

DEPARTMENT OF INSURANCE

OFFICE OF THE COMMISSIONER

Statutory Authority: 18 Delaware Code, Section 311 (18 Del.C. §311)

PROPOSED

PUBLIC NOTICE

1401 Medical Malpractice Review Panel Rules

A. Type of Regulatory Action Required

Proposal to repeal Regulation 1401.

B. Synopsis of Subject Matter of Regulation

The Department of Insurance hereby gives notice of a proposal to repeal Regulation 1401, Medical Malpractice Review Panel Rules. Enacted on June 25, 1976, Regulation 1401 has become obsolete due to the passage of Senate Bill 208 (SB 208) by the 152nd General Assembly, signed by the Governor on August 29, 2024. SB 208 amended Chapter 68 of Title 18, repealing Subchapters III and V in their entirety and eliminating the use of medical review panels in medical negligence cases. The Superior Court of Delaware maintains exclusive jurisdiction over civil actions alleging healthcare medical negligence. As a result, the Insurance Commissioner finds it necessary to repeal Regulation 1401.

C. Notice of Public Comment

The proposed regulation appears below and may also be viewed at the Department of Insurance website at <http://insurance.delaware.gov/information/proposedregs/>. The Department will not be holding a public hearing on the proposed regulation.

Any person may file written comments, suggestions, briefs, and compilations of data or other materials concerning the proposed regulation. Any written submission in response to this notice and relevant to the proposed regulation must be received by the Department of Insurance no later than 4:30 p.m. EDT, the 2nd day of December, 2024 and should be directed to:

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Delaware Department of Insurance
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1401 Medical Malpractice Review Panel Rules

~~1.0 Rules and Regulations~~

~~Pursuant to 18 Del.C. §6806(b), the following rules are hereby published and adopted. They are applicable to any civil action alleging malpractice as defined in 18 Del.C. §6801(7).~~

~~2.0 Purpose~~

~~The purpose of these rules is to carry out the provisions of 18 Del.C. Ch. 68.~~

~~3.0 Definitions~~

~~The definitions established by 18 Del.C., §6801 are applicable to these rules.~~

~~4.0 Panelists~~

~~The Commissioner has established lists of panelists including physicians, attorneys, and lay persons as described in 18 Del.C. §6804. These may be inspected by interested persons at the Office of the Department of Insurance, 21 The Green, Dover, Delaware at any time during business hours. These lists shall be updated annually as of August 1 of each calendar year, commencing with August 1, 1977, by the Commissioner. Brief biographical material of each person on such lists is included.~~

5.0 Filling Vacancies

- 5.1 ~~If any panel member should resign, die, withdraw, refuse, be disqualified, or otherwise be excused by the Court after having been selected pursuant to 18 Del.C. §6803, the chairperson of the panel (or, in his absence, the Superior Court) will, on satisfactory proof, declare the position on the panel vacant. Vacancies on any malpractice review panel will be filled in accordance with sections 5.2 and 5.3 of this section.~~
- 5.2 ~~If the position on the panel is declared vacant prior to the commencement of the hearing, the parties shall select a substitute member from the same list, pursuant to the provisions of 18 Del.C. §6805, each party retaining any previously unused peremptory challenge.~~
- 5.3 ~~If the position on the panel is declared vacant after the commencement of the hearing, the matter shall be re-heard before a new malpractice review panel selected in accordance with 18 Del.C. §6805, unless all parties, with the approval of the chairperson, agree to select a substitute member from the same list, or to proceed with less than a full panel.~~
- 5.4 ~~The chairperson may direct, in cases expected to be protracted, provided such persons are willing to serve without compensation, that one additional physician, one additional attorney, and one additional lay person be selected to sit as alternate panel members. Alternate panel members shall replace panel members in the same category who, prior to the conclusion of the presentation of evidence, become or are found to be unable or disqualified to perform their duties. Alternate panel members shall be selected in the same manner, and shall have the same qualifications, and shall be subject to the same examination and challenges and shall take the same oath, and shall have the same privileges as regular panel members. They shall have the same functions and powers as the panel members whom they replace, if they so serve. An alternate panel member who does not replace a regular panel member shall be discharged after the panel retires to consider its decision. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law for each category (physician, attorney, lay person) of alternate members. The additional peremptory challenge may be used against an alternate panel member only, and the other peremptory challenges allowed by law shall not be used against an alternate panel member.~~

6.0 Disclosure of Interests

- 6.1 ~~Any party to a proceeding before a malpractice review panel may propound, through the ex-officio member of the panel, reasonable questions to a panel candidate if such questions are submitted to the ex-officio member of the panel within ten days of the receipt of the list on which the candidate's name appears.~~
- 6.2 ~~Any individual selected as a member of a malpractice review panel shall disclose to the non-voting, ex-officio member of the panel any circumstances which might affect his impartiality, including any bias or any past or present relationship with the parties, their counsel or their fellow panel members. The non-voting, ex-officio member of the panel shall promptly communicate such disclosure to the parties. The panel member will be disqualified from the panel upon application by the chairperson to the Court in the event of the existence of any circumstances which might affect the panel members' impartiality, unless all parties waive in writing, any presumption of bias on the part of the panel member by reason of the disclosure.~~
- 6.3 ~~If a panel member knowingly fails to make the required disclosure contained in 6.2 of this section, the non-voting, ex-officio member of the panel will communicate the name of such individual to the Commissioner. The Commissioner, upon receipt of same shall strike the panel member's name from the appropriate list of panel candidates.~~

7.0 Hearing in Absence of a Party

~~The medical malpractice review panel may conduct a proceeding in the absence of any party who, after due notice, fails to be present at the proceeding.~~

8.0 Hearing Testimony under Oath

~~All testimony taken before a malpractice review panel shall be taken under oath.~~

9.0 Recording of Proceedings and Availability of Transcripts

- 9.1 ~~All hearings before a malpractice review panel shall be reported by an official reporter designated by the non-voting, ex-officio member of the panel.~~
- 9.2 ~~Parties desiring copies of the transcript of a hearing may obtain such copies from the designated official reporter upon payment of a reasonable fee therefor.~~

- 9.3 The non-voting, ex-officio member of the panel shall keep the record of the proceedings before the panel, including all exhibits and evidence introduced, but not including a transcript. The record shall be filed with the Prothonotary within ten days after the panel renders its opinion.

10.0 Compensation of Panelists and Expert Witnesses

- 10.1 Members of a malpractice review panel, and alternates who have replaced a member, and any expert witnesses called by the panel, shall be compensated pursuant to ~~18 Del.C., §6813~~. The non-voting, ex-officio member of the panel shall be responsible for preparing vouchers for the disbursement of compensation and other reasonable expenses to panel members and the expert witnesses called by the panel. The panel members and such expert witnesses shall substantiate all actual and necessary expenses incurred in such manner as is required by the ex-officio member of the panel. The ex-officio member of the panel shall submit all approved vouchers to the President Judge of the Superior Court.
- 10.2 Fees of the panel and reasonable fees of expert witnesses called by the panel, together with travel expenses, and the attendance fee of the designated official reporter, and other proper expenses, shall be paid by the State on vouchers submitted by the President Judge of the Superior Court.

11.0 Powers and Duties of Panel Chairperson

- 11.1 The chairperson of the malpractice review panel shall have primary responsibility for supervising the proceedings. The chairperson may make and enforce orders (unless overruled by a majority of the panel):
- 11.1.1 limiting the type of evidence that is admissible in any proceeding before the panel, subject to ~~18 Del.C. §6808~~;
 - 11.1.2 limiting the number of witnesses whose testimony is similar or cumulative;
 - 11.1.3 regulating the number and length of addresses to the malpractice review panel; and
 - 11.1.4 limiting the number of attorneys representing the same party who may actively participate in any proceeding before the panel.

12.0 Convening of Panel

- 12.1 On and after June 25, 1976, any party to any civil action alleging malpractice as defined in ~~18 Del.C. §6801(7)~~, at any time after the filing of an answer or any motion filed in lieu thereof, shall have the right to convene a malpractice review panel by filing a demand therefor with the Prothonotary, all parties to the civil action, and the Commissioner. The demand for the convening of such a malpractice review panel shall be in substantially the following form:

Name of Case: _____ Civil Action No. _____

The undersigned (name of petitioner), of (city) in (county), being a party to the above civil action alleging malpractice within the meaning of ~~18 Del.C. §6801(7)~~, certifies that:

- 12.1.1 (patient's name) was a patient of (health care provider), on (date); and
- 12.1.2 Said (health care provider), in treating said (patient's name) for (nature of condition or disease), is alleged to have committed an act of malpractice in rendering or failing to render health care services to the injury of (patient's name) in that (short statement of incident and injury); and
- 12.1.3 A complaint and an answer have been filed in the above mentioned action (or a motion has been filed in lieu of an answer), copies of which are annexed hereto.

In consequence thereof, the undersigned petitioner hereby respectfully and in good faith requests that a panel be convened pursuant to ~~18 Del.C. §6802~~ for investigation of this matter.

Petitioner or Attorney for Petitioner

- 12.2 Upon receipt of a demand for convening a malpractice review panel, the Commissioner shall appoint a member of his staff as the ex-officio member of the panel. The ex-officio member, after consultation with the appropriate medical professional society, shall also designate the health care discipline involved. See ~~18 Del.C. §6804(a)~~. The member of the Commissioner's staff so appointed shall, within five days of his appointment, advise all named parties where they may inspect copies of the various lists prepared and updated by the Commissioner, which lists contain the names and descriptions of potential panel members.

- 12.3 The members of the panel shall be selected from such lists in accordance with ~~18 Del.C. §6805~~ and the provisions of this rule. If the parties to the action do not, within ten days after receipt of such notice, agree in writing to the ex-officio member of the panel on the members of such panel, the ex-officio member of the panel shall so inform the Commissioner. The ex-officio member of the panel shall then promptly submit a list of each category of proposed panelists to the parties. The number of persons on each list will be calculated by the following formula: three times the number of parties plus two persons for each category. The parties shall exercise their peremptory challenges within ten days from receipt of the list, delivering these challenges to the ex-officio member of the panel who shall promptly select the panel from the remaining names on each list by lot.
- 12.4 Promptly after selection of the panel, the ex-officio member of the panel shall notify the parties of the date by which all evidence shall be submitted to the panel pursuant to ~~18 Del.C. §6807~~. The ex-officio member shall be responsible for presentation or delivery of such evidence or copies thereof to the panel members as expeditiously as feasible.
- 12.5 In the event a hearing is to be held, the ex-officio member of the panel, after consulting with the members selected for the panel and the parties, shall schedule it promptly. The parties to the proceeding shall be given not less than ten days' notice of such hearing. Either party may submit further evidence, in addition to that referred to in section 12.4 hereof, at that time.
- 12.6 A request for a continuance of the hearing may be made in writing to the chairperson. A continuance will be granted only upon good cause shown.

13.0 Decisions of the Panel

A majority vote of the malpractice review panel shall be required to decide the issues presented to it. The written findings of the panel shall conform to the requirements of ~~18 Del.C. §6811~~ and shall be rendered to the Court and the parties within thirty days after the hearing.

14.0 Direct Communications with Panel

Other than at hearings, the parties and their attorneys shall not directly communicate in any way with the panel candidates or panel members concerning the merits of the pending action, and any such communications from a party to a panel member or a panel candidate, other than at hearings, shall be directed to the ex-officio member of the panel for transmittal to the candidate or member. Any panel candidate or panel member who is aware of any direct communication concerning the merits of a pending action shall promptly inform the ex-officio member of the panel.

15.0 Calendar of Panel Hearings

A calendar of all malpractice actions noticed for hearing shall be prepared by the Commissioner and retained at his office for the inspection of any interested persons.

16.0 Filing with Prothonotary

In the event that a motion for review has been filed by either party, the moving party shall forthwith give written directions in substantially the same form as required by Rule 7 of the Supreme Court of the State of Delaware to the designated official reporter to prepare a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. Within five days after the motion for review has been filed, the moving parties shall serve upon all opposing attorneys and file with the Prothonotary a written statement showing compliance with this section. Such statement shall include the caption of the case, the name of the designated official reporter directed to prepare the transcript, the parts of the proceedings ordered transcribed, the date on which such direction was given, and the attorney's certification that the transcript ordered is essential to the review. Within five days after the receipt of the statement just described, or within fifteen days after the motion for review has been filed if no such statement is received from the attorney from the moving party, each other attorney shall give written directions to the designated court reporter to prepare a transcript for review of any part of the proceedings not already on file or on order by the moving party, as he deems necessary for inclusion in the record. Such attorney shall promptly serve upon all opposing attorneys and file with the Prothonotary a written statement substantially in the form specified by Rule 7 of the Supreme Court of the State of Delaware. In lieu of the transcript, the parties may prepare and sign an Agreed Statement of the substance of the testimony or other proceedings before the medical review panel as may be essential to the decision of the issues to be presented on the review.

17.0 Representation by Counsel

All parties may be represented at the hearing by counsel authorized to act for their respective clients, in which case notice of appearance shall be filed promptly by such attorneys, and all notices thereafter shall be served on the attorney rather than the party.

18.0 Effective Date

This Regulation shall become effective June 25, 1976.

28 DE Reg. 369 (11/01/24) (Prop.)