

**To: New Jersey Law Revision Commission**  
**From: Jayne Johnson**  
**Re: Pending legislation revising the statutes governing the affidavit of merit**  
**Date: March 6, 2017**

## MEMORANDUM

### Executive Summary

Staff presented the text of A3620 at the January 2017 Commission meeting, before joining discussions concerning the bill at the Sponsor's district office. The Commission provided comments concerning potential conflicts with the Federal Rules of Civil Procedure and issues that may implicate the statute of limitations. Staff shared these insights during the discussion at the Sponsor's district office and they were well-received. The Sponsor requested additional research concerning the potential issues involving the *Erie* Rule and any drafting guidance the Commission may provide to steer clear of conflicts with the federal pleading rules.

This Memorandum provides the results of Staff's research regarding state affidavit or certificate of merit statutes, and federal court decisions that consider whether the state statutes conflict with the Federal Rules of Civil Procedure. The outcomes of the federal decisions concerning affidavit of merit statutes vary considerably without giving clear guidance as to what aspects of the statutes may co-exist or conflict with the federal rules.

The United States Court of Appeals for the Third Circuit (Third Circuit), which serves Pennsylvania, New Jersey, Delaware, and the Virgin Islands, reviewed the decision of the U.S. District Court, District of New Jersey in *Chamberlain v. Giampapa*.<sup>1</sup> The Third Circuit held that the New Jersey affidavit of merit statute, as currently written, does not conflict with the Federal Rules of Civil Procedure, since it meets the following criteria: (1) the statute does not create a procedural rule, but instead, seeks to deter meritless claims by providing notice of the claims, along with the defenses of the claims and parties; (2) the affidavit is required after the initial filings are submitted; and (3) the content of the affidavit is not required with specificity.

The Delaware statute, on the other hand, like the proposed revisions to A3620, requires the affidavit of merit to be filed contemporaneously with the complaint. While the Third Circuit has not considered the Delaware statute, the U.S. District Court, District of Delaware, has applied the Delaware statute in federal courts, without finding conflict with the federal pleading rules.

Staff finds that based on the reasoning provided in *Chamberlain* and the subsequent Third Circuit decisions, maintaining language already recognized and affirmed by the Third Circuit, may be most advisable in this unsettled area of law. While the U.S. Supreme Court, in *Shady Grove*, determined that conflict with a federal rule does not doom a state law that effects

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<sup>1</sup> *Chamberlain v. Giampapa*, 210 F.3d 154 (3d Cir. 2000).

substantive goals by procedural aims, Staff observes that challenges to the New Jersey affidavit of merit statute standing side-by-side with the federal rules, are not likely if revisions to the statute require the affidavit to be filed after the initial pleadings and avoid dictating with specificity the content of the affidavit.

### **Federal Consideration – Affidavit of Merit statutes**

The affidavit of merit or certificate of merit statutes, as they are referred to in some states, “become relevant whenever state malpractice law provides the rule of law” for cases decided in federal court.<sup>2</sup> Since there is “no general federal malpractice cause of action, any medical negligence case in federal court” will apply state medical negligence law.<sup>3</sup> “Medical negligence actions arrive in federal court under three different scenarios:”

- Diversity cases – matters where the parties reside in different states or jurisdictions;
- Federal question cases in which a state malpractice claim is pendent to the federal claim, and
- Malpractice claims against the federal government arising under the Federal Tort Claims Act (FTCA).<sup>4</sup>

Cases brought under any of these three circumstances generate an inquiry by the federal court to determine whether the state law should be applied in the federal proceedings.<sup>5</sup> The outcomes of federal decisions involving application of state affidavit of merit statutes vary considerably within and amongst the twelve circuits, and the decisions fail to provide clear guidance as to what aspects of the statutes may co-exist or conflict with the federal rules.

#### **A. The Erie Rule**

Most of the federal decisions considering affidavit of merit statutes or their equivalent involve cases where each of the parties are domiciled in different states or jurisdictions.<sup>6</sup> When a case comes before a federal court due to the parties’ diversity of citizenship, the court applies state substantive law and federal procedural law, and the results of the court proceedings should be similar to the outcome that would occur if the same matter were heard before a state court.<sup>7</sup>

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<sup>2</sup> Benjamin Grossberg, *Uniformity, Federalism, and Tort Reform: The Erie Implication of Medical Malpractice Certificate of Merit Statutes*, 159 U. Pa. L. Rev. 217, 225 (2010).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 225-26.

<sup>5</sup> *Id.* at 226.

<sup>6</sup> *Id.*

<sup>7</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

This doctrine is referred to as the “Erie rule,” as established in the case, *Erie R.R. v. Tompkins*,

in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of a litigation in federal court [will] be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be tried in a State court.”<sup>8</sup>

The Erie rule serves “twin aims” to (1) discourage forum shopping; and (2) avoid inequitable administration of the laws.<sup>9</sup> The Third Circuit, explained that in medical malpractice claims, this rule prevents

[p]laintiffs who have been unable to secure expert support for their claims and face dismissal under the statute in state court may, by filing in the federal court, be able to survive beyond the pleading stage and secure discovery. The resulting opportunity for a ‘fishing expedition,’ which would hold the hope of turning up evidence of a meritorious claim or of a settlement to save defense litigation costs, can reasonably be expected to affect the forum choice of these plaintiffs.<sup>10</sup>

The Court further observed in cases involving medical malpractice,

[a] defendant in a federal court that refused to apply the affidavit requirement would be unfairly exposed to additional litigation time and expense before the dismissal of a non-meritorious lawsuit could be secured, merely because the plaintiff is a citizen of a different state. Perhaps more importantly, the reputation of the professional involved would be more likely to suffer the longer the lawsuit went on, putting added pressure on the defendant to settle rather than endure extensive discovery.<sup>11</sup>

Under *Hanna*, a federal court sitting in diversity first must determine

- whether a Federal Rule directly “collides” with the state law it is being urged to apply.
- If there is such a direct conflict, the Federal Rule must be applied if it is constitutional and within the scope of the Rule Enabling Act.
- If a ‘direct collision’ does not exist, then the court applies the *Erie* rule to determine if state law should be applied.<sup>12</sup>

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<sup>8</sup> *Erie R.R.*, 304 U.S. at 78 (1938).

<sup>9</sup> *Chamberlain*, 210 F.3d at 158-59 (3d Cir. 2000), citing *Guaranty Trust Co. v. York*, 326 U.S. at 109.

<sup>10</sup> *Chamberlain*, 210 F.3d at 161.

<sup>11</sup> *Id.*

<sup>12</sup> *Chamberlain*, 210 F.3d at 159, citing *Hanna v. Plumer*, 380 U.S. 460, 463-64 (1965).

The U.S. Supreme Court added two caveats to the Erie doctrine: (1) even though application of the state rule may hold some potential for affecting the outcome, a strong countervailing federal interest will dictate recourse to the federal rule; (2) the *Erie* rule may not be ‘invoked to void a Federal Rule of Civil Procedure.’<sup>13</sup> The Court explained that

[w]here a Federal Rule of Civil Procedure provides a resolution of an issue, that rule must be applied by a federal court sitting in diversity to the exclusion of a conflicting state rule so long as the federal rule is authorized by the Rules Enabling Act and consistent with the Constitution.<sup>14</sup>

### **B. *Shady Grove***

The Supreme Court, in *Shady Grove*, discussed the issues that arise when considering whether a state statute collides with federal procedural rules.<sup>15</sup> Noting that, as *Erie* acknowledged, “the line between procedural and substantive law is hazy,” and “matters of procedure and matters of substance are not mutually exclusive categories with easily ascertainable contents.”<sup>16</sup> The Court further explained that

[a] ‘state procedural rule, though undeniably ‘procedural’ in the ordinary sense of the term,’ may exist ‘to influence substantive outcomes’<sup>17</sup>, and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy. Such laws, for example, may be seemingly procedural rules that make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim.<sup>18</sup>

In accord, Justice Stevens stated, in his concurrence which is now the controlling opinion of the *Shady Grove* decision, that the “conflict with a federal rule does not doom a state law that effects substantive goals by procedural aims.”<sup>19</sup>

### **C. *Chamberlain v. Giampapa***

In a case of first impression, the Third Circuit considered, in *Chamberlain v. Giampapa*, whether the New Jersey affidavit of merit statute collides with the Federal Rules of Civil

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 419 (2010) (Stevens, J., concurring).

<sup>16</sup> *Erie R. Co.*, 304 U.S. at 92.

<sup>17</sup> *Shady Grove*, 559 U.S. 420, citing *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995) (Posner, J.)

<sup>18</sup> *Shady Grove*, 559 U.S. at 420.

<sup>19</sup> *Shady Grove*, 559 U.S. at 419.

Procedure.<sup>20</sup> The underlying action was filed months after the affidavit of merit statute was enacted, by a plaintiff dissatisfied with the results of plastic surgery.<sup>21</sup> The plaintiff failed to file an affidavit of merit as a part of the medical malpractice claim, and the suit was subsequently dismissed with prejudice.<sup>22</sup>

On appeal, the plaintiff argued that the “New Jersey affidavit of merit statute conflicts with Federal Rule 8 and 9, which govern the content of pleadings in federal actions.”<sup>23</sup> The Court held that the affidavit of merit statute, as currently written, does not conflict with the Federal Rules of Civil Procedure and must be applied by federal courts sitting in diversity. The Court observed that

Rule 8 requires only a short and plain statement of the claim showing that the pleader is entitled to relief. The only situations that require pleading with particularity are specified in Rule 9, and a malpractice claim is not one of the situations listed in that rule.<sup>24</sup>

The Third Circuit found “no direct conflict between the New Jersey affidavit of merit statute and Federal Rules 8 and 9.” The Court found that the “overall purpose” of the New Jersey statute “is to provide notice of the claims, defenses of the claims, and defenses of the parties.”<sup>25</sup> In contrast, “Rules 8 and 9 dictate the content of the pleadings and the degree of specificity that is required” under federal law.

The Court observed that the New Jersey statute as currently provided

has no effect on what is included in the pleadings of a case or the specificity thereof. The required affidavit is not a pleading, it is not filed until after the pleadings are closed, and does not contain a statement of the factual basis for the claim. Its purpose is not to give notice of the plaintiff’s claim, but rather to assure that malpractice claims for which there is no expert support will be terminated at an early stage in the proceedings. This state policy can be effectuated without compromising any of the policy choices reflected in Rules 8 and 9. In short, these Federal Rules and the New Jersey Statute can exist side by side, ‘each controlling its own intended sphere of coverage without conflict.’<sup>26</sup>

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<sup>20</sup> *Chamberlain*, 210 F.3d at 159.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 158.

<sup>23</sup> *Id.*; see Fed. R. Civ. P. 8(a), 9 (West 2017).

<sup>24</sup> *Chamberlain*, 210 F.3d at 160.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

The Third Circuit identified that the “twin aims” of the Erie rule were served by the Court’s holding, and ruled that by

requiring dismissal to adhere to the statute, the New Jersey legislature clearly intended to influence substantive outcomes. It sought early dismissal of meritless lawsuits, not merely to apply a new procedural rule. Clearly, failure to apply the statute in a federal diversity action where no affidavit of merit has been filed would produce a different outcome than that mandated in a state proceeding.<sup>27</sup>

**D. Guidance from the *Chamberlain* holding**

The Third Circuit, in *Chamberlain*, also addressed the “stipulation in the New Jersey statute that a failure to file the required affidavit ‘shall be deemed a failure to state a cause of action.’ ” The Court rejected the interpretation that the stipulation “somehow renders pleadings insufficient that would otherwise be sufficient.” Instead, the Court found the stipulation to mean that “failure to file must result in dismissal with prejudice unless extraordinary circumstances are shown” – failure to file shall be deemed the same as failure to state a claim.<sup>28</sup>

In order for the state statute and the federal pleading rules to exist side by side, the Court articulated several factors that the New Jersey affidavit of merit statute, as currently drafted, maintains:

(1) The overall purpose of the statute is to provide *notice* of the claims and defense of the parties:

- a. The purpose of the statute is to ensure that malpractice claims lacking expert support will be dismissed at an early stage of the proceedings;
- b. The goal of the statute is to deter and dismiss meritless claims.

(2) The statute does not impose on the specificity or substance of the pleading requirements;

(3) The affidavit of merit, itself, is not a pleading;

(4) It is filed after the pleadings are closed.

Revisions to the New Jersey affidavit of merit statute should maintain the following objectives as identified by the Third Circuit in *Chamberlain*,

- (1) Promotes the interest of the State through substantive outcomes – early dismissal of meritless law suits;

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<sup>27</sup> *Id.* at 161.

<sup>28</sup> *Id.* at 160.

- (2) Does not seek to create a procedural rule;
- (3) Provides notice of the claims and defenses of the parties – is not a pleading.

The current version of the New Jersey statute, reads in part, as follows:

for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill, or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.<sup>29</sup>

A3620 proposes the following revisions:

for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, [ **within 60 days following the date** ] at the time of filing [ **of the answer to** ] the complaint [ **by the defendant** ] , provide each defendant, including any business entity named as a defendant, with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The affidavit shall include a specific articulation of the duty of care allegedly breached and the conduct that constituted that breach, and shall provide the basis for identifying that duty, which shall not limit or preclude supplementation of the areas of alleged deviation in any subsequent formal expert report. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.<sup>30</sup>

## **E. Third Circuit Decisions after *Chamberlain***

### **1. Pennsylvania**

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<sup>29</sup> N.J. STAT. ANN. §2A:53A-27(West 2017).

<sup>30</sup> AB 3620, 2016-2017 Leg., 218 Sess. (N.J. 2017).

The Third Circuit continues to follow the precedent established in *Chamberlain* when considering affidavit or certificate of merit statutes.<sup>31</sup> The Third Circuit, in *Liggon-Reading v. Estate of Robert Sugarman*, considered the Pennsylvania statute, under an analysis similar to the *Chamberlain* review of the New Jersey statute.<sup>32</sup> The Court held that Pennsylvania Rule 1042.11 did not conflict with the federal pleading rules, but instead, was substantive state law, which must be applied by a federal court sitting in diversity.<sup>33</sup>

The Third Circuit held that “the ‘twin aims’ of Erie, therefore, weigh in favor of concluding that the Pennsylvania rule is substantive, rather than procedural.”<sup>34</sup> The Court identified that the form and filing time supported the Court’s finding that the rule was not a pleading and did not conflict with federal procedural rules.<sup>35</sup> The Court stated that

[a]s was the case with the New Jersey statute, Pennsylvania Rule 1042.3 does not govern the content of pleadings or the level of specificity contained therein. The Pennsylvania Certificate of Merit, like its New Jersey counterpart, is not a pleading and need not be filed until well after the complaint. The Pennsylvania rule does not interfere with the pleading standards set forth in Federal Rules 8 and 9. Therefore, these rules can co-exist with the Federal Rules.<sup>36</sup>

Most recently, the Third Circuit held in *Schmigel v. Uchal*, that the notice requirement of the Pennsylvania certificate of merit statute (COM) is the “centerpiece” of the provision and must be applied as state substantive law by federal courts.<sup>37</sup> The Court, in a case of first impression concerning this condition precedent, highlighted that the certificate must be submitted “within sixty days of filing ‘any action based upon an allegation that a licensed professional deviated from an acceptable professional standard.’ ”<sup>38</sup> The Court ruled that

Pennsylvania's notice requirement, like the COM requirement itself, is substantive state law under *Erie* and therefore must be applied by a federal court sitting in diversity. We base this conclusion on (1) our precedent addressing Pennsylvania's COM rules and New Jersey's analogous Affidavit of Merit (“AOM”) statute; and (2) an independent application of our three-part test under the *Erie* doctrine.<sup>39</sup>

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<sup>31</sup> See *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. Withum Smith Brown, P.C.*, 692 F.3d 283, 302 (3d Cir.2012).

<sup>32</sup> *Liggon-Reading v. Estate of Robert Sugarman*, 659 F.3d 258, 260 (3d. Cir. 2011).

<sup>33</sup> See *id.* at 264-65

<sup>34</sup> PA. R. CIV. P.1042.3 (West 2017).

<sup>35</sup> *Id.*

<sup>36</sup> *Liggon-Reading*, 659 F.3d. at 263.

<sup>37</sup> *Schmigel v. Uchal*, 800 F.3d 113, 120-24 (3d Cir. 2015).

<sup>38</sup> *Id.* at 122.

<sup>39</sup> *Id.* at 120.

## 2. Delaware

Unlike the New Jersey or Pennsylvania statutes, which require the affidavit of merit to be filed after the pleadings are closed, the Delaware statute requires the affidavit of merit to “accompany” the complaint. Del. Stat. Ann. § 6853 provides the following:

(a) No health-care negligence lawsuit shall be filed in this State unless the complaint is accompanied by:

(1) An affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant. If the required affidavit does not accompany the complaint or if a motion to extend the time to file said affidavit as permitted by paragraph (a)(2) of this section has not been filed with the court, then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court.<sup>40</sup>

The federal district court, in an unreported decision, held that

[f]ailure to file an affidavit under § 6853 is grounds for dismissal of a state law medical negligence suit. State statutes requiring affidavits of merit constitute substantive law that federal courts must apply in diversity professional negligence suits.<sup>41</sup>

Similarly, in dicta, the federal district court, responded to a plaintiff’s argument that unlike New Jersey or Pennsylvania’s statute, “Delaware’s affidavit of merit requirement is procedural, not substantive, and therefore does not apply in diversity suits brought in federal court.”<sup>42</sup> The federal district court noted that the Third Circuit and many federal district courts have *implicitly* assumed that the affidavit of merit statute is applicable in diversity suits.<sup>43</sup>

Although federal district courts recognize the Delaware statute, which requires the affidavit of merit to accompany the complaint, the Third Circuit, to date, has not considered the Delaware statute in a published decision.<sup>44</sup> If the Third Circuit considers the Delaware statute, the Court may, as in other circuits, preserve the statute, possibly on the reasoning of Justice

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<sup>40</sup> DE. STAT.ANN. 6853 (West 2017) (See Appendix for the full text).

<sup>41</sup> *Hopkins v. Frontino*, 2012 WL 32400 (Jan. 5, 2012); *see also Davis v. Corr. Med. Servs.*, 760 F.Supp.2d 469, 475 -76 (D. Del.2011).

<sup>42</sup> *See, e.g., Woods v. First Corr. Med., Inc.*, 2011 WL 3627393 (3d Cir. Aug. 18, 2011); *Hartman v. Corr. Med. Servs.*, 366 F. App’x 453 (3d Cir.2010); *Davis v. Corr. Med. Servs.*, 760 F.Supp.2d 469 (D.Del.2011); *Turner v. Kastre*, 741 F.Supp.2d 578 (D.Del.2010); *Diaz v. Carroll*, 570 F.Supp.2d 571 (D.Del.2008).

<sup>43</sup> *Id.* (emphasis added).

<sup>44</sup> *Shady Grove v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010).

Stevens in *Shady Grove*, that the statute serves substantive goals, reducing meritless claims, by “procedural aims.”<sup>45</sup> Beyond the Third Circuit, the outcomes of federal decisions concerning affidavit of merit statutes, vary as much as the individual provisions, without giving clear guidance as to what aspects of the statutes may co-exist or conflict with the federal rules.

## **F. Federal Decisions Outside of the Third Circuit**

### **1. State statutes requiring the affidavit to be filed contemporaneously with the complaint**

Delaware is in a category of states, along with Michigan, Ohio, Florida, Georgia, and Texas, with statutes that provide for the affidavit of merit to be filed contemporaneously with the complaint.

The Michigan statute, for example, reads in part,

the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.1 The affidavit of merit shall certify that the health professional 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 and shall contain a statement of each of the following

The Sixth Circuit, in *Sellars v. U.S.*, considered whether the Michigan statute applied in federal court, when deciding a claim filed under the Federal Torts Claim Act.<sup>46</sup> The Court held that the statute did not conflict with federal pleading rules and should be applied in federal court.<sup>47</sup> Later, the U.S. District Court, Eastern District of Michigan, followed the reasoning of the Sixth Circuit in an unreported decision, *Luckett v. United States*, and also held that state affidavit of merit statute applied in federal court under a similar claim.<sup>48</sup> Likewise, the U.S. District Court, Western District determined that the statute should be applied as substantive law in federal diversity actions.<sup>49</sup>

On the other hand, several federal district courts in Ohio, including the Northern District of Ohio, Western Division, held that the “ ‘Ohio Civ. R. 10(D)(2) states a procedural rule of law . . . [and] as a result of a direct conflict with the Federal Civil Rules’ ” does not apply in federal

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<sup>45</sup> *Id.*

<sup>46</sup> *Sellars v. United States*, 870 F.2d 1098, 1101 (6th Cir.1989); 28 U.S.C. § 1346(b)(1) (West 2017).

<sup>47</sup> *Id.*

<sup>48</sup> *Luckett v. United States*, 2009 WL 1856417 \*159 (E.D. Mich. June 29, 2009).

<sup>49</sup> *Jones v. Correctional Med. Svcs.*, 845 F.Supp.2d 824 (2012).

court. The Court also found that “ ‘Rule 8 is a legitimate exercise of Congress's power over federal procedure through the Rules Enabling Act and therefore the requirements of the state rule do not apply in this case.’ ”<sup>50</sup> The Ohio statute reads in part,

Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in R.C. 2305.113, shall be accompanied by one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability.

In *Larca v. U.S.*, the U.S. District Court, Northern District of Ohio, agreed with two prior district court decisions, finding that the Ohio state statute conflicted with the federal pleading rules, in an action brought under the Federal Tort Claims Act.<sup>51</sup> The Court determined that the Ohio affidavit of merit statute, should not be applied as substantive law, since it directly collides with the pleading requirements set forth in Rules 8 and 9 of the Federal Rules of Civil Procedure.<sup>52</sup>

The Eleventh Circuit, in *Brown v. Nichols*, considered the Georgia affidavit of merit statute, as originally enacted, and determined that the statute did not conflict with Federal Rule 8.<sup>53</sup> The Court, however, did not decide whether the statute, which requires the affidavit to be filed contemporaneous with the complaint, should apply in a federal diversity action.<sup>54</sup> Subsequently, the federal district court considered the issue and determined that the Georgia statute is in direct conflict with the notice pleading standard of Federal Rule 8(a).<sup>55</sup> Moreover, the federal district court in *Baird v. Celis*, held that the statute applied “exclusively to actions brought in state court and was not applicable in federal cases.”<sup>56</sup>

Similarly, the Middle District Court of Florida, in *Braddock v. Orlando Regional Health Care Sys., Inc.*, also found that the Florida affidavit of merit statute, which requires a contemporaneous filing, created a heightened pleading requirement that directly conflicts with Federal Rule 8(a).<sup>57</sup> However, when the federal district court, in *Ellingson v. Walgreen Co.*, applied the Minnesota affidavit of merit statute, which requires contemporaneous filing with the

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<sup>50</sup> *Gold v. City of Sandusky*, 2016 WL 5462970 \*2 (N.D. Ohio September 29, 2016).

<sup>51</sup> *Larca v. U.S.*, 302 F.R.D. 148, 158 - 59 (N.D. Ohio 2014); *see also Thompson v. U.S.*, 2013 WL 3480347 (N.D. Ohio, July 10, 2013); *Muncy v. Siefker*, 2013 WL 1284233 (N.D. Ohio March 26, 2013).

<sup>52</sup> *Larca*, 302 F.R.D. at 159.

<sup>53</sup> *Brown v. Nichols*, 8 F.3d 770, 772 (11th Cir. 1993).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Baird v. Celis*, 41 F.Supp.2d 1358, 1362 (N.D.Ga.1999).

<sup>57</sup> *Braddock v. Orlando Regional Health Care Sys., Inc.*, 881 F.Supp. 580, 584 (M.D.Fla.1995).

complaint, in a federal diversity action; the district court found that the state statute was substantive, not procedural law, and applied the statute in the federal diversity action.<sup>58</sup>

Earlier in *Estate of C.A. v. Grier*, the Southern District of Texas, considered the certificate of merit statute governing licensed or registered professionals. The statute has a contemporaneous filing requirement, and reads in part

[i]n any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor.<sup>59</sup>

The Court held that the certificate of merit requirement was procedural and thus, was not applicable in federal court.<sup>60</sup>

## **2. State statutes requiring the affidavit to be filed after the close of the pleadings**

The Fifth Circuit, in *Passmore v. Baylor Health Sys.*, later considered the Texas statute governing expert reports in medical negligence claims, which requires the plaintiff to file the affidavit “not later the 120th day after the date each defendant’s original answer is file.” The Fifth Circuit found that the statute undeniably regulates discovery and significantly interferes with “federal control of discovery.” The Court held that the statute directly conflicts with federal law since “ [d]iscovery is a procedural matter, which is governed [in federal court] by the Federal Rules of Civil Procedure.’ ”

However, the Tenth Circuit, in *Trierweiler v. Croxton & Trench Holding Corp.*, provided one of the early federal appellate decisions considering whether state affidavit of merit statutes conflict with federal law. The Court determined that the Colorado affidavit of merit statute did not directly collide with the federal pleading rules.<sup>61</sup>

The Colorado statute requires that,

[w]ithin 60 days of filing a malpractice claim against a license professional (or an

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<sup>58</sup> *Ellingson v. Walgreen Co.*, 78 F.Supp.2d 965, 968-69 (D.Minn.1999) (finding that the Court was called to consider a separate issue under the federal pleading rules, determining whether the state statute governing expert affidavit conflicted with Federal Rule 26(a), which addresses controlled expert disclosures. The district court found that the state statute was substantive, not procedural law, and applied the statute in the federal diversity action).

<sup>59</sup> *Passmore v. Baylor Health Sys.* 823 F.3d 292, 298-99 (5th Cir. 2016) (noting that a different filing requirement is provided for medical negligence claims. Under the Texas statute, the plaintiff must file an affidavit of merit “not later the 120th day after the date each defendant’s original answer is file”).

<sup>60</sup> *Estate of C.A. v. Grier*, 752 F. Supp. 2d 763, 768 (S.D. Tex. 2010).

<sup>61</sup> *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1541 (10th Cir.1996).

acupuncturist), the plaintiff must file a certificate that he/she has consulted with an appropriate professional who opined that the defendant breached the standard.<sup>62</sup>

The Court observed that

Both rules demonstrate an intent to weed unjustifiable claims out of the system.

Despite the superficial similarity of the two rules, we conclude that they do not collide. Rule 11 and § 13–20–602 “can exist side by side, . . . , each controlling its own intended sphere of coverage without conflict.” While § 13–20–602 penalizes the party, Rule 11 targets the attorney (although it does apply to unrepresented parties appearing pro se). Furthermore, § 13–20–602 does not merely operate to discourage frivolous claims; it does so only with respect to lawsuits filed against licensed professionals, and it also seeks “to expedite the litigation process in [such] cases” by imposing a 60–day time limit.

On the other hand, the Eighth Circuit found that the North Dakota affidavit of merit statute conflicts with the federal rules of pleading. The Court held that the Federal Rules of Civil Procedure should be followed instead.<sup>63</sup> The state statute requires that the affidavit supporting a medical malpractice claim “must be filed within 3 months of suit.” The Eighth Circuit stated that the affidavit of merit statute “collides” with the federal rules, and provided the following explanation:

- The federal and state provisions involved in this case both seek to penalize parties that file baseless suits. Fed. R. Civ. P. 11 allows sanctions for frivolous suits and Fed. R. Civ. P. 37 governs the sanctions to be imposed for discovery disputes.
- The federal rules adopt a case-by-case approach to discovery of experts and identifying and deterring frivolous actions. On the other hand, § 28–01–46 automatically characterizes every medical malpractice suit as frivolous where an expert affidavit is not obtained within three months and mandates dismissal of such suits. . . . These two provisions cannot operate simultaneously.<sup>64</sup>

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<sup>62</sup> Colo. Rev. Stat. 3–20–602 (West 2017).

<sup>63</sup> *Serocki v. MeritCare Health Sys.*, 312 F. Supp. 2d 1201, 1209 (D.S.D. 2004).

<sup>64</sup> *Id.* at 1209-1210.

However, in another case from the Eight Circuit, the federal district court in *Hill v. Morrison*, found that the Missouri statute which requires the affidavit to be filed no later than ninety days after the filing of the petition, did not conflict with the Federal Rule 11.<sup>65</sup>

### Conclusion

These varying federal decisions provide mixed guidance, demonstrating that the case law in this area still remains unsettled. As one legal observer noted the state federal district decisions are “murkier” than the appellate opinions, and

one reason for the lack of settled appellate law is that *Erie* issues at the pleading stage are generally not appealed. In most states, a plaintiff who fails to file a certificate of merit will be given a second chance. Assuming the plaintiff is then able to fulfill the requirements of the statute, [the plaintiff] may never have a reason to appeal the prior ruling.<sup>66</sup>

The outcomes of the federal decisions concerning affidavit of merit statutes, vary as much as the individual provisions, without giving clear guidance as to what aspects of the statutes may co-exist or conflict with the federal rules.<sup>67</sup>

Revisions to the New Jersey statute, requiring the plaintiff to file the affidavit contemporaneously with the complaint may survive Third Circuit review. Following the reasoning of Justice Stevens in *Shady Grove*, the statute may be preserved if it is found to effect substantive goals by procedural aims.

While the U.S. Supreme Court in *Shady Grove*, determined that conflict with a federal rule does not doom a state law that effects substantive goals by procedural aims, Staff observes that challenges to the New Jersey affidavit of merit statute standing side-by-side with the federal rules, are even less likely if revisions to the statute do not dictate with specificity the content of the affidavit and require the affidavit to be filed after the initial pleadings.

Staff finds that maintaining language already recognized and affirmed by the Third Circuit may be most advisable, in this still unsettled area of the law. The guidance provided from *Chamberlain* may best direct proposed statutory language revising the New Jersey affidavit of merit statute.

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<sup>65</sup> *Hill v. Morrison*, 870 F.Supp. 978 (W.D.Mo.1994) (Missouri statute requiring medical malpractice plaintiff to submit affidavit did not conflict with Fed. R. Civ. P. 11; *see also Connolly v. Foudree*, 141 F.R.D. 124 (S.D. Iowa 1992) (Iowa's statutory requirement of early disclosure of expert witnesses in professional malpractice cases did not conflict with Fed.R.Civ.P. 26(b)(4)(A)(i)).

<sup>66</sup> Benjamin Grossberg, *Uniformity, Federalism, and Tort Reform: The Erie Implication of Medical Malpractice Certificate of Merit Statutes*, 159 U. Pa. L. Rev. 217, 228 (2010).

<sup>67</sup> *See id.*

Note - A fifty-state survey of the states with certificate or affidavit of merit statutes will be provided for further review, along with the full text of the bill A3620 proposing revisions to the New Jersey affidavit of merit statute.

Any additional drafting guidance that the Commission may provide to steer the Legislation away from potential conflicts with the federal pleading rules or other conflicts, will be greatly appreciated.

## APPENDIX

### EXAMPLES OF STATUTORY LANGUAGE:

#### I. STATUTES FROM OTHER STATES IN THE THIRD CIRCUIT

##### A. DELAWARE – DEL. STAT. ANN. 6854

a) No health-care negligence lawsuit shall be filed in this State unless the complaint is accompanied by:

(1) An affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant. If the required affidavit does not accompany the complaint or if a motion to extend the time to file said affidavit as permitted by paragraph (a)(2) of this section has not been filed with the court, then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court. The affidavit of merit and curriculum vitae shall be filed with the court in a sealed envelope which envelope shall state on its face:

“CONFIDENTIAL SUBJECT TO 18 DEL. C., SECTION 6853. THE CONTENTS OF THIS ENVELOPE MAY ONLY BE VIEWED BY A JUDGE OF THE SUPERIOR COURT.”

Notwithstanding any law or rule to the contrary the affidavit of merit shall be and shall remain sealed and confidential, except as provided in subsection (d) of this section, shall not be a public record and is exempt from Chapter 100 of Title 29.

(2) The court, may, upon timely motion of the plaintiff and for good cause shown, grant a single 60-day extension for the time of filing the affidavit of merit. Good cause shall include, but not be limited to, the inability to obtain, despite reasonable efforts, relevant medical records for expert review.

(3) A motion to extend the time for filing an affidavit of merit is timely only if it is filed on or before the filing date that the plaintiff seeks to extend. The filing of a

motion to extend the time for filing an affidavit of merit tolls the time period within which the affidavit must be filed until the court rules on the motion.

(4) The defendant or defendants not required to take any action with respect to the complaint in such cases until 20 days after plaintiff has filed the affidavit or affidavits of merit.

(b) An affidavit of merit shall be unnecessary if the complaint alleges a rebuttable inference of medical negligence, the grounds of which are set forth below in subsection (e) of this section.

(c) Qualifications of expert and contents of affidavit.--The affidavit or affidavits of merit shall set forth the expert's opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant or defendants and that the breach was a proximate cause of injury or injuries claimed in the complaint. An expert signing an affidavit of merit shall be licensed to practice medicine as of the date of the affidavit; and in the 3 years immediately preceding the alleged negligent act has been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the defendant or defendants, and the expert shall be Board certified in the same or similar field of medicine if the defendant or defendants is Board certified. The Board Certification requirement shall not apply to an expert that began the practice of medicine prior to the existence of Board certification in the applicable specialty.

(d) Upon motion by the defendant the court shall determine *in camera* if the affidavit of merit complies with paragraph (a)(1) and subsection (c) of this section. The affidavit of merit shall not be discoverable in any medical negligence action. The affidavit of merit itself, and the fact that an expert has signed the affidavit of merit, shall not be admissible nor may the expert be questioned in any respect about the existence of said affidavit in the underlying medical negligence action or any subsequent unrelated medical negligence action in which that expert is a witness.

(e) No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death, except that such expert medical testimony shall not be required if a medical negligence review panel has found negligence to have occurred and to have caused the alleged personal injury or death and the opinion of such panel is admitted into evidence; provided, however, that a rebuttable

inference that personal injury or death was caused by negligence shall arise where evidence is presented that the personal injury or death occurred in any 1 or more of the following circumstances:

- (1) A foreign object was unintentionally left within the body of the patient following surgery;
- (2) An explosion or fire originating in a substance used in treatment occurred in the course of treatment; or
- (3) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of the patient's body.

Except as otherwise provided herein, there shall be no inference or presumption of negligence on the part of a health-care provider.

**B. PENNSYLVANIA - RULE 1042.11**

(a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either

*Note:* The requirements of subdivision (a) apply to a claim for lack of informed consent.

(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

*Note:* It is not required that the “appropriate licensed professional” who supplies the necessary statement in support of a certificate of merit required by subdivision (a)(1) be the same person who will actually testify at trial. It is required, however, that the “appropriate licensed professional” who supplies such a statement be an expert with sufficient education, training, knowledge and experience to provide credible, competent testimony, or stated another way, the expert who supplies the statement must have qualifications such that the trial court would find them

sufficient to allow that expert to testify at trial. For example, in a medical professional liability action against a physician, the expert who provides the statement in support of a certificate of merit should meet the qualifications set forth in Section 512 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. § 1303.512.

(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

*Note:* A certificate of merit, based on the statement of an appropriate licensed professional required by subdivision (a)(1), must be filed as to the other licensed professionals for whom the defendant is responsible. The statement is not required to identify the specific licensed professionals who deviated from an acceptable standard of care. The purpose of this subdivision is to ensure that a claim of vicarious liability made against a defendant is supported by a certificate of merit. Separate certificates of merit as to each licensed professional for whom a defendant is alleged to be responsible are not required. Only a single certificate of merit as to a claim under subdivision (a)(2) is required.

(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

*Note:* In the event that the attorney certifies under subdivision (a)(3) that an expert is unnecessary for prosecution of the claim, in the absence of exceptional circumstances the attorney is bound by the certification and, subsequently, the trial court shall preclude the plaintiff from presenting testimony by an expert on the questions of standard of care and causation.

(b) (1) A separate certificate of merit shall be filed as to each licensed professional against whom a claim is asserted.

*Note:* This subdivision relates to licensed professionals named as defendants. It should not be interpreted to require certificates of merit under subdivision (a)(2) or otherwise as to non-defendant licensed professionals.

(2) If a complaint raises claims under both subdivisions (a)(1) and (a)(2) against the same defendant, the attorney for the plaintiff, or the plaintiff if not represented, shall file

(i) a separate certificate of merit as to each claim raised, or

(ii) a single certificate of merit stating that claims are raised under both subdivisions (a)(1) and (a)(2).

(c)(1) A defendant who files a counterclaim asserting a claim for professional liability shall file a certificate of merit as required by this rule.

(2) A defendant or an additional defendant who has joined a licensed professional as an additional defendant or asserted a cross-claim against a licensed professional need not file a certificate of merit unless the joinder or cross-claim is based on acts of negligence that are unrelated to the acts of negligence that are the basis for the claim against the joining or cross-claiming party.

(d) The court, upon good cause shown, shall extend the time for filing a certificate of merit for a period not to exceed sixty days. A motion to extend the time for filing a certificate of merit must be filed by the thirtieth day after the filing of a notice of intention to enter judgment of non pros on a professional liability claim under Rule 1042.6(a) or on or before the expiration of the extended time where a court has granted a motion to extend the time to file a certificate of merit, whichever is greater. The filing of a motion to extend tolls the time period within which a certificate of merit must be filed until the court rules upon the motion.

*Note:* There are no restrictions on the number of orders that a court may enter extending the time for filing a certificate of merit provided that each order is entered pursuant to a new motion, timely filed and based on cause shown as of the date of filing the new motion.

The moving party must act with reasonable diligence to see that the motion is promptly presented to the court if required by local practice.

In ruling upon a motion to extend time, the court shall give appropriate consideration to the practicalities of securing expert review. There is a basis for granting an extension of time within which to file the certificate of merit if counsel for the plaintiff was first contacted shortly before the statute of limitations was about to expire, or if, despite diligent efforts by counsel, records necessary to review the validity of the claim are not available.

(e) If a certificate of merit is not signed by an attorney, the party signing the certificate of merit shall, in addition to the other requirements of this rule, attach to the certificate of merit the written statement from an appropriate licensed professional as required by subdivisions (a)(1) and (2). If the written statement is not attached to the certificate of merit, a defendant seeking to enter a judgment of

non pros shall file a written notice of intent to enter a judgment of non pros for failure to file a written statement under Rule 1042.11.

**II. Statutes requiring affidavit to be filed contemporaneously with the complaint:**

**A. CONNECTICUT – CONN. GEN. STAT. ANN. § 52-190A**

(a) No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney, and any apportionment complainant or apportionment complainant's attorney, shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. The similar health care provider who provides such written opinion shall not, without a showing of malice, be personally liable for any damages to the defendant health care provider by reason of having provided such written opinion. In addition to such written opinion, the court may consider other factors with regard to the existence of good faith. If the court determines, after the completion of discovery, that such certificate was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court upon motion or upon its

own initiative shall impose upon the person who signed such certificate or a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. The court may also submit the matter to the appropriate authority for disciplinary review of the attorney if the claimant's attorney or the apportionment complainant's attorney submitted the certificate.

(b) Upon petition to the clerk of the court where the civil action will be filed to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted to allow the reasonable inquiry required by subsection (a) of this section. This period shall be in addition to other tolling periods.

(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.

**B. FLORIDA - FLA. STAT. ANN. §766.104**

The existing Florida statute reflects amended language crafted after the district court decision. The earlier version of the statute reads as follows:

(1) No action shall be filed for personal injury or wrongful death arising out of medical negligence, whether in tort or in contract, unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint or initial pleading shall contain a certificate of counsel that such reasonable investigation gave rise to a good faith belief that grounds exist for an action against each named defendant. For purposes of this section, good faith may be shown to exist if the claimant or his counsel has received a written opinion, which shall not be subject to discovery by an opposing party, of an expert as defined in s. 768.45 that there appears to be evidence of medical negligence. If the court determines that such certificate of counsel was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court shall award attorney's fees and taxable costs against claimant's counsel, and shall submit the matter to The Florida Bar for disciplinary review of the attorney.

The existing statute now reads:

[n]o action shall be filed for personal injury or wrongful death arising out of medical negligence, whether in tort or in contract, unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint or initial pleading shall contain a certificate of counsel that such reasonable investigation gave rise to a good faith belief that grounds exist for an action against each named defendant. For purposes of this section, good faith may be shown to exist if the claimant or his or her counsel has received a written opinion, which shall not be subject to discovery by an opposing party, of an expert as defined in s. 766.102 that there appears to be evidence of medical negligence. If the court determines that such certificate of counsel was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court shall award attorney's fees and taxable costs against claimant's counsel, and shall submit the matter to The Florida Bar for disciplinary review of the attorney.

(2) Upon petition to the clerk of the court where the suit will be filed and payment to the clerk of a filing fee, not to exceed \$42, an automatic 90-day extension of the statute of limitations shall be granted to allow the reasonable investigation required by subsection (1). This period shall be in addition to other tolling periods. No court order is required for the extension to be effective. The provisions of this subsection shall not be deemed to revive a cause of action on which the statute of limitations has run.

(3) For purposes of conducting the investigation required by this section, and notwithstanding any other provision of law to the contrary, subsequent to the death of a person and prior to the administration of such person's estate, copies of all medical reports and records, including bills, films, and other records relating to the care and treatment of such person that are in the possession of a health care practitioner as defined in s. 456.001 shall be made available, upon request, to the spouse, parent, child who has reached majority, guardian pursuant to chapter 744, surrogate or proxy pursuant to chapter 765, or attorney in fact of the deceased pursuant to chapter 709. A health care practitioner complying in good faith with the provisions of this subsection shall not be held liable for civil damages attributable to the disclosure of such records or be subject to any disciplinary action based on such disclosure.

**C. GEORGIA - GA. CODE ANN., § 9-11-9.1**

(a) In any action for damages alleging professional malpractice against:

(1) A professional licensed by the State of Georgia and listed in subsection (g) of this Code section;

(2) A domestic or foreign partnership, corporation, professional corporation, business trust, general partnership, limited partnership, limited liability company, limited liability partnership, association, or any other legal entity alleged to be liable based upon the action or inaction of a professional licensed by the State of Georgia and listed in subsection (g) of this Code section; or

(3) Any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (g) of this Code section,

the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) The contemporaneous affidavit filing requirement pursuant to subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire or there is a good faith basis to believe it will expire on any claim stated in the complaint within ten days of the date of filing the complaint and, because of time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, if the attorney for the plaintiff files with the complaint an affidavit in which the attorney swears or affirms that his or her law firm was not retained by the plaintiff more than 90 days prior to the expiration of the period of limitation on the plaintiff's claim or claims, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court shall not extend such time for any reason without consent of all parties. If either affidavit is not filed within the periods specified in this Code section, or it is determined that the law firm of the attorney who filed the affidavit permitted in lieu of the contemporaneous filing of an expert affidavit or any attorney who appears on the pleadings was retained by the plaintiff more than 90 days prior to the expiration of the period of limitation, the complaint shall be dismissed for failure to state a claim.

(c) This Code section shall not be construed to extend any applicable period of limitation, except that if the affidavits are filed within the periods specified in this

Code section, the filing of the affidavit of an expert after the expiration of the period of limitations shall be considered timely and shall provide no basis for a statute of limitations defense.

(d) If a complaint alleging professional malpractice is filed without the contemporaneous filing of an affidavit as permitted by subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint until 30 days after the filing of the affidavit of an expert, and no discovery shall take place until after the filing of the answer.

(e) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint shall be subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit within the time required by this Code section and the failure to file the affidavit was the result of a mistake.

(g) The professions to which this Code section shall apply are:

- (1) Architects;
- (2) Attorneys at law;
- (3) Audiologists;
- (4) Certified public accountants;
- (5) Chiropractors;
- (6) Clinical social workers;
- (7) Dentists;
- (8) Dietitians;

- (9) Land surveyors;
- (10) Marriage and family therapists;
- (11) Medical doctors;
- (12) Nurses;
- (13) Occupational therapists;
- (14) Optometrists;
- (15) Osteopathic physicians;
- (16) Pharmacists;
- (17) Physical therapists;
- (18) Physicians' assistants;
- (19) Podiatrists;
- (20) Professional counselors;
- (21) Professional engineers;
- (22) Psychologists;
- (23) Radiological technicians;
- (24) Respiratory therapists;
- (25) Speech-language pathologists; or
- (26) Veterinarians.

**D. MICHIGAN - MICH. COMP. LAWS § 600.2912D(1)**

[emphasis added in (1) and (3)]:

**(1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional** who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.1 The affidavit of merit shall certify that the health professional 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 and shall contain a statement of each of the following:

- (a) The applicable standard of practice or care.
  - (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
  - (c) 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.
  - (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.
- (2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).
- (3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b(6),<sup>2</sup> the **affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint**

**E. Ohio R. Civ. P. 10(d) (emphasis added in (D)2a.)**

**(A) Caption; names of parties**

Every pleading shall contain a caption setting forth the name of the court, the title of the action, the case number, and a designation as in Rule 7(A). In the complaint the title of the action shall include the names and addresses of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

**(B) Paragraphs; separate statements**

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all

succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

**(C) Adoption by reference; exhibits**

Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.

**(D) Attachments to pleadings.**

(1) *Account or written instrument.* When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

(2) *Affidavit of merit; medical, dental, optometric, and chiropractic liability claims.*

**(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in R.C. 2305.113, shall be accompanied by one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness meeting the requirements of Evid.R. 702 and, if applicable, also meeting the requirements of Evid.R. 601(D). Affidavits of merit shall include all of the following:**

(i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

(ii) A statement that the affiant is familiar with the applicable standard of care;

(iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

(b) The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion shall be filed by the plaintiff with the complaint. For good cause shown and in accordance with division (c) of this rule, the court shall grant

the plaintiff a reasonable period of time to file an affidavit of merit, not to exceed ninety days, except the time may be extended beyond ninety days if the court determines that a defendant or non-party has failed to cooperate with discovery or that other circumstances warrant extension.

(c) In determining whether good cause exists to extend the period of time to file an affidavit of merit, the court shall consider the following:

(i) A description of any information necessary in order to obtain an affidavit of merit;

(ii) Whether the information is in the possession or control of a defendant or third party;

(iii) The scope and type of discovery necessary to obtain the information;

(iv) What efforts, if any, were taken to obtain the information;

(v) Any other facts or circumstances relevant to the ability of the plaintiff to obtain an affidavit of merit.

(d) An affidavit of merit is required to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment. Any dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits.

(e) If an affidavit of merit as required by this rule has been filed as to any defendant along with the complaint or amended complaint in which claims are first asserted against that defendant, and the affidavit of merit is determined by the court to be defective pursuant to the provisions of division (D)(2)(a) of this rule, the court shall grant the plaintiff a reasonable time, not to exceed sixty days, to file an affidavit of merit intended to cure the defect.

**(E) Size of paper filed**

All pleadings, motions, briefs, and other papers filed with the clerk, including those filed by electronic means, shall be on paper not exceeding 8 1/2 x 11 inches in size without backing or cover.

**F. TEXAS - § 150.002. CERTIFICATE OF MERIT**

(a) In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the

plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:

- (1) is competent to testify;
- (2) holds the same professional license or registration as the defendant; and
- (3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's:
  - (A) knowledge;
  - (B) skill;
  - (C) experience;
  - (D) education;
  - (E) training; and
  - (F) practice.

(b) The affidavit shall set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim. The third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor shall be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying.

(c) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

(d) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.

(e) The plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.

(f) An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.

(g) This statute shall not be construed to extend any applicable period of limitation or repose.

(h) This statute does not apply to any suit or action for the payment of fees arising out of the provision of professional services.