New Florida Medical Malpractice Laws by Stuart J. Weissman, Esq.

Florida now has newly enacted legislation pertaining to medical malpractice matters which became effective on October 1, 2011, and which applies to causes of action accruing on or after October 1, 2011.

In 1985, the Florida Legislature passed the Medical Malpractice Reform Act of 1985 for reasons which are beyond the scope of this article. Among other provisions within the Act, before any medical negligence lawsuit could be initiated in Florida, the Act required a presuit period where a medical malpractice plaintiff needed to put prospective defendants on notice that a lawsuit alleging medical negligence would be filed.

Over time, the laws pertaining to the presuit period, which include the obligations on the part of the plaintiff and prospective defendant, have been codified as follows: Florida Statutes sections 766.104, 766.106, 766.1065, 766.203, 766.205, and 766.206. Attorneys must closely examine these statutes that pertain to the presuit period as the consequences for failure to comply with the laws can be severe. **Please click here for a copy of these statutes.**

There are several requirements which must be included with the notice of intent to initiate litigation for medical negligence under Florida Statutes section 766.106(2) (2011). For example, 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 along with all known health care providers during the 2-year period prior to the alleged act of negligence. In addition, the claimant must conduct an investigation to ascertain that there are reasonable grounds to initiate medical negligence litigation with the submission of a verified written medical expert opinion from a medical expert pursuant to Florida Statutes section 766.203(2) (2011). The new laws pertaining to medical experts testifying in Florida will be discussed more fully below.

Along with the list of health care providers, the verified written medical expert opinion, copies of all the medical records relied upon by the medical expert in signing the expert opinion, claimants must now provide an accompanying Authorization for Release of Protected Health Information pursuant to the newly enacted Florida Statutes section 766.1065 (2011). **Please click here for a copy of this statute and Authorization for Release of Protected Health Information.**

According to section 766.1065, the notice of intent to initiate litigation "**must be accompanied** by an authorization for release of protected health information **in the form specified by this section**, authorizing the disclosure of protected health information that is potentially relevant to the claim of personal injury or wrongful death…The authorization required by this section **shall be in the following form**…"

As indicated by the emphasized language above, the Authorization required must be in the form specified in section 766.1065. The statute does not set out what consequences may

arise in the event the Authorization is not in the identical form as provided within the statute. The only consequences set out within the statute pertain to the actual revocation of an Authorization.

There are significant potential consequences due to the language contained within the now mandatory release language. The Authorization provides in relevant part: "The health information obtained, used, or disclosed extends to, and includes, the verbal as well as the written and is described as follows: The health information in the custody of the following healthcare providers who have examined, evaluated, or treated the Patient in connection with the injuries complained of after the alleged act of negligence…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…," as well as health information of health care providers "who have examined, evaluated, or treated the Patient during a period commencing 2 years before the incident…" As written, the broadness of the Authorization in section 766.1065 could lead to a considerable and impermissible invasion of a patient's privacy rights under the law.

It must be noted that, as indicated above, the Authorization only applies to those causes of action accruing on or after October 1, 2011. There have simply been no reported decisions pertaining to this newly enacted statute, but we are likely to someday see the Florida appellate courts undertake review of the statute and more specifically, the language contained within the mandatory Authorization, as it is probable attorneys will challenge the new law. Simply put, the Authorization as written could potentially lead to such actions like ex parte communications with treating physicians without notice to or presence of the claimant or claimant's representative which would be in direct violation of a patient's privacy rights under both Florida Statutes section 456.057(7)(a) and the Federal Health Insurance Portability and Accountability Act at 42 USC § 201 et seq. and 45 CFR §164.512.

A claimant should specifically explain, in bold face type, in the notice of intent letter, that the attached Authorization form does NOT abrogate or supersede the doctor-patient confidentiality laws under Florida Statutes section 456.057(7)(a) and the federal Health Insurance Portability and Accountability Act at 42 USC § 201 et seq. and 45 CFR §164.512. **Please click here for an example of a Notice of Intent to Initiate Litigation letter.** The above language should also be set out in the actual Authorization.

Please contact a Ratzan Law Group attorney at 305-374-6366 to obtain further information and recommendations for dealing with the new Florida law.

Additionally, Florida has a new law pertaining to medical experts providing testimony in Florida. The new law now requires that in order for a physician licensed in other states to provide expert testimony in the state of Florida, or to execute and submit a verified written medical expert opinion in presuit as discussed above, that out of state physician must satisfy certain requirements and obtain an Expert Witness Certificate pursuant to Florida Statutes

section 766.102(12) (2011) and Florida Statutes section 458.3175 (2011). **Please click here for a copy of these statutes.** The law only applies to a physician licensed under chapter 458 (Medical Physicians) or chapter 459 (Osteopathic Physicians) or to dentists who will be providing expert testimony about the prevailing professional standard of care.

The Florida Department of Health is the issuer of Expert Witness Certificates. In order to obtain such Certificate, the following is required according to section 458.3175: a complete registration application containing the physician's legal name, mailing address, telephone number, business locations, the names of the jurisdictions where the physician holds an active and valid license to practice medicine, and the license number or other identifying number issued to the physician by the jurisdiction's licensing entity and a $50 application fee. **Please click here for a link to the application on the Florida Department of Health website.**

According to the law, the Florida Department of Health shall approve an application for an expert witness certificate within 10 business days after receipt of the completed application and payment. An application though will be approved by default if the department does not act within the required period, however, the physician must notify the department in writing of the intent to rely on a certificate approved by default. A Certificate is valid for 2 years after the date of issuance. The new law also makes the holder of the expert witness certificate to be subject to disciplinary action.

Attorneys already know the difficulty of retaining truly qualified expert witnesses from around the country. Not only is it difficult to retain such qualified and experienced medical experts, but quite frankly, it is frequently a challenge to schedule time to speak with expert physicians. Time must be used wisely as expert physicians are frequently occupied with treating patients, researching, and academic responsibilities. This new law is one more hurdle thrown at attorneys in Florida who practice medical malpractice. While the Ratzan Law Group has yet to deal with this situation regarding the new Expert Witness Certificate (as the law applies to causes of action accruing on or after October 1, 2011), it is foreseeable that getting an out of state physician to complete this process will not be so simple.

One recommendation is for the attorney to complete the process with the information provided from the physician or with the assistance of the physician's office staff. There is nothing in section 458.3175 that says a Florida attorney retaining an out of state expert cannot complete the registration application, or submit the $50 fee for that matter, on behalf of the expert.

The medical malpractice landscape continues to change in Florida. As these new laws have just been passed, and have only taken effect just over one month ago, there is no way to determine for certain what the true consequences will be. Please check back at a later date for updates on these matters.

Please contact a Ratzan Law Group attorney at 305-374-6366 to obtain further information and recommendations for dealing with the new Florida laws.