

Regular Session, 2008

HOUSE BILL NO. 881

BY REPRESENTATIVE LORUSSO

MALPRACTICE/MEDICAL: Provides relative to medical malpractice actions

1 AN ACT

2 To amend and reenact R.S. 40:1299.44(A)(5)(c), 1299.47(A)(1)(a), (2)(a) and (3)(b), and
3 (B)(1)(a)(i) and 1299.49(A)(introductory paragraph) and to enact R.S.
4 40:1299.41(A)(22) and (23), 1299.47(A)(3)(d) and (4)(e), 1299.47.1 and 1299.49(B),
5 relative to medical malpractice claims; to provide definition and requirements for
6 "expert" and "expert report"; to provide limitations on expert testimony; to provide
7 relative to claims required to be filed with a medical review panel; to limit the
8 requirement for medical review panels to claims filed on or before December 31,
9 2008; to provide procedures for filing and service of a claim after December 31,
10 2008; and to provide for related matters.

11 Be it enacted by the Legislature of Louisiana:

12 Section 1. R.S. 40:1299.44(A)(5)(c), 1299.47(A)(1)(a), (2)(a) and (3)(b), and
13 (B)(1)(a)(i) and 1299.49(A)(introductory paragraph) are hereby amended and reenacted and
14 R.S. 40:1299.41(A)(22) and (23), 1299.47(A)(3)(d) and (4)(e), 1299.47.1, and 1299.49(B)
15 are hereby enacted to read as follows:

16 §1299.41. Definitions and general applications

17 A. As used in this Part:

18 * * *

1 (22) "Expert" means:

2 (a)(i) With respect to opinion testimony regarding the applicable standard
3 of care and whether a physician departed from such a standard of care, a physician
4 who is actively practicing in the field, specialty, or subspecialty which ever is
5 applicable to the defendant physician and otherwise qualified to testify under the
6 requirements of R.S. 9:2794 or any other revised statute specifically applicable to the
7 burden of proof and expert witness qualification in a medical malpractice action.

8 (ii) With respect to opinion testimony regarding the applicable standard of
9 care or the appropriateness of the health care rendered by a health care provider other
10 than a physician, a person qualified to testify under the requirements of R.S. 9:2794
11 or any other revised statute specifically applicable to the burden of proof and expert
12 witness qualification in a medical malpractice action or the Louisiana Code of
13 Evidence.

14 (iii) With respect to opinion testimony in a malpractice claim against a
15 physician regarding whether the injury, harm, or damage claimed was the proximate
16 result of the alleged departure from the applicable standard of care, a physician,
17 whether or not a treating physician, who practices in a field, specialty, or
18 subspecialty that is ordinarily and commonly engaged in the diagnosis and treatment
19 of such injury, harm, or damage and who is otherwise qualified to render opinions
20 on such causal relationship under R.S. 9:2794 or any other revised statute
21 specifically applicable to the burden of proof and expert witness qualification in a
22 medical malpractice action.

23 (iv) With respect to opinion testimony in a malpractice claim against a
24 dentist, optometrist, or chiropractic physician regarding whether the injury, harm, or
25 damage claimed was the proximate result of the alleged departure from the
26 applicable standard of care, a physician, dentist, optometrist, or chiropractic
27 physician, whether or not a treating physician, dentist, optometrist, or chiropractic
28 physician, who practices in a field, specialty, or subspecialty that is ordinarily and
29 commonly engaged in the diagnosis and treatment of such injury, harm, or damage

1 and who is otherwise qualified to render opinions on such causal relationship under
2 the R.S. 9:2794 or any other revised statute specifically applicable to the burden of
3 proof and expert witness qualification in a medical malpractice action.

4 (v) With respect to opinion testimony in a malpractice claim against a health
5 care provider other than a physician, dentist, optometrist, and chiropractic physician
6 regarding whether the injury, harm, or damage claimed was the proximate result of
7 the failure to render the appropriate health care, a person qualified to testify under
8 the requirements of R.S. 9:2794 or any other revised statute specifically applicable
9 to the burden of proof and expert witness qualification in a medical malpractice
10 action or the Louisiana Code of Evidence.

11 (b) A nurse shall not be qualified to give opinion testimony as to whether the
12 harm, injury, or damage claimed was the proximate result of the alleged departure
13 from the applicable standard of care or from the failure to render the appropriate
14 health care in a medical malpractice claim.

15 (23) "Expert report" means a written report by a person who qualifies as an
16 expert under R.S. 40:1299(A)(22) that provides a fair summary of the expert's
17 opinions as of the date of the report relative to each health care provider against
18 whom a medical malpractice claim is asserted regarding the applicable standard of
19 care, whether the health care provider departed from such standard of care and
20 whether the injury, harm, or damage was the proximate result of the alleged
21 departure as provided for in R.S. 9:2794 or any other revised statute specifically
22 applicable to the burden of proof and expert witness qualification in a medical
23 malpractice action. The report shall include a certification by the expert that he has
24 reviewed sufficient medical records upon which to base his opinion. The report shall
25 also specifically identify the medical or hospital records and other documents and
26 tangible things reviewed, and additionally it shall state any other factual sources
27 upon which his opinions are founded.

28 * * *

CODING: Words in ~~struck through~~ type are deletions from existing law; words underscored are additions.

1 Part, but who has not qualified under this Part, until ninety days following
 2 notification by certified mail to the claimant or his attorney by the board that the
 3 health care provider is not covered by this Part. The timely filing of a request for
 4 review of a claim on or before December 31, 2008, shall suspend the running of
 5 prescription against all joint and solidary obligors, and all joint tortfeasors, including
 6 but not limited to health care providers, both qualified and not qualified, to the same
 7 extent that prescription is suspended against the party or parties that are the subject
 8 of the request for review. Filing a request for review of a malpractice claim as
 9 required by this Section with any agency or entity other than the division of
 10 administration shall not suspend or interrupt the running of prescription. All requests
 11 for review of a malpractice claim identifying additional health care providers shall
 12 also be filed with the division of administration. Filing or attempting to file a request
 13 for review of a malpractice claim on or after January 1, 2009, shall not suspend or
 14 interrupt the running of prescription.

15 * * *

16 (3) It shall be the duty of the board within fifteen days of the receipt of the
 17 claim by the board to:

18 * * *

19 (b) In the confirmation to the claimant pursuant to Subparagraph (a) of this
 20 Paragraph, notify the claimant of the amount of the filing fee due and the time frame
 21 within which such fee is due to the board, and that upon failure to comply with the
 22 provisions of Subparagraph (1)(c) or (d) of this Subsection, the request for review
 23 of a malpractice claim is invalid and without effect and that the request shall not
 24 suspend the time within which ~~suit~~ a malpractice claim must be instituted in
 25 Subparagraph (2)(a) of this Subsection.

26 * * *

27 (d) Notify claimant that it is refusing to accept for filing a request for review
 28 when the claim was not filed as provided herein before January 1, 2009, and that, as

1 provided in R.S. 40:1299.47A(2)(a), prescription shall not be suspended or
2 interrupted by such an attempted filing.

3 (4) The board shall notify the claimant and all named defendants by certified
4 mail, return receipt requested, of any of the following information:

5 * * *

6 (e) That the claimant has attempted to file a claim on or after January 1,
7 2009, and that such attempt to file was refused.

8 * * *

9 B.(1)(a)(i) No action against a health care provider covered by this Part, or
10 his insurer, may be commenced in any court prior to January 1, 2009, before the
11 claimant's proposed complaint has been presented to a medical review panel
12 established pursuant to this Section.

13 * * *

14 §1299.47.1. Claim filing procedure

15 A. The claim filing procedure provided herein shall apply to all malpractice
16 claims filed on or after January 1, 2009, against a qualified health care provider,
17 regardless of when the claim arose.

18 B.(1) Any person asserting a malpractice claim shall furnish written notice
19 of such claim by certified mail, return receipt requested, to the Patient's
20 Compensation Fund and to each health care provider against whom such claim is
21 being made at least sixty days before the filing of a malpractice claim in a court of
22 competent jurisdiction and proper venue, provided however a claim which has been
23 the subject of a previously filed medical review panel proceeding shall be exempt
24 from this notice requirement and may be filed in a court of competent jurisdiction
25 and proper venue. The notice shall reasonably describe the facts, circumstances, or
26 incidents giving rise to the claim, including the dates or time frames thereof, and
27 shall be accompanied by the authorization form for release of protected health
28 information required herein.

1 (2) In the event a claim is subsequently filed in a court of competent
2 jurisdiction and proper venue, the claimant shall verify he has fully complied with
3 the provisions of this Section.

4 (3) In the event that the claim is exempt from the notice requirement of
5 Paragraph (1) of this Subsection because a claim has been the subject of a previously
6 filed medical review panel proceeding, the claimant shall furnish a copy of a claim
7 for damages filed in a court of competent jurisdiction and proper venue to the
8 Patient's Compensation Fund by certified mail, return receipt requested.

9 (4) Notice as provided in this Section shall suspend the running of
10 prescription as to any health care provider to whom such notice was mailed for a
11 maximum of seventy-five days from the date of mailing, as evidenced by the
12 certified mail receipt. Subject to R.S. 9:5628, notice as required by this Section shall
13 also suspend the running of prescription against all joint and solidary obligors, and
14 all joint tortfeasors, including but not limited to health care providers, both qualified
15 and not qualified, to the same extent that prescription is suspended against a health
16 care provider to whom such notice was mailed as provided in this Section. No
17 suspension of the prescriptive period resulting from the mailing of such notice shall
18 be construed to extend the three-year preemptive period established by R.S. 9:5628.

19 (5) Each health care provider against whom a claim is being asserted shall
20 be entitled to obtain complete and unaltered copies of the patient's medical records
21 pursuant to the provisions of R.S. 40:1299.96 and Subsection D of this Section.

22 (6) Upon receipt of written notice as provided in Paragraph (1) of this
23 Subsection, each health care provider against whom a claim of malpractice is being
24 asserted shall be entitled to discuss with and provide copies of medical or hospital
25 records or other documents or tangible things related to the patient's health care to
26 his attorney and professional liability insurer.

27 (7)(a) For the purposes of this Section, a request for the medical records of
28 a claimant who is incompetent shall be deemed to be valid if accompanied by an

1 authorization in the form provided herein and signed by a person authorized by law
2 to consent to medical treatment on behalf of said claimant.

3 (b) For the purposes of this Section, and notwithstanding R.S. 40:1299.96,
4 or any other law, a request for the medical records of a deceased person whose health
5 care is the subject of alleged malpractice shall be deemed to be valid if accompanied
6 by an authorization in the form provided herein and signed by a person authorized
7 by law to assert any claim arising out of or related to the malpractice claimed.

8 (8) Except for those claims which were the subject of a previously filed
9 medical review panel proceeding, any malpractice claim filed in court more than
10 sixty days after January 1, 2009, asserting a malpractice claim shall be dismissed as
11 premature at the cost of the filing party if either:

12 (a) The claimant has failed to mail the notice as required by this Section.

13 (b) The malpractice claim was filed fewer than sixty days after the mailing
14 of the required notice.

15 C.(1) Not later than the one hundred twentieth day after the date of filing of
16 a malpractice claim in court, the claimant shall serve on each party or, if represented,
17 on each party's attorney, one or more expert reports, as defined in R.S. 40:1299.41,
18 with a curriculum vitae of each expert listed in the report, relative to each health care
19 provider against whom a malpractice claim is asserted. The date for serving the
20 report may be extended by written agreement of the claimant and health care
21 provider. Each defendant health care provider whose conduct is implicated in a
22 report must file and serve any objection to the sufficiency of the report not later than
23 the twenty-first day after the date it was served, failing which all objections are
24 waived.

25 (2) Notwithstanding any other provision of this Section, a claimant may
26 satisfy any requirement of this Section for serving an expert report by serving reports
27 of separate experts.

28 (3) If, as to a defendant health care provider, an expert report has not been
29 served within the period specified by Paragraph (1) of this Subsection, the court, on

1 the motion of the affected health care provider, shall, subject to Paragraph (4) of this
2 Subsection, enter an order that dismisses the malpractice claim with respect to the
3 health care provider and award reasonable attorney fees and costs. The filing of a
4 malpractice claim shall not interrupt or suspend the running of prescription.

5 (4) A court shall grant a motion challenging the adequacy of an expert report
6 if it appears to the court, after hearing, that the report does not comply with all
7 elements of the definition of an expert report in R.S. 40:1299.41. If the court
8 determines that an expert report does not comply with the requirements of R.S.
9 40:1299.41(A)(23), the court may grant one thirty-day extension to the claimant in
10 order to cure the deficiency. If the claimant does not receive notice of the court's
11 ruling granting the extension until after the one-hundred-twenty-day deadline has
12 passed, the thirty-day extension shall run from the date the claimant first received the
13 notice. If claimant fails to furnish an expert report which complies with the
14 requirements of R.S. 40:1299.41A(23) after the expiration of the court ordered
15 extension, the court shall dismiss the malpractice claim and award reasonable
16 attorney fees and costs.

17 (5) Until a claimant has served the expert report and curriculum vitae as
18 required by Paragraph (1) of this Subsection, all discovery other than provided for
19 in Paragraph (6) of this Subsection shall be stayed except the discovery related to the
20 identification and acquisition of information in the form of medical or hospital
21 records or other documents or tangible things related to the patient's health care.

22 (6) A claimant may take the deposition of a health care provider against
23 whom a malpractice claim has been asserted prior to the filing of the expert witness
24 report upon certification to the court that the scope of the deposition shall be limited
25 to information necessary for the preparation of the expert report.

26 D. The Louisiana Department of Health and Hospitals shall, prior to
27 November 1, 2008, publish in the Louisiana Register an authorization form that
28 complies with the provisions of this Section, with other requirements for
29 authorizations provided by Louisiana law, and with 45 CFR 164.508, 42 CFR Part

1 2, and any other applicable laws. This form shall be used by claimants to satisfy the
2 requirements of this Section. No health care provider shall refuse to accept the
3 published authorization form in a malpractice claim without good cause, but said
4 healthcare provider shall continue to be entitled to receive the reimbursement for
5 providing the copies allowed by R.S. 40:1299.96.

6 E. Legal interest shall accrue from the date of mailing of the notice required
7 by this Section on a judgment rendered by a court in a medical malpractice claim
8 brought after compliance with this Part.

9 * * *

10 §1299.49. Medical review panel; one panel for state and private claims

11 A. The following provisions shall apply when, for the same injury to or death
12 of a patient, a malpractice claim filed before January 1, 2009, alleges liability of both
13 a state health care provider under the provisions of this Part and a health care
14 provider under the provisions of Part XXI-A of this Chapter:

15 * * *

16 B. When a malpractice claim filed on or after January 1, 2009, alleges
17 liability of both a state health care provider under the provisions of this Part and a
18 health care provider under the provisions of Part XXI-A of this Chapter for the same
19 injury to or death of a patient, unless all parties have agreed otherwise, only the
20 health care providers covered by Part XXI-A shall be subject to the medical review
21 panel convened in such instance to review the claims under Part XXI-A of this
22 Chapter.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

Lorusso

HB No. 881

Abstract: Provides definitions for "expert" and "expert report" and eliminates the requirements of a medical review panel for private health care providers covered by the Medical Malpractice Act (MMA).

Proposed law provides a definition for the terms "expert" and "expert report".

Present law requires that all medical malpractice claims be heard by a medical review panel prior to suit being filed.

Proposed law retains present law until December 31, 2008, and provides that all claims filed under the Medical Malpractice Act (MMA) for private services after December 31, 2008, are not required to be heard by a medical review panel.

Proposed law provides new procedures for the filing of a medical malpractice claim for private services under the (MMA) filed on or after January 1, 2009. The new procedures include, but are not limited to the: (1) furnishing notice to the Patient's Compensation Fund and to each health care provider; (2) verifying full compliance with proposed law; (3) suspending prescription by the proper sending of notice; (4) availability of the patient's complete medical records; (5) dismissal of the claim as premature if the required notices were not timely delivered prior to filing suit; (6) service of expert reports; (7) challenging the adequacy of an expert report and the staying of all discovery until the expert report is timely served; and (8) taking of a deposition of a health care provider.

Proposed law requires the Louisiana Department of Health and Hospitals publish a form authorization for the request for medical records.

Proposed law provides that if a claim alleges liability of both a state health care provider under the Malpractice Liability for State Services Act (MLSSA) and a private health care provider under the MMA, only the health care providers covered by the MLSSA shall be subject to a medical review panel.

(Amends R.S. 40:1299.44(A)(5)(c), 1299.47(A)(1)(a), (2)(a), and (3)(b), and (B)(1)(a)(i) and 1299.49(A)(intro. para.); Adds R.S. 40:1299.41(A)(22) and (23), 1299.47(A)(3)(d) and (4)(e), and 1299.47.1, and 1299.49(B))