

September 25, 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 Rules 2.112 and 2.118 of  
the Michigan Court Rules**

Dear Mr. Davis:

I am the President-Elect of the Michigan Association for Justice (formerly the Michigan Trial Lawyers Association) and am writing this letter on behalf of MAJ. For the last twenty-two years the majority of my practice has been representing people who have been injured as a result of medical negligence.

I attended the Court's Public Administrative Conference on September 2, 2009 and followed the Court's discussion about ADM File No. 2009-13 with great interest. I believe that there were two proposed changes to the language of ADM File No. 2009-13 that were uncontroversial and two other proposed changes that generated considerable discussion. I will address each of the proposed changes to the language of ADM File No. 2009-13.

**Uncontroversial Proposals:**

1. MAJ President Richard L. Warsh, in his letter to you dated August 20, 2009, suggested a change to clarify what constituted a "challenge" under the proposed amendments to MCR 2.112(L)(2). MAJ suggested the following additions (set forth below in **bold**) to MCR 2.112(L)(2)(a) and (b):

Rule 2.112 Pleading Special Matters

(L) Medical Malpractice Actions.

...

- (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 not be justified. See MCR 2.116(I)(5).

2. In his August 18, 2009 letter, Dean Googasian suggested a change to the proposed amendment to MCR 2.112(L)(2)(b) which would clear up a grammatical concern. As the Court will recall, the State Bar of Michigan (SBM) responded to ADM File Nos. 2006-43 and 2007-07 with a proposal that was very similar to the proposed changes contained within ADM File No. 2009-13. Unfortunately, the SBM proposal contained a grammatical error. Mr. Googasian suggested one of two alternatives to clarify the intent of the proposed amendment to MCR 2.112(L)(2)(b). Mr. Googasian's second suggestion is particularly worthy as it is patterned after the language used in MCR 2.116(I)(5), the rule cited at the end of the proposed change to MCR 2.112(L)(2)(b).

Adoption of Mr. Googasian's second formulation would result in the following additions (set forth below in **bold and double underlined** for additions and **double strikethroughs** for deletions) to MCR 2.112(L)(2)(b):

- (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~~ give the party that filed the challenged affidavit an opportunity to file a revised affidavit unless the information before the court shows that amendment would not be justified. See MCR 2.116(I)(5).**

**Controversial Proposals:**

3. During the discussion of ADM File No. 2009-13 at the Court's Public Administrative Conference on September 2, 2009, Justice Markman proposed that language be added to the proposed amendment to MCR 2.118(D). If Justice Markman's proposed amendment (set forth below in **bold**) was adopted, MCR 2.118(D) would then state:

Rule 2.118 Amended and Supplemental Pleadings

....

- (D) Relation Back of Amendments. An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. **In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of original filing of the affidavit **subject to the statute of limitations as set forth in *Kirkaldy*<sup>1</sup>.****

Respectfully, MAJ urges the Court to not adopt Justice Markman's proposed amendment for the following reasons:

- Requiring a case to be dismissed and refiled will result in timing uncertainty and will likely lead to increased motions and appeals which are unnecessary as an affidavit of merit is a pleading subject to amendment. As Justice Markman himself wrote for the Court in

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<sup>1</sup> Justice Markman's reference is to *Kirkaldy v Rim*, 478 Mich 581 (2007).

*Barnett v Hidalgo*, 478 Mich 151, 161 (2007), an affidavit of merit is a pleading: “As part of the pleadings, an affidavit of merit is generally admissible as an adoptive admission; ...” Pleadings are generally amendable<sup>2</sup>. There is no reason to treat affidavits of merit differently than other pleadings are treated.

- The essence of the Court’s decision in *Kirkaldy* was that the running of the statute of limitations is tolled by the filing of a medical malpractice complaint accompanied by an affidavit of merit, and dismissal with prejudice is not the appropriate remedy when the affidavit is later found to be defective. While the *Kirkaldy* Court also held that the appropriate remedy was dismissal without prejudice, that remedy was drawn from language within *Scarsella v Pollak*, 461 Mich 547, 551-552 (2000), a decision which otherwise was found to not apply to the facts in *Kirkaldy*, 478 Mich 584.
- The affidavit of merit statute, MCL 600.2912d, and the affidavit of meritorious defense statute, MCL 600.2912e, do not state that dismissal, with or without prejudice, or any other specific remedy is required when an affidavit is found to be defective. In fact, two sections allow for the filing of an affidavit of merit *after* the complaint is filed. MCL 600.2912d(2) allows the trial court to grant a twenty-eight day extension upon a showing of good cause, and MCL 600.2912d(3) allows a ninety-one day extension (without a court order) if access to the medical records has not been provided by the defendant. Under those circumstances the statute of limitations is tolled with the filing of a complaint without an accompanying affidavit of merit.
- There are numerous expenses and inefficiencies associated with the remedy of dismissal without prejudice, including:
  - **For the trial court:**
    - Clerk time to process the filing of the new complaint and the issuance of new summons.
    - Clerk time to file documents in the new case that are similar to documents previously filed in the old case.
    - The storage of two court files, one closed and one open.

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<sup>2</sup> For example, a pleading may be amended as a matter of course if done within 14 days of a responsive pleading [MCR 2.118(A)(1)], and otherwise may be amended with leave of the court which shall be freely given when justice requires, [MCR 2.118(A)(2)].

- A second Scheduling Conference.
- Perhaps the rehearing of motions decided before the dismissal.
- **For the plaintiff/plaintiff's counsel:**
  - Drafting and filing of the new complaint and summons.
  - Payment of another filing and jury fee (currently \$235.00).
  - Service of the new complaint, summons and revised affidavit of merit.
  - Filing a new proof of service.
  - Attendance at a second Scheduling Conference.
  - Repeat of discovery and depositions completed before the dismissal without prejudice.
- **For the defendant/defendant's counsel:**
  - Reviewing the new complaint, summons and revised affidavit of merit.
  - Drafting and filing another answer and affirmative defenses.
  - Perhaps the need to obtain a new affidavit of meritorious defense.
  - Filing a new proof of service.
  - Attendance at a second Scheduling Conference.
  - Repeat of discovery and depositions completed before the dismissal without prejudice.
- **For the appellate courts:**
  - Resolve when the statute of limitation resumes running after a dismissal without prejudice. On the date of the hearing? The date of the entry of an order of dismissal? When a motion for reconsideration is decided? After the period ends in which to file an appeal of right? After resolution of an appeal of right?
  - What happens when an appellate court reverses a dismissal after determining that the original affidavit was not deficient? The trial court will then have two cases open.
- As with a notice of intent to file suit (NOI), the affidavit of merit is filed at a time when no formal discovery has occurred. Access to medical records is to be provided during the NOI period, but many times important records are not legible and important events are not

contained in the records. With respect to NOIs, this Court has recognized the likelihood of errors due to the early stage at which they are drafted, *Roberts v Mecosta Co Gen Hosp (Aft Rem)*, 470 Mich 679, 691-692 (2004), and *Bush v Shabahang*, 484 Mich 156, 178 (2009).

- A dismissal without prejudice will present insurmountable logistical problems at times. Until the trial court rules on a motion challenging the affidavit, the plaintiff will not know whether, or how, the affidavit of merit must be revised. There are times, due to no fault of the plaintiff, when cases get filed with very little time left in the statute of limitations. It is a reality that very few Michigan physicians will act as standard of care experts against another Michigan doctor. Consequently, standard of care experts usually are from other states and there will be time and distance factors in obtaining a revised affidavit of merit.

Additionally, like the situation in *Kirkaldy*, the defect in the affidavit of merit may relate only to the qualifications of the expert who signed the affidavit. Under *Woodard v Custer*, 476 Mich 545, 586 (2006) the expert signing the affidavit of merit must match the specialty and board certification for the “one most relevant specialty” practiced by the defendant at the time of the alleged malpractice. However, there is no current requirement for the defendant to disclose that “one most relevant specialty” until during formal discovery in the case. Thus, there will be circumstances where the plaintiff may have to obtain the revised affidavit of merit from a new expert. Therefore, the amount of time needed to file a revised affidavit may vary from case to case. The trial court is in the best position to determine how long any party needs to obtain a revised affidavit.

- Respectfully, if Justice Markman’s proposed amendment was added to the proposed amendments contained in ADM File No. 2009-13, there would be a great disparity between the severity of the remedy (dismissal without prejudice) provided for a defective affidavit of merit when compared to the remedy (amendment) for a defective affidavit of meritorious defense. Justice Markman’s proposed language would not affect a defective affidavit of meritorious defense because there is no statute of limitations issue associated with the filing or revision of the defense affidavit.
- Respectfully, Justice Markman’s proposed amendment to MCR 2.118(D), which would add the words “subject to the statute of

limitations as set forth in *Kirkaldy*”, is essentially the same as the language the Court rejected on May 12, 2009 when it did not adopt the proposed amendment to MCR 2.118(D) as contained in ADM File Nos. 2006-43 and 2007-07. The language rejected then was: “Following dismissal, the plaintiff may file a complaint accompanied by a conforming affidavit of merit within the time that remains in the period of limitations.”

- Allowing amendments to affidavits that relate back to the date the affidavit was originally filed does not overrule *Kirkaldy*. Instead the proposed amendment to MCR 2.118(D) contained within ADM File No. 2009-13 simply provides a different remedy than *Kirkaldy* provided. This Court is now involved in rulemaking, not deciding a case. Rulemaking can be viewed as providing a “prospective roadmap” to be used to guide the Court of Appeals, trial courts and practitioners. Article VI, Sec. 5 of the Michigan Constitution provides the framework for rulemaking: “Sec. 5. The supreme court shall by general rules establish, modify, amend and *simplify* the practice and procedure in all courts of this state. ....” Allowing amendments that relate back is consistent with the way amendments of other pleadings are accomplished, and is a much simpler, efficient and economical procedure than requiring a dismissal without prejudice.
- Finally, very recently in *Bush v Shabahang*, this Court structured a very simple remedy when a notice of intent to file suit is later found to be defective. Under *Bush*, if a timely served NOI is later found to be defective, MCL 600.2301 allows the defects to be disregarded or cured by an amendment, 484 Mich 180. A revised NOI then relates back to the date of mailing of the original NOI, 484 Mich 181, fn. 44.

By rejecting Justice Markman’s proposed amendment, this Court will establish consistent procedures to address defects in NOIs and affidavits of merit, the two requirements in medical malpractice cases. Because both documents are created before the formal discovery phase, it makes enormous sense to allow amendments to correct defects with the amendments relating back to the date of original service or filing.

4. The other controversial proposal was submitted by Gregory W. Moore on behalf of the Michigan Osteopathic Association (MOA) in his August 31, 2009 letter to you. The MOA argues that all of the proposed changes to MCR 2.112(L) and MCR 2.118(D) are unnecessary. In particular MOA argues against

allowing an affidavit of merit to be amended stating: "... we want attorneys to get it right the first time and not give them the chance to make, learn from, and consequently correct mistakes."

The MOA proposes additional language (set forth below in **bold**) to MCR 2.118(D) as follows:

Rule 2.118 Amended and Supplemental Pleadings

....

- (D) Relation Back of Amendments. An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of original filing of the affidavit **if the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, and the original pleading gives the responding party the necessary information to prepare a defense to the subsequently asserted claim.**

Despite its assurances of balance, the MOA proposal is one-sided as its language would only apply to revisions of affidavits of merit. Further, the MOA proposal is internally inconsistent. The defendant, on one hand, is challenging the *original* affidavit of merit as defective, and, on the other hand, saying that the *revised* affidavit of merit is only allowed if the *original* affidavit of merit had provided the defendant with the information necessary to prepare a defense to what is now stated in the *revised* affidavit. The MOA proposal would require the "omniscience" that was rejected by the Court in *Roberts*, 470 Mich 691. The MOA proposal would simply require much more than can reasonably be expected at the stage of the case where no formal discovery has occurred.

Finally, the MOA proposal ignores long-standing rules and case law allowing amendments in medical malpractice cases, see *LaBar v Cooper*, 376 Mich 401, 404 - 408 (1965) which allows amendments of pleadings in medical malpractice cases and relation back of the amendments.

## SUMMARY AND CONCLUSION

To promote fairness, consistency and simplicity, MAJ urges the Court to adopt the proposed changes contained within ADM File No. 2009-13 with only the minor changes suggested by Richard Warsh and Dean Googasian. The result would be the following rules:

### Rule 2.112 Pleading Special Matters

(A)-(K) [Unchanged.]

(L) Medical Malpractice Actions.

(1) In an action alleging medical malpractice filed on or after October 1, 1993, each party must file an affidavit as provided in MCL 600.2912d, 600.2912e. Notice of filing the affidavit must be promptly served on the opposing party. If the opposing party has appeared in the action, the notice may be served in the manner provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court.

(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~~ give the party that filed the challenged affidavit an opportunity to file a revised affidavit unless the information before the court shows that amendment would not be justified. See MCR 2.116(I)(5).

(M) [Unchanged.]

Rule 2.118 Amended and Supplemental Pleadings

(A)-(C) [Unchanged.]

- (D) Relation Back of Amendments. An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of original filing of the affidavit.

We also urge the Court to not adopt the changes proposed by Justice Markman and the Michigan Osteopathic Association.

Please thank the Court for the opportunity to express our opinion.

Sincerely,

*Barry J. Gates*

Barry J. Gates  
Attorney at Law  
President-Elect of the Michigan Association for Justice