

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:

1 Section 1. Subparagraph (i) of paragraph 1 of subdivision (d) of
2 section 3101 of the civil practice law and rules, as amended by chapter
3 184 of the laws of 1988, is amended to read as follows:
4 (i) Upon request, each party shall identify each person whom the party
5 expects to call as an expert witness at trial and shall disclose in
6 reasonable detail the subject matter on which each expert is expected to
7 testify, the substance of the facts and opinions on which each expert is
8 expected to testify, the qualifications of each expert witness and a
9 summary of the grounds for each expert's opinion. However, where a party
10 for good cause shown retains an expert an insufficient period of time
11 before the commencement of trial to give appropriate notice thereof, the
12 party shall not thereupon be precluded from introducing the expert's
13 testimony at the trial solely on grounds of noncompliance with this
14 paragraph. In that instance, upon motion of any party, made before or at
15 trial, or on its own initiative, the court may make whatever order may
16 be just. In an action for medical, dental or podiatric malpractice, [a
17 party, in responding to a request, may omit the names of medical, dental
18 or podiatric experts but shall be required to disclose all other infor-
19 mation concerning such experts otherwise required by this paragraph] NO
20 INDIVIDUAL SHALL BE QUALIFIED TO TESTIFY AS AN EXPERT WITNESS UNLESS
21 SUCH INDIVIDUAL IS A HEALTH CARE PROFESSIONAL WHO: (A) IS LICENSED TO
22 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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1 (B) IS ACTIVELY ENGAGED IN CLINICAL PRACTICE OR TEACHING AND EXPERIENCED
 2 IN THE CARE AT ISSUE; AND (C) IF THE DEFENDANT IS BOARD CERTIFIED AND
 3 THE STANDARD OF CARE AT ISSUE INVOLVES HIS OR HER SPECIALTY, THE EXPERT
 4 MUST BE BOARD CERTIFIED IN THE SAME SPECIALTY.

5 S 2. Subparagraph (ii) of paragraph 1 of subdivision (d) of section
 6 3101 of the civil practice law and rules is REPEALED and a new subpara-
 7 graph (ii) is added to read as follows:

8 (II) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE OR OF ARTICLE
 9 THIRTY-TWO OF THIS CHAPTER, IN AN ACTION FOR MEDICAL, DENTAL OR PODIA-
 10 TRIC MALPRACTICE, AT THE TIMES AND IN THE SEQUENCE DIRECTED BY THE
 11 COURT, SUCH TIMES TO BE PRIOR TO THE SERVICE AND FILING OF A NOTE OF
 12 ISSUE UNLESS THE COURT DIRECTS OTHERWISE AND PRESERVES THE RIGHT OF
 13 EVERY PARTY TO DEPOSE A PERSON WHOSE DISCLOSURE OCCURS SUBSEQUENT TO THE
 14 FILING OF A NOTE OF ISSUE, EACH PARTY SHALL DISCLOSE TO THE OTHER
 15 PARTIES THE IDENTITY OF ANY PERSON WHO MAY BE USED AT TRIAL TO PROVIDE
 16 EXPERT TESTIMONY IN THE CASE AND EACH SUCH DISCLOSURE SHALL BE ACCOMPA-
 17 NIED BY A WRITTEN REPORT PREPARED AND SIGNED BY SUCH PERSON. THE REPORT
 18 SHALL CONTAIN A COMPLETE STATEMENT OF ALL OPINIONS TO BE EXPRESSED AND
 19 THE BASIS AND REASONS THEREFOR; THE DATA OR OTHER INFORMATION CONSIDERED
 20 BY SUCH PERSON IN FORMING THE OPINIONS; ANY EXHIBITS TO BE USED AS A
 21 SUMMARY OF OR SUPPORT FOR THE OPINIONS; THE QUALIFICATIONS OF THE
 22 PERSON, INCLUDING A LIST OF ALL PUBLICATIONS AUTHORED BY THE PERSON
 23 DURING THE PRECEDING TEN YEARS; THE COMPENSATION TO BE PAID FOR THE
 24 PERSON'S CONSIDERATION OF DATA OR OTHER INFORMATION AND FOR HIS OR HER
 25 TESTIMONY; AND A LISTING OF ANY OTHER CASES IN WHICH THE PERSON HAS
 26 TESTIFIED AS AN EXPERT AT TRIAL OR BY ORAL DEPOSITION WITHIN THE PRECED-
 27 ING FOUR YEARS. EACH PARTY SHALL BE REQUIRED TO PRODUCE EACH PERSON SO
 28 IDENTIFIED BY SUCH PARTY AS AN EXPERT WITNESS, FOR EXAMINATION UPON ORAL
 29 DEPOSITION UPON RECEIPT OF A NOTICE TO TAKE ORAL DEPOSITION IN ACCORD-
 30 ANCE WITH RULE THIRTY-ONE HUNDRED SEVEN OF THIS ARTICLE. UNLESS MANIFEST
 31 INJUSTICE WOULD RESULT, THE COURT SHALL REQUIRE THAT THE PARTY NOTICING
 32 AN ORAL DEPOSITION OF SUCH AN EXPERT WITNESS PAY SUCH WITNESS A REASON-
 33 ABLE FEE FOR TIME SPENT IN ATTENDING SUCH ORAL DEPOSITION. IF ANY PARTY
 34 FAILS TO IDENTIFY A PERSON AS AN EXPERT WITNESS IN ACCORDANCE WITH THE
 35 PROVISIONS OF THIS SUBPARAGRAPH, OR IF ANY PARTY FAILS TO MAKE ANY
 36 PERSON IDENTIFIED BY THE PARTY AS AN EXPERT WITNESS AVAILABLE FOR ORAL
 37 DEPOSITION IN ACCORDANCE WITH THE PROVISIONS OF THIS SUBPARAGRAPH, SUCH
 38 PARTY SHALL BE PRECLUDED FROM OFFERING SUCH EXPERT'S TESTIMONY AT THE
 39 TRIAL OF THE ACTION.

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

42 ARTICLE 44-A

43 HEALTH CARE COURTS PILOT PROGRAM

44 SECTION 4410. CREATION.
 45 4411. HEALTH CARE COURT JUDGES; SELECTION.
 46 4412. JUDICIAL TRAINING.
 47 4413. COURT APPOINTED MEDICAL EXPERTS.
 48 4414. PROCEDURE.
 49 4415. APPELLATE REVIEW.
 50 4416. REPORTS.
 51 4417. DISCLAIMER.

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

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

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

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

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

21 (C) THE CURRICULUM TO BE CREATED PURSUANT TO SUBDIVISION (B) OF THIS
22 SECTION SHALL INCLUDE BOTH IN-CLASSROOM CLINICAL TRAINING AND AN INTERN-
23 SHIP. THE IN-CLASSROOM CLINICAL TRAINING SHALL INCLUDE AT THE MINIMUM
24 THE FOLLOWING: AN OVERVIEW OF THE MAJOR BODY SYSTEMS, PHARMACOLOGY,
25 COMMON DISEASE PATHOLOGY, ALTERNATIVE MEDICINE THERAPIES, AND THE EDUCA-
26 TION AND TRAINING REQUIRED FOR VARIOUS HEALTH PROFESSIONALS. THE INTERN-
27 SHIP SHALL PROVIDE JUDGES AN OPPORTUNITY TO FOLLOW A PRACTICING PHYSI-
28 CIAN AND OTHER HEALTH CARE PROFESSIONALS IN DIFFERENT HEALTH CARE
29 SETTINGS. THE TRAINING PROGRAM MAY ALSO INCLUDE A LEGAL COMPONENT WHICH
30 SHALL INCLUDE A REVIEW OF MEDICAL LEGAL ISSUES THAT MAY BE THE BASIS OF
31 CASES FALLING UNDER THE JURISDICTION OF THE HEALTH CARE COURT.

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

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

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

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

52 (3) IF THE DEFENDANT IS CERTIFIED BY A BOARD RECOGNIZED BY THE AMERI-
53 CAN BOARD OF MEDICAL SPECIALITIES OR THE AMERICAN OSTEOPATHIC ASSOCI-
54 ATION, THE EXPERT MUST BE CERTIFIED IN THE SAME SPECIALTY BY A BOARD
55 RECOGNIZED BY THE AMERICAN BOARD OF MEDICAL SPECIALITIES OR THE AMERICAN
56 OSTEOPATHIC ASSOCIATION AND MUST HAVE ACKNOWLEDGED EXPERTISE AND TRAIN-

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

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

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

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

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

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

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

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

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

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

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

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