SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Health Care Committee

BILL:	SB 2686
INTRODUCER:	Senator Webster
SUBJECT:	Expert Witness Certificates
DATE:	March 27, 2006
REVISED:	03/29/06

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HE	**Fav/3 amendments**
2.			JU	
3.				
4.				
5.				
6.				

Please see last section for Summary of Amendments

- [ ] Technical amendments were recommended
- [X] Amendments were recommended
- [ ] Significant amendments were recommended

I. Summary:

The bill requires a certificate to provide expert testimony to be issued to any medical physician or osteopathic physician who holds a current, active, and valid license to practice allopathic medicine or osteopathic medicine in any other state or Canada, completes a registration form prescribed by the Board of Medicine or the Board of Osteopathic Medicine, as applicable, pays the application fee, and who has not had a previous expert witness certificate revoked by the Board of Medicine or the Board of Osteopathic Medicine, as applicable. A medical physician or osteopathic physician who holds an expert witness certificate may use the license only to give a verified written medical expert opinion as provided in s. 766.203, F.S., relating to presuit investigation of medical negligence claims and defenses, and to provide expert testimony concerning the prevailing professional standard of care in connection with any medical negligence litigation pending in Florida against a Florida-licensed medical or osteopathic physician. The medical physician or osteopathic physician who holds an expert witness certificate is not entitled to engage in the practice of medicine as defined in s. 458.305, F.S.

The bill makes Florida-licensed medical physicians and osteopathic physician subject to discipline for providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine.

The bill requires the expert witness who offers testimony concerning the prevailing professional standard of care in any action for damages involving a claim of negligence against a Florida-licensed medical physician or osteopathic physician to be a Florida-licensed medical physician or osteopathic physician or to hold an expert witness certificate issued as provided in the bill.

This bill amends ss. 458.331, 459.015, and 766.102, F.S.

This bill creates ss. 458.3175 and 459.0094, F.S.

II. Present Situation:

Notices of Intent and Unsworn Statements in Medical Malpractice Actions

Chapter 766, F.S., entitled Medical Malpractice and Related Matters, provides for standards of recovery in medical negligence cases. 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. Under s. 766.106(3), F.S., a suit may not 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 ch. 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 2 weeks after the hearing, the arbitrators are required to notify the parties of their award and the court has jurisdiction to enforce any award.

Expert Witnesses in Medical Malpractice Actions

Chapter 766, F.S., 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.[1] 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.

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 that 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. The written opinion of the expert is not subject to discovery by an opposing party to the litigation. Section 766.102(5), 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 that there has been medical negligence.

The purpose of s. 766.102(5), 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(5)(c), F.S., if the health care provider against whom or on whose behalf testimony is offered is a specialist, the expert witness must:

- Specialize in the same specialty as the health care provider 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 claim and have prior experience treating similar patients; and
- Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:
    - The active clinical practice of, or consulting with respect to, the same or similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients;
    - Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same or similar specialty; or
    - 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.

[1] See s. 766.102(1), F.S.

If the health care provider against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness must have devoted professional time during the 5 years immediately preceding the date of the occurrence that is the basis for the action to:

- The active clinical practice or consultation as a general practitioner;
- The 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.

If the health care provider against whom or on whose behalf the testimony is offered is a health care provider other than a specialist or a general practitioner, the expert witness must have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:

- The active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered;
- The instruction of students in an accredited health professional school or accredited residency program in the same or similar health profession in which the health care provider against whom or on whose behalf the testimony is offered; or
- A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered.

A Florida-licensed medical or osteopathic physician who qualifies as an expert witness under s. 766.102(5), F.S., 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 support staff.

If a health care provider is providing evaluation, treatment, or diagnosis for a condition that is not within his or her specialty, a specialist trained in the evaluation, treatment, or diagnosis for that condition is considered a similar health care provider.[2]

In any action for damages involving a claim of negligence against a Florida-licensed medical physician, osteopathic physician, podiatric physician, or chiropractic physician providing emergency medical services in a hospital emergency department, the court must admit expert medical testimony only from medical physicians, osteopathic physicians, podiatric physicians, and chiropractic physicians who have had substantial professional experience within the preceding 5 years while assigned to provide emergency medical services in a hospital emergency department.

[2] See s. 766.102(8), F.S.

Section 766.102, F.S., does not limit the power of the trial court to *disqualify or qualify* an expert witness on grounds other than the qualifications in that section of law.

The Practice of Medicine and Osteopathic Medicine

Chapter 458, F.S., governs the practice of medicine in Florida. Section 458.305(3), F.S., defines the "practice of medicine" to mean the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition. Under s. 458.309, F.S., the Board of Medicine is authorized to adopt rules to implement provisions of the medical practice act conferring duties upon it. Section 458.331, F.S., specifies grounds for which a medical physician may be subject to disciplinary action by the Board of Medicine.

Chapter 459, F.S., also known as the osteopathic medicine practice act, governs the practice of osteopathic medicine. Section 459.003, F.S., defines the "practice of osteopathic medicine" to mean the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition, which practice is based in part upon educational standards and requirements which emphasize the importance of the musculoskeletal structure and manipulative therapy in the maintenance and restoration of health. Chapter 459, F.S., contains provisions relating to the Board of Osteopathic Medicine's rulemaking authority, exceptions to the licensure requirements, and discipline of osteopathic physicians.

Allopathic and osteopathic physicians and other health care practitioners are licensed under the provisions of their practice acts and s. 120.60, F.S. Section 456.013, F.S., outlines general licensing procedures to be used by the Department of Health (DOH) and appropriate boards to issue an initial license to practice a profession. In considering applications for licensure, the board or DOH may require a personal appearance of the applicant. If the applicant is required to appear, the time period in which the application must be granted or denied must be tolled until such time as the applicant appears.

The licensure application procedures for each board may differ slightly based on the supporting documents required by boards to meet licensure eligibility requirements, such as education transcripts, proof of insurance, and proof of bonding, letters of reference, and the reporting of examination results. Licensure applicants whose applications are incomplete are sent a notice indicating the missing information, documents, or fees. The department or appropriate board, as any other state agency, must follow procedures outlined in ch. 120, F.S., to issue a license.[3] Under s. 120.60, F.S., once a licensure application is verified as complete, it must be reviewed by DOH or the appropriate board to determine whether the application has met the licensure qualifications for the profession and the applicant must be notified within 30 days of any errors or omissions. Every application must be approved or denied within 90 days of the department's receipt of the application or request for additional information.

When a state agency or regulatory board acts on a license application, it is using discretionary authority that the Legislature has delegated to that agency under the state's police power. A

[3] See s. 120.60, F.S. Section 120.57(1)(j), F.S., provides that in administrative hearings findings of fact must be based upon a preponderance of evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.

proceeding involving the granting or denying of a licensure application is not penal.[4] The licensure applicant has the burden of persuasion to establish his or her fitness for licensure by a preponderance of evidence.[5] The burden of proof in a hearing on a license application denial is on the applicant to establish entitlement to the license.[6] The Florida Supreme Court has held that the use of the clear and convincing standard of evidence in license application proceedings was inconsistent with the discretionary authority granted by the Legislature under the state's police powers.[7] The Florida Supreme Court has declined to extend the clear and convincing standard required in disciplinary proceedings to license application proceedings even when a violation of a statute relating to discipline was the basis for determining that the license applicant was unfit to practice the profession.[8]

The boards within DOH have the status of an agency for certain administrative actions, including licensee discipline. A board may issue an order imposing discipline on any licensee under its jurisdiction as authorized by the profession's practice act and the provisions of ch. 456, F.S. Typically, boards are authorized to impose the following disciplinary penalties against licensees or persons seeking licensure: refusal to certify, or to certify with restrictions, an application for a license; suspension or permanent revocation of a license; restriction of practice or license; imposition of an administrative fine for each count or separate offense; issuance of a reprimand or letter of concern; placement of the licensee on probation for a specified period of time and subject to specified conditions; or corrective action.

III. Effect of Proposed Changes:

Section 1. Creates s. 458.3175, F.S., relating to expert witness certificates, to require a certificate to provide expert testimony to be issued to any physician who holds a current, active, and valid license to practice allopathic medicine in any other state or Canada, completes a registration form prescribed by the Board of Medicine, pays the application fee, and who has not had a previous expert witness certificate revoked by the Board of Medicine.

A medical physician who holds an expert witness certificate may use the license only to give a verified written medical expert opinion as provided in s. 766.203, F.S., relating to presuit investigation of medical negligence claims and defenses, and to provide expert testimony concerning the prevailing professional standard of care in connection with any medical negligence litigation pending in Florida against a Florida-licensed medical or osteopathic physician. The medical physician who holds an expert witness certificate is not entitled to engage in the practice of medicine as defined in s. 458.305, F.S.

Each application for an expert witness certificate must be approved or denied within five business days after receipt of a completed application. Any application for a certificate, which is

[4] See *Hevilla v. Department of Professional Regulation, Board of Medicine,* 11 FALR 1730 (Division of Adm. Hearings 1989).
[5] See *Florida Department of Transportation v. J.W.C. Co.*, 396 So.2d 778 (Fla. 1st DCA 1981).
[6] See *Florida Department of Transportation v. J.W.C. Co.*, 396 So.2d 778 (Fla. 1st DCA 1981).
[7] *See Osborne Stern & Co. v Department of Banking and Finance,* 647 So. 2d 245 (Fla. 1st D.C.A. 1994), rev'd and remanded, 670 So. 2d 932 (Fla. 1996).
[8] See *Osborne Stern & Co. v Department of Banking and Finance,* 647 So. 2d 245 (Fla. 1st D.C.A. 1994), rev'd and remanded, 670 So. 2d 932 at 934 (Fla. 1996).

not approved or denied within the required time, is considered approved. Any applicant for an expert witness certificate who seeks to claim licensure by default must notify the Board of Medicine, in writing, of the intent to rely on the default license.

All licensure fees other than the initial application fee, including neurological injury compensation assessments, are waived for those persons obtaining an expert witness certificate and such certificateholders are not otherwise authorized to practice medicine in Florida.

The Board of Medicine must adopt rules to administer this section, including rules to set the amount of the application fee, which may not exceed $50, for the expert witness certificate. An expert witness certificate expires 2 years after the date of issuance.

Section 2. Amends s. 458.331, F.S., relating to the discipline of medical physicians, to make a medical physician liable for discipline for providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine.

Section 3. Creates s. 459.0094, F.S., relating to expert witness certificates, to require a certificate to provide expert testimony to be issued to any physician who holds a current, active, and valid license to practice osteopathic medicine in any other state or Canada, completes a registration form prescribed by the Board of Osteopathic Medicine, pays the application fee, and who has not had a previous expert witness certificate revoked by the Board of Osteopathic Medicine.

An osteopathic physician who holds an expert witness certificate may use the license only to give a verified written medical expert opinion as provided in s. 766.203, F.S., relating to presuit investigation of medical negligence claims and defenses, and to provide expert testimony concerning the prevailing professional standard of care in connection with any medical negligence litigation pending in Florida against a Florida-licensed medical or osteopathic physician. The osteopathic physician who holds an expert witness certificate is not entitled to engage in the practice of medicine as defined in s. 458.305, F.S.

Each application for an expert witness certificate must be approved or denied within five business days after receipt of a completed application. Any application for a certificate, which is not approved or denied within the required time, is considered approved. Any applicant for an expert witness certificate who seeks to claim licensure by default must notify the Board of Osteopathic Medicine, in writing, of the intent to rely on the default license.

All licensure fees other than the initial application fee, including neurological injury compensation assessments, are waived for those persons obtaining an expert witness certificate and such certificateholders are not otherwise authorized to practice medicine in Florida.

The Board of Osteopathic Medicine must adopt rules to administer this section, including rules to set the amount of the application fee, which may not exceed $50, for the expert witness certificate. An expert witness certificate expires 2 years after the date of issuance.

Section 4. Amends s. 459.015, F.S., relating to the discipline of osteopathic physicians, to make an osteopathic physician liable for discipline for providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine.

Section 5. Amends s. 766.102, F.S., relating to medical negligence and requirements for expert witnesses in medical negligence actions, to require the expert witness who offers testimony concerning the prevailing professional standard of care in any action for damages involving a claim of negligence against a Florida-licensed medical physician or osteopathic physician to be a Florida-licensed medical physician or osteopathic physician or to hold an expert witness certificate issued as provided in s. 458.3175, F.S., or s. 459.0094, F.S.[9]

Section 6. Provides an effective date of July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

Section 21, Art I of the State Constitution provides that the courts shall be open to all for redress for an injury. To impose a barrier or limitation on litigants' right to file certain actions it would have to meet the test announced by the Florida Supreme Court in Kluger v. White.[10] Under the constitutional test established by the Florida Supreme Court in *Kluger v. White,* the Legislature would have to: (1) provide a reasonable alternative remedy or commensurate benefit, or (2) make a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

The bill requires medical physicians and osteopathic physicians who are not licensed to practice in Florida to obtain an expert witness certificate as a prerequisite to providing medical expert opinion as a part of medical negligence presuit requirements and in proceedings relating to a medical negligence claim. Additionally, the bill does not provide an avenue for physicians who are authorized to practice in jurisdictions outside of the United States and Canada a means to obtain an expert witness certificate in order to testify in a medical negligence case. To the extent, the requirements to bring a cause of

[9] Under existing subsection 766.102(12), F.S., the trial court may *disqualify or qualify* an expert witness on grounds other than those specified in s. 766.102, F.S.
[10] See *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

action to allege a medical malpractice claim are prevented under the bill; it raises questions about possible infringements on the right of access to the courts.

The bill makes providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine a ground for discipline for both Florida-licensed medical and osteopathic physicians. It is unclear what the "practice of medicine" means within the context of the "practice of osteopathic medicine" and other definitions of practice for licensed health care practitioners, which have distinct statutory meanings. It is unclear whether a health care practitioner who is not a Florida-licensed medical physician or osteopathic physician who performs acts or uses speech that is comparable to "expert witness testimony" may be subject to applicable penalties for the unlicensed practice of medicine or osteopathic medicine. The unlicensed practice of medicine or osteopathic medicine constitutes a third-degree felony punishable by a fine of up to $5,000 and imposition of imprisonment of up to 5 years.[11] Establishing a criminal penalty for acts that are prohibited or required, but that are not clearly defined, is likely to be void for vagueness or for overbreadth under the due process clause of the state and federal constitutions. Both constitutions prohibit a statute from forbidding or requiring the doing of an act in terms so vague that persons of common understanding must necessarily guess at its meaning and differ as to its application.[12] A statute is overbroad when its proscriptive language embraces not only acts properly and legally punishable, but others, which are constitutionally protected or outside the police power of the state to regulate.[13]

Applicable case law has held that, as long as commercial speech describes lawful activity and is truthful and not fraudulent or misleading, it is entitled to the protections of the First Amendment of the *United States Constitution*. To regulate or ban commercial speech, the government must have substantial governmental interest, which is directly advanced by the restriction, and must demonstrate that there is a reasonable fit between the legislature's ends and narrowly tailored means chosen to accomplish those ends. In enacting or enforcing a restriction on commercial speech, the government need not select the least restrictive means, but rather must tailor its restriction to meet the desired objective.[14] Case law also describes various legally recognized regulatory safeguards, which the state may impose in place of the total ban on commercial speech, such as requiring a disclaimer to ensure that the consumer is not misled.[15]

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

Osteopathic physicians and medical physicians who must obtain an expert witness certificate in order to provide expert testimony or opinions will incur a fee no greater than

[11] See s. 458.327, F.S., and s. 459.013, F.S.
[12] See *Brock v. Hardie*, 154 So.690 (Fla.1934).
[13] See *Locklin v. Pridgeon*, 30 So.2d 102 (Fla. 1947).
[14] See *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2243, 65 L.Ed.2d 341 (1980).
[15] See *Abramson v. Gonzalez* 949 F.2d 1567 (11th Cir. 1992).

$50 as determine by the Board of Medicine or the Board of Osteopathic Medicine, as applicable.

B. Private Sector Impact:

Parties to a medical negligence claim who are defending or pursuing such claims may incur additional costs associated with finding medical physicians and osteopathic physicians who are willing to provide expert testimony in Florida.

C. Government Sector Impact:

The Department of Health will incur costs to implement the bill. (An analysis of the bill by DOH was not available at the time this staff analysis was published.)

VI. Technical Deficiencies:

None.

VII. Related Issues:

On page 5, line 2, the bill provides that the osteopathic physician who holds an expert witness certificate be not entitled to engage in the practice of medicine as defined in s. 458.305, F.S. However, this does not prevent the osteopathic physician from engaging in the practice of osteopathic medicine as defined in s. 459.003, F.S. On page 5, line 17, the bill again refers to the practice of medicine instead of the practice of osteopathic medicine.

The bill provides that each application for an expert witness certificate must be approved or denied within five business days after receipt of a completed application. Any application for a certificate, which is not approved or denied within the required time, is considered approved. Any applicant for an expert witness certificate who seeks to claim licensure by default must notify the Board of Medicine, in writing, of the intent to rely on the default license. The bill provides alternative administrative procedures for the approval or denial of an expert witness certificate without any reference to ch. 120 or ch. 456, F.S., whose procedures for licensing would generally apply to any license of a health care practitioner issued by the Division of Medical Quality Assurance within DOH.

It is unclear what nexus exists between expert witness testimony and the “practice of medicine” or “practice of osteopathic medicine” if recipients of the expert witness certificate are prohibited from engaging in the practice of medicine in Florida (page 3, line 3, and page 4, line 19).

It is unclear what nexus exists between the newly created provision in the bill, which would make a medical physician or osteopathic physician subject to discipline for providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine when it is not limited to a medical negligence action. Such testimony, for instance could be given as part of other proceedings such as those involving forensic matters, child custody, workers’ compensation, the discipline of physicians and other licensed health care practitioners, and legislative claims.

For purposes of the expert witness certificate issued under the bill, the bill uses the term "certificate" and "license" interchangeably and does not provide a definition for certificate. Section 456.001(5), F.S., defines "license" to mean any permit, registration, certificate, or license, including a provisional license, issued by DOH.

The bill disqualifies any medical physician or osteopathic physician who has had an expert witness certificate revoked by the Board of Medicine or the Board of Osteopathic Medicine, as applicable. It is unclear whether the disciplinary authority of the Board of Medicine and the Board of Osteopathic over expert witness certificates issued under the bill is limited to revocation. Either board, pursuant to applicable law, may enter an order *denying licensure or imposing any of the penalties* in s. 456.072(2), F.S., against any applicant for licensure, for conduct constituting a substantial violation of the applicable practice act which occurred prior to obtaining a license, or any licensee who is found guilty of violating any applicable law relating to the practice of medicine or osteopathic medicine, as applicable. In determining what action is appropriate, the board must first consider what sanctions are necessary to protect the public or to compensate the patient. Only after those sanctions have been imposed may the disciplining authority consider and include in the order requirements designed to rehabilitate the physician. All costs associated with compliance with orders issued under this subsection are the obligation of the physician.

Section 456.072(2), F.S., has a range of penalties which include: refusal to certify, or to certify with restrictions, an application for a license; suspension or permanent revocation of a license; restriction of practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or any other restriction found to be necessary for the protection of the public health, safety, and welfare; imposition of an administrative fine not to exceed $10,000 for each count or separate offense. If the violation is for fraud or making a false or fraudulent representation, the board, or the department if there is no board, must impose a fine of $10,000 per count or offense; issuance of a reprimand or letter of concern; placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found; corrective action; imposition of an administrative fine in accordance with applicable law for violations regarding patient rights; refund of fees billed and collected from the patient or a third party on behalf of the patient; and requirement that the practitioner undergo remedial education.

Additionally in any administrative action against a medical or osteopathic physician, which does not involve revocation or suspension of license, the division must have the burden, by the greater weight of the evidence, to establish the existence of grounds for disciplinary action. The division shall establish grounds for revocation or suspension of license by clear and convincing evidence.

The bill does not establish grounds for discipline under which the Board of Medicine or the Board of Osteopathic Medicine may take action within the applicable practice act against the

recipient of an expert witness certificate. Under existing general regulatory provisions of ch. 456, F.S., the applicable board may discipline or deny expert witness certificateholders or applicants seeking expert witness certificates, as applicable.

VIII. Summary of Amendments:

Barcode 964990 by Health Care:
Expands the need for an expert witness certificate to the provision of expert testimony concerning the prevailing professional standard of care to any civil, criminal, or administrative proceeding.

Barcode 193392 by Health Care:
Limits the ground for physician discipline created in the bill for providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine to only situations when a court of competent jurisdiction has found the expert has provided such testimony.

Barcode 735788 by Health Care:
Corrects an error in the bill to provide that an expert witness certificate issued to an osteopathic physician does not entitle the recipient to practice osteopathic medicine (not medicine) as defined in Florida law.