Ellen:

Thank you for soliciting comments on the Code and Rules of Evidence Committee’s (CREC) proposal that recent amendments to F.S. 458.3175, 466.005, 495.0066, and 766.102 be filed with the Florida Supreme Court with a recommendation that they be adopted as procedural rules.

Ms. Amy Schrader chaired a committee to consider the Section’s position. The committee recommended that the Section make no comment with respect to the CREC proposal. That position was unanimously adopted by the Administrative Law Section’s Executive Council this morning.

Therefore please convey to Ms. Menendez and the CREC that the Administrative Law Section has no comment with respect to this proposal. Again, thank you for the opportunity to comment.

F. Scott Boyd
Chair

From: Ellen Sloyer [mailto:esloyer@flabar.org]
Sent: Monday, August 13, 2012 2:42 PM
To: Section Chairs 2012-2013; Section Chairs-elect 2012-2013; Ufferman@uffermanlaw.com; nielsera@fjud13.org; tshults@kirkpinkerton.com; mcaliel@coj.net; mcapstraw@helpisontheway.cc; ctjudd1@ocnjcc.org; georgej@gtlaw.com; tcslaw@aol.com; david@fightyourcase.com; arieman@17th.flcourts.org
Subject: Comments on Code and Rules of Evidence proposals

Dear Committee and Section Chairs and Chair Elects:

As you know, each rules committee is required by Fla.R.Jud.Admin. 2.140 to submit a three-year cycle report to the Florida Supreme Court. Unlike other rules committees, which propose language for new or amended rules, the Code and Rules of Evidence Committee (CREC), requests that the Court adopt legislation that is believed to be procedural as a procedural rule. This year, the committee is making this request for 6 statutory amendments. See attached memo of June 26, 2012, to the Board of Governors. The Board of Governors considered this request at its August 21, 2012 meeting. See attached Bar News article.

The Board of Governors has requested that the CREC seek comments from committees, sections, and divisions, and from other rules committees regarding its proposals for F.S. 458.3175, 495.0066, 466.005, and 766.102. The comments will be considered by the CREC at its September 21, 2012 meeting. Please submit any comments from you section, division, or committee to Ellen Sloyer (esloyer@flabar.org) by September 10, 2012.

Thank you.

Ellen H. Sloyer
Rules Committee Liaison
Assoc. Editor
The Florida Bar
850.561.5709
esloyer@flabar.org
The Florida Bar Board of Governors has been asked to accept, reject, or modify as a Rule of Evidence the recently enacted Fla. Stat. Sec. 766.102. This request has been made pursuant to Fla R Jud Admin 2.140.

I urge the rejection of this proposed rule for several reasons. The adoption of such a rule would give credence to a statute which is a clear and substantial invasion by the legislature of the Court's rule making authority. To enact a rule which mimics the statute would provide approval of this legislative overstepping. That is not something that the Florida Bar should be involved in.

The rule (and by association the statute) is a clear attempt to prevent consumers from being able to secure experts in medical malpractice cases. In such cases, the plaintiffs most often must resort to experts who reside and practice out of state. Experts who practice in Florida most often refuse to testify against physicians in Florida for fear of social and professional retaliation before the Board of Medicine. With this rule, the out of state physician would be subject to discipline for incorrect or misleading testimony. I can assure you that in the eyes of the medical profession all testimony by the plaintiffs expert against a Florida physician would be considered "misleading" regardless of who the prevailing party may be. This provision has the danger of allowing the board of Medicine to use it in a retaliatory manner against out of state experts. This in turn would require the physician to report this to his/her own state Board of Medicine which most likely would result in discipline there. This would also require the physician to report the disciplinary finding on his/her malpractice insurance application. That of course would drive up his/her malpractice premiums.

In the end few if any out of state physicians would agree to testify for a plaintiff in a Florida based malpractice case. Any such rule would be unfair to plaintiffs and unfair to the out of state expert/physician.

The proposed rule is patently controversial and partisan. Adoption of any such rule by the BOG or by the Court would subject the BOG and the Court to allegations that The Florida Bar has taken a partisan, controversial stance which is counter to the purpose and mission of the Florida bar.

I believe the rule under consideration should be rejected by the Florida Bar and urge the committee to reject it as well.

O. John Alpizar, Esq

Alpizar Law, LLC.
1528 Palm Bay Rd. N.E.
Palm Bay, Florida 32905

APPX. C-2
Via Email: tshults@kirkpinkerton.com
esloyer@flabar.org

Mr. Thomas D. Shults, Chairman CREC
Ms. Ellen Sloyer, FL Bar Staff Liaison
The Florida Bar
Code and Rules of Evidence Committee
650 Apalachee Parkway
Tallahassee, Florida 32399

Re: Amendments to Florida Evidence Code

Dear Chairman Shults and Ms. Sloyer:

This letter is to provide comments and urge rejection of the proposed adoption of Fla. Stat. Sec. 766.102 concerning out-of-state medical expert certification as a Rule of Evidence for the foregoing reasons.

We have significant concerns about the constitutionality of Fla. Stat. § 766.102 especially given the South Carolina Supreme Court’s opinion which refused to adopt as a rule a nearly identical statute requiring out of state experts to get certificates before they could testify and subjecting them to discipline by the state’s medical board.

It is well known that plaintiffs in medical malpractice cases often must resort to retaining experts who practice outside of Florida for reasons that are obvious. Florida experts are reluctant to testify against Florida healthcare providers for fear of professional scorn and retribution. Therefore, it has long been
difficult for victims of malpractice to find qualified physicians willing to testify against their brethren. This statute is an attempt to prevent such victims from being able to secure experts who are required to initiate their cause of action. The threat of subjecting such qualified experts to disciplinary action in Florida was meant to create a chilling effect. This is particularly true given that the definition of “incorrect” or “misleading” testimony is ill defined and defending such an action, even the most frivolous, would no doubt be expensive and time consuming.

Hence, to enact a rule which mimics the statute would only provide the court's approval of this legislative overstepping. Any such rule also would result in unfairness to the plaintiff and unfairness to the out of state physician.

It is not surprising, therefore, that the proposed rule is controversial and partisan. Adoption of any such rule would subject the Bar and Court to charges that they have taken a partisan, controversial stance which is counter to the purpose and mission of The Florida Bar.

The legal effect of such a rule applies equally to both Plaintiffs and Defendants in that an expert's qualifications go to the weight, but not the admissibility of the evidence and therefore should not be a rule of evidence.

For all the above reasons, we trust these significant concerns will be considered by the committee and that on September 21st its members will vote to reject the rule under consideration.

Very truly yours,

ANDREW B. YAFFA

GROSSMAN ROTH, P.A.
A PROFESSIONAL ASSOCIATION
APPX. C-5
I am writing to urge the Board of Governors to recommend against the adoption of the 2011 statutory amendments regarding expert witness certification as a Rule of Evidence.

The purpose of Rules of Evidence are to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. See Fed. R. Evid. 102. The expert witness certification amendments are not in keeping with those purposes and should not be adopted as a Rule of Evidence. The amendments were promoted by special interest groups with the clear intent of providing an advantage to a certain class of litigants. The Rules of Evidence should not be used in such a manner and I fear the adoption of these proposed rules would serve to encourage other special interest groups to lobby the legislature in an effort to effect changes in the Evidence Code that favor one side over the other.

Thank you for considering my comments.

Robert T. Bergin, Jr., Esq.
Board Certified Civil Trial Lawyer

ROBERT T. BERGIN, JR., P.A.
Law Offices
Dear Members of the Board of Governors of the Florida Bar:

It is my understanding that the full Board of Governors intends to consider a new rule regarding Expert Witness Certification at its next meeting in December. On behalf of the members of my law firm, I take this time to ask that the Board take no action to implement any rule regarding Expert Witness Certification.

In thinking about this issue, I was reviewing those ideas that act as the very foundation to this organization. The stated purpose of the Florida Bar, taken from its very own materials, states that its purpose, among others, is to “To inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.” Taken as a whole, those rules which have heretofore been promulgated by the Supreme Court and adopted by the Bar are rules that advance the science of jurisprudence; that advance the search for justice and for fairness in the Courts. Rules that are meant to level the playing field for all those who seek justice.

The expert certification requirement is not such a rule. In fact, it is meant as yet another block to the doors of the Court House for the victims of medical malpractice. At its core, it is an attempt to prevent access to expert testimony by and on behalf of victims of malpractice who often have to rely upon out of state experts to provide opinions in medical cases. The analysis should not stop there however. When thinking about this rule, the Bar should look beyond its face and seek to understand its intended effects as stated above and its unintended effects. One very important unintended effect will be to chill the desire of true experts from universities across the United States to review cases in Florida and provide important opinions and testimony to our Jurors. Our Courts could be deprived of testimony and information from those who literally write the books and do the research in areas of medicine and science. True experts who are not biased by in state medical legal politics but whose only interest is in the truth. In reviewing the propriety of this rule you should therefore evaluate and balance the potential to eliminate unscrupulous testimony which likely will not be chilled in any event, with the loss of the true experts in their fields, many of which do not reside or practice within the State of Florida. If as an organization we seek to support the pursuit of the truth and the pursuit of justice, then as an organization, we cannot and should not adopt any rule the effect of which is to create a bar to, create a hurdle to or to chill the ability of true experts to testify before Florida Juries.

Lastly, it should be noted that this expert witness certificate requirement is a usurpation of the Supreme Court’s Rule making authority by the Florida Legislature. To therefore support such a rule and to place the Bar’s stamp of approval on such a piece of legislation runs afoul of the Bar’s decision to remain politically neutral.

I would invite any of you who wish to discuss this rule, its application or its likely effects to contact me directly.

I thank you for your anticipated consideration of these comment and I also thank you for your individual service to The Florida Bar.

Respectfully,
Mr. Thomas D. Shults, Chairman CREC
Ms. Ellen Sloyer, FL Bar Staff Liaison
The Florida Bar
Code and Rules of Evidence Committee
650 Apalachee Parkway
Tallahassee, Florida 32399
tshults@kirkpinkerton.com
tshults@kirkpinkerton.com
esloyer@flabar.org

Re: Amendments to Florida Evidence Code

Dear Chairman Shults and Ms. Sloyer:

This letter is to provide comments and urge rejection of the proposed adoption of Fla. Stat. Sec. 766.102 concerning out-of-state medical expert certification as a Rule of Evidence for the foregoing reasons.

We have significant concerns about the constitutionality of Fla. Stat. § 766.102 especially given the South Carolina Supreme Court’s opinion which refused to adopt as a rule a nearly identical statute requiring out of state experts to get certificates before they could testify and subjecting them to discipline by the state’s medical board.

It is well known that plaintiffs in medical malpractice cases often must resort to retaining experts who practice outside of Florida for reasons that are obvious. Florida experts are reluctant to testify against Florida healthcare providers for fear of professional scorn and retribution. Therefore, it has long been difficult for victims of malpractice to find qualified physicians willing to testify against their brethren. This statute is an attempt to prevent such victims from being able to secure experts who are required to initiate their cause of action. The threat of subjecting such qualified experts to disciplinary action in Florida was meant to create a chilling effect. This is particularly true given that the definition of “incorrect” or “misleading” testimony is ill defined and defending such an action, even the most frivolous, would no doubt be expensive and time consuming.
Hence, to enact a rule which mimics the statute would only provide the court's approval of this legislative overstepping. Any such rule also would result in unfairness to the plaintiff and unfairness to the out of state physician.

It is not surprising, therefore, that the proposed rule is controversial and partisan. Adoption of any such rule would subject the Bar and Court to charges that they have taken a partisan, controversial stance which is counter to the purpose and mission of The Florida Bar.

The legal effect of such a rule applies equally to both Plaintiffs and Defendants in that an expert's qualifications go to the weight, but not the admissibility of the evidence and therefore should not be a rule of evidence.

For all the above reasons, we trust these significant concerns will be considered by the committee and that on September 21st its members will vote to reject the rule under consideration.

Sincerely,

David M. Buckner
At its September 19, 2012 meeting, the Civil Procedure Rules Committee adopted the following comment to the Code and Rules of Evidence Committee’s 3-year cycle proposal:

*F.S.* 458.3175, 495.006, 466.005, and 766.102 have the potential to infringe on the court’s power to regulate who appears before the court and potentially effects *Fla.R.Civ.P.* 1.390(a) and (v) and *Rule* 1.280. The Civil Procedure Rules Committee recommends against adoption of the statutes as procedural rules.
August 29, 2012

Mr. Thomas D. Shults, Chairman CREC
Ms. Ellen Sloyer, FL Bar Staff Liaison
The Florida Bar
Code and Rules of Evidence Committee
650 Apalachee Parkway
Tallahassee, Florida 32399

Re: Amendments to Florida Evidence Code

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This letter is to provide comments and urge rejection of the proposed adoption of Fla. Stat. Sec. 766.102 concerning out-of-state medical expert certification as a Rule of Evidence for the foregoing reasons.

We have significant concerns about the constitutionality of Fla. Stat. § 766.102 especially given the South Carolina Supreme Court’s opinion which refused to adopt as a rule a nearly identical statute requiring out of state experts to get certificates before they could testify and subjecting them to discipline by the state’s medical board.

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Hence, to enact a rule which mimics the statute would only provide the court's approval of this legislative overstepping. Any such rule also would result in unfairness to the plaintiff and unfairness to the out of state physician.

It is not surprising, therefore, that the proposed rule is controversial and partisan. Adoption of any such rule would subject the Bar and Court to charges that they have taken a partisan, controversial stance which is counter to the purpose and mission of The Florida Bar.

The legal effect of such a rule applies equally to both Plaintiffs and Defendants in that an expert’s qualifications go to the weight, but not the admissibility of the evidence and therefore should not be a rule of evidence.

For all the above reasons, we trust these significant concerns will be considered by the committee and that on September 21st its members will vote to reject the rule under consideration.

Sincerely yours,

Gary M. Cohen

GMC/dk
August 29, 2012

Via Email: tshults@kirkpinkerton.com
esloyer@flabar.org

Mr. Thomas D. Shults, Chairman CREC
Ms. Ellen Sloyer, FL Bar Staff Liaison
The Florida Bar
Code and Rules of Evidence Committee
650 Apalachee Parkway
Tallahassee, Florida 32399

Re: Amendments to Florida Evidence Code

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We have significant concerns about the constitutionality of Fla. Stat. § 766.102 especially given the South Carolina Supreme Court’s opinion which refused to adopt as a rule a nearly identical statute requiring out of state experts to get certificates before they could testify and subjecting them to discipline by the state’s medical board.

It is well known that plaintiffs in medical malpractice cases often must resort to retaining experts who practice outside of Florida for reasons that are obvious. Florida experts are reluctant to testify against Florida healthcare providers for fear of professional scorn and retribution. Therefore, it has long been difficult for victims of malpractice to find qualified physicians willing to testify against their brethren. This statute is an attempt to prevent such victims from being able to secure experts who are required to initiate their cause of action. The threat of subjecting such qualified experts to disciplinary action in Florida was meant to create a chilling effect. This is particularly true given that the
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For all the above reasons, we trust these significant concerns will be considered by the committee and that on September 21st its members will vote to reject the rule under consideration.

Sincerely yours,

NATASHA CORTES

NC/mto
To: Thomas Shults <tshults@kirkpinkerton.com>

"Dean Nelson Livermore (Business Fax)" <IMCEAFAX-Dean+20Nelson+20Livermore+40+2B1+20+28727+29+2084
cc: "sharrit@terrellhogan.com" <sharrit@terrellhogan.com>, "hickey@hickeylawfirm.com" <hickey@hickeylawfirm.com>
"epettis@haliczerpettis.com" <epettis@haliczerpettis.com>

Subject: Proposed Rule For "Expert Witness Certificate"

Dear Mr. Shults,

For the good of the order, I have pulled together what I think is pertinent to the procedural posture, of The Florida Bar, with respect to the captioned rule of court proposed by the Code and Rules of Evidence Committee. I thought it would be helpful to share it with you, Tom, as well as with the vice chairs of the Committee, in light of y'all's respective leadership roles and the interest the proposal has generated.

As you might recall, I had a keen interest, philosophically, when the issue first came before the Board of Governors. I hadn't heard of it before I saw it, belatedly, among our agenda materials. It does not affect my practice, but I have handled medical malpractice cases for plaintiffs and defendants (defense only, after the advent of advertising, and none at all for 10 or 15 years).

I have no personal, substantive interest in the statute: My interest is jurisprudential and stems from a concern for the separation of powers.

As I see it, the Code and Rules of Evidence Committee has recommended that the Florida Supreme Court adopt, as a rule, the following statute (and the various statutory provisions cited therein):

Section Fla. Stat. 766.102:

(12) If a physician licensed under chapter 458 or chapter 459 or a dentist licensed under chapter 466 is the party against whom, or on whose behalf, expert testimony about the prevailing professional standard of care is offered, the expert witness must be licensed under chapter 458, chapter 459, or chapter 466 or possess a valid expert witness certificate issued under s. 458.3175, s. 459.0066, or s. 466.005.

As you know, the role of the Board of Governors--with respect to committee-proposed rules of court is--set out in subsections (3) and (4) of the Rules of Judicial Administration, Rule 2.140 (a copy of which is attached). That rule requires that the BOG "consider the proposals" and "recommend" to the Court that the Court take a certain action: The Board is to "recommend acceptance, rejection, or amendment," by the Court, of each proposed rule change.

Also attached is the August 1, 2011, letter from the Clerk of the Florida Supreme Court, pertaining to the role of each rules committee when considering statutes; a letter suggesting, it seems to me, that the rules committees should all engage in "independent review" and that committees should not simply "automatically" recommend that the Court adopt, as a rule, statutory provisions that may be either procedural (thus invading the province of the Court) or substantive. I can’t believe that the Court would want a Bar that would “automatically” recommend adoption of statutes; and, regardless, I don’t think that would be our best role.

At this stage, now that the matter has come so sharply into focus, I gather that the CREC will be reconsidering—at its September meeting—whether to go forward with, or perhaps to withdraw from, these particular rules. Personally, as a citizen, I hope that jurisprudential as well as substantive concerns carry the day, such that the Committee will consider re-thinking its routine with respect to reacting to statutory changes. It would be an interesting discussion.
In any event, I sincerely thank you for your patience and your service. I know that rules committees are a lot of work, especially for the Chair, but it is very important work indeed and I am thankful that you and other members of the Bar are so involved in it.

Respectfully,

Bill Davis,

BOG (Second Circuit)

William H. Davis
bdavis@ddslaw.net
Dobson, Davis & Smith
610 North Duval Street
Tallahassee, FL 32301
Tel.: 850.224.2683
Fax: 850.224.2283
Dear Members of the Board of Governors of The Florida Bar:

It is my understanding that the full Board of Governors intends to consider rule making regarding Expert Witness Certification at its next meeting in December. On behalf of the members of my law firm, I take this time to ask that the Board take no action to implement any rule regarding Expert Witness Certification.

This issue is highly partisan and very political. Anyone who participated in the legislative process that led to the legislative enactment of Expert Witness Certification knows how contentious the passage of that bill was and remains. Those of us who represent injured victims of malpractice know this law for what it is: An effort to close the courthouse doors. It is the icing on the cake of 15 years of medical malpractice tort reform.

I anticipate that there will be challenges to the constitutionality of the law on due process and equal protection grounds. The Board should allow that legal process to work its way through the courts.

It should come as no surprise that it is far easier for defendant medical providers to find their co-workers in Florida to come to their defense, than it is for injured victims to find a Florida Doctor to testify against another Florida Doctor. That is a matter of common sense. Certainly the medical community and their insurers understood that when they championed the passage of this legislation.

The legislation is an unconstitutional usurpation of the Court's rule making authority. It serves no true purpose, other than to prevent medical negligence cases from succeeding, as the courts already have all the inherent power necessary to control witnesses who testify fraudulently.

The true nefarious purpose of this rule is further highlighted by the fact that it does not apply to other types of witnesses, only witnesses in medical malpractice cases. This disparate treatment violates fundamental notions of fair play and justice.

I urge the Board to stay out of partisan politics. I urge the board to reject enacting a rule that is not about creating a solution for a problem, but is about closing the courthouse doors to injured victims.

This is another of a multitude of solutions in search of a problem. The courts already have the inherent power to censure witnesses and hold them accountable should their testimony be untruthful. It does not take a great leap of faith to understand that the purpose of this rule is not to ensure the integrity of expert witnesses, but to further impede access to the courts of the citizens of this State.

On behalf of our clients, past, present and future, I urge each of you to reject any effort to have the Bar wade into such a partisan issue.
I would be happy to discuss this issue with any member of the Board should they have any questions.

Thank you for your consideration.

Sean C. Domnick  
Florida Bar Board Certified Civil Trial Attorney  
Domnick & Shevin pl  
5100 PGA Blvd. Suite 317  
Palm Beach Gardens, Fl 33418  
561-630-5363  
scd@acallforjustice.com  
www.acallforjustice.com
Dear Ms. Sloyer:

It is my understanding that you are collecting comments on the issue of the adoption of a Rule that codify the recent legislative enactment of the Expert Witness Certification requirement. This was and is a highly partisan issue. Its genesis was an effort to prevent injured victims of medical malpractice from being able to find qualified experts to testify on their behalf in Florida's courts.

It should come as no surprise that it is far easier for defendant medical providers to find their co-workers in Florida to come to their defense, than it is for injured victims to find a Florida Doctor to testify against another Florida Doctor. That is a matter of common sense. Certainly the medical community and their insurers understood that when they championed the passage of this legislation.

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I would be happy to discuss this issue with any member of the Board should they have any questions.

Thank You.

Sean Domnick
Domnick & Shevin pl
561-630-5363 (o)
561-707-7293 (c)
scd@acallforjustice.com
www.acallforjustice.com
Dear Ms. Sloyer and Mr. Shults:

We write to you on behalf of our entire law firm regarding a very important issue that will impact current and future clients, as well as the citizens of the State of Florida. As you know, the Board of Governors has been asked at the next meeting to accept as a FL Rule of Evidence the highly controversial Expert Witness Certification that was passed as law in 2011. Our law firm practices primarily in this area of law and would strongly urge the Board to refrain from approving this partisan rule and to reject this proposal for several reasons:

1. The Supreme Court has the rule making authority and this law is an example of the Legislative Branch encroaching on the Court's power. Adopting it as a Rule is an attempt to obtain the Court's tacit approval of this statute and encroachment.
2. It is near impossible to find a Florida physician to even review a case on behalf of a patient, let alone ask them to sign a pre-suit affidavit and testify. This expert witness certification law now makes out of state physicians subject to discipline in Florida and makes it even more difficult for patients to find an expert to review and testify in worthy cases.
3. This law was an unconstitutional restriction on interstate commerce because it restricts out of state businesses in Florida and is being challenged in Court. Recommending this law as a Rule would arguably impede any constitutional challenges, since the Supreme Court would "approve" it.
4. The Board of Governors should not take a partisan stance on these issues. It certainly did not take a partisan stance when it was being lobbied by the Medical Groups promoting this law to be passed. If the Board of Governors were to recommend it now be adopted, the Board would be approving a partisan (and controversial) stance on this law - when it refused to do so when it was being debated in the House and Senate.
5. Finally, the Supreme Court of South Carolina rejected an identical law in 2006 for all of the same reasons stated above.

If you need any more information on these issues, any of our attorneys would be happy to speak with you. We hope you will take this issue very seriously, as it would greatly impact patient's rights into the future and impede our efforts for justice in the State of Florida.

Sincerely,

Attorneys and Staff of Domnick & Shevin, PL

Domnick & Shevin, PL
5100 PGA Boulevard, Suite 317
Palm Beach Gardens, FL 33418
Telephone: 561.630.5363
Facsimile: 561.630.5654
www.ACallForJustice.com
Dear Ellen:

The Family Law Section has no comments regarding the CREC proposals for F.S. 458.3175, 495.0066, 466.005, and 766.102.

Thank you.
Carin Porras
Chair, Family Law Section 2012-13

Carin M. Porras, Esq.
Brydger & Porras, LLP
Family Law Lawyers
100 N.E. Third Avenue
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Fort Lauderdale, FL 33301
Carin@brydgerporras.com

Phone: 954-527-2855
Fax: 954-527-4166
Mr. Thomas D. Shults, Chairman CREC  
Ms. Ellen Sloyer, FL Bar Staff Liaison  
The Florida Bar  
Code and Rules of Evidence Committee  
650 Apalachee Parkway  
Tallahassee, Florida 32399

Re: Amendments to Florida Evidence Code

Dear Chairman Shults and Ms. Sloyer:

This letter is to provide comments and urge rejection of the proposed adoption of Fla. Stat. Sec. 766.102 concerning out-of-state medical expert certification as a Rule of Evidence for the foregoing reasons.

We have significant concerns about the constitutionality of Fla. Stat. § 766.102 especially given the South Carolina Supreme Court’s opinion which refused to adopt as a rule a nearly identical statute requiring out of state experts to get certificates before they could testify and subjecting them to discipline by the state’s medical board.

It is well known that plaintiffs in medical malpractice cases often must resort to retaining experts who practice outside of Florida for reasons that are obvious. Florida experts are reluctant to testify against Florida healthcare providers for fear of professional scorn and retribution. Therefore, it has long been difficult for victims of malpractice to find qualified physicians willing to testify against their brethren. This statute is an attempt to prevent such victims from being
able to secure experts who are required to initiate their cause of action. The threat of subjecting such qualified experts to disciplinary action in Florida was meant to create a chilling effect. This is particularly true given that the definition of “incorrect” or “misleading” testimony is ill defined and defending such an action, even the most frivolous, would no doubt be expensive and time consuming.

Hence, to enact a rule which mimics the statute would only provide the court’s approval of this legislative overstepping. Any such rule also would result in unfairness to the plaintiff and unfairness to the out of state physician.

It is not surprising, therefore, that the proposed rule is controversial and partisan. Adoption of any such rule would subject the Bar and Court to charges that they have taken a partisan, controversial stance which is counter to the purpose and mission of The Florida Bar.

The legal effect of such a rule applies equally to both Plaintiffs and Defendants in that an expert’s qualifications go to the weight, but not the admissibility of the evidence and therefore should not be a rule of evidence.

For all the above reasons, we trust these significant concerns will be considered by the committee and that on September 21st its members will vote to reject the rule under consideration.

Sincerely yours,

Gary M. Cohen

GMC/dk
August 29, 2012

Via Email: tshults@kirkpinkerton.com  
esloyer@flabar.org

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This letter is to provide comments and urge rejection of the proposed adoption of Fla. Stat. Sec. 766.102 concerning out-of-state medical expert certification as a Rule of Evidence for the foregoing reasons.

We have significant concerns about the constitutionality of Fla. Stat. § 766.102 especially given the South Carolina Supreme Court’s opinion which refused to adopt as a rule a nearly identical statute requiring out of state experts to get certificates before they could testify and subjecting them to discipline by the state’s medical board.

It is well known that plaintiffs in medical malpractice cases often must resort to retaining experts who practice outside of Florida for reasons that are obvious. Florida experts are reluctant to testify against Florida healthcare providers for fear of professional scorn and retribution. Therefore, it has long been difficult for victims of malpractice to find qualified physicians willing to testify against their brethren. This statute is an attempt to prevent such victims
from being able to secure experts who are required to initiate their cause of action. The threat of subjecting such qualified experts to disciplinary action in Florida was meant to create a chilling effect. This is particularly true given that the definition of “incorrect” or “misleading” testimony is ill defined and defending such an action, even the most frivolous, would no doubt be expensive and time consuming.

Hence, to enact a rule which mimics the statute would only provide the court’s approval of this legislative overstepping. Any such rule also would result in unfairness to the plaintiff and unfairness to the out of state physician.

It is not surprising, therefore, that the proposed rule is controversial and partisan. Adoption of any such rule would subject the Bar and Court to charges that they have taken a partisan, controversial stance which is counter to the purpose and mission of The Florida Bar.

The legal effect of such a rule applies equally to both Plaintiffs and Defendants in that an expert’s qualifications go to the weight, but not the admissibility of the evidence and therefore should not be a rule of evidence.

For all the above reasons, we trust these significant concerns will be considered by the committee and that on September 21st its members will vote to reject the rule under consideration.

Sincerely yours,

STUART Z. GROSSMAN

SZG/ajs
Mr. Shults and Ms. Sloyer:

I am writing concerning the medical malpractice expert state certification mandate provided by the 2011 amendments to Fla. Stat. Sec. 766.102. The Supreme Court of Florida has authority over adopting procedural rules in all courts. See Fla. Const. Art. 5 § 2, In re Florida Evidence Code, 372 So.2d 1369 (Fla. 1979). The expert certification mandate encroaches upon the Court’s rule-making authority. Accordingly, pursuant to Fla. R. Jud. Admin. 2.140, the Florida Bar Board of Governors is tasked to recommend acceptance, rejection, or modification of this section as a Rule of Evidence to the Florida Supreme Court. I urge the Board to recommend rejection of this proposed rule for several reasons, which I have outlined below.

Under current law, the trial judge is a gatekeeper of the expert evidence in medical malpractice and other civil actions. See Angrand v. Key, 657 So.2d 1146 (Fla. 1995). There has been no showing that trial courts are allowing out-of-state medical malpractice experts to testify under circumstances impairing any party’s right to present relevant testimony from a reliable expert witness. Indeed, it is commonplace for out-of-state experts to testify for either the plaintiff or the defendant, or both. Often the particular standard of care issues are the subject of scholarly works authored by out-of-state experts. Thus, any impairment of a party’s access to the highest quality of expert testimony must be avoided.

Additionally, Sec. 766.102 provides (through its related statutory provisions Sec. 458.3175, Sec. 459.0066, and Sec. 466.005) the ability for the applicable Board of Medicine to “discipline” expert witnesses, presumably for incorrect or misleading testimony. In other words, the Board of Medicine may also, according to Sec. 766.102, intrude upon the jurisdiction of Florida courts and discipline witnesses for providing testimony, apparently without regard to whether the court before which the expert witness testified found the testimony incorrect or misleading. Should the Board then make a finding against the expert physician, she would be required by her own state board of medicine to report this occurrence, as well as report same on her malpractice insurance application. Such constraints against expert physicians from other states unfairly and improvidently burdens both parties in medical malpractice cases, as well as intrudes upon the inherent power of trial judges in this state.

Sec. 766.102, if adopted, would result in unnecessary and pointless litigation surrounding medical malpractice cases in this state. I must point out that a similar provision does not exist for other expert witnesses testifying in other types of professional negligence cases, such as accounting malpractice, legal malpractice, etc. Such an unequal application of this type of legislation must not be applied to hinder access to courts of parties to medical malpractice actions.

Due to the above, I urge the Board of Governors to reject Sec. 766.102.

Sincerely,

Lee D. Gunn IV, Esquire
Gunn Law Group, P.A.
400 North Ashley Drive, Suite #2050
Tampa, FL 33602
(813) 228-7070 Telephone
(813) 228-9400 Fax
Dear Members of the Florida Bar Board of Governors:

I urge the board to reject enacting a rule that is not about creating a solution for a problem, but instead is designed to side in a partisan manner with one side of a political issue over the other. Many of you are either directly involved or members of your firms are involved in this battle. I don’t have to tell you that this is a rule which will aid medical providers in closing the courthouse doors to legitimate and valid claims of injured victims. Our Board should not participate in furthering any such efforts. Regardless of which side of the debate you side with, we can all agree that this is a partisan battle.

I participated in the legislative process in which the Expert Witness Certification was enacted. During this session there were several attempts made to enact changes designed to close the courthouse doors for victims of medical negligence. This has been true for many years, and each year the rights of truly injured victims are whittled away. Why would our Board ever become involved in this battle?

There will be challenges to the constitutionality of the law on due process and equal protection grounds and possibly others that greater minds than mine will see. I hope that The Board would allow that legal process to work its way through the courts, as opposed to creating a rule which may aid the medical providers in blocking legitimate claims.

It is already abundantly easier for providers to find experts to defend their positions as compared with the injured claimant who must search across the nation for a provider willing to review their claim. This knowledge was seized upon by the medical community and their insurers in enacting this most recent road block to the court house steps.

This legislation serves no true purpose, other than to prevent medical negligence victims from obtaining their day in court. This is true because the courts already have all the inherent power necessary to control witnesses who testify fraudulently. If it were not true, the rule would apply even handedly to other types of experts, but it does not. Instead this rule will prevent the best of experts who would truly perform an independent review from participating in an area where they stand only the chance, or perception at the least, that they may be subject to an attack on their license.

On behalf of our firm’s clients, past, present and future, I urge each of you to reject any effort to have the Bar enter into such a partisan issue.

Thank you for your consideration.

Elizabeth Herd, Morgenstern & Herd
August 17, 2012

Good Afternoon Ms. Sloyer,

The Florida Bar Board of Governors has been asked to accept, reject, or modify as a Rule of Evidence the recently enacted Fla. Stat. Sec. 766.102. This request has been made pursuant to Fla R Jud Admin 2.140.

I urge the rejection of this proposed rule for several reasons. First, the adoption of such a rule would give credence and approval of a statute which is a clear and substantial invasion by the legislature of the Court’s rule making authority. To enact a rule which mimics the statute would only provide the court’s approval of this legislative overstepping.

Second, the rule (and by association the statute) is a thinly veiled attempt to prevent consumers from being able to secure experts in medical malpractice cases. In such cases, the plaintiffs most often must resort to experts who reside and practice out of state. Experts who practice in Florida most often refuse to testify against physicians in Florida for fear of social and professional ostracism and professional retaliation before the Board of Medicine. With this rule, the out of state physician would be subject to discipline for incorrect or misleading testimony. In the medical malpractice context, all testimony by the plaintiffs expert against a Florida physician would be considered "misleading" whether the plaintiff prevails, the defendant prevails, or the case settles. If the Board of Medicine agrees, as surely it would, there would be a disciplinary action and after proceedings and hearings which would be expensive for the Board of Medicine as well as for the physician--there would be a finding against the physician. This in turn would require the physician to report this to his/her own state Board of Medicine which most likely would result in discipline there. This would also require the physician to report the disciplinary finding on his/her malpractice insurance application. That of course would drive up his/her malpractice premiums.

The end result would be that few if any physicians would ever agree to testify for the plaintiff.

Thus, the result is a set of rules which would create cumbersome regulations and unnecessary proceedings and litigation involving the Florida Board of Medicine. Any such rule also would result in unfairness to the plaintiff and unfairness to the out of state physician. It would also result in unfairness to the out of state expert for the defendant.

Finally, the proposed rule is controversial and partisan. Adoption of any such rule by the BOG or by the Court would subject the BOG and the Court to charges that The Florida Bar has taken a partisan, controversial stance which is counter to the purpose and mission of TFB.

For these reasons, the rule under consideration should be rejected.

John H. (Jack) Hickey
Board Certified Civil Trial Lawyer
by The Florida Bar and by The National Board of Trial Advocacy
VIA E-MAIL

The Board of Governors of The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

Re: Proposed Rule-Making For Expert Witness Certification

Dear Governors:

I hope this communication finds you well.

It is my understanding that the full Board of Governors intends to consider rule making regarding Expert Witness Certification at its next meeting in December. On behalf of the members of my law firm, I now write to request that the Board decline to implement any rule regarding Expert Witness Certification.

The issue of Expert Witness Certification is highly partisan and very political. The legislative process which led to enactment of Expert Witness Certification legislation was contentious and the legislation remains controversial.

Expert Witness Certification requires that out-of-state medical experts who offer testimony in Florida courts obtain a state certification. It should come as no surprise that it is far easier for defendant medical providers in medical negligence cases to find fellow professionals in Florida to come to their defense than it is for injured victims to find a Florida physician willing to testify against an in-state colleague. That is a matter of common sense. Certainly the medical profession and its insurers understood that when they championed the passage of this legislation. Lawyers who represent injured victims of medical negligence know this law for what it is: another effort to close the courthouse doors to those of limited means. Expert Witness Certification is the latest step in the long and highly partisan campaign of so-called “medical malpractice tort reform”.
There will undoubtedly be challenges to the constitutionality of the law on due process and equal protection grounds. In light of that, the Board should allow that legal process to work its way through the courts.

In addition to those constitutional defects, I strongly believe that the legislation is an unconstitutional usurpation of the Florida Supreme Court's rule making authority. Courts already have the inherent power to control witness testimony and, accordingly, the Expert Witness Certification legislation serves no true purpose other than to place another roadblock to the successful pursuit of medical negligence cases.

The true purpose of this legislation is further highlighted by the fact that it does not apply to other types of witnesses, only witnesses in medical malpractice cases. This disparate treatment violates fundamental notions of justice and fair play.

I respectfully urge the Board to steer clear of partisan politics. I urge the Board to reject enacting a rule which is really intended to restrict access to the courts for one set of litigants.

On behalf of our clients, past, present and future, I urge each of you to reject any effort to have The Florida Bar wade into such a partisan issue.

I will happily discuss this issue with any member of the Board.

Thank you for your consideration.

Very truly yours,

[Signature]

Christopher S. Knopik

CSK/bat
Dear Ms. Sloyer and Mr. Shults:

The Board of Governors has been asked at the next meeting to accept as a FL Rule of Evidence the highly controversial Expert Witness Certification that was passed as law in 2011. I practice solely in this area of law and would strongly urge the Board to refrain from approving of this partisan rule and reject this proposal for several reasons:

1. The Supreme Court has the rule making authority and this law is an example of the Legislative Branch encroaching on the Court’s power. Adopting it as a Rule is an attempt to obtain the Court’s tacit approval of this statute and encroachment.
2. It is near impossible to find a Florida physician to even review a case on behalf of a patient, let alone ask them to sign a pre-suit affidavit and testify. This expert witness certification law now makes out of state physicians subject to discipline in Florida and makes it even more difficult for patients to find an expert to review and testify in worthy cases.
3. This law was an unconstitutional restriction on interstate commerce because it restricts out of state businesses in Florida and is being challenged in Court. Recommending this law as a Rule would arguably impede any constitutional challenges, since the Supreme Court would “approve” it.
4. The Board of Governors should not take a partisan stance on these issues. It certainly did not take a partisan stance when it was being lobbied by the Medical Groups promoting this law to be passed. If the Board of Governors were to recommend it now be adopted, the Board would be approving a partisan (and controversial) stance on this law – when it refused to do so when it was being debated in the House and Senate.
5. Finally, the Supreme Court of South Carolina rejected an identical law in 2006 for all of the same reasons stated above – see attached.

If you need any more information on these issues, I would be happy to speak with you. I hope you will take this issue very seriously, as it would greatly impact patient’s rights and would throw the BOG into a deeply partisan issue.

Grant A. Kuvin
Attorney
Morgan & Morgan, P.A.
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Orlando, FL 32801
407-420-1414 ofc
407-422-8925 fax
The Supreme Court of South Carolina

RE: Act No. 385 of 2006 – relating to defining the "practice of medicine."

ORDER

Act No. 385 of 2006 – ratified 6/7/2006 and effective 6/9/2006 – substantially revises Chapter 47 of Title 40 of the South Carolina Code; the chapter dealing with "physicians, surgeons, and osteopaths." The Act contains the following language:

'Practice of Medicine' means:

***

(h) testifying as a physician in an administrative, civil, or criminal proceeding in this State by expressing an expert medical opinion.

Section 40-47-20(36), Act No. 385, 2006 S.C. Acts __. Furthermore, the Act provides significant detail regarding the information that the South Carolina Board of Medical Examiners shall require before issuing a “limited license” to a physician licensed in good standing in another state who has been engaged to testify as an expert medical witness in an administrative or judicial proceeding in South Carolina. Section 40-47-35, Act No. 385, 2006 S.C. Acts __.

Traditionally, court rules allowed any witness who was qualified as an expert by knowledge, skill, experience, training, or education to offer expert testimony in a South Carolina court. Rule 702, SCRE. Furthermore, in a lawsuit alleging a cause of action for medical malpractice, the general rule is that expert testimony is required to show that the defendant failed to conform to the required standard of care; specifically, the reasonable and ordinary knowledge, skill, and diligence physicians in similar neighborhoods and surroundings ordinarily use under like circumstances. Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978) (quoting Jarboe v. Harting, 397 S.W.2d 775, 778 (Ky. 1965)). Thus, although no South Carolina statute or court rule has ever embraced the higher scrutiny applied as a pre-requisite for the admission of expert testimony enunciated in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), our rules have always charged the court with performing a “gate keeping” function in limiting the presentation of expert testimony to situations where the testimony will assist the trier of fact in understanding evidence or determining a fact in issue.[1]
After careful consideration, we believe that while the General Assembly certainly sought, through Act 385, to make needed revisions to the methods South Carolina courts utilize in the area of expert medical testimony, the effect of the revised statutes has the potential to substantially impair the orderly administration of justice. Specifically, Act 385 casts serious doubt on a physician’s ability to offer testimony regarding the treatment provided to a witness, party litigant, or criminal defendant if the physician, at the time of trial, resides outside of South Carolina. This categorical exclusion overlooks the fact that the physician may have treated the patient in the physician’s home jurisdiction, and also that the physician, although at one time licensed and providing treatment to the patient in South Carolina, has relocated out of this state. We believe requiring a treating physician to seek a South Carolina medical license before offering often necessary testimony strains Act 385 far beyond its intended scope.

Additionally, Act 385 is ambiguous as to its relevance to pre-trial practices and proceedings that are of fundamental importance to the judicial process. For example, Act 385’s applicability to witnesses used during discovery that might not be used at trial is unclear. Furthermore, although expert testimony is traditionally presented by a witness offering live testimony, lawyers often draw heavily from learned treatises authored by prominent national experts. It would do a great disservice to our system of justice if the doors of South Carolina courtrooms were closed to these scholarly works and the country’s leading medical scholars, who may have no intentions of ever visiting this jurisdiction, because our state law would deem them unqualified to offer expert testimony by virtue of their refusal to subject themselves to the disciplinary authority of the South Carolina Board of Medical Examiners.[2]

The South Carolina Constitution vests this Court with the authority to make rules governing the administration of the unified South Carolina court system. S.C. Const. art V, § 4. In order to prevent a significant impairment to this Court’s duty to properly administer the judicial power of South Carolina, and pursuant to Article V, Section 4’s authority, we hereby temporarily delay judicial enforcement of Act 385 insofar as the Act requires a physician to obtain a license to practice medicine in South Carolina before offering expert medical testimony in a South Carolina administrative or court proceeding.[3]

While we remain respectful of the General Assembly’s voice in matters of practice and procedure in South Carolina’s courts, this Court cannot allow the administration of justice to be substantially impaired. We are confident, however, that when the General Assembly provides further clarity on this matter, the changes that result will reflect careful consideration and deliberation; will consider and account for the scope of the court’s existing rules and the need for efficient and orderly court administration; and will be subjected to close scrutiny in the Judiciary Committees of both the South Carolina Senate and the House of Representatives.

This order is effective immediately and shall remain in effect until further order of this Court.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.
In *Daubert*, the United States Supreme Court interpreted Rule 702 of the Federal Rules of Evidence to require trial courts to ensure that all testimony offered as expert scientific, technical, or specialized testimony be both relevant and reliable, be grounded in scientific methods and procedures, and be supported by appropriate scientific validation. 509 U.S. at 589-92. Furthermore, the court interpreted federal evidentiary rules to require "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. Although Rule 702, SCRE, contains identical language to the federal rule, we have expressly declined to adopt this interpretation in South Carolina. See *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (declining to adopt *Daubert*; interpreting the South Carolina Rules of Evidence to require the trial judge to determine that the evidence will assist the trier of fact, that the expert witness is qualified, and that the underlying science is reliable; and adopting the factors set forth in *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979) for determining the reliability of the offered evidence).

We also note that although Title 40 of the Code has always contained civil and criminal penalties for violations of the title’s licensing requirements and for aiding and abetting one who violates those provisions, see S.C. Code Ann. §§ 40-1-210, 40-47-260 (2001), Act 385’s significantly broader definition of the “practice of medicine” and licensing requirements now introduce the possibility of incurring these penalties in connection with conducting a trial in South Carolina.

Furthermore, the Act defines the “practice of medicine” to include “rendering a written or otherwise documented medical opinion concerning the diagnosis or treatment of a patient or the actual rendering of treatment to a patient within this State by a physician located outside the State as a result of transmission of individual patient data by electronic or other means from within a state to such physician or his or her agent.” Section 40-47-20(36), Act No. 385, 2006 S.C. Acts __. In an effort to ensure that unintended consequences do not overwhelm the noble motives of the legislation, these factors further necessitate our issuing this order.

Because we are not presently presented with a case or controversy questioning the constitutionality of Act 385, we reserve those serious questions for another day. At the present, we rely exclusively on our Constitutional authority to police the orderly administration of justice in the South Carolina courts.
I understand that the Board of Governors is going to consider making the Expert Witness Certification law a formal Rule at the next meeting in December. Practicing in this very difficult area of law, medical malpractice, I strongly urge the Board to reject making this controversial and partisan law a Rule.

Those of us that were involved in the legislative efforts of this law know that it was a huge battle between several different political interests. There were many constitutional arguments made in opposition that will inevitably be decided by the Courts. If this law became a Rule it may impair the Courts’ ability to decide these issues. This law invades the province of the Courts to decide who is qualified to testify. In addition, it gives a State agency (Board of Medicine) the ability to decide and potentially overrule the courts in deciding who is qualified to testify at trial.

It is important to know that the Supreme Court in South Carolina invalidated an identical law in 2006 for these reasons, and more. I have cut and pasted it below for your review. On behalf of my firm, I strongly urge this Board to reject adopting this law as a Rule.

The Supreme Court of South Carolina
RE: Act No. 385 of 2006 - relating to defining the "practice of medicine."

ORDER

Act No. 385 of 2006 - ratified 6/7/2006 and effective 6/9/2006 - substantially revises Chapter 47 of Title 40 of the South Carolina Code; the chapter dealing with "physicians, surgeons, and osteopaths." The Act contains the following language:

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(h) testifying as a physician in an administrative, civil, or criminal proceeding in this State by expressing an expert medical opinion.

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Traditionally, court rules allowed any witness who was qualified as an expert by knowledge, skill, experience, training, or education to offer expert testimony in a South Carolina court. Rule 702, SCRE. Furthermore, in a lawsuit alleging a cause of action for medical malpractice, the general rule is that expert testimony is required to show that the defendant failed to conform to the required standard of care; specifically, the reasonable and ordinary knowledge, skill, and diligence physicians in similar neighborhoods and surroundings ordinarily use under like circumstances. Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978) (quoting Jarboe v. Harting, 397 S.W.2d 775, 778 (Ky. 1965)). Thus, although no South Carolina statute or court rule has ever embraced the higher scrutiny applied as a pre-requisite for the admission of expert testimony enunciated in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), our rules have always charged the court with performing a "gate keeping" function in limiting the presentation of expert testimony to situations where the testimony will assist the trier of fact in understanding evidence or determining a fact in issue.[1]

After careful consideration, we believe that while the General Assembly certainly sought, through Act 385, to make needed revisions to the methods South Carolina courts utilize in the area of expert medical testimony, the effect of the revised statutes has the potential to substantially impair the orderly administration of justice. Specifically, Act 385 casts serious doubt on a physician's ability to offer testimony regarding the treatment provided to a witness,
party litigant, or criminal defendant if the physician, at the time of trial, resides outside of South Carolina. This categorical exclusion overlooks the fact that the physician may have treated the patient in the physician’s home jurisdiction, and also that the physician, although at one time licensed and providing treatment to the patient in South Carolina, has relocated out of this state. We believe requiring a treating physician to seek a South Carolina medical license before offering often necessary testimony strains Act 385 far beyond its intended scope. Additionally, Act 385 is ambiguous as to its relevance to pre-trial practices and proceedings that are of fundamental importance to the judicial process. For example, Act 385’s applicability to witnesses used during discovery that might not be used at trial is unclear. Furthermore, although expert testimony is traditionally presented by a witness offering live testimony, lawyers often draw heavily from learned treatises authored by prominent national experts. It would do a great disservice to our system of justice if the doors of South Carolina courtrooms were closed to these scholarly works and the country’s leading medical scholars, who may have no intentions of ever visiting this jurisdiction, because our state law would deem them unqualified to offer expert testimony by virtue of their refusal to subject themselves to the disciplinary authority of the South Carolina Board of Medical Examiners.[2]

The South Carolina Constitution vests this Court with the authority to make rules governing the administration of the unified South Carolina court system. S.C. Const. art V, § 4. In order to prevent a significant impairment to this Court’s duty to properly administer the judicial power of South Carolina, and pursuant to Article V, Section 4’s authority, we hereby temporarily delay judicial enforcement of Act 385 insofar as the Act requires a physician to obtain a license to practice medicine in South Carolina before offering expert medical testimony in a South Carolina administrative or court proceeding.[3]

While we remain respectful of the General Assembly’s voice in matters of practice and procedure in South Carolina’s courts, this Court cannot allow the administration of justice to be substantially impaired. We are confident, however, that when the General Assembly provides further clarity on this matter, the changes that result will reflect careful consideration and deliberation; will consider and account for the scope of the court’s existing rules and the need for efficient and orderly court administration; and will be subjected to close scrutiny in the Judiciary Committees of both the South Carolina Senate and the House of Representatives. This order is effective immediately and shall remain in effect until further order of this Court.

s/Jean H. Toal  C.J.
s/James E. Moore  J.
s/John H. Waller, Jr.  J.
s/E.C. Burnett, III  J.
s/Costa M. Pleicones  J.
Columbia, South Carolina
August 24, 2006

[1] In Daubert, the United States Supreme Court interpreted Rule 702 of the Federal Rules of Evidence to require trial courts to ensure that all testimony offered as expert scientific, technical, or specialized testimony be both relevant and reliable, be grounded in scientific methods and procedures, and be supported by appropriate scientific validation. 509 U.S. at 589-92. Furthermore, the court interpreted federal evidentiary rules to require “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” Id. at 592-93. Although Rule 702, SCRE, contains identical language to the federal rule, we have expressly declined to adopt this interpretation in South Carolina. See State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (declining to adopt Daubert; interpreting the South Carolina Rules of Evidence to require the trial judge to determine that the evidence will assist the trier of
fact, that the expert witness is qualified, and that the underlying science is reliable; and adopting the factors set forth in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) for determining the reliability of the offered evidence).

[2] We also note that although Title 40 of the Code has always contained civil and criminal penalties for violations of the title's licensing requirements and for aiding and abetting one who violates those provisions, see S.C. Code Ann. §§ 40-1-210, 40-47-260 (2001), Act 385's significantly broader definition of the "practice of medicine" and licensing requirements now introduce the possibility of incurring these penalties in connection with conducting a trial in South Carolina.

Furthermore, the Act defines the "practice of medicine" to include "rendering a written or otherwise documented medical opinion concerning the diagnosis or treatment of a patient or the actual rendering of treatment to a patient within this State by a physician located outside the State as a result of transmission of individual patient data by electronic or other means from within a state to such physician or his or her agent." Section 40-47-20(36), Act No. 385, 2006 S.C. Acts __. In an effort to ensure that unintended consequences do not overwhelm the noble motives of the legislation, these factors further necessitate our issuing this order.

[3] Because we are not presently presented with a case or controversy questioning the constitutionality of Act 385, we reserve those serious questions for another day. At the present, we rely exclusively on our Constitutional authority to police the orderly administration of justice in the South Carolina courts.

From Grant Kuvin
GKuvin@forthepeople.com
Dear Members of the Board of Governors of The Florida Bar:

It is my understanding that the full Board of Governors intends to consider rule making regarding Expert Witness Certification at its next meeting in December. As a member of the Bar practicing in the area of medical malpractice, I ask that the Board take no action to implement any rule regarding Expert Witness Certification.

I have experience with the certificate process as I have required my out of state experts obtain this certificate even in cases where it seems the rule would not yet apply. In my opinion, the rule is solely to intimidate the expert. It serves no purpose other than to attempt to block experts from championing a victim’s cause. What purpose does it serve? The courts have always had the authority to challenge false testimony. This issue is highly partisan and very political. Anyone who participated in the legislative process that led to the legislative enactment of Expert Witness Certification knows how contentious the passage of that bill was and remains.

Generally, medical malpractice experts for the Plaintiff are out of state, the defense in state. Isn’t it a little ironic that only out of state “experts” need an “expert certificate”. It is also a “little” suspicious that only standard of care experts are required to have a certificate and only in medical malpractice cases.

I anticipate that there will be challenges to the constitutionality of the law on due process and equal protection grounds. The Board should allow that legal process to work its way through the courts.

I urge the Board to reject any attempt to have the Bar embroiled in this partisan issue. I work request the Bar allow the legal system to work and allow the courts to address this partisan issue.

I would be happy to discuss this issue with any member of the Board should they have any questions.

Thank you for your consideration.

Nancy La Vista
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NLaVista@ClarkFountain.com

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Website: www.clarkfountain.com
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Those of us that were involved in the legislative efforts of this law know that it was a huge battle between several different political interests. There were many constitutional arguments made in opposition that will inevitably be decided by the Courts. If this law became a Rule it may impair the Courts' ability to decide these issues. This law invades the province of the Courts to decide who is qualified to testify. In addition, it gives a State agency (Board of Medicine) the ability to decide and potentially overrule the courts in deciding who is qualified to testify at trial.

It is important to know that the Supreme Court in South Carolina invalidated an identical law in 2006 for these reasons, and more. I have cut and pasted it below for your review. On behalf of my firm, I strongly urge this Board to reject adopting this law as a Rule.

Anthony T. Martino

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The Supreme Court of South Carolina
ORDER

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***

(h) testifying as a physician in an administrative, civil, or criminal proceeding in this State by expressing an expert medical opinion.

Section 40-47-20(36), Act No. 385, 2006 S.C. Acts __. Furthermore, the Act provides significant detail regarding the information that the South Carolina Board of Medical Examiners shall require before issuing a "limited license" to a physician licensed in good standing in another state who has been engaged to testify as an expert medical witness in an administrative or judicial proceeding in South Carolina. Section 40-47-35, Act No. 385, 2006 S.C. Acts __. Traditionally, court rules allowed any witness who was qualified as an expert by knowledge, skill, experience, training, or education to offer expert testimony in a South Carolina court. Rule 702, SCRE. Furthermore, in a lawsuit alleging a cause of action for medical malpractice, the general rule is that expert testimony is required to show that the defendant failed to conform to the required standard of care; specifically, the reasonable and ordinary knowledge, skill, and diligence physicians in similar neighborhoods and surroundings ordinarily use under like circumstances. Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 710, 713 (1978) (quoting Jarboe v. Harting, 397 S.W.2d 775, 778 (Ky. 1965)). Thus, although no South Carolina statute or court rule has ever embraced the higher scrutiny applied as a pre-requisite for the admission of expert testimony enunciated in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), our rules have always charged the court with performing a "gate keeping" function in limiting the presentation of expert testimony to situations where the testimony will assist the trier of fact in understanding evidence or determining a fact in issue.[1]

After careful consideration, we believe that while the General Assembly certainly sought, through Act 385, to make needed revisions to the methods South Carolina courts utilize in the area of expert medical testimony, the effect of the revised statutes has the potential to substantially impair the orderly administration of justice. Specifically, Act 385 casts serious doubt on a physician's ability to offer testimony regarding the treatment provided to a witness, party litigant, or criminal defendant if the physician, at the time of trial, resides outside of South Carolina. This categorical exclusion overlooks the fact that the physician may have treated the patient in the physician's home jurisdiction, and also that the physician, although at one time licensed and providing treatment to the patient in South Carolina, has relocated out of this state. We believe requiring a treating physician to seek a South Carolina medical license before offering often necessary testimony strains Act 385 far beyond its intended scope.

Additionally, Act 385 is ambiguous as to its relevance to pre-trial practices and proceedings that are of fundamental importance to the judicial process. For example, Act 385's applicability to witnesses used during discovery that might not be used at trial is unclear. Furthermore, although expert testimony is traditionally presented by a witness offering live testimony, lawyers often draw heavily from learned treatises authored by prominent national experts. It would do a great disservice to our system of justice if the doors of South Carolina courtrooms were closed to these scholarly works and the country's leading medical scholars, who may have no intentions of ever visiting this jurisdiction, because our state law would deem them unqualified to offer expert testimony by virtue of their refusal to subject themselves to the disciplinary authority of the South Carolina Board of Medical Examiners.[2]
The South Carolina Constitution vests this Court with the authority to make rules governing the administration of the unified South Carolina court system. S.C. Const. art V, § 4. In order to prevent a significant impairment to this Court’s duty to properly administer the judicial power of South Carolina, and pursuant to Article V, Section 4's authority, we hereby temporarily delay judicial enforcement of Act 385 insofar as the Act requires a physician to obtain a license to practice medicine in South Carolina before offering expert medical testimony in a South Carolina administrative or court proceeding.[3]

While we remain respectful of the General Assembly’s voice in matters of practice and procedure in South Carolina’s courts, this Court cannot allow the administration of justice to be substantially impaired. We are confident, however, that when the General Assembly provides further clarity on this matter, the changes that result will reflect careful consideration and deliberation; will consider and account for the scope of the court's existing rules and the need for efficient and orderly court administration; and will be subjected to close scrutiny in the Judiciary Committees of both the South Carolina Senate and the House of Representatives. This order is effective immediately and shall remain in effect until further order of this Court.

s/Jean H. Toal
s/James E. Moore
s/John H. Waller, Jr.
s/E.C. Burnett, III
s/Costa M. Pleicones
Columbia, South Carolina
August 24, 2006

[1] In Daubert, the United States Supreme Court interpreted Rule 702 of the Federal Rules of Evidence to require trial courts to ensure that all testimony offered as expert scientific, technical, or specialized testimony be both relevant and reliable, be grounded in scientific methods and procedures, and be supported by appropriate scientific validation. 509 U.S. at 589-92. Furthermore, the court interpreted federal evidentiary rules to require “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” Id. at 592-93. Although Rule 702, SCRE, contains identical language to the federal rule, we have expressly declined to adopt this interpretation in South Carolina. See State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (declining to adopt Daubert; interpreting the South Carolina Rules of Evidence to require the trial judge to determine that the evidence will assist the trier of fact, that the expert witness is qualified, and that the underlying science is reliable; and adopting the factors set forth in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) for determining the reliability of the offered evidence).

[2] We also note that although Title 40 of the Code has always contained civil and criminal penalties for violations of the title's licensing requirements and for aiding and abetting one who violates those provisions, see S.C. Code Ann. §§ 40-1-210, 40-47-260 (2001), Act 385’s significantly broader definition of the “practice of medicine” and licensing requirements now introduce the possibility of incurring these penalties in connection with conducting a trial in South Carolina. Furthermore, the Act defines the “practice of medicine” to include “rendering a written or otherwise documented medical opinion concerning the diagnosis or treatment of a patient or the actual rendering of treatment to a patient within this State by a physician located outside the State as a result of transmission of individual patient data by electronic or other means from within a state to such physician or his or her agent.” Section 40-47-20(36), Act No. 385, 2006 S.C. Acts __. In an effort to ensure that unintended consequences do not overwhelm the noble motives of the legislation, these factors further necessitate our issuing this order.
Because we are not presently presented with a case or controversy questioning the constitutionality of Act 385, we reserve those serious questions for another day. At the present, we rely exclusively on our Constitutional authority to police the orderly administration of justice in the South Carolina courts.

Anthony T. Martino
Via Email: tshults@kirkpinkerton.com
esloyer@flabar.org

Mr. Thomas D. Shults, Chairman CREC
Ms. Ellen Sloyer, FL Bar Staff Liaison
The Florida Bar
Code and Rules of Evidence Committee
650 Apalachee Parkway
Tallahassee, Florida 32399

Re: Amendments to Florida Evidence Code

Dear Chairman Shults and Ms. Sloyer:

This letter is to provide comments and urge rejection of the proposed adoption of Fla. Stat. Sec. 766.102 concerning out-of-state medical expert certification as a Rule of Evidence for the foregoing reasons.

We have significant concerns about the constitutionality of Fla. Stat. § 766.102 especially given the South Carolina Supreme Court’s opinion which refused to adopt as a rule a nearly identical statute requiring out of state experts to get certificates before they could testify and subjecting them to discipline by the state’s medical board.

It is well known that plaintiffs in medical malpractice cases often must resort to retaining experts who practice outside of Florida for reasons that are obvious. Florida experts are reluctant to testify against Florida healthcare providers for fear of professional scorn and retribution. Therefore, it has long been difficult for victims of malpractice to find qualified physicians willing to testify against their brethren. This statute is an attempt to prevent such victims from being able to secure experts who are required to initiate their
cause of action. The threat of subjecting such qualified experts to disciplinary action in Florida was meant to create a chilling effect. This is particularly true given that the definition of “incorrect” or “misleading” testimony is ill defined and defending such an action, even the most frivolous, would no doubt be expensive and time consuming.

Hence, to enact a rule which mimics the statute would only provide the court's approval of this legislative overstepping. Any such rule also would result in unfairness to the plaintiff and unfairness to the out of state physician.

It is not surprising, therefore, that the proposed rule is controversial and partisan. Adoption of any such rule would subject the Bar and Court to charges that they have taken a partisan, controversial stance which is counter to the purpose and mission of The Florida Bar.

The legal effect of such a rule applies equally to both Plaintiffs and Defendants in that an expert’s qualifications go to the weight, but not the admissibility of the evidence and therefore should not be a rule of evidence.

For all the above reasons, we trust these significant concerns will be considered by the committee and that on September 21st its members will vote to reject the rule under consideration.

Very truly yours,

Seth E. Miles

SEM/jws
Via Email: tshults@kirkpinkerton.com  
esloyer@flabar.org

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Ms. Ellen Sloyer, FL Bar Staff Liaison  
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For all the above reasons, we trust these significant concerns will be considered by the committee and that on September 21st its members will vote to reject the rule under consideration.

Sincerely yours,

[Signature]

William E. Partridge

WEP/ajs
Dear Governors:

I write to you regarding your upcoming consideration of a proposed Rule regarding Expert Witness Certification. I write to urge you to vote AGAINST the proposed Rule.

As you know, the proposed Rule originates from a controversial, and highly politicized statute that seeks to convert medical expert testimony into the "practice of medicine" in Florida. The ostensible purpose of this statutory labeling is to give the Florida Board of Medicine the power to discipline doctors for what they say under oath in a Florida medical malpractice case. The real purpose, in my experience, is to stifle those experts courageous enough to step forward and testify about medical malpractice. The statute further requires out of state experts to register with the state to subject themselves to discipline in the event the Board of Medicine chooses to take action against them for their testimony.

Without delving too deeply regarding the motivations for this law, suffice it to say that injured patients and their families often seek experts from outside of Florida in order to get an objective opinion about their case. When the expert lives or practices in the same locale as the defendant doctor or hospital, there is understandable reluctance to testify. Further, some of the best and brightest experts live in cities outside of Florida. The statute has a chilling effect on out of state experts who fear discipline, notwithstanding the truthfulness or courage of their convictions.

The statute has multiple constitutional issues, from access to courts, due process, and equal protection to separation of powers. How can a statute give power to a state agency (Board of Medicine) regarding who is and is not qualified to testify in a court room without encroaching on the unique role of the trial court? When it does this, the statute not only has separation of powers problems. The statute evokes cynicism toward our justice system as it denigrates the trial court's inherent power and ability to deal with wayward and dishonest testimony.

Also, when a statute chills the ability of a plaintiff to obtain an expert, and where no medical malpractice case can be brought without an expert, how can that be anything other than an infringement on the right to freely access our court system? As an aside, the Supreme Court of South Carolina recently found a similar statute unconstitutional for many of the reasons expressed here.

This statute will be a source of constitutional litigation in our state. The Florida Bar, looking out for the fair and impartial administration of justice, should not inject itself into this quagmire by re-codifying this infirmed statute into a Rule for the Supreme Court to consider. Please vote against this step.

Thank you.

Best wishes, Stuart
Dear Ms. Sloyer and Mr. Shults:

My comments are addressed to those who are deliberating the merits of recommending whether the Florida Supreme Court should adopt as rules of evidence and place its imprimatur upon Sections 458.3175 (2011), 459.0066 (2011), 466.005 (2011) and 766.102 (2011). As a prelude, I served as the Vice-Chair of the Medical Malpractice Committee of the Florida Justice Association when these statutes were being considered by the legislature and passed into law. I was that committee’s chair last legislative session and I am serving another term as chair for the 2013 legislative session. I offer this background only because after I explain by way of background, what these statutes do, my comments are going to address the manner in which the subject statutes wended their way through the legislative process, as I truly believe that before these laws are adopted as rules of evidence, the statutes need to be understood, not in isolation, but in the context of the legislative process from which they were born. I am leaving it to others who I know have commented, to address whether these proposals are meritorious, desirable or constitutional. I side with those who say that they are not.

Those who do not practice in the medical malpractice field or are unfamiliar with it should know that there are two activities which the expert certification rules address- A) The Pre-Litigation, Presuit Process and B) Testimony in Litigation.

The former is the legally mandated, medical malpractice presuit requirement which requires that before a lawsuit can be filed, the potential plaintiff must obtain opinions from a similar expert who opines in an affidavit that there are reasonable grounds to believe that the potential defendant deviated from the prevailing standard of care. That affidavit is attached to a certified letter sent to the potential defendant and is called a Notice of Intent. It informs the potential defendant of the claim and starts a ninety (90) day investigation period during which discovery is conducted on a very shortened time schedule and is not judicially supervised[1]. At the conclusion, if the potential defendant denies the claim, the potential defendant must provide its own expert affidavit explaining why. This presuit process is addressed by Rule 1.650, Fla. R. Civ. P., but is not and by definition cannot be considered as a rule of evidence.

Only after the presuit 90 day investigation period ends, can a lawsuit be filed. Once in suit, experts qualified in the same area of specialization or practice area as the defendant must testify on behalf of or in defense of the claim, addressing whether there was a deviation from the prevailing standard of care. Clearly the Rules of Evidence apply at this stage.

Under the status quo ante, prior to the passage of the statutes under consideration, appropriately credentialed experts could sign expert affidavits and testify at trial. The new statutes have changed this; and a brief explanation of what these laws accomplish may be helpful. To that end, an outline is provided below.

Expert Certification is Only Required by the Following Experts Testifying on Whether the Standard of Care was Breached:

- Medical Doctors 458.3175 (2011)
- Osteopaths 459.0066 (2011)
- Dentists 466.005 (2011)
Who Does Not Need Certification?

- Standard of Care Experts Licensed by the State of Florida; and
- Experts Offering Opinions on Whether a Breach of the Standard of Care Caused an Injury

Who Can Be Certified?

- Licensed Medical Doctors, Osteopaths and Dentists from
  - any other state or
  - any province of Canada.

Who Cannot Be Certified to Render Standard of Care Opinions:

- Europeans
- Asians
- South Americans
- Central Americans
- Africans
- Middle Easterners

What Activities Require Certification?

- Signing Corroborating Affidavits pursuant to §766.203, where the Notice of Intent ("NOI") names a Physician, Osteopath or Dentist
- Only when the recipient of the NOI will be named in the litigation as having been negligent.
- When testifying to the Standard of Care in litigation pending against a physician, osteopath or dentist

The new law does not require Florida licensees or certified experts when

- The statute does not address passive tortfeasors, such as hospitals or medical groups whose physicians are alleged to have deviated from the prevailing standard of care but have not, themselves, been named
· Signing corroborating affidavits against any entity other than physicians, e.g.,
  actions against hospitals founded on their own neglect and actions against nurses or
  hospital technologists.

· If, at trial, the physician, osteopath or dentist against whom the Expert is
testifying is not a party, it does not appear that certification is required

Technical Requirements For Certification

· Application must be sent to the Department of Health

· The application for certification must include the applicant’s:
  (a) Legal name
  (b) Mailing address
  (c) Telephone number
  (d) Business locations
  (e) Names of jurisdiction where he/she holds an active license to practice
  (f) License number in all licensing jurisdictions
  (g) Fee of $50.00

The Department of Health’s duties upon receipt of an application:

· Must approve the application within 10 business days after receipt if the
  application:

  o Holds an active and valid license to practice in another state or Canada; and

  o Has not previously had his/her expert certificate revoked by the Board of
    Medicine.

Applications not rejected within 10 business days are automatically deemed approved.

· In which case, the applicant must notify the Dept. of Health of his/her intent to
  rely upon the approval by default.

Certificates are valid for 2 years.

The certification process cannot be understood in a vacuum and without knowing why it was created.
Although it is not included in the statutes you are considering, there was another statute that was
amended in the 2011 Legislative Session which puts into context the changes you are considering.
Section 458.331 (1)(oo) was added to Florida Law in the same bill that contains the statutes you are
considering; and in pertinent part, subjects a physician to disciplinary action for “ (oo) Providing
deceptive or fraudulent expert witness testimony.”[2]
Because the rules you are considering are part of a statutory scheme, you must consider the other statutes which are a part of that scheme; and accordingly, you should consider what a Canadian or non-Floridian expert is being subjected to when they become certified. The disciplinary procedure for violating the prohibition against deceptive and fraudulent is outlined below, as follows:

Discipline

- Certified Experts can be disciplined for “providing deceptive or fraudulent expert witness testimony related to the practice of medicine.
  - There do not appear to be any disciplinary provisions for providing fraudulent or deceptive pre-suit affidavits.

- Who can discipline?
  - Reference is made to “the board [of medicine] and department [of health]

- §456.073 describes the disciplinary procedure
  - Complaints can be anonymous or filed by confidential informants
  - Copies of complaints must be furnished to the subject or his/her attorney
  - A response is due in 20 days
  - After an investigation, a determination is made if there is probable cause.
    - § Complaints and proceedings for which probable cause is not found are confidential and not subject to the public records act
  - If probable cause is found, a formal complaint is filed and handled under Chapter 120.
  - Complaints not made in good faith or filed with malice are not exempt from civil liability but if the plaintiff does not prevail, he/she shall be liable for attorney’s fees and costs.
  - Complaints must be filed within 6 years of the offending conduct.

Based solely upon the statutes under consideration for adoption, it should be clear that outside of the merits of regulating professional conduct outside of the State of Florida and what motivations exist to
do so- subjects adequately addressed by other commentators, two very important and looming issues need to be analyzed when considering altering our Code of Evidence.

1. Should a Rule of Evidence be Adopted Which Addresses a Presuit Procedure?

2. Should the Florida Supreme Court Cede to the Board of Medicine or Department of Health The Mechanisms For Disciplining Deceptive And Fraudulent Testimony Given In A Florida Court?

The presuit process addressed by Rule 1.650 and the statutes from which it was generated are designed to reduce the number non-meritorious medical malpractice claims filed in Florida. To do so, hurdles were enacted before a lawsuit could be filed. A claim has to have at least one expert say that there were reasonable grounds to believe that there was medical neglect; and an affidavit corroborating the same can only be signed after a reasonable investigation has been made. The presuit process, however, is not a court proceeding at which evidence is proffered. Evidence, according to Black’s Law Dictionary, is “something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact.” The presuit process is not about “proof.” It’s about whether a claim can satisfy a certain minimal threshold of being based on “reasonable grounds.” As such, it is not appropriate for a rule of evidence and is much more a rule of procedure and should never be recommended for consideration as a rule of evidence.

On a policy basis, the Florida Supreme Court should never consider adopting anything, including a Rule of Evidence that would shift responsibility from the Courts and vest it with a collection of physicians who are not required to have any legal training before they can impose punishments on out of state experts who have contributed their time to assisting the processing of cases in the courts. Finally, the statutes under consideration were just one part of Chapter 2011-233, Laws of Florida, which did so much more than reflect a concentrated focus on an evidentiary issue. Those considering adopting these statutes as Rules of Evidence need to understand that these statutes were part of a sweeping package of medical malpractice restrictions which whose proponents, the Florida Medical Association, the Florida Hospital Association and the Malpractice Insurance Industry collaborated upon. Expert Certification was just one of many major subjects addressed in Chapter 2011-233 and other statutes which came from the same legislative session in what was the most harsh and punishing retrenchments on the rights of citizens to redress legal wrongs and access the courthouse since damage caps were passed in 2003.

Chapter 2011-233 emanated from House Bill 479, which, in addition to the provisions passed into law from that bill and are now found in Chapter 2011-233, included severe restrictions on patients’ rights which fortunately did not pass, including:

- Eliminating Prohibitions Against Defendant Doctors and Their Attorneys From Engaging in Ex Parte Communications with a Medical Malpractice Claimant’s Doctors
- Imposing a Clear and Convincing Burden of Proof on a Cause of Action for a Doctor’s Failure to Administer a Supplemental Diagnostic Test
- Eliminating a Hospital’s Liability for Medical Malpractice Occurring Within its Walls by Non-Employee Medical Providers.
While these restrictions did not pass, along with requiring Expert Witness Certification, the following erosions of a medical malpractice victim’s rights were enacted with Chapter 2011-233, Laws of Florida:

- Creating a rebuttable presumption that a physician disclosed cataract surgery risks if a pre-approved, state drafted consent form is executed
- Deleting a requirement that medical malpractice insurance contracts contain a clause authorizing the insurer to make and conclude certain offers within policy limits over the insured’s veto
- Making inadmissible in medical negligence cases in the state a health care provider’s failure to comply with or breach a federal requirement
- Requiring a claimant for medical malpractice to execute an authorization form allowing a medical malpractice defendant to obtain the claimant’s medical records
- Revising provisions relating to discovery and admissibility into evidence of an insurance provider’s reimbursement policies
- Requiring that presuit notice for medical negligence claims be accompanied by an authorization for release of protected health information and providing requirements for the form of such authorization
- Providing immunity for volunteer team physicians under certain circumstances

In addition, separate laws were enacted outside of Chapter 2011-233 which did the following:
- Imposed non-economic damage caps on Medicaid victims of medical malpractice
- Vested Private Medical Schools with Sovereign Immunity and the damage limits that go with it
- Vested the Shands medical providers with Sovereign Immunity and the damage limits that go with it

With this backdrop, it can hardly be said that any rational and reasoned consideration was given to the policy considerations that are normally visited when considering a rule of evidence. Rather, the statutes you are considering are nothing other than a part of a powerful industry’s continued attempt to simply eliminate the right to sue for an injury caused by medical neglect. A study of the legislative record will reveal no evidence of any justification in fact for changing the law in order to allow the Board of Medicine or Department of Health to punish out of state experts. This state’s rules of evidence should be reserved, as they are, for much more lofty and aspirational goals. I strongly urge that neither the statutes under consideration nor any of the other evidentiary statutes included in Chapter 2011-233, Laws of Florida, be considered any further and that their consideration as a rule of evidence be resoundingly rejected.

Respectfully,

Kenneth Jay Sobel
Leopold Law, P.A.

Kenneth J. Sobel | Shareholder
ksobel@leopold-law.com
Florida Bar Code and Rules  
of Evidence Committee  
c/o Thomas D. Shults, Chair  
Ellen Slayer, FL Bar Staff Liaison  

Dear Mr. Chair and Committee Members:  

I write to urge rejection of a Rule of Evidence based on Fla. Stat. Sec. 766.102. As both a matter of process and substance, this is a wrongheaded proposition. 

First, as to process, this would be tantamount to endorsing what is a clear invasion of the Supreme Court’s rule making authority. The statute, whose purpose is to exclude certain witnesses in medical malpractice cases, transgresses the Court’s authority to regulate trials. Adopting a mirror image rule would serve to “cure” that violation but that is not the purpose of rule making. 

Second, as to substance, this is an unwarranted attempt to prevent injured patients from being able to bring a claim for their injuries. I know too well the conspiracy of silence that exists in medical culture and the difficulty of obtaining medical experts for injured patients. It is rare that an in-state doctor will testify against another doctor and often we have to resort to out-of-state doctors for expert opinions. Exposing the out-of-state doctors to discipline would have a chilling effect on the availability of such testimony. It’s not like there was a real problem that needs to be solved. Instead, this is just a partisan attempt to make what already is some of the most difficult litigation even more difficult. The loser would be Florida citizens who would be unable to bring their cases to court. 

For these reasons, I urge that you reject this partisan effort to tip the scales in favor of medical defendants. 

Very truly yours, 

Larry S. Stewart 

LSS:tl