Legislative Analysis

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MEDICAL MALPRACTICE:
REVISE PROCEDURAL PROVISIONS

House Bill 4571
Sponsor: Rep. Mark Meadows
Committee: Judiciary

Complete to 6-15-09

A SUMMARY OF HOUSE BILL 4571 AS INTRODUCED 3-12-09

The bill would amend several sections of the Revised Judicature Act (MCL 600.2169 et al.) relating to medical malpractice actions and would increase the penalty for an expert witness testifying on a contingency fee basis. Numerous provisions would be revised, with many of the changes being more editorial in nature. House Bill 4571 is nearly identical to House Bill 6277 of the 2007-2008 legislative session. Following is a discussion of some of the substantive changes proposed by the bill.

Expert witnesses

At present, in an action alleging medical malpractice, only a licensed health care professional meeting criteria specified in the act can give expert testimony on the appropriate standard of practice or care. The criteria would be revised for clarity but would also make the following changes:

- Eliminate the requirement that if the defendant health care professional was board certified in a specialty, that the proposed expert witness would have to also be board certified in the same specialty.

- Require that, during the year immediately preceding the date of the occurrence that is the basis for the claim, the proposed expert witness devoted a majority of professional time to one or more of the following:

  ** The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony was offered is licensed.

  ** If the party against whom or on whose behalf the testimony was offered was a general practitioner, active clinical practice as a general practitioner with more than *de minimus* experience in the area relevant to the claim.

  ** If the party against whom or on whose behalf the testimony was offered was a specialist, regardless of whether the party was board-certified, the active clinical practice of that specialty or the specialty the party was practicing at the time of the occurrence.

** The instruction of students in an accredited health professional school or accredited residency or clinical research program in a relevant specialty. (Currently, the expert witness must provide the instruction in the same health profession as the defendant and if the defendant is a specialist, then the expert witness must teach in the same specialty.)

- In determining the qualifications of an expert witness, require the court to also evaluate the certification, if any, of the expert witness.

- Increase the penalty for an expert witness who violates the prohibition on testifying on a contingency basis to a misdemeanor punishable by imprisonment for not more than one year or a fine of not more than $10,000, or both. (Currently, the crime is an unspecified misdemeanor, meaning it is punishable by up to 90 days in jail and/or a maximum fine of $500.)

Further, currently under the act, the tax returns of an expert witness cannot be sought or used by counsel to determine whether an expert witness is qualified, and counsel is forbidden from interviewing the witness's family members concerning the amount of time the witness spends engaged in his or her health profession. The bill would revise this provision to instead specify that financial records of the expert witness that relate to income from acting as an expert witness are discoverable only by leave of court. Information possessed by a family member of the expert witness concerning the amount of time the expert witness spends engaged in the practice of his or her health profession would not be discoverable unless the family member was or had been employed by the expert witness or an entity that employed the expert witness.

Filing a claim of medical malpractice

Currently, at least 182 days before beginning a medical malpractice action, the plaintiff must provide the health professional or health facility a written notice of intent to file a claim. If certain conditions are met, the 182-day period is shortened to 91 days. One of the conditions triggering the shorter time period states the claimant did not identify, *and could not reasonably have identified*, a health professional or health facility to which notice must be sent as a potential party to the action before filing the complaint. The bill would delete the highlighted portion.

The notice of intent to file a claim is required to include specified statements. The bill would delete the requirement to include a statement as to the manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice. The bill would instead add to the list of required statements a description of the injury that the claimant contends was **a** proximate result of the claimed breach of the standard of practice or care by the health professional or health facility; this would pertain to situations in which the health professional was not employed by, or the health facility was not operated by, a governmental entity. If the health professional was employed by, or the health facility operated by, a governmental entity, the statement would have to contain a slightly different statement – a description

of the injury that the claimant contends was **the** proximate result of the claimed breach of the standard of practice or care by the health professional or health facility.

Currently, within 56 days after the claimant gives notice of the intent to file a medical malpractice action, the claimant must allow the health professional or health facility access to all of the medical records related to the claim in his or her control. Instead, the bill would specify that within 56 days of receiving a written request from a health professional or health facility that has received a notice, the claimant must provide the health professional or health facility access to all of the related medical records in his or her control or possession. Likewise, the health profession or health facility would have to allow access to the claimant to medical records related to the claim in the control or possession of the health professional or health facility.

Currently, within 154 days of the receipt of the notice of the intent to file, the health professional or health facility must furnish the claimant with a written response containing specified statements. The statement regarding the standard of practice or care that the health professional or health facility claims to be applicable to the action and that had been complied with would also have to identify any specialty and board certification the health professional or health facility claims to be applicable to the action.

At present, if the claimant did not receive the written response within the required 154-day time period, the claimant may begin an action alleging medical malpractice upon the expiration of the 154-day time period. The bill would add that upon expiration of the 154-day time period, all objections to the notice or its contents would be waived.

Further, the bill would add the following:

- An objection to the form or content of a notice of intent or to a written response would have to be made by motion filed within 28 days after service of the complaint on all defendants.
- If an objection was not filed under the above provision within the 28-day period, all objections to the notice of intent or response would be waived. A motion objecting to a notice of intent or response would have to assert each specific defect being claimed.
- If the trial court determined that a notice of intent or response did not comply with the requirements in the act, the specific basis for that determination would have to be set forth by the court and the court would have to allow the claimant, health professional, or health facility 14 days to amend the notice of intent or response to correct the alleged defect. An amended notice of intent or response under this provision would relate back to the date the original notice or intent or response had been mailed.

Affidavit of merit

The bill would make substantial revisions and additions that essentially would rewrite Section 2912d as follows.

Under the bill, to comply with the time periods specified in Section 2912b (waiting 182 days, or 91 days in certain situations, after filing the notice of intent and before filing a medical malpractice claim), the plaintiff in an action alleging medical malpractice would have to file with the complaint one or more affidavits of merit that do all of the following:

- Describe the standard of practice or care that the plaintiff claims was applicable.
- Contain an expert opinion that the applicable standard of practice or care had been breached by the health professional or health facility.
- State the actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
- State the expert's opinion that the injury was proximately caused by the breach of the standard of practice or care.
- Are signed by a health professional who was reasonably believed to meet the requirements for an expert witness under the bill.

Upon motion of a party for good cause shown, the court in which the complaint was filed would have to grant an additional 56 days in which to file the affidavit of merit. (Currently, the court has discretion to grant an additional 28 days in which to file the affidavit of merit.)

Currently, if the defendant failed to allow access to medical records within the prescribed time periods, the affidavit of merit may be filed within 91 days after filing the complaint. Under the bill, the additional time to file an affidavit of merit would also apply if the defendant failed within the applicable time period to furnish a response to the plaintiff's notice of intent.

If the plaintiff filed an amended complaint that set forth claims arising out of the same conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original complaint, an additional affidavit of merit would not have to be filed unless ordered by the court.

An objection to an affidavit of merit must be raised in a motion filed within 28 days after the plaintiff's complaint and affidavit of merit were served. An objection to an affidavit of merit that was not included in a timely filed motion would be waived. An objection that the health care professional who signed the affidavit did not meet the specialty requirements of Section 2169 would be waived if the defendant had not identified the relevant specialty or board certification as required by the bill in the written response.

If the court determined that the plaintiff had not fully complied with the provisions regarding an affidavit of merit, the plaintiff would have to be given 56 days to file one or more affidavits that correct the deficiencies identified by the court. The filing of the affidavits would relate back to the date of filing the original complaint. If one or more affidavits were filed under this provision, the defendant could renew its objections by filing a motion within 14 days after service of the affidavits.

Affidavit of meritorious defense

The bill would also significantly rewrite Section 2912e, which pertains to affidavits of meritorious defense. Under the bill, the defendant would be required to file with the answer to the complaint one or more affidavits of meritorious defense signed by an expert who was reasonably believed to have met the requirements for an expert witness under Section 2169. An affidavit of meritorious defense could not be signed by the defendant against whom the allegations were made. An affidavit of meritorious defense would have to do all of the following:

- Certify that the expert had reviewed the complaint and all medical records supplied to him or her concerning the allegations contained in the complaint.
- Identify the records reviewed.
- State the factual basis for each defense to the claims made against the defendant in the complaint.
- State the standard of practice or care that the health professional or health facility named as a defendant in the complaint claimed to be applicable to the action.
- Identify each specialty and board certification the health professional or health facility claimed to be applicable to the action.
- State the manner in which it was claimed by the health professional or health facility named as a defendant in the complaint that there had been compliance with the applicable standard or practice or care.
- State the manner in which the health professional or health facility named as a defendant in the complaint contended that the alleged injury or alleged damage to the plaintiff was not proximately caused by the care and treatment rendered.

Under the bill, on motion of a party for good cause shown, the court would have to grant the defendant an additional 56 days in which to file the affidavit of meritorious defense.

Similarly to the new provisions pertaining to affidavits of merit, if the plaintiff filed an amended answer that set forth defenses arising out of the same conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original answer, an additional affidavit of meritorious defense would not have to be filed unless ordered by the court.

An objection to an affidavit of meritorious defense would have to be raised in a motion filed within eight days after the defendant's affidavit of merit was filed. An objection to an affidavit of meritorious defense that was not included in a timely filed motion would be waived.

If the court determined based on a timely filed motion that the defendant had not fully complied with the provisions regarding an affidavit of meritorious defense, the defendant would have to be given 56 days to file one or more affidavits that correct the deficiencies identified by the court. The filing of the affidavits would relate back to the date of filing the original complaint.

Statutes of limitations

The bill would apply provisions pertaining to the statutes of limitations (SOL) or repose also to any time periods for filing an action. The bill would also significantly revise one of the circumstances in which the SOL is tolled (stopped). Currently, the SOL is tolled at the time notice is given *in compliance with the applicable notice period* under Section 2912b, if during that period a claim would be barred *by the SOL or repose; but in such a case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given*. The bill would delete the highlighted portions.

Under the bill, the SOL, repose, or any time periods for filing an action would be tolled at the time notice was given under Section 2912b, if during the applicable notice period a claim would be barred as untimely. If this provision applied, the time to bring the action would be tolled for 182 days beginning the day the notice was given under Section 2912b.

FISCAL IMPACT:

HB 4571 will have an indeterminate, but likely negligible, fiscal impact on the judiciary through the modification of various procedural provisions for medical malpractice actions. Any fine revenue received for a violation under the bill would be dedicated to public libraries.

Furthermore, the increase in the misdemeanor penalty would likely trigger a negligible, although indeterminate, increase in administrative costs for the local judiciary, local corrections facilities, and the Michigan State Police as well.

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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.