

BILL TEXT:

STATE OF NEW YORK

4149--A

2007-2008 Regular Sessions

IN SENATE

March 28, 2007

Introduced by Sens. VOLKER, LEIBELL, MORAHAN, RATH, WRIGHT, YOUNG -- read twice and ordered printed, and when printed to be committed to the Committee on Codes -- reported favorably from said committee and committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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~~

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

LBD10498-02-7

S. 4149--A

2

1 ~~mation concerning such experts otherwise required by this paragraph]~~ no
2 individual shall be qualified to testify as an expert witness unless
3 such individual is a health care professional who: (A) is licensed to
4 practice in at least one state in the same profession as the defendant;
5 (B) is actively engaged in clinical practice or teaching and experienced
6 in the care at issue; and (C) if the defendant is board certified and
7 the standard of care at issue involves his or her specialty, the expert
8 must be board certified in the same specialty.

9 § 2. Subparagraph (ii) of paragraph 1 of subdivision (d) of section
10 3101 of the civil practice law and rules is REPEALED and a new subpara-
11 graph (ii) is added to read as follows:

12 (ii) Notwithstanding any other provision of this article or of article
13 thirty-two of this chapter, in an action for medical, dental or podia-
14 tric malpractice, at the times and in the sequence directed by the
15 court, such times to be prior to the service and filing of a note of
16 issue unless the court directs otherwise and preserves the right of
17 every party to depose a person whose disclosure occurs subsequent to the
18 filing of a note of issue, each party shall disclose to the other
19 parties the identity of any person who may be used at trial to provide
20 expert testimony in the case and each such disclosure shall be accompa-
21 nied by a written report prepared and signed by such person. The report
22 shall contain a complete statement of all opinions to be expressed and
23 the basis and reasons therefor; the data or other information considered
24 by such person in forming the opinions; any exhibits to be used as a
25 summary of or support for the opinions; the qualifications of the
26 person, including a list of all publications authored by the person
27 during the preceding ten years; the compensation to be paid for the
28 person's consideration of data or other information and for his or her
29 testimony; and a listing of any other cases in which the person has
30 testified as an expert at trial or by oral deposition within the preced-
31 ing four years. Each party shall be required to produce each person so
32 identified by such party as an expert witness, for examination upon oral
33 deposition upon receipt of a notice to take oral deposition in accord-
34 ance with rule thirty-one hundred seven of this article. Unless manifest
35 injustice would result, the court shall require that the party noticing
36 an oral deposition of such an expert witness pay such witness a reason-
37 able fee for time spent in attending such oral deposition. If any party
38 fails to identify a person as an expert witness in accordance with the
39 provisions of this subparagraph, or if any party fails to make any
40 person identified by the party as an expert witness available for oral
41 deposition in accordance with the provisions of this subparagraph, such
42 party shall be precluded from offering such expert's testimony at the
43 trial of the action.

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

46 ARTICLE 44-A

47 HEALTH CARE COURTS PILOT PROGRAM

48 Section 4410. Creation.

49 4411. Health care court judges; selection.

50 4412. Judicial training.

51 4413. Court appointed medical experts.

52 4414. Procedure.

53 4415. Appellate review.

54 4416. Reports.

55 4417. Disclaimer.

S. 4149--A

3

1 § 4410. Creation. The office of court administration may select up to
2 five counties, each within a separate judicial district in this state,
3 to establish specialized health care courts within the supreme court of
4 such counties to govern claims for medical, dental or podiatric malprac-
5 tice as set forth in this section. Once a supreme court within a partic-
6 ular county has established a health care court as set forth in this
7 section, such court shall have exclusive jurisdiction over all the
8 claims for medical, dental or podiatric malpractice brought within the
9 supreme court of such county.

10 § 4411. Health care court judges; selection. Judges shall be selected
11 to serve in the health care court division from among those judges who
12 are elected or appointed to the supreme court in a county selected to
13 participate in the health care courts pilot program. For the purposes
14 of this article, "judge" shall mean a judge of the health care division.

15 § 4412. Judicial training. (a) Upon selection of a particular supreme
16 court judge to hear cases in the county's health care court and prior to
17 hearing such cases, each judge shall complete a judicial training
18 program on the law and science of medicine that may be the basis for
19 cases falling under the jurisdiction of the health care court. Such
20 program shall be administered by the office of court administration.

21 (b) A committee shall be created to develop the curriculum of the
22 judicial training program. A task force shall be coordinated by the
23 office of court administration and shall include equal representation
24 from the Medical Society of the State of New York and the New York State
25 Bar Association.

26 (c) The curriculum to be created pursuant to subdivision (b) of this
27 section shall include both in-classroom clinical training and an intern-
28 ship. The in-classroom clinical training shall include at the minimum
29 the following: an overview of the major body systems, pharmacology,
30 common disease pathology, alternative medicine therapies, and the educa-
31 tion and training required for various health professionals. The intern-
32 ship shall provide judges an opportunity to follow a practicing physi-
33 cian and other health care professionals in different health care
34 settings. The training program may also include a legal component which
35 shall include a review of medical legal issues that may be the basis of
36 cases falling under the jurisdiction of the health care court.

37 § 4413. Court appointed medical experts. (a) The health care court
38 shall maintain a list of qualified medical experts who may be utilized
39 by the court to provide independent expert opinions to the judge. Such
40 experts may provide opinions in writing to the judge or may be called by
41 the judge to testify before the court to clarify or interpret medical
42 testimony or evidence, or for any other purpose the judge deems relevant
43 to the proceedings.

44 (b) A court appointed medical expert must meet the following minimum
45 expert witness requirements:

46 (1) Holds an active license in the same profession as the defendant.
47 If the defendant is a licensed New York physician or doctor of osteo-
48 pathic medicine, the expert witness must also be licensed in New York
49 state as a doctor of medicine or osteopathic medicine;

50 (2) Is trained and experienced in the same discipline or school of
51 practice as the defendant and can demonstrate by competent evidence
52 that, as a result of training, education, knowledge, and experience in
53 the evaluation, diagnosis, and treatment of the disease or injury which
54 is the subject matter of the lawsuit against the defendant, the individ-
55 ual was substantially familiar with the applicable standards of care and

S. 4149--A

4

1 practice as they relate to the act or omission which is the subject of
2 the lawsuit on the date of the incident;

3 (3) If the defendant is certified by a board recognized by the Ameri-
4 can Board of Medical Specialities or the American Osteopathic Associ-
5 ation, the expert must be certified in the same specialty by a board
6 recognized by the American Board of Medical Specialities or the American
7 Osteopathic Association and must have acknowledged expertise and train-
8 ing directly related to the particular health care or matter at issue;
9 and

10 (4) Within five years of the date of the alleged occurrence giving
11 rise to the claim, was in active medical practice in the same discipline
12 or school of practice as the defendant or devoted a substantial portion
13 of his time teaching at an accredited medical school, or in university-
14 based research in relation to the medical care and type of treatment at
15 issue.

16 (c) A court appointed medical expert shall have no financial ties or
17 familial relationship with any party to the lawsuit, any expert called
18 to testify, or any attorney representing any party to the lawsuit.

19 (d) The court appointed medical expert shall have no ex parte communi-
20 cations with any party to the lawsuit, except as permitted by the court.

21 (e) The plaintiff and defendant shall equally compensate the court
22 appointed medical expert based on the prevailing fee for medical experts
23 with similar qualifications.

24 § 4414. Procedure. Claims adjudicated through the health care court
25 shall adhere to this chapter except as otherwise provided for in this
26 article.

27 § 4415. Appellate review. Any party to an action in a health care
28 court may avail themselves of all appeal rights that otherwise would be
29 available under this chapter.

30 § 4416. Reports. The office of court administration shall submit an
31 annual report to the speaker of the assembly, the temporary president of
32 the senate, the minority leader of the senate, the minority leader of
33 the assembly and the governor describing the functioning of the health
34 care courts, including the number of disputes heard by the courts and
35 recommendations for improving the ability of such courts to resolve
36 claims involving medical, dental or podiatric malpractice.

37 § 4417. Disclaimer. Nothing in this article shall be construed to
38 remove the jury as the ultimate finder of fact in an action for medical,
39 dental or podiatric malpractice.

40 § 4. Section 6530 of the education law is amended by adding a new
41 subdivision 48 to read as follows:

42 48. Providing expert medical testimony that is false or completely
43 without reasonable medical foundation in any action for injury or death
44 arising out of the provision of or failure to provide health care
45 services. As used in this subdivision, testimony may be considered false
46 or completely without reasonable medical foundation if it was without
47 foundation in accepted peer reviewed science-based medical research.

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

SPONSORS MEMO:

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S4149A

SPONSOR: VOLKER

TITLE OF BILL:

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

PURPOSE:

The purpose of the bill is to make revisions to the manner by which medical liability claims are adjudicated.

SUMMARY OF PROVISIONS:

Section 1 of the bill would amend the Section 3101(d)(1)(i) of the Civil Practice Law and Rules to remove the current provision in law that prohibits the disclosure of the identity of a medical expert witness who intends to testify in a medical liability action. Section 1 would also require that an individual may not serve as expert witness in an action for medical, dental or podiatric malpractice unless that individual has appropriate qualifications, including board certification in the same specialty as the defendant health care provider (if applicable) and experience in treating the clinical area of expertise that is the subject of the dispute.

Section 2 replaces clause (ii) of paragraph 1 of subdivision (d) of Section 3101 of the CPLR to require that, in an action for medical, dental or podiatric malpractice, the report shall contain a complete statement of all opinions to be expressed, 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. Additionally, this bill requires a party to produce such expert for an EBT, in accordance with Rule 3107 of the CPLR. 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. Violation of these provisions shall preclude a party from offering such expert's testimony at the trial of the action.

Section 3 of the bill would create a new Article 44-A of the Civil Practice Law and Rules to establish a pilot program to authorize the Office of Court Administration to set up specialized "medical courts" to adjudicate medical liability actions within five counties across New York State. Such courts would use specially trained judges and objective independent medical expert witnesses, but would otherwise not interfere with the statutory process for adjudicating an action for medical, dental or podiatric malpractice.

Section 4 would amend section 6530 of the education law to create a new element of professional misconduct for providing medical expert witness testimony that is without reasonable medical foundation.

Section 5 would establish an effective date ninety days from when the bill is signed into law.

JUSTIFICATION:

The cost of medical liability insurance has risen steadily over the last several years. Most New York physicians, who were already paying enormously high liability premiums to begin with, are now paying 30-47% more for liability insurance than they were in 2003. For many physician specialists practicing in the New York City metropolitan area, the cost for such insurance over the last five years has almost doubled. A recent report by the Center for Health Workforce Studies documented that many regions all across the State have begun to see a considerable drop in the number of critically needed surgical specialists, OB-GYNs and primary care physicians. A significant factor is the high cost of liability insurance in New York State.

One cause of the problem is the randomness by which verdicts in medical liability lawsuits are reached. Numerous studies have concluded that the civil justice system frequently produces awards to plaintiffs in medical liability actions where there has been no negligence and, conversely, results in no payment to the plaintiff when there has been error. Often virtually the same facts will produce an award in one case but a verdict for the defendant in another. There is a lack of consistency in litigation outcome. As a result, this has led to numerous settlements in medical liability actions due to concern that the severity of an injury will result in a jury verdict for the plaintiff even if no negligence has been committed, with the effect that medical liability insurance costs are driven up substantially.

This legislation would begin to take steps to facilitate a more objective analysis of medical liability disputes. Like statutes already passed in many other states in the country, this bill would assure that an expert witness who testifies in a medical liability action has a similar educational and treating background as the defendant health care provider. The bill would also remove a provision that currently exists under New York law that prohibits the disclosure of the identity of an expert witness who is to testify at a medical liability trial. This rule applies to no other type of action in New York State, and runs completely contrary to the whole premise of modern jurisprudence which seeks the early and complete exchange of information between litigants.

Moreover, this legislation would permit the creation of special courts to hear medical malpractice cases in up to 5 counties in New York State. Such courts would use specially trained judges who could call independent expert witnesses to provide greater clarity to the jury regarding the specific care that is the subject of the lawsuit. Such courts hold the promise of improving the reliability of the system of resolving medical liability disputes, which could ultimately result in reducing the cost of medical liability insurance for physicians and hospitals. Importantly for injured plaintiffs, the bill would not impact upon the damages that such plaintiff could receive.

This bill would take important first steps to reduce the increasingly unaffordable cost of medical liability insurance by better facilitating an objective analysis of medical liability disputes without limiting the ability of a plaintiff to bring an action or to be compensated for negligent actions on the part of health care providers.

LEGISLATIVE HISTORY:

New bill.

FISCAL IMPLICATIONS:

Undetermined.

EFFECTIVE DATE:

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