

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.)

Prepared By: Health Care Committee

BILL: PCS/SB 940

SPONSOR: Health Care Committee and Senator Peadar

SUBJECT: Repeated Medical Malpractice

DATE: March 11, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HE	Pre-meeting
2.	_____	_____	JU	_____
3.	_____	_____	WM	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The proposed committee substitute creates a provision within the medical practice act for purposes of implementing s. 26, Art. X of the Florida Constitution, which provides that “[n]o person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a medical doctor.” The Florida Board of Medicine is prohibited from certifying a person to the Florida Department of Health (DOH) for a license to provide health care services as a medical doctor if that person has been found to have committed three or more incidents of medical malpractice and the department may not continue to license a person to provide health care services as a medical doctor if that person has been found to have committed three or more incidents of medical malpractice. The bill applies only to incidents of medical malpractice which occur on or after November 2, 2004.

“Medical malpractice” is defined to mean both the failure to practice medicine in Florida with that level of care, skill, and treatment recognized in general law related to health care providers’ licensure, and any similar wrongful act, neglect, or default in other states or countries which, if committed in Florida, would have been considered medical malpractice. “Found to have committed” is defined to mean that the malpractice has been found in a final judgment of a court of law, final administrative agency decision, or decision of binding arbitration.

This bill creates section 458.3195, Florida Statutes.

II. Present Situation:

Constitutional Amendment 8

Constitutional Amendment 8, entitled “Public Protection from Repeated Medical Malpractice,” was filed with the Secretary of State on April 7, 2003, and proposed through the citizens’ initiative process. The amendment was placed on the November 2, 2004 ballot and approved by the voters. The final certification by the Canvassing Commission of the vote for the election of November 2, 2004, was November 14, 2004. The amendment provides that it takes effect on the date it was approved by the electorate.¹

Amendment 8 is codified in s. 26, Art. X of the State Constitution² and states:

(a) No person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a medical doctor.

(b) For purposes of this section, the following terms have the following meanings:

(1) The phrase “medical malpractice” means both the failure to practice medicine in Florida with that level of care, skill, and treatment recognized in general law related to health care providers' licensure, and any similar wrongful act, neglect, or default in other states or countries which, if committed in Florida, would have been considered medical malpractice.

(2) The phrase “found to have committed” means that the malpractice has been found in a final judgment of a court of law, final administrative agency decision, or decision of binding arbitration.

On October 18, 2004, the Florida Hospital Association (FHA) and other health care entities filed suit (2004 CA 002483) in the 2nd Judicial Circuit in Franklin, Gadsden, Jefferson, Leon, Liberty, and Wakulla Counties for declaratory and injunctive relief relating to Amendment 8. Judge Ferris had a hearing on the FHA’s motion for a temporary injunction on November 15, 2004. Judge Ferris ruled in favor of the FHA and issued an oral order granting a temporary injunction against implementation of Amendment 8 until after the 2005 Regular Session of the Legislature. The FHA also has a motion for partial summary judgment and is asking the judge to rule on the question of whether the amendment is self-executing. There has not been a hearing or ruling on that issue yet. On November 18, 2004, Judge Ferris granted a motion by the Floridians for Patient Protection to intervene in the action. The Pediatrix Medical Group filed a motion to appear as amicus curiae and on January 7, 2005, the motion was denied. On December 17, 2004, the FHA moved to add the following additional parties as plaintiffs to the proceedings: All Children’s Hospital, Inc.; Bay Medical Center; Bay Medical Center, A Special District of the State of Florida; Holy Cross Hospital, Inc.; Lakeland Regional Hospital; and University Community Hospital, and the motion was granted on December 20, 2004.

¹ Amendment 8 provides that the “amendment shall be effective on the date it is approved by the electorate. If any portion of this measure is held invalid for any reason, the remaining portion of this measure, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.”

² This section, originally designated section 20 by Amendment No. 8, 2004, was redesignated section 26 in order to avoid confusion with already existing section 20, relating to prohibiting workplace smoking.

On December 6, 2005, Floridians for Patient Protection filed a motion for dismissal of the complaint based on the court's lack of subject-matter jurisdiction. The court has not yet ruled on this motion for dismissal.

Practice of Medicine

Chapter 458, F.S., governs the practice of medicine under the Board of Medicine within DOH. Under s. 458.311 and s. 458.313, F.S., DOH must issue a license to any applicant who the Board of Medicine certifies has met the requirements to practice medicine as a physician in Florida. Section 458.331, F.S., provides grounds for which a medical physician may be subject to discipline by his or her board. Medical physicians may be subject to discipline for gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. "Repeated malpractice" includes, but is not limited to, three or more claims for medical malpractice within the previous 5-year period resulting in indemnities being paid in excess of \$50,000 each to the claimant in a judgment or settlement and which incidents involved negligent conduct by the physician.

Under s. 456.049, F.S., Florida-licensed medical physicians must report to the Office of Insurance Regulation any claim or action for damages for personal injury alleged to have been caused by error, omission, or negligence in the performance of such licensee's professional services or based on a claimed performance of professional services without consent pursuant to s. 627.912, F.S. The Office of Insurance Regulation must provide DOH with electronic access to all information it receives and DOH must review each report and determine whether any of the incidents that resulted in the claim potentially involved conduct by the licensee that is subject to disciplinary action, in which case the provisions of s. 456.073, F.S. apply.

Health Care Practitioner Disciplinary Procedures

Section 456.073, F.S., sets forth procedures DOH and regulatory boards must follow in order to conduct disciplinary proceedings against practitioners under its jurisdiction. The department, for the boards under its jurisdiction, must investigate all written complaints filed with it that are legally sufficient. Complaints are legally sufficient if they contain facts, which, if true, show that a licensee has violated any applicable regulations governing the licensee's profession or occupation. Even if the original complainant withdraws or otherwise indicates a desire that the complaint not be investigated or prosecuted to its completion, the department at its discretion may continue its investigation of the complaint. The department may investigate anonymous, written complaints or complaints filed by confidential informants if the complaints are legally sufficient and the department has reason to believe after a preliminary inquiry that the alleged violations are true. If the department has reasonable cause to believe that a licensee has violated any applicable regulations governing the licensee's profession, it may initiate an investigation on its own.

When investigations of licensees within the department's jurisdiction are determined to be complete and legally sufficient, the department is required to prepare, and submit to a probable cause panel of the appropriate board, if there is a board, an investigative report along with a

recommendation of the department regarding the existence of probable cause. A board has discretion over whether to delegate the responsibility of determining probable cause to the department or to retain the responsibility to do so by appointing a probable cause panel for the board. The determination as to whether probable cause exists must be made by majority vote of a probable cause panel of the appropriate board, or by the department if there is no board or if the board has delegated the probable cause determination to the department.

The subject of the complaint must be notified regarding the department's investigation of alleged violations that may subject the licensee to disciplinary action. When the department investigates a complaint, it must provide the subject of the complaint or her or his attorney a copy of the complaint or document that resulted in the initiation of the investigation. Except for cases involving physicians, within 20 days after the service of the complaint, the subject of the complaint may submit a written response to the information contained in the complaint. The department may conduct an investigation without notification to the subject if the act under investigation is a criminal offense. If the department's secretary or her or his designee and the chair of its probable cause panel agree, in writing, that notification to the subject of the investigation would be detrimental to the investigation, then the department may withhold notification of the subject.

If the subject of the complaint makes a written request and agrees to maintain the confidentiality of the information, the subject may review the department's complete investigative file. The licensee may respond within 20 days of the licensee's review of the investigative file to information in the file before it is considered by the probable cause panel. Complaints and information obtained by the department during its investigations are exempt from the Public Records Law until 10 days after probable cause has been found to exist by the probable cause panel or the department, or until the subject of the investigation waives confidentiality. If no probable cause is found to exist, the complaints and information remain confidential in perpetuity.

When the department presents its recommendations regarding the existence of probable cause to the probable cause panel of the appropriate board, the panel may find that probable cause exists or does not exist, or it may find that additional investigative information is necessary in order to make its findings regarding probable cause. Probable cause proceedings are exempt from the noticing requirements of ch. 120, F.S. After the panel convenes and receives the department's final investigative report, the panel may make additional requests for investigative information. Section 456.073(4), F.S., specifies time limits within which the probable cause panel may request additional investigative information from the department and within which the probable cause panel must make a determination regarding the existence of probable cause. Within 30 days of receiving the final investigative report, the department or the appropriate probable cause panel must make a determination regarding the existence of probable cause. The secretary of the department may grant an extension of the 15-day and 30-day time limits outlined in s. 456.073(4), F.S. If the panel does not issue a letter of guidance or find probable cause within the 30-day time limit as extended, the department must make a determination regarding the existence of probable cause within 10 days after the time limit has elapsed.

Instead of making a finding of probable cause, the probable cause panel may issue a letter of guidance to the subject of a disciplinary complaint. Letters of guidance do not constitute

discipline. If the panel finds that probable cause exists, it must direct the department to file a formal administrative complaint against the licensee under the provisions of ch. 120, F.S. The department has the option of not prosecuting the complaint if it finds that probable cause has been improvidently found by the probable cause panel. In the event the department does not prosecute the complaint on the grounds that probable cause was improvidently found, it must refer the complaint back to the board that then may independently prosecute the complaint. The department must report to the appropriate board any investigation or disciplinary proceeding not before the Division of Administrative Hearings under ch. 120, F.S., or otherwise not completed within 1 year of the filing of the complaint. The appropriate probable cause panel then has the option to retain independent legal counsel, employ investigators, and continue the investigation, as it deems necessary.

When an administrative complaint is filed against a subject based on an alleged disciplinary violation, the subject of the complaint is informed of her or his right to request an informal hearing if there are no disputed issues of material fact, or a formal hearing if there are disputed issues of material fact or the subject disputes the allegations of the complaint. The subject may waive her or his rights to object to the allegations of the complaint, which allows the department to proceed with the prosecution of the case without the licensee's involvement. Once the administrative complaint has been filed, the licensee has 21 days to respond to the department. If the subject of the complaint and the department do not agree in writing that there are no disputed issues of material fact, s. 456.073(5), F.S., requires a formal hearing before a hearing officer of the Division of Administrative Hearings under ch. 120, F.S. The hearing provides a forum for the licensee to dispute the allegations of the administrative complaint. At any point before an administrative hearing is held, the licensee and the department may reach a settlement. The settlement is prepared by the prosecuting attorney and sent to the appropriate board. The board may accept, reject, or modify the settlement offer. If accepted, the board may issue a final order to dispose of the complaint. If rejected or modified by the board, the licensee and department may renegotiate a settlement or the licensee may request a formal hearing. If a hearing is held, the hearing officer makes findings of fact and conclusions of law that are placed in a recommended order. The licensee and the department's prosecuting attorney may file exceptions to the hearing officer's findings of facts. The boards resolve the exceptions to the hearing officer's findings of facts when they issue a final order for the disciplinary action.

The boards within DOH have the status of an agency for certain administrative actions, including licensee discipline. A board may issue an order imposing discipline on any licensee under its jurisdiction as authorized by the profession's practice act and the provisions of ch. 456, F.S. Typically, boards are authorized to impose the following disciplinary penalties against licensees: 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 for each count or separate offense; issuance of a reprimand or letter of concern; placement of the licensee on probation for a specified period of time and subject to specified conditions; or corrective action.

Emergency Suspension of a License

Section 120.60(6), F.S., authorizes an agency to take emergency action against a license if the agency finds that immediate serious danger to the public health, safety, or welfare requires

emergency suspension, restriction, or limitation of a license.³ The agency may take such action by any procedure that is fair under the circumstances if: the procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution; the agency takes only that action necessary to protect the public interest under the emergency procedure; and the agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable.⁴ Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding under ss. 120.569 and 120.57, F.S., must also be promptly instituted and acted upon.

Voluntary Binding Arbitration in a Medical Malpractice Action

Section 766.207, F.S., provides for voluntary binding arbitration of medical negligence claims. Upon completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, either party may elect to have damages determined by an arbitration panel. The opposing party may accept the offer of voluntary binding arbitration and the acceptance is a binding commitment to comply with the decision of the arbitration panel. Arbitration precludes recourse to any other remedy by the claimant against any participating defendant. Voluntary binding arbitration is undertaken with the understanding that:

- Net economic damages shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments;
- Noneconomic damages shall be limited to a maximum of \$250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his or her capacity to enjoy life would warrant an award of not more than \$125,000 noneconomic damages;
- Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(8), F.S., and shall be offset by future collateral source payments;
- Punitive damages shall not be awarded;
- The defendant shall be responsible for the payment of interest on all accrued damages with respect to which interest would be awarded at trial;
- The defendant shall pay the claimant's reasonable attorney's fees and costs, as determined by the arbitration panel, but in no event more than 15 percent of the award, reduced to present value;

³ Similar procedures are required for emergency rulemaking under the Administrative Procedure Act. See s. 120.54(4)(a), F.S.

⁴ See also s. 120.68, F.S., which provides for immediate judicial review of final agency action.

- The defendant shall pay all the costs of the arbitration proceeding and the fees of all the arbitrators other than the administrative law judge;
- Each defendant who submits to arbitration shall be jointly and severally liable for all damages assessed under this section;
- The defendant's obligation to pay the claimant's damages shall be for the purpose of arbitration under this section only;
- A defendant's or claimant's offer to arbitrate shall not be used in evidence or in argument during any subsequent litigation of the claim following the rejection thereof;
- The fact of making or accepting an offer to arbitrate shall not be admissible as evidence of liability in any collateral or subsequent proceeding on the claim;
- Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim;
- Any offer by a defendant to arbitrate must be made to each claimant who has joined in the notice of intent to initiate litigation;
- A defendant who rejects a claimant's offer to arbitrate shall be subject to the claim proceeding to trial without limitation on damages, and the claimant, upon proving medical negligence, shall be entitled to recover prejudgment interest, and reasonable attorney's fees up to 25 percent of the award reduced to present value;
- A claimant who rejects a defendant's offer to arbitrate shall be subject to damages awardable at trial being limited to net economic damages, plus noneconomic damages not to exceed \$350,000 per incident;
- The hearing shall be conducted by all of the arbitrators, but a majority may determine any question of fact and render a final decision;
- The chief arbitrator shall decide all evidentiary matters; and
- Voluntary binding arbitration does not preclude settlement at any time by mutual agreement of the parties.

Section 766.207, F.S., also specifies that the arbitration panel is composed of three arbitrators, one selected by the claimant, one selected by the defendant, and one an administrative law judge furnished by the Division of Administrative Hearings who shall serve as the chief arbitrator. This section specifies how arbitrators are to be selected if there are multiple plaintiffs or multiple defendants, requires independence of arbitrators, specifies the rate of compensation for arbitrators, and authorizes the Division of Administrative Hearings to promulgate rules for voluntary binding arbitration.

III. Effect of Proposed Changes:

The bill creates a provision within the medical practice act for purposes of implementing s. 26, Art. X of the Florida Constitution, which provides that “[n]o person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a medical doctor.”

Section 458.3195, F.S., is created to prohibit the Florida Board of Medicine from certifying a person to the Florida Department of Health for a license to provide health care services as a medical doctor if that person has been found to have committed three or more incidents of medical malpractice and the department may not continue to license a person to provide health care services as a medical doctor if that person has been found to have committed three or more incidents of medical malpractice. The bill applies only to incidents of medical malpractice which occur on or after November 2, 2004.

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The bill provides an effective date of upon becoming a law.

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 Article VII, Section 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 Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

The bill implements s. 26, Art. X of the Florida Constitution. A constitutional provision may be self-executing and require no legislative action to put its terms into operation or it may not be self-executing and require legislative action to make it operative. The test for determining whether a constitutional provision should be construed to be self-executing or not self-executing is whether the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be

determined, enjoyed, or protected without the aid of legislative enactment. See *Gray v. Bryant*, 125 So.2d 846 (Fla. 1960). Committee staff is not aware of any binding appellate decisions regarding whether s. 26, Art X of the Florida Constitution is self-executing or not self-executing.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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

VIII. Summary of Amendments:

None.

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