

# STATE OF NEW YORK

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4149

2007-2008 Regular Sessions

## IN SENATE

March 28, 2007

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Introduced by Sens. VOLKER, MORAHAN, RATH, WRIGHT -- 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; and to amend the civil practice law and rules, in relation to creating the health care courts pilot program

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

7 ARTICLE 44-A

8 HEALTH CARE COURTS PILOT PROGRAM

9 Section 4410. Creation.

10 4411. Health care court judges; selection.

11 4412. Judicial training.

12 4413. Court appointed medical experts.

13 4414. Procedure.

14 4415. Appellate review.

15 4416. Reports.

16 4417. Disclaimer.

17 § 4410. Creation. The office of court administration may select up to  
18 five counties, each within a separate judicial district in this state,  
19 to establish specialized health care courts within the supreme court of  
20 such counties to govern claims for medical, dental or podiatric malprac-  
21 tice as set forth in this section. Once a supreme court within a partic-  
22 ular county has established a health care court as set forth in this  
23 section, such court shall have exclusive jurisdiction over all the  
24 claims for medical, dental or podiatric malpractice brought within the  
25 supreme court of such county.

26 § 4411. Health care court judges; selection. Judges shall be selected  
27 to serve in the health care court division from among those judges who  
28 are elected or appointed to the supreme court in a county selected to  
29 participate in the health care courts pilot program. For the purposes  
30 of this article, "judge" shall mean a judge of the health care division.

31 § 4412. Judicial training. (a) Upon selection of a particular supreme  
32 court judge to hear cases in the county's health care court and prior to  
33 hearing such cases, each judge shall complete a judicial training  
34 program on the law and science of medicine that may be the basis for  
35 cases falling under the jurisdiction of the health care court. Such  
36 program shall be administered by the office of court administration.

37 (b) A committee shall be created to develop the curriculum of the  
38 judicial training program. A task force shall be coordinated by the  
39 office of court administration and shall include equal representation  
40 from the Medical Society of the State of New York and the New York State  
41 Bar Association.

42 (c) The curriculum to be created pursuant to subdivision (b) of this  
43 section shall include both in-classroom clinical training and an intern-  
44 ship. The in-classroom clinical training shall include at the minimum  
45 the following: an overview of the major body systems, pharmacology,  
46 common disease pathology, alternative medicine therapies, and the educa-  
47 tion and training required for various health professionals. The intern-  
48 ship shall provide judges an opportunity to follow a practicing physi-  
49 cian and other health care professionals in different health care  
50 settings. The training program may also include a legal component which  
51 shall include a review of medical legal issues that may be the basis of  
52 cases falling under the jurisdiction of the health care court.

53 § 4413. Court appointed medical experts. (a) The health care court  
54 shall maintain a list of qualified medical experts who may be utilized  
55 by the court to provide independent expert opinion to the judge. The  
56 expert may provide an opinion in writing to the judge or may be called

1 by the judge to testify before the court to clarify or interpret medical  
2 testimony or evidence, or for any other purpose the judge deems relevant  
3 to the proceedings.

4 (b) Such court appointed medical expert must meet the following mini-  
5 mum expert witness requirements:

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

10 (2) Is trained and experienced in the same discipline or school of  
11 practice as the defendant and can demonstrate by competent evidence  
12 that, as a result of training, education, knowledge, and experience in  
13 the evaluation, diagnosis, and treatment of the disease or injury which  
14 is the subject matter of the lawsuit against the defendant, the individ-  
15 ual was substantially familiar with the applicable standards of care and  
16 practice as they relate to the act or omission which is the subject of  
17 the lawsuit on the date of the incident;

18 (3) If the defendant is certified by a board recognized by the Ameri-  
19 can Board of Medical Specialities or the American Osteopathic Associ-  
20 ation, the expert must be certified in the same specialty by a board  
21 recognized by the American Board of Medical Specialities or the American  
22 Osteopathic Association and must have acknowledged expertise and train-  
23 ing directly related to the particular health care or matter at issue;  
24 and

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

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

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

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

39 § 4414. Procedure. Claims adjudicated through the health care court  
40 shall adhere to this chapter except as otherwise provided for in this  
41 article.

42 § 4415. Appellate review. Any party to an action in a health care  
43 court may avail themselves of all appeal rights that otherwise would be  
44 available under this chapter.

45 § 4416. Reports. The office of court administration shall submit an  
46 annual report to the speaker of the assembly, the temporary president of  
47 the senate, the minority leader of the senate, the minority leader of  
48 the assembly and the governor describing the functioning of the health  
49 care courts, including the number of disputes heard by the courts and  
50 recommendations for improving the ability of such courts to resolve  
51 claims involving medical, dental or podiatric malpractice.

52 § 4417. Disclaimer. Nothing in this article shall be construed to

53 **remove the jury as the ultimate finder of fact in an action for medical,**  
54 **dental or podiatric malpractice.**  
55 § 3. Section 6530 of the education law is amended by adding a new  
56 subdivision 48 to read as follows:

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1 **48. Providing expert medical testimony that is false or completely**  
2 **without reasonable medical foundation in any action for injury or death**  
3 **arising out of the provision of or failure to provide health care**  
4 **services. As used in this subdivision, testimony may be considered false**  
5 **or completely without reasonable medical foundation if it was without**  
6 **foundation in accepted peer reviewed science-based medical research.**

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

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