Proposed Amendment to Procedural Rule to affect Commencing a Medical Malpractice Claim

In 2004, Ohio Tort Reform Legislation placed the burden on plaintiffs bringing medical claims to include an affidavit of merit authored by an expert attesting to the sufficiency of medical evidence supporting the plaintiff’s claims. This requirement is described in Rule 10(D)(2) of the Ohio Rules of Civil Procedure. The Ohio Supreme Court recently published a proposed amendment to this Rule suggested by the Commission on the Rules of Practice and Procedure in Ohio Courts. In its present form, the Rule sets forth three specific requirements regarding the contents of the affidavit of merit. Currently, the affidavit must include:

i. A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

ii. A statement that the affiant is familiar with the applicable standard of care; and

iii. The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

The amendment to Civ.R. 10(D)(2) poses three major changes that call for a more detailed attestation of the above requirements.

Firstly, the amendment redefines two types of medical claims by separately identifying dental, optometric, and chiropractic claims brought pursuant to R.C. 2305.113. These claims would only require the affiant qualify as an expert pursuant to Evidence Rule 702 which requires the testimony meet a certain set of criteria for reliability, compared to claims asserted against a physician, podiatrist, or hospital which requires the affiant qualify as an expert under both Evidence Rules 601(D) and 702. This distinction effectively exempts those experts from having to devote at least one half of his or her professional time to the active clinical practice in his or her field of licensure before rendering opinions as to liability in claims against dentists, optometrists and chiropractors. In addition, the Commission proposes an amendment in tandem with Rule 10(D)(2) to Evidence Rule 601 to increase the active clinical practice requirement from one-half to three-quarters of professional time at the time of the occurrence.

Secondly, the amendment requires an affidavit of merit for each named defendant, rather than one affidavit as to all named defendants. In addition, each affidavit of merit must specifically address the defendant by name.

Finally, the amendment requires a more specific declaration of qualifications of the expert authoring the affidavit under the applicable Rules of Evidence (either 601(D) or 702, or both). The expert must also identify which records he or she reviewed, including the source of the records and the dates of service. In its current form, the Rule only requires the affiant state it has reviewed the records reasonably available.

The practical effect of this amendment, if adopted, will undoubtedly increase the burden on plaintiffs in pleading a *prima facie* case for medical malpractice. More specifically, requiring separate affidavits for each named defendant would undoubtedly pose an added challenge to plaintiffs who already struggle with the complexities of amending the complaint. Often times, the plaintiff will name each care provider identified in the medical record to avoid racing to amend the complaint to later add additional defendants before the one-year statute of limitations has run. This proposed requirement may deter such conduct, as obtaining a sufficient affidavit of merit attesting to each care provider’s negligence would be a daunting task.

The proposed amendment is available for public comment until November 13, 2012. Until then, the judiciary, practicing bar, and the public at large are encouraged to comment on the potential legal and practical effect of the suggested amendment. If you have any questions regarding the proposed amendment to Rule 10(D)(2) of the Ohio Rules of Civil Procedure, or would like information on how to submit a comment to the Supreme Court of Ohio, please feel free to call upon one of our Medical Malpractice Group Members.

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