

# ASSEMBLY HEALTH AND SENIOR SERVICES COMMITTEE

## STATEMENT TO

### **ASSEMBLY, No. 1982**

with committee amendments

# **STATE OF NEW JERSEY**

DATED: MARCH 7, 2011

The Assembly Health and Senior Services Committee reports favorably and with committee amendments Assembly Bill No. 1982.

As amended by the committee, this bill provides for various revisions to the laws governing lawsuits and insurance coverage for medical malpractice.

The bill provides specifically as follows:

- A malpractice action against a health care provider is to be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the injury, but not more than four years after the date of the alleged act, omission, neglect or occurrence that is the basis of the action, except that in the case in which the allegation of malpractice against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim is to be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs.
- An action by or on behalf of a minor that has accrued for medical malpractice for injuries sustained at birth is to be commenced prior to the minor's 11th birthday (rather than the minor's 13th birthday, as currently provided in the law).
- The bill revises the requirements for an affidavit by an appropriately licensed person to be provided by a plaintiff in certain negligence and malpractice actions, by further requiring that the affidavit state that the care, skill or knowledge used in the treatment, practice or work that is the subject of the complaint did not meet a commonly recognized reasonable standard of care. In the case of an action for medical malpractice, the affidavit is to further: (1) establish that there was a provider-patient relationship and identify the specific act by the defendant which is the basis for the cause of action against the defendant, or, if there was no provider-patient relationship, identify the specific act by the defendant which is the basis for the cause of action against the defendant; and (2) be based on and refer

to objective scientific clinical evidence. The person executing the affidavit is to include in the affidavit a certification, under penalty of perjury, that the patient's chart and other pertinent information submitted has been personally reviewed. A person is guilty of a crime of the fourth degree (punishable by imprisonment for up to 18 months or a fine of up to \$10,000, or both) if the person purposefully or knowingly makes, or causes to be made, a false, fictitious, fraudulent, or misleading statement of material fact in, or omits a material fact from, or causes a material fact to be omitted from, any such affidavit.

- A court may waive the same specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association and board certification requirements of section 7 of P.L.2004, c.17 (C.2A:53A-41), upon motion by the party seeking a waiver, if, after the moving party has demonstrated to the satisfaction of the court that a good faith effort has been made to identify an expert in the same specialty or subspecialty, and the court has been presented with the reasons for any person declining to give expert testimony or execute an affidavit in the case, the court determines that the expert possesses sufficient training, experience, and knowledge to provide the testimony as a result of active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field of medicine during the year immediately preceding the date of the occurrence that is the basis for the claim or action. The good faith requirement for a waiver by the court pursuant to this paragraph will not be met by a showing that reviewing or potentially reviewing experts declined to give testimony or execute an affidavit based upon a lack of merit.
- In an action alleging medical malpractice, a person is not to give expert testimony or execute an affidavit pursuant to the provisions of P.L.1995, c.139 (C.2A:53A-26 et seq.) on the appropriate standard of practice or care unless the person is licensed as a physician or other health care professional in New Jersey, as opposed to the current requirement that the physician or professional be licensed in the United States, provided however, that a court may waive the requirement that a person providing testimony as an expert witness be licensed in New Jersey upon sufficient evidence that no person licensed in New Jersey meets the qualifications set forth in section 7 of P.L.2004, c.17 (2A:53A-41).
- Expert testimony in an action alleging medical malpractice is to be based on and refer to objective scientific clinical evidence, as defined in the bill. A person testifying as an expert witness in such an action is guilty of a crime of the fourth degree and is permanently barred from presenting expert testimony in this State if the person purposefully or knowingly makes, or causes to be made, a false, fictitious, fraudulent, or misleading statement of material fact in, or

omits a material fact from, or causes a material fact to be omitted from, any expert testimony.

- An insurer is prohibited from increasing the premium of any medical malpractice liability insurance policy based on a claim of medical negligence or malpractice against an insured:
  - unless the claim, as defined in the bill, results in a medical malpractice claim settlement, judgment or arbitration award against the insured; or
  - if the alleged medical malpractice occurred in any case in which the insured performed any treatment or procedure on a charitable basis, without consideration; or in which the insured provided emergency assistance pursuant to section 10 of P.L.2004, c.17 (C.2A:62A-1.3), whether or not for consideration.
- In any judgment resulting from a medical malpractice action brought by a claimant for medical malpractice, if agreed to by the parties, the court may approve payment of a judgment or settlement in the form of a structured payment agreement by any person, organization, group, or insurer that is contractually liable to pay the judgment. (This modifies the structured settlement provision of the current law, which: applies only to medical malpractice actions in which noneconomic damages exceed \$1 million; and requires that 50% of those damages be paid immediately, including the costs and attorney's fees, and the remainder within 60 months.)
- Every claim or demand filed against an insured for damages in excess of \$100,000 per occurrence for economic loss and non-economic loss is to document the economic loss for which relief is sought and to set forth in detail the economic loss incurred at the time the case is subject to a complementary dispute resolution proceeding, at the time settlement negotiations are entered into, or at the time a case is tried, as well as a detailed statement of claimed prospective economic loss resulting from the allegation of medical malpractice, which documentation is to be updated from time to time as necessary and be provided to the court, the complementary dispute resolution agent, or (in the case of settlement) the defendant, as applicable.
- In every trial in which damages are awarded in an action alleging medical malpractice, the trier of fact is to separately itemize damages awarded for economic loss and damages awarded for non-economic loss; and the judge presiding over the proceeding is to review each verdict to determine, pursuant to section 9 of P.L.2004, c.17 (C.2A:53A-42), whether the award is clearly inadequate, excessive, or disproportionate in view of the nature of the medical condition or injury that is the cause of action or because of passion or prejudice by the jury.
- It is to be presumed that a person who signs an informed consent form or document for a medical procedure or other form of health care has read that form or document.

- If an attorney representing a plaintiff in a medical malpractice action files the complaint using fictitious names for one or more persons who may be determined to be parties to the action but whose role is unknown at the time of the filing of the complaint, there is to be no time limitation within which the attorney may substitute the name of any person or persons for a fictitious name nor any other bar to such substitution if the person or persons are subsequently determined to be joined as a party to the action.
- A physician licensed to practice medicine in this State will not be liable for civil damages as a result of any act or omission in connection with the rendering of any treatment or procedure for illness or injury if the treatment or procedure is rendered while the physician is performing the treatment or procedure as a volunteer, in good faith and without consideration, at a clinic, other health care facility, or any other location where the treatment or procedure is being rendered.
- The bill takes effect immediately and applies to actions for damages that accrue on or after the effective date of the bill.

As reported by the committee, this bill is similar to Senate Bill No. 760 (Beck/Weinberg), which is pending in the Senate Commerce Committee.

#### COMMITTEE AMENDMENTS

The committee amendments to this bill provide that:

-- The demonstration to a court that a good faith effort has been made to identify an expert in the same specialty or subspecialty is to include a presentation of the reasons for any person declining to give expert testimony or execute an affidavit in the case;

-- A waiver of the same specialty or subspecialty requirement is to be based on a determination by the court that the expert possesses sufficient training, experience, and knowledge to provide the testimony as a result of active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field of medicine during the year immediately preceding the date of the occurrence that is the basis for the claim or action; and

-- The good faith requirement for a waiver by the court of the same specialty or subspecialty requirement will not be met by a showing that reviewing or potentially reviewing experts declined to give testimony or execute an affidavit based upon a lack of merit.