[15] *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996).

[16] *Id.*

[17] *Id.*

- Motor Vehicle
- Surety
- Title
- Long-term Care

Chapter 641, F.S., 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 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.,[18] 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.

[18] Section 624.9541, F.S., contains enhanced penalties for specific volitions of s. 626.9541, F.S., that are deemed fraudulent.

The bill specifies that non-compliance by licensed health care practitioners and health care facilities constitutes grounds for disciplinary action under ss. 456.072(2), and 395.1055, 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 the 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 increasing 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 amends the Florida's Patient's Bill of Rights and Responsibilities (s. 381.026, F.S.) 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 providers 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.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

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.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.