

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: Judiciary Committee

BILL: SB 2686

INTRODUCER: Senator Webster

SUBJECT: Expert Witness Certificates

DATE: April 24, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HE	Fav/3 amendments
2.	Cibula	Maclure	JU	Pre-meeting
3.				
4.				
5.				
6.				

Please see last section for Summary of Amendments

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Technical amendments were recommended

☒

Amendments were recommended

☐

Significant amendments were recommended

I. Summary:

This bill requires physicians to be licensed in this state or hold an expert witness certificate to testify as experts in medical liability cases. Allopathic and osteopathic physicians licensed in other states or Canada may apply to the Board of Medicine or Board of Osteopathic Medicine for an expert witness certificate. To obtain an expert witness certificate, a physician must have an active license and pay an application fee of up to \$50. However, an expert witness certificate may be revoked for giving misleading, deceptive, or fraudulent medical expert witness testimony. An application for an expert witness certificate may be denied based on the revocation of a previous expert witness certificate. Lastly, the bill makes Florida-licensed physicians subject to discipline for providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine.

This bill substantially amends the following sections of the Florida Statutes: 458.331, 459.015, and 766.102. This bill creates sections 458.3175 and 459.0094, Florida Statutes.

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.

Expert Witnesses in Medical Malpractice Actions

Standards for recovery in medical negligence cases 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

¹ See s. 766.102(1), F.S.

- 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.

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.

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

² See s. 766.102(8), F.S.

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 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:

This bill requires physicians to be licensed in this state or hold an expert witness certificate to testify as experts in medical liability cases. Allopathic and osteopathic physicians licensed in other states or Canada may apply to the Board of Medicine or Board of Osteopathic Medicine for an expert witness certificate. To obtain an expert witness certificate, a physician must have an

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.

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).

active license and pay an application fee of up to \$50. However, an expert witness certificate may be revoked for giving misleading, deceptive, or fraudulent medical expert witness testimony. An application for an expert witness certificate may be denied based on the revocation of a previous expert witness certificate. Lastly, the bill makes Florida-licensed physicians subject to discipline for providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine.

The bill takes effect on July 1, 2006.

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:

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 \$50 as determined 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.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

Barcode 964990 by Health Care:

Permits those with an expert witness certificate to provide expert testimony in civil, criminal, or administrative proceedings.

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:

Provides that an expert witness certificate issued to an osteopathic physician does not entitle the recipient to practice osteopathic medicine.

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