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MEDICAL MALPRACTICE RULES OF PRACTICE

Rule 1. Applicability; Definitions

(a) These Rules are promulgated in accordance with [Section 8.01-581.11](#) of the Code of Virginia and shall govern all formal proceedings instituted pursuant to the provisions of Chapter 21.1 of Title 8.01 with respect to the activities of a duly constituted Medical Malpractice Review Panel. The Rules shall not apply to any cause of action which arose prior to July 1, 1976, the effective date of Chapter 21.1 of Title 8.01 unless the claimant has filed notice under § 8.01-581.2 and such filing occurred prior to the expiration of any applicable statute of limitation.

(b) References herein to "it" and "its" shall apply equally to "him," "his," or "her." The singular shall include the plural. Terms used in this part that are defined in Chapter 21.1 of Title 8.01 are used with the definitions therein contained.

MEDICAL MALPRACTICE RULES OF PRACTICE

Rule 2. Request for Medical Malpractice Review Panel

(a) *Request for Panel.* -- The plaintiff or any defendant health care provider may, within thirty days from the filing of the responsive pleading in any action brought for malpractice against a health care provider, file a written request for a review by a panel with the clerk of the Supreme Court of Virginia. The request for review of such claim by a panel shall be deemed to be filed when delivered or mailed by registered or certified mail to the clerk of the Supreme Court of Virginia. The request shall include a copy of the complaint and a copy of all responsive pleadings. A copy of the request shall be filed with the clerk of the circuit court wherein the malpractice action has been filed, and a copy of such request shall be mailed to the opposing party and its counsel, if known. The request shall include the name of the judge to whom the case is assigned. Upon receipt of the request the circuit court clerk shall immediately advise the judge to whom the case has been assigned.

(b) *Contents of Request.* -- The request for the appointment of a medical review panel shall contain the following (to the extent known):

- (1) The name, address and telephone number of the plaintiff.
- (2) The name, address and telephone number of the attorney of record for the plaintiff.
- (3) The name, address and telephone number of the defendant health care provider(s).
- (4) The name, address and telephone number of the attorney of record for the health care provider.
- (5) A statement specifying the classification of the health care provider in accordance with Section 8.01-581.1 of the Code and, in the case of a physician, his specialty or subspecialty.
- (6) A certification that a copy of the request for a review panel has been mailed to all other parties and their counsel, if known.
- (7) The name of the judge to whom the case is assigned.

(c) *Multiple Parties.* -- Any health care provider named as a defendant shall have the right to request a panel and, in that event, shall mail copies of its request to the other health care providers named in the complaint as well as to the plaintiff and his counsel of record. When a request for a panel is made by any party, a single panel shall be designated and all health care providers against whom a claim is asserted shall be subject to the jurisdiction of such panel.

MEDICAL MALPRACTICE RULES OF PRACTICE

Rule 3. Designation of Panel; Certificate of Parties

(a) *Designation of Panel.* — Upon receipt of a request for the appointment of a medical review panel, the Supreme Court of Virginia shall designate the panel within sixty days after receipt of the request.

(b) *Composition.* — The panel so designated shall consist of two impartial attorneys and two impartial health care providers, licensed and actively practicing their professions, and a circuit court judge of the court in which the action was filed who shall preside over the panel but need not attend or participate in the deliberations of the panel.

(c) *Attorney Members.* — The Supreme Court of Virginia shall select the attorney members of each panel from a list provided by the Virginia State Bar. The Virginia State Bar shall provide to the Executive Secretary of the Supreme Court of Virginia a list of sixty actively practicing attorneys. Such list shall include the office address and telephone number of each attorney. One third of such list shall be replaced each year but members may be reappointed to the list without limit in time. In compiling the list, the Virginia State Bar shall endeavor to include attorneys from throughout the Commonwealth.

(d) *Health Care Provider Members.* — The Supreme Court of Virginia shall select the health care provider members of the panel from a list provided by the State Board of Medicine. The State Board of Medicine shall provide to the Executive Secretary of the Supreme Court of Virginia a list of two hundred thirty-five health care providers. Such a list shall include the office address and telephone number of each health care provider. In compiling the list, the State Board of Medicine shall endeavor to include health care providers from throughout the Commonwealth. The list furnished by the State Board of Medicine shall be by classification, as stated in [Section 8.01-581.1](#) of the Code, and, where practical, by specialty as follows:

(1) Physicians (140). Fifteen in General Practice; ten in Surgery; ten in Internal Medicine; ten in Orthopedic Surgery; ten in Obstetrics and Gynecology; ten in Anesthesiology; ten in Emergency Medicine; and five in each of the following: Dermatology, Neurology, Neurosurgery, Ophthalmology, Otorhinolaryngology, Pediatrics, Pathology, Physical Medicine, Plastic Surgery, Radiology, Urology, Psychiatry and Osteopathy.

(2) Hospitals (10). Ten hospital administrators.

(3) Dentists (15). Seven in General Practice. Two in each of the following specialties: Oral Surgery, Endodontics, Orthodontics and Periodontics.

(4) Pharmacists (10). Five each in community pharmacy and hospital pharmacy.

(5) Registered or Licensed Practical Nurses or Nurse Practitioners (10).

- (6) Optometrists (5).
- (7) Podiatrists (5).
- (8) Chiropractors (5).
- (9) Physical Therapists (5).
- (10) Physical Therapy Assistants (5).
- (11) Clinical Psychologists (5).
- (12) Nursing homes (5). Five nursing home administrators.
- (13) Clinical Social Workers (5).
- (14) Professional Counselors (5).
- (15) Dental Hygienists (5).

It shall be the responsibility of the State Board of Medicine to coordinate with the State Board of Health, State Board of Dentistry, State Board of Pharmacy, State Board of Nursing, State Board of Optometry, and such other regulatory boards as may be necessary to compile this list. A new list shall be provided every three years but members may be reappointed to the list without limit in time.

(e) *Withdrawal from List.* — (1) An individual whose name is included on any list may have his or her name withdrawn from the list by notifying the Virginia State Bar or the State Board of Medicine. Upon receipt of such notification, the Virginia State Bar or the State Board of Medicine shall advise the Executive Secretary of the Supreme Court of Virginia of this change and submit a replacement.

(2) Any person subject to disciplinary action by his or her profession shall be automatically removed from the list by the appropriate regulatory body and a replacement submitted to the Executive Secretary of the Supreme Court not later than 90 days after the effective date of the disciplinary action.

(3) Any person who is unable through sickness, disability, or for any other reason to serve regularly on a panel shall be removed from the list and a replacement submitted to the Executive Secretary of the Supreme Court.

(4) The Executive Secretary of the Supreme Court may request that a name be removed from the list because of repeated refusal to serve.

(f) *Manner of Selection.* — (1) Selection from the lists by the Supreme Court of Virginia

will be rotated based on availability with due regard to the nature of the claim.

(2) Unless it shall prove impracticable, one health care provider on the panel shall represent the medical specialty involved in the claim.

(3) Any member of the panel may disqualify himself if he believes that his presence constitutes a conflict of interest or gives the appearance of impropriety. A party may move for such disqualification for cause within ten days after receiving notice of designation of the panel. The motion shall be in writing addressed to the judge presiding over the panel and served by mail on the opposing party or its counsel. The judge shall act on the motion unless the panel member in question disqualifies himself. In the event of such disqualification, the Supreme Court of Virginia shall designate a new panel member.

(g) *Rescission.* — A party may rescind a request for review by a panel at any time prior to the selection of the panel, in which event, if no other party had also requested the panel, the presiding judge shall dismiss the panel. After the selection of the members of the review panel, the requesting party may rescind a request for review by the panel only with the consent of all parties or with leave of the judge presiding over the panel. The Executive Secretary of the Supreme Court of Virginia shall be notified of any dismissal.

Last amended by Order dated April 17, 2017; effective July 1, 2017.

MEDICAL MALPRACTICE RULES OF PRACTICE

Rule 4. Convening of Panel

(a) *Notice of Appointment.* -- Upon selection of the panel members by the Supreme Court, the Executive Secretary shall mail a letter to the panel members advising them of their selection to the panel and of the names and addresses of the parties and attorneys involved in this proceeding. A brief description of the claim shall be included in this letter. The panelists, within ten days thereafter, shall advise the Executive Secretary if they will be unable to serve. Upon expiration of the ten days, the Supreme Court will issue an official designation specifying the style of the proceeding and each panel member. A copy of this designation shall be mailed together with the names, addresses and professional practice of each panel member to the plaintiff and the health care provider and their counsel. This designation shall recite that the date, time, and place for the convening of the panel shall be fixed by the judge presiding over the panel in consultation with the members of the panel.

(b) *Additional Parties.* -- Upon request, the judge of the circuit court hearing the case may grant leave to amend the request for a review panel to add additional parties or causes of action in furtherance of the ends of justice except where (i) the request for leave to amend is made less than ten days before the date set for the review panel to convene or (ii) the judge finds that the request for leave to amend is without merit. If leave to amend is granted, the judge may, upon motion of either party, stay the review panel proceedings, extend the time for completion of discovery, filing of submissions and other procedural limitation periods, or enter such orders as are appropriate to avoid prejudice to the parties and to avoid unnecessary delay and duplication in the proceedings. Leave to add additional parties shall not be granted if the judge finds that the applicable statute of limitations has expired with respect to the new or additional parties or causes of action.

(c) *Notification.* -- At the time the panel is designated the Supreme Court shall advise the clerk of the circuit court in which the matter is filed of the names of the panel members. The Supreme Court shall also notify the parties of the name, address and professional practice of each panel member and shall also notify the panel members, in writing, of their appointment.

(d) *Completion of Discovery.* -- Within ten days of receipt of the request for the panel the judge shall advise the parties of the date set for the completion of discovery. Except for good cause shown, the date for completion of discovery shall not be set beyond one hundred twenty days from the date on which the panel was requested. Procedures for the taking of depositions shall be governed by Part Four of the Rules of the Supreme Court and the provisions of Section 8.01-581.4 of the Code of Virginia, 1950, as amended.

(e) *Submission by Plaintiff.* -- The plaintiff within ten days after the date set for completion of discovery, shall submit to each member of the panel, including the judge, a statement of facts together with all documentary evidence he or she desires to introduce. The plaintiff shall submit to the panel members only those portions of deposition

transcripts, medical records, treatises and other documents which are relevant to the claim. However, upon request of the judge, the plaintiff shall produce all or part of any such document submitted. These materials shall be accompanied by a certificate stating that a copy of all such materials has been mailed to the health care provider and its counsel. All costs attendant to the submission of these materials shall be borne by the plaintiff. If the plaintiff fails to comply with this subsection, the judge shall prescribe a time within which the health care provider may submit evidence and shall order that the matter be considered solely upon the evidence. If the health care provider fails to comply with such order, the judge shall order the panel discharged.

(f) *Submission by Health Care Provider.* -- Within ten days after receipt of the materials filed by the plaintiff, the health care provider shall submit to each panel member, including the judge, a counter statement of facts and all materials that it desires to introduce. The health care provider shall submit to the panel members only those portions of deposition transcripts, medical records, treatises and other documents which are relevant to the claim. However, upon request of the judge, the health care provider shall produce all or part of any such document submitted. These materials shall be accompanied by a certificate stating that a copy of all such materials has been mailed to the plaintiff and his counsel. All costs attendant to the submission of these materials shall be borne by the health care provider.

(g) *Extension of Time.* -- The time periods stated in Rules Four (e) and Four (f) above may be extended by the judge for good cause shown.

(h) *Convening of Panel.* -- The circuit judge presiding over the panel, within the period set for the taking of discovery and upon consultation with the panel members, shall notify all parties of the date, time and place for a hearing by the review panel, if any, or the date on which the panel will convene, having given due regard to the location of the other panel members and the parties involved and the time periods granted the parties to file their submissions. Such date shall not be set sooner than ten days after the date set for filing of the submission by the health care provider.

(i) *Oath.* -- Upon convening of the panel, the judge shall swear in each panel member as follows:

I do solemnly swear (or affirm) that I have no past or present relationship with the parties nor am I aware of anything that would prevent me from being impartial in my deliberations. I further swear (or affirm) that I will render an opinion faithfully and fairly on the basis of the evidence presented, applying any professional expertise I may have, giving due regard to the nature of the claim and the nature of the practice of the health care provider.

MEDICAL MALPRACTICE RULES OF PRACTICE

Rule 5. Request for Ore Tenus Hearing

Either party may request the panel to conduct an ore tenus hearing and, when such a hearing is requested, it shall be held. Such a request shall be made in writing to the judge within ten days after the receipt of the designation of a panel. A copy of the request for an ore tenus hearing shall be sent to each panel member, the opposing party and its counsel. The panel may, in the absence of a request from either party, determine that an ore tenus hearing shall be held. If an ore tenus hearing is held, the judge shall notify all parties and panel members of the date, time and place for such a hearing. If no ore tenus hearing is held, the judge may, on the request of any party, extend the time for the submission of evidence in order to permit the parties to take and file depositions, and, in any such case, the panel shall convene at the direction of the judge in executive session for the purpose of conducting its review of the written evidence; provided, however, that when the panel chooses to act only in executive session, counsel for all parties shall be notified of the date, time and place of that session.

MEDICAL MALPRACTICE RULES OF PRACTICE

Rule 6. Conduct of an Ore Tenus Hearing

(a) *Subpoenas.* -- The judge upon the oral or written request of any party, without notice, or upon motion of the panel, may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence. When so issued, such subpoenas and subpoenas duces tecum shall be in the form prescribed in the Appendix of Forms attached hereto and shall be returnable to the office of the Clerk of the Circuit Court where the action was filed. Any expense incurred in the service of such subpoenas shall be borne by the requesting party except in the case of subpoenas requested by the panel in which case the expense will be distributed as costs.

(b) Reserved.

(c) *Copies.* -- Any party may obtain from the clerk of the court to which subpoenas are returnable copies of any books, records or documents and other tangible evidence, upon paying to the clerk the reasonable cost of the copy.

(d) *Assembly of Record.* -- The judge shall see to the transportation to the panel's meeting place of such books, records and documents as have been lodged in such clerk's office. The judge, upon request of any party, shall, for the purpose of depositions, permit such books, records and documents to be transported by counsel for such party to the place for the taking of depositions after such counsel has given an appropriate receipt to the clerk, and such counsel shall be responsible for the return of such materials to the clerk's office. Upon conclusion of deliberations and rendering of an opinion by the panel, all documentary evidence submitted to the panel, a transcript of the ore tenus hearing, if any, and a copy of the written opinion of the panel shall be filed in the office of the clerk in which the action was filed. The clerk shall mail a copy of the written opinion to the plaintiff and the defendant within five days of the date of rendering. A copy of such opinion shall also be mailed to the Executive Secretary of the Supreme Court of Virginia together with the apportionment of the costs as may be determined by the judge.

(e) *Quorum.* -- All members of the panel must be present at a hearing unless waived by both parties.

(f) *Decision.* -- A majority vote of the panel members may decide any question and determine the ultimate opinion. The judge shall have no vote.

(g) *Evidence.* -- The judge shall rule upon the admissibility of all evidence, but strict rules of evidence need not be observed. Caution should be taken to insure that an opinion is not based entirely on hearsay evidence. Evidence should be material, but should be excluded only when it does not contribute to the development of a fair record.

(h) *Exclusion of Witnesses.* -- Witnesses other than the parties or one representative of each may be excluded at the discretion of the judge.

(i) *Reporter.* -- Upon application of either party, a court reporter may be present to prepare a transcript of the proceeding. The cost of such reporter shall be borne by the party or parties using the services of the court reporter.

(j) *Procedure at Hearing.* -- The following general procedure shall be followed at an ore tenus hearing:

(1) The judge shall convene the hearing, state the style of the case, and state any general rules adopted by the panel.

(2) The judge shall swear in all panel members as provided in Rule Four (i).

(3) Preliminary motions may be made except that no demurrers, motions to dismiss or motions to strike will be permitted.

(4) All testimony shall be taken under oath.

(5) The counsel for the plaintiff may make an opening statement giving a chronological account of events, stating the acts or omissions that he believes constitute the professional negligence and specifying the evidence that he expects to produce.

(6) The counsel for the health care provider may make an opening statement setting forth his statement of facts and the evidence that he expects to produce.

(7) The counsel for the plaintiff shall then produce his evidence. All witnesses are subject to cross-examination and may be questioned by the panel.

(8) The counsel for the health care provider shall then produce his evidence. All witnesses are subject to cross-examination and may be questioned by the panel.

(9) The panel may call any witnesses that it desires to hear including expert witnesses. Any expense incurred by the panel in the calling of expert witnesses shall be apportioned as costs.

(10) Counsel for the plaintiff may present oral argument.

(11) Counsel for the health care provider may present oral argument.

(12) If oral argument is presented by the health care provider, counsel for the plaintiff shall be allowed rebuttal.

(13) At the conclusion of the hearing, the panel will deliberate in executive session and render its decision pursuant to [Section 8.01-581.7 of the Code](#). The judge presiding over the panel need not attend or participate in the deliberations.

MEDICAL MALPRACTICE RULES OF PRACTICE

Rule 7. Expenses and Costs

- (a) *Expenses.* -- Each member of the panel including the judge shall be reimbursed for his actual and necessary expenses.
- (b) *Compensation.* -- Each member of the panel except the judge shall be paid at a rate of fifty dollars per day for service as a member of the panel.
- (c) *Claims.* -- The Executive Secretary of the Supreme Court of Virginia shall provide a form of voucher to each member of the panel for reimbursement and compensation. All vouchers shall be submitted by panel members to the Executive Secretary not later than thirty days after the rendering of the decision by the panel.
- (d) *Costs.* -- The judge shall apportion to the parties the expenses of conducting the panel in such proportions as may be determined by the judge in his discretion. When apportioning the costs, the judge shall add to the per diem and other expenses of the panel a fee of twenty-five dollars to cover administrative costs incurred by the Commonwealth with respect to proceedings under Chapter 21.1 of Title 8.01 of the Code of Virginia.
- (e) *Expert Witness.* -- The charges of any expert witness called by any party shall be paid by such party.
- (f) *Payment.* -- The Executive Secretary shall invoice the costs as apportioned by the judge. Within thirty days after the date of the invoice, each party shall send to the Executive Secretary of the Supreme Court of Virginia a check or money order payable to the Treasurer of Virginia in payment of all sums due and owing as that party's respective share of the costs. It shall be the duty of the counsel of record to insure that such payments are forwarded to the Executive Secretary.

MEDICAL MALPRACTICE RULES OF PRACTICE
APPENDIX OF FORMS

Subpoena

COMMONWEALTH OF VIRGINIA

COUNTY OF (OR CITY OF), to-wit:

To the Sheriff of said City/County Greeting:

We command you in the name of the Commonwealth of Virginia at the instance of a Medical Malpractice Review Panel duly constituted in accordance with §§ 8.01-581.2 and 8.01-581.3 of the Virginia Code to summon.....

.....
to appear before the Medical Malpractice Review Panel, at.....

....., Virginia, at a.m./p.m. on, 20..., to give evidence in connection with a claim pending before the Medical Malpractice Review Panel brought by.....

.....
against.....
and make return how you have executed this subpoena.

Given under my hand this day of, 20

Medical Malpractice Review Panel

By
Judge or Clerk

MEDICAL MALPRACTICE RULES OF PRACTICE
APPENDIX OF FORMS

Subpoena Duces Tecum

COMMONWEALTH OF VIRGINIA

COUNTY OF (OR CITY OF), to-wit:

To the Sheriff of said City/County Greeting:

We command you in the name of the Commonwealth of Virginia at the instance of a Medical Malpractice Review Panel duly constituted in accordance with §§ 8.01-581.2 and 8.01-581.3 of the Virginia Code to summon.....

.....
to produce on or before, 20, at the office of the Clerk of the Circuit Court of

.....
the following written material, to-wit:

.....
.....
.....
such material to remain in such office until further ordered and to be available for review and copy, and make return how you have executed this subpoena.

Medical Malpractice Review Panel

By
Judge or Clerk