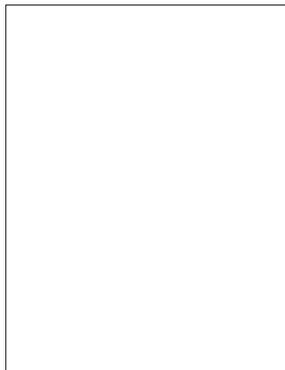
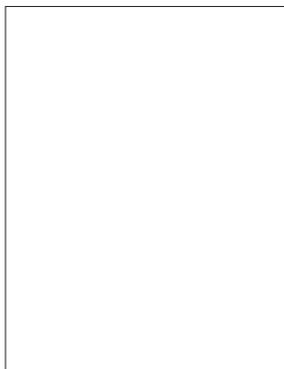


## A Survey of Certificate of Merit Statutes

By Misty Hubbard Gutierrez, Emily R. Gifford, and R. Thomas Dunn



Several states have taken steps to limit frivolous suits against design professionals by enacting what are commonly known as “certificate of merit” statutes that require formal,<sup>1</sup> considered certification that claims against a design professional are factually and legally supportable.<sup>2</sup> The central purpose of a certificate of merit (COM) is “to demonstrate

that the plaintiff has consulted with a person who has expertise in the area and that the expert consulted has concluded that the claim does not lack substantial justification.”<sup>3</sup> COM requirements are designed to weed out frivolous claims at an early stage of the judicial process, and thereby avoid entangling design professionals and their insurers in the substantial time, inconvenience, and expense of defending professional negligence claims.<sup>4</sup> Twelve states currently have COM statutes, and two others achieve the same goal by requiring claims to be submitted to screening panels.<sup>5</sup> Although these statutes are intended to reduce meritless claims, they also provide mechanisms to permit adjudication of legitimate claims against design professionals.

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This article will provide a summary of current COM statutes, address some practical considerations of the statutes, discuss constitutional challenges to COM requirements, examine the timing requirements for filing COMs, and outline the consequences of noncompliance.

By way of overview, COM statutes typically require a claimant to obtain a certification from an independent expert in the same field as the professional defendant, which certification identifies at least one breach of the applicable standard of care on the part of the design professional defendant. In other words, COM statutes require claimants to evaluate in a deliberate and conscious matter whether they have a legitimate, supportable claim against a design professional, and not merely file a suit based on an attorney’s broad allegation that the design professional engaged in some actionable misconduct. Claimants thereby must incur some initial expenses by hiring an expert to review the case and to produce (when required) a report or affidavit identifying potential negligence on the part of the design professional. Presumably, this prelitigation investigation and verification will help to curb frivolous suits to the extent that truly baseless claims will never find the requisite support of a licensed professional. The details and ramifications of COM statutes are discussed below.

### Chart 1: Summary of Certificate of Merit Statutes

The following chart (on page 36) summarizes key features of current COM statutes. As detailed below, some states allow the claimant’s attorney to sign the COM,<sup>6</sup> while other states require another design professional to sign the COM.<sup>7</sup> Kansas is the only state with a specific procedural mechanism for claims against design professionals that does not require an affidavit or expert report.

States also vary in the manner and timing in which the COMs are filed. Some states require submission of the claim to a screening panel prior to filing suit,<sup>8</sup> some require a claimant to file the COM contemporaneously with the lawsuit,<sup>9</sup> and others allow a claimant to file the COM after the commencement of the lawsuit.<sup>10</sup>

### Considerations

For those filing suit, consideration must be given as to what type of expert must be consulted. The statutes may require that the expert be one practicing or experienced in the same area as the professional defendant. Care should be taken to identify an expert experienced not only in the general practice of the professional defendant, but also in the area at issue in the litigation. For example, while a licensed architect may technically satisfy the statutory

requirement by signing the COM, an architect experienced in single-family residential construction may not be the best choice for a case involving condominium construction. Similarly, a civil engineer is not ordinarily qualified to offer an opinion regarding the work of a structural engineer, even if a state does not distinguish among different types of engineers for purposes of satisfying the statute. Indeed, reliance on the opinion of a minimally qualified professional for issuance of the COM may merely postpone the claimant's realization that the claimant's case against the design professional is ultimately fruitless. Ironically, COM statutes aim to require that licensed professionals participate alongside attorneys in evaluating cases before filing precisely because legislatures do not trust the attorneys to make the decisions on their own. However, by leaving the COM process itself in the hands of attorneys, there is still some possibility that meritless claims will be filed simply because the responsible attorney finds an accommodating "expert."

For those defending the design professional, counsel must assess the extent to which a COM is arguably required. Although most COM statutes address negligence on the part of the professional, many causes of action may be based on breach of the professional's duty of care even if the claim is not technically pleaded as one for negligence. As such, there is a good argument that a COM should be required whenever proof of the claim against the licensed professional will require testimony from an expert in that field of design that the defendant breached a professional standard of care. For example, many courts bar tort claims against design professionals under the economic loss rule whenever the contract between the parties incorporates an express standard of care. If a contract states that a design professional will provide services "in accordance with the standard of care applicable to similar design professionals performing like services in the geographic region of the project," the professional's breach of that standard is essentially the same as professional negligence, even if the claim sounds in contract. Other claims such as breach of fiduciary duty may invoke precisely the same considerations, and a court may well be persuaded that a complaint that is not supported by a COM should fail whenever the underlying purpose of the COM statute—to ensure that design professionals participate in determining the viability of claims against other design professionals—would be frustrated by putting too much emphasis on the manner in which the claim is pleaded.

### Constitutional Challenges

Some COM statutes have not survived constitutional challenges. The Wyoming Supreme Court struck down the Professional Review Panel Act holding that it violated equal protection guarantees.<sup>11</sup> The court, looking to prior case law, reiterated that it felt that continued availability of "causes of action [against professionals] serve[d] an important public policy"<sup>12</sup> and that the act was "not rationally

related to the state's interest in . . . economic or social stability."<sup>13</sup> In particular, the Wyoming Supreme Court traced the genesis of the licensed professional statute to an effort by the Wyoming legislature to curb medical malpractice cases that were arguably responsible for an insurance crisis in the state. The court found that putting procedural barriers in the way of medical malpractice cases was not rationally related to the resolution of any insurance crisis (real or perceived) and that selecting medical providers for this special protection was an impermissible classification of potential defendants. Although the legislature sought to expand coverage of the review panel to all licensed professionals, the court summarily rejected the suggestion that the expansion to all professionals cured the constitutional defect.

**For those filing suit, consideration must be given as to what type of expert must be consulted.**

Arizona's current COM statute<sup>14</sup> passed constitutional muster,<sup>15</sup> but its predecessor was declared unconstitutional in 1997 because it required an expert affidavit even where expert testimony itself might not be required to establish the underlying claims; for example, where the common knowledge exception to the requirement of expert testimony would apply.<sup>16</sup> Because the predecessor to the current statute contained no exception when an issue fell within common knowledge, the Arizona Court of Appeals found in *Hunter Contracting Co. v. Superior Court in & for County of Maricopa* that the statute violated the equal protection clause and a plaintiff's fundamental right to pursue damages for injuries.<sup>17</sup> In summary, the court observed, plaintiffs who had no reason to hire experts to establish their cases at trial were being impermissibly burdened by having to hire experts merely to pursue a claim.

The Supreme Court of Oklahoma recently ruled that a statute<sup>18</sup> requiring an expert affidavit in civil actions for professional negligence was unconstitutional.<sup>19</sup> The statute declared unconstitutional was recently repealed by the Oklahoma legislature.<sup>20</sup> In *Wall v. Marouk*, the court found that the affidavit requirement "create[d] two classes, those who file a cause of action for negligence generally, and those who file a cause of action for professional negligence."<sup>21</sup> The court determined that the creation of these classes violated the Oklahoma Constitution's provision prohibiting the creation of "special laws."<sup>22</sup>

The court articulated that under Oklahoma law, a "special law confers some right or imposes some duty on some but not all of the class of those who stand upon the same footing and same relation to the subject of the law."<sup>23</sup> The court stated that the affidavit statute:

State	Summary	Person Signing the COM	Disclosure of Expert's Identity?
<b>Screening Panel Prior to Filing Suit</b>			
<b>Hawaii</b>  HAW. REV. STAT. §§ 672B-5 to -6	Before suit may proceed in state court, a statement of claim is filed with the Design Claim Conciliation Panel.  Litigation may not proceed until a party rejects the decision of the Design Claim Conciliation Panel.	Attorney or plaintiff	Only to the Design Claim Conciliation Panel and only on request.
<b>Kansas</b>  KAN. STAT. ANN. §§ 60-3501 to -3509	If professional negligence action is filed, one of the parties can request that professional malpractice screening panel be convened.	None	No affidavit or expert report is required.
<b>COM Filed With Complaint</b>			
<b>Arizona</b>  ARIZ. REV. STAT. ANN. § 12-2602	Failure to file COM can result in abatement of proceedings or dismissal without prejudice.	Attorney or plaintiff	Yes, with initial disclosures made during discovery.
<b>California</b>  CAL. CIV. PROC. CODE § 411.35 (West)	Attorney files COM stating that he or she has consulted with a professional licensed in the same discipline. Not required if claimant's attorney states that claim is based solely on the doctrine of res ipsa loquitur.	Attorney	No, attorney has a privilege to refuse to disclose identity of expert.
<b>Georgia</b>  GA. CODE ANN. § 9-11-9.1	An expert affidavit must set forth at least one negligent act or omission claimed to exist and the factual basis for each claim.	Expert	Yes, affidavit signed by expert must accompany complaint.
<b>Nevada</b>  NEV. REV. STAT. §§ 40.6884 (residential) and 11.258 (nonresidential)	Attorney files an affidavit attaching a report prepared by a consultant that includes the consultant's resume, copies of all nonprivileged documents the consultant reviewed, and a statement that the consultant has concluded that there is a reasonable basis for the action. Subject to dismissal for failure to file.	Attorney with expert's report attached	Yes.
<b>Oregon</b>  OR. REV. STAT. § 31.300	Attorney certifies that he or she has consulted with a licensed professional "qualified, available, and willing" to offer testimony that will create a question of fact regarding the liability of the design professional. Subject to dismissal for failure to file.	Attorney	No.

State	Summary	Person Signing the COM	Disclosure of Expert's Identity?
<b>South Carolina</b> S.C. CODE ANN. § 15-36-100	Affidavit of expert witness must specify at least one negligent act or omission claimed to exist and the factual basis for each claim.	Expert	Yes.
<b>Texas</b> TEX. CIV. PRAC. & REM. CODE ANN. § 150.002 (Vernon)	Affidavit of qualified professional must set forth each theory of recovery and the negligent act or omission of the professional. Subject to dismissal with prejudice if COM is not filed.	Expert	Yes.
<b>COM Due After Complaint Filed</b>			
<b>Colorado</b> COLO. REV. STAT. ANN. § 13-20-602 (West)	Attorney files a COM stating that he or she has consulted with an expert who concluded that the claim does not lack "substantial justification."	Attorney	No. Court may require that identity of expert be disclosed, but identity is not disclosed to adverse party.
<b>Maryland</b> MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2C-01 to -09 (West)	COM must contain a statement from a qualified expert attesting that the licensed professional failed to meet an applicable standard of professional care. Failure to file a COM results in a dismissal without prejudice.	Expert	Yes, because the report must be written by the expert.
<b>Minnesota</b> MINN. STAT. ANN. § 544.42 (West)	Statute requires two affidavits. The first certifies that the attorney consulted with an expert. The second identifies the experts to be called as witnesses.	Attorney	Yes, within 180 days of commencement of action.
<b>New Jersey</b> N.J. STAT. ANN. §§ 2A:53A-26 to -29	Plaintiff is required to provide either: (1) an affidavit of a qualified person that there exists a reasonable probability of a standard of care breach, or (2) a statement in lieu of the affidavit that states that the defendant failed to provide the necessary information for completion of the affidavit.	Expert	Yes.
<b>Pennsylvania</b> PA. R. CIV. P. Nos. 1042.1-12.	COM must certify that: (1) there is a reasonable probability that the defendant fell below the standard of care, or (2) persons for whom the defendant was responsible deviated from the standard of care, or (3) expert testimony is not required for the prosecution of the claim.	Attorney.  If COM is not signed by the attorney, then written statement of expert must be attached.	No.

create[d] a new subclass of tort victims and tortfeasors known as professional tort victims and tortfeasors. In doing so, it places an out of the ordinary enhanced burden on these subgroups to access the courts by requiring victims of professional misconduct to obtain expert review in the form of an affidavit of merit prior to proceeding, and it requires the victims of professional misconduct to pay the cost.<sup>24</sup>

Notably, the statute at issue in *Wall* did not define “professional negligence,” and the only definition the court was able to find of “professional negligence” in any Oklahoma statute defined it as a negligence act on behalf of a health care provider.<sup>25</sup> The negligence at issue in *Wall* was medical negligence, but given the court’s analysis of the statute and potentially broad interpretation of “professional negligence,” it is likely that the same result would have occurred in the context of a claim against a design professional.

**In enacting a COM statute, a state legislature tries to strike a balance between protecting against frivolous claims and discouraging legitimate claimants from seeking redress.**

In an apparent effort to respond to the *Wall* court, the Oklahoma legislature recently enacted a new “affidavit of merit” statute.<sup>26</sup> Although there are several authorities that have stricken COM statutes, it is also clear that many statutes will not face potentially viable constitutional challenges simply because the cost of litigating the constitutional question may be several times the cost of hiring an expert. It takes very special circumstances (or perhaps the coordination of plaintiff attorney groups) to warrant any substantial constitutional challenge to a COM statute.

#### **The Timing of COM Statutes and the Effect on Claimants’ and Design Professionals’ Interests**

As described above, the overarching purpose of a COM statute is to screen meritless professional negligence claims. In enacting a COM statute, a state legislature tries to strike a balance between protecting against frivolous claims and discouraging legitimate claimants from seeking redress. The states that have enacted COM statutes have drawn that line differently as represented in the chart.<sup>27</sup> In this part, we will compare the COM statutes from the perspective of the claimant by organizing them into three categories: (a) screening panel prior to suit; (b)

contemporaneous filing of COM; and (c) postsuit filing of COM. Each of the three categories will be discussed in turn.

#### **Screening Panel Prior to Suit<sup>28</sup>**

Hawaii and Kansas are the only two states that use “screening panels” as a means of protecting design professionals. In these states, a claim must be submitted to a “screening panel” that conducts an administrative proceeding as a condition precedent to filing suit. These evidentiary proceedings go far beyond merely filing a COM. In that vein, these statutes are not really COM statutes at all in that after the administrative proceedings are completed, a party may proceed to court without service of a COM. While a claimant in Hawaii must present a COM to the “design claim conciliation panel,”<sup>29</sup> the Kansas statute has no such requirement to proceed before the “professional malpractice screening panel.”<sup>30</sup>

The certificate contemplated by Hawaiian law must declare that the claimant or the claimant’s attorney has consulted with a qualified design professional who is knowledgeable and experienced in the same specialty as the design professional against whom the primary claim is made, and that the claimant or claimant’s attorney has concluded on the basis of this consultation that there is a reasonable and meritorious cause for filing the claim.<sup>31</sup> Significantly, the identity of the design professional need not be disclosed in order to satisfy the statute’s requirements and the design professional cannot be compelled to testify before the panel.<sup>32</sup> The panel can, however, compel disclosure of the professional’s identity, though not to the opposing party and only for purposes of confirming whether the consultation actually occurred.<sup>33</sup>

Still, claimants in Hawaii and Kansas must participate in what amounts to an administrative hearing before they can seek redress from the courts.<sup>34</sup> The hope, of course, is that the screening panel can better and more cost-effectively address the claimant’s allegations because the panel is made up of experienced design professionals with knowledge of the technical issues likely to be presented.<sup>35</sup> Neither state permits the evidentiary record developed—and, in Hawaii, the decision reached—to be used in the litigation should the matter fail to be resolved by the panel to either party’s satisfaction.<sup>36</sup> Thus, any hope that the screening panel will offer a cost-effective means of resolving professional negligence claims is limited to the parties’ willingness to accept the screening panel’s decision without proceeding to court.

#### **COM Filed Contemporaneously With the Complaint<sup>37</sup>**

Seven states require the claimant to file the certificate at the same time the professional malpractice action is filed.<sup>38</sup> There are differences among this group that are worth discussing.

Beginning with the least onerous statute in this category, Arizona requires that the claimant’s attorney certify whether or not expert testimony is necessary to prove

either the standard of care or liability for the claim.<sup>39</sup> Becoming more difficult to satisfy, states such as California and Oregon require that the claimant's attorney attest by affidavit that he or she consulted with a qualified design professional and that on the basis of that consultation has concluded that there is a reasonable and meritorious cause for filing the lawsuit.<sup>40</sup>

Last and most difficult to satisfy are those states such as Georgia, Nevada, South Carolina, and Texas, which require that the independent expert witness—rather than the attorney—execute an affidavit specifying at least one negligent act or omission of the design professional and the factual basis for each claim.<sup>41</sup> There is greater risk and front-loaded expense where an affidavit is required from a design professional as opposed to consultation about the claimant's allegations.<sup>42</sup> This additional time that the attorney must spend with the expert witness may help to protect design professionals from frivolous suits, but it adds to the costs that the claimant must shoulder just to gain entry to the courthouse.

### **COM Filed Subsequent to Filing the Complaint<sup>43</sup>**

The third category does not require the filing of the COM until after the complaint has been filed. The statutes either create a fixed period of time (e.g., 60 days after filing of complaint<sup>44</sup> or filing of the answer<sup>45</sup>), provide extensions for good cause shown,<sup>46</sup> or provide time after the defendant responds to limited document requests.<sup>47</sup>

The statutes vary in that some states, such as Colorado, Minnesota, and Pennsylvania, require the attorney to execute the affidavit, whereas others, such as Maryland and New Jersey, require that a qualified design professional (i.e., the expert) sign the affidavit.<sup>48</sup> Regardless of these differences, each of these COM statutes is notable because it allows claimants additional time before their experts must go on record with their opinions. These statutes are less protective of design professionals because they must respond to a lawsuit, and in some jurisdictions respond to discovery, before the claimant serves a COM.

### **Identification of the COM Affiant**

Whether the COM is required to be served at the time of filing of the complaint or after commencement of the action, there is a split as to whether the claimant must disclose the identity of the independent expert before normal exchange of expert witness information.

Half of the jurisdictions cited in the chart do not alter the normal time period for exchange of expert witness information: Arizona, California, Colorado, Hawaii, Kansas, Oregon, and Pennsylvania. These COM statutes recognize that the development of expert witnesses and their opinions is a collaborative process between an attorney, his or her client, and the consultants over the course of the dispute and litigation. Often the expert that is consulted before the complaint is filed is not the expert who is asked to testify at the time of trial. In addition, there is a natural tendency for experts to be more conservative and cautious to issue opinions to a reasonable degree of

certainty if they do not have access to the defendant's work papers and documents. In other words, an expert's opinion naturally evolves through fact discovery as more information is acquired.

The other seven jurisdictions require the claimant to disclose the identity of the expert at a point that is not necessarily tied to the exchange of expert witness information: Georgia, Maryland, Minnesota,<sup>49</sup> Nevada, New Jersey, South Carolina, and Texas. These states provide less flexibility for claimants. Here, valid or not, the defense counsel may perceive an admitted weakness or deficiency in the plaintiff's claim if an expert is changed later in the proceedings. Such a change will also likely spur ancillary motions to compel so as to permit investigation of the opinions of the expert who issued the COM. Yet, these statutes may also foster more productive settlement discussions between the parties because there is mandatory, early disclosure of expert witness information. In sum, the litigation strategy of the parties will materially change based upon when and in what form they must disclose their expert witness's identity and opinions.

**Often the expert that is consulted before the complaint is filed is not the expert who is asked to testify at the time of trial.**

### **Consequences for Noncompliance With COM Statutes**

Among the states that have passed COM statutes, the consequences for failing to timely file a COM vary widely, from abatement of the proceedings to dismissal with prejudice. Dismissal of the complaint is, by far, the most common consequence for noncompliance with COM statutes, and not all states provide an opportunity to cure a missing or noncomplying COM.

### **Dismissal**

Dismissal with prejudice is sometimes mandated, underscoring the importance of compliance with COM statutes. In New Jersey, the failure to provide a COM is deemed a failure to state a cause of action,<sup>50</sup> which the New Jersey Supreme Court interpreted as requiring a dismissal with prejudice, except in extraordinary circumstances.<sup>51</sup> Minnesota also mandates a dismissal with prejudice but provides an opportunity to cure by shifting the burden to the defendant to demand that the claimant file a COM affidavit, and allowing the claimant 60 days to comply before the dismissal.<sup>52</sup>

Pennsylvania provides for the entry of judgment *non pros* if a COM is not timely filed.<sup>53</sup> The defendant must

first file a notice of intention to file a judgment of *non pros* within 31 days after the complaint is filed.<sup>54</sup> If the court has previously either granted or denied a motion to extend time to file the COM, the judgment *non pros* may be entered without notice.<sup>55</sup> Otherwise, before the judgment *non pros* is entered, the claimant may move the court to determine whether a COM is necessary, and if a COM is so required, the claimant may have 20 days to file the COM.<sup>56</sup>

Other states provide for dismissal but do not require that the dismissal be with prejudice. Texas requires dismissal for the failure to file a COM and allows the dismissal to be with prejudice at the court's discretion.<sup>57</sup> The COM must be filed at the time of the complaint (unless the limitations' period runs within 10 days of the filing), or pleadings are subject to dismissal, possibly with prejudice.<sup>58</sup> Texas does not provide an opportunity to cure if the COM is not timely filed.

Nevada and Colorado also require dismissal of an action for the failure to file a COM but do not state whether the dismissal may be with prejudice.<sup>59</sup> Likewise, South Carolina provides for dismissal for failure to state a claim if a claimant does not file a COM or files a defective affidavit and fails to cure the defect within 30 days.<sup>60</sup> Oregon also provides for dismissal for failing to comply with its COM statute but does not state whether it is with or without prejudice.<sup>61</sup> A federal district court interpreting the Oregon COM statute found that it did not mandate dismissal with prejudice.<sup>62</sup> Arizona and Maryland both provide for dismissal without prejudice for the failure to file a COM.<sup>63</sup>

### **Litigation Abated**

Other states simply do not allow litigation to proceed until a claimant complies with the COM statute. In Georgia, no answer is required and no discovery may take place until the COM is filed.<sup>64</sup> However, if a COM is filed but the defendant alleges that the affidavit is defective, the complaint is subject to dismissal for failure to state a claim unless the defect is cured within 30 days.<sup>65</sup>

Likewise, proceedings in Hawaii cannot commence until a party complies with COM requirements. As discussed above, a party must submit a statement of claim that includes a "certificate of consultation" to the "design claim conciliation panel" before a lawsuit may commence against a design professional in Hawaii.<sup>66</sup> The party's claim is not considered received for filing until the certificate of consultation is filed.<sup>67</sup> Once the claim is properly filed with the design claim conciliation panel, the statute of limitations is tolled until the panel reaches a decision. If the panel has not reached a decision within 12 months, the tolling period ends and the parties may commence litigation.<sup>68</sup>

Similarly, Kansas allows either party to request a screening panel, either before or after filing suit. If a screening panel is requested before suit is filed, the statute of limitations is tolled.<sup>69</sup> The screening panel has 180 days to issue a

written report, and either party may proceed with litigation upon rejection of the screening panel's report.<sup>70</sup>

### **Disciplinary Action Against the Attorney**

California provides for a demurrer or motion to strike the claimant's pleadings for the failure to file a COM.<sup>71</sup> Additionally, because the claimant's attorney executes the COM in California, noncompliance with the COM statute can also result in disciplinary action against the attorney.<sup>72</sup>

### **Conclusion**

In sum, where COM statutes are enacted, compliance is essential to maintaining a claim against a design professional. Nearly every state that has enacted a COM statute provides for dismissal of a complaint due to noncompliance. Most importantly, several states either mandate or provide the opportunity for dismissal with prejudice. Even where proceedings are merely abated until a plaintiff meets COM requirements, there is a risk of overrunning the applicable statute of limitations.

Identifying when the COM must be filed and who must execute it is key to ensuring compliance with the relevant statute. Some states allow an opportunity to cure a missing or defective COM affidavit, but many do not. Because noncompliance can be fatal to a party's claim, it is vitally important for both claimants and defendants to know their state's COM requirements, the consequences for failing to comply, and the steps each party must take in the event of noncompliance. 

### **Endnotes**

1. Special thanks to Nicholas P. Brown, associate at Little Bulman Medeiros & Whitney, PC, for his assistance and contributions to this article.

2. This article generally refers to "certificates of merit" or "certificate of merit statutes," although the same general concept may be referred to as a "certificate of consultation," "certification," "affidavit of merit," or other similar term.

3. *RMB Servs. Inc. v. Truhlar*, 151 P.3d 673 (Colo. Ct. App. 2006) (citing *Baumgarten v. Coppage*, 15 P.3d 304, 306 (Colo. App. 2000)).

4. *Yadon v. Southward*, 64 P.3d 909 (Colo. Ct. App. 2002) (citing *Shelton v. Penrose/St. Francis Healthcare Sys.*, 984 P.2d 623, 628 (Colo. 1999)).

5. Arizona, California, Colorado, Georgia, Hawaii, Kansas, Maryland, Minnesota, Nevada, New Jersey, South Carolina, Oregon, Texas, and Pennsylvania.

6. Arizona, California, Colorado, Hawaii, Minnesota, Nevada (an expert's report must be attached), Oregon, and Pennsylvania.

7. Georgia, Maryland, New Jersey, South Carolina, and Texas.

8. Hawaii and Kansas.

9. Arizona, California, Georgia, Nevada, Oregon, South Carolina, and Texas.

10. Colorado, Maryland, Minnesota, New Jersey, and Pennsylvania.

11. *State ex rel. Wyo. Ass'n of Consulting Eng'rs & Land Surveyors v. Sullivan*, 798 P.2d 826, 828 (Wyo. 1990).

12. *Id.*

13. *Id.*

(Continued on page 51)

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(Continued from page 40)

14. ARIZ. REV. STAT. ANN. § 12-2602 (2013).
15. *Bertleson v. Sacks Tierney, P.A.*, 204 Ariz. 124, 60 P.3d 703 (Ct. App. 2002).
16. *Hunter Contracting Co. v. Super. Ct. in & for Cty. of Maricopa*, 947 P.2d 892 (Ariz. Ct. App. 1997).
17. *Id.*
18. OKLA. STAT. ANN. tit. 12, § 19 (West 2009).
19. *Wall v. Marouk*, 302 P.3d 775, 779 (Okla. 2013).
20. See 2013 Okla. Sess. Law Serv 1st Ex. Sess., ch. 12 (S.B. ix).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 791.
26. OKLA. STAT. TIT. 12, § 19.1 (West).
27. Compare HAW. REV. STAT. § 672B-5 (before suit can be filed, COM must be presented to screening panel that holds informal hearing concerning the legitimacy of claims) with MINN. STAT. § 544.42 (COM may be filed anytime up to 90 days after complaint is filed and need not identify expert).
28. See HAW. REV. STAT. §§ 672B-5 to -6; KAN. STAT. ANN. §§ 60-3501 to -3509.
29. See HAW. REV. STAT. §§ 672B-5 to -6.
30. KAN. STAT. ANN. §§ 60-3501 to -3509.
31. HAW. REV. STAT. § 672B-6.
32. *Id.*
33. *Id.* § 672B-6(a)(1), (b).
34. HAW. REV. STAT. § 672B-7; KAN. STAT. ANN. §§ 60-3502 to -3505.
35. HAW. REV. STAT. § 672B-5; KAN. STAT. ANN. § 60-3503.
36. HAW. REV. STAT. § 672B-11; KAN. STAT. ANN. §§ 60-3504 to -3505. At least in Kansas, unlike in Hawaii, the decision of the screening panel is admissible in any subsequent legal proceedings and the panel members can be subpoenaed to testify at trial. KAN. STAT. ANN. § 60-3505.
37. See ARIZ. REV. STAT. ANN. § 12-2602; CAL. CIV. PROC. CODE § 411.35 (West); GA. CODE ANN. § 9-11-9.1; NEV. REV. STAT. § 40.6884; OR. REV. STAT. § 31.300; S.C. CODE ANN. § 15-36-100; TEX. CIV. PROC. & REM. CODE ANN. § 150.002 (Vernon).
38. Those states are Arizona, California, Georgia, Nevada, Oregon, South Carolina, and Texas.
39. ARIZ. REV. STAT. ANN. § 12-2602. In Arizona, if the attorney certifies that expert testimony is required, he or she must still file an affidavit of a qualified expert, but it need not be filed until initial discovery disclosures are due. *Id.*
40. See CAL. CIV. PROC. CODE § 411.35 (West); see also OR. REV. STAT. § 31.300 (attorney must certify that he or she consulted with design profession who is “qualified, available, and willing” to offer testimony that will create a question of fact regarding liability).
41. See GA. CODE ANN. § 9-11-9.1; S.C. CODE ANN. § 15-36-100; TEX. CIV. PROC. & REM. CODE ANN. § 150.002 (Vernon). Similarly, in Nevada, the expert must attest that he or she is experienced in the subject matter of the affidavit, that he or she has reviewed the allegations made by the claimant and any supporting documentation, and that it is his or her opinion that there is a reasonable basis for the action. See NEV. REV. STAT. § 40.6884.
42. See NEV. REV. STAT. § 40.6884.
43. See COLO. REV. STAT. ANN. § 13-20-602 (West); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2C-01 to -09 (West); MINN. STAT. ANN. § 544.42 (West); N.J. STAT. ANN. §§ 2A:53A-26 to -29; PA. R. CIV. P. Nos. 1042.1–12.
44. COLO. REV. STAT. ANN. § 13-20-602 (West) (60 days); MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-02 (West) (90 days); MINN. STAT. ANN. § 544.42 (West) (90 days); PA. R. CIV. P. No. 1042.3 (60 days). It should be noted that in Minnesota, two affidavits are required. The first is filed within 90 days of the complaint and simply certifies that a qualified design professional has been consulted and that as a result of that consultation the attorney has concluded that the allegations have merit. MINN. STAT. ANN. § 544.42 (West). The second, filed within 180 days of the complaint, is more burdensome because it requires the attorney, at this still early stage of the litigation, to identify not only each expert expected to be called to testify at trial with respect to the negligence claims, but also the substance of that testimony and the grounds for each opinion. *Id.*
45. See N.J. STAT. ANN. §§ 2A:53A-26 to -29.
46. GA. CODE ANN. § 9-11-9.1; S.C. CODE ANN. § 15-36-100 (permits limited extension for good faith shown if needed to comply with statute of limitations and there is insufficient time to develop expert opinion).
47. MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-02 (West) (90-day period extended if defendant fails to produce documents).
48. COLO. REV. STAT. ANN. § 13-20-602 (West); MINN. STAT. ANN. § 544.42 (West); PA. R. CIV. P. No. 1042.3; MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-02 (West); N.J. STAT. ANN. § 2A:53A-27.
49. MINN. STAT. ANN. § 544.42 (West) (second COM with expert affidavit must be filed within 180 days of commencement of the action).
50. N.J. STAT. ANN. § 2A:53A-29 (West).
51. *Alan J. Cornblatt, P.A. v. Barow*, 708 A.2d 401, 414, 415 (N.J. 1998).
52. MINN. STAT. ANN. § 544.42, subd. 6.
53. PA. R. CIV. P. No. 1042.6.
54. *Id.* 1042.6(a).
55. *Id.* 1042.6(b).
56. *Id.* 1042.6(c).
57. TEX. CIV. PROC. & REM. CODE § 150.002(e).
58. *Id.* § 150.002(a), (c).
59. See NEV. REV. STAT. §§ 11.259 (pertaining to nonresidential construction claims), 40.6885 (pertaining to residential construction claims); COLO. REV. STAT. ANN. § 13-20-602(4) (West).
60. See S.C. CODE ANN. § 15-36-100(E)–(F), but it does not expound on whether the dismissal may be with prejudice.
61. OR. REV. STAT. ANN. § 31.300 (West).
62. *Mastec N. Am., Inc. v. Coos Cnty.*, CIV. 04-278-AA, 2006 WL 1888928 (D. Or. July 6, 2006).
63. ARIZ. REV. STAT. ANN. § 12-2602; MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-02 (West).
64. GA. CODE ANN. § 9-11-9.1(d) (West).
65. *Id.* § 9-11-9.1(e).
66. HAW. REV. STAT. §§ 672B-5(a), -11 (West).
67. *Id.* § 672B-6(a), (c).
68. *Id.* § 672B-15.
69. KAN. STAT. ANN. § 60-3509.
70. *Id.* §§ 60-3505 to -3506.
71. CAL. CIV. PROC. CODE § 411.35(g) (West).
72. *Id.* § 411.35(f).