

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1084

SPONSOR: Judiciary Committee and Senator Villalobos

SUBJECT: Medical Malpractice Presuit Investigations

DATE: March 20, 2001      REVISED: 2/24/2001 \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Forgas</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	<u>Munroe</u>	<u>Wilson</u>	<u>HC</u>	<u>Favorable</u>
3.	_____	_____	<u>BI</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

This committee substitute amends s. 766.104, F.S., to allow a health care practitioner to provide the medical records of a deceased patient to the spouse, parent, adult child, guardian, surrogate, proxy, or attorney in fact of the deceased patient. The committee substitute allows the health care provider to provide the records to such persons subsequent to the death of the patient and prior to the administration of the deceased patient’s estate. This provision only applies for the purpose of completing the investigation of a potential medical malpractice claim, as required by s. 766.104, F.S.

The committee substitute also provides the health care practitioner with immunity from civil damages and disciplinary action, as long as the health care practitioner acts in good faith in complying with the bill’s provisions.

This committee substitute substantially amends section 766.104 of the Florida Statutes.

**II. Present Situation:**

Chapter 766, F.S., entitled Medical Malpractice and Related Matters, provides for standards of recovery in medical negligence cases. Section 766.104(1), F.S., provides that no action shall be filed for personal injury or wrongful death arising out of medical negligence unless the attorney filing the action has made a reasonable investigation to determine there are grounds for a good faith belief there has been negligence in the care or treatment of the claimant. Additionally, sections 766.203-766.206, F.S., set out the presuit investigation procedure that both the claimant and defendant must follow before a medical negligence claim may be brought in court. The first step is for the claimant to determine whether reasonable grounds exist to believe that a defendant acted negligently in the claimant’s care or treatment, and that this negligence caused the

claimant's injury. The claim must be corroborated by a verified written medical expert opinion before giving notice to a defendant.

One of the key elements in determining whether medical malpractice has occurred is the patient's medical records. Generally, medical records kept by health care practitioners in connection with the examination or treatment of patients may not be furnished to any person other than the patient, the patient's legal representative, or other health care practitioners rendering treatment to the patient. *See* s. 456.057(5), F.S. The records may be provided to other people or entities when the patient gives written authorization for the release of the records to the other persons or entities. Section 456.057(5), F.S., also provides for the furnishing of the patient's records without the patient's written authorization under certain limited conditions (e.g. pursuant to a subpoena).

Section 456.057, F.S., does not allow the release of a deceased patient's medical records to anyone other than the deceased or the deceased's legal representative. For obvious reasons, the deceased patient cannot obtain the medical records. Unless the deceased had a legal representative prior to death, or the deceased had provided written authorization for the release of the medical records to a family member, the family of the deceased patient has no mechanism under current Florida law to obtain the deceased's medical records until an estate has been opened and an administrator of the estate has been appointed.

### **III. Effect of Proposed Changes:**

The committee substitute adds subsection (3) to s. 766.104, F.S., to provide that, for the purposes of completing the presuit investigation in a medical malpractice case, copies of all medical records and reports relating to the care and treatment of a deceased patient shall be made available, upon request, to the spouse, parent, child who has reached majority, guardian, surrogate, proxy or attorney in fact for the deceased. The request and furnishing of the records may be made after the death of the patient and before the administration of the patient's estate. The health care practitioner must furnish all medical records and reports, including bills, films, and any other records, relating to the care and treatment of the deceased patient, which are in the possession of the health care practitioner.

The committee substitute only applies to health care practitioners as defined in s. 456.001, F.S. Section 456.001, F.S., defines a health care practitioner as any person licensed under: chapter 457 (acupuncturist), chapter 458 (medical physicians), chapter 459 (osteopathic physicians), chapter 460 (chiropractic physicians), chapter 461 (podiatric physicians), chapter 462 (naturopaths), chapter 463 (optometrists), chapter 464 (nurses), chapter 465 (pharmacists), chapter 466 (dentists), chapter 467 (midwives), chapter 468 (audiologists, speech language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dietitians/nutritionists, athletic trainers, orthotists, pedorthists, prosthetists), chapter 478 (electrologists), chapter 480 (massage therapists), chapter 483 (clinical laboratory personnel and medical physicists), chapter 484 (opticians and hearing aid specialists), chapter 486 (physical therapists), chapter 490 (psychologists), and chapter 491 (clinical social workers, marriage and family therapists, and mental health counselors).

The committee substitute allows the spouse, parent or adult child of the deceased to make the request for records. Also, a surrogate or proxy acting pursuant to chapter 765, F.S., guardian acting pursuant to chapter 744, F.S., or attorney in fact of the deceased acting pursuant to chapter 709, F.S., may request the records.

The health care practitioner shall provide the deceased patient's medical records "upon request." Accordingly, verbal requests for records would probably be permitted.

The committee substitute provides that a health care practitioner who complies in good faith with the bill's provisions is not liable for any civil damages attributable to the disclosure of the medical records. Likewise, a health care practitioner is not subject to any disciplinary action based on any such disclosure.

The effective date of the bill is July 1, 2001.

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

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

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

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

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

##### **C. Trust Funds Restrictions:**

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

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

The bill should make it easier and quicker for family members of a deceased relative to obtain the deceased relative's medical records.

##### **C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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