HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	CS/CS/HB 827	**FINAL HOUSE FLOOR ACTION:**	
SPONSOR(S):	Judiciary Committee; Civil Justice Subcommittee; Gaetz and others	77 **Y's**	38 **N's**
COMPANION BILLS:	(SB 1792)	**GOVERNOR'S ACTION:**	Approved

SUMMARY ANALYSIS

CS/CS/HB 827 passed the House on May 1, 2013 as SB 1792. The bill changes medical malpractice laws.

The purpose of personal injury law is to fairly compensate a person injured due to wrongful action of another. Medical malpractice is a subset of personal injury law, applicable when the person allegedly causing the injury is a medical professional.

Under current law, patient records are generally confidential and may not be disclosed except in very limited circumstances. Florida courts have interpreted existing statutes to provide that a subsequent-treating provider may not be represented by an attorney hired by his or her insurance company during a deposition if the current provider and the defendant provider are insured by the same insurer, unless the provider reasonably expects to be named as a defendant, even if the current provider agrees not to discuss confidential patient information. The bill provides that if the practitioner's insurer represents the defendant in the action, the insurer may not contact the practitioner to recommend that the practitioner seek legal counsel, nor select an attorney for the practitioner, nor may the attorney disclose information to the insurer except as it relates to billing information. These limitations do not apply if the practitioner is named or expects to be named as a defendant.

Current law prohibits defense counsel from having an ex parte communication (outside of the view of the plaintiff and his or her attorney) with a subsequent treating provider. This creates a situation where a plaintiff can waive confidentiality in order to allow his or her attorney to discuss the case with the physician while denying defense counsel the same opportunity. The bill allows a prospective defendant or his or her attorney to interview the claimant's treating health care provider upon providing notice to the claimant of the intent to conduct such an interview.

Currently, a provider practicing a similar or the same specialty may testify as an expert witness in a medical malpractice case. The bill requires that such an expert must practice in the same specialty as the defendant provider.

The bill does not appear to have a fiscal impact on state or local governments.

The bill was approved by the Governor on June 5, 2013, ch. 2013-108, L.O.F., and will become effective on July 1, 2013.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Medical Malpractice Actions - In General

In general, a person has a common law cause of action against another for personal injury occasioned by the other's negligence. The purpose of personal injury law is to fairly compensate a person injured due to wrongful action of another. The term "medical malpractice" refers to personal injury lawsuits related to negligence committed by medical professionals. Negligence actions in general are governed by ch. 768, F.S.; medical malpractice actions are also governed by ch. 766, F.S. In any medical malpractice action, the plaintiff must prove

> that the alleged actions 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 for a given health care provider shall be 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]

Patient Records

Current law provides that patient records may not be furnished to any person other than the patient, the patient's legal representative, or another health care provider involved in the treatment of the patient without the patient's written authorization. However, there are five exceptions to this general rule, where a patient's records may be provided without written authorization:

- To any person, firm, or corporation that has treated the patient with the patient's consent;
- When a compulsory physical examination is made specifically for the purpose of civil litigation;
- Upon the issuance of a subpoena from a court;
- For statistical and scientific research, if the information protects the identity of the patient; or
- To a regional poison control center for purposes of treating a poison episode or for data collection and reporting.[2]

Current law also provides that information disclosed by a patient to a health care practitioner in the course of treatment is confidential and may not be disclosed to any other person, except:

- In a medical negligence action when the practitioner is or reasonably expects to be named as a defendant;
- In an administrative proceeding (namely a disciplinary action) when the practitioner is or reasonably expects to be named as a defendant;
- When communicating with other health care practitioners and providers involved in the patient's care;
- If permitted by written authorization from the patient; or
- If compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.[3]

The bill amends s. 456.057(7), F.S., to provide additional exceptions that would allow the release of patient records to an attorney. Information disclosed by the patient to the provider during treatment may also be disclosed:

[1] Section 766.102(1), F.S.
[2] Section 456.057(7), F.S.
[3] Section 456.057(8), F.S.

- In a medical negligence action or administrative proceeding if the provider reasonably expects to be named as a defendant;
- By a subsequent treating physician in accordance with the provisions of this bill;
- As provided for in the authorization for release of protected health information by the patient as a result of providing a notice of intent to initiate litigation; or
- To the practitioner's attorney during a consultation if the practitioner reasonably expects to be deposed, called as a witness, or receive formal or informal discovery requests.

As to the last exception listed above, if the practitioner's insurer represents the defendant in the action, the insurer may not contact the practitioner to recommend that the practitioner seek legal counsel, nor select an attorney for the practitioner, nor may the attorney disclose information to the insurer except as it relates to billing information. These limitations do not apply if the practitioner is named or expects to be named as a defendant.

Interviews with Treating Health Care Providers in Medical Malpractice Cases

Background

Section 766.203(2), F.S., requires a claimant (a prospective medical malpractice plaintiff) to investigate whether there are any reasonable grounds to believe that a health care provider was negligent in the care and treatment of the claimant and whether such treatment resulted in injury to the claimant prior to issuing a presuit notice. The claimant must corroborate reasonable grounds to initiate medical negligence litigation by submitting an affidavit from a medical expert.[4] After completion of presuit investigation, a claimant must send a presuit notice to each prospective defendant.[5] The presuit notice must include 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.[6] However, the requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions[7] for failure to provide presuit discovery.[8]

Once the presuit notice is provided, no suit may be filed for a period of 90 days. During the 90-day period, the statute of limitations is tolled and the prospective defendant must conduct an investigation to determine the liability of the defendant.[9] Once the presuit notice is received, the parties must make discoverable information available without formal discovery.[10] Informal discovery includes:

- Unsworn statements - Any party may require any other party to appear for the taking of an unsworn statement.
- Documents or things - Any party may request discovery of documents or things.
- Physical and mental examinations - A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants.
- Written questions - Any party may request answers to written questions.

[4] Section 766.203(2), F.S.
[5] Section 766.106(2)(a), F.S.
[6] *Id.*
[7] Sanctions can include the striking of pleadings, claims, or defenses, the exclusion of evidence, or, in extreme cases, dismissal of the case.
[8] Section 766.106(2)(a), F.S.
[9] Sections 766.106(3) and (4), F.S.
[10] Section 766.106(6)(a), F.S. The statute also provides that failure to make information available is grounds for dismissal of claims or defenses.

- Unsworn statements - The claimant must execute a medical information release that allows a prospective defendant to take unsworn statements of the claimant's treating health care providers. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.[11]

Section 766.106(7), F.S., provides that a failure to cooperate during the presuit investigation may be grounds to strike claims made or defenses raised. Statements, discussions, documents, reports, or work product generated during the presuit process are not admissible in any civil action and participants in the presuit process are immune from civil liability arising from participation in the presuit process.[12]

At or before the end of the 90 days, the prospective defendant must respond by rejecting the claim, making a settlement offer, or making an offer to arbitrate in which liability is deemed admitted, at which point arbitration will be held only on the issue of damages.[13] Failure to respond constitutes a rejection of the claim.[14] If the defendant rejects the claim, the claimant can file a lawsuit.

Ex Parte Interviews with Physicians by Defense Counsel

In many civil cases, counsel for any party can meet with any potential witness who is willing to speak without notice to the opposing counsel. In 1984, the Florida Supreme Court ruled that there was no common law or statutory privilege of confidentiality as to physician-patient communications[15] and that there was no prohibition on defense counsel communicating with a claimant's physicians. In 1988, the Legislature enacted a statute to create a physician-patient privilege.[16] The current version of the statute provides, in relevant part:

> Except as otherwise provided in this section and in s. 440.13(4)(c), [patient medical records] may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient.[17]

The statute provides some exceptions to the confidentiality in medical malpractice cases but the Florida Supreme Court has ruled that defense counsel are barred by the statute from having an ex parte conference with a claimant's current treating physicians.[18]

The Governor's Select Task Force on Healthcare Professional Liability Insurance noted problems caused by the inability of defense counsel to interview a claimant's treating physicians:

> [T]he defendant is frequently in the position of having to investigate the plaintiff's medical history or current condition in order to discover other possible causes of the plaintiff's injury that could be used in defending the action. In addition, this information is often useful in determining the strength of the plaintiff's case, which the defendant could use to decide whether to settle the claim or proceed to trial. It is often necessary to interview several of the plaintiff's treating healthcare providers in order to acquire this information.

[11] Section 766.106(6), F.S.
[12] Section 766.106(5), F.S.
[13] Section 766.106(3)(b), F.S.
[14] Section 766.106(3)(c), F.S.
[15] See *Coralluzzo v. Fass*, 450 So.2d 858 (Fla. 1984).
[16] Chapter 88-208, L.O.F.
[17] Section 456.057(7)(a), F.S.
[18] *See Acosta v. Richter*, 671 So.2d 149 (Fla. 1996).

> But, because formal discovery is an expensive and time consuming process, defendants are often unable to adequately gather this information in preparation of their defense.[19]

Opponents of allowing defendants access to ex parte interviews with treating physicians argued the system was not broken. The report continued:

> The problem the Legislature corrected was the private, closed-door meetings between insurance adjusters, defense lawyers, and the person being sued. Typically, the person being sued would speak with his or her colleagues and say "I need your help here. I'm getting sued. I need you to help me out on either the causation issue or the liability issue or the damage issue."
>
> The present system is not broken. Crafting language to go back prior to 1988, to allow unfettered access, is not appropriate. To allow a situation where a defense lawyer or an insurance adjuster and the doctor go to see a patient's treating physician on an informal basis would further drive a wedge between that physician and the patient.[20]

In 2003, the Legislature amended s. 706.106, F.S., to require a claimant to execute a medical information release to allow prospective defendants to take unsworn statements of the claimant's treating physician on issues relating to the personal injury or wrongful death during the presuit process. The claimant and counsel are entitled to notice, an opportunity to be heard, and to attend the taking of the statement. The legislation did not provide for ex parte interviews by defense counsel with a claimant's treating physicians.[21]

Effect of the Bill - Interviews

This bill amends s. 766.106(6), F.S., to provide that a prospective defendant or his or her legal representative may interview the claimant's treating health care providers, consistent with the authorization for release of protected health information. To do so, the prospective defendant must provide the claimant with notice of intent to conduct such an interview. The claimant then has 15 days to arrange a mutually convenient date, time and location for the interview. Any subsequent interviews may be conducted with at least 72 hours' notice. If the claimant does not schedule the interview, then the prospective defendant may attempt to conduct an interview without further notice to the claimant. The bill does not require a subsequent treating practitioner to submit to such an interview.

Statutory Authorization Form for Release of Protected Health Information

As noted in the section above, a patient seeking to pursue a medical malpractice action must, prior to filing the medical malpractice lawsuit, give notice to the medical provider[22] and participate in informal discovery.[23] Part of the cooperation in informal discovery is the requirement that the patient execute a release form authorizing the medical provider to access the patient's medical records held by other medical providers. The form is found at s. 766.1065(3), F.S.

Where there is an allegation of medical malpractice by a medical provider, it is common to seek evidence from the patient's other treating providers for a number of reasons, including to learn of the extent of the injuries and to ensure that the alleged injury did not exist prior to the alleged incident. These other providers are sometimes nervous when contacted to give records or testimony regarding the injury, as a common defense of one being sued is to allege that someone else is responsible.

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[19] *Report of the Governor's Select Task Force on Healthcare Professional Liability Insurance* (2003) at p. 231. The Report can be accessed at www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf (last accessed May 8, 2013).
[20] *Id.* at 233 (internal footnotes omitted).
[21] Chapter 2003-416, L.O.F.
[22] Section 766.106(2), F.S.
[23] Section 766.106(6), F.S.

Courts have strictly interpreted the statutes to prohibit an ex parte meeting between a nonparty treating physician and an outsider to the patient-health care provider relationship. A nonparty treating physician may not consult an attorney hired by the defendant's insurance prior to a deposition if the doctor does not reasonably expect to be named as a defendant.[24] If the defendant medical provider and the subsequent-treating medical provider are both insured by the same insurance company, the subsequent-treating medical provider may not be represented by an attorney hired by his or her insurance company, even if there is a verbal agreement to not discuss privileged information.[25] The courts appear to leave open the option of a physician hiring an attorney out-of-pocket so long as privileged information will not be discussed. However, the inability to discuss privileged information with an attorney may leave the subsequent-treating medical provider unclear as to whether he or she may reasonably expect to be named as a defendant. It is possible that if a doctor contacts an attorney in such a situation, it may be admissible as evidence that the doctor believes that he or she may have some liability since the doctor cannot contact an attorney about the privileged information unless he or she reasonably believes he or she may be named as a defendant.

This bill amends the statutory form in s. 766.1065, F.S., to resolve the problem of legal consultation and in conformity with other changes made by this bill to:

- Allow treating physicians and their attorneys access to the medical information;
- Add that obtaining legal advice is an authorized use of the medical information; and
- Authorize an attorney to interview a health care provider.

Expert Testimony

The plaintiff in a medical practice action must prove that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The defendant in most cases will try to prove that there was no breach of the prevailing professional standard of care. Plaintiffs and defendants alike must employ expert witnesses to testify to the prevailing standard of care and whether the defendant health care provider breached that standard.

In addition to general laws on evidence,[26] s. 766.102(5), F.S., limits who may be authorized as an expert witness in a medical malpractice case. If the defendant is a specialist, only a specialist in the same or a similar specialty as the provider may testify as an expert. A similar specialty is one that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim. An expert who is in a similar specialty must also have prior experience treating similar patients.[27]

Section 766.102(14), F.S., authorizes a court to qualify an expert witness "on grounds other than the qualifications in this section." The effect of this subsection is that the limit in subsection (5) is avoidable.

The bill amends s. 766.102(5), F.S., to limit expert testimony regarding a specialist to only a fellow specialist. The bill removes the ability of a specialist who is merely similar to the specialty of the defendant medical practitioner. The bill also repeals s. 766.102(14), F.S., making the limits on expert testimony in subsection (5) mandatory.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

[24] *Hasan v. Garvar*, 2012 WL 6619334 at 6 (Fla. 2012).
[25] *Id.* at 2.
[26] See generally ch. 90, F.S.
[27] Section 766.102(5), F.S.

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.