

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

Senate Bill 510

BY SENATORS TAKUBO, MARONEY, AND WELD

[Introduced February 1, 2019; Referred
to the Committee on Finance]

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; setting out requirements for an expert who signs a
3 certificate of merit; allowing for admissibility of certificate of merit in actions against health
4 care providers; and allowing testimony in a judicial proceeding or by deposition upon
5 issuing a certificate of merit.

Be it enacted by the Legislature of West Virginia:

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 30 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. For the purposes of this
7 section, where the medical professional liability claim against a health care provider is premised
8 upon the act or failure to act of agents, servants, employees or officers of the health care provider,
9 such agents, servants, employees, or officers shall be identified individually by name, or to the
10 extent reasonably identifiable within the medical records or other records. Otherwise, such
11 agents, servants, employees, or officers shall be identified by job title, specific area of professional
12 practice, or specific role in the health care at issue. The notice of claim shall include a statement
13 of the theory or theories of liability upon which a cause of action may be based, and a list of all
14 health care providers and health care facilities to whom notices of claim are being sent, together
15 with a screening certificate of merit, and a list of all medical records and other information
16 reviewed by the signer of the certificate of merit before providing the opinions set forth in
17 subsection (b)(1) through (b)(4). The screening certificate of merit shall be executed under oath

18 by a health care provider qualified as an expert under the West Virginia rules of evidence. ~~and~~
19 The health care provider signing a certificate of merit shall, as of the date of the affidavit:

20 (1) Be licensed to practice medicine or health care with the appropriate licensing authority
21 of any state of the United States: *Provided*, That such license has not been revoked or suspended
22 in the past year in any state;

23 (2) Be engaged or qualified in a medical or health care field in which the health care
24 provider has experience or training in diagnosing or treating injuries or conditions similar to those
25 of the claimant; and,

26 (3) Have devoted 60 percent of his or her professional time annually to the active clinical
27 practice in such medical or health care field or specialty, or to teaching in such medical or health
28 care field or specialty in an accredited medical school or university.

29 ~~shall state with particularity:~~ The certificate of merit shall state with particularity: (1) The
30 basis for the expert's familiarity with the applicable standard of care ~~in~~ at issue; (2) the expert's
31 qualifications; (3) the expert's opinion as to how the applicable standard of care was breached;
32 and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in
33 injury or death. A separate screening certificate of merit must be provided for each health care
34 provider against whom a claim is asserted. The ~~person~~ health care provider signing the screening
35 certificate of merit shall have no financial interest in the underlying claim, but may participate as
36 an expert witness in any judicial proceeding. Nothing in this subsection ~~may be construed to limit~~
37 limits the application of Rule 15 of the Rules of Civil Procedure.

38 (c) Notwithstanding any provision of this code, if a claimant or his or her counsel, believes
39 that no screening certificate of merit is necessary because the cause of action is based upon a
40 well-established legal theory of liability which does not require expert testimony supporting a
41 breach of the applicable standard of care, the claimant or his or her counsel shall file a statement
42 specifically setting forth the basis of the alleged liability of the health care provider in lieu of a
43 screening certificate of merit. The statement shall be accompanied by the list of medical records

44 and other information otherwise required to be provided pursuant to subsection (b) of this section.

45 (d) Except for medical professional liability actions against a nursing home, assisted living
46 facility, their related entities or employees or a distinct part of an acute care hospital providing
47 intermediate care or skilled nursing care or its employees, if a claimant or his or her counsel has
48 insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable
49 statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section
50 except that the claimant or his or her counsel shall furnish the health care provider with a
51 statement of intent to provide a screening certificate of merit within 60 days of the date the health
52 care provider receives the notice of claim. The screening certificate of merit shall be accompanied
53 by a list of the medial records otherwise required to be provided pursuant to subsection (b) of this
54 section.

55 (e) In medical professional liability actions against a nursing home, assisted living facility,
56 their related entities or employees or a distinct part of an acute care hospital providing
57 intermediate care or skilled nursing care or its employees, if a claimant or his or her counsel has
58 insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable
59 statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section
60 except that the claimant or his or her counsel shall furnish the health care provider with a
61 statement of intent to provide a screening certificate of merit within 180 days of the date the health
62 care provider receives the notice of claim.

63 (f) Any health care provider who receives a notice of claim pursuant to the provisions of
64 this section may respond, in writing, to the claimant or his or her counsel within 30 days of receipt
65 of the claim or within 30 days of receipt of the screening certificate of merit if the claimant is
66 proceeding pursuant to the provisions of subsection (d) or (e) of this section. The response may
67 state that the health care provider has a bona fide defense and the name of the health care
68 provider's counsel, if any.

69 (g) Upon receipt of the notice of claim or of the screening certificate of merit, if the claimant

70 is proceeding pursuant to the provisions of subsection (d) or (e) of this section, the health care
71 provider is entitled to prelitigation mediation before a qualified mediator upon written demand to
72 the claimant.

73 (h) If the health care provider demands mediation pursuant to the provisions of subsection
74 (g) of this section, the mediation shall be concluded within 45 days of the date of the written
75 demand. The mediation shall otherwise be conducted pursuant to rule 25 of the trial court rules,
76 unless portions of the rule are clearly not applicable to a mediation conducted prior to the filing of
77 a complaint or unless the Supreme Court of Appeals promulgates rules governing mediation prior
78 to the filing of a complaint. If mediation is conducted, the claimant may depose the health care
79 provider before mediation or take the testimony of the health care provider during the mediation.

80 (i)(1) Except for medical professional liability actions against a nursing home, assisted
81 living facility, their related entities or employees or a distinct part of an acute care hospital
82 providing intermediate care or skilled nursing care or its employees, and except as otherwise
83 provided in this subsection, any statute of limitations applicable to a cause of action against a
84 health care provider upon whom notice was served for alleged medical professional liability shall
85 be tolled from the date of mail of a notice of claim to 30 days following receipt of a response to
86 the notice of claim, 30 days from the date a response to the notice of claim would be due, or 30
87 days from the receipt by the claimant of written notice from the mediator that the mediation has
88 not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last
89 occurs.

90 (2) In medical professional liability actions against a nursing home, assisted living facility,
91 their related entities or employees or a distinct part of an acute care hospital providing
92 intermediate care or skilled nursing care or its employees, except as otherwise provided in this
93 subsection, any statute of limitations applicable to a cause of action against a health care provider
94 upon whom notice was served for alleged medical professional liability shall be tolled 180 days
95 from the date of mail of a notice of claim to 30 days following receipt of a response to the notice

96 of claim, 30 days from the date a response to the notice of claim would be due, or 30 days from
97 the receipt by the claimant of written notice from the mediator that the mediation has not resulted
98 in a settlement of the alleged claim and that mediation is concluded, whichever last occurs.

99 (3) If a claimant has sent a notice of claim relating to any injury or death to more than one
100 health care provider, any one of whom has demanded mediation, then the statute of limitations
101 shall be tolled with respect to, and only with respect to, those health care providers to whom the
102 claimant sent a notice of claim to 30 days from the receipt of the claimant of written notice from
103 the mediator that the mediation has not resulted in a settlement of the alleged claim and that
104 mediation is concluded.

105 (j) Notwithstanding any other provision of this code, a notice of claim, a health care
106 provider's response to any notice claim, a screening certificate of merit and the results of any
107 mediation conducted pursuant to the provisions of this section are confidential and are not
108 admissible as evidence in any court proceeding unless the court, upon hearing, determines that
109 failure to disclose the contents would cause a miscarriage of justice.

NOTE: The purpose of this bill is to update the requirements for a certificate of merit.

Strike-throughs indicate language that would be stricken from a heading or the present law
and underscoring indicates new language that would be added.