



To: House Federal and State Affairs Committee

From: Jerry Slaughter
Executive Director

Date: February 20, 2013

Subject: HB 2199; the second amendment protection act

The Kansas Medical Society appreciates the opportunity to submit the following comments on HB 2199, which deals with the regulation of firearms in the state of Kansas. We have no position on the bill itself, but we do have serious concerns about one section of the bill.

Section 9 of the bill prohibits all physicians, except psychiatrists, from inquiring about the presence of firearms in the patient's home or property, as a part of the process of obtaining the patient's medical history. It is our understanding that at least some of the impetus for this section of the bill grew out of concerns that the Affordable Care Act (ACA) contained a provision that requires physicians to ask their patients about guns in the home. There is no such requirement in the ACA. The only reference to this issue that we are aware of is the recent announcement that the President, through an executive order, had directed HHS to issue a letter clarifying that the ACA does not regulate communication between physicians and their patients, nor does it *prohibit* physicians from asking patients about the presence of firearms in the home.

As to the bill itself, our concerns about Section 9 are two-fold. First, the diagnosis and treatment of mental health disorders is not limited to psychiatrists. Most primary care physicians routinely treat their patients for a variety of mental health disorders.

A physician may inquire in an initial questionnaire or medical history interview about a wide variety of matters, such as lifestyle choices, diet, smoking, domestic violence, alcohol abuse, household chemicals, use of bicycle helmets, use of car seats, use of smoke detectors and also, firearms safety. The purpose of the inquiry is so that the physician can determine what subject matters require further follow-up as a part of providing proper medical advice, and most particularly if the patient is suspected to have a diagnosis for a mental health condition. If the subject is not raised by the physician, the patient may not know to raise the issue himself or herself, and therefore may not receive appropriate, possibly life-saving, information about potentially dangerous topics, including firearm safety. The physician can then properly counsel and educate the patient or parent about the potential dangers or risks associated with such substances or devices in the home, and in the case of firearms, remind parents to properly lock or otherwise secure the firearms.

Second, as a matter of public policy, we believe that, within the confines of the confidential physician-patient relationship, physicians should be free to discuss any matters with their patients that are relevant to that patient's health, well-being and safety. Whether it is discussing healthy lifestyles, proper diet, risky behaviors, or taking steps to prevent injuries from potentially dangerous substances or devices in the home, physicians must be free to candidly discuss matters that affect their patients' well-being without undue interference from government.

Courts have long recognized that the free flow of truthful, non-misleading information is critical within the physician-patient relationship, and that attempts by government to regulate the content of physicians' communications with patients are very rarely constitutionally permissible. Content-based restrictions on speech have been permitted only for a few categories of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent.

The United States Supreme Court has recognized that physician speech is entitled to First Amendment protection because of the significance of the physician-patient relationship. To hold that physicians are barred from communicating with patients their sincere medical judgments and non-misleading information would prevent patients from understanding their own situations well enough to make informed decisions about their own health, safety and welfare. We believe this bill inserts itself into the physician-patient relationship in a constitutionally impermissible way, by burdening certain communication necessary to the proper practice of medicine, thereby preventing patients from receiving truthful, non-misleading information which could prevent injury and save lives. The bill would have a chilling effect on physicians' speech in a way that could ultimately harm the patient.

Our concerns can be addressed in the bill in more than one way. We would offer two options for your consideration, and urge that you adopt one or the other of the following:

OPTION 1: amend Section 9 of the bill on page 3, by deleting lines 33-37, and inserting the following therein:

- (a) *Any act, law, treaty, order, rule or regulation of the government of the United States which violates the first amendment to the constitution of the United States by attempting to regulate communication between physician and patient is null, void and unenforceable in the state of Kansas.*
- (b) *A patient may decline to provide information to a health care provider regarding whether the patient has any firearms in such patient's home or on such patient's property. In the event a patient provides information to a health care provider relating to the presence of firearms in such patient's home or on such patient's property, such information is privileged and protected from unauthorized access as set forth in the federal privacy rule (45 C.F.R. part 160 and 45 C.F.R. part 164, subparts A and E, as amended); or*

OPTION 2: strike Section 9 of the bill, which is found on page 3, at lines 33-37.

For the reasons set forth above, we respectfully urge the committee to amend HB 2199 in one of the ways we have recommended. Thank you for the opportunity to offer these comments.

KMS Amendments
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1 state and that are subject to federal regulation as being in interstate
2 commerce do not subject a firearm to federal regulation under interstate
3 commerce because they are attached to or used in conjunction with a
4 firearm in Kansas.

5 Sec. 5. A firearm manufactured in Kansas within the meaning of
6 sections 1 through 11, and amendments thereto, must have the words
7 "Made in Kansas" clearly stamped on a central metallic part, such as the
8 receiver or frame.

9 Sec. 6. (a) Any act, law, treaty, order, rule or regulation of the
10 government of the United States which violates the second amendment to
11 the constitution of the United States is null, void and unenforceable in the
12 state of Kansas.

13 (b) No official, agent or employee of the state of Kansas, nor any
14 dealer selling any firearm in the state of Kansas, shall enforce or attempt to
15 enforce any act, law, treaty, order, rule or regulation of the government of
16 the United States regarding any personal firearm, firearm accessory or
17 ammunition that is owned or manufactured commercially or privately in
18 the state of Kansas and that remains within the borders of Kansas.

19 Sec. 7. It is unlawful for any official, agent or employee of the
20 government of the United States, or employee of a corporation providing
21 services to the government of the United States to enforce or attempt to
22 enforce any act, law, treaty, order, rule or regulation of the government of
23 the United States upon a firearm, a firearm accessory, or ammunition that
24 is owned or manufactured commercially or privately in the state of Kansas
25 and that remains within the borders of Kansas. Violation of this section is a
26 severity level 10 nonperson felony.

27 Sec. 8. Sections 1 through 11, and amendments thereto, do not apply
28 to: (a) A firearm that cannot be carried and used by one person;

29 (b) ammunition with a projectile that explodes using an explosion of
30 chemical energy after the projectile leaves the firearm; or
31 (c) other than shotguns, a firearm that discharges two or more
32 projectiles with one activation of the trigger or other firing device.

33 Sec. 9. ~~No physician, other than a psychiatrist, shall inquire of any
34 patient in conjunction with obtaining the patient's personal information and
35 medical history, whether the patient has any firearms in such patient's
36 home or on such patient's property and shall not require such information
37 before providing treatment.~~

38 Sec. 10. Sections 1 through 11, and amendments thereto, apply to
39 firearms, firearm accessories and ammunition that are owned or
40 manufactured, as defined in section 3, and amendments thereto, and
41 remain within the borders of Kansas on and after October 1, 2009.

42 Sec. 11. If any provision of sections 1 through 10, and amendments
43 thereto, or the application to any persons or circumstances is held to be

(a) Any act, law, treaty, order, rule or regulation of the government of the United States which violates the first amendment to the constitution of the United States by attempting to regulate communication between physician and patient is null, void and unenforceable in the state of Kansas.
(b) A patient may decline to provide information to a health care provider regarding whether the patient has any firearms in such patient's home or on such patient's property. In the event a patient provides information to a health care provider relating to the presence of firearms in such patient's home or on such patient's property, such information is privileged and protected from unauthorized access as set forth in the federal privacy rule (45 C.F.R. part 160 and 45 C.F.R. part 164, subparts A and E, as amended)