

May 9, 2014

OFFICIAL OPINION 2014-1

Mr. Kevin S. Smith
Clerk of the Indiana Supreme Court
200 W. Washington St.
Indianapolis, IN 46204

RE: Medical review panel chair removal for good cause after 15 days

Dear Mr. Smith:

You asked whether Ind. Code § 34-18-10-12 allows the chair of a medical review panel to be excused for good cause after the fifteen day period in Ind. Code § 34-18-10-4(7).

BRIEF ANSWER

Ind. Code § 34-18-10-12 applies during the initial formation of the panel, and allows the Clerk of the Supreme Court to excuse a chair for good cause within fifteen days after the chair is notified of his or her selection. After the chair acknowledges appointment pursuant to IND. CODE § 34-18-10-4-(7)(A), the chair can be removed only by the Commissioner of the Department of Insurance.

ANALYSIS

Ind. Code § 34-18-10 sets out the process for establishing a medical review panel to review a proposed malpractice complaint against a healthcare provider. Ind. Code § 34-18-10-4 provides that the parties shall agree on a chair, who must be an attorney. If the parties cannot agree on a chair, they may request that the Clerk draw at random a list of five attorneys who:

- (A) are qualified to practice;
- (B) are presently on the rolls of the supreme court; and
- (C) maintain offices in the county of venue designated in the proposed complaint or in a contiguous county.

The parties then strike names until one remains, and that person is the chair. The Clerk then notifies the attorney that he or she is selected as the chair. The statute provides that

Within fifteen (15) days after being notified by the clerk of being selected as chairman, the chairman shall:

- (A) send a written acknowledgment of appointment to the clerk; or
- (B) show good cause for relief from serving as provided in section 12 of this chapter.

Ind. Code § 34-18-10-12 sets out the process for excusing a chair for cause. Subsection (b) provides:

To show good cause for relief from serving, the attorney selected as chairman of a medical review panel must serve an affidavit upon the clerk of the supreme court. The

affidavit must set out the facts showing that service would constitute an unreasonable burden or undue hardship. The clerk may excuse the attorney from serving. The attorney shall notify all parties, who shall then select a new chairman as provided in section 4 of this chapter.

Ind. Code § 34-18-10-12 does not explicitly reference the fifteen day deadline in Ind. Code § 34-18-10-4(7). It is not clear how the statute applies when a change in circumstances after the initial appointment makes the chairmanship burdensome. However, other sections of the same chapter suggest that once the panel is formed, the chair can only be removed by the Commissioner or a court. Ind. Code § 34-18-10-13, which sets a 180-day deadline for the panel's opinion, provides for an extension of the deadline if "(1) the chairman of the panel is removed under section 15 of this chapter, another member of the panel is removed under section 16 of this chapter, or any member of the panel, including the chairman, is removed by a court order..." This section makes no mention of a panelist excused under Ind. Code § 34-18-10-12.

The case law addressing Ind. Code § 34-18-10-12 is very limited. In *Harlett v. St. Vincent Hospital and Health Services*, 478 N.E. 2d 921 (Ind. Ct. App 2001), a party challenging the qualifications of a panelist attempted to require the chairman to excuse the panelist under that statute. The Court noted that section 12 "relates solely to excusals initiated by panel members for reasons of 'unreasonable burden or undue hardship.' The statute has no application to the present case where a party is seeking to have a panelist excused on the grounds of lack of qualification." *Id.* at 924.

If continued service would constitute an undue hardship or burden, the chairman may ask the Commissioner to be removed as chair. Removal of the chairman is governed by Ind. Code § 34-18-10-15, which provides:

(a) The commissioner may remove the chairman of the panel if the commissioner determines that the chairman is not fulfilling the duties imposed upon the chairman by this chapter.

(b) If the chairman is removed under this section, a new chairman shall be selected under this chapter.

Although a chairman who fulfilling his or duties without good cause can be subject to mandate or sanctions under Ind. Code § 34-18-10-14, this penalty would not apply to a chairman who has good cause for not fulfilling his or her duties. If the chairman has good cause for not fulfilling his duties, he should be able to request removal with no penalty or stigma.

The Commissioner has an ongoing role in the operation of the medical review panel, so it is logical that the Commissioner would decide if the chairman should continue to serve. The Commissioner has the authority to remove the chair under IND. CODE § 34-18-10-15. In addition, the panel must report to the Commissioner under Ind. Code § 34-18-10-13 if the panel's report is not issued within 180 days and the Commissioner receives the panel's final report under Ind. Code § 34-18-10-26. In contrast, the Clerk of the Supreme Court's role is limited to selecting a chairman and excusing a chairman who declines to serve based on good cause. Once the panel is established, the Commissioner, rather than the Clerk, is responsible for ensuring that the chair continues to fulfill his or her duties. The Commissioner will know when the panel's decision is due or when it is

expected if it is not completed within 180 days. The Commissioner is in a better position to evaluate the chairman's request to be dismissed based on the chairman's circumstances and the time commitment of service on that particular panel.

Ind. Code Chpt. 34-18-10 does not clearly set out a process by which a chairman or other panelist can request relief from duty if the panelist can no longer serve after the panel is formed. This is a shortcoming in the statute, because it is possible for such a situation to arise due to illness, relocation, retirement, or other causes. As discussed above, the statute does not expressly state that a chair may be excused only if he files the request within fifteen days of appointment. Given the ambiguity, a court could find that the Clerk has the authority to excuse a chairman even if the request is filed more than fifteen days after appointment. However, because there is no doubt that the Commissioner can remove the chairman at any time, a challenge could be avoided by requesting that the Commissioner dismiss the chairman.

CONCLUSION

Ind. Code Chpt. 34-18-10 does not clearly set out a process for excusing the chairman of a medical review panel when service becomes burdensome after the panel is formed. The statute does not clearly allow the Clerk to excuse the chairman after the panel is formed, but the chairman could ask the Commissioner to remove him because he is no longer able to serve.

Sincerely,

Gregory F. Zoeller
Attorney General

Donna Stolz Sembroski
Deputy Attorney General