

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: Judiciary Committee

BILL: CS/SB 940

SPONSOR: Health Care Committee and Senator Peaden

SUBJECT: Repeated Medical Malpractice

DATE: April 5, 2005

REVISED: 04/07/05

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Munroe</u>	<u>Wilson</u>	<u>HC</u>	Fav/CS
2.	<u>Cibula</u>	<u>Maclure</u>	<u>JU</u>	Favorable
3.	<u></u>	<u></u>	<u>BI</u>	Withdrawn
4.	<u></u>	<u></u>	<u>HA</u>	Withdrawn
5.	<u></u>	<u></u>	<u>WM</u>	Withdrawn
6.	<u></u>	<u></u>	<u>RC</u>	Withdrawn

I. Summary:

This committee substitute appears designed to clarify and implement the provisions of Amendment 8 to the State Constitution, which prohibits persons who have engaged in repeated medical malpractice from having a medical license.

Under the committee substitute, the Department of Health must use databases including the National Practitioner Data Bank to verify the medical malpractice claims against medical doctors, osteopathic physicians, and certain other medical professionals. The committee substitute also requires findings of medical malpractice to be made by clear and convincing evidence in order to count against a medical doctor or osteopathic physician to revoke or deny a medical license as required by Amendment 8. However, not all findings of medical malpractice by clear and convincing evidence count toward license revocation.

This bill substantially amends the following sections of the Florida Statutes: 456.041, 458.331, and 459.015. This bill also creates section 456.50, Florida Statutes.

II. Present Situation:

The Department of Health (department) regulates and licenses allopathic physicians and osteopathic physicians.¹ “Allopathic physicians are medical doctors who treat disease and injury using counteractive methods.”² Most medical doctors are specialists.³ Osteopathic physicians differ from medical doctors:

¹ See chs. 458 and 459, F.S.

² HEALTHCARE CAREER INFORMATION, ALLOPATHIC PHYSICIAN (M.D.), at <http://library.thinkquest.org/15569/car1bmd1.html>.

by emphasizing the importance of the musculoskeletal system, holistic medicine, proper nutrition, and environmental factors in maintaining good health. . . . The majority of osteopaths are general practitioners, family practitioners, or emergency medicine specialists.⁴

An applicant for a license as a medical doctor or osteopathic physician must provide the department with information on medical malpractice claims against the applicant.⁵ Information on medical malpractice information for individual physicians and osteopathic physicians is available on the department's website.⁶ The department has the authority to deny licenses or revoke the licenses of physicians and osteopathic physicians who have engaged in medical malpractice.⁷

Amendment 8

No provision of law until the adoption of Amendment 8, codified as s. 26, Art. X, State Const., in the November 2, 2004, general election, required the revocation of a medical doctor's license for a specific number of medical malpractice incidents.⁸ The text of Amendment 8 is reproduced below.

Prohibition of medical license after repeated medical malpractice.—

(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.

³ *Id.*

⁴ HEALTHCARE CAREER INFORMATION, OSTEOPATHIC PHYSICIAN (D.O.), at <http://library.thinkquest.org/15569/car1bmd4.html>.

⁵ See ss. 456.039(1)(a)8. and (1)(b) and 456.049, F.S.

⁶ Sections 456.041(4) and (8), F.S.

⁷ Section 458.331(1)(t) and (5); 459.015(1)(x) and (5), F.S.; and Rules 64B8-8.001(2) and 64B15-6.011(2), F.A.C.

⁸ Amendment 8 was the eighth constitutional amendment proposal on the November 2, 2004, general election ballot. See DEPARTMENT OF STATE, DIVISION OF ELECTIONS, NOVEMBER 2, 2004 GENERAL ELECTION: OFFICIAL RESULTS, at <http://election.dos.state.fl.us/elections/resultsarchive/index.asp>.

The Florida Supreme Court in its advisory opinion on Amendment 8 stated that the amendment:

clearly would supersede section 458.331(1)(t), Florida Statutes (2003), and revoke any discretion the Board of Medicine previously had with regard to the discipline of any medical doctor found to have committed three or more incidents of medical malpractice. It would also limit the Legislature's power to enact any other law in conflict with the proposed amendment.⁹

Enforcement of Amendment 8

Committee staff is only aware of one trial court case in which the enforcement of Amendment 8 has been litigated. In *Florida Hospital Association, Inc., v. Florida Agency for Health Care Administration*, No. 2004 CA 002483 (Fla. 2d Cir. Ct. Dec. 2, 2004), the Florida Hospital Association, Inc., alleged that Amendment 8 raised so many unanswered questions that the court should "declare that Amendment 8 is not self-executing, and enter an injunction against AHCA and DOH suspending implementation and enforcement of Amendment 8 until such time as the Florida Legislature resolves the ambiguities in Amendment 8 through implementing legislation."¹⁰ In response to the allegations, the court enjoined the enforcement and implementation of Amendment 8 "until the earlier . . . of the following events: (a) the effective date of any legislation by the Florida Legislature implementing Amendment 8; or (b) the adjournment of regular or any extended session of the 2005 Florida Legislature without such implementing legislation having been enacted."¹¹

Medical Malpractice Sufficiency of Proof

Tort Claims

An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care.¹²

To prevail in a medical malpractice action, a claimant must prove by the "greater weight of the evidence" that the actions of the health care provider breached the prevailing professional standard of care for that health care provider.^{13, 14} This standard of care is

⁹ *Advisory Opinion to the Attorney General re Public Protection from Repeated Medical Malpractice*, 880 So. 2d 667, 670 (Fla. 2004) (footnote omitted).

¹⁰ Complaint filed in *Florida Hospital Association, Inc., v. Florida Agency for Health Care Administration*, No. 2004 CA 002483, dated October 18, 2004.

¹¹ *Florida Hospital Association, Inc., v. Florida Agency for Health Care Administration*, No. 2004 CA 002483 (Fla. 2d Cir. Ct. Dec. 1, 2004).

¹² Section 95.11(4)(b), F.S.

¹³ Section 766.102(1), F.S.

¹⁴ The greater weight of the evidence and preponderance of the evidence standards for the sufficiency of proof required to prevail in a case are synonymous. Preponderance of the evidence is defined as:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that,

that “level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.”¹⁵

Administrative Action

The Division of Medical Quality Assurance (division) has the burden of proving by the greater weight of the evidence the existence of medical malpractice when it seeks to impose a penalty less severe than license revocation or suspension.¹⁶ When the division seeks to revoke or suspend the license of a medical doctor or osteopathic physician for medical malpractice, the division must establish the grounds by clear and convincing evidence.^{17, 18} Similarly, in *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987), the Florida Supreme Court held that the revocation of a professional license is of “sufficient gravity and magnitude” to warrant the clear and convincing evidence standard of proof rather “than a mere preponderance of the evidence.”¹⁹ However, in *Rife, M.D. v. Department of Professional Regulation*, 638 So. 2d 542 (Fla. 1st DCA 1994), the court ruled that a Florida medical license may be revoked based on the revocation of a medical license by another state that requires less proof than clear and convincing evidence.

Disciplinary Proceedings

Under s. 456.073(1), F.S., the department may investigate medical malpractice actions against medical doctors and osteopathic physicians for any paid claim that exceeds \$50,000. In such cases, the subject of the investigation may submit a response to the document prompting the investigation for consideration by a probable cause panel.²⁰ The investigative report, when complete and legally sufficient, will be presented to a probable cause panel for a determination of probable cause.²¹ If the panel determines that probable cause to believe that a violation law exists, an administrative complaint may be filed against the medical doctor or osteopathic physician. Upon the filing of a complaint, the medical doctor or osteopathic physician may request a hearing.²²

though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. • This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

BLACK’S LAW DICTIONARY (8th ed. 2004).

¹⁵ *Id.*

¹⁶ See s. 458.331(1)(t) and (3) and s. 459.015(1)(x) and (3), F.S.

¹⁷ *Id.*

¹⁸ Clear and convincing evidence may be defined as an:

intermediate level of proof [that] entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

In re Davey, 645 So. 2d 398, 404 (Fla.1994).

¹⁹ *Ferris v. Turlington*, 510 So. 2d 292, 294 (Fla. 1987).

²⁰ Section 456.073(1), F.S.

²¹ Section 456.073(4), F.S., and see Rule 64B8-1.001, F.A.C.

²² Section 456.073(5), F.S.

National Practitioner Data Bank

The National Practitioner Data Bank (NPDB) was created as the result of federal legislation to reduce medical malpractice litigation and to improve the quality of medical care.²³

The NPDB is primarily an alert or flagging system intended to facilitate a comprehensive review of health care practitioners' professional credentials. The information contained in the NPDB is intended to direct discrete inquiry into, and scrutiny of, specific areas of a practitioner's licensure, professional society memberships, medical malpractice payment history, and record of clinical privileges. The information contained in the NPDB should be considered together with other relevant data in evaluating a practitioner's credentials; it is intended to augment, not replace, traditional forms of credentials.²⁴

Information regarding specific health care practitioners contained in the NPDB is not available to the public.²⁵

III. Effect of Proposed Changes:

This committee substitute appears designed to clarify and implement the provisions of Amendment 8 to the State Constitution, which prohibits persons who have engaged in repeated medical malpractice from having a medical license.

Under the committee substitute, the Department of Health must use databases including the National Practitioner Data Bank to verify the medical malpractice claims against medical doctors, osteopathic physicians, and certain other medical professionals. The committee substitute also requires findings of medical malpractice to be made by clear and convincing evidence in order to count against a medical doctor or osteopathic physician to revoke or deny a medical license as required by Amendment 8. However, not all findings of medical malpractice by clear and convincing evidence count toward license revocation.

What Findings of Medical Malpractice Count Toward Revocation

- Findings of medical malpractice by clear and convincing evidence by Florida courts.
- Findings of medical malpractice by clear and convincing evidence in Florida administrative agency final orders.
- Findings of medical malpractice made by courts of other states and countries that have the same or greater standard of care than in Florida and require proof of medical malpractice by at least clear and convincing evidence.
- Findings of medical malpractice by clear and convincing evidence made in binding arbitration decisions.

²³ Title IV of P.L. 99-660.

²⁴ NATIONAL PRACTITIONER DATA BANK, at <http://www.npdb-hipdb.com/npdb.html>.

²⁵ *Id.*

What *May* Count Toward Revocation

For findings of medical malpractice contained in a decision of binding arbitration or a Florida court or administrative order which were proven by less than clear and convincing evidence, the Board of Medicine or Board of Osteopathic Medicine is directed to investigate the matters leading to the finding. Only after a finding of probable cause, the filing of an administrative complaint, and final agency order finding of medical malpractice by clear and convincing evidence may a finding of medical malpractice count against a medical doctor or osteopathic physician for purposes of Amendment 8.²⁶

What does not Count Toward Revocation

- Florida administrative agency decisions finding medical malpractice by less than clear and convincing evidence.
- Findings of medical malpractice in courts of other states and countries that have a lower standard of care than in Florida or require less than clear and convincing evidence of medical malpractice. The acts leading to these findings are excluded from the definition of medical malpractice provided in the committee substitute.
- Findings from other states' or countries' administrative agencies regardless of the standard of care required or sufficiency of proof of medical malpractice. The definition of final administrative agency decision provided in the bill does not include decisions from agencies of other states and countries. As such the definition prevents findings from non-Florida administrative agencies from counting toward license revocation or denial.
- Decisions of binding arbitration that award damages but contain no findings of medical malpractice.
- Settlement agreements providing for the payment of damages for medical malpractice.

Nevertheless, the facts underlying the above items may form the basis of administrative action that results in a finding of medical malpractice by clear and convincing evidence.

Effective Date

The committee substitute takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

²⁶ Specifically, the committee substitute requires compliance with the procedures for disciplinary action in s. 456.073, F.S.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The committee substitute defines the term “medical doctor” as used in Amendment 8 as a medical doctor licensed under ch. 458, F.S., or an osteopathic physician licensed under ch. 459, F.S. The Florida Supreme Court in its advisory opinion expressly noted that the term medical doctor was alleged to be ambiguous.²⁷ However, the Court did not determine whether the term “medical doctor” as used in Amendment 8 refers to physicians licensed under ch. 458, F.S., or includes other types of health care providers subject to malpractice.

Amendment 8 is unclear as to whether findings of medical malpractice must be made by clear and convincing evidence in order to count toward license revocation. In response to an argument that Amendment 8 may affect several branches of government, the Court stated:

it is too speculative to conclude, because the proposed amendment requires the revocation of some medical doctors’ licenses on the basis of findings reached under the preponderance of the evidence standard, rather than the clear and convincing standard of proof required under *Ferris v. Turlington*, 510 So.2d 292 (Fla.1987), that the judiciary will be forced to either overrule *Ferris* or change the standard of proof in malpractice cases.²⁸

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The provisions of the committee substitute in combination with Amendment 8 may reduce the number of medical doctors and osteopathic physicians in this state. Additionally, the provisions of the committee substitute in combination with Amendment 8 may act to compel medical doctors and osteopathic physicians to settle medical malpractice claims rather than risk losing a medical license.

C. Government Sector Impact:

According to the Department of Health (department) responsibilities under the committee substitute will cost \$509,899 in year 1 and 415,349 in year 2. The majority of its costs

²⁷ *Advisory Opinion to the Attorney General re Public Protection from Repeated Medical Malpractice*, 880 So. 2d 667, 673 (Fla. 2004).

²⁸ *See id.* at 670.

will be for using the National Practitioner Data Bank. The department may also incur additional costs to investigate findings of medical malpractice that were made by less than clear and convincing evidence.

	<u>Year 1</u>	<u>Year 2</u>
Salary		
RS II, PG 17 - 1.5 FTE	\$56,690.00	\$56,690.00
 Expense		
NPDB Query	\$421,371.00	\$336,881.00
Non-Recurring-1.5 FTE	\$6,460.00	
Recurring-1.5 FTE	\$21,000.00	\$21,000.00
 OCO		
Non-Recurring-1.5 FTE	\$3,600.00	
 Human Resource Service		
	\$778.00	\$778.00
 Total	 \$509,899.00	 \$415,349.00

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.
