# Don't Take Their Word For It — Attack The Plaintiffs' Expert

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Since 2005, the landscape of medical malpractice litigation has changed dramatically in Maryland. This article addresses several of those changes and offers strategies which may be useful in attacking plaintiffs' certificates of merit and certifying experts.

## Is The Plaintiff's Expert "Qualified"?

In order to maintain a medical malpractice claim, a plaintiff must meet the requisite statutory requirements of the Health Care Malpractice Claims Act, set forth in the Courts and Judicial Proceedings Article of the Maryland Code, section 3-2A-01, et. seq., ("the Malpractice Claims Act"). The first such requirement of the Malpractice Claims Act is that "claims against health care providers, first, be submitted to arbitration..." *Walzer v. Osborne*, 395 Md. 563, 575, n. 7, 911 A.2d 427, 433 (2006) (*citing* CJP § 3-2A-02(a)). In Maryland, the body which arbitrates claims against health care providers is the Health Care Alternative Dispute Resolution Office ("HCADRO"). Thus, pursuant to the Malpractice Claims Act, a plaintiff is required to initially file their Statement of Claim in the HCADRO.

The vast majority of plaintiffs wish to litigate their claims in Circuit Court, rather than submit to arbitration in the HCADRO. However, a plaintiff may only waive arbitration and file a complaint in the Circuit Court after filing a certificate of qualified expert and report with HCADRO, pursuant to CJP section 3-2A-04.[1] Filing a certificate of qualified expert and accompanying report, both of which must comply with various statutory requirements, is not just a procedural mechanism by which jurisdiction in the circuit court is obtained; rather, it is an "indispensable step" in the medical malpractice process and a condition precedent to obtaining subject matter jurisdiction in the Circuit Court. *Walzer*, 395 Md. at 582. Because the filing of a certificate is an "indispensable step in the [HCADRO] arbitration process," a plaintiff can only pursue a claim in circuit court after filing a certificate and report that meet the statutory requirements enunciated in *Walzer* and its progeny. *Id.* at 577.

A certificate and report that contain only general statements alleging that a defendant health care provider breached the standard of care is *not* sufficient. *Carroll v. Konitz*, 400 Md. 167, 172, 929 A.2d 19, 22 (Md. 2007). Rather, the certificate must include, at a minimum, a statement that the defendant's conduct breached a particularized and defined standard of care, and that such a departure from the standard of care was the proximate cause of the plaintiffs' injuries. Id. The certificate of qualified expert and report are intended to "certify" that the plaintiff's case against a particular health care provider is meritorious. Maryland courts consistently hold that if a plaintiff fails to file a satisfactory certificate of qualified expert and accompanying report, his case shall be dismissed without prejudice. Ideally, this requirement prevents health care providers from having to defend non-meritorious claims.

In *Walzer*, the Court of Appeals interpreted CJP section 3-2A-04(b) and established detailed requirements for the contents of the report. The Court determined that the report must contain something more than just a mere recitation of the language in the certificate. The *Walzer* Court stated:

> While it is arguably unclear from the Statute exactly what the expert report should contain, common sense dictates that the Legislature would not require two documents that assert the same information. Furthermore, it is clear from the language of the Statute that the certificate required of the plaintiff is merely an assertion that the physician failed to meet the standard of care and that such failure was the proximate cause of the patient-plaintiff's complaints. *It therefore follows that the attesting expert report must explain how or why the physician failed or did not fail to meet the standard of care and include some details supporting the certificate of qualified expert… Accordingly, the expert report should contain at least some additional information and should supplement the certificate.*

*Id.* at 582-83 (emphasis added). A report that fails to define the standard of care and provide, with specificity, how the health care provider breached the standard of care must be stricken. Carroll, 400 Md. at 197-98 (upholding the trial court's dismissal of the plaintiff's case on the basis that the certificate of qualified expert and report failed to explain the requisite standard of care owed to the plaintiff or how the defendant's care departed from it).

The expert witness who provides the plaintiff with a certificate of *qualified* expert and report must be just that — *qualified.* Recent amendments to the Malpractice Claims Act restrict a witness' ability to testify in a field outside his own specialty. In order to testify with regard to the standard of care or how it was breached, the expert must possess the same board certifications as the health care provider about whom he is testifying, unless certain exceptions apply. Under this statute, for example, an emergency medicine physician would be statutorily unqualified to offer opinions in a certificate of qualified expert or at trial regarding a board certified otolaryngologist. The statute states as follows:

> (2) (i) This paragraph applies to a claim or action filed on or after January 1, 2005.
>
> (ii) 1. In addition to any other qualifications, a health care provider who attests in a certificate of a qualified expert or testifies in relation to a proceeding before a panel or court concerning a defendant's compliance with or departure from standards of care:
>
> A. Shall have had clinical experience, provided consultation relating to clinical practice, or taught medicine in the defendant's specialty or

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[1] *Although an infrequent occurrence, the parties can mutually agree to waive arbitration, pursuant to §3-2A-06A. When arbitration is mutually waived, the plaintiff is not required to file a certificate of qualified expert.*

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> a related field of health care, or in the field of health care in which the defendant provided care or treatment to the plaintiff, within 5 years of the date of the alleged act or omission giving rise to the cause of action; and
>
> B. Except as provided in item 2 of this subparagraph, if the defendant is board certified in a specialty, *shall be board certified in the same or a related specialty as the defendant*.
>
> 2. Item (ii)1.B of this subparagraph does not apply if:
>
> A. The defendant was providing care or treatment to the plaintiff unrelated to the area in which the defendant is board certified; or
>
> B. The health care provider taught medicine in the defendant's specialty or a related field of health care.

CJP § 3-2A-02 (c)(2).

Because the Court of Appeals and the Legislature have recently put teeth into the certifying requirements, defense counsel often receive detailed and lengthy certificates and reports from plaintiffs. Preliminarily, defense counsel must ask themselves whether the certifying expert is statutorily qualified to offer such opinions. If he is not qualified, a motion to dismiss should be filed.

## "Pinning Down" The Plaintiff's Certifying Expert Early

Assuming the expert is qualified, at least on paper, defense counsel must question (a) the range of the expert's opinions and (b) what the certifying expert relied on to formulate his opinions. Absent the answers to these questions, defense counsel may spend valuable time chasing down the plaintiff's real theory of the case and the bases for it.

It is important to identify the bases for the expert's opinions, and thereby gain an understanding of what opinions are actually being offered, as early as possible. This will assist in narrowing the issues in the case before substantive discovery occurs. An early deposition of plaintiff's certifying expert —before any other depositions are completed — accomplishes both of these goals and can lead to much more efficient litigation.

The ability to depose a certifying expert witness early in litigation, solely for the purpose of determining the basis for the expert's certificate and report, can offer the defense an important strategic advantage. Namely, defense counsel has the opportunity to "pin down" the expert's particular criticisms and identify holes in the plaintiff's theory of liability. Less often, defense counsel may "catch" an expert who has attested to breaches of the standard of care in their certificate or report without having the factual information necessary to render such opinions.

At least two Maryland Circuit Court judges have interpreted the language of the Malpractice Claims Act, in conjunction with the Maryland Rules relating to discovery, to mean that a plaintiff's expert can be deposed twice — once as to the basis of their certificate and report, and a second time in the regular course of discovery, assuming the expert is designated as one prepared to offer opinions at trial.

Although this tactic is unusual, it finds support in the plain language of the relevant legislation. Section 3-2A-04(b)(3)(ii) of the Act states that "discovery is available as to the basis of the certificate." Maryland Rule 2-401(a) provides that parties may obtain "discovery" by conducting depositions upon oral examination or written questions. Read together, these provisions support the position that a certifying expert can be deposed early in litigation with regard to their certificate and report, and then again in the regular course.

This tactic also ensures that the certifying expert will be deposed – a plaintiff is not required to designate their certifying expert to testify at trial. In such a case, pursuant to the traditional "discovery deposition only" position, defense counsel would never be afforded an opportunity to determine the basis for the expert's certificate and report. However, if a certifying expert can be deposed solely on the basis of their certificate and report, defense counsel cannot be stymied in this effort.

When presenting this argument to the court, it is helpful to point out that the cardinal rule of statutory construction "is to ascertain and effectuate the intent of the Legislature." *Stoddard v. State of Md*, 395 Md. 653, 661, 911, A.2d 1245, 1249 (2006). The analysis begins by examining the plain language of the statute based on the underlying premise that "the Legislature is presumed to have meant what it said and said what it meant." *Id.* at 661 (*quoting Witte v. Azarian*, 369 Md. 518, 525, 801 A.2d 160, 165 (2002). By its terms, section 3-2A-04(b)(3)(ii) clearly affords defendants the right to conduct discovery "*on the basis of the Certificate*" (emphasis added). To assume otherwise is inconsistent with the plain language of the statute.

Judges Leo E. Green and Thomas P. Smith, both from the Circuit Court for Prince George's County, have recently ordered that the plaintiff's certifying expert be produced for deposition on the basis of the certificates and reports, and then be produced a second time for a discovery deposition if the expert were to be offered at trial. Their rulings were based upon the arguments laid out in this article. In each case, the early deposition of the plaintiff's certifying expert played a critical role in defense counsel's (a) determination of whether the expert was statutorily qualified to offer standard of care opinions, (b) precise and efficient identification of each allegation of negligence and the bases for each and (c) preparation of a comprehensive defense.

In an appropriate case, the early deposition of a plaintiff's certifying expert can prove invaluable. In our experience, plaintiffs have uniformly denied our requests to depose their certifying expert twice, making court involvement necessary in the form of a motion to compel. If the motion to compel is granted, defense counsel should be prepared to depose the plaintiff's expert in as surgical a fashion as possible, focusing on the expert's qualifications and on identifying the particular criticisms of your health care provider client. To a large extent, this is a novel defense tactic; thus, plaintiffs' lawyers and/or their experts may be unprepared for the scope of the deposition or be unappreciative of the impact it can have on their case.

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