New York State Bar Association

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Memorandum in Support

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #4 — June 7, 2007

S. 4149 — By: Senator Volker
A. 8066 — By: M. of A. Towns
Senate Committee: Finance
Assembly Committee: Codes
Effective Date: 90th day after it shall have become a law

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

LAW AND SECTION REFERRED TO: Amending CPLR § 3101(d)(1) and adding new Article 44-A

THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES
SUPPORTS THIS LEGISLATION IN PART

This bill, per the sponsor's memorandum, invokes an impending medical malpractice crisis[1] in this State as the rationale for proposing changes to the subsection of Article 31 dealing with medical expert disclosure; for creating a new Article 44-A of the CPLR to enable a pilot program for health care courts; and for adding a sanction provision under the Education Law for errant medical malpractice experts.

This bill would first delete that part of Section 3101(d)(1) permitting a party to withhold the medical expert's name from disclosure (not a prohibition from providing it, as the bill's Memorandum suggests). The purpose for this 1985 exception was to enable plaintiff's counsel to withhold identification of his or her expert to reduce the possibility that the physician chosen would be influenced against testifying by her peers (see Ryan v. Michelsen, 241 AD2d 434, 660 NYS2d 435 (1st Dept 1997); Pizzi v. Muccia, 127 AD2d 338, 340, 515 NYS2d 341, 342 (3rd Dept 1987)).

[1] The unavailability of and high premium cost for medical services providers' liability insurance in 1975 and again in 1986 drove the Legislature to carve out a series of exceptions and special provisions for the industry in civil litigation. There has been an ongoing debate as the reasons for these crises, if not their existence (see, e.g. Stackman, D., lead article in Washington Post Business section, December 29, 2005, pp. D1-D2; reporting that the medical insurance industry may have overstated its estimated losses from malpractice claims by 31 per cent from 1986-1994 and may have increased premiums because flat bond and stock markets reduced industry profits on investing premiums, not because of increases in actual awards or settlements). Verification of these crises and the cause therefor would now be in order. The Office of Court Administration has kept detailed statistics with regard to the commencement and dispositions of medical malpractice cases in New York for the last ten years at least. It might behoove the Legislature to obtain and analyze this data before declaring that another such crisis is in the offing.

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

Some plaintiffs' attorneys report that defense counsel may have gotten the upper hand in medical malpractice non-disclosure of plaintiffs' experts, by merely plugging in the required disclosure – sans name – into a medical provider data base either not available – or as yet undeveloped – by the plaintiffs' Bar.

The exception and its use or abuse has given rise to a split in the Departments as to what must be disclosed under CPLR 3101(d)(1). The Fourth Department, realizing that computer advances in search engines using the precise information previously required by the section (see Jasorpersaud v. Rho, 169 AD2d 184, 572 NYS2d 700 (2d Dept 1991)) was tantamount to identifying the expert, granted a protective order against disclosure beyond the expert's licensing state or states, the board certification and the field, and limited practice information (Thompson v. Swiantek, 291 AD2d 884, 736 NYS2d 819 (4th Dept 2002)). The Second Department in the same year addressed the same computer advances and concluded that providing an expert's qualifications in "reasonable detail" - as the statute requires - made anonymity of the medical expert impossible. But the court nevertheless followed the letter of the statute requiring broad disclosure, unless the plaintiff could show both that such disclosure would lead to the expert's identity and that the plaintiff would be subject to "unreasonable annoyance" as a result (Thomas v. Alleyne, 302 AD2d 36, 752 NYS2d 362 (2d Dept 2002)). The Second and Fourth Departments remain split on the issue (see Quinn v. St. Peter's Hospital, 9 Misc 3d 1102(A), 806 NYS2d 448 (Sup Ct, Albany County 2005); Muniz v. Our Lady of Mercy Med Ctr, Misc 2d ; NYS2d (Sup Ct Bronx Cty 2003)(2003 Slip Op. 50910(U), for an excellent history).

The primary reason cited in the sponsor's memorandum for deleting the permissive exclusion of the expert's identity in section 3101(d)(1)(i) is:

> "This rule applies to no other type of action in New York State…"
> (Introducer's Memorandum to 54149)

This comment applies equally to a plethora of protective legislation peculiar to health care providers enacted in response to earlier medical malpractice crises in the mid 1980s and mid 1990s: a limited infancy toll (CPLR 208); separate statute of limitations (CPLR 214a); itemized verdicts (CPLR 2411(d)); attorney certification of medical consultation before suit (CPLR 3012(a)); arbitration of damages (CPLR 3045); trial preferences (CPLR 3403(a)(5)); jury itemized verdicts (CPLR 4111(d)); bench trial itemized verdicts (CPLR 4213(b)); collateral source setoffs (CPLR 4545(a)); evidence of income tax obligations (CPLR 4546); attorney mandated periodic payments of future damages (CPLR Article 50-A); lump sum payment of judgments (CPLR 5031 and CPLR 5036(b)); calculation of attorney fees (CPLR 5031(f)(3)); stay of enforcement pending appeal (CPLR 5519(g)); mandatory sanctions for frivolous litigation (see legislative history of CPLR 8303-a) and capped contingency fees in such cases (Judiciary Law 474-a).

Because the Committee believes that carve-outs and exceptions for certain litigants are potentially inequitable and a trap for the unwary practitioner, a majority would approve this deletion of a special expert non-disclosure rule. However, many were concerned that the elimination of the expert non-disclosure rule would discourage medical providers from giving evidence on behalf of plaintiffs, and would increase the plaintiffs' burden in responding to motions for summary judgment in such cases, where the identity of medical experts is still universally redacted (Katechis v. Our Lady of Mercy Med Ctr, 36 AD3d 514, 515, 828 NYS2d 58, 60 (1st Dept 2007); Graham v. Mitchell, 37 AD3d 408, 409, 829 NYS2d 628, 629 (2d Dept 2007); Gage v.

Dutkewych, 3 AD3d 629, 631, 771 NYS2d 202, 204 (3d Dept 2004): Moticik v. Sisters Healthcare, 19 AD3d 1052, 1053, 796 NYS2d 834, 835 (4th Dept 2005)). The proposed amendment could result in a change in the right to so redact.

The present right to withhold the medical expert's name, unfortunately, is to be supplanted by a new provision in subdivision (i) which prohibits testimonial qualification of a medical malpractice expert who does not meet the following benchmarks: a health care professional licensed in at least one state in the defendant's profession and actively engaged in clinical practice or teaching and experienced in the care at issue and, if the defendant is board certified and the standard of his medical care involves a specialty, board certification in the same specialty.

As indicated, this Committee does not favor special treatment for certain litigants. Furthermore, there is an obvious procedural problem. A practitioner – especially a newly admitted attorney or a general practitioner with little experience in litigation, much less medical malpractice – would not expect to find a trial requirement in Article 31 of the CPLR, expressly reserved for disclosure provisions. Were this proposal a change that this Committee could support, it should appear in Article 40 (trial generally), Articles 41-43 (trials by jury, court and referee) or Article 45 (evidence). To bury it in the discovery article does a disservice to the practicing Bar.

Furthermore, the proposed change appears unwise on its merits, an additional hurdle over which a medical malpractice plaintiff must vault. The courts have long realized that the plaintiff is at a decided disadvantage in finding – and engaging – a doctor to pronounce upon the malpractice of her peers. The Court of Appeals was prescient in its understanding of the problem in McDermott v. Manhattan Eye, Ear & Throat Hospital (15 NY2d 20, 27, 203 NE2d 469, 474, 255 NYS2d 65, 71 (1964)) when articulating its rationale for permitting a plaintiff to support her medical malpractice claim at trial solely by examining the defendant doctor who treated her:

> The importance of enabling the plaintiff to take the testimony of the defendant doctor as to both 'fact' and 'opinion' is accentuated by recognition of the difficulty inherent in securing 'independent' expert witnesses. It is not always a simple matter to have one expert, a doctor in this case, condemn in open court the practice of another, particularly if the latter is a leader in his field. In consequence, the plaintiff's only recourse in many cases may be to question the defendant doctor as an expert in the hope that he will thereby be able to establish his malpractice claim.

This proposal further supplants settled law that an expert's qualifications go to the weight – not the admissibility – of his/her testimony. (Corcino v. Filstein, 32 AD3d 201, 202, 820 NYS2d 220, 221 (1st Dept 2006); Williams v. Halpern, 25 AD3d 467, 468, 808 NYS2d 68, 69 (1st Dept 2006); Bodensiek v. Schwartz, 292 AD2d 411, 739 NYS2d 405 (2nd Dept 2002); Hranek v. United Methodist Homes, 27 AD3d 879, 810 NYS2d 544, 546 (3d Dept 2006)). It also abrogates the trial court's role as gatekeeper – whether the standard be Frye or Daubert (Zito v. Zabaresky, 28 AD3d 42, 44, 872 NYS2d 535, 536 (2nd Dept 2006)) – to determine any expert's minimal qualifications. To set these two longstanding precedents aside – in the name of another medical malpractice crisis – appears unjustified and extremely prejudicial to plaintiffs with legitimate claims.

This Committee does not address in depth the wisdom of the new Article 44-A proposal for health care courts, principally because it is by its terms an experiment – a pilot program. However, the "Disclaimer" of proposed section 4417, purporting to retain the jury as the ultimate finder of

fact, may be cold comfort when compared to the provisions of proposed section 4413, which requires the health care court to maintain a list of qualified health care providers to use as court-appointed experts for written opinions and/or testimony in such cases. The bias of a particular trial judge's prior experience as a practicing attorney could easily result in a stable of court-appointed experts to testify more often in favor of one party than the other. Even in the most even-handed of circumstances, adding the imprimatur of the presiding judge to the awe with which physicians may still be held by the general public leaves little doubt as to which of the conflicting experts the jury will believe. To add insult to injury, the party unhappy to hear such testimony would wind up bearing a share of its cost under the proposal.

The feasibility of the project seems questionable in light of the recognized failure of the medical malpractice panel system under Judiciary Law 148-a (repealed in 1991 (L. 1991, c165, §47, effective October 1, 1991)), ushered in by a previous malpractice crisis, which died of its own inability to involve the required medical member of the panel. It is difficult to believe that there would be enough of the even higher-caliber of expert anticipated by this proposal, willing to spend the time necessary to review cases and provide reports, much less testify, no matter what degree of "reasonable compensation" is offered. The proposal excludes from consideration retired health care providers.

Finally, this Committee offers no opinion regarding the sanctions proposed to be made available to punish "false or completely without reasonable medical foundation" testimony in medical malpractice cases (Education Law Section 6530, subdiv 48), although – again – this rule would "apply to no other type of action in New York State".

For the foregoing reasons, the proposed bill is SUPPORTED ONLY as to the portion which would delete from CPLR 3101(d)(1)(i) the provision permitting withholding of the medical malpractice expert's name, and then with reservations of this Committee.

Person Who Prepared the Report: James C. Gacioch, Esq.
Chair of the Committee: David L. Ferstendig, Esq.