

AN ACT related to medical malpractice mediation.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔SECTION 1. KRS CHAPTER 417A IS ESTABLISHED AND A NEW SECTION THEREOF IS CREATED TO READ AS FOLLOWS:

As used in this chapter unless the context otherwise requires:

- (1) "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;*
- (2) "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 202A, 205, 210, 216, 216A, 216B, 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;*
- (3) "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;*
- (4) "Malpractice-related claim" means a claim for a tort, breach of contract, 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;*
- (5) "Medical malpractice mediator" means an attorney who has:*
 - (a) Been a member of the Kentucky bar for at least five (5) years;*
 - (b) Significant experience in medical malpractice litigation or settlement;*
 - (c) Agreed to comply with the mediation guidelines in Part XII of the*

Administrative Procedures for the Court of Justice; and

(d) Requested to be listed on a medical malpractice mediator roster maintained by the Administrative Office of the Courts.

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

(7) "Representative with settlement authority" means an individual with control of the financial settlement resources for the claim and the authority to negotiate the terms of any settlement and to pledge those resources to settle the claim on behalf of a party; and

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

➔SECTION 2. A NEW SECTION OF KRS CHAPTER 417A IS CREATED TO READ AS FOLLOWS:

(1) When a complaint for malpractice or a malpractice-related claim is filed in a court against a health care provider, the court shall refer the action to mandatory malpractice mediation for the purpose of achieving a settlement.

(2) (a) The court shall stay the time periods within which all further pleadings, motions, requests, discovery, and other procedures must be undertaken until mediation is terminated under Section 6 of this Act; and

(b) Any applicable statutes of limitation shall be tolled and not deemed to run until thirty (30) days after the mediator's report is delivered to the court

pursuant to Section 7 of this Act.

(3) (a) 1. Before the close of pleadings in the civil action, the court shall provide a roster of eligible medical malpractice mediators from which the parties may select a mediator.

2. If the parties cannot agree on the selection of a mediator within fifteen (15) days of the referral, they shall notify the court, which shall then appoint a mediator.

(b) 1. A medical malpractice mediator who is selected or appointed shall serve unless the mediator is excused by the court for good cause shown.

2. If a mediator has been excused, the court shall stay the proceedings until a new mediator is selected by the parties or appointed by the court under this subsection.

(4) Once a mediator has been selected or appointed, the mediator shall schedule an initial mediation session within thirty (30) days;

➔SECTION 3. A NEW SECTION OF KRS CHAPTER 417A IS CREATED TO READ AS FOLLOWS:

(1) Each party shall submit a confidential mediation statement to the mediator no later than seven (7) days prior to the initial mediation session. The parties shall not send copies of the mediation statement to the clerk, the assigned judge, or the other parties.

(2) Unless not already stated in the complaint and answer, the mediation statement shall:

(a) Include a brief summary of facts;

(b) Identify the issues of law and fact in dispute and summarize the party's position on those issues;

(c) Discuss whether there are issues of law or fact the early resolution of which

could facilitate early settlement or narrow the scope of the dispute;

(d) Identify the attorney who will represent the party at the mediation session and any representative with settlement authority who will attend the mediation session;

(e) Include any documents or materials relevant to the case which may assist the mediator and advance the purposes of the mediation session; and

(f) Present any other matters that may assist the mediator and facilitate the mediation.

(3) Mediation statements are intended solely to facilitate the mediation and shall not be filed with the court.

→SECTION 4. A NEW SECTION OF KRS CHAPTER 417A IS CREATED TO READ AS FOLLOWS:

(1) All parties shall personally attend mediation sessions, unless participation by electronic means is specifically permitted by the mediator.

(2) Attorneys representing each party shall attend the mediation sessions, unless otherwise agreed to by the parties and the mediator.

(3) If a party is not an individual, a representative with settlement authority for the party shall attend the mediation sessions.

(4) If any party is insured for the claim in dispute, a representative of the insurance company who is not that company's outside counsel and who has settlement authority shall attend the mediation sessions.

→SECTION 5. A NEW SECTION OF KRS CHAPTER 417A IS CREATED TO READ AS FOLLOWS:

(1) Unless otherwise agreed by the parties, fifty percent (50%) of the cost of mediation shall be paid by the plaintiffs, and fifty percent (50%) of the cost of mediation shall be apportioned among all defendants.

(2) The fee for the mediator shall be reasonable and no greater than the mediator's

standard rate.

➔SECTION 6. A NEW SECTION OF KRS CHAPTER 417A IS CREATED TO READ AS FOLLOWS:

A referred medical malpractice mediation is considered terminated when:

- (1) A settlement is reached;
- (2) The mediator determines that continued sessions would be unproductive; or
- (3) The duration of the referred mediation has exceeded one hundred twenty (120) days, unless the court, for good cause shown, extends the mediation.

➔SECTION 7. A NEW SECTION OF KRS CHAPTER 417A IS CREATED TO READ AS FOLLOWS:

- (1) A mediator's report shall be filed with the court no later than ten (10) days after the mediation has terminated.
- (2) The report shall inform the court regarding attendance at each session by the parties and their representatives, and:
 - (a) The terms of settlement, if any; or
 - (b) If no settlement was reached, any agreements among the parties to narrow the scope of the dispute, limit discovery, or otherwise reduce the cost and time of trial preparation.

➔SECTION 8. A NEW SECTION OF KRS CHAPTER 417A IS CREATED TO READ AS FOLLOWS:

- (1) The mediation sessions shall be confidential and privileged, except on order of the court for good cause shown. This privilege and immunity reside in the mediator and may not be waived by the parties.
- (2) Mediation sessions shall be closed to all persons other than the parties, their legal representatives, their representatives with settlement authority, and other persons invited by the mediator with the consent of the parties.
- (3) Mediation shall be regarded as settlement negotiations for purposes of Kentucky

Rule of Evidence 408.

(4) A mediator shall not be compelled to provide evidence of a mediation communication at any subsequent trial.

➔Section 9. This Act takes effect July 1, 2017.