CARLTON FIELDS

# Medical Malpractice Update - Spring 2013

June 10, 2013

**I. 2013 Medical Malpractice Reform Legislation** In less than a month, the way medical malpractice cases are handled in Florida will change significantly. The Florida Legislature passed SB 1792, which legislatively reversed the controversial Florida Supreme Court decision in *Hasan v. Garvar* and made some additional meaningful changes to Florida medical malpractice law for the benefit of the state's health care providers. The bill, which was signed yesterday by Governor Scott and became law, makes four significant changes to medical malpractice law:

1. For all causes of action accruing after July 1, 2013, standard of care expert witnesses must specialize in the same specialty as the defendant about whose care they testify;

2. Effective July 1, 2013, and applying retroactively to all causes of action regardless of when they accrued, health care providers will be expressly authorized to discuss a patient's care and treatment with an attorney to prepare for deposition, hearing testimony, or discovery requests;

3. Effective July 1, 2013, and applying retroactively to all causes of action regardless of when they accrued, defense counsel will be permitted to interview treating physicians during presuit; and

4. Effective July 1, 2013, and applying retroactively to all causes of action regardless of when they accrued, defense counsel will be permitted to conduct *ex parte* interviews of treating physicians at any time – with a catch.

Most of the attention SB 1792 has received has focused on the revisions to the law of physician-patient confidentiality in reaction to the *Hasan* decision. However, the most significant aspect of SB 1792 may prove to be its abolition of "similar specialty" standard of care witnesses. Under SB 1792's provisions, standard of care witnesses will be required to specialize in the same specialty as the provider whose care they are critiquing. And trial courts will be divested of discretion to qualify or disqualify standard of care expert witnesses on grounds other than those specified in section 766.102. No longer will plaintiffs' attorneys be able to use "jack of all trades" hospitalists or internal medicine physicians as their presuit experts against specialists from cardiologists to oncologists. This practice, which helped plaintiffs' counsel avoid the expense of finding and retaining a proper

expert in the proper specialty, worked to frustrate the legislative intent that malpractice claims actually be subjected to legitimate scrutiny before being pursued. As noted above, the changes to the law regarding standard of care expert qualifications will apply only to causes of action accruing on or after July 1, 2013. So it will be some time before cases affected by these changes begin to work their way through the pipeline and trial courts are called upon to begin to enforce these new restrictions on "similar specialty" expert witnesses. By contrast, the changes to physician-patient confidentiality law go into effect immediately and will likely improve the quality of information available to counsel defending medical malpractice actions – and protect the rights of Florida physicians called to testify. Effective July 1, 2013, Florida health care providers called to testify or to respond to formal or informal discovery will have their right to counsel protected. In a clear response to the *Hasan* opinion, SB 1792 expressly authorizes health care providers to discuss otherwise privileged information about a patient's care and treatment with their own counsel during a consultation if the provider reasonably expects to be deposed, to be called as a witness, or to receive formal or informal discovery requests in a medical negligence action, a presuit investigation of medical negligence, or an administrative proceeding. In what appears to be an attempt to deal with some of the concerns expressed in *Hasan* regarding the potential for abuse by insurers, SB 1792 places restrictions on the role insurers can play in influencing a treating provider's choice of counsel. If the insurer of the treating provider also insures a defendant or prospective defendant, the insurer may not contact the treating provider to recommend that the treating provider seek counsel. The insurer may not select an attorney for the treating provider. However, the insurer may recommend attorneys who do not represent any defendant or prospective defendant in the matter – if the treating provider contacts the insurer (and not vice versa). The counsel retained by the treating provider may not, directly or indirectly, disclose to the insurer any otherwise privileged information relating to the representation. None of these restrictions apply if the treating provider reasonably expects to be named as a defendant (or actually receives a Notice of Intent or is named as a defendant). Also on July 1, 2013, the long-standing prohibition against *ex parte* conferences between defense counsel and a plaintiff's treating physicians will be legislatively abolished. But defense counsel may not be able to enjoy the benefit of this watershed change immediately. Or perhaps ever, if a possible loophole left by the Legislature is successfully exploited by plaintiffs and not closed by judicial action or legislative revision. This is because the Legislature removed the prohibition on *ex parte* conferences subtly. Instead of explicitly authorizing the conferences, they changed the authorization that plaintiffs are required to execute and include with their Notice of Intent. Previously applicable only to causes of action accruing after October 1, 2011, the authorization will now be required for all new Notices of Intent after July 1, 2013 regardless of the date on which the cause of action accrued, and it will be required to contain language permitting defendants and their counsel to interview treating providers without the presence of the plaintiff or his/her counsel. There is a potential loophole in the way the Legislature has chosen to address this issue. The *ex parte* conferences are to be limited to those providers identified by the plaintiff as having examined, evaluated or treated him/her in connection with the alleged injuries at issue, and those providers identified by the plaintiff who examined, evaluated, or treated him/her during the two years before

the incident that is at issue. Specifically excluded are those providers identified by the plaintiff as possessing health care information about him/her that is not potentially relevant to the claim. The potential for abuse by plaintiffs is obvious. There is no device in SB 1792 for challenging a plaintiff's omission of a provider who should have been included, nor for challenging a plaintiff's improper exclusion of a provider who has information that is, in fact, potentially relevant to the claim. A defendant's sole expressly authorized remedy is a motion under section 766.206(2) arguing that "the authorization accompanying the notice of intent…is not completed in good faith by the claimant[.]" Since the remedy authorized by section 766.206 is dismissal of the claim and imposition of costs and fees against the plaintiff or his/her attorney, trial courts will likely be constrained by the longstanding caselaw favoring resolution of claims on their merits and urging courts to avoid dismissal of claims absent the most egregious of circumstances. Nothing in SB 1792 appears to require medical malpractice plaintiffs to add the *ex parte* conference language to past authorizations already executed, and nothing appears to require plaintiffs who have not already provided an authorization to do so. The requirement to provide an authorization with the *ex parte* conference language appears to apply – as a practical matter – only to plaintiffs whose Notice of Intent is served on or after July 1, 2013. So for all cases already in existence – whether in presuit or in litigation – as of June 30, 2013, this aspect of SB 1792 appears to be of no import. However, in light of the explicit legislative intent that this aspect of SB 1792 be given retroactive application, it is possible that some trial court judges may entertain motions to compel plaintiffs to execute new authorizations that include the ex parte conference language. It would be a creative argument, and one not expressly supported by the language of the statute, but certainly not a frivolous argument. In fact, I can imagine some more defense-friendly trial courts may agree that requiring a plaintiff to execute a new authorization best effectuates the legislature's intent in passing SB 1792. Another provision of SB 1792 permits defense counsel to conduct interviews of treating physicians during presuit. This is a change only of degree, not of kind. Unsworn statements of treating physicians are already authorized. Now interviews are also authorized, with additional provisions concerning scheduling. Defense counsel wishing to interview a treating provider must provide notice to plaintiff's counsel, who then bears responsibility for arranging a mutually convenient date, time and location within 15 days after the request for interview is made. Follow-up interviews are also permitted, with defense counsel required to notify plaintiff's counsel at least 72 hours before any such subsequent interview. If plaintiff's counsel fails to schedule the interview, defense counsel may then attempt to conduct an interview with the treating provider without further notice to claimant's counsel. **II. Discoverability of Records of Adverse Medical Incidents** The last year saw the Florida Supreme Court issue a second opinion – *West Florida Regional Medical Center v. See* – construing the scope and application of Florida's "Patients' Right to Know" constitutional provision. As most in the health care industry in Florida know very well, in 2004 the voters of Florida amended the state constitution at the behest of the medical malpractice plaintiffs' bar, providing themselves with a right of access to previously confidential records of "adverse medical incidents" maintained by health care providers. Because it was, incredibly, the seventh constitutional amendment on the ballot that year, it has come to be known as "Amendment 7" and the name has stuck even after the constitutional provision took its

place as article X, section 25 of the Florida Constitution. In the nine years since the adoption of Amendment 7, both Florida and federal courts have dealt with a multitude of challenges testing the validity, construction, and interpretation of Amendment 7. Sadly for the health care industry, but happily for the plaintiffs' bar, the overwhelming majority of those courts have interpreted Amendment 7 to provide a very broad right of access to a vast array of documents relating to all manner of medical "incidents", including some that seem to defy characterization as an "adverse medical incident"[1]. The Florida Legislature took action, enacting enabling legislation that established procedures for requesting and obtaining records under Amendment 7 and sought to place some limits on the records available under Amendment 7[2]. It was largely invalidated as unconstitutional by the Florida Supreme Court[3]. Other courts have turned away objections to Amendment 7 production based on constitutional principles, relevance[4], overbreadth and burdensomeness[5], and even "fact" work product.[6] Among the few objections to Amendment 7 requests not yet judicially rejected are "opinion" work product and attorney-client privilege – but that may be only because no appellate court has squarely ruled on their applicability yet[7]. All in all, victories for health care providers on Amendment 7 issues have been few and far between. One of those victories, however, has proven over the last nine years to be the most effective tool available to narrow overly broad requests and, at times, to deter plaintiffs from requesting records at all. This victory was the Florida Supreme Court's holding that the procedures established in the enabling legislation for disclosure of Amendment 7 materials did not conflict with the language of Amendment 7 and were therefore constitutional[8]. Foremost among these approved procedures is section 381.028(7)(c), pursuant to which a health care provider may require a requesting party to pay the reasonable cost of compliance – including a reasonable charge for staff time necessary to search for records and redact other patients' identifying information – before acting on the request. Another victory, albeit non-judicial and perhaps lesser utilized, is a federal statute – the Patient Safety Quality Improvement Act of 2005 (PSQIA)[9]. By enacting PSQIA, Congress established a broad, federal privilege protecting medical peer review and patient safety processes. In order to qualify for its protection, health care providers must submit their "patient safety work product" to a "patient safety organization" (PSO) – external organizations that collect and analyze patient safety work product and provide feedback to providers on strategies to improve patient safety and quality of care.[10] "Patient safety work product" that is submitted to a PSO is privileged and not subject to discovery in connection with a federal, state or local civil, criminal or administrative proceeding[11]. As a federal statute, the PSQIA and its privilege preempt Amendment 7 pursuant to the Supremacy Clause of the United States Constitution[12]. PSQIA's protection of records that would be subject to Amendment 7 were they in Florida has been upheld by a small but growing number of courts nationwide[13]. Florida health care providers seeking to avoid or minimize the impact of Amendment 7 compliance would be well advised to investigate how to avail themselves of the protection of PSQIA by joining a PSO and submitting their patient safety work product for review and analysis.

[1] For example, the granting of staff privileges by a hospital to a physician. See West Fla. Reg. Med. Ctr. v. See, 79 So. 3d 1, 12-13 (Fla. 2012). [2] § 381.028, Fla. Stat. (2005). [3] Florida Hosp. Waterman v. Buster, 984 So. 2d 478, 492-94 (Fla. 2008). [4] Morton Plant Hosp. Ass'n v. Shahbas, 960 So. 2d 820, 824-25

(Fla. 2d DCA 2007). [5] Columbia Hosp. Corp. of S. Broward v. Fain, 16 So. 3d 236, 240-41 (Fla. 4th DCA 2009). [6] Acevedo v. Doctors Hosp., 68 So. 3d 949, 953 (Fla. 3d DCA 2011); Florida Eye Clinic v. Gmach, 14 So. 3d 1044, 1048-49 (Fla. 5th DCA 2009); Lakeland Reg. Med. Ctr. v. Neely, 8 So. 3d 1268, 1269-70 (Fla. 2d DCA 2009). [7] But see Acevedo, 68 So. 3d at 953 ("[B]ecause proper representation demands that counsel be able to assemble information and plan her strategy without undue interference, opinion work product is generally afforded absolute immunity....[T]here is nothing in Amendment 7 to suggest the voters intended to create a chilling effect within legal profession by mandating disclosure of opinion work product."); Gmach, 14 So. 3d at 1050 ("We do not read amendment 7 as evincing an intent from the voters to eliminate the privilege of opinion work product. There is no indication from either section 25, the ballot summary, or the statement and purpose to the amendment that the voters intended for amendment 7 to provide patients not only a right to access records of any adverse incident report prepared in the course of a medical facility's business, but also of any such reports that include an attorney's mental impressions, conclusions, theories, or opinions. It is hard to imagine that the voters contemplated the potential chilling effect that may result in the legal community if an attorney's mental impressions contained in such a report could be made readily available to a requesting patient under the amendment.") [8] Buster, 984 So. 2d at 493; See, 79 So. 3d at 15. [9] 42 U.S.C. § 299b-21 et seq. [10] See, e.g., K.D. ex rel. Dieffenbach v. U.S., 715 F. Supp. 587, 595-96 (D. Del. 2010). [11] 42 U.S.C. § 299b-22(a). [12] See U.S. Const., art. VI, cl. 2; see also 42 U.S.C. § 299b-22(a) ("Notwithstanding any other provision of Federal, State, or local law, and subject to subsection (c) of this section, patient safety work product shall be privileged...."). [13] See Sevilla v. U.S., 852 F. Supp. 2d 1057, 1068-69 (N.D. Ill. 2012); Dep't of Fin. and Prof. Reg. v. Walgreen Co., 361 Ill. Dec. 186, 191-92 (Ill. App. 2012); Francis v. U.S., 2011 WL 2224509, *6-7 (S.D.N.Y. 2011); K.D. ex rel Dieffenbach v. U.S., 715 F. Supp. 587, 595-96 (D. Del. 2010).

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