

FEBRUARY 2010 MICHIGAN BAR EXAMINATION MODEL ANSWERS

ANSWER TO QUESTION NO. 1

MCR 2.116 governs summary disposition motions. A motion for summary disposition based on a lack of subject matter jurisdiction is brought under MCR 2.116(C) (4). MCR 2.116(D) addresses when summary disposition motions must be raised. The grounds for the motion dictate which subrule applies. Subrules (D) (3) and (4) provide:

"(3) The grounds listed in subrule (C) (4) and the ground of governmental immunity may be raised at any time, regardless of whether the motion is filed after the expiration of the period in which to file dispositive motions under a scheduling order entered pursuant to MCR 2.401.

"(4) The grounds listed in subrule (C) (8), (9), and (10) may be raised at any time, unless a period in which to file dispositive motions is established under a scheduling order entered pursuant to MCR 2.401. It is within the trial court's discretion to allow a motion filed under this subsection to be considered if the motion is filed after such period."

MCR 2.116(D) (3) and (4) were amended by the Michigan Supreme Court effective September 1, 2007. Before then, (D) (3) provided "the grounds listed in subrule (C) (4), (8), (9) and (10) may be raised at any time." The Staff Comment to the 2007 amendment states the amendments:

"clarify that motions for summary disposition based on governmental immunity or lack of subject-matter jurisdiction may be filed even if the time set for dispositive motions in a scheduling order has expired. Defects in subject-matter jurisdiction cannot be waived and may be raised at any time."

"It is well established that subject matter jurisdiction can be considered at any stage of a proceeding because it calls into question the power of the court to hear a case." *Sumpter v Kosinski*, 165 Mich App 784, 797 (1988). Subject matter jurisdiction "can never be conferred by the actions of the parties." *Hastings v Hastings*, 154 Mich App 96, 99 (1986). Subject matter jurisdiction can also be raised on appeal. *Orloff v Morehead Mfg Co*, 273 Mich 62, 66 (1935).

Therefore, the supervising attorney should be advised that there is a dispositive motion to file but that the filing deadline has been missed. However, because a summary disposition motion regarding a lack of subject matter jurisdiction can be filed "at any time" under MCR 2.116(D)(3), this rule will prevail over the trial court's scheduling order that places limits on the filing of motions.

However, the supervising attorney should also be told that the trial is in 18 days and summary disposition motions need at least 21 days notice. MCR 2.116(G)(1) (a) (i). Thus a motion to adjourn the trial to allow filing of the motion for summary disposition would be needed to have the motion heard before trial. One argument could be that the prior attorney's illness prevented him from timely filing the motion and that constitutes good cause for an adjournment. Additionally, it could be argued that a dispositive motion based on a lack of subject matter jurisdiction should be heard before a trial is conducted. MCR 2.116(G) also contemplates the trial court setting a different period for the filing of motions and any replies.