

**Introduced by Senator Aanestad**

February 20, 2004

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An act to add Section 11152.5 to the Health and Safety Code, and to add Section 1538.1 to the Penal Code, relating to medical crime.

LEGISLATIVE COUNSEL'S DIGEST

SB 1782, as introduced, Aanestad. Medical crimes: investigation and prosecution.

Existing law provides that a search warrant for property can issue only upon probable cause, supported by affidavit, particularly describing the property, thing, or things and the place to be searched, and requires the application for a warrant to specify, when applicable, that the place to be searched is in the possession or under the control of a physician. Existing law provides special procedures to protect the privacy of patient information and other privileged materials in the context of a search of a physician's records, when the physician is not reasonably suspected of involvement in criminal activity relating to those records.

This bill would make findings and declarations, and state the intent of the Legislature regarding its provisions. The bill would bar the filing of charges against a physician in connection with a physician's prescription of medication to patients unless the prosecutor first obtains declarations under penalty of perjury of at least 2 qualified medical experts, as specified, that the physician did not exercise good faith medical judgment, did not meet the applicable standard of care, and demonstrated malice or demonstrated recklessness that requires the physician be deemed to have known the consequences of his or her actions. This bill would also, in the context of a criminal investigation of a physician, require that patient records taken pursuant to a warrant

be copied by the officer seizing the records, would require those copies be provided by the officer to the physician or the physician’s designee within 5 days, would require the officer by affidavit to indicate this has been done to the magistrate, and would provide for the magistrate to get copies to the physician or the physician’s designee if the officer did not.

By authorizing declarations by medical experts under penalty of perjury, expanding the scope of that felony offense, and by requiring certain acts and affidavits by officers who seek warrants and prosecutors who pursue the prosecution of physicians in connection with prescriptions, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. (a) The Legislature finds and declares that, for  
2 the past 20 years, medical journals have reported that when  
3 physicians fail to manage their patients’ pain appropriately it is  
4 partially out of fear of criminal prosecution. It is the intent of the  
5 Legislature to alleviate this fear by providing for proper review of  
6 cases involving the prescription of pain medication before  
7 criminal charges are filed.

8 (b) It is the intent of the Legislature to encourage physicians to  
9 provide adequate pain management to patients in California  
10 consistent with Section 2241.5 of the Business and Professions  
11 Code, the Intractable Pain Treatment Act.



1 (c) It is the intent of the Legislature that, where patient records  
2 are seized in connection with criminal investigations, physicians  
3 should not be prematurely disabled from practicing medicine by  
4 not having access to their patient treatment records during those  
5 investigations. It is the further intent of the Legislature that, where  
6 medical records have been seized in a criminal investigation or  
7 prosecution, patients should have access to their medical records  
8 through their physicians to continue treatment.

9 SEC. 2. Section 11152.5 is added to the Health and Safety  
10 Code, to read:

11 11152.5. (a) No criminal charges shall be filed in connection  
12 with a physician's prescription of medication to a patient unless the  
13 charging person or entity first obtains declarations under penalty  
14 of perjury of at least two qualified medical experts licensed by and  
15 in good standing with the Medical Board of California and with  
16 substantial current experience in the same specialty and practice  
17 setting as the prospective defendant. These declarations must state  
18 all of the following:

19 (1) The physician did not exercise good faith medical  
20 judgment.

21 (2) The physician did not meet the applicable standard of care.

22 (3) The physician demonstrated malice or demonstrated  
23 recklessness that requires the physician be deemed to have known  
24 the consequences of his or her actions.

25 (b) Where the prospective defendant characterizes the  
26 treatment that gives rise to charges as pain management, at least  
27 one of the qualified medical experts identified in subdivision (a)  
28 must be board certified in pain medicine by a specialty board  
29 recognized by the American Board of Medical Specialties or the  
30 Medical Board of California.

31 SEC. 3. Section 1538.1 is added to the Penal Code, to read:

32 1538.1. (a) Notwithstanding any other provision of law, all  
33 documents that are records of the identity, diagnosis, prognosis, or  
34 treatment of any patient that are taken by an officer pursuant to a  
35 warrant from a physician who is suspected of engaging or having  
36 engaged in criminal activity related to the documents must be  
37 copied by the officer, and the copies must be received within five  
38 days of the seizure by the physician or, if the physician is in  
39 custody, by the physician's designee.



1 (b) If records taken under a warrant are required to be copied  
2 pursuant to this section, the officer shall so indicate at the time of  
3 the return of the warrant, and shall deliver to the magistrate an  
4 affidavit no later than five days from the execution of the warrant  
5 to the following effect: “I, R.S., the officer by whom this warrant  
6 was executed, do swear that true and clear copies of all records of  
7 the identity, diagnosis, prognosis, or treatment of any patient that  
8 were taken under this warrant were delivered within five days of  
9 seizure to the physician who was subject of the search warrant or  
10 to that physician’s designee, if the physician is in custody.”

11 (c) If no statement is received indicating that copies of these  
12 records have been provided to the physician or the physician’s  
13 designee within the time provided, the magistrate shall order that  
14 copies be delivered to the magistrate within three days, and the  
15 magistrate shall deliver the copies to the physician or the  
16 physician’s designee within two days following their receipt by the  
17 magistrate.

18 SEC. 4. No reimbursement is required by this act pursuant to  
19 Section 6 of Article XIII B of the California Constitution for  
20 certain costs that may be incurred by a local agency or school  
21 district because in that regard this act creates a new crime or  
22 infraction, eliminates a crime or infraction, or changes the penalty  
23 for a crime or infraction, within the meaning of Section 17556 of  
24 the Government Code, or changes the definition of a crime within  
25 the meaning of Section 6 of Article XIII B of the California  
26 Constitution.

27 However, notwithstanding Section 17610 of the Government  
28 Code, if the Commission on State Mandates determines that this  
29 act contains other costs mandated by the state, reimbursement to  
30 local agencies and school districts for those costs shall be made  
31 pursuant to Part 7 (commencing with Section 17500) of Division  
32 4 of Title 2 of the Government Code. If the statewide cost of the  
33 claim for reimbursement does not exceed one million dollars  
34 (\$1,000,000), reimbursement shall be made from the State  
35 Mandates Claims Fund.

