

MONTANA MEDICAL LEGAL PANEL RULES

INTRODUCTION TO PANEL RULES

Should you have a claim to be filed before the Montana Medical Legal Panel, you may request Application and Consent Forms by contacting:

Montana Medical Legal Panel
2021 - 11th Avenue, Suite 1
Helena, Montana 59601-4890
(406) 443-1110
(406) 443-4042 fax

Case No. 3
Date 2-10-05
File No. SB 352

It will be helpful if you will provide the date of each alleged occurrence in your correspondence requesting the forms so that the Panel can determine if the claim is one covered by the Act. For your assistance, a timetable outlining the various time requirements of the Rules and instructions to aid in filing a claim are presented herein.

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN RE: RULES OF PROCEDURE)
MONTANA MEDICAL LEGAL PANEL) ORDER

The Director of the Montana Medical Legal Panel, after consultation with the State Bar of Montana, having presented proposed Rule changes to the Court with respect to the Rules of Procedure of the Panel, and the approval of the State Bar of Montana being forthcoming for such proposed changes or the position of the Panel and the State Bar having been set forth where there was disagreement,

And § 27-6-204, MCA, authorizing the Director of the Panel, in consultation with the State Bar of Montana, and subject to the approval of this Court, to adopt and publish Rules of Procedure necessary to implement and carry out the duties of the Panel,

IT IS HEREBY ORDERED that, effective the date of this Order, the Rules of Procedure of the Montana Medical Legal Panel are hereby amended in the manner set out following this Order.

DATED this 30th day of August, 2001.

(Signed--all 7 justices)

RULE 1 - DEFINITIONS

As used in these Rules:

(a) "Health care provider" means a "physician," "dentist," "podiatrist," or a "health care facility."

(b) "Physician" means, for all purposes other than assessment of the annual surcharge required under § 27-6-206(3), an individual or business entity, who at the time of the occurrence of the incident giving rise to the claim:

(1) was an individual, licensed to practice medicine under the provisions of Title 37, Chapter 3, who had the State of Montana as his or her principal residence or place of medical practice and was not employed full-time by any federal governmental agency or entity; or

(2) was a professional service corporation, partnership, or other business entity organized under the laws of any state to render medical services, whose shareholders, partners, or owners were all individual physicians licensed to practice medicine under the provisions of Title 37, Chapter 3, or included a shareholder, partner, owner or employee who was a physician under (b)(i) of this Rule and is a proper party to the claim.

(c) "Dentist" means, for all purposes other than assessment of the annual surcharge required under § 27-6-206(3), an individual or business entity, who at the time of the occurrence of the incident giving rise to the claim:

(1) was an individual, licensed to practice dentistry under the provisions of Title 37, Chapter 4, who had the State of Montana as his or her principal residence or place of dental practice and was not employed full-time by any federal governmental agency or entity; or

(2) was a professional service corporation, partnership, or other business entity organized under the laws of any state to render dental services, and whose shareholders, partners, or owners were all individual dentists licensed to practice dentistry under the provisions of Title 37, Chapter 4, or included a shareholder, partner, owner or employee who was a dentist under (c)(i) of this Rule and is a proper party to the claim.

(d) "Health care facility" means, for all purposes other than assessment

of the annual surcharge required under 27-6-206(3), a facility (other than an infirmary) licensed as a health care facility under Title 50, Chapter 5 at the time of the occurrence of the incident giving rise to the claim, excluding an end-stage renal dialysis facility, home infusion therapy agency, or a residential care facility.

(e) "Malpractice claim" means any claim or potential claim of a claimant against a health care provider for medical or dental treatment, lack of medical or dental treatment, or other alleged departure from accepted standards of health care in the rendering of professional services which causes injury to the claimant, whether the claimant's claim or potential claim sounds in tort or contract, and includes but is not limited to allegations of battery or wrongful death.

(f) "Panel" means the Montana Medical Legal Panel provided for in Section 27-6-104, MCA.

(g) "Act" means the Montana Medical Legal Panel Act as established by Sections 27-6-101 through 27-6-704, MCA.

(h) "Director" means the Director of the Panel, or an authorized member of the Director's staff.

(i) "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, or, stated another way, enough evidence to justify refusal to direct a verdict on a factual issue in jury trial.

(j) "Claimant" is the person (or persons) who was the patient who received or was to receive services from the health care provider against whom the claim is made, or is the authorized representative of the patient.

(k) "Patient" is the person who received or was to receive services from the health care provider against whom the claim is made or who received services from other health care providers prior or subsequent to that of the health care provider against whom the claim is made.

(l) "Hospital" means a hospital as defined in 50-5-101, MCA, licensed as a hospital at the time of the occurrence of the incident giving rise to the claim.

(m) "Podiatrist" means, for all purposes other than assessment of the annual surcharge required under § 27-6-206(3), MCA, an individual licensed to practice podiatry under the provisions of Title 37, Chapter 6, who at the time of the occurrence of the incident giving rise to the claim:

(1) was an individual, licensed to practice podiatry under the provisions of Title 37, Chapter 6, who had the State of Montana as his or her principal residence or place of podiatric practice and was not employed full-time by any federal governmental agency or entity; or

(2) was a professional service corporation, partnership, or other business entity organized under the laws of any state to render podiatric services, and whose shareholders, partners, or owners were all individual podiatrists licensed to practice podiatry under the provisions of Title 37, Chapter 4, or included a shareholder, partner, owner or employee who was a podiatrist under (c)(i) of this Rule and is a proper party to the claim.

RULE 2 - SCOPE OF RULES

These Rules apply to all proceedings before the Montana Medical Legal Panel established by the Act.

RULE 3 - PURPOSE OF THE PANEL

The purpose of the Panel is to prevent, where possible, the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are or reasonably may be well founded.

(f) Any supplemental hearing shall be held in the same manner as the original hearing, and the parties and their attorneys may be present.
(g) No Panel member may be called to testify in any proceeding concerning the deliberations, discussions, decisions and internal proceedings of the Panel.

RULE 16 - PANEL DELIBERATIONS AND DECISIONS

(a) The deliberations of the Panel are confidential. Upon consideration of all the relevant material, the Panel shall decide:

(1) Is there substantial evidence that the acts or omissions constitute a departure from the accepted standards of health care;

(2) If the answer to (1) is "Yes," whether there is a reasonable probability that the patient was injured thereby.

(b) All votes of the Panel on the questions for discussion shall be by secret ballot. The decision shall be by a majority vote of those voting members of the Panel who sat on the entire case. The decision shall be communicated in writing to the parties and their attorneys of record, or to a party if that party has no attorney, and a copy thereof shall be retained in the permanent files of the Panel.

(c) The decision shall, in every case, be signed for the Panel by the Chairperson and shall contain only the conclusions reached by a majority of its members and shall list the number of members, if any, dissenting therefrom. Upon request of any party, the majority shall briefly explain the reasoning and the basis for their decision, and the dissenters may likewise explain the reason for disagreement.

(d) The decision and the reasoning and basis for the decision of the Panel is not admissible as evidence in any action subsequently brought in any court of law. A copy of the decision shall be sent by the Director to the health care provider's professional licensing board.

(e) Panelists and witnesses are immune from civil liability for all communications, findings, opinions and conclusions made in the course and scope of the duties prescribed by the Act.

(f) The Panel's decision is without administrative or judicial authority and is not binding upon any party. The Panel may, however, recommend an award, approve settlement agreements consented to by the parties and discuss the same and all such approved settlement agreements are binding on the parties.

RULE 17 - TRAVEL EXPENSES

All members of the Panel, the Director, and the Director's staff are entitled to travel expenses incurred while on the business of the Panel, as provided in Sections 2-18-501 through 2-18-503, MCA, but such expenses shall be approved by the Director before payment is made.

RULE 18 - COMPENSATION OF THE PANEL

All members of the Panel shall be paid a fee of Forty Dollars (\$40.00) per hour, up to a maximum of Three Hundred Twenty Dollars (\$320.00) per day in which a hearing or part of a hearing is held, for the time spent in hearing claims, subject to the approval of the Director and upon presentation of a billing itemizing to the one-tenth (1/10th) of an hour the nature of the services performed and the time involved. Upon the effective date of an amendment to Section 27-6-203, MCA, authorizing the same, the amount of such compensation shall be increased to Fifty Dollars (\$50.00) per hour, up to a maximum of Five Hundred Dollars (\$500.00) per day in which a hearing or part of a hearing is held, for the time spent in hearing claims. Additional compensation for travel time and other services shall be considered by the Director under circumstances including, but not limited to, weather or distance.

RULE 19 - ADDITIONAL AUTHORITY OF PANEL

The Panel may provide for the administration of oaths, the receipt of claims filed, the promulgation of forms required by the Act, the issuance of subpoenas in connection with the administration of the Act, and the performance of other acts to fairly and effectively administer the Act.

RULE 20 - STATUTE OF LIMITATIONS - SEPARATELY - DESIGNATED NECESSARY OR PROPER PARTIES

(a) The running of the applicable limitation period in a malpractice claim is tolled upon receipt by the Director of the application for review, as to all health care providers named in the application as parties to the Panel proceeding, and as to all other persons or entities named in the application as necessary or proper parties, for any court action which might subsequently arise out of the same factual circumstances set forth in the application.

(b) The running of the applicable limitation period in a malpractice claim does not begin again until 30 days after either an order of dismissal, with or without prejudice against re-filing, is issued from the Panel Chairperson or from the Director upon the consent of the parties to the claim, or the Panel's final decision, whichever occurs first, is entered in the permanent files of the Panel and a copy is served upon the complainant or claimant's attorney, if he or she is represented by counsel, by certified mail.

Amended August 30, 2001

Part 6 Deliberations and Decision of Panel

27-6-601. Selection of chairman. At or prior to the time set for the hearing, the attorney members of the panel shall select a chairman who shall be an attorney and who shall preside over the panel deliberations.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(part).

27-6-602. Questions panel must decide. Upon consideration of all the relevant material, the panel shall decide whether there is:

(1) substantial evidence that the acts complained of occurred and that they constitute malpractice; and

(2) a reasonable medical probability that the patient was injured thereby.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(part).

27-6-603. Deliberations to be secret — voting. The deliberations of the panel are confidential. All votes of the panel on the questions for discussion shall be by secret ballot. The decision shall be by a majority vote of those voting members of the panel who sat on the entire case.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(part).

27-6-604. Form and content of decision. The decision must in every case be signed for the panel by the chairman, must contain only the conclusions reached by a majority of its members, and must list the number of members, if any, dissenting from the opinion. Upon request of any party, the majority shall briefly explain the reasoning and basis for the decision and the dissenters shall explain the reasoning and basis for disagreement. Each party must be informed by the panel of the right to nonbinding mediation under 27-6-606.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(3); amd. Sec. 1, Ch. 59, L. 1995.

27-6-605. Decision to be filed and copies sent to parties, attorneys, and licensing board. The decision shall be communicated in writing to the parties and attorneys concerned, and a copy thereof shall be retained in the permanent files of the panel. A copy of the decision shall be sent to the health care provider's professional licensing board.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(part); amd. Sec. 29, Ch. 12, L. 1979.

Cross-References

Board of Medical Examiners, 2-15-1731.

Board of Dentistry, 2-15-1732.

Hospitals and related facilities — licensing, Title 50, ch. 5, part 2.

27-6-606. Decision not binding — settlement agreements — nonbinding mediation. (1) The panel's decision is without administrative or judicial authority and is not binding upon any party.

(2) The panel may recommend an award, approve settlement agreements, and discuss the settlement agreements, all in a manner consistent with this part. All approved settlement agreements are binding on the parties.

(3) If the panel decides both questions required by 27-6-602 in the affirmative, the court in which the complaint is filed shall, at the request of a party, require the parties to participate in court-supervised, nonbinding mediation prior to proceeding.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(6); amd. Sec. 2, Ch. 59, L. 1995.

Part 7 Effect of Proceedings in Court Action — Confidentiality

27-6-701. No court action before application to and decision by panel. No malpractice claim may be filed in any court against a health care provider before an application is made to the panel and its decision is rendered.

History: En. 17-1307 by Sec. 7, Ch. 449, L. 1977; R.C.M. 1947, 17-1307(1).

Cross-References

Administration of justice — access to courts, Art. II, sec. 16, Mont. Const.

Wheat

SENATE BILL NO. 21
INTRODUCED BY D. GRIMES
BY REQUEST OF THE LEGISLATIVE COUNCIL

A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING DAMAGES THAT MAY BE GRANTED FOR MEDICAL MALPRACTICE THAT REDUCES A PATIENT'S CHANCE OF RECOVERY; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Liability of health care provider for reduced chance of recovery caused by malpractice.** (1) For purposes of a malpractice claim, as defined in 27-6-103, damages may be awarded against a health care provider, as defined in 27-6-103, if a negligent act or omission during diagnosis or treatment for a medical condition reduces a patient's chance of recovering and the negligent act or omission is a contributing cause of:

- (a) death;
- (b) survival for a shorter period of time;
- (c) no recovery;
- (d) a recovery that is of lesser extent or quality or that takes longer to occur; or
- (e) other injury.

(2) The damages must be determined based on which of the events referred to in subsections (1)(a) through (1)(e) occurred and the resulting types of injury, damage, and loss.

~~(3) Damages awarded must be the difference between the percentage chance of recovering prior to the negligent act or omission and the percentage chance of recovering after the negligent act or omission, multiplied by the total damages proved under subsection (2)~~ (a) If the evidence establishes that the chance of recovering prior to the negligent act or omission was more likely than not, damages awarded must be 100% of the damages proved under subsection (2).

(b) If the evidence establishes that the chance of recovering prior to the negligent act or omission was not more likely than not, damages awarded must be the difference between the chance of recovering prior to the negligent act or omission and the chance of recovering after the negligent act or omission, multiplied by the total damages proved under subsection (2).

NEW SECTION. **Section 2. Applicability.** [This act] applies to malpractice claims that arise after [the effective date of this act].

- END -

Effective Date July 1, 2005