

ASSEMBLY, No. 3294

STATE OF NEW JERSEY 210th LEGISLATURE

INTRODUCED FEBRUARY 4, 2003

Sponsored by:

Assemblyman SAMUEL D. THOMPSON

District 13 (Middlesex and Monmouth)

SYNOPSIS

Concerns medical malpractice procedures and liability.

CURRENT VERSION OF TEXT

As introduced.



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

19
20 2. (New section) a. A person shall not commence an action
21 alleging medical malpractice against a health care provider, unless the
22 person has given the health care provider written notice of that
23 proposed action not less than 180 days before the action is filed. The
24 notice of intent to file an action shall be mailed to the last known
25 professional business address or residential address of the health care
26 provider who is the subject of the claim. Proof of the mailing of the
27 notice required pursuant to this subsection shall be prima facie
28 evidence of compliance. If no professional business or residential
29 address is known, notice may be mailed to the health care facility
30 where the care that is the subject of the action was rendered.

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

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

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 notices that may be filed in connection with the claim or the number
2 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 all
6 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 of
11 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 standard
15 of practice or care was the proximate cause of the injury that is the
16 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 records
24 related to the claim that are in the claimant's control, and shall provide
25 releases for any medical records related to the claim that are not in the
26 claimant's control, but of which the claimant has knowledge.

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

34
35 5. (New section) a. A person who has given notice pursuant to
36 section 2 of this act or who has commenced an action alleging medical
37 malpractice shall be deemed to have waived, for the purposes of that
38 claim or action, any right of confidentiality with respect to any medical
39 records relating to the claim or action as well as any other similar
40 privilege established in law with respect to any person or entity who
41 was involved in the acts, transactions, events, or occurrences that are
42 the basis for the claim or action or who provided care or treatment to
43 the claimant or plaintiff for the condition that is the subject of the
44 claim or action or a condition related to the claim or action either
45 before or after those acts, transactions, events, or occurrences,
46 whether or not the person is a party to the claim or action.

1 b. Pursuant to subsection a. of this section, a person or entity: (1)
2 who has received notice pursuant to section 2 of this act; or (2) who
3 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 any
6 business entity of which the foregoing are a part, or any employee or
7 agent thereof, in order to obtain all information relevant to the subject
8 matter of the claim or action and to prepare the person's or entity's
9 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 under
12 section 2 of this act or to a person or entity who has been named as a
13 defendant in an action alleging medical malpractice or to the person or
14 entity's attorney or other authorized representative shall not be deemed
15 to have violated any law regarding the privacy or confidentiality of
16 records or any other similar duty or obligation to the claimant or
17 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 claimant
22 or his authorized representative a written response that contains a
23 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 care
27 provider that is the subject of the claim complied with that standard;

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

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

34

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

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

1 8. (New section) a. Subject to the provisions of subsection b. of
2 this section, in an action alleging medical malpractice, the plaintiff
3 shall have the burden of proving that in light of the state of the art
4 existing at the time of the alleged malpractice: (1) the defendant, if a
5 general practitioner, failed to provide the plaintiff with the recognized
6 standard of acceptable professional practice or care in the community
7 in which the defendant practices or in a similar community, and that as
8 a proximate result of the defendant failing to provide that standard, the
9 plaintiff suffered an injury; or (2) the defendant, if a specialist, failed
10 to provide the plaintiff with the recognized standard of practice or care
11 within that specialty as reasonably applied in light of the facilities
12 available in the community or other facilities reasonably available in
13 the community or other facilities reasonably available under the
14 circumstances, and as a proximate result of the defendant failing to
15 provide that 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 not
21 recover for loss of an opportunity to survive or an opportunity to
22 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, the
26 plaintiff shall file an affidavit pursuant to the provisions of P.L.1995,
27 c.139 (C.2A:53A-26 et seq.); provided, however, that notwithstanding
28 the provisions of that law to the contrary, the affidavit shall be filed by
29 the plaintiff at the time of the filing of the complaint and the affidavit
30 shall be submitted by a person who the plaintiff's attorney reasonably
31 believes meets the requirements of an expert witness as set forth in
32 section 10 of this act.

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

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

46 (2) The standard of practice or care that the health care provider

1 named as a defendant in the complaint claims to be applicable to the
2 action and that the defendant complied with that standard;

3 (3) The manner in which it is claimed by the defendant that there
4 was compliance with the applicable standard of practice or 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 to
9 allow access to medical records as required pursuant to section 4 of
10 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, a
15 person shall not give expert testimony or execute an affidavit pursuant
16 to section 9 of this act on the appropriate standard of practice or care
17 unless the person is licensed as a physician or other health care
18 professional licensed in this State and meets the following criteria:

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

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

1 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 care
8 profession or specialty; and (4) the relevancy of the expert witness's
9 testimony.

10 c. Nothing in this section shall limit the power of the trial court to
11 disqualify an expert witness on grounds other than the qualifications
12 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 to
15 determine whether or not an expert witness is qualified: (1) tax returns
16 of an expert witness are not discoverable; (2) family members of an
17 expert witness shall not be deposed concerning the amount of time the
18 expert witness spends engaged in the practice of his or her profession;
19 and (3) a personal diary or calendar belonging to an expert witness is
20 not discoverable. For the purposes of this paragraph (3), "personal
21 diary or calendar" means a diary or calendar that does not include
22 listings or records of professional activities.

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

26

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

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

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

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

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

43 (5) The degree to which the opinion and its basis are generally
44 accepted within the relevant expert community. As used in this
45 paragraph (5), "relevant expert community" means individuals who are
46 knowledgeable in the field of study and are gainfully employed

1 applying that knowledge on the free market;

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

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

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

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

14

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

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

34

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

40 b. An action referred to mediation pursuant to subsection a. of this
41 section shall be heard by a panel of neutral mediators. A person
42 serving as a neutral mediator shall comply with ethics standards
43 established by the Supreme Court governing conflicts of interest,
44 professional relationships, and such other issues as the Court may
45 establish. A proposed neutral mediator shall be disqualified from
46 service in any case in which a judge determines that the ethics

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

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

22
23 14. (New section) a. The judge to whom the medical malpractice
24 action has been assigned shall designate a person, who may be the
25 clerk of the court, the assignment clerk, or another person, to serve as
26 the mediation clerk. The mediation clerk shall set a time and place for
27 the mediation hearing and send notice to the neutral mediators and the
28 attorneys of record in the case at least 30 days before the date set for
29 the mediation hearing. Adjournments of mediation hearings shall be
30 granted only for good cause, in accordance with the Rules Governing
31 the Courts of the State of New Jersey.

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

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

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

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

18
19 16. (New section) a. Except as otherwise provided in subsection
20 b. of this section, not later than 14 days after the mediation hearing,
21 the panel shall make an evaluation and notify the attorney for each
22 party of its evaluation in writing. The evaluation shall include a
23 specific finding on the standard of care provided. The mediation panel
24 shall indicate in the evaluation if a determination or award of the panel
25 is not unanimous.

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

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

40
41 17. (New section) a. Each party shall file a written acceptance or
42 rejection of the mediation panel's evaluation with the mediation clerk
43 not later than 30 days after service of the panel's evaluation. The
44 failure to file a written acceptance or rejection within the time limit
45 prescribed shall constitute acceptance of the evaluation. A party's
46 acceptance or rejection of the panel's evaluation shall not be disclosed

1 until the expiration of the time limit prescribed herein, at which time
2 the mediation clerk shall send a notice indicating each party's
3 acceptance or rejection of the panel's evaluation.

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

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

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

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

24
25 18. (New section) a. If all of the parties accept the mediation
26 panel's evaluation, judgment shall be entered in that amount, which
27 shall include all fees costs and interest to the date of judgment. In a
28 case involving multiple parties, judgment shall be entered as to those
29 opposing parties who have accepted the portions of the panel's
30 evaluation that apply to them. Except as otherwise provided in this
31 act with respect to cases involving multiple parties, if all or part of the
32 evaluation of the mediation panel is rejected, the action shall proceed
33 to trial.

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

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

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

11

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

27 b. In awarding damages in an action alleging medical malpractice,
28 the trier of fact shall itemize damages into damages for economic loss
29 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 for
34 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 section
40 19 of this act. If the verdict exceeds the limitations on noneconomic
41 loss set forth in that section, the court shall set aside any amount of
42 noneconomic damages in excess of the amounts provided therein.

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

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

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

15 d. If the court finds that the only error in the trial is the inadequacy
16 or excessiveness of the verdict, the court may grant a new trial unless,
17 within 14 days, the nonmoving party consents in writing to the entry
18 of judgment in an amount found by the court to be the lowest or
19 highest amount the evidence will support. If the moving party appeals,
20 the written consent provided for in this subsection shall in no way
21 prejudice the nonmoving party's argument on appeal that the original
22 verdict was correct. If the nonmoving party prevails on appeal, the
23 original verdict may be 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 and
31 defendant are not represented by attorneys, the plaintiff and defendant,
32 shall jointly file a complete written copy of the settlement agreement
33 with the professional board in the Division of Consumer Affairs in the
34 Department of Law and Public Safety not later than 30 days after the
35 settlement agreement is entered into. Any such information filed with
36 a professional board shall be confidential except for use by the board,
37 and shall not be subject to disclosure under the provisions of
38 P.L.1963, c.73 (C.47:1A-1 et seq.).

39
40 22. (New section) a. A health care facility or health care agency
41 shall not discharge or discipline, threaten to discharge or discipline, or
42 otherwise discriminate against an employee regarding the employee's
43 compensation, terms, conditions, location, or privileges of
44 employment, or against the privileges of a person who is not an
45 employee of a facility or agency because the employee, other person,
46 or an individual acting on their behalf: (1) reports in good faith or

1 intends to report, verbally or in writing, the medical malpractice of a
2 health care provider; or (2) acts as an expert witness in a civil or
3 administrative action involving medical 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 of
6 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 assignment
11 under section 130 of the Internal Revenue Code, 26 U.S.C. s. 130;

12 "Future damages" means damages for economic and noneconomic
13 loss which may arise or be incurred after the date on which a judgment
14 or settlement is entered into in an action involving medical
15 malpractice, which shall include future medical treatment, care or
16 custody, loss of earnings, loss of bodily function, or damages for
17 noneconomic loss;

18 "Judgment creditor" means a plaintiff who is the recipient of an
19 award for economic or noneconomic loss that is as the result of an
20 action filed against a health care provider for medical malpractice,
21 which award is subject to the provisions of subsection b. of this
22 section;

23 "Judgment debtor" means a health care provider who, as a
24 defendant in an action brought for medical malpractice, is required to
25 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 care
28 provider for medical malpractice;

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

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

47 c. The structured settlement agreement shall specify the recipient

1 of the payments, the dollar amount of the payments, the interval
2 between payments, the number of payments or the period of time over
3 which payments are to be made and the persons to whom money
4 damages are owed, if any, in the event of the judgment creditor's
5 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 in
8 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 not
13 be reduced, nor payments terminated, by reason of the death of the
14 judgment creditor, but shall be paid to persons to whom the judgment
15 creditor owed a duty of support, as provided by law, immediately prior
16 to the judgment creditor's death, or if none, to the judgment creditor's
17 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, any
20 obligation of the judgment debtor with respect to the judgment or
21 settlement shall cease.

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

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

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

45 d. Every insurer authorized to transact medical malpractice liability
46 insurance in this State shall offer to individual physicians or practice
47 groups such deductibles on those policies as they may require, for a

1 commensurate reduction in premium, which deductibles shall be
2 straight deductibles and shall not be treated as self-insured retention.

3
4 25. (New section) Notwithstanding any law or regulation to the
5 contrary, no insurer authorized to transact medical malpractice liability
6 insurance shall increase the premium of any medical malpractice
7 liability insurance policy based on a claim of medical negligence or
8 malpractice against the insured unless the claim results in a medical
9 malpractice claim settlement, judgment or arbitration award against the
10 insured.

11
12 26. N.J.S.2A:14-2 is amended to read as follows:

13 2A:14-2. **[Every]** a. Except as provided in subsection b. of this
14 section, every action at law for an injury to the person caused by the
15 wrongful act, neglect or default of any person within this state shall
16 be commenced within 2 years next after the cause of any such action
17 shall have accrued.

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

34 For purposes of this subsection:

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

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

47 (cf: N.J.S.2A:14-2)

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

3
4
5 STATEMENT

6
7 This bill establishes procedures for the more expeditious discovery
8 and disposition of medical malpractice claims in order to reduce the
9 costs of litigation, and therefore ultimately, the premiums paid by
10 physicians and other health care providers for medical malpractice
11 liability insurance. Further, the bill establishes certain parameters with
12 respect to proof and liability in medical malpractice actions, also in the
13 interests of affordability and availability of malpractice insurance.

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

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

43 The bill defines the burdens of proof that the plaintiff in a medical
44 malpractice action must meet; specifically that the defendant, if a
45 general practitioner, failed to provide the plaintiff with the recognized
46 standard of acceptable professional practice or care in the community
47 in which the defendant practices or in a similar community, and that as

1 a proximate result of the defendant failing to provide that standard, the
2 plaintiff suffered an injury; or (2) the defendant, if a specialist, failed
3 to provide the plaintiff with the recognized standard of practice within
4 that specialty as reasonably applied in light of the facilities available in
5 the community or other facilities reasonably available in the
6 community or other facilities reasonably available under the
7 circumstances, and as a proximate result of the defendant failing to
8 provide that standard the plaintiff suffered an injury. In any action
9 alleging medical malpractice, the plaintiff shall have the burden of
10 proving that he suffered an injury that more probably than not was
11 proximately caused by the negligence of the defendant. A plaintiff
12 shall not recover for loss of an opportunity to survive or an
13 opportunity to achieve a better result unless the opportunity is
14 determined to be greater than 50%.

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

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

45 Noneconomic damages in medical malpractice actions are limited
46 by the bill to \$250,000, unless, as a result of the malpractice, the
47 plaintiff is hemiplegic, paraplegic, or quadriplegic, the plaintiff has

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

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

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

31 The bill also prohibits a medical malpractice liability insurer from
32 increasing the premium of an insured for a medical malpractice liability
33 claim unless that claim results in a medical malpractice claim
34 settlement, judgment or arbitration award against the insured.

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

41 The bill creates two separate statutes of limitations, both of which
42 must be satisfied if a plaintiff is to timely file a medical malpractice
43 action. The action must be brought within one year after the injured
44 party first suffered appreciable harm and suspected, or a reasonable
45 person would have suspected, that someone had done something
46 wrong. The bill also provides that no action may be brought more
47 than three years after the plaintiff first suffered appreciable harm.

1 Either period can be tolled by fraud, intentional concealment or the
2 presence of a foreign object in the patient's body. However, if the
3 injured party was less than two years old when appreciable harm was
4 first suffered, the action must be brought within seven years after the
5 harm. In addition to the other reasons the provisions of the bill may
6 be tolled, the minor's limitations period is tolled if the parent or
7 guardian and the health care provider or malpractice insurer have
8 committed fraud or collusion.