

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB RORS 16-02 Ratification of administrative rules of the Board of Medicine

**SPONSOR(S):** Rulemaking Oversight & Repeal Subcommittee

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee		Rubottom	Rubottom

### SUMMARY ANALYSIS

The Board of Medicine has adopted amendments to the rule limiting physician's charges for reproducing medical records. The rule sets out the maximum reasonable cost per page reproduced that a physician may ask of any party requesting the medical records. The rule increases the cap with respect to patients and government entities requesting records. It raises that cap to \$1.00 per page, which is the current cap for other entities requesting records and equal to the statutory cap for hospitals.

The Statement of Estimated Regulatory Costs showed Rule 64B8-10.003, F.A.C., *Costs of Reproducing Medical Records*, would have a specific, adverse economic effect, or would increase regulatory costs, exceeding \$1 million over the first 5 years the rule was in effect. Accordingly, the Rule must be ratified by the Legislature before it may go into effect.

The Rule was adopted on December 9, 2015, and submitted for ratification on December 10, 2015.

The proposed bill authorizes the Rule to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill is effective upon becoming law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Medical Records Charges

##### *Statutory and administrative regulation of charges*

Health care practitioners must regularly provide copies of patient records for use by the patient, insurers, other medical professionals or users authorized in legal proceedings. Such records can include materials such as X-Rays and other photographic records. All such records are private and confidential information regulated by federal and state patient privacy laws. Compliance with such laws entails administrative costs associated with the reproduction of such records.

Florida law limits the amount that can be charged by a practitioner for the reproduction and provision of copies of medical records to no more than the actual cost of copying including reasonable staff time or an amount specified in administrative rule adopted by the licensing board governing the practitioner.<sup>1</sup>

For Hospitals, Florida law sets the charge for copies of patient records at \$1.00 per page, \$2.00 for non-paper records.<sup>2</sup> This includes the medical records of physicians employed by a hospital, which accounts for over half of all licensed medical doctors in Florida.

For Medical Doctors not employed by hospitals, the Board of Medicine in the Department of Health (DOH) is the board responsible for rulemaking with respect to costs charged for copies of records. The current Board of Medicine rule limits charges to patients and government entities to \$1.00 per page for written and typed documents for the first 25 pages and 25 cents for any additional pages. Other requesters may be charged up to \$1.00 per page for each page. The \$1.00/¢25 cap was adopted in 1988.<sup>3</sup> That rate was increased in 2009 to \$1.00 per page for all pages for requesters other than patients and governmental entities.<sup>4</sup> The rule also limits the reasonable cost of reproducing X-rays and other special kinds of records to the actual cost of reproduction and delivery.<sup>5</sup>

Boards governing other health professions have followed the Board of Medicine in adopting limits on copy charges.<sup>6</sup>

After nine hearings conducted between August 2, 2013, and February 6, 2015, the Board of Medicine on March 12, 2015, filed a final version of a revision to its rule.<sup>7</sup> The rule was challenged in two separate administrative proceedings and a decision in the consolidated cases was entered December 8, 2015, upholding the rule as a valid exercise of the Board's authority. The Board filed the rule for adoption the following day with the Department of State.

The revised rule, if it goes into effect, would increase the limit of charges for such copies to \$1.00 per page for all records. Following is the text of the rule as filed for adoption:

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<sup>1</sup> Section 456.057(17), F.S.

<sup>2</sup> Section 395.3025(1), F.S.

<sup>3</sup> The 1988 rule may be found at: [https://www.flrules.org/gateway/notice\\_Files.asp?ID=2414541](https://www.flrules.org/gateway/notice_Files.asp?ID=2414541).

<sup>4</sup> 64B8-10.003, F.A.C. Accessed on January 11, 2016, at: [https://www.flrules.org/gateway/notice\\_Files.asp?ID=6848605](https://www.flrules.org/gateway/notice_Files.asp?ID=6848605).

<sup>5</sup> 64B-10.003, F.A.C. Accessed on January 11, 2016, at: [https://www.flrules.org/gateway/notice\\_Files.asp?ID=6848605](https://www.flrules.org/gateway/notice_Files.asp?ID=6848605).

<sup>6</sup> See 64B2-17.0055, F.A.C. (2010) and 64B2-17.0055, F.A.C. (1993) (Board of Chiropractic Medicine).

<sup>7</sup> "Additional Statement to the Secretary of State" included with "Certificate of Board of Medicine Administrative Rules" filed December 9, 2015. A copy of the Certificate and the Additional Statement are available in the offices of the Rulemaking Oversight and Repeal Subcommittee.

#### 64B8-10.003 Costs of Reproducing Medical Records.

Recognizing that patient access to medical records is important and necessary to assure continuity of patient care, the Board of Medicine urges physicians to provide their patients a copy of their medical records, upon request, without cost, especially when the patient is economically disadvantaged. The Board, however, also recognizes that the cost of reproducing voluminous medical records may be financially burdensome to some practitioners. Therefore, the following rule sets forth the permitted costs for the reproduction of medical records stored and delivered in any format or medium.

(1) Any person licensed pursuant to Chapter 458, F.S., required to release copies of patient medical records may condition such release upon payment by the requesting party of the reasonable costs of reproducing the records.

(2) The reasonable costs of reproducing copies of written or typed documents or reports shall not be more than \$1.00 per page.

(3) Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs associated with duplication, plus postage.

(4) Accessing medical records through patient portals does not constitute the reproduction of medical records.<sup>8</sup>

#### *Actual costs of reproducing and providing patient records*

The validity of the proposed rule was challenged by various parties in March of 2015. Addressing the factual basis for the increased limit on copy charges and objections related to the actual cost of such copies, the Administrative Law Judge made the following factual determinations:

57. Those opposed to the alleged increase testified there was no basis for the change, that the proposed change quadrupled the price for patients and governmental entities, and that it was arbitrary and capricious, especially with respect to electronic records. These opponents fail to recognize changes in medicine. HIPAA brought patient confidentiality and the need to maintain that confidentiality into sharp focus. Medical practitioners are required to ensure that confidential patient information is not disseminated to unauthorized persons. Physicians must pay to have medical records copied, whether it is done "in-house" or by an ROI provider. Labor costs have increased and the tedious review to ensure that confidential information remains confidential is time-consuming and costly.

58. Medical practices can be quite varied in type, size, sophistication, location, and much more. Petitioners' claim that the proposed rule should be the "actual cost" to the practitioner is impracticable. A general practitioner in a rural solo practice, who receives one request for medical records, might be able to ascertain the "actual cost" to produce that one medical record. A specialist in an urban multi-partner practice group, who receives multiple requests for medical records, would find it nearly impossible to ascertain the "actual cost" to produce each requested medical record without extensive business record-keeping.

59. ...Physicians provide medical records, free of charge, to subsequent or specialty physicians to ensure care. However, physicians are not in the business of repeatedly producing medical records.

60. Those in favor of the proposed rule testified that the cost to physicians for reproducing medical records has not increased in years. The stringent HIPAA requirements placed an additional requirement on health care providers to ensure that private individual health data is kept confidential.

61. The process to release medical records is not simply to pull a paper, digital or electronic medical record, copy it, and send it out the door. The process, as explained, takes valuable time from practitioners and their staff. In a simplified fashion once the request is made: staff must verify the requester's identity and right to obtain the copy; the request must be logged into a HIPAA log; staff must locate and retrieve the medical record in whatever format it is in; staff must redact confidential information; staff must review for specific health treatment records

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<sup>8</sup> See Notice of Proposed Rule, F.A.R. No. 39, Iss. 95 (5/15/2013), and Notice of Change, F.A.R. Vol. 41, No. 49 (3/12/2015).

(mental health, alcohol or drug treatment, HIV status) that cannot be provided pursuant to statute; a copy may need to be made or a paper copy may need to be scanned to an electronic disc; and the practitioner must review it to make sure it can be provided as requested. It is a time-consuming process.<sup>9</sup>

In sum, the ALJ found that the \$1.00 was not arbitrary and capricious in light of the factors, including HIPAA requirements, controlling the actual costs incurred by physicians.

Costs of complying with records requests are impacted by the kind of record (paper, electronic, etc.), size of the record, scope of the records request (all or some specific part of a patient's records), labor costs where records are examined and duplicated, the medical specialization of the particular practice, as well as the need for legal review of the records to be produced. Records are not only identified and copied, but each page of records is also examined for compliance with a request and the propriety of release under the circumstances whenever medical records are produced for any purpose. A consultant employed by a medical records outsourcing firm has studied records request compliance costs at three different medical records sites and recently signed an affidavit asserting that costs average 93 cents, \$1.01 and \$1.20 at the three sites respectively.

The firm employing the consultant reports that 31 pages is the size of the average record request fulfilled for its clients who are medical practices subject to the Board's rule. Under the present rule, the maximum charges would be \$26.50. Under the revised rule, that maximum charge would be \$31.00, an increase of \$3.50. All stakeholders report that a large proportion of physicians provide records at no charge when records are requested for treatment purposes.

Opponents of the rule asserted in a subcommittee hearing on the bill that actual costs in some circumstances are as low as 52 cents. Documentation for such assertion has been requested but not provided.

#### Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.<sup>10</sup> Rulemaking authority is delegated by the Legislature<sup>11</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>12</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>13</sup> To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>14</sup> The grant of rulemaking authority itself need not be detailed.<sup>15</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>16</sup>

An agency begins the formal rulemaking process by filing a notice of the proposed rule.<sup>17</sup> The notice is published by the Department of State in the Florida Administrative Weekly<sup>18</sup> and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the

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<sup>9</sup> Fernandez, et al. vs. DOH, Board of Medicine, et al., Cases no. 15-1774RP, etc., Final Order, pp. 29-31 (Dec. 8, 2015).

<sup>10</sup> Section 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

<sup>11</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>12</sup> Section 120.52(17).

<sup>13</sup> Section 120.54(1)(a), F.S.

<sup>14</sup> Section 120.52(8) & s. 120.536(1), F.S.

<sup>15</sup> *Save the Manatee Club, Inc.*, supra at 599.

<sup>16</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>17</sup> Section 120.54(3)(a)1, F.S.

<sup>18</sup> Section 120.55(1)(b)2, F.S.

proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.<sup>19</sup>

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. First is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.<sup>20</sup> Next is the likely adverse impact on business competitiveness,<sup>21</sup> productivity, or innovation.<sup>22</sup> Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.<sup>23</sup> If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."<sup>24</sup> A rule must be filed for adoption before it may go into effect<sup>25</sup> and cannot be filed for adoption until completion of the rulemaking process.<sup>26</sup> A rule projected to have a specific economic impact exceeding \$1 million in the aggregate over 5 years<sup>27</sup> must be ratified by the Legislature before going into effect.<sup>28</sup> As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

### SERC for Rule 64B8-10.003

At its December 4, 2014, hearing, the Board determined that a SERC should be prepared for the rule. The Board approved the SERC on February 6, 2015. The SERC estimates increased annual costs to DOH for its regulatory investigations of almost \$100,000 annually, increased annual costs in civil litigation of about \$300,000, and increased annual costs of about \$250,000 in Social Security disability cases.<sup>29</sup> The SERC does not attempt to estimate costs associated with other records requests. The ALJ found that "Physicians provide medical records, free of charge, to subsequent or specialty physicians to ensure care. However, physicians are not in the business of repeatedly producing medical records." Based on the administrative record it appears that increased costs to patients are indeterminate other than estimates of the litigation volume listed above. Testimony in a subcommittee hearing on the bill indicated that an average records request of patients is about 33 pages, which if charged would raise the cost from \$27.00 to \$33.00. But there was no testimony or other basis to determine how many patients may be charged for such requests as compared to how many may not be charged at all.

The SERC recognized that net impact on the Florida economy is neutral owing to the fact that increased costs are economically offset by an equivalent increase in revenues to medical practices providing copies.. Nonetheless, to evaluate regulatory cost impacts it is appropriate to total the impacts on negatively affected parties without offset. It is the impact on parties expected to pay for copies that establishes estimated regulatory costs above the threshold requiring legislative ratification. On March 12, 2015, the Board filed a Notice of Change indicated that the rule appeared to require legislative ratification.<sup>30</sup>

The bill ratifies the rule as filed, making the rule effective upon the bill's becoming law.

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<sup>19</sup> Section 120.541(2)(a), F.S.

<sup>20</sup> Section 120.541(2)(a)1., F.S.

<sup>21</sup> This includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>22</sup> Section 120.541(2)(a) 2., F.S.

<sup>23</sup> Section 120.541(2)(a) 3., F.S.

<sup>24</sup> Section 120.54(3)(e)6. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

<sup>25</sup> Section 120.54(3)(e)6, F.S.

<sup>26</sup> Section 120.54(3)(e), F.S.

<sup>27</sup> Section 120.541(2)(a), F.S.

<sup>28</sup> Section 120.541(3), F.S.

<sup>29</sup> A copy of the SERC is available in the offices of the Rulemaking Oversight and Repeal Subcommittee.

<sup>30</sup> Notice of Change, accessed on January 11, 2015, at [https://www.flrules.org/gateway/notice\\_Files.asp?ID=15773963](https://www.flrules.org/gateway/notice_Files.asp?ID=15773963).

**B. SECTION DIRECTORY:**

Section 1: Ratifies Rule 64B8-10.003, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S. Expressly limits ratification to the effectiveness of the rules. Directs the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

Section 2: Provides the act goes into effect upon becoming law.

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

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

1. Revenues:

The bill creates no additional source of state revenues.

2. Expenditures:

If ratified, the SERC anticipates regulatory costs to DOH investigative activities of about \$100,000, less whatever might be recoverable therefor by costs assessments against licensees disciplined or entering into consent orders in such matters.

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

1. Revenues:

The bill itself has no impact on local government revenues.

2. Expenditures:

The bill itself does not impose additional expenditures on local governments.

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

If ratified, the rule appears to have a neutral economic impact on the private sector. However, this impact results from increased costs to patients and governmental entities being offset by the physicians' receipt of any increased charges authorized and actually charged. The total increased costs estimated are in excess of \$650,000 annually.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

The legislation does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

**B. RULE-MAKING AUTHORITY:**

This bill does not grant additional rulemaking authority. It ratifies a rule that is subject to ratification due to its likely regulatory costs.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**