# By: Delegates Shank, Donoghue, Kelly, McComas, McKee, Morhaim, Myers, Sophocleus, Weldon, and Zirkin Introduced and read first time: February 11, 2005 Assigned to: Judiciary

A BILL ENTITLED

## 1 AN ACT concerning

2	Health Care Malpractice - Medical Experts - Maintaining or Defending
3	Claim or Action in Bad Faith or Without Substantial Justification

4 FOR the purpose of requiring that certain certificates and testimony of medical

5 experts meet certain criteria in a health care malpractice claim or action under

6 certain circumstances; requiring a panel chairman or court to order a party or

7 an attorney of the party or both to pay certain costs and expenses of certain

8 proceedings if the proceeding was maintained or defended under certain

9 circumstances involving bad faith or a lack of substantial justification; altering

10 the definition of the practice of medicine to include testifying as or offering an

opinion as a medical expert under certain circumstances; providing certain

12 exemptions from license requirements for practicing medicine; providing that

13 certain medical experts are subject to certain proceedings by the Board of 14 Physicians under certain circumstances: providing for the application of this

Physicians under certain circumstances; providing for the application of thisAct; and generally relating to certain certificates and testimony of experts in

health care malpractice claims or actions and requiring the payment of certain

17 costs and expenses incurred by maintaining or defending a health care

18 malpractice claim or action in a certain manner.

19 BY repealing and reenacting, with amendments,

- 20 Article Courts and Judicial Proceedings
- 21 Section 3-2A-04(b)(1)(i)1 and (2)(i), 3-2A-06D(b)(1), and 3-2A-10
- 22 Annotated Code of Maryland
- 23 (2002 Replacement Volume and 2004 Supplement)
- (As enacted by Ch. 5 of the Acts of the General Assembly of the 2004 Special
   Session)
- 26 BY adding to
- 27 Article Courts and Judicial Proceedings
- 28 Section 3-2A-10 and 9-124
- 29 Annotated Code of Maryland
- 30 (2002 Replacement Volume and 2004 Supplement)

## **UNOFFICIAL COPY OF HOUSE BILL 1193**

- 1 BY repealing and reenacting, with amendments,
- 2 Article Health Occupations
- 3 Section 14-101, 14-302, and 14-401(i)
- 4 Annotated Code of Maryland
- 5 (2000 Replacement Volume and 2004 Supplement)

6 BY adding to

- 7 Article Health Occupations
- 8 Section 14-404.1
- 9 Annotated Code of Maryland
- 10 (2000 Replacement Volume and 2004 Supplement)

# 11 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF

12 MARYLAND, That the Laws of Maryland read as follows:

# 13

# **Article - Courts and Judicial Proceedings**

14 3-2A-04.

15 (b) Unless the sole issue in the claim is lack of informed consent:

- 16 (1) (i) 1. Except as provided in subparagraph (ii) of this paragraph,
- 17 a claim or action filed after July 1, 1986, shall be dismissed, without prejudice, if the

18 claimant or plaintiff fails to file, WITHIN 90 DAYS FROM THE DATE OF THE

19 COMPLAINT, a certificate of a qualified expert with the Director attesting to

20 departure from standards of care [, and], that the departure from standards of care is

21 the proximate cause of the alleged injury, [within 90 days from the date of the

22 complaint;] AND THAT THE EXPERT'S OPINION:

23 24 CERTAINTY;	А.	IS EXPRESSED TO A REASONABLE DEGREE OF MEDICAL
25 26 VALIDITY;	В.	IS SCIENTIFICALLY VALID AND HAS BEEN TESTED FOR
27	C.	HAS BEEN OBJECTIVELY EXAMINED FOR ERROR; AND
28	D.	HAS BEEN SUBJECT TO PEER REVIEW; AND
31 liability and fails to file, WIT	tiff on the HIN 120	n or action filed after July 1, 1986, may be adjudicated in e issue of liability, if the defendant disputes DAYS FROM THE DATE THE CLAIMANT OR CATE OF A QUALIFIED EXPERT SET FORTH IN
		CTION ON THE DEFENDANT, a certificate of a qualified

34 expert attesting to compliance with standards of care, or that the departure from

35 standards of care is not the proximate cause of the alleged injury[, within 120 days

36 from the date the claimant or plaintiff served the certificate of a qualified expert set

3	UNOI	FICIAL	COPY OF HOUSE BILL 1193			
<ol> <li>forth in paragraph (1) of this subsection on the defendant] AND THAT THE EXPERT'S</li> <li>OPINION:</li> </ol>						
3 4 CERTAINTY;		1.	IS EXPRESSED TO A REASONABLE DEGREE OF MEDICAL			
5 6 VALIDITY;		2.	IS SCIENTIFICALLY VALID AND HAS BEEN TESTED FOR			
7		3.	HAS BEEN OBJECTIVELY EXAMINED FOR ERROR; AND			
8		4.	HAS BEEN SUBJECT TO PEER REVIEW.			
9 3-2A-06D.						
10 (b) (1) 11 completed, a part 12 expert, for each de	y shall file	with the c	after the date that discovery is required to be ourt a supplemental certificate of a qualified to:			
<ul><li>13</li><li>14 standard of care;</li></ul>	(i)	The ce	rtifying expert's basis for alleging what is the specific			
15 16 standard of care;	(ii)	The ce	rtifying expert's qualifications to testify to the specific			
17	(iii)	The sp	ecific standard of care;			
17 18	(iii) (iv)	-	ecific standard of care; plaintiff:			
		-				
18		For the	plaintiff:			
18 19	(iv)	For the 1. 2. 3.	plaintiff: The specific injury complained of;			
18 19 20 21	(iv) ard of care	For the 1. 2. 3. [and] 4.	plaintiff: The specific injury complained of; How the specific standard of care was breached; What specifically the defendant should have done to meet The inference that the breach of the standard of care			
<ol> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22 the specific standa</li> <li>23</li> </ol>	(iv) ard of care	For the 1. 2. 3. [and] 4.	plaintiff: The specific injury complained of; How the specific standard of care was breached; What specifically the defendant should have done to meet The inference that the breach of the standard of care			
<ul> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22 the specific standa</li> <li>23</li> <li>24 proximately cause</li> </ul>	(iv) ard of care	For the 1. 2. 3. [and] 4. utiff's injust	plaintiff: The specific injury complained of; How the specific standard of care was breached; What specifically the defendant should have done to meet The inference that the breach of the standard of care ry; and			
<ul> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22 the specific standa</li> <li>23</li> <li>24 proximately cause</li> <li>25</li> <li>26</li> </ul>	(iv) ard of care	For the 1. 2. 3. [and] 4. tiff's injut 5.	plaintiff: The specific injury complained of; How the specific standard of care was breached; What specifically the defendant should have done to meet The inference that the breach of the standard of care ry; and THE EXPERT'S OPINION AS:			
<ul> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22 the specific standa</li> <li>23</li> <li>24 proximately cause</li> <li>25</li> <li>26</li> <li>27 CERTAINTY;</li> </ul>	(iv) ard of care	For the 1. 2. 3. [and] 4. ttiff's injut 5. A.	plaintiff: The specific injury complained of; How the specific standard of care was breached; What specifically the defendant should have done to meet The inference that the breach of the standard of care ry; and THE EXPERT'S OPINION AS: EXPRESSED TO A REASONABLE DEGREE OF MEDICAL			
<ul> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22 the specific standa</li> <li>23</li> <li>24 proximately cause</li> <li>25</li> <li>26</li> <li>27 CERTAINTY;</li> <li>28</li> </ul>	(iv) ard of care	For the 1. 2. 3. [and] 4. .tiff's injut 5. A. B.	plaintiff: The specific injury complained of; How the specific standard of care was breached; What specifically the defendant should have done to meet The inference that the breach of the standard of care ry; and THE EXPERT'S OPINION AS: EXPRESSED TO A REASONABLE DEGREE OF MEDICAL SCIENTIFICALLY VALID AND TESTED FOR VALIDITY;			

#### **UNOFFICIAL COPY OF HOUSE BILL 1193** 4 1. How the defendant complied with the specific standard of 1 2 care; 3 2. What the defendant did to meet the specific standard of 4 care; [and] 5 3. If applicable, that the breach of the standard of care did 6 not proximately cause the plaintiff's injury; AND 7 THE EXPERT'S OPINION AS: 4. 8 EXPRESSED TO A REASONABLE DEGREE OF MEDICAL A. 9 CERTAINTY: 10 B. SCIENTIFICALLY VALID AND TESTED FOR VALIDITY; 11 C. OBJECTIVELY EXAMINED FOR ERROR; AND 12 D. SUBJECTED TO PEER REVIEW. 13 3-2A-10.

IN A CLAIM OR ACTION UNDER THIS SUBTITLE, IF A PANEL CHAIRMAN OR
COURT FINDS THAT THE CONDUCT OF A PARTY IN MAINTAINING OR DEFENDING A
PROCEEDING WAS IN BAD FAITH OR WITHOUT SUBSTANTIAL JUSTIFICATION, THE
PANEL CHAIRMAN OR COURT SHALL ORDER THE OFFENDING PARTY OR THE
ATTORNEY ADVISING THE CONDUCT OR BOTH TO PAY TO THE ADVERSE PARTY THE
COSTS OF THE PROCEEDING AND THE REASONABLE EXPENSES, INCLUDING
REASONABLE ATTORNEY'S FEES, INCURRED BY THE ADVERSE PARTY IN OPPOSING
IT.

22 [3-2A-10.] 3-2A-11.

23 Except as otherwise provided in §§ 3-2A-08A [and], 3-2A-09, AND 3-2A-10 of

24 this subtitle, the provisions of this subtitle shall be deemed procedural in nature and

25 may not be construed to create, enlarge, or diminish any cause of action not heretofore

26 existing, except the defense of failure to comply with the procedures required under

27 this subtitle.

28 9-124.

(A) IN A CLAIM OR ACTION SUBJECT TO TITLE 3, SUBTITLE 2A OF THIS
ARTICLE, IF A COURT DETERMINES THAT SCIENTIFIC, TECHNICAL, OR OTHER
SPECIALIZED KNOWLEDGE WILL ASSIST THE TRIER OF FACT TO UNDERSTAND THE
EVIDENCE OR TO DETERMINE A FACT IN ISSUE, A WITNESS DETERMINED BY THE
COURT TO BE QUALIFIED AS AN EXPERT BY KNOWLEDGE, SKILL, EXPERIENCE,
TRAINING, OR EDUCATION MAY TESTIFY CONCERNING THE EVIDENCE OR FACT IN
ISSUE IN THE FORM OF AN OPINION OR OTHERWISE ONLY IF THE FOLLOWING
CRITERIA ARE MET:

5 **UNOFFICIAL COPY OF HOUSE BILL 1193** 1 (1)THE TESTIMONY IS BASED ON SUFFICIENT FACTS OR DATA; THE TESTIMONY IS THE PRODUCT OF RELIABLE PRINCIPLES AND 2 (2)3 METHODS; THE WITNESS HAS APPLIED THE PRINCIPLES AND METHODS (3) 4 5 RELIABLY TO THE FACTS OF THE CASE; AND IF THE EXPERT'S TESTIMONY IS IN THE FORM OF AN OPINION, THE (4)6 7 OPINION: 8 (I) IS EXPRESSED TO A REASONABLE DEGREE OF MEDICAL 9 CERTAINTY;

10(II)IS SCIENTIFICALLY VALID AND HAS BEEN TESTED FOR11 VALIDITY;

12 (III) HAS BEEN OBJECTIVELY EXAMINED FOR ERROR; AND

13 (IV) HAS BEEN SUBJECT TO PEER REVIEW.

14 (B) (1) THE COURT, ON ITS OWN MOTION OR A MOTION BY A PARTY, MAY
15 HEAR EVIDENCE REGARDING THE CRITERIA IN SUBSECTION (A) OF THIS SECTION,
16 INCLUDING HEARING TESTIMONY FROM THE PROPOSED EXPERT WITNESS.

IF THE COURT DECIDES TO HEAR EVIDENCE REGARDING THE
 CRITERIA IN SUBSECTION (A) OF THIS SECTION, THE COURT SHALL HEAR THE
 EVIDENCE OUT OF THE PRESENCE OF A JURY BEFORE DECIDING WHETHER THE
 TESTIMONY IS ADMISSIBLE OR INADMISSIBLE.

21 Article - Health Occupations

22 14-101.

23 (a) In this title the following words have the meanings indicated.

24 (b) "Board" means the State Board of Physicians.

(c) "Civil action" includes a health care malpractice claim under Title 3,
Subtitle 2A of the Courts Article.

27 (d) "Faculty" means the Medical and Chirurgical Faculty of the State of28 Maryland.

29 (e) "Hospital" has the meaning stated in § 19-301 of the Health - General30 Article.

31 (f) "License" means, unless the context requires otherwise, a license issued by32 the Board to practice medicine.

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1 (g) "Licensed physician" means, unless the context requires otherwise, a 2 physician, including a doctor of osteopathy, who is licensed by the Board to practice 3 medicine.

4 (h) "Licensee" means an individual to whom a license is issued, including an 5 individual practicing medicine within or as a professional corporation or professional 6 association.

7 (i) "Perform acupuncture" means to stimulate a certain point or points on or 8 near the surface of the human body by the insertion of needles to prevent or modify 9 the perception of pain or to normalize physiological functions, including pain control, 10 for the treatment of ailments or conditions of the body.

11 (j) "Physician" means an individual who practices medicine.

12 (k) "Physician Rehabilitation Committee" means the committee of the entity

13 or entities with whom the Board contracts under § 14-401(e) of this title that

14 evaluates and provides assistance to impaired physicians in need of treatment and

15 rehabilitation for alcoholism, chemical dependency, or other physical, emotional, or 16 mental conditions.

17 (1) (1) "Practice medicine" means to engage, with or without compensation[, 18 in medical]:

19 (i) IN MEDICAL:

20 1. Diagnosis;

21 [(ii)] 2. Healing;

22 [(iii)] 3. Treatment; or

23 [(iv)] 4. Surgery; OR

(ii)

24 (II) IN TESTIFYING AS OR OFFERING AN OPINION AS A MEDICAL
25 EXPERT WITNESS REGARDING THE CONDUCT DESCRIBED IN ITEM (I) OF THIS
26 PARAGRAPH IN THE COURSE OF A LEGAL PROCEEDING.

27 (2) "Practice medicine" includes doing, undertaking, professing to do,28 and attempting any of the following:

29 (i) Diagnosing, healing, treating, preventing, prescribing for, or
 30 removing any physical, mental, or emotional ailment or supposed ailment of an
 31 individual:

By physical, mental, emotional, or other process that is
 exercised or invoked by the practitioner, the patient, or both; or

34 2. By appliance, test, drug, operation, or treatment;

35

Ending of a human pregnancy; and

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1 (iii) Performing acupuncture. 2 (3)"Practice medicine" does not include: 3 Selling any nonprescription drug or medicine; (i) Practicing as an optician; or 4 (ii) 5 Performing a massage or other manipulation by hand, but by no (iii) 6 other means. 7 "Related institution" has the meaning stated in § 19-301 of the Health -(m)8 General Article. 9 14-302. 10 Subject to the rules, regulations, and orders of the Board, the following 11 individuals may practice medicine without a license: A medical student or an individual in a postgraduate medical 12 (1)13 training program that is approved by the Board, while doing the assigned duties at any office of a licensed physician, hospital, clinic, or similar facility; 14 15 A physician licensed by and residing in another jurisdiction, while (2)16 engaging in consultation with a physician licensed in this State; 17 (3)A physician employed in the service of the federal government while 18 performing the duties incident to that employment; 19 (4)A physician who resides in and is authorized to practice medicine by 20 any state adjoining this State and whose practice extends into this State, if: 21 The physician does not have an office or other regularly (i) 22 appointed place in this State to meet patients; and 23 The same privileges are extended to licensed physicians of this (ii) 24 State by the adjoining state; [and] 25 An individual while under the supervision of a licensed physician (5)26 who has specialty training in psychiatry, and whose specialty training in psychiatry 27 has been approved by the Board, if the individual submits an application to the Board 28 on or before October 1, 1993, and either: 29 (i) 1. Has a master's degree from an accredited college or 30 university; and 31 2. Has completed a graduate program accepted by the Board 32 in a behavioral science that includes 1,000 hours of supervised clinical psychotherapy 33 experience; or

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- 2 university; and
- (ii) 1. Has a baccalaureate degree from an accredited college or

34 approved by the Board; AND

Has 4,000 hours of supervised clinical experience that is

5 (6) A PHYSICIAN LICENSED BY AND RESIDING IN ANOTHER
6 JURISDICTION, WHILE TESTIFYING IN A CIVIL ACTION OR ATTESTING TO
7 COMPLIANCE WITH OR DEPARTURE FROM STANDARDS OF CARE FOR PURPOSES OF A
8 CERTIFICATE OF A QUALIFIED EXPERT UNDER TITLE 3, SUBTITLE 2A OF THE COURTS

2.

9 ARTICLE.

10 14-401.

(i) Those individuals not licensed under this title but covered under §
12 14-302(6) OF THIS TITLE OR § 14-413(a)(1)(ii)3 and 4 of this subtitle are subject to the
13 hearing provisions of § 14-405 of this subtitle.

14 14-404.1.

SUBJECT TO THE HEARING PROVISIONS OF § 14-405 OF THIS SUBTITLE AND
APPROPRIATE PEER REVIEW, THE BOARD, ON THE AFFIRMATIVE VOTE OF A
MAJORITY OF THE QUORUM, MAY ISSUE FINDINGS AND A REPORT CONCERNING AN
INDIVIDUAL COVERED UNDER § 14-302(6) OF THIS TITLE WHO FALSELY TESTIFIES OR
FALSELY OFFERS AN OPINION AS A MEDICAL EXPERT REGARDING MEDICAL
DIAGNOSIS, HEALING, TREATMENT, OR SURGERY.

21 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be

22 construed to apply only prospectively and may not be applied or interpreted to have23 any effect on or application to any claim or action filed before the effective date of this24 Act.

25 SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect 26 October 1, 2005.

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