

ASSEMBLY BILL

No. 540

Introduced by Assembly Member Machado

February 18, 1999

An act to amend Section 411.35 of the Code of Civil Procedure, relating to malpractice actions.

LEGISLATIVE COUNSEL'S DIGEST

AB 540, as introduced, Machado. Malpractice actions: architects, engineers, or surveyors.

Existing law requires the attorney for the plaintiff or cross-complainant in any action arising out of the professional negligence of an architect, professional engineer, or land surveyor to file a certificate declaring either that the attorney has consulted and received an opinion from an architect, professional engineer, or land surveyor, licensed to practice in this state or in any other state, or that the attorney was unable to obtain that consultation for specified reasons. Existing law does not, except in specified circumstances, require the attorney to disclose the name of the expert consulted or who refused the consultation and requires only one certificate be filed, even if multiple defendants have been named.

This bill would require the certificate to be served in addition to being filed; would specify that the expert giving the consultation shall be licensed by this state or a state that has reciprocity for California licensed architects, professional engineers, or land surveyors; and would require that the expert giving the consultation, or refusing to give a

consultation, be named in the certificate. The bill would specify that one certificate shall be filed and served for each practice discipline, as defined, of the defendant or multiple defendants.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 411.35 of the Code of Civil
2 Procedure is amended to read:

3 411.35. (a) In every action, including a
4 cross-complaint for damages or indemnity, arising out of
5 the professional negligence of a person holding a valid
6 architect’s certificate issued pursuant to Chapter 3
7 (commencing with Section 5500) of Division 3 of the
8 Business and Professions Code, or of a person holding a
9 valid registration as a professional engineer issued
10 pursuant to Chapter 7 (commencing with Section 6700)
11 of Division 3 of the Business and Professions Code, or a
12 person holding a valid land surveyor’s license issued
13 pursuant to Chapter 15 (commencing with Section 8700)
14 of Division 3 of the Business and Professions Code on or
15 before the date of service of the complaint *or*
16 *cross-complaint* on any defendant *or cross-defendant*, the
17 ~~plaintiff’s~~ attorney *for the plaintiff or cross-complainant*
18 shall file *and serve* the certificate specified by subdivision
19 (b).

20 (b) A certificate shall be executed by the attorney for
21 the plaintiff or cross-complainant declaring one of the
22 following:

23 (1) That the attorney has reviewed the facts of the
24 case, that the attorney has consulted with and received an
25 opinion from at least one architect, professional engineer,
26 or land surveyor who is licensed to practice and practices
27 in this state or any other state, ~~or who teaches at an~~
28 ~~accredited college or university and is licensed to practice~~
29 ~~in this state or any other state that has reciprocity for~~
30 *California licensed architects, professional engineers, or*
31 *land surveyors*, in the same discipline as the defendant or



1 cross-defendant and who the attorney reasonably
2 believes is knowledgeable in the relevant issues involved
3 in the particular action, and that the attorney has
4 concluded on the basis of this review and consultation
5 that there is reasonable and meritorious cause for the
6 filing of this action. The person consulted may not be a
7 party to the litigation *and shall be named in the*
8 *certificate*. The person consulted shall render his or her
9 opinion that the named defendant or cross-defendant was
10 negligent or was not negligent in the performance of the
11 applicable professional services.

12 (2) That the attorney was unable to obtain the
13 consultation required by paragraph (1) because a statute
14 of limitations would impair the action and that the
15 certificate required by paragraph (1) could not be
16 obtained before the impairment of the action. If a
17 certificate is executed pursuant to this paragraph, the
18 certificate required by paragraph (1) shall be filed within
19 60 days after filing the complaint.

20 (3) That the attorney was unable to obtain the
21 consultation required by paragraph (1) because the
22 attorney had made three separate good faith attempts
23 with three separate architects, professional engineers, or
24 land surveyors to obtain this consultation and none of
25 those contacted would agree to the consultation.
26 *However, a certificate filed pursuant to this paragraph*
27 *shall disclose the names of the architects, professional*
28 *engineers, or land surveyors refusing the consultation.*

29 (c) Where a certificate is required pursuant to this
30 section, ~~only~~ one certificate shall be filed *and served*
31 *based upon an opinion from a design professional in the*
32 *same practice discipline as each defendant or*
33 *cross-defendant. One certificate shall be filed and served*
34 *for each practice discipline, notwithstanding that*
35 *multiple defendants or cross-defendants in the same*
36 *practice discipline have been named in the complaint or*
37 *may be named at a later time. For the purposes of this*
38 *subdivision, the term "practice discipline" means an*
39 *architect, a structural engineer, a mechanical engineer,*
40 *an electrical engineer, a civil engineer, or land surveyor,*



1 *as defined in the licensing provisions of the Business and*
2 *Professions Code.*

3 (d) Where the attorney intends to rely solely on the
4 doctrine of “res ipsa loquitur,” as defined in Section 646
5 of the Evidence Code, or exclusively on a failure to inform
6 of the consequences of a procedure, or both, this section
7 shall be inapplicable. The attorney shall certify upon
8 filing of the complaint that the attorney is solely relying
9 on the doctrines of “res ipsa loquitur” or failure to inform
10 of the consequences of a procedure or both, and for that
11 reason is not filing a certificate required by this section.

12 (e) For purposes of this section, and subject to Section
13 912 of the Evidence Code, an attorney who submits a
14 certificate as required by paragraph (1) or (2) of
15 subdivision (b) has a privilege to refuse to disclose the
16 ~~identity of the architect, professional engineer, or land~~
17 ~~surveyor consulted and the contents of the consultation.~~
18 The privilege shall also be held by the architect,
19 professional engineer, or land surveyor so consulted. ~~If,~~
20 ~~however, the attorney makes a claim under paragraph~~
21 ~~(3) of subdivision (b) that he or she was unable to obtain~~
22 ~~the required consultation with the architect, professional~~
23 ~~engineer, or land surveyor, the court may require the~~
24 ~~attorney to divulge the names of architects, professional~~
25 ~~engineers, or land surveyors refusing the consultation.~~

26 (f) A violation of this section may constitute
27 unprofessional conduct and be grounds for discipline
28 against the attorney, except that the failure to file the
29 certificate required by paragraph (1) of subdivision (b),
30 within 60 days after filing the complaint and certificate
31 provided for by paragraph (2) of subdivision (b), shall not
32 be grounds for discipline against the attorney.

33 (g) The failure to file a certificate in accordance with
34 this section shall be grounds for a demurrer pursuant to
35 Section 430.10 or a motion to strike pursuant to Section
36 435.

37 (h) Upon the favorable conclusion of the litigation
38 with respect to any party for whom a certificate of merit
39 was filed or for whom a certificate of merit should have
40 been filed pursuant to this section, the trial court may,



1 upon the motion of a party or upon the court's own
2 motion, verify compliance with this section, by requiring
3 the attorney for the plaintiff or cross-complainant who
4 was required by subdivision (b) to execute the certificate
5 to reveal the ~~name~~, address, and telephone number of the
6 person or persons consulted with pursuant to subdivision
7 (b) that were relied upon by the attorney in preparation
8 of the certificate of merit. The ~~name~~, address, and
9 telephone number shall be disclosed to the trial judge in
10 an in-camera proceeding at which the moving party shall
11 not be present. If the trial judge finds there has been a
12 failure to comply with this section, the court may order
13 a party, a party's attorney, or both, to pay any reasonable
14 expenses, including attorney's fees, incurred by another
15 party as a result of the failure to comply with this section.

16 (i) For purposes of this section, "action" includes a
17 complaint or cross-complaint for equitable indemnity
18 arising out of the rendition of professional services
19 whether or not the complaint or cross-complaint
20 specifically asserts or utilizes the terms "professional
21 negligence" or "negligence."

