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No "New" Breaches: Adding a Section to the Indiana Medical Malpractice Act to Alleviate the Pain Caused by K.D. v. Chambers

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NO "NEW" BREACHES: ADDING A SECTION TO THE INDIANA MEDICAL MALPRACTICE ACT TO ALLEVIATE THE PAIN CAUSED BY *K.D. V. CHAMBERS*

I. INTRODUCTION

Fitz visits Green Medical Center with stomach pain.[1] The physician on duty, Dr. Huck, determines that Fitz needs a quick outpatient procedure to remedy his ailment. The procedure goes well, and Dr. Huck sends him home to recover. Three days later, Fitz experiences excruciating stomach pain, and Dr. Huck advises him to go to Lynniebrook Hospital. Within five hours of his arrival at the hospital, Dr. Syrus, a general surgeon, performs surgery on him. The next day, Nurse Quinn monitors Fitz, charting his progress and her care of him. He is recovering well, and the hospital staff informs his wife that he will be released in a few days. However, just a few hours later, Fitz's condition changes drastically. The on-call physician, Dr. Harrison, enters the room within three minutes of hearing the emergency code being called, and Dr. Harrison and Nurse Quinn attempt to resuscitate Fitz. Thirty minutes later, he is declared dead.

Fitz's wife hires Olivia, a local attorney, to file suit. Complying with the Indiana Medical Malpractice Act, Olivia first files a proposed complaint on behalf of Fitz's estate and his wife with the Indiana Department of Insurance and serves all parties.[2] The list of defendants is complex. She sues Green Medical Center and its employee, Dr. Huck, Lynniebrook Hospital and employees Dr. Harrison and Nurse Quinn, and IND Medial Group and its employee Dr. Syrus. The parties begin discovery, and submit evidence to the medical review panel ("Panel") to support their arguments that the medical providers did or did not breach the applicable standard of care in their treatment of Fitz.[3] The Panel determines Dr. Huck (which includes Green Medical Center) and Dr. Syrus (which includes IND Medical Group) breached the standard of care. However, it finds that Lynniebrook Hospital and its employees did not breach the standard of care. Now, a trial court gains jurisdiction over the case, and it proceeds like any other civil suit.[4]

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1 The hypothetical scenario is fictional and is the sole creation of the author.

2 *See infra* notes 43–46 and accompanying text (reviewing the procedure to commence a medical malpractice lawsuit in Indiana).

3 *See infra* notes 57–63 and accompanying text (explaining the requirements for a Panel submission and the acceptable forms of evidence that the parties may submit to the Panel).

4 *See infra* notes 69–71 and accompanying text (discussing the statutory requirements for a trial court to gain jurisdiction in a medical malpractice case).

Two weeks later, Lynniebrook Hospital files a motion for summary judgment, arguing that the court should grant its motion because the Panel did not find that the hospital or its employees breached the standard of care, therefore no claim exists for which relief may be granted.[5] Olivia wants to keep the hospital in the suit, but knows that she does not have a strong case against Lynniebrook. Along with the unfavorable Panel opinion, the notes in Fitz's medical chart do not yield any damaging evidence against the hospital. At this point, Olivia's argument to maintain a cause of action against the hospital will not likely prevail.[6]

The next day, Olivia receives a call from Dr. Huck's counsel, who informs her that Lynniebrook Hospital was at fault for Fitz's death. The attorney could not provide any more details, so Olivia scrambles to validate this claim. The only individual who was unavailable during discovery, prior to the Panel review meeting, was Nurse Quinn. With high hopes that the nurse might be able to provide more information, Olivia hires a private investigator to locate Nurse Quinn.

Nurse Quinn's deposition turns out to be a game-changer for the case. The nurse admits that she was fired from Lynniebrook, and says that she will no longer lie for the hospital. She explains that it is common practice at Lynniebrook to "leave things out of charts that might be problematic," such as changing a patient's medicine dosage without authorization by a doctor, or charting that a nurse did something when it was really an aide. Nurse Quinn says she remembers caring for Fitz and knows she was not in the room when his vital signs deteriorated. However, she came in as soon as an aide yelled for her so she charted that she had been in the room to avoid anyone questioning the aide. The nurse began to cry, and regrettably testified "that aide could have done *anything* to the patient. When I walked in, he had a syringe in his hand. That's probably why that poor man is dead!"

Now, Olivia has to find a way to keep Lynniebrook Hospital in the suit. With this new evidence, she will be able to prove that the hospital, through its employees, committed a breach in the standard of care.[7]

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5 *See infra* notes 62–68 and accompanying text (reviewing the four opinions available to the Panel when it determines what constitutes a breach of the applicable standard of care and the implications of a positive or negative opinion by the Panel for each health care provider).

6 *See infra* note 68 and accompanying text (explaining that an unfavorable opinion from the Panel is not a complete bar to recovery, but is often grounds for a defendant health care provider to file a motion for summary judgment).

7 *See infra* note 63 and accompanying text (reviewing the Act's requirement that the Panel must determine whether each health care provider breached the applicable standard of care).

Olivia asks the judge to deny the hospital's motion for summary judgment based on this new evidence. The hospital cites a recent case and argues that the evidence is inadmissible because this issue was never presented to the Panel.[8] The judge researches the law, and it is clear—evidence not presented to and reviewed by a Panel is inadmissible.[9] With no authority to remand the case to the Panel for further review, the judge has no choice but to grant summary judgment for the hospital.[10]

This Note proposes an additional statutory section to chapter ten, the Panel chapter, of the Indiana Medical Malpractice Act, to ensure that parties have a fair chance to present every viable theory of recovery to a court.[11] If a new theory comes to light after a Panel renders an opinion, judges should have the discretionary authority to remand the case to the Panel for further review, or to permit the parties to proceed without further review by the Panel.[12] With this authority, unjust situations, such as the hypothetical just presented, are preventable.[13]

First, Part II of this Note describes the Indiana Medical Malpractice Act's purpose and reasons for enactment by the Indiana General Assembly, with an emphasis on the Panel provisions.[14] This Part also explains how malpractice claims work through the Panel process, discusses case law concerning the Panel, and considers the relevant evidentiary and trial rules that govern the trial court.[15] Next, Part III analyzes the prerequisite Panel requirement with *Miller v. Memorial Hospital of South Bend* and *K.D. v. Chambers* as precedent, how judicial discretion might be used to alleviate the implications of conflicting case

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8 *See infra* note 86 and accompanying text (presenting the holding from the recent case from the Indiana Court of Appeals, *K.D. v. Chambers*, where the court held that evidence not submitted to a Panel is inadmissible at trial).

9 *See id.* (discussing the court's holding in *K.D. v. Chambers*).

10 *See infra* notes 130–34 and accompanying text (exploring the implications of the *K.D. v. Chambers* holding).

11 *See infra* Part IV (proposing an additional section to include in the Panel chapter of the Act, which focuses primarily on judicial discretion when evidence of an additional breach in the applicable standard of care is discovered after a Panel renders an opinion).

12 *See id.* (arguing for the benefits of this judicial authority and discussing its possible implications to the overall process of medical malpractice claims).

13 *See infra* notes 204–09 and accompanying text (resolving the hypothetical with the proposed section to chapter ten of the Act).

14 *See infra* Part II (exploring the history of the Act, including an Indiana governor's call for legislative reform, and an overview of how medical malpractice claims work in Indiana, highlighting the Panel process).

15 *See id.* (explaining how a medical malpractice case works through the Panel process, case law addressing the Panel requirement focusing primarily on *Miller v. Memorial Hospital of South Bend* and *K.D. v. Chambers*, and relevant evidentiary and trial rules).

law, and whether the courts or legislature should provide a remedy.[16] Finally, Part IV proposes an additional section that the Indiana General Assembly should include in the Panel chapter to remedy the unfortunate result of *K.D. v. Chambers*, and discusses the advantages and possible implications of the proposed section's enactment.[17] The proposed section grants trial judges the authority to remand cases to a Panel for further review when parties discover evidence of an additional breach after the Panel process.[18]

II. BACKGROUND

The Panel requirement of the Indiana Medical Malpractice Act ("Act"), in certain circumstances, has become more problematic than imaginable at its creation.[19] Indiana was among the first states to address growing concerns about medical malpractice claims, in part by introducing a prerequisite Panel requirement.[20] Before focusing on the prescreening Panel process, Part II.A briefly discusses the history of the Act, including the purpose for its creation and the Act's three main components.[21] Second, Part II.B explains how a Panel is formed, the composition of a Panel, how a medical malpractice claim moves through the Panel process, and duties of medical malpractice attorneys, parties, panelists, and trial courts that will gain jurisdiction of the suit after the Panel process.[22] Next, Part II.C explores Indiana case law that addresses the Panel requirement, including two conflicting decisions from the

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16 *See infra* Part III (analyzing the implications and inconsistencies of *Miller v. Memorial Hospital of South Bend* and *K.D. v. Chambers*, the discretion of trial judges, and how already-available trial rules are used in the Panel process).

17 *See infra* Part IV (proposing a statute to add to the Panel chapter of the Act, providing support and reasoning for the proposed statute, and addressing the arguments against its inclusion).

18 *See infra* Part IV.B (explaining how the proposed statute can be used as a tool to medical malpractice plaintiffs in order to fully adjudicate their claims based on all available evidence that *K.D. v. Chambers* excludes).

19 *See infra* Part II.A (reviewing the purposes for the Act's creation, such as rising health care costs and medical malpractice insurance, the Act's goals, and generally how a claim works its way through the process, from the time a plaintiff files a proposed complaint, through the Panel process, and up until the trial court gains jurisdiction of the case).

20 *See infra* notes 30–33 (examining the concerns with medical malpractice claims in Indiana, such as some medical providers refusing to perform certain high risk procedures for fear of the patient later filing a lawsuit, and the three major reforms created by the Act).

21 *See id.* (providing an overview of the reasons the Act was created and its three major components: a comprehensive damage cap, the patient's compensation fund, and the prerequisite Panel requirement).

22 *See infra* Part II.B (explaining how a Panel is formed, the duties of the panelists and parties, the requirements to complete the Panel process, and the role of the trial court during the Panel process).

Indiana Supreme Court and Indiana Court of Appeals, *Miller v. Memorial Hospital of South Bend* and *K.D. v. Chambers*.[23] Last, Part II.D explains the trial rules relevant to the Panel process, as well as the role of trial judges, including judicial discretion to determine evidentiary issues that arise after a Panel renders an opinion.[24]

A. The Enactment of the Indiana Medical Malpractice Act

Early in 1975, Indiana was facing a growing health care crisis.[25] The price of medical malpractice insurance was quickly rising, in sync with the number of malpractice claims being filed.[26] It was becoming increasingly more difficult for health care providers to obtain malpractice insurance; the insurance companies stopped providing this type of coverage in Indiana, and this situation even caused the medical providers to stop performing certain medical procedures for fear of litigation.[27] Indiana Governor Otis R. Bowen, a medical doctor, called for reform of the tort system for medical malpractice claims.[28] Governor

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[23] *See infra* Part II.C (discussing *Miller v. Memorial Hospital of South Bend* and *K.D. v. Chambers*).

[24] *See infra* Part II.D (explaining several relevant evidentiary and trial rules that are used during the Panel process and the role of the trial court during and after the process).

[25] *See* Bruce D. Jones, Note, *Unfair and Harsh Results of Contributory Negligence Lives in Indiana: The Indiana Medical Malpractice System and the Indiana Comparative Fault Act*, 6 IND. HEALTH L. REV. 107, 108 (2009) (stating the Act was passed "in response to the growing health care crisis the state was facing").

[26] *See infra* note 28 and accompanying text (providing excerpts from Governor Bowen's speech to the General Assembly, where he called for legislative reform of the health care delivery system); *see also* Scott A. DeVries, Note, *Medical Malpractice Acts' Statutes of Limitation as They Apply to Minors: Are They Proper?*, 28 IND. L. REV. 413, 416 (1995) ("The number of claims filed, the average amount awarded, and malpractice insurance premiums rose significantly between 1970 and 1975.").

[27] *See* DeVries, *supra* note 26, at 416 (providing three basic assumptions under which medical malpractice laws, including Indiana's, were passed in the 1970s). Devries states:

> Medical malpractice statutes were passed based upon assumptions that: (1) increased insurance premiums created a lack of available affordable liability insurance; (2) there is a close nexus between substantive tort law, the tort litigation process and the insurance industry's decisions regarding the availability and the price of such insurance; and (3) placing restrictions on the tort liability system will effectuate a reduction in insurance premiums resulting in an increase in reasonably priced insurance.

Id.; see also infra note 28 and accompanying text (providing excerpts from Governor Bowen's speech to the General Assembly, where he called for legislative reform of the Indiana health care delivery system).

[28] GOVERNOR OTIS R. BOWEN, MESSAGE TO THE GENERAL ASSEMBLY, STATE OF INDIANA, JOURNAL OF THE HOUSE 31, 35–36 (Jan. 9, 1975). The message includes:

> Recently the attention of all Hoosiers has been drawn to a problem of growing severity which threatens Indiana's health care delivery

Bowen addressed the Indiana General Assembly, stating, "[t]he solution to this growing health care crisis is not an easy one . . . and it certainly will not be gained without a great deal of debate and controversy."[29] In April of that same year, the General Assembly responded by enacting the Indiana Medical Malpractice Act.[30] Indiana was among the first states to institute tort reform through a legislative solution to address the increasing costs of malpractice liability insurance.[31] The Act's

> system. . . . The problem—the eroding effect that the shrinking availability of reasonable medical malpractice insurance is having upon the quality of and accessibility to proper medical care. The traditional procedures of medical malpractice settlement and frequency of malpractice litigation have driven a number of insurance carriers completely out of the business of writing this coverage. This lack of reasonably available medical malpractice insurance coverage is forcing doctors to opt out of certain types of operations or medical specialties due to their high legal risk. . . . These factors also combine to drive up the cost of medical care to the patient because the increased threat of potential legal exposure forces the physicians to practice "defensive medicine"—that which is carried out with one eye on the patient and one eye on the courts. . . . The solution to this growing health care crisis is not an easy one . . . and it certainly will not be one gained without a great deal of debate and controversy. There are, however, a number of potential ways by which this problem may be confronted, and I am certain that a number of proposals will be introduced before you in this session. . . .

Id. at 35–36. *But see* Garau Germano Hanley & Pennington, P.C., *Indiana Medical Malpractice Lawyers Know "Defensive Medicine" is More Myth Than Fact*, IND. MED. MALPRACTICE LAW. BLOG (Sept. 8, 2010), http://www.indianapolis-medical-malpractice-lawyer.com/blog/2010/09/indiana-medical-malpractice-lawyers-know-defensive-medicine-is-more-myth-than-fact.shtml, *archived at* http://perma.cc/FS8E-SKCU (citing a recent *Health Affairs* journal study, which "found that the costs of 'defensive medicine' have been dramatically overstated by critics of the malpractice system").

[29] *See supra* note 28 (providing excerpts of Governor's Bowen's Address to the Indiana General Assembly).

[30] Act of Apr. 17, 1975, Pub. L. No. 146-1975, 1975 Ind. Acts 854 (codified as amended at IND. CODE §§ 27-12-1-1 to 18-2 (1975)). *See* INDIANA STATE MEDICAL ASSOCIATION, A HISTORY OF THE MEDICAL LIABILITY ISSUE, INDIANA COMPENSATION ACT FOR PATIENTS (May 2003), *available at* http://www.ismanet.org/pdf/INCAP_White_Paper.pdf, *archived at* http://perma.cc/EH2S-638C (describing the reasons for the Act's enactment, and explaining that "[m]edical malpractice is not one problem, but a series of interrelated problems that involve the regulation and social control of medical practice, quality of care, insurance markets, consistent assessment of liability in the legal system and the existing paradigm of societal attitudes toward the practice of medicine").

[31] *See* James D. Kemper et al., *Reform Revisited: A Review of the Indiana Medical Malpractice Act Ten Years Later*, 19 IND. L. REV. 1129, 1129 (1986) (exploring the Indiana General Assembly's purpose for enacting the Act); Eleanor D. Kinney, *Indiana's Medical Malpractice Reform Revisited: A Limited Constitutional Challenge*, 31 IND. L. REV. 1043, 1046 (1998) [hereinafter *Indiana's Medical Malpractice Reform Revisited*] (explaining the Indiana General Assembly's response to the growing health care crisis); Jones, *supra* note 25, at 108 (noting that Indiana was the first state to pass statutory reform through legislative measures).

overarching goal was to help health care providers maintain insurance coverage, and in turn, protect the public from decreased services.[32] The Act's three major components are: (1) a comprehensive damage cap; (2) a patient's compensation fund; and (3) a Panel requirement.[33]

Currently, a patient's award for damages may not exceed $1,250,000.[34] Liable health care providers are responsible for the first $250,000, and the remaining amount of damages awarded is payable from the patient's compensation fund.[35] All qualified insured health care

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[32] *See supra* note 28 and accompanying text (discussing Governor Bowen's call for tort reform); Kemper et al., *supra* note 31, at 1129 (explaining the Act's purpose and the legislative response); *see also* Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three Year Study*, 24 IND. L. REV. 1275, 1277 (1991) [hereinafter *Indiana's Medical Malpractice Act: Results of a Three Year Study*] (discussing the Act's purpose and stating that it was to "assure the continued availability of health care services in the state").

[33] *See* IND. CODE § 34-18-14-3 (2014) (providing the maximum amount of damages recoverable under the Act); *id.* § 34-18-6-1 (creating the patient's compensation fund); *id.* § 34-18-10-1 (establishing "medical review panels to review proposed medical malpractice complaints against health care providers"); *see also Indiana's Medical Malpractice Reform Revisited*, *supra* note 31, at 1046 (explaining the comprehensive damage cap, patient's compensation fund, and the Panel requirement of the Act).

[34] *See* IND. CODE § 34-18-14-3(a)(3) (2014) (referring to acts of malpractice that occurred from July 1, 1999 to present). Additionally, the Indiana General Assembly is currently considering a Senate Bill that will require all claims be paid every three months, instead of every six months. S.B. 56, 118th Gen. Assemb., 2d Reg. Sess. (Ind. 2014). Over the past several years, the damage cap has increased. *See id.* § 34-18-14-3(a)(2)–(3) (stating that acts of malpractice before January 1, 1990 were capped at $500,000, and acts before July 1, 1999 at $750,000). Further, the Indiana Department of Insurance ("IDOI") maintains a website where anyone can search for any health care provider's malpractice history. *See* INDIANA PATIENT'S COMPENSATION FUND, http://www.indianapcf.com (last visited Mar. 5, 2015), *archived at* http://perma.cc/8P4Y-NHB5 (last visited Mar. 5, 2015) (providing a search engine where users may search by provider or claim for more information on medical malpractice suits brought against health care providers in Indiana).

[35] *See* IND. CODE § 34-18-14-3(c) (2014) ("[a]ny amount due from a judgment or settlement that is in excess of the total liability of all liable health care providers . . . shall be paid from the patient's compensation fund"). Many plaintiffs have argued that the current damage cap leaves a large gap between the amount of loss suffered by the patient and the amount the plaintiff can be awarded in a successful medical malpractice case. *See Patients Blast Indiana Law That Protects Doctors: Patient's Family Fights Malpractice Act*, INDY CHANNEL (May 20, 2011), http://www.theindychannel.com/lifestyle/health/patients-blast-indiana-law-that-protects-doctors, *archived at* http://perma.cc/W5PB-LCX2 (recounting a malpractice plaintiff's unhappiness with the $250,000 damage cap for physicians, when the patient's "medical expenses top $1.8 million and his lost income totals more than $4 million"); Marc Chase, *Millions in Malpractice Claims to be Paid by State Fund, Not "Nose Doc"*, HAMMOND COMM. NEWS (June 25, 2013, 7:15 PM), http://www.nwitimes.com/ news/local/lake/hammond/millions-in-malpractice-claims-to-be-paid-by-state-fund/ article_8a37a7bf-e3c2-5408-a554-7ec4304ccdb9.html, *archived at* http://perma.cc/DU4R-58KT (detailing the highly-publicized lawsuits against a former Merrillville, Indiana physician in which the patient's compensation fund was used to settle approximately 300 suits totaling $66 million).

providers in the state are assessed an annual special surcharge, which is paid into the patient's compensation fund, in order to cover damages awarded for malpractice.[36]

The Panel requirement is a prerequisite to filing a medical malpractice suit against health care providers in Indiana.[37] It serves as a tool to screen medical malpractice claims before they are filed in court, with one of its goals clearly designed to distinguish the meritorious claims from the frivolous.[38] The Panel requirement is also meant to speed up the overall disposition of malpractice claims, and control costs for all parties by providing expert opinions early in the process.[39] By design, the Panel provides parties with a quick, informal decision on liability before the claim may be filed in open court.[40] Many critics note

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[36] *See* IND. CODE § 34-18-5-1 (2014) ("[t]o create a source of money for the patient's compensation fund, an annual surcharge shall be levied on all health care providers in Indiana"); *see also* American Medical Association, *State Patient Compensation Funds* (Feb. 2008), *available at* http://www.scribd.com/doc/181171839/AMA-state-Patient-Compensation-Funds#scribd, *archived at* http://perma.cc/2T4Q-CR2G (describing Indiana's patient compensation fund by stating that it "is funded through annual surcharges assessed against all qualified health care providers").

[37] *See* IND. CODE § 34-18-8-4 (2014) (providing that actions against health care providers cannot be commenced in an Indiana court before a proposed complaint is presented to a Panel and the Panel gives an opinion). *But see id.* § 34-18-8-5 (noting that this prerequisite is not a complete mandate, as parties can agree to bypass the Panel review); *id.* § 34-18-8-6(a) (providing that claims for less than $15,000 do not have to be presented to a Panel).

[38] *See* Kemper et al., *supra* note 31, at 1129 (explaining the Indiana General Assembly's purpose and goals for the Act's creation); Sebastian Kitchen, *Medical Review Panels Approved by Kentucky Senate Panel*, COURIER-J. (Feb. 12, 2014), http://www.courier-journal.com/story/news/politics/ky-legislature/2014/02/12/medical-review-panels-approved-by-kentucky-senate-panel/5424389/, *archived at* http://perma.cc/765P-FN62 (discussing the Kentucky Senate Panel's recent vote to approve the use of medical review panels, with Dr. Glenn Loomis, CEO of St. Elizabeth Physicians, stating, "Indiana has used review panels for years to reduce malpractice claims"). However, not everyone in Kentucky is welcoming of the proposed bill to enact a prerequisite Panel requirement similar to Indiana's. *See* Jan Scherrer, *Jan Scherrer: Bill for Medical Review Panel Blocks Our Access to Courts*, LEXINGTON HERALD-LEADER (Feb. 19, 2014), http://www.kentucky.com/2014/02/19/3096228_jan-scherrer-bill-for-medical.html?rh=1, *archived at* http://perma.cc/S3Y7-4SSD (opposing the proposed medical malpractice reform in Kentucky that resembles Indiana law by asserting "Indiana is the only neighboring state that uses review panels, and Indiana's nursing home care is abominable").

[39] *See* Kemper et al., *supra* note 31, at 1129 (explaining the Indiana General Assembly's purpose and goals for the Act's creation); Catherine Schick Hurlbut, Note, *Constitutionality of the Indiana Medical Malpractice Act: Re-Evaluated*, 19 VAL. U. L. REV. 493, 494 (1985) (asserting that the legislative intent of the Panel process was to decrease delays in the disposition of medical malpractice claims).

[40] *See* IND. CODE § 34-18-10-20 (2014) ("[m]eetings shall be informal"); Kemper et al., *supra* note 31, at 1142 ("[t]he opinion of the panel is no more than an opinion"); *id.* at 1133, 1141 (discussing that "[t]he panel is not bound by formalities," and additionally, that the "[t]he entire panel process should take nine months" but that "reality is much different from the mechanism set out in the Act").

that the reality of the Panel's place in medical malpractice claims is much more.[41] The Act's statutory requirements for the Panel process impact attorneys, parties, panelists, and trial judges from the proposed complaint, through discovery, during trial, and even after a final judgment is entered and the decision is appealed.[42]

B. A Walk Through the Panel Process

Chapter ten of the Act sets out specific guidelines for the Panel process that parties must follow before a medical malpractice claim may be pursued in a trial court.[43] First, a claimant files a proposed complaint with the Indiana Department of Insurance ("IDOI") commissioner and serves all parties to be included in the suit.[44] Next, the claimant requests the formation of a Panel, which will evaluate the plaintiff's proposed complaint.[45] All parties to the suit and the IDOI receive notice of this

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41 *See* Kemper et al., *supra* note 31, at 1133 ("The nine-month statutory timetable is rarely, if ever, met."); William A. Ramsey & Catherine Hart, *DTCI: The Medical Review Panel Process*, IND. LAW. (Sept. 11, 2013), http://www.theindianalawyer.com/dtci-the-medical-review-panel-process/PARAMS/article/32336, *archived at* http://perma.cc/M3AZ-PF9H ("The medical review panel process plays an important role in medical malpractice litigation, including separating meritorious claims from meritless claims."); *How to File a Claim with a Medical Review Panel,* BAKER & GILCHRIST, http://www.bakerandgilchrist.com/legal-services/medical-malpractice/medical-review-panel/ (last visited Mar. 2, 2015), *archived at* http://perma.cc/UHT2-HK3D (explaining the Panel process for medical malpractice claims in Indiana, articulating "[t]he panel's report is admissible as evidence in the case, and it could carry a great deal of weight with a jury" and "the selection of the medical review panel process is critical to the outcome of [a] claim"); Garau Germano Hanley & Pennington, P.C., *Indiana Court of Appeals Affirms Medical Malpractice Verdict*, IND. MED. MALPRACTICE L. BLOG (May 18, 2012), http://www.indianapolis-medical-malpractice-lawyer.com/blog/2012/05/indiana-court-of-appeals-affirms-medical-malpractice-verdict.shtml, *archived at* http://perma.cc/5CQ9-7NG9 (highlighting frequent problems with medical malpractice cases, such as when "panels ignore the limit on their power," and further stating that "when the physicians on the medical review panel overstep their bounds by resolving conflicts in the evidence, they almost always resolve them in favor of their fellow physicians").

42 *See infra* Part II.B (explaining the step-by-step process required under chapter ten of the Act and the roles of medical malpractice parties, attorneys, panelists, and trial judges).

43 *See infra* notes 44–71 and accompanying text (reviewing the statutory requirements in chapter ten of the Act, focusing predominantly on the Panel process).

44 *See* IND. CODE § 34-18-7-3(b) (2014) (clarifying that proposed complaints are "considered filed when a copy of the proposed complaint is delivered or mailed by registered or certified mail to the commissioner"); *see also id.* § 34-18-7-3(a) ("The filing of a proposed complaint tolls the applicable statute of limitations to and including a period of ninety (90) days following the receipt of the opinion of the medical review panel by the claimant.").

45 *See id.* § 34-18-10-2 ("[n]o earlier than twenty (20) days after the filing of a proposed complaint, either party may request the formation of a medical review panel"); Jones, *supra* note 25, at 113 (describing the Panel process, including the statutory requirement that parties may convene a Panel twenty days after filing a complaint).

action.[46] Although each requirement of Panel selection includes a relatively short time restriction, given the numerous steps, the process of selecting a Panel should ideally span seventy to ninety days.[47]

Each Panel includes one attorney and three health care providers.[48] The attorney acts as chairman of the Panel, serves in an advisory capacity, and does not vote.[49] The chairman, using "his or her professional experience as an attorney," is tasked with "advising the three medical professionals on the panel about the law."[50] The parties select the chairman, who expedites the selection of Panel members, convenes the Panel, may remove panelists, and oversees the Panel's review of the proposed complaint and evidence submitted by the parties.[51]

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[46] *See* IND. CODE § 34-18-10-2 (2014) (explaining that the party requesting the Panel must do so "by serving a request by registered or certified mail upon all parties and the commissioner").

[47] *See* Hurlbut, *supra* note 39, at 497 ("[T]he selection process encompasses seventy to ninety days from the request for a formation."). More information on the Panel process is available on the IDOI website. *See Medical Malpractice,* IND. DEPT. OF INS., http://www.in.gov/idoi/2614.htm#1 (last visited Mar. 5, 2015), *archived at* http://perma.cc/4H6B-NF77 (providing consumer information for medical malpractice complaints, such as the filing procedure and attorney referrals).

[48] *See* IND. CODE § 34-18-10-3 (2014) ("A medical review panel consists of one (1) attorney and three (3) health care providers."); Hurlbut, *supra* note 39, at 496 (stating that Panels consist of three health care providers and one attorney).

[49] *See* IND. CODE § 34-18-10-3 (2014) ("The attorney member of the medical review panel shall act as the chairman of the panel and in an advisory capacity but may not vote."); *see also* Hurlbut, *supra* note 39, at 496–97 (explaining that the chairman "sits in an advisory capacity" and "has no vote in the [P]anel's decision").

[50] *See* Sherrow v. GYN, Ltd., 745 N.E.2d 880, 884 (Ind. Ct. App. 2001) (discussing a chairman's role in advising panelists of the validity of legal arguments raised by parties in panel submissions); IND. CODE § 34-18-10-16(a) (2014) ("The chairman may remove a member of the panel if the chairman decides that the member is not fulfilling the duties imposed upon the panel members by this chapter."); *id.* § 34-18-10-17(d) ("The chairman shall ensure that before the panel gives its expert opinion . . . each panel member has the opportunity to review every item of evidence submitted by the parties.").

[51] *See supra* note 50 and accompanying text (explaining that the attorney member serves in an advisory capacity); IND. CODE § 34-18-10-4 (2014) (providing the process for selecting a Panel). The process is as follows:

> A medical review panel shall be selected in the following manner: (1) Within fifteen (15) days after the filing of a request for formation of a medical review panel . . . the parties shall select a panel chairman by agreement. If no agreement on a panel chairman can be reached, either party may request the clerk of the supreme court to draw at random a list of five (5) names of 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. (2) Before selecting the random list, the clerk shall collect a twenty-five dollar ($25) medical review panel selection fee from the party making the request for the formation

All health care providers licensed in Indiana are eligible for selection to serve as members of a Panel.[52] Each party (or one party per side) selects one health care provider within fifteen days of the chairman selection, and those two providers select the third panelist.[53] If a defendant health care provider is a specialist, at least one of the panelists must specialize in the same area.[54] Panelists are paid a fee for participating in the process, as well as travel expenses.[55] The side whose favor the majority opinion is written is responsible for payment, or the

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> of the random list. (3) The clerk shall notify the parties, and the parties shall then strike names alternatively with the plaintiff striking first until one (1) name remains. . . . (5) If a party does not strike a name within five (5) days after receiving notice from the clerk: (A) the opposing party shall, in writing, request the clerk to strike for the party; and (B) the clerk shall strike for that party.

Id.

[52] *Id.* § 34-18-10-5. There are many cases addressing which health care providers fall within the statutory definition and how this is to be determined. *See, e.g.*, Harlett v. St. Vincent Hosps. & Health Svcs., 748 N.E.2d 921, 925 (Ind. Ct. App. 2001) (reversing the trial court's determination that registered or licensed practical nurses were not health care providers under the Act); Guinn v. Light, 536 N.E.2d 546, 546 (Ind. Ct. App. 1989) (clarifying that the Panel "can act only if the health care provider before it is 'qualified' under the Act"); Michael W. Hoskins, *Court Clarifies Ruling on Medical Review Panel Process*, IND. LAW. (July 8, 2011), http://www.theindianalawyer.com/court-clarifies-ruling-on-medical-review-panel-process/PARAMS/article/26723, *archived at* http://perma.cc/7V9R-CDY3 (evaluating the *Honore* case and determining that "[r]egistered nurses or licensed practical nurses are included in the statutory definition of health care providers").

[53] *See* IND. CODE § 34-18-10-6 (2014) ("Each party to the action has the right to select one (1) health care provider, and upon selection, the two (2) health care providers thus selected shall select the third panelist."); *id.* § 34-18-10-7 ("[if] there are multiple plaintiffs or defendants, only one (1) health care provider shall be selected per side," and "[t]he plaintiff . . . has the right to select one (1) health care provider and the defendant . . . has the right to select one (1) health care provider").

[54] *See id.* § 34-18-10-8 (explaining that two of the panelists must be a member of the same profession as the defendant, and if the defendant's area of practice is a specialty, two of the panelists must also specialize in the same area); *see also* Ryan M. Siedermann et al., *Closing the Gate on Questionable Expert Witness Testimony: A Proposal to Institute Expert Review Panels*, 33 S.U. L. REV. 29, 79 (2005) (proposing a model rule for the creation of expert review panels in the future, which in part references language from Indiana's Act, including "[t]he expert members of the panel must be selected from a pool of individuals qualified in the same specialty as the expert whose testimony or evidence is to be reviewed").

[55] *See* IND. CODE § 34-18-10-25 (2014) (explaining that health care providers receive $350 and reasonable travel expenses, the Panel chairman receives $250 per diem, with a limit set of $2000 and reasonable travel expenses); *see also* Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 596 (Ind. 1980) (holding that the panelist compensation provision of the Act is constitutional due to the low amount of compensation required). *But see* INDIANA'S MEDICAL MALPRACTICE ACT: RESULTS OF A THREE YEAR STUDY, *supra* note 32, at 1302 (characterizing the Panel process as a "costly" proceeding).

chairman may decide to divide the cost if the Panel does not render a uniform or unanimous opinion.[56]

Next, the parties begin discovery and must promptly submit written evidence for the Panel's consideration.[57] Evidence may consist of: medical charts, x-rays, lab tests, excerpts from treatises, depositions of witnesses including the parties, and any other form allowable by the panel.[58] Before considering any evidence, the panelists must take an oath to perform to the best of their ability.[59] By statute, the Panel should render its expert opinion within 180 days of the selection of the last member.[60] However, there are commonly used exceptions to this rule, which can heavily impact the length of time before a Panel actually renders an opinion.[61]

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[56] *See* IND. CODE § 34-18-10-25(d) (2014) ("Fees of the panel, including travel expenses and other expenses of the review, shall be paid by the side whose favor the majority opinion is written[,]" and "[i]f there is no majority opinion, each side shall pay fifty percent (50%) of the cost.").

[57] *See id.* § 34-18-10-17(a) ("[E]vidence in written form to be considered by the medical review panel shall be promptly submitted by the respective parties."); s*ee also* Sherrow v. GYN, Ltd., 745 N.E.2d 880, 884 (Ind. Ct. App. 2001) ("[P]arties are permitted to submit evidence to the panel.").

[58] *See* IND. CODE § 34-18-10-17(b) (2014) (explaining the permissible forms of evidence that may be submitted to the Panel for review); s*ee also Sherrow*, 745 N.E.2d at 884–85 (determining that panelists "may consult with other medical authorities and reports by other health care providers); Kranda v. Houser-Norberg Med. Corp., 419 N.E.2d 1024, 1032–33 (Ind. Ct. App. 1981) (explaining that this provision should not be so narrowly construed to determine that panelists may only consult the medical authorities outlined in the provision).

[59] *See* IND. CODE § 34-18-10-17(e) (2014) (supplying the suggested oath or affirmation to be recited by the panelists). The oath states:

> I (swear) (affirm) under penalties of perjury that I will well and truly consider the evidence submitted by the parties; that I will render my opinion without bias, based upon the evidence submitted by the parties, and that I have not and will not communicate with any party or representative of a party before rendering my opinion, except as authorized by law.

Id.; *see also* Tucker v. Harrison, 973 N.E.2d 46, 54–55 (Ind. Ct. App. 2012) (discussing that the oath also includes rendering an "opinion without bias" and holding that all health care providers are not generally biased merely because they have a financial interest in the patient's compensation fund).

[60] *See* IND. CODE § 34-18-10-13(a) (2014) (providing the time for issuance of an opinion by the Panel); Stephen L. Williams, *Indiana's Medical Malpractice Act—The Developing Law—*, RES GESTAE 494, 497 (Apr. 1984) ("One of the most important time limits within the Act is that the panel must render its written opinion within 180 days after the last panel member is selected.").

[61] *See* Beemer v. Elskens, 677 N.E.2d 1117, 1119 (Ind. Ct. App. 1997) (explaining that if an opinion is not rendered within the requisite time frame, the panel must provide an explanation for the delay and attempt to move the process forward in a reasonable manner); Gleason v. Bush, 664 N.E.2d 1183, 1185 (Ind. Ct. App. 1996) (explaining that if a panel is unable to comply with the requisite time frame, sanctions are not automatically

Within thirty days of reviewing all evidence, the Panel renders its opinion in writing.[62] The Panel's sole duty is to give an expert opinion as to whether the evidence supports a conclusion that the defendant(s) acted or failed to act within the appropriate standard of care as charged in the proposed complaint.[63] Under the statutory time limitations set out in the Act, the entire Panel process should be complete approximately nine months after the filing of a proposed complaint.[64]

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triggered); Lester F. Murphy, *Pitfalls in Medical Malpractice Panel Practice*, RES GESTAE 178, 180 (Oct. 1985) (discussing the difficulty of meeting this deadline because of delays due to scheduling conflicts and geographical location of the panelists); Hurlbut, *supra* note 39, at 500–01 (concluding that "few claims receive a review panel decision within the nine month prescribed limitation").

[62] *See* IND. CODE § 34-18-10-22 (2014); s*ee also* Murphy, *supra* note 61, at 180 ("The panel normally reaches its opinion the same night that it convenes"). However, the statutory time limitation is rarely met. *See* Hurlbut, *supra* note 39, at 500–01 (concluding that few claims meet the statutory time limitations). One study found that the average timeframe from the time a proposed complaint was filed and the Panel rendering an opinion was thirty-two months. *See Indiana's Medical Malpractice Act: Results of a Three Year Study*, *supra* note 32, at 1296 (reporting results from a study based on evidence collected from 1975 through 1988).

[63] IND. CODE § 34-18-10-22(b (2014). The available opinions are whether:

> (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 comply with the appropriate standard of care as charged in the complaint; (3) There is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury; or (4) The conduct complained of was or was not a factor of the resultant damages. If so, whether the plaintiff suffered: (A) any disability and the extent and duration of the disability; and (B) any permanent impairment and the percentage of the impairment.

Id.; see Bonnes v. Feldner, 642 N.E.2d 217, 219 (Ind. 1994) ("The panel has the sole duty to express its expert opinion or opinions as to whether or not the evidence supports the conclusion that the defendant acted or failed to act within the appropriate standard of care as charged in the complaint."); Kranda v. Houser-Norborg Med. Corp., 419 N.E.2d 1024, 1033 (Ind. Ct. App. 1981) (stating that the panel's "purpose is to conduct a rational inquiry into the extent and source of the patient's injury for the purpose of forming its expert opinion"); *Indiana's Medical Malpractice Act: Results of a Three Year Study*, *supra* note 32, at 1279 (discussing the Panel's duty); Hurlbut, *supra* note 39, at 498 (explaining that a Panel's "sole duty is to determine the validity of the patient's complaint against the defendant health care provider").

[64] *See* Hurlbut, *supra* note 39, at 498 (totaling all time requirements of the Panel process, including ninety days for Panel selection and 180 days for the Panel to render its opinion). *But see* Mooney v. Anonymous M.D. 4, 991 N.E.2d 565, 578 (Ind. Ct. App. 2013) ("The Act anticipates that a panel might not always be able to meet the deadline."). *See also* IND. CODE § 34-18-10-13(b) (2014) ("If the panel has not given an opinion within the time allowed under subsection (a), the panel shall submit a report to the commissioner, stating the reasons for the delay."); *Beemer*, 677 N.E.2d at 1120 (explaining that the Panel must submit an explanation for the delay and make a reasonable effort to expedite the process);

Although the Panel review is a statutory requirement, Panel decisions are admissible, but not binding, upon the court.[65] Additionally, panelists are immune from civil liability concerning their duties on a Panel.[66] The Panel opinion is "not conclusive, and either party, at the party's cost, has the right to call any member of the medical review panel as a witness."[67] Quite often, defendant health care providers that receive a unanimous Panel opinion will likely file a motion for summary judgment.[68]

Gleason, 664 N.E.2d at 1187 (determining that if a Panel does not comply with the time requirements of the Act, sanctions are not automatically triggered, but it must explain the reason for delay and make a reasonable attempt to expedite the process).

65 *See* IND. CODE § 34-18-10-23 (2014) ("A report of the expert opinion reached by the medical review panel is admissible as evidence in any action subsequently brought by the claimant in a court of law."); s*ee also* Smith v. Dermatology Assocs. of Ft. Wayne, P.C., 977 N.E.2d 1, 4 (Ind. Ct. App. 2012) (discussing that the defendant health care provider admitted evidence of a favorable Panel opinion at trial).

66 *See* IND. CODE § 34-18-10-24 (2014) ("A panelist has absolute immunity from civil liability for all communications, findings, opinions, and conclusions made in the course and scope of duties prescribed by this article."); *see also* Siedermann, *supra* note 54, at 81 (proposing a model rule for the creation of expert review panels in the future, which in part references language from Indiana's Act, including "[a] panelist has absolute immunity from civil liability for all communications, findings, opinions, and conclusions made in the course and scope of duties . . . ").

67 *See* IND. CODE § 34-18-10-23 (2014) (discussing the admissibility of the Panel's report at trial and the parties' ability to call Panel members as witnesses); Haas v. Bush, 894 N.E.2d 229, 235 (Ind. Ct. App. 2008) (holding that Panelists must appear and testify if called by either party, and "any alleged frailties in the panel opinion [can be] exposed" by the trial judge); Dickey v. Long, 575 N.E.2d 339, 340 (Ind. Ct. App. 1991) (finding that under no circumstances should the Panel's report be determined inadmissible, because the trier of fact can judge the credibility and issues with the Panel at trial).

68 *See Smith*, 977 N.E.2d at 5 (quoting Mills v. Berrios, 851 N.E.2d 1066, 1070 (Ind. Ct. App. 2006)). The court states:

> When a medical review panel issues an opinion in favor of the physician, the plaintiff must present expert medical testimony to negate the panel's opinion. If the plaintiff fails to provide sufficient expert testimony, summary judgment should be granted in favor of the defendants. However, a medical malpractice case based upon negligence is rarely appropriate for disposal by summary judgment, particularly when the critical issue is whether the defendant exercised the appropriate standard of care under the circumstances. This issue is generally inappropriate for resolution as a matter of law and is a question that should be reserved for the trier of fact.

Id.; *see also Mills*, 851 N.E.2d at 1070 ("When a medical review panel issues an opinion in favor of the physician, the plaintiff must present expert medical testimony to negate the panel's opinion. If the plaintiff fails to provide sufficient expert testimony, summary judgment should be granted in favor of the defendants." (citations omitted)).

Until the Panel issues an opinion, the trial court has no jurisdiction to hear and adjudicate the malpractice claim.[69] This statute ensures that one of the Indiana General Assembly's main goals for creating the Panel requirement, prescreening of proposed medical malpractice claims, is met.[70] However, it has wide discretion to impose sanctions for failure to comply with the Act's prerequisite Panel process.[71] Next, case law interpreting the statutes concerning the Panel process and the additional rules created by the courts are discussed, with the primary focus on *Miller v. Memorial Hospital of South Bend* and *K.D. v. Chambers*.[72]

C. *Defining the Parameters of the Panel Requirement with* Miller *and* Chambers

The Act has been challenged on many grounds since it became law in 1975.[73] The Indiana Supreme Court has, on more than one occasion, upheld the constitutionality of the Act.[74] Other challenges address the

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[69] *See* Griffith v. Jones, 602 N.E.2d 107, 111 (Ind. 1992) (discussing trial court's lack of jurisdiction to instruct Panel concerning definitions of terms and phrases used in the Act); K.D. v. Chambers, 951 N.E.2d 855, 858 (Ind. Ct. App. 2011) (holding that the trial court had no jurisdiction to hear and adjudicate the case until the Panel issues its opinion). *But see* Harlett v. St. Vincent Hosps. & Health Svcs., 748 N.E.2d 921, 924 (Ind. Ct. App. 2001) (determining that the trial court did have jurisdiction to make a preliminary determination of law concerning the formation of a panel).

[70] *See supra* Part II.A (discussing the Indiana General Assembly's purpose for enacting a statute that requires medical malpractice prescreening Panels).

[71] *See* IND. CODE § 34-18-10-14 (2014) ("A party, attorney, or panelist who fails to act as required by this chapter without good cause shown is subject to mandate or appropriate sanctions upon application to the court designated in the proposed complaint as having jurisdiction."); s*ee also* Doe Corp. v. Honore, 950 N.E.2d 722, 728 (Ind. Ct. App. 2011) (determining that the trial court had discretion to determine appropriate sanctions upon a party failing to act as required); *Harlett*, 748 N.E.2d at 924 (Ind. Ct. App. 2001) (stating that the trial court had limited jurisdiction and authority to make certain preliminary determinations of law in medical malpractice cases); Sherrow v. GYN, Ltd., 745 N.E.2d 880, 884 (Ind. Ct. App. 2001) (finding that trial courts have subject matter jurisdiction "in cases where a panel member is alleged to have failed to carry out required statutory duties").

[72] *See infra* Part II.C (discussing the various challenges to the Panel requirement of the Act, and the two cases that directly address the sufficiency of submissions to a Panel: *Miller v. Memorial Hospital of South Bend* and *K.D. v. Chambers*).

[73] *See Indiana's Medical Malpractice Act: Results of a Three Year Study*, *supra* note 32, at 1281, 1284 (informing that "[s]ince 1975, over fifty judicial decisions have interpreted provisions of the Act[,]" and that "Indiana courts have played, and continue to play, a dynamic role in defining the function and extent of the Act's provisions").

[74] *See* Cha v. Warnick, 476 N.E.2d 109, 114 (Ind. 1995) (upholding the constitutionality of the Act by finding that the Panel proceedings were not an unreasonable delay); Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 595 (Ind. 1980) (holding that the Panel requirement of the Act did not create impermissible delay and expense, therefore it is constitutional).

trial court's jurisdiction and behavior of panelists.[75] However, two major decisions address issues with the Act's prerequisite Panel requirement—*Miller v. Memorial Hospital of South Bend* and *K.D. v. Chambers*.[76]

In *Miller*, the Indiana Supreme Court addressed whether the plaintiffs' proposed complaint to the Panel "sufficiently articulated two separate injuries."[77] The plaintiffs, parents of an infant son, alleged that the child was injured during birth.[78] After the parents settled their claim against the doctor, the hospital argued that it could not be liable because

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[75] *See* Mooney v. Anonymous M.D. 4, 991 N.E.2d 565, 575 (Ind. Ct. App. 2013) (establishing that it was within the trial court's discretion whether to dismiss a proposed complaint under the Act and the decision is a "question of law and fact that may be preliminarily determined by the trial court in the exercise of its discretion after a hearing"); *Honore*, 950 N.E.2d at 728 (determining that the trial court did have subject matter jurisdiction to issue a preliminary determination of law regarding the validity of a Panel opinion); *Harlett*, 748 N.E.2d at 925 (holding that the trial court and court of appeals have jurisdiction to determine preliminary issues raised by the parties during the panel process); Gleason v. Bush, 664 N.E.2d 1183, 1186 (Ind. Ct. App. 1996) (explaining that the trial court has authority to impose sanctions upon parties that fail to comply with Act's requirement); St. Anthony Med. Ctr., Inc. v. Smith, 592 N.E.2d 732, 736 (Ind. Ct. App. 1992) (holding that the trial court lacked subject matter jurisdiction over a medical malpractice action where the original complaint was filed in trial court before the proposed complaint was filed with the medical review panel and before the Panel rendered an opinion); Galindo v. Christensen, 569 N.E.2d 702, 705–06 (Ind. Ct. App. 1991) (discussing the trial court's authority to impose sanctions when a party "fails to act as required by [the Act] without good cause shown"); Kranda v. Houser-Norborg Med. Corp., 419 N.E.2d 1024, 1034 (Ind. Ct. App. 1981) (challenging two Panel members' decision being based on casual conversations with other physicians).

[76] *See* Miller v. Mem'l Hosp. of S. Bend, 679 N.E.2d 1329, 1331 (Ind. 1997) (challenging the proper articulation of two separate instances of malpractice alleged in a proposed complaint); K.D. v. Chambers, 951 N.E.2d 855, 859 (Ind. Ct. App. 2011) (challenging whether additional breaches discovered after the Panel opinion may be raised at trial). Other cases have addressed the Panel requirement, but not as in depth as the cases discussed in the text of this Note. *See* McGill v. Ling, 801 N.E.2d 678, 682 (Ind. Ct. App. 2004) ("[A] medical malpractice action may not be brought against a health care provider until the claimant's proposed complaint has been filed with the [IDOI] and an opinion has been issued by a medical review panel."); Winona Mem'l Hosp. v. Kuester, 737 N.E.2d 824, 827 (Ind. Ct. App. 2000) ("Submission of a proposed complaint to a medical review panel is a condition precedent to filing a medical malpractice claim in Indiana.").

[77] *See Miller*, 679 N.E.2d at 1330–32 (explaining the facts of the case and the issue addressed by the court). In *Miller*, the plaintiffs alleged that their infant son suffered injuries caused by the conduct of a doctor and the hospital. *Id.* at 1330. The plaintiffs settled with the doctor for the statutory maximum, and pursued their claim against the hospital. *Id.* The hospital argued that it could not be liable for the same injury that the plaintiffs already received damages for from the doctor. *Id.* at 1331. The plaintiffs claimed that they alleged two separate injuries, prenatal injuries by the doctor and postnatal injuries by the hospital; therefore, they still had a claim against the hospital for the separate, postnatal injury. *Id.*

[78] *See id.* at 1330 (explaining the facts of the case that caused the plaintiffs to seek relief through the Act, including the injuries the plaintiffs alleged the health care providers caused to their infant son).

the plaintiffs would be compensated twice for the same injury.[79] The plaintiffs argued that the complaint alleged separate injuries against the doctor and the hospital.[80] The court held that the plaintiffs' claim against the hospital was articulated clear enough to continue the suit, determining "the plaintiffs' action is [not] restricted by the substance of the submissions presented to the medical review panel."[81] The court reasoned that no requirement exists that requires plaintiffs "to fully explicate and provide particulars or legal contentions regarding the claim."[82] Furthermore, the court opined "the complaints utilize separate counts to assert their claims against the two defendants and specify differing dates for each defendant's alleged acts of malpractice."[83]

In a recent Indiana Court of Appeals decision, *K.D. v. Chambers*, the court addressed whether a plaintiff may raise additional, separate breaches in the standard of care by a medical provider at trial, if the plaintiff did not previously present evidence of the alleged breaches to the Panel.[84] The mother of a young boy brought suit against a hospital and nurse, alleging the nurse administered excessive amounts of medication to the boy.[85] Relying on the lack of reference to an additional breach in the plaintiff's proposed complaint, the court determined that at trial, the plaintiff may only present evidence of the breach articulated in the proposed complaint.[86]

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[79] *See Miller*, 679 N.E.2d at 1331 (articulating the arguments made by the parties that were considered by the court, specifically that the plaintiffs argued that they alleged two separate injuries, prenatal injuries by the doctor and postnatal injuries by the hospital, thus they still had a claim against the hospital for the separate, postnatal injury).

[80] *See id.* (reviewing the procedural facts of the case and the arguments made by the plaintiff in response to the remaining defendant health care provider's arguments).

[81] *See id.* at 1332 (providing the court's holding in *Miller,* where it held "the plaintiffs' action is [not] restricted by the substance of the submissions presented to the medical review panel").

[82] *See id.* (explaining the court's reasoning for holding that the plaintiffs sufficiently articulated a separate breach against the remaining defendant health care provider).

[83] *See id.* (finding that the plaintiffs clearly established that they were asserting separate and distinct claims against the two defendants).

[84] *See* K.D. v. Chambers, 951 N.E.2d 855, 858 (Ind. Ct. App. 2011) (explaining the court's holding and reasoning). In *Chambers*, a young boy was taken to a hospital after bumping his head. *Id.* While being treated, a nurse administered an excessive dose of Benadryl to the boy, which caused an adverse reaction. *Id.* After being released from the hospital, the boy continued to suffer from a tremor, which his parents believed was a result of the overdose. *Id.* The parents filed a proposed complaint, alleging carelessness and negligence of the hospital, including the nurse, two physicians, and other employees. *Id.* In the proposed complaint, the plaintiffs "did not specify any overdose or breaches of the standard of care other than the overdose of Benadryl." *Id.* at 859.

[85] *See Chambers*, 951 N.E.2d at 858 (explaining the facts of the case that caused the plaintiffs to file a medical malpractice claim against the defendant health care provider).

[86] *Id.* at 864. The court stated:

The plaintiffs argued that their case was similar to *Miller*, and the issue is not whether the additional breach was raised, but whether two breaches are distinguishable in the proposed complaint.[87] The court disagreed, determining that the plaintiffs failed "to present all claimed breaches of the standard of care" to the Panel.[88] The court distinguished *Miller*, holding that the case should not be read so broadly "to allow a plaintiff to argue at trial separate breaches of the standard of care that were not presented in a submission of evidence to the panel."[89] The Indiana Supreme Court chose not to hear the *Chambers* case, and medical malpractice practitioners quickly recognized possible implications of the decision.[90] In addition to the rules from *Miller* and *Chambers*, there are

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> [T]he question of whether defendants breached the standard of care must be presented to the medical review panel and answered based on the evidence submitted to it. It logically follows that a malpractice plaintiff cannot present one breach of the standard of care to the panel and, after receiving an opinion, proceed to trial and raise claims of additional, separate breaches of the standard of care that were not presented to the panel and addressed in its opinion.

Id.

87 *See id.* (explaining the parties' arguments for or against summary judgment); *Miller*, 679 N.E.2d at 1331 (explaining the facts, holding, and reasoning).

88 *See Miller*, 679 N.E.2d at 1332 (providing the court's holding and reasoning, where it determined "the plaintiffs' action is [not] restricted by the substance of the submissions presented to the medical review panel").

89 *See Chambers*, 951 N.E.2d at 865 (providing the court's reasoning for distinguishing the case from the issue in *Miller*). The court stated:

> As we are addressing a different issue, namely, Plaintiffs' failure to present all claimed breaches of the standard of care to the Review Panel, we do not interpret the above language so broadly as to allow a plaintiff to argue at trial separate breaches of the standard of care that were not presented in a submission of evidence to the panel.

Id.

90 *See Chambers*, 951 N.E.2d 855 (Ind. Ct. App. 2011), *trans. denied*, 962 N.E.2d 654 (Ind. 2011) (stating that the transfer was denied by a two-to-two decision); Hall Render, *Can a Plaintiff Present Evidence that There Was A Breach in the Standard of Care at Trial When Evidence of the Breach of the Standard of Care Was Not Presented to the Medical Review Panel?*, LITIGATION ANALYSIS (Jan. 6, 2012), http://blogs.hallrender.com/blog/can-a-plaintiff-present-evidence-that-there-was-a-breach-in-the-standard-of-care-at-trial-when-evidence-of-the-breach-of-the-standard-of-care-was-not-presented-to-the-medical-review-panel/, *archived at* http://perma.cc/PFY9-4TS3 (reviewing *Chambers* and determining that "a plaintiff must present all claimed breaches of the standard of care to the medical review panel"); Alicia Gallegos, *Indiana Court: New Claims Can't be Added to Lawsuits After Review*, AM. MED. NEWS (Aug. 15, 2011), http://www.amednews.com/article/20110815/profession/308159941/6/, *archived at* http://perma.cc/4ZUK-6NSJ (discussing the *Chambers* decision and stating "[s]ome plaintiff attorneys, however, are unhappy with the ruling, saying it changes the way lawyers must present their cases"); Garau Germano Hanley & Pennington, P.C., *Medical Review Panel Process Complicated by Indiana Court of Appeal's Decision*, IND. MED. MALPRACTICE LAW. BLOG (July 31, 2011, 2:12 PM), http://www.indianapolis-medical-malpractice-lawyer.com/blog/2011/07/medical-review-panel-process-complicated-

various tools available to the trial court that relate to the Panel process, and can be used during and after the time a Panel renders an opinion.[91]

D. The Power and Role of Trial Rules and Judicial Discretion

Rules that govern trial procedures are also relevant.[92] Indiana Trial Rule 26, mandating an ongoing duty to update discovery, and Indiana Trial Rule 59, which addresses motions to correct errors, are specifically important to the Panel process of medical malpractice cases because the rules can be used as tools to combat the adverse effects of *Chambers*.[93] Indiana Trial Rule 8 is also relevant, and will be briefly explained, because it calls for pleadings to be construed in a manner that best provides justice.[94] Additionally, the power of judicial discretion in

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by-indiana-court-of-appeals-decision.shtml, *archived at* http://perma.cc/N3NS-TADS (discussing how *Chambers* will change the way attorneys handle cases). Garau, Germano, Hanley, and Pennington state:

> If the decision stands, it could create significant changes in the way Indiana's medical malpractice attorneys pursue and present their cases. . . . The [decision] looks to change the panel process from an informal administrative proceeding into something resembling a full-blown trial. . . . The court of appeals' opinion creates a number of problems for Indiana medical malpractice lawyers. . . . The [Chambers] decision now places the burden on lay attorneys and their clients to tell the panel what breaches of the standard of care arise from the facts of the case, rather than rely on the panel to tell them where the breaches are. If a patient fails to articulate a potential breach in his submission to the panel, that breach cannot be raised in the trial court. In order to avoid the risk of waiving a claim of negligence, lawyers for the patients will now be forced to conduct full discovery at the panel process stage. This will cause the cost of pursuing malpractice claims to skyrocket.

Id.; Brad Catlin, *Important Medical Malpractice Opinion on Experts and the Review Panel*, IND. L. UPDATE BLOG (July 19, 2011), http://www.indianalawupdate.com/2011/07/important-medical-malpractice-opinion-on-experts-and-the-review-panel/, *archived at* http://perma.cc/CNS4-7MF5 ("the full effect . . . will likely be felt outside the courtroom, rather than in it" and will "increase the costs of litigation" and even "prevent lawyers from pursuing some otherwise meritorious claims which would otherwise have been pursued").

91 *See infra* Part II.D (discussing judicial discretion, various trial rules, and how they may be used during and after the Panel process when evidentiary issues occur).

92 *See infra* notes 93–105 and accompanying text (providing a discussion of relevant trial rules).

93 *See infra* notes 93–105 and accompanying text (explaining Rule 26, which requires attorneys to amend information given to other parties when it is received up until trial, and Rule 59, which can be used when a party discovers new evidence).

94 *See infra* note 106 and accompanying text (providing the statutory language of Trial Rule 8, which requires that all pleadings should be construed in a way that provides "substantial justice" and fairness).

medical malpractice claims will be explored, as well as different areas of law where judicial discretion tends to be broader.[95]

Indiana Trial Rule 26 plays a large role in the discovery process of malpractice claims.[96] First, the rule provides the framework for the scope of discovery.[97] Generally, attorneys may obtain any discovery that is relevant to the pending action.[98] The rule also governs the supplementation of responses, better known as the "ongoing duty" rule.[99] Under this rule, attorneys have an ongoing duty until trial to update information provided to other parties if new information suggests the previous information is no longer accurate.[100]

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[95] *See infra* notes 106–09 and accompanying text (explaining that judicial discretion is generally wide, but in medical malpractice claims, discretion is constrained by the Panel requirement).

[96] *See* Ind. T.R. 26 (providing the general provisions that govern discovery). The rule plays a role in all civil and criminal claims, but this Note will refer to it in reference to medical malpractice claims.

[97] *See* Ind. T.R. 26(B) (detailing the discovery provisions). Trial Rule 26(B) states:

> Parties may obtain discovery regarding *any* matter, not privileged, *which is relevant to the subject-matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Ind. T.R. 26(B)(1) (emphasis added); In re WTHR-TV v. Cline, 693 N.E.2d 1, 7 (Ind. 1998) (determining that "[a]n item is 'material' if it appears that it might benefit the preparation" of a party's case); Hyundai Motor Co. v. Stamper, 651 N.E.2d 803, 808 (Ind. Ct. App. 1995) (distinguishing relevancy in discovery from relevancy at trial by explaining that "[a] document is relevant to discovery if there is the possibility that the information sought may be relevant to the subject matter of the action").

[98] *See supra* note 97 (reviewing case law that interprets Trial Rule 26, specifically concerning relevancy of evidence in discovery and at trial).

[99] *See infra* note 100 (implying that the rule also encompasses the rule that attorneys have an ongoing duty to update discovery, through statutory language such as "duty seasonably" and "no longer true").

[100] *See* Ind. T.R. 26(E). The rule states:

> A party is under a *duty seasonably* to amend a prior response if he obtains information upon the basis of which
>
> (a) he knows that the *response was incorrect when made*, or
>
> (b) he knows that the response though correct when made *is no longer true* and the circumstances are such that *a failure to amend the response is in substance a knowing concealment*.

Id. (emphasis added); *see* Lucas v. Dorsey Corp., 609 N.E.2d 1191, 1196 (Ind. Ct. App. 1993) ("The duty seasonably to supplement a discovery response is absolute and is not predicated on a court order."). For example, in the hypothetical contained in Part I, once the attorney learned new information from Nurse Quinn, the attorney had a duty to share the new information with the other parties. *See supra* Part I (posing a hypothetical scenario in which the plaintiff's attorney discovers new evidence after a Panel renders an opinion).

Indiana Trial Rule 59 is also relevant to malpractice claims and the Panel process because it addresses newly discovered evidence.[101] Under this rule, the trial court may consider evidence discovered *after* a final judgment.[102] Moreover, the newly discovered evidence must only be supported by affidavits demonstrating its truthfulness.[103] Trial judges have the authority to grant relief based on the newly discovered evidence, including amending the judgment or granting a new trial.[104] Furthermore, the Indiana Supreme Court has articulated a nine-part test

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[101] *See* Ind. T.R. 59(A)–(C) (explaining that the motion may be used "when a party seeks to address: (1) [n]ewly discovered evidence . . . capable of production within [thirty] days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial").

[102] *See supra* note 100 (providing the statutory language that allows evidence discovered within thirty days after a final judgment to be considered by the court); *see also* Babinchak v. Town of Chesterton, 598 N.E.2d 1099, 1102–03 (Ind. Ct. App. 1992) (recognizing that a motion to correct error may be predicated upon the assertion of newly discovered evidence "if the proponent could not, with reasonable diligence, have earlier discovered and produced such evidence"); Laudig v. Marion Cnty. Bd. of Voters Registration, 585 N.E.2d 700, 712 (Ind. Ct. App. 1992). The court stated:

> To prevail on a motion to correct error based on newly discovered evidence, [the proponent] needed to demonstrate that the evidence could not have been discovered and produced at trial with reasonable diligence; that the evidence is material, relevant, and not merely cumulative or impeaching; that the evidence is not incompetent; that [the proponent] exercised due diligence to discover the evidence . . . ; that the evidence is worthy of credit; and, that the evidence raises a strong presumption that a different result would have been reached upon retrial.

Id. Compare Laudig, 585 N.E.2d at 712 (explaining the elements necessary for a party to prevail on a motion to correct error based on newly discovered evidence), *with* Dumont v. Davis, 992 N.E.2d 795, 810 (Ind. Ct. App. 2013) (holding that despite the defendant's misconduct of attempting "to add a new expert witness" beyond the pre-trial deadline, and allowing another expert witness to give medical testimony beyond the area of expertise disclosed to the court, the trial court erred in granting a new trial).

[103] *See* Ind. T.R. 59(H)(1) ("When a motion to correct error is based upon evidence outside the record, the motion shall be supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion.").

[104] Ind. T.R. 59(J). The rule states:

> The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors: (1) Grant a new trial; (2) Enter final judgment; (3) Alter, amend, modify or correct judgment; (4) Amend or correct the findings or judgment . . .

Id.

to determine whether it is appropriate to grant a new trial based on newly discovered evidence.[105]

Judicial discretion, in combination with Indiana Trial Rule 8, are powerful tools available to the trial court judge in all cases, but specifically so in medical malpractice cases.[106] Indiana Trial Rule 8 is relevant to proposed complaints in malpractice actions because it instructs courts to construe all pleadings "to do substantial justice, lead to disposition on the merits, and avoid litigation of procedural points."[107] Additionally, statutes in chapter ten of the Act, which shapes the Panel process, have been interpreted to allow wide judicial discretion.[108] For

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[105] *See* Kahlenbeck v. Indiana, 719 N.E.2d 1213, 1218 (Ind. 1999) (articulating the test to determine whether it is appropriate for the trial judge to grant a new trial based on newly discovered evidence). The test includes:

> To obtain a new trial based on newly discovered evidence, a defendant must show that (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced on a retrial of the case; and (9) it will probably produce a different result.

Id. Although this test was formulated in a criminal proceeding, it is relevant to malpractice claims because Trial Rule 59 is available for civil and criminal claims. Ind. T.R. 59. *See also* Hawkins v. Cannon, 826 N.E.2d 658, 663 (Ind. Ct. App. 2005) (citing *Kahlenbeck*, 719 N.E.2d at 1218) (reaffirming that the nine part test must be used to order a new trial based on newly discovered evidence).

[106] *See infra* notes 107–09 and accompanying text (discussing Indiana Trial Rule 8 and the powerful role of judicial discretion in other areas of law, such as administrative law hearings, where judges have wide discretion to remand a case to an agency for further investigation).

[107] *See* Ind. T.R. 8(F) ("[a]ll pleadings shall be so construed as to do substantial justice, lead to disposition on the merits, and avoid litigation of procedural points"). The fraudulent concealment doctrine might also be relevant to the Panel process of medical malpractice claims, because the statute of limitations is tolled when a liable party conceals information pertinent to another party's malpractice claim. *See* IND. CODE § 34-11-5-1 (2014) (explaining the fraudulent concealment doctrine); s*ee also* Neal F. Eggeston, Jr., *Snatching Confusion from the Jaws of Clarity: The Puzzling Evolution of the Discovery Rule Vis-à-vis Indiana's Medical Malpractice Statute of Limitations*, 8 IND. HEALTH L. REV. 95, 129–31 (2011) (discussing, among other cases, Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692 (Ind. 2000), which touches on the doctrine of fraudulent concealment as it relates to medical malpractice claims, specifically addressing statute of limitations concerns); Render et al., *Health Care Law: A Survey of 1994 Developments*, 28 IND. L. REV. 959, 962 (1995) (discussing the application of the fraudulent concealment doctrine to a medical malpractice claim).

[108] *See* Ramsey v. Moore, 959 N.E.2d 246, 250 (Ind. 2012) (holding that the trial court may dismiss a proposed complaint during Panel review for failure to follow the Panel's schedule); Rambo v. Begley, 796 N.E.2d 314, 320 (Ind. Ct. App. 2003) ("[I]t is, however, well settled that a trial court is vested with the discretion to impose appropriate sanctions."); Gleason v. Bush, 689 N.E.2d 1183, 1186 (Ind. Ct. App. 1996) (explaining that the trial court has authority to impose sanctions upon parties that fail to comply with Act's requirement); Beemer v. Elskens, 677 N.E.2d 1117, 1119 (Ind. Ct. App. 1997) (considering whether the trial

example, trial judges have the sole discretion to determine appropriate sanctions when a panelist, attorney, or party fails to comply with the requirements of the Act.[109] In other areas, such as administrative law proceedings, Indiana courts have interpreted judicial discretion so broadly as to allow judges to remand cases to investigatory agencies for further findings before a judge makes a final determination in the case.[110]

Considering the statutes defining the prerequisite Panel requirement, conflicting case law such as *Miller* and *Chambers*, and all of the trial court rules discussed, it is not surprising that similar medical

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court abused its discretion by dismissing a proposed complaint); Cleary v. Indiana, 663 N.E.2d 779, 784 (Ind. Ct. App. 1996) ("the trial court has broad discretion in ruling on violations of discovery"); Jones v. Wasserman, 656 N.E.2d 1195, 1197 (Ind. Ct. App. 1995) (holding that the trial court did not abuse its discretion by issuing a sanction for a party's failure to comply with an evidentiary schedule set by the Panel); Rivers v. Methodist Hosps., Inc., 654 N.E.2d 811, 814 (Ind. Ct. App. 1995) (determining that the trial court did not abuse its discretion when it dismissed a claim due to the party's bad faith during the discovery process); Marshall v. Woodruff, 631 N.E.2d 3, 5 (Ind. Ct. App. 1994) ("[t]he trial court is vested with broad discretion in ruling on the issues of discovery"); Hudgins v. McAtee, 596 N.E.2d 286, 289 (Ind. Ct. App. 1992) ("[t]he grant or denial of motions for discovery, motions for sanctions, and motions for a continuance rests in the sound discretion of the trial court"); Galindo v. R.L. Christensen, M.D., 569 N.E.2d 702, 705 (Ind. Ct. App. 1991) (discussing the trial court's authority to impose sanctions); Doe Corp. v. Honore, 950 N.E.2d 722, 728 (Ind. Ct. App. 2011) (determining that the trial court did have subject matter jurisdiction to issue a preliminary determination of law regarding the validity of a panel opinion); Rust v. Guinn, 429 N.E.2d 299, 305 (Ind. Ct. App. 1981) (stating that the trial court has sound discretion to determine admissibility of evidence).

109 *See supra* note 108 (discussing court holdings reinforcing trial judges' right of judicial discretion during Panel review to determine appropriate sanctions for noncompliance with the Act's requirements).

110 *See* IND. CODE § 4-21.5-5-12(b) (2012). The statute states:

> (b) The court may remand a matter to the agency before final disposition of a petition for review with directions that the agency conduct further factfinding or that the agency prepare an adequate record, if:
>
> (1) he agency failed to prepare or preserve an adequate record;
>
> (2) the agency *improperly excluded or omitted evidence from the record*; or
>
> (3) a relevant law changed after the agency action and the court determines that the new provision of law may control the outcome.

Id. (emphasis added); Jackson v. Ind. Family & Soc. Servs. Admin., 884 N.E.2d 284, 292 (Ind. Ct. App. 2008) (interpreting an administrative law statute to allow the trial court to "remand the matter to the agency before final disposition of a petition for judicial review with directions for that agency to conduct further factfinding"); Jones v. Review Bd. of Ind. Emp't Sec. Div., 405 N.E.2d 601, 604–05 (Ind. Ct. App. 1980) ("When the administrative board's decision precludes an award the findings of fact must exclude every possibility of recovery. If the findings are found to be lacking in these areas the cause should be remanded to the board.").

malpractice claims might easily yield very different results.[111] Moreover, the General Assembly is certainly under pressure to revise or amend the Act.[112] Even before the *Chambers* decision, the plaintiffs' bar was pressuring the Indiana General Assembly to amend or repeal parts of the Act.[113]

III. ANALYSIS

Like Governor Bowen's call to action almost forty years ago, it is time for the Indiana General Assembly to readdress the Act.[114] Part III discusses and analyzes the current state of the Panel requirement of the Act and the future of the Panel process with *Miller v. Memorial Hospital of South Bend* and *K.D. v. Chambers* as precedent.[115] First, Part III.A discusses general challenges of the Panel requirement and the implications of *Miller* and *Chambers*.[116] Next, Part III.B compares trial judges' discretion to decide preliminary matters and the Panel chairman's discretion to deviate from the statutory requirements of the panel procedure with the lack of discretion judges have to determine discovery issues after a Panel renders an opinion.[117] This section also discusses two important discovery rules that affect the panel process—Trial Rule 34, the ongoing duty rule, and Trial Rule 59, motion to correct errors based on newly discovered evidence. Finally, Part III.C considers the roles of the Indiana Supreme Court and the Indiana General Assembly, and weighs the concerns of which body is in a better position to remedy the inconsistencies caused by *Chambers*.[118] This section also

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111 *See infra* Part III (asserting that the different results reached in *Miller* and *Chambers* are irreconcilable).

112 *See* Steven P. Lammers, *Recent Developments in Medical Malpractice*, 43 IND. L. REV. 855, 871 (2010) (providing a survey of recent decisions regarding the Act from October 1, 2008 to September 30, 2009, and concluding that, during the survey period, the "General Assembly did not add to, amend, or repeal any section of the Act," although "pressure to do so certainly comes from the plaintiff's bar").

113 *See* Lammers, *supra* note 112 and accompanying text (asserting that the plaintiff's bar was dissatisfied with the Indiana General Assembly's lack of legislative action concerning the Act from 2008 to 2009).

114 *See supra* note 28 and accompanying text (presenting Governor Bowen's address to the Indiana General Assembly, where he called for tort reform).

115 *See infra* Part III (analyzing the implications of *Miller* and *Chambers*, the statutory requirements of the Act, and the tools available that might be useful to remedy the case law implications to the Panel process).

116 *See infra* Part III.A (discussing the various challenges of the Panel requirement and analyzing the *Miller* and *Chambers* decisions).

117 *See infra* Part III.B (analyzing the varying level of discretion afforded to trial judges in medical malpractice claims with the wide discretion afforded in other areas of law).

118 *See infra* Part III.C (discussing the advantages and implications of the courts or general assembly addressing the inconsistencies created by *Miller* and *Chambers*).

addresses the concerns of allowing additional evidence to be considered after a Panel renders an opinion.[119]

A. Inconsistencies and Implications of Miller *and* Chambers

In Indiana, a number of cases raise issues with the Panel requirement of the Act.[120] While courts have addressed various facets of the Panel requirement many times, such as constitutionality, jurisdictional, and compliance issues, *Miller* and *Chambers* are the only cases that directly address separate breaches of the applicable standard of care by health care providers.[121] Although the facts of the cases differ, their similarities were overlooked by the appellate court in *Chambers*, resulting in two

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[119] *See infra* Part III.C (discussing the implications of allowing Panels to consider evidence of additional breaches after the Panel renders its opinion).

[120] *See infra* note 121 (discussing challenges raised in court based on the constitutionality of the Panel requirement, on grounds such as unreasonable delay, impermissible expense, and the trial court's authority and discretion to impose sanctions).

[121] *See* IND. CODE § 34-18-10-14 (2014) (giving the court with jurisdiction the authority to mandate sanctions for noncompliance by a party, attorney or panelist); Cha v. Warnick, 476 N.E.2d 109, 114 (Ind. 1985) (upholding the constitutionality of the Act by finding the Panel proceedings not to be an unreasonable delay); Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 592 (Ind. 1980) (holding that the Panel requirement of the Act did not create impermissible delay and expense, therefore is constitutional); *see also* Doe Corp. v. Honore, 950 N.E.2d 722, 728 (Ind. Ct. App. 2011) (determining the trial court did have subject matter jurisdiction to issue a preliminary determination of law regarding the validity of the Panel opinion); Harlett v. St. Vincent Hosps. & Health Svcs., 748 N.E.2d 921, 924 (Ind. Ct. App. 2001) (holding that the trial court and court of appeals have jurisdiction to determine preliminary issues raised by the parties during the Panel process); Gleason v. Bush, 689 N.E.2d 1183, 1186 (Ind. Ct. App. 1996) (explaining that the trial court has authority to impose sanctions upon parties that fail to comply with the Act's requirement); Galindo v. R.L. Christensen, M.D., 569 N.E.2d 702, 705 (Ind. Ct. App. 1991) (determining that the trial court has authority to impose sanctions when a party "fails to act as required by this chapter without good cause shown"). The basic rule, as defined in chapter eight of the Act and subsequent case law, is that "an action against a health care provider may not be commenced in a court in Indiana before: (1) the claimant's proposed complaint has been presented to a medical review panel . . . and (2) an opinion is given by the panel." IND. CODE § 34-18-8-4 (2014). *See* McGill v. Ling, 801 N.E.2d 678, 682 (Ind. Ct. App. 2004) ("[A] medical malpractice action may not be brought against a health care provider until the claimant's proposed complaint has been filed with the [IDOI] and an opinion has been issued by a medical review panel."); Winona Mem. Hosp. v. Kuester, 737 N.E.2d 824, 827 (Ind. Ct. App. 2000) ("Submission of a proposed complaint to a medical review panel is a condition precedent to filing a medical malpractice claim in Indiana"); St. Anthony Med. Ctr. v. Smith, 592 N.E.2d 732, 736 (Ind. Ct. App. 1992) (holding that the trial court lacked subject matter jurisdiction over a medical malpractice action where the original complaint was filed in the trial court before the proposed complaint was filed with the Panel and before the Panel rendered an opinion).

opinions that are irreconcilable by trial judges, medical malpractice attorneys, and parties in future medical malpractice cases.[122]

At issue in *Miller* was whether malpractice plaintiffs "sufficiently articulated two separate injuries so as to avoid certain limitations imposed by the [Act.]"[123] The Indiana Supreme Court refused to limit the reading of general injury allegations in the proposed complaint as only alleging that one breach occurred by two defendant health care providers.[124] The court's willingness to read a proposed complaint broadly, and therefore not precluding the plaintiffs from litigating their case, should be the standard practice of trial and appellate courts.[125] With this rule as precedent, *Chambers* was decided fourteen years later.[126]

The facts in *Chambers* are simple, which made it an easy case for the Indiana Court of Appeals to deliver this straightforward rule—additional breaches of the standard of care by health care providers, which are discovered after a Panel renders an opinion, cannot be raised at trial.[127] But the Court did not take into consideration future cases that will not fit so neatly inside this rule.[128] There will be instances where

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122 *See supra* notes 77–89 and accompanying text (discussing the facts, holding, and reasoning in *Miller* and *Chambers*).

123 *See supra* note 77 and accompanying text (recounting the pertinent facts of the *Miller* case, as well as the court's holding and reasoning). After the plaintiffs received an opinion from the Panel based on a proposed complaint and the submission of evidence, the plaintiffs used a virtually identical complaint in their filing with the trial court. Miller v. Mem. Hosp. of S. Bend, Inc., 679 N.E.2d 1329, 1332 (Ind. 1997). The plaintiffs settled with one defendant health care provider, leaving one other defendant health care provider in the suit. *Id.* at 1330.

124 *See supra* note 77 and accompanying text (articulating the facts of *Miller* and the nature of the breaches alleged by the plaintiffs in the proposed complaint).

125 *See supra* note 81 (reviewing the *Miller* holding that the substance of the plaintiffs' submissions to the Panel does not restrict the plaintiffs from continuing to pursue their medical malpractice claim against the remaining defendant health care provider).

126 *See supra* notes 84–89 and accompanying text (discussing *Chambers* and the appellate court's interpretation of the application of *Miller*).

127 *See supra* notes 84–86 and accompanying text (explaining the facts of the *Chambers* case and the broad rule the court created). The plaintiff alleged in the proposed complaint: "[t]he two physicians were careless and negligent in the care and treatment of [plaintiff], as [plaintiff] suffered a Benadryl overdose while under their care. [Plaintiff] received various other overdoses while under the care of defendant." K.D. v. Chambers, 951 N.E.2d 855, 858 (Ind. Ct. App. 2011). At issue was the vagueness of the second allegation of "receiv[ing] various other overdoses[.]" *Id.* The Court rejected the plaintiff's argument that pleading "various other overdoses" was sufficient under Indiana's notice pleading. *Id.* at 858–59. The Court explained that the notice pleading was "not per se insufficient," but took issue with the pleading because "no evidence of any breaches besides the overdose of Benadryl" was contained in the plaintiff's submission to the panel. *Id.* at 864.

128 *See supra* notes 82–89 and accompanying text (explaining the *Chambers* court's reasoning for its decision). Instead, the court differentiates the plaintiff's case from the facts of *Miller*. *Chambers*, 951 N.E.2d at 865. In *Miller*, the Indiana Supreme Court held that

evidence of an additional breach is not discovered until after a Panel opinion is rendered.[129] With *Chambers* as precedent, this evidence cannot be presented at trial under *any* circumstances.[130]

The *Chambers* rule leaves Indiana trial judges in a frustrating position to properly—and fairly—address evidentiary issues that arise after a Panel renders an opinion.[131] In theory, the rule eliminates surprises at trial.[132] The rule would serve that purpose if it were interpreted in the following manner: one party should not be blind-sided by (1) the introduction of a brand new breach argument; and (2) evidence at trial that was not brought to the table earlier.[133] However, in practice, the decision eliminates judges' discretion to resolve discovery issues.[134]

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the plaintiffs are not required to raise a distinction between two injuries in a panel submission. *Miller*, 679 N.E.2d at 1332.

[129] *See, e.g., supra* Part I (offering a hypothetical scenario that outlines the problems created by *Chambers*). Additional examples include the discovery of medical records that were previously thought to be "lost," or information in medical charts that is later verified to be inaccurate by a previously-unavailable witness. *See also supra* Part I (providing a hypothetical situation outlining the problems that may arise with the current provisions in the Act and the court's interpretation of the Act); Hawkins v. Cannon, 826 N.E.2d 658, 663 (Ind. Ct. App. 2005) (arguing that newly discovered evidence, a video, that was not available during the trial, should be considered by the court through a motion to correct error). A specific rule that addresses how to proceed with and present newly discovered evidence strengthens the argument that courts make every effort to permit all relevant evidence, discovered in good faith, regardless of when it is discovered. For additional resources and discussion of the fraudulent concealment doctrine, see Eggeston, *supra* note 107, at 129–31 and accompanying text (discussing, among other cases, Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692 (Ind. 2000), which touches on the doctrine of fraudulent concealment as it relates to medical malpractice claims, specifically addressing statute of limitations concerns). This Note is not directed at evidence discovered as a result of "bad lawyering," which is precisely what *Chambers* is meant to prevent.

[130] *See supra* note 86 and accompanying text (presenting the Court's holding in *Chambers*, where it determined that at trial, medical malpractice plaintiffs may *only* present evidence of a breach of the applicable standard of care that was articulated in the proposed complaint and reviewed by the Panel).

[131] *See supra* note 86 and accompanying text (discussing the holding from *Chambers*); *infra* notes 136–41 and accompanying text (arguing that trial courts will face difficult decisions in future cases if they must decide whether a case more closely resembles *Miller* or *Chambers*).

[132] *See supra* notes 82–89 (explaining the court's reasoning for creating the broad rule created by the *Chambers* opinion).

[133] *See infra* note 136–39 and accompanying text (arguing that a more narrow reading of *Chambers* is appropriate in some cases in order to allow trial courts to make a fair decision).

[134] *See supra* note 142 and accompanying text (asserting that the rule from *Chambers* does not allow judicial discretion to formulate an appropriate remedy, but instead, imposes a broad rule that is not appropriate in all circumstances). Judges have historically been granted wide discretion to deal with discovery issues. *See* Cleary v. Indiana, 663 N.E.2d 779, 784 (Ind. Ct. App. 1996) ("[T]he trial court has broad discretion in ruling on violations of discovery."); Marshall v. Woodruff, 631 N.E.2d 3, 5 (Ind. Ct. App. 1994) ("The trial court is vested with broad discretion in ruling on the issues of discovery."); Hudgins v. McAtee, 596 N.E.2d 286, 289 (Ind. Ct. App. 1992) ("The grant or denial of motions for discovery,

Looking beyond a cut and dry scenario, like the facts of *Chambers*, Indiana courts will, at some point, be faced with a situation where evidence discovered after a Panel opinion will cause substantial injustice if the trial judge does not have the authority to provide a remedy for the inadmissibility of the evidence.[135]

Trial courts will be placed in a difficult situation if they are forced to adopt a narrow reading of *Miller* and a broad reading of *Chambers*.[136] First, expecting trial courts to follow a narrow reading of a rule from an appellate court over a broad reading of a rule set out by the state's high court works completely against the hierarchical composition of our court system.[137] Second, the *Chambers* opinion did not give any indication that the holding was fact-specific, or recognize that the holding might not be generally applicable to future cases.[138] Had the court acknowledged that exceptions to its rule might exist, trial courts would have the necessary breathing room to follow the *Miller* rule instead of *Chambers* rule.[139] Finally, if trial courts are forced to follow *Chambers* in all cases in which defendant health care providers argue that separate breaches were not articulated in the proposed complaint, plaintiffs will be barred from proving at trial that potentially liable health care providers contributed to the injury of a patient.[140] Other tools, namely judicial discretion, are available in trial courts in order to remedy the incompatibility of *Miller* and *Chambers*.[141]

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motions for sanctions, and motions for a continuance rests in the sound discretion of the trial court.").

135 *See infra* Part IV (resolving the issues discussed in Part III with a proposed section to chapter ten of the Act, which creates wide judicial discretion); *infra* Part V (revisiting the hypothetical scenario posed in Part I and reconciling the problem through the proposed statutory section introduced in Part IV).

136 *See supra* notes 81–83 and accompanying text (discussing the court's holding and reasoning in *Miller*); *supra* notes 86–89 and accompanying text (discussing the court's holding and reasoning in *Chambers*).

137 *See supra* notes 81–83 and accompanying text (reviewing the *Miller* court's holding and reasoning); *supra* note 86–89 and accompanying text (reviewing the *Chambers* court's holding and reasoning).

138 *See supra* notes 87–89 and accompanying text (presenting the court's brief reasoning in *Chambers* that led it to create such a broad rule with no mention of any possible exceptions).

139 *See supra* notes 86–90 and accompanying text (discussing the court's broad reasoning in *Chambers*, and that the *Chambers* court merely distinguished the *Miller* holding, instead of creating a small exception to the *Miller* rule).

140 *See infra* notes 159–61 and accompanying text (discussing the implications of the *Chambers* decision if trial judges are forced to follow a broad rule of law, instead of using judicial discretion to determine whether the Panel should consider newly discovered evidence under any circumstances).

141 *See infra* Part III.B (discussing judicial discretion and discovery rules that can be used during the Panel process in order to correctly address cases where new evidence is discovered after a Panel renders an opinion).

B. Using Judicial Discretion to Remedy Case Law Inconsistencies

Chambers does not discuss the option of leaving discretion to trial judges when new evidence is discovered.[142] But other provisions in chapter ten of the Act have been interpreted to provide trial courts with authority and discretion to make certain findings before a panel renders an opinion.[143] For example, courts have wide discretion to determine whether to impose sanctions for noncompliance with the Act's requirements.[144] In other areas of law, such as the relationship between administrative agency decisions and trial courts, courts have also been given discretion to remand cases to respective agencies for further determinations.[145] Additionally, a feature of the panel process' informal design is that the panel chairman is afforded wide discretion to allow or disallow parties to deviate from the guidelines set out in chapter ten.[146]

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[142] *See supra* notes 88–89 and accompanying text (discussing the court's reasoning in *Chambers* that led it to create such a broad rule with no exceptions).

[143] *See, e.g.*, IND. CODE § 34-18-10-14 (2014) (granting the trial court jurisdiction and the authority to mandate sanctions for noncompliance by a party, attorney, or panelist). Additionally, there are other instances in which trial judges are afforded discretion to remand a case to an administrative agency for further review. *See id.* § 4-21.5-5-12(b). The Code states:

> (b) The court may remand a matter to the agency before final disposition of a petition for review with directions that the agency conduct further factfinding or that the agency prepare an adequate record, if: (1) the agency failed to prepare or preserve an adequate record; (2) the agency improperly excluded or omitted evidence from the record; or (3) a relevant law changed after the agency action and the court determines that the new provision of law may control the outcome.

Id.

[144] *See supra* note 108 (reviewing Indiana cases where courts have determined that trial judges have wide discretionary authority to sanction parties for noncompliance during the Panel process); Gleason v. Bush, 689 N.E.2d 1183, 1186 (Ind. Ct. App. 1996) (explaining that the trial court has authority to impose sanctions upon parties that fail to comply with the Act's requirement); Galindo v. R.L. Christensen, M.D., 569 N.E.2d 702, 705 (Ind. Ct. App. 1991) (discussing the trial court's authority to impose sanctions when a party "fails to act as required by this chapter without good cause shown").

[145] *See* Jackson v. Ind. Fam. & Soc. Svcs. Admin., 884 N.E.2d 284, 292 (Ind. Ct. App. 2008) (interpreting an administrative law statute to allow the trial court to "remand the matter to the agency before final disposition of a petition for judicial review with directions for that agency to conduct further factfinding"); Jones v. Review Bd. of Ind. Emp. Sec. Div., 405 N.E.2d 601, 604–05 (Ind. Ct. App. 1980) ("When the administrative board's decision precludes an award the findings of fact must exclude every possibility of recovery. If the findings are found to be lacking in these areas the cause should be remanded to the board." (citations omitted)).

[146] *See* IND. CODE § 34-18-10-20 (2014) ("Meetings shall be informal."); *see also* Kemper, *supra* note 31, at 1141 ("The panel is not bound by formalities."). The panel chairman has discretion in determining if a party or panelist may go beyond a deadline set by the Act. *See* IND. CODE § 34-18-10-3 (2014) (giving the panel chairman authority to serve in an

Moreover, attorneys have an ongoing duty to update discovery, suggesting newly discovered evidence is intended to be included in the judicial process.[147]

Along with an attorney's ongoing duty to update discovery comes the possibility of the discovery of new evidence that suggests an additional, separate breach in the standard of care by a medical provider.[148] When a party discovers new evidence, the next step to be able to use this new evidence seemingly should be to submit it to the Panel for an additional determination of whether this evidence suggests a separate breach in the standard of care.[149] However, no mechanism exists that allows a party to request that a Panel evaluate new evidence for an additional breach after that Panel renders its opinion.[150] Essentially, *Chambers* takes the discretion to do so out of the hands of trial judges.[151]

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advisory capacity); Doe Corp. v. Honore, 950 N.E.2d 722, 728 (Ind. Ct. App. 2011) (affirming statutory language giving the panel chair an advisory role); Kranda v. Houser-Norborg Med. Corp., 419 N.E.2d 1024, 1024 (Ind. Ct. App. 1981) (extending the chairman's authority to include the allowance of additional evidence to be submitted to the panel before it renders an opinion). IND. CODE § 34-18-10-20(a) (2014). The statute states:

> Either party, after submission of all evidence and upon ten (10) days notice to the other side, has the right to convene the panel at a time and place agreeable to the members of the panel. Either party may question the panel concerning any matters relevant to issues to be decided by the panel before the issuance of the panel's report.

Id.

147 *See* Ind. T.R. 34 (discussing the scope of discovery and production of requested documents). The rule does not directly state this proposition. However, discovery can continue up until a trial and after a final judgment.

148 *See id.* (discussing Ind. T.R. 34 concerning the scope of discovery and production of requested documents); *supra* note 100 and accompanying text (providing the statutory language of the "ongoing duty" rule).

149 *See infra* Part IV.B (arguing that the proposed statutory language will remedy this problem); *see also* Kemper, *supra* note 31, at 1141 ("If new theories are submitted to a court after the panel opinion is rendered, the defendant has a basis to argue for reconvening the panel and submitting the new claims to the panel.")

150 *See supra* notes 136–41 and accompanying text (asserting that the implications of the *Chambers* decision will be felt in future medical malpractice cases, mainly because the rule is irreconcilable with the *Miller* decision, and it does not allow judicial discretion).

151 *See supra* notes 136–41 and accompanying text (presenting the implications of the *Chambers* decision); *see also* Murphy, *supra* note 61, at 179 (discussing the Medical Malpractice Act many years before *Chambers*, where Murphy, an attorney, essentially predicts the problem addressed by this Note). Murphy points out:

> A good argument can be made that a plaintiff should be barred from presenting any evidence at trial concerning an act or acts of malpractice, which were not charged in the complaint or presented to the panel prior to the rendition of its opinion. If the plaintiff fails to submit such evidence, then obviously the purpose of panel screening is circumvented.

Also consider Indiana Trial Rule 59, addressing when parties may file a motion to correct errors.[152] This rule directly addresses the admission of newly discovered evidence—that is, evidence discovered as late as after a final judgment is entered.[153] When a motion to correct error based on evidence outside the record is used, the motion must only be "supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion."[154] By only requiring its truthfulness to be supported by affidavits, the language of this rule suggests the high value of newly discovered evidence that could alter the decision of the case.[155] Coupled with the various trial rules discussed, these additional rules present a strong indication that Indiana courts should have the authority to determine when newly discovered evidence, even in a medical malpractice case with a Panel requirement, is admissible.[156]

Miller and *Chambers* cannot be reconciled with these rules of evidence and trial rules unless trial judges are afforded discretion to consider newly discovered evidence.[157] The Act only mandates that an action "may not be commenced" before "the claimant's proposed complaint has been presented to" a Panel.[158] The Act does *not* include language that states parties are only entitled to one Panel opinion,

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Id. This is the most direct recognition of the problem addressed in this Note. Interestingly, the article was written more than a decade before *Chambers* was decided, and has not been discussed in further detail in any other source.

152 *See supra* note 100 and accompanying text (providing the statutory language for a motion to correct errors, and discussing how this trial rule works and how it can be used in medical malpractice cases).

153 *See supra* note 100 and accompanying text (explaining the broad scope of a motion to correct errors).

154 *See* Ind. T.R. 59(H)(1) ("When a motion to correct error is based upon evidence outside the record, the motion shall be supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion.").

155 *See supra* note 100 and accompanying text (reviewing the statutory language and explaining how this trial rule can be used in medical malpractice cases).

156 *See supra* Part II.D (explaining the general applicability of the trial rules as they relate to medical malpractice cases, and the various instances where the rules have been used in medical malpractice cases).

157 *See supra* Part II.C (presenting case discussions for *Miller* and *Chambers*); *supra* Part II.D (discussing the various trial rules that can be used after the Panel process).

158 IND. CODE § 34-18-8-4(1) (2014). The Code states:

> Notwithstanding section 1 of this chapter, and except as provided in sections 5 and 6 of this chapter, an action against a health care provider may not be commenced in a court in Indiana before: (1) the claimant's proposed complaint has been presented to a medical review panel established under IC 34-18-10 (or IC 27-12-10 before its repeal); and (2) an opinion is given by the panel.

Id.

therefore the *Chambers* opinion should not be used to have that effect.[159] Interpreting *Chambers* to bar additional Panel review, even when a trial judge finds that it is appropriate and not allowing a Panel to review it will create injustice, in effect creates a new statute.[160] This is clearly the job of the Indiana General Assembly, which can receive input from trial attorneys, the IDOI, health care providers, and concerned citizens, not just the appellate court.[161]

Through judicial discretion, trial judges can determine when, and if, newly discovered evidence should be subject to additional review by a Panel in order to fairly adjudicate the plaintiff's case.[162] Since trial judges have wide discretion to decide other evidentiary matters, from deadline extensions to sanctions, the Act should afford the necessary breathing room to allow newly discovered evidence to be admitted when a trial judge determines the evidence, which the Panel did not previously review, should be considered by the trier of fact.[163] In order for trial judges across the state to exercise broad judicial discretion in these instances, the Indiana Supreme Court or General Assembly must clarify the permissible uses and limits of judicial discretion regarding the Panel process.[164]

C. The Roles of the Indiana Supreme Court and General Assembly

By denying transfer, the Indiana Supreme Court leaves many answerable questions unresolved.[165] Though some might argue the best remedy is to let case law develop, the *Chambers* decision will allow evidence to be unfairly excluded until the issue is more thoroughly

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159 *See supra* note 63 and accompanying text (providing the statutory language from the Act that requires a Panel to render an opinion, and various case law discussing a Panel's responsibilities under the Act).

160 *See supra* notes 84–90 and accompanying text (discussing the facts, holding, and reasoning in the *Chambers* case, including the *Chambers* court's unwillingness to carve out any exceptions to the broad rule it created).

161 *See supra* Part II.A (discussing the Indiana General Assembly's call to action from Governor Bowen and the creation of the Act by the General Assembly).

162 *See infra* Part IV.A (proposing a possible solution to allow newly discovered evidence to be evaluated by a Panel or judge with broad judicial discretion to determine whether a case is appropriate for additional Panel review).

163 *See supra* notes 106–09 and accompanying text (reviewing examples of the legislature providing wide judicial discretion in other matters that arise during the Panel process, such as a trial judge's authority to impose sanctions for noncompliance by an attorney).

164 *See infra* Part III.C (exploring whether the Indiana Supreme Court or the Indiana General Assembly is the best decision maker to clarify the bounds of judicial discretion during the Panel process).

165 *See supra* note 90 and accompanying text (discussing the Indiana Supreme Court's decision to deny transfer, thus refusing to hear the *Chambers* case and then providing an opinion about its broad holding).

addressed.[166] There is no way of knowing when the right case with a perfect fact scenario will come along and find its way in front of the Indiana Supreme Court.[167] Silence by the court is a strong indicator that the legislature is in a better position to remedy the problem.[168] The legislature can fully examine the difficulties with the Panel process and optimize its usefulness.[169]

There are three viable concerns against allowing Panels to review additional breaches discovered after an opinion is rendered: (1) it will add length to an already lengthy process; (2) this situation is not one that occurs regularly; and (3) it will give lawyers the dreaded "second bite at the apple."[170] The first concern is understandable, considering the Indiana Supreme Court has continuously considered whether the Panel requirement is an unconstitutional delay.[171] The trial judge can easily control these concerns with judicial discretion.[172] Discretion will allow judges to ensure any additional review is brief, and to discern the parties who truly made a good-faith discovery after a Panel renders an opinion

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166 *See infra* notes 190–92 (examining the possible implications of altering the Panel chapter of the Act); *infra* note 194 (addressing the probability of allowing the issue to be resolved by the Indiana Supreme Court at some point in the future).

167 *See infra* note 194 (asserting that since the issue is not common, it is not likely to be raised with regularity in court, and therefore creates uncertainty as to when the Indiana Supreme Court might ever have the opportunity to decide the issue).

168 *See infra* note 194 and accompanying text (exploring the possibility that the best remedy is to let the case law develop over time). The legislature is in a better position because it can receive feedback from all parties involved and interested in the Act, such as plaintiffs, attorneys, medical providers, and insurance companies. *See* Lammers, *supra* note 112 and accompanying text (discussing discontent by Indiana attorneys and their call to the Indiana General Assembly to re-examine the Act). This Note does not address the issue of whether the entire Act is in need of an overhaul by the legislature.

169 *See infra* note 195 and accompanying text (arguing that the Indiana General Assembly is in the best position to offer a comprehensive remedy to this issue because it can receive input from trial attorneys, trial judges, the IDOI, health care providers, and concerned citizens).

170 *See infra* notes 190–92 and accompanying text (addressing the potential concerns with the proposed statutory language).

171 *See supra* note 74 (citing Indiana Supreme Court decisions upholding the Act's constitutionality because the Panel process was not found to be an unreasonable delay or expense); *see also* Kemper et al., *supra* note 31, at 1143–45 (discussing various bases for constitutional challenges of the Act); *Indiana's Medical Malpractice Act: Results of a Three Year Study*, *supra* note 32, at 1303 (reviewing the constitutionality of the delays caused by the Panel process); Hurlbut, *supra* note 39, at 507 (examining the constitutional challenges to the Act); Williams, *supra* note 60, at 497 (explaining why the constitutionality of the Act was challenged, focusing on the delay caused by Panel review).

172 *See supra* notes 106–10 (discussing the various areas of law that trial judges have wide discretion to resolve evidentiary issues, such as administrative law hearings).

from those that did not complete due diligence in their discovery efforts before the Panel renders an opinion.[173]

IV. CONTRIBUTION

Although the Panel requirement of the Act adds a significant amount of time to the life of a medical malpractice lawsuit, if adequate limitations are included, Panels can take a second look at new evidence in cases where a party discovers an additional breach in the standard of care *after* a Panel decision, without creating a substantial delay to the process.[174] Amending the Act to give judges discretion to remand cases in limited instances is an effective way of eliminating the issue of barring plaintiffs from arguing additional breaches at trial.[175] However, this proposition is based on the plaintiff raising an additional breach that he could not reasonably discover before a Panel renders an opinion.

The Indiana General Assembly must reconcile the various tools available that already provide trial judges with discretion when dealing with evidentiary issues and the respective arguments for and against changing the Panel process of the Act.[176] Judges, panelists, parties, attorneys, the IDOI, and health care providers all need clear direction on how to address additional evidence discovered after a Panel renders an opinion.[177] The General Assembly is in a position to provide a legislative

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[173] *See also* Ind. T.R. 8(F) ("All pleadings shall be so construed as to do substantial justice, lead to disposition on the merits, and avoid litigation of procedural points."). This rule encompasses the overall reasoning for this Note. Judges are capable of differentiating the good from the bad, so they should be afforded the opportunity to do so. For example, given discretion, a judge could easily differentiate a party who tries to save money by not hiring an expert to look over a patient's medical records before submitting evidence to a panel from a party that found, after a panel rendered an opinion, that a hospital employee did not accurately notate steps taken to resuscitate a patient. Revisit the hypothetical posed in Part I of this Note, and compare that situation with "save money by not hiring an expert" scenario described above.

[174] *See supra* Part II.B (explaining the issues with the extended length of the Panel process in light of the short statutory deadlines); *infra* Part IV.B (arguing that any additional delay caused by a second Panel review will be minimal due to strict time limitations imposed by the proposed section to chapter ten of the Act).

[175] *See supra* Part I (posing a hypothetical situation where the plaintiff discovered evidence of an additional breach after the Panel rendered an opinion, therefore making the new evidence inadmissible under *Chambers*).

[176] *See supra* Part II.D (explaining the trial rules relevant to the Panel process); *supra* Part III.C (addressing the Indiana General Assembly's potential role in reconciling the implications created by *Chambers*).

[177] *See infra* Part IV.A (providing a proposed section to chapter 10 of the Act that will allow trial judges to remand cases to a Panel for further review, and includes strict time limitations for this additional process).

remedy to this problem by adding an additional section to chapter ten of the Act that allows broad judicial discretion.[178]

The remainder of this Part focuses on proposing an additional section that the Indiana General Assembly can add to chapter ten of the Act.[179] The language included in this proposed section will ensure that judges, parties, and panelists have proper guidance of the limited instances in which it is appropriate to remand a case to a Panel for further review, the evidence that may be submitted to the Panel on remand, and the time limitations of an additional Panel determination.[180]

A. Proposed Section to the Act's Chapter Addressing Panel Requirements

The Indiana General Assembly should insert the proposed section between section 34-18-10-22, discussing the Panel's duties and available opinions, and section 34-18-10-23, discussing the admissibility of the Panel's report as evidence at trial.[181] The Indiana General Assembly should place it there because the situation the proposed section addresses will occur in sequence between the Panel's initial opinion and the use of the Panel's opinion at trial.[182]

The Indiana General Assembly should amend the Act to include the proposed section, as follows:

> *(a) Upon good faith discovery of any materially relevant evidence after a Panel opinion is rendered, a party shall promptly notify the court and all parties.*
> *(b) The evidence must lead the party to reasonably believe a separate, additional breach in the applicable standard of care occurred that was not known at the time of the original Panel submission and could not reasonably be discovered at that time.*

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178 *See supra* Part III (addressing the concerns created by the conflicting opinions in *Miller* and *Chambers*); *infra* Part IV.A (proposing an additional section for chapter ten of the Act to address the concerns raised in Part III).

179 *See infra* Part IV.A (providing new statutory language to add to chapter ten of the Act to alleviate the inconsistencies of *Miller* and *Chambers*); *infra* Part IV.B (discussing the suggested placement of the proposed section, the reasoning for placing the section between two other statutes in chapter ten, and addressing the potential criticisms of the proposed section).

180 *See infra* note 192 and accompanying text (discussing the importance of clear guidance to trial judges, parties, and Panelists to ensure the additional review is limited and timely).

181 The reason for the suggested placement of the proposed section is the contribution of the author.

182 The suggested placement of the proposed section is the contribution of the author.

(c) The party must notify the court of the discovery and request a hearing, which must be held within thirty (30) days of making the request.

(d) The trial judge shall have broad discretion to determine, based on a reasonableness standard, whether the Panel should consider the newly discovered evidence before the case is further adjudicated.

(e) If the judge determines a Panel should consider this evidence, the judge may remand the case for further Panel review, or, if justice requires, make a judicial determination whether the evidence is admissible without Panel review.

(f) The Panel shall be comprised of the same members of the original Panel appointed to the case, and if any original member is unavailable, the trial judge shall appoint a replacement.

(g) The same Panel chairman, if available, shall oversee the process, and make every reasonable effort to ensure the Panel renders a timely opinion.

(h) The parties shall have thirty (30) days to prepare additional evidence to submit to the Panel. The evidence shall be limited only to evidence reasonably related to the moving party's claim of an additional breach in the standard of care. The trial judge may not grant an extension of time to any party.

(i) The Panel shall have sixty (60) days to review the submitted evidence and render a written opinion. The opinion shall be delivered to the trial court and all parties. The trial judge shall have the discretion to grant one (1) extension of time, no more than thirty (30) days, if requested by the Panel.

(j) To expedite the Panel's deliberation, the Panel does not have to meet in person to discuss the evidence. Telephone conferences and video conferences are permitted so long as all panelists are present for the conferences. Panelists are subject to sanctions by the court for failure to make every reasonable effort to ensure the timeliness of the Panel's opinion.

(k) The Panel may request that the trial court convene the parties to present arguments concerning only the additional evidence. If the Panel selects this process, all panelists must be present and an opinion may be rendered at the conclusion of the hearing.

> *(l) If the panelists request additional time to deliberate after parties present arguments, the Panel must render its expert opinion, in writing, within thirty (30) days of the hearing.*
> *(m) The trial court shall have limited jurisdiction during the course of the remand, and may impose sanctions upon any panelist, attorney, or party who causes unreasonable delay in the process.*
> *(n) All other sections of the statute set out in the Act, to the extent they do not contradict these provisions, shall apply.*[183]

B. Commentary

Most subsections are crafted with brief time periods so that parties, the trial judge, and the Panel cannot create an unreasonable delay.[184] Subsection *c* requires that the initial hearing to address evidence of an additional breach must be held within thirty days of when a party notifies the court.[185] Subsections *f* and *g* attempt to reassemble the same Panel that previously examined the evidence in the case.[186] Subsection *i* limits the Panel's time to issue an additional expert opinion to sixty days, and subsection *l* only allows the trial judge to grant the Panel one thirty day time extension to issue its opinion, if needed.[187]

This proposed section is the best solution because it gives clear direction and guidance to parties, attorneys, trial judges, and panelists.

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183 The proposed section is italicized and is the contribution of the author.

184 *See supra* note 183 and accompanying text (providing the proposed section to chapter ten of the Act, which includes subsections with short time limitations).

185 *See supra* note 183 and accompanying text ("*(c) The party must notify the court of the discovery and request a hearing, which must be held within thirty (30) days of making the request.*").

186 *See supra* note 183 and accompanying text ("*(f) The Panel shall be comprised of the same members of the original panel appointed to the case, and if any original member is unavailable, the trial judge shall appoint a replacement. (g) The same Panel chairman, if available, shall oversee the process, and make every reasonable effort to ensure the Panel renders a timely opinion.*").

187 *See supra* note 183 and accompanying text (providing the proposed statutory language to chapter ten of the Act). It states:

> *(i) The Panel shall have sixty (60) days to review the submitted evidence and render a written opinion. The opinion shall be delivered to the trial court and all parties. The trial judge shall have the discretion to grant one (1) extension of time, if requested.*
> *(l) If the panelists request additional time to deliberate after parties present arguments, the Panel must render its expert opinion, in writing, within thirty (30) days of the hearing.*

Id.

The proposed section also ensures any additional delay is minimal by requiring the trial judge to enforce thirty to sixty day deadlines on attorneys and panelists.[188] Furthermore, the proposed section only allows the trial judge to grant *one* thirty day extension to the Panel, and *zero* time extensions to the parties, which will ensure the additional Panel review is timely.[189]

There are two major arguments and a few concerns against amending the Act. First, critics may argue that the Indiana Supreme Court is best left to resolve this issue because it has already set precedent with *Miller*.[190] Second, critics may argue that allowing judges to remand cases for an additional determination from a Panel will significantly increase the length of time to resolve an already lengthy process.[191] However, the proposed section includes strict time limitations for additional Panel review to ensure any further delay is minimal.[192] By remanding the case to the Panel that reviewed the original submission and is familiar with the evidence, rather than assigning it to a new Panel, the length of time required can be significantly decreased.

A legislative solution created by the Indiana General Assembly is the most direct and effective way to remedy the inconsistencies in *Miller* and *Chambers*.[193] Waiting for the Indiana Supreme Court to accept an appropriate case to set guidelines for remand could take years, if it ever occurs at all.[194] The Indiana General Assembly is in a better position to

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188 *See supra* note 183 and accompanying text (articulating the proposed statutory language, specifically subsections *(c)*, *(h)*, *(i)*, and *(l)*, which impose thirty or sixty day time limitations on attorneys and panelists).

189 *See supra* note 183 and accompanying text (including specific statutory language in subsection *(i)* that allows trial judges to only grant one thirty day time extension to the Panel).

190 *See supra* notes 77–83 and accompanying text (presenting the facts, holding, and reasoning of the only Indiana Supreme Court case that directly addresses the issue, *Miller*).

191 *See supra* note 41 and accompanying text (discussing the substantial length of time the Panel process adds to the overall disposition of medical malpractice claims, and that the statutory timeframe is never met).

192 *See supra* note 183 and accompanying text (providing examples of clear language in the proposed statute to ensure strict time limitations on additional Panel review).

193 *See supra* Part III.C (evaluating the benefits of a solution stemming from the Indiana General Assembly, especially considering the Indiana Supreme Court's denial of transfer in the *Chambers* case, along with the uncertainty of the "perfect" case coming through the judicial system and eventually finding its way to Indiana's high court).

194 *See supra* note 90 and accompanying text (discussing the unlikelihood of this issue arising and the Indiana Supreme Court accepting it in light of the court's denial of transfer of the *Chambers* case).

amend the Act because it can receive input from trial attorneys, the IDOI, health care providers, and concerned citizens.[195]

In light of the *Chambers* decision and the implications it will have on future medical malpractice cases, it is time that the Indiana General Assembly revisits the Panel provision of the Act to eliminate confusion and conflicting case law. Hoping that the Indiana Supreme Court hears a case that perfectly addresses all of the issues this Note raises is impractical and unrealistic.[196] For that reason, the Indiana General Assembly is in the best position to provide a remedy to trial judges, medical malpractice attorneys, and medical malpractice patients who will seek relief under the Act.[197]

V. CONCLUSION

Currently, the Act and Indiana case law do not permit new evidence of additional breaches in the standard of care, discovered in good faith after a Panel opinion, to come into evidence under any circumstances.[198] Although *Miller v. Memorial Hospital of South Bend* and *K.D. v. Chambers* use different reasoning in determining the fate of additional breaches, neither decision directly addresses the concerns raised in this Note.[199] These decisions do indicate that the outcome of future cases with similar issues could be resolved using the reasoning of either case, but predicting how a court will rule is unclear.[200] Thus far, courts will likely

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195 *See Indiana's Medical Malpractice Reform Revisited*, *supra* note 31, at 1047 (asserting that a balance must be struck in order for medical malpractice reform to be successful). In addressing the balance:

> The adoption of tort reform in any field, including malpractice, involves the balancing of interests among injured claimants, tortfeasors and the insurers that effectively finance the tort claim awards and settlement of tortfeasors. If the balance is struck too far in favor of tortfeasors and their insurers, tort claimants have reduced access to fair compensation for their injuries. If the balance is struck too far in favor of tort claimants, the ability of tortfeasors and their insurers to finance tort claims and settlements is compromised.

Id.; *see also supra* note 34 (providing an example of current legislative action in order to remedy an issue with the patient's compensation fund provision in the Act, which reduces the payout time from six months to three months).

196 *See supra* note 90 and accompanying text (addressing the Indiana Supreme Court's denial of transfer of the *Chambers* case).

197 *See supra* notes 193–94 and accompanying text (discussing the competing roles of the Indiana courts and the General Assembly).

198 *See supra* Part II.C (explaining *Miller* and *Chambers*); *supra* Part III.A (analyzing the rules of law from *Miller* and *Chambers*).

199 *See supra* notes 82–83 (discussing the reasoning in *Miller*); *supra* note 89 (providing the reasoning for the court's decision in *Chambers*).

200 *See supra* Part III.A (distinguishing the outcomes of *Miller* and *Chambers*).

be split on which precedent to follow when analyzing additional breaches.[201] If a court views the additional breach as one that was expressed in the proposed complaint, clearly or vaguely, the court will likely follow *Miller* and determine whether the breach was articulated enough to be considered a separate breach.[202] If a court views the additional breach as new and separate from the breach, or breaches, alleged in the proposed complaint, the court will likely follow *Chambers* and determine that evidence of that separate breach is inadmissible.[203]

Through the additional section to chapter ten of the Act proposed in Part IV.A, the hypothetical scenario presented in Part I is easily resolved.[204] Olivia requests a court hearing, and presents evidence of an additional breach in the standard of care by Lynniebrook Hospital that was not previously presented to the Panel.[205] The judge determines the evidence was discovered in good faith, and remands the case to the Panel that reviewed Olivia's original submission for further review.[206] The judge instructs the Panel that its inquiry is strictly limited to the new evidence and stays the proceedings while the panelists review it.[207] Once the Panel renders an opinion on whether there was an additional breach of the standard of care, the court regains jurisdiction and proceeds with adjudication.[208] Following the proposed statute, courts will not have to decide whether *Miller* or *Chambers* is more applicable to each case.[209]

If the Indiana General Assembly passes a similar statute to the Panel chapter of the Act, the three major problems under the current Act will be resolved.[210] First, attorneys will be able to honor the ongoing duty to update discovery responses until trial, and the statute ensures that a

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201 *See supra* Part III.A (considering the conflicting rules of law produced by *Miller* and *Chambers*).

202 *See supra* notes 77–83 (reviewing *Miller*).

203 *See supra* notes 84–90 (discussing *Chambers*).

204 *See supra* Part IV (proposing an additional section to chapter ten of the Act as a legislative remedy to the issue created by *Chambers*); *supra* Part I (providing a hypothetical scenario that highlights the implications of *Chambers*).

205 *See supra* Part I (providing a hypothetical scenario that highlights the implications of *Chambers*); *supra* Part IV (proposing a method by which the problem presented in the hypothetical scenario can be resolved by the trial judge).

206 *See supra* Part I (providing a hypothetical scenario); *supra* Part IV.A (resolving the issue raised in the scenario through the proposed statute).

207 *See supra* Part IV.B (arguing that the proposed statute provides clear guidelines to trial judges).

208 *See supra* Part IV.B (asserting that the proposed statute allows the trial court to retain limited jurisdiction during the additional Panel review to ensure the process is timely).

209 *See supra* Part II.A (discussing the conflicting decisions in *Miller* and *Chambers*).

210 *See supra* Part III (explaining the implications of the current law); *supra* Part IV.B (addressing the concerns of each through the proposed statute).

Panel may review newly discovered evidence.[211] Second, plaintiffs will be afforded the opportunity to litigate based on an additional breach, even after a Panel reviews the evidence of the additional breach.[212] Finally, Indiana courts will have concrete statutory language to follow, which will resolve any inconsistency in case law.[213] Without legislative action from the Indiana General Assembly, the "big fish" defendants, like Lynniebrook Hospital in the hypothetical, will continue to be off the hook for injuries caused by its employees if the relevant evidence is buried deep enough that it cannot be discovered before a Panel renders an opinion.[214]

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211 *See supra* Part II.D (explaining the ongoing duty rule and the duties of the Panel).

212 *See supra* Part IV.B (explaining how the proposed statute will ensure parties can fully litigate all claims of breaches in the standard of care by health care providers).

213 *See supra* Part III.A (analyzing the opposite holdings in *Miller* and *Chambers* due to varying judicial interpretation of the statutes and case law).

214 *See supra* Part I (posing a hypothetical scenario to be resolved by the statutory section proposed in Part IV.A); *supra* Part IV.B (addressing the future implications to medical malpractice cases if the Indiana General Assembly does not adopt a new statute addressing the problematic case law created by *Chambers*).

* J.D. Candidate, Valparaiso University Law School (2015); B.S., Criminal Justice, Indiana University East (2011). This Note is my first publication and is dedicated to my husband, John Green, who is my biggest supporter. John, I appreciate your patience and love for me while I spent so much time on this Note, and on my entire law school career. I would also like to thank my dad, Bob Bullock, for cheering me on through this whole experience. Special thanks to Lake County Superior Court Civil Division 6 Judge John R. Pera for the wonderful opportunity to clerk for you and for providing the inspiration for the topic of this Note. Thank you to my Faculty Advisor, Adjunct Professor Daniel A. Gioia, for helping me understand this area of law with your endless knowledge and experience. Finally, thank you to the Valparaiso University Law Review Volume 48 Executive Board and my mentor, Danelle Albosta, for your edits, advice, and encouragement.