Update On Required Expert Qualifications for Affidavits of Merit And Standard of Care Opinions

By Colin Ray

I. Introduction

Despite enjoying many already-existing defenses and hurdles, defense counsel for medical practitioners have lately resorted to a simple and rarely-successful procedural move: challenging the qualifications of the plaintiff's expert who signs the affidavit of merit. The affidavit of merit itself sets a very low floor for competency, and all but the most poorly-chosen experts can easily comply with the rule. Nevertheless, attorneys for patients and the fiduciaries of their estates must devote substantial time and resources to such motions, despite what appears to be an extremely low success rate. Attorneys responding to such motions for the first time are often surprised to learn that their affidavit provider need not be certified in the same specialty as the defendant provider. Consequently, these motions should not be difficult to defeat.

II. Required Standards for Medical Experts

a. Basic Requirements for Affidavit of Merit Signers

As medical malpractice attorneys know, to obtain discovery in a malpractice case, a lawsuit must carry an affidavit of merit and slip by a three-headed dragon comprised of Civ.R. 10(D)(2), R.C. 2743.43, and Evid.R. 601(D). Civ.R.10(D)(2) requires nothing more than the sworn statement that the affiant reviewed all medical records reasonably related to the complaint, a statement that the affiant is familiar with the standard of care, and an opinion that such standard of care was breached and such breach damaged the patient.

Rolled into Civ.R.10 are the attendant requirements of Evid.R. 601(B). Affiants must be licensed to practice medicine and surgery, devote at least half of their professional time to active

clinical practice or instruction, and practice in the "same or a substantially similar specialty" as the defendant. And, R.C. 2743.43, while more restrictive, contains similar requirements, including that the witnesses spend 75% of their time in active clinical practice or instruction (though the 50% in the Rules of Evidence currently prevails), and if certified in a specialty, must be certified by recognized board and the specialty must be related to the issues in the case. These requirements are not extensive, but it is imperative that a practitioner follow them to the letter of the law.

b. Signer Not Required to Be Best Witness.

Anyone who has ever faced a less-than-qualified expert or seen their own expert stumble likely knows, the expert need not be the best witness; they need only be qualified. "An expert witness need only aid the trier of fact in the search for the truth and need not be the best witness on the subject." *Berlinger v. Mt. Sinai Med. Ctr.*, 68 Ohio App.3d 830, 835 (8th Dist. 1990), citing *Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St2d 155, 158 (1978) and *Ishler v. Miller* (1978), 56 Ohio St.2d 447, 10 O.O.3d 539, 384 N.E.2d 296. In Ohio, where "fields of medicine overlap and more than one type of specialist may perform the treatment, a witness may qualify as an expert even though he does not practice the same specialty as the defendant." *Berlinger*, 68 Ohio App.3d at 835 (8th Dist. 1990). "The test of admissibility is whether a particular witness offered as an expert will aid the trier of fact in the search for the truth, not whether the expert witness is the best witness on the subject." *King v. LaKamp*, 50 Ohio App.3d 84, 85 (1st Dist. 1988). The difference in specialty applies to the weight of the evidence rather than its admissibility. *Id.* Thus, while one typically wants the best witness available, the rules provide ample leeway for the more common situation where sometimes the best witness is not actually available or is economically not prudent.

c. Experts may testify even in specialties in which they do not practice.

Dozens of Ohio cases are quite clear: even where the overlap is tenuous, when expert doctors testify they are familiar with the standards of care, they will not be excluded. Some of these cases are quite helpful: *Johnson v Emergency Physicians of Northwest Ohio at Toledo, Inc.*, 6th Dist. No. L-11-1290, 2013-Ohio-332, ¶¶ 40-45 (ER/internal medicine expert could opine as to urologist's standard of care); *Schutte v. Mooney*, 2nd Dist. No. 20888, 2006-Ohio-44, ¶¶ 22-36 (trial court abused its discretion in excluding testimony of vascular surgeon regarding breach of care by ER physician) *Greene v. Marchyn*, 4th Dist. No. 99 CA 2662, 2000 WL 1468791 (Sept. 27, 2000) (radiologist who worked with orthopedic surgeons competent to testify as to standard of care in fracture treatment); *Duckworth v. Lutheran Med. Ctr.*, 8th Dist. Nos 65738, 65995 (Jan. 25, 1996) (oncologist competent to testify to standard of care for ER physician); *King v. LaKamp*, 50 Ohio App.3d 84 (1st Dist. 1988) (abuse of discretion to exclude expert orthopedic surgeon who was familiar with podiatric standards of care and who had performed surgery in issue). Therefore, it is critical that the affidavit state that the affiant is familiar with the standard of care.

III. Developments in Caselaw And Practice Points

Many practitioners have noted an increase in the number of motions challenging expert testimony, whether at the pleading stage with regard to an affidavit of merit, or at summary judgment or trial. Thus, for practitioners, at the very start of expert selection it is imperative to spend more time reviewing CV's and speaking with experts to determine their quality and qualifications. *See O'Stricker v. Robinson Mem'l Hosp. Found.*, 11th Dist. Portage No. 2016-P-0042, 2017-Ohio-2600 (affidavit of merit need not include specific averments evidencing that affiant satisfies every aspect of Evid.R. 702 and 601(D); individual defendants must be named).

A. What to Watch For.

Though threshold for affidavit of merit testimony is quite low, attorneys must be prepared. Defendants favor pointing out that an affidavit signer does not practice in the same specialty as a defendant physician. This is not fatal to the affidavit of merit—the physician signing the affidavit of merit must simply utilize and be familiar with the applicable standard of care. There is no requirement that they practice in the same specialty.

B. Prepare for Trial The Day A Case Is Signed Up.

It's become a cliché often neglected: every case should only be signed up and prepared as though it will need to be tried. This is startlingly true in malpractice cases, where doctors often veto a settlement in order to maintain insureability. Scarcely a trial occurs where even a robustly-qualified expert does not face a motion in limine prior to trial regarding limitation or disqualification. Attorneys should consider the following when selecting an expert to combat procedural challenges:

(1) Whenever possible, choose an expert against whom a challenge to competency will seem frivolous;

(2) Before retaining, make sure your expert is licensed, not suspended, not under investigation, and has no red flags, both at the time of substandard care, at the time of affidavit of merit, and the time of testimony;

(3) Spend time vetting your expert on the active teaching and/or clinical practice points, as there should be no good reason for that to ever be a basis for disqualification. Medical personnel with less-traditional practice roles such as traveling nurses or locum tenens physicians must also be prepared to testify truthfully within the parameters of the rules;

(4) Don't forget about the messy stuff: your expert must review all records that are reasonably available. Make sure radiologists have reviewed all relevant film,

pathologists have reviewed all relevant slides, and that all doctors have reviewed all records reasonably available;

(5) Prepare for potential motions for summary judgment, motions in limine, and motions for directed verdict and judgment notwithstanding the verdict from day one to avoid doing the same research repeatedly. Remember, a verdict or judgment without jurisdiction can be challenged at any time;

(6) Don't forget that if an affidavit of merit is rejected, you have up to 60 days to repair it under Civ.R. 10(D)(2)(e); *see Chalmers v. HCR ManorCare, Inc.*, 6th Dist. Lucas No. L-16-1143, 2017-Ohio-5678 (error not to allow 60 days to remedy defective affidavit);

(7) Once you are into discovery, aggressively object to all efforts to obtain discovery or expert deposition questions on what materials were reviewed prior to signing the affidavit. Under Civ.R. 10(D)(2)(d), anything pertaining to the affidavit of merit "shall not otherwise admissible as evidence or used for purposes of impeachment." *See Snowden v. Ekeh*, 2d Dist. Montgomery No. 26688, 2016-Ohio-4976 (error to allow defendant to use affidavit of merit for impeachment).

(8) Know your judge: in counties with high judge turnover, particularly where newer judges have no medical malpractice backgrounds, provide the court with broad, clear briefs containing adequate authority to decide the motion in your favor. If you do not properly educate the court, the other side will prevail with parsed citations.

IV. Conclusion

Medical malpractice cases are exposed to evolving challenges involving the affidavit of merit.. A review of recent cases evidences quite clearly that courts are at times not tolerating even minor lapses in compliance to Civ.R. 10(D). But such challenges can be avoided with careful

expert selection and well-drafted affidavits that comply with the applicable rules. These should easily defeat such motions and allow plaintiffs to reach the discovery phase of litigation.