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POSITION STATEMENT ON APSEY V. MEMORIAL HOSPITAL

The Problem: A Pointless Requirement with Unintended Consequences

Michigan protects against the filing of improper or false documents in court in several ways: documents must be signed, affidavits must be verified by oath or affirmation, and a person who knowingly makes a false declaration may be required to pay the opposing party reasonable expenses and may even be held in contempt of court. Furthermore, for medical malpractice cases since 1986, Michigan has also required that both patients intending to sue and the medical professionals who are the subject of the lawsuit sign a notarized affidavit stating the opinion of a qualified health professional before the case can begin. The point of the notarization is to certify that the signature of the health professional is valid. Notarizing a document does not and cannot validate the merit of the affidavit.

A 2005 Michigan Court of Appeals decision added an unexpected, costly and unnecessary step for filing an out-of-state document. The decision, Apsey v. Memorial Hospital, reached back to an obscure 1879 provision in the Revised Judicature Act and held that the signatures on out-of-state documents to be filed in a Michigan court must be certified by an out-of-state notary and the notary's notarization itself must be certified by the clerk of a court within the notary's county. The decision was unexpected for several reasons:

- The 1879 provision had not been in use for many decades and was reasonably believed by both plaintiff and defense lawyers to have been rendered moot first by the Legislature's enactment of a 1948 statute and second by its subsequent enactment in 1969 of the Uniform Recognition of Acknowledgements Act.
- No evidence was offered, nor has any been provided since, of problems with out-of-state notarizations.
- The requirement of additional certification by the county clerk of the court is impossible to meet in at least 24 states and the District of Columbia.

The Solution: Remove the Pointless Requirement

The requirement for additional certification that the Court of Appeals imposed serves no useful purpose. It is a pointless barrier to the presentation of nonfrivolous cases and to the legitimate defense of cases and therefore should be eliminated without exception. Removing the unnecessary requirement for all cases would return Michigan to the pre-Apsey practices the Legislature has long sanctioned. Indeed, the Apsey decision acknowledges that it is not based on the wisdom of the requirement and suggests that the Legislature look at whether the requirement is outdated and impossible to meet.

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