

HOUSE BILL No. 5671

May 23, 2012, Introduced by Reps. Walsh, MacGregor, Johnson, LeBlanc and Womack and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled
"Revised judicature act of 1961,"
by amending sections 2169 and 2912 (MCL 600.2169 and 600.2912),
section 2169 as amended by 1993 PA 78.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 2169. (1) In an action alleging medical malpractice, a
2 person shall not give expert testimony on the appropriate standard
3 of practice or care **AGAINST OR ON BEHALF OF A PARTY WHO IS A**
4 **LICENSED HEALTH PROFESSIONAL** unless the person is licensed as a
5 health professional in this state or another state and meets the
6 following criteria:

7 (a) If the party against whom or on whose behalf the testimony
8 is offered is a specialist, specializes at the time of the
9 occurrence that is the basis for the action in the same specialty

1 as the party against whom or on whose behalf the testimony is
2 offered. However, if the party against whom or on whose behalf the
3 testimony is offered is a specialist who is board certified, the
4 expert witness must be a specialist who is board certified in that
5 specialty.

6 (b) Subject to subdivision (c), during the year immediately
7 preceding the date of the occurrence that is the basis for the
8 claim or action, devoted a majority of his or her professional time
9 to either or both of the following:

10 (i) The active clinical practice of the same health profession
11 in which the party against whom or on whose behalf the testimony is
12 offered is licensed and, if that party is a specialist, the active
13 clinical practice of that specialty.

14 (ii) The instruction of students in an accredited health
15 professional school or accredited residency or clinical research
16 program in the same health profession in which the party against
17 whom or on whose behalf the testimony is offered is licensed and,
18 if that party is a specialist, an accredited health professional
19 school or accredited residency or clinical research program in the
20 same specialty.

21 (c) If the party against whom or on whose behalf the testimony
22 is offered is a general practitioner, ~~the expert witness,~~ during
23 the year immediately preceding the date of the occurrence that is
24 the basis for the claim or action, devoted a majority of his or her
25 professional time to either or both of the following:

26 (i) Active clinical practice as a general practitioner.

27 (ii) Instruction of students in an accredited health

1 professional school or accredited residency or clinical research
2 program in the same health profession in which the party against
3 whom or on whose behalf the testimony is offered is licensed.

4 (2) IN AN ACTION ALLEGING MEDICAL MALPRACTICE, A PERSON SHALL
5 NOT GIVE EXPERT TESTIMONY ON THE APPROPRIATE STANDARD OF PRACTICE
6 OR CARE AGAINST OR ON BEHALF OF A PARTY WHO IS NOT A LICENSED
7 HEALTH PROFESSIONAL UNLESS THE PERSON MEETS THE FOLLOWING CRITERIA:

8 (A) SPECIALIZES AT THE TIME OF THE OCCURRENCE THAT IS THE
9 BASIS FOR THE ACTION IN THE SAME HEALTH PROFESSION AS THE PARTY
10 AGAINST WHOM OR ON WHOSE BEHALF THE TESTIMONY IS OFFERED.

11 (B) DURING THE YEAR IMMEDIATELY PRECEDING THE DATE OF THE
12 OCCURRENCE THAT IS THE BASIS FOR THE CLAIM OR ACTION, DEVOTED A
13 MAJORITY OF HIS OR HER PROFESSIONAL TIME TO EITHER OR BOTH OF THE
14 FOLLOWING:

15 (i) THE ACTIVE CLINICAL PRACTICE OF THE SAME HEALTH PROFESSION
16 AS THE PARTY AGAINST WHOM OR ON WHOSE BEHALF THE TESTIMONY IS
17 OFFERED.

18 (ii) THE INSTRUCTION OF STUDENTS IN AN ACCREDITED HEALTH
19 PROFESSIONAL SCHOOL OR ACCREDITED RESIDENCY OR CLINICAL RESEARCH
20 PROGRAM IN THE SAME HEALTH PROFESSION AS THE PARTY AGAINST WHOM OR
21 ON WHOSE BEHALF THE TESTIMONY IS OFFERED.

22 (3) ~~(2)~~—In determining the qualifications of an expert witness
23 in an action alleging medical malpractice, the court shall, at a
24 minimum, evaluate all of the following:

25 (a) The educational and professional training of the expert
26 witness.

27 (b) The area of specialization of the expert witness.

1 (c) The length of time the expert witness has been engaged in
2 the active clinical practice or instruction of the health
3 profession or the specialty.

4 (d) The relevancy of the expert witness's testimony.

5 (4) ~~(3)~~—This section does not limit the power of the trial
6 court to disqualify an expert witness on grounds other than the
7 qualifications set forth in this section.

8 (5) ~~(4)~~—In an action alleging medical malpractice, an expert
9 witness shall not testify on a contingency fee basis. A person who
10 violates this subsection is guilty of a misdemeanor.

11 (6) ~~(5)~~—In an action alleging medical malpractice, all of the
12 following limitations apply to discovery conducted by opposing
13 counsel to determine whether or not an expert witness is qualified:

14 (a) Tax returns of the expert witness are not discoverable.

15 (b) Family members of the expert witness shall not be deposed
16 concerning the amount of time the expert witness spends engaged in
17 the practice of his or her health profession.

18 (c) A personal diary or calendar belonging to the expert
19 witness is not discoverable. As used in this subdivision, "personal
20 diary or calendar" means a diary or calendar that does not include
21 listings or records of professional activities.

22 Sec. 2912. (1) A civil action for malpractice may be
23 maintained against any person professing or holding himself **OR**
24 **HERSELF** out to be a member of a state licensed profession. The
25 rules of the common law applicable to actions against members of a
26 state licensed profession ~~—~~for malpractice ~~—~~are applicable
27 against any person who holds himself **OR HERSELF** out to be a member

1 of a state licensed profession.

2 (2) A CIVIL ACTION FOR MEDICAL MALPRACTICE MAY BE MAINTAINED
3 AGAINST ANY PERSON WHO IS OR WHO HOLDS HIMSELF OR HERSELF OUT TO BE
4 A LICENSED HEALTH CARE PROFESSIONAL, LICENSED HEALTH FACILITY OR
5 AGENCY, OR AN EMPLOYEE OR AGENT OF A LICENSED HEALTH FACILITY OR
6 AGENCY AND WHO IS ENGAGING IN OR OTHERWISE ASSISTING IN MEDICAL
7 CARE AND TREATMENT, REGARDLESS OF WHETHER THE PERSON IS ENGAGING IN
8 THE PRACTICE OF THE HEALTH PROFESSION IN A SOLE PROPRIETORSHIP,
9 PARTNERSHIP, PROFESSIONAL CORPORATION, OR OTHER BUSINESS ENTITY.

10 (3) ~~(2)~~ Malpractice may be given in evidence in defense to any
11 AN action for services rendered by ~~the~~ A member of a state licensed
12 profession, ~~or~~ A person holding himself OR HERSELF out to be a
13 member of a state licensed profession, OR AN UNLICENSED INDIVIDUAL
14 DESCRIBED IN SUBSECTION (2).

15 (4) AS USED IN THIS SECTION, "PERSON" MEANS AN INDIVIDUAL,
16 PARTNERSHIP, CORPORATION, ASSOCIATION, GOVERNMENTAL ENTITY, OR
17 OTHER LEGAL ENTITY.