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How To Get That Affidavit of Merit In Professional Malpractice Cases

The recent tort reform legislation included enactment of a statute requiring an "Affidavit of Merit" in malpractice cases. See N.J.S.A. 2A:53-26 et seq. Like it or not, the requirement is now law and attorneys must be familiar with its requirements. Fortunately, case law and existing regulations provide a handy framework for understanding how the statute will work in practice.

The act applies not only to physicians, dentists, podiatrists, chiropractors, nurses, and health-care facilities, but also to accountants, architects, attorneys and engineers. The statute provides that in any malpractice suit against a member of the designated professions, the plaintiff shall:

"[W]ithin 60 days following the date of filing of the answer to the complaint by the defendant provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices." N.J.S.A. 2A:53-27."

The court may grant "no more than one additional period, not to exceed 60 days, to file the affidavit ... upon a showing of good cause." *Id.* The failure to submit the affidavit "shall be deemed a failure to state a cause of action." N.J.S.A. 2A:53-29.

Who Is Qualified To Render The Affidavit?

The statute provides that the "person executing the affidavit shall be licensed in this or any other state; [and] have particular exper-

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tise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years." N.J.S.A. 2A:53-27. The legislative history reveals that the initial draft of the legislation required the expert to be "actively" engaged in the practice of the profession and devote at least 80 percent of the witness' professional time to the practice of the profession. These requirements were eliminated, thus allowing professors and retired practitioners to serve as experts.

The requirement that the expert "have particular expertise in the general area or specialty" does not differ significantly from either N.J.R.E. 702, which states that an expert is qualified by "knowledge, skill, experience, training or education," or from well-settled case law. See, e.g., *Carbone v. Warburton*, 11 N.J. 418, 425-26 (1953), and the cases cited in *Bellardini v. Krikorian*, 222 N.J. Super. 457, 463 (App. Div. 1988).

The fact that one need not be a specialist in the same field as the defendant, but rather merely have "particular expertise in the general area or specialty" is also consistent with well-established case law. See *Rosenberg by Rosenberg v. Cahill*, 99 N.J. 318, 334 (1985) (medical doctor competent to establish the standard of care as to chiropractor); *Klimko v. Rose*, 84 N.J. 496 (1980) (medical doctor permitted to testify against chiropractor); *Sanzari v. Rosenfeld*, 34 N.J. 128 (1961) (anesthesiologist established standard of care as to dentist who administered xylocaine); *Carbone, supra*, (retired general practitioner qualified by study to testify against orthopedist); *James v. East Orange General Hospital*, 246 N.J. Super. 554 (App. Div. 1991) (laboratory pathologist allowed to testify as to emergency-room procedures).

However, in *Crespo v. McCartin*, 244 N.J. Super. 413 (App. Div. 1990), the plaintiff presented the testimony of Lawrence Miller, D.O., an orthopedist, to establish the required standard of care in a case involving an ectopic pregnancy. In affirming the dismissal of the case for lack of a qualified expert, the court noted:

"Dr. Miller admitted during cross-examination that he has never practiced obstetrics and gynecology; nor has

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he performed surgery to terminate an ectopic pregnancy. He has never seen anyone perform such surgery. He even admitted that he has never cared for a pregnant patient. He read no books, articles or pertinent literature to assist in formulating his opinion in this case. ... In addition to holding a license to practice medicine, Dr. Miller was required to demonstrate that he was "versed in the subject [of obstetrics and gynecology] from actual experience in his own practice or from observations of treatments by other practitioners or from reading and study." ... The trial judge's finding of lack of qualification ... was not clearly erroneous. *Id.* at 418-22."

Under the statute, Dr. Miller would not have been qualified to render the affidavit as he did not have "particular expertise in the general area or specialty involved in the litigation."

There are, of course, several recognized exceptions to the requirement that the plaintiff must produce expert testimony as to the defendant's malpractice. For instance, in informed-consent cases, once the plaintiff proves that the risk which occurred was known in the medical community, the plaintiff no longer needs to produce an expert opinion that the failure to disclose the risk constituted a deviation from accepted medical standards. See, e.g., *Febus v. Barot*, 260 N.J. Super. 322, 327 (App. Div. 1992); *Adamski v. Moss*, 271 N.J. Super. 513, 519 (App. Div. 1994). Similarly, in *res ipsa loquitur* cases, expert testimony is not required. Nevertheless, it would appear that in such cases the affidavit of merit is still required by the statute.

What Must the Affidavit State?

The statute requires that the expert state that there is a "reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment ... fell outside acceptable professional occupational standards or treatment practices." N.J.S.A. 2A:53A-27. Since the affidavit is required before any discovery, the statute sets a lower standard than that required at trial. In fact, there is nothing in the statute that would prohibit the expert from stating that there is a reasonable probability of negligence based only upon the records that have been produced to date and reserving the right to comment further when more information becomes available. Indeed, the expert's opinion may change after reviewing the discovery produced by the defendants. The plaintiff would then need another expert to testify at trial should he or she wish to go forward. However, plaintiffs need not be concerned that the expert who executed the affidavit, but then changed the opinion after completion of discovery, may be used by the adversary. In *Graham v. Gielchinsky*, 126 N.J. 361 (1991), the Supreme Court precluded the use of an adversary's expert except in exceptional circumstances. A change in opinion by a prelimi-

nary expert clearly will not fit into the category of exceptional circumstances.

The affidavit of merit is not required to be submitted if the defendant fails to provide the plaintiff with medical records within 45 days after receiving a written request by certified mail or personal service. In such a case, counsel for the plaintiff need only file a certification stating that:

"[T]he defendant has failed to provide plaintiff with medical records or other records or information having a substantial bearing on the preparation of the affidavit; a written request therefore along with, if necessary, a signed authorization by the plaintiff for the release of the medical records or other records or information requested, has been made by certified mail or personal service; and at least forty-five days have elapsed since the defendant received the request. N.J.S.A. 2A:53-28.

To determine what constitutes production of records by a medical practitioner, one must refer to N.J.A.C. 13:35-6.5 et seq. This regulation states that physicians must prepare:

"... contemporaneous, permanent professional treatment records. These records shall contain the dates of treatment, the patient's complaints, the history taken by the physician, the findings made on physical examination, progress notes, orders for tests or consultations and the results of same, the diagnosis or impression, the treatment plan, including specific dosages of medications and the identity of the provider of treatment. N.J.A.C. 13:35- 6.5(b)(1)."

Reading the Records

The records must be provided 30 days after receipt of the request from a patient or authorized representative. N.J.A.C. 13:35- 6.5(b)(3)(vii)(3) and N.J.A.C. 13:35-6.5(c)(1). The doctor may charge "\$1 per page or \$100 for the whole record, whichever is less." Significantly, the regulations state that if the patient "is unable to read the treatment record, either because it is illegible or prepared in a language other than English, the licensee shall provide a transcription at no cost to the patient." N.J.A.C. 13:35-6.5(c)(5).

Similarly, hospitals are required to provide a complete copy of the hospital chart within 30 days of the request. N.J.A.C. 8:43G- 15.3(d). The hospital chart must be "a legible, written copy of the record." N.J.A.C. 8:43G-15.3(d). Furthermore, "incidents, including patient injuries and mishaps, shall be fully documented in the patient's record." N.J.A.C. 8:43G-15.3(i). Hospitals can only charge \$1 per page for the first 100 pages, and 25 cents a page thereafter to a maximum charge of \$200 for the

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entire record. N.J.A.C. 8:43G- (d)(1).

Finally, the hospital must establish a policy of providing copies of medical records for patients who do not have the ability to pay. See N.J.A.C. 8:43G-15.3(d)(3). Thus, if the medical record is illegible, the defendant has not provided records as required by the statute and the plaintiff can avoid the requirement of submitting an affidavit of merit by filing a certification demonstrating the noncompliance by the defendant.

If legible medical records are supplied, the statute requires the plaintiff to provide "each defendant" with the affidavit of merit within 60 days following the date of filing of the answer to the complaint by "the defendant." Obviously, in cases involving multiple defendants, the time period for the filing of the affidavits cannot begin to run until all of the defendants have supplied their records and filed their answers. Otherwise, the Legislature would have required production of the affidavit within 60 days following the filing of an answer by "each" defendant, as opposed to "the defendant."

Indeed, where care has been provided by more than one potential defendant, it may be impossible for an expert to opine on whether malpractice has occurred without being able to determine what information was communicated between the two treating physicians. Nevertheless, in a case involving multiple defendants and with a statute of limitations about to expire in the near future, the plaintiff's counsel may be forced to file suit

immediately. If the 60-day time period were triggered as to each defendant by the filing of each defendant's answer, one could be faced with a situation where one defendant supplies records promptly, while a second defendant, or even a nonparty medical provider, refuses to provide records which are needed to demonstrate the liability of the first defendant.

Clearly it would be unjust to dismiss the case against the first defendant where the plaintiff cannot supply the required affidavit due to the failure of another party to supply medical records. Therefore, it would appear that in such circumstances the plaintiff should be permitted to file the certification stating that the records of a defendant or other medical provider have not been supplied and therefore the plaintiff cannot supply the affidavit of merit even as to a defendant that has supplied the records.

The "Affidavit of Merit" statute will have little effect on the majority of malpractice cases where plaintiff's attorney has adequate time to obtain and review the medical records with competent experts. The statute does not affect the standards by which an expert's qualifications are based and only requires a preliminary opinion from the expert. The statute will only be a factor in those cases where the statute of limitations is about to expire and the plaintiff is forced to file suit. In such cases, the statute will compel the defendants to provide promptly the medical records in legible form, thus helping the plaintiff's attorney determine the merits of the case. ■