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Physicians

First Amendment Rights of Doctors at Issue In Appeal Over State Gun Owners Privacy Law

A doctor's right to delve into matters that may affect a patient's safety is being put to the test in Florida, where a federal appeals court has been asked to rule on the validity of a state law that precludes doctors from asking patients questions about gun ownership (*Wollschlaeger v. Governor of Florida*, 11th Cir., No. 12-14009, *appeal filed* 8/2/12).

The governor of Florida has urged the U.S. Court of Appeals for the Eleventh Circuit to overturn a federal district court ruling that declared the state's Firearm Owners' Privacy Act unconstitutional. The act, codified in several sections of the Florida Code, including Fla. Code § 790.338, prohibits health care providers from asking patients about firearms, from recording information about firearms in patients' medical records, and from ''unnecessarily harassing'' or ''discriminat[ing] against'' patients based on firearm ownership.

The U.S. District Court for the Southern District of Florida June 29, 2012, granted summary judgment for the doctors who challenged the law, including named plaintiff Dr. Bernd Wollschlaeger. The court found that the act violates physicians' First Amendment right to free speech by imposing a content-based restriction that was not justified by a compelling governmental interest.

The ruling followed a September 2011 decision in which the district court entered a preliminary injunction prohibiting Florida from enforcing the law (20 HLR 1421, 9/22/11).

Briefing has been completed in the Eleventh Circuit, but oral argument has not yet been set, Hallward-Driemeier told BNA.

Stakes at Issue. Douglas H. Hallward-Driemeier, with Ropes & Gray, in Washington, who is representing the physicians, told BNA that the outcome of the case could have ramifications beyond Florida. Although the law is the first attempt by a state to impose this type of limitation on a doctor's ability to counsel patients, legislatures in Alabama, North Carolina, Tennessee, Oklahoma, Virginia, and West Virginia, are considering adopting similar laws, he said.

Additionally, he said, states could view a ruling upholding the law as an opening to restrict physicians' speech on other subjects, such as cigarette smoking, obesity, and reproductive rights counseling. There are any number of industries that might view such a decision as an invitation to lobby state legislatures to restrict physicians' rights to counsel their patients about using their products—sugary drinks, for example—Hallward-Driemeier said.

This case, he told BNA, is about ''preserving doctors' rights to speak honestly with patients about any subject that might affect their health.'' Firearm ownership is a particularly relevant subject for physicians to address, he said, because accidental shootings are a leading cause of death among young children. Every week, he said, there are newspaper accounts of children accidentally shooting themselves, a sibling, or a friend after finding a loaded gun.

''The tragic killings in Connecticut are particularly horrific examples of the danger that guns in the home will be used to harm their owners or innocent third parties, rather than for self-defense,'' Hallward-Driemeier added. ''Our lawsuit seeks to establish that doctors have a First Amendment right to counsel their patients about these risks, including patients who would prefer not to be reminded of the unpleasant truth.''

Hallward-Driemeier's colleague at Ropes & Gray, Mariel Goetz, added that it is important to protect doctors' rights to engage in a free flow of information with their patients. The Florida Department of Health did not respond to BNA's request for comment.

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—Douglas H. Hallward-Driemeier, Ropes & Gray, Washington

The case also could have national ramifications, as it recently came to light that Section 2717 of the Affordable Care Act, codified at 42 U.S.C. § 300gg-17, prohibits group health plans and health insurers from requiring patients to disclose information relating to firearm ownership as part of a quality of care program.

The ACA also prohibits plans and insurers from collecting information about gun ownership, maintaining records of firearm ownership, and increasing premium rates for gun owners. No individual shall be required to disclose, pursuant to any ACA data collection activity, the lawful use, ownership, possession, or storage of a firearm.

Briefing and Arguments. The Firearm Owners' Privacy Act states that a health care practitioner ''may not'' enter information about firearm ownership into a patient's medical record and ''should refrain'' from asking ques-

tions about firearm ownership. It also states, however, that a practitioner who ''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 verbal inquiry.''

The law requires physicians to respect a patient's right to refrain from answering questions about firearm ownership and prohibits physicians from discriminating against or harassing patients who own or possess a firearm.

In the district court, the physicians argued that the law violated the First Amendment by restricting their right to counsel their patients on a matter that could affect their health or that of others. The state countered that the act was a traditional antidiscrimination statute, intended primarily to end discrimination against and harassment of gun owners by physicians.

The district court rejected this argument after finding that there was no evidence in the legislative history that doctors had been discriminating or harassing their gun-owning patients. The strongest evidence in the record, Hallward-Driemeier told BNA, was an anecdotal account of a patient whose doctor told her to find another physician after she refused to answer questions about gun ownership.

On appeal, the state changed its position. In its Sept. 18, 2012, opening brief, it argued that the doctors did not have standing to challenge the constitutionality of the law because the statute merely suggested that they refrain from asking patients about guns and did not prohibit doctors from talking about the subject. The law did not cause the doctors an actual, concrete injury, the state said.

The state argued that the ''should refrain'' language gave physicians discretion about whether to ask patients about firearm ownership. The language of the next sentence, it said, expressly permitted physicians to ask about firearm ownership when ''relevant to the patient's medical care or safety, or the safety of others.''

Florida Attorney General Pamela J. Bondi, along with Solicitor General Timothy D. Osterhaus, Assistant Attorney General Jason Vail, and Deputy Solicitors General Diane DeWolf and Rachel E. Nordby, Tallahassee, represented the state.

Not Mere 'Hortatory.' The physicians disagreed in an Oct. 29 2012, response brief, saying the statutory language was not merely ''hortatory.'' The law's use of the word ''should'' instead of ''shall'' was ''not determinative,'' the physicians said, since '' 'should' can impose a mandatory rule of conduct.'' Here, they said, the context made it clear that ''should'' was mandatory. The use of ''may'' in the following sentence made no sense unless the preceding sentence established a mandatory prohibition.

Additionally, the physicians said, interpreting the second sentence—the ''relevance'' exception—so broadly as to allow physicians to ask patients about gun ownership as a routine part of preventive care, ''would contravene, not carry out'' the Florida Legislature's intent in enacting the law. They also pointed out that the statute was vague, since it did not define when the information would be ''relevant to the patient's medical care or safety.''

Hallward-Dreimeier said that the state's position was inconsistent with statutory language providing that a violation of the section ''shall constitute grounds for which disciplinary actions . . . may be taken.'' Also, he said, the same day the law took effect, the Florida Board of Medicine declared that violations of the law would be dealt with under existing disciplinary guidelines applicable to providers who failed ''to comply with legal obligations.''

Based on these considerations, the physicians argued that the law caused them an injury in fact because they felt constrained not to ask patients about gun ownership for fear the state would enforce the law or the state medical board would take disciplinary action against them.

Hallward-Dreimeier, Goetz, and Bruce S. Manheim Jr., of Ropes & Gray, Washington, along with Elizabeth N. Dewar, of Ropes & Gray LLP, Boston; Edward M. Mullins and Hal M. Lucas, of Astigarraga Davis Mullins & Grossman PA, Miami; and Jonathan E. Lowy and Daniel R. Vice, of the Brady Center to Prevent Gun Violence, Washington, represented the physicians.

State: Physicians Misconstrue Law. In a Nov. 20, 2012 reply brief, the state asserted that the physicians misconstrued the act. The act ''does not prohibit [physicians'] speech,'' the brief argued. ''In fact,'' it said, ''the Act *allows* all of the firearms-related preventive care practices that the plaintiff physicians allege to be concerned about.''

Sections of the law that subject health care providers to discipline, the state asserted, did not ''discredit'' its interpretation of the law as merely hortatory. The act contains permitted professional conduct provisions, such as the antidiscrimination and recordkeeping provisions, that may be enforced through professional disciplinary actions, it said.

In short, the state argued, the statute did not prohibit speech and could not be construed as subjecting physicians to discipline.

Amici Weigh In. The National Rifle Association of America Inc. (NRA) Oct. 1, 2012, filed an amicus brief supporting the state's position. NRA argued that the law was not intended to target truthful, nonmisleading speech by physicians. On the contrary, it said, the act was intended to fight ''discrimination against and harassment of individuals who exercise their fundamental right to keep and bear arms, while leaving physicians free to exercise their good faith medical judgment in discussing firearms safety with patients.'' Like the state, the NRA argued that the law ''is precatory, not mandatory.''

Charles J. Cooper, David H. Thompson, and Peter A. Patterson, of Cooper & Kirk PLLC, Washington, filed the brief on behalf of the NRA.

The American Medical Association, in conjunction with a number of national professional associations, Nov. 5, 2012, filed an amicus brief supporting the physicians. In defending the physicians' standing to bring the action, AMA argued that the law ''causes an immediate and concrete modification of physicians' ability to communicate freely in their medical practices.''

On the merits, AMA said, the Firearm Owners' Privacy Act ''prevents physicians from communicating with their patients so as to provide medical care under the accepted standards of the medical profession.''

Richard H. Levenstein, of Kramer Sopko & Levenstein PA, Stuart, Fla., and Jon N. Ekdahl and Leonard

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A. Nelson, of the American Medical Association, Chicago, filed the AMA's brief.

BY MARY ANNE PAZANOWSKI

The state's opening brief is at http://op.bna.com/hl.nsf/r?Open=mapi-92vmu9. The physicians' response brief is at http://op.bna.com/hl.nsf/r?Open=mapi-92vmve. The state's reply brief is at http://op.bna.com/hl.nsf/r?Open=mapi-92vmw8. The NRA's amicus brief is at http://op.bna.com/hl.nsf/r?Open=mapi-92vmx2. The AMA's amicus brief is at http://op.bna.com/hl.nsf/r?Open=mapi-92vmxx.