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## **Certificates of Merit and Medical Malpractice: What's at Stake for States**

**By Amy Widman, Staff Attorney**

**(October 30, 2009)**

“As President Obama announced last night, we’re going to move forward with an initiative to investigate whether we can improve our malpractice system. This new initiative will give states the chance to apply for grants that would support projects that help reduce lawsuits and promote patient safety.

For example, the demonstration projects could include early disclosure models and **certificates of merit**, both of which were part of an amendment accepted by the Energy and Commerce Committee when they considered health reform legislation.”

*-Remarks by Secretary of Health and Human Services Kathleen Sebelius,  
September 10, 2009.*

### **Overview**

Whether through the Administration’s HHS project or the adoption of the final health care bill, states may soon be faced with pressure to enact a certificate of merit law for medical malpractice cases. Many states already have these laws on their books. They require that when an injured patient files a medical malpractice lawsuit, he or she must also file a certificate or affidavit stating that the case is legitimate. Since these certificates typically must be filed before a patient/plaintiff has had any opportunity for detailed fact-finding or discovery, certification is not always easy and depends on the level of detail required to be certified. The ostensible goal of these laws is to ensure that “frivolous” lawsuits are not filed. However, sometimes these laws can prevent legitimate cases from going forward.

Most certificate of merit statutes use language either requiring an attorney to consult with an expert and certify that such a consultation took place, or that the expert certify that the case is reasonable. Many times the language of the statute is vague enough that the details have only been carved out through court cases.

A review of a few selected state laws reveals some important issues that any state should consider when facing pressure to enact a certificate of merit law:

### **Issue #1 – The Standard**

Language in the statutes varies from as light a requirement as “based on available records” (or plaintiff’s version of the facts) to as onerous as stating that there is reasonable cause that malpractice has occurred.

On the standard of culpability required by the expert, COLORADO requires merely a statement that an expert was consulted. CONNECTICUT requires a statement that there “appears to be evidence of negligence.” On the other side of the spectrum, ARKANSAS requires certification that the conduct was a “reasonable cause” of the injury and MARYLAND requires a statement that the deviation from the standard of care was the proximate cause of the injury. Proximate cause is also required in MICHIGAN, MINNESOTA, VIRGINIA, TEXAS, and MISSOURI. GEORGIA and NEW JERSEY require the expert to certify that the provider in question deviated from the standard of care but there is no proximate cause requirement.

### **Issue #2 – The Identity of the Expert**

Whether or not the expert is identified in the affidavit, or even more onerous, must testify or be deposed, etc. varies widely. PENNSYLVANIA, WEST VIRGINIA, and VIRGINIA do not require the identity of the experts. MARYLAND, for example, allows for certifying experts to be identified and deposed.

This issue has a few subissues: first, there may exist cultural or professional pressure against an expert testifying for a patient, certifying publicly and making him or herself available for depositions, etc. This might lessen the pool of available experts. It also might drive up the cost of experts, leading to the possibility of foreclosing some cases due to lack of ability to pay for the expert certification. Finally, if an expert is disclosed at the filing of the case, it is less likely that the same expert will be the testifying expert at trial (as the defense might claim that the expert had predetermined the outcome or is otherwise biased, etc.) This also places a heavier burden on plaintiff attorneys, both in terms of cost and time involved in finding additional experts for trial.

### **Issue #3 – The cost of an expert**

There was a lawsuit in West Virginia challenging a certificate of merit where the expert fee was \$40,000. The West Virginia Supreme Court remanded the case without prejudice while some judges opined that such a cost, “impose[d] upon [the plaintiff] a filing fee substantially different from that in every other type of lawsuit.” Given that West Virginia is one of the states where an expert is not even identified, the cost of an expert who will have to testify and potentially mar his professional reputation (based on a culture/peer pressure within the medical community) will be higher and potentially high enough to foreclose the ability to sue for many of those injured.

A 1993 Maryland study found that certificates of merit requirements only reduced filings by uninsured and Medicaid patients, leading at least one legal scholar to conclude that the requirements place an undue burden on low-income plaintiffs.

#### **Issue #4 – Penalties for failing to comply**

MARYLAND imposes a fee on an attorney who fails to comply with the statute. Other states dismiss without prejudice [i.e., they can refile the case] or with attorneys fees. The majority of states dismiss with prejudice for failure to comply with the requirement.

#### **Issue #5 – Constitutionality**

Certificate of Merit statutes have been found unconstitutional in several states including WASHINGTON, ARKANSAS, OHIO and OKLAHOMA. Courts have reasoned that the laws interfere with access to the courts or violate precepts like “separation of powers” or “equal protection.”

OKLAHOMA enacted a new certificate of merit law this year applying to all professions rather than just medical malpractice (the reason it had been struck down previously).

The OHIO Supreme Court passed a rule requiring certificates of merit after previously striking down such a legislative requirement on separation of powers grounds.

#### **Issue #6 – Timing / Amendments**

Some states (FLORIDA, GEORGIA, ILLINOIS, MICHIGAN) require certificates to be filed at the time of the complaint; other states grant extensions between 45-180 days after the complaint is filed. The timing issue is relevant to the amount of information the plaintiff has at their disposal when certifying the merit of the case.

Most state civil procedure rules allow a plaintiff to amend a complaint up until the eve of trial – an unanswered question is whether a plaintiff could amend a complaint in a medical malpractice case to include an allegation not discussed in the certificate of merit and how these two requirements should interact.

#### **Issue #7 – Escape Valves**

NEW JERSEY allows for a waiver from the requirement if the plaintiff cannot “in good faith” find an expert who meets the law’s requirements. NEW YORK also has an escape valve if an attorney has made three good faith attempts to reach out to experts and still cannot obtain one.

#### **Issue #8 – Pro Se**

Some states (NEW YORK) do not require pro se litigants (those without attorneys) to comply with a certificate of merit. Other states (PENNSYLVANIA) do.

## Issue #9 –Expert Qualifications

These laws each have different means of certifying who is an appropriate expert. ILLINOIS considers how long the expert has spent teaching/practicing and whether s/he is in the same field; MARYLAND requires no more than 20 percent of the expert’s time be given annually to such expert consultations for litigation purposes. TEXAS requires the expert to be practicing at the time of certification.

A few states (COLORADO, GEORGIA) require the expert be licensed within that state, which can be a difficult criterion to meet. Most states, however, allow for the expert to be licensed in any state. TENNESSEE requires an expert be licensed in the state or a contiguous, bordering state. VIRGINIA requires a license in Virginia or another state with similar qualifications. An attempt to require out-of-state experts to get an in-state license in (SOUTH CAROLINA) was overturned by the South Carolina Supreme Court in 2006. OHIO passed a law deeming all out-of-state licensed experts to be licensed in Ohio as well, in order to be able to hold them accountable for their testimony.

Some of these requirements are stricter than those requirements for a testifying expert. Other states require the same standard for the certificate of merit expert as a testifying expert.

## Issue #10 -Who signs?

Some states (ILLINOIS, NEW YORK, MISSOURI, MINNESOTA, NORTH CAROLINA, MISSISSIPPI) only require the attorney to certify that they consulted an expert – the expert need not sign anything.

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