

HOUSE BILL NO. HB0106

Medical malpractice-use of expert witnesses.

Sponsored by: Representative(s) Gingery

A BILL

for

1 AN ACT relating to medical malpractice actions; providing
2 for filing of affidavits as specified; providing for expert
3 testimony as specified; providing definitions; providing
4 penalties; and providing for an effective date.

5

6 *Be It Enacted by the Legislature of the State of Wyoming:*

7

8 **Section 1.** W.S. 1-1-131 through 1-1-133 are created
9 to read:

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11 **1-1-131. Medical malpractice actions; certification**
12 **of expert review.**

13

14 (a) For purposes of this act:

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16 (i) "Expert witness" means a person authorized
17 to give expert testimony pursuant to W.S. 1-1-133;

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2 (ii) "Health care provider" means a physician,
3 surgeon, dentist, or other health care professional or
4 hospital, or health care professional employed by or
5 providing services as an independent contractor in a
6 hospital;

7

8 (iii) "Malpractice action" means any action
9 alleging malpractice, error, mistake, or failure to cure,
10 whether based on contract or tort, against a health care
11 provider, which includes a cause of action for which expert
12 testimony is necessary to establish a prima facie case;

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14 (iv) "This act" means W.S. 1-1-131 through
15 1-1-133.

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17 (b) In any malpractice action, the plaintiff shall:

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19 (i) At the time of service of a complaint and
20 summons, serve upon the defendant an affidavit, signed by
21 the plaintiff's attorney, stating:

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23 (A) That the facts of the case have been
24 reviewed by the plaintiff's attorney with an expert witness

1 whose qualifications provide a reasonable expectation that
2 the expert witness' opinions could be admissible at trial;

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4 (B) That, in the opinion of the expert
5 witness, one (1) or more defendants deviated from the
6 applicable standard of care; and

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8 (C) That, in the opinion of the expert
9 witness, the defendant's deviation from the applicable
10 standard of care caused injury to the plaintiff; or

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12 (ii) At the time of service of a complaint and
13 summons, serve upon the defendant an affidavit, signed by
14 the plaintiff's attorney, stating the expert witness review
15 required by paragraph (i) of this subsection could not
16 reasonably be obtained before the action was commenced
17 because the applicable statute of limitations required the
18 filing of the complaint prior to obtaining the expert
19 witness review. If an affidavit is executed pursuant to
20 this paragraph, the affidavit provided in paragraph (i) of
21 this subsection shall be served on the defendant or the
22 defendant's counsel within ninety (90) days after service
23 of the summons and complaint; and

24

1 (iii) Within one hundred eighty (180) days after
2 commencement of an action, serve upon the defendant an
3 affidavit, signed by each expert witness and by the
4 plaintiff's attorney which states:

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6 (A) The identity of each person whom
7 plaintiff expects to call as an expert witness at trial to
8 testify with respect to the issues of malpractice or
9 causation;

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11 (B) The substance of the facts and opinions
12 to which the expert witness is expected to testify;

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14 (C) A summary of the grounds for each
15 opinion;

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17 (D) The factual basis of the claim;

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19 (E) The applicable standard of practice or
20 care alleged by the claimant;

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22 (F) The manner in which the expert witness
23 claims that the applicable standard of practice or care was
24 breached by the health professional or health facility;

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(G) The alleged action that the expert witness asserts should have been taken to achieve compliance with the standard of practice or care; and

(H) The manner in which the expert witness asserts that the breach of the standard of practice or care was the proximate cause of the injury claimed.

(c) Answers to interrogatories that state the information required by paragraph (b)(iii) of this section shall satisfy the requirements of paragraph (b)(iii) of this section if they are signed by the plaintiff's attorney and by each expert witness listed in the answers to interrogatories and they are served upon the defendant within one hundred eighty (180) days after commencement of the action.

(d) The parties or the court for good cause shown, may by agreement, provide for extensions of the time limits specified in subsection (b) of this section. Nothing in this section may be construed to prevent either party from calling additional expert witnesses or substituting other

1 expert witnesses prior to the deadline provided in
2 subsection (e) of this section.

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4 (e) In any malpractice action, all expert witness
5 interrogatory answers must be signed by the attorney for
6 the party responding to the interrogatory and by each
7 expert witness listed in the answers. The court shall
8 include in a scheduling order a deadline prior to the close
9 of discovery for all parties to answer expert witness
10 interrogatories for all expert witnesses to be called at
11 trial. No additional expert witnesses may be called by any
12 party without agreement of the parties or by leave of the
13 court for good cause shown.

14

15 (f) If the plaintiff is acting pro se, the plaintiff
16 shall sign the affidavits and answers to interrogatories
17 referred to in this section and is bound by those
18 provisions as if represented by an attorney.

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20 (g) Failure to comply with paragraph (b)(i) or (ii)
21 of this section within sixty (60) days after demand for the
22 affidavit shall result, upon motion, in dismissal with
23 prejudice of each cause of action as for which expert

1 witness testimony is necessary to establish a prima facie
2 case.

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4 (h) Failure to comply with paragraph (b)(iii) or
5 subsection (c) of this section due to deficiencies in the
6 affidavit or answers to interrogatories shall result, upon
7 motion, in dismissal with prejudice of each action as to
8 which expert witness testimony is necessary to establish a
9 prima facie case, provided that:

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11 (i) The motion to dismiss the action identifies
12 the claimed deficiencies in the affidavit or answers to
13 interrogatories;

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15 (ii) The time for hearing the motion is at least
16 forty-five (45) days from the date of service of the
17 motion; and

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19 (iii) Before the hearing on the motion, the
20 plaintiff does not serve upon the defendant an amended
21 affidavit or answers to interrogatories that correct the
22 claimed deficiencies.

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1 (j) The signature of the plaintiff or the plaintiff's
2 attorney shall constitute a certification that the person
3 has read the affidavit or answers to interrogatories, and
4 that to the best of the person's knowledge, information,
5 and belief formed after a reasonable inquiry, it is true,
6 accurate and made in good faith. An attorney or plaintiff
7 who signs a certification in violation of this subsection
8 shall be subject to reasonable attorney's fees, costs and
9 disbursements.

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11 **1-1-132. Medical malpractice actions; duty of**
12 **defendant to furnish affidavit.**

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14 (a) In any malpractice action, a defendant shall file
15 within ninety (90) days after the plaintiff has filed the
16 affidavit required under W.S. 1-1-132(b)(i), an affidavit
17 of meritorious defense signed by an expert witness. The
18 affidavit of meritorious defense shall certify that the
19 expert witness has reviewed the complaint and all medical
20 records supplied to him by the defendant's attorney
21 concerning the allegations contained in the complaint and
22 shall contain a statement of each of the following:

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1 (i) The factual basis for each defense to the
2 claims made against the defendant in the complaint;

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4 (ii) The standard of practice or care that the
5 health professional or health facility named as a defendant
6 in the complaint claims to be applicable to the action and
7 that the health professional or health facility complied
8 with that standard;

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10 (iii) The manner in which the expert witness
11 asserts that there was compliance with the applicable
12 standard of practice or care; and

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14 (iv) The manner in which the expert witness
15 asserts that the alleged injury or alleged damage to the
16 plaintiff is not related to the care and treatment
17 rendered.

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19 **1-1-133. Medical malpractice actions; expert witness**
20 **criteria.**

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22 (a) In any malpractice action, a person shall not
23 give expert testimony or execute an affidavit on the
24 appropriate standard of practice or care unless the person

1 is licensed as a physician or other health care
2 professional in the United States and meets the following
3 criteria:

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5 (i) If the party against whom or on whose behalf
6 the testimony is offered is a specialist or subspecialist
7 recognized by the American Board of Medical Specialties or
8 the American Osteopathic Association and the care or
9 treatment at issue involves that specialty or subspecialty
10 recognized by the American Board of Medical Specialties or
11 the American Osteopathic Association, the person providing
12 the testimony shall have specialized at the time of the
13 occurrence that is the basis for the action in the same
14 specialty or subspecialty, recognized by the American Board
15 of Medical Specialties or the American Osteopathic
16 Association, as the party against whom or on whose behalf
17 the testimony is offered, and if the person against whom or
18 on whose behalf the testimony is being offered is board
19 certified and the care or treatment at issue involves that
20 board specialty or subspecialty recognized by the American
21 Board of Medical Specialties or the American Osteopathic
22 Association, the expert witness shall be:

23

1 (A) A physician credentialed by a hospital
2 to treat patients for the medical condition, or to perform
3 the procedure, that is the basis for the claim or action;
4 or

5
6 (B) A specialist or subspecialist
7 recognized by the American Board Of Medical Specialties or
8 the American Osteopathic Association who is board certified
9 in the same specialty or subspecialty, recognized by the
10 American Board Of Medical Specialties or the American
11 Osteopathic Association, and during the year immediately
12 preceding the date of the occurrence that is the basis for
13 the claim or action, shall have devoted a majority of his
14 professional time to either:

15
16 (I) The active clinical practice of
17 the same health care profession in which the defendant is
18 licensed, and, if the defendant is a specialist or
19 subspecialist recognized by the American Board of Medical
20 Specialties or the American Osteopathic Association, the
21 active clinical practice of that specialty or subspecialty
22 recognized by the American Board of Medical Specialties or
23 the American Osteopathic Association; or

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1 (II) The instruction of students in an
2 accredited medical school, other accredited health
3 professional school or accredited residency or clinical
4 research program in the same health care profession in
5 which the defendant is licensed, and, if that party is a
6 specialist or subspecialist recognized by the American
7 Board of Medical Specialties or the American Osteopathic
8 Association, an accredited medical school, health
9 professional school or accredited residency or clinical
10 research program in the same specialty or subspecialty
11 recognized by the American Board of Medical Specialties or
12 the American Osteopathic Association.

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14 (ii) If the party against whom or on whose
15 behalf the testimony is offered is a general practitioner,
16 the expert witness, during the year immediately preceding
17 the date of the occurrence that is the basis for the claim
18 or action, shall have devoted a majority of his
19 professional time to:

20

21 (A) Active clinical practice as a general
22 practitioner or active clinical practice that encompasses
23 the medical condition, or that includes performance of the
24 procedure, that is the basis of the claim or action; or

1 (B) The instruction of students in an
2 accredited medical school, health professional school, or
3 accredited residency or clinical research program in the
4 same health care profession in which the party against whom
5 or on whose behalf the testimony is licensed.

6
7 (b) A court may waive the same specialty or
8 subspecialty recognized by the American Board of Medical
9 Specialties or the American Osteopathic Association and
10 board certification requirements of this section, upon
11 motion by the party seeking a waiver, if, after the moving
12 party has demonstrated to the satisfaction of the court
13 that a good faith effort has been made to identify an
14 expert in the same specialty or subspecialty, the court
15 determines that the expert possesses sufficient training,
16 experience and knowledge to provide the testimony as a
17 result of active involvement in, or full-time teaching of,
18 medicine in the applicable area of practice or a related
19 field of medicine.

20
21 (c) Nothing in this section shall limit the power of
22 the trial court to disqualify an expert witness on grounds
23 other than the qualifications set forth in this section.

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1 (d) In any malpractice action, an expert witness
2 shall not testify on a contingency fee basis.

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4 (e) An individual or entity who threatens to take or
5 takes adverse action against a person in retaliation for
6 that person providing or agreeing to provide expert
7 testimony, or for that person executing an affidavit
8 pursuant to the provisions of W.S. 1-1-131 or 1-1-132,
9 which adverse action relates to that person's employment,
10 accreditation, certification, credentialing or licensure,
11 shall be liable for a civil penalty not to exceed ten
12 thousand dollars (\$10,000.00) and other damages incurred by
13 the person and the party for whom the person was testifying
14 as an expert.

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16 **Section 2.** This act is effective July 1, 2005.

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(END)