Department of Legislative Services

Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

House Bill 340 (Delegates Dumais and Simmons)
Judiciary

Health Care Malpractice - Certificate and Report of Qualified Expert - Objection

This bill requires that, in health care malpractice cases, any objection to the sufficiency of a certificate of qualified expert or report must be filed within 14 days after the filing of the certificate or report. The bill further specifies that, if the arbitration panel chairman or the court rules that a party's certificate or report is legally insufficient, the party must file a legally sufficient certificate and report of an attesting expert within 30 days of the order's entry.

The bill takes effect June 1, 2011.

Fiscal Summary

State Effect: None. The changes are procedural in nature and are not expected to materially affect governmental finances.

Local Effect: None.

Small Business Effect: None.

Analysis

Current Law: Except for a claim seeking damages within the limit of the District Court's concurrent civil jurisdiction ($30,000 or less), a claim for medical injury against a health care provider is required to be filed with the Director of the Health Care Alternative Dispute Resolution Office (although the parties may elect mutually or unilaterally to waive arbitration of the claim).

Unless the sole issue in a health care malpractice claim is lack of informed consent, a claim before the office or an action filed in a court must be dismissed without prejudice if the claimant or plaintiff fails to file with the director, within 90 days from the date of the complaint, a certificate of qualified expert attesting (1) to a departure from standards of care; and (2) that the departure is the proximate cause of the alleged injury. (This certificate is commonly referred to as a "certificate of merit.") However, an extension of not more than 90 days for filing the certificate must be granted for good cause shown by any party if (1) the limitations period applicable to the claim or action has expired; and (2) the failure to file the certificate was neither willful nor the result of gross negligence. Each party must file the appropriate certificate with an attached report of the attesting expert.

A health care malpractice claim may be adjudicated in favor of the claimant or plaintiff on the issue of liability if the defendant disputes liability and fails to timely file a certificate of a qualified expert attesting (1) to compliance with standards of care; or (2) that the departure from standards of care is not the proximate cause of the alleged injury. (This is commonly referred to as a "certificate of meritorious defense.")

A party is required to file with the court, within 15 days after the discovery deadline, a supplemental certificate of a qualified expert, for each defendant, that attests specifically to various matters. An extension of time for filing a supplemental certificate must be granted for good cause shown. On motion by a defendant, the court may dismiss without prejudice the action as to the defendant if a plaintiff fails to file a supplemental certificate. On motion by a plaintiff, the court may adjudicate in favor of the plaintiff on the issue of liability if a defendant fails to file a supplemental certificate.

Failure to file a proper certificate is tantamount to not having filed a certificate at all. *D'Angelo v. St. Agnes Healthcare, Inc.*, 157 Md. App. 631, cert. denied, 384 Md. 158 (2004). A certificate of a qualified expert is a condition precedent to a medical malpractice action and, if the certificate is insufficient, the action must be dismissed. *Carroll v. Konits*, 400 Md. 167 (2007).

A health care provider who attests in a certificate of a qualified expert (or who testifies in relation to a proceeding before an arbitration panel or a court concerning compliance with or departure from standards of care) may not devote annually more than 20% of the expert's professional activities to activities that directly involve testimony in personal injury claims. A party may not serve as a party's expert, and the certificate may not be signed by a party, an employee or partner of a party, or an employee or stockholder of any professional corporation of which the party is a stockholder.

When calculating whether an expert annually devotes more than 20% of his or her professional activities to activities directly involving testimony in personal injury cases,

the time properly included is time the expert spends (1) in, or traveling to or from, court or deposition for the purpose of testifying; (2) assisting an attorney or other member of a litigation team in developing or responding to interrogatories and other forms of discovery; (3) reviewing notes and other materials, preparing reports, and conferring with attorneys, insurance adjusters, other members of a litigation team, the patient, or others after being informed the expert will likely be called on to sign an affidavit or otherwise testify; and (4) doing any similar activity that has a clear and direct relationship to testimony to be given by the expert or the expert's preparation to give testimony. *Witte v. Azarian*, 369 Md. 519 (2002).

For activities to qualify as professional activities, the activities must (1) contribute to or advance the profession to which the individual belongs; or (2) involve the individual's active participation in that profession. Activities that do not constitute professional activities for purposes of the "20 percent rule" include reading journals, observing procedures conducted by other physicians, and discussing with former colleagues matters for one's own personal knowledge. *Univ. of Md. Med. Sys. Corp. v. Waldt*, 411 Md. 207 (2009).

Additional Information

Prior Introductions: None.

Cross File: None.

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

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