

CIVIL PROCEDURE & COURTS COMMITTEE
Respectfully submits the following position on:

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SB 1296

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The Civil Procedure & Courts Committee is comprised of members appointed by the President of the State Bar of Michigan.

The position expressed is that of the Civil Procedure & Courts Committee only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan.

The State Bar position on this matter is take no position, but authorize the committee to advocate its position.

The total membership of the Civil Procedure & Courts Committee is 17.

The position was adopted after an electronic discussion and vote. The number of members in the decision-making body is 17. The number who voted in favor to this position was 11. The number who voted opposed to this position was 2.

Report on Public Policy Position

Name of committee:

Civil Procedure & Courts Committee

Contact person:

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Bill Number:

[SB 1296](#) (Schuitmaker) Civil procedure, statute of limitations; Torts, nonmedical malpractice; Occupations, attorneys. Civil procedure; statute of limitations; statute of repose for actions against an attorney-at-law or a law firm; enact. Amends sec. 5838 of 1961 PA 236 (MCL 600.5838) & adds sec. 5838b.

Date position was adopted:

November 13, 2012

Process used to take the ideological position:

Position adopted after an electronic discussion and vote.

Number of members in the decision-making body:

17

Number who voted in favor and opposed to the position:

11 Voted for position

2 Voted against position

0 Abstained from vote

4 Did not vote

Position:

Support with Recommended Amendment

Explanation of the position, including any recommended amendments:

After reviewing the revised bill, the majority of the committee voted to support the substitute bill, with the exception of the addition of “or 5838b” in section 5838(1). Section 5838(1) defines accrual of a malpractice claim. Section 5838b does not address accrual of a legal malpractice claim or create a unique accrual rule for legal malpractice claims (unlike section 5838a, which is currently an exception to the general accrual rule, applying specifically to medical malpractice claim accrual). The cross-reference to 5838b in 5838(1) is unnecessary and could lead to confusion.

Also, the reference in 5805(15) to “5838A” should state “5838a.”

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

<http://legislature.mi.gov/doc.aspx?2012-SB-1296>

**Probate and Estate Planning Section Approved
Substitute for SB 1296 (as of 10.27.2012)**

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961," by amending section 5805 (MCL 600.5805), amending section 5838 (MCL 600.5838), and by adding section 5838b.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 5805.

(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

(2) Subject to subsections (3) and (4), the period of limitations is 2 years for an action charging assault, battery, or false imprisonment.

(3) The period of limitations is 5 years for an action charging assault or battery brought by a person who has been assaulted or battered by his or her spouse or former spouse, an individual with whom he or she has had a child in common, or a person with whom he or she resides or formerly resided.

(4) The period of limitations is 5 years for an action charging assault and battery brought by a person who has been assaulted or battered by an individual with whom he or she has or has had a dating relationship.

(5) The period of limitations is 2 years for an action charging malicious prosecution.

(6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

(7) The period of limitations is 2 years for an action against a sheriff charging misconduct or neglect of office by the sheriff or the sheriff's deputies.

(8) The period of limitations is 2 years after the expiration of the year for which a constable was elected for actions based on the constable's negligence or misconduct as constable.

(9) The period of limitations is 1 year for an action charging libel or slander.

(10) Except as otherwise provided in this section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property.

(11) The period of limitations is 5 years for an action to recover damages for injury to a person or property brought by a person who has been assaulted or battered by his or her spouse or former spouse, an individual with whom he or she has had a child in common, or a person with whom he or she resides or formerly resided.

(12) The period of limitations is 5 years for an action to recover damages for injury to a person or property brought by a person who has been assaulted or battered by an individual with whom he or she has or has had a dating relationship.

(13) The period of limitations is 3 years for a products liability action. However, in the case of a product that has been in use for not less than 10 years, the plaintiff, in proving a prima facie case, shall be required to do so without benefit of any presumption.

(14) An action against a state licensed architect or professional engineer or licensed professional surveyor arising from professional services rendered is an action charging malpractice subject to the period of limitation contained in subsection (6).

(15) The periods of limitation under this section are subject to the applicable period of repose established in ~~section~~ **SECTIONS 5838A, 5838B,** and 5839.

(16) The amendments to this section made by the 2011 amendatory act that added this subsection apply to causes of action that accrue on or after the effective date of that amendatory act.

(17) As used in this section, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

Sec. 5838. (1) Except as otherwise provided in section 5838a **OR 5838B**, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

(2) Except as otherwise provided in section 5838a **OR 5838B**, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The **PLAINTIFF HAS THE** burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim ~~shall be on the plaintiff. A malpractice action which~~ **THAT** is not commenced within the time prescribed by this subsection is barred.

SEC. 5838B.

(1) AN ACTION FOR LEGAL MALPRACTICE AGAINST AN ATTORNEY-AT-LAW OR A LAW FIRM SHALL NOT BE COMMENCED AFTER THE EARLIER OF:

(A) THE EXPIRATION OF THE APPLICABLE PERIODS OF LIMITATION DESCRIBED IN THIS CHAPTER, OR

(B) 6 YEARS AFTER THE DATE OF THE ACT OR OMISSION THAT IS THE BASIS FOR THE CLAIM.

(2) A LEGAL MALPRACTICE ACTION THAT IS NOT COMMENCED WITHIN THE TIME PRESCRIBED BY SUBSECTION (1) IS BARRED.

(3) AS USED IN THIS SECTION:

(A) “LAW FIRM” MEANS A PERSON OR ENTITY THAT IS PRIMARILY ENGAGED IN THE PRACTICE OF LAW, REGARDLESS OF WHETHER IT IS ORGANIZED AS A SOLE PROPRIETORSHIP, PARTNERSHIP, LIMITED LIABILITY PARTNERSHIP, PROFESSIONAL LIMITED LIABILITY COMPANY, PROFESSIONAL CORPORATION, OR OTHER BUSINESS ENTITY. THE TERM “LAW FIRM” ALSO INCLUDES A LEGAL SERVICES ORGANIZATION.

(B) “ATTORNEY-AT-LAW” MEANS AN INDIVIDUAL LICENSED TO PRACTICE LAW IN THIS STATE OR ELSEWHERE.

IF RECOMMENDING STATE BAR ACTION ON THIS ISSUE, COMPLETE THE FOLLOWING:

List any arguments against the position:

Two committee members opposed this position on the basis that the proposed statute does not contain an exception for fraud. These committee members would have suggested that the legal malpractice statute of repose contain an exception that would track the relevant language of 5838a(2) and (3) (i.e. the medical malpractice statute of repose) thereby allowing a plaintiff to bring the claim within 6 months of discovering it, if discovery of the existence of the claim was prevented by the fraudulent conduct of the attorney-at-law or law firm against whom the claim is made.

FOR LEGISLATIVE ISSUES ONLY:

This position falls within the following Keller-permissible category:

- The regulation and discipline of attorneys
- The improvement of the functioning of the courts
- The availability of legal services to society
- The regulation of attorney trust accounts
- ✓ The regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.