



# OLR RESEARCH REPORT

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## FLORIDA MALPRACTICE LAWS AND HEALTH COURTS

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You asked for information on Florida's medical malpractice laws. You also asked if Florida has any type of health court or health care court.

### SUMMARY

Florida enacted several reforms to its medical malpractice law in 2003. Among numerous other things, Florida's medical malpractice law:

1. requires parties to conduct presuit investigation of claims, including obtaining expert opinions, to minimize frivolous claims and defenses;
2. creates financial incentives for parties to submit the case to binding arbitration rather than proceed to trial;
3. requires claimants to prove a higher standard than ordinary negligence ("reckless disregard") for most claims involving emergency medical treatment;
4. caps the allowable non-economic damages that claimants can recover; and
5. provides a separate, no-fault administrative process to compensate parents for the care of infants born with certain birth-related neurological injuries.

Below, we summarize Florida's medical malpractice law. The summary is grouped by topic. It generally focuses on substantive provisions rather than procedural requirements, and not all provisions are discussed. Most of the provisions discussed below are from Chapter 766 of the Florida Statutes. The full text of that chapter is available [here](#).

Florida has no general health courts or health care courts. However, approximately two-thirds of the state's 20 judicial circuits have at least one mental health court. Generally, eligible defendants have the option of proceeding through a mental health court rather than a traditional court, and local courts have discretion regarding eligibility criteria for the use of such courts. Mental health courts serve as an alternative to the traditional court system for people with specified mental health conditions.

## **FLORIDA MEDICAL MALPRACTICE LAW**

### ***Standard of Care and Related Matters***

Under Florida law, in medical malpractice cases, the claimant has the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care (i.e., 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 providers).

If the injury is claimed to have resulted from negligent affirmative medical intervention, the claimant must show that the injury was not within the necessary or reasonably foreseeable results of the procedure, if the intervention was carried out in accordance with the prevailing professional standard of care by a reasonably prudent similar provider. This provision applies only when the intervention was taken with the patient's informed consent in compliance with law (see below).

A provider's failure to order, perform, or administer supplemental diagnostic tests is not actionable if the provider acted in good faith and with due regard for the prevailing professional standard of care.

Florida law specifies that the existence of a medical injury does not create any inference or presumption of a provider's negligence. Records, policies, or testimony of an insurer's reimbursement policies or reimbursement determinations are not admissible. However, the

discovery of the presence of a foreign body commonly used in surgical, examination, or diagnostic procedures (e.g., a sponge or clamp) is prima facie evidence of the provider's negligence.

A provider's failure to comply with or breach of any federal requirement is also not admissible (Fla. Stat. Ann. § 766.102).

**Good Samaritan Act and Emergency Services.** Florida law provides civil immunity for "Good Samaritans" in certain circumstances. For example, under specified conditions (e.g., the victim does not object to the treatment), immunity extends to people who render gratuitous emergency care in response to an emergency outside of a hospital or other medical setting.

Providers and hospitals providing emergency services are also generally immune from civil liability related to such services unless their actions demonstrate a reckless disregard for the consequences so as to affect life or health. Facilities granted such immunity must accept and treat all emergency care patients within their operational capacity without regard to ability to pay.

If a practitioner is in a hospital (either attending to a patient, or for other business or personal reasons) and voluntarily treats a patient with whom the practitioner does not have an existing patient-practitioner relationship, and that care is necessitated by a sudden or unexpected situation or an occurrence demanding immediate medical attention, the practitioner is generally immune from civil damages for that care. He or she would be liable for (1) willful and wanton conduct that would likely result in injury so as to affect the life or health of another or (2) damages related to treatment unrelated to the original situation that demanded immediate medical attention (Fla. Stat. Ann. § 768.13).

**Medical Consent Law.** In treatments that are not covered by the Good Samaritan Act, the law specifies and limits the circumstances under which claimants can recover for a provider's treating, examining, or operating on a patient without his or her informed consent (Fla. Stat. Ann. § 766.103).

### ***Pleading and Notice Requirements***

Florida requires attorneys filing a medical malpractice case to first make a reasonable investigation under the circumstances to determine that there are grounds for a good faith belief that the claimant received

negligent medical care or treatment, and to certify this in the complaint or initial pleading. Good faith can be shown if the claimant or counsel has received an expert's written opinion that there appears to be evidence of medical negligence. (See below for presuit investigation requirements.)

If the court determines that the counsel's certificate was not made in good faith and that no justiciable issue was presented against a provider that fully cooperated in providing informal discovery, the court must (1) award attorneys fees and taxable costs against the claimant's counsel and (2) submit the matter to the state bar for disciplinary review (Fla. Stat. Ann. § 766.104).

After completing the required presuit investigation (see below) and before filing the complaint, the claimant must notify each prospective defendant of the intent to initiate the litigation. The notice must include specified information (e.g., a list of all known providers the claimant saw for the relevant injuries, if available).

After serving the complaint, the claimant must provide a copy to the state Department of Health, and, if the complaint involves a licensed facility (such as a hospital), the Agency for Health Care Administration. The department or agency must review each such incident and determine whether the licensee's conduct is potentially subject to disciplinary action (Fla. Stat. Ann. § 766.106).

***Ninety-Day Waiting Period; Discovery.*** After mailing the notice, the claimant must wait at least 90 days to file the lawsuit; during that time, the prospective defendant or defendant's insurer must investigate to determine the defendant's liability (see below). Insurers must also have a procedure, meeting specified criteria, for the prompt investigation, review, and evaluation of claims during this period.

The insurer must investigate the claim in good faith, and both the claimant and prospective defendant must cooperate with the insurer in good faith. If the insurer requires, a claimant must appear before a pretrial screening panel or medical review committee, as well as submit to a physical examination. A party's unreasonable failure to comply with these requirements justifies dismissal of claims or defenses.

By the end of the 90 days, the prospective defendant or defendant's insurer must provide the claimant with a response (1) rejecting the claim; (2) making a settlement offer; or (3) admitting to liability, and offering to arbitrate as to damages.

Work product generated by the presuit screening process is not discoverable or admissible in any civil action by the opposing party. All participants are immune from civil liability arising from participation in the presuit screening process.

The law requires the parties to make discoverable information available without formal discovery. Failure to do so, or failure to otherwise comply with specified requirements during the presuit investigation, is grounds for dismissal of claims or defenses. The law sets several requirements and conditions regarding discovery (Fla. Stat. Ann. §§ 766.106, 205).

To be valid, the presuit notice of intent to initiate litigation must be accompanied by an authorization for release of protected health information in a form specified by law, authorizing the disclosure of potentially relevant health information (Fla. Stat. Ann. § 766.1065)

### ***Presuit Investigation***

Claimants seeking to bring a medical malpractice case must follow a presuit investigation procedure before issuing notification of the intent to initiate litigation. Claimants must conduct an investigation to determine that there are reasonable grounds to believe (1) the defendants were negligent in their care or treatment and (2) the negligence resulted in injury to the claimant. Claimants must obtain a written medical opinion from a medical expert that corroborates reasonable grounds to support the claims of malpractice.

Defendants or their insurers must also investigate the claims against them, in the time allowed for responding to the claimant's notice of intent to initiate litigation. Before denying the claims of medical negligence, the defendants must submit a medical expert opinion showing a lack of reasonable grounds that there was such negligence.

Both sides' medical experts' opinions are subject to discovery. The opinions must specify whether any previous opinion by the same medical expert has been disqualified, and if so, the name of the court and the case number (Fla. Stat. Ann. § 766.203).

***Court's Investigation.*** After the presuit investigation and discovery process is completed, any party may request the court to determine whether the opposing party's claim or denial is reasonably based. If the court finds that the claimant has not complied with certain requirements specified above, the court must dismiss the claim, and the claimant or attorney is personally liable for the defendant's reasonable attorneys fees and costs. Likewise, if the court finds that the defendant has not complied with certain requirements, the court must strike the defendant's pleading, and the defendant, attorney, or insurer is personally liable for the claimant's reasonable attorneys fees and costs.

After its investigation, under specified circumstances, the court can also report an attorney or medical expert for disciplinary review (Fla. Stat. Ann. § 766.206).

### ***Expert Witnesses***

Florida law specifies the qualifications someone must have to testify as an expert witness in a malpractice case. Expert witnesses must be licensed providers and must have conducted a complete review of the pertinent medical records. Generally, if the defendant is a specialist, the expert witness must specialize in (1) the same specialty or (2) a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have experience treating similar patients. Expert witnesses regarding specialists must also have devoted professional time during the preceding three years to:

1. active practice of, or consulting with respect to, the same or similar specialty that includes the medical condition that is the subject of the claim and have experience treating similar patients;
2. instructing students in the same or similar specialty; or
3. a clinical research program that is affiliated with a school or residency in the same or similar specialty.

If the defendant evaluated, treated, or diagnosed a condition that is not within his or her specialty, a specialist trained in that condition is considered a similar health care provider and can testify.

If the defendant is a general practitioner, the expert witness must have devoted professional time during the preceding five years to (1) active clinical practice or consultation as a general practitioner; (2) instructing students in the general practice of medicine; or (3) a clinical research program that is affiliated with a school or residency in the general practice of medicine.

If the testimony concerns a physician or dentist, the expert witness must be licensed as a physician or dentist or have a valid expert witness certificate.

A physician can give expert testimony with respect to the standard of care of other medical staff (such as nurses, nurse practitioners, and physician assistants) if the physician has knowledge of that standard due to active clinical practice or instruction.

In actions against physicians and certain other providers providing emergency services in a hospital emergency department, the court can admit expert medical testimony only from these same types of providers who have had substantial professional experience within the preceding five years while assigned to provide emergency services in a hospital emergency department.

Expert witnesses cannot testify on a contingency fee basis.

Any attorney who proffers a person as an expert witness must certify that the person has not been found guilty of fraud or perjury in any jurisdiction (Fla. Stat. Ann. § 766.102).

### ***Cap on Noneconomic Damages***

Florida limits the allowable recovery for noneconomic damages (such as pain and suffering, mental anguish, or disfigurement) in medical malpractice cases. For nonemergencies, the cap is generally \$500,000 for each practitioner or their employer, with an aggregate cap of \$1 million for all claimants. Generally, a claimant cannot be awarded more than \$500,000 in noneconomic damages, regardless of the number of defendants; and a practitioner cannot be liable for more than \$500,000 in such damages, regardless of the number of claimants. In cases against non-practitioners, the caps are higher (\$750,000 per claimant, with an aggregate cap of \$1.5 million).

These caps are higher (allowing a claimant to recover up to \$1 million for cases against practitioners and \$1.5 million against non-practitioners) if the negligence resulted in death or a permanent vegetative state. These higher caps also apply if a judge determines that (1) manifest injustice would occur unless increased noneconomic damages are awarded, due to the patient's noneconomic harm being particularly severe due to special circumstances and (2) the negligence caused a catastrophic injury (e.g., severe brain injuries or blindness).

In cases against practitioners involving emergency care, the limit on noneconomic damages is \$150,000 per claimant, with an aggregate cap of \$300,000 for all claimants against all defendants. For cases against non-practitioners involving emergency services, the limit is \$750,000 per claimant, with an aggregate \$1.5 million cap.

Different rules apply for Medicaid recipients—e.g., there is generally a per-claimant cap on noneconomic damages of \$300,000, and a cap of \$200,000 per practitioner, unless the claimant proves by clear and convincing evidence that the practitioner acted in bad faith, with malicious purpose, or in a manner showing wanton and willful disregard of human rights, safety, or property (Fla. Stat. Ann. § 766.118).

In 2011, a federal appellate court held that Florida's statutory cap on noneconomic damages did not violate the constitutional equal protection or takings clauses (*Estate of McCall ex rel. McCall vs. U.S.*, 642 F.3d 944 (11<sup>th</sup> Cir. 2011)).

Different caps on non-economic damages apply in cases submitted to voluntary binding arbitration (see below).

## **Arbitration**

**Voluntary Binding Arbitration.** If there is preliminary reasonable grounds for a medical negligence claim after the presuit investigation is completed, either party may request that an arbitration panel, rather than a court, determine damages. If the opposing party accepts, the acceptance is a binding commitment to comply with the arbitration panel's decision (if no settlement is reached beforehand).

Arbitrations are conducted by three-person panels. The claimant and defendant each choose one arbitrator, and the third is an administrative law judge, provided by the Division of Administrative Hearings, who serves as chief arbitrator. Arbitrators must be independent of all parties, witnesses, and legal counsel.

The law sets parameters for the allowable damages that can be awarded by arbitration panels. For example, noneconomic damages are subject to a \$250,000 cap per incident, and are calculated on a percentage basis with respect to capacity to enjoy life (thus, the limit is \$125,000 if the claimant's injuries resulted in a 50% reduction in capacity to enjoy life). Punitive damages are not allowed. Attorneys fees are capped at 15% of the award; the defendant must pay all costs of the arbitration proceeding and the fees of the arbitrators other than the administrative law judge.

Either party's offer to arbitrate, if rejected, cannot be used in evidence or in argument during any subsequent litigation of the claim (Fla. Stat. Ann. § 766.207). The chief arbitrator can dissolve an arbitration panel and declare the proceeding concluded if he or she determines that the parties cannot reach agreement (Fla. Stat. Ann. § 766.21).

If a defendant refuses a claimant's offer of voluntary binding arbitration and the claimant prevails at trial, the claimant (in addition to other damages) can recover reasonable attorneys fees of up to 25% of the award. If the claimant rejects a defendant's offer to enter voluntary binding arbitration, the damages awardable at trial are limited to net economic damages, plus noneconomic damages of up to \$350,000 per incident (Fla. Stat. Ann. § 766.209).

Ninety days after an arbitration panel renders its decision, unpaid arbitration awards begin to accrue interest at an annual rate of 18% (Fla. Stat. Ann. § 766.211). Arbitration awards can be appealed to district courts of appeal; appeals are limited to a review of the record (Fla. Stat. Ann. § 766.212).

***Nonbinding Arbitration.*** Upon either party's motion, the court can also submit malpractice claims to nonbinding arbitration. The chief judge of the judicial circuit must prepare three lists of prospective arbitrators: one each consisting of attorneys with experience in handling negligence actions who principally represent plaintiffs or defendants, and a third consisting of experienced trial attorneys who do not devote a majority of their practice to medical negligence matters.

The plaintiff and defendant each select one arbitrator, and the two arbitrators selected then choose the third. No person may serve as an arbitrator in any arbitration in which he or she has a financial or personal interest.

The arbitration hearing must generally occur within 60 days after the selection of the arbitrators. The arbitration panel must decide on liability and damages; they cannot award punitive damages. Arbitration hearings are conducted informally. Arbitrators are immune from liability for performing their duties.

The arbitration panel's decision must be provided to the parties within 30 days after the hearing ends. The decision is not binding. If all parties accept the decision, the decision is deemed a settlement of the case and the case is dismissed with prejudice. After the arbitration award is rendered, any party may demand a trial de novo in the circuit court. At the trial, the court must not admit evidence that there has been an arbitration proceeding, the nature or the amount of the award, or any other matter concerning the arbitration proceeding, except that testimony given at an arbitration hearing may be used for the purposes otherwise permitted by applicable law. The trial must be conducted without any reference to insurance, insurance coverage, or joinder of the insurer as codefendant in the suit (Fla. Stat. Ann. § 766.107).

### ***Mandatory Mediation and Settlement Conference***

Unless the parties have agreed to submit the claim to binding arbitration, they must attend an in-person mandatory mediation session, within 120 days after the suit is filed (unless the period is extended by mutual agreement). The court must also require a settlement conference at least three weeks before trial (Fla. Stat. Ann. § 766.108).

### ***Statute of Limitations***

Under Florida law, medical malpractice cases must generally be brought within two years from the time the incident (1) occurred or (2) is discovered, or should have been discovered with the exercise of due diligence, but no later than four years from the time the incident occurred (this four-year limit does not apply to actions brought on a minor's behalf on or before the minor's eighth birthday). If fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury, the action must be brought within seven years of the incident (Fla. Stat. Ann. § 95.11).

## ***Attorneys Fees***

Under Article 1, Section 26 of the Florida constitution, in medical liability cases where attorneys charge a contingency fee, the fee is limited to 30% of the first \$250,000 of damages and 10% of the amount over that threshold (exclusive of costs). However, clients can waive these limits, and hire attorneys who charge higher fees.

The Florida Rules of Professional Conduct set limits for attorneys fees on a sliding scale, depending on the stage of the proceeding and the amount of recovery. More information is available on the Florida Bar's [website](#).

## ***Birth-Related Neurological Injuries***

The Florida legislature created the Birth-Related Neurological Injury Compensation Association (NICA) in 1988 following a task force's recommendation. NICA oversees a fund which provides compensation, without litigation and on a no-fault basis, to eligible families for the care of infants born with certain birth-related neurological injuries (Fla. Stat. Ann. § 766.301 – 766.316).

NICA covers children who sustained brain or spinal cord injuries during a birthing process by oxygen deprivation or a mechanical injury. The infant must have been born over a certain weight and must be permanently and substantially mentally and physically impaired. Children suffering from genetic or congenital abnormalities are not eligible (Fla. Stat. Ann. § 766.302).

Doctors' participation is voluntary; if they participate, they do not have to face malpractice suits if an infant is found eligible for compensation.

Claims to the fund are decided by administrative law judges. If a claim is rejected, a claimant can pursue a malpractice case (Fla. Stat. Ann. § 766.304). The law includes several procedural and substantive provisions related to the claims process. A participating doctor must have delivered the infant. Hospitals with participating physicians on their staff, and participating physicians, must generally notify obstetrical patients about the limited no-fault alternative for birth-related neurological injuries (Fla. Stat. Ann. § 766.316).

If a claim is successful, NICA pays for necessary and reasonable care, services, drugs, equipment, facilities, and travel, except for those covered by private insurance or government programs. It also pays the child's parents an award of up to \$100,000; a death benefit of \$10,000; and reasonable expenses for filing the claim, including attorneys fees (Fla. Stat. Ann. § 766.31). Claimants can appeal the administrative law judge's decision (§ 766.311).

The compensation fund was initially capitalized with a \$20 million appropriation. It is maintained by annual assessments on participating physicians (\$5,000) and nurse midwives (\$2,500), other physicians (\$250), and non-governmental hospitals (\$50 per live birth), with some exclusions.

If the assessments are insufficient to maintain the fund, NICA can tap up to \$20 million from an Insurance Regulatory Trust Fund (funded by assessments on casualty insurers). The law generally requires NICA to cut off applications for new claims (unless the legislature expressly authorizes them) if its liability for existing claims reaches 80% of its available assets (Fla. Stat. Ann. § 766.314).

More information about the program is available on NICA's website: <http://www.nica.com/>.

### ***Other Provisions***

Florida's medical malpractice act has provisions concerning various other matters, some of which are briefly described below:

***Risk Management and Insurance Requirements.*** Florida law provides that all health care facilities have a duty to assure comprehensive risk management and the competence of their medical staff and personnel through careful selection and review, and are liable for a failure to exercise due care in fulfilling these duties. The law spells out certain steps facilities must take to comply.

Among other insurance-related requirements, licensed hospitals must carry liability insurance of at least \$1.5 million per claim, and a minimum \$5 million annual aggregate (Fla. Stat. Ann. § 766.110).

***Bad Faith Actions Against Insurers.*** Florida law includes various provisions concerning bad faith actions against a medical malpractice insurer relating to professional liability coverage for medical negligence,

in determining whether the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly towards its insured with due regard for her or his interests (Fla. Stat. Ann. § 766.1185).

***Disciplinary Action for Unnecessary Diagnostic Testing.*** Florida law provides that health care providers are subject to disciplinary action for ordering, procuring, providing, or administering unnecessary diagnostic tests, which are not reasonably calculated to assist the provider in patient diagnosis and treatment (Fla. Stat. Ann. § 766.111).

***Volunteer Health Care Provider Program.*** Under specified conditions, health care providers who volunteer their services to indigent residents are deemed to be agents of the state and thus protected by the state's sovereign immunity, shielding them from individual civil liability (Fla. Stat. Ann. § 766.1115).

***Medical Review Committees.*** Medical review committees of hospitals, ambulatory surgical centers, and health maintenance organizations must screen, evaluate, and review the professional and medical competence of applicants to, and members of, their medical staff. Health care providers at these and specified other settings, as a condition of their licensure, must cooperate with a professional competence review performed by a medical review committee. Members of medical review committees are immune from liability in performing their duties, unless they intentionally commit fraud.

A professional society of physicians' medical or peer review committee can also review complaints against physicians for possible malpractice. The society can enter agreements with the state Department of Health concerning the referral of complaints to the society for investigation, after which the society submits an advisory report to the department. The department must use the advisory reports as background information only, and must prepare its own case when considering regulatory action against a physician (Fla. Stat. Ann. § 766.101).

## **FLORIDA MENTAL HEALTH COURTS**

Several circuits in Florida have mental health courts, as an alternative to the traditional court system for certain offenders. For example, the Nassau County Mental Health Court's website describes the program as providing diversion opportunities for offenders with mental illness, which allows the courts to use alternatives to prosecution with graduated

sanctions, along with monitoring of offenders' reentry into the community. The program is designed to "be conducive to mental health treatment and wellness, while insuring the safety of the public at large" (<http://www.ncmhc.org/>).

The following links provide additional information about various mental health courts in Florida:

- 1<sup>st</sup> Circuit Mental Health Court website:  
<http://www.firstjudicialcircuit.org/programs-and-services/mental-health-court>
- 20<sup>th</sup> Circuit Mental Health Court website:  
<http://www.ca.cjis20.org/home/main/mhct.asp>
- 2001 OLR Report on the Broward County mental health court (the first such court in the nation):  
<http://www.cga.ct.gov/2001/rpt/2001-R-0552.htm>

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