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TO: The Honorable Joseph F. Vallario, Jr., Chair
Members, House Judiciary Committee
The Honorable Peter A. Hammen, Chair
Members, House Health and Government Operations Committee
The Honorable Kathleen Dumais

FROM: Joseph A. Schwartz, III
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J. Steven Wise
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DATE: March 11, 2015

RE: **SUPPORT WITH AMENDMENT** – House Bill 547 – *Medical Liability Efficiency Act of 2015*

The Maryland State Medical Society (MedChi), which represents more than 8,000 Maryland physicians and their patients, supports House Bill 547, with amendments.

House Bill 547 is an omnibus proposal relating to medical malpractice cases. There are multiple reforms contained in the legislation, and MedChi believes a number of them would be particularly effective.

At the outset, some may question why a reform of medical malpractice litigation is necessary. It appears that Maryland may well be at a “tipping point” where prophylactic action is needed in order to avoid the 4th medical malpractice “crisis” in the last 40 years. In the 1970s, the General Assembly created the Medical Mutual Insurance Society as a company which would insure doctors, since all other malpractice insurers had “withdrawn” from the State. In 1986, the General Assembly again addressed a malpractice crisis by initiating the changes in the civil justice system with respect to malpractice (requirement of a certification of merit before a case could be filed, and a cap on non-economic damages). And, just 10 years ago, the General Assembly met in a Special Session as malpractice premiums spiraled out of control forcing numerous OB/GYNs to give up their obstetrics practices because of the cost of malpractice insurance.

Several of the past actions of the General Assembly dealing with medical malpractice have proven effective, while others have not. For example, one change was to require medical malpractice cases to be “arbitrated” before going to court. This created what is known as the Health Care Alternative Dispute Resolution Office. Originally (and still) all malpractice cases must first be filed

in this Office before proceeding to the appropriate Circuit Court. At one time, the case was required to be “arbitrated” unless both parties agreed to waive arbitration. It became clear that the arbitration system was not working as promised but rather was creating two time consuming and expensive trials, one before the arbitration panel and the second before the Circuit Court. Virtually no cases are now “arbitrated” because the law was changed in the 1990s to allow either party to waive arbitration which is now done on a regular basis. Hence, the Health Care Alternative Dispute Resolution Office really serves no purpose any longer, other than to collect malpractice filings and be a repository of information. That function could be assumed by the Administrative Office of the Courts and this Office could be eliminated.

Another change in House Bill 547, is to require a medical expert who testifies in a medical malpractice case to devote at least 80% of his/her time directly to activities involving patient care. This is a change to the present law which requires that no more than 20% of the expert’s professional activity may involve testimony in personal injury claims. MedChi understands the intent of this provision is to have doctors who actually treat patients be the ones that provide expert testimony; however, the proposal as drafted appears unduly restrictive. For instance, there may be physicians employed by academic medical institutions such as the University of Maryland Medical System or Johns Hopkins who are acknowledged “experts,” but may not actually reach the 80% patient care threshold. Accordingly, MedChi believes that some sort of amendment is necessary to accomplish the objective of House Bill 547, without disqualifying appropriate medical experts.

Another improvement of House Bill 547 is its elimination of a loop hole in the Maryland Apology Law (see page 31, lines 5-8). Essentially, the Apology Law allows a doctor to speak to a patient after a bad outcome, and to offer his or her regret or apology without that expression being used against the doctor in later court proceedings. Apology Laws have been enacted throughout the United States and often have the beneficial result of reducing litigation, resulting in settlements outside of the court process. However, the Maryland Apology Law has an exception which swallows the rule so that - if the expression of regret or apology is an “admission of liability” - it can be considered in court. House Bill 547 deletes this exception and will finally make the Apology Law effective. Very few Maryland doctors express regret or apology under the present wording of the law and, hence, Maryland has an Apology Law in name only.

There are several other provisions of House Bill 547 (e.g. early notice of lawsuit, expert witness fees to be paid by a party declining an offer of judgment where the actual judgment is less favorable) and MedChi believes the overall thrust of the bill is positive and should be endorsed. It is just a matter of time before there is another \$50 Million verdict as there was a few years ago against Hopkins in a “bad baby” case. Even though that verdict was substantially modified downward, it is the proverbial canary in the mine warning us that another “tipping point” may be approaching.

For more information call:

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