HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1739 PCB JU 05-03 Repeated Medical Malpractice
SPONSOR(S): Judiciary Committee and Simmons
TIED BILLS: IDEN./SIM. BILLS: SB 940

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Judiciary Committee	12 Y, 0 N	Hogge	Hogge
1) Health Care Regulation Committee	10 Y, 0 N	Hamrick	Mitchell
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

On November 2, 2004, Florida voters approved Constitutional Amendment 8, relating to repeated medical malpractice. The bill combines the provisions of Constitutional Amendment 8 with supplemental statutory provisions relating to repeated medical malpractice. In so doing, it also conforms terminology and definitions in the disciplinary provisions of the practice act for medical doctors (i.e., allopathic and osteopathic physicians under the bill) with those of the new section of law implementing Constitutional Amendment 8. Among other changes, the bill:

- Applies Constitutional Amendment 8 prospectively to incidents occurring on or after November 3, 2004, and defines "medical doctor" to include only physicians licensed under chapter 458 or 459, F.S.
- Incorporates the definition of "medical malpractice" from Constitutional Amendment 8, applies the standard of care used in civil actions for medical malpractice to findings of medical malpractice under the disciplinary provisions of the medical doctor practice act and Constitutional Amendment 8.
- Labels the conduct proscribed in Constitutional Amendment 8—committing three or more incidents of medical malpractice—as "repeated medical malpractice." In so doing, the bill also defines the term "incident" and modifies thresholds for a finding of repeated medical malpractice under current law.
- For the Board of Medicine or the Board of Osteopathic Medicine, as applicable, to count a similar act committed in another state or country as medical malpractice for purposes of mandatory license denial or revocation under Constitutional Amendment 8, requires the other state or country to have applied a standard of care and burden of proof equal to or exceeding that used in Florida.
- Assigns responsibility to the Board of Medicine or the Board of Osteopathic Medicine, as applicable, to determine by clear and convincing evidence that a medical doctor has committed repeated medical malpractice. The bill requires board review of the record of any incident found to be malpractice using a less stringent standard of review.

The fiscal impact results principally from the requirements of Constitutional Amendment 8, rather than from this bill, in evaluating findings of medical malpractice from Florida and other jurisdictions. The Board of Medicine and the Board of Osteopathic Medicine are likely to experience increased costs resulting from conducting any required reviews. The number and extent of these reviews is indeterminate.

The bill takes effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

To the extent the principles are invoked, it is due to the terms of Constitutional Amendment 8 and not to this implementing bill.

B. EFFECT OF PROPOSED CHANGES:

General Background

On November 2, 2004, Florida voters approved Constitutional Amendment 8[1] relating to repeated medical malpractice. Constitutional Amendment 8, provides that "no person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed…to provide health care services as a medical doctor."[2]

Since approved by the voters, the amendment has been the subject of several lawsuits seeking to have the amendment enjoined. At least one circuit court has issued an injunction against the implementation of the amendment in order to give the Legislature the opportunity to consider what the court considered to be numerous unanswered implementation questions.

> "Because implementation of Amendment 8 may require significant changes to existing licensing statutes and rules, including changes to what is already a complex administrative process; the Court must conclude that the Amendment will require some statutory framework in order to be effective."[3]

Proposed Changes

The bill combines the provisions of Constitutional Amendment 8 with supplemental statutory provisions relating to repeated medical malpractice. In so doing, it also conforms terminology and definitions in the disciplinary provisions of the physician practice acts under chapters 458 and 459, F.S., with those of the new section of law implementing Constitutional Amendment 8.

Applicability of the amendment

The bill defines "medical doctor," for purposes of applying Constitutional Amendment 8, as physicians licensed under chapter 458 or 459, F.S. Chapter 458, F.S., physicians are allopathic physicians holding the degree of Medical Doctor, and chapter 459, F.S., physicians are osteopathic physicians.

By its terms, Constitutional Amendment 8 applies to "medical doctors," but leaves that phrase undefined. "Medical doctor" is not defined in existing statutes relating to the health professions, medical practice, or physician licensing. It is defined in only one place, that being in an unrelated section of the Insurance Code dealing with contract construction for prepaid health clinics.[4] Although "physician" and "medical doctor" appear to be used interchangeably in certain contexts in Florida

[1] Art. X, s. 20, Fla. Const.
[2] *Id.*
[3] Florida Hospital Association v. Florida Agency for Health Care Administration, Case No. 2004 CA 002483, Order granting Plaintiffs' Joint Motion for Temporary Injunction, at 8.
[4] S. 641.425(2), Fla. Stat.(2004)

Statutes, the only practitioners with the degree Doctor of Medicine are allopathic physicians licensed under chapter 458, F.S.[5]

The bill also gives Constitutional Amendment 8 prospective application by making it applicable only to incidents occurring on or after November 3, 2004.

Malpractice defined

The bill incorporates the definition of "medical malpractice" found in Constitutional Amendment 8 into the new section of law pertaining to repeated medical malpractice and into disciplinary provisions of the practice acts under chapters 458 and 459, F.S. However, the bill makes that part of the definition treating similar acts committed in other states or countries as medical malpractice applicable only to findings of repeated medical malpractice triggering the mandatory sanctions under Constitutional Amendment 8.

Furthermore, in the event the medical doctor has committed similar wrongful acts in other states or countries, the bill treats these acts as medical malpractice for purposes of finding repeated medical malpractice only if the other state or country applied a standard of care and burden of proof equal to or exceeding that used in Florida.

Constitutional Amendment 8 defines "medical malpractice" to mean "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…." It also includes "any similar wrongful act, neglect, or default in other states or countries which, if committed in Florida, would have been considered medical malpractice."[6]

In Florida, the standard of care for physicians for purposes of determining if grounds exist for disciplinary action is "that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances."[7] The burden of proof required to suspend or revoke a license is "clear and convincing evidence."[8]

The bill labels the conduct proscribed in Constitutional Amendment 8—committing three or more incidents of medical malpractice—as "repeated medical malpractice."

In so doing, the bill also defines the term "incident" and incorporates timeframes and modifies thresholds from current disciplinary provisions of the practice act for allopathic and osteopathic physicians (i.e., incidents occurring within a 5-year period would be changed to incidents occurring within a 10 year period but the dollar threshold in current law—in excess of $50,000 per incident--would be retained.[9]

"Incident" is defined in the bill to mean the wrongful act or occurrence from which the medical malpractice arises, regardless of the number of claimants or findings.

In determining whether or not a medical doctor has committed repeated medical malpractice, the bill requires the Board of Medicine or the Board of Osteopathic Medicine, as applicable, to base its finding

[5] In a brief filed on June 1, 2004, the Floridians for Patient Protection (amendment proponents) claimed Constitutional Amendment 8 applies only to medical doctors and not to dentists (ch. 466, F.S.), osteopaths (ch. 459, F.S.), or chiropractors (ch. 460, F.S.): (U)se of the term "medical doctor" together with "licensed to practice medicine" prevents voters from mistakenly supposing that the proposed Public Protection amendments will apply to other professionals such as dentists, osteopaths or chiropractors. Answer Brief of Sponsor Floridians for Patient Protection in support of the Initiative, Re: Request of the Attorney General for an Advisory Opinion as to the validity of an Initiative Petition, Supreme Court of Florida, Case No. SC04-778, June 1, 2004, at 18.

[6] Art. X, s. 20 b)i), Fla. Const.

[7] S. 458.331(1)(t), Fla. Stat. (2004) and s. 459.015 (1)(x), Fla. Stat. (2004). The standard for osteopathic physicians is virtually identical. Note also that the standard of care applied in a civil action for medical malpractice varies somewhat from that required in a licensing context. See s. 766.102, Fla. Stat. (2004)

[8] S. 458.331(3), Fla. Stat. (2004) and s. 459.015 (3), Fla. Stat. (2004)

[9] S. 458.331 (1)(t), Fla. Stat. (2004) and s. 459.015 (1)(x), Fla. Stat. (2004)

on clear and convincing evidence. To rely on an incident of medical malpractice as a basis for triggering the mandatory sanctions under Constitutional Amendment 8, the finding must have been based on a clear and convincing standard. If based on a less stringent standard, such as preponderance of the evidence, then the Board must review the record of the case and find that the decision would be supported by such evidence.

The bill directs each board, as applicable, to adopt by rule, a procedure for conducting the review that does not require a de novo hearing or trial, but does allow the submission of briefs and oral argument.

In a disciplinary proceeding against a physician under current statutory provisions, the Division of Medical Quality Assurance (Division) within the Department of Health acts as the prosecutorial authority and has the burden of establishing the grounds for disciplinary action "by the greater weight of the evidence."[10] However, the Division must establish the grounds for suspension or revocation of a license by "clear and convincing evidence."[11]

In Florida, the Supreme Court has found the revocation of a professional license to be of "sufficient gravity and magnitude" to warrant a standard of proof that is clear and convincing,[12] although the Court has declined to extend this standard to license application proceedings.[13]

Standard of care

The bill makes the standard of care utilized in civil actions for medical malpractice the standard of care under Constitutional Amendment 8 by defining the phrase "level of care, skill, and treatment recognized in general law related to health care providers' licensure," as used in Constitutional Amendment 8, to mean "the standard of care specified in 766.02."

The bill also conforms the standard of care in the disciplinary provisions of the practice acts in chapters 458 and 459, F.S., to the standard used in civil actions. As a result, the standard of care will be the same whether a civil action for medical malpractice, a disciplinary proceeding for medical malpractice, or a finding of repeated medical malpractice under Constitutional Amendment 8.

In Florida, the standard of care related to physician licensure is "that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances." This standard is essentially the same as that provided in civil actions for medical malpractice in s. 766.102, F.S.

Disciplinary action

The bill retains board discretion in disciplining medical doctors (as defined in the act) found to have committed malpractice, but incorporates the provision of Constitutional Amendment 8 removing this discretion when the Board finds a medical doctor has committed repeated medical malpractice as defined in the bill. When that occurs, the applicable board must deny the license of an applicant or revoke the license of a medical doctor.

Under existing statutory provisions, the Board of Medicine and the Board of Osteopathic Medicine may discipline physicians for medical malpractice, including gross or repeated medical malpractice, but they are not required to deny, suspend, or revoke their license. The sanction to be imposed is left to the discretion of the applicable board.[14] In making that determination, the applicable board must consider the response necessary to protect the public or compensate the patient. The constitutional amendment

[10] S. 458.331(3), Fla. Stat. (2004) and s. 459.015(3), Fla. Stat. (2004)
[11] *Id.*
[12] Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987)
[13] Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 933-34 (Fla. 1996)
[14] S. 458.331(1) and (2), Fla. Stat.(2004) and s. 459.015(2), Fla. Stat. (2004)

removes this discretion when the Board finds the medical doctor has committed repeated medical malpractice—that is, denial or revocation is mandatory.

C. SECTION DIRECTORY:

Section 1. Creates s. 456.50, F.S., implementing Article. X, section 20, of the Florida Constitution relating to repeated medical malpractice.

Section 2. Amends s. 458.331, F.S., relating to the grounds for denial of a license or disciplinary action for allopathic physicians for reasons of malpractice.

Section 3. Amends s. 459.015, F.S., relating to the grounds for denial of a license or disciplinary action for osteopathic physicians for reasons of malpractice.

Section 4. Provides the bill shall take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See II.D., FISCAL COMMENTS.

2. Expenditures:

   See II.D., FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   See II.D. FISCAL COMMENTS.

2. Expenditures:

   See II.D., FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. Physicians may be adversely affected, such that they may alter their practice and limit high risk procedures. Any fiscal impact to the private sector is due to the terms of Constitutional Amendment 8 and not to this implementing bill.

D. FISCAL COMMENTS:

The fiscal impact results principally from the requirements of Constitutional Amendment 8, rather than from this bill, in evaluating findings of medical malpractice from other jurisdictions. The Board of Medicine and the Board of Osteopathic Medicine are likely to experience increased costs resulting from having to conduct reviews of those malpractice findings based on a standard less stringent than a clear and convincing standard. The number and extent of these reviews is indeterminate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

No additional rulemaking authority is required to implement the provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 16, 2005, the Judiciary Committee amended, then adopted, the proposed committee bill. The amended version differs from the original version in that the amended version:

- Replaces reference to “indemnities being paid” for purposes of the definition of “repeated medical malpractice” with a reference to incidents of malpractice which “required payment.”
- Changes, from 5 years to 10 years, the period of time within which the three incidents of medical malpractice must have occurred to constitute “repeated medical malpractice.”
- Authorizes the Board of Medicine and Board of Osteopathic Medicine, as applicable, to use certain databases to verify the medical malpractice history of out-of-state licensees.
- Directs the Board of Medicine and Board of Osteopathic Medicine, as applicable, to adopt a process for reviewing the record and determining if a finding of malpractice would be supported under the clear and convincing standard. Prohibits procedures that provide for a de novo trial or hearing, but permits submission of briefs and oral arguments.

This analysis is written to the bill as amended.