

Medical Malpractice Lawsuits: Why Keep Making It Easier?

The Affidavit of Merit statute should be read broadly in order to maintain the integrity and intentions of the legislature. While some questions have been reviewed by the New Jersey Supreme Court, this article addresses lingering gaps in the effectiveness of the AOM.

By Eric S. Poe, Esq., CPA

Whether termed ludicrous, or more professionally deemed lacking merit, frivolous lawsuits are not new. There are also no signs that such claims are on the decline. In fact, I might argue it is the contrary. Actions to curb these legal “black eyes” date back centuries.

As the U.S. Constitution was written by our forefathers, they created three branches of government to serve our democracy: 1) Legislative Branch – those who are elected by the people and those who write the laws; 2) Judicial Branch – those who interpret the laws, especially the grey areas, and also who determine if the laws are permitted under the confines of the U.S. Constitution; and 3) Executive Branch – those who are tasked with enforcing the laws.

Turning back to the present day ... the New Jersey legislature introduced the Affidavit of Merit Act (AOM) with the intention to weed out frivolous negligence claims against professionals. The law, which requires Affidavit of Merit (“Affidavit”), supports that the lawsuit has merit and is not frivolous. Notably, in medical malpractice cases, the Affidavit must be served by a licensed peer with the same board certification as the health-care professional accused of medical negligence.

Despite the clearly written components of the AOM, there are flaws that lead to inconsistencies with the legislators’ original intent. Questions of accountability or correlation between the standard of care deviations and resulting injury are two of



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ways lawyers look to circumvent the law. Today’s increasingly complex legal landscape—with multi-party claims and numerous defendants—adds to the fray.

As a result, the AOM should be read broadly in order to maintain the integrity and intentions of our legislature. While some of the questions have been reviewed by the New Jersey Supreme Court, it is lingering gaps in the effectiveness of the AOM that I address here.

Begging the Question: Who Is the Plaintiff?

According to the New Jersey Supreme Court, the language of the AOM only refers to “plaintiff” but when it comes to the legislative intent, the Affidavit is required for any claims against any professional. What happens when the allegations of medical malpractice are raised by a defendant, whether a physician, a hospital, or a laboratory, and that defendant brings in a third-party that was never sued by the plaintiff? Something that seems so obvious actually creates a complexity that has greater potential consequences.

The question of the application of the Affidavit was once again at the center of attention in *Mejia v. Quest Diagnostics* (A-88-18; 082739). The New Jersey Supreme Court was asked to examine a case in which a third-party physician was brought into a claim by another defendant, and there was no Affidavit supporting the claims. Essentially, the court was asked if there could ever be an allegation of medical negligence by a doctor when the statutorily required Affidavit is not needed for the suit to proceed. To me, the short answer has been no and remains no.



In *Mejia*, the court ultimately did not reach the issue of whether an Affidavit was required on a third-party defendant. However, the court did raise a concern over the “plain language” of the statute, which refers to the plaintiff’s filing requirement. Yes, the AOM says “plaintiff” but isn’t the originally named defendant who brings in another professional into the case then a claimant, now sitting as a plaintiff? I say yes.

The legislative history of the AOM makes clear that a person bringing a claim for malpractice against a professional is required to proffer the Affidavit. It is my position that “any” means “any”—plaintiff, third-party complainant, cross-claimant, etc. Rather than honor the original

intent, the AOM is being slowly eroded by case law. For this reason, I proposed a statutory amendment to provide greater clarification—a change that would recognize the intricacies of medical malpractice cases and the current landscape of complex litigation.

Specifically, the change would require “any party” asserting malpractice or negligence against a professional in “any pleading.” No one is immune from the AOM requirements. Such an amendment is consistent with the original tort reform and legislative commitment to keep highly qualified and skilled professionals and their businesses in New Jersey. To coincide with this change and further support the legislative intent of

the AOM, I also recommended that failure to comply with the AOM would result in an administrative dismissal of the claims, thus removing the burden of the licensed professional to formally move the court to dismiss the unsupported claims.

Holding Professional Experts Accountable

Once the language of the AOM is clarified, and “plaintiff” is defined as intended—“any party”—and requirements of an Affidavit supporting all claims of professional negligence is clear, there are still issues with the AOM, which are also require attention.

The first issue is rooted in the basic question asked by the professional peer when reviewing the case. Within the medical malpractice arena, that question is: Did the medical professional deviate from the standard of care? Yes or no seems straightforward. However the AOM does not require that the Affidavit make a correlation between the deviation from the standard of care and the alleged injury or harm. Such lack of connection is an essential element to a claim of

negligence. The fact that the professional peer reviewing the case and attesting to the alleged deviation does not have to also draw a direct link to the harm seems misplaced and irresponsible. Further it leaves an incomplete assessment of the case, allowing for frivolous and unsupported lawsuits to get through what is supposed to be a narrow door.

The second issue is accountability specific to the professional who will serve as the affiant of the Affidavit. Currently, professionals who sign and submit an Affidavit are neither required to appear and testify before the court, subject to cross-examination, nor are they subject to a deposition. By having a professional serve as an affiant on a document critical to a claim of malpractice, without requiring them be subject to cross-examination allows the flood gates to open. Affiants need to do nothing more than a cursory review of a case, sign their name to the Affidavit, and move on. Holding these professionals accountable and subject to questions by all parties would provide further support for the legislative intent—to prevent frivolous and expensive litigation in New

Jersey when professionals are involved.

Putting the Brakes on a Slippery Slope

Most often, I speak from the realm of medical malpractice, yet the AOM applies to all industries. That reason alone elevates the importance. The requirement to produce an Affidavit from a professional peer and attest that the professional deviated from the standard of care or conduct must be applied in a uniform manner. It can (and should) not be a matter of judicial choice. I am hopeful the legislature will adopt the proposed changes and look closely at the flaws brought to light here, so we can reduce the number of frivolous claims that continue to haunt our doctors and other professionals as well as keep reputable companies in business and in New Jersey.

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