Civil Justice Subcommittee

Tuesday, January 14, 2014
1:00 PM
404 HOB

REVISED

Will Weatherford
Speaker

Larry Metz
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time:	Tuesday, January 14, 2014 01:00 pm
End Date and Time:	Tuesday, January 14, 2014 03:00 pm
Location:	Sumner Hall (404 HOB)
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 23 Canned or Perishable Food Distributed Free of Charge by Rogers
HB 97 Dentists & Dental Hygienists by Magar
HB 105 Florida Civil Rights Act by Berman
HB 123 Fees and Costs in Guardianship Proceedings by Schwartz
HB 125 Pub. Rec./Claim Settlement on Behalf of Minor or Ward by Schwartz

Workshop on court ruling regarding recent statutory changes to the Evidence Code

NOTICE FINALIZED on 01/07/2014 16:17 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 23 Canned or Perishable Food Distributed Free of Charge
SPONSOR(S): Rogers and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 160

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Ward	Bond
2) K-12 Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Current law protects most donors who give food to a charitable organization from civil and criminal liability related to injury caused by such donated food. The bill adds public schools to the list of defined donors

The bill does not appear to have a fiscal impact on the state or local governments.

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Section 768.136, F.S., provides that a donor of food apparently fit for human consumption may donate the food to charity while enjoying liability protection.[1] The statute defines a "donor," a "gleaner," "canned food," and "perishable food." The term "donor" includes grocery stores and any place where food is regularly prepared for sale. Where the food is apparently fit for human consumption and donated to a bona fide charitable or nonprofit organization, the donor is not liable for an injury caused by the food unless the injury is caused by the gross negligence, recklessness, or misconduct of the donor.[2] Likewise, a nonprofit or charitable organization or a representative of such organization which distributes donated food is protected from criminal and civil penalties under the same conditions. Public schools are not specifically included in the list of donors protected by the law.

Public schools in Florida participate in school lunch and breakfast programs subsidized by the federal government. Federal law was amended in 2011 to include: "[e]ach school and local educational agency participating in the school lunch program under this chapter may donate any food not consumed under such program to eligible local food banks or charitable organizations."[3]

The bill adds public schools to the list of defined donors protected from civil and criminal liability when they donate food to charitable organizations under the terms set forth in the statute. The bill provides that a public school may donate food with the same protections and provisions if the school meets its school board standards for food handling and transport and the donation is approved by the school principal.

B. SECTION DIRECTORY:

Section 1 amends s. 768.136, F.S., regarding liability for canned or perishable food distributed free of charge.

Section 2 provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

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[1] Section 768.136, F.S.
[2] Section 768.136(d), F.S.
[3] 42 U.S.C. §1758(l)(1)

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."[4] In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously enjoyed by the people of Florida and, if so, that it has not provided a reasonable alternative for redress and that there is not an "overpowering public necessity" for eliminating the right.[5] This right could be implicated if a court were to find that the bill abolishes a right of access to the courts that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution.[6]

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[4] Fla. Jur. 2d., s. 360.
[5] *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973).
[6] The enactment of the Declaration of Rights of the Florida Constitution was part of Florida's new constitution of 1968 and occurred when it was ratified by the electorate on November 5, 1968.

A bill to be entitled

An act relating to canned or perishable food distributed free of charge; amending s. 768.136, F.S.; limiting the liability of public schools with respect to the donation of canned or perishable food to charitable or nonprofit organizations; revising a definition; providing an effective date.

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

Section 1. Paragraph (a) of subsection (1) of section 768.136, Florida Statutes, is amended to read:

768.136 Liability for canned or perishable food distributed free of charge.—

(1) As used in this section:

(a) "Donor" means a person, business, organization, or institution, including a public school, which owns, rents, leases, or operates:

1. Any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure, that is maintained and operated as a place where food is regularly prepared, served, or sold for immediate consumption on or in the vicinity of the premises; or to be called for or taken out by customers; or to be delivered to factories, construction camps, airlines, locations where catered events are being held, and other similar locations for consumption at any place;

2. Any public location with vending machines dispensing prepared meals; or

3. Any retail grocery store.

Section 2. This act shall take effect July 1, 2014.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 97 Dentists & Dental Hygienists
SPONSOR(S): Magar and Spano
TIED BILLS: None **IDEN./SIM. BILLS:** SB 142

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Cary	Bond
2) Health & Human Services Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The Access to Health Care Act was enacted to provide sovereign immunity to health care professionals who contract with the state to provide free medical care for indigent persons. The contract must be for "volunteer, uncompensated services" for the benefit of low-income recipients. Dentist and dental hygienists licensed by the state are among those health care professionals that are protected by sovereign immunity under the Act.

The bill allows a dentist or dental hygienist to accept reimbursement of some or all of a patient's dental laboratory cost without being considered to have accepted compensation, thus retaining sovereign immunity protection.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

History of Sovereign Immunity

The legal doctrine of sovereign immunity prevents a government from being sued in its own courts without its consent.[1] According to United States Supreme Court Justice Oliver Wendell Holmes, citing the noted 17th century Hobbes work, *Leviathan*, "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[2] State governments in the United States, as sovereigns, inherently possess sovereign immunity.[3]

Sovereign Immunity in Florida

The Florida Constitution addresses sovereign immunity as follows:

> Suits Against the State.—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.[4]

The Florida Constitution grants "absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment."[5] The state has waived its sovereign immunity in tort actions and the state may be liable to the same extent as a private individual under like circumstances.[6] However, the Legislature has capped damages in suits against the state.[7] The current cap on damages is $200,000 per person and $300,000 per incident.[8]

Exceptions to Sovereign Immunity in Florida

There are exceptions to the otherwise broad waiver of governmental tort immunity when the government is performing a discretionary function and when the government has a public duty.[9] Whether the particular facts of a case bring the case within one of these exceptions is complex. One court described the problem as such: "Although these exceptions are somewhat elusive and are not susceptible to neat formulations which fit all cases, the courts have nonetheless attempted to articulate these exceptions in general terms."[10]

Parties That May Claim Sovereign Immunity in Florida

As discussed above, the state has provided a limited waiver of sovereign immunity in some circumstances. A party may sue the state or one of its agencies or subdivisions in a tort action.[11] The statutes define state agencies or subdivisions to include executive departments, the legislature, the judicial branch, and independent establishments of the state, such as state university boards of

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[1] Black's Law Dictionary, 3rd Pocket Edition, 2006.
[2] *Kawananakoa v Polyblank*, 205 U.S. 349, 353 (1907).
[3] *See, e.g., Fla. Jur. 2d, Government Tort Liability, Sec. 1.*
[4] Fla. Const., Art. X, s. 13.
[5] *Cir. Ct. of the Twelfth Jud. Cir. v. Dep't of Natural Resources*, 339 So.2d 1113, 1114 (Fla. 1976).
[6] Section 768.28(1), F.S.
[7] Section 768.28(5), F.S.
[8] *Id.*
[9] *Seguine v. City of Miami*, 627 So.2d 14, 16 (Fla. 3rd DCA 1993).
[10] *Id.*
[11] Section 768.28(1), F.S.

trustees, counties and municipalities, and corporations primarily acting as instrumentalities or agencies of the state, including the Florida Space Authority.[12]

Whether a corporation is primarily acting as an instrumentality or agency of the state primarily depends on the level of governmental control over the performance and day-to-day operations of the corporation.[13] The analysis tends to be heavily fact-dependent, while also considering the intent of the Legislature. For example, the University of Central Florida Athletics Association was found to have sovereign immunity[14] while the University of Florida's Shands Hospital was not.[1516]

An individual state employee or agent of the state is also immune if the employee is acting within the scope of his employment as long as the acts are not done in bad faith or with a wanton and wilful disregard of human rights, safety or property.[17] Many agencies or individuals that do not work directly for the state have been granted sovereign immunity under certain circumstances. Among those are:

- Department of Corrections-contracted health care providers;[18]
- Department of Health-supervised regional poison control centers;[19]
- Department of Transportation contractors, if the tort is not an automobile accident;[20]
- Department of Juvenile Justice contractors;[21] and
- Health care professionals who contract to provide free medical care to indigent residents.[22]

Volunteer Health Services Program

The Access to Health Care Act was enacted to provide sovereign immunity to health care professionals who contract with the state to provide free medical care for indigent residents.[23] The contract must be for "volunteer, uncompensated services" for the benefit of low-income recipients.[24] Dentist and dental hygienists licensed by the state are among those health care professionals that are protected by sovereign immunity.[25] To be protected, the governmental contractor must not accept compensation and must provide written notice to each patient or the patient's legal representative, which must be acknowledged in writing, that the provider is covered under s. 768.28, F.S., for purposes of actions related to medical negligence.[26]

The individual accepting services through this contracted provider may not have medical or dental care coverage for the illness, injury, or condition in which medical or dental care is sought.[27] The services not covered under this program include experimental procedures and clinically unproven procedures.[28] The governmental contractor has the authority to determine whether or not a procedure is covered.[29] A provider must provide services without compensation from the government contractor for any services provided under the contract and "must not bill or accept compensation from the recipient, or

[12] Section 768.28(2), F.S.
[13] *UCF Athletics Ass'n Inc. v. Plancher*, 121 So.3d 1097, 1106 (Fla. 5th DCA 2013).
[14] *Id.*
[15] *Shands Teaching Hospital & Clinics, Inc. v. Lee*, 478 So.2d 77 (Fla. 1st DCA 1985).
[16] Teaching hospitals have since been granted sovereign immunity by statute. *See* s. 768.28(10)(f), F.S.
[17] Section 768.28(9)(a), F.S.
[18] Section 768.28(10)(a), F.S.
[19] Section 768.28(10)(c), F.S.
[20] Section 768.28(10)(e), F.S.
[21] Section 768.28(11), F.S.
[22] Section 766.1115(2), F.S.
[23] *Id.*
[24] Section 766.1115(3)(a), F.S.
[25] Section 766.1115(3)(d)(13), F.S.
[26] Section 766.1115(5), F.S.
[27] Rule 64I-2.002, F.A.C.
[28] Rule 64I-2.006, F.A.C.
[29] *Id.*

any public or private third-party payor, for the specific services provided to the low-income recipients covered by the contract."[30] Additionally, the health care provider may not subcontract for the provision of services under the Act.[31]

Dentists and dental hygienists report that, while they are willing to provide uncompensated services to the poor, some of the dental laboratories that they work with are not as charitable. Laboratory services are needed for items such as dentures, crowns and bridges.

Effect of the Bill

The bill amends ss. 766.1115(4) and 766.1115(3)(a), F.S., to allow a health care provider licensed under ch. 466, F.S. (generally dentists and dental hygienists), to be reimbursed for up the full amount of dental laboratory fees without being considered to have accepted compensation, thus retaining sovereign immunity protection when otherwise providing uncompensated care. The compensation is limited to a voluntary contribution by the patient of a monetary amount to cover the cost of dental laboratory work, which may not exceed the actual cost of the dental laboratory charges.

B. SECTION DIRECTORY:

Section 1 amends s. 766.1115, F.S., relating to health care providers and creation of agency relationship with governmental contractors.

Section 2 provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

[30] Section 766.1115(3)(a), F.S.
[31] Section 766.1115(4), F.S.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to dentists and dental hygienists; amending s. 766.1115, F.S.; revising the definition of the term "contract"; requiring that a contract with a governmental contractor for health care services include a provision allowing a voluntary contribution toward certain dental laboratory work; providing that the contribution may not exceed the actual amount of the dental laboratory charges; providing an effective date.

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

Section 1. Paragraph (a) of subsection (3) of section 766.1115, Florida Statutes, is amended, and paragraph (g) is added to subsection (4) of that section, to read:

766.1115 Health care providers; creation of agency relationship with governmental contractors.—

(3) DEFINITIONS.—As used in this section, the term:

(a) "Contract" means an agreement executed in compliance with this section between a health care provider and a governmental contractor <u>which allows</u>~~. This contract shall allow~~ the health care provider to deliver health care services to low-income recipients as an agent of the governmental contractor. The contract must be for volunteer, uncompensated services<u>,</u> <u>except as provided in paragraph (4)(g)</u>. For services to qualify as volunteer, uncompensated services under this section, the health care provider must receive no compensation from the

governmental contractor for any services provided under the contract and must not bill or accept compensation from the recipient, or a ~~any~~ public or private third-party payor, for the specific services provided to the low-income recipients covered by the contract.

(4) CONTRACT REQUIREMENTS.—A health care provider that executes a contract with a governmental contractor to deliver health care services on or after April 17, 1992, as an agent of the governmental contractor is an agent for purposes of s. 768.28(9), while acting within the scope of duties under the contract, if the contract complies with the requirements of this section and regardless of whether the individual treated is later found to be ineligible. A health care provider under contract with the state may not be named as a defendant in any action arising out of medical care or treatment provided on or after April 17, 1992, under contracts entered into under this section. The contract must provide that:

(g) As an agent of the governmental contractor for purposes of s. 768.28(9), while acting within the scope of duties under the contract, a health care provider licensed under chapter 466 may allow a patient or a parent or guardian of the patient to voluntarily contribute a monetary amount to cover costs of dental laboratory work related to the services provided to the patient. This contribution may not exceed the actual cost of the dental laboratory charges.

A governmental contractor that is also a health care provider is not required to enter into a contract under this section with

respect to the health care services delivered by its employees.

Section 2. This act shall take effect July 1, 2014.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 105 Florida Civil Rights Act
SPONSOR(S): Berman and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 220

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Ward	Bond
2) State Affairs Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The Florida Civil Rights Act of 1992 was enacted to "secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status..." Similar to federal law, the Florida Civil Rights Act provides a number of actions that, if undertaken by an employer, are unlawful employment practices. For example, it is unlawful to discharge or fail to hire an individual or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment based on that individual's race, color, religion, sex, national origin, age, handicap, or marital status.

Unlike federal law, the Florida Civil Rights Act has not been amended to specifically include a prohibition against pregnancy discrimination.

The bill brings Florida in line with federal law to prohibit pregnancy-related discrimination in:

- Public lodging or food service accommodations;
- Hiring for employment;
- Compensation for employment;
- Terms, conditions, benefits, or privileges of employment.

The bill does not appear to have a fiscal impact on the state or local governments.

The bill is effective July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Title VII Civil Rights Act of 1964[1]

Title VII of the Civil Rights Act of 1962 (Title VII) prohibits discrimination on the basis of race, color, religion, national origin, or sex. Title VII covers employers with 15 or more employees and outlines a number of unlawful employment practices. For example, Title VII makes it unlawful for an employer to refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, based on race, color, religion, national origin, or sex.

Pregnancy Discrimination Act[2]

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert*[3] that Title VII did not include pregnancy under its prohibition against unlawful employment practices. The Pregnancy Discrimination Act (PDA), passed in 1978, amended Title VII to define the terms "because of sex" or "on the basis of sex," to prohibit discrimination against a woman due to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.[4] Under the PDA, an employer cannot discriminate against a woman on the basis of pregnancy in hiring, fringe benefits (such as health insurance), pregnancy and maternity leave, harassment, and any other term or condition of employment.[5]

Florida Civil Rights Act of 1992

The Florida Civil Rights Act of 1992 (FCRA) was enacted to "secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status..."[6] The FCRA provides protection from discrimination in the areas of education, employment, housing, and public accommodations.

Similar to Title VII, the FCRA specifically provides a number of actions that, if undertaken by an employer, would be considered unlawful employment practices.[7] For example, it is unlawful to discharge or fail to hire an individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment based on an individual's race, color, religion, sex, national origin, age, handicap, or marital status. Unlike Title VII, the FCRA has not been amended to specifically include a prohibition against pregnancy discrimination, although the question of whether the FRCA impliedly covers pregnancy discrimination is currently pending before the Florida Supreme Court.[8]

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[1] 42 U.S.C. § 2000e. et seq.
[2] Pub. L. No. 95-555, 95th Cong. (Oct. 31, 1978).
[3] 429 U.S. 125, 145 (1976).
[4] The PDA defines the terms "because of sex" or "on the basis of sex" to include pregnancy, childbirth, or related conditions and women who are affected by pregnancy, childbirth, or related conditions. It further states that these individuals must be treated the same for employment purposes, including the receipt of benefits, as any other person who is not so infected but has similar ability or inability to work.
[5] For more information, see U.S. Equal Employment Opportunity Commission, Facts about Pregnancy Discrimination, http://www.eeoc.gov/facts/fs-preg.html (last visited January 7, 2014).
[6] Section 760.01, F.S.
[7] Section 760.10, F.S. Note that this section does not apply to a religious corporation, association, educational institution, or society which conditions employment opportunities to members of that religious corporation, association, educational institution, or society.
[8] *Delva v. The Continental Group, Inc.*, Fla.Sup.Ct. Case No. SC12-2315.

Pregnancy Discrimination in Florida

Although Title VII expressly includes pregnancy status as a component of sex discrimination, the FCRA does not. The fact that the FCRA is patterned after Title VII but failed to include this provision has caused division among both federal and state courts as to whether the Florida Legislature intended to provide protection on the basis of pregnancy status. Since the Florida Supreme Court has not yet considered the issue, the ability to bring a claim based on pregnancy discrimination varies among the jurisdictions.

The earliest case to address the issue of pregnancy discrimination under the FCRA was *O'Laughlin v. Pinchback.*[9] In this case, the plaintiff alleged that she was terminated from her position as a correctional officer based on pregnancy. The First District Court of Appeals held that the Florida Human Rights Act was preempted by Title VII, as amended, as it stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by not recognizing that discrimination against pregnant employees is sex based discrimination."[10] By preempting the Florida statute, the court did not reach the question of whether the Florida law prohibits pregnancy discrimination. However, the court did note that Florida law had not been amended to include a prohibition against pregnancy-based discrimination.

The court in *Carsillo v. City of Lake Worth*[11] found that since the FCRA is patterned after Title VII, which considers pregnancy discrimination to be sex discrimination, the FCRA also bars such discrimination. The court recognized that the Florida statute had never been amended, but concluded that since Congress' original intent was to prohibit this type of discrimination it was unnecessary for Florida to amend its statute to import the intent of the law after which it was patterned.

The court *in Delva v. Continental Group, Inc.*[12] held that FCRA does not prohibit pregnancy discrimination based on the *O'Laughlin* court's analysis that the FCRA had not been amended to include pregnancy status. The issue before the court was narrowly defined to whether the FCRA prohibited discrimination in employment on the basis of pregnancy; therefore, it did not address the preemption holding in *O'Laughlin.* The court certified the conflict with the *Carsillo* case to the Florida Supreme Court.[13]

Federal courts interpreting the FCRA have similarly wrestled with whether pregnancy status is covered by its provisions.[14] Like the state courts, the federal courts that have found that the FCRA does provide a cause of action based on pregnancy discrimination did so because the FCRA is patterned after Title VII, which bars pregnancy discrimination. The courts finding that the FCRA does not prohibit pregnancy discrimination primarily did so because the Legislature has not amended the FCRA to specifically protect pregnancy status.

Most recently, a Florida federal court concluded that the Florida Legislature intended to include pregnancy in its definition of 'sex,' and therefore discrimination based on pregnancy is an unlawful employment practice under the FCRA.[15]

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[9] 579 So.2d 788 (Fla. 1st DCA 1991). This case was brought under the Florida Human Rights Act of 1977, which was the predecessor to the Florida Civil Rights Act of 1992, and was also patterned after Title VII.
[10] *Id.* at 792.
[11] 995 So.2d 1118 (Fla. 4th DCA 2008), *rev. denied*, 20 So.3d 848 (Fla. 2009).
[12] 96 So.3d 956 (Fla. 3d DCA 2012), *reh'g denied.*
[13] The case was filed with the Florida Supreme Court on October 16, 2012 and assigned case number SC12-2315.
[14] Federal courts finding that the FCRA does not include a prohibition against pregnancy discrimination include: *Frazier v. T- Mobile USA, Inc.*, 495 F.Supp.2d 1185, (M.D. Fla. 2003), *Boone v. Total Renal Laboratories, Inc.*, 565 F.Supp.2d 1323 (M.D. Fla. 2008), and *DuChateau v. Camp Dresser & McKee, Inc.*, 822 F.Supp.2d 1325 (S.D. Fla. 2011). Federal courts finding that FCRA does provide protection against pregnancy discrimination include *Jolley v. Phillips Educ. Grp. of Cent. Fla., Inc.*, 1996 WL 529202 (M.D. Fla. 1996), *Terry v. Real Talent, Inc.*, 2009 WL 3494476 (M.D. Fla. 2009), and *Constable v. Agilysys, Inc.*, 2011 WL 2446605 (M.D. Fla. 2011).
[15] *Glass v. Captain Katanna's, Inc.*, --- F.Supp. ---, 2013 WL 3017010 (M.D. Fla. 2013).

Effect of the Bill

The bill provides that pregnancy discrimination in employment and in public lodging and food service establishments is unlawful. This affirmatively brings the Florida provision in line with the federal provision which includes pregnancy in its definition of sex.[16] The bill precludes any discrimination in:

- Public lodging or food service accommodations;
- Hiring for employment;
- Compensation for employment;
- Terms, conditions, benefits, or privileges of employment.

The bill also adds "benefits" to the existing list of employment perquisites that may not be used to discriminate for any of the prohibited reasons.

B. SECTION DIRECTORY:

Section 1 amends s. 509.092, F.S., relating to public lodging establishments and public food service establishments; rights as private enterprises.

Section 2 amends s. 760.01, F.S., relating to purposes; construction; title.

Section 3 amends s. 760.02, F.S., relating to definitions.

Section 4 amends s. 760.05, F.S., relating to functions of the commission.

Section 5 amends s. 760.07, F.S., relating to remedies for unlawful discrimination.

Section 6 amends s. 760.08, F.S., relating to discrimination in places of public accommodation.

Section 7 amends s. 760.10, F.S., relating to unlawful employment practices.

Section 8 reenacts s. 760.11, F.S., relating to administrative and civil remedies; construction.

Section 9 provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

[16] 42 U.S.C. § 2000e (k) includes the condition of pregnancy in the definition of 'sex,' and uses the term 'benefits' in references to employment privileges that may not be withheld in discrimination.

2. Expenditures:

The bill does not appear to have any direct economic impact on the private sector.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The addition of the term "benefits" (line 111) may have no practical effect since courts routinely use the term "benefits" interchangeably with the existing statutory language "terms, conditions, or privileges of employment."[17] Courts have awarded employment "benefits" as damages without the word in the statute.[18] The term "benefits" is not included in the federal equivalent to this statute,[19] but is included in the federal provision which includes pregnancy in the definition of "sex."[20]

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[17] See, eg., *Sunbeam Television Corp. v. Mitzel*, 83 So.3rd 865 (Fla. 3d DCA 2012) and *Duchateau v. Camp, Dresser & McKee, Inc.*, 713 F.3d 1298,1300 (11th Cir. 2013). (". . .a position that did not affect her compensation, benefits, or the terms of her employment.").

[18] *Sunbeam Television Corp. v. Mitzel*, 83 So.3rd 865 (Fla. 3d DCA 2012).

[19] See 42 U.S.C. §2000e-2, which provides, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . ."

[20] 42 U.S.C. § 2000e (k).

A bill to be entitled

An act relating to the Florida Civil Rights Act; amending s. 509.092, F.S.; prohibiting discrimination on the basis of pregnancy in public lodging and food service establishments; amending s. 760.01, F.S.; revising the general purpose of the Florida Civil Rights Act of 1992; amending s. 760.02, F.S.; providing a definition for the term "pregnancy"; amending s. 760.05, F.S.; revising the function of the Florida Commission on Human Relations; amending s. 760.07, F.S.; providing civil and administrative remedies for discrimination on the basis of pregnancy; amending s. 760.08, F.S.; prohibiting discrimination on the basis of pregnancy in places of public accommodation; amending s. 760.10, F.S.; prohibiting discrimination with regard to employment benefits; prohibiting employment discrimination on the basis of pregnancy; prohibiting discrimination on the basis of pregnancy by labor organizations, joint labor-management committees, and employment agencies; prohibiting discrimination on the basis of pregnancy in occupational licensing, certification, and membership organizations; providing an exception to unlawful employment practices based on pregnancy; reenacting s. 760.11(1), F.S., relating to administrative and civil remedies for violations of the Florida Civil Rights Act of 1992, to incorporate the amendments made to s. 760.10(5), F.S., in a

reference thereto; providing an effective date.

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

Section 1. Section 509.092, Florida Statutes, is amended to read:

509.092 Public lodging establishments and public food service establishments; rights as private enterprises.—Public lodging establishments and public food service establishments are private enterprises, and the operator has the right to refuse accommodations or service to any person who is objectionable or undesirable to the operator, but such refusal may not be based upon race, creed, color, sex, pregnancy, physical disability, or national origin. A person aggrieved by a violation of this section or a violation of a rule adopted under this section has a right of action pursuant to s. 760.11.

Section 2. Subsection (2) of section 760.01, Florida Statutes, is amended to read:

760.01 Purposes; construction; title.—

(2) The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of

individuals within the state.

Section 3. Subsection (12) is added to section 760.02, Florida Statutes, to read:

760.02 Definitions.—For the purposes of ss. 760.01-760.11 and 509.092, the term:

(12) "Pregnancy" means a woman affected by pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

Section 4. Section 760.05, Florida Statutes, is amended to read:

760.05 Functions of the commission.—The commission shall promote and encourage fair treatment and equal opportunity for all persons regardless of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status and mutual understanding and respect among all members of all economic, social, racial, religious, and ethnic groups; and shall endeavor to eliminate discrimination against, and antagonism between, religious, racial, and ethnic groups and their members.

Section 5. Section 760.07, Florida Statutes, is amended to read:

760.07 Remedies for unlawful discrimination.—Any violation of any Florida statute making unlawful discrimination because of race, color, religion, gender, pregnancy, national origin, age, handicap, or marital status in the areas of education, employment, housing, or public accommodations gives rise to a cause of action for all relief and damages described in s. 760.11(5), unless greater damages are expressly provided for. If the statute prohibiting unlawful discrimination provides an

administrative remedy, the action for equitable relief and damages provided for in this section may be initiated only after the plaintiff has exhausted his or her administrative remedy. The term "public accommodations" does not include lodge halls or other similar facilities of private organizations which are made available for public use occasionally or periodically. The right to trial by jury is preserved in any case in which the plaintiff is seeking actual or punitive damages.

Section 6. Section 760.08, Florida Statutes, is amended to read:

760.08 Discrimination in places of public accommodation.—All persons are ~~shall be~~ entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation~~, as defined in this chapter,~~ without discrimination or segregation on the ground of race, color, national origin, sex, pregnancy, handicap, familial status, or religion.

Section 7. Subsections (1) and (2), paragraphs (a) and (b) of subsection (3), subsections (4) through (6), and paragraph (a) of subsection (8) of section 760.10, Florida Statutes, are amended to read:

760.10 Unlawful employment practices.—

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, benefits, terms, conditions, or privileges of employment, because of such individual's race,

color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(2) It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status or to classify or refer for employment any individual on the basis of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(3) It is an unlawful employment practice for a labor organization:

(a) To exclude or to expel from its membership, or otherwise to discriminate against, any individual because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee or as an applicant for employment, because of such

individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(4) It is an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status in admission to, or employment in, any program established to provide apprenticeship or other training.

(5) Whenever, in order to engage in a profession, occupation, or trade, it is required that a person receive a license, certification, or other credential, become a member or an associate of any club, association, or other organization, or pass any examination, it is an unlawful employment practice for any person to discriminate against any other person seeking such license, certification, or other credential, seeking to become a member or associate of such club, association, or other organization, or seeking to take or pass such examination, because of such other person's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

(6) It is an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee to print, or cause to be printed or published, any notice or advertisement relating to employment, membership, classification, referral for employment, or apprenticeship or other training, indicating any preference, limitation, specification, or discrimination, based on race, color,

religion, sex, pregnancy, national origin, age, absence of handicap, or marital status.

(8) Notwithstanding any other provision of this section, it is not an unlawful employment practice under ss. 760.01-760.10 for an employer, employment agency, labor organization, or joint labor-management committee to:

(a) Take or fail to take any action on the basis of religion, sex, pregnancy, national origin, age, handicap, or marital status in those certain instances in which religion, sex, condition of pregnancy, national origin, age, absence of a particular handicap, or marital status is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.

Section 8. For the purpose of incorporating the amendment made by this act to section 760.10(5), Florida Statutes, in a reference thereto, subsection (1) of section 760.11, Florida Statutes, is reenacted to read:

760.11 Administrative and civil remedies; construction.—

(1) Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation, naming the employer, employment agency, labor organization, or joint labor-management committee, or, in the case of an alleged violation of s. 760.10(5), the person responsible for the violation and describing the violation. Any person aggrieved by a violation of s. 509.092 may file a complaint with the commission within 365 days of the alleged violation naming the person responsible for the

violation and describing the violation. The commission, a commissioner, or the Attorney General may in like manner file such a complaint. On the same day the complaint is filed with the commission, the commission shall clearly stamp on the face of the complaint the date the complaint was filed with the commission. In lieu of filing the complaint with the commission, a complaint under this section may be filed with the federal Equal Employment Opportunity Commission or with any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80. If the date the complaint is filed is clearly stamped on the face of the complaint, that date is the date of filing. The date the complaint is filed with the commission for purposes of this section is the earliest date of filing with the Equal Employment Opportunity Commission, the fair-employment-practice agency, or the commission. The complaint shall contain a short and plain statement of the facts describing the violation and the relief sought. The commission may require additional information to be in the complaint. The commission, within 5 days of the complaint being filed, shall by registered mail send a copy of the complaint to the person who allegedly committed the violation. The person who allegedly committed the violation may file an answer to the complaint within 25 days of the date the complaint was filed with the commission. Any answer filed shall be mailed to the aggrieved person by the person filing the answer. Both the complaint and the answer shall be verified.

Section 9. This act shall take effect July 1, 2014.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 123 Fees and Costs in Guardianship Proceedings
SPONSOR(S): Schwartz
TIED BILLS: HB 125 **IDEN./SIM. BILLS:** SB 120

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Ward	Bond
2) Healthy Families Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

A formal guardianship is established when a person is unable to manage his or her own property for any reason. The need for guardianship over an adult may be established by an adjudication of legal incompetence, which is based upon the determination of an examining committee. The parents of a minor child are the natural guardians and can generally act on behalf of the minor, although a formal guardianship must be filed in some circumstances. The bill:

- Allows a court to authorize payments to experts and professionals acting on behalf of the guardianship without the need for expert testimony regarding whether the billed amounts are reasonable.
- Requires the state to pay the fees of an examining committee in the event that the court finds that an adult is not incapacitated. In such case, if the court finds the petitioner acted in bad faith, the court may require the petitioner to reimburse these fees.
- Makes technical, grammatical, clarifying and style changes to guardianship statutes.

The bill appears to have a minimal negative fiscal impact on the state government. The bill does not appear to have a fiscal impact on local governments.

The bill takes effect upon becoming law and applies to all pending proceedings.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

A formal guardianship is established when a person is unable to manage his or her own property for any reason. The need for guardianship over an adult may be established by an adjudication of legal incompetence, which is based upon the determination of an examining committee when a petition to determine capacity has been filed. The parents of a minor child are the natural guardians and can generally act on behalf of the minor, although a formal guardianship must be filed in some circumstances.

Costs and Fees Associated with Guardianship Administration

Current Situation

Section 744.108, F.S., governs awards of compensation to a guardian or attorney in connection with a guardianship. It provides that "a guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement of costs incurred on behalf of the ward."[1] Similarly, s. 744.311(7), F.S.,[2] provides that any attorney appointed under s. 744.311(2), F.S., is entitled to a reasonable fee to be determined by the court.

Fees and costs incurred in determining compensation are part of the guardianship administration and are generally awardable from the guardianship estate, unless the court finds the requested compensation substantially unreasonable.[3] It is unclear whether the scope of subsection (8) covers all requests for attorney's fees or is limited to only fees for the guardian's attorney. Specifically, the statute does not address whether an attorney who has rendered services to a ward, such as court-appointed counsel for the ward, is entitled to recover attorneys' fees and costs associated with proceedings to review and determine compensation.

Further, it is unclear whether expert testimony is required to establish a reasonable fee for a guardian or an attorney. Section 744.108, F.S., is silent on the subject. Practitioners report that many attorneys and judges interpret the current law as requiring testimony from an expert witness to establish a reasonable attorney's fee unless a statute dispenses with that requirement.[4] If this is a correct interpretation of existing law, then expert testimony is presently required in all guardianship proceedings for an award of attorney's fees.

Cost considerations are a significant factor in many guardianships. Requiring expert testimony at every hearing for determination of interim guardian's fees or attorney's fees adds a layer of costs that deplete the ward's estate. Practitioners report that the judiciary is capable of determining a reasonable fee without expert testimony in the vast majority of cases. In those cases where expert testimony would be necessary, the interested party may present such testimony.

Effect of Proposed Changes

The bill adds subsection (9) to s. 744.108, F.S., dispensing with any requirement for expert testimony to support an award of fees unless requested. Expert testimony may be offered at the option of either

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[1] Section 744.108(1), F.S.
[2] This section provides that an attorney will be provided for the alleged incompetent.
[3] Section 744.108(8), F.S.
[4] See, *Shwartz, Gold & Cohen, P.A. v. Streicher*, 549 So. 2d 1044 (Fla. 4th DCA 1989); *Estate of Cordiner v. Evans*, 497 So. 2d 920 (Fla. 2d DCA 1986); *Clark v. Squire, Sanders & Dempsey*, 495 So.2d 264 (Fla. 3d DCA 1986).

party upon written notice. If expert testimony is offered, a reasonable expert witness fee must be awarded by the court and paid from the assets of the ward.[5]

The bill amends s. 744.108(8), F.S., to provide that attorneys' fees and costs associated with proceedings to determine the fees of a guardian or an attorney who has rendered services to a guardian or ward, including court-appointed counsel, are payable from guardianship assets unless the court finds the requested compensation substantially unreasonable.

The bill amends s. 744.108(8), F.S., to provide that the court may award attorney's fees and costs incurred in compensation proceedings to an attorney who has rendered services to the ward, including the ward's court-appointed counsel.

Claims of Minors

Current Situation

Pursuant to s. 744.3025(1)(a), F.S., the court may appoint a guardian ad litem before approving a settlement of a minor's claim in any case in which the gross settlement of the claim exceeds $15,000.[6] The statute is silent as to the specific criteria to be utilized by the court in its determination of the need for the appointment of a guardian ad litem.

Effect of Proposed Changes

The bill amends s. 744.3025(1)(a), F.S., to provide the standard to be utilized by the court in its determination of the need for the appointment of a guardian ad litem. Specifically, the bill provides that the court may appoint a guardian ad litem "if the court believes that a guardian ad litem is necessary to protect the interest of the minor."

Costs and Fees Associated with Adjudication

Current Situation

When a petition for incapacity is filed, the court is required to appoint an examining committee consisting of three members, at least one of which must be a psychiatrist or other physician.[7] The remaining members must be either a psychologist or gerontologist, another psychiatrist or physician, a registered nurse, nurse practitioner, licensed social worker with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill experience, training of education may, in the court's discretion, "advise the court in the form of an expert opinion."[8]

Each member of the examining committee is charged with examining the alleged incapacitated person, making a comprehensive assessment, and rendering to the court a professional opinion as to a diagnosis, a prognosis and a recommended course of treatment. This evaluation includes an assessment of the capacity of the individual to exercise enumerated rights in s. 744.3215, F.S.

Compensation of examining committee members is governed by s. 744.331(7), F.S., which provides generally that the examining committee and any attorney appointed to represent the alleged incapacitated person are entitled to reasonable fees to be determined by the court. Under current law, the fees awarded are to be paid by the guardian from the property of the ward or if the ward is indigent,

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[5] This provision is derived from and similar to s. 733.6175(4), F.S., of the Florida Probate Code.
[6] Under current law, parents as natural guardians may settle a claim of less than $15,000 without appointment of a guardian ad litem. Sections 744.301, 744.3025, F.S.
[7] Section 744.331(3)(a), F.S.
[8] *Id.*

"by the state."[9] If the court finds the petition was brought in bad faith, the costs may be assessed against the petitioner.[10]

The statute is silent, however, with respect to how the examining committee members are to be compensated in the event the petition is dismissed and the court finds no bad faith in the filing of the petition to determine incapacity. Under such circumstances, no guardian is appointed and no property ever comes into the hands of a guardian or under the authority of the court. Likewise, there is no authority for assessing such fees against the petitioner or against the alleged incapacitated person.

This "gap" in s. 744.331(7), F.S., as to who is responsible for the payment of such fees has been recognized in several reported decisions, all of which have recognized the need for remedy by the Legislature.[11]

Effect of Proposed Changes

This bill amends s. 744.331(7), F.S., by creating a new subsection (c), which provides that if the petition is dismissed, the fees of the examining committee are paid upon court order as "expert witness" fees under s. 29.004(6), F.S. This change implements the provisions of s. 29.004(6), F.S., which awards fees to court appointed experts generally, and provides a secure source of funding to insure that the members of the examining committee are reasonably compensated as contemplated by s. 744.331, F.S., without incentive to find incompetency.

B. SECTION DIRECTORY:

Section 1 amends s. 744.108, F.S, regarding guardian's and attorney's fees and expenses.

Section 2 amends s. 744.3025, F.S., regarding claims of minors.

Section 3 amends s. 744.331, F.S., regarding procedures to determine incapacity.

Section 4 provides an effective date upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill appears to create an unknown minimal negative fiscal impact. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

[9] Section 744.331(7)(b), F.S.
[10] Section 744.331(7)(c), F.S.
[11] *See, Ehrlich v. Severinson*, 985 So.2d 639 (Fla. 4th DCA 2008); *Levine v. Levine*, 4 So.3d 730 (Fla. 5th DCA 2009); and *Faulkner v. Faulkner*, 65 So.3d 1167 (Fla. 1st DCA 2011).

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill appears to lower the cost to individuals for maintenance of a guardianship case. In the majority of guardianship cases the cost of presenting expert testimony will be avoided and the situations where expert testimony is used will be minimized.

D. FISCAL COMMENTS:

The Real Property, Probate, and Trust Law Section of the Florida Bar reports that compensation awarded to an examining committee is modest, generally $600 or less per appointment.

The Office of State Courts Administration (OSCA) reports an anticipated fiscal impact because the bill will require the State Courts System to pay examining committee fees in situations in which it is not currently required by statute to do so (i.e., when the petition is dismissed and there is no "ward," indigent or otherwise). Information from the circuits indicates that some currently pay examining committee fees only when the ward/alleged incapacitated person is indigent. Other circuits report that they also pay the fees in those situations in which the alleged incapacitated person is not indigent and a good faith petition is dismissed (e.g., to ensure that the examining committee members do not go uncompensated for their services). Thus, in some cases circuits are already paying the fees in situations contemplated by the bill.

The feedback from the circuits suggests that these situations arise infrequently. In addition, the bill requires the petitioner to reimburse the state if the court concludes that the petition was filed in bad faith. To the extent such reimbursements are indeed made, some of the fiscal impact will be reduced. OSCA does not expect the fiscal impact from the legislation to be significant.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

A search for the word, 'confidential' throughout the whole of ch. 744, F.S., does not produce a definitive duty of confidentiality that would apply directly to the new provision in s. 744.3025(3), F.S, which provides, at lines 75 and 76, "Any settlement of a claim pursuant to this section is subject to the confidentiality provisions of this chapter." If the tied bill, HB 943 passes, this language will be rendered unnecessary.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a.

A bill to be entitled

An act relating to fees and costs incurred in guardianship proceedings; amending s. 744.108, F.S.; updating terminology; providing that fees and costs incurred by an attorney who has rendered services to a ward in compensation proceedings are payable from guardianship assets; providing that expert testimony is not required in proceedings to determine compensation for an attorney or guardian; amending s. 744.3025, F.S.; providing that a court may appoint a guardian ad litem to represent a minor if necessary to protect the minor's interest in a settlement; providing that a settlement of a minor's claim is subject to certain confidentiality provisions; amending s. 744.331, F.S.; requiring that the examining committee be paid from state funds as court-appointed expert witnesses if a petition for incapacity is dismissed; requiring that a petitioner reimburse the state for expert witness fees if the court finds the petition to have been filed in bad faith; providing applicability; providing an effective date.

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

Section 1. Subsections (5) and (8) of section 744.108,

Florida Statutes, are amended, and subsection (9) is added to that section, to read:

744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees and expenses.—

(5) All petitions for guardian ~~guardian's~~ and attorney ~~attorney's~~ fees and expenses must be accompanied by an itemized description of the services performed for the fees and expenses sought to be recovered.

(8) When court proceedings are instituted to review or determine a guardian's or an attorney's fees under subsection (2), such proceedings are part of the guardianship administration process and the costs, including costs and attorney fees for the guardian's attorney, an attorney appointed under s. 744.331(2), or an attorney who has rendered services to the ward, shall be determined by the court and paid from the assets of the guardianship estate unless the court finds the requested compensation under subsection (2) to be substantially unreasonable.

(9) The court may determine reasonable compensation for the guardian, the guardian's attorney, a person employed by the guardian, an attorney appointed under s. 744.331(2), or an attorney who has rendered services to the ward without receiving expert testimony. Any person or party may offer expert testimony after giving notice to interested persons. If expert testimony is offered, a reasonable expert witness fee shall be awarded by the court and paid from the assets of the guardianship estate.

Section 2. Section 744.3025, Florida Statutes, is amended to read:

744.3025 Claims of minors.—

(1)(a) The court may appoint a guardian ad litem to represent the minor's interest before approving a settlement of the minor's portion of the claim in any case in which a minor has a claim for personal injury, property damage, wrongful death, or other cause of action in which the gross settlement of the claim exceeds $15,000 if the court believes a guardian ad litem is necessary to protect the minor's interest.

(b) Except as provided in paragraph (e), the court shall appoint a guardian ad litem to represent the minor's interest before approving a settlement of the minor's claim in any case in which the gross settlement involving a minor equals or exceeds $50,000.

(c) The appointment of the guardian ad litem must be without the necessity of bond or notice.

(d) The duty of the guardian ad litem is to protect the minor's interests as described in the Florida Probate Rules.

(e) A court need not appoint a guardian ad litem for the minor if a guardian of the minor has previously been appointed and that guardian has no potential adverse interest to the minor. ~~A court may appoint a guardian ad litem if the court believes a guardian ad litem is necessary to protect the interests of the minor.~~

(2) Unless waived, the court shall award reasonable fees

and costs to the guardian ad litem to be paid out of the gross proceeds of the settlement.

(3) Any settlement of a claim pursuant to this section is subject to the confidentiality provisions of this chapter.

Section 3. Paragraph (c) of subsection (7) of section 744.331, Florida Statutes, is amended to read:

744.331 Procedures to determine incapacity.—

(7) FEES.—

(c) If the petition is dismissed:~~,~~

1. The fees of the examining committee shall be paid upon court order as expert witness fees under s. 29.004(6).

2. Costs and attorney ~~attorney's~~ fees of the proceeding may be assessed against the petitioner if the court finds the petition to have been filed in bad faith. If the court finds bad faith under this subparagraph, the petitioner shall reimburse the state courts system for any amounts paid under subparagraph 1.

Section 4. The amendments made by this act to ss. 744.108, 744.3025, and 744.331, Florida Statutes, apply to all proceedings pending on the effective date of this act.

Section 5. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 125 Pub. Rec./Claim Settlement on Behalf of Minor or Ward
SPONSOR(S): Schwartz
TIED BILLS: HB 123 **IDEN./SIM. BILLS:** CS/SB 108

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Ward	Bond
2) Government Operations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Litigation settlement agreements in guardianship cases routinely include a provision that the terms will be held in confidence by all parties. Because an adult may settle a lawsuit without court approval, those confidentiality clauses are effective and enforceable. However, a minor cannot settle a case valued in excess of $15,000 without court approval. The court approval process requires a petition setting forth the terms of the settlement. An order is eventually entered that also may contain the terms of settlement, or may refer to the petition. The petition and the order are part of a court file, and therefore are a matter of public record and open for inspection under current law.

The bill amends the guardianship law to provide that the petition requesting permission for settlement of a claim, the order on the petition, and any document associated with the settlement, are confidential and exempt from public records requirements. The court may order partial or full disclosure of the confidential and exempt record upon a showing of good cause.

The bill provides a statement of public necessity as required by the State Constitution.

The bill provides that the exemption will take effect on the same date as House Bill 941 or similar legislation if such legislation is adopted in the same legislative session, or an extension thereof, and becomes law.

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands the current public record exemption for certain information related to guardianship; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.[1]

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. An exemption may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

Court Records

Florida courts have consistently held that the judiciary is not an "agency" for purposes of Ch. 119, F.S.[2] However, the Florida Supreme Court found that "both civil and criminal proceedings in Florida are public events" and that the court will "adhere to the well-established common law right of access to court proceedings and records."[3] There is a Florida constitutional guarantee of access to judicial records.[4] The constitutional provision provides for public access to judicial records, except for those records expressly exempted by the State Constitution, Florida law in effect on July 1, 1993, court rules in effect on November 3, 1992, or by future acts of the legislature in accordance with the Constitution.[5]

Confidential versus Confidential and Exempt

There is a difference between records the legislature has determined to be exempt and those which have been determined to be confidential and exempt.[6] If the legislature has determined the information to be confidential then the information is not subject to inspection by the public.[7] Also, if the information is deemed to be confidential it may only be released to those person and entities designated in the statute.[8] However, the agency is not prohibited from disclosing the records in all circumstances where the records are only exempt.[9]

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[1] Art I., s. 24(c), Fla. Const.
[2] *See* e.g., *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995).
[3] *Barron v. Florida Freedom Newspapers*, 531 so. 2d 113, 116 (Fla. 1988).
[4] Fla. Const. art. I, s. 24(a).
[5] Fla. Const. art. I, ss. 24(c) and (d).
[6] *WFTV, Inc. v. School Board of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).
[7] *Id.*
[8] *Id.*
[9] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991).

Settlements in Guardianship Cases

Litigation settlement agreements routinely include a provision that the terms will be held in confidence by all parties. Because an adult may settle a lawsuit without court approval, those confidentiality clauses are effective and enforceable. However, a minor cannot settle a case valued in excess of $15,000 without court approval.[10] The court approval process requires a petition setting forth the terms of the settlement.[11] An order is eventually entered that also may contain the terms of settlement, or may refer to the petition.[12] The petition and the order are part of a court file, and therefore, are a matter of public record and open for inspection under current law.

Effect of the Bill

The bill amends s. 744.3701, F.S., to provide that any court record relating to the settlement of a ward's or minor's claim, including a petition for approval of a settlement on behalf of a ward or minor, a report of a guardian ad litem relating to a pending settlement, or an order approving a settlement on behalf of a ward or minor, is confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution and may not be disclosed except as specifically authorized.

Because the record is made confidential and exempt, it may not be disclosed except as provided in law. Current law allows the court, the clerk of court, the guardian and the guardian's attorney to review the guardianship court file. The bill amends s. 744.3701, F.S., to provide that record of a settlement may also be disclosed to the guardian ad litem (if any) related to the settlement, to the ward (the minor) if he or she is 14 years of age or older and has not been declared incompetent, and to the attorney for the ward. The record may also be disclosed as ordered by the court.

The bill includes a public necessity statement.

B. SECTION DIRECTORY:

Section 1 amends s. 744.3701, F.S., regarding confidentiality.

Section 2 provides a public necessity statement.

Section 3 provides for an effective date to coincide with passage of House Bill 941, if adopted in the same legislative session.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

[10] *See* s. 744.301(2), F.S.
[11] Section 744.387, F.S.
[12] *Id.*

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

Like any other public records exemption, the bill may lead to a minimal fiscal impact on the affected portions of the government, in this case, the court system and clerks of court. Staff responsible for complying with public record requests could require training related to expansion of the public record exemption, and court and clerk offices could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the court system and clerks.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement
Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption related to guardianships; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement
Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption related to guardianships; thus, it includes a public necessity statement.

Breadth of Exemption
Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption related to guardianships. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for executive branch rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to public records; amending s. 744.3701, F.S.; creating an exemption from public records requirements for records relating to the settlement of a claim on behalf of a minor or ward; authorizing a guardian ad litem, a ward, a minor, and a minor's attorney to inspect guardianship reports and court records relating to the settlement of a claim on behalf of a minor or ward, upon a showing of good cause; authorizing the court to direct disclosure and recording of an amendment to a report or court records relating to the settlement of a claim on behalf of a ward or minor, in connection with real property or for other purposes; providing a statement of public necessity; providing a contingent effective date.

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

Section 1. Section 744.3701, Florida Statutes, is amended to read:

744.3701 Confidentiality ~~Inspection of report~~.—

(1) Unless otherwise ordered by the court, upon a showing of good cause, an ~~any~~ initial, annual, or final guardianship report or amendment thereto, or a court record relating to the settlement of a claim, is subject to inspection only by the court, the clerk or the clerk's representative, the guardian and

the guardian's attorney, the guardian ad litem with regard to the settlement of the claim, ~~and~~ the ward if he or she is at least 14 years of age and has not~~, unless he or she is a minor or has~~ been determined to be totally incapacitated, ~~and~~ the ward's attorney, the minor if he or she is at least 14 years of age, or the attorney representing the minor with regard to the minor's claim, or as otherwise provided by this chapter.

(2) The court may direct disclosure and recording of parts of an initial, annual, or final report or amendment thereto, or a court record relating to the settlement of a claim, including a petition for approval of a settlement on behalf of a ward or minor, a report of a guardian ad litem relating to a pending settlement, or an order approving a settlement on behalf of a ward or minor, in connection with a ~~any~~ real property transaction or for such other purpose as the court allows~~, in its discretion~~.

(3) A court record relating to the settlement of a ward's or minor's claim, including a petition for approval of a settlement on behalf of a ward or minor, a report of a guardian ad litem relating to a pending settlement, or an order approving a settlement on behalf of a ward or minor, is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution and may not be disclosed except as specifically authorized.

Section 2. The Legislature finds that it is a public necessity to keep confidential and exempt from public disclosure

information contained in a settlement record which could be used to identify a minor or ward. The information contained in these records is of a sensitive, personal nature, and its disclosure could jeopardize the physical safety and financial security of the minor or ward. In order to protect minors, wards, and others who could be at risk upon disclosure of a settlement, it is necessary to ensure that only those interested persons who are involved in settlement proceedings or the administration of the guardianship have access to reports and records. The Legislature finds that the court retaining discretion to direct disclosure of these records is a fair alternative to public access.

Section 3. This act shall take effect on the same date that HB 123 or similar legislation takes effect if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

Evidence Code

A Separation of Powers Issue

PROCEDURE VERSUS SUBSTANCE

REPRISE

REVIEW

- The Florida Constitution:
  - Only the Florida Supreme Court may adopt rules of procedure.
  - Lawmaking function is inherent in the Legislature.
  - The Legislature is restricted only by Constitutions.
  - The Legislature makes state policy.

SUBSTANTIVE	PROCEDURAL
Primary rights of individuals with respect towards their persons and property	**Course, form, manner, means, method, mode, order, process or steps**

PER DECISIONS

LEGISLATIVE AND COURT BALANCE

- Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the Legislature.
- Statutes may be determined to be unconstitutional by the courts.

THE TWILIGHT ZONE

- The entire area of substance and procedure may be described as a 'twilight zone. . .'

IN PRACTICE - STATUTES

- A statute is challenged.
- Appeal is taken.
- The Supreme Court decides.
- A rule may be adopted.
- OR

IN PRACTICE - RULES

- Chapter 90 – The Evidence Code
- Viewed by the Court as a combination of substance and procedure
- Generally adopted by the Supreme Court to the extent the content is "procedural"

ADOPTION OF THE EVIDENCE CODE

- Enacted in 1976
- Adopted in its entirety 1979
- The Supreme Court has repeatedly emphasized that the Evidence Code is both substantive and procedural, and has, when it has adopted the code, stated that it adopts "amendments to the Code to the extent they are procedural. . ."

SUPREME COURT ADOPTION AS RULES

- According to the Rule 2.140, R. Jud. Admin., anyone may propose a court rule or amendment.
- Proposals are submitted directly to the Supreme Court, and referred to the appropriate committee.
- The Florida Bar forms committees to review and vote on each proposal.
- The Board of Governors also votes.
- Public comment is invited.

HISTORICALLY

- The Supreme Court has reviewed dozens of statutory changes at least 10 times since 1979.
- The Court has rejected four statutory measures.
- Three of those statutes were rejected in December 2013.

THE STATUTES NOT ADOPTED AS RULES

- Ch. 2011 - 183, L.O.F., s. 1, creating s. 90.5021, F.S.
- CH 2012-152, L.O.F., s. 1, amending s. 90.804, F.S.
- Ch. 2011 - 233, L.O.F., s. 10, amending s. 766.102, F.S.

RECOMMENDATIONS AND RESULTS

- The Committee recommended adoption of all three statutes.
- The Board of Governors voted to reject one provision (expert witnesses).
- The Court declined to adopt the legislative changes, "to the extent they are procedural."

NO. 1: CH. 2011-183, L.O.F.

- Fiduciary Lawyer-Client Privilege
- Created Sec. 90.5021:
- "A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary."

NO. 1: THE DECISION

- The Committee voted to adopt the privilege.
- The Court declined to adopt the new provision of the Code
- "We question the need for the privilege to the extent that it is procedural."

NO. 2: CH. 2012-152, L.O.F.

- Amended s. 90.804, F.S.
- Creates an exception to the hearsay rule when the unavailability of a witness is caused by the opposing party's wrongful conduct
- Mirrors Federal Rule 804(b)(6)

NO. 2: THE DECISION

- The Committee voted to adopt.
- The statute is a codification of common law.
- One who wrongfully procures the absence of a witness from court cannot complain of the admission of the hearsay statement of the witness.
- The Court declined to adopt the exception based upon the right to confront witnesses.

NO. 3: CH. 2011 - 233, L.O.F.

- Added section (12) to s. 766.102, F.S.
- An expert medical witness must be licensed in Florida or have a valid expert witness certificate.

NO. 3: THE DECISION

- The Committee voted to adopt.
- The Board of Governors voted to reject.
- The Court state it ruled due to the concerns raised.
- The Court declined to adopt the measure to the extent it is procedural.

Supreme Court of Florida

No. SC13-98

IN RE: AMENDMENTS TO THE FLORIDA EVIDENCE CODE.

[December 12, 2013]

PER CURIAM.

We have for consideration the regular-cycle report filed by the Florida Bar Code and Rules of Evidence Committee (Committee) concerning recent legislative changes to the Florida Evidence Code (Code), see ch. 2011-183, § 1, Laws of Fla.; ch. 2012-152, § 1, Laws of Fla.; and to section 766.102(12) of the Florida Statutes, see Ch. 2011-233, § 10, Laws of Fla. We have jurisdiction. See art. V, § 2(a), Fla. Const.

The Committee recommends that the Court adopt the above provisions to the extent that they concern court procedure. The amendments at issue in this case are those enacted by the Florida Legislature since this Court last considered amendments to the Florida Evidence Code. See In re Amendments to the Florida Evidence Code, 53 So. 3d 1019 (Fla. 2011). For the reasons discussed below, we decline to adopt the Committee's recommendations.

In chapter 2011-183, section 1, Laws of Florida, the Legislature enacted section 90.5021, Florida Statutes, which establishes a "[f]iduciary lawyer-client privilege." According to the Committee, whether a fiduciary is entitled to the lawyer-client privilege when the fiduciary employs an attorney in connection with his or her fiduciary duties has been an issue in several cases; for example, the Committee cites Jacob v. Barton, 877 So. 2d 935 (Fla. 2d DCA 2004), and Tripp v. Salkovitz, 919 So. 2d 716 (Fla. 2d DCA 2006). We decline to follow the Committee's recommendation to adopt the new provision of the Code because we question the need for the privilege to the extent that it is procedural.

In chapter 2012-152, section 1, Laws of Florida, the Legislature amended section 90.804 to include the hearsay exception of "Statement offered against a party that wrongfully caused the declarant's unavailability." See § 90.804(2)(f), Fla. Stat. (2012). According to the Committee, the provision is a codification of the common law rule that one who wrongfully procures the absence of a witness from court cannot complain of the admission of the hearsay statement of the witness. See Reynolds v. United States, 98 U.S. 145, 158-59 (1878). We decline to adopt this amendment to the extent it is procedural in light of constitutional concerns. See Crawford v. Washington, 541 U.S. 36 (2004) (holding that the Confrontation Clause of the Sixth Amendment bars the admission of a witness's testimonial statement unless the witness was unavailable to testify and the

defendant had a prior opportunity for cross-examination); In re Amendments to the Fla. Evidence Code, 782 So. 2d 339 (Fla. 2000) (declining to adopt chapter 98-2, § 1, Laws of Florida, amending section 90.803(22), Florida Statutes, which allows the admission of former testimony although the declarant is available as witness, in part because of concerns about its constitutionality).

Finally, in chapter 2011-233, section 10, Laws of Florida, the Legislature created section 766.102(12), Florida Statutes, which provides as follows:

> 766.102 Medical negligence; standards of recovery; expert witness.
>
> (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.

§ 766.102(12), Fla. Stat. (2012). The Committee voted 14-13 to recommend that the statutory provision be adopted as a rule of procedure to the extent that it is procedural. The Board of Governors voted 34-5 to recommend that the Court reject the Committee's proposal, on the grounds that the provision is unconstitutional, will have a chilling effect on the ability to obtain expert witnesses, and is prejudicial to the administration of justice. Numerous comments were filed with respect to this proposal, all in opposition to its adoption. After hearing oral argument and carefully considering the Committee's recommendation

in light of those comments, we decline to follow this recommendation due to the concerns raised.

Accordingly, the Court declines to adopt the legislative changes to the Code or newly created section 766.102(12), Florida Statutes, to the extent they are procedural.

It is so ordered.

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.
CANADY, J., dissents with an opinion.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

CANADY, J., dissenting.

I would adopt each of the rule amendments recommended by the Code and Rules of Evidence Committee. I therefore dissent from the majority's rejection of those proposals.

Original Proceedings – Florida Bar Code and Rules of Evidence Committee

Thomas Charles Allison, Chair, Code and Rules of Evidence Committee, Fox Rothschild LLP, West Palm Beach, Florida; Thomas D. Shults, Past Chair, Code and Rules of Evidence Committee, Kirk-Pinkerton, P.A., Sarasota, Florida; John Harkness, Executive Director, and Ellen Sloyer, Bar Staff Liaison, The Florida Bar, Tallahassee, Florida,

for Petitioner

Wayne Lawrence Helsby, Winter Park, Florida, Theodore C. Eastmoore, Sarasota, Florida, and Hector Antonio Moré, Orlando, Florida, on behalf of The Trial Lawyers Section of the Florida Bar; Jay Cohen of the Law Office of Jay Cohen, P.A., Ft. Lauderdale, Florida; Scott Ramsey McMillen of McMillen Law Firm, Orlando, Florida; Stuart Z. Grossman, Neal Allan Roth, Andrew B. Yaffa, Seth Eric Miles, Brett Elliott Von Borke, Natasha Santiago Cortes, Susan C. Odess, David Marc Buckner, and Robert Cecil Gilbert of Grossman Roth, P.A., Coral Gables, Florida; Gary M. Cohen of Grossman Roth, P.A., Boca Raton, Florida; William E. Partridge and Patrick Stephen McArdle of Grossman Roth and Partridge, Sarasota, Florida; Sean C. Domnick of Domnick and Shevin PL, Palm Beach Gardens, Florida; James William Gustafson, Jr. of Searcy Denney Scarola Barnhart & Shipley, P.A., Tallahassee, Florida; Larry Scott Stewart of Stewart Tilghman Fox Bianchi & Gain, P.A., Miami, Florida; and Lee Delton Gunn, IV of the Gunn Law Group, Tampa Florida,

Responding with comments

CHAPTER 2011-183

Committee Substitute for House Bill No. 325

An act relating to estates; creating s. 90.5021, F.S.; providing a fiduciary lawyer-client privilege; providing that the section is inapplicable to a specified crime or fraud exception to lawyer-client privilege; amending s. 732.102, F.S.; revising provisions relating to the intestate share of a surviving spouse; creating s. 732.615, F.S.; providing a right to reform the terms of a will to correct mistakes; creating s. 732.616, F.S.; providing a right to modify the terms of a will to achieve tax objectives; creating s. 733.1061, F.S.; providing for a court to award fees and costs in reformation and modification proceedings either against a party's share in the estate or in the form of a personal judgment against a party individually; amending s. 732.5165, F.S.; clarifying that a revocation of a will is subject to challenge on the grounds of fraud, duress, mistake, or undue influence; amending s. 732.518, F.S.; specifying that a challenge to the revocation of a will may not be commenced before the testator's death; amending s. 733.212, F.S.; providing for notice of fiduciary lawyer-client privilege in a notice of administration; amending s. 736.0207, F.S.; clarifying when a challenge to the revocation of a revocable trust may be brought; amending s. 736.0406, F.S.; providing that the creation of a trust amendment or trust restatement and the revocation of a trust are subject to challenge on the grounds of fraud, duress, mistake, or undue influence; amending s. 736.0813, F.S.; providing for notice of fiduciary lawyer-client privilege by a trustee; amending s. 744.441, F.S.; limiting the circumstances under which a guardian of an incapacitated person may bring a challenge to a settlor's revocation of a revocable trust; amending s. 736.0201, F.S.; clarifying that certain payments by a trustee from trust assets are not taxation of attorney's fees and costs subject to a specified Rule of Civil Procedure; providing effective dates.

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

Section 1. Section 90.5021, Florida Statutes, is created to read:

90.5021 Fiduciary lawyer-client privilege.—

(1) For the purpose of this section, a client acts as a fiduciary when serving as a personal representative or a trustee as defined in ss. 731.201 and 736.0103, an administrator ad litem as described in s. 733.308, a curator as described in s. 733.501, a guardian or guardian ad litem as defined in s. 744.102, a conservator as defined in s. 710.102, or an attorney in fact as described in chapter 709.

(2) A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary. In applying s. 90.502 to a

communication under this section, only the person or entity acting as a fiduciary is considered a client of the lawyer.

(3) This section does not affect the crime or fraud exception to the lawyer-client privilege provided in s. 90.502(4)(a).

Section 2. Effective October 1, 2011, subsections (2) and (3) of section 732.102, Florida Statutes, are amended, and subsection (4) is added to that section, to read:

732.102 Spouse's share of intestate estate.—The intestate share of the surviving spouse is:

(2) If the decedent is survived by one or more descendants ~~there are surviving descendants of the decedent~~, all of whom are also ~~lineal~~ descendants of the surviving spouse, and the surviving spouse has no other descendant, the entire intestate estate ~~the first $60,000 of the intestate estate, plus one-half of the balance of the intestate estate. Property allocated to the surviving spouse to satisfy the $60,000 shall be valued at the fair market value on the date of distribution~~.

(3) If there are one or more surviving descendants of the decedent who~~,~~ ~~one or more of whom~~ are not lineal descendants of the surviving spouse, one-half of the intestate estate.

(4) If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants who are not descendants of the decedent, one-half of the intestate estate.

Section 3. Effective July 1, 2011, section 732.615, Florida Statutes, is created to read:

732.615 Reformation to correct mistakes.—Upon application of any interested person, the court may reform the terms of a will, even if unambiguous, to conform the terms to the testator's intent if it is proved by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. In determining the testator's original intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plain meaning of the will.

Section 4. Effective July 1, 2011, section 732.616, Florida Statutes, is created to read:

732.616 Modification to achieve testator's tax objectives.—Upon application of any interested person, to achieve the testator's tax objectives the court may modify the terms of a will in a manner that is not contrary to the testator's probable intent. The court may provide that the modification has retroactive effect.

Section 5. Effective July 1, 2011, section 733.1061, Florida Statutes, is created to read:

733.1061 Fees and costs; will reformation and modification.—

(1) In a proceeding arising under s. 732.615 or s. 732.616, the court shall award taxable costs as in chancery actions, including attorney's fees and guardian ad litem fees.

(2) When awarding taxable costs, including attorney's fees and guardian ad litem fees, under this section, the court in its discretion may direct payment from a party's interest, if any, in the estate or enter a judgment which may be satisfied from other property of the party, or both.

Section 6. Section 732.5165, Florida Statutes, is amended to read:

732.5165 Effect of fraud, duress, mistake, and undue influence.—A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons. If the revocation of a will, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void.

Section 7. Section 732.518, Florida Statutes, is amended to read:

732.518 Will contests.—An action to contest the validity of all or part of a will or the revocation of all or part of a will may not be commenced before the death of the testator.

Section 8. Paragraph (b) of subsection (2) of section 733.212, Florida Statutes, is amended to read:

733.212 Notice of administration; filing of objections.—

(2) The notice shall state:

(b) The name and address of the personal representative and the name and address of the personal representative's attorney, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the personal representative and any attorney employed by the personal representative.

Section 9. Section 736.0207, Florida Statutes, is amended to read:

736.0207 Trust contests.—An action to contest the validity of all or part of a revocable trust, or the revocation of part of a revocable trust, may not be commenced until the trust becomes irrevocable by its terms or by the settlor's death. If all of a revocable trust has been revoked, an action to contest the revocation may not be commenced until after the settlor's death., ~~except~~ This section does not prohibit such action by the guardian of the property of an incapacitated settlor.

Section 10. Section 736.0406, Florida Statutes, is amended to read:

736.0406 Effect of fraud, duress, mistake, or undue influence.—~~A trust is void~~ If the creation, amendment, or restatement of a ~~the~~ trust is procured by fraud, duress, mistake, or undue influence, the trust or ~~:~~ any part so procured ~~of the trust~~ is void. ~~if procured by such means, but~~ The remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons. If the revocation of a trust, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void.

Section 11. Paragraphs (a) and (b) of subsection (1) of section 736.0813, Florida Statutes, are amended to read:

736.0813 Duty to inform and account.—The trustee shall keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration.

(1) The trustee's duty to inform and account includes, but is not limited to, the following:

(a) Within 60 days after acceptance of the trust, the trustee shall give notice to the qualified beneficiaries of the acceptance of the trust, ~~and~~ the full name and address of the trustee, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the trustee and any attorney employed by the trustee.

(b) Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, the trustee shall give notice to the qualified beneficiaries of the trust's existence, the identity of the settlor or settlors, the right to request a copy of the trust instrument, ~~and~~ the right to accountings under this section, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the trustee and any attorney employed by the trustee.

Paragraphs (a) and (b) do not apply to an irrevocable trust created before the effective date of this code, or to a revocable trust that becomes irrevocable before the effective date of this code. Paragraph (a) does not apply to a trustee who accepts a trusteeship before the effective date of this code.

Section 12. Subsection (11) of section 744.441, Florida Statutes, is amended to read:

744.441 Powers of guardian upon court approval.—After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

(11) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties. Before authorizing a guardian to bring an action described in s. 736.0207, the court shall first find that the action appears to be in the ward's

best interests during the ward's probable lifetime. There shall be a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interests if the revocation relates solely to a devise. This subsection does not preclude a challenge after the ward's death. If the court denies a request that a guardian be authorized to bring an action described in s. 736.0207, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

Section 13. Subsection (1) of section 736.0201, Florida Statutes, is amended, and subsection (6) is added to that section, to read:

736.0201 Role of court in trust proceedings.—

(1) Except as provided in subsections ~~subsection~~ (5) and (6) and s. 736.0206, judicial proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure.

(6) Rule 1.525, Florida Rules of Civil Procedure, shall apply to judicial proceedings concerning trusts, except that the following do not constitute taxation of costs or attorney's fees even if the payment is for services rendered or costs incurred in a judicial proceeding:

(a) A trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust.

(b) A determination by the court directing from what part of the trust fees or costs shall be paid, unless the determination is made under s. 736.1004 in an action for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers.

Section 14. Except as otherwise expressly provided in this act, this act shall take effect upon becoming a law and shall apply to all proceedings pending before such date and all cases commenced on or after the effective date.

Approved by the Governor June 21, 2011.

Filed in Office Secretary of State June 21, 2011.

CHAPTER 2012-152

Committee Substitute for House Bill No. 701

An act relating to the Florida Evidence Code; amending s. 90.804, F.S.; providing that a statement offered against a party that wrongfully caused the declarant's unavailability is not excluded as hearsay; providing an effective date.

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

Section 1. Paragraph (f) is added to subsection (2) of section 90.804, Florida Statutes, to read:

90.804 Hearsay exceptions; declarant unavailable.—

(2) HEARSAY EXCEPTIONS.—The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:

(f) *Statement offered against a party that wrongfully caused the declarant's unavailability.*—A statement offered against a party that wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability as a witness, and did so intending that result.

Section 2. This act shall take effect upon becoming a law.

Approved by the Governor April 27, 2012.

Filed in Office Secretary of State April 27, 2012.

CHAPTER 2011-233

Committee Substitute for Committee Substitute for Committee Substitute for Committee Substitute for House Bill No. 479

An act relating to medical malpractice; creating ss. 458.3175, 459.0066, and 466.005, F.S.; requiring the Department of Health to issue expert witness certificates to certain physicians and dentists licensed outside of the state; providing application and certification requirements; establishing application fees; providing for the validity and use of certifications; exempting physicians and dentists issued certifications from certain licensure and fee requirements; amending ss. 458.331, 459.015, and 466.028, F.S.; providing additional acts that constitute grounds for denial of a license or disciplinary action to which penalties apply; providing construction with respect to the doctrine of incorporation by reference; amending ss. 458.351 and 459.026, F.S.; requiring the Board of Medicine and the Board of Osteopathic Medicine to adopt within a specified period certain patient forms specifying cataract surgery risks; specifying that an incident resulting from risks disclosed in the patient form is not an adverse incident; providing for the execution and admissibility of the patient forms in civil and administrative proceedings; creating a rebuttable presumption that a physician disclosed cataract surgery risks if the patient form is executed; amending s. 627.4147, F.S.; 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; amending s. 766.102, F.S.; defining terms; providing that certain insurance information is not admissible as evidence in medical negligence actions; requiring that certain expert witnesses who provide certain expert testimony meet certain licensure or certification requirements; excluding a health care provider's failure to comply with or breach of federal requirements from evidence in medical negligence cases in the state; amending s. 766.106, F.S.; requiring a claimant for medical malpractice to execute an authorization form; revising provisions relating to discovery and admissibility; allowing a prospective medical malpractice defendant to interview a claimant's treating health care providers without the presence of the claimant or the claimant's legal representative; requiring a prospective defendant to provide 10 days' notice before such interviews; authorizing a prospective defendant to take unsworn statements of a claimant's health care providers; creating s. 766.1065, F.S.; requiring that presuit notice for medical negligence claims be accompanied by an authorization for release of protected health information; providing requirements for the form of such authorization; amending s. 766.110, F.S.; authorizing a health care facility to use scientific diagnostic disease methodologies that use information regarding specific diseases in health care facilities and that are adopted by the facility's medical review committee; amending s. 766.206, F.S.; requiring dismissal of a medical malpractice claim if such authorization is not completed in good faith;

amending s. 768.135, F.S.; providing immunity for volunteer team physicians under certain circumstances; providing an effective date.

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

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

458.3175 Expert witness certificate.—

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

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

2. An application fee of $50.

(b) The department shall approve an application for an expert witness certificate within 10 business days after receipt of the completed application and payment of the application fee if the applicant holds an active and valid license to practice medicine in another state or a province of Canada and has not had a previous expert witness certificate revoked by the board. An application is approved by default if the department does not act upon the application within the required period. A physician must notify the department in writing of his or her intent to rely on a certificate approved by default.

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

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

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

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

(3) An expert witness certificate does not authorize a physician to engage in the practice of medicine as defined in s. 458.305. A physician issued a certificate under this section who does not otherwise practice medicine in this state is not required to obtain a license under this chapter or pay any license fees, including, but not limited to, a neurological injury compensation assessment. An expert witness certificate shall be treated as a license in

any disciplinary action, and the holder of an expert witness certificate shall be subject to discipline by the board.

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

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

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

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

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

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

458.351 Reports of adverse incidents in office practice settings.—

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

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

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

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

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

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

459.0066 Expert witness certificate.—

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

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

2. An application fee of $50.

(b) The department shall approve an application for an expert witness certificate within 10 business days after receipt of the completed application and payment of the application fee if the applicant holds an active and valid license to practice osteopathic medicine in another state or a province of Canada and has not had a previous expert witness certificate revoked by the board. An application is approved by default if the department does not act upon the application within the required period. A physician must notify the department in writing of his or her intent to rely on a certificate approved by default.

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

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

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

(b) Provide expert testimony about the prevailing professional standard of care in connection with medical negligence litigation pending in this state against a physician licensed under chapter 458 or this chapter.

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

Section 5. Subsection (11) is added to section 459.015, Florida Statutes, paragraphs (qq) through (ss) of subsection (1) of that section are redesignated

as paragraphs (rr) through (tt), respectively, and a new paragraph (qq) is added to that subsection, to read:

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

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

(qq) Providing deceptive or fraudulent expert witness testimony related to the practice of osteopathic medicine.

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

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

466.005 Expert witness certificate.—

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

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

2. An application fee of $50.

(b) The department shall approve an application for an expert witness certificate within 10 business days after receipt of the completed application and payment of the application fee if the applicant holds an active and valid license to practice dentistry in another state or a province of Canada and has not had a previous expert witness certificate revoked by the board. An application is approved by default if the department does not act upon the application within the required period. A dentist must notify the department in writing of his or her intent to rely on a certificate approved by default.

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

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

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

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

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

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

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

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

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

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

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

459.026 Reports of adverse incidents in office practice settings.—

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

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

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

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

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

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

627.4147 Medical malpractice insurance contracts.—

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

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

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

2.~~b.~~ If the policy contains a clause stating the insured does not have the exclusive right to veto any offer or admission of liability and for arbitration made pursuant to s. 766.106, settlement offer or offer of judgment, the insurer or self-insurer shall provide to the insured or the insured's legal representative by certified mail, return receipt requested, a copy of the final offer of admission of liability and for arbitration made pursuant to s. 766.106,

settlement offer or offer of judgment and at the same time such offer is provided to the claimant. A copy of any final agreement reached between the insurer and claimant shall also be provided to the insurer or his or her legal representative by certified mail, return receipt requested not more than 10 days after affecting such agreement.

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

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

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

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

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

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

(b) The existence of a medical injury does ~~shall~~ not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. Any records, policies, or testimony of an insurer's reimbursement policies or reimbursement determination regarding the care provided to the plaintiff are not admissible as evidence in any medical negligence action. However, the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider.

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

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

1. Specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; or specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical

condition that is the subject of the claim and have prior experience treating similar patients; and

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

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

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

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

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

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

2. The instruction of students in an accredited health professional school or accredited residency program in the general practice of medicine; or

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

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

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

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

3. A clinical research program that is affiliated with an accredited medical school or teaching hospital and that is in the same or similar health

profession as the health care provider against whom or on whose behalf the testimony is offered.

(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.

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

Section 11. Paragraph (a) of subsection (2), subsection (5), and paragraph (b) of subsection (6) of section 766.106, Florida Statutes, are amended to read:

766.106 Notice before filing action for medical negligence; presuit screening period; offers for admission of liability and for arbitration; informal discovery; review.—

(2) PRESUIT NOTICE.—

(a) After completion of presuit investigation pursuant to s. 766.203(2) and prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical negligence. Notice to each prospective defendant must include, if available, a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, ~~and~~ copies of all of the medical records relied upon by the expert in signing the affidavit, and the executed authorization form provided in s. 766.1065. ~~The requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions for failure to provide presuit discovery.~~

(5) DISCOVERY AND ADMISSIBILITY.—A ~~No~~ statement, discussion, written document, report, or other work product generated by the presuit screening process is not discoverable or admissible in any civil action for any purpose by the opposing party. All participants, including, but not limited to, physicians, investigators, witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit screening process. This subsection does not prevent a physician licensed under chapter 458 or chapter 459 or a dentist licensed under chapter 466 who submits a verified written expert medical opinion from being subject to denial of a license or disciplinary action under s. 458.331(1)(oo), s. 459.015(1)(qq), or s. 466.028(1)(ll).

(6) INFORMAL DISCOVERY.—

(b) Informal discovery may be used by a party to obtain unsworn statements, the production of documents or things, and physical and mental examinations, as follows:

1. Unsworn statements.—Any party may require other parties to appear for the taking of an unsworn statement. Such statements may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party. A party desiring to take the unsworn statement of any party must give reasonable notice in writing to all parties. The notice must state the time and place for taking the statement and the name and address of the party to be examined. Unless otherwise impractical, the examination of any party must be done at the same time by all other parties. Any party may be represented by counsel at the taking of an unsworn statement. An unsworn statement may be recorded electronically, stenographically, or on videotape. The taking of unsworn statements is subject to the provisions of the Florida Rules of Civil Procedure and may be terminated for abuses.

2. Documents or things.—Any party may request discovery of documents or things. The documents or things must be produced, at the expense of the requesting party, within 20 days after the date of receipt of the request. A party is required to produce discoverable documents or things within that party's possession or control. Medical records shall be produced as provided in s. 766.204.

3. Physical and mental examinations.—A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. The prospective defendant shall give reasonable notice in writing to all parties as to the time and place for examination. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants. The practicality of a single examination must be determined by the nature of the claimant's condition, as it relates to the liability of each prospective defendant. Such examination report is available to the parties and their attorneys upon payment of the reasonable cost of reproduction and may be used only for the purpose of presuit screening. Otherwise, such examination report is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

4. Written questions.—Any party may request answers to written questions, the number of which may not exceed 30, including subparts. A response must be made within 20 days after receipt of the questions.

5. Unsworn statements of treating health care providers

~~Medical information release.—The claimant must execute a medical information release that allows~~ A prospective defendant or his or her legal representative may also ~~to~~ take unsworn statements of the claimant's treating health care providers ~~physicians~~. The statements must be limited to those areas that are potentially relevant to the claim of personal injury or

wrongful death. Subject to the procedural requirements of subparagraph 1., a prospective defendant may take unsworn statements from a claimant's treating physicians. Reasonable notice and opportunity to be heard must be given to the claimant or the claimant's legal representative before taking unsworn statements. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.

Section 12. Section 766.1065, Florida Statutes, is created to read:

766.1065 Authorization for release of protected health information.—

(1) Presuit notice of intent to initiate litigation for medical negligence under s. 766.106(2) must be accompanied by an authorization for release of protected health information in the form specified by this section, authorizing the disclosure of protected health information that is potentially relevant to the claim of personal injury or wrongful death. The presuit notice is void if this authorization does not accompany the presuit notice and other materials required by s. 766.106(2).

(2) If the authorization required by this section is revoked, the presuit notice under s. 766.106(2) is deemed retroactively void from the date of issuance, and any tolling effect that the presuit notice may have had on any applicable statute-of-limitations period is retroactively rendered void.

(3) The authorization required by this section shall be in the following form and shall be construed in accordance with the "Standards for Privacy of Individually Identifiable Health Information" in 45 C.F.R. parts 160 and 164:

AUTHORIZATION FOR RELEASE OF
PROTECTED HEALTH INFORMATION

A. I, (...Name of patient or authorized representative...) [hereinafter "Patient"], authorize that (...Name of health care provider to whom the presuit notice is directed...) and his/her/its insurer(s), self-insurer(s), and attorney(s) may obtain and disclose (within the parameters set out below) the protected health information described below for the following specific purposes:

1. Facilitating the investigation and evaluation of the medical negligence claim described in the accompanying presuit notice; or

2. Defending against any litigation arising out of the medical negligence claim made on the basis of the accompanying presuit notice.

B. The health information obtained, used, or disclosed extends to, and includes, the verbal as well as the written and is described as follows:

1. The health information in the custody of the following health care providers who have examined, evaluated, or treated the Patient in connection with injuries complained of after the alleged act of negligence: (List the name and current address of all health care providers). This authorization extends to any additional health care providers that

may in the future evaluate, examine, or treat the Patient for the injuries complained of.

2. The health information in the custody of the following health care providers who have examined, evaluated, or treated the Patient during a period commencing 2 years before the incident that is the basis of the accompanying presuit notice.

(List the name and current address of such health care providers, if applicable.)

C. This authorization does not apply to the following list of health care providers possessing health care information about the Patient because the Patient certifies that such health care information is not potentially relevant to the claim of personal injury or wrongful death that is the basis of the accompanying presuit notice.

(List the name of each health care provider to whom this authorization does not apply and the inclusive dates of examination, evaluation, or treatment to be withheld from disclosure. If none, specify "none.")

D. The persons or class of persons to whom the Patient authorizes such health information to be disclosed or by whom such health information is to be used:

1. Any health care provider providing care or treatment for the Patient.

2. Any liability insurer or self-insurer providing liability insurance coverage, self-insurance, or defense to any health care provider to whom presuit notice is given regarding the care and treatment of the Patient.

3. Any consulting or testifying expert employed by or on behalf of (name of health care provider to whom presuit notice was given) and his/her/its insurer(s), self-insurer(s), or attorney(s) regarding to the matter of the presuit notice accompanying this authorization.

4. Any attorney (including secretarial, clerical, or paralegal staff) employed by or on behalf of (name of health care provider to whom presuit notice was given) regarding the matter of the presuit notice accompanying this authorization.

5. Any trier of the law or facts relating to any suit filed seeking damages arising out of the medical care or treatment of the Patient.

E. This authorization expires upon resolution of the claim or at the conclusion of any litigation instituted in connection with the matter of the presuit notice accompanying this authorization, whichever occurs first.

F. The Patient understands that, without exception, the Patient has the right to revoke this authorization in writing. The Patient further understands that the consequence of any such revocation is that the presuit notice under s. 766.106(2), Florida Statutes, is deemed retroactively void from the date of issuance, and any tolling effect that the presuit notice may have had on any applicable statute-of-limitations period is retroactively rendered void.

G. The Patient understands that signing this authorization is not a condition for continued treatment, payment, enrollment, or eligibility for health plan benefits.

H. The Patient understands that information used or disclosed under this authorization may be subject to additional disclosure by the recipient and may not be protected by federal HIPAA privacy regulations.

Signature of Patient/Representative: .....
Date: .....
Name of Patient/Representative: .....
Description of Representative's Authority: .....

Section 13. Subsection (3) is added to section 766.110, Florida Statutes, to read:

766.110 Liability of health care facilities.—

(3) In order to ensure comprehensive risk management for diagnosis of disease, a health care facility, including a hospital or ambulatory surgical center, as defined in chapter 395, may use scientific diagnostic disease methodologies that use information regarding specific diseases in health care facilities and that are adopted by the facility's medical review committee.

Section 14. Subsection (2) of section 766.206, Florida Statutes, is amended to read:

766.206 Presuit investigation of medical negligence claims and defenses by court.—

(2) If the court finds that the notice of intent to initiate litigation mailed by the claimant does ~~is~~ not comply ~~in compliance~~ with the reasonable investigation requirements of ss. 766.201-766.212, including a review of the claim and a verified written medical expert opinion by an expert witness as defined in s. 766.202, or that the authorization accompanying the notice of intent required under s. 766.1065 is not completed in good faith by the claimant, the court shall dismiss the claim, and the person who mailed such notice of intent, whether the claimant or the claimant's attorney, is ~~shall be~~ personally liable for all attorney's fees and costs incurred during the investigation and evaluation of the claim, including the reasonable attorney's fees and costs of the defendant or the defendant's insurer.

Section 15. Section 768.135, Florida Statutes, is amended to read:

768.135 Volunteer team physicians; immunity.—

(1) A volunteer team physician is any person licensed to practice medicine pursuant to chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466:

(a)~~(1)~~ Who is acting in the capacity of a volunteer team physician in attendance at an athletic event sponsored by a public or private elementary or secondary school; and

(b)~~(2)~~ Who gratuitously and in good faith prior to the athletic event agrees to render emergency care or treatment to any participant in such event in connection with an emergency arising during or as the result of such event, without objection of such participant.~~,~~

(2) A volunteer team physician is ~~shall~~ not ~~be held~~ liable for any civil damages as a result of such care or treatment or as a result of any act or failure to act in providing or arranging further medical treatment unless the ~~when such~~ care or treatment was rendered in a wrongful manner ~~as a reasonably prudent person similarly licensed to practice medicine would have acted under the same or similar circumstances~~.

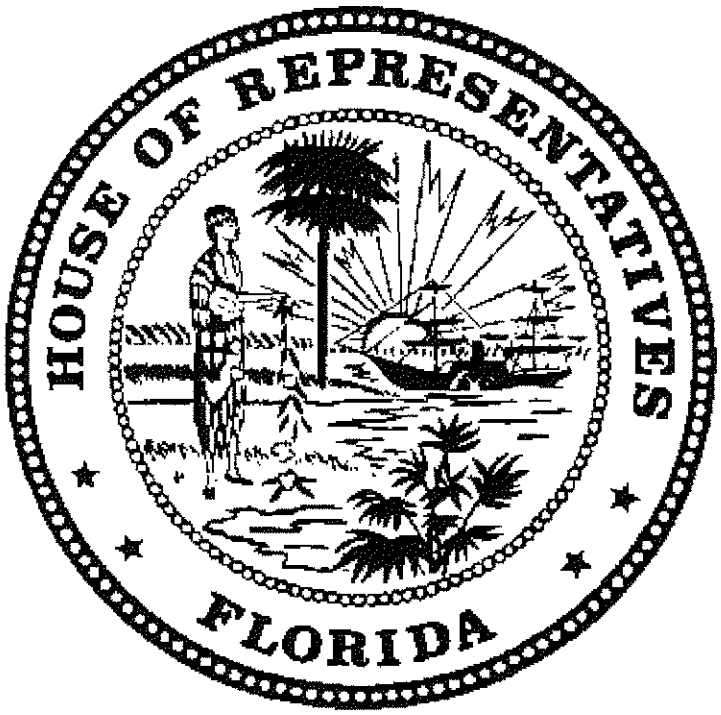
(3) A practitioner licensed under chapter 458, chapter 459, chapter 460, or s. 464.012 who gratuitously and in good faith conducts an evaluation pursuant to s. 1006.20(2)(c) is not liable for any civil damages arising from that evaluation unless the evaluation was conducted in a wrongful manner.

(4) As used in this section, the term "wrongful manner" means in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, and shall be construed in conformity with the standard set forth in s. 768.28(9)(a).

Section 16. This act shall take effect October 1, 2011, and applies to causes of action accruing on or after that date.

Approved by the Governor June 27, 2011.

Filed in Office Secretary of State June 27, 2011.



Civil Justice Subcommittee

Tuesday, January 14, 2014
1:00 PM
404 HOB

AMENDMENT PACKET

Will Weatherford
Speaker

Larry Metz
Chair

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 105 (2014)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Ahern offered the following:

Amendment

Remove lines 62-64 and insert:

(12) "Pregnancy" means the condition resulting in a female from the fertilized ovum, the existence of the condition beginning at the moment of conception and terminating with delivery of the child.