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 Committee on Judiciary

BILL:	SB 1792
INTRODUCER:	Judiciary Committee
SUBJECT:	Medical Negligence Actions
DATE:	March 20, 2013
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown/Shankle	Cibula		**ju SPB 7030 as introduced**
2.				
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I. Summary:

SB 1792 revises the laws relating to ex parte communications and qualifications of expert medical witnesses in medical negligence actions.

The bill allows a health care practitioner or provider who may be called as a witness in a medical negligence action to consult with his or her attorney. During a consultation, the practitioner or provider may disclose information disclosed by a patient or records created during the course of care or treatment of the patient. However, the bill prohibits the attorney from being a conduit for ex parte communications between the practitioner or provider and the defendant or the defendant's insurer. If the liability insurer for the provider or practitioner represents a defendant or prospective defendant in the action:

- The insurer may not choose an attorney for the practitioner, but may recommend attorneys other than the attorney representing the defendant or a prospective defendant.
- The practitioner's attorney may not disclose any information to the insurer, other than categories of work performed or time billed.

The bill also revises informal discovery procedures under chapter 766, F.S., to authorize the defendant and his or her insurer to conduct ex parte interviews of a claimant's treating health care providers.

The bill limits the class of individuals who may offer expert testimony against a defendant specialist in a medical negligence action. These experts must specialize in the same, rather than similar, medical specialty as the defendant.

This bill substantially amends the following sections of the Florida Statutes: 456.057, 766.102, 766.106, 766.1065, and 381.028.

II. Present Situation:

Florida's Physician-Patient Confidentiality Law

Florida's physician-patient confidentiality law is contained in s. 456.057, F.S. The law generally prohibits the release of a patient's medical records and medical information unless the patient provides written consent. However, in the context of medical care, a patient's written consent is not needed to release his or her records to:

- The patient or the patient's legal representative; or
- Other health care providers involved in the care or treatment of the patient.[1]

In the litigation context, the patient's written consent is not required for the release of information and records related to the patient's care or treatment:

- In any civil or criminal action, when a court issues a subpoena, with proper notice to the patient.[2]
- In a medical negligence action or administrative proceeding when a health care practitioner reasonably expects to be named as a defendant.[3]

Case Law on Disclosure of Medical Information by a Subsequent Treating Physician

In the recent case of *Hasan v. Garvar*, the Florida Supreme Court held that Florida's patient confidentiality statute bars communication between a subsequent treating physician and the physician's attorney.[4] The plaintiff in the case alleged that his dentist failure to diagnose and treat his dental conditions resulting in permanent physical and emotional damage.[5]

Subsequent to his medical malpractice filing against the dentist, the plaintiff moved to prevent an ex parte private predeposition conference between the subsequent treating physician and the physician's attorney. The attorney for the subsequent treating physician was appointed by the physician's insurer, which was also the insurer of the defendant dentist.[6] Although different attorneys represented the defendant and the subsequent treating physician, the insurer selected, retained, and paid for both.[7] The trial authorized the predeposition conference but prohibited the discussion of privileged medical information pertaining to the plaintiff.[8]

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[1] Section 456.057(7)(a), F.S.
[2] Section 456.057(7)(a)3., F.S.
[3] Section 456.057(8), F.S.
[4] *Hasan v. Garvar*, 2012 WL 6619334 (Fla. 2012). Florida's physician-patient confidentiality statute is s. 456.057, F.S.
[5] *Id*. at *1.
[6] *Id*.
[7] *Id*.
[8] *Id.*

The defendant argued that the subsequent treating physician should be allowed to speak with her attorney, ex parte, to address:

- General questions about depositions and trial procedures;
- The potential for legal exposure in the lawsuit as a *Fabre* defendant, including being named as a defendant in a subsequent indemnity action; and
- The potential of giving testimony that could affect board certification or create adverse media coverage.[9]

The court held that the physician-patient confidentiality statute barred ex parte meetings, regardless of the attorney's and physician's assertions that they would limit communication to non-privileged issues. In its opinion, the Court detailed the history of physician-patient privilege in Florida.

Before the patient confidentiality statute was broadened in 1988, the statute only protected a patient's medical records from disclosure. Ex parte communications were freely permitted between defense counsel and a non-party treating physician.[10]

In 1984, in the landmark case of *Coralluzzo v. Fass*, the Florida Supreme Court permitted communication between the defense counsel and a subsequent treating physician.[11] In so doing, the Court indicated that Florida law only addressed confidentiality through medical records.[12] As the law was silent about disclosure through oral communication, the Court stated that its only option was to allow contact: "[w]e note that no evidentiary rule of physician/patient confidentiality exists in Florida and that, although several statutes preserve confidentiality in certain medical records, petitioner has failed to identify a specific statute respondents have infringed."[13]

The *Corralluzzo* case represented the impetus for legislative expansion of physician-patient confidentiality and the decision was subsequently superseded in statute.[14]

In 1990, in *Franklin v. Nationwide Mutual Fire Insurance Co.*, the First District Court of Appeal reviewed a trial court order that required a plaintiff to provide a medical release form to defense counsel.[15] In striking down the lower court decision, the court cited the changes in the law in ruling that the plaintiff now has a statutory right to maintain the confidentiality of his or her medical information.[16] The court classified Florida's physician-patient privilege as providing a limited confidentiality waiver.

[9] *Id*. at *7-8.
[10] *Id.* at *2.
[11] *Coralluzzo v. Fass*, 450 So. 2d 858, 859 (Fla. 1984).
[12] *Id*. at 859.
[13] *Id*. at 859.
[14] J.B. Harris, *The Limits of Ex Parte Communications with a Plaintiff's Treating Physicians under Florida Law*, 70 FLA.B.J. 57 (Nov. 1996).
[15] *Franklin v. Nationwide Mutual Fire Insurance Co*., 566 So. 2d 529, 532 (Fla. 1st DCA 1990).
[16] *Id*. at 535.

Specific to the litigation context, the court summarized the waiver as permitting the release of information only if:

- A health care provider is, or reasonably expects to be, named as a defendant.
- The information is compelled by subpoena at deposition, hearing or trial with proper notice.[17]

Moreover, the *Franklin* Court held that a court may not compel a person to authorize the release of his or her confidential medical information to defense counsel.[18]

The Fifth District Court of Appeal reached the same finding as the *Franklin* Court in *Kirkland v. Middleton*.[19] Here, the court prohibited contact where the defendant pledged to limit discussions with treating health care providers to non-privileged matters, such as scheduling deposition testimony and arranging the production of medical records.[20]

The Florida Supreme Court in *Acosta v. Richter* affirmed that Florida intended, through the 1988 amendment of the physician-patient privilege, to "create a physician-patient privilege where none existed before, and to provide an explicit but limited scheme for the disclosure of personal medical information."[21] In response to the defendant's assertion that banning ex parte contact constituted a First Amendment violation of the defendant physician's freedom of speech, the Court noted that the legislature provided an adequate balance between individual privacy rights and society's reasonable need for limited disclosure.[22] Further, the Court took note of the Fifth DCA's rationale in *Kirkland v. Middleton*: "Were unsupervised *ex parte* interviews allowed, medical malpractice plaintiffs could not object and act to protect against inadvertent disclosure of privileged information, nor could they effectively prove that improper disclosure actually took place."[23]

The Florida Supreme Court has twice issued strongly worded opinions prohibiting communications between a subsequent treating health care provider and defense-linked counsel. The *Hasan* Court, however, seemed to leave unanswered the question of whether Florida law imposes a blanket ban on communications between a treating physician and any attorney, including an attorney who has no connection to the defendant. In a strongly-written dissent, Justice Polston took issue with the majority opinion, which "improperly prohibits nonparty physicians from obtaining the legal counsel to which they are entitled under the insurance that they purchased, and … from obtaining ANY legal counsel, even from lawyers not provided by their insurance."[24] The majority did not respond to the dissent's description of the effect of the majority's ruling.

[17] *Id*. at 531.
[18] *Id*. at 535.
[19] *Kirkland v. Middleton*, 639 So. 2d 1002, 1004 (Fla. 5th DCA 1994).
[20] *Id*. at 1004.
[21] *Acosta v. Richter*, 671 So. 2d 149, 154 (Fla. 1996).
[22] *Id*. at 156.
[23] *Kirkland*, 639 So. 2d, at 1004.
[24] *Hasan*, 2012 WL 6619334, at 8.

Medical Specialists as Expert Witnesses

In medical malpractice actions, the plaintiff must prove that the defendant breached the prevailing professional standard of care. Both plaintiffs and defendants use expert witnesses to testify as to what that prevailing standard of care is and whether the defendant breached that standard.

In addition to general laws on evidence, s. 766.102(5), F.S., limits who may be qualified as an expert witness against a specialist who is a defendant in a medical malpractice case. If the defendant is a specialist, only a specialist in the same or a similar specialty as the defendant may testify as an expert.[25] A similar specialty is a specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the medical negligence claim.[26] An expert who practices in a similar specialty must also have prior experience treating similar patients.[27] Case law has provided mixed meanings over what constitutes a similar specialty.[28] In *Oken v. Williams*, the First District Court of Appeal noted that: "'Similar specialty' is not defined within the statutes. Case law also provides little useful guidance."[29]

In *Oken v. Williams,* the defendant was a cardiologist and the expert who offered testimony against the defendant was an emergency room physician. The court found that the emergency room physician lacked the expertise to know what to do in the same situation; the expert did not practice in the same or similar specialty and was not qualified to testify.[30]

However, in *Wiess v. Pratt*, the expert was also an emergency room physician and the defendant was an orthopedic surgeon. The case involved a claim that the defendant failed to properly place the plaintiff on a backboard after a football injury. The court found that, because the emergency room physician had the expertise to know what to do in the same situation the expert practiced in the same or similar specialty and was qualified to testify.[31]

In addition to specifying the qualifications of expert witnesses who may testify against a specialist, s. 766.102, F.S., specifies the qualifications of several other expert witnesses.

- Section 766.102(6), F.S., provides that an expert qualified under s. 766.102(5), F.S., who, either through clinical practice or instruction, demonstrates knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff is qualified to give expert testimony on the negligence of such staff.
- Section 766.102(7), F.S., provides that a person may give expert testimony on the standard of care on administrative issues if the person has substantial knowledge concerning the standard of care among health care facilities of the same type as the health care facility whose potential negligence the subject of the testimony.

[25] Section 766.102(5), F.S
[26] *Id*.
[27] Section 766.102(5)(a)2, F.S.
[28] *Weiss v. Pratt*, 53 So. 3d 395, 400 (Fla. 4th DCA 2011).
[29] *Oken v. Williams*, 23 So. 3d 140, 146 (Fla. 1st DCA 2009).
[30] *Id*. at 150.
[31] *Weiss*, 53 So. 3d at 401.

- Section 766.102(8), F.S., provides that if a health care provider is giving evaluation, treatment, or diagnosis for a condition that is not within his or her specialty, then an expert in the treatment, evaluation or diagnosis of that condition shall be considered a similar specialist.
- Section 766.102(9), F.S., provides that in any negligence action against a physician, osteopathic physician, podiatric physician, or chiropractic physician providing emergency medical services in a hospital, the court may accept expert testimony only from physicians, osteopathic physicians, podiatric physicians, and chiropractic physicians who have had substantial professional experience within the preceding 5 years in a hospital emergency department.

Section 766.102(14), F.S., grants a court flexibility in determining whether the experts described in the section may be qualified or disqualified as an expert. Specifically, s. 766.102(14), F.S., allows a court to qualify or disqualify an expert witness" on grounds other than the qualifications specified in [s. 766.102, F.S.]"

In *Oliveros v. Adventist Health Systems/Sunbelt, Inc*., the court held that s. 766.102(14), F.S., allowed a court to consider other experiences by a doctor and admit his expert testimony even though he failed to satisfy the requirements to offer testimony against an emergency room physician. The court found that under s. 766.102(14), F.S., the emergency experience of the expert as part of a medical evacuation team constituted other grounds to admit the expert's testimony.[32]

In an earlier case, *Barrio v. Wilson*, the court excluded similar expert testimony because it found that the expert's qualifications did not satisfy the specific requirements of the applicable standard.[33] *Barrio*, however, was decided before the adoption of s. 766.102(14), F.S.

Specialists and Specialties

The Florida Statutes do not directly define who is a specialist or what specialties exist. However, for advertising purposes, the statutes prohibit a physician from holding himself or herself out as a board-certified specialist unless the physician is recognized as a specialist by the American Board of Medical Specialties or other recognizing agency that has been approved by the Board of Medicine.[34] The additional recognizing agencies include the: American Board of Facial Plastic & Reconstructive Surgery, Inc., American Board of Pain Medicine, American Association of Physician Specialists, Inc./American Board of Physician Specialties, and American Board of Interventional Pain Physicians.[35]

Similarly, an osteopathic physician may not hold himself or herself out as a board-certified specialist unless the osteopathic physician is certified by the American Osteopathic Association or the Graduate Council on Medical Education and is certified as a specialist by a certifying agency approved by the Board of Osteopathic Medicine.[36] The Board of Osteopathic Medicine

[32] *Oliveros v. Adventist Health Systems/Sunbelt, Inc*, 45 So. 3d 873 (Fla. 2d DCA 2010).
[33] *Barrio v. Wilson*, 779 So. 2d 413(Fla. 2d DCA 2000).
[34] Section 458.3312, F.S.
[35] Rule 64B8-11001, F.A.C.
[36] Section 459.0152, F.S.

has approved two recognizing agencies, the American Association of Physician Specialists, Inc., and the American Board of Interventional Pain Physicians.[37]

According to the American Board of Medical Specialties, it certifies nearly 800,000 doctors, representing 80 to 85 percent of all licensed doctors, in 24 specialties.[38] While the American Board of Medical Specialties is the largest certifying medical board in the country, about 200 such boards certify specialists in the United States.[39]

Presuit Process

All medical negligence claims are subject to statutory presuit screening and investigation requirements.[40] After a prospective defendant files a notice of claim, the parties may engage in informal discovery. In fact, failing to do so constitutes grounds for a dismissal of claims.[41] Likewise, a failure to cooperate may be grounds to strike any claim or defense raised by the non-cooperative party.[42] Informal discovery includes the taking of statements of treating health care professionals.[43]

Florida law requires a presuit notice of intent to bring a medical malpractice claim to include an authorization for release of protected health information.[44] The sanction for failing to attach a written authorization to a presuit notice is that the notice is rendered void.[45] Section 766.1065, F.S., provides the form and clarifies that the form is in conformity with HIPAA.[46] The form reads, in part:

AUTHORIZATION FOR RELEASE OF PROTECTED HEALTH INFORMATION

A. I, (...Name of patient or authorized representative...) [hereinafter "Patient"], authorize that (...Name of health care provider to whom the presuit notice is directed...) and his/her/its insurer(s), self-insurer(s), and attorney(s) may obtain and disclose (within the parameters set out below) the protected health information described below for the following specific purposes:

1. Facilitating the investigation and evaluation of the medical negligence claim described in the accompanying presuit notice; or
2. Defending against any litigation arising out of the medical negligence claim made on the basis of the accompanying presuit notice.

[37] Rule 64B15-14.001, F.A.C.
[38] American Board of Medical Specialties, *Board Certification Editorial Background*, http://www.abms.org/news_and_events/media_newsroom/pdf/abms_editorialbackground.pdf (last visited Mar. 12, 2013).
[39] *Id.*
[40] Edward J. Carbone, *Presuit Nuts 'N' Bolts*, 26 No. 4 Trial Advoc. Q. 27, 27 (Fall 2007).
[41] Section 766.106(6)(a), F.S.
[42] Section 766.106(7), F.S.
[43] Section 766.106(6)(b), F.S.
[44] Section 766.1065(1), F.S.
[45] Section 766.1065(1), F.S.
[46] Section 766.1065(3), F.S., cross-references HIPAA law, contained in 45 C.F.R. parts 160 and 164.

B. The health information obtained, used, or disclosed extends to, and includes, the verbal as well as the written and is described as follows:
1. The health information in the custody of the following health care providers who have examined, evaluated, or treated the Patient in connection with injuries complained of after the alleged act of negligence: (List the name and current address of all health care providers). This authorization extends to any additional health care providers that may in the future evaluate, examine, or treat the Patient for the injuries complained of.
2. The health information in the custody of the following health care providers who have examined, evaluated, or treated the Patient during a period commencing 2 years before the incident that is the basis of the accompanying presuit notice.[47]

The Taking of Unsworn Statements

Current law allows for the taking of the following types of unsworn statements:

- Unsworn statements, recorded by either party of the opposing party, limited to the following:
  - The taking of these statements may be used solely for presuit screening, not as evidence in a court case;
  - The party initiating the taking of an unsworn statement must provide written, reasonable notice and an opportunity to have counsel present; and
  - The court may withdraw authority if a party uses this form of discovery for abuse.[48]
- Unsworn statements of treating health care providers by defense counsel:
  - The party taking statements is limited to communication about areas potentially relevant to the personal injury or wrongful death claim; and
  - The party taking statements must provide reasonable notice and the opportunity for the claimant and counsel to attend and be heard.[49]

Statements, discussions, written documents, reports, or other work product produced during the presuit screening process are not discoverable or admissible in civil proceedings for any purpose.[50]

III. Effect of Proposed Changes:

Consultations between a Health Care Practitioner and an Attorney

This bill clarifies that a health care practitioner or provider may consult with his or her own attorney about medical information disclosed by a patient or records generated during the time the practitioner treated the patient. The bill limits the release of the information to those situations in which the health care provider reasonably expects to be deposed, called as a witness, or receive formal or informal discovery requests in a medical negligence action, presuit investigation, or administrative proceeding.

[47] Section 766.1065(3), F.S.
[48] Section 766.106(6)(b)1., F.S.
[49] Section 766.106 (6) (b)1. and 5., F.S.
[50] Section 766.106(5), F.S.

The bill prohibits the attorney for the practitioner or provider who may be called as a witness from disclosing information to the insurer of the practitioner or provider in certain cases. If the medical liability insurer of a health care practitioner or provider represents a defendant or prospective defendant in a medical negligence action, the:

- The insurer may not choose an attorney for the practitioner, but may recommend attorneys other than the attorney representing the defendant or a prospective defendant.
- The practitioner's attorney may not disclose any information to the insurer, other than categories of work performed or time billed.

These limits on disclosures by an attorney do not apply if the attorney and practitioner reasonably expect the practitioner to be named as a defendant, the practitioner receives a presuit notice, or the practitioner is actually named as a defendant.

Ex Parte Interviews of Treating Health Care Providers

This bill allows a defendant or a defendant's counsel to conduct ex parte interviews of treating health care providers without requiring defense to provide notice to the claimant or the opportunity to be present by the claimant or the claimant's counsel. The term "interview" appears to be effectively the same as what is currently authorized in informal discovery as the taking of unsworn statements of treating health care providers, as addressed in the current s. 766.105(6)(b)5., F.S. However, the provision authorizing ex parte interviews does not require advance notice to the claimant or the claimant's legal representative or limit statements to areas potentially relevant to the claim of personal injury or wrongful death. As such, the provision relating to unsworn statements may no longer be needed in statute.

This bill amends the written authorization for release of protected health information required as part of presuit notice.

- The written authorization adds to the list of entities authorized to secure and disclose protected health information, the claimant's treating health care provider, his or her insurer, self-insurer, and counsel.
- The bill adds as a specific basis for release, the purpose of obtaining legal advice or representation arising out of the medical negligence claim.
- The written authorization expressly authorizes any of the entities listed to conduct ex parte interviews of the health care provider holding a claimant's health information without notice to the claimant or the presence of the claimant or the claimant's attorney.

The language in this bill relating to the written authorization is substantially similar to that adopted in Texas law, and upheld by the state Supreme Court.[51] The marked difference between the two forms is that the form provided in this bill contains an express ex parte provision. The Texas form is silent on the issue of ex parte contact. Still, the case in Texas involved a challenge to ex parte contact based on a validly executed written authorization waiver.[52] The Texas form,

[51] The written authorization form provided in Texas law is contained in V.T.C.A., Civil Practice & Remedies Code Section 74.052(c).
[52] *In re Collins*, 286 S.W. 3d 911 (TX 2009).

like the Florida form, authorizes the release of written and verbal protected health information. The trial court granted the plaintiff's motion for a preemptive protective order.[53] The Texas Supreme Court noted that HIPAA did not preempt Texas state law, and specific to the mandates of HIPAA:

> While the rules strongly favor the protection of individual health information, they permit disclosure … in a number of circumstances. … In a judicial proceeding, protected information may be disclosed in response to a court order. … It may also be disclosed without a court order in response to a subpoena or discovery request if the health care provider receives satisfactory assurances that the requestor has made reasonable efforts to ensure that the subject of the information has been given notice of the request. … . Finally, health care information may be disclosed if the patient has executed a validly written authorization.[54]

The plaintiff asserted a HIPAA violation in that written consent in Texas was not voluntary, as execution of the form is a condition to bringing suit (as is the case in Florida). The Court responded that the plaintiff didn't have to bring suit.[55] The Court also noted that although several courts found HIPAA preemption to state law procedures that would permit ex parte contact, none of them involved a validly executed written authorization.[56] On these grounds, the Court vacated the protective order of the trial court.[57]

Medical Specialist as Expert Witnesses

The bill amends s. 766.102(5), F.S., to limit the class of specialists qualified to offer expert testimony in a medical negligence action against a defendant specialist, to those specialists who practice in the same specialty as the defendant.

The bill repeals s. 766.102(14), F.S. This appears to have the effect of overturning *Oliveros v. Adventist Health Systems/Sunbelt, Inc.* and reinstating the holding in *Barrio v. Wilson.* Accordingly, the repeal of the subsection appears to remove the discretion of the court to qualify or disqualify an expert witness on grounds other than the specific qualifications specified in ss. 766.102(5)-(9), F.S.

Effective Date

The bill takes effect July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[53] *Id*. at 914.
[54] *Id*. at 917-918.
[55] *Id*. at 920.
[56] *Id*.
[57] *Id*. at 920-921.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Medical practitioners and providers who may be called as witnesses in medical negligence actions will clear rights to consult with an attorney.

Access to information through ex parte interviews may facilitate the evaluation of a medical negligence claim by the defendant or the defendant's insurer.

C. Government Sector Impact:

According to the Office of the State Courts Administrator, the "stringent requirements in relation to expert witness testimony will reduce the expenditure of judicial time."

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. 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.