

Department of Legislative Services  
Maryland General Assembly  
2006 Session

FISCAL AND POLICY NOTE

House Bill 1058  
Judiciary

(Delegate Shank, *et al.*)

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Civil Action Reform Act of 2006

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This bill imposes civil sanctions for maintaining or defending a health care malpractice claim or action in bad faith or without substantial justification, establishes new requirements for expert testimony in all civil actions, and imposes additional requirements on experts attesting in a certificate or supplemental certificate of qualified expert or testifying in a health care malpractice claim.

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Fiscal Summary

**State Effect:** None. The bill's changes are procedural in nature and would not directly affect governmental finances.

**Local Effect:** None.

**Small Business Effect:** Minimal.

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Analysis

**Bill Summary:** In a health care malpractice claim, if a panel chairman or court finds that the conduct of a party in maintaining or defending a proceeding was in bad faith or without substantial justification, the chairman or court must require the offending party, the attorney advising the conduct, or both, to pay the adverse party's costs and expenses, including reasonable attorney's fees, incurred in opposing it.

In a civil action, if a court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in

issue, a witness determined by the court to be qualified as an expert by knowledge, skill, experience, training, or education may testify concerning the evidence or fact in issue in the form of an opinion or otherwise only if: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. If a court considers it necessary or on motion by a party, the court may hear evidence regarding these criteria. If the court does so, the court must hear the evidence out of the jury's presence.

A physician licensed by and residing in another jurisdiction, while testifying as or attesting to compliance with or departures from standards of care for purposes of a certificate of qualified expert, is practicing medicine for purposes of discipline by the State Board of Physicians. Subject to applicable hearing requirements, the board, on affirmative vote of a majority of a quorum, may issue findings and a report concerning a physician licensed in another jurisdiction who falsely testifies or falsely offers an opinion as a medical expert regarding medical diagnosis, healing, treatment, or surgery.

**Current Law:** Under the Maryland Rules, if a court finds that the conduct of a party in maintaining or defending a proceeding was in bad faith or without substantial justification, the court may require the offending party, the attorney advising the conduct, or both, to pay the adverse party's costs, including reasonable attorney's fees.

Under the Maryland Rules, expert testimony may be admitted in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making its determination, the court must determine: (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the appropriateness of the expert testimony on the particular subject; and (3) whether a sufficient factual basis exists to support the expert testimony.

The Board of Physicians on affirmative vote of a majority of a quorum, may reprimand a licensee, place a licensee on probation, or suspend or revoke a license for violations of prescribed standards. Providing testimony is not one of the grounds for discipline.

**Background:** Under the Federal Rules of Evidence, "[i]f scientific will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case."

In determining whether scientific knowledge is admissible under the federal rules, the U.S. Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, said that first, a court must first determine “whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue.” 509 U.S. 579, 592 (1993). Under *Daubert*, key questions in determining whether a theory or technique is scientific knowledge that will assist the trier of fact are: (1) whether it can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; and (3) the known or potential rate of error. *Id.*, at 593-94. The court said that although these are not dispositive, they are relevant to admissibility under the rule. To sum up its findings, the court said that a trial judge’s task under the federal rules is to ensure that “an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.” *Id.*, at 597.

At the time *Daubert* was decided, under the then federal rule governing the admissibility of expert testimony, “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.”

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### Additional Information

**Prior Introductions:** A similar bill, HB 1193 of 2005, was heard in the House Judiciary Committee, but no further action was taken.

**Cross File:** None.

**Information Source(s):** Judiciary (Administrative Office of the Courts), Maryland Health Claims Alternative Dispute Resolution Office, Department of Health and Mental Hygiene, Maryland Insurance Administration, Department of Legislative Services

**Fiscal Note History:** First Reader - March 10, 2006  
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