

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Committee Substitute

for

Senate Bill 465

BY SENATORS TAKUBO, STOLLINGS AND MARONEY

[Originating in the Committee on the Judiciary;

reported on March 27, 2017.]

1 A BILL to amend and reenact §55-7B-6 of the Code of West Virginia, 1931, as amended, relating
2 to medical professional liability; clarifying requirements for screening certificates of merit;
3 and requiring person who signs screening certificate of merit be from the profession and
4 within the specialty field, if any, or another specialty field that encompasses the area of
5 practice of the health care provider upon whom a notice is required to be served in a
6 medical professional liability action.

Be it enacted by the Legislature of West Virginia:

1 That §55-7B-6 of the Code of West Virginia, 1931, as amended, be amended and
2 reenacted to read as follows:

ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.

**§55-7B-6. Prerequisites for filing an action against a health care provider; procedures;
sanctions.**

1 (a) Notwithstanding any other provision of this code, no person may file a medical
2 professional liability action against any health care provider without complying with the provisions
3 of this section.

4 (b) At least thirty days prior to the filing of a medical professional liability action against a
5 health care provider, the claimant shall serve by certified mail, return receipt requested, a notice
6 of claim on each health care provider the claimant will join in litigation. The notice of claim shall
7 include a statement of the theory or theories of liability upon which a cause of action may be
8 based, and a list of all health care providers and health care facilities to whom notices of claim
9 are being sent, together with a screening certificate of merit. The screening certificate of merit
10 shall be executed under oath by a health care provider qualified as an expert under the West
11 Virginia Rules of Evidence and shall state with particularity: (1) The expert's familiarity with the
12 applicable standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to
13 how the applicable standard of care was breached; and (4) the expert's opinion as to how the
14 breach of the applicable standard of care resulted in injury or death. A separate screening

15 certificate of merit must be provided for each health care provider against whom a claim is
16 asserted. The person signing the screening certificate shall be from the profession and within the
17 specialty field, if any, or another specialty field that encompasses the area of practice of the health
18 care provider upon whom the service of a notice described in this subsection is required. The
19 person signing the screening certificate of merit ~~shall~~ may have no financial interest in the
20 underlying claim, but may participate as an expert witness in any judicial proceeding. Nothing in
21 this subsection ~~may be construed to limit~~ limits the application of Rule 15 of the Rules of Civil
22 Procedure.

23 (c) Notwithstanding any provision of this code, if a claimant or his or her counsel believes
24 that no screening certificate of merit is necessary because the cause of action is based upon a
25 well-established legal theory of liability which does not require expert testimony supporting a
26 breach of the applicable standard of care, the claimant or his or her counsel shall file a statement
27 specifically setting forth the basis of the alleged liability of the health care provider in lieu of a
28 screening certificate of merit.

29 (d) If a claimant or his or her counsel has insufficient time to obtain a screening certificate
30 of merit prior to the expiration of the applicable statute of limitations, the claimant shall comply
31 with the provisions of subsection (b) of this section except that the claimant or his or her counsel
32 shall furnish the health care provider with a statement of intent to provide a screening certificate
33 of merit within sixty days of the date the health care provider receives the notice of claim.

34 (e) Any health care provider who receives a notice of claim pursuant to the provisions of
35 this section may respond, in writing, to the claimant or his or her counsel within thirty days of
36 receipt of the claim or within thirty days of receipt of the screening certificate of merit if the claimant
37 is proceeding pursuant to the provisions of subsection (d) of this section. The response may state
38 that the health care provider has a bona fide defense and the name of the health care provider's
39 counsel, if any.

40 (f) Upon receipt of the notice of claim or of the screening certificate of merit, if the claimant

41 is proceeding pursuant to the provisions of subsection (d) of this section, the health care provider
42 is entitled to prelitigation mediation before a qualified mediator upon written demand to the
43 claimant.

44 (g) If the health care provider demands mediation pursuant to the provisions of subsection
45 (f) of this section, the mediation shall be concluded within forty-five days of the date of the written
46 demand. The mediation shall otherwise be conducted pursuant to Rule 25 of the Trial Court Rules,
47 unless portions of the rule are clearly not applicable to a mediation conducted prior to the filing of
48 a complaint or unless the Supreme Court of Appeals promulgates rules governing mediation prior
49 to the filing of a complaint. If mediation is conducted, the claimant may depose the health care
50 provider before mediation or take the testimony of the health care provider during the mediation.

51 (h) Except as otherwise provided in this subsection, any statute of limitations applicable
52 to a cause of action against a health care provider upon whom notice was served for alleged
53 medical professional liability shall be tolled from the date of mail of a notice of claim to thirty days
54 following receipt of a response to the notice of claim, thirty days from the date a response to the
55 notice of claim would be due, or thirty days from the receipt by the claimant of written notice from
56 the mediator that the mediation has not resulted in a settlement of the alleged claim and that
57 mediation is concluded, whichever last occurs. If a claimant has sent a notice of claim relating to
58 any injury or death to more than one health care provider, any one of whom has demanded
59 mediation, then the statute of limitations shall be tolled with respect to, and only with respect to,
60 those health care providers to whom the claimant sent a notice of claim to thirty days from the
61 receipt of the claimant of written notice from the mediator that the mediation has not resulted in a
62 settlement of the alleged claim and that mediation is concluded.

63 (i) Notwithstanding any other provision of this code, a notice of claim, a health care
64 provider's response to any notice claim, a screening certificate of merit and the results of any
65 mediation conducted pursuant to the provisions of this section are confidential and are not
66 admissible as evidence in any court proceeding unless the court, upon hearing, determines that

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67 failure to disclose the contents would cause a miscarriage of justice.