

Legislative Analysis



PROHIBIT EXPRESSION OF SYMPATHY AS EVIDENCE IN CIVIL ACTIONS

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House Bill 4259 (Substitute H-1)

Sponsor: Rep. Joe Hune

Committee: Judiciary

First Analysis (2-27-06)

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 significant fiscal impact.

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 his or her family on these occasions, but are often restricted by hospital policy or advised by their lawyers to say nothing in case the expression is viewed as an admission of guilt and culpability.

A few recent 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. Policymakers are beginning to hear the message.

In the last few years, several 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. In addition, some hospitals and medical malpractice insurance companies are encouraging openness and frankness between physicians and patients when things go wrong. Several years ago, according to the AMA online article, a veteran's hospital in Lexington, Kentucky instituted a policy of having the chief of staff apologize to any patient harmed by a medical error and for a fair settlement offer to be made if the hospital or its employees were responsible for that harm. As a result, the hospital has experienced a significant reduction in malpractice claims.

Some believe that Michigan should follow the example of California, Texas, and the other 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:

The bill would add a new section to the Revised Judicature Act to specify that a statement, writing, or action that expressed sympathy, compassion, commiseration, or a general sense of benevolence in regards 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 liability in an action for medical malpractice.

A statement of fault, negligence, or culpable conduct that was part of or that was made in addition to a statement, writing, or action described above would not be excluded under the bill and therefore could remain admissible. The bill would only apply to civil actions filed on or after the effective date of the act.

"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.

MCL 600.2155

BACKGROUND INFORMATION:

A nearly identical bill, House Bill 5311, passed the House in the 2003-04 legislative session. Information in this analysis is derived from the House Fiscal Agency analysis of that bill, dated 6-4-04.

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 his or her 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 may well be a reduction in frivolous lawsuits as some 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 some institutions. 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. 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.

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. 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.

POSITIONS:

Michigan Osteopathic Association indicated support for the bill. (2-22-06)

The Michigan Dental Association indicated support for the bill. (2-22-06)

University of Michigan Health Systems indicated support for the bill. (2-22-06)

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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.