

Department of Legislative Services
Maryland General Assembly
2005 Session

FISCAL AND POLICY NOTE

House Bill 1193
Judiciary

(Delegate Shank, *et al.*)

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

This bill imposes additional requirements on experts attesting in a certificate or supplemental certificate of qualified expert or testifying in a health care malpractice claim and imposes disciplinary and civil sanctions for maintaining or defending a claim or action in bad faith or without substantial justification.

The bill may not be applied or interpreted to have any effect on or application to a claim or action filed before October 1, 2005.

Fiscal Summary

State Effect: The bill would not materially affect governmental finances or operations.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: In a health care malpractice claim, 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 chairman or court must require the offending party, the attorney advising the conduct, or both, to pay the adverse party's costs and expenses, including reasonable attorney's fees, incurred in opposing it.

The bill requires that an expert's opinion in attesting to a certificate of qualified expert or a supplemental certificate of qualified expert be: (1) expressed to a reasonable degree of medical certainty; (2) scientifically valid and tested for validity; (3) objectively examined for error; and (4) subjected to peer review.

In a health care malpractice claim or action, 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: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.

If the testimony is in the form of an opinion, the opinion must: (1) be expressed to a reasonable degree of medical certainty; (2) be scientifically valid and have been tested for validity; (3) have been objectively examined for error; and (4) have been subject to peer review.

If a court considers it necessary or on motion by a party, the court may hear evidence regarding the criteria for expert witness testimony. If the court does so, the court must hear the evidence out of the jury's presence.

A physician licensed by and residing in another jurisdiction, while testifying as or attesting to compliance with or departures from standards of care for purposes of a certificate of qualified expert, is practicing medicine for purposes of discipline by the State Board of Physicians. Subject to applicable hearing requirements, the board, on affirmative vote of a majority of a quorum, may issue findings and a report concerning a physician licensed in another jurisdiction who falsely testifies or falsely offers an opinion as a medical expert regarding medical diagnosis, healing, treatment, or surgery.

Current Law: Under the Maryland Rules, if a court finds that the conduct of a party in maintaining or defending a proceeding was in bad faith or without substantial justification, the court may require the offending party, the attorney advising the conduct, or both, to pay the adverse party's costs, including reasonable attorney's fees.

A health care malpractice claim must be dismissed without prejudice, if the claimant or plaintiff fails to file a certificate of a qualified expert with the Director of the Health Claims Alternative Dispute Resolution Office that attests to the departure from standards of care and that the departure from those standards is the proximate cause of the alleged injury within 90 days from the date of the complaint. A claim may be adjudicated in favor of the claimant or plaintiff on the issue of liability if the defendant disputes liability

and fails to file a certificate of a qualified expert attesting to compliance with standards of care, or that the departure from standards of care is not the proximate cause of the alleged injury within 120 days from the date the claimant or plaintiff serviced the claimant's or plaintiff's certificate of qualified expert on the defendant.

Within 15 days after the date that discovery must be completed, a party must file a supplemental certificate of a qualified expert for each defendant that attests to: (1) the basis for alleging the specific standard of care; (2) the expert's qualifications; and (3) the standard of care. For the plaintiff, the supplemental certificate must also attest to: (1) the specific injury; (2) how the standard of care was breached; (3) what the defendant should have done; and (4) the inference that the breach proximately caused the plaintiff's injury. For the defendant, the supplemental certificate must also attest to: (1) how the defendant complied with the standard of care; (2) what the defendant did to meet that standard; and (3) if applicable, that the breach did not proximately cause the plaintiff's injury. Failure to file by the plaintiff may result in dismissal without prejudice. Failure to file by the defendant may result in a ruling by the court for the plaintiff on the issue of liability.

For actions filed on or after January 1, 2005, a health care provider who attests in a certificate of a qualified expert or testifies concerning a defendant's compliance with or departure from standards of care must: (1) have clinical experience, provided consultation relating to clinical practice, or taught medicine in the defendant's specialty or related field or in the field of health care in which the defendant provided care or treatment within five years of the incident; and (2) be board certified in the same specialty if the defendant is board certified in a specialty, unless the defendant was providing care or treatment to the plaintiff unrelated to the area in which the defendant is board certified or the health care provider taught medicine in the same or similar field. A health care provider who attests in a certificate of qualified expert or testifies about the merits of a claim or defense as a qualified expert may not devote more than 20% of the expert's professional activities that directly involve testimony in personal injury claims. There are no additional standards for the opinion expressed in a certificate of qualified expert or supplemental certificate of qualified expert.

Under the Maryland Rules, expert testimony may be admitted in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making its determination, the court must determine: (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the appropriateness of the expert testimony on the particular subject; and (3) whether a sufficient factual basis exists to support the expert testimony.

The Board of Physicians on affirmative vote of a majority of a quorum, may reprimand a licensee, place a licensee on probation, or suspend or revoke a license for violations of prescribed standards. Providing testimony is not one of the grounds for discipline.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts), Maryland Health Claims Alternative Dispute Resolution Office, Department of Health and Mental Hygiene, Maryland Insurance Administration, Office of the Attorney General, Department of Legislative Services

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mp/jr

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