

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 773

(Senator Smith)

Judicial Proceedings

Judiciary

Health Care Malpractice Qualified Expert - Qualification

This bill makes multiple changes to statute related to the qualification of an expert in a health care malpractice action. The bill (1) defines “professional activities”; (2) increases, from 20% to 25%, the limit on the amount of an expert’s professional activities that may directly involve testimony in personal injury claims during the 12 months immediately before the date when the claim was first filed; (3) specifies that, once a health care provider meets the requirements to qualify as an expert, the health care provider must be *deemed* to be a qualified expert during the pendency of the claim; and (4) establishes additional standards and procedures related to the dismissal and filing of an action based on the failure of an expert to comply with the bill’s requirements. The bill’s provisions apply to any proceeding filed on or after the bill’s October 1, 2019 effective date.

Fiscal Summary

State Effect: None. The change is procedural in nature and does not directly affect governmental finances.

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

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: “Professional activities” means all activities arising from or related to the health care profession. A health care provider (who attests or testifies in a specified manner concerning compliance with or departure from standards of care) may not have devoted more than 25% of the expert’s professional activities to activities that directly involve

testimony in personal injury claims during the 12 months immediately before the date when the claim was first filed.

If a court dismisses a claim or action because a qualified expert failed to comply with the bill's requirements, unless there is a showing of bad faith, a party may refile the same claim or action before the later of (1) the expiration of the applicable period of limitation or (2) 120 days after the date of the dismissal. However, a claim may be refiled only once.

Current Law: 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 more than 20% of the expert's professional activities each year to activities that directly involve testimony in personal injury claims.

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: To the extent that fees related to providing expert testimony are higher than those received for treating patients, health care practitioners who otherwise qualify as a small business may be authorized to devote more time to providing testimony in personal injury claims.

Additional Information

Prior Introductions: None.

Cross File: None.

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

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Analysis by: Nathan W. McCurdy

Direct Inquiries to:
(410) 946-5510
(301) 970-5510