

# EXPERT WITNESS CERTIFICATES: CREATING ACCOUNTABILITY FOR OUT-OF-STATE WITNESSES IN FLORIDA COURTS

*By Doug Jones and Matthew Scanlan*

Until recently, no mechanism existed for sanctioning an out-of-state expert who gave fraudulent testimony in a Florida court. As explained here, the Florida Legislature recently addressed this issue by requiring an "expert certificate" for doctors and dentists who want to serve as expert witnesses in Florida malpractice cases.

With the passage of HB 479 in the 2011 legislative session, physicians and dentists licensed in other states or in Canada will be required to obtain a certificate prior to providing expert standard of care testimony in support of, or against, physicians or dentists in medical negligence litigation venued in Florida.

The bill was priority legislation for the Florida Medical Association (FMA), which saw a need to create accountability for out-of-state physicians and dentists testifying in Florida malpractice cases. Physicians and dentists licensed to practice in Florida have been, at least in theory, subject to disciplinary action if their testimony was found to be fraudulent. Before the enactment of HB 479, however, an out-of-state practitioner could only be made to answer for questionable testimony by filing a complaint with the state or specialty board that had licensed or certified the expert. The FMA apparently thought a more direct approach would better serve the citizens of Florida. The legislature agreed.

HB 479 created sections 458.3175, 459.0066, and 466.005, Florida Statutes, establishing "expert witness certificates" and a process by which out-of-state medical doctors, doctors of osteopathic medicine, and dentists who wish to serve as stan-

dard of care expert witnesses in Florida can obtain them. The three sections essentially mirror each other in authorizing any physician or dentist licensed in another state or Canada to obtain a certificate from the Department of Health to participate as a standard of care expert in medical negligence litigation. HB 479 also created section 766.102(12), which requires expert witnesses offering standard of care opinions about physicians or dentists in medical negligence actions in Florida either to be licensed in Florida or to possess a valid expert witness certificate.

Prior to the passage of these provisions, Florida law required a standard of care expert in a medical negligence action to be a licensed healthcare provider who practiced in the same or similar specialty as the defendant.<sup>1</sup> If the defendant provider was a specialist, the expert must have practiced in the same or similar specialty for three years in active clinical practice, teaching, or in a clinical research program.<sup>2</sup> If the defendant provider was a general practitioner, the expert must have practiced in the same or similar specialty for the past five years in an active clinical practice, teaching, or a clinical research program.<sup>3</sup> These requirements are still in place, but the statutes now require any out-of-state practitioner to follow a registration process and obtain a Florida certificate.<sup>4</sup>

By design, the new law makes certification easy. A trip to the Department of

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Health web page for the Division of Medical Quality Assurance<sup>5</sup> reveals a link for "Apply for a License," which in turn leads to "Apply for Initial Licensure." The applicant then chooses the appropriate certificate ("Dental Expert Witness Certificate", "Medical Doctor Expert Certificate", or "Osteopathic Physician Expert Certificate") from a drop-down menu. Regardless of which specialty is chosen, the user is taken to a new page, where a click on "Create Account" opens a form to be completed by the user.

By statute, the applicant is required to provide his/her legal name, mailing address, telephone number, business locations, the names of jurisdictions where they hold a valid license, along with the license numbers, the date of licensure, and the date the license expires.<sup>6</sup> All on-line applicants must provide a valid email address. The licensure application costs \$50.00 to complete, and can be paid with most credit cards.<sup>7</sup>

According to the Department of Health, the applications will be uploaded twice a day Monday through Friday. A confirmation email is sent verifying that the application will be reviewed within 10 days. Once the certificate is approved, the applicant will receive an email that includes the applicant's license number and instructions for printing the certificate. The certificate is valid for two years.<sup>8</sup>

Importantly, the statutes require the Department of Health to approve any new application within 10 days of receipt of the application and fee, assuming the applicant holds a valid license to practice in another state or Canada and has not had a previous expert witness certificate revoked by the board.<sup>9</sup> If the Department of Health fails to act upon the application within 10 days, the application is approved by default.<sup>10</sup> However, the applicant is required to notify the department in writing if he/she intends to rely on an application approved by default.<sup>11</sup>

There is no need to rush to the phone to call all currently retained experts. The enactments took effect

October 1, 2011, and apply only to causes of action that *accrued on or after* that date.<sup>12</sup>

The Florida certificate only authorizes the physician or dentist to 1) provide a verified written medical expert opinion for pre-suit, and 2) provide expert testimony about the prevailing professional standard of care about a physician or dentist.<sup>13</sup> Although the certificate in no way authorizes the holder to engage in the practice of medicine or dentistry, the statutes specifically provide that "...the certificate shall be treated as a license in any disciplinary action, and the holder of an expert witness certificate shall be subject to discipline by the board."<sup>14</sup>

To add "teeth" to the legislation, HB 479 also added language to sections 458.331, 459.015, and 466.028, Florida Statutes, which govern the disciplinary actions available by the respective medical Boards. The new language provides that the governing licensing body may discipline a license holder for providing deceptive or fraudulent expert witness testimony related to the practice of medicine<sup>15</sup>, osteopathic medicine<sup>16</sup> or dentistry.<sup>17</sup>

The obvious purpose of this legislation was to bring testifying physicians and dentists licensed outside the state of Florida under the umbrella of Florida's licensing boards and subject the certificate holder to sanctions for fraudulent testimony.

Florida is not the first state to require out-of-state experts to apply for and obtain a license. South Carolina passed a similar measure in 2006; that law not only required all out-of-state experts to have a South Carolina medical license, but also defined expert testimony as "practicing medicine."<sup>18</sup> The South Carolina Supreme Court struck down the measure, expressing concern about its effect on treating physicians who no longer resided in the state, and indicating the provision "ha[d] the potential to substantially impair the orderly administration of justice."<sup>19</sup> Although it does not appear the Florida provision has the same defect, it will

be interesting to see whether similar legal challenges are made.

Nothing in the new Florida legislation prohibits certification of an expert that has been disciplined in another state. As long as the applicant expert holds "an active and valid license" from any state (or Canadian province), and has not had a previous Florida certificate revoked, he or she appears automatically qualified for certification.<sup>20</sup>

The new laws have introduced certain quirks as well. For example, since there is no provision for certification of foreign experts licensed in foreign nations other than Canada, potential experts from Great Britain, Australia, or any other non-Canadian foreign country appear to be barred from serving as standard of care experts in Florida medical negligence cases. They may serve only as causation or damages experts, apparently. To the extent this raises "access to courts" concerns, Florida courts have long held that the medical malpractice statutory scheme should be construed liberally as to not infringe on a citizen's right of access to courts, while at the same time respecting the stated legislative policy of screening out frivolous lawsuits and defenses.<sup>21</sup> It will be interesting to see how courts handle this restriction, or whether the legislature feels it is necessary to make changes.

Arguably, another potential quirk is that the new laws impose no requirement that an out-of-state practitioner obtain an "expert witness certificate" to offer standard of care testimony about a hospital, nurse, or any other health care provider other than a physician or a dentist.<sup>22</sup> Although a strict reading of the statute might suggest the intent to require certification only when the physician or dentist in question is named as a party, this demarcation may not always be clear. For example, in cases where a hospital is sued, at least in part, over alleged malpractice by a staff physician not named as a party, the court may be asked to interpret this provision to determine whether certification is required. It could be argued that a

strict interpretation thwarts the obvious purpose of the legislation — that is, to insure physicians and dentists licensed outside the state of Florida are subject to sanctions by Florida's licensing boards for fraudulent testimony.

How will the enacted legislation impact efforts to retain experts? It is hard to know. The response to this new requirement will likely be individualized. While the application process itself and the \$50.00 fee are unlikely to restrain experts who see themselves as advocates for justice, some will realize there is much to lose. The certificate holder is subject to "disciplinary action" for providing "deceptive or fraudulent expert witness testimony."<sup>22</sup> Disciplinary action could have a meaningful financial impact on any expert with substantial "expert" income. More importantly, an expert who has been sanctioned in Florida for providing "deceptive or fraudulent testimony" is less likely to be an appealing candidate for retention as an expert in any case in any jurisdiction. Additionally, Florida sanctions may expose the expert to disciplinary action in the state(s) where the expert is licensed to practice.

It might also be argued the legislation creates hurdles at the other end of the spectrum. For the lawyer calling the department head at a major university teaching center, the endeavor now requires not only the usual conversation about why the expert should become engaged in a matter involving many lawyers, but additionally, the department head must be told that he/she is not authorized to take on the task until he/she obtains one more credential — a credential which creates nothing positive for them, and has the sole purpose of allowing the Florida governing board to impose a sanction in the event the expert's testimony is viewed with sufficient disfavor. This may make it more difficult to retain well-qualified academic experts to participate as standard of care experts in Florida medical negligence cases.

Whatever their blemishes, the new provisions have the potential

to temper expert witnesses who believe accepting a retainer is an invitation to take liberties on the stand. The statutes are specifically designed to create a measure of pause. There is reason to hope that this legislation will serve its intended purpose.

<sup>1</sup> See § 766.102, Fla. Stat. (2010).

<sup>2</sup> § 766.102(5)(a), Fla. Stat.

<sup>3</sup> § 766.102(5)(b), Fla. Stat.

<sup>4</sup> § 766.102(12), Fla. Stat. (2011).

<sup>5</sup> <http://www.doh.state.fl.us/mqa/index.html>.

<sup>6</sup> §§ 458.3175(1)(a)(1); 459.0066(1)(a)(1); 466.005(1)(a)(1), Fla. Stat.

<sup>7</sup> If the applicant wants to pay with a cashier's check or money order, the form should be printed out and mailed (with payment) to Florida Department of Health, Licensing and Auditing Services, 4052 Bald Cypress Way, Bin C-10, Tallahassee, FL 32399-3260.

<sup>8</sup> §§ 458.3175(1)(c); 459.0066(1)(c); 466.055(1)(c).

<sup>9</sup> *Id.* at (1)(b).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See footnote 1 to §§ 458.3175, 459.0066, and 466.005, Fla. Stat.

<sup>13</sup> *Id.* at (2).

<sup>14</sup> *Id.* at (3).

<sup>15</sup> § 458.331(1)(oo), Fla. Stat.

<sup>16</sup> § 459.015(1)(qq), Fla. Stat.

<sup>17</sup> § 466.028(1)(ll), Fla. Stat.

<sup>18</sup> S.C. Code Ann. §§ 40-47-35; 40-47-20 (36)(h).

<sup>19</sup> *In re: Act No. 385 of 2006*, 2006 S.C. LEXIS 287 (S.C. 2006).

<sup>20</sup> §§ 458.3175(1)(b); 459.0066(1)(b); 466.005(1)(b), Fla. Stat.

<sup>21</sup> *Kukral v. Mekras*, 679 So. 2d 278, 284 (Fla. 1996).

<sup>22</sup> § 766.102(12), Fla. Stat.

<sup>23</sup> See *supra* notes 13-15.

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