

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

Senate Bill 575

BY SENATORS TAKUBO AND MARONEY

[Introduced February 12, 2019; Referred
to the Committee on the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §55-7L-1, §55-7L-2, §55-7L-3, §55-7L-4, §55-7L-5, §55-7L-6, §55-7L-7, §55-
3 7L-8, §55-7L-9, §55-7L-10, §55-7L-11, §55-7L-12, §55-7L-13, §55-7L-14, §55-7L-15, and
4 §55-7L-16, all relating to the creation of long-term care medical review panels; providing
5 definitions; requiring the West Virginia State Bar to administer the medical review panel
6 program; specifying process for selection of medical review panel; establishing eligibility
7 requirements for medical review panelists; clarifying circumstances in which a panelist
8 may be removed; setting forth time limitations; allowing courts to render sanctions for
9 noncompliance with statutory requirements; specifying evidence to be considered by
10 medical review panel; setting forth powers and duties of the panelists; requiring panel to
11 determine whether applicable standard of care has been violated; requiring production of
12 a panel opinion; providing that costs and attorney's fees may be awarded if a claim is
13 unsuccessfully pursued following the issuance of an adverse panel opinion; providing civil
14 immunity for panel members; and allowing for payment of panelists, expenses, and fees.

Be it enacted by the Legislature of West Virginia:

CHAPTER 55. ACTIONS, SUITS AND ARBITRATION; JUDICIAL SALE.

ARTICLE 7L. LONG-TERM CARE MEDICAL REVIEW PANELS.

§55-7L-1. Definitions.

1 Except as otherwise provided in this section, all terms in this article shall have the same
2 definitions as set forth in §55-7B-2 of this code.

3 “Long-term care facility” means any nursing home, assisted living facility, residential care
4 community, home health agency, group residential facility, located in West Virginia and licensed,
5 regulated or certified by the State of West Virginia under state or federal law and any related
6 entity.

7 “Long-term care provider” means any individual providing health care at a long-term care

8 facility, including, but not limited to, an advanced practice registered nurse, dentist, registered or
9 licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language
10 pathologist, audiologist, occupational therapist, psychologist, pharmacist, technician, certified
11 nursing assistant, any person supervised by or acting under the direction of a licensed
12 professional, any person taking actions or providing service or treatment pursuant to or in
13 furtherance of a long-term care facility's plan of care, medical diagnosis or treatment; or an officer,
14 employee or agent of such a long-term care facility acting in the course and scope of the officer's,
15 employee's or agent's employment.

16 "Medical review panel" means a three-person panel convened to facilitate the unbiased,
17 transparent review of complex medical issues arising in claims against long-term care providers.

§55-7L-2. Request to form panel.

1 In all cases alleging medical professional liability for a medical injury arising, in whole or
2 in part, from health care rendered at a long-term care facility, at any time following the service of
3 a screening certificate of merit upon a long-term care facility or long-term care provider, the long-
4 term care facility or long-term care provider may request the formation of a medical review panel
5 by serving a request by registered or certified mail upon all parties and the Executive Director of
6 the West Virginia State Bar.

§55-7L-3. Members of panel; chair.

1 (a) A medical review panel consists of one attorney currently admitted to practice before
2 the West Virginia Supreme Court of Appeals and three physicians licensed to practice medicine
3 by the West Virginia Board of Medicine or the West Virginia Board of Osteopathic Medicine in
4 active clinical practice in the State of West Virginia.

5 (b) The attorney member of the medical review panel shall act as chair of the panel and
6 in an advisory capacity but may not vote.

7 (1) The chair of the medical review panel shall expedite the selection of the other panel
8 members, convene the panel, expedite the panel's review, and assist in the compilation of the

9 panel's report.

10 (2) The chair may establish a reasonable schedule for submission of evidence to the
11 medical review panel but must allow sufficient time for the parties to make reasonable
12 presentation of related facts and authorities.

§55-7L-4. Panel selection.

1 (a) Within five business days after the service of a request for formation of a medical
2 review panel, the parties shall select a panel chair by agreement. If no agreement on a panel
3 chair can be reached, either party may request the executive director of the West Virginia State
4 Bar to draw at random a list of five names of attorneys who are admitted to practice in this state,
5 maintain offices in the county in which the long-term care facility is located or in a bordering
6 county, and who have previously expressed interest to the West Virginia State Bar in serving as
7 a panelist. Prior to selecting the random list, the executive director shall solicit names of attorneys
8 admitted to practice in the state who are interested in serving on a medical review panel and
9 collect a \$25 fee from the party making the request for the formation of the random list.

10 (b) The executive director shall notify the parties in writing of the randomly drawn list, and
11 the parties shall then strike names alternately with the long-term care facility or long-term care
12 provider striking first until one name remains. The remaining attorney shall be the chair of the
13 panel.

14 (c) Upon exercising each strike, the party so exercising shall notify all other parties of its
15 decision.

16 (d) If a party does not strike a name within five business days after receiving notice from
17 the executive director, the opposing party shall, in writing, request the executive director to strike
18 for the party; and the executive director shall strike a name from the list at random.

19 (e) Within five business days after being notified by the executive director of being selected
20 as chair, the chair shall send a written acknowledgment of appointment to the executive director
21 and the parties or serve an affidavit showing good cause for relief from serving as provided in this

22 article.

23 (f) The executive director may remove the chair of the panel if the executive director
24 determines that the chair is not fulfilling the duties imposed upon the chair by this article.

25 (g) If the chair is removed under this section, a new chair shall be selected under this
26 article.

§55-7L-5. Panelist eligibility.

1 (a) All physicians who, at the time of the medical injury at issue, devoted 60 percent of his
2 or her professional time annually to the active clinical practice in his or her medical field or
3 specialty within this state, or to teaching in his or her medical field or specialty in an accredited
4 university within this state, shall be available for selection as members of the medical review
5 panel.

6 (b) Each party to the action has the right to select one physician, and upon selection, the
7 two physicians thus selected shall select the third panelist. If there are multiple plaintiffs or
8 defendants, only one physician shall be selected per side. The plaintiff or plaintiffs may select one
9 physician and the defendant or defendants may select one physician.

10 (c) Within 15 business days after the chair is selected, both parties shall select a physician
11 and the parties shall notify the other party and the chair of their selection. If a party fails to make
12 a selection within the time provided, the chair shall make the selection and notify both parties.
13 Within 15 days after their selection, the physician members shall select the third member within
14 the time provided and notify the chair and the parties. If the providers fail to make a selection, the
15 chair shall make the selection and notify both parties.

16 (d) Within 10 days after the selection of a panel member, written challenge without cause
17 may be made to the panel member. Upon challenge or excuse, the party whose appointee was
18 challenged or dismissed shall select another panelist. If the challenged or dismissed panel
19 member was selected by the other two panel members, the panel members shall make a new
20 selection. If two such challenges are made and submitted, the chair shall within 10 days appoint

21 a panel consisting of three qualified panelists and each side shall, within ten 10 days after the
22 appointment, strike one panelist. The party whose appointment was challenged shall strike last,
23 and the remaining member shall serve.

24 (e) When a medical review panel is formed, the chair shall within five business days notify
25 the parties of the name and address of each panel member and the date on which the last member
26 was selected.

§55-7L-6. Excusing a panel member from service.

1 (a) A member of a medical review panel who is selected under this article shall serve
2 unless the parties excuse the panelist by written agreement or the panelist is excused as provided
3 in this section for good cause shown.

4 (b) To show good cause for relief from serving, the attorney selected as chair of a medical
5 review panel must serve an affidavit upon the executive director and the parties setting forth the
6 facts showing that service would constitute an unreasonable burden or undue hardship. The
7 executive director may excuse the attorney from serving and shall notify all parties, who shall then
8 select a new chair as provided in this article.

9 (c) To show good cause for relief from serving, a physician member of a medical review
10 panel must serve an affidavit upon the panel chair. The affidavit must set out the facts showing
11 that service would constitute an unreasonable burden or undue hardship. The chair may excuse
12 the member from serving and notify all parties.

13 (d) The chair may remove a member of the panel if the chair determines that the member
14 is not fulfilling the duties imposed upon the panel members by this article upon notice to the parties
15 and an opportunity to be heard.

16 (e) If a member is removed under this section, a new member shall be selected as
17 provided in this article.

§55-7L-7. Time limitation on providing expert opinion.

1 (a) The panel shall give its expert opinion within 180 days after the selection of the last

2 member of the panel unless the chair or a panelist is removed as provided in this article in which
3 case the panel shall submit its report within 90 days after a replacement is named.

4 (b) If the panel has not given an opinion within the time allowed under subsection (a) of
5 this section, the panel shall submit a report to the parties, stating the reasons for the delay.

§55-7L-8. Sanctions for noncompliance.

1 A party, attorney, or panelist who fails to act as required by this article without good cause
2 shown is, after notice and an opportunity to be heard, subject to appropriate sanctions by the
3 court in which the action is pending or, if no action has been filed, by any court of this state with
4 jurisdiction over the party, attorney, or panelist.

§55-7L-9. Evidence; oath or affirmation.

1 (a) The evidence in written form to be considered by the medical review panel shall be
2 promptly submitted by the respective parties, but in no event less than 45 days after the formation
3 of the panel.

4 (b) The evidence may consist of medical records, x-rays, lab tests, excerpts of treatises
5 or peer reviewed medical literature, affidavits or depositions of witnesses, and any other form of
6 evidence allowable by the medical review panel.

7 (c) Depositions of parties and witnesses may be taken before the convening of the panel,
8 but incomplete discovery shall not serve as a basis to delay the completion of the panel's opinion.

9 (d) The chair shall ensure that before the panel gives its expert opinion under this article,
10 each panel member has the opportunity to review every item of evidence submitted by the parties.

11 (e) Before considering any evidence or deliberating with other panel members, each
12 member of the medical review panel shall take an oath in writing on a form provided by the panel
13 chair, which shall read as follows:

14 "I (swear or affirm) under penalty of perjury that I will well and truly consider all of the
15 evidence submitted by the parties; that I will render my opinion impartially and without bias, based
16 upon all of the evidence submitted by the parties, and that I have not and will not communicate

17 with any party or representative of a party before rendering my opinion, except as authorized by
18 law.”

§55-7L-10. Prohibition against ex parte communication with panel members.

1 Neither a party, a party’s agent, a party’s attorney, nor a party’s insurance carrier may
2 communicate with any member of the panel, except as authorized by law, before the giving of the
3 panel’s expert opinion as provided in this article.

§55-7L-11. Duties of chair; advice relative to legal questions; preparation of opinion.

1 The chair of the panel shall advise the panel relative to any legal question involved in the
2 review proceeding and shall prepare the opinion of the panel as provided in this article. Any such
3 question and the chair’s answer shall be included in the opinion of the panel.

§55-7L-12. Powers and duties of panel relative to information; access to material submitted to panel.

1 (a) The panel has the right and duty to request any additional information necessary to
2 form its opinion.

3 (b) The panel may consult with medical treatises or peer reviewed medical journals; the
4 panel report shall cite all such sources.

5 (c) The panel may examine reports of other physicians necessary to fully inform the panel
6 regarding the issue to be decided.

7 (d) Both parties shall have full access to any material submitted to or considered by the
8 panel.

§55-7L-13. Expert opinion.

1 (a) The panel has the sole duty to express the panel’s expert opinion as to whether or not
2 the evidence supports the conclusion that the defendant or defendants acted or failed to act within
3 the applicable standard of care in the treatment of the patient.

4 (b) After reviewing all evidence, the panel shall, within 30 days, give one or more of the
5 following expert opinions, which must be in writing and signed by the panelists:

6 (1) The evidence supports the conclusion that the defendant or defendants failed to
7 comply with the applicable standard of care.

8 (2) The evidence does not support the conclusion that the defendant or defendants failed
9 to meet the applicable standard of care.

10 (3) There is a material issue of fact, not requiring expert opinion, bearing on liability for
11 consideration by the court or jury.

12 (4) Whether any medical injury suffered by the patient was caused by a deviation from the
13 standard of care by the defendant or defendants, and if so, whether the medical injury constitutes
14 permanent injury, or death.

15 (c) A report of the expert opinion reached by the medical review panel shall be admissible
16 as evidence in any action between the parties to the report. However, the expert opinion is not
17 conclusive, and either party, at the party's cost, has the right to call any member of the medical
18 review panel as a witness. If called, a witness shall appear and testify.

19 (d) If a case proceeds to trial following issuance of a panel opinion that the evidence does
20 not support the conclusion that the defendant or defendants failed to comply with the applicable
21 standard of care and the trier of fact finds that the defendant did not deviate from the applicable
22 standard of care, the defendant shall be entitled to an award of costs and reasonable attorneys'
23 fees incurred from the date of the panel's decision to the date of the verdict.

§55-7L-14. Immunity from civil liability.

1 The chair and each panel member have absolute immunity from civil liability for all
2 communications, findings, opinions, and conclusions made in the course and scope of duties
3 prescribed by this article.

§55-7L-15. Payment; expenses; payment of fees.

1 (a) Each physician member of the medical review panel is entitled to be paid up to \$500
2 for all work performed as a member of the panel, exclusive of time involved if called as a witness
3 to testify in court and reasonable expenses.

4 (b) The chair of the panel is entitled to be paid at the rate of \$250 per diem, not to exceed
5 \$2,500 and reasonable expenses.

6 (c) The chair shall keep an accurate record of the time and expenses of all the members
7 of the panel. The record shall be submitted to the parties for payment with the panel's report.

8 (d) Fees of the panel, including expenses of the review, shall be paid by the side in whose
9 favor the majority opinion is written. If there is no majority opinion, each side shall pay 50 percent
10 of the cost.

§55-7L-16. Submission of report to parties.

1 The chair shall submit a copy of the panel's report to counsel for all parties within three
2 business days after the panel issues its opinion.

NOTE: The purpose of this bill is to permit a long-term care provider to request that a medical review panel review claims of injury against the provider.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.