To: New Jersey Law Revision Commission  
From: Jayne Johnson  
Re: Proposed draft language to revise the statutes governing the affidavit of merit  
Date: April 10, 2017

Executive Summary

This Memorandum proposes draft language to revise N.J.S. 2A:53A-27, based on the recommendations of the Commission provided at the March meeting. The proposed provision requires the filing of the affidavit as an element of the malpractice or negligence cause of action.

Staff would greatly appreciate any additional input or suggestions recommending how to best reflect the guidance provided by the Commission at the March meeting.

Background

Staff presented, at the January 2017 Commission meeting, the text of A-3620 introduced in the current legislative session to revise the statutes governing the affidavit required in malpractice and negligence actions. Following the January meeting, Staff joined discussions concerning A-3620 at the Sponsor’s district office, and identified aspects of the draft language that may create issues which implicate the statute of limitations and other provisions which raise potential conflicts with the Federal Rules of Civil Procedure. The Sponsor requested additional research and drafting guidance to avoid potential conflicts with federal pleading rules.

Last month, the Commission further discussed the amendments introduced to revise the statutes governing the affidavit required in certain actions against licensed persons, particularly N.J.S. 2A:53A-27. The Commission reviewed the Memorandum prepared by Staff concerning federal consideration of the New Jersey statute and similar statutes in other jurisdictions. During the meeting, the Commission discussed the decision of the Third Circuit, in Chamberlain v. Giampapa, in which the Court considered the existing New Jersey statute on first impression.¹ The Third Circuit identified select provisions of the statute when ruling that the existing statute did not conflict with federal procedural rules by imposing on the specificity or substance of the pleading requirements.² The Court held that the purpose of the New Jersey statute is to deter and dismiss meritless claims, achieving substantive rather than procedural aims, by providing a notice of claims and defense of the parties.³

Later, in Liggon-Reading v. Estate of Robert Sugarman, the Third Circuit considered the Pennsylvania statute, which in substance mirrors the New Jersey statute.⁴ Most recently, in Schmigel v. Uchal, under an analysis similar to the Chamberlain decision, the Third Circuit held

¹ Chamberlain v. Giampapa, 210 F.3d 154, 158 (3d Cir. 2000).
² Id. at 158-59.
³ Id. at 160.
that the Pennsylvania statute 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.  

Unlike New Jersey and Pennsylvania, the Delaware statute provides for a contemporaneous filing requirement similar to the amendments introduced in A-3620. The Third Circuit has not considered whether the statute conflicts with the federal pleading rules, but the Court recognized the contemporaneous filing requirement in an unpublished decision upholding the district court’s dismissal of a prisoner’s 1983 action for failure to file a claim.  

Beyond the Third Circuit, the outcomes of the federal decisions concerning affidavit of merit statutes seem to vary considerably from one jurisdiction to another, without giving clear guidance as to what aspects of the statutes may conflict with the federal rules. Based on the research provided, the Commission considered the objectives of the introduced amendments, to ensure that the affidavit is filed at the earliest stages of the action, and then discussed the best means to preserve meritorious cases, while expeditiously dismissing frivolous and meritless claims.

The Commission recognized that the introduced amendments alter statutory requirements which, as identified by the Third Circuit, furthered the substantive aims of the statute. The Commission considered how to further the objectives of the amendments without inviting challenges resulting from potential conflicts with the federal pleading rules.

Commissioner Bunn observed that the Legislature is empowered to establish causes of action and the elements which determine a cognizable claim. In accord, the Commission recommended proposing statutory language which establishes the filing of the affidavit as an element of a malpractice or negligence cause of action.

Proposed Draft Language

The draft language which follows is based on the discussion of the March Commission meeting. Staff would greatly appreciate any additional input or suggestions recommending how to best reflect the guidance provided by the Commission.

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5 Schmigel v. Uchal, 800 F.3d 113, 120-24 (3d Cir. 2015).
7 E.g. Larca v. U.S., 302 F.R.D. 148, 158 - 59 (N.D. Ohio 2014)(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; Luckett v. United States, 2009 WL 1856417 *159 (E.D. Mich. June 29, 2009 (the U.S. District Court, Western District determined that the statute should be applied as substantive law in federal diversity actions; Sellars v. United States, 870 F.2d 1098, 1101 (6th Cir.1989)(the Sixth Circuit determined that the Michigan statute governing the affidavit required in malpractice claims applied in federal court, when deciding a claim filed under the Federal Torts Claim Act); Braddock v. Orlando Regional Health Care Sys., Inc., 881 F. Supp. 580, 584 (M.D.Fla.1995)(the Middle District Court of Florida held 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); Brown v. Nichols, 8 F.3d 770, 772 (11th Cir. 1993)( 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).
Proposed revisions to N.J. STAT. ANN. § 2A:53A-27:


a. A person shall have no cause of action for damages for personal injuries, wrongful death, or property damage resulting from an alleged act of malpractice or negligence by a licensed person in that person’s profession or occupation until an affidavit that complies with the requirements of this section or a sworn statement in lieu of an affidavit pursuant to N.J.S.A. 2A:53-28 is filed. The availability of the affidavit required by this section or a sworn statement in lieu of an affidavit shall not affect the applicable statute of limitations.

b. In any action 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. 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. Any challenge to the sufficiency of the credentials or experience of the person executing the affidavit in an action for medical malpractice shall be made in the responsive pleading to be filed within the time provided by the Rules of Court or it is waived. In the event that the time for the affidavit has been extended for good cause shown, a comparable extension of time for inclusion of challenges to the sufficiency of the credentials or experience shall be granted. Such challenges shall be addressed by the court pursuant to a motion filed in accordance with the Rules of Court not later than two motion cycles after the filing of the responsive pleading. If the court rules on motion finding insufficiency, it may grant an additional period of time for providing a sufficient affidavit of up to 60 days.

c. In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in section 7 of P.L.2004, c. 17 (C.2A:53A-41). In all other cases, the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.


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An affidavit shall not be required pursuant to section 2 of this act if the plaintiff provides a sworn statement in lieu of the affidavit setting forth that: the defendant has failed to provide plaintiff with medical records or other records or information having a substantial bearing on preparation of the affidavit; a written request therefor along with, if necessary, a signed authorization by the plaintiff for release of the medical records or other records or information requested, has been made by certified mail or personal service; and at least 45 days have elapsed since the defendant received the request.