

DENTAL PROVIDER MALPRACTICE AMENDMENTS

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Jordan D. Teuscher

Senate Sponsor: Michael S. Kennedy

LONG TITLE

General Description:

This bill amends the Utah Health Care Malpractice Act.

Highlighted Provisions:

This bill:

- ▶ exempts dental care providers from the requirement for a prelitigation hearing panel in a health care malpractice action.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78B-3-403, as last amended by Laws of Utah 2019, Chapter 349

78B-3-412, as last amended by Laws of Utah 2010, Chapter 97

78B-3-416, as last amended by Laws of Utah 2020, Chapter 339

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78B-3-403** is amended to read:

78B-3-403. Definitions.

As used in this part:

(1) "Audiologist" means a person licensed to practice audiology under Title 58, Chapter 41, Speech-Language Pathology and Audiology Licensing Act.

(2) "Certified social worker" means a person licensed to practice as a certified social worker under Section 58-60-205.

(3) "Chiropractic physician" means a person licensed to practice chiropractic under Title 58, Chapter 73, Chiropractic Physician Practice Act.

(4) "Clinical social worker" means a person licensed to practice as a clinical social worker under Section 58-60-205.

(5) "Commissioner" means the commissioner of insurance as provided in Section 31A-2-102.

(6) "Dental hygienist" means a person licensed to engage in the practice of dental hygiene as defined in Section 58-69-102.

(7) "Dental care provider" means any person, partnership, association, corporation, or other facility or institution who causes to be rendered or who renders dental care or professional services as a dentist, dental hygienist, or other person rendering similar care and services relating to or arising out of the practice of dentistry or the practice of dental hygiene, and the officers, employees, or agents of any of the above acting in the course and scope of their employment.

~~[(7)]~~ (8) "Dentist" means a person licensed to engage in the practice of dentistry as defined in Section 58-69-102.

~~[(8)]~~ (9) "Division" means the Division of Occupational and Professional Licensing created in Section 58-1-103.

~~[(9)]~~ (10) "Future damages" includes a judgment creditor's damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering.

~~[(10)]~~ (11) "Health care" means any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

~~[(11)]~~ (12) "Health care facility" means general acute hospitals, specialty hospitals, home health agencies, hospices, nursing care facilities, assisted living facilities, birthing

centers, ambulatory surgical facilities, small health care facilities, health care facilities owned or operated by health maintenance organizations, and end stage renal disease facilities.

~~[(12)]~~ (13) "Health care provider" includes any person, partnership, association, corporation, or other facility or institution who causes to be rendered or who renders health care or professional services as a hospital, health care facility, physician, physician assistant, registered nurse, licensed practical nurse, nurse-midwife, licensed direct-entry midwife, dentist, dental hygienist, optometrist, clinical laboratory technologist, pharmacist, physical therapist, physical therapist assistant, podiatric physician, psychologist, chiropractic physician, naturopathic physician, osteopathic physician, osteopathic physician and surgeon, audiologist, speech-language pathologist, clinical social worker, certified social worker, social service worker, marriage and family counselor, practitioner of obstetrics, licensed athletic trainer, or others rendering similar care and services relating to or arising out of the health needs of persons or groups of persons and officers, employees, or agents of any of the above acting in the course and scope of their employment.

~~[(13)]~~ (14) "Hospital" means a public or private institution licensed under Title 26, Chapter 21, Health Care Facility Licensing and Inspection Act.

~~[(14)]~~ (15) "Licensed athletic trainer" means a person licensed under Title 58, Chapter 40a, Athletic Trainer Licensing Act.

~~[(15)]~~ (16) "Licensed direct-entry midwife" means a person licensed under the Direct-entry Midwife Act to engage in the practice of direct-entry midwifery as defined in Section [58-77-102](#).

~~[(16)]~~ (17) "Licensed practical nurse" means a person licensed to practice as a licensed practical nurse as provided in Section [58-31b-301](#).

~~[(17)]~~ (18) "Malpractice action against a health care provider" means any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider.

~~[(18)]~~ (19) "Marriage and family therapist" means a person licensed to practice as a

marriage therapist or family therapist under Sections 58-60-305 and 58-60-405.

~~[(19)]~~ (20) "Naturopathic physician" means a person licensed to engage in the practice of naturopathic medicine as defined in Section 58-71-102.

~~[(20)]~~ (21) "Nurse-midwife" means a person licensed to engage in practice as a nurse midwife under Section 58-44a-301.

~~[(21)]~~ (22) "Optometrist" means a person licensed to practice optometry under Title 58, Chapter 16a, Utah Optometry Practice Act.

~~[(22)]~~ (23) "Osteopathic physician" means a person licensed to practice osteopathy under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

~~[(23)]~~ (24) "Patient" means a person who is under the care of a health care provider, under a contract, express or implied.

~~[(24)]~~ (25) "Periodic payments" means the payment of money or delivery of other property to a judgment creditor at intervals ordered by the court.

~~[(25)]~~ (26) "Pharmacist" means a person licensed to practice pharmacy as provided in Section 58-17b-301.

~~[(26)]~~ (27) "Physical therapist" means a person licensed to practice physical therapy under Title 58, Chapter 24b, Physical Therapy Practice Act.

~~[(27)]~~ (28) "Physical therapist assistant" means a person licensed to practice physical therapy, within the scope of a physical therapist assistant license, under Title 58, Chapter 24b, Physical Therapy Practice Act.

~~[(28)]~~ (29) "Physician" means a person licensed to practice medicine and surgery under Title 58, Chapter 67, Utah Medical Practice Act.

~~[(29)]~~ (30) "Physician assistant" means a person licensed to practice as a physician assistant under Title 58, Chapter 70a, Utah Physician Assistant Act.

~~[(30)]~~ (31) "Podiatric physician" means a person licensed to practice podiatry under Title 58, Chapter 5a, Podiatric Physician Licensing Act.

~~[(31)]~~ (32) "Practitioner of obstetrics" means a person licensed to practice as a physician in this state under Title 58, Chapter 67, Utah Medical Practice Act, or under Title 58,

Chapter 68, Utah Osteopathic Medical Practice Act.

~~[(32)]~~ (33) "Psychologist" means a person licensed under Title 58, Chapter 61, Psychologist Licensing Act, to engage in the practice of psychology as defined in Section 58-61-102.

~~[(33)]~~ (34) "Registered nurse" means a person licensed to practice professional nursing as provided in Section 58-31b-301.

~~[(34)]~~ (35) "Relative" means a patient's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half brother, half sister, or spouse's parents. The term includes relationships that are created as a result of adoption.

~~[(35)]~~ (36) "Representative" means the spouse, parent, guardian, trustee, attorney-in-fact, person designated to make decisions on behalf of a patient under a medical power of attorney, or other legal agent of the patient.

~~[(36)]~~ (37) "Social service worker" means a person licensed to practice as a social service worker under Section 58-60-205.

~~[(37)]~~ (38) "Speech-language pathologist" means a person licensed to practice speech-language pathology under Title 58, Chapter 41, Speech-Language Pathology and Audiology Licensing Act.

~~[(38)]~~ (39) "Tort" means any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another.

~~[(39)]~~ (40) "Unanticipated outcome" means the outcome of a medical treatment or procedure that differs from an expected result.

Section 2. Section **78B-3-412** is amended to read:

78B-3-412. Notice of intent to commence action.

(1) A malpractice action against a health care provider may not be initiated unless and until the plaintiff:

(a) gives the prospective defendant or his executor or successor, at least 90 days' prior notice of intent to commence an action; and

(b) except for an action against a dentist or a dental care provider, the plaintiff receives

a certificate of compliance from the division in accordance with Section 78B-3-418.

(2) The notice shall include:

(a) a general statement of the nature of the claim;

(b) the persons involved;

(c) the date, time, and place of the occurrence;

(d) the circumstances surrounding the claim;

(e) specific allegations of misconduct on the part of the prospective defendant; and

(f) the nature of the alleged injuries and other damages sustained.

(3) Notice may be in letter or affidavit form executed by the plaintiff or his attorney.

Service shall be accomplished by persons authorized and in the manner prescribed by the Utah Rules of Civil Procedure for the service of the summons and complaint in a civil action or by certified mail, return receipt requested, in which case notice shall be considered served on the date of mailing.

(4) Notice shall be served within the time allowed for commencing a malpractice action against a health care provider. If the notice is served less than 90 days prior to the expiration of the applicable time period, the time for commencing the malpractice action against the health care provider shall be extended to 120 days from the date of service of notice.

(5) This section shall, for purposes of determining its retroactivity, not be construed as relating to the limitation on the time for commencing any action, and shall apply only to causes of action arising on or after April 1, 1976. This section shall not apply to third party actions, counterclaims or crossclaims against a health care provider.

Section 3. Section 78B-3-416 is amended to read:

78B-3-416. Division to provide panel -- Exemption -- Procedures -- Statute of limitations tolled -- Composition of panel -- Expenses -- Division authorized to set license fees.

(1) (a) The division shall provide a hearing panel in alleged medical liability cases against health care providers as defined in Section 78B-3-403, except dentists or dental care

170 providers.

171 (b) (i) The division shall establish procedures for prelitigation consideration of medical
172 liability claims for damages arising out of the provision of or alleged failure to provide health
173 care.

174 (ii) The division may establish rules necessary to administer the process and
175 procedures related to prelitigation hearings and the conduct of prelitigation hearings in
176 accordance with Sections 78B-3-416 through 78B-3-420.

177 (c) The proceedings are informal, nonbinding, and are not subject to Title 63G, Chapter
178 4, Administrative Procedures Act, but are compulsory as a condition precedent to commencing
179 litigation.

180 (d) Proceedings conducted under authority of this section are confidential, privileged,
181 and immune from civil process.

182 (e) The division may not provide more than one hearing panel for each alleged medical
183 liability case against a health care provider.

184 (2) (a) The party initiating a medical liability action shall file a request for prelitigation
185 panel review with the division within 60 days after the service of a statutory notice of intent to
186 commence action under Section 78B-3-412.

187 (b) The request shall include a copy of the notice of intent to commence action. The
188 request shall be mailed to all health care providers named in the notice and request.

189 (3) (a) The filing of a request for prelitigation panel review under this section tolls the
190 applicable statute of limitations until the later of:

191 (i) 60 days following the division's issuance of:

192 (A) an opinion by the prelitigation panel; or

193 (B) a certificate of compliance under Section 78B-3-418; or

194 (ii) the expiration of the time for holding a hearing under Subsection (3)(b)(ii).

195 (b) The division shall:

196 (i) send any opinion issued by the panel to all parties by regular mail; and

197 (ii) complete a prelitigation hearing under this section within:

198 (A) 180 days after the filing of the request for prelitigation panel review; or

199 (B) any longer period as agreed upon in writing by all parties to the review.

200 (c) If the prelitigation hearing has not been completed within the time limits
201 established in Subsection (3)(b)(ii), the claimant shall:

202 (i) file an affidavit of merit under the provisions of Section 78B-3-423; or

203 (ii) file an affidavit with the division within 180 days of the request for pre-litigation
204 review, in accordance with Subsection (3)(d), alleging that the respondent has failed to
205 reasonably cooperate in scheduling the hearing.

206 (d) If the claimant files an affidavit under Subsection (3)(c)(ii):

207 (i) within 15 days of the filing of the affidavit under Subsection (3)(c)(ii), the division
208 shall determine whether either the respondent or the claimant failed to reasonably cooperate in
209 the scheduling of a pre-litigation hearing; and

210 (ii) (A) if the determination is that the respondent failed to reasonably cooperate in the
211 scheduling of a hearing, and the claimant did not fail to reasonably cooperate, the division
212 shall, issue a certificate of compliance for the claimant in accordance with Section 78B-3-418;
213 or

214 (B) if the division makes a determination other than the determination in Subsection
215 (3)(d)(ii)(A), the claimant shall file an affidavit of merit in accordance with Section 78B-3-423,
216 within 30 days of the determination of the division under this Subsection (3).

217 (e) (i) The claimant and any respondent may agree by written stipulation that no useful
218 purpose would be served by convening a prelitigation panel under this section.

219 (ii) When the stipulation is filed with the division, the division shall within 10 days
220 after receipt issue a certificate of compliance under Section 78B-3-418, as it concerns the
221 stipulating respondent, and stating that the claimant has complied with all conditions precedent
222 to the commencement of litigation regarding the claim.

223 (4) The division shall provide for and appoint an appropriate panel or panels to hear
224 complaints of medical liability and damages, made by or on behalf of any patient who is an
225 alleged victim of medical liability. The panels are composed of:

(a) one member who is a resident lawyer currently licensed and in good standing to practice law in this state and who shall serve as chairman of the panel, who is appointed by the division from among qualified individuals who have registered with the division indicating a willingness to serve as panel members, and a willingness to comply with the rules of professional conduct governing lawyers in the state, and who has completed division training regarding conduct of panel hearings;

(b) (i) one or more members who are licensed health care providers listed under Section 78B-3-403, who are practicing and knowledgeable in the same specialty as the proposed defendant, and who are appointed by the division in accordance with Subsection (5); or

(ii) in claims against only a health care facility or the facility's employees, one member who is an individual currently serving in a health care facility administration position directly related to health care facility operations or conduct that includes responsibility for the area of practice that is the subject of the liability claim, and who is appointed by the division; and

(c) a lay panelist who is not a lawyer, doctor, hospital employee, or other health care provider, and who is a responsible citizen of the state, selected and appointed by the division from among individuals who have completed division training with respect to panel hearings.

(5) (a) Each person listed as a health care provider in Section 78B-3-403 and practicing under a license issued by the state, is obligated as a condition of holding that license to participate as a member of a medical liability prelitigation panel at reasonable times, places, and intervals, upon issuance, with advance notice given in a reasonable time frame, by the division of an Order to Participate as a Medical Liability Prelitigation Panel Member.

(b) A licensee may be excused from appearance and participation as a panel member upon the division finding participation by the licensee will create an unreasonable burden or hardship upon the licensee.

(c) A licensee whom the division finds failed to appear and participate as a panel member when so ordered, without adequate explanation or justification and without being excused for cause by the division, may be assessed an administrative fine not to exceed \$5,000.

(d) A licensee whom the division finds intentionally or repeatedly failed to appear and participate as a panel member when so ordered, without adequate explanation or justification and without being excused for cause by the division, may be assessed an administrative fine not to exceed \$5,000, and is guilty of unprofessional conduct.

(e) All fines collected under Subsections (5)(c) and (d) shall be deposited in the Physicians Education Fund created in Section 58-67a-1.

(f) The director of the division may collect a fine that is not paid by:

(i) referring the matter to a collection agency; or

(ii) bringing an action in the district court of the county where the person against whom the penalty is imposed resides or in the county where the office of the director is located.

(g) A county attorney or the attorney general of the state shall provide legal assistance and advice to the director in an action to collect a fine.

(h) A court shall award reasonable attorney fees and costs to the prevailing party in an action brought by the division to collect a fine.

(6) Each person selected as a panel member shall certify, under oath, that he has no bias or conflict of interest with respect to any matter under consideration.

(7) A member of the prelitigation hearing panel may not receive compensation or benefits for the member's service, but may receive per diem and travel expenses in accordance with:

(a) Section 63A-3-106;

(b) Section 63A-3-107; and

(c) rules made by the Division of Finance pursuant to Sections 63A-3-106 and 63A-3-107.

(8) (a) In addition to the actual cost of administering the licensure of health care providers, the division may set license fees of health care providers within the limits established by law equal to their proportionate costs of administering prelitigation panels.

(b) The claimant bears none of the costs of administering the prelitigation panel except under Section 78B-3-420.

