

Innocent Doctor Sued After 'Secret' Medical Expert Approves: Fuels 18-Month Legal Nightmare

Alicia Gallegos

May 06, 2022

When the hospital's trauma team could not get an IV inserted into an accident victim, they called Illinois emergency physician William Sullivan, DO, JD, for help. Sullivan, who is based in the Chicago suburb of Frankfort, inserted a central line into the patient's leg on his first attempt — a task that took about 20 minutes.



A year later, Sullivan was shocked and angry to learn he was being sued by the trauma patient's family. Inserting the line was his only interaction with the woman, and he had no role in her care management, he said. Yet, the suit claimed he was negligent for failing to diagnose the patient with internal bleeding and for not performing surgery.

"The lawsuit put a lot of stress on our family," Sullivan recalled. "At the time my wife was pregnant. I was in law school, and I was also working full time in the ER to support our family. I remember my wife crying on the couch after reading the complaint and asking how the plaintiff's attorney could get away with making the allegations he made."

Sullivan soon learned that 15 medical providers in the patient's medical record were named as defendants. This included the director of the radiology department, whose name was on a radiology report as "director" but who was actually out of the country when the incident occurred.

Despite some of the accusations being impossible, a medical expert had claimed there was a "meritorious claim" against every health professional named in the suit. Illinois is among the 28 states that require plaintiffs' attorneys to file an affidavit of merit for medical malpractice claims to move forward.

Sullivan wondered who would endorse such outlandish accusations, but the expert's identity was a mystery. According to [Illinois law](#), plaintiffs' attorneys can withhold the identity of medical experts with whom they consult for affidavits of merit. About one third of states with merit requirements permit anonymous experts, according to [research and attorneys familiar with the issue](#).

Because the expert's identity remains hidden, physicians have no way of knowing whether they were qualified to render an opinion, Sullivan said. The loopholes can drag out frivolous claims and waste significant time and expense, say legal experts. Frequently, it takes a year or more before innocent physicians are dismissed from unfounded lawsuits by the court or dropped when plaintiffs can't support the claim.

"It's hugely frustrating," said Bruce Montoya, JD, a Colorado medical liability defense attorney. "You have an expert who is not disclosed. Further down the road, when experts are being deposed, the plaintiff does not have to reveal whether any of those testifying experts is the same one who certified the case. You never get to determine whether they, in fact, had a certificate reviewer who was legitimate."

The laws have led to a recent outcry among physicians and fueled a revised resolution by the American College of Emergency Physicians (ACEP) denouncing anonymous affidavits of merit. (The revision has not yet been published online.)

"The minute experts are identified, they can be vetted," said Rade B. Vukmir, MD, JD, chair of ACEP's Medical Legal Committee. "There are reasons that you want to clarify the qualification and veracity of the witness. [Anonymous affidavits of merit] don't allow that, and there's something inherently wrong with that."

Because the identities of consulting experts are unknown, it's hard to know how many are unqualified. Expert witnesses who testify during trials, on the other hand, have long come under scrutiny for questionable qualifications. Some have come under fire for allegedly [lying under oath](#) about their experience, [misrepresenting their credentials](#), and [falsely representing their knowledge](#).

"Considering the known problem of potentially unethical expert witness testimony at trial, there's is the potential likelihood that experts in anonymous affidavits of merit may sometimes lack the qualifications to give opinions," said Vukmir, an emergency care physician in Pittsburgh, Pennsylvania.

Attorneys: Hidden Experts Increase Costs, Waste Time

In Colorado, Montoya has seen firsthand how anonymous experts can prolong questionable claims and burden defendants.

Like Illinois, Colorado does not require attorneys to identify the medical experts used to fulfill its [certificate of review statute](#). The expert consulted must have expertise in the same area of the alleged negligence, but does have to practice in the same specialty, and the statute allows one expert to certify a lawsuit against multiple doctors.

In a recent case, Montoya represented a Denver neurosurgeon who was sued along with multiple other healthcare professionals. From the outset, Montoya argued the claim had no merit against the neurosurgeon, but the plaintiff's attorney refused to dismiss the physician. Montoya asked whether the expert consulted for the certificate of merit was a neurosurgeon, but the attorney declined to disclose that information, he said.

The case progressed and Montoya eventually asked the judge to review the certificate of merit. By law, a judge can confidentially review the certificate of merit and decide whether it aligns with the state statute, but without disclosing the expert's identity to the defense. The judge ruled the certificate appeared to conform with state law, and the case continued.

A year later, as both sides were getting ready to disclose their experts who would testify, Montoya again argued the neurosurgeon should be dropped from the suit. This time, he warned if the claim continued against the neurosurgeon, the defense would be filing a motion for summary judgment and pursuing attorney fees and costs. [Colorado law](#) allows for such fees if the filing or pursuit of an action is frivolous.

"Boom, my client was dismissed," Montoya said. "This is a year later, after multiple conferences among the attorneys, multiple pleadings filed, expert witnesses retained to review the care, discovery exchanged, and records obtained. If we had [a stronger] certificate of review statute, it would have been a different ballgame. It's never going to get a year down the road."

In New York, physician defendants have experienced similar woes. The [state's law](#) requires plaintiffs' attorneys to certify that they consulted with a physician prior to filing the claim, and that they believe based on that discussion, there's a reasonable basis for the claim to move forward. Attorneys are not required to disclose the expert's identity.

The law also allows "an out," explained Morris Auster, JD, senior vice president and chief legislative counsel for the Medical Society of the State of New York. If the attorney made three separate attempts to obtain a consultation, and all three experts would not agree to the consultation, the lawsuit can be filed anyway, he said.

"From our standpoint, it's important to have an affidavit of merit requirement; it's better than not having it," Auster said. "But its effectiveness in providing control over the filing of lawsuits in New York has never been as strong as it could've been."

Auster notes that New York has some of the highest liability costs in the country in addition to doctors paying some of the steepest medical liability insurance premiums.

"This really affects a lot of physicians and it's driving physicians into employment arrangements, so they don't have to deal with it on their own," he said. "We support a number of measures to address these significantly high costs, and stronger certificate of merit requirements would certainly be one of those advocacy goals."

Why Are Anonymous Experts Allowed?

Certificates of merit that shield the identity of consultants encourage a greater pool of physicians willing to review cases, says J. Matthew Dudley, JD, president of the Illinois Trial Lawyers Association. When the requirements first went into effect in Illinois, there was significant animosity among physicians toward doctors who testified in medical malpractice cases for patients, Dudley explained.

"Sometimes they would be ostracized from their professional societies, or it would hurt a referral relationship," he said. "Over time, that animosity has lessened, but there was a concern that if the identity of physicians in certificates of merit weren't protected, then doctors would not look at cases for patients."

This would result in additional barriers for patients and their attorneys in pursuing their legal rights, Dudley said. He believes Illinois' certificate of merit statute is successful in fulfilling its intended purpose, and he has not seen any statistical evidence to suggest otherwise, he said.

"It has proven effective at decreasing filings in medical malpractice and effectively screening medical malpractice cases," he said. "Certificates of merit help to decrease filings by firms that aren't that experienced in dealing with those kinds of cases."

Kentucky is another state that does not require attorneys to identify the experts consulted for [certificates of merit](#). Malpractice defense attorney Andrew DeSimone, JD, who practices in Kentucky, believes this isn't a problem since attorneys eventually must disclose the expert witnesses who will testify at trial.

"Knowing the name behind the certificate of merit is not that pertinent," DeSimone said. "Physicians and their attorneys will ultimately have the chance to question and evaluate the expert witnesses used at trial. The certificate of merit is designed to weed out totally frivolous cases that do not have expert support. It's not designed to be a trial on the merits."

The belief that plaintiffs' attorneys frequently bring weak cases and use unqualified experts to certify claims is not realistic or logical, adds Sean Domnick, JD, a Florida medical malpractice attorney and vice president for the American Association for Justice. Medical malpractice cases are extremely challenging for plaintiffs — and they're expensive, Domnick said.

"We can't afford to take bad cases," he said. "For me to take on a medical malpractice case, it's not unusual for me to spend well over \$100,000. Remember, if we lose, I don't get that money back and I don't get paid. Why in the world would a plaintiff take on that type of a burden for a case they didn't believe in? The logic escapes me."

In Florida, where Domnick practices, plaintiffs' attorneys must send their certificates of merit to the defense with the expert identified. Domnick believes the requirement is a hindrance.

"It creates a delay that is unnecessary in a system that is already designed to wear our clients down," he said. "It's just another component that makes it harder on them."

Hidden Experts May Insulate Plaintiffs' Attorneys from Liability

Sullivan, the Illinois emergency physician, was ultimately dismissed from the multiparty lawsuit, but not for roughly 18 months. After the dismissal, he fought back. Sullivan sued the plaintiff's law firm for malicious prosecution, negligence in hiring, and relying on the opinion of an expert who was unqualified to render an opinion against an emergency physician.

The law firm however, argued that it was immune from liability because it reasonably relied on the expert's opinion as required by Illinois law. A trial court agreed with the plaintiffs' firm. The judge denied Sullivan's request to identify the expert, ruling there was no finding that the affidavit was untrue or made without reasonable cause. Sullivan appealed, and the appellate court upheld the trial's court decision.

"As happened with my case, law firms can use the affidavit as a defense against countersuits or motions for sanctions," Sullivan said. "Although the certificate of merit is intended to prevent attorneys from filing frivolous cases, it can also have the opposite effect of helping to insulate plaintiff attorneys from liability for filing a frivolous lawsuit."

In Colorado, complaints about the state's certificate of merit statute have gone before the Colorado Supreme Court. In [one case](#), a lower court ruled that a certificate of merit was deficient because the consultants were not chiropractors. In [another case](#), a nurse defendant argued the claim's certificate of review was insufficient because the consulting expert was a physician.

In both instances, Colorado judges held the state's statute does not require consultants to be in the same profession or the same specialty as the health professional defendant.

In New York, meanwhile, Auster said several bills to strengthen the state's certificate of merit requirements have failed in recent years.

"It's hard to say whether it will improve anytime soon," he said. "The trial lawyers are a very powerful advocacy force in the state, and they tend to oppose even the slightest of changes in civil liability. [In addition], some of these issues have been put on a lower tier because of trying to manage the pandemic."

Ultimately, Sullivan believes that courts and legislatures need to strongly consider the ethics of allowing anonymous experts to provide testimony against defendant physicians.

"I also think we need to consider how the notion of a secret expert comports with a defendant physician's due process," he said. "If an expert's opinion is appropriate, why would there be a need to shroud one's identity in a veil of secrecy?"

For more news, follow Medscape on [Facebook](#), [Twitter](#), [Instagram](#), [YouTube](#), and [LinkedIn](#)

Credits:

Images: Medscape Illustration/Dreamstime/Getty Images

Medscape Medical News © 2022

Send news tips to news@medscape.net.

Cite this: Innocent Doctor Sued After 'Secret' Medical Expert Approves: Fuels 18-Month Legal Nightmare - *Medscape* - May 06, 2022.