S T A T E  O F  N E W  Y O R K

2349

2011-2012 Regular Sessions

I N  S E N A T E

January 19, 2011

Introduced by Sen. HANNON -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the civil practice law and rules and the education law, in relation to the use of expert medical testimony; to amend the civil practice law and rules, in relation to creating the health care courts pilot program; and to repeal certain provisions of the civil practice law and rules relating thereto

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subparagraph (i) of paragraph 1 of subdivision (d) of section 3101 of the civil practice law and rules, as amended by chapter 184 of the laws of 1988, is amended to read as follows:

(i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, [a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph] NO INDIVIDUAL SHALL BE QUALIFIED TO TESTIFY AS AN EXPERT WITNESS UNLESS SUCH INDIVIDUAL IS A HEALTH CARE PROFESSIONAL WHO: (A) IS LICENSED TO PRACTICE IN AT LEAST ONE STATE IN THE SAME PROFESSION AS THE DEFENDANT;

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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(B) IS ACTIVELY ENGAGED IN CLINICAL PRACTICE OR TEACHING AND EXPERIENCED IN THE CARE AT ISSUE; AND (C) IF THE DEFENDANT IS BOARD CERTIFIED AND THE STANDARD OF CARE AT ISSUE INVOLVES HIS OR HER SPECIALTY, THE EXPERT MUST BE BOARD CERTIFIED IN THE SAME SPECIALTY.

S 2. Subparagraph (ii) of paragraph 1 of subdivision (d) of section 3101 of the civil practice law and rules is REPEALED and a new subparagraph (ii) is added to read as follows:

(II) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE OR OF ARTICLE THIRTY-TWO OF THIS CHAPTER, IN AN ACTION FOR MEDICAL, DENTAL OR PODIATRIC MALPRACTICE, AT THE TIMES AND IN THE SEQUENCE DIRECTED BY THE COURT, SUCH TIMES TO BE PRIOR TO THE SERVICE AND FILING OF A NOTE OF ISSUE UNLESS THE COURT DIRECTS OTHERWISE AND PRESERVES THE RIGHT OF EVERY PARTY TO DEPOSE A PERSON WHOSE DISCLOSURE OCCURS SUBSEQUENT TO THE FILING OF A NOTE OF ISSUE, EACH PARTY SHALL DISCLOSE TO THE OTHER PARTIES THE IDENTITY OF ANY PERSON WHO MAY BE USED AT TRIAL TO PROVIDE EXPERT TESTIMONY IN THE CASE AND EACH SUCH DISCLOSURE SHALL BE ACCOMPANIED BY A WRITTEN REPORT PREPARED AND SIGNED BY SUCH PERSON. THE REPORT SHALL CONTAIN A COMPLETE STATEMENT OF ALL OPINIONS TO BE EXPRESSED AND THE BASIS AND REASONS THEREFOR; THE DATA OR OTHER INFORMATION CONSIDERED BY SUCH PERSON IN FORMING THE OPINIONS; ANY EXHIBITS TO BE USED AS A SUMMARY OF OR SUPPORT FOR THE OPINIONS; THE QUALIFICATIONS OF THE PERSON, INCLUDING A LIST OF ALL PUBLICATIONS AUTHORED BY THE PERSON DURING THE PRECEDING TEN YEARS; THE COMPENSATION TO BE PAID FOR THE PERSON'S CONSIDERATION OF DATA OR OTHER INFORMATION AND FOR HIS OR HER TESTIMONY; AND A LISTING OF ANY OTHER CASES IN WHICH THE PERSON HAS TESTIFIED AS AN EXPERT AT TRIAL OR BY ORAL DEPOSITION WITHIN THE PRECEDING FOUR YEARS. EACH PARTY SHALL BE REQUIRED TO PRODUCE EACH PERSON SO IDENTIFIED BY SUCH PARTY AS AN EXPERT WITNESS, FOR EXAMINATION UPON ORAL DEPOSITION UPON RECEIPT OF A NOTICE TO TAKE ORAL DEPOSITION IN ACCORDANCE WITH RULE THIRTY-ONE HUNDRED SEVEN OF THIS ARTICLE. UNLESS MANIFEST INJUSTICE WOULD RESULT, THE COURT SHALL REQUIRE THAT THE PARTY NOTICING AN ORAL DEPOSITION OF SUCH AN EXPERT WITNESS PAY SUCH WITNESS A REASONABLE FEE FOR TIME SPENT IN ATTENDING SUCH ORAL DEPOSITION. IF ANY PARTY FAILS TO IDENTIFY A PERSON AS AN EXPERT WITNESS IN ACCORDANCE WITH THE PROVISIONS OF THIS SUBPARAGRAPH, OR IF ANY PARTY FAILS TO MAKE ANY PERSON IDENTIFIED BY THE PARTY AS AN EXPERT WITNESS AVAILABLE FOR ORAL DEPOSITION IN ACCORDANCE WITH THE PROVISIONS OF THIS SUBPARAGRAPH, SUCH PARTY SHALL BE PRECLUDED FROM OFFERING SUCH EXPERT'S TESTIMONY AT THE TRIAL OF THE ACTION.

S 3. The civil practice law and rules is amended by adding a new article 44-A to read as follows:

ARTICLE 44-A

HEALTH CARE COURTS PILOT PROGRAM

SECTION 4410. CREATION.
4411. HEALTH CARE COURT JUDGES; SELECTION.
4412. JUDICIAL TRAINING.
4413. COURT APPOINTED MEDICAL EXPERTS.
4414. PROCEDURE.
4415. APPELLATE REVIEW.
4416. REPORTS.
4417. DISCLAIMER.

S 4410. CREATION. THE OFFICE OF COURT ADMINISTRATION MAY SELECT UP TO FIVE COUNTIES, EACH WITHIN A SEPARATE JUDICIAL DISTRICT IN THIS STATE, TO ESTABLISH SPECIALIZED HEALTH CARE COURTS WITHIN THE SUPREME COURT OF SUCH COUNTIES TO GOVERN CLAIMS FOR MEDICAL, DENTAL OR PODIATRIC MALPRACTICE AS SET FORTH IN THIS SECTION. ONCE A SUPREME COURT WITHIN A PARTIC-

ULAR COUNTY HAS ESTABLISHED A HEALTH CARE COURT AS SET FORTH IN THIS SECTION, SUCH COURT SHALL HAVE EXCLUSIVE JURISDICTION OVER ALL THE CLAIMS FOR MEDICAL, DENTAL OR PODIATRIC MALPRACTICE BROUGHT WITHIN THE SUPREME COURT OF SUCH COUNTY.

S 4411. HEALTH CARE COURT JUDGES; SELECTION. JUDGES SHALL BE SELECTED TO SERVE IN THE HEALTH CARE COURT DIVISION FROM AMONG THOSE JUDGES WHO ARE ELECTED OR APPOINTED TO THE SUPREME COURT IN A COUNTY SELECTED TO PARTICIPATE IN THE HEALTH CARE COURTS PILOT PROGRAM. FOR THE PURPOSES OF THIS ARTICLE, "JUDGE" SHALL MEAN A JUDGE OF THE HEALTH CARE DIVISION.

S 4412. JUDICIAL TRAINING. (A) UPON SELECTION OF A PARTICULAR SUPREME COURT JUDGE TO HEAR CASES IN THE COUNTY'S HEALTH CARE COURT AND PRIOR TO HEARING SUCH CASES, EACH JUDGE SHALL COMPLETE A JUDICIAL TRAINING PROGRAM ON THE LAW AND SCIENCE OF MEDICINE THAT MAY BE THE BASIS FOR CASES FALLING UNDER THE JURISDICTION OF THE HEALTH CARE COURT. SUCH PROGRAM SHALL BE ADMINISTERED BY THE OFFICE OF COURT ADMINISTRATION.

(B) A COMMITTEE SHALL BE CREATED TO DEVELOP THE CURRICULUM OF THE JUDICIAL TRAINING PROGRAM. A TASK FORCE SHALL BE COORDINATED BY THE OFFICE OF COURT ADMINISTRATION AND SHALL INCLUDE EQUAL REPRESENTATION FROM THE MEDICAL SOCIETY OF THE STATE OF NEW YORK AND THE NEW YORK STATE BAR ASSOCIATION.

(C) THE CURRICULUM TO BE CREATED PURSUANT TO SUBDIVISION (B) OF THIS SECTION SHALL INCLUDE BOTH IN-CLASSROOM CLINICAL TRAINING AND AN INTERNSHIP. THE IN-CLASSROOM CLINICAL TRAINING SHALL INCLUDE AT THE MINIMUM THE FOLLOWING: AN OVERVIEW OF THE MAJOR BODY SYSTEMS, PHARMACOLOGY, COMMON DISEASE PATHOLOGY, ALTERNATIVE MEDICINE THERAPIES, AND THE EDUCATION AND TRAINING REQUIRED FOR VARIOUS HEALTH PROFESSIONALS. THE INTERNSHIP SHALL PROVIDE JUDGES AN OPPORTUNITY TO FOLLOW A PRACTICING PHYSICIAN AND OTHER HEALTH CARE PROFESSIONALS IN DIFFERENT HEALTH CARE SETTINGS. THE TRAINING PROGRAM MAY ALSO INCLUDE A LEGAL COMPONENT WHICH SHALL INCLUDE A REVIEW OF MEDICAL LEGAL ISSUES THAT MAY BE THE BASIS OF CASES FALLING UNDER THE JURISDICTION OF THE HEALTH CARE COURT.

S 4413. COURT APPOINTED MEDICAL EXPERTS. (A) THE HEALTH CARE COURT SHALL MAINTAIN A LIST OF QUALIFIED MEDICAL EXPERTS WHO MAY BE UTILIZED BY THE COURT TO PROVIDE INDEPENDENT EXPERT OPINIONS TO THE JUDGE. SUCH EXPERTS MAY PROVIDE OPINIONS IN WRITING TO THE JUDGE OR MAY BE CALLED BY THE JUDGE TO TESTIFY BEFORE THE COURT TO CLARIFY OR INTERPRET MEDICAL TESTIMONY OR EVIDENCE, OR FOR ANY OTHER PURPOSE THE JUDGE DEEMS RELEVANT TO THE PROCEEDINGS.

(B) A COURT APPOINTED MEDICAL EXPERT MUST MEET THE FOLLOWING MINIMUM EXPERT WITNESS REQUIREMENTS:

(1) HOLDS AN ACTIVE LICENSE IN THE SAME PROFESSION AS THE DEFENDANT. IF THE DEFENDANT IS LICENSED TO PRACTICE MEDICINE IN THIS STATE, THE EXPERT WITNESS MUST ALSO BE LICENSED TO PRACTICE MEDICINE IN THIS STATE;

(2) IS TRAINED AND EXPERIENCED IN THE SAME DISCIPLINE OR SCHOOL OF PRACTICE AS THE DEFENDANT AND CAN DEMONSTRATE BY COMPETENT EVIDENCE THAT, AS A RESULT OF TRAINING, EDUCATION, KNOWLEDGE, AND EXPERIENCE IN THE EVALUATION, DIAGNOSIS, AND TREATMENT OF THE DISEASE OR INJURY WHICH IS THE SUBJECT MATTER OF THE LAWSUIT AGAINST THE DEFENDANT, THE INDIVIDUAL WAS SUBSTANTIALLY FAMILIAR WITH THE APPLICABLE STANDARDS OF CARE AND PRACTICE AS THEY RELATE TO THE ACT OR OMISSION WHICH IS THE SUBJECT OF THE LAWSUIT ON THE DATE OF THE INCIDENT;

(3) IF THE DEFENDANT IS CERTIFIED BY A BOARD RECOGNIZED BY THE AMERICAN BOARD OF MEDICAL SPECIALITIES OR THE AMERICAN OSTEOPATHIC ASSOCIATION, THE EXPERT MUST BE CERTIFIED IN THE SAME SPECIALTY BY A BOARD RECOGNIZED BY THE AMERICAN BOARD OF MEDICAL SPECIALITIES OR THE AMERICAN OSTEOPATHIC ASSOCIATION AND MUST HAVE ACKNOWLEDGED EXPERTISE AND TRAIN-

ING DIRECTLY RELATED TO THE PARTICULAR HEALTH CARE OR MATTER AT ISSUE; AND

(4) WITHIN FIVE YEARS OF THE DATE OF THE ALLEGED OCCURRENCE GIVING RISE TO THE CLAIM, WAS IN ACTIVE MEDICAL PRACTICE IN THE SAME DISCIPLINE OR SCHOOL OF PRACTICE AS THE DEFENDANT OR DEVOTED A SUBSTANTIAL PORTION OF HIS TIME TEACHING AT AN ACCREDITED MEDICAL SCHOOL, OR IN UNIVERSITY-BASED RESEARCH IN RELATION TO THE MEDICAL CARE AND TYPE OF TREATMENT AT ISSUE.

(C) A COURT APPOINTED MEDICAL EXPERT SHALL HAVE NO FINANCIAL TIES OR FAMILIAL RELATIONSHIP WITH ANY PARTY TO THE LAWSUIT, ANY EXPERT CALLED TO TESTIFY, OR ANY ATTORNEY REPRESENTING ANY PARTY TO THE LAWSUIT.

(D) THE COURT APPOINTED MEDICAL EXPERT SHALL HAVE NO EX PARTE COMMUNICATIONS WITH ANY PARTY TO THE LAWSUIT, EXCEPT AS PERMITTED BY THE COURT.

(E) THE PLAINTIFF AND DEFENDANT SHALL EQUALLY COMPENSATE THE COURT APPOINTED MEDICAL EXPERT BASED ON THE PREVAILING FEE FOR MEDICAL EXPERTS WITH SIMILAR QUALIFICATIONS.

S 4414. PROCEDURE. CLAIMS ADJUDICATED THROUGH THE HEALTH CARE COURT SHALL ADHERE TO THIS CHAPTER EXCEPT AS OTHERWISE PROVIDED FOR IN THIS ARTICLE.

S 4415. APPELLATE REVIEW. ANY PARTY TO AN ACTION IN A HEALTH CARE COURT MAY AVAIL THEMSELVES OF ALL APPEAL RIGHTS THAT OTHERWISE WOULD BE AVAILABLE UNDER THIS CHAPTER.

S 4416. REPORTS. THE OFFICE OF COURT ADMINISTRATION SHALL SUBMIT AN ANNUAL REPORT TO THE SPEAKER OF THE ASSEMBLY, THE TEMPORARY PRESIDENT OF THE SENATE, THE MINORITY LEADER OF THE SENATE, THE MINORITY LEADER OF THE ASSEMBLY AND THE GOVERNOR DESCRIBING THE FUNCTIONING OF THE HEALTH CARE COURTS, INCLUDING THE NUMBER OF DISPUTES HEARD BY THE COURTS AND RECOMMENDATIONS FOR IMPROVING THE ABILITY OF SUCH COURTS TO RESOLVE CLAIMS INVOLVING MEDICAL, DENTAL OR PODIATRIC MALPRACTICE.

S 4417. DISCLAIMER. NOTHING IN THIS ARTICLE SHALL BE CONSTRUED TO REMOVE THE JURY AS THE ULTIMATE FINDER OF FACT IN AN ACTION FOR MEDICAL, DENTAL OR PODIATRIC MALPRACTICE.

S 4. Section 6530 of the education law is amended by adding a new subdivision 50 to read as follows:

50. PROVIDING EXPERT MEDICAL TESTIMONY THAT IS FALSE OR COMPLETELY WITHOUT REASONABLE MEDICAL FOUNDATION IN ANY ACTION FOR INJURY OR DEATH ARISING OUT OF THE PROVISION OF OR FAILURE TO PROVIDE HEALTH CARE SERVICES. AS USED IN THIS SUBDIVISION, TESTIMONY MAY BE CONSIDERED FALSE OR COMPLETELY WITHOUT REASONABLE MEDICAL FOUNDATION IF IT WAS WITHOUT FOUNDATION IN ACCEPTED PEER REVIEWED SCIENCE-BASED MEDICAL RESEARCH.

S 5. This act shall take effect on the ninetieth day after it shall have become a law.