

New Change to Florida Law Affects Physicians' Ability to Retain Out of State Experts to Defend Medical Malpractice Suits

By Andrea L. Diederich



The change to Section 766.102, Florida Statutes, now requires experts to either be licensed in Florida, or obtain an expert witness certification from the Florida Department of Health.

As of October 1, 2011, Florida physicians and dentists will face a new challenge when retaining top notch experts around the country to assist them in defending against medical malpractice suits. The change in Florida law is found in Section 766.102, Florida Statutes, and provides new qualification requirements for out of state expert witnesses testifying on behalf of Florida physicians and dentists in medical malpractice actions.

Under the prior law, counsel representing a physician or dentist in a medical malpractice lawsuit could retain any qualified physician from anywhere in the country to opine that the standard of care was met by the defendant. Such latitude provided monumental support to Florida physicians, who enjoyed the benefit of having the top experts in their specialties by their sides to support them both during the presuit investigation process and at trial. Under the new law, an out of state physician expert cannot testify for or against the standard of care rendered by a Florida licensed physician or dentist unless the expert is either: a) licensed in Florida; or b) obtains an expert witness certificate from the Florida Department of Health. The certification process applies to all causes of action accruing on or after October 1, 2011.

Currently, the certification application is only available online, and requires that the expert complete the process himself or herself. Aside from the minor inconvenience of having to fill out the application, holding such a certificate may subject the out of state expert to discipline by the Florida boards of medicine, osteopathic medicine, and dentistry. An expert witness certificate does not authorize a physician to engage in the practice of medicine or dentistry. However, an expert witness certificate is treated as a license in any disciplinary action, and the holder of an expert witness certificate is subject to discipline by the board.

The certification process requires that the expert fill out an application containing the expert's legal name, mailing address, telephone number, business locations, the names of the jurisdictions where the expert holds an active and valid license to practice medicine or dentistry, and the license number or other identifying number issued to the expert by the jurisdiction's licensing entity. The expert must also pay a \$50 application fee. The Department of Health has 10 days to act on the application. Once approved, the certification is good for two years. The complete certification requirements are

found at Sections 458.3175 (for medicine), 459.0066 (for osteopathic medicine), and 466.005 (for dentistry), Florida Statutes.

This is a new hurdle that Florida physicians and their counsel will need to jump through when retaining out of state experts to testify on behalf of defendant physicians. Unfortunately, the new requirements may serve to limit the pool of talented out of state experts willing to testify on behalf of Florida physicians. As counsel for defendant physicians, I have already spoken to one out of state expert who refused to complete the application process, stating that it was too much of a burden, and that he was already too busy with other cases which did not involve any certification process. Other experts have reluctantly completed the process. Having been involved in complex medical litigation where a jury verdict can come down to which expert is most qualified and most believed, this new change could affect the outcome of many malpractice actions. On the plus side, the law also affects experts retained by plaintiffs, so the caliber of experts available to plaintiffs will also be limited.

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