

ASSEMBLY, No. 1801

STATE OF NEW JERSEY 217th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2016 SESSION

Sponsored by:

Assemblyman HERB CONAWAY, JR.

District 7 (Burlington)

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District 18 (Middlesex)

SYNOPSIS

Revises standards for expert witnesses in medical malpractice actions.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel.



1 AN ACT concerning expert witnesses in medical malpractice actions
2 and amending P.L.2004, c.17.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

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7 1. Section 7 of P.L.2004, c.17 (C.2A:53A-41) is amended to
8 read as follows:

9 7. In an action alleging medical malpractice, a person shall not
10 give expert testimony or execute an affidavit pursuant to the
11 provisions of P.L.1995, c.139 (C.2A:53A-26 et seq.) on the
12 appropriate standard of practice or care unless the person is licensed
13 as a physician or other health care professional in the United States
14 and meets the following criteria:

15 a. If the party against whom or on whose behalf the testimony
16 is offered is a specialist or subspecialist recognized by the
17 American Board of Medical Specialties or the American
18 Osteopathic Association and the care or treatment at issue involves
19 that specialty or subspecialty recognized by the American Board of
20 Medical Specialties or the American Osteopathic Association, the
21 person providing the testimony shall have specialized at the time of
22 the occurrence that is the basis for the action in the same specialty
23 or subspecialty, recognized by the American Board of Medical
24 Specialties or the American Osteopathic Association, as the party
25 against whom or on whose behalf the testimony is offered, and if
26 the person against whom or on whose behalf the testimony is being
27 offered is board certified and the care or treatment at issue involves
28 that board specialty or subspecialty recognized by the American
29 Board of Medical Specialties or the American Osteopathic
30 Association, the expert witness shall be:

31 (1) a physician credentialed by a hospital to treat patients for the
32 medical condition, or to perform the procedure, that is the basis for
33 the claim or action; **or** and

34 (2) a specialist or subspecialist recognized by the American
35 Board of Medical Specialties or the American Osteopathic
36 Association who is board certified in the same specialty or
37 subspecialty, recognized by the American Board of Medical
38 Specialties or the American Osteopathic Association, and during the
39 year immediately preceding the date of the occurrence that is the
40 basis for the claim or action, shall have devoted a majority of his
41 professional time to **either**:

42 (a) **the** active clinical practice of the same health care
43 profession in which the defendant is licensed, and, if the defendant
44 is a specialist or subspecialist recognized by the American Board of
45 Medical Specialties or the American Osteopathic Association, the

EXPLANATION – Matter enclosed in bold-faced brackets **[thus]** in the above bill is
not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 active clinical practice of that specialty or subspecialty recognized
2 by the American Board of Medical Specialties or the American
3 Osteopathic Association【; or

4 (b) the instruction of students in an accredited medical school,
5 other accredited health professional school or accredited residency
6 or clinical research program in the same health care profession in
7 which the defendant is licensed, and, if that party is a specialist or
8 subspecialist recognized by the American Board of Medical
9 Specialties or the American Osteopathic Association, an accredited
10 medical school, health professional school or accredited residency
11 or clinical research program in the same specialty or subspecialty
12 recognized by the American Board of Medical Specialties or the
13 American Osteopathic Association; or

14 (c) both】.

15 b. If the party against whom or on whose behalf the testimony
16 is offered is a general practitioner, the expert witness, during the
17 year immediately preceding the date of the occurrence that is the
18 basis for the claim or action, shall have devoted a majority of his
19 professional time to:

20 (1) active clinical practice as a general practitioner; or active
21 clinical practice that encompasses the medical condition, or that
22 includes performance of the procedure, that is the basis of the claim
23 or action; or

24 (2) the instruction of students in an accredited medical school,
25 health professional school, or accredited residency or clinical
26 research program in the same health care profession in which the
27 party against whom or on whose behalf the testimony is licensed; or

28 (3) both.

29 c. A court may waive the same specialty or subspecialty
30 recognized by the American Board of Medical Specialties or the
31 American Osteopathic Association and board certification
32 requirements of this section, upon motion by the party seeking a
33 waiver, if, after the moving party has demonstrated to the
34 satisfaction of the court that a good faith effort has been made to
35 identify an expert in the same specialty or subspecialty, the court
36 determines that 【the expert possesses sufficient training, experience
37 and knowledge to provide the testimony as a result of active
38 involvement in, or full-time teaching of, medicine in the applicable
39 area of practice or a related field of medicine】:

40 (1) the expert specializes in a substantially similar speciality or
41 subspecialty that includes the evaluation, diagnosis or treatment of
42 the medical condition that is the subject of the claim or action and
43 has prior clinical experience treating similar patients;

44 (2) if the party against whom or on whose behalf the testimony
45 is offered is board certified in a speciality or subspecialty, the
46 expert is certified by a board recognized by the American Board of
47 Medical Specialties or the American Osteopathic Association in a
48 specialty or subspecialty having acknowledged expertise and

1 training directly related to the particular health care matter at issue;
2 (3) the expert has devoted a majority of his professional time
3 during the five years immediately preceding the date of the
4 occurrence that is the basis for the claim or action to the active
5 clinical practice of the same or a substantially similar specialty or
6 subspecialty recognized by the American Board of Medical
7 Specialties or the American Osteopathic Association; and
8 (4) the expert has demonstrated to the satisfaction of the court
9 both that the standards of care and practice in the two specialties or
10 subspecialties are similar and that the expert has substantial
11 familiarity between the specialties or subspecialties.
12 d. Nothing in this section shall limit the power of the trial court
13 to disqualify an expert witness on grounds other than the
14 qualifications set forth in this section.
15 e. In an action alleging medical malpractice, an expert witness
16 shall not testify on a contingency fee basis.
17 f. An individual or entity who threatens to take or takes
18 adverse action against a person in retaliation for that person
19 providing or agreeing to provide expert testimony, or for that
20 person executing an affidavit pursuant to the provisions of
21 P.L.1995, c.139 (C.2A:53A-26 et seq.), which adverse action relates
22 to that person's employment, accreditation, certification,
23 credentialing or licensure, shall be liable to a civil penalty not to
24 exceed \$10,000 and other damages incurred by the person and the
25 party for whom the person was testifying as an expert.
26 (cf: P.L.2004, c.17, s.7)

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28 2. This act shall take effect immediately.

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STATEMENT

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33 This bill tightens the standards and requirements for expert
34 witnesses in actions involving medical malpractice and amends
35 N.J.S.A.2A:53A-41, which sets forth the standards for expert
36 witnesses.

37 The bill makes the following changes to the expert witness
38 requirements:

39 X the bill deletes the option that an expert witness for a
40 specialist or subspecialist would be qualified to give testimony if
41 the person is either a hospital-credentialed physician or a board
42 certified specialist or subspecialist in the same specialty or
43 subspecialty and requires, instead, that the person be both hospital-
44 credentialed and board certified;

45 X the bill deletes the option that an expert witness for a
46 specialist or subspecialist would be qualified to give testimony if
47 the person devotes a majority of his professional time to the
48 instruction of students in an accredited medical school, other

1 accredited health professional school or accredited residency or
2 clinical research program in the same health care profession in
3 which the defendant is licensed and requires, instead, that the
4 person devote a majority of his professional time to the active
5 clinical practice of the same health care profession in which the
6 defendant is licensed; and

7 X regarding the court's option to waive the same specialty or
8 subspecialty requirement for an expert witness, the bill provides
9 that the waiver shall be granted if the court determines that:

10 (1) the expert specializes in a substantially similar speciality or
11 subspecialty that includes the evaluation, diagnosis or treatment of
12 the medical condition that is the subject of the claim or action and
13 has prior clinical experience treating similar patients;

14 (2) if the party against whom or on whose behalf the testimony
15 is offered is board certified in a speciality or subspecialty, the
16 expert is certified by a board recognized by the American Board of
17 Medical Specialties or the American Osteopathic Association in a
18 specialty or subspecialty having acknowledged expertise and
19 training directly related to the particular health care matter at issue;

20 (3) the expert has devoted a majority of his professional time
21 during the five years immediately preceding the date of the
22 occurrence that is the basis for the claim or action to the active
23 clinical practice of the same or a substantially similar specialty or
24 subspecialty recognized by the American Board of Medical
25 Specialties or the American Osteopathic Association; and

26 (4) the expert has demonstrated to the satisfaction of the court
27 both that the standards of care and practice in the two specialties or
28 subspecialties are similar and that the expert has substantial
29 familiarity between the specialties or subspecialties.