

KENTUCKY GENERAL ASSEMBLY AMENDMENT FORM
2017 REGULAR SESSION
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Amend printed copy of **SB 4/HCS 1**

From page 1, line 3, to page 15, line 23, by deleting all text and inserting in place thereof:

"➔SECTION 1. KRS CHAPTER 216C IS ESTABLISHED AND A NEW SECTION THEREOF IS CREATED TO READ AS FOLLOWS:

This chapter provides for the establishment of medical review panels to review proposed malpractice complaints against health care providers covered by this chapter.

➔SECTION 2. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

As used in this chapter unless the context otherwise requires:

(1) "Cabinet" means the Cabinet for Health and Family Services;

(2) "Affidavit of merit" means an affidavit executed by an expert witness meeting the requirements of Rule 702 of the Kentucky Rules of Evidence, that includes:

(a) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

(b) A statement that the affiant is familiar with the applicable standard of care, receives more than fifty percent (50%) of his or her revenue from long-term care, clinical or hospital work, or academia, and, in the case of a claim against a nursing home, has work experience in a nursing home;

(c) The opinion of the affiant that the standard of care was breached by one (1) or

Amendment No. HFA 17

Rep. Rep. Chad McCoy

Committee Amendment _____

Signed: _____

Floor Amendment _____

LRC Drafter: Trebelhorn, Matt

Adopted: _____

Date: _____

Rejected: _____

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more of the defendants to the action; and

(d) The opinion of the affiant, or a supplementary affidavit by a physician if the primary affiant is not a physician, stating that the breach caused injury to the plaintiff;

(3) "Dependent claim" means any claim against an entity or person that owns, controls, or manages any part of the operations of a health care provider, and which arises out of or relates in any way, in whole or in part, to a claim of malpractice or a malpractice-related claim;

(4) "Health care" means an act or treatment performed or furnished or that should have been performed or furnished by a health care provider for, to, or on behalf of a patient;

(5) "Health care provider" means any health facility as defined in KRS 216B.015, or a provider, including natural persons, of health care or health services, including but not limited to those licensed, certified, registered under, or subject to KRS 194A.700 to 194A.729 or KRS Chapter 310, 311, 311A, 311B, 312, 313, 314, 314A, 315, 319, 319A, 320, 327, 333, 334A, or 335 and the current and former officers, directors, administrators, agents, or employees of any such persons or entities acting within the course and scope of their office, employment, or agency;

(6) "Malpractice" means a tort based on or arising out of health care or professional services that were provided, or that should have been provided, by a health care provider to a patient;

(7) "Malpractice-related claim" means a claim for a tort or a violation of a statute, administrative regulation, right, or rule based on or arising out of health care or professional services that were provided, or that should have been provided, by a health care provider to a patient;

(8) "Patient" means an individual who receives or should have received health care from a

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health care provider under a contract, express or implied, and includes a person having a claim of any kind, whether derivative or otherwise, related to alleged malpractice on the part of a health care provider. Derivative claims include the claim of a spouse, parent, guardian, trustee, child, relative, heir, beneficiary, estate of the patient, representative of the patient's estate, attorney, or any other representative of the patient, including claims for loss of services, wrongful death, loss of consortium, expenses, and other similar claims; and

(9) "Tort" means a legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another.

➔SECTION 3. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

(1) All malpractice and malpractice-related claims against a health care provider, other than claims validly agreed for submission to a binding arbitration procedure or claims filed with an affidavit of merit or a motion to extend the period of time to file an affidavit of merit, shall be reviewed by a medical review panel. Such an action may not be commenced in a court in Kentucky before:

(a) The claimant's proposed complaint has been presented to a medical review panel established under this chapter; and

(b) An opinion is given by the panel. If the panel has not given its opinion within nine (9) months after the filing of the proposed complaint, the plaintiff may commence the action in court.

(2) Any action involving a dependent claim accruing after the effective date of this Act shall be immediately and automatically stayed until:

(a) The claimant's proposed complaint against the health care provider has been presented to a medical review panel established under this chapter and an opinion

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is given by the panel; or

(b) Nine (9) months after the filing of the proposed complaint if the panel has not given its opinion.

(3) Nothing in this chapter shall apply to a cause of action filed before the effective date of this Act.

→SECTION 4. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

(1) A claimant may commence an action in court for malpractice or for a malpractice-related claim against a health care provider without the presentation of the claim to a medical review panel if:

(a) The complaint is filed with an affidavit of merit or a motion to extend the period of time to file an affidavit of merit; or

(b) The claimant and all parties named as defendants in the action agree that the claim is not to be presented to a medical review panel. The agreement shall be in writing and shall be signed by each party or an authorized agent of the party.

(2) The claimant shall attach a copy of the affidavit of merit or the agreement to the complaint filed with the court in which the action is commenced. If the motion to extend the period of time to file an affidavit of merit is not granted, or if the affidavit of merit is not filed within the time allowed, the suit shall be dismissed.

→SECTION 5. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

(1) The filing of a proposed complaint tolls the applicable statute of limitations. The statute of limitations is tolled until ninety (90) days after the claimant has received the opinion of the medical review panel.

(2) A proposed complaint is considered filed when:

- (a) A copy of the proposed complaint and the filing fees set forth in subsection (3) of this section are delivered or mailed by registered or certified mail to the cabinet; or
- (b) An electronic copy of the proposed complaint and the filing fees set forth in subsection (3) of this section are transmitted to the cabinet if the cabinet establishes an electronic filing system.

(3) The following fees shall accompany each proposed complaint:

- (a) A filing fee of one hundred dollars (\$100); and
- (b) A processing fee of ten dollars (\$10) for each additional defendant after the first defendant.

→SECTION 6. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

Within ten (10) days after receiving a proposed complaint and the filing fee, the cabinet shall serve a copy of the proposed complaint by registered or certified mail on each health care provider that has been named as a defendant in the proposed complaint. The proposed complaint shall be served on a person authorized to receive summons under the Kentucky Rules of Civil Procedure. Service shall be deemed complete for purposes of this chapter upon receipt by the cabinet of the return mail receipt showing delivery on the defendant.

→SECTION 7. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

- (1) A medical review panel shall consist of one (1) attorney and three (3) health care providers eligible to serve under Section 9 of this Act.
- (2) The attorney member of the medical review panel shall act as chairperson of the panel and in an advisory capacity, but shall not vote.
- (3) The chairperson of the medical review panel shall expedite the selection of the other panel members, convene the panel, and expedite the panel's review of the proposed

complaint. The chairperson may establish a reasonable schedule for submission of evidence to the medical review panel, but shall allow reasonable time for the parties to make full and adequate presentation of related facts and authorities in accordance with this chapter.

➔SECTION 8. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

The chairperson of a medical review panel shall be selected in the following manner:

- (1) Within ten (10) days after service of the complaint on all defendants as described in Section 6 of this Act, the cabinet shall notify the parties to select a panel chairperson by agreement. If no agreement on a panel chairperson can be reached within twenty (20) days of service upon all parties, any party may request the cabinet to select a list of potential chairpersons;
- (2) Upon receipt of a twenty-five dollar (\$25) medical review panel chairperson selection fee from the party making the request, the cabinet shall draw at random a list of five (5) names of attorneys who:
 - (a) Are licensed to practice law in the Commonwealth of Kentucky;
 - (b) Applied to serve as the chairperson of a panel and are on the list of attorneys maintained by the cabinet pursuant to subsection (8) of this section; and
 - (c) Practice in the Supreme Court district in which the case would be filed or, if five (5) attorneys cannot be drawn from that Supreme Court district, from an adjacent Supreme Court district;
- (3) The cabinet shall notify the parties, and the parties shall then strike names alternately, with the plaintiff striking first until one (1) name remains. If there is more than one (1) plaintiff or more than one (1) defendant, the plaintiffs shall make their strikes collectively and the defendants shall make their strikes collectively. The remaining

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attorney shall be the chairperson of the panel;

(4) After the striking, the party making the last strike shall notify the chairperson and all other parties of the name of the chairperson;

(5) If a party does not strike a name within five (5) days after receiving notice from the cabinet:

(a) The opposing party shall, in writing, request the cabinet to strike for the nonresponsive party; and

(b) The cabinet shall draw at random a name to strike and shall strike that name;

(6) When one (1) name remains, the cabinet shall within five (5) days notify the chairperson and all other parties of the name of the chairperson;

(7) Within fifteen (15) days after being notified of being selected as chairperson, the chairperson shall:

(a) Send a written acknowledgment of appointment to the cabinet; or

(b) Show good cause for relief from serving as provided in Section 13 of this Act; and

(8) The cabinet shall maintain a list of attorneys who have applied to serve as chairperson of a medical review panel, as described in Section 7 of this Act. This list shall be used to select a chairperson if the parties do not agree on a chairperson.

→SECTION 9. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

Those health care providers who are natural persons, whether in the teaching profession or otherwise, who hold a valid, active license to practice in his or her profession shall be eligible for selection as a member of the medical review panel.

→SECTION 10. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

(1) Within five (5) days after acknowledging appointment of the selection of a panel

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- chairperson, the parties shall each propose a list of three (3) panelists who are eligible for panel membership under Section 9 of this Act.
- (2) Within fifteen (15) days of receipt of the opposing party's list, each party shall select one (1) person from the list proposed by the opposing party to serve on the medical review panel.
- (3) If there is more than one (1) plaintiff or more than one (1) defendant, the plaintiffs shall make their list and their selection from the defendants' list collectively, and the defendants shall make their list and their selection from the plaintiffs' list collectively.
- (4) If a party fails to make a selection from the opposing party's list within the time provided, the chairperson shall make the selection and notify all parties.
- (5) Within fifteen (15) days after their selection, the two (2) panel members shall select a third panel member who meets the criteria set forth in Section 9 of this Act and is licensed to practice his or her profession in Kentucky, and shall notify the chairperson and the parties. If the panel members fail to make a selection, the chairperson shall make the selection and notify all parties.

➔SECTION 11. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

- (1) Within ten (10) days after the selection of a panel member, written challenge may be made to the chairperson. Upon challenge, the chairperson shall determine if there is sufficient cause to dismiss the panel member. A party whose panel member is dismissed shall submit a new list of proposed panel members. If at any time the chairperson determines that a party is not proposing a list or panelist in good faith, the chairperson may select a panel member.
- (2) If the challenged or dismissed panel member was selected by the other two (2) panel members or by the chairperson, the panel members or the chairperson who selected the

challenged panel member shall make a new selection.

➔SECTION 12. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

When a medical review panel is formed, the chairperson shall, within five (5) days, notify the cabinet and the parties by registered or certified mail of the following:

- (1) The names and addresses of the panel members; and**
- (2) The date on which the last member was selected.**

➔SECTION 13. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

(1) A member of a medical review panel who is selected shall serve unless:

- (a) The panel member is dismissed pursuant to a successful challenge as provided in Section 11 of this Act or removed pursuant to Section 15 of this Act;**
- (b) The parties by agreement excuse the panelist; or**
- (c) The panelist is excused as provided in this section for good cause shown.**

(2) To show good cause for relief from serving, the attorney selected as chairperson of a medical review panel shall serve an affidavit upon the cabinet. The affidavit shall set out the facts showing that service would constitute an unreasonable burden or undue hardship. The cabinet may excuse the attorney from serving. The attorney shall notify all parties, who shall then select a new chairperson using the procedure set forth in Section 8 of this Act.

(3) To show good cause for relief from serving, a panel member who is not the chairperson of a medical review panel shall serve an affidavit upon the panel chairperson. The affidavit shall set out the facts showing that service would constitute an unreasonable burden or undue hardship. The chairperson may excuse the member from serving and notify all parties. The excused panel member shall be replaced using the procedure set

forth in Section 11 of this Act for dismissed panel members.

→SECTION 14. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

A party, attorney, or panelist who fails to act as required by this chapter without good cause shown is subject to appropriate sanctions upon application to a Circuit Court that has jurisdiction over the subject matter.

→SECTION 15. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

The chairperson may remove a member of the panel if the chairperson determines that the member is not fulfilling the duties imposed upon the panel members by this chapter. If a member is removed under this section, a new member shall be selected in the manner provided in Section 11 of this Act for dismissed panel members.

→SECTION 16. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

- (1) The evidence to be considered by the medical review panel shall be submitted by the respective parties in written or electronic form.
- (2) The evidence may consist of nonprivileged medical records, X-rays, lab tests, excerpts of treatises, depositions of witnesses including parties, and affidavits.
- (3) Depositions of parties and witnesses may be taken after the formation of the panel but before the evidence is submitted to the panel.
- (4) Upon request of any party, or upon request of any panel member, the chairperson shall issue administrative subpoenas and subpoenas duces tecum in aid of the taking of depositions and the production of documentary evidence for inspection or copying, or both.
- (5) The chairperson shall ensure that before the panel gives its opinion, each panel member

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has the opportunity to review every item of evidence submitted by the parties.

(6) The plaintiff's evidence shall be submitted to the medical review panel within sixty (60) days after the chairperson has notified the parties of the formation of the medical review panel as set forth in Section 12 of this Act.

(7) The defendants' evidence shall be submitted to the medical review panel within forty-five (45) days after the receipt of the plaintiff's submission of evidence.

(8) If no submission is made by one (1) or more of the parties, the medical review panel shall review the evidence submitted by the other parties and shall proceed with rendering its opinion on the evidence submitted.

(9) The chairperson may extend the deadlines set forth in this section in the event of extenuating circumstances, if requested by one (1) or more of the parties.

➔SECTION 17. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

(1) A party, a party's agent, a party's attorney, or a party's insurance carrier shall not communicate with any member of the panel, except as authorized by law, before the giving of the panel's opinion.

(2) (a) The panel has the right and duty to request all necessary and relevant information.

(b) The panel may consult with medical authorities.

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

(d) All parties shall have full access to any material submitted to the panel.

(e) The panel may conduct an evidentiary hearing or ask the parties to present oral arguments.

(3) The chairperson of the panel shall advise the panel relative to any legal question involved in the review proceeding and shall prepare the opinion of the panel.

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➔SECTION 18. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

- (1) The panel has the sole duty to express the panel's opinion as to whether or not the evidence supports the conclusion that a defendant or defendants acted or failed to act within the appropriate standards of care as charged in the complaint and whether any such failure was a substantial factor in providing a negative outcome for that patient.
- (2) After reviewing all evidence, the panel shall, within thirty (30) days of receipt of the defendants' evidence submitted under Section 17 of this Act, give as to each defendant one (1) of the following opinions, which shall be in writing and signed by the panelists:

 - (a) The evidence supports the conclusion that the specifically identified defendant failed to comply with the appropriate standard of care as charged in the complaint and the conduct was a substantial factor in producing a negative outcome for the patient;
 - (b) The evidence supports the conclusion that the specifically identified defendant failed to comply with the appropriate standard of care as charged in the complaint, but the conduct was not a substantial factor in producing a negative outcome for the patient;
 - (c) The evidence does not support the conclusion that the specifically identified defendant failed to meet the applicable standard of care as charged in the complaint; or
 - (d) The panel is unable to make a determination based on the evidence.
- (3) In order to give the opinion of the panel in accordance with subsection (2) of this section, two (2) or more of the members of the panel shall agree on the conclusion.
- (4) After the panel gives its opinion as to each defendant, the panel is dissolved and shall take no further action.

→SECTION 19. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

If the panel has not given its opinion within nine (9) months after the filing of the proposed complaint, the plaintiff may commence the action in court. The panel shall submit a report to the parties, stating the reasons for the delay, and may continue its work to reach an opinion.

→SECTION 20. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

(1) Upon motion, the trial court shall admit the panel's opinion into evidence, subject to cross-examination, upon a written finding that the evidence would assist the trier of fact and otherwise comply with the Kentucky Rules of Evidence.

(2) The opinion is not conclusive, and either party may call any member of the medical review panel as a witness. If called as a witness, the panel member shall appear and testify, but shall be entitled to reasonable compensation by the party calling the witness.

→SECTION 21. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

A panelist shall have absolute immunity for civil liability for all communications, findings, opinions, and conclusions made in the course and scope of duties prescribed by this chapter.

→SECTION 22. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

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

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

(b) Reasonable travel expenses.

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

(a) At the rate of two hundred fifty dollars (\$250) per diem, not to exceed two thousand dollars (\$2,000) per case; and

(b) Reasonable travel expenses.

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

(4) Fees of the panel, including travel expenses and other expenses of the review, shall be paid by the party or parties in whose favor the opinion is written.

→SECTION 23. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

The chairperson shall submit a copy of the panel's report by registered or certified mail within five (5) days after the panel gives its opinion to:

(1) The cabinet; and

(2) All parties and the attorneys for the parties.

→SECTION 24. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

(1) A court having jurisdiction over the subject matter and the parties to a proposed complaint filed with the cabinet under this chapter may, upon the filing of a petition as set forth in Section 25 of this Act:

(a) Entertain motions to compel or limit discovery previously authorized by the chairperson of the medical review panel;

(b) Entertain motions to enforce or quash subpoenas issued by the chairperson of the medical review panel; and

(c) Entertain motions for sanctions pursuant to Section 14 of this Act.

(2) The court has jurisdiction to entertain a motion filed under this chapter only during that

time after a proposed complaint is filed with the cabinet under this chapter but before the medical review panel gives the panel's written opinion.

(3) The failure of any party to move to compel or limit discovery under this chapter does not constitute the waiver of any affirmative defense or issue of law or fact.

➔SECTION 25. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

(1) A party to a proceeding commenced under this chapter, the cabinet, or the chairperson of a medical review panel, if any, may invoke the jurisdiction of the court by paying the statutory filing fee to the clerk and filing a petition with a copy of the proposed complaint and motion with the clerk.

(2) The filing of a copy of the proposed complaint and motion with the clerk confers jurisdiction upon the court over the subject matter of the proceeding for the limited purposes stated in this chapter, including the assessment of costs or the allowance of expenses, including reasonable attorney's fees, or both.

(3) The moving party or the moving party's attorney shall cause as many summonses as are necessary to be issued by the clerk and served, together with a copy of the proposed complaint and a copy of the motion, and in accordance with the Kentucky Rules of Civil Procedure upon:

(a) The cabinet;

(b) Each nonmoving party to the proceedings; and

(c) The chairperson of the medical review panel, if any, unless the cabinet or the chairperson is the moving party.

➔SECTION 26. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

(1) Each nonmoving party to the proceeding, including the cabinet and the chairperson of

the medical review panel, if any, shall have a period of twenty (20) days after service, or a period of twenty-three (23) days after service if service is by mail, to appear and file and serve a written response to the motion, unless the court, for cause shown, orders the period enlarged.

(2) The court shall order the clerk to serve a copy of the court's ruling on the motion by ordinary mail on the cabinet, each party to the proceeding, and the chairperson of the medical review panel, if any.

→SECTION 27. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

Upon the filing of a copy of the proposed complaint and motion with the clerk of the court, all further proceedings before the medical review panel shall be stayed automatically until the court has entered a ruling on the motion.

→SECTION 28. A NEW SECTION OF KRS CHAPTER 216C IS CREATED TO READ AS FOLLOWS:

The court may enforce its ruling on any motion filed under this chapter in accordance with the Kentucky Rules of Civil Procedure, subject to any right of appeal otherwise allowed by Kentucky law."