

Testimony in Support of HB 64 (Expert Witness Bill)

I speak on behalf of the physicians of the Rocky Mountain Health Network in strong support of HB 64, the so called Expert Witness Bill. It is a major step forward in helping to control runaway malpractice claims by defining the medical expert witness in Montana. We want to persuade you that for the purposes of malpractice litigation, a medical expert should be well defined, a "practicing" physician or professional active in his/her purported field of expertise.

I support this bill even though this bill is not as restrictive as the American Medical Association Board of Trustees definition of the necessary qualifications for an expert witness (see list at bottom).

One of the aggravating factors about medical malpractice cases is the presence of a substantial number of what practitioners see as frivolous cases. These vary by region and medical specialty, but we know from Montana data that over 70% of malpractice claims are closed without payment to the patient because they lack merit and yet the yearly cost of defending those claims is very expensive. It is the presence of "shotgun" suits naming all the doctors on a medical chart, even if the majority of the physicians have no responsibility for the patient's outcome. The initiation of a suite for a poor or undesired outcome, understood prior to the treatment as a possible outcome or risk of the treatment, but not reflecting negligence, has drastically increased the number of cases. Even if a case is ultimately dismissed, it still produces large amounts of emotional trauma for both patients and physicians and their families. This requires time, and money better spent elsewhere. The monetary costs of defending frivolous cases are one variable driving the cost of insurance. Often physicians are asked to settle frivolous suits by their insurance carrier instead of paying the high legal costs of fighting them. My own experience, in the only malpractice case where payments were made, was similar to this. The plaintiff's expert witness admitted that his own practice never included any comparable patient care or surgical procedures. The case was dismissed by the judge but an appeal to the MT Supreme Court overturned the dismissal based on the expert witness qualifications. Nine

indicates a deviation from the standard of care. The medical expert also renders an opinion (within reasonable medical certainty) as to whether or not the breach in the standard is the cause of the patient's injury.

Physicians are asking that the "expert" be clearly defined and adhere to reasonable criteria. Expert witnesses should be unbiased conveyers of information. The pivotal factor in the medical liability process is the integrity of the expert witness testimony. It should be reliable, objective, and accurate and provide a truthful analysis of the standard of care. The medical community and the public are aware that not all experts testify within scientific standards and ethical guidelines. Medical societies have implemented strategies to regulate expert witness testimony through prevention, peer review, and sanctioning programs. However, medical societies have to approach such methods with caution. Aggressive expert witness disciplinary programs may be seen as organized medicine preventing physicians from testifying to the truth. The medical community has to be committed to reviewing and sanctioning false statements by medical experts for the defense as well as for the plaintiff.

Thank you,



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Laurel

AMA Board of Trustees Report 8 summary of expert witness qualifications:

- 1) that the witness be required to have comparable education, training and occupational experience or specialty expertise in the disease process or procedure performed in the case;
- 2) that the occupational experience include active medical practice or teaching experience in the same field as the defendant;
- 3) that the active practice or teaching experience must have been within five years of the date of the occurrence; and
- 4) that the witness be certified by an ABMS or AOA Board or one of equivalent standards.

References:

American Medical Association Board of Trustees Report 8 (2004)

www.hcla.org – Health Coalition on Liability and Access (>50 organizations)

<http://aspe.hhs.gov> – Medical Liability updates from HHS



years after my patient care was completed, I settled for far less than the projected cost of a jury trial.

The primary method used to perpetuate a frivolous lawsuit is by obtaining “expert” witness testimony early on in the proceedings to say that negligence or a breach in the standard of care was present. Without an “expert” there is not a case. Juries, and even attorneys and judges have no effective way of evaluating the credentials of an “expert” except that he or she has an M.D., D.O., or PhD. To the dismay of many legitimate physicians a cottage industry has arisen within the USA of colleagues who earn the majority of their income or greatly supplement their income of offering “expert” testimony. One need only go to the internet and search for Medical Expert Witness to immediately find a plethora of sites from which to select a witness (I found 1,340,000 hits on “Google”, eight were sponsored links and many are individual physicians advertising expertise). Some of the sites have physicians who are actively practicing in a specialty and offer opinion only in their field. However, there are many who begin with an opening statement that plaintiffs should be protected. While a truism, this opening statement suggests strongly that the forthcoming opinion will be based on a specific bias toward the plaintiff.

Physicians are not requesting that medical expert testimony be eliminated. The expert witness plays an essential role in determining medical negligence under the US system of jurisprudence. By and large, the courts rely on expert witness testimony to establish standards of care germane to the malpractice suite. Generally, the purpose of an expert witness testimony in medical malpractice is to describe standards of care relevant to a given case, identify any breaches in those standards, and if so noted, render an opinion as to whether those breaches are the most likely cause of injury. In addition, an expert may be needed to testify about the current clinical state of a patient to assist the process of determining damages. The expert in a malpractice case is not a “witness of fact” (those testifying because they have personal knowledge of the incident or people involved in the lawsuit). The expert here is given more latitude in being allowed to compare the applicable standards of care with the facts of the case and interpret whether the evidence

