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HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
ANALYSIS

BILL #: HB 2185 (PCB JUD 99-04)

RELATING TO: Medical Negligence Actions

SPONSOR(S): Committee on Judiciary, Rep. Byrd, Rep. Levine & Rep. Sobel

COMPANION BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) JUDICIARY YEAS 9 NAYS 0
(2)
(3)
(4)
(5)

I. SUMMARY:

HB 2185 adds certain limitations on persons who may serve as expert witnesses in medical malpractice actions by specifying certain required areas of practice and prior professional experience for such experts based on the nature of the practice of the person against whom or on whose behalf the expert testimony will be offered. The bill also prescribes certain background requirements for experts who testify on administrative or nonclinical matters. The bill prohibits an expert from testifying on a contingent fee basis, and allows a trial court to retain discretion to qualify or disqualify an expert on grounds not enumerated in the bill.

The bill requires a claimant to identify all health care providers seen by the claimant subsequent to the alleged act of malpractice for the injuries complained of 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. The bill allows a party to take the unsworn statement of such treating physicians, and limits the scope of the unsworn statements to the issues of liability and damages raised in the claimant's notice of intent to litigate letter. The bill provides for the taking of unsworn statements after a suit is filed, but no later than 90 days from the date of service of the complaint on a defendant, and limits the taking of such statements to 1 per prospective defendant. The bill provides that such statements, taken after the suit has been filed, are not admissible for any purpose in the suit. The bill also allows a party to take the unsworn statement of a treating physician who is not identified in the claimant's notice of intent to litigate.

The bill provides that a defendant who elects voluntary arbitration shall be deemed to admit liability and causation with respect to the allegations contained in the claimant's notice of intent to litigate letter. The bill leaves open a claimant's right to litigate against defendants who do not offer or agree to arbitration. The bill also exempts from the confidentiality provisions of s. 455.667, F.S., patient records furnished without written authorization for purposes of taking an unsworn statement. The bill provides that s. 455.667, as amended, will apply to notices of intent to litigate sent on or after October 1, 1999.

The bill has an effective date of October 1, 1999, except as otherwise provided therein, and shall apply to causes of action accruing on or after that date.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Expert Witnesses

Under current Florida law, a "similar health care provider" may testify as an expert "in any action" if he or she meets the definition of a "similar health care provider" or satisfies the court that he or she 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 to be able to provide expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience, or knowledge must result from the active practice or teaching of medicine within 5 years preceding the incident giving rise to the claim. See generally, s. 766.102(2), F.S. A "similar health care provider" for a general practitioner is one who is (1) licensed by the state; (2) trained and experienced in the same discipline or school of practice; and (3) practices in the same or similar medical community. For a specialist, a "similar health care provider" is one who (1) is trained and experienced in the same specialty, and (2) is certified by the appropriate American board in the same specialty. s. 766.102, F.S.

Pre-suit Notice of Treating Physicians

Currently, Florida law does not provide for the pre-suit identification of treating physicians in medical malpractice actions. The law requires a claimant to notify prospective defendants and the Department of Health, if any of the defendants are licensed health care providers, of the claimant's intention to file a claim for medical malpractice. s. 766.106, F.S.

Unsworn Statements

Currently, Florida law does not provide for taking of unsworn statements from treating physicians. The law limits such statements to parties to the medical malpractice action. s. 766.106, F.S.

Arbitration of Medical Negligence Claims

Currently, Florida law does not clearly provide for admission of liability and causation when a party requests or offers to arbitrate a medical malpractice claim. See s. 766.207, F.S.

Confidentiality of Patient Records

Currently, Florida law does not exempt from the confidentiality provisions of s. 455.667, F.S., patient records that are released without written authorization for purposes of taking an unsworn statement. See s. 455.667, F.S.

B. EFFECT OF PROPOSED CHANGES:

Expert Witnesses

HB 2185 provides that a person may not give expert testimony concerning the prevailing professional standard of care unless that person is a licensed health care provider. The bill requires that if the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must (1) specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or (2) 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.

The bill additionally requires that during the 3 years prior to the date of the occurrence that is the basis for the action, the expert must have devoted professional time to (1) the active clinical practice or consulting of the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered and, if the health care provider is a specialist, the active clinical practice or consulting of the same specialty or a similar specialty that includes the evaluation, diagnosis, or treatment of the medical "condition procedure" [*sic*] that is the subject of the action and have prior experience treating similar patients; (2) the instruction of students in an accredited health professional school or accredited residency program in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered, and if that health care provider is a

specialist, an accredited health professional school or accredited residency or clinical research program in the same or similar specialty; or (3) a clinical research program affiliated with an accredited medical school or teaching hospital that is in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered, and if that health care provider is a specialist, a clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same or similar specialty.

The bill provides that if the health care provider against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness must have, during the three years preceding the event that is the basis for the action devoted his professional time to (1) active clinical practice or consulting as a general practitioner; (2) instruction of students in an accredited health care professional school or accredited residency program in the general practice of medicine; or (3) clinical research in a program affiliated with an accredited medical school or teaching hospital in the general practice of medicine.

The bill provides that a physician licensed under Chapters 458 or 459 who qualifies as an expert under the bill and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical negligence action with respect to the standard of care of such medical staff.

The bill provides that in a medical negligence action against a hospital or other health care or medical facility, 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 this 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.

The bill provides that an expert witness may not testify on a contingent fee basis in a medical negligence action, and that the power of a trial court to qualify or disqualify an expert on grounds other than those set forth in the bill is not limited by the bill.

Provides that for a health care provider who is providing treatment or diagnosis for a condition which is not within his or her specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider."

Pre-suit Notice of Treating Physicians

The bill requires that notice of a claimant's intent to bring suit for medical malpractice, which must be provided to each prospective defendant, also must include a list of all known health care providers seen by the claimant subsequent to the alleged act of malpractice for the injuries complained of 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.

Unsworn Statements

The bill also provides that any party may require other parties and the claimant's treating physicians listed in the claimant's notice to initiate litigation for medical malpractice to appear for the taking of an unsworn statement. The bill provides that the scope of such inquiries shall be 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 letter. Allows a prospective defendant to take such unsworn statements after suit has been filed but no later than 90 days from the date of service of the complaint on the defendant. The bill limits a defendant to one unsworn statement of a treating physician. Provides that unsworn statement taken after suit has been filed are not admissible in the civil action for any purpose by any party. Allows defendants to take unsworn statements of treating physicians whose names were not disclosed on the claimant's notice to initiate a claim for medical malpractice. This section shall apply to all notices of intent to litigate sent on or after October 1, 1999.

Arbitration of Medical Negligence Claims

The bill provides that defendants offering to submit to arbitration pursuant to s. 766.207, F.S., 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 letter. A defendant may elect to arbitration within 90 days of the receipt of the notice of intent to initiate litigation. The bill provides that a claimant's acceptance of an offer to arbitrate shall not bar the claimant from pursuing a cause of action against defendants who do not offer or agree to arbitration under this section. This section shall apply to all civil actions pending on or after its effective date.

Confidentiality of Patient Records

The bill exempts from the confidentiality provisions of s. 455.667, F.S., patient records furnished without written authorization for purposes of taking an unsworn statement pursuant to s. 766.106(7)(a), F.S. This section shall apply to all notices of intent to litigate sent on or after October 1, 1999.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The bill requires a claimant to disclose the names of his or her treating physicians prior to filing a medical malpractice suit.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

The bill does not reduce any agency or program.

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Presently, some medical malpractice defendants use statutory arbitration as a means to determine culpability and damages. That practice would be prohibited by the bill.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

The bill does not purport to provide services to families or children.

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

The bill does not create or change a program providing services to families or children.

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

ss. 766.102, 766.106, 766.207, and 455.667, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 766.102, F.S. Provides that a person may not give expert testimony concerning the prevailing professional standard of care unless that person is a licensed health care provider. Requires that if the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must (1) specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or (2) 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.

Requires that during the three years prior to the date of the occurrence that is the basis for the action, the expert must have devoted professional time to (1) the active clinical practice or consulting of the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered and, if the health care provider is a specialist, the active clinical practice or consulting of the same specialty or a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition (sic?) procedure that is the subject of the action and have prior experience treating similar patients; (2) the instruction of students in an accredited health professional school or accredited residency program in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered, and if that health care provider is a specialist, an accredited health professional school or accredited residency or clinical research program in the same or similar specialty; or (3) a clinical research program affiliated with an accredited medical school or teaching hospital that is in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered, and if that health care provider is a specialist, a clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same or similar specialty.

Provides that if the health care provider against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness must have, during the three years preceding the event that is the basis for the action must have devoted his professional time to (1) active clinical practice or consulting as a general practitioner; (2) instruction of students in an accredited health care professional school or accredited residency program in the general practice of medicine; or (3) clinical research in a program affiliated with an accredited medical school or teaching hospital in the general practice of medicine.

Provides that a physician licensed under Chapters 458 or 459 who qualifies as an expert under the bill and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified

registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical negligence action with respect to the standard of care of such medical staff.

Provides that an expert witness may not testify on a contingent fee basis in a medical negligence action. Provides that the power of a trial court to qualify or disqualify an expert on grounds other than those set forth in the bill is not limited by the bill.

Provides that in a medical negligence action against a hospital or other health care or medical facility, 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 this 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.

Provides that for a health care provider who is providing treatment or diagnosis for a condition which is not within his or her specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider."

Section 2. Amends s. 766.106, F.S. Requires that notice of a claimant's intent to bring suit for medical malpractice, which must be provided to each prospective defendant, also must include a list of all known health care providers seen by the claimant subsequent to the alleged act of malpractice for the injuries complained of 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. The bill also provides that any party may require other parties and the claimant's treating physicians listed in the claimant's notice to initiate litigation for medical malpractice to appear for the taking of an unsworn statement. The bill provides that the scope of such inquiries shall be 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 letter. Allows a prospective defendant to take such unsworn statements after suit has been filed but no later than 90 days from the date of service of the complaint on the defendant. The bill limits a defendant to one unsworn statement of a treating physician. Provides that unsworn statement taken after suit has been filed are not admissible in the civil action for any purpose by any party. Allows defendants to take unsworn statements of treating physicians whose names were not disclosed on the claimant's notice to initiate a claim for medical malpractice. This section shall apply to all notices of intent to litigate sent on or after October 1, 1999.

Section 3. Amends s. 766.207, F.S. The bill provides that defendants offering to submit to arbitration pursuant to s. 766.207, F.S., 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 letter. A defendant may elect to arbitration within 90 days of the receipt of the notice of intent to initiate litigation. The bill provides that a claimant's acceptance of an offer to arbitrate shall not bar the claimant from pursuing a cause of action against defendants who do not offer or agree to arbitration under this section. This section shall apply to all civil actions pending on or after its effective date.

Section 4. Amends s. 455.667, F.S. The bill exempts from the confidentiality provisions of s. 455.667, F.S., patient records furnished without written authorization for purposes of taking an unsworn statement pursuant to s. 766.106(7)(a), F.S. This section shall apply to all notices of intent to litigate sent on or after October 1, 1999.

Section 5. Provides an effective date of October 1, 1999, except as otherwise provided by the bill.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None

2. Recurring Effects:

   None

3. Long Run Effects Other Than Normal Growth:

   None

4. Total Revenues and Expenditures:

   None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

   None

2. Recurring Effects:

   None

3. Long Run Effects Other Than Normal Growth:

   None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   None

2. Direct Private Sector Benefits:

   None

3. Effects on Competition, Private Enterprise and Employment Markets:

   None

D. FISCAL COMMENTS:

None

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to spend funds or to take any action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the revenue raising authority of a city or county.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the amount of state tax shared with cities or counties.

V. COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

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