SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1258

SPONSOR: Senator Sebesta

SUBJECT: Expert witnesses in medical negligence cases

DATE: March 6, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Forgas	Johnson	JU	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

This bill amends subsection (2) of s. 766.102, F.S., which pertains to medical negligence standards of recovery. Subsection (2) is amended to change the conditions regarding testimony of expert witnesses in negligent health care provider cases. The bill narrows the class of expert witnesses who can testify about the prevailing professional standard of care for a specialist and general practitioner.

The bill expressly provides for the allowance of physicians licensed under ch. 458 or ch. 459 to give expert testimony, under certain conditions, regarding the standard of care for nurses, nurse practitioners and other listed medical support staff.

The bill allows expert testimony on the appropriate standard of care as to administrative and other nonclinical issues from a person who has substantial knowledge about such matters among hospitals, health care or medical facilities of the same type as the one whose actions are the subject of the testimony and which are located in the same or similar communities at the time of the alleged act giving rise to the cause of action.

An expert witness in a medical malpractice action is prohibited from testifying on a contingency fee basis.

The bill also amends subsections (2) and (7) of s. 766.106, F.S. Subsection (2) is amended to require a claimant to include in the notice of intent to initiate litigation a list of all known health care providers seen by the claimant after the alleged act of malpractice and those known health care providers seen by the claimant for related conditions during the 5 year period prior to the alleged act of malpractice. Subsection (7)(a) is changed to allow the parties to take the unsworn statements of the claimant's treating physicians listed in the notice of intent and places conditions and limitations on the taking of such unsworn statements.

Subsection (5) of s. 455.667, F.S., is amended to add the taking of an unsworn statement pursuant to s. 766.106 (7)(a), F.S., to the list of exceptions to the confidentiality of the ownership and control of a patient's medical records.

The bill also amends subsections (2) and (3) of s. 766.207, F.S. Subsection (2) is amended to specify that defendants offering to submit to arbitration pursuant to this section and in conjunction with s. 766.106, F.S., shall be deemed to have admitted both liability and causation with respect to the allegations contained in the claimant's notice of intent. Subsection (2) is further amended to provide for a party's right to request arbitration within 90 days after receipt of the claimant's notice of intent by the defendant.

Subsection (3) of s. 766.207, F.S., is amended to clarify that a claimant's acceptance of an offer to arbitrate does not bar the claimant from pursuing an action against any defendant who does not agree to arbitrate.

The provisions pertaining to s. 766.102, F.S., take effect on October 1, 1999, and apply to all causes of action accruing on or after that date. The amendments to s. 766.106, F.S., and s. 455.667, F.S., are effective October 1, 1999, and apply to all notices of intent to litigate sent on or after that date. The provisions pertaining to s. 766.207, F.S., take effect on October 1, 1999, are remedial in nature, and apply to all civil actions pending on October 1, 1999, in which the trial or retrial of the action has not commenced.

This bill substantially amends the following sections of the Florida Statutes: 766.102, 766.106, 766.207, and 455.667.

II. Present Situation:

Expert witnesses in medical malpractice actions

Chapter 766, F.S., entitled Medical Malpractice and Related Matters, provides for standards of recovery in medical negligence cases. Those standards are found in s.766.102, F.S. In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider, the claimant has the burden of proving the alleged actions of the health care provider represented a breach of the prevailing standard of care for that health care provider. s.766.102(1), F.S. The prevailing professional standard of care for a given health care provider is 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 health care providers. *Id.*

Section 766.104(1), F.S., provides that no action shall be filed for personal injury or wrongful death arising out of medical negligence unless the attorney filing the action has made a reasonable investigation to determine there are grounds for a good faith belief there has been negligence in the care or treatment of the claimant. This statute provides a safe harbor for the attorney's good faith determination as good faith may be shown to exist if the claimant or his counsel has received a written opinion of an expert as defined in s. 766.102, F.S., that there appears to be evidence of medical negligence. Section 766.102(2), F.S., sets forth the qualifications of the health care provider who may testify as an expert in a medical negligence action, and who, pursuant to s.

766.104(1), F.S., may provide an opinion supporting the attorney's good faith presuit belief there has been medical negligence.

The purpose of s. 766.102(2), F.S., is to establish a relative standard of care for various categories and classifications of health care providers for the purpose of testifying in court. Accordingly, pursuant to s. 766.102(2)(c), F.S., any health care provider may testify as an expert if he or she is a similar health care provider to the provider accused of negligence. If the expert is not a similar health care provider, he or she may still testify if the court determines the expert possesses sufficient training, experience and knowledge as a result of practice or teaching in the specialty of the defendant, or practice or teaching in a related field of medicine, such that the expert can testify to the prevailing professional standard of care in a given field of medicine. The expert must have had active involvement in the practice or teaching of medicine within the five year period before the incident giving rise to the claim.

Sections 766.102(2)(a) and (b), F.S., define the term "similar health care provider" and classify health care providers as specialists and non-specialists. A specialist is one who is certified by the appropriate American board as a specialist, is trained and experienced as a medical specialist, or holds himself or herself out as a specialist. On the other hand, a non-specialist is a health care provider who meets none of the aforementioned criteria. For a specialist, a similar health care provider is one who is trained and experienced in the same specialty and is certified by the appropriate American board in the same specialty. For a non-specialist, a similar health care provider is one who is licensed by the appropriate regulatory agency of this state, is trained and experienced in the same discipline or school of practice, and practices in the same or similar medical community. If a health care provider provides treatment or diagnosis for a condition which is not in his or her specialty, a specialist trained in the treatment or diagnosis of that condition shall be considered a similar health care provider.

A great deal of litigation has occurred as a result of attempting to interpret and apply the provisions of s. 766.102(2), F.S. This is especially so in light of the fact that the terms "medical specialty", "specialty", "specialist", and "discipline or school of practice" are not defined anywhere. As a result, it is not uncommon for trial court judges to allow specialists to testify against non-specialists and general practitioners.

Notices of intent and unsworn statements in medical malpractice actions

Section 766.106, F.S., provides a statutory scheme for presuit screening of medical malpractice claims. After completion of the presuit investigation pursuant to s. 766.203, F.S., a claimant must notify each prospective defendant of the claimant's intent to initiate litigation for medical malpractice prior to filing a lawsuit. Pursuant to s. 766.106 (3), F.S., no suit may be filed for a period of 90 days after the notice of intent is mailed to any prospective defendant. During the 90 day period, the defendant's insurer is required to conduct a review to determine the liability of the defendant. To facilitate the review, s. 766.106 (6), F.S., requires the parties to engage in fairly extensive informal discovery.

One of the mechanisms of informal discovery is the taking of unsworn statements as provided in s. 766.106 (7)(a), F.S. Currently, any party may require other parties to appear for the taking of an unsworn statement. Such statements may be used only for the purpose of presuit screening and

are not discoverable or admissible in any civil action by any party. Non-parties cannot be required to have their unsworn statements taken.

At or before the end of the 90 day presuit screening period, the defendant's insurer must, pursuant to s. 766.106 (3)(b), F.S., respond to the claimant by rejecting the claim, making a settlement offer, or making an offer of admission of liability and for arbitration on the issue of damages. If the defendant makes an offer to arbitrate, the claimant has 50 days, pursuant to s. 766.106 (10), F.S., to accept or reject the offer. The claimant cannot force the defendant to arbitrate under s. 766.106, F.S. Acceptance of the offer waives recourse to any other remedy by the parties. The parties then have 30 days to settle the amount of damages and, if they cannot reach a settlement, they must proceed to binding arbitration to determine the amount of damages. Pursuant to s. 766.106 (12), F.S., the provisions of the Florida Arbitration Code contained in chapter 682, F.S., are applicable to the arbitration proceeding. The parties then provide written arguments to the arbitration panel and a one day hearing is subsequently held, wherein the rules of evidence and civil procedure do not apply. No later than two weeks after the hearing the arbitrators are required to notify the parties of their award and the court has jurisdiction to enforce any award.

Voluntary binding arbitration of medical negligence claims

In 1988, the Legislature enacted major amendments to what is now chapter 766, F.S., known as Medical Malpractice and Related Matters. An additional set of procedures for admission of liability and voluntary binding arbitration of damages, in addition to those already found in s. 766.106, F.S., were created and subsequently codified as ss. 766.207-766.212, F.S.(1993). The legislative intent for the new provisions was for voluntary arbitration to provide:

- Substantial incentives for both claimants and defendants to submit cases to binding arbitration;
- A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees; and
- Limitations on the noneconomic damage components of large awards to provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

Currently under s. 766.207, F.S., upon completion of the pre-suit investigation, either party may elect to have damages determined by an arbitration panel. The election may be initiated by either party serving a request for voluntary binding arbitration of damages within 90 days after service on the defendant of the claimant's notice of intent to initiate litigation. Upon receipt of a party's request for arbitration, the opposing party may accept the offer of voluntary binding arbitration within 30 days. However, a defendant is not required to respond to a request for arbitration submitted earlier than 90 days after service of the notice of intent to initiate litigation.

The arbitration panel is composed of three arbitrators with one selected by the claimant and one selected by the defendant. The third arbitrator is an administrative hearing officer furnished by the Division of Administrative Hearings, who serves as the chief arbitrator. The arbitrators are supposed to be independent of all parties, witnesses and legal counsel. The arbitration is conducted pursuant to rules promulgated by the Division of Administrative Hearings and evidentiary standards pursuant to ss. 120.569(2)(e) and 120.57(1)(c), F.S., (Administrative

Procedure Act).

Voluntary arbitration pursuant to s. 766.207, F.S., precludes recourse to any other remedy by the claimant against any participating defendant and is undertaken with the following understandings:

- Net economic damages are awardable, subject to an offset for collateral source payments, but past and future wage losses and loss of earning capacity are limited to 80%;
- Noneconomic damages are limited to a maximum of $250,000 per incident and are reduced according to the percentage reduction in the claimant's capacity to enjoy life;
- Damages for future economic losses must be offset by future collateral source payments and must be paid by periodic payments;
- Punitive damages may not be awarded;
- The defendant is responsible for the payment of interest on all accrued damages;
- The defendant must pay the claimant's reasonable attorney's fees and cost, as determined by the arbitration panel, but in no event more than 15% of the award after it is reduced to present value;
- The defendant must pay all the costs of the arbitration proceeding and the fees of the arbitrators, other than the administrative hearing officer;
- Each defendant submitting to arbitration is jointly and severally liable for all damages awarded;
- A defendant's or claimant's offer to arbitrate cannot be used in evidence or in argument during any subsequent litigation of the claim following the rejection thereof;
- The fact of making or accepting an offer to arbitrate is not admissible as evidence in any collateral or subsequent proceeding on the claim;
- Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim; and
- Any offer by a defendant to arbitrate must be made to each claimant who has joined in the notice of intent to initiate litigation.

If the defendant refuses the claimant's offer to arbitrate, then the claim must proceed to trial without any limitation on damages. Pursuant to s. 766.209(3), F.S., upon proving medical negligence, the claimant is entitled to recover prejudgment interest and reasonable attorney's fees, up to 25% of the award reduced to present value. The claimant's award will be reduced by any damages recovered by the claimant from arbitrating codefendants.

If the claimant rejects a defendant's offer to arbitrate, the damages awardable at trial will be limited to net economic damages reduced to present value. Past and future lost wages and lost earning capacity are limited to 80%. Net economic damages are also offset by future collateral source payments. Furthermore, noneconomic damages are limited to $350,000 per incident.

Currently, an arbitration award is a final agency action for purposes of s. 120.68, F.S., and any appeal pursuant to s. 766.212, F.S., shall be limited to review of the record and otherwise proceed in accordance with s. 120.68, F.S. The amount of an arbitration award, the evidence in support of it and the procedure by which it is determined are subject to judicial scrutiny only in a proceeding pursuant to s. 766.212, F.S. This is slightly more review than arbitrations under s. 766.106, F.S., in which judicial review is the narrowest possible as they are governed by the Florida Arbitration Code in chapter 682, F.S., s. 766.212, F.S.

Confidentiality of patient records

Section 455.667, F.S., provides that medical records are confidential and, absent certain exceptions, they cannot be shared with or provided to anyone without the consent of the patient. Subsection (5) identifies the circumstances when medical records may be released without written authorization from the patient. The circumstances are as follows:

- To any person, firm, or corporation that has procured or furnished such examination or treatment with the patient's consent;
- When compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff;
- In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records; or
- For statistical and scientific research, provided the information is abstracted in such a way as to protect the identity of the patient or provided written permission is received from the patient or the patient's legal representative.

In *Acosta v. Richter, 671 So.2d 149 (Fla. 1996)*, the Florida Supreme Court addressed the issue of whether a health care provider, absent any of the above-referenced circumstances, can disclose confidential information contained in a patient's medical records as part of a medical malpractice action. The court ruled that, pursuant to s. 455.241, F.S., (the predecessor to current s. 455.667 (6), F.S.), only a health care provider who is a defendant, or reasonably expects to become a defendant, in a medical malpractice action can discuss a patient's medical condition. The court also held that the health care provider can only discuss the patient's medical condition with his or her attorney in conjunction with the defense of the action. The court determined that a defendant's attorney cannot have *ex parte* discussions about the patient's medical condition with any other treating health care provider.

III. Effect of Proposed Changes:

The bill amends several sections of chapter 766 of the Florida Statutes. First, the bill alters the expert witness provisions in s. 766.102(2), F.S., by narrowing the field of potential experts who may testify for or against health care providers in medical negligence actions. Second, the bill changes the notice and unsworn statement provisions contained in s. 766.106, F.S. Third, the bill amends the voluntary binding arbitration provisions contained in subsections (2) and (3) of s. 766.207, F.S.

The bill also amends s. 455.667 (5), F.S., to allow an exception to the confidentiality of medical records for the purposes of taking an unsworn statement in medical malpractice presuit screening procedures.

Expert Witnesses

The expert witness provisions of the bill tighten the criteria for determining the relative standard of care for the various categories and classifications of health care providers. Currently, s. 766.102(2), F.S., provides definitions of inclusion for experts who may testify and the courts have interpreted the section's provisions broadly so that it is not uncommon for a specialist to testify against a general practitioner or a specialist in one field to testify against a specialist in another field. To the contrary, the bill provides definitions of exclusion by stating that "a person may not give expert testimony concerning the prevailing professional standard of care unless that person is a licensed health care provider and meets" a set of criteria. The listed criteria are narrower in scope than the criteria currently identified in s. 766.102(2), F.S.

If the person against whom, or on whose behalf, the testimony is offered is a specialist, the bill provides the expert must:

- Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
- Specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the complaint and have prior experience treating similar patients.

Furthermore, in the three years immediately preceding the date of the occurrence that is the subject of the action, the expert must have devoted professional time to the active clinical practice in, or the consultation of, the same specialty; or a similar specialty that includes the evaluation, diagnosis, or treatment that is the subject of the action and have prior experience treating similar patients. The expert can also testify if the professional time requirement is met by teaching students in an accredited health professional school or accredited residency program in the same or similar specialty. Also, the professional time requirement can be met by conducting clinical research in a program affiliated with an accredited health professional school, accredited residency or clinical research program in the same or similar specialty.

Currently, there is no similar professional time requirement that a similar specialist must meet before being allowed to testify for or against another similar specialist. Accordingly, the field of specialist experts will be narrowed. Additionally, the current provisions in s. 766.102(2)(c), F.S., allow a dissimilar specialist to testify against or for a dissimilar specialist or nonspecialist if the court determines the expert has "sufficient training, experience, and knowledge as a result of practice or teaching...[and] such training, experience, or knowledge [is] a result of the active involvement in the practice or teaching of medicine within the 5 year period before the incident giving rise to the claim." The bill provides no such similar discretionary language but does state that a trial court judge can qualify an expert witness on grounds other than the qualifications in this section. This provision arguably gives the court just as much discretion, if not more, than that currently provided in s. 766.102, F.S.

For nonspecialists, the bill prescribes a list of somewhat similar conditions. If the health care provider is a general practitioner against whom, or on whose behalf, the testimony is offered, the expert witness, during the three years immediately preceding the date of the occurrence that is the basis for the action, must have devoted his or her professional time to:

- Active clinical practice or consultation as a general practitioner;

- Instruction of students in an accredited health professional school or accredited residency program in the general practice of medicine; or
- A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the general practice of medicine.

As stated previously, current s. 766.102(2)(c), F.S., gives the court broad discretion when determining whether an expert can testify if the expert is not a similar health care provider. This has resulted in specialists testifying against general practitioners on a routine basis. Clearly, the bill attempts to eliminate this from occurring by expressly providing that an expert can only testify against or for a general practitioner if that expert has devoted his or her professional time to practicing, consulting, teaching or conducting clinical research in general medicine. However, subsection (6) provides that "[t]his section does not limit the power of the trial court to disqualify or qualify an expert witness on grounds other than the qualifications in this section." This language could also allow the court to qualify an expert who might not otherwise be qualified and, arguably, gives the court more discretion than that which is currently provided in s. 766.102 (2)(c), F.S.

The bill also provides that health care providers who treat or diagnose patients for conditions not within their specialty will be subject to having specialists in that area testify for or against them as a similar health care provider.

The bill does not define the terms "specialist", "general practitioner" or "specialty". The lack of definition of these same terms has created some confusion for the trial and appellate courts. *See Catron v. Roger Bohn, D.C, P.A., 580 So.2d 814 (Fla. 2d DCA 1991).* The problem could continue.

The bill also adds a new subsection for expert testimony concerning the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants or "other medical support staff." The bill provides that, notwithstanding the other expert qualifications contained in s. 766.102(2), F.S., a physician licensed under chapter 458 or chapter 459, F.S., who qualifies as an expert under the section, and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for the persons listed above, may give expert testimony with respect to the standard of care of such medical support staff.

Another new subsection created by the bill concerns expert testimony against hospitals and other health care or medical facilities. The bill provides that a person may give expert testimony on the appropriate standard of care as to administrative and other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, concerning the standard of care among hospitals, or health care or medical facilities of the same type as the hospital, health facility, or medical facility whose actions or inactions are the subject of the testimony. The standard of care must be for hospitals, health facilities, or medical facilities which are located in the same or similar communities at the time of the alleged act giving rise to the cause of action.

The bill adds a new subsection which states an expert witness in a medical malpractice action may not testify on a contingent fee basis.

Notices of intent and unsworn statements

The bill amends subsections (2) and (7)(a) of s. 766.106, F.S. Subsection (2) is changed to require the claimant to list in the notice of intent to initiate litigation all known health care providers seen by the claimant subsequent to the alleged act of malpractice. Only those health care providers who saw the claimant for the injuries complained of are required to be listed. Additionally, the bill also requires the claimant's notice of intent to identify those known health care providers seen by the claimant for related conditions during the five year period prior to the alleged act of malpractice.

Subsection (7)(a) is changed to allow any party to take the unsworn statement of any physicians listed in the claimant's notice of intent. The scope of inquiry for these unsworn statements is limited to opinions formulated by the treating physicians with respect to the issues of liability and damages set forth in the claimant's notice of intent. If a prospective defendant did not take the unsworn statement of a treating physician, then one may be taken after suit is filed and no later than 90 days from the date of service of the complaint on the defendant. Any unsworn statement taken after suit is filed is not admissible in the civil action for any purpose by any party. No prospective defendant can take more than one unsworn statement of a treating physician. Nothing in this section prohibits the taking of an unsworn statement of a treating physician subsequent to the filing of the civil action upon good cause shown that the name of any treating physician was not provided in the claimant's notice of intent.

Voluntary binding arbitration

The bill amends the voluntary binding arbitration provisions in subsections (2) and (3) of s. 766.207, F.S. Subsection (2) is amended to specify that defendants offering to submit to arbitration pursuant to this section and in conjunction with s. 766.106, F.S., shall be deemed to have admitted both liability and causation with respect to the allegations contained in the claimant's notice of intent. Subsection (2) is also changed to reflect that either party may request to arbitrate by serving a request for voluntary binding arbitration within 90 days after receipt of the claimant's notice of intent.

Subsection (3) is amended to expressly clarify that a claimant's acceptance of an offer to arbitrate shall not bar the claimant from pursuing an action against defendants who do not offer or agree to arbitrate under this section.

Confidentiality of patient records

The bill amends subsection (5) of s. 455.667, F.S., to create an additional exception when a patient's medical records, or the contents thereof, may be disclosed without the patient's written authorization. The patient's records may be furnished or discussed for the purposes of taking an unsworn statement pursuant to s. 766.106 (7)(a), F.S. This exception will allow defendants in medical malpractice cases to take the unsworn statements of all of the claimant's health care providers listed in the claimant's notice of intent, regardless of whether those health care providers are defendants or potential defendants.

Effective date

The bill's provisions for s. 766.102, F.S., take effect October 1, 1999, and apply to causes of action accruing on or after that date. The provisions pertaining to s. 766.106, F.S., and s. 455.667, F.S., take effect October 1, 1999, and apply to notices of intent sent on or after that date. The provisions pertaining to s. 766.207, F.S., are expressly stated to be remedial in nature and apply to all civil actions pending on October 1, 1999, in which the trial or retrial of the action has not commenced.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

B. Private Sector Impact:

The bill's provisions regarding expert witnesses could substantially reduce the number of experts who earn a living doing nothing but testifying as expert witnesses. The provisions pertaining to the notice of intent and confidentiality of medical records will result in a greater number of unsworn statements being taken in the presuit screening process. This could result in more claims being settled prior to filing lawsuits. The precise impact cannot be determined at this time.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.