

Legislative Analysis



PROHIBIT EXPRESSION OF SYMPATHY AS EVIDENCE IN MEDICAL MALPRACTICE ACTION

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Senate Bill 53 as passed by the Senate

Sponsor: Sen. Jim Marleau

House Committee: Judiciary

Senate Committee: Judiciary

First Analysis (2-26-11)

BRIEF SUMMARY: Under the bill, an admissibility of an expression of sympathy or compassion could not be considered as evidence of liability in a medical malpractice action.

FISCAL IMPACT: The bill would have no fiscal impact on state or local government, including the judicial branch.

THE APPARENT PROBLEM:

Not all medical procedures have a positive outcome. Sometimes the doctor or another member of the medical team makes a mistake; sometimes a bad outcome just happens. Some doctors would like to be able to express sympathy or compassion to the patient or patient's family on these occasions, but are often restricted by hospital policy or medical malpractice insurance companies, or else are advised by their lawyers to say nothing, in case the expression is viewed as an admission of guilt and culpability.

For over a decade, studies show a different story. According to an American Medical Association (AMA) online newspaper article, as many as one-quarter of medical malpractice suits may stem from the feeling that the doctor is not being honest about what went wrong or a feeling of being intentionally misled (amednews.com, Aug. 21, 2000). Many patients simply want an apology and reassurances that steps will be taken to minimize the chance that a similar outcome will happen to others. Policy makers are beginning to hear the message. Increasingly, hospitals and medical malpractice insurance companies are encouraging openness and frankness between physicians and patients when things go wrong. Approximately 35 states have enacted so-called "I'm sorry" laws which exclude expressions of sympathy from being admissible as evidence of liability in medical malpractice law suits.

According to Pinnacle Actuarial Resources, as cited in testimony presented by the Michigan Health & Hospital Association, so-called "I'm sorry" programs "led to a reduction in legal defense costs of 30% to 67%" that translated "into claims reduction savings of 3.5% to 5.9%". Closer to home, the MHA testimony reported that since adopting an "I'm sorry" program in 2002, attorney fees for the University of Michigan Health System have dropped by \$2 million per year and medical liability lawsuits and notices of intent to sue have been cut in half – from 262 filed in 2001 to approximately 130 per year.

Some believe that Michigan should follow the example of those states with "I'm sorry" laws, and enact similar legislation to encourage and allow doctors to express sorrow without fear of self-incrimination.

THE CONTENT OF THE BILL:

Senate Bill 53 would add a new section to the Revised Judicature Act (MCL 600.2155) to specify that a statement, writing, or action that expressed sympathy, compassion, commiseration, or a general sense of benevolence relating to the pain, suffering, or death of an individual that had been made to the individual or his or her family would not be admissible as evidence of an admission of liability in an action for medical malpractice. The bill's provisions would apply only to civil actions filed on or after the bill's effective date.

A statement of fault, negligence, or culpable conduct that was part of or made in addition to a statement, writing, or action described above would not be excluded under the bill and therefore could remain admissible.

"Family" would mean a spouse, parent, grandparent, stepmother or stepfather, adopted or natural child, grandchild, brother or sister, half- brother or sister, or father- or mother-in-law.

BACKGROUND INFORMATION:

Bills to exclude expressions of sympathy from being admissible as evidence of culpability in a medical malpractice action were first introduced in the 2003-2004 legislative session and have been introduced in each session since then. Twice before, bills were passed by the House only to die in the Senate (HB 5311 of 2003-2004 and HB 4259 of 2005-2006). Bills introduced in the last two sessions were not taken up (HB 4708 of 2007-2008 and HB 6073 of 2009-2010).

ARGUMENTS:

For:

Some believe the so-called "I'm sorry" laws to be one of the most important recent policy changes on the part of physicians, hospitals, malpractice insurers, and attorneys. For decades the policy has been never to apologize or offer sympathy for fear that such statements would automatically open the door to a malpractice suit. The bill would work to eliminate this reticence by excluding benevolent statements made to a patient or patient's family in the event of a negative outcome or death as evidence of liability. The result should be more open and honest communication between a physician and his or her patients and their families. The benefit, as experienced by many hospitals and physician practices, may well be a reduction in frivolous lawsuits as studies reveal that many patients simply want an apology and straight answers.

Though the bill would not exclude statements that acknowledge culpability or fault, the bill may encourage Michigan health providers and malpractice insurers to take a serious look at how policies of admitting errors and offering fair settlements to patients who suffered harm have reduced the number of malpractice claims filed against individual practitioners and institutions. Reportedly, some providers have found that cases are settled more quickly when errors are admitted and most likely at a lower cost than if each case had gone to litigation. Taking responsibility for errors gives patients the assurance that the same mistakes are unlikely to be repeated in the future and enables health providers and institutions to implement practice changes to ensure that they aren't.

Against:

The bill is far from being a panacea and could be problematic for doctors. The bill would exclude from admissibility as evidence of fault or culpability certain expressions of sympathy or compassion but not statements that admitted fault or culpability. Unless doctors recognized this fine line, they could be given a false sense of security that anything said in the apology was protected and therefore could inadvertently make a statement that, as the saying goes, could be used against them. In addition, regardless of evidence of wrongdoing, some patients or grieving family members may be suspicious of apologies and so misinterpret the attempt to show compassion as an admission of fault and still sue the doctor or hospital. Also, it is conceivable that a caring physician who was innocent of committing an error, but who was caught up in the grief of losing a patient, could word an expression of sorrow in such a way as to unfairly implicate himself or herself. Many medical malpractice policies refuse to provide coverage if a physician or health care provider says or does anything that compromises their defense. Thus, physicians may continue to be reticent regarding apologies or expressions of compassion and the end result may be that the bill would have little impact on reducing the numbers of medical malpractice actions, including frivolous actions, filed against Michigan hospitals and physicians.

Response:

"I'm sorry" laws and policies have been in place in some states or institutions since the mid-1980s. The overwhelming evidence is in – these laws and programs lead to greater accountability and communication between patients and the medical community which in turn lead to reductions, not increases, in medical malpractice actions. The savings to the health care system may be substantial, with these savings helping to keep overall health care delivery costs down. Both of the state's medical societies, representing M.D.s and D.O.s, support the bill, as does the association representing hospitals. Enactment of the legislation will go a long way in helping the medical community (and hopefully malpractice insurance carriers, as well) to overcome any remaining reticence over the benefit to all of saying "I'm sorry."

POSITIONS:

The University of Michigan Health System testified in support of the bill. (2-24-11)

The Michigan Health & Hospital Association (MHA) supports the bill. (2-24-11)

The Michigan Academy of Family Physicians indicated support for the bill. (2-24-11)

Beaumont Hospitals indicated support for the bill. (2-24-11)

Michigan Association for Justice (representing trial lawyers) indicated support for the bill. (2-24-11)

Michigan Osteopathic Association indicated support for the bill. (2-24-11)

Michigan State Medical Society indicated support for the bill. (2-24-11)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.