

1 provider represented a breach of the prevailing professional
2 standard of care for that health care provider. The
3 prevailing professional standard of care for a given health
4 care provider shall be that level of care, skill, and
5 treatment which, in light of all relevant surrounding
6 circumstances, is recognized as acceptable and appropriate by
7 reasonably prudent similar health care providers.

8 (2) A person may not give expert testimony concerning
9 the prevailing professional standard of care unless that
10 person is a licensed health care provider and meets the
11 following criteria:

12 (a) If the party against whom or on whose behalf the
13 testimony is offered is a specialist, the expert witness must:

14 1. Specialize in the same specialty as the party
15 against whom or on whose behalf the testimony is offered; or

16 2. Specialize in a similar specialty that includes the
17 evaluation, diagnosis, or treatment of the medical condition
18 that is the subject of the complaint and have prior experience
19 treating similar patients.

20 (b) During the 3 years immediately preceding the date
21 of the occurrence that is the basis for the action, the expert
22 witness must have devoted professional time to:

23 1. The active clinical practice or consulting of the
24 same or similar health profession as the health care provider
25 against whom or on whose behalf the testimony is offered and,
26 if that health care provider is a specialist, the active
27 clinical practice or consulting of the same specialty or a
28 similar specialty that includes the evaluation, diagnosis, or
29 treatment of the medical condition or procedure that is the
30 subject of the action and have prior experience treating
31 similar patients;

1 2. The instruction of students in an accredited health
2 professional school or accredited residency program in the
3 same or similar health profession as the health care provider
4 against whom or on whose behalf the testimony is offered, and
5 if that health care provider is a specialist, an accredited
6 health professional school or accredited residency or clinical
7 research program in the same or similar specialty; or

8 3. A clinical research program that is affiliated with
9 an accredited medical school or teaching hospital and that is
10 in the same or similar health profession as the health care
11 provider against whom or on whose behalf the testimony is
12 offered and, if that health care provider is a specialist, a
13 clinical research program that is affiliated with an
14 accredited health professional school or accredited residency
15 or clinical research program in the same or similar specialty.

16 (3) Notwithstanding subsection (2), if the health care
17 provider against whom or on whose behalf the testimony is
18 offered is a general practitioner, the expert witness, during
19 the 3 years immediately preceding the date of the occurrence
20 that is the basis for the action, must have devoted his or her
21 professional time to:

22 (a) Active clinical practice or consulting as a
23 general practitioner;

24 (b) Instruction of students in an accredited health
25 professional school or accredited residency program in the
26 general practice of medicine; or

27 (c) A clinical research program that is affiliated
28 with an accredited medical school or teaching hospital and
29 that is in the general practice of medicine.

30 (4) Notwithstanding subsection (2), a physician
31 licensed under chapter 458 or chapter 459 who qualifies as an

1 expert under the section and who by reason of active clinical
2 practice or instruction of students has knowledge of the
3 applicable standard of care for nurses, nurse practitioners,
4 certified registered nurse anesthetists, certified registered
5 nurse midwives, physician assistants, or other medical support
6 staff may give expert testimony in a medical negligence action
7 with respect to the standard of care of such medical support
8 staff.

9 (5) In an action alleging medical negligence, an
10 expert witness may not testify on a contingency fee basis.

11 (6) This section does not limit the power of the trial
12 court to disqualify or qualify an expert witness on grounds
13 other than the qualification in this section.

14 (7) Notwithstanding subsection (2), in a medical
15 negligence action against a hospital or other health care or
16 medical facility, a person may give expert testimony on the
17 appropriate standard of care as to administrative and other
18 nonclinical issues if the person has substantial knowledge, by
19 virtue of his or her training and experience, concerning the
20 standard of care among hospitals, or health care or medical
21 facilities of the same type as the hospital, health facility,
22 or medical facility whose actions or inactions are the subject
23 of this testimony and which are located in the same or similar
24 communities at the time of the alleged act giving rise to the
25 cause of action.

26 ~~(2)(a) If the health care provider whose negligence is~~
27 ~~claimed to have created the cause of action is not certified~~
28 ~~by the appropriate American board as being a specialist, is~~
29 ~~not trained and experienced in a medical specialty, or does~~
30 ~~not hold himself or herself out as a specialist, a "similar~~
31 ~~health care provider" is one who:~~

1 1. ~~Is licensed by the appropriate regulatory agency of~~
2 ~~this state;~~
3 2. ~~Is trained and experienced in the same discipline~~
4 ~~or school of practice; and~~
5 3. ~~Practices in the same or similar medical community.~~
6 (b) ~~If the health care provider whose negligence is~~
7 ~~claimed to have created the cause of action is certified by~~
8 ~~the appropriate American board as a specialist, is trained and~~
9 ~~experienced in a medical specialty, or holds himself or~~
10 ~~herself out as a specialist, a "similar health care provider"~~
11 ~~is one who:~~
12 1. ~~Is trained and experienced in the same specialty;~~
13 ~~and~~
14 2. ~~Is certified by the appropriate American board in~~
15 ~~the same specialty.~~
16
17 ~~However, if any health care provider described in this~~
18 ~~paragraph is providing treatment or diagnosis for a condition~~
19 ~~which is not within his or her specialty, a specialist trained~~
20 ~~in the treatment or diagnosis for that condition shall be~~
21 ~~considered a "similar health care provider."~~
22 (c) ~~The purpose of this subsection is to establish a~~
23 ~~relative standard of care for various categories and~~
24 ~~classifications of health care providers. Any health care~~
25 ~~provider may testify as an expert in any action if he or she:~~
26 1. ~~Is a similar health care provider pursuant to~~
27 ~~paragraph (a) or paragraph (b); or~~
28 2. ~~Is not a similar health care provider pursuant to~~
29 ~~paragraph (a) or paragraph (b) but, to the satisfaction of the~~
30 ~~court, possesses sufficient training, experience, and~~
31 ~~knowledge as a result of practice or teaching in the specialty~~

1 ~~of the defendant or practice or teaching in a related field of~~
2 ~~medicine, so as to be able to provide such expert testimony as~~
3 ~~to the prevailing professional standard of care in a given~~
4 ~~field of medicine. Such training, experience, or knowledge~~
5 ~~must be as a result of the active involvement in the practice~~
6 ~~or teaching of medicine within the 5-year period before the~~
7 ~~incident giving rise to the claim.~~

8 (8)~~(3)~~(a) If the injury is claimed to have resulted
9 from the negligent affirmative medical intervention of the
10 health care provider, the claimant must, in order to prove a
11 breach of the prevailing professional standard of care, show
12 that the injury was not within the necessary or reasonably
13 foreseeable results of the surgical, medicinal, or diagnostic
14 procedure constituting the medical intervention, if the
15 intervention from which the injury is alleged to have resulted
16 was carried out in accordance with the prevailing professional
17 standard of care by a reasonably prudent similar health care
18 provider.

19 (b) The provisions of this subsection shall apply only
20 when the medical intervention was undertaken with the informed
21 consent of the patient in compliance with the provisions of s.
22 766.103.

23 (9)~~(4)~~ The existence of a medical injury shall not
24 create any inference or presumption of negligence against a
25 health care provider, and the claimant must maintain the
26 burden of proving that an injury was proximately caused by a
27 breach of the prevailing professional standard of care by the
28 health care provider. However, the discovery of the presence
29 of a foreign body, such as a sponge, clamp, forceps, surgical
30 needle, or other paraphernalia commonly used in surgical,
31 examination, or diagnostic procedures, shall be prima facie

1 evidence of negligence on the part of the health care
2 provider.

3 (10)~~(5)~~ The Legislature is cognizant of the changing
4 trends and techniques for the delivery of health care in this
5 state and the discretion that is inherent in the diagnosis,
6 care, and treatment of patients by different health care
7 providers. The failure of a health care provider to order,
8 perform, or administer supplemental diagnostic tests shall not
9 be actionable if the health care provider acted in good faith
10 and with due regard for the prevailing professional standard
11 of care.

12 (11)~~(6)~~(a) In any action for damages involving a claim
13 of negligence against a physician licensed under chapter 458,
14 osteopathic physician licensed under chapter 459, podiatric
15 physician licensed under chapter 461, or chiropractic
16 physician licensed under chapter 460 providing emergency
17 medical services in a hospital emergency department, the court
18 shall admit expert medical testimony only from physicians,
19 osteopathic physicians, podiatric physicians, and chiropractic
20 physicians who have had substantial professional experience
21 within the preceding 5 years while assigned to provide
22 emergency medical services in a hospital emergency department.

23 (b) For the purposes of this subsection:

24 1. The term "emergency medical services" means those
25 medical services required for the immediate diagnosis and
26 treatment of medical conditions which, if not immediately
27 diagnosed and treated, could lead to serious physical or
28 mental disability or death.

29 2. "Substantial professional experience" shall be
30 determined by the custom and practice of the manner in which
31 emergency medical coverage is provided in hospital emergency

1 departments in the same or similar localities where the
2 alleged negligence occurred.

3 (12) However, if any health care provider described in
4 subsection (2), subsection (3), or subsection (4) is providing
5 treatment or diagnosis for a condition which is not within his
6 or her specialty, a specialist trained in the treatment or
7 diagnosis for that condition shall be considered a "similar
8 health care provider."

9 Section 2. (1) Subsection (2) and paragraph (a) of
10 subsection (7) of section 766.106, Florida Statutes, 1998
11 Supplement, are amended to read:

12 766.106 Notice before filing action for medical
13 malpractice; presuit screening period; offers for admission of
14 liability and for arbitration; informal discovery; review.--

15 (2) After completion of presuit investigation pursuant
16 to s. 766.203 and prior to filing a claim for medical
17 malpractice, a claimant shall notify each prospective
18 defendant and, if any prospective defendant is a health care
19 provider licensed under chapter 458, chapter 459, chapter 460,
20 chapter 461, or chapter 466, the Department of Health by
21 certified mail, return receipt requested, of intent to
22 initiate litigation for medical malpractice. Notice to each
23 prospective defendant must include a list of all known health
24 care providers seen by the claimant subsequent to the alleged
25 act of malpractice for the injuries complained of and those
26 known health care providers seen by the claimant for related
27 conditions during the 5-year period prior to the alleged act
28 of malpractice. Notice to the Department of Health must
29 include the full name and address of the claimant; the full
30 names and any known addresses of any health care providers
31 licensed under chapter 458, chapter 459, chapter 460, chapter

1 461, or chapter 466 who are prospective defendants identified
2 at the time; the date and a summary of the occurrence giving
3 rise to the claim; and a description of the injury to the
4 claimant. The requirement for notice to the Department of
5 Health does not impair the claimant's legal rights or ability
6 to seek relief for his or her claim, and the notice provided
7 to the department is not discoverable or admissible in any
8 civil or administrative action. The Department of Health shall
9 review each incident and determine whether it involved conduct
10 by a licensee which is potentially subject to disciplinary
11 action, in which case the provisions of s. 455.621 apply.

12 (7) Informal discovery may be used by a party to
13 obtain unsworn statements, the production of documents or
14 things, and physical and mental examinations, as follows:

15 (a) Unsworn statements.--Any party may require other
16 parties and the claimant's treating physicians listed in the
17 claimant's notice to initiate litigation for medical
18 malpractice to appear for the taking of an unsworn statement.
19 Such statements may be used only for the purpose of presuit
20 screening and are not discoverable or admissible in any civil
21 action for any purpose by any party. A party desiring to take
22 the unsworn statement of any party must give reasonable notice
23 in writing to all parties. The notice must state the time and
24 place for taking the statement and the name and address of the
25 party to be examined. Unless otherwise impractical, the
26 examination of any party must be done at the same time by all
27 other parties. Any party may be represented by counsel at the
28 taking of an unsworn statement. An unsworn statement may be
29 recorded electronically, stenographically, or on videotape.
30 The taking of unsworn statements is subject to the provisions
31 of the Florida Rules of Civil Procedure and may be terminated

1 for abuses. Further, as to the taking of unsworn statements of
2 the claimant's treating physicians, the scope of such inquiry
3 shall be limited to opinions formulated by the treating
4 physicians with respect to the issues of liability and damages
5 set forth in the claimant's notice of intent letter. In the
6 event that a prospective defendant did not take an unsworn
7 statement of a claimant's treating medical physicians as set
8 forth in the claimant's notice to initiate a claim for medical
9 malpractice, then an unsworn statement may be taken after suit
10 has been filed, but no later than 90 days from the date of
11 service of the complaint on the defendant. However, in no
12 event shall a prospective defendant take more than one unsworn
13 statement of a treating physician. Unsworn statements taken
14 after suit has been filed are not admissible in the civil
15 action for any purpose by any party. Nothing in this section
16 shall prohibit the taking of an unsworn statement of a
17 treating physician subsequent to the filing of the civil
18 action upon good cause shown that the name of any treating
19 physician was not provided in the claimant's notice to
20 initiate a claim for medical malpractice.

21 (2) This section shall apply to all notices of intent
22 to litigate sent on or after October 1, 1999.

23 Section 3. (1) Effective upon this act becoming a
24 law, subsections (2) and (3) of section 766.207, Florida
25 Statutes, are amended to read:

26 766.207 Voluntary binding arbitration of medical
27 negligence claims.--

28 (2) Upon the completion of presuit investigation with
29 preliminary reasonable grounds for a medical negligence claim
30 intact, the parties may elect to have damages determined by an
31 arbitration panel. Defendants offering to submit to

1 arbitration pursuant to this section and in conjunction with
2 s. 766.106 shall be deemed to have admitted both liability and
3 causation with respect to the allegations contained in the
4 claimant's notice of intent letter.Such election may be
5 initiated by either party by serving a request for voluntary
6 binding arbitration of damages within 90 days after receipt
7 ~~service~~ of the claimant's notice of intent to initiate
8 litigation upon the defendant. The evidentiary standards for
9 voluntary binding arbitration of medical negligence claims
10 shall be as provided in ss. 120.569(2)(e) and 120.57(1)(c).

11 (3) Upon receipt of a party's request for such
12 arbitration, the opposing party may accept the offer of
13 voluntary binding arbitration within 30 days. However, in no
14 event shall the defendant be required to respond to the
15 request for arbitration sooner than 90 days after service of
16 the notice of intent to initiate litigation under s. 766.106.
17 Such acceptance within the time period provided by this
18 subsection shall be a binding commitment to comply with the
19 decision of the arbitration panel. The liability of any
20 insurer shall be subject to any applicable insurance policy
21 limits. A claimant's acceptance of an offer to arbitrate shall
22 not bar the claimant from pursuing a cause of action against
23 defendants who do not offer or agree to arbitration under this
24 section.

25 (2) The provisions of this section are remedial in
26 nature and shall apply to all civil actions pending on or
27 after the effective date of this section.

28 Section 4. (1) Paragraph (e) is added to subsection
29 (5) of section 455.667, Florida Statutes, 1998 Supplement, to
30 read:

31

1 455.667 Ownership and control of patient records;
2 report or copies of records to be furnished.--

3 (5) Except as otherwise provided in this section and
4 in s. 440.13(4)(c), such records may not be furnished to, and
5 the medical condition of a patient may not be discussed with,
6 any person other than the patient or the patient's legal
7 representative or other health care practitioners and
8 providers involved in the care or treatment of the patient,
9 except upon written authorization of the patient. However,
10 such records may be furnished without written authorization
11 under the following circumstances:

12 (e) For purposes of taking an unsworn statement
13 pursuant to s. 766.106(7)(a).

14 (2) This section shall apply to all notices of intent
15 to litigate sent on or after October 1, 1999.

16 Section 5. Except as provided herein, this act shall
17 take effect on October 1, 1999, and shall apply to causes of
18 action accruing on or after said date.

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21 HOUSE SUMMARY

22 Revises provisions of law relating to medical negligence
23 actions to:

- 24 1. Provide requirements for expert witness
25 testimony in actions based on medical negligence.
26 2. Provide requirements with respect to notice
27 before filing an action for medical malpractice.
28 3. Regulate unsworn statements of treating
29 physicians.
30 4. Revise language with respect to voluntary
31 binding arbitration of medical malpractice claims.
32 5. Provide for the effect of an offer to submit to
33 voluntary binding arbitration with respect to allegations
34 contained in the claimant's notice of intent letter.

35 See bill for details.