

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 469 Informed Consent  
**SPONSOR(S):** Hays and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1508

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Health Quality</u>	<u>10 Y, 0 N</u>	<u>Lowell</u>	<u>Lowell</u>
2) <u>Healthcare Council</u>			
3) _____			
4) _____			
5) _____			

**SUMMARY ANALYSIS**

This bill adds advanced registered nurse practitioners and physician assistants to the list of health care practitioners who are immune from a civil recovery under s. 401.445, F.S., emergency examination and treatment of incapacitated persons, and s. 766.103, F.S., the Florida Medical Consent Law.

This bill may implicate Article I, section 21 of the Florida Constitution, the right of access to the courts, by barring a civil recovery against advanced registered nurse practitioners and physician assistants under specific circumstances.

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

The bill takes effect July 1, 2007.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation

##### *Advanced Registered Nurse Practitioners*

Nurses are licensed and regulated by the Board of Nursing pursuant to part I of chapter 464, F.S. There are approximately 10,305 Advanced Registered Nurse Practitioners (ARNPs) in Florida<sup>1</sup>. ARNPs practice under a protocol with a supervising physician and are not required to be under direct supervision.

ARNPs perform medical acts of diagnosis, treatment, and operation pursuant to a protocol between the ARNP and a Florida-licensed medical doctor, osteopathic physician, or dentist. The degree and method of supervision is determined by the ARNP and the supervisor, must be appropriate for prudent health care providers under similar circumstances, and must be specifically identified in a written protocol.

##### *Paramedics and Emergency Medical Technicians*

Paramedics and emergency medical technicians are regulated under chapter 401, F.S., Medical Transportation and Services. There are approximately 18,456 paramedics and 30,010 emergency medical technicians (EMTs) in Florida<sup>2</sup>. Each paramedic and EMT employed within an Emergency Medical Services (EMS) system must operate under the direct supervision of a physician medical director, or indirectly by standing orders or protocols. Each EMS agency employs or contracts with a physician medical director to provide this medical oversight and quality assurance. The larger EMS providers in Florida have over 1,000 EMTs and paramedics on staff, all of them working under one medical director.

Medical directors must supervise and assume direct responsibility for the medical performance of the EMTs and paramedics, and must perform duties including advising, consulting, training, counseling, and overseeing of services. This includes appropriate quality assurance but does not include administrative or managerial functions. Each medical director is required to establish a quality assurance committee to provide reviews of all EMTs and paramedics operating under the director's supervision.

##### *Physician Assistants*

Sections 458.347(7), and 459.022(7), F.S., govern the licensure of physician assistants in Florida. Physician assistants are licensed by the department and regulated by either the Florida Board of Medicine or the Florida Board of Osteopathic Medicine. Among other requirements, an applicant for licensure as a physician assistant must demonstrate passage of the National Commission on Certification of Physician Assistants examination and submit certification of completion of a physician assistant training program. Applicants for renewal must complete 100 hours of continuing medical education every two years or hold a current certification issued by the National Commission on Certification of Physician Assistants.

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<sup>1</sup> The Florida Department of Health, Division of Medical Quality Assurance Annual Report 2005-2006.

<sup>2</sup> *Id.*

There are currently 3,675 active, licensed physician assistants practicing in the state of Florida.<sup>3</sup>

### *Informed Consent*

In general, a health care practitioner may not treat a patient without his or her informed consent. In Florida, this general principle is codified in what is known as the "Florida Medical Consent Law."<sup>4</sup> This law prohibits a civil recovery for treating, examining, or operating upon a patient without his or her informed consent against a physician, chiropractic physician, podiatric physician, or dentist ("health care practitioners") under two circumstances.

In the first circumstance, the civil recovery is barred when:

- The action of the health care practitioner, in obtaining the consent of the patient or a person authorized to give consent for the patient, was in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community; and
- A reasonable individual, from the information provided by the health care practitioner under the circumstances would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among other health care practitioners in the same or similar community who perform similar treatments of procedures.

In the alternative, a civil recovery is also barred when the patient would reasonably, under the circumstances, have undergone such treatment or procedure had he or she been advised by the health care practitioner in the manner noted above.

Written consent to medical treatment given by a patient or another authorized person is presumptively valid.

### *Florida Patient's Bill of Rights and Responsibilities*

Florida law delineates information that must be provided to the patient within the Patient's Bill of Rights and Responsibilities<sup>5</sup>. These rights include the right of a patient:

- To know the name, function, and qualifications of each health care provider who is providing medical services to the patient;
- To be given by his or her health care provider information concerning diagnosis, planned course of treatment, alternatives, risks, and prognosis, unless it is medically inadvisable or impossible to give this information to the patient, in which case the information must be given to the patient's guardian or a person designated as the patient's representative. A patient has the right to refuse this information; and
- To refuse any treatment based on information required by this paragraph, except as otherwise provided by law.

### *Emergency Examination and Treatment of Incapacitated Persons*

Florida law also bars a civil recovery for an emergency examination or treatment without the patient's informed consent by an emergency medical technician, paramedic, physician, or any person acting under the direct medical supervision of a physician<sup>6</sup>. This immunity is available where the patient:

- At the time of examination or treatment is intoxicated, under the influence of drugs, or otherwise incapable of providing informed consent under s. 766.103, F.S.;

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<sup>3</sup> *Id.*

<sup>4</sup> s. 766.103, F.S.

<sup>5</sup> s. 381.026, F.S.

<sup>6</sup> s. 401.445, F.S.

- At the time of examination or treatment is experiencing an emergency medical condition; and
- Would reasonably, under the circumstances, undergo the examination, treatment, or procedure if he or she were advised by the emergency medical technician, paramedic, or physician under s. 766.103, F.S.

An examination or treatment must be limited to a reasonable examination of the patient to determine his or her medical condition and treatment reasonably necessary to alleviate the emergency medical condition or to stabilize the patient. If the patient reasonably appears to be incapacitated and refuses consent, the patient may be examined or treated if he or she needs emergency attention; however, unreasonable force may not be used.

### Effect of Proposed Changes

The bill adds advanced registered nurse practitioners and physician assistants to the list of health care practitioners who are immune from a civil recovery under the Florida Medical Consent Law as well as s. 401.445, F.S., emergency examination and treatment of incapacitated persons.

#### C. SECTION DIRECTORY:

Section 1. Amends s. 401.445, F.S., relating to immunity for medical personnel for emergency examination and treatment without consent of the patient.

Section 2. Amends s. 766.103, F.S., relating to immunity for medical personnel under the medical consent law.

Section 3. Provides an effective date of July 1, 2007.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may protect a larger number of health care practitioners from civil lawsuits, and thus large monetary judgments, where informed consent is at issue.

#### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill will have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

##### 2. Other:

This bill may implicate Article I, section 21 of the Florida Constitution, which states that the courts “shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.” The test for ensuring the right of access to the courts was declared in *Kluger v. White*, 281 So.2d 1 (Fla. 1973), in which the Florida Supreme Court held that the Legislature is without power to abolish or otherwise restrict a statutory law right that predated the adoption of the constitution or a common law right without providing a reasonable alternative remedy, unless there is a showing of an overpowering public necessity to limit or abolish such right and no alternative remedy of meeting such public necessity exists.

The Florida Supreme Court refined the *Kluger* test in *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1986). There, comprehensive tort reform legislation capping non-economic damages at \$450,000 was challenged on the basis that it denied claimants access to the courts. In that case, the Court noted the *Kluger* test requires either (1) providing a reasonable alternative remedy or commensurate benefit, or (2) a legislative showing of overpowering public necessity for the abolishment of the right *and* no alternative method of meeting such public necessity. The Court noted that the right to sue and recover non-economic damages of any amount existed at the time the Florida Constitution was adopted. Consequently, the Court found the cap on non-economic damages unconstitutional as the Legislature did not provide an alternative remedy or commensurate benefit and the parties did not assert the existence of an overpowering public necessity.

#### B. RULE-MAKING AUTHORITY:

No additional rule-making authority is required as a result of this bill.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

Paragraph (a)2. of subsection (3), section 766.103, F.S., appears to contain a drafting error. The end of the paragraph reads, “which are recognized among other physicians, osteopathic physicians, chiropractic physicians, podiatric physicians, or dentists in the same or similar community who perform similar treatments or procedures; or”; this language fails to reference advanced registered nurse practitioners or physician assistants.

#### D. STATEMENT OF THE SPONSOR

This bill will enhance access to medical care by more fully utilizing the skills and talents of our Physician Assistants and our Advanced Registered Nurse Practitioners.

### IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On February 20, 2007, the Health Quality Committee adopted one amendment to the bill. The amendment corrects a drafting error by adding “advanced registered nurse practitioner” and “physician assistant” to the end of paragraph (a)2. of subsection (3).

The bill was reported favorably as amended.