Maryland Association for Justice, Inc.
2020 Position Paper

HB 684 – Health Care Malpractice Claims – Expert Witnesses
STRONGLY OPPOSE

The Maryland Association for Justice (MAJ) strongly opposes HB 684, which would codify Federal Rule of Evidence 702 in medical negligence cases only, thus adopting the flawed admissibility standard for expert witness testimony in a trilogy of cases beginning with Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

More than a quarter-century of experience has exposed *Daubert*'s dangerous flaws. According to the research and education agency of the judicial branch of the U.S. Government itself:

> The *Daubert* trilogy has ***dramatically changed the legal landscape with regard to expert witness testimony***. The Supreme Court attempted in *Daubert* to articulate basic principles to guide trial judges in making decisions about the admissibility of complex scientific and technological expert testimony. ***Unfortunately, the Daubert trilogy has, in actuality, spawned a huge, and expensive, new subject of litigation*** and have left many procedural and substantive questions unanswered. Moreover, there are ***serious concerns*** about whether the guidelines enunciated by the Court have been interpreted by lower courts to limit, rather than respect, the discretion of trial judges to manage their complex cases, whether the guidelines conflict with the preference for admissibility contained in both the Federal Rules of Evidence and *Daubert* itself, and whether the guidelines have resulted in trial judges encroaching on the province of the jury to decide highly contested factual issues and to judge the overall credibility of expert witnesses and their scientific theories. Perhaps most disturbingly, there are serious concerns on the part of many scientists as to whether the courts are, as Daubert prescribed, making admissibility decisions—decisions that may well determine the ultimate outcome of a case—which are in fact "ground[ed] in the methods and procedures of science."

Federal Judicial Center, "Reference Manual on Scientific Evidence," at 36 (3rd ed. 2011) (emphasis added). After decades of effort aimed at ***reducing*** the time, expense, and judicial resources devoted to medical negligence cases, it would be illogical and counter-productive to force litigants in state courts to endure the *Daubert* standard.

HB 684 is bad public policy. First, HB 684 imposes the new *Daubert* standard without clarifying whether current Maryland Rule 5-702 no longer applies, thereby creating a mish-mash of conflicting evidentiary standards. Even if Fed. R. Evid. 702 supersedes Rule 5-702, trial courts would apply different standards to expert testimony from one case to the next.

In practice, the *Daubert* standard favors litigants with greater economic resources, because Goliath can bankrupt David by driving up the costs of litigation. In practice, the *Daubert* standard notoriously favors civil defendants over plaintiffs, and prosecutors over criminal defendants, as judges with no scientific training or expertise are called upon – if not encouraged – to weigh the credibility of expert opinions and exclude those that they find "unreliable" – a finding that is subjected only to weak "abuse of discretion" appellate review.

Finally, the Court of Appeals decided not to adopt *Daubert* when the evidentiary rules were adopted in 1994, and the Court of Appeals has refused to adopt *Daubert* ever since. On February 7, 2020, the Court heard oral argument in Rochkind v. Stevenson, Case No. 2019-47, in which the question of adopting *Daubert* again was presented. The Court should decide the issues in that case without undue influence from the Legislature. HB 684 is flawed, misguided, and fundamentally unfair. It must not become law.

Maryland Association for Justice strongly urges an UNFAVORABLE REPORT ON HB 684.

6240 Old Dobbin Ln, Ste 100 | Columbia, MD 21045 | (410) 872-0990 | info@marylandassociationforjustice.com