

Legislative Analysis



MEDICAL MALPRACTICE: AFFIDAVITS OF MERIT AND MERITORIOUS DEFENSE

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House Bill 5338 (Substitute H-4)

House Bill 5905 (Substitute H-3)

Sponsor: Rep. Jim Howell

Committee: Judiciary

First Analysis (6-8-04)

BRIEF SUMMARY: The bills would allow certain types of technical defects in affidavits of merit and affidavits of meritorious defense to be corrected relating back to the date the original affidavit was filed.

FISCAL IMPACT: The bills would have an indeterminate impact on the judiciary.

THE APPARENT PROBLEM:

Legislation enacted in the mid-1980s and again in the mid-1990s attempted to decrease the number of frivolous malpractice suits filed against doctors and hospitals by requiring a plaintiff to include an affidavit of merit when filing the complaint and for the defendant to include an affidavit of meritorious defense when filing the answer to the complaint. The information that must be included in an affidavit is prescribed in statute, but in general, includes statements by a health professional who has reviewed the plaintiff's allegations and medical records regarding the applicable standard of practice or care, breach of or compliance with that standard, actions taken or that should have been taken in order to comply with the standard of practice or care, and the manner in which the alleged breach was the proximate cause of injury to the plaintiff or the manner in which the injury was not related to the care rendered.

Apparently, it was hoped that these affidavits would weed out the frivolous suits and let only those cases with merit proceed. Reportedly, however, cases are being dismissed not because of a lack of merit, but because of technical defects in the affidavits that were not discovered in time for the plaintiff to file a new, corrected complaint before the statute of limitations expired. Some believe that the law should be amended to allow these affidavits to be corrected for technical errors only, even if the statute of limitations has run.

THE CONTENT OF THE BILLS:

The bills would amend sections of the Revised Judicature Act pertaining to affidavits of merit and affidavits of meritorious defense to add virtually identical provisions allowing the affidavits to be corrected for formal defects relating back to the original date of filing. House Bill 5338 would apply to affidavits of merit filed by a plaintiff in a medical

malpractice action (MCL 600.2912d) and House Bill 5905 would apply to affidavits of meritorious defense filed by a defendant in response to a plaintiff's complaint (MCL 600.2912e). The bills are tie-barred to each other and would only apply to civil actions filed on or after the bills' effective date.

A "formal defect" would mean a defect to which one or both of the following would apply:

- The defect was in the notarization of the affidavit.
- The defect resulted from an inadvertent clerical error. This could include, but not be limited to, a typographical, grammatical, or punctuation error; improper pagination; and missing pages, including a page with a signature if the signed page had been in existence at the time the affidavit had been required to be filed under the act's requirements.

Generally speaking, the bills would establish a process, including time frames, by which a defendant or plaintiff could challenge an affidavit because of a formal defect; respond to a challenge by correcting only the alleged defect; file a motion challenging the affidavit after it was corrected or challenging an affidavit which remained uncorrected; and challenge an affidavit because of a substantive defect (a defect that is not a formal defect) or a formal defect that for good cause was not discovered before the original time frame for filing a challenge expired.

An affidavit with a defect that had resulted from the intentional misconduct of a defendant or plaintiff or his or her attorney could be challenged at any time and the defect could not be corrected under the bills' provisions.

Moreover, if an affidavit required by these provisions had been taken before a notary public or justice of the peace in another state, the bill would specify that it would not be necessary that the signature and official status of that official be certified by the clerk of a court as otherwise required by Section 2102(4) of the act.

In addition, House Bill 5905 would allow a defendant to file an affidavit of meritorious defense 91 days after the plaintiff filed the affidavit of merit or 112 days after receiving service of the complaint, whichever was later.

ARGUMENTS:

For:

Whether a medical malpractice action proceeds or is summarily dismissed should be based entirely on the merits of the case. However, some feel that a significant number of cases are being thrown out of court or go unfairly against a defendant due to technical errors in the affidavits of merit or meritorious defense that must accompany a complaint and answer. These affidavits contain statements made by expert witnesses pertaining to the validity or lack of validity of the plaintiff's claim that he or she suffered harm due to a medical mistake by a health provider. Apparently, these affidavits are quite technical in

nature, are often done under extreme time pressures, and are often done by physicians in other states who have an expertise with the medical questions at issue in the law suit (meaning that information may be relayed over phone lines, by mail, by facsimile, etc. and notarized by notaries public regulated under another state's law). For these and other reasons, such as human fallibility or glitches in technology, sometimes mistakes are made on these affidavits that have nothing to do with whether the plaintiff was or was not injured. Sometimes a mistake may be nothing more than a page that wasn't transmitted, even though it does exist and exists in the proper form.

If a mistake is found after the affidavit has been filed, it cannot be corrected under current law. However, if the statute of limitation has expired, it is too late to file a new and correct affidavit, with the result that the case is dismissed (plaintiff's error) or goes against a defendant (defendant's error). As a result, legal malpractice cases have increased against attorneys who failed to catch and correct a technical error on the affidavit of merit or meritorious defense. The state supreme court recently abandoned one proposal to ameliorate the problem proposed by the Civil Practice and Courts Committee of the State Bar. Now, the Negligence Section of the State Bar has requested help from the legislature.

The bills would create a very narrow provision to correct only technical errors, called "formal defects", in affidavits of merit and meritorious defense and to establish timelines for challenges and corrections. These corrections would relate back to the original date of filing, which means that even if the statute of limitations had expired, the date of filing the corrected affidavit would be considered to be the same as the filing date of the original affidavit. Proponents believe that the bills represent a fair solution for problems experienced by both plaintiff's and defendant's attorneys and their clients.

In addition, House Bill 5905 would allow a defendant to file an affidavit of meritorious defense either 91 days after the plaintiff filed the affidavit of merit or 112 days after service of the complaint on the defendant, whichever was later. Now, an affidavit of merit is supposed to be filed with the complaint, but the act allows a plaintiff, for good cause, to have an additional 28 days in which to file the affidavit after filing the complaint. Some feel that some plaintiff's attorneys deliberately request the extension so that the defendant and his or her attorney have less time to respond with their affidavit of meritorious defense. The bill would give a defendant and his or her attorney an additional 21 days in which to find a medical expert to review the plaintiff's medical records and file the affidavit of meritorious defense.

Against:

Though many agree that something needs to be done, some feel that the bills' provisions allowing a technical error to be corrected at a later date lowers the bar, so to speak, regarding the legal nature of an affidavit. Opponents maintain that what separates an affidavit from just a statement signed by a doctor is the higher legal requirements such as being properly signed, properly notarized, words spelled correctly, correct terms being used, sworn under oath, and so forth. They feel that allowing these documents to be corrected at a later time in essence would be allowing the acceptance of a document in

place of an affidavit until such time that someone notices the document does not really constitute an affidavit and then corrects it so that it then becomes an affidavit. They feel that this is sanctioning sloppy attorney work and feel that the problem can be addressed by educating colleagues on the importance of making sure the affidavits are done correctly and exactly according to legal requirements, not by lowering the bar of what constitutes an affidavit.

In addition, a concern was raised that the part of the definition of “formal defect” pertaining to defects in the notarization of the affidavit is too broad and therefore could mean anything. For example, the notary is supposed to have the physician who is the expert witness raise his or her right hand and swear under oath that he or she is the person identified in the document. However, since an affidavit typically contains a statement warning the person signing it that any false statements would constitute perjury, some notaries just have the person read the statement and then sign the document. So, one could argue that failure to have the notary read the oath out loud was just a “formal defect” that could be corrected later, where another would argue that the document never met the test of an affidavit and therefore would be a substantial defect which would not be correctable under the bill. At the very least, this provision should be clarified.

POSITIONS:

A representative of the Negligence Law Section, State Bar of Michigan, indicated support for the bills. (6-2-04)

Representatives of the following organizations indicated opposition to the bills:

Michigan State Medical Society (6-2-04)
Beaumont Hospital (6-2-04)
Michigan Orthopaedic Society (6-2-04)
American College of Obstetricians and Gynecologists (6-2-04)
Michigan Hospital Association (6-2-04)
Michigan Osteopathic Association (6-2-04)
Insurance Institute of Michigan (5-18-04)
ProNational Insurance Company (5-18-04)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.