Reforming Tort Reform: What's Going On With Ohio's Affidavit Of Merit Rule?

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Many states have instituted so-called "affidavit of merit" or "certificate of merit" provisions into their laws as a tort reform measure to screen out frivolous medical malpractice lawsuits. The theory behind such measures is to prevent medical malpractice lawsuits from being filed, unless and until a qualified physician has actually reviewed the case and deemed the claim to have some threshold level of merit.

In Ohio, the current affidavit of merit requirement has roots dating back to 2004, when the Ohio General Assembly formally asked the Ohio Supreme Court to amend the Ohio Rules of Civil Procedure to include such a provision. *See* House Bill 215, 125th Ohio General Assembly, effective September 13, 2004. This was not the first time an affidavit of merit provision had been considered in Ohio. And, technically, the legislature's request in House Bill 215 had no binding authority on the Ohio Supreme Court.

Ultimately, through a separate Ohio Supreme Court rulemaking process, the affidavit of merit requirement did become a part of the Ohio Rules of Civil Procedure, effective July 1, 2005, as Civil Rule 10(D)(2) ("the Rule"). The Rule was then amended effective July 1, 2007 to further clarify the criteria trial courts should use to evaluate whether an extension of time to produce an affidavit of merit is warranted.

The first part of the current Rule generally provides that the first document filed to initiate a medical malpractice lawsuit, i.e., the "Complaint," must be accompanied by an affidavit from a qualified expert describing:

a) that the expert has reviewed all pertinent medical records reasonably available;
b) the expert's familiarity with the applicable standard of care;
c) the alleged breach of the standard of care; and
d) that the breach caused injury to the patient.

The second part of this Rule allows a plaintiff to file a motion to extend the time to produce the affidavit of merit, usually limited to 90 days, "for good cause shown." In this scenario, the malpractice case is filed without an affidavit of merit, and the affidavit is then produced (theoretically) during the early stages of the case. The Rule provides five criteria for trial courts to consider when evaluating whether "good cause" for an extension exists, such as whether the information necessary to draft the affidavit is "in the possession or control of a defendant or third party."

The third part of the Rule provides that if an existing affidavit of merit is deemed defective by the Court as to a particular defendant, the Court "shall" give plaintiff an additional 60 days to correct the deficiency.

After the Rule became effective on July 1, 2005, Ohio trial and appellate courts interpreted the Rule in differing and inconsistent ways. These varying interpretations ultimately led to the Ohio Supreme Court's 2008 decision clarifying the appropriate application of the Rule, in *Fletcher v. University Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379.

Despite the 2007 amendment to the Rule, and the *Fletcher* decision in 2008, the turmoil over enforcement of the Rule has continued. In particular, the issue of extensions granted under the second part of the Rule has continued to be a contentious issue in Ohio trial and appellate courts. Litigants have frequently disputed whether a particular extension is warranted in cases where medical malpractice lawsuits are filed without any affidavit of merit, or perhaps with a potentially defective affidavit of merit. This ongoing debate has now led to two related, pending initiatives to further "reform the tort reform."

The first initiative is pending with the Ohio Supreme Court and its Rules Commission ("Commission"). At the suggestion of the Commission, the Ohio Supreme Court proposed formal changes to the Rule in 2012, and requested input from stakeholders by October of 2012. AMCNO was one of several stakeholders who expressed support for the proposed changes, to encourage more rigorous and consistent enforcement of the Rule, and to ensure that expert affiants were truly qualified to render the opinions being expressed in the affidavits. These amendments initially were planned to take effect on July 1, 2013. (Ohio Supreme Court changes to the Civil Rules only take effect once per year, on July 1.)

However, the Ohio Supreme Court determined that further input was required, after a two-part proposal for reforming the Rule and simultaneously amending a related statute through legislative action emerged from a task force of Ohio State Bar Association. The current proposed changes to the Rule (the same amendments that were considered for July 1, 2013 adoption) could take effect, at the soonest, on July 1, 2014. It is expected that further discussion and public comment will occur on these proposed changes over the next 14 months, through the Ohio Supreme Court's established rulemaking process.

The second initiative is not a formal amendment to the Rule at all, but a related initiative in a separate forum – a bill pending in the Ohio General Assembly, House Bill 103, introduced March 13, 2013 ("HB 103"). Tying together an amendment to the Rule with HB 103 was the proposal from the Ohio State Bar Association task force. In theory, HB 103 seeks to supplement the Rule through a separate "filtering" mechanism, to reduce the number of peripheral medical providers who are often named as defendants in medical malpractice lawsuits, then subsequently dismissed.

The idea behind HB 103 was not specifically to reduce the number of medical malpractice *lawsuits* overall, but rather to reduce the *number of defendants* named in those same suits. HB 103 is currently pending before the Judiciary Committee of the Ohio House of Representatives.

Although the original impetus behind HB 103 seemed appropriate, the most recent text of the Bill was wrought with compromises that could undermine its intended purpose. For example, various groups proposed amendments that would substantially extend the time to file malpractice suits (a.k.a. the "statute of limitations") as a *quid pro quo* for the "filtering" provisions in the Bill. As always with legislative amendments, the devil is in the details, and it is yet to be seen whether HB 103 will emerge as an effective tort reform tool or not.

For the time being, the Rule remains somewhat useful for its original purpose, but limited by inconsistent enforcement by trial courts, and the intertwined problem of large numbers of peripheral medical providers being named in individual malpractice lawsuits. Therefore, the debate to improve the Rule will continue in 2014. ■