CIVIL REMEDIES AND PROCEDURE: MEDICAL MALPRACTICE.

Ore tenus hearings of medical malpractice review panel must be open to public and media, and are to be closed only during deliberation of panel to reach decision.

The Honorable Emmett W. Hanger Jr.

Member, Senate of Virginia

May 10, 1999

You ask whether the ore tenus[1] hearings of medical malpractice review panels are to be open to the public and media.

A newspaper constituency in your district advises you that the news media and others were excluded from the courtroom where an ore tenus hearing was held before a medical malpractice review panel. The constituency believes that a medical malpractice review panel ore tenus hearing is similar to a civil proceeding, and, therefore, public access may not be denied without some compelling interest. The constituency has observed certain characteristics of an ore tenus hearing that are similar to a civil proceeding, such as: (1) the panel hearing convenes in a courtroom and is presided over by a circuit court judge; (2) the panel meets after the close of discovery to hear evidence from witnesses and allow cross-examination; and (3) the panel issues a written opinion. The constituency also believes that the composition of the ore tenus panel hearing resembles that of a civil proceeding. For example, the panel is composed of two impartial attorneys, two impartial health care providers, and a judge. In addition, the panel's issuance of a written opinion as to malpractice, which later may be admitted in a court action, reflects the apparent intent of the General Assembly to have the panel act as an informed jury to reduce frivolous and dubious claims.

The medical malpractice review panels and methods for reporting medical malpractice claims were implemented in response to a perceived medical malpractice crisis in the mid-1970s.[2] Article 1, Chapter 21.1 of Title 8.01, §§ 8.01-581.1 through 8.01-581.12:2, details the procedures for selecting a medical malpractice review panel and arbitrating malpractice claims. Section 8.01-581.2(A) allows a claimant or health care provider to request a panel to review a malpractice claim:

> At any time within thirty days from the filing of the responsive pleading in any action brought for malpractice against a health care provider, the plaintiff or defendant may request a review by a medical malpractice review panel established as provided in § 8.01-581.3. The request shall be forwarded by the clerk of the circuit court to the Clerk of the Supreme Court of Virginia. Upon receipt of such request, the Supreme Court shall select the panel members as provided in § 8.01-581.3:1. If a panel is requested, proceedings on the action based on the alleged malpractice shall be stayed during the period of review by the medical review panel, except that the judge may rule on any motions, demurrers, or pleas that can be disposed of as a matter of law and, prior to the designation of the panel, shall rule on any motions to transfer venue.

When a review panel is requested, the Supreme Court of Virginia must designate two impartial attorneys and two impartial health care providers, from a preapproved list, to comprise the panel, along with a circuit court judge who presides over the panel.[3] Either the claimant or health care

provider may request a hearing on any claim referred to the panel.[4] Should a request for a panel hearing be made, § 8.01-581.5 provides that "the medical review panel shall conduct a hearing thereon in accordance with § 8.01-581.6." The use of the word "shall" in a statute indicates that the General Assembly intended its terms to be mandatory.[5] It is well-settled that when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.[6]

Pursuant to the requirements of § 8.01-581.11, the Chief Justice of the Supreme Court of Virginia has promulgated rules "to carry out the provisions of [Chapter 21.1]."[7] The rules govern the practice and procedures of malpractice review panels. Rule 5 of the Medical Malpractice Rules of Practice provides that "[e]ither party may request the panel to conduct an ore tenus hearing and, when such a hearing is requested, it shall be held." Rule 6 sets forth the procedural rules applicable to the conduct of the hearings. Pursuant to Rule 6(h), "[w]itnesses other than the parties or one representative of each may be excluded at the discretion of the judge." Rule 6(j) lists the general procedures to be followed at an ore tenus hearing. These procedures allow lawyers representing the parties to make opening statements, produce evidence, examine and cross-examine witnesses, and present oral argument.[8] Rule 6(j)(13) specifically requires that, "[a]t the conclusion of the hearing, the panel will deliberate in executive session" in order to reach a decision.[9]

It is apparent that the ore tenus hearings of the panel under the procedures contained in the Medical Malpractice Rules of Practice are to be open to the public and media, and are to be closed only during such time as the panel deliberates to reach a decision in the matter.[10] If the ore tenus panel hearings were closed to the public and media, there would be no need to have a rule requiring that the panel convene in executive session to reach a decision. I am, therefore, of the opinion that the ore tenus hearings of medical malpractice review panels must be open to the public and media.

[1]"Ore tenus" means "[b]y word of mouth; orally." Black's Law Dictionary 1099 (6th ed. 1990).

[2]*See* 1976 Va. Acts ch. 611, at 784; *see also* DiAntonio v. Northampton-Accomack Memorial, 628 F.2d 287 (4th Cir. 1980). In the DiAntonio case, the Fourth Circuit noted the following with respect to the legislative intent of the Virginia Medical Malpractice Act: "There was a legislative finding that the high cost of medical malpractice insurance was beyond the means of some health care providers and that they were ceasing to render services. It was thought that passage of the Act would lower the cost of medical malpractice insurance, since the panel would weed out frivolous claims and would perform a mediation function with respect to other claims. In consequence of the panel's performance of these functions, it was believed that the amount of medical malpractice litigation would be substantially reduced, thus substantially lowering the cost of medical malpractice insurance." 628 F.2d at 290.

[3]Section 8.01-581.3 stipulates that the medical review panel be selected "from a list of health care providers submitted by the Board of Medicine and a list of attorneys submitted by the Virginia State Bar."

[4]Section 8.01-581.5.

[5]*See* Op. Va. Att'y Gen.: 1997 at 1, 2; 1986-1987 at 300, 300, and opinions cited therein.

[6]2A Norman J. Singer, Sutherland Statutory Construction § 47.23 (5th ed. 1992 & Supp. 1998); 1996 Op. Va. Att'y Gen. 61, 62.

[7]*See* Va. Rules Ann. Medical Malpractice Rules of Practice 1-7, at 389-95 (Michie 1999).

[8]*See id*. R. 6(j)(4)-(12), at 394.

[9]*Id*. R. 6(j)(13), at 394.

[10]I note that it is an elementary rule of statutory interpretation that the construction given to statutes by public officials charged with their administration is entitled to great weight and, in doubtful cases, will be regarded as decisive. *See* Bed Company v. Corporation Commission, 205 Va. 272, 136 S.E.2d 900 (1964).