

1 A bill to be entitled
2 An act relating to medical malpractice; creating ss.
3 458.3175, 459.0066, and 466.005, F.S.; requiring the
4 Department of Health to issue expert witness certificates
5 to certain physicians and dentists licensed outside of the
6 state; providing application and certification
7 requirements; establishing application fees; providing for
8 the validity and use of certifications; exempting
9 physicians and dentists issued certifications from certain
10 licensure and fee requirements; amending ss. 458.331,
11 459.015, and 466.028, F.S.; providing additional acts that
12 constitute grounds for denial of a license or disciplinary
13 action to which penalties apply; providing construction
14 with respect to the doctrine of incorporation by
15 reference; amending ss. 458.351 and 459.026, F.S.;
16 requiring the Board of Medicine and the Board of
17 Osteopathic Medicine to adopt within a specified period
18 certain patient forms specifying cataract surgery risks;
19 specifying that an incident resulting from risks disclosed
20 in the patient form is not an adverse incident; providing
21 for the execution and admissibility of the patient forms
22 in civil and administrative proceedings; creating a
23 rebuttable presumption that a physician disclosed cataract
24 surgery risks if the patient form is executed; amending s.
25 627.4147, F.S.; deleting a requirement that medical
26 malpractice insurance contracts contain a clause
27 authorizing the insurer to make and conclude certain
28 offers within policy limits over the insured's veto;

29 | amending s. 766.102, F.S.; defining terms; providing that
 30 | certain insurance information is not admissible as
 31 | evidence in medical negligence actions; establishing the
 32 | burden of proof that a claimant must meet in certain
 33 | damage claims against health care providers based on death
 34 | or personal injury; requiring that certain expert
 35 | witnesses who provide certain expert testimony meet
 36 | certain licensure or certification requirements; excluding
 37 | a health care provider's failure to comply with or breach
 38 | of federal requirements from evidence in medical
 39 | negligence cases in the state; amending s. 768.0981, F.S.;
 40 | limiting the liability of hospitals related to certain
 41 | medical negligence claims; providing an effective date.

42 |

43 | Be It Enacted by the Legislature of the State of Florida:

44 |

45 | Section 1. Section 458.3175, Florida Statutes, is created
 46 | to read:

47 | 458.3175 Expert witness certificate.-

48 | (1) (a) The department shall issue a certificate
 49 | authorizing a physician who holds an active and valid license to
 50 | practice medicine in another state or a province of Canada to
 51 | provide expert testimony in this state, if the physician submits
 52 | to the department:

53 | 1. A complete registration application containing the
 54 | physician's legal name, mailing address, telephone number,
 55 | business locations, the names of the jurisdictions where the
 56 | physician holds an active and valid license to practice

57 medicine, and the license number or other identifying number
58 issued to the physician by the jurisdiction's licensing entity;
59 and

60 2. An application fee of \$50.

61 (b) The department shall approve an application for an
62 expert witness certificate within 7 business days after receipt
63 of the completed application and payment of the application fee
64 if the applicant holds an active and valid license to practice
65 medicine in another state or a province of Canada and has not
66 had a previous expert witness certificate revoked by the board.
67 An application is approved by default if the department does not
68 act upon the application within the required period. A physician
69 must notify the department in writing of his or her intent to
70 rely on a certificate approved by default.

71 (c) An expert witness certificate is valid for 2 years
72 after the date of issuance.

73 (2) An expert witness certificate authorizes the physician
74 to whom the certificate is issued to do only the following:

75 (a) Provide a verified written medical expert opinion as
76 provided in s. 766.203.

77 (b) Provide expert testimony about the prevailing
78 professional standard of care in connection with medical
79 negligence litigation pending in this state against a physician
80 licensed under this chapter or chapter 459.

81 (3) An expert witness certificate does not authorize a
82 physician to engage in the practice of medicine as defined in s.
83 458.305. A physician issued a certificate under this section who
84 does not otherwise practice medicine in this state is not

85 required to obtain a license under this chapter or pay any
 86 license fees, including, but not limited to, a neurological
 87 injury compensation assessment. An expert witness certificate
 88 shall be treated as a license in any disciplinary action, and
 89 the holder of an expert witness certificate shall be subject to
 90 discipline by the board.

91 Section 2. Subsection (11) is added to section 458.331,
 92 Florida Statutes, paragraphs (oo) through (qq) of subsection (1)
 93 of that section are redesignated as paragraphs (pp) through
 94 (rr), respectively, and a new paragraph (oo) is added to that
 95 subsection, to read:

96 458.331 Grounds for disciplinary action; action by the
 97 board and department.—

98 (1) The following acts constitute grounds for denial of a
 99 license or disciplinary action, as specified in s. 456.072(2):

100 (oo) Providing misleading, deceptive, or fraudulent expert
 101 witness testimony related to the practice of medicine.

102 (11) The purpose of this section is to facilitate uniform
 103 discipline for those acts made punishable under this section
 104 and, to this end, a reference to this section constitutes a
 105 general reference under the doctrine of incorporation by
 106 reference.

107 Section 3. Subsection (6) of section 458.351, Florida
 108 Statutes, is renumbered as subsection (7), and a new subsection
 109 (6) is added to that section to read:

110 458.351 Reports of adverse incidents in office practice
 111 settings.—

112 (6) (a) The board shall adopt rules establishing a standard

CS/CS/CS/HB 479

2011

113 informed consent form that sets forth the recognized specific
114 risks related to cataract surgery. The board must propose such
115 rules within 90 days after the effective date of this
116 subsection.

117 (b) Before formally proposing the rule, the board must
118 consider information from physicians licensed under this chapter
119 or chapter 459 regarding recognized specific risks related to
120 cataract surgery and the standard informed consent forms adopted
121 for use in the medical field by other states.

122 (c) A patient's informed consent is not executed until the
123 patient, or a person authorized by the patient to give consent,
124 and a competent witness sign the form adopted by the board.

125 (d) An incident resulting from recognized specific risks
126 described in the signed consent form is not considered an
127 adverse incident for purposes of s. 395.0197 and this section.

128 (e) In a civil action or administrative proceeding against
129 a physician based on his or her alleged failure to properly
130 disclose the risks of cataract surgery, a patient's informed
131 consent executed as provided in paragraph (c) on the form
132 adopted by the board is admissible as evidence and creates a
133 rebuttable presumption that the physician properly disclosed the
134 risks.

135 Section 4. Section 459.0066, Florida Statutes, is created
136 to read:

137 459.0066 Expert witness certificate.-

138 (1) (a) The department shall issue a certificate
139 authorizing a physician who holds an active and valid license to
140 practice osteopathic medicine in another state or a province of

141 Canada to provide expert testimony in this state, if the
142 physician submits to the department:

143 1. A complete registration application containing the
144 physician's legal name, mailing address, telephone number,
145 business locations, the names of the jurisdictions where the
146 physician holds an active and valid license to practice
147 osteopathic medicine, and the license number or other
148 identifying number issued to the physician by the jurisdiction's
149 licensing entity; and

150 2. An application fee of \$50.

151 (b) The department shall approve an application for an
152 expert witness certificate within 7 business days after receipt
153 of the completed application and payment of the application fee
154 if the applicant holds an active and valid license to practice
155 osteopathic medicine in another state or a province of Canada
156 and has not had a previous expert witness certificate revoked by
157 the board. An application is approved by default if the
158 department does not act upon the application within the required
159 period. A physician must notify the department in writing of his
160 or her intent to rely on a certificate approved by default.

161 (c) An expert witness certificate is valid for 2 years
162 after the date of issuance.

163 (2) An expert witness certificate authorizes the physician
164 to whom the certificate is issued to do only the following:

165 (a) Provide a verified written medical expert opinion as
166 provided in s. 766.203.

167 (b) Provide expert testimony about the prevailing
168 professional standard of care in connection with medical

169 negligence litigation pending in this state against a physician
 170 licensed under chapter 458 or this chapter.

171 (3) An expert witness certificate does not authorize a
 172 physician to engage in the practice of osteopathic medicine as
 173 defined in s. 459.003. A physician issued a certificate under
 174 this section who does not otherwise practice osteopathic
 175 medicine in this state is not required to obtain a license under
 176 this chapter or pay any license fees, including, but not limited
 177 to, a neurological injury compensation assessment. An expert
 178 witness certificate shall be treated as a license in any
 179 disciplinary action, and the holder of an expert witness
 180 certificate shall be subject to discipline by the board.

181 Section 5. Subsection (11) is added to section 459.015,
 182 Florida Statutes, paragraphs (qq) through (ss) of subsection (1)
 183 of that section are redesignated as paragraphs (rr) through
 184 (tt), respectively, and a new paragraph (qq) is added to that
 185 subsection, to read:

186 459.015 Grounds for disciplinary action; action by the
 187 board and department.—

188 (1) The following acts constitute grounds for denial of a
 189 license or disciplinary action, as specified in s. 456.072(2):

190 (qq) Providing misleading, deceptive, or fraudulent expert
 191 witness testimony related to the practice of osteopathic
 192 medicine.

193 (11) The purpose of this section is to facilitate uniform
 194 discipline for those acts made punishable under this section
 195 and, to this end, a reference to this section constitutes a

196 general reference under the doctrine of incorporation by
 197 reference.

198 Section 6. Section 466.005, Florida Statutes, is created
 199 to read:

200 466.005 Expert witness certificate.-

201 (1) (a) The department shall issue a certificate
 202 authorizing a dentist who holds an active and valid license to
 203 practice dentistry in another state or a province of Canada to
 204 provide expert testimony in this state, if the dentist submits
 205 to the department:

206 1. A complete registration application containing the
 207 dentist's legal name, mailing address, telephone number,
 208 business locations, the names of the jurisdictions where the
 209 dentist holds an active and valid license to practice dentistry,
 210 and the license number or other identifying number issued to the
 211 dentist by the jurisdiction's licensing entity; and

212 2. An application fee of \$50.

213 (b) The department shall approve an application for an
 214 expert witness certificate within 7 business days after receipt
 215 of the completed application and payment of the application fee
 216 if the applicant holds an active and valid license to practice
 217 dentistry in another state or a province of Canada and has not
 218 had a previous expert witness certificate revoked by the board.
 219 An application is approved by default if the department does not
 220 act upon the application within the required period. A dentist
 221 must notify the department in writing of his or her intent to
 222 rely on a certificate approved by default.

223 (c) An expert witness certificate is valid for 2 years

224 after the date of issuance.

225 (2) An expert witness certificate authorizes the dentist
 226 to whom the certificate is issued to do only the following:

227 (a) Provide a verified written medical expert opinion as
 228 provided in s. 766.203.

229 (b) Provide expert testimony about the prevailing
 230 professional standard of care in connection with medical
 231 negligence litigation pending in this state against a dentist
 232 licensed under this chapter.

233 (3) An expert witness certificate does not authorize a
 234 dentist to engage in the practice of dentistry as defined in s.
 235 466.003. A dentist issued a certificate under this section who
 236 does not otherwise practice dentistry in this state is not
 237 required to obtain a license under this chapter or pay any
 238 license fees. An expert witness certificate shall be treated as
 239 a license in any disciplinary action, and the holder of an
 240 expert witness certificate shall be subject to discipline by the
 241 board.

242 Section 7. Subsection (8) is added to section 466.028,
 243 Florida Statutes, paragraph (ll) of subsection (1) of that
 244 section is redesignated as paragraph (mm), and a new paragraph
 245 (ll) is added to that subsection, to read:

246 466.028 Grounds for disciplinary action; action by the
 247 board.—

248 (1) The following acts constitute grounds for denial of a
 249 license or disciplinary action, as specified in s. 456.072(2):

250 (ll) Providing misleading, deceptive, or fraudulent expert
 251 witness testimony related to the practice of dentistry.

252 (8) The purpose of this section is to facilitate uniform
253 discipline for those acts made punishable under this section
254 and, to this end, a reference to this section constitutes a
255 general reference under the doctrine of incorporation by
256 reference.

257 Section 8. Subsection (6) of section 459.026, Florida
258 Statutes, is renumbered as subsection (7), and a new subsection
259 (6) is added to that section to read:

260 459.026 Reports of adverse incidents in office practice
261 settings.—

262 (6) (a) The board shall adopt rules establishing a standard
263 informed consent form that sets forth the recognized specific
264 risks related to cataract surgery. The board must propose such
265 rules within 90 days after the effective date of this
266 subsection.

267 (b) Before formally proposing the rule, the board must
268 consider information from physicians licensed under chapter 458
269 or this chapter regarding recognized specific risks related to
270 cataract surgery and the standard informed consent forms adopted
271 for use in the medical field by other states.

272 (c) A patient's informed consent is not executed until the
273 patient, or a person authorized by the patient to give consent,
274 and a competent witness sign the form adopted by the board.

275 (d) An incident resulting from recognized specific risks
276 described in the signed consent form is not considered an
277 adverse incident for purposes of s. 395.0197 and this section.

278 (e) In a civil action or administrative proceeding against
279 a physician based on his or her alleged failure to properly

280 disclose the risks of cataract surgery, a patient's informed
 281 consent executed as provided in paragraph (c) on the form
 282 adopted by the board is admissible as evidence and creates a
 283 rebuttable presumption that the physician properly disclosed the
 284 risks.

285 Section 9. Paragraph (b) of subsection (1) of section
 286 627.4147, Florida Statutes, is amended to read:

287 627.4147 Medical malpractice insurance contracts.—

288 (1) In addition to any other requirements imposed by law,
 289 each self-insurance policy as authorized under s. 627.357 or s.
 290 624.462 or insurance policy providing coverage for claims
 291 arising out of the rendering of, or the failure to render,
 292 medical care or services, including those of the Florida Medical
 293 Malpractice Joint Underwriting Association, shall include:

294 (b)1. ~~Except as provided in subparagraph 2., a clause~~
 295 ~~authorizing the insurer or self-insurer to determine, to make,~~
 296 ~~and to conclude, without the permission of the insured, any~~
 297 ~~offer of admission of liability and for arbitration pursuant to~~
 298 ~~s. 766.106, settlement offer, or offer of judgment, if the offer~~
 299 ~~is within the policy limits. It is against public policy for any~~
 300 ~~insurance or self-insurance policy to contain a clause giving~~
 301 ~~the insured the exclusive right to veto any offer for admission~~
 302 ~~of liability and for arbitration made pursuant to s. 766.106,~~
 303 ~~settlement offer, or offer of judgment, when such offer is~~
 304 ~~within the policy limits. However, any offer of admission of~~
 305 ~~liability, settlement offer, or offer of judgment made by an~~
 306 ~~insurer or self-insurer shall be made in good faith and in the~~
 307 ~~best interests of the insured.~~

308 ~~2.a. With respect to dentists licensed under chapter 466,~~
309 A clause clearly stating whether or not the insured has the
310 exclusive right to veto any offer of admission of liability and
311 for arbitration pursuant to s. 766.106, settlement offer, or
312 offer of judgment if the offer is within policy limits. An
313 insurer or self-insurer shall not make or conclude, without the
314 permission of the insured, any offer of admission of liability
315 and for arbitration pursuant to s. 766.106, settlement offer, or
316 offer of judgment, if such offer is outside the policy limits.
317 However, any offer for admission of liability and for
318 arbitration made under s. 766.106, settlement offer, or offer of
319 judgment made by an insurer or self-insurer shall be made in
320 good faith and in the best interest of the insured.

321 2.b. If the policy contains a clause stating the insured
322 does not have the exclusive right to veto any offer or admission
323 of liability and for arbitration made pursuant to s. 766.106,
324 settlement offer or offer of judgment, the insurer or self-
325 insurer shall provide to the insured or the insured's legal
326 representative by certified mail, return receipt requested, a
327 copy of the final offer of admission of liability and for
328 arbitration made pursuant to s. 766.106, settlement offer or
329 offer of judgment and at the same time such offer is provided to
330 the claimant. A copy of any final agreement reached between the
331 insurer and claimant shall also be provided to the insurer or
332 his or her legal representative by certified mail, return
333 receipt requested not more than 10 days after affecting such
334 agreement.

335 Section 10. Subsections (3), (4), and (5) of section
336 766.102, Florida Statutes, are amended, subsection (12) of that
337 section is renumbered as subsection (14), and new subsections
338 (12) and (13) are added to that section, to read:

339 766.102 Medical negligence; standards of recovery; expert
340 witness.—

341 (3)(a) As used in this subsection, the term:

342 1. "Insurer" means any public or private insurer,
343 including the Centers for Medicare and Medicaid Services.

344 2. "Reimbursement determination" means an insurer's
345 determination of the amount that the insurer will reimburse a
346 health care provider for health care services.

347 3. "Reimbursement policies" means an insurer's policies
348 and procedures governing its decisions regarding health
349 insurance coverage and method of payment and the data upon which
350 such policies and procedures are based, including, but not
351 limited to, data from national research groups and other patient
352 safety data as defined in s. 766.1016.

353 (b) The existence of a medical injury does ~~shall~~ not
354 create any inference or presumption of negligence against a
355 health care provider, and the claimant must maintain the burden
356 of proving that an injury was proximately caused by a breach of
357 the prevailing professional standard of care by the health care
358 provider. Any records, policies, or testimony of an insurer's
359 reimbursement policies or reimbursement determination regarding
360 the care provided to the plaintiff are not admissible as
361 evidence in any medical negligence action. However, the
362 discovery of the presence of a foreign body, such as a sponge,

363 clamp, forceps, surgical needle, or other paraphernalia commonly
 364 used in surgical, examination, or diagnostic procedures, shall
 365 be prima facie evidence of negligence on the part of the health
 366 care provider.

367 (4) (a) The Legislature is cognizant of the changing trends
 368 and techniques for the delivery of health care in this state and
 369 the discretion that is inherent in the diagnosis, care, and
 370 treatment of patients by different health care providers. The
 371 failure of a health care provider to order, perform, or
 372 administer supplemental diagnostic tests is shall not be
 373 actionable if the health care provider acted in good faith and
 374 with due regard for the prevailing professional standard of
 375 care.

376 (b) In an action for damages based on death or personal
 377 injury which alleges that such death or injury resulted from the
 378 failure of a health care provider to order, perform, or
 379 administer supplemental diagnostic tests, the claimant has the
 380 burden of proving by clear and convincing evidence that the
 381 alleged actions of the health care provider represented a breach
 382 of the prevailing professional standard of care.

383 (5) A person may not give expert testimony concerning the
 384 prevailing professional standard of care unless the ~~that~~ person
 385 is a ~~licensed~~ health care provider who holds an active and valid
 386 license and conducts a complete review of the pertinent medical
 387 records and meets the following criteria:

388 (a) If the health care provider against whom or on whose
 389 behalf the testimony is offered is a specialist, the expert
 390 witness must:

391 1. Specialize in the same specialty as the health care
 392 provider against whom or on whose behalf the testimony is
 393 offered; or specialize in a similar specialty that includes the
 394 evaluation, diagnosis, or treatment of the medical condition
 395 that is the subject of the claim and have prior experience
 396 treating similar patients; and

397 2. Have devoted professional time during the 3 years
 398 immediately preceding the date of the occurrence that is the
 399 basis for the action to:

400 a. The active clinical practice of, or consulting with
 401 respect to, the same or similar specialty that includes the
 402 evaluation, diagnosis, or treatment of the medical condition
 403 that is the subject of the claim and have prior experience
 404 treating similar patients;

405 b. Instruction of students in an accredited health
 406 professional school or accredited residency or clinical research
 407 program in the same or similar specialty; or

408 c. A clinical research program that is affiliated with an
 409 accredited health professional school or accredited residency or
 410 clinical research program in the same or similar specialty.

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

416 1. The active clinical practice or consultation as a
 417 general practitioner;

418 2. The instruction of students in an accredited health

419 professional school or accredited residency program in the
 420 general practice of medicine; or

421 3. A clinical research program that is affiliated with an
 422 accredited medical school or teaching hospital and that is in
 423 the general practice of medicine.

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

430 1. The active clinical practice of, or consulting with
 431 respect to, the same or similar health profession as the health
 432 care provider against whom or on whose behalf the testimony is
 433 offered;

434 2. The instruction of students in an accredited health
 435 professional school or accredited residency program in the same
 436 or similar health profession in which the health care provider
 437 against whom or on whose behalf the testimony is offered; or

438 3. A clinical research program that is affiliated with an
 439 accredited medical school or teaching hospital and that is in
 440 the same or similar health profession as the health care
 441 provider against whom or on whose behalf the testimony is
 442 offered.

443 (12) If a physician licensed under chapter 458 or chapter
 444 459 or a dentist licensed under chapter 466 is the party against
 445 whom, or on whose behalf, expert testimony about the prevailing
 446 professional standard of care is offered, the expert witness

447 must be licensed under chapter 458, chapter 459, or chapter 466
 448 or possess a valid expert witness certificate issued under s.
 449 458.3175, s. 459.0066, or s. 466.005.

450 (13) A health care provider's failure to comply with or
 451 breach of any federal requirement is not admissible as evidence
 452 in any medical negligence case in this state.

453 Section 11. Section 768.0981, Florida Statutes, is amended
 454 to read:

455 768.0981 Limitation on actions against insurers, prepaid
 456 limited health service organizations, health maintenance
 457 organizations, hospitals, or prepaid health clinics.—An entity
 458 licensed or certified under chapter 395, chapter 624, chapter
 459 636, or chapter 641 ~~is shall~~ not be liable for the medical
 460 negligence of a health care provider with whom the licensed or
 461 certified entity has entered into a contract, other than an
 462 employee of such licensed or certified entity, unless the
 463 licensed or certified entity expressly directs or exercises
 464 actual control over the specific conduct that caused injury.

465 Section 12. This act shall take effect July 1, 2011.