

# **WEST VIRGINIA LEGISLATURE**

**2017 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 560**

BY SENATORS TAKUBO, MAYNARD, STOLLINGS, SWOPE,

PLYMALE AND CLINE

[Originating in the Committee on the Judiciary;

reported on March 27, 2017]

1 A BILL to amend and reenact section §55-7B-2 of the Code of West Virginia, 1931, as amended;  
2 and to amend said code by adding thereto thirteen new sections, designated §55-7B-6d,  
3 §55-7B-6e, §55-7B-6f, §55-7B-6g, §55-7B-6h, §55-7B-6i, §55-7B-6j, §55-7B-6k, §55-7B-  
4 6l, §55-7B-6m, §55-7B-6n, §55-7B-6o and §55-7B-6p, all relating to establishing a medical  
5 malpractice review panel; defining terms; allowing the Board of Medicine to convene a  
6 review panel; making use of the panel voluntary; providing for selection of a chairperson;  
7 setting forth powers and duties of the chairperson; providing for selection of panel  
8 members; setting out a procedure to challenge panel members; setting out powers and  
9 duties of the review panel; providing for matters which the panel may consider in their  
10 deliberations; requiring the panel to issue findings and expert opinions; establishing a  
11 procedure for the payment of costs and fees; allowing the report to be admissible in court  
12 in certain circumstances; granting civil and criminal immunity to panel members; providing  
13 for compensation of panel members; and providing for rulemaking.

*Be it enacted by the Legislature of West Virginia:*

1 That §55-7B-2 of the Code of West Virginia, 1931, as amended, be amended and  
2 reenacted; and that said code be amended by adding thereto thirteen new sections, designated  
3 §55-7B-6d, §55-7B-6e, §55-7B-6f, §55-7B-6g, §55-7B-6h, §55-7B-6i, §55-7B-6j, §55-7B-6k, §55-  
4 7B-6l, §55-7B-6m, §55-7B-6n, §55-7B-6o and §55-7B-6p, all to read as follows:

**ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.**

**§55-7B-2. Definitions.**

1 The following words shall have the following meaning:

2 ~~(a)~~ (1) “Board” means the state Board of Risk and Insurance Management.

3 (2) “Board of Medicine” shall mean the West Virginia Board of Medicine as created  
4 pursuant to article three, chapter thirty of this code.

5 ~~(b)~~ (3) “Collateral source” means a source of benefits or advantages for economic loss  
6 that the claimant has received from:

7           ~~(4)~~ (A) Any federal or state act, public program or insurance which provides payments for  
8 medical expenses, disability benefits, including workers' compensation benefits, or other similar  
9 benefits. Benefits payable under the Social Security Act and Medicare are not considered  
10 payments from collateral sources except for Social Security disability benefits directly attributable  
11 to the medical injury in question;

12           ~~(2)~~ (B) Any contract or agreement of any group, organization, partnership or corporation  
13 to provide, pay for or reimburse the cost of medical, hospital, dental, nursing, rehabilitation,  
14 therapy or other health care services or provide similar benefits, but excluding any amount that a  
15 group, organization, partnership, corporation or health care provider agrees to reduce, discount  
16 or write off of a medical bill;

17           ~~(3)~~ (C) Any group accident, sickness or income disability insurance, any casualty or  
18 property insurance, including automobile and homeowners' insurance, which provides medical  
19 benefits, income replacement or disability coverage, or any other similar insurance benefits,  
20 except life insurance, to the extent that someone other than the insured, including the insured's  
21 employer, has paid all or part of the premium or made an economic contribution on behalf of the  
22 plaintiff; or

23           ~~(4)~~ (D) Any contractual or voluntary wage continuation plan provided by an employer or  
24 otherwise or any other system intended to provide wages during a period of disability.

25           ~~(e)~~ (4) "Consumer Price Index" means the most recent Consumer Price Index for All  
26 Consumers published by the United States Department of Labor.

27           ~~(d)~~ (5) "Emergency condition" means any acute traumatic injury or acute medical condition  
28 which, according to standardized criteria for triage, involves a significant risk of death or the  
29 precipitation of significant complications or disabilities, impairment of bodily functions or, with  
30 respect to a pregnant woman, a significant risk to the health of the unborn child.

31           ~~(e)~~ (6) "Health care" means:

32           ~~(4)~~ (A) Any act, service or treatment provided under, pursuant to or in the furtherance of a  
33 physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment;

34           ~~(2)~~ (B) Any act, service or treatment performed or furnished, or which should have been  
35 performed or furnished, by any health care provider or person supervised by or acting under the  
36 direction of a health care provider or licensed professional for, to or on behalf of a patient during  
37 the patient's medical care, treatment or confinement, including, but not limited to, staffing, medical  
38 transport, custodial care or basic care, infection control, positioning, hydration, nutrition and  
39 similar patient services; and

40           ~~(3)~~ (C) The process employed by health care providers and health care facilities for the  
41 appointment, employment, contracting, credentialing, privileging and supervision of health care  
42 providers.

43           ~~(f)~~ (7) "Health care facility" means any clinic, hospital, pharmacy, nursing home, assisted  
44 living facility, residential care community, end-stage renal disease facility, home health agency,  
45 child welfare agency, group residential facility, behavioral health care facility or comprehensive  
46 community mental health center, intellectual/developmental disability center or program, or other  
47 ambulatory health care facility, in and licensed, regulated or certified by the State of West Virginia  
48 under state or federal law and any state-operated institution or clinic providing health care and  
49 any related entity to the health care facility.

50           ~~(g)~~ (8) "Health care provider" means a person, partnership, corporation, professional  
51 limited liability company, health care facility, entity or institution licensed by, or certified in, this  
52 state or another state, to provide health care or professional health care services, including, but  
53 not limited to, a physician, osteopathic physician, physician assistant, advanced practice  
54 registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse,  
55 optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist, audiologist,  
56 occupational therapist, psychologist, pharmacist, technician, certified nursing assistant,  
57 emergency medical service personnel, emergency medical services authority or agency, any

58 person supervised by or acting under the direction of a licensed professional, any person taking  
59 actions or providing service or treatment pursuant to or in furtherance of a physician's plan of  
60 care, a health care facility's plan of care, medical diagnosis or treatment; or an officer, employee  
61 or agent of a health care provider acting in the course and scope of the officer's, employee's or  
62 agent's employment.

63 (9) "Malpractice" shall mean a tort based on, or arising out of, health care or professional  
64 services that were provided, or that should have been provided, by a health care provider to a  
65 patient.

66 (10) "Malpractice-related claim" shall mean a claim for a tort, breach of contract, or a  
67 violation of a statute, or rule based on, or arising out of, health care or professional services that  
68 were provided, or should have been provided by a health care provider to a patient.

69 ~~(h)~~ (11) "Medical injury" means injury or death to a patient arising or resulting from the  
70 rendering of or failure to render health care.

71 ~~(i)~~ (12) "Medical professional liability" means any liability for damages resulting from the  
72 death or injury of a person for any tort or breach of contract based on health care services  
73 rendered, or which should have been rendered, by a health care provider or health care facility to  
74 a patient. It also means other claims that may be contemporaneous to or related to the alleged  
75 tort or breach of contract or otherwise provided, all in the context of rendering health care services.

76 ~~(j)~~ (13) "Medical professional liability insurance" means a contract of insurance or any  
77 actuarially sound self-funding program that pays for the legal liability of a health care facility or  
78 health care provider arising from a claim of medical professional liability. In order to qualify as  
79 medical professional liability insurance for purposes of this article, a self-funding program for an  
80 individual physician must meet the requirements and minimum standards set forth in section  
81 twelve of this article.

82 ~~(k)~~ (14) "Noneconomic loss" means losses, including, but not limited to, pain, suffering,  
83 mental anguish and grief.

84 (15) "Panel" shall mean a Medical Malpractice Peer Review Panel, as set forth in  
85 this article.

86 ~~(16)~~ (16) "Patient" means a natural person who receives or should have received health care  
87 from a licensed health care provider under a contract, expressed or implied.

88 ~~(17)~~ (17) "Plaintiff" means a patient or representative of a patient who brings an action for  
89 medical professional liability under this article.

90 ~~(18)~~ (18) "Related entity" means any corporation, foundation, partnership, joint venture,  
91 professional limited liability company, limited liability company, trust, affiliate or other entity under  
92 common control or ownership, whether directly or indirectly, partially or completely, legally,  
93 beneficially or constructively, with a health care provider or health care facility; or which owns  
94 directly, indirectly, beneficially or constructively any part of a health care provider or health care  
95 facility.

96 ~~(19)~~ (19) "Representative" means the spouse, parent, guardian, trustee, attorney or other  
97 legal agent of another.

**§55-7B-6d. Convening of a medical malpractice peer review panel.**

1 (a) Prior to the commencement or within thirty days of filing of any action pursuant to this  
2 article a patient or health care provider may voluntarily request a review of a proposed complaint  
3 by a medical malpractice peer review panel. Either party shall request such a review with the  
4 Board of Medicine as set forth in this article and in rules promulgated pursuant to this article.

5 (b) The panel shall be selected and convened by the Board of Medicine. The panel shall  
6 review all records and evidence available and make findings for consideration by the patient or  
7 health care provider.

8 (c) Nothing in this article shall be construed to require the convening of a medical review  
9 panel prior to the commencement of any action pursuant to this article.

10 (d) The panel shall consist of:

11 (A) One attorney, who shall act as chairperson, and is a nonvoting member; and

12 (B) Three physicians selected pursuant to this article.

**§55-7B-6e. Selection of the chairperson.**

1 (a) Within ten days after notice to the Board of Medicine to convene a medical malpractice  
2 peer review panel, the Board of Medicine shall select a chairperson who shall be an attorney  
3 licensed to practice law in this state pursuant to article two, chapter thirty of this code.

4 (b) The chairperson shall serve as a nonvoting member of the panel.

5 (c) The Board of Medicine shall notify the parties of the selection of a chairperson via  
6 certified mail.

**§55-7B-6f. Powers and duties of the chairperson.**

1 (a) The chairperson shall expedite the selection of the other panel members, convene the  
2 panel, and expedite the panel's review of all submitted evidence and information.

3 (b) The chairperson shall establish a reasonable schedule for submission of evidence to  
4 the panel but shall allow reasonable time for the parties to make full and adequate presentation  
5 of related facts and authorities in accordance with the provisions of this article.

6 (c) The chairperson of the panel shall advise the panel relative to any legal question  
7 involved in the review proceeding and shall prepare the final expert opinion of the panel.

**§55-7B-6g. Selection of panel members.**

1 (a) Within twenty days of receipt of a request for the convening of a panel, the Board of  
2 Medicine shall provide the parties with two lists of physicians who are eligible for panel  
3 membership. Eligible members for a panel must have a valid, active license issued pursuant to  
4 article three or article fourteen, chapter thirty of this code.

5 (b) Each list shall contain three names of prospective panelists eligible to serve. The lists  
6 shall, to the extent reasonably possible, include only prospective panelists from the professions  
7 and within the specialty fields, if any, of one or more of the health care providers.

8 (c) The patient shall strike a name from each list, and the health care provider shall strike  
9 a name from each list. If there is more than one patient or more than one health care provider,

10 the patients shall make their strikes collectively and the health care providers shall make their  
11 strikes collectively.

12 (d) The remaining names on each list shall serve as panel members. The two selected  
13 panelists shall then select a third panel member who meets the criteria set forth in this section  
14 and is from the profession and specialty field, if any, of one or more of the health care providers.

15 (e) If a party does not make a strike within the timeframe as set forth in rules, the panel  
16 will cease to exist and the action may proceed without findings of the panel. Parties may not  
17 make subsequent requests for review by a panel if they have not complied with the provisions for  
18 panel selection as set forth in this section and any rules promulgated pursuant to this article.

19 (f) If there are multiple patients or health care providers, only one panel member shall be  
20 selected by the patients, collectively, and one by the health care providers, collectively.

21 (g) A member of a panel who is selected shall serve unless:

22 (1) The panel member is dismissed pursuant to a successful challenge as provided in this  
23 article;

24 (2) The parties by agreement excuse the panelist; or

25 (3) The panelist is excused as provided in this section for good cause shown.

26 (h) When a panel is formed, as set forth in this section, the parties shall, within five days,  
27 notify the Board of Medicine and the chairperson by certified mail of the following:

28 (1) The names and addresses of the panel members; and

29 (2) The date on which the last member was selected.

**§55-7B-6h. Challenges and removal of panel members.**

1 (a) Within ten days after the selection of a panel member, written challenges of a panel  
2 member's selection may be submitted to the chairperson. Upon a challenge, the chairperson shall  
3 determine if there is sufficient cause to dismiss the panel member for a conflict or potential bias.  
4 If the challenged or dismissed panel member was selected through the striking process, the



5 chairperson shall provide a new striking panel. The patient or health care provider whose  
6 appointment was challenged shall strike last, and the remaining members shall serve.

7 (b) If the challenged or dismissed panel member was selected by the other two panel  
8 members, or by the chairperson, the panel members or the chairperson who selected the  
9 challenged panel member shall make a new selection.

10 (c) The Board of Medicine may remove the chairperson of the panel if the chairperson is  
11 not fulfilling the duties imposed upon the chairperson by this article. If the chairperson is removed,  
12 a new chairperson shall be selected in the manner set forth in section six-e of this article.

13 (d) The chairperson may remove a member of the panel if the chairperson determines that  
14 the member is not fulfilling the duties imposed upon the panel members by this article. If a member  
15 is removed pursuant to this section, a new member shall be selected in the manner provided in  
16 this article.

**§55-7B-6i. Powers and duties of the panel.**

1 (a) Neither a patient or a health care provider, their agent, attorney, or insurance carrier  
2 may communicate with any member of the panel, except as authorized by law, before the panel  
3 issues its expert opinion.

4 (b) The panel has the right and duty to request all necessary and relevant information  
5 regarding a malpractice or malpractice-related claim. This information shall be redacted and  
6 remain confidential.

7 (c) The panel may consult with medical authorities.

8 (d) The panel may examine reports of other health care providers necessary to fully inform  
9 the panel regarding the issue to be decided.

10 (e) The panel has the sole duty to express its expert opinion as to whether or not the  
11 evidence supports the conclusion that a health care provider or providers acted or failed to act  
12 within the appropriate standards of care as alleged and whether any such failure was a substantial  
13 factor in providing a negative outcome for that patient.

**§55-7B-6j. Evidentiary considerations.**

1           (a) The evidence to be considered by the panel shall be promptly submitted by the  
2 respective parties in written form only.

3           (b) The evidence may consist of nonprivileged medical records, x-rays, lab tests, excerpts  
4 of treatises and affidavits.

5           (c) Statements of parties and witnesses, subject to approval by the chairperson, may be  
6 taken after the formation of the panel but before the evidence is submitted to the panel.

7           (d) Upon request of any party, or upon request of any panel member, the chairperson may  
8 issue administrative subpoenas and subpoenas duces tecum in aid of the taking of statements  
9 and the production of documentary evidence for inspection or copying, or both.

10           (e) The chairperson shall ensure that before the panel gives its expert opinion, each panel  
11 member has the opportunity to review every item of evidence submitted.

12           (f) The patient's evidence shall be submitted to the panel within thirty days after the  
13 chairperson has notified the parties of the formation of the panel as set forth in this article.

14           (g) The health care provider's evidence shall be submitted to the panel within forty-five  
15 days after the receipt of patient's submission of evidence.

16           (h) The chairperson may extend the deadlines set forth above due to extenuating  
17 circumstances, if requested by one or more of the parties.

18           (i) All evidence presented to the panel shall have the personal information of the patient  
19 redacted.

20           (j) If no submission is made by either the patients or the health care providers, the panel  
21 shall cease to exist and no report or expert opinion will be rendered.

**§55-7B-6k. Panel findings.**

1           (a) After reviewing all evidence, the panel shall, within thirty days of receipt of the  
2 submission of the health care provider, give to each health care provider one of the following  
3 expert opinions, which shall be in writing and signed by the panelists:

4           (1) The evidence supports the conclusion that the specifically identified health care  
5 provider failed to comply with the appropriate standard of care as alleged and the conduct was a  
6 substantial factor in producing a negative outcome for the patient;

7           (2) The evidence supports the conclusion that the specifically identified health care  
8 provider failed to comply with the appropriate standard of care as alleged, but the conduct was  
9 not a substantial factor in producing a negative outcome for the patient; or

10           (3) The evidence does not support the conclusion that the specifically identified health  
11 care provider failed to meet the applicable standard of care as alleged.

12           (b) In order to give the expert opinion of the panel in accordance with this section, two or  
13 more of the members of the panel shall agree on the conclusion. The panel may issue an opinion  
14 that their findings are inconclusive. Should the panel be unable to reach a consensus they shall  
15 cease to exist and neither the patient or the health care provider may request a second panel be  
16 convened to review the same matter.

17           (c) The panel shall give its expert opinion within one hundred eighty days after the  
18 selection of the last member of the initial panel. This timeframe may be extended if:

19           (1) The chairperson or any other member of the panel is removed; and

20           (2) A new member is selected to replace the removed member more than ninety days  
21 after the last member of the initial panel is selected. The panel has ninety days after the selection  
22 of the new member to give its expert opinion; or

23           (3) The panel has not given its opinion within the time allowed, and has submitted a report  
24 to the parties, stating the reasons for the delay.

25           (d) The chairperson shall submit a copy of the panel's report by certified mail within five  
26 days after the panel gives its opinion to:

27           (1) The Board of Medicine;

28           (2) The patient and his or her attorney; and

29           (3) The health care provider and his or her attorney.

**§55-7B-6l. Costs and fees.**

1 If a patient receives an adverse expert opinion from the panel but chooses to file and  
2 proceed with a malpractice or malpractice-related claim as set forth in this article and:

3 (1) That action is dismissed in a manner averse to the patient; or

4 (2) Results in a verdict finding no liability against a health care provider.

5 The patient shall reimburse the health care provider for all costs and fees associated with  
6 the litigation of the complaint including reasonable attorney fees.

**§55-7B-6m. Admissibility.**

1 (a) The report of the expert opinion reached by the panel is admissible as evidence in any  
2 action pending or subsequently brought by the patient under this article, unless the court finds  
3 that admissible evidence first produced during pretrial discovery in the action would have had a  
4 substantial and material impact on the panel's deliberations and ultimate conclusions reported  
5 pursuant to this article.

6 (b) The expert opinion is not conclusive in any action brought under this article, and either  
7 party may call any member of the panel as a witness. If called as a witness, the panel member  
8 shall appear and testify, but shall be entitled to reasonable compensation by the party calling the  
9 witness.

**§55-7B-6n. Immunity.**

1 A panelist shall have absolute immunity from civil or criminal liability from all  
2 communications, findings, opinions, and conclusions made in the course and scope of duties  
3 prescribed by this article.

**§55-7B-6o. Compensation.**

1 (a) Each member of the medical review panel, other than the chairperson, is entitled to be  
2 compensated as follows:

3 (1) Up to \$350 for all work performed as a member of the panel exclusive of time involved  
4 if called as a witness to testify in court; and

5 (2) Reasonable travel expenses.

6 (b) The chairperson of the panel is entitled to be paid as follows:

7 (1) At the rate of \$250 per diem, not to exceed \$2000 per case; and

8 (2) Reasonable travel expenses.

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

12 (d) Fees of the panel, including travel expenses and other expenses of the review, shall  
13 be paid by the patient or health care provider against whose interest the expert opinion is written.

14 (e) If the panel's decision is inconclusive, the party who made the request to convene the  
15 panel shall be responsible for all fees and expenses of the panel.

**§55-7B-6p. Rulemaking.**

1 The Board of Medicine shall promulgate rules for legislative approval in accordance with  
2 the provisions of article three, section twenty-nine-a of this code relative to the creation and  
3 operation of medical malpractice peer review panels. These rules shall include, at a minimum,  
4 the following:

5 (1) Detail on the process for selection and striking of members of the panel;

6 (2) Any necessary forms, including forms to place the Board of Medicine on notice of a  
7 request to convene a panel;

8 (3) The manner in which the Board of Medicine selects a chairperson; and

9 (4) Any other provisions the Board of Medicine finds necessary to accomplish the creating  
10 and operation of medical malpractice review panels.

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