

INITIATIVE FINANCIAL INFORMATION STATEMENT

Patients' Right to Know About Adverse Medical Incidents

SUMMARY OF INITIATIVE FINANCIAL INFORMATION STATEMENT

Information about most adverse medical incidents is currently collected by the Agency for Health Care Administration, Department of Health, and to some degree the Department of Insurance Regulation. Current Florida law restricts information available to patients related to investigations of adverse medical incidents, such as medical malpractice. This amendment would give patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents, including those which could cause injury or death. Patients' identities are precluded from being disclosed and any privacy restrictions imposed by federal law are required to be maintained.

Based on the information provided through public workshops, arguments before the Florida Supreme Court, and information collected through staff research, the Financial Impact Estimating Conference principals expect that the proposed amendment will have the following financial effects:

- The number of public information requests will significantly increase. The costs for public records will generally be recoverable from requestors.
- Administrative costs could increase if this amendment were applied retroactively. The fiscal impact is indeterminate, but would be funded from licensure fees.
- Increased availability of adverse incident reports may enhance the discovery process by giving potential litigants more data. A stronger basis for lawsuits and additional opportunities for class action litigation may be created. This may increase the general cost of health care and, therefore, public expenditures for Medicaid and government employee health insurance could increase. The fiscal impact is indeterminate.
- Making additional medical records public may cause the quality of peer reviews to decline and increase the risk of lower quality physician services. This may lead to more malpractice incidents and lawsuits thus increasing the general cost of health care. The fiscal impact is indeterminate.

FINANCIAL IMPACT STATEMENT

The direct financial impact this amendment will have on state and local government revenues and expenditures cannot be determined, but is expected to be minimal. State agencies may incur some additional costs to comply with public records requirements of the amendment, but these costs will be generally offset by fees charged to the persons requesting the information.

I. SUBSTANTIVE ANALYSIS

A. Proposed Amendment

Ballot Title:

Patients' Right to Know About Adverse Medical Incidents

Ballot Summary:

Current Florida law restricts information available to patients related to investigations of adverse medical incidents, such as medical malpractice. This amendment would give patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents, including those which could cause injury or death. Provides that patients' identities should not be disclosed.

1) Statement and Purpose:

The Legislature has enacted provisions relating to a patients' bill of rights and responsibilities, including provisions relating to information about practitioners' qualifications, treatment and financial aspects of patient care. The Legislature has, however, restricted public access to information concerning a particular health care provider's or facility's investigations, incidents or history of acts, neglects, or defaults that have injured patients or had the potential to injure patients. This information may be important to a patient. The purpose of this amendment is to create a constitutional right for a patient or potential patient to know and have access to records of a health care facility's or provider's adverse medical incidents, including medical malpractice and other acts which have caused or have the potential to cause injury or death. This right to know is to be balanced against an individual patient's rights to privacy and dignity, so that the information available relates to the practitioner or facility as opposed to individuals who may have been or are patients.

2) Amendment of Florida Constitution:

Art. X, Fla. Const., is amended by inserting the following new section at the end thereof, to read:

"Section 22. Patients' Right to Know About Adverse Medical Incidents."

(a) In addition to any other similar rights provided herein or by general law, patients have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident.

(b) In providing such access, the identity of patients involved in the incidents shall not be disclosed, and any privacy restrictions imposed by federal law shall be maintained.

(c) For purposes of this section, the following terms have the following meanings:

(1) The phrases "health care facility" and "health care provider" have the meaning given in general law related to a patient's rights and responsibilities.

(2) The term "patient" means an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider.

(3) The phrase "adverse medical incident" means medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental

agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.

(4) The phrase "have access to any records" means, in addition to any other procedure for producing such records provided by general law, making the records available for inspection and copying upon formal or informal request by the patient or a representative of the patient, provided that current records which have been made publicly available by publication or on the Internet may be "provided" by reference to the location at which the records are publicly available.

3) Effective Date and Severability:

This amendment shall be effective on the date it is approved by the electorate. If any portion of this measure is held invalid for any reason, the remaining portion of this measure, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.

B. Effect of Proposed Amendment

Currently, Florida law restricts information available to patients related to investigations of adverse medical incidents, such as medical malpractice. This proposed constitutional amendment would give patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents, including those which could cause injury or death.

Background

Floridians for Patient Protection (FPP) is the sponsor of this proposed constitutional amendment. FPP is an organization of medical malpractice and negligence victims and their families with significant representation by the Academy of Florida Trial Lawyers. As of April 2004, FPP raised almost \$12 million in support of their amendment campaign which includes this and two other proposed amendments.

FPP argues that the proposed amendment is necessary to allow Florida citizens access to information about adverse medical incidents which currently may be unavailable to them. In their brief filed before the Florida Supreme Court in support of this proposed amendment, FPP wrote that:

“The expressed purpose of this amendment is to expand a patient’s right to know about information currently kept confidential by statute. This information may be important to a patient. The purpose of this amendment is to create a constitutional right for a patient or potential patient to know and have access to records of a health care facility’s or provider’s adverse medical incidents, including medical malpractice and other acts which have caused or have the potential to cause injury or death.”

Adverse incidents that occur in health care facilities must be reported to the Agency for Health Care Administration (s. 395.0197 (6), Florida Statutes). Florida currently has a system of public disclosure of which physicians have significant histories of adverse medical incidents. According to FPP, this system does not include all adverse medical incidents and similar claims. Physicians are required to report to the Department of Insurance Regulation any claim or action for “personal injury alleged to have been caused by error, omission, or negligence in the practice of medicine” (s. 456.049, Florida Statutes). The Department of Health is required to compile a “practitioner

profile” of healthcare practitioners, including physicians. The threshold for disclosure in the profile system is \$100,000 per claim.

Additionally, current law also requires certain adverse medical incidents and disciplinary actions taken against a doctor to be reported to the Department (s. 458.337(1), (2) and s. 458.351, Florida Statutes). Information about adverse medical incidents, even when reported to the Department is statutorily exempt from disclosure, precluding regular access to public records (s. 458.337 (3), Florida Statutes). Those records are to be used solely for the purpose of the Department and the board in disciplinary proceedings and are not available for use in legal proceedings. The Patient’s Bill of Rights” (s. 381.026, Florida Statutes) allows a patient to request information from his or her health care provider or health care facility in which they are receiving medical services, yet does not provide access to information statutorily hidden from patients. According to FPP, some information, which might be desired by patients wishing to avoid doctors with a high incidence of adverse medical incidents, is not available to the public. The proposed amendment will remove the public disclosure exemption and make this information available to the patient who requests the information.

The amendment provides definitions, including for the new term “adverse medical incident”, which extends to near miss incidents that could have caused injury to or death of a patient.

The proposal would repeal statutory law (s. 90.502, Florida Statutes), which provides that peer review materials are not discoverable. Opponents of this amendment believe this would destroy the attorney-client privilege for any materials that are otherwise privileged, but are received by a provider or facility and which involve adverse medical incidents. There may be a reluctance to report adverse incidents in peer review documents. A lower quality peer review process will decrease the quality of physician services and could lead to an increase in medical malpractice actions and thus increased health care costs.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

Section 100.371, Florida Statutes, requires that the Financial Impact Estimating Conference “...complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenue or costs to state or local governments resulting from the proposed initiative.”

As part of determining the fiscal impact of this proposed amendment, the Financial Impact Estimating Conference principals held a public workshop on June 4, 2004. The principals heard testimony on the fiscal effects of this amendment from representatives of Floridians for Patient Protection (FPP). Additionally, a questionnaire was mailed on June 8, 2004 requesting input from various state agencies, local governmental entities, and other organizations regarding fiscal impacts and the development of cost estimates. Representatives of these entities were invited to the June 17, 2004 meeting of the Financial Impact Estimating Conference to answer questions or provide additional information on potential costs.

A. FISCAL ANALYSIS

The fiscal impact summary for this proposed amendment is based on independent research; oral and written statements from the proponents, opponents, and state departments and agencies; and discussions among the Estimating Conference principals and their professional staff. Based

on this information, the Financial Impact Estimating Conference principals expect that the proposed amendment will have the following financial effects on state and local government:

Public Records Requests will Increase. According to the Agency for Health Care Administration (AHCA), there would be a significant increase in the number of public information requests. Although costs for public records are potentially recoverable from requestors, there may be additional changes in law to permit charges to routine overhead costs that are not currently covered and represent significant cost to the state. The Agency currently has a contractor that provides redaction and copier services for large requests. Additional staff would be required, the Florida Regulatory Administration and Enforcement System (FRAES) database would need to be modified to track whether the adverse incident met the medical incident definition, a review of all adverse incident documents would need to be performed, field office survey staff would need to investigate adverse incidents, and other changes would be necessary to keep multiple documents. AHCA estimates four staff and \$440,000 for additional records requests associated with adverse incidents for nursing homes and assisted living facilities and an additional half-time position and \$25,600 for incidents related to hospitals and ambulatory surgery centers. Public records request costs may be recovered in part by charging fees to cover the costs of storage, retrieval and duplication of documents.

According to the Department of Health (DOH), if the amendment were applied retroactively, the costs would be extensive. A retroactive application would require the county health departments to go through each medical record to determine if the incident met the standard for an “adverse incident”. These records would then have to be logged, copied, redacted, and reported. The administrative costs would be funded through adjustments to licensure fees because the cost of professional regulation is fee supported. The costs for public records are recoverable from requestors.

Documents made available from public records requests may provide sufficient data to allow more informed consumer choices about health care providers. If a market shift occurs toward physicians whose patients have lower overall health care costs, then savings may attribute to both the private sector and public sector. At this time, the cost savings from such a shift cannot be determined.

Public records requests under this amendment are likely to generate more adverse data than previously available during the discovery process. This could lead to more litigation and expand the possibility of class action litigation.

Analysis of Near Miss Data. “Near miss” is commonly understood to mean incidents that could have caused injury or death of a patient. These incidents may have been prevented because internal controls and operating procedures functioned properly. Near misses are currently not required to be reported. According to AHCA, the cost of maintaining a “near miss” database is unknown. The first attempt at collecting near miss data is being funded through a start-up appropriation of \$300,000 through AHCA to the Patient Safety Authority.

Quality of Health Care may Decline. As more data related to adverse incidents and near misses are made available, increased malpractice lawsuits may occur and the quality of health care may decline. This decline may be the result of a lower quality peer review process because physicians may be reluctant or refuse to participate in reviews that criticize fellow practitioners publicly. Increased litigation may also change practice procedures of physicians thus impacting the overall cost of health care.

B. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS:

1. Revenues:

- The increase in revenues, generated from processing fees, for AHCA are estimated at \$465,600 and are indeterminate for DOH.

2. Expenditures:

- Public records request processing costs will increase for both AHCA and DOH. These expenditures are estimated at \$465,600 for AHCA and are indeterminate for DOH.