INDIANA MEDICAL MALPRACTICE: FROM PLANNING TO PANEL

The primary source of statutory authority for Indiana malpractice is found in Indiana Code § 34-18-1-1.

1. Commencing a Medical Malpractice Case.

Under I.C. 34-18-8-4, subject to limited exceptions, a claim against a qualified healthcare provider cannot be commenced in court before the proposed Complaint has been presented to a medical review panel and an opinion is given by the panel. By statute, for claims not greater than $15,000.00, compliance with panel is unnecessary. The constitutionality of this statutory framework was challenged in several different cases. Uniformly, the Indiana Courts have upheld the constitutionality of the Act. See Cha v. Warnick, 455 N.E.2d 1165 (Ind. Ct. App. 1983); Kranda v. Houser-Norborg Medical Corporation, 419 N.E.2d 1024 (Ind. Ct. App. 1981).

2. When is a Medical Claim Not a Medical Malpractice Claim?

A claim against a healthcare provider is not automatically a medical malpractice case. It must involve medical judgment or patient care. For example, in Harts v. Caylor-Nickel Hospital, Inc., 553 N.E.2d 874 (Ind. Ct. App. 1990), the court held that the patient's claim against a hospital for injuries sustained when he fell out of a bed after the collapse of the siderail was based upon ordinary negligence, not the breach of any duty directly associated with medical negligence, and thus, was not within the scope of the medical malpractice act. By contrast, in Ogle v. St. John's Hickey Memorial Hospital, 473 N.E.2d 1055 (Ind. Ct. App. 1985), the court held that a patient's claim for inadequate security in a psychiatric ward was within the scope of the act.

In Campbell v. Eckman/Freeman & Assoc., 670 N.E.2d 925 (Ind. Ct. App. 1996), the court held that an employee's negligence action against a company hired by his employer and his

employer's worker's compensation carrier which monitored the employee's claim and his rehabilitation did not fall within the medical malpractice act. The company hired a registered nurse, but the nurse was not providing healthcare and did not fall within the act's definition of a healthcare provider.

The Court of Appeals recently decided the case of H.D. v. BHC Meadows Hospital, Inc., 884 N.E.2d 849 (Ind. Ct. App. 2008). The essential facts are that the patient who was a minor was admitted to a psychiatric hospital and the hospital subsequently contacted the patient's school about her hospitalization, in violation of the confidentiality agreement stating information was not to be shared with the school. The hospital then subsequently sent a satisfaction survey to the school's counselor. The patient's parents filed an action for invasion of privacy, negligent infliction of emotional distress, and intentional infliction of emotional distress. The hospital argued that the fax sent by the hospital to the school in the follow-up letters were for healthcare purposes, but the patient claimed that the communications were for the purpose of generating business and thus did not fall within the Medical Malpractice Act. The Court quickly found that the marketing surveys were for a business purpose and not for healthcare or professional services and thus could not constitute malpractice within the meaning of the Act. As to the second question of whether the therapist's decision to communicate with the school counselor and share confidential information amounted to exercise of judgment in rendering professional services, the Court noted that the facsimile was sent to the high school without any knowledge of who had access to the facsimile machine. The Court framed the question as whether a healthcare provider's negligent or reckless dissemination of the patient's confidential information comes within the meaning of the Medical Malpractice Act. The Court held that the patient's claims, as

presented, would not require consideration by a medical review panel.

3. What Does it Mean to be a Qualified Healthcare Provider?

Even if a claim clearly involves medical negligence, the potential defendant must still be a qualified healthcare provider within the meaning of the Act. If a person is not qualified, the patient may file a complaint in court without having to go through the medical review panel. Guinn v. Light, 558 N.E.2d 821 (Ind. Ct. App. 1990). Under I.C. § 34-18-3-2, to be qualified, the healthcare provider must file with the Department of Insurance proof of "financial responsibility." Financial responsibility means that the healthcare provider has the minimum insurance limits the Department of Insurance has established and that the provider has filed the appropriate certificate establishing that with the Department of Insurance.

In Shenefield v. Barrette, 716 N.E.2d 1 (Ind. Ct. App. 1999), the court determined that whether a healthcare provider is qualified is not determined solely by whether the provider has insurance, but whether the proof of insurance has been filed and the surcharge paid.

By statute, the receipt of proof of financial responsibility constitutes compliance with the qualification rules as of the date on which the proof is received or as of the effective date of the policy, if it is filed no less than ninety (90) days after the effective date of the insurance policy. If the insurer attempts to file this after ninety-one (91) days, but before one hundred eighty (180) days after the policy's effective date, by statute I.C. § 34-18-3-5, the Department of Insurance may, under certain circumstances accept this payment, but shall collect a penalty from the insurer. Officers, agents and employees of a healthcare provider, acting in the course and scope of their employment, may be qualified as well if the officers, agents and employees are individually named or members of a named class in the proof of financial responsibility filed

with the Department of Insurance. See I.C. § 34-18-3-3.

Under I.C. § 34-18-14-3, most providers carry a policy that has a per claim limit of $250,000.00, since that is the maximum personal liability for a healthcare provider under current law. The maximum liability for any claims that occurred after June 30, 1999 is $1,250,000.00, of which the patient compensation fund would be responsible for a maximum of $1 million. See I.C. § 34-18-14-3.

4. The Small Medical Malpractice Claim Exception.

As noted earlier, if the claim is less than $15,000.00, under I.C. § 34-18-8-6, the patient may file the complaint in court, but must include a specific declaration that the patient seeks damages not to exceed $15,000.00. The patient is barred from recovering any amount greater than $15,000.00. A patient who proceeds under this subsection, however, under the reasonable belief that damages are less than $15,000.00 has the right to later move to dismiss the action without prejudice and refile a proposed complaint for additional damages, but only if the motion for dismissal is filed within two (2) years after commencement of the original action. Note that the $15,000.00 limit covers the entire action, and not each defendant. See Albright v. Pyle, 637 N.E.2d 1360 (Ind. Ct. App. 1994). In Albright, the plaintiff sought $15,000.00 against one doctor and $15,000.00 against another doctor. The court held that this did not comply with the statute. Id.

5. Agreements Not to Present Claims to Panels.

Notwithstanding the requirement of the medical review panel process, if all parties agree that the claim is not to be presented to a medical review panel, the parties may agree to proceed in court. The agreement to waive the panel must be in writing and signed by each party or an

authorized agent of the party, and the claimant must attach a copy of the agreement to the complaint filed with the court in which the action is commenced. I.C. § 34-18-8-5.

Notwithstanding the fact that the case may not be pursued while a claim for medical malpractice is pending, a plaintiff always has the right to file a complaint in court, so long as the requirements of I.C. § 34-18-8-7 are met, namely, the complaint must not contain any information that would allow a third party to identify the defendant. The claimant is prohibited from pursuing any action, aside from setting a date for trial, a preliminary determination, or any other motions which may be considered by the trial court. Once the medical review panel process has been completed, the plaintiff may add the identifying information to the complaint filed with the court.

In a recent Indiana Supreme Court decision, Kho v. Pennington, 875 N.E.2d 208 (Ind. 2007), a doctor sued an attorney and the plaintiff's personal representative for filing a complaint which identified the doctor. After some lengthy proceedings, the Supreme Court ultimately held that the doctor's claim presented a cognizable negligence action for violation of express statutory duty. Id.

6. Preliminary Determinations.

By statute, any party may file a motion with the court under I.C. § 34-18-11-1, to: (1) preliminarily determine an affirmative defense or issue of law or a fact that may be preliminarily determined under the Indiana Rules of Procedure, such as a statute of limitations question or other jurisdictional question; or (2) compel discovery in accordance with the Indiana Rules of Procedure. The court cannot preliminarily rule on any matter which is covered by the provisions of the medical review panel procedure. A party's failure to move for a preliminary determination

or to compel discovery does not amount to a waiver of any such affirmative defense. I.C. § 34-18-11-1. Preliminary determination motions tend to be confusing for the clerks of the courts. In essence, typically the defendant is filing a motion with the court which requires the defendant to file the plaintiff's complaint. I have received a number of phone calls from the clerk, curious about why I am doing this and exactly who I am representing.

The potential uses for a motion for preliminary determination are numerous. In Miller v. Martig, 754 N.E.2d 41 (Ind. Ct. App. 2001), the defendant filed a motion for a preliminary determination to determine whether a physician breached the duty to a plaintiff by being unavailable to administer an anesthetic. The doctor alleged that he had never treated the patient and therefore, in the absence of a physician-patient relationship, that, as a matter of law, he could not commit medical malpractice. The undisputed evidence was the doctor had informed the patient that he was not qualified to administer a particular anesthetic. The doctor made no recommendations to the patient and did not participate in any course of treatment. At a later time, however, one of the nurses tried to contact his beeper, which malfunctioned, and he never received the page. The court held that this was an appropriate issue for preliminary determination and found that, as no physician-patient relationship existed, that the entry of summary judgment in favor of the doctor was appropriate. The court may also consider issues of preferred venue. Price v. Methodist Hospitals, Inc., 604 N.E.2d 652 (Ind. Ct. App. 1992); Perry v. Cooper, 738 N.E.2d 690 (Ind. Ct. App. 2000). In one interesting case, the defendant tried to argue that the patient's failure to answer a Request for Admissions about the appropriate standard of care required the court to issue summary judgment in favor of the doctor. The Court of Appeals, in reviewing this, found that this action was beyond the subject matter jurisdiction

conferred upon it by the medical malpractice act because the issue of standard of care was statutorily reserved to the medical review panel. Santiago v. Kilmer, 605 N.E.2d 237 (Ind. Ct. App. 1992).

By statute, a party invokes the jurisdiction of the court by paying the statutory filing fee to the clerk and filing a copy of the proposed complaint and motion with the clerk. The moving party must issue summonses to be served on each party and the chairman of the medical review panel. Curiously, the medical malpractice act itself changes the time limits to respond to particular matters. Under I.C. § 34-18-11-3, each non-moving party has a period of twenty (20) days after service or twenty-three (23) days after service if service is performed by mail, to appear, file and serve a written response to the motion, unless the court orders the period enlarged. This is clearly different that the presumptive thirty (30) day period for a motion for summary judgment and the typical fifteen (15) day period for responding to a motion to dismiss. Additionally, the statute requires the court to enter a ruling on the motion within thirty (30) days after the motion is heard or, if no hearing is requested, granted or ordered within thirty (30) days after the date in which the last written response to the motion is filed. The clerk then has to serve a copy of the court's ruling by ordinary mail to the insurance commissioner, the party of the proceeding and the chairman of the medical review panel. In Hepp v. Pierce, 460 N.E.2d 186 (Ind. Ct. App. 1994), the court held that a judge who fails to rule upon a motion, pursuant to statute, within the time period, is subject to disqualification pursuant to Trial Rule 53.1, but that a party must take affirmative action to disqualify the judge on this basis.

In Jones v. Wasserman, 656 N.E.2d 1195 (Ind. Ct. App. 1995), the court held that the trial court did not abuse its discretion in dismissing the plaintiff's medical malpractice act based upon

the patient's failure to comply with the schedule established by the medical review panel chairman, where the panel never received any evidence from the plaintiff and the patient had received one prior extension of time.

Once a motion for preliminary determination has been filed, all further proceedings before the medical review panel are stayed automatically until the court has ruled on the motion. I.C. § 34-18-11-4. The court has the same inherent powers it has in any other case to enforce its rulings. I.C. § 34-18-11-5.

7. Forming the Medical Review Panel.

By statute, not earlier than twenty (20) days after the filing of a proposed complaint, either party may request the formation of a medical review panel by serving a request by registered or certified mail upon all parties and the commissioner. I.C. § 34-18-10-2. The panel consists of one (1) attorney and three (3) healthcare professionals. The attorney member shall act as chairman of the panel and act in an advisory capacity, but may not vote. The chairman is responsible for expediting the selection of the panels, convening the panels, and expediting the panel's review. The chairman may establish a schedule for submissions, but "must allow sufficient time for the parties to make full and adequate presentation of related facts and authorities." I.C. § 34-18-10-3

The chairperson, by statute, can be selected by a request from the Clerk of the Supreme Court to draw at random from a list five (5) names of attorneys who are qualified to practice, are presently in the rolls of the Supreme Court, and maintain offices in the county of preferred venue. There is a twenty-five dollar ($25.00) selection fee. The parties strike alternately, with the plaintiff striking first, until one (1) person remains. The remaining attorney shall be chairman of

the panel. I.C. § 34-18-10-4

By statute, to show good cause, the panel chairperson must serve an affidavit upon the Clerk of the Supreme Court to avoid serving, and the clerk may then excuse the attorney from serving. If the chairperson is not fulfilling his obligations, the insurance commissioner has the power to remove the chairman. I.C. § 34-18-10-15.

Although this statutory striking panel exists, there is a clear preference for the parties selecting a panel chair by agreement. The problem you get into with the statutory striking process, provided in I.C. § 34-18-10-4, is you may end up with an attorney who knows nothing about medical malpractice and will have a substantial learning curve. In almost any community, there are a group of attorneys who have served as panel chairpersons in the past and who are familiar with the process. There are times when it takes proposing a few additional panel chairs to get the job accomplished, but I am only aware of one or two cases where the parties ultimately had to result to the statutory process because they simply could not agree upon a panel chair.

8. The Medical Review Panelists.

Any person who holds a license to practice in their profession "shall be available for selection as members of the medical review panel." I.C. § 34-18-10-5. Each party to the action has the right to select one (1) healthcare provider and, upon selection, the two (2) healthcare providers select the third panelist. I.C. § 34-18-10-6. This is the statutory framework, but it is not what generally happens in real life. When one person proposes a particular healthcare provider, it is typically going to be a hired gun, which is rejected by the other party. Likewise, it will encourage the other party to then pick their hired gun as their nominee. In practice, what generally happens is the parties agree upon the composition of the panel by practice area, i.e., if

the case involves radiologists, the parties generally agree to have a panel of radiologists.

Once the parties agree to the type of professionals who are on the panel, the panel chair generally provides panels for each person to strike from. The panel chair may tender a letter to both parties providing: Panel A, a list of three physicians for the plaintiff to strike from; and Panel B, three physicians for the defendant to strike from. Each party strikes one from each panel, leaving one healthcare provider left. Those two panelists then choose a third.

If there is only one party defendant who is an individual, two of the panelists selected must be members of the profession of which the defendant is a member. If the individual defendant is a healthcare professional who specializes in an area, two of the panelists must be healthcare professionals who specialize in the same area as the defendant. I.C. § 34-18-10-8. By statute, the healthcare providers are supposed to select the third member within fifteen (15) days and notify the chairman and the parties about their selection. If the two panelists are unable to make the selection, the chairperson shall make the selection and notify both parties. I.C. § 34-18-10-9. Practically speaking, this rarely happens. There are often circumstances where the two panelists cannot get together that quickly, or are not able to agree to a third person. After the medical review panel is formed, the chairman shall advise the insurance commissioner and the parties within five (5) days of the names and addresses of the panel members and when the last panel member was selected. I.C. § 34-18-10-11.

At times, the medical review panel chairman's job is not an easy one in trying to find panelists who will serve. By statute, a member of the medical review panel must serve, unless the parties excuse the panelist or the panelist is excused for good cause shown. I.C. § 34-18-10-12. To show good cause for relief from serving as a panelist, a healthcare provider, by statute,

must serve an affidavit upon the panel chair setting out facts indicating that this service would be an unreasonable burden or undue hardship. In practice, this is not how this situation typically works out. You often have a situation where a panelist simply does not respond, feigns ignorance about the particular procedure, or simply indicates an unwillingness to serve. Most panel chairs ultimately find that it would be better to have a new panelist rather than have a panelist serve who has a clear desire not to serve. The medical review panel chairman has the right to remove a member of the panel if the chairman determines the member is not fulfilling his or her duties. I.C. § 34-18-10-16. The statute requires each member of the medical review panel to take an oath, in writing, indicating that the panelists will render their opinion without bias. I.C. § 34-18-10-17.

Once the panel is formed, it must give its expert opinion within one hundred eighty (180) days after the selection of the last member, but the parties may agree to extend this time. In a series of cases, such as Galindo v. Christensen, 569 N.E.2d 702 (Ind. Ct. App. 1991), the Court of Appeals sustained dismissals of proposed complaints on the basis that the patient failed to submit his evidence within one hundred eighty (180) days of the selection of the panel. If the panel itself delays, by statute, the panel is supposed to submit a report to the commissioner about why the opinion has not been rendered. Practically speaking, however, there are many occasions where the panel opinion is not generated within 180 days, largely due to attorneys' scheduling issues, or cases requiring extensive discovery. Under most circumstance, the parties will agree ahead of time to extensions beyond the 180 days. In Beemer v. Elskens, 677 N.E.2d 1117 (Ind. Ct. App. 1997) (transfer denied 691 N.E.2d 1183), the Court of Appeals held that dismissal of a proposed complaint was not an appropriate sanction for the plaintiff's failure to submit their

evidence with 180 days because the panel chair implicitly granted the plaintiff's counsel an extension of time, evidence indicated that the submission was provided as soon as practical, and there was no history of repeated failures to comply with the deadlines.

9. Submissions.

Under I.C. § 34-18-10-17, all evidence must be submitted in written form, and may include medical charts, x-rays, lab tests, treatises, depositions, and any other form of evidence allowable by the medical review panel. The Act specifically allows for depositions to be taken before the convening of the panel. Although a medical malpractice plaintiff must present a proposed complaint for review by the medical review panel, there is no requirement for the plaintiff to fully explain or provide particulars about the claim to the panelists. Miller v. Memorial Hospital South Bend, Inc., 679 N.E.2d 1329 (Ind. 1997).

Recent cases have found that the medical review panel alone has the power to determine the evidence it will consider in reaching its decision, and that the panel chair's job is not to act as a gatekeeper of the materials submitted to it by the parties. Chen v. Kirkpatrick, 738 N.E.2d 727 (Ind. Ct. App. 2000). In Chen v. Kirkpatrick, the plaintiffs tendered expert reports that discussed breaches in standard of care of not only defendant's care of this patient, but also the defendant's care of other patients, and the doctors sought to exclude the reports to the extent they included complaints about other patients. The Court of Appeals held that this was not something that was appropriate for the court to do, and therefore allowed the materials to go to the panel. Although the panel has an obligation to review all information submitted, the panelists are also free by statute I.C. § 34-18-10-21 to consult with medical authorities and examine reports of other healthcare providers.

In the past, it was not uncommon for both parties to submit some brief discussion of law to the panelists. In Sherrow v. Gynn, Ltd., 745 N.E.2d 880 (Ind. Ct. App. 2001), the defendant tendered a submission which included arguments stating that, "nor is a physician liable for errors in judgment or honest mistakes in the treatment of a patient." The plaintiff objected, stating that the statements of the law were either slanted or misrepresented Indiana law. The chairperson refused to require the redaction of this language, but requested the removal of other language. The plaintiff subsequently filed a motion for a preliminary determination about the contents of the submission. The court held that legal argument is inappropriate in evidentiary submissions because legal argument is not "evidence" as suggested by the statute. The proper person to advise the panel about any legal questions involved in the review proceeding is the panel chairperson.

Neither party, attorney, or carrier may communicate with any member of the medical review panel before rendering the opinion. In the case of Matter of Lacava, 615 N.E.2d 93 (Ind. 1993), an attorney was charged with ethical misconduct by talking to one of the panelists after the attorney was advised that the medical review panel had unanimously decided against one of the physicians, but that a written opinion was circulating for signatures. The attorney angrily expressed his surprise to one of the panelists, and the panelist called the panel chair and informed him that he wanted to change his opinion about the doctor's compliance with the standard of care. This led another panelist to change his opinion as well. Ultimately, the opinion reached no conclusion as to the defendant doctor, with the understanding that the issues would be submitted to another medical review panel. Finding that the attorney had engaged in improper ex parte communication by contacting the panelist before the actual rendition of the opinion, the court

reprimanded the attorney.

10. Convening and Questioning the Panel.

Under I.C. § 34-18-10-20, either party, after submission of all the evidence, upon ten (10) days notice to the other side, has the right to convene the panel at a time and place agreeable to all members of the panel. Either party may question the panel concerning any matters relevant to issue to be decided by the panel before the issuance of the panel's report. The convening meeting shall be informal. The right to convene the panel does not suggest the right to do a complete voir dire similar to a jury trial situation, or a complete deposition.

In Surgical Associates, Inc. v. Zabolotney, 599 N.E.2d 614 (Ind. Ct. App. 1992), plaintiff's counsel filed with the chairman a list of 35 interrogatories to be sent to and answered by prospective nominees to the panel. The defendant objected to this request and the panel chairperson filed a motion for a preliminary determination about whether the interrogatories were appropriate. In reviewing the interrogatories, the court noted that they were what might typically be expected, in the sense they sought to obtain information about: (1) the healthcare provider's professional biography; (2) whether the person has ever been involved in disciplinary or malpractice proceedings; (3) the person's previous experience as a medical review panelist; and (4) whether the person has had experience with any similar issues. Although the court noted that these were relevant, the court held that requiring complete answers to interrogatories would add significant expense to the proceedings and that, in the absence of a specific provision authorizing the service of interrogatories, that there was no basis for imposing it upon the panelist. The court noted that "we see no reason why the less formal procedures they have utilized in such instances cannot be successfully brought to bear concerning proposed members of a medical review

panel." Id.

11. Type of Opinions Allowed.

After reviewing all the evidence and after any examination of the panel by counsel, the panel shall, within thirty (30) days, provide a written opinion stating:

> (1) the evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint;
> (2) the evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care;
> (3) there is a material issue of fact not requiring expert opinion bearing upon liability for consideration by the court or the jury; and/or
> (4) the conduct complained of was or was not a factor of the resulting damage, if any, to the plaintiff, and if so, whether the plaintiff suffered any disability or permanent impairment.

I.C. § 34-18-10-22.

Although the panel chair is supposed to guide the panelists as to a general understanding of the law, neither a trial court nor a panel chair has the power to instruct the medical review panel concerning the definition of terms and phrases used in the medical malpractice act. In Griffin v. Jones, 802 N.E.2d 107 (Ind. 1992), the plaintiff sought to have the trial court enter an order requiring the panel to find that there were material issues of fact bearing upon consideration, which precluded an expert opinion from the panel. The court held that the trial courts of the State do not have jurisdiction to instruct the medical review panel concerning definitions of terms and phrases used in the act because the panel should be allowed to operate in the informal manner contemplated by the legislature.

The report of the medical review panel is admissible into evidence, but is not conclusive. I.C. § 34-18-10-23. Either party has the right to call any member of the medical review panel as

a witness, but it is at their cost. I.C. § 34-18-10-23. Even though the statute says it is admissible into evidence, the better practice is to have a certified copy of the medical review panel opinion admitted into evidence, See Bonness v. Feldner, 642 N.E.2d 217 (Ind. Ct. App. 1994), or affidavits of the panel chairman, proving the panel opinion was accurate. See Jordan v. Deery, 609 N.E.2d 1104 (Ind. 1993).

By statute, a panelist has absolute immunity from civil liability from all communications, findings, opinions and conclusions made in the course and scope of serving as a panelist. I.C. § 34-18-10-24. The person who wins the medical review panel is responsible for paying the cost of the panel process, which may not exceed $2,000.00 for the chairman of the panel plus reasonable travel expenses, and up to $350.00 for the panelists plus reasonable travel expenses. If there is no majority opinion, each side pays 50% of the cost. Although challenged, Indiana courts have held that the act is not unconstitutional on the basis that compensation of the panelists was so low as to be essentially a taking. Johnson v. St. Vincent Hospital, Inc., 404 N.E.2d 585 (Ind. 1980). After the completion of the panel process, the chairman is required to send a copy of the panel to the commissioner, all parties and attorneys by registered or certified mail within five (5) days after the panel renders its opinion.