

AMENDMENT TO RULES COMMITTEE PRINT 115-

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OFFERED BY MR. HUDSON OF NORTH CAROLINA

Add, at the end of the bill, the following:

1 **SEC. 11. COMMUNICATIONS FOLLOWING UNANTICIPATED**

2 **OUTCOME.**

3 (a) PROVIDER COMMUNICATIONS.—In any health
4 care liability action, any and all statements, affirmations,
5 gestures, or conduct expressing apology, fault, sympathy,
6 commiseration, condolence, compassion, or a general sense
7 of benevolence which are made by a health care provider
8 or an employee of a health care provider to the patient,
9 a relative of the patient, or a representative of the patient
10 and which relate to the discomfort, pain, suffering, injury,
11 or death of the patient as the result of the unanticipated
12 outcome of medical care shall be inadmissible for any pur-
13 pose as evidence of an admission of liability or as evidence
14 of an admission against interest.

15 (b) STATE FLEXIBILITY.—No provision of this sec-
16 tion shall be construed to preempt any State law (whether
17 effective before, on, or after the date of the enactment of
18 this Act) that makes additional communications inadmis-

1 sible as evidence of an admission of liability or as evidence
2 of an admission against interest.

3 **SEC. 12. EXPERT WITNESS QUALIFICATIONS.**

4 (a) IN GENERAL.—In any health care lawsuit, an in-
5 dividual shall not give expert testimony on the appropriate
6 standard of practice or care involved unless the individual
7 is licensed as a health professional in one or more States
8 and the individual meets the following criteria:

9 (1) If the party against whom or on whose be-
10 half the testimony is to be offered is or claims to be
11 a specialist, the expert witness shall specialize at the
12 time of the occurrence that is the basis for the law-
13 suit in the same specialty or claimed specialty as the
14 party against whom or on whose behalf the testi-
15 mony is to be offered. If the party against whom or
16 on whose behalf the testimony is to be offered is or
17 claims to be a specialist who is board certified, the
18 expert witness shall be a specialist who is board cer-
19 tified in that specialty or claimed specialty.

20 (2) During the 1-year period immediately pre-
21 ceding the occurrence of the action that gave rise to
22 the lawsuit, the expert witness shall have devoted a
23 majority of the individual's professional time to one
24 or more of the following:

1 (A) The active clinical practice of the same
2 health profession as the defendant and, if the
3 defendant is or claims to be a specialist, in the
4 same specialty or claimed specialty.

5 (B) The instruction of students in an ac-
6 credited health professional school or accredited
7 residency or clinical research program in the
8 same health profession as the defendant and, if
9 the defendant is or claims to be a specialist, in
10 an accredited health professional school or ac-
11 credited residency or clinical research program
12 in the same specialty or claimed specialty.

13 (3) If the defendant is a general practitioner,
14 the expert witness shall have devoted a majority of
15 the witness's professional time in the 1-year period
16 preceding the occurrence of the action giving rise to
17 the lawsuit to one or more of the following:

18 (A) Active clinical practice as a general
19 practitioner.

20 (B) Instruction of students in an accred-
21 ited health professional school or accredited
22 residency or clinical research program in the
23 same health profession as the defendant.

24 (b) LAWSUITS AGAINST ENTITIES.—If the defendant
25 in a health care lawsuit is an entity that employs a person

1 against whom or on whose behalf the testimony is offered,
2 the provisions of subsection (a) apply as if the person were
3 the party or defendant against whom or on whose behalf
4 the testimony is offered.

5 (c) POWER OF COURT.—Nothing in this subsection
6 shall limit the power of the trial court in a health care
7 lawsuit to disqualify an expert witness on grounds other
8 than the qualifications set forth under this subsection.

9 (d) LIMITATION.—An expert witness in a health care
10 lawsuit shall not be permitted to testify if the fee of the
11 witness is in any way contingent on the outcome of the
12 lawsuit.

13 (e) STATE FLEXIBILITY.—No provision of this sec-
14 tion shall be construed to preempt any State law (whether
15 effective before, on, or after the date of the enactment of
16 this Act) that places additional qualification requirements
17 upon any individual testifying as an expert witness.

18 **SEC. 13. AFFIDAVIT OF MERIT.**

19 (a) REQUIRED FILING.—Subject to subsection (b),
20 the plaintiff in a health care lawsuit alleging negligence
21 or, if the plaintiff is represented by an attorney, the plain-
22 tiff's attorney shall file simultaneously with the health
23 care lawsuit an affidavit of merit signed by a health pro-
24 fessional who meets the requirements for an expert wit-
25 ness under section 14 of this Act. The affidavit of merit

1 shall certify that the health professional has reviewed the
2 notice and all medical records supplied to him or her by
3 the plaintiff's attorney concerning the allegations con-
4 tained in the notice and shall contain a statement of each
5 of the following:

6 (1) The applicable standard of practice or care.

7 (2) The health professional's opinion that the
8 applicable standard of practice or care was breached
9 by the health professional or health facility receiving
10 the notice.

11 (3) The actions that should have been taken or
12 omitted by the health professional or health facility
13 in order to have complied with the applicable stand-
14 ard of practice or care.

15 (4) The manner in which the breach of the
16 standard of practice or care was the proximate cause
17 of the injury alleged in the notice.

18 (5) A listing of the medical records reviewed.

19 (b) FILING EXTENSION.—Upon motion of a party for
20 good cause shown, the court in which the complaint is filed
21 may grant the plaintiff or, if the plaintiff is represented
22 by an attorney, the plaintiff's attorney an additional 28
23 days in which to file the affidavit required under sub-
24 section (a).

1 (c) STATE FLEXIBILITY.—No provision of this sec-
2 tion shall be construed to preempt any State law (whether
3 effective before, on, or after the date of the enactment of
4 this Act) that establishes additional requirements for the
5 filing of an affidavit of merit or similar pre-litigation docu-
6 mentation.

7 **SEC. 14. NOTICE OF INTENT TO COMMENCE LAWSUIT.**

8 (a) ADVANCE NOTICE.—A person shall not com-
9 mence a health care lawsuit against a health care provider
10 unless the person has given the health care provider 90
11 days written notice before the action is commenced.

12 (b) EXCEPTIONS.—A health care lawsuit against a
13 health care provider filed within 6 months of the statute
14 of limitations expiring as to any claimant, or within 1 year
15 of the statute of repose expiring as to any claimant, shall
16 be exempt from compliance with this section.

17 (c) STATE FLEXIBILITY.—No provision of this sec-
18 tion shall be construed to preempt any State law (whether
19 effective before, on, or after the date of the enactment of
20 this Act) that establishes a different time period for the
21 filing of written notice.

