

WISCONSIN HOSPITAL ASSOCIATION, INC.

April 11, 2013

To: Senate Committee on Judiciary and Labor

From: Eric Borgerding
Executive Vice President

Laura Leitch
Senior Vice President and General Counsel

Subject: WHA testimony in support of SB 137
Protecting the Physician-Patient Relationship



The Wisconsin Hospital Association is a statewide nonprofit association with a membership of more than 140 Wisconsin hospitals and health systems including not only critical access hospital providing crucial services to their rural communities, but also major academic medical centers providing world-class research and training. On behalf of WHA and its members, we thank Senator Grothman for his leadership on this issue and submit this written testimony in strong support of AB 139, a bill that would protect the physician-patient relationship by addressing the Wisconsin Supreme Court's recent decision *Jandre v. Wisconsin Injured Patients and Families Compensation Fund*. Thank you for the opportunity to comment on this important bill.

In Wisconsin, a physician must inform his or her patient about the availability of all alternate medical modes of treatment and the risks and benefits of those treatments. The bill would require physicians to inform his or her patient about the availability of *reasonable* alternate medical modes of treatment and the risks and benefits of those treatments. The bill would establish the "reasonable physician" standard as the legal standard a physician must meet when informing his or her patient. The "reasonable physician" standard requires disclosure of information that a reasonable physician in the same or similar medical specialty would know and disclose under the circumstances. A physician would not be required to provide information about alternate medical modes of treatment for conditions the physician did not believe the patient had at the time the physician informs the patient. Subparagraph 7 of the bill incorporates the phrase, "alternate medical modes of treatment," phrasing that appears in the body of the existing statute, to ensure that the court's interpretation that the word treatment includes diagnostic tests is consistently applied throughout the statute.

By establishing the reasonable physician standard, the bill rejects strict liability, or liability without the finding of negligence, for a missed diagnosis by a physician. It is important to note that the bill would not affect a patient's claim against a doctor for a missed diagnosis. The common sense bill, simply put, would prevent the plaintiff's attorney from having two kicks at the same issue.

Four of the seven Supreme Court justices in *Jandre* disagree with the current direction of the court in informed consent cases, expressing concern that the court is expanding the law of informed consent beyond its original scope and purpose. Justice Roggensack called the lead opinion in *Jandre* “breathtaking” in the potential scope of its reasoning. Justice Prosser noted, “Nearly three decades have passed since the adoption of [the informed consent statute]. Much has changed in the intervening years.” This legislation halts the expansion of the statute noted by the four justices and realigns the informed consent statute with its original purpose, protecting and strengthening the physician-patient relationship through a clearer standard for informed consent in Wisconsin.

Wisconsin hospitals and health systems are dedicated to providing high quality, high value health care to their patients. Defensive medicine, the logical outcome of the Court’s *Jandre* decision, works against efficient value-based health care. Addressing the *Jandre* decision by establishing the reasonable physician standard will provide a reasonable, clear, and effective informed consent statute in Wisconsin, again encouraging excellent health care provided efficiently.