



Maryland
Hospital Association

**Senate Bill 773 – Health Care Malpractice Qualified Expert – Qualification
Position: *Oppose***

Bill Summary

SB 773 makes several significant changes to the qualification of an expert witness in a medical liability class, including exempting certain documents when assessing whether a witness qualifies under the rule. Additionally, SB 773 alters the percentage of an expert's professional activities that may have been devoted to certain activities that directly involve testimony in personal injury claims for the expert to otherwise qualify.

MHA Position

Maryland's hospitals oppose efforts that would exacerbate the state's highly litigious climate and threaten Maryland's unique health care system. While not explicit in the legislation, SB 773 would effectively repeal the 20 percent rule. The 20 percent rule ensures that judges and juries in Maryland hear expert testimony from individuals who actively practice medicine in their field. If the 20 percent rule is removed Maryland's courts will, instead, hear expert testimony on medical liability cases from a class of full-time professional witnesses.

While there are opportunities to improve the rule, including ensuring an expert who was qualified at the beginning of a case remains qualified throughout the case, SB 773 guts the rule without making a good faith effort to advance it. Maryland's hospitals have been working with relevant stakeholders including MedChi, Med Mutual and the Maryland Association for Justice to identify a path forward to improve this rule. Though we have not come to an agreement with the proponents yet, we remain open to discussing reasonable ways forward. To be clear, as offered, SB 773 goes far beyond reason.

SB 773 also runs counter to the American College of Physicians position of encouraging "broad participation" — rather than full-time or majority-time participation — by the physician community in testifying, a concept Maryland's hospitals strongly support. Other professional medical societies, such as the American Academy of Pediatrics, also recommend against the removal of such protections.

Maryland's hospitals recently conducted a survey that found that in 2018, annual hospital payouts (closed claims) were \$176 million — nearly 140 percent higher than in 2008 when they totaled 73.5 million — despite the frequency of claims remaining relatively stable.¹ This large increase in payouts is a result of record economic damages being awarded in, which directly benefits plaintiff attorneys who receive up to 40 percent in contingency fees. SB 773 would effectively continue to grow this trend, offering a means for attorneys to utilize the same stable of expert witnesses who are not guaranteed to be actively practicing in their field.

¹ MHA Medical Liability Survey (2018), includes medical liability claims by service type representing about 90 percent of Maryland's hospitals and includes claims from 2004 – 2018.

To avoid costly litigation, doctors and other providers have resorted to using defensive medicine — the overuse of tests and procedures to protect themselves from potential lawsuits. The use of defensive medicine makes up 13 percent of all hospital costs, translating into an additional \$2 billion in unnecessary health care spending in Maryland. As a result, this unnecessary inflation in health care costs threatens the ability for hospitals and other providers to succeed under the aggressive cost saving targets of the Total Cost of Care Model, which went into effect on January 1, 2019. If the waiver is lost due to failure to meet these fiscal limits, Maryland stands to lose an estimated \$2 billion each year in federal funding.

Current Maryland law caps the time spent by actively practicing physicians in the courtroom to 20 percent of their time. This approach helps protect against the creation of a niche culture of professional witnesses and ensures that court proceedings benefit from more informed testimony.

Fostering an atmosphere that incentivizes the creation of a class of “full-time expert witnesses” will worsen Maryland’s medical liability climate.

For these reasons, we urge you to give SB 773 an *unfavorable* report.