The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Health Regulation Committee

BILL:	SB 1590
INTRODUCER:	Senators Hays and Gaetz
SUBJECT:	Medical Malpractice Actions
DATE:	April 10, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stovall	Stovall	HR	**Favorable**
2.	Arzillo/Knudson	Burgess	BI	**Pre-Meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

Senate bill 1590 revises statutes related to medical malpractice claims. The bill requires a physician or osteopathic physician who provides expert testimony concerning the prevailing professional standard of care of a physician or osteopathic physician to be licensed in this state under ch. 458, The Medical Practice Act, or ch. 459, F.S., The Osteopathic Medical Practice Act, or possess an expert witness certificate issued by the Board of Medicine (BOM) or the Board of Osteopathic Medicine (BOOM). Florida licensed physicians will be subject to disciplinary action by the BOM or the BOOM for offing false or misleading information as an expert witness, while physicians outside Florida will be subject to revocation of the expert witness certificate for offering such testimony.

The bill reduces the period of time immediately preceding the date of the occurrence that is the basis for the action within which the expert witness must have performed certain activities. The time frames and activities depend upon whether the health care provider against whom or on whose behalf the testimony is offered is a specialist, a general practitioner, other type of health care provider, or was providing emergency medical services in a hospital emergency department.

The bill requires a clause in an insurance policy or self-insurance policy for medical malpractice coverage to clearly state whether or not the insured has the exclusive right of veto of any admission of liability or offer of judgment. The bill repeals the authority for a self-insurance policy or insurance policy for medical malpractice to grant authority for the insurer to bring the case to closure without the permission of the insured if the action is within the policy limits.

The bill requires a claimant to submit, along with the other required information, an executed authorization form for the release of protected health information that is potentially relevant to

the claim of personal injury or wrongful death when he or she notifies each prospective defendant of his or her intent to initiate litigation for medical negligence.

The bill authorizes a prospective defendant or his or her legal representative access to conduct ex-parte interviews of the claimant's treating health care providers without notice to, or the presence of, the claimant or the claimant's legal representative.

This bill substantially amends the following sections of the Florida Statutes: 458.331, 459.015, 627.4147, 766.102, 766.106, and 766.206. The bill creates the following sections of the Florida Statutes: 458.3175, 459.0066, and 766.1065.

II. Present Situation:

Standard of Proof in Medical Malpractice Actions

In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that the death or injury resulted from the negligence of a health care provider, the claimant has the burden of proving by the greater weight of evidence that the alleged action of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care is 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.[1]

Presuit Investigation[2]

Prior to the filing of a lawsuit, the person allegedly injured by medical negligence or a party bringing a wrongful death action arising from an alleged incidence of medical malpractice (the claimant) and the defendant (the health care professional or health care facility) are required to conduct presuit investigations to determine whether medical negligence occurred and what damages, if any, are appropriate.

The claimant is required to conduct an investigation to ascertain that there are reasonable grounds to believe that:

- A named defendant in the litigation was negligent in the care or treatment of the claimant; and
- That negligence resulted in injury to the claimant.

Corroboration of reasonable grounds to initiate medical negligence litigation must be provided by the claimant's submission of a verified written medical expert opinion from a medical expert.

Before the defendant issues his or her response, the defendant or his or her insurer or self-insurer is required to ascertain whether there are reasonable grounds to believe that:

[1] S. 766.102, F.S.
[2] S. 766.203, F.S.

- The defendant was negligent in the care or treatment of the claimant; and
- That negligence resulted in injury to the claimant.

Corroboration of the lack of reasonable grounds for medical negligence litigation must be provided by submission of a verified written medical expert opinion which corroborates reasonable grounds for lack of negligent injury sufficient to support the response denying negligent injury.

These expert opinions are subject to discovery. Furthermore, the opinion must specify whether any previous opinion by that medical expert has been disqualified and if so, the name of the court and the case number in which the ruling was issued.

Qualification of Medical Expert[3] Witnesses

A person may not give expert testimony concerning the prevailing professional standard of care unless that person is a licensed health care provider and meets the following criteria:

- If the health care provider against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
  - Specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; or specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients; and
  - Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:
    - The active clinical practice of, or consulting with respect to, the same or similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients;
    - Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same or similar specialty; or
    - A clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same or similar specialty.
- If the health care provider against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness must have devoted professional time during the 5 years immediately preceding the date of the occurrence that is the basis for the action to:
  - The active clinical practice or consultation as a general practitioner;
  - The instruction of students in an accredited health professional school or accredited residency program in the general practice of medicine; or
  - A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the general practice of medicine.
- If the health care provider against whom or on whose behalf the testimony is offered is a health care provider other than a specialist or a general practitioner, the expert witness must have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:

[3] S. 766.102(5), (9), and (12), F.S.

  - The active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered;
  - The instruction of students in an accredited health professional school or accredited residency program in the same or similar health profession in which the health care provider against whom or on whose behalf the testimony is offered; or
  - A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered.
- If the claim of negligence is against a physician licensed under chapter 458, osteopathic physician licensed under chapter 459, podiatric physician licensed under chapter 461, or chiropractic physician licensed under chapter 460 providing emergency medical services in a hospital emergency department, the court shall admit expert medical testimony only from physicians, osteopathic physicians, podiatric physicians, and chiropractic physicians who have had substantial professional experience within the preceding 5 years while assigned to provide emergency medical services in a hospital emergency department.

These provisions do not limit the power of the trial court to disqualify or qualify an expert witness on grounds other than the qualifications in this section (s. 766.102, F.S.). Relevant portions of the Florida Evidence Code provide requirements for expert opinion testimony.[4] The Florida Rules of Civil Procedure define "expert witness" as a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify.[5]

The court must refuse to consider the testimony or opinion attached to any notice of intent or to any response rejecting a claim of an expert who has been disqualified three times.[6]

After Claimant's Presuit Investigation[7]

After completion of the presuit investigation and prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical negligence. Notice to each prospective defendant must include, if available, a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, and copies of all of the medical records relied upon by the expert in signing the affidavit. The requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions for failure to provide presuit discovery.
A suit may not be filed for a period of 90 days after notice is mailed to any prospective defendant. The statue of limitations is tolled during the 90-day period. During the 90-day period, the prospective defendant or the defendant's insurer or self-insurer shall conduct a presuit investigation to determine the liability of the defendant. Each insurer or self-insurer shall have a

[4] Sections 90.702 and 90.704, F.S.
[5] Fla. R. Civ. P. 1.390(a).
[6] S. 766.206, F.S.
[7] S. 766.106, F.S.

procedure for the prompt investigation, review, and evaluation of claims during the 90-day period.

Each insurer or self-insurer must investigate the claim in good faith, and both the claimant and prospective defendant must cooperate with the insurer in good faith. If the insurer requires, a claimant shall appear before a pretrial screening panel or before a medical review committee and shall submit to a physical examination. Unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses. There is no civil liability for participation in a pretrial screening procedure if done without intentional fraud.

At or before the end of the 90 days, the prospective defendant or the prospective defendant's insurer or self-insurer shall provide the claimant with a response:

- Rejecting the claim;
- Making a settlement offer; or
- Making an offer to arbitrate in which liability is deemed admitted and arbitration will be held only on the issue of damages. This offer may be made contingent upon a limit of general damages.

The response shall be delivered to the claimant if not represented by counsel or to the claimant's attorney, by certified mail, return receipt requested. Failure of the prospective defendant or insurer or self-insurer to reply to the notice within 90 days after receipt shall be deemed a final rejection of the claim for purposes of this section.

Discovery and Admissibility of Evidence

Statements, discussions, written documents, reports, or other work product generated by the presuit screening process are not discoverable or admissible in any civil action for any purpose by the opposing party. All participants, including, but not limited to, physicians, investigators, witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit screening process.[8]

Upon receipt by a prospective defendant of a notice of claim, the parties are required to make discoverable information available without undertaking formal discovery. Informational discovery may be used to obtain unsworn statements, the production of documents or things, and physical and mental examinations as follows:[9]

- Unsworn statements – Any party may require other parties to appear for the taking of an unsworn statement. Unsworn statements may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party.
- Documents or things – Any party may request discovery of documents or things. This includes medical records.

[8] S. 766.106(5), F.S.
[9] S. 766.106(6), F.S.

- Physical and mental examination – A prospective defendant may require an injured claimant to be examined by an appropriate health care provider. Unless otherwise impractical, a claimant is required to submit to only one examination of behalf of all potential defendants. The examination report is available to the parties and their attorney and may be used only for the purpose of presuit screening. Otherwise the examination is confidential.
- Written questions – Any party may request answers to written questions.
- Medical information release – The claimant must execute a medical information release that allows a prospective defendant or his or her legal representative to take unsworn statements of the claimant's treating physicians that address areas that are potentially relevant to the claim of personal injury or wrongful death. The claimant or claimant's legal representative has the right to attend the taking of these unsworn statements.

The failure to cooperate on the part of any party during the presuit investigation may be grounds to strike any claim made, or defense raised in the suit.

Medical Malpractice Insurance Policies

Section 627.4147, F.S., provides that medical malpractice insurance policies must authorize the insurer or self-insurer to make decisions without the permission of the insured regarding any offer of admission of liability and for arbitration, settlement offer, or offer of judgment, if the offer is within the policy limits. The statute states that it is against public policy to give the insured exclusive right to veto the insurer or self-insurer's decision when the offer is within policy limits. However, malpractice insurance policies issued to licensed dentists provide dentists with an exclusive right to veto, as long as it is clearly stated in the policy, and the policy states that the insurer or self-insurer may not make admissions to liability and arbitration, settlement offer or offer of judgment that are outside the policy limits. Nevertheless, in both instances, the insurer or self-insurer must make a good faith admission of liability, settlement offer, or offer of judgment and it must be in the best interest of the insured.

III. Effect of Proposed Changes:

Section 1 and section 3 create s. 458.3175, F.S., and s. 459.0066, F.S., respectively, to authorize the BOM or the BOOM to issue a certificate to a physician or osteopathic physician who is licensed to practice medicine or osteopathic medicine in another state or a province of Canada to provide expert testimony in this state pertaining to medical negligence litigation against a physician. The expert witness certificate authorizes the physician or osteopathic physician to provide a verified written medical opinion for purposes of presuit investigation of medical negligence claims and provide expert testimony about the prevailing professional standard of care in connection with medical negligence litigation pending in this state against a physician licensed under ch. 458, F.S., or ch. 459, F.S. These sections allow the BOM and BOOM to enforce jurisdiction, currently not available, over out-of-state physicians who provide expert testimony in medical malpractice cases concerning the prevailing professional standard of care that physicians who are licensed in the State under ch. 458 and ch. 459 should provide.
A physician who is not licensed in this state but intends to provide expert testimony in this state must submit a completed application and pay an application fee in an amount not to exceed $50. The BOM or the BOOM may not issue a certificate to a physician who has had a previous expert witness certificate revoked by the BOM or the BOOM. The BOM or the BOOM is required to

approve or deny the application within 5 business days after receipt of the completed application and fee, otherwise the application is approved by default. If a physician intends to rely on a certificate that is approved by default, he or she must notify the BOM or BOOM in writing. An expert witness certificate is valid for 2 years.

The expert witness certificate does not authorize the physician to practice medicine or osteopathic medicine in this state, and a physician who does not otherwise practice medicine in this state is not required to obtain a license to practice medicine in this state, or pay other fees, including the neurological injury compensation assessment.

The BOM and the BOOM are required to adopt rules to administer their respective section of law.

Section 2 and section 4 amend s. 458.331, F.S., and s. 459.015, F.S., respectively, to add that providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine is grounds for denial of a license or other disciplinary action against a physician or osteopathic physician licensed in this state under ch. 458 and ch. 459. These sections create statutory authority for the BOM or the BOOM to enforce jurisdiction over physicians licensed in the State who provide misleading or false testimony.

Section 5 amends s. 627.4147, F.S., to repeal the requirement that a self-insurance policy or insurance policy that provides coverage for medical malpractice must authorize the insurer or self-insurer to determine, make, and conclude any offer of admission of liability and for arbitration, settlement offer, or offer of judgment if the offer is within the policy limits without the permission of the insured. The bill also repeals the statement that it is against public policy for an insurance or self-insurance policy to contain a clause giving the insured the exclusive right to veto an offer for admission of liability and for arbitration, settlement offer, or offer of judgment, when the offer is within the policy limits.

Instead, the bill requires a clause in all malpractice insurance policies that clearly states whether or not the insured has the exclusive right of veto if the offer is within policy limits. The policy must also prohibit the insurer or self-insurer from making or concluding, without the permission of the insured, any offer of admission of liability and for arbitration, settlement offer, or offer of judgment, if such offer is outside the policy limit. In current law, these provisions only apply policies covering licensed dentists.

Section 6 amends s. 766.102, F.S., to reduce the period of time immediately preceding the date of the occurrence that is the basis for the action within which the expert witness must have performed certain activities. If the health care provider against whom or on whose behalf the testimony is offered is:

- A specialist, in addition, to other things, the expert witness must have devoted professional time during the 2 years, rather than 3 years, immediately preceding the date of the occurrence that is the basis for the action to:
  - The active clinical practice of, or consulting with respect to, the same or similar specialty,
  - Instructing students in an accredited health professional school or accrediting residency or clinical research program in the same or similar specialty, or

  - A clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same or similar specialty.
- A general practitioner, the expert witness must have devoted professional time during the 2 years, rather than 5 years, immediately preceding the date of the occurrence that is the basis for the action to:
  - The active clinic practice or consultation as a general practitioner,
  - Instructing students in an accredited health professional school or accrediting residency program in the general practice of medicine, or
  - A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the general practice of medicine.
- A health care provider other than a specialist or a general practitioner, the expert witness must have devoted professional time during the 2 years, rather than 3 years, immediately preceding the date of the occurrence that is the basis for the action to:
  - The active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered,
  - Instructing students in an accredited health professional school or accrediting residency program in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered, or
  - A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered.
- A physician, osteopathic physician, podiatric physician, or chiropractic physician providing emergency medical services in a hospital emergency department, the expert witness must have had substantial professional experience within the preceding 2 years, rather than 5 years, while assigned to provide emergency medical services in a hospital emergency department.

In addition, this section requires a physician or osteopathic physician who provides expert testimony concerning the prevailing professional standard of care of a physician or osteopathic physician to be licensed in this state under The Medical Practice Act or The Osteopathic Medical Practice Act, or possess an expert witness certificate issued by the BOM or the BOOM.

Section 7 amends s. 766.106, F.S., to require a claimant to submit, along with the other required information, an executed authorization form for the release of protected health information that is potentially relevant to the claim of personal injury or wrongful death when he or she notifies each prospective defendant of his or her intent to initiate litigation for medical negligence. This expands the current requirement that the claimant provide a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, and copies of all of the medical records relied upon by the expert in signing the affidavit.

This section provides that notwithstanding the immunity from civil liability arising from participation in the presuit screening process that is currently afforded under the law, a physician who is licensed under the Medical Practice Act or the Osteopathic Medical Practice Act who submits a verified written expert medical opinion is subject to denial of a license or disciplinary

action for providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine or osteopathic medicine.

Unlike the current requirement to request permission from the plaintiff to perform an unsworn interview with the claimant's health care providers, the bill authorizes a prospective defendant or his or her legal representative access to interview the claimant's treating health care providers without notice to or the presence of the claimant or the claimant's legal representative. However, a prospective defendant or his or her legal representative who takes an unsworn statement from a claimant's treating physicians must provide reasonable notice and opportunity to be heard to the claimant or the claimant's legal representative before taking unsworn statements. Unsworn statements are used for presuit screening and are not discoverable or admissible in a civil action for any purpose by any party.

Section 8 creates s. 766.1065, F.S., to establish an authorization form for the release of protected health information that is potentially relevant to the claim of personal injury or wrongful death. The bill sets forth the specific content of the form, including identification of the parties; authorizing the disclosure of protected health information for specified purposes; description of the information and the health care providers from whom the information is available; identification of health care providers to whom the authorization for disclosure does not apply because the health care information is not potentially relevant to the claim of personal injury or wrongful death; the persons to whom the patient authorizes the information to be disclosed; a statement regarding the expiration of the authorization; acknowledgement that the patient understands that he or she has the right to revoke the authorization in writing, the consequences for the revocation, signing the authorization is not a condition for health plan benefits, and that the information authorized for disclosure may be subject to additional disclosure by the recipient and may not be protected by federal HIPAA privacy regulations;[10] and applicable signature by the patient or his or her representative.

The bill provides that the presuit notice is void if this authorization does not accompany the presuit notice and other materials required by s. 766.106(2), F.S. If the authorization is revoked, the presuit notice is deemed retroactively void from the date of issuance, and any tolling effect that the presuit notice may have had on the applicable statute-of-limitations period is retroactively rendered void.

Section 9 amends s. 766.206, F.S., to authorize the court to dismiss the claim if the court finds that the authorization form accompanying the notice of intent to initiate litigation for medical negligence was not completed in good faith by the claimant. If the court dismisses the claim, the claimant or the claimant's attorney is personally liable for all attorney's fees and costs incurred during the investigation and evaluation of the claim, including the reasonable attorney's fees and costs of the defendant or the defendant's insurer.

Section 10 provides an effective date of July 1, 2011.

[10] HIPAA is the federal Health Insurance Portability and Accountability Act of 1996 (Public Law 104-194) and generally include the privacy rules adopted thereunder. With certain exceptions, the HIPAA privacy rules preempt contrary provisions in state law, unless the state law is more stringent than the federal rules. *See* 45 C.F.R. Part 164.

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 Article I, Section 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:

Section 1 and section 3 of the bill change provisions relating to expert witnesses. Article V, s. 2(a), Fla. Const., provides that the Florida Supreme Court "shall adopt rules for the practice and procedure" in all courts. The Florida Supreme Court has interpreted this provision to mean that the court has the exclusive power to create rules of practice and procedure. Section 1 and section 3 provide requirements for expert witnesses who do not possess a Florida license. If a court were to find that any of these requirements encroached on the court's rulemaking power, it could hold the provisions invalid.Fiscal Impact Statement:

E. Tax/Fee Issues:

None.

F. Private Sector Impact:

The bill requires physicians and dentists licensed in another state or Canada to pay a fee of not more than $50 to obtain an expert witness certificate in order to provide an expert witness opinion or provide expert testimony relating to the standard of care in a medical malpractice case involving a physician or dentist. The department estimates that during the first year there will be approximately 2,478 expert witness certificates applied for, thereby resulting in revenues of $123,900 to be deposited within the Medical Quality Assurance Trust Fund.

A party seeking to use an expert witness who is not a physician or osteopathic physician licensed in this state may only use an expert witness who has a certificate from the Florida BOM or the Florida BOOM. Proponents of the bill assert that this will help ensure that medical expert witness testimony is accurate. Opponents of the bill assert that this requirement, and the reduced timeframe in which substantial professional experience qualifies a person as an expert witness, might limit or delay a claimant’s ability to engage

an expert witness to conduct a presuit investigation and proceed with a claim for medical negligence.

The specific HIPAA-compliant form will facilitate the release and disclosure of protected health information and more clearly protect persons who release that information. The defense will have an additional discovery tool with the authorization to conduct ex parte interviews of treating health care providers.

The changes to insurance and self-insurance policies provide physicians with greater control over the disposition of medical malpractice claims.

G. Government Sector Impact:

The BOM and the BOOM will be required to develop application forms and rules to administer the certification program for expert witnesses. Additional regulatory and enforcement activities may emerge as a result of the bill.

V. Technical Deficiencies:

None.

VI. Related Issues:

None.

VII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.