

## IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 13-0027

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IN RE RULES OF PROCEDURE OF THE )  
MONTANA MEDICAL LEGAL PANEL ) O R D E R  
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Section 27-6-204, MCA, authorizes the Director of the Montana Medical Legal 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. In December of 2012, after consultation with the State Bar of Montana and other affected organizations, the Director of the Panel presented to the Court proposed changes to the Rules of Procedure of the Panel. The Director stated the intent that all proposed changes will improve the style and language of the Rules, and that the substantive changes conform the Rules to statutes and provide clarification in matters that have arisen since the Rules were last revised in 2001.

This Court discussed the proposed changes to the Montana Medical Legal Panel Rules of Procedure at a public meeting, and decided it would be advisable to invite public comments on the proposals. As a result of the public comments filed with the Clerk of this Court, several changes have been incorporated into the rules presented by the Director of the Montana Medical Legal Panel. Not all suggested changes have been adopted, however.

IT IS NOW ORDERED that the attached Rules of Procedure for the Montana Medical Legal Panel are approved, effective immediately.

This Order and the attached Rules shall be posted on the Court's website. The Clerk is directed to provide copies of this order and the attached Rules to the Director of the Montana Medical Legal Panel and to the State Bar of Montana with the request that a link to this Order and the attached Rules be published on the Bar's website.

DATED this 7th day of May, 2013.

/S/ MIKE McGRATH  
/S/ BETH BAKER  
/S/ LAURIE McKINNON  
/S/ MICHAEL E WHEAT  
/S/ PATRICIA COTTER  
/S/ JIM RICE

## Montana Medical Legal Panel Rules of Procedure

**As requested and agreed upon by: the MMLP Office of the Director and the MMLP Rules Advisory Committee in consultation with the State Bar of Montana.**

### **RULE 1. DEFINITIONS**

As used in these Rules:

(a) “Act” means the Montana Medical Legal Panel Act as established by §§ 27-6-101 through 27-6-704, MCA.

(b) “Administrator” may be a hospital administrator with or without medical training or medical expertise in the subject matter of the claim.

(c) “Chairperson” means the person selected from among the Panel members to preside over the Panel proceedings.

(d) “Claimant” is the person (or persons) who was the Patient alleged to have been injured by Malpractice or who is the legally authorized personal representative of the Patient, if the Patient is legally unable to bring a claim on behalf of himself or herself, or is a person who is permitted by law to recover for injuries alleged to be caused by Malpractice to a Patient. If the Patient is deceased, a “Claimant” is the person legally authorized to act on behalf of the deceased Patient and/or on behalf of those individuals permitted to assert a claim of Malpractice on behalf of the deceased Patient or themselves.

(e) “Defendant” means a health care provider against whom a claim has been made.

(f) “Dentist” means:

(1) for purposes of the assessment of the annual surcharge, an individual licensed to practice dentistry under the provisions of Title 37, chapter 4, MCA, who at the time of the assessment:

(i) has as the individual’s principal residence or place of dental practice the state of Montana;

(ii) is not employed full-time by any federal governmental agency or entity; and

(iii) is not fully retired from the practice of dentistry; or

(2) for all other purposes, a person licensed to practice dentistry under the provisions of Title 37, chapter 4, MCA, who at the time of the occurrence of the incident giving rise to the claim:

(i) was an individual who had as the principal residence or place of dental practice the state of Montana and was not employed full-time by any federal governmental agency or entity; or

(ii) 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 individual dentists licensed to practice dentistry under the provisions of Title 37, chapter 4, MCA.

(g) “Director” means the Director of the Panel or the Director’s authorized representatives.

(h) “Electronically” means by electronic mail or by facsimile. If the office of the Director serves a document electronically, the office of the Director shall ensure that the intended recipient received the document sent electronically. If any document is sent electronically by

a party to the office of the Director, the Chairperson or another party, the sending party has the burden of proving that the document was sent electronically and that the intended recipient received and was able to view, electronically or otherwise, and, if applicable, download the document sent electronically, in order to establish service was effectuated by the party. Documents will be accepted as received by the office of the Director if sent electronically by midnight of the day submitted.

(i) “Health care facility,” for all purposes under the Act, means each separately licensed facility licensed as a health care facility under Title 50, chapter 5, MCA. A “health care facility” for purposes of this rule does not include:

- (1) an end-stage renal dialysis facility;
- (2) a home infusion therapy agency;
- (3) a residential care facility; or
- (4) a governmental infirmary, except a university or college infirmary.

(j) “Health care provider” or “provider” means a “physician,” “dentist,” “podiatrist,” a “health care facility,” a “hospital” or any other health care provider that is made subject to the jurisdiction of the Montana Medical Legal Panel under Montana law.

(k) “Hospital” means hospitals and critical access hospitals, as defined in § 50-5-101, MCA, that are licensed as hospitals and critical access hospitals at the time of the occurrence of the incident giving rise to the claim.

(l) “Legal counsel,” “counsel,” or “attorney” mean a person licensed to practice law in Montana by the State Bar of Montana.

(m) “Malpractice claim” or “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.

(n) “Medical records” means any document in any form kept or generated by a health care provider containing information about a patient’s past, present or future mental or physical health. This definition does not include psychotherapy notes, which are notes taken by a mental health professional during a conversation with the patient and kept separate from the patient’s medical and billing records.

(o) “Office of the Director” means the official office of the Montana Medical Legal Panel, provided for in § 27-6-104, MCA, which administers the Act, facilitates Panel hearings pursuant to the Act and is supervised by the Director.

(p) “Panel” means the Montana Medical Legal Panel provided for in § 27-6-104, MCA, and it also refers to each individual Panel of Panel members selected to hear a claim or claims against a health care provider.

(q) “Panel member” means a health care provider or attorney selected to hear a claim or claims against a health care provider as set forth in the Act.

(r) “Party” means the Claimant and the health care provider named in the claim. If multiple health care providers are subject to a single Panel hearing, each health care provider subject

to that hearing is considered a party. The parties subject to the Panel hearing are collectively referred to in these Rules as the “parties.”

(s) “Patient” is the person who received or was to receive services from the health care provider against whom a Malpractice claim is made and upon whom the Claimant asserts the alleged Malpractice occurred.

(t) “Physician” means:

(1) for purposes of the assessment of the annual surcharge, an individual licensed to practice medicine under the provisions of Title 37, chapter 3, MCA, who at the time of the assessment:

(i) has as the individual’s principal residence or place of medical practice the state of Montana or practices telemedicine as defined in § 37-3-342, MCA;

(ii) is not employed full-time by any federal governmental agency or entity; and

(iii) is not fully retired from the practice of medicine; or

(2) for all other purposes, a person licensed to practice medicine under the provisions of Title 37, chapter 3, MCA, who at the time of the occurrence of the incident giving rise to the claim:

(i) was an individual who had as the principal residence or place of medical practice the state of Montana or practiced telemedicine as defined in § 37-3-342, MCA, and was not employed full-time by any federal governmental agency or entity; or

(ii) was a professional service corporation, partnership, or other business entity organized under the laws of any state to render medical services and whose shareholders, partners, or owners were individual physicians licensed to practice medicine under the provisions of Title 37, chapter 3, MCA.

(u) “Podiatrist” means:

(1) for purposes of the assessment of the annual surcharge, an individual licensed to practice podiatry under the provisions of Title 37, chapter 6, MCA, who at the time of the assessment:

(i) has as the individual’s principal residence or place of podiatric practice the state of Montana;

(ii) is not employed full-time by any federal governmental agency or entity; and

(iii) is not fully retired from the practice of podiatry; or

(2) for all other purposes, a person licensed to practice podiatry under the provisions of Title 37, chapter 6, MCA, who at the time of the occurrence of the incident giving rise to the claim:

(i) was an individual who had as the principal residence or place of podiatric practice the state of Montana and was not employed full-time by any federal governmental agency or entity; or

(ii) 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 6, MCA.

(v) “Submittal date” means the date that the office of the Director receives an Application from the Claimant that complies with these Rules. That is the date the Claimant’s case shall be deemed submitted to the Panel.

(w) “Substantial evidence” means such relevant evidence as a reasonable mind might accept as adequate to support a reasonable inference of malpractice.

(x) “Transmittal date” means the date that the office of the Director transmits a copy of the Claimant’s completed Application to all health care providers whose conduct is claimed by the Application to have constituted the basis for a malpractice claim. This act shall constitute the “transmittal” of the case for purposes set forth in these Rules.

## **RULE 2. SCOPE OF RULES AND POWERS OF THE PANEL**

(a) **Scope of the Rules.** These Rules apply to all proceedings before the Montana Medical Legal Panel established by the Act.

(b) **Powers 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 all other acts required to fairly and effectively administer the Act.

## **RULE 3. PURPOSE OF THE PANEL AND EFFECT ON COURT ACTION**

(a) **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.

(b) **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.

## **RULE 4. FILING FEES**

No fees or charges are to be levied upon Claimants as a precondition to the bringing of a malpractice claim before the Panel.

## **RULE 5. REPRESENTATION AND APPEARANCE – LEGAL COUNSEL**

(a) **Counsel Permitted but Not Required.** The parties may be represented by counsel in proceedings before the Panel; however, the MMLP shall not require a party to obtain legal counsel unless representation by legal counsel is otherwise required by Montana law.

(b) **Counsel Must Enter Appearance.** If a Claimant or health care provider has retained or otherwise obtained counsel for prosecution or defense of a claim, prior to or following the filing of a claim with the Panel, that counsel shall file an informal appearance with the office of the Director. Counsel shall enter his or her appearance by letter if representing a Claimant or health care provider who has previously filed an Application, a responsive Motion to the Application or Answer, on behalf of himself or herself, or upon the filing of the required Application, a responsive Motion to the Application, or an Answer on behalf of a party.

(c) **Effect of Counsel Appearing.** After counsel enters an appearance on behalf of a party, all communications required by these Rules to be transmitted to that party shall be directed to the counsel who has entered an appearance for that party, with a copy to the Director, except that the Notice of Hearing required by Rule 13 shall be provided to all parties involved and their counsel, if any.

(d) **Adherence to These Rules.** All parties shall adhere to these Montana Medical Legal Panel Rules of Procedure (“Rules”).

## **RULE 6. CLAIMS REVIEWED BY PANEL AND PRESENTATION OF CLAIMS**

(a) **Claims Subject to Rules.** These Rules shall apply to all malpractice claims arising from a health care provider’s acts and/or omissions, unless the claim is the subject of a valid arbitration agreement under the Uniform Arbitration Act, at § 27-5-111, et seq., MCA, where the agreement to arbitrate was signed after the alleged incident occurred.

(b) **Claim Made Prior to Filing of Lawsuit.** Prior to filing a complaint in any State District, Justice Court, or any Federal District Court in Montana, in which a malpractice claim is asserted, Claimants shall submit a case for consideration of the Panel. No malpractice claim, to which the Act is applicable, may be filed in any such court against a health care provider before an Application is made to the Panel and its decision rendered.

(c) **Notification to Panel of Lawsuit Filed in Violation of Act.** If a complaint has been filed in any such court prior to the filing of an Application before the Panel, the Claimant, at the time of filing an Application with the Panel, shall notify the Panel of such fact by providing to the Panel a conformed copy of the complaint and a conformed copy of any order related to the submission of the claim to the Panel, along with a brief report as to the status of the case.

(d) **Filing Case with Panel.** Claimants shall submit a case for consideration of the Panel by delivery of a completed Application in writing and signed by the Claimant or his or her counsel, by certified mail, to the office of the Director. Applications may also be filed in person at the office of the Director.

(e) **Effect of Electronic Filing.** Copies of Applications also sent electronically to the office of the Director and actually received by the office of the Director shall be shown as received by the Panel on the date of the electronic receipt, in order to preserve the statute of limitations, and a paper copy of the electronic Application shall be placed in the claim file along with the certified copy Application. The use of such a procedure shall not relieve a party from the requirements of subsection (d) of this Rule 6.

(f) **Form of Application.** The Application shall be made on the Application Form provided by the office of the Director, or by a separate legal pleading as permitted in the Application Form, and must be signed by the Claimant or his or her counsel. Any Application made must include the following:

(1) A statement in reasonable detail containing:

(i) the elements of the health care provider’s conduct that are believed to constitute a malpractice claim,

(ii) the dates the conduct occurred,

(iii) the names and addresses of all persons having knowledge of any facts relating to the claim or defense to it,

(iv) the names and addresses of all physicians, dentists, podiatrists, hospitals, health care facilities or other persons or entities (whether named as parties to the claim or not) who have possession, custody, or control of any medical, dental, podiatric, hospital or health care facility records (such as imaging studies) or other such information pertaining to the claim, and

(v) a declaration of whether or not the Claimant would be willing to stipulate to permitting health care provider panelists to attend the Panel Hearing from a distant location within the state of Montana by way of web based communications arranged by the office of the Director.

(2) An authorization for release of health care information, compliant with the requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and applicable Montana law, signed and dated by the Patient or the Patient's legally authorized personal representative ("Authorization"), on the Authorization Form provided by the office of the Director ("Authorization Form"), for each health care provider involved in or with knowledge about the malpractice claim (whether a party to the claim or not).

(g) **Authorization Form.** The Authorization Form shall authorize the Panel to obtain access to all medical records and information pertaining to the claim and, for purposes of its consideration of the matter only, which includes distribution of such records only to the health care providers named in the claim before the Panel or their respective counsel and the Panel members reviewing the claim, waiving any privilege as to the contents of those records. The authorization may not in any way be construed as waiving the Patient's confidentiality for any other purpose or in any other context, in or out of court, nor is this Rule intended to provide for discovery of information which would be privileged or otherwise beyond discovery, pursuant to Rule 26(b)(4)(B) of the Montana Rules of Civil Procedure.

(h) **Authorized Representative Claimant Must Provide Documentation.** A Claimant who is the legally authorized representative of a Patient, other than a Claimant who is the parent of a minor child, must provide the legal documentation appointing the Claimant as the authorized representative of the Patient as part of the Application. An Application made by a Claimant who is not also the Patient will not be considered complete and will not be transmitted until that legal documentation is provided to the office of the Director showing that the Claimant is the legally authorized representative of the Patient.

(i) **Failure to Execute Authorization Form Constitutes Good Cause.** If a Claimant fails or refuses to execute the Authorization Form or revokes his or her consent for the Panel to obtain access to all medical records and information pertaining to the claim, that failure or refusal shall constitute good cause for the Director to extend the time period for the hearing, which is set forth in the Act and described, below, in Rule 13(c).

(j) **Claims Made Against Employees of Health Care Providers.** Any claim against an employee of a health care provider, who is other than a health care provider as defined in Rule 1, shall be brought only by naming the employer as a party before the Panel.

(k) **Completed Application.** For purposes of this Rule 6, a completed Application shall be one which is in compliance with subsections (f) through (h) of this Rule 6. If a Claimant revokes the consent to obtain the Patient's medical records and health care information,

required as part of the Authorization Form provided pursuant to subsection (g), the Application shall not be a completed Application.

(l) **Notification of Health Care Provider.** Upon receipt of a completed Application, the Director shall notify the health care provider of filing of the claim and furnish the health care provider a copy thereof.

(m) **Amendment of Applications.** The following subsections govern the amending of Applications:

(1) Applications may be amended as follows:

(i) A Claimant may amend the Application as a matter of course within twenty (20) days of the receipt of the Application by the Panel. After the expiration of twenty (20) days, a Claimant may only Amend the Application by approval of the Director, or the Chairperson, if one is selected; or

(ii) The Director or, the Chairperson, if one has been selected, may, upon his or her own initiative, or upon the written request of the health care provider, require the Application to be amended in order to provide additional details of the claim. Amendments made pursuant to a request by the Director or the Chairperson must be delivered to the Director within twenty (20) days of receipt of the request.

(2) Amended Applications must be delivered to the office of the Director.

(3) In the event an amended Application is filed less than thirty (30) days prior to hearing, upon request of the Director, the Chairperson or health care provider, the hearing may be continued by the Director or the Chairperson, without a request from a party, or may be continued pursuant to the request of a party upon a showing of good cause and as required by Rule 13(d) of these Rules.

## **RULE 7. ANSWER TO APPLICATION**

(a) **Time for Filing Answer.** Within twenty (20) days after receipt of the claim, the health care provider shall file an Answer signed by the health care provider or the health care provider's counsel with the office of the Director. The filing with the Director shall be made by sending the Answer to the office of the Director by mail or electronically. If the Answer is sent electronically, the sender is responsible for verifying and establishing that the office of the Director received and was able to view and download the Answer sent electronically. For good cause shown, the Director may extend the time for a party to submit an Answer. The Answer shall be deemed the Answer to any amended Application, unless within twenty (20) days after the receipt of the amended Application, the health care provider delivers in the same manner as required above, an amended Answer.

(b) **Form of Answer.** The Answer shall be made on the Answer Form provided by the office of the Director, or by a separate legal pleading as permitted in the Answer Form and must be signed by the Defendant or his or her counsel. Any Answer made, whether or not a separate legal pleading is used as permitted on the Answer Form, must be made by using the following general format:

(1) **General Format.** In responding to an Application, the health care provider shall:

(i) admit or deny the allegations asserted by Claimant;

(ii) include a statement authorizing the Panel to inspect all medical records and information pertaining to the Application and, for the purposes of Panel inspection only, waiving any privilege as to the contents of those records; and

(iii) state whether or not the Defendant would be willing to stipulate to permitting health care provider panelists to attend the Panel Hearing from a distant location within the state of Montana by way of web based communications arranged by the office of the Director.

(2) **Denials -- Responding to the Substance.** A denial shall respond to the substance of the allegation by setting forth why the provider denies the allegation.

(3) **General and Specific Denials.** If the health care provider intends to deny all the allegations contained in an Application, the health care provider may do so by a general denial that substantively responds to the Claimant's allegations. A health care provider that does not intend to deny all the allegations shall either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) **Denying Part of an Allegation.** A health care provider that intends in good faith to deny only part of an allegation shall admit the part that is true and deny the rest.

(5) **Lacking Knowledge or Information.** A health care provider that lacks knowledge or information sufficient to form a belief about the truth of an allegation shall so state, and the statement has the effect of a denial. To the extent that a health care provider relies upon this subsection to answer an Application, the provider shall submit an Amended Answer, which meets the requirements of subsections (b)(1) through (b)(4) of this Rule 7, above, no later than seven (7) days prior to the date of the prehearing conference required by Rule 14.

(c) **Answer Served on Parties by Director.** Upon the receipt of an Answer or an amended Answer to an Application, the office of the Director shall serve a true copy of the same upon the Claimant, and all other health care providers by mail or electronically.

## **RULE 8. SUBMITTAL OF CASE, TRANSMITTAL OF APPLICATION, FILING AND SERVICE OF RECORDS, DOCUMENTS, REQUESTS, MOTIONS AND OTHER PAPERS**

(a) **How Cases Submitted.** Claimants shall submit a case for the consideration of the Panel through an Application made pursuant to these Rules. When an Application that complies with these Rules is received by the Panel, the case shall be deemed submitted.

(b) **Transmittal of the Case.** Upon receipt of an Application or an amendment thereto, the office of the Director shall:

(1) Transmit a copy of the same upon all health care providers whose conduct is claimed by the Application to have constituted the basis for a malpractice claim. Service must be made by mailing a certified copy of the Application to the health care provider at the provider's last-known address, postage prepaid, by certified mail, return receipt requested.

(2) Upon the receipt of the Application for review, the Director shall send a copy of the Application to the health care provider's professional society or association by U.S. mail or electronically. If no state professional society or association exists with respect to such health care provider, or if the health care provider does not belong to such a society or association, the Director shall send the Application to the health care provider's state licensing board.

(c) **Service of Names and Information on Panel Members to Parties.** Following the selection of Panel members pursuant to Rule 10, the Director shall send to all parties, by U.S. mail or electronically, a list of the Panel members selected, including a short professional biographical sketch of each Panel member, if available.

(d) **Service of Records on Panel Members.** At least ten (10) days prior to the hearing date set for a claim, the Director shall serve on each Panel member electronic or, if requested by the Panel member, paper copies of all claims, briefs and medical records of the Patient which have been obtained by the Panel, and other documents pertaining to the claim. If the Director or Chairperson determines that it is impractical to reproduce or furnish a medical record or other document to each Panel member, such records or documents may be made available for inspection by the Panel members and parties, at the office of the Director, during regular business hours, upon reasonable notice of the intended time and date of inspection, and shall be officially served on the Panel members for the first and only time at the hearing.

(e) **Return of Records by Panel Members.** Each Panel member shall return all copies of the claim, medical records, exhibits and other documents to a Panel representative upon the completion of the hearing or to the office of the Director upon a Panel decision made without hearing, Order of Dismissal being entered or other termination of claim proceedings. If a Panel member has received copies of the claim, medical records, exhibits and/or other documents and is unable to complete his/her duties as a Panel member, that member shall return all such copies to the office of the Director or provide written confirmation to the office of the Director that all such copies were destroyed in compliance with Panel destruction requirements, within ten (10) days of being removed as a Panel member.

(f) **Filing with the Office of the Director Only Manner of Pleading.** Filing with the office of the Director is the only manner for a party to file a motion, pleading or other similar paper in a Panel matter. Service by the parties upon the Chairperson does not constitute filing with the office of the Director or notice to the Panel or other parties. All motions, memoranda, pleadings and other papers filed with the office of the Director, other than the filing of an Application or an amended Application by the Claimant, may be filed electronically by any party.

(g) **Service on Parties and Chairperson required.** Except as otherwise provided in these Rules, all motions, memoranda, pleadings and other papers filed with the office of the Director shall be served on the Chairperson, if one has been selected, and upon all other parties in the manner provided by Rule 5 of the Montana Rules of Civil Procedure.

(h) **Costs.** The cost of a request for records or other information, either pursuant to an appropriate Authorization Form or a Panel issued subpoena, and the reproduction and transmission of the medical records, health care information or other similar information to the parties and Panel members, shall be at the expense of the Panel, except a party will be charged for the reasonable expense of reproducing imaging studies and other out of the ordinary requests made by that party, as determined by the office of the Director.

## **RULE 9. OBTAINING INFORMATION BY COMPULSORY PROCESS**

(a) **Compelling Disclosure of Health Care Information when Authorized Request Denied by Health Care Provider.** Where an authorized request by a Patient for the

disclosure of health care information is denied by a health care provider, pursuant to HIPAA, Montana law or other applicable law, the Director or the Chairperson, if one has been selected, may order disclosure of health care information, with or without restrictions as to the information's use in the Panel hearing only, as the Director or Chairperson deems necessary and appropriate, subject to an allowance for any party being provided a full opportunity for district court review of the Director's or Chairperson's decision.

**(b) Process to Compel Disclosure by Health Care Provider.**

(1) When determining whether to order a health care provider to disclose health care information to the Panel, the Director or Chairperson shall consider the explanation provided to the Panel by the health care provider for denying an authorized request for disclosure and any arguments presented by interested parties.

(2) After considering the explanation and arguments of the parties, the Director or Chairperson shall either enter an order requiring the health care provider to disclose the information or an order stating that the information shall not be sought by compulsory process by the Panel.

(3) The health care information, if any, that is received by the Panel pursuant to an order requiring disclosure of health care information, shall be furnished by the office of the Director to the Panel members prior to the hearing, and each Panel member and party shall be notified of the decision of the Chairperson or Director and availability of the health care information for Panel purposes.

**(c) Process for Compelling Disclosure of Records or Information.**

(1) If a party claims that medical or other records or information which pertain to the claim are in the possession, custody and control of another party or persons other than a party or in the possession of health care providers from whom the Claimant has failed to execute an authorization for disclosure of health care information, a party who seeks such records and information may move the Director or Chairperson to:

(i) compel the Claimant to execute an authorization for disclosure of health care information as to the health care provider, or

(ii) compel the party or persons in possession of the records or information to produce the information to the Panel.

(2) A request for the Panel to compel production of records or disclosure of information shall be made in writing and served on the Director, and the Chairperson if one has been selected, at the office of the Director, describing the records or information and stating how the records or information pertain to the claim, along with the name, address and other pertinent contact information of the person, persons, or entity believed to be in possession or control of the records or information, to the extent that such information is known to the requesting party.

(3) A request to compel the disclosure of health care information, including the production of medical records, shall:

(i) comply with the notice requirements of §§ 50-16-536(1) or 50-16-812(1), MCA, and provide proof of compliance with applicable law to the Panel,

(ii) file with the Panel the written certification required by §§ 50-16-536(2) or 50-16-812(2), MCA,

(iii) comply with all other applicable requirements for the compulsory process of health care information, including protected health information (PHI) as defined by HIPAA, under applicable law and provide proof of compliance with all such requirements to the Panel, and

(iv) request the issuance of a subpoena by the Director or Chairperson, if one has been selected.

(4) After receiving a request from a party that complies with the requirements set forth in this Rule 9, subsections (c)(1) through (c)(3), the Director or Chairperson, if one has been selected, shall issue a subpoena for all records and/or information requested that pertain to the claim, unless relieved of the responsibility of doing so by order of a district court.

(d) **Reporting of Results of Compulsory Process.** The Panel shall report to the parties whether or not records or information are obtained by the Panel pursuant to compulsory process, including any denial of production of records or disclosure of information made by the person or persons upon whom a subpoena is served and the reasons for the denial provided by the person or persons.

(e) **Costs.** The costs associated with the service of subpoenas at the request of a party for the purpose of obtaining information other than health care information relevant to the Panel hearing, along with any costs associated with obtaining or compelling witness testimony of any witness that is not a party to the Panel hearing, including statutory witness fees, shall be at the expense of the party seeking the service or the appearance of the witness.

## **RULE 10. SELECTION OF PANEL MEMBERS**

(a) **Persons Eligible to be Panel Members.** Except as otherwise provided in subsection (g) of this Rule 10, those eligible to sit on the Panel are health care providers licensed pursuant to Montana law residing in Montana and active members of the State Bar of Montana residing in Montana.

(b) **Process of Selecting Panel Members.** Except as otherwise provided in subsection (g) of this Rule 10, the Panel members shall be selected as follows:

(1) Every completed Application submitted to the Panel shall be promptly sent by the office of the Director, by U.S. mail or electronically, to the state professional society or association of every health care provider against whom a claim is made and the state bar, which shall, within fourteen (14) days from the date of transmittal of the Application, each select twelve (12) proposed Panel members. If no state professional society or association exists or if the health care provider does not belong to such a society or association, the Director shall send the Application to the health care provider's state licensing board, which shall in turn select twelve (12) persons from the health care provider's profession and, where applicable, from persons specializing in the same field or discipline as the health care provider; or

(2) At the election of the office of the Director and the professional society or association, the applicable state licensing board or the state bar, the entire list of available prospective Panel members shall be provided at the request of the office of the Director and no less than annually, by the professional society or association, the applicable state licensing board or

the state bar, to the Panel as a pool of available Panel members for the claims filed during that year.

(3) After the Director's office obtains the names of potential Panel members, the Director's office shall provide to the parties before the Panel, a list of at least twelve (12) selected prospective Panel members for a claim, either as the twelve (12) provided to the Panel pursuant to subsection (b)(1) of this Rule 10 or as randomly selected by the Panel from the lists provided to the Panel pursuant to subsection (b)(2) of this Rule 10.

**(c) Panels for Multiple Defendants.** Whenever there are multiple Defendants, the case against each health care provider may be reviewed by a separate Panel or, by stipulation of the parties, a single combined Panel may review all the claims against all Defendants.

**(d) Number of Panel Members.** Except as otherwise provided in subsection (g) of this Rule 10, six (6) Panel members shall sit in review of each case. Where a Panel has six (6) members, each claim shall have three (3) Panel members who are health care providers, as set forth in subsection (f) of this Rule 10 and three (3) Panel members who are attorneys.

**(e) Selection of Chairperson.**

(1) **Selection and Notification to the Parties.** Not later than ten (10) days prior to the date set for the hearing of the claim, the Director shall select one of the attorney Panel members as Chairperson, the office of the Director shall notify the parties of the selection.

(2) **Objection to Chairperson by Party.** If one of the parties objects to the initial Chairperson selected that party shall inform the office of the Director of the objection in writing within five (5) day of being notified of that selection.

(3) **Selection of New Chairperson upon Objection.** Once an objection has been made to the initial Chairperson, that initial Chairperson shall immediately cease to act as the Chairperson and the attorney Panel members shall select any one of the attorney Panel members as Chairperson, other than the attorney to whom the party objected prior to the hearing. The Chairperson selected by the attorney Panel members shall thereafter be the Chairperson and shall not be subject to further objection from the parties.

**(f) Selection of Health Care Provider Panel Members.** The health care provider Panel members shall consist of:

(1) Three (3) physicians when the claim is only against one or more physicians; or three (3) dentists when the claim is only against one or more dentists; or three (3) podiatrists when the claim is only against one or more podiatrists. If the claim is only against one or more health care facilities, two (2) of the Panel members must be administrators of the same type of facility or facilities and one (1) Panel member must be a physician.

(2) In cases against physicians and/or dentists and/or podiatrists, and a health care facility, two (2) Panel members must be chosen from the physician's and/or dentist's and/or podiatrist's profession(s) and one (1) Panel member must be an administrator from the same type of facility.

(3) In cases against one or more physicians and one or more dentists or one or more podiatrists and no facility, two (2) Panel members must be physicians and one (1) Panel member must be a dentist, if there is a dentist in the claim, or one (1) Panel member must be a podiatrist, if there is a podiatrist in the claim, unless the number of dentists or podiatrists named exceeds the number of physicians named, then in that event two (2) Panel members

must be dentists if dentists exceed the number of physicians named, or two (2) Panel members must be podiatrists if podiatrists exceed the number of physicians named, and one (1) Panel member must be a physician.

**(g) Stipulation to a Different Number and Composition of Panel Members and Exceptions.**

(1) **Stipulation.** All parties may stipulate to a lesser or greater number of health care provider or attorney Panel members or a different composition of such members. Any such stipulation shall be effective only upon approval of the Director, or of the Chairperson, if one has been selected.

(2) **Exception.** The sole exception to the requirements of (f) of this Rule 10, is that there shall be no requirement that a physician, dentist, or podiatrist Panel member be in the same specialty or sub-specialty as one or more of the individual health care providers against whom a claim is made, if all such Panel members selected would otherwise be competent to act as an expert witness in a suit at law involving the individual health care providers and if the number of prospective Panel members available in the specialty or sub-specialty would be insufficient from which to select a Panel.

**(h) Communication of Final Panel Members Selected.** Upon selection of the final Panel members by the office of the Director, the names of those selected shall be communicated to the parties by U.S. mail or electronically.

**RULE 11. DISQUALIFICATION AND REMOVAL OF PROPOSED PANEL MEMBERS**

**(a) Required Disqualification of Proposed Panel Member.** A proposed Panel member must be disqualified from consideration of a case in which, by virtue of the member's circumstances, the member believes that serving on the Panel would be inappropriate, considering the purpose of the Panel.

**(b) Method for Excusing of Proposed Panel Member.** The Director may excuse a proposed Panel member from serving on the Panel upon receipt by the office of the Director of a request from the Panel member to be excused from the Panel. Requests to be excused from the Panel may be submitted to the office of the Director by U.S. mail or electronically.

**(c) Method for Disqualification of Proposed Panel Members by Party.** A party may request that a proposed Panel member be disqualified from the Panel as follows:

(1) A party requesting that a proposed Panel member be disqualified shall make and file an affidavit that a proposed Panel member cannot, according to the belief of the party making the affidavit, sit in review of the Application with impartiality.

(2) If the Director receives an affidavit from a party asserting that a proposed Panel member cannot sit in review of the Application with impartiality, that proposed Panel member may continue no further as a Panel member, and the Director shall disqualify the proposed Panel member.

(3) A party may not request to disqualify more than three (3) proposed Panel members in this manner in any single malpractice claim. The affidavit required by subsection (c)(1) of this Rule 11 must be filed with the office of the Director, by U.S. mail or electronically, within fifteen (15) days of the date that the names of the proposed Panel members selected

were sent to the Parties by the office of the Director, or the Director may deny the request. However, if the party is requesting to disqualify a proposed panel member appearing on an additional list of proposed Panel members sent to parties pursuant to subsection (d) (2) of this Rule 11, the affidavit required by subsection (c)(1) of this Rule 11 must be filed with the office of the Director, by U. S. mail or electronically, within five (5) days of the date the additional list of proposed Panel members was received by the party.

**(d) Method for Selecting Proposed Panel Members After Disqualification or Removal.**

(1) Once a proposed Panel member is disqualified or excused, another proposed Panel member shall be selected by the Director.

(2) If a category or categories of original proposed Panel members is exhausted, the Director shall distribute an additional list of proposed Panel members and proceed in the same manner as defined in Rule 10 and this Rule 11.

**RULE 12. MEDICAL AND DENTAL EXPERT CONSULTATION**

**(a) Assistance to Claimant in Obtaining Expert Consultation.** The Panel Director shall cooperate fully with the Claimant in retaining an expert, to consult with the Claimant, upon payment of a reasonable fee by the Claimant to the expert, in claims involving: (1) a physician, a physician qualified in the field of medicine involved; or (2) a dentist, a dentist qualified in the field of dentistry involved.

**(b) Requesting Expert Consultation.** A claimant must request the Panel's assistance in obtaining an expert consultant pursuant to subsection (a) of this Rule 12 no later than four (4) weeks after the Application is submitted.

**(c) Fee Paid to Consultant.** The consultant's fee shall be calculated on an hourly basis and, upon Claimant's request, reviewed by the Director or the Chairperson, if one has been selected. If the Director or Chairperson determines the fee charged is unreasonably high, the Panel or Chairperson shall reduce the same to a reasonable fee, and that fee shall be accepted by the consultant.

**(d) Communications with Expert Consultant Privileged.** Communications between the consultant and the Claimant or the Claimant's counsel are privileged, unless that privilege is waived by the Claimant or is otherwise required to be disclosed by Rule 26(b) of the Montana Rules of Civil Procedure.

**RULE 13. TIME AND PLACE OF HEARING**

**(a) Selection of Time and Place and Notice of Hearing.** Except as otherwise provided in subsection (d) of this Rule 13, after a completed Application has been received by the office of the Director, a date, time and place for the hearing shall be fixed by the office of the Director. The office of the Director shall then notify the parties and the Panel members selected.

**(b) Hearing by Telephone or Electronic Means.** A telephonic hearing, video conference or other similar type of electronically held hearing shall be authorized upon the written stipulation of all parties and upon the approval of the Chairperson, where the interests of justice would not be served by requiring an in-person hearing and then only under the

following specific circumstances where the circumstances of the case and the requirements of orderly processing of the claim:

(1) make physical travel to the Panel hearing in Helena, Montana impractical for Panel members who must be utilized;

(2) impose an unreasonable burden upon a party; or

(3) the issues as represented by each of the parties are such that the use of a telephonic hearing, video conference or other similar type of electronically held hearing would allow full consideration of the matter by the Panel selected to hear the claim.

(c) **Time Period for Hearing.** In no instance may the date of the hearing set be more than one hundred twenty (120) days after the transmittal by the Director to the health care provider of the Application, unless the Chairperson or the Director finds good cause exists for extending the period.

(d) **Requests for Continuance or Change of Hearing Date.** All requests for a continuance and change of hearing date must be submitted to the Panel in writing, stating the reasons for the request, and each request must include a selection of one (1) alternative future date for the hearing which is known to be available to each of the parties to the claim and to the office of the Director. If the request is made within five (5) calendar days of the date of the scheduled hearing, a copy of the request shall be submitted electronically to the office of the Director.

(e) **Location of Hearing.** Panel hearings may be held in any county the Panel considers necessary or advisable. The county commissioners or other governing authority shall provide, upon request of the Director, suitable facilities for any such hearing.

(f) **When a Hearing Need Not be Held.** A hearing need not be held, telephonic or otherwise, and a decision shall be rendered by the Panel only on the written record, where all of the parties have stipulated in writing to the waiver of a hearing.

#### **RULE 14. PREHEARING TELEPHONE CONFERENCE**

(a) **Setting the date for prehearing conference call.** No less than fourteen (14) days prior to the hearing, the Chairperson shall, unless otherwise stipulated by the parties, hold a prehearing conference by telephone or other electronic means approved by the Panel, for the purpose of conferring with the Claimant or the Claimant's counsel on behalf of the Claimant, the health care provider or the health care provider's counsel on behalf of the health care provider, and the Director of the Panel regarding the hearing. This conference shall be called the "prehearing conference."

(b) **Matters to be determined at prehearing conference.** During the prehearing conference, the parties shall consider and determine whether the following may be accomplished by the parties at the prehearing conference or, if necessary, prior to the hearing and establish a plan for doing so:

(1) Specifically identify the elements of the malpractice claim to be presented at the hearing;

(2) Obtain admissions to or stipulations of facts not remaining in dispute;

(3) Identify witnesses, quantify the number of witnesses to be called and schedule the order of appearance of witnesses;

(4) Estimate length of hearing and, if applicable, consideration of any transcription requests;

(5) Identify and discuss any other matters that might aid in the Panel's hearing of the claim; and

(6) Identify materials submitted pursuant to Rule 15 and determine whether the parties dispute the authenticity of any documents a party plans to present at the hearing.

## **RULE 15. EXHIBITS AND DOCUMENTARY EVIDENCE**

**(a) Service of Exhibits and Other Documentary Evidence Prior to the Hearing.** No later than fourteen (14) days prior to the hearing date set for the claim, unless the parties otherwise stipulate, the parties shall each serve each other a copy and the office of the Director seven (7) copies of all records and other documents and exhibits, other than medical records obtained by the Panel, upon which they intend to rely at the time of the hearing.

**(b) Obtaining Exception to Required Service.** If a party makes a sufficient showing by affidavit, filed with the office of the Director and served on the parties and the Chairperson, that documents or records upon which that party intends to rely were not available within the period set forth in subsection (a) of this Rule 15, the Chairperson shall have the discretionary authority to admit such later-acquired evidence upon such terms and conditions as are just and equitable in the premises. At the time of filing the affidavit required by this subsection, the party providing the same shall serve copies of the documents or records in dispute on the office of the Director, the Chairperson and all other parties.

## **RULE 16. HEARING PROCEDURES**

**(a) Presence of Parties Required at Hearing.** The presence of the parties is required at the Panel hearing as follows:

(1) The Claimant submitting the case for review shall be present, personally, unless that presence is:

(i) waived by all health care providers; or

(ii) excused by the Chairperson or the Director upon a timely request stating the reasons therefore.

(2) The health care provider against whom the claim is brought and the health care provider's counsel shall be present, which presence may be excused in like manner as the Claimant as provided by this Rule 16 in subsections (a)(1)(i) and (ii).

**(b) Hearing Process.** The Chairperson shall have discretion to determine the Panel hearing process. Unless otherwise agreed upon by the parties, the Panel hearing shall proceed as follows:

(1) Claimant shall proceed first with his or her case, followed by the health care provider.

(2) The Claimant or Claimant's counsel shall make a brief introduction of the case, including a resume of the facts constituting the alleged professional malpractice which he or she is prepared to prove. The health care provider against whom the claim is brought may make an introductory statement of his or her case, personally or through counsel.

(3) Both parties may call witnesses to testify, who shall be subject to cross-examination and who shall be sworn by the Chairperson. Medical texts, journals and other documentary

evidence relied upon by either party may be offered and admitted, if relevant, and if submitted timely under Rule 15. Written statements of fact by treating health care providers or Claimants may be reviewed by the Panel.

(4) All members of the Panel and counsel to the parties, or the parties if unrepresented, shall have the right to examine the parties and witnesses, including the parties when called as witnesses, subject to the control of the Chairperson.

(5) The Montana Rules of Evidence shall not apply to hearings before the Panel; however, irrelevant, immaterial or unduly repetitious evidence may be excluded by the Chairperson.

(c) **Confidentiality of Hearing and Transcripts.** The hearing will be confidential and informal, and the Panel shall not permit the making of an official transcript of the hearing to be made. However, upon the filing of an executed stipulation by all parties to the claim for the making of an unofficial transcript of the Panel hearing, the parties may provide for the making, payment and retention of such a transcript, and the parties shall be responsible for all other details related to making and obtaining such a transcript. Under no circumstances shall the Panel participate in or bear the cost of the making of a transcript of the Panel hearing.

(d) **Panel Proceedings and Decision Privileged from Disclosure in Court Actions.** A Panel member may not be called to testify in a proceeding concerning the deliberations, discussions, decisions, and internal proceedings of the Panel. The decision and the reasoning and basis for the decision of the Panel are not admissible as evidence in an action subsequently brought in a court of law and are not evidence for any purpose in an action brought under §§ 33-18-201 or 33-18-242, MCA, or common law.

(e) **Conclusion of Hearing - Supplemental Hearing.** At the conclusion of the hearing, the Panel may take the claim under advisement or may request that additional facts, records, witnesses or other information be obtained and presented to it at a supplemental hearing. The supplemental hearing shall be set for a date and time certain, not longer than thirty (30) days from the date of the original hearing, unless the party bringing the matter for review consents in writing to a longer period. Any supplemental hearing shall be held in person, unless otherwise stipulated by the parties, and the parties and their counsel may be present.

## **RULE 17. PANEL DELIBERATIONS AND DECISIONS**

(a) **Confidentiality of Panel Deliberations.** The deliberations of the Panel are confidential.

(b) **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.

(c) **Panel Decision.** The Panel members shall determine the answer to the questions set forth in this Rule 17, subsections (b)(1) and (b)(2) as follows:

(1) Each Panel member shall determine the answers to the questions set forth in this Rule 17, subsections (b)(1) and (b)(2) by answering an anonymous questionnaire containing the two questions;

(2) Each Panel member's completed questionnaire shall be submitted to the Chairperson for tabulation under subsection (3).

(3) The Chairperson shall determine the Panel's decision, based upon the Panel members' answers contained in the anonymous questionnaires as follows:

(i) The Chairperson must first determine whether the Panel members answered "yes" or "no" more often to the question set forth in this Rule 17, subsection (b)(1). If the majority of the Panel members answered "no" to the question set forth in subsection (b)(1), then the Panel decision shall be rendered in favor of the health care provider and the Panel members' answers to subsection (b)(2) need not be considered in the Panel decision.

(ii) If the majority of the Panel members answered "yes" to the question set forth in subsection (b)(1), then the Chairperson must consider the Panel members' answers to subsection (b)(2). If the majority of the Panel members answered "no" more often to the question set forth in subsection (b)(2), then the decision shall be rendered in favor of the health care provider.

(iii) If the majority of the Panel members answered "yes" to the question set forth in both subsections (b)(1) and (b)(2), then the decision shall be rendered in favor of the Claimant.

(4) Upon request of any party, the panel members shall briefly explain the reasoning and basis for their determination at the Panel hearing, so long as the request is made prior to the conclusion of the Panel hearing.

(5) The Panel shall render a final written decision and the final written decision 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.

(6) The final written Panel decision must be signed by the Chairperson prior to concluding the Panel deliberations.

**(d) Communication, Retention of Panel Decision and Right to Mediation.** The Panel's decision shall be communicated as follows:

(1) The Panel's decision shall be communicated by the office of the Director in writing to the parties, by U.S. mail or electronically; the Panel's decision shall be served upon the claimant or claimant's attorney if represented by counsel, by certified mail.

(2) A copy of each Panel's decision shall be retained in the permanent files of the Panel by the office of the Director. A copy of the decision shall be sent to the health care provider's professional licensing board, by U.S. mail or electronically.

**(e) Admissibility of Panel Decision.** 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.

**(f) Civil Immunity of Panel Members and Witnesses.** Panel members 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.

**(g) Effect of Decision and Recommendations Permitted.** The Panel's decision is without administrative or judicial authority and is not binding upon any party. 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.

(h) **Nonbinding Mediation.** Each party must be informed by the Panel of the right to nonbinding mediation under § 27-6-606, MCA. If the Panel decides both questions required by § 27-6-602, MCA, 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.

(i) **Maintenance of Records and Confidentiality.** The office of the Director shall maintain only the records of all proceedings before the Panel, which must include the nature of the act or omissions complained of, a brief summary of the evidence expressed, the decision of the Panel, and any majority or dissenting opinions filed. Such records shall be maintained for a minimum of ten (10) years. Any records which may identify any party to the proceedings may not be made public and are not subject to subpoena but are to be used solely for the purpose of compiling statistical data and facilitating ongoing studies of medical malpractice in Montana.

#### **RULE 18. TRAVEL EXPENSES**

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

#### **RULE 19. COMPENSATION OF THE PANEL**

All members of the Panel shall be paid a fee as set by applicable Montana law. 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 20. TOLLING OF STATUTE OF LIMITATIONS - SEPARATELY-DESIGNATED NECESSARY OR PROPER PARTIES**

(a) The running of the applicable limitation period related to 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 that 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 thirty (30) days after either an order of dismissal, with or without prejudice against re-filing, is issued from the Chairperson or from the Director upon the consent of the parties to the claim, or after the Panel's final decision, whichever occurs first, is entered in the permanent files of the Panel and a copy is served upon the Claimant or Claimant's attorney, if he or she is represented by counsel, by certified mail.