

SENATE, No. 477

STATE OF NEW JERSEY
215th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2012 SESSION

Sponsored by:

Senator SAMUEL D. THOMPSON

District 12 (Burlington, Middlesex, Monmouth and Ocean)

SYNOPSIS

Concerns medical malpractice procedures and liability.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel



1 **AN ACT** concerning medical malpractice and revising parts of the
2 statutory law.

3
4 **BE IT ENACTED** *by the Senate and General Assembly of the State*
5 *of New Jersey:*

6
7 1. (New section) As used in this act:

8 "Health care provider" means any person licensed in this State to
9 practice medicine and surgery, chiropractic, podiatry, dentistry,
10 optometry, psychology, pharmacy, nursing, physical therapy or as a
11 bioanalytical laboratory director, or a hospital or other health care
12 facility.

13 "Medical malpractice" means a negligent act or omission to act
14 by a health care provider in the rendering of professional services,
15 which act or omission is the proximate cause of a personal injury or
16 wrongful death, provided that such services are within the scope of
17 services for which the health care provider is licensed and which are
18 not within any restriction imposed by the licensing board or
19 licensed hospital.

20
21 2. (New section) a. A person shall not commence an action
22 alleging medical malpractice against a health care provider, unless
23 the person has given the health care provider written notice of that
24 proposed action not less than 180 days before the action is filed.
25 The notice of intent to file an action shall be mailed to the last
26 known professional business address or residential address of the
27 health care provider who is the subject of the claim. Proof of the
28 mailing of the notice required pursuant to this subsection shall be
29 prima facie evidence of compliance. If no professional business or
30 residential address is known, notice may be mailed to the health
31 care facility where the care that is the subject of the action was
32 rendered.

33 b. Notwithstanding the provisions of subsection a. of this
34 section, there shall be a 90-day notice period in any case in which
35 (1) the claimant has previously filed the 180-day notice required in
36 subsection a. against other health care providers; (2) the claimant
37 has filed a complaint and commenced an action alleging medical
38 malpractice against one or more of the health care providers in
39 connection with the same claim; or (3) the claimant did not identify,
40 and could not reasonably have identified, a health care provider to
41 which notice is required to be sent pursuant to subsection a. of this
42 section, as a potential party to the complaint.

43 c. After the initial notice is given to a health care provider under
44 subsection a. of this section, no addition of any successive 180-day
45 periods shall be permitted, notwithstanding the number of

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 additional notices that may be filed in connection with the claim or
2 the number of health care providers that may be notified.

3
4 3. (New section) Every notice given to a health care provider
5 pursuant to section 2 of this act shall contain a statement of at least
6 all of the following:

7 a. The factual basis for the claim;

8 b. The applicable standard of practice or care alleged by the
9 claimant;

10 c. The manner in which it is claimed that the applicable standard
11 of practice or care was breached by the health care provider;

12 d. The alleged action that should have been taken to achieve
13 compliance with the alleged standard of practice or care;

14 e. The manner in which it is alleged that the breach of the
15 standard of practice or care was the proximate cause of the injury
16 that is the subject of the proposed action; and

17 f. The names of all health care providers that the claimant is
18 notifying pursuant to section 2 of this act in connection with the
19 alleged action.

20
21 4. (New section) a. Not later than 60 days after giving notice
22 pursuant to section 2 of this act, the claimant shall allow the health
23 care provider receiving the notice access to all of the medical
24 records related to the claim that are in the claimant's control, and
25 shall provide releases for any medical records related to the claim
26 that are not in the claimant's control, but of which the claimant has
27 knowledge.

28 b. Not later than 60 days after giving notice pursuant to
29 subsection a. of this section, the health care provider shall allow the
30 claimant access to all medical records in its possession that are
31 related to the claim, provided that this shall not restrict a health care
32 provider that receives notice of a claim from communicating with
33 other health care providers and acquiring medical records as may be
34 necessary or pertinent to the claim.

35
36 5. (New section) a. A person who has given notice pursuant to
37 section 2 of this act or who has commenced an action alleging
38 medical malpractice shall be deemed to have waived, for the
39 purposes of that claim or action, any right of confidentiality with
40 respect to any medical records relating to the claim or action as well
41 as any other similar privilege established in law with respect to any
42 person or entity who was involved in the acts, transactions, events,
43 or occurrences that are the basis for the claim or action or who
44 provided care or treatment to the claimant or plaintiff for the
45 condition that is the subject of the claim or action or a condition
46 related to the claim or action either before or after those acts,
47 transactions, events, or occurrences, whether or not the person is a
48 party to the claim or action.

1 b. Pursuant to subsection a. of this section, a person or entity:
2 (1) who has received notice pursuant to section 2 of this act; or (2)
3 who has been named as a defendant in an action alleging medical
4 malpractice, or that person's or entity's attorney or authorized
5 representative, may communicate with a health care provider, or
6 any business entity of which the foregoing are a part, or any
7 employee or agent thereof, in order to obtain all information
8 relevant to the subject matter of the claim or action and to prepare
9 the person's or entity's defense to the claim or action.

10 c. Any person who discloses or releases information pursuant to
11 subsection b. of this section to a person who has received notice
12 under section 2 of this act or to a person or entity who has been
13 named as a defendant in an action alleging medical malpractice or
14 to the person or entity's attorney or other authorized representative
15 shall not be deemed to have violated any law regarding the privacy
16 or confidentiality of records or any other similar duty or obligation
17 to the claimant or plaintiff otherwise provided by law.

18
19 6. (New section) Not later than 120 days after receipt of the
20 notice required pursuant to section 2 of this act, the health care
21 provider against whom the claim is made shall furnish to the
22 claimant or his authorized representative a written response that
23 contains a statement of the following:

24 a. The factual basis for the defense of the claim;

25 b. The standard of practice or care that the health care provider
26 claims to be applicable to the proposed action, and that the health
27 care provider that is the subject of the claim complied with that
28 standard;

29 c. The manner in which it is claimed by the health care provider
30 that there was compliance with the applicable standard of practice
31 or care;

32 d. The manner in which the health care provider contends that
33 the alleged negligence was not the proximate cause of the claimant's
34 alleged injury or damage.

35
36 7. (New section) a. If at any time during the applicable notice
37 period or periods provided in sections 2, 4 and 6 of this act, a health
38 care provider receiving notice informs the claimant in writing that it
39 does not intend to settle the claim within the applicable notice
40 period, the claimant may file an action alleging medical malpractice
41 against the health care provider, as long as the claim is not barred
42 by the applicable statute of limitations for the filing of such claims.

43 b. If a claimant does not receive the written response required
44 pursuant to section 6 of this act within the required 120-day time
45 period, the claimant may file an action alleging medical malpractice
46 upon the expiration of that period.

47
48 8. (New section) a. Subject to the provisions of subsection b. of

1 this section, in an action alleging medical malpractice, the plaintiff
2 shall have the burden of proving that in light of the state of the art
3 existing at the time of the alleged malpractice: (1) the defendant, if
4 a general practitioner, failed to provide the plaintiff with the
5 recognized standard of acceptable professional practice or care in
6 the community in which the defendant practices or in a similar
7 community, and that as a proximate result of the defendant failing
8 to provide that standard, the plaintiff suffered an injury; or (2) the
9 defendant, if a specialist, failed to provide the plaintiff with the
10 recognized standard of practice or care within that specialty as
11 reasonably applied in light of the facilities available in the
12 community or other facilities reasonably available in the community
13 or other facilities reasonably available under the circumstances, and
14 as a proximate result of the defendant failing to provide that
15 standard, the plaintiff suffered an injury.

16 b. In any action alleging medical malpractice, the plaintiff shall
17 have the burden of proving that he suffered an injury that more
18 probably than not was proximately caused by the negligence of the
19 defendant or defendants.

20 c. In any action alleging medical malpractice, a plaintiff shall
21 not recover for loss of an opportunity to survive or an opportunity
22 to achieve a better result unless the opportunity is determined to be
23 greater than 50%.

24

25 9. (New section) a. In any action alleging medical malpractice,
26 the plaintiff shall file an affidavit pursuant to the provisions of
27 P.L.1995, c.139 (C.2A:53A-26 et seq.); provided, however, that
28 notwithstanding the provisions of that law to the contrary, the
29 affidavit shall be filed by the plaintiff at the time of the filing of the
30 complaint and the affidavit shall be submitted by a person who the
31 plaintiff's attorney reasonably believes meets the requirements of an
32 expert witness as set forth in section 10 of this act.

33 b. Within 21 days following the filing of an affidavit by the
34 plaintiff in accordance with subsection a. of this section, the
35 defendant shall file an answer. In addition, not later than 90 days
36 following the filing of the affidavit, the defendant shall file an
37 affidavit of meritorious defense signed by a person whom the
38 defendant's attorney reasonably believes meets the qualifications for
39 an expert witness as set forth in section 10 of this act. The affidavit
40 of meritorious defense shall certify that the person providing the
41 affidavit has reviewed the complaint and all medical records
42 supplied to him by the defendant's attorney concerning the
43 allegations contained in the complaint and shall contain a statement
44 of each of the following:

45 (1) The factual basis for each defense to the claims made against
46 the defendant in the complaint;

47 (2) The standard of practice or care that the health care provider
48 named as a defendant in the complaint claims to be applicable to the

1 action and that the defendant complied with that standard;

2 (3) The manner in which it is claimed by the defendant that
3 there was compliance with the applicable standard of practice or
4 care;

5 (4) The manner in which the defendant contends that the alleged
6 injury or damage to the plaintiff is not related to the care and
7 treatment rendered.

8 c. If the plaintiff in an action alleging medical malpractice fails
9 to allow access to medical records as required pursuant to section 4
10 of this act, the affidavit of meritorious defense required pursuant to
11 subsection b. of this section may be filed not later than 90 days after
12 filing an answer to the complaint.

13

14 10. (New section) a. In an action alleging medical malpractice,
15 a person shall not give expert testimony or execute an affidavit
16 pursuant to section 9 of this act on the appropriate standard of
17 practice or care unless the person is licensed as a physician or other
18 health care professional licensed in this State and meets the
19 following criteria:

20 (1) If the party against whom or on whose behalf the testimony
21 is offered is a specialist, the person providing the testimony shall
22 have specialized at the time of the occurrence that is the basis for
23 the action in the same specialty as the party against whom or on
24 whose behalf the testimony is offered, and if the person against
25 whom or on whose behalf the testimony is being offered is board
26 certified, the expert witness shall be a specialist who is board
27 certified in the same specialty, and during the year immediately
28 preceding the date of the occurrence that is the basis for the claim
29 or action, shall have devoted a majority of his or her professional
30 time to either: (a) the active clinical practice of the same health
31 care profession in which the defendant is licensed, and if the
32 defendant is a specialist, the active clinical practice of that
33 specialty; or (b) the instruction of students in an accredited medical
34 school, other accredited health professional school or accredited
35 residency or clinical research program in the same health profession
36 in which the defendant is licensed, and, if that party is a specialist,
37 an accredited medical school, health professional school or
38 accredited residency or clinical research program in the same
39 specialty; or (c) both.

40 (2) If the party against whom or on whose behalf the testimony
41 is offered is a general practitioner, the expert witness, during the
42 year immediately preceding the date of the occurrence that is the
43 basis for the claim or action shall have devoted a majority of his or
44 her professional time to: (a) active clinical practice as a general
45 practitioner; or (b) the instruction of students in an accredited
46 medical school, health professional school, or accredited residency
47 or clinical research program in the same health care profession in
48 which the party against whom or on whose behalf the testimony is

1 licensed; or (c) both.

2 b. In determining the qualifications of an expert witness in an
3 action alleging medical malpractice, the court shall, at a minimum,
4 evaluate all of the following: (1) the educational and professional
5 training of the expert witness; (2) the area of specialization of the
6 expert witness; (3) the length of time the expert witness has been
7 engaged in the active clinical practice or instruction of the health
8 care profession or specialty; and (4) the relevancy of the expert
9 witness's testimony.

10 c. Nothing in this section shall limit the power of the trial court
11 to disqualify an expert witness on grounds other than the
12 qualifications set forth in this section.

13 d. In an action alleging medical malpractice, the following
14 limitations shall apply to discovery conducted by opposing counsel
15 to determine whether or not an expert witness is qualified: (1) tax
16 returns of an expert witness are not discoverable; (2) family
17 members of an expert witness shall not be deposed concerning the
18 amount of time the expert witness spends engaged in the practice of
19 his or her profession; and (3) a personal diary or calendar belonging
20 to an expert witness is not discoverable. For the purposes of this
21 paragraph (3), "personal diary or calendar" means a diary or
22 calendar that does not include listings or records of professional
23 activities.

24 e. In an action alleging medical malpractice, an expert witness
25 shall not testify on a contingency fee basis. A person who violates
26 this subsection is guilty of a crime of the fourth degree.

27

28 11. (New section) a. In an action alleging medical malpractice,
29 a scientific opinion rendered by an otherwise qualified expert is not
30 admissible unless the court determines that the opinion is reliable
31 and will assist the trier of fact. In making that determination, the
32 court shall examine the opinion and the basis for the opinion, which
33 basis shall include the facts, technique, methodology, and reasoning
34 relied up on by the expert, and shall consider all of the following
35 factors:

36 (1) Whether the opinion and its basis have been subjected to
37 scientific testing and replication;

38 (2) Whether the opinion and its basis have been subjected to
39 peer review publication;

40 (3) The existence and maintenance of generally accepted
41 standards governing the application and interpretation of a
42 methodology or technique and whether the opinion and its basis are
43 consistent with those standards;

44 (4) The known or potential error rate of the opinion and its
45 basis;

46 (5) The degree to which the opinion and its basis are generally
47 accepted within the relevant expert community. As used in this
48 paragraph (5), "relevant expert community" means individuals who

1 are knowledgeable in the field of study and are gainfully employed
2 applying that knowledge on the free market;

3 (6) Whether the basis for the opinion is reliable and whether
4 experts in that field would rely on the same basis to reach the type
5 of opinion being proffered;

6 (7) Whether the opinion or methodology is relied upon by
7 experts outside of the context of litigation.

8 b. A novel methodology or form of scientific evidence may be
9 admitted into evidence only if its proponent establishes that it has
10 achieved general scientific acceptance among impartial and
11 disinterested experts in the field.

12 c. In an action alleging medical malpractice, the provisions of
13 this section are in addition to, and do not otherwise affect, the
14 criteria for expert testimony provided for in section 10 of this act.
15

16 12. (New section) a. In an action alleging medical malpractice,
17 a party named as a defendant in the action may, instead of
18 answering or otherwise pleading, file with the court an affidavit
19 certifying that he was not involved, either directly or indirectly, in
20 the occurrence alleged in the action. Unless the affidavit is opposed
21 pursuant to subsection b. of this section, the court shall order the
22 dismissal of the claim, without prejudice, against the party
23 providing that certification.

24 b. Any party to a medical malpractice action may oppose the
25 dismissal of any claim pursuant to the filing of an affidavit in
26 accordance with subsection a. of this section or may move to vacate
27 an order of dismissal and the court may reinstate as a party the
28 person filing the affidavit if it can be shown that the party was
29 involved in the occurrence alleged in the action. Reinstatement of a
30 party pursuant to this subsection shall not be barred by any statute
31 of limitations defense that was not valid at the time the original
32 action was filed. The person opposing the dismissal of the claim
33 pursuant to this subsection shall have standing to obtain discovery
34 regarding the involvement or noninvolvement of the party filing the
35 affidavit, which discovery shall be completed within 90 days after
36 the affidavit is filed.
37

38 13. (New section) a. An action alleging medical malpractice
39 shall be mediated pursuant to this act. The judge to whom an action
40 alleging medical malpractice is assigned shall refer the action to
41 mediation by written order not less than 90 days after the filing of
42 the answer or answers required by sections 6 and 9 of this act.

43 b. An action referred to mediation pursuant to subsection a. of
44 this section shall be heard by a panel of neutral mediators. A
45 person serving as a neutral mediator shall comply with ethics
46 standards established by the Supreme Court governing conflicts of
47 interest, professional relationships, and such other issues as the
48 Court may establish. A proposed neutral mediator shall be

1 disqualified from service in any case in which a judge determines
2 that the ethics standards established by the Court would preclude
3 his service on the case, and a neutral mediator may disqualify
4 himself if he determines an affiliation with any party to the dispute
5 that would preclude his service under the ethics standards.

6 c. In any mediation required pursuant to subsection a. of this
7 section, a panel of neutral mediators shall be selected in a manner
8 determined by the court. Each panel shall be composed of five
9 voting members, two of whom shall be attorneys admitted in this
10 State, and two of whom shall be licensed health care providers
11 licensed under the same licensing board as the defendant. If a
12 defendant is a specialist, the health care providers on the panel shall
13 specialize in the same, or related, relevant area of health care as the
14 defendant. The fifth member shall be selected from a pool of active
15 or retired Superior Court judges, active or retired administrative law
16 judges, active or retired workers compensation judges, or other
17 individuals as the Court may determine appropriate to qualify as
18 neutral mediators. An active judge of the Superior Court may be
19 selected as a member of a mediation panel but may not preside at
20 the trial of any action in which he served as mediator. The grounds
21 for disqualification of a neutral mediator in an action shall be the
22 same as the grounds for the disqualification of a judge from an
23 action.

24
25 14. (New section) a. The judge to whom the medical
26 malpractice action has been assigned shall designate a person, who
27 may be the clerk of the court, the assignment clerk, or another
28 person, to serve as the mediation clerk. The mediation clerk shall
29 set a time and place for the mediation hearing and send notice to the
30 neutral mediators and the attorneys of record in the case at least 30
31 days before the date set for the mediation hearing. Adjournments of
32 mediation hearings shall be granted only for good cause, in
33 accordance with the Rules Governing the Courts of the State of
34 New Jersey.

35 b. Not later than the 14 days following the mailing of the notice
36 of the mediation hearing pursuant to subsection a. of this section,
37 each party to the mediation shall pay a fee as prescribed by the
38 court. If a claim is derivative of another claim, the claims shall be
39 treated as a single claim, with one fee paid and a single award made
40 by the neutral mediators.

41 c. Not later than seven days before the mediation hearing date,
42 each party shall submit to the mediation clerk five copies of the
43 documents relating to the issues to be mediated and five copies of a
44 concise brief or summary that sets forth that party's factual or legal
45 position on issues presented in the malpractice action. In addition,
46 one copy of each shall be provided to each attorney of record in the
47 case. Failure to submit the materials required by this subsection
48 shall result in a fine to be determined by the judge to whom the

1 medical malpractice action has been assigned.
2

3 15. (New section) a. A party to the case has the right, but is not
4 required, to attend a mediation hearing. If scars, disfigurement or
5 other pertinent conditions exist, they may be demonstrated to the
6 mediation panel by a personal appearance of the party alleging
7 malpractice, but testimony shall not be taken or permitted from any
8 such party. The Rules of Evidence shall not apply in proceedings of
9 the mediation panel but factual information having a bearing on
10 damages or liability shall be supported by documentary evidence if
11 possible or practicable.

12 b. Oral presentation shall be limited to fifteen minutes per side
13 unless multiple parties or unusual circumstances warrant additional
14 time, which may be granted by the mediation panel. The panel may
15 request information on applicable insurance policy limits and may
16 inquire about settlement negotiations unless objected to by any
17 party. Statements by the attorneys during the hearing and the briefs
18 or summaries presented pursuant to subsection c. of section 14 of
19 this act shall not be admissible in any subsequent court or
20 evidentiary hearing.
21

22 16. (New section) a. Except as otherwise provided in subsection
23 b. of this section, not later than 14 days after the mediation hearing,
24 the panel shall make an evaluation and notify the attorney for each
25 party of its evaluation in writing. The evaluation shall include a
26 specific finding on the standard of care provided. The mediation
27 panel shall indicate in the evaluation if a determination or award of
28 the panel is not unanimous.

29 b. If the mediation panel unanimously determines that a
30 complete action or defense is frivolous as to any party, the panel
31 shall state this to that party. If the action proceeds to trial, the party
32 who has been determined to have a frivolous action or defense shall
33 post a cash or surety bond, approved by the court, in the amount of
34 \$10,000 for each party against whom the action or defense was
35 determined to be frivolous. If judgment is entered against the party
36 who posted the bond, the bond shall be used to pay all reasonable
37 costs incurred by the other party or parties in the frivolous action, as
38 well as any costs allowed by law or by court rule, including court
39 costs and reasonable attorneys' fees.

40 c. The evaluation of the mediation panel shall include a
41 separate determination or award as to each cross-claim,
42 counterclaim, or third-party claim that has been filed in the action.
43

44 17. (New section) a. Each party shall file a written acceptance
45 or rejection of the mediation panel's evaluation with the mediation
46 clerk not later than 30 days after service of the panel's evaluation.
47 The failure to file a written acceptance or rejection within the time
48 limit prescribed shall constitute acceptance of the evaluation. A

1 party's acceptance or rejection of the panel's evaluation shall not be
2 disclosed until the expiration of the time limit prescribed herein, at
3 which time the mediation clerk shall send a notice indicating each
4 party's acceptance or rejection of the panel's evaluation.

5 b. With respect to mediation involving multiple parties, the
6 following rules shall apply:

7 (1) Each party shall have the option of accepting all of the
8 determinations or awards covering the claims by or against that
9 party or of accepting some and rejecting others; provided, however,
10 that as to any particular opposing party, the party shall either accept
11 or reject the evaluation in its entirety;

12 (2) A party who accepts all of the awards may specifically
13 indicate that he or she intends the acceptance to be effective only if
14 all opposing parties accept. If this limitation is not included in the
15 acceptance, an accepting party shall be considered to have agreed to
16 entry of judgment as to that party and those of the opposing parties
17 who accept, with the action to continue between the accepting party
18 and those opposing parties who reject;

19 (3) If a party makes a limited acceptance under paragraph (2) of
20 this subsection and some of the opposing parties accept and others
21 reject the evaluation, for the purposes of the cost provisions
22 contained in section 18 of this act, the party who made the limited
23 acceptance shall be considered to have rejected as to those opposing
24 parties who accepted.

25

26 18. (New section) a. If all of the parties accept the mediation
27 panel's evaluation, judgment shall be entered in that amount, which
28 shall include all fees costs and interest to the date of judgment. In a
29 case involving multiple parties, judgment shall be entered as to
30 those opposing parties who have accepted the portions of the panel's
31 evaluation that apply to them. Except as otherwise provided in this
32 act with respect to cases involving multiple parties, if all or part of
33 the evaluation of the mediation panel is rejected, the action shall
34 proceed to trial.

35 b. The mediation clerk shall place a copy of the mediation
36 evaluation and the parties' respective acceptances and rejections in a
37 sealed envelope for filing with the clerk of the court. In a nonjury
38 action, the envelope shall not be opened and the parties shall not
39 reveal the amount of the evaluation until the judge has rendered
40 judgment.

41 c. If a party has rejected an evaluation and the action proceeds to
42 trial, that party shall pay the opposing party's actual costs unless the
43 verdict is more favorable to the rejecting party than the mediation
44 evaluation; provided, however, that if the opposing party has also
45 rejected the evaluation, that party is entitled to costs only if the
46 verdict is more favorable to that party than the mediation
47 evaluation. For the purposes of this subsection, a verdict shall be
48 adjusted by adding to it assessable costs and interest on the amount

1 of the verdict from the filing of the complaint to the date of the
2 mediation evaluation. Following this adjustment, the verdict shall
3 be considered more favorable to a defendant if it is more than 10%
4 below the evaluation, and is considered more favorable to the
5 plaintiff if it is more than 10% above the evaluation. The judge
6 shall determine the costs pursuant to this subsection, including
7 reasonable fees for attorney services necessitated by the rejection of
8 the mediation panel's evaluation. No costs shall be awarded if the
9 mediation determination or award was not unanimous.

10
11 19. (New section) a. In any action for damages alleging medical
12 malpractice by or against a health care provider, the total amount of
13 damages for noneconomic loss recoverable by all plaintiffs,
14 resulting from negligence of all defendants, shall not exceed
15 \$250,000, unless, as the result of the negligence of one or more of
16 the defendants, one or more of the following exceptions exist, in
17 which case damages for noneconomic loss shall not exceed
18 \$500,000: (1) the plaintiff is hemiplegic, paraplegic, or quadriplegic
19 resulting in a total permanent functional loss of one or more limbs
20 caused by injury to the brain or injury to the spinal cord, or both;
21 (2) the plaintiff has permanently impaired cognitive capacity
22 rendering him incapable of making independent, responsible life
23 decisions and permanently incapable of independently performing
24 the activities of normal, daily living; or (3) there has been
25 permanent loss of or damage to a reproductive organ resulting in the
26 inability to procreate.

27 b. In awarding damages in an action alleging medical
28 malpractice, the trier of fact shall itemize damages into damages for
29 economic loss and damages for noneconomic loss.

30 c. The Supreme Court shall adjust the limitation annually on
31 damages for noneconomic loss provided for in subsection a. of this
32 section by an amount determined by the Court to reflect the
33 cumulative annual percentage change in the Consumer Price Index
34 for All Urban Consumers issued by the United States Department of
35 Labor.

36
37 20. (New section) a. A judge presiding over an action alleging
38 medical malpractice shall review each verdict to determine if the
39 judgment or settlement is in accordance with the provisions of
40 section 19 of this act. If the verdict exceeds the limitations on
41 noneconomic loss set forth in that section, the court shall set aside
42 any amount of noneconomic damages in excess of the amounts
43 provided therein.

44 b. A judge presiding over an action alleging medical malpractice
45 shall review each verdict and shall: (1) concur with the award; (2)
46 upon motion by any party, within 21 days of entry of the judgment
47 of the court, grant a new trial to all or some of the parties, on all or
48 some issues, whenever their substantial rights are materially

1 affected because: (a) the judge determines a verdict to be clearly
2 inadequate or excessive; (b) the judge determines excessive or
3 inadequate damages to have been influenced by passion or
4 prejudice; (c) the judge determines a verdict to have been against
5 the great weight of the evidence or contrary to law; (d) the judge
6 determines that there is newly discovered material evidence which
7 with reasonable diligence could not have been discovered and
8 produced at trial; or (e) the judge makes any other determination
9 otherwise provided by law or court rule.

10 c. Within 21 days after entry of a judgment, the court on its own
11 initiative may order a new trial for any of the reasons set forth in
12 subsection b. of this section, which order shall specify the grounds
13 upon which the order is based.

14 d. If the court finds that the only error in the trial is the
15 inadequacy or excessiveness of the verdict, the court may grant a
16 new trial unless, within 14 days, the nonmoving party consents in
17 writing to the entry of judgment in an amount found by the court to
18 be the lowest or highest amount the evidence will support. If the
19 moving party appeals, the written consent provided for in this
20 subsection shall in no way prejudice the nonmoving party's
21 argument on appeal that the original verdict was correct. If the
22 nonmoving party prevails on appeal, the original verdict may be
23 reinstated by the Appellate Division.

24
25 21. (New section) If the plaintiff in an action alleging medical
26 malpractice enters into a settlement agreement with a defendant
27 concerning the action, whether or not the settlement agreement was
28 entered into under court supervision, and the defendant was a health
29 care provider licensed under Title 45 of the Revised Statutes, the
30 plaintiff's attorney and the defendant's attorney or, if the plaintiff
31 and defendant are not represented by attorneys, the plaintiff and
32 defendant, shall jointly file a complete written copy of the
33 settlement agreement with the professional board in the Division of
34 Consumer Affairs in the Department of Law and Public Safety not
35 later than 30 days after the settlement agreement is entered into.
36 Any such information filed with a professional board shall be
37 confidential except for use by the board, and shall not be subject to
38 disclosure under the provisions of P.L.1963, c.73 (C.47:1A-1 et
39 seq.).

40
41 22. (New section) a. A health care facility or health care agency
42 shall not discharge or discipline, threaten to discharge or discipline,
43 or otherwise discriminate against an employee regarding the
44 employee's compensation, terms, conditions, location, or privileges
45 of employment, or against the privileges of a person who is not an
46 employee of a facility or agency because the employee, other
47 person, or an individual acting on their behalf: (1) reports in good
48 faith or intends to report, verbally or in writing, the medical

1 malpractice of a health care provider; or (2) acts as an expert
2 witness in a civil or administrative action involving medical
3 malpractice.

4 b. A health care facility or health care agency that violates the
5 provisions of subsection a. of this section shall be subject to a fine
6 of not less than \$5,000 nor more than \$10,000 for each violation.

7
8 23. (New section) a. For the purposes of this section:

9 "Annuity" means an annuity issued by an insurer licensed or
10 authorized to do business in this State which is a qualified
11 assignment under section 130 of the Internal Revenue Code, 26
12 U.S.C. s. 130;

13 "Future damages" means damages for economic and
14 noneconomic loss which may arise or be incurred after the date on
15 which a judgment or settlement is entered into in an action
16 involving medical malpractice, which shall include future medical
17 treatment, care or custody, loss of earnings, loss of bodily function,
18 or damages for noneconomic loss "Judgment creditor" means a
19 plaintiff who is the recipient of an award for economic or
20 noneconomic loss that is as the result of an action filed against a
21 health care provider for medical malpractice, which award is
22 subject to the provisions of subsection b. of this section;

23 "Judgment debtor" means a health care provider who, as a
24 defendant in an action brought for medical malpractice, is required
25 to pay the plaintiff an award that is subject to the provisions of
26 subsection a. of this section;

27 "Plaintiff" means a person bringing an action against a health
28 care provider for medical malpractice;

29 "Structured settlement" means an agreement made to settle a
30 claim or lawsuit or respond to a judgment in a lawsuit brought for
31 medical malpractice by an injured person whereby a series of
32 periodic payments rather than a lump sum payment are made over
33 time to a plaintiff, in accordance with the needs of the plaintiff or
34 his family, either through the purchase of an annuity or the
35 establishment of a trust fund, or by another means approved by the
36 court.

37 b. In any judgment or settlement resulting from any medical
38 malpractice action brought by a plaintiff for personal injury or death
39 which is in excess of \$250,000, the court shall enter a judgment
40 ordering that money damages for economic and noneconomic loss,
41 or its equivalent for future damages, shall be paid in the form of a
42 structured settlement by any person, organization, group, or insurer
43 that is contractually liable to pay the judgment or settlement. The
44 sum of \$250,000 as provided herein shall be adjusted annually by
45 the Supreme Court to reflect the cumulative annual percentage
46 change in the Consumer Price Index for All Urban Consumers
47 issued by the United States Department of Labor.

48 c. The structured settlement agreement shall specify the

1 recipient of the payments, the dollar amount of the payments, the
2 interval between payments, the number of payments or the period of
3 time over which payments are to be made and the persons to whom
4 money damages are owed, if any, in the event of the judgment
5 creditor's death.

6 d. In the event of the judgment creditor's death, the court that
7 rendered the original judgment shall, upon application of any party
8 in interest, modify the judgment to reduce the amount of payments
9 required under the structured settlement agreement by any amounts
10 attributable to the future medical treatment, care or custody, loss of
11 bodily function, or pain and suffering of the deceased judgment
12 creditor. Money damages awarded for loss of future earnings shall
13 not be reduced, nor payments terminated, by reason of the death of
14 the judgment creditor, but shall be paid to persons to whom the
15 judgment creditor owed a duty of support, as provided by law,
16 immediately prior to the judgment creditor's death, or if none, to the
17 judgment creditor's estate.

18 e. Upon the purchase of an annuity, establishment of a trust, or
19 approval of another arrangement for periodic payments by a court,
20 any obligation of the judgment debtor with respect to the judgment
21 or settlement shall cease.

22
23 24. (New section) a. Every insurer authorized to transact
24 medical malpractice liability insurance in this State shall offer, to
25 groups of 50 or more insureds, group medical malpractice liability
26 insurance policies with a deductible, at the option of the insureds, in
27 amounts of at least \$50,000 per occurrence and up to \$1,000,000
28 per occurrence.

29 b. Physicians, who may be in the same specialty or in different
30 specialties, may purchase such policies jointly, whether or not they
31 are members of the same practice group, and may elect to treat the
32 deductible amount under the policy as a self-insured retention, in
33 which claims filed under the policy are managed by either the
34 insurer issuing the policy, on an administrative-services-only basis,
35 or by an independent third party administrator approved by the
36 commissioner and the insurer issuing the policy.

37 c. A physician group purchasing a policy issued pursuant to the
38 provisions of this section shall do so pursuant to a written
39 agreement, subscribed to by all of the participating physicians. The
40 agreement shall include provisions regarding the selection of an
41 administrator, allocation of contributions to the self-insured
42 retention under the policy, procedures for investment and
43 management of the contributions, allocation of the cost of the
44 policy premium among physician members of the group, and such
45 other matters as to the administration of the program as may be
46 necessary.

47 d. Every insurer authorized to transact medical malpractice
48 liability insurance in this State shall offer to individual physicians

1 or practice groups such deductibles on those policies as they may
2 require, for a commensurate reduction in premium, which
3 deductibles shall be straight deductibles and shall not be treated as
4 self-insured retention.

5
6 25. (New section) Notwithstanding any law or regulation to the
7 contrary, no insurer authorized to transact medical malpractice
8 liability insurance shall increase the premium of any medical
9 malpractice liability insurance policy based on a claim of medical
10 negligence or malpractice against the insured unless the claim
11 results in a medical malpractice claim settlement, judgment or
12 arbitration award against the insured.

13
14 26. N.J.S.2A:14-2 is amended to read as follows:

15 2A:14-2. **【Every】** a. Except as provided in subsection b. of this
16 section, every action at law for an injury to the person caused by the
17 wrongful act, neglect or default of any person within this state shall
18 be commenced within 2 years next after the cause of any such
19 action shall have accrued.

20 b. Every action at law for an injury to the person caused by the
21 professional negligence of a health care provider within this State
22 shall be commenced within three years after the cause of such
23 action shall have accrued or one year after the injured person
24 discovers, or through the use of reasonable diligence should have
25 discovered, the injury, whichever occurs first, except that no such
26 action shall be commenced after three years unless tolled upon
27 proof of fraud, intentional concealment or the presence of a foreign
28 body, which has no therapeutic or diagnostic purpose or effect, in
29 the person of the injured person; and except that actions by a minor
30 under the full age of two years shall be commenced within seven
31 years, except that the time limit shall be tolled for these minors for
32 any of the four previous reasons provided in this subsection and for
33 any period during which the parent or guardian and the health care
34 provider's insurer or health care provider have committed fraud or
35 collusion in failure to bring an action for professional negligence on
36 behalf of the injured minor.

37 For purposes of this subsection:

38 "Health care provider" means any person licensed in this State to
39 practice medicine and surgery, chiropractic, podiatry, dentistry,
40 optometry, psychology, pharmacy, nursing, physical therapy or as a
41 bioanalytical laboratory director or hospital or other health care
42 facility.

43 "Professional negligence" means a negligent act or omission to
44 act by a health care provider in the rendering of professional
45 services, which act or omission is the proximate cause of a personal
46 injury or wrongful death, provided that those services are within the
47 scope of services for which the health care provider is licensed and
48 which are not within any restriction imposed by the licensing board

1 or licensed hospital.
2 (cf: N.J.S.2A:14-2)

3

4 27. This act shall take effect on the 180th day following
5 enactment, and shall apply to any cause of action arising on or after
6 that date.

7

8

9

STATEMENT

10

11 This bill establishes procedures for the more expeditious
12 discovery and disposition of medical malpractice claims in order to
13 reduce the costs of litigation, and therefore ultimately, the
14 premiums paid by physicians and other health care providers for
15 medical malpractice liability insurance. Further, the bill establishes
16 certain parameters with respect to proof and liability in medical
17 malpractice actions, also in the interests of affordability and
18 availability of malpractice insurance.

19 The bill requires a person contemplating commencement of an
20 action alleging malpractice to give the health care provider who is
21 alleged to have been negligent in the rendering of professional
22 services written notice of the proposed action at least 180 days
23 before the action is filed. The notice shall contain the factual basis
24 for the claim, the applicable standard of care and the manner in
25 which that standard was breached and all health care providers that
26 the claimant is notifying. Within 60 days of the initial notice, the
27 claimant must allow the health care providers involved access to all
28 medical records related to the claim and in the claimant's control
29 and, likewise, the health care providers must allow the claimant
30 similar access. Not later than 120 days after receipt of the initial
31 notice, the health care provider must respond to the notice stating
32 the basis for the defense of the claim. If at any time during the
33 applicable periods, a health care provider informs the claimant that
34 it does not intend to settle the claim within the notice period, the
35 claimant may immediately file an action alleging medical
36 malpractice, so long as the claim is not otherwise barred by the
37 applicable statute of limitations.

38 "Health care provider" is defined by the bill as any person
39 licensed in this State to practice medicine and surgery, chiropractic,
40 podiatry, dentistry, optometry, psychology, pharmacy, nursing,
41 physical therapy or as a bioanalytical laboratory director, or a
42 hospital or other health care facility or health care agency.
43 "Medical malpractice" is defined as a negligent act or omission to
44 act by a health care provider in the rendering of professional
45 services, which act or omission is the proximate cause of a personal
46 injury or wrongful death, provided that such services are within the
47 scope of services for which the health care provider is licensed and
48 which are not within any restriction imposed by the licensing board

1 or licensed hospital.

2 The bill defines the burdens of proof that the plaintiff in a
3 medical malpractice action must meet; specifically that the
4 defendant, if a general practitioner, failed to provide the plaintiff
5 with the recognized standard of acceptable professional practice or
6 care in the community in which the defendant practices or in a
7 similar community, and that as a proximate result of the defendant
8 failing to provide that standard, the plaintiff suffered an injury; or
9 (2) the defendant, if a specialist, failed to provide the plaintiff with
10 the recognized standard of practice within that specialty as
11 reasonably applied in light of the facilities available in the
12 community or other facilities reasonably available in the community
13 or other facilities reasonably available under the circumstances, and
14 as a proximate result of the defendant failing to provide that
15 standard the plaintiff suffered an injury. In any action alleging
16 medical malpractice, the plaintiff shall have the burden of proving
17 that he suffered an injury that more probably than not was
18 proximately caused by the negligence of the defendant. A plaintiff
19 shall not recover for loss of an opportunity to survive or an
20 opportunity to achieve a better result unless the opportunity is
21 determined to be greater than 50%.

22 The bill requires the plaintiff in a medical malpractice action to
23 file an affidavit of merit pursuant to P.L.1995, c.139 (C.2A:53A-26
24 et seq.) at the same time as the filing of the complaint, contrary to
25 the provisions of that law generally. The defendant shall file an
26 answer to the complaint within 21 days of the filing of the
27 complaint and the affidavit of merit and, within 90 days from that
28 filing date, shall file an affidavit of meritorious defense by a person
29 who the defense believes meets the qualifications for an expert
30 witness as established by the bill. Essentially, to qualify as an
31 expert or execute an affidavit, the bill requires that the individual be
32 in the same type of practice and possess the same certifications, as
33 applicable, as the defendant. Other requirements for expert and
34 scientific opinions are also spelled out in the bill.

35 Under the bill, all actions alleging malpractice must be mediated
36 by a panel of five neutral mediators, which shall include two
37 attorneys, two health care providers licensed by the same board as
38 the defendant and an active or retired judge, selected in a manner
39 determined by the Supreme Court. Procedures for the mediation of
40 the complaint are enumerated in the bill. A party to the mediation
41 is permitted, but not required, to attend. If scars or disfigurement
42 exist, they may be demonstrated, but testimony shall not be taken.
43 The Rules of Evidence will not apply and each side shall be limited
44 to a 15 minute oral presentation. The panel's evaluation of the
45 complaint shall be completed and submitted to the parties in writing
46 within 14 days of the hearing. Each party must file an acceptance
47 or rejection of the evaluation. If all of the parties accept the
48 evaluation, judgment shall be entered in that amount. If any party

1 rejects the evaluation, the action may proceed to trial. Costs and
2 interest are also allocated under the bill according to the outcome of
3 the mediation and evaluation process.

4 Noneconomic damages in medical malpractice actions are
5 limited by the bill to \$250,000, unless, as a result of the
6 malpractice, the plaintiff is hemiplegic, paraplegic, or quadriplegic,
7 the plaintiff has permanently impaired cognitive capacity rendering
8 him incapable of independent daily living, or there has been a
9 permanent loss of or damage to a reproductive organ resulting in the
10 inability to procreate, in which case damages for noneconomic loss
11 shall not exceed \$500,000. The trier of fact must itemize damages
12 into economic and noneconomic loss. The presiding judge must
13 review each verdict or settlement and set aside any amount of
14 noneconomic damages in excess of the limits specified by the bill.
15 In cases in which the judgment or settlement exceeds \$250,000, the
16 bill requires structured settlement of money damages for economic
17 and noneconomic loss. In the case of both this amount, and the
18 limits on noneconomic damages, the Supreme Court shall adjust the
19 amounts annually based on the Consumer Price Index.

20 The bill requires that, in any settled action, the plaintiff and
21 defendant shall jointly file a copy of the settlement agreement with
22 the appropriate professional board in the Division of Consumer
23 Affairs within 30 days of the execution of the agreement. A
24 provision prohibiting retaliation by a health care facility or agency
25 against an employee who reports malpractice or acts as an expert
26 witness in a malpractice action is also included.

27 The bill requires that medical malpractice liability insurers must
28 offer groups of 50 or more physicians medical malpractice liability
29 insurance policies with a deductible in amounts of at least \$50,000
30 per occurrence and up to \$1,000,000 per occurrence. The
31 deductible amount may be treated as a self-insured retention, using
32 a third party administrator approved by the commissioner, or using
33 the medical malpractice liability insurer as a third party
34 administrator on an administrative-services-only basis. The bill
35 also requires that insurers offer deductibles to individual physicians
36 and practice groups, with a commensurate reduction in premium.

37 The bill also prohibits a medical malpractice liability insurer
38 from increasing the premium of an insured for a medical
39 malpractice liability claim unless that claim results in a medical
40 malpractice claim settlement, judgment or arbitration award against
41 the insured.

42 The statute of limitations for medical malpractice actions under
43 current law is two years. However, under the discovery rule, the
44 statute is tolled and does not begin to run until the plaintiff knew or,
45 through the exercise of reasonable due diligence should have
46 known, of the injury. The result of this rule is that the tail for
47 medical malpractice liability actions can be virtually infinite.

48 The bill creates two separate statutes of limitations, both of

1 which must be satisfied if a plaintiff is to timely file a medical
2 malpractice action. The action must be brought within one year
3 after the injured party first suffered appreciable harm and suspected,
4 or a reasonable person would have suspected, that someone had
5 done something wrong. The bill also provides that no action may
6 be brought more than three years after the plaintiff first suffered
7 appreciable harm. Either period can be tolled by fraud, intentional
8 concealment or the presence of a foreign object in the patient's
9 body. However, if the injured party was less than two years old
10 when appreciable harm was first suffered, the action must be
11 brought within seven years after the harm. In addition to the other
12 reasons the provisions of the bill may be tolled, the minor's
13 limitations period is tolled if the parent or guardian and the health
14 care provider or malpractice insurer have committed fraud or
15 collusion.