

Legislative Analysis



EXPERT WITNESS TESTIMONY

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House Bill 4647 (Substitute H-1)

Sponsor: Rep. Kurt Heise

Committee: Judiciary

First Analysis (11-9-11)

BRIEF SUMMARY: The bill would allow expert witness testimony to be given in court via video communication equipment under certain conditions.

FISCAL IMPACT: Implementing this bill would not have a direct fiscal impact on the state or local governments. This law would allow for the use of video testimony by expert witnesses, though it does not mandate its usage. If a court wishes to utilize such testimony, the court would have to be properly equipped to handle video testimony. Such equipment typically includes a secure video connection, recording equipment, and cameras. The average cost to equip a courtroom with such technology is about \$22,800, though exact costs vary by court. Several courts already are equipped for such testimony and would not face additional costs.

Long term savings could result from reduced travel costs for expert witnesses. If the witness is a state employee, the reduced travel time could translate to an increase in state employee productivity. The exact savings would depend on how frequently expert video testimony is utilized, and the cost of travel compared to the cost of conducting video testimony. The initiating party would pay for the costs of utilizing video testimony by an expert witness. If the video testimony is initiated by the court, the cost is shared equally by all parties unless stated otherwise by the court.

THE APPARENT PROBLEM:

Many court cases, civil and criminal, rely on the testimony of expert witnesses. Expert witnesses are considered to have an expertise or knowledge above that of the average person such that the opinion of the expert witness has a legal bearing on issues of fact or evidence. Often an expert witness will testify as to the importance of a piece of evidence, or how a piece of evidence can or cannot be linked to a specific person. For example, in a medical malpractice case, an expert witness for the injured person is likely to testify that the treating doctor did not follow the medical standard of care thus resulting in harm to the plaintiff, whereas an expert witness testifying on behalf of the doctor would present testimony that the doctor did indeed follow proper medical protocol and that either the patient was not injured or that the injury resulted from some factor other than the doctor's care.

As can be imagined, expert witnesses are generally highly educated or experienced professionals in their respective fields. As such, their fees, which may be billed hourly, can be quite high. In addition, the party retaining an expert witness must also pay travel

costs, including meals and lodging. Even if an expert witness is only on the stand for a few minutes, the fee can be exorbitant if delays or adjournments keep the clock ticking or require the expert witness to return on another day. The result is that one or more expert witnesses can add significant costs to a party in a lawsuit or a criminal trial. When the state or a local governmental body is one of the parties in a civil or a criminal trial, it is the taxpayer that ultimately foots the bill, including costs associated with expert witnesses. Moreover, some types of actions allow or require a court to assign all (or most) of the expenses of the winning party to the losing party. Again, if a public body is on the losing end, taxpayers bear the brunt of the other party's costs.

Currently, under state law and court rules, expert witnesses are allowed to present testimony via telecommunication devices, including interactive video technology, in a few limited situations. For instance, a state or local forensic pathologist or medical examiner may testify by video or voice communication equipment in a preliminary examination (held in district court, a preliminary examination requires the state to establish probable cause that a felony has been committed and that the defendant committed it). Some feel that if the practice could be expanded to include any expert witness in either a criminal or civil trial, legal costs to both plaintiffs and defendants could be reduced. In addition, it is believed that the state and local governments could save money, and perhaps increase public safety, if police officers and other public employees could present their expert witness testimony via video communication rather than leave their posts or laboratories for extended periods of time waiting to be called to the stand. Legislation addressing this concern has been offered.

THE CONTENT OF THE BILL:

House Bill 4647 would add a new section to the Revised Judicature Act (MCL 600.2164a). If a court determined that expert testimony would assist the trier of fact and that a witness was qualified to give the expert testimony, the bill would authorize the court to allow the expert witness to be sworn and testify at trial by video communication equipment that permitted all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place. Testimony by an expert witness could only be given in this manner if all parties gave consent. A verbatim record of the testimony would have to be taken in the same manner as for other testimony.

Unless good cause were shown to waive the requirement, a party wishing to present expert testimony by video communication equipment would have to submit a motion in writing and serve a copy of the motion on all other parties at least seven days before the date set for the trial.

Unless the court otherwise directs, the cost for the use of video communication equipment would be paid by the party initiating its use.

BACKGROUND INFORMATION:

Video conferencing technology is already authorized in limited court proceedings under statute and the Michigan Court Rules.

MCL 600.2167 allows, in a preliminary examination or grand jury proceeding, a signed report of the findings by a technician with the Department of State Police concerned with forensic science to be received in evidence in place of the technician's appearance and testimony. However, the accused or the accused's attorney may request that the technician be sworn and testify by video or voice communication equipment (or in person if no equipment is available).

In addition, in a preliminary examination, the prosecuting attorney may move, in writing, to permit a forensic pathologist or medical examiner to be sworn and testify by video or voice communication equipment. The court is required to grant the motion for good cause shown.

Rule 6.006 of the Michigan Rules of Court allows the use of video and audio in some proceedings. For example, district and circuit courts may use two-way interactive video technology to conduct arraignments, pretrial conferences, pleas, sentencing for misdemeanor offenses, show cause hearings, and other proceedings. District courts may take expert witness testimony in a preliminary examination if the defendant is present in the courtroom or waives the right to be present. District and circuit courts may, upon a showing of good cause, also use the equipment to take testimony in evidentiary hearings, competency hearings, sentencings, and probation revocation proceedings. At a trial, district and circuit courts may take testimony by two-way interactive video technology for a showing of good cause and with consent of both parties, if the defendant is present in the courtroom or waives the right to be present.

ARGUMENTS:

For:

Expert witnesses certainly have a key role to play in the modern judicial system, as they provide explanations and information invaluable to juries on complicated issues. However, much of the testimony that they provide is routine in nature. For instance, a state or local forensic expert may be called upon to verify that the substance found on a defendant was cocaine and not some other white powder. Sometimes, the expert witness may be on the stand for just minutes. But, it may have taken that witness hours to travel to the court, and hours of waiting before being called to the stand. Sometimes, court is recessed before an expert witness can give or finish giving testimony, meaning that the person must either travel back to the court the next day or be furnished meals and lodging. This increases the cost of a trial for the party hiring the expert witness. If the court orders the losing party to pay the costs of the prevailing party, then that party may incur the cost of the expert witness. When the state or a local government is a party in a lawsuit or trial, or when a public employee (e.g., a forensic specialist with the Michigan State Police or law enforcement officer) are in the role of expert witness, taxpayers bear the burden of that employees travel expenses and time away from work.

Some feel that in some situations, advancements in communication technology could be used to reduce the travel time and expenses associated with using expert witnesses. For example, two-way interactive video conferencing communication systems are very sophisticated these days and provide a clear picture and sound that would enable reliable examination and cross-examination by both parties, even enabling the jury to see shifts in body positions or hear changes in intonation of the expert witness that could suggest uncertainty, unreliability, or evasion. The use of video communication systems may not be appropriate for all expert witness testimony, but would be cost-effective and increase court efficiency for situations where the testimony would be technical or routine in nature but not going to the heart of the case.

The bill would address the issue by allowing the use of the video communication equipment in either civil or criminal trials (and thus would not conflict with court rules relating to the use of the equipment in certain hearings or examinations). Both parties would have to consent, thereby allaying concerns that a defendant in a criminal proceeding could lose the right of facing his or her accuser. The expert witness would be under oath and a record of the testimony would be taken just as if the witness were present in the courtroom. The cost of using the equipment would be borne by the party initiating its use.

Properly utilized, the bill would help modernize the judicial system, improve efficiency of the courts, reduce costs for parties in civil or criminal trials, and reduce costs for taxpayers when the state or a local government is one of the parties. The bill would also increase public safety if the use of the video communication equipment reduced the time that law enforcement officers had to be away from their posts or enabled forensic scientists to spend more time in the lab processing evidence.

Against:

The Board of Commissioners of the State Bar of Michigan, though acknowledging "the importance of effectively and efficiently utilizing existing and developing technology in the court room," has nonetheless requested that the changes needed to facilitate the use of expert witness testimony by video communication be made in a court rule or a rule of evidence through a request to the Michigan Supreme Court.

POSITIONS:

The Prosecuting Attorneys Association of Michigan indicated support for the bill. (10-20-11.

The State Bar of Michigan supports the concept of the bill. (8-3-11)

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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.