

Legislative Analysis



MEDICAL MALPRACTICE: AFFIDAVITS OF MERIT

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 5338 and House Bill 5905

Sponsor: Rep. Jim Howell

Committee: Judiciary

Complete to 5-17-04

A SUMMARY OF HOUSE BILL 5338 AS INTRODUCED 12-3-04 AND HOUSE BILL 5905 AS INTRODUCED 5-13-04

The bills would revise provisions pertaining to affidavits of merit. In a medical malpractice action, at least 182 days prior to filing a complaint, a plaintiff must notify a defendant that he or she is planning to file suit. The law also requires a plaintiff to file an affidavit of merit with the complaint and requires a defendant to file an affidavit of meritorious defense in response to the plaintiff's allegations. 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.

House Bill 5338 would amend the Revised Judicature Act (600.2912d). Currently, Section 2912d requires a plaintiff or his or her attorney to file, with the complaint, an affidavit of merit signed by a health professional certifying that he or she has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice. The health professional must also include the statements described above.

The bill, instead, would allow either party to request an affidavit of merit from the opposing party. Under the bill, a plaintiff in an action alleging medical malpractice could request an affidavit from a defendant who had filed an answer and vice versa. Except to the extent that an applicable Michigan Court Rule conflicted with the bill, a request for or response to a request would have to comply with court rules that govern the request for and production of documents in a civil action.

The affidavit of merit would have to be signed by a health professional who met requirements for an expert witness. The affidavit would also have to list all medical records reviewed by the health professional and contain a statement of each of the following as to the defendant receiving or making the request:

- The standard practice of care;
- how the applicable standard of practice or care was breached or not breached;
- the actions that should have been taken or omitted (or that had been taken or omitted) to comply with the applicable standard of practice or care; and,
- the manner in which the alleged breach of, or the compliance with, the standard of practice or care was or was not the proximate cause of the injury alleged.

If either party in a malpractice action failed to allow access to medical records within the time period required under Section 2912b(7), an affidavit requested under the bill would not have to be produced until 182 days after the party provided the records to the party from whom the affidavit had been requested. (Note: Subsection (7) requires a written response to the notice be provided to the claimant, whereas subsection (5) requires the claimant to allow, within 56 days of giving notice of an intention to file suit, the health professional or facility receiving the notice to access the medical records related to the claim that are in the claimant's control and vice versa.)

Further, the bill would repeal Section 2912e, which would be amended by House Bill 5905.

House Bill 5905 would amend Section 2912e of the Revised Judicature Act (600.2912e). Section 2912e requires a defendant named in a medical malpractice action to file an answer to the complaint within 21 days and an affidavit of meritorious defense within 91 days of when the affidavit of merit had been filed by the plaintiff.

The bill would add that the court could, upon a showing of good cause, allow the amendment or replacement of an affidavit of merit filed in compliance with the provision's requirements to relate back to the date of the original filing of the affidavit of merit. The bill would apply only to civil actions filed on or after the bill's effective date.

The bill is tie-barred to House Bill 5338.

Legislative Analyst: Susan Stutzky

■ 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.