

August 20, 2009

Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

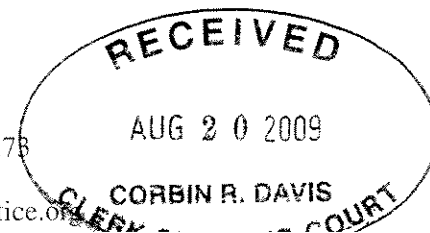
**Re: ADM File No: 2009-13
Proposed Amendments of Rule 2.112 and 2.118 of the Michigan
Court Rules**

Dear Mr. Davis:

The Michigan Association for Justice has considered ADM File No. 2009-13 and the proposed amendments to the Michigan Court Rules pertaining to Notices of Intent and Affidavits of Merit and Meritorious Defense in medical malpractice actions, and is submitting the following comments. We appreciate the Court's proposed amendments of MCR 2.112 and MCR 2.118 which will simplify the procedure and the remedies for defects or deficiencies in these notice and affidavit documents, which are unique to medical malpractice actions. These changes will add a great degree of guidance and clarity for the litigants and the courts, and will likely minimize the number of motions and appeals that will be filed throughout the pendency of the action. MAJ therefore supports the proposed changes, with the only caveat that further definition should be given to what constitutes a "challenge" under MCR 2.112(L)(2).

Since the date the Court published this proposal, on May 20, 2009, the Court has issued its opinion in *Bush v Shabahang*, (Docket Nos. 136617, 136653 and 136983 issued July 29, 2009.) The proposed court rule changes would not conflict with *Bush* pertaining to defective Notices of Intent. As such, MAJ supports these proposed amendments to MCR 2.112 and MCR 2.118, and requests the Court adopt this proposal with the minor changes noted below.

MAJ requests that clarification be added to this proposal as to what satisfies a "challenge." It is MAJ's concern that this term is vague, and will not provide the trial courts a means of determining what in fact is a challenge: Is it an affirmative defense? Is it a sentence in a letter sent to counsel for the opposing party? Is it a paragraph in an answer? Or is it a motion or some other type of formal filing?



In an effort to define clearly for the litigants and the courts what is in fact a "challenge," MAJ suggests the following addition to MCR 2.112(L)(2)(a) and (b) as **set forth below in bold**:

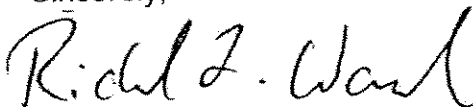
(2) In a medical malpractice action, unless the court allows a later challenge for good cause:

- (a) All challenges to a notice of intent to sue must be made **by motion, filed pursuant to MCR 2.119**, at the time the defendant files its first response to the complaint, whether by answer or motion, and
- (b) All challenges to an affidavit of merit or affidavit of meritorious defense, including the qualifications of the signer, must be made **by motion, filed pursuant to MCR 2.119**, within 63 days of service of the affidavit on the opposing party. If the court finds that the affidavit is insufficient, it shall afford the party that filed the challenged affidavit to file a revised affidavit unless the information before the court shows that amendment would no be justified. See MCR 2.116(I)(5).

Since the original enactment of the statutory requirements pertaining to Affidavits of Merit, as well as Notices of Intent, many meritorious cases have never reached a discussion of the merits of the claims, and have instead been delayed and dismissed due to protracted litigation over what amounts to minor issues in wording or descriptions. Remedying much of the procedural ambiguity in this area will help to insure that there is a fair opportunity for the citizens of this state who have meritorious claims to have their claims adjudicated on the merits.

Please convey our appreciation to the Court for its consideration of our comments. We are available if further information or comment is requested.

Sincerely,



Richard L. Warsh
President