

MCKEEN
& ASSOCIATES, P.C.
CIVIL JUSTICE ATTORNEYS

PENOBSCOT BUILDING
42ND FLOOR
645 GRISWOLD STREET
DETROIT • MICHIGAN 48226

BRIAN J. MCKEEN
TERRY A. DAWES
RAMONA C. HOWARD
EUEL W. KINSEY*

TELEPHONE (313) 961-4400 • FACSIMILE (313) 961-5985

TERRANCE J. CIROCCO**
KEVIN J. COX
TERESA E. HOHMAN KASEL***
JODY L. AARON
* Admitted to MI, TN, AR, MS, TX, PA, WI
** Admitted to MI, TN, AR, MS, PA, WI
*** Admitted to MI, OH

September 28, 2009

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

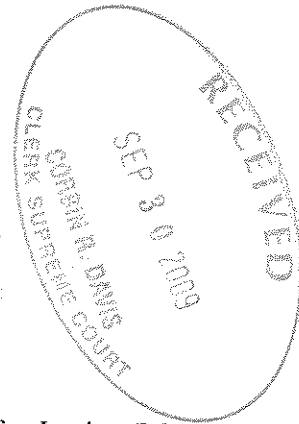
Re: ADM File No. 2009-13
Proposed Amendments of Rules 2.112 and 2.118 of
the Michigan Court Rules

Dear Mr. Davis:

I write today to express my support of Michigan Association for Justice (MAJ) President-Elect Barry Gates' recommendations as to the proposed amendments to Michigan Court Rules 2.112 and 2.118. Mr. Gates provided MAJ's recommendations in a letter dated September 25, 2009. For the majority of my career, I have represented people injured as a result of medical negligence, and from this experience, I believe that Mr. Gates' recommendations will best serve the interests of medical malpractice plaintiffs in Michigan, while promoting fairness and balance in the civil justice system.

MAJ's recommended changes to MCR 2.112 and 2.118 reflect a common-sense balanced approach to defects in affidavits and notices of intent in medical malpractice actions. The MAJ's proposals are forged by a dedication to Michiganders who have been unfortunately injured by medical negligence. It is my belief that MAJ's proposals will advance simplicity and increase cost-effectiveness in medical malpractice litigation. Moreover, I believe that the MAJ's proposed changes will reflect the consistent, balanced scheme imparted by the medical malpractice reform package enacted by the Michigan Legislature. See *Bush v Shabahang*, 484 Mich 156 (2009).

I would also like to express my disapproval of Justice Markman's recommendation during the Court's Public Administrative Conference on September 2, 2009. Justice Markman suggests that the remedy for a defective affidavit of merit should be dismissal without prejudice. Contrary to the objectives of the medical malpractice reform package, Justice Markman's proposal would provide the remedy of dismissal without prejudice for affidavits of merit, while merely allowing for amendment of affidavits of meritorious defense. This disparity of remedies stands in stark contrast to the consistent, balanced scheme the legislature deemed appropriate in medical malpractice litigation.



Further, Justice Markman's proposal will impose financial hardships on both civil litigants and the courts by requiring the refiling of claims dismissed because of defective affidavits of merit. Moreover, Justice Markman's proposal will increase appellate litigation, increasing the burden upon Michigan appellate courts. Given that affidavits of merit are submitted before the discovery process even begins, the resulting costs from Justice Markman's proposal are not necessary, and should be avoided by not adopting it.

Finally, I would like to express my disapproval of the Michigan Osteopathic Association's (MOA) proposal made in Gregory W. Moore's August 31, 2009 letter to you. The MOA's proposal would require that a plaintiff's original pleadings provide the full basis for a defense before a modification to an affidavit of merit would be allowed. Given the often complex nature of medical malpractice cases, the MOA proposal asks too much of an injured party prior to the commencement of discovery. The MOA's approach to the modification of MCR 2.118 and 2.112 is one-sided and ignores long-standing case law in medical malpractice cases, allowing the amendment of pleadings and relation back of those amendments. *Labar v Cooper*, 376 Mich 401, 404-408 (1965).

By adopting Mr. Gates' recommendations as outlined in his September 25, 2009 letter, and rejecting the proposals of Justice Markman and the MOA, the Michigan Court Rules will be amended to further promote fairness, consistency and simplicity.

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

Very truly yours,



Kevin J. Cox