

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 1581
Judiciary

(Delegate Vallario, *et al.*)

Judicial Proceedings

Health Care Malpractice Qualified Expert – Limitation on Testimony in
Personal Injury Claims

This bill specifies that 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 have devoted more than 20% of the expert's professional activities to activities that directly involve testimony in personal injury claims during the 12 months immediately preceding the date on which (1) the certificate of a qualified expert was filed or (2) the expert was designated by a party to testify before an arbitration panel or a court, if the designated expert is not the person who prepared the certificate. Once a health care provider meets such requirements, the health care provider may not be disqualified during the pendency of the case for exceeding the specified 20% limit. The bill's provisions apply only to any proceeding filed or pending on or after October 1, 2018.

Fiscal Summary

State Effect: The bill does not directly affect State operations or finances.

Local Effect: The bill does not directly affect local government operations or finances.

Small Business Effect: Potential meaningful.

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 (HCADRO) (although the parties may elect mutually or unilaterally to waive arbitration of the claim). The director must serve a copy of the claim on the health care provider by the appropriate sheriff in accordance with the Maryland Rules. If the claim is against a physician, the director must also forward a copy of the claim to the State Board of Physicians. The health care provider must file a timely response with the director and serve a copy of the response on the claimant and any other named health care providers. Claims may be decided through the arbitration process or may proceed to trial.

Unless the sole issue in a health care malpractice claim is lack of informed consent, a claim before HCADRO 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 a 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 at most 90 days for filing the certificate must be granted 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.

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. 518, 801 A.2d 160 (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% 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, 983 A.2d 112 (2009).

Small Business Effect: Potential meaningful, as a health care provider is able to qualify as an expert in more cases.

Additional Information

Prior Introductions: None.

Cross File: SB 30 (Senator Ramirez) - Judicial Proceedings.

Information Source(s): Judiciary (Administrative Office of the Courts); Maryland Health Care Alternative Dispute Resolution Office; Department of Legislative Services

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