

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1561 Expert Witnesses  
**SPONSOR(S):** Brummer and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 2686

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Health Care General Committee	_____	Brown-Barrios	Brown-Barrios
2) Health & Families Council	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

Currently, expert witnesses are not required to hold a Florida license or hold any Board issued certificate in order to testify in medical negligence (medical malpractice) litigation.

The bill requires an expert witness who provides testimony concerning the prevailing professional standard of care in any action for damages involving a claim of negligence against a Florida-licensed medical (allopathic) physician or osteopathic physician to be:

- A Florida-licensed medical physician or osteopathic physician or
- If licensed in another state or Canada, to hold an expert witness certificate.

The bill requires the Board of Medicine or the Board of Osteopathic Medicine to issue an expert witness certificate to any physician who:

1. is licensed to practice allopathic or osteopathic medicine in any other state or in Canada,
2. whose license is currently active and valid,
3. who completes a registration form prescribed by the board,
4. pays the application fee, and
5. has not had a previous expert witness certificate revoked by the Board of Medicine or the Board of Osteopathic Medicine.

The expert witness certificate is valid for two years. The bill authorizes the Board of Medicine and the Board of Osteopathic Medicine to adopt rules.

The bill limits a physician possessing an expert witness certificate to use the certificate solely to give a verified written medical expert opinion and to provide expert testimony concerning the prevailing professional standard of care in connection with any medical malpractice litigation pending in this state against a physician licensed in Florida.

The bill makes the act of providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine by a medical physician or osteopathic physician grounds for denial of a license or disciplinary action.

The bill has an estimated fiscal impact of \$377,541 in FY 06/07 and \$404,875 in FY 07/08.

If enacted, the bill takes effect July 1, 2006.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h1561.HCG.doc  
**DATE:** 3/28/2006

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill creates additional statutory requirements and regulations for government agencies and the public.

#### B. EFFECT OF PROPOSED CHANGES:

Primary effects of the bill include:

- Creation of an expert witness certificate good for two years for a medical physician or osteopathic physician licensed in another state or Canada that entitles the holder to provide verified written medical expert opinion and to provide expert testimony in medical malpractice cases.
- Limiting the admission of verified written medical expert opinion and expert testimony involving a claim of negligence against a Florida medical or osteopathic physician to physicians licensed by this state or physicians possessing an expert witness certificate.
- Granting authority to the Board of Medicine or the Board of Osteopathic Medicine to issue and revoke an expert witness certificate.
- Granting authority to the Board of Medicine or the Board of Osteopathic Medicine to deny a license or discipline a medical physician or osteopathic physician for providing misleading, deceptive, or fraudulent witness testimony related to the practice of medicine.

## BACKGROUND

### **Medical Expert**

"A Medical expert" is defined as:

[A] person duly and regularly engaged in the practice of his or her profession who holds a health care professional degree from a university or college and who meets the requirements of an expert witness as set forth in s. 766.102.<sup>1</sup>

### **Expert Witness Requirements in a medical negligence proceeding**

Florida law provides that in a medical negligence or medical malpractice<sup>2</sup> proceeding a person may not give expert testimony against or on behalf of the defendant concerning the prevailing professional standard of care unless that person is a licensed health care provider and meets certain requirements and conditions of health care providers for the purpose of testifying in court. There are no requirements in current law that an expert witness must have a Florida license.<sup>3</sup>

### ***If the health care provider against whom or on whose behalf the testimony is offered is a specialist<sup>4</sup>***

The expert witness must:

1. 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,

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<sup>1</sup> s. [766.202\(6\)](#), F.S.

<sup>2</sup> s. [766.202\(7\)](#), F.S.

<sup>3</sup> s. [766.102](#), F.S.

<sup>4</sup> s. [766.102\(5\)\(a\)](#), F.S.

diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients; and

2. Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:
  - a. 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;
  - b. Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same or similar specialty; or
  - c. 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.<sup>5</sup>***

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:

1. The active clinical practice or consultation as a general practitioner;
2. The instruction of students in an accredited health professional school or accredited residency program in the general practice of medicine; or
3. 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.<sup>6</sup>***

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:

1. 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;
2. 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
3. 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.

***Other requirements and conditions for providing expert testimony.***

A physician licensed under chapter 458, F.S., or chapter 459, F.S., who qualifies as an expert witness 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 medical support staff.<sup>7</sup>

In a medical negligence action against a hospital, a health care facility, or medical facility, a person may give expert testimony on the appropriate standard of care as to administrative and other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, concerning the standard of care among hospitals, health care facilities, or medical facilities of the same type as the hospital, health care facility, or medical facility whose acts or omissions are the subject of the testimony and which are located in the same or similar communities at the time of the alleged act giving rise to the cause of action.<sup>8</sup>

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<sup>5</sup> s. 766.102(5)(b), F.S.

<sup>6</sup> s. 766.102(5)(c), F.S.

<sup>7</sup> s. 766.102(6), F.S.

<sup>8</sup> s. 766.102(7), F.S.

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.<sup>9</sup>

In any action for damages involving a claim of negligence against a physician licensed under chapter 458, F.S., osteopathic physician licensed under chapter 459, F.S., podiatric physician licensed under chapter 461, F.S., or chiropractic physician licensed under chapter 460, F.S., providing emergency medical services in a hospital emergency department, the court must admit expert medical testimony only from 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.<sup>10</sup>

### **Power of the trial court**

The requirements and conditions delineated in law regarding who may provide testimony as an expert witness in a medical negligence proceeding does not limit the power of the trial court to disqualify or qualify an expert witness on other grounds.<sup>11</sup> In addition, in the Florida Evidence Code it is the court that determines preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence.<sup>12</sup>

### **The framework for expert testimony in Florida courts**

Florida allows that if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to the evidence at trial.<sup>13</sup>

In *Frye v. United States*<sup>14</sup> the court laid the framework for how courts would treat expert opinion testimony based on novel scientific procedures. *Frye* became the federal standard for judges to apply in evaluating scientific evidence. In *Frye*, a defendant in a murder trial attempted to show his innocence by using a lie detector test that measured systolic blood pressure. The court excluded the evidence, reasoning that the lie detector test was unreliable because the scientific principle upon which it was based was not "sufficiently established to have gained general acceptance in the particular field in which it belongs." The implication is that one "expert" scientist testifying to the accuracy of the lie detector would not be enough and that a large community of scientists must accept the test in order for the judge to allow the jury to hear the evidence.

In Florida, the *Frye* general standard was adopted in the context of a lie detector test in a 1952 case.<sup>15</sup> Since then, all novel scientific evidence in Florida has been held up to the *Frye* standard. In 1995, the Florida Supreme Court, in *Ramirez v. State*, held that Florida will continue to use the *Frye* standard.<sup>16</sup> Consistent with s. 90.702, F.S., and the Florida Supreme Court's decision in *Ramirez*, the admission of expert opinion testimony concerning scientific principles is governed by the following four-step process:

First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact at issue.

Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs". (*Frye* standard)

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<sup>9</sup> s. 766.102(8), F.S.

<sup>10</sup> s. 766.102(9)(a), F.S.

<sup>11</sup> s. 766.102(12), F.S.

<sup>12</sup> s. [90.105](#)(1), F.S.

<sup>13</sup> s. [90.702](#), F.S.

<sup>14</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)

<sup>15</sup> *Kaminski v. State*, 63 So. 2d 339 (Fla. 1952)

<sup>16</sup> *Ramirez v. State*, 651 So. 2d 1164, 1167 (Fla. 1995)

Third, the trial judge must determine whether a particular witness is qualified as an expert to present opinion testimony on the subject at issue.

Fourth, the trial judge may then allow the expert to render an opinion on the subject of his or her expertise, and then it is up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.

These four steps are the basic framework that applies to Florida's statutory and case law.

### **The Practice of Medicine**

Chapter 458, F.S., governs the practice of medicine (allopathic) in Florida. The chapter 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.<sup>17</sup> The Board of Medicine is authorized to adopt rules to implement provisions of the medical practice act and discipline medical physicians.<sup>18</sup>

### **The Practice of Osteopathic Medicine**

Chapter 459, F.S., also known as the osteopathic medicine practice act, governs the practice of osteopathic medicine. The chapter 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.<sup>19</sup> The Board of Osteopathic Medicine has the authority to adopt rules to implement provisions of the osteopathic medicine practice act, and discipline osteopathic physicians.<sup>20</sup>

## **C. SECTION DIRECTORY:**

Section 1. Creates s. 458.3175, F.S., relating to expert witness certificate.

Section 2. Creates paragraph (oo) of subsection (1) of s.458.331, F.S., relating to grounds for disciplinary action.

Section 3. Creates s. 459.0066, F.S., relating to expert witness certificate.

Section 4. Creates paragraph (qq) of subsection (1) of s. 459.015, F.S., relating to grounds for disciplinary action.

Section 5. Creates subsection (12) and renumbers existing subsection (12) of s.766.102, F.S., relating to medical negligence; standards of recovery; expert witness.

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

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The Department of Health should generate revenue as a result of the application fee required to secure an expert witness certificate.

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<sup>17</sup> s. [458.305\(3\)](#), F.S.,  
<sup>18</sup> ss. [458.309](#), and [458.331](#), F.S. .

<sup>19</sup> s. [459.003](#), F.S.,

<sup>20</sup> ss. [459.005](#), and [459.015](#), F.S.

2. Expenditures: According to DOH the cost associated with this bill is as follows:

<b>Estimated Expenditures</b>	<b>FY 2006/2007</b>	<b>FY 2007/2008</b> (Annualized/Recurr.)
<b>Salaries</b>		
1 Research Specialist (RS) II, PG 17 (BOM) (not lapsed)	\$38,550	\$38,550
2 RS II, PG 17 (BMS)	\$57,825	\$77,100
1 Information Specialist (IS) II, PG 20 (CSU)	\$33,851	\$45,135
2 RS I, PG 15, (BMS)	\$52,758	\$70,344
1 IS II, PG 20 (ISU)	\$33,851	\$45,135
1 Admin Asst, PG 15 (BMS)	\$26,379	\$35,172
<b>Other Personal Services</b>		
Expert Witness fees to review disciplinary cases	\$20,000	\$20,000
<b>Expense</b>		
	\$25,088	
Non-recurring expense package		
Recurring expense package with limited travel for one RS II	\$10,390	\$10,390
Recurring expense package with maximum travel for two IS II	\$31,514	\$31,514
Recurring expense package with no travel for two RS II	\$12,806	\$12,806
Recurring expense	\$15,585	\$15,585
<b>Operating Capital Outlay</b>		
OCO package for new FTEs	\$15,800	
<b>Human Resource Services</b>		
For new FTEs	\$3,144	\$3,144
<b>Total Estimated Expenditures</b>	<b>\$377,541</b>	<b>\$404,875</b>

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

An expert witness who resides in a state other than Florida or in Canada would need to secure a certificate to provide expert testimony in Florida and would incur an application fee for the certificate of no greater than \$50.

D. FISCAL COMMENTS:

According to DOH, because the bill creates two new regulatory programs (one in the Board of Medicine and one in the Board of Osteopathic Medicine), it necessitates additional staff to administer. DOH computed salaries at 10% above the minimum for the pay grade plus 28% for benefits and all positions were lapsed at 25% except for the Board of Medicine position.

- Two positions are needed for the Compliance Monitoring Unit in the Bureau of Management Services to handle the expected multiple requests for certification and public documents and the increased monitoring of new disciplinary actions.
- Two positions are needed in the Central Records Unit in the Bureau of Management Services due to the expected increase in the clerk's filing of documents, reporting to the Federation of State Medical Boards, public records requests (general public and state), certification of disciplinary files and orders, and certification of licensure orders and appeals processed.
- One position is required for the Federal Health Care Integrity Protection Data Bank (HIPDB) unit to handle increased federally mandated reporting of board actions.
- One position is required for the Investigative Services Unit to absorb the anticipated investigative workload.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take any action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

##### 2. Other:

The bill provides authority to the Board of Medicine or the Board of Osteopathic Medicine to revoke an expert witness certificate issued by the respective boards (line 26 & 70). However, there is no provision or guidance regarding what would constitute grounds for revocation and other procedures related to this including appeals. The bill allows each board to adopt rules to implement the new requirements related to the expert witness certificate.

In contrast, the bill makes the act of providing misleading, deceptive, or fraudulent witness testimony related to the practice of medicine by a medical physician or osteopathic physician licensed in Florida grounds for denial of a license or disciplinary action. Since, by definition, the expert witness certificate is granted only to physicians not licensed in Florida, it is unclear how the current statutory framework in chapters 456, 458 and 459, F.S., relating to disciplinary action would apply, if at all.

The lack of legislative direction to the Board of Medicine or the Board of Osteopathic Medicine on revoking an expert witness certificate could be construed as "unlawful" delegation of Legislative power to the Executive. The separation-of-powers doctrine prevents the Legislature from delegating its constitutional duties making an agency the lawgiver rather than the administrator of the law. The Legislature must promulgate standards sufficient to guide administrative agencies in the performance of their duties.<sup>21</sup>

Amendments have been drafted to address this issue.

#### B. RULE-MAKING AUTHORITY:

The bill provides authority to the Florida Board of Medicine and the Board of Osteopathic Medicine to adopt rules to implement expert witness certificate requirements.

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<sup>21</sup> See Board of Architecture v. Wasserman, 377 So.2d 653 (Fla. 1979) and Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978),

C. DRAFTING ISSUES OR OTHER COMMENTS:

According to DOH, the effective date of the bill, July 1, 2006, does not provide adequate time for the boards to promulgate rules, develop forms and hire staff to administer the expert witness certificate programs.

Technical drafting error on line 80. The line should read "osteopathic medicine as defined in s. 459.003(3)."

Amendments have been drafted to address these issues.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**