

28 78B-3-420, as renumbered and amended by Laws of Utah 2008, Chapter 3

29 78B-3-423, as last amended by Laws of Utah 2018, Chapter 440



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

32 Section 1. Section 58-60-112 is amended to read:

33 **58-60-112. Reporting of unprofessional or unlawful conduct -- Immunity from**
34 **liability -- Reporting conduct of court-appointed therapist.**

35 (1) Upon learning of an act of unlawful or unprofessional conduct as defined in Section
36 58-60-102 by a person licensed under this chapter or an individual not licensed under this
37 chapter and engaged in acts or practices regulated under this chapter, that results in disciplinary
38 action by a licensed health care facility, professional practice group, or professional society, or
39 that results in a significant adverse impact upon the public health, safety, or welfare, the
40 following shall report the conduct in writing to the division within 10 days after learning of the
41 disciplinary action or the conduct unless the individual or person knows it has been reported:

42 (a) a licensed health care facility or organization in which an individual licensed under
43 this chapter engages in practice;

44 (b) an individual licensed under this chapter; and

45 (c) a professional society or organization whose membership is individuals licensed
46 under this chapter and which has the authority to discipline or expel a member for acts of
47 unprofessional or unlawful conduct.

48 (2) Any individual reporting acts of unprofessional or unlawful conduct by an
49 individual licensed under this chapter is immune from liability arising out of the disclosure to
50 the extent the individual furnishes the information in good faith and without malice.

51 (3) (a) As defined in this Subsection (3):

52 (i) "Court-appointed therapist" means a mental health therapist ordered by a court to
53 provide psychotherapeutic treatment to an individual, a couple, or a family in a domestic case.

54 (ii) "Domestic case" means a proceeding under:

55 (A) Title 30, Chapter 3, Divorce;

56 (B) Title 30, Chapter 4, Separate Maintenance;

57 (C) Title 30, Chapter 5, Grandparents;

58 (D) Title 30, Chapter 5a, Custody and Visitation for Individuals Other than Parents

59 Act;

60 (E) Title 78B, Chapter 7, Protective Orders and Stalking Injunctions;

61 (F) Title 78B, Chapter 13, Utah Uniform Child Custody Jurisdiction and Enforcement

62 Act; or

63 (G) Title 78B, Chapter 15, Utah Uniform Parentage Act.

64 (b) If a court appoints a court-appointed therapist in a domestic case, a party to the
65 domestic case may not file a report against the court-appointed therapist for unlawful or
66 unprofessional conduct during the pendency of the domestic case, unless:

67 (i) the party has notified the court that appointed the court-appointed therapist; and

68 (ii) the appointing court has made a finding that the proposed complaint is not being
69 filed in bad faith or with the intent to harass the court-appointed therapist.

70 Section 2. Section **78B-3-416** is amended to read:

71 **78B-3-416. Division to provide panel -- Exemption -- Procedures -- Statute of**
72 **limitations tolled -- Composition of panel -- Expenses -- Division authorized to set license**
73 **fees.**

74 (1) (a) The division shall provide a hearing panel in alleged medical liability cases
75 against health care providers as defined in Section [78B-3-403](#), except dentists.

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

79 (ii) The division may establish rules necessary to administer the process and
80 procedures related to prelitigation hearings and the conduct of prelitigation hearings in
81 accordance with Sections [78B-3-416](#) through [78B-3-420](#).

82 (c) The proceedings are informal, nonbinding, and are not subject to Title 63G, Chapter
83 4, Administrative Procedures Act, but are compulsory as a condition precedent to commencing
84 litigation.

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

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

89 (2) (a) The party initiating a medical liability action shall file a request for prelitigation

90 panel review with the division within 60 days after the service of a statutory notice of intent to
91 commence action under Section [78B-3-412](#).

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

94 (3) (a) As defined in this Subsection (3):

95 (i) "Court-appointed therapist" means a mental health therapist ordered by a court to
96 provide psychotherapeutic treatment to an individual, a couple, or a family in a domestic case.

97 (ii) "Domestic case" means a proceeding under:

98 (A) Title 30, Chapter 3, Divorce;

99 (B) Title 30, Chapter 4, Separate Maintenance;

100 (C) Title 30, Chapter 5, Grandparents;

101 (D) Title 30, Chapter 5a, Custody and Visitation for Individuals Other than Parents

102 Act;

103 (E) Title 78B, Chapter 7, Protective Orders and Stalking Injunctions;

104 (F) Title 78B, Chapter 13, Utah Uniform Child Custody Jurisdiction and Enforcement

105 Act; or

106 (G) Title 78B, Chapter 15, Utah Uniform Parentage Act.

107 (iii) "Mental health therapist" means the same as that term is defined in Section

108 [58-60-102](#).

109 (b) If a court appoints a court-appointed therapist in a domestic case, a party to the
110 domestic case may not file a request for a prelitigation panel review for a malpractice action
111 against the court-appointed therapist during the pendency of the domestic case, unless:

112 (i) the party has notified the court that appointed the court-appointed therapist; and

113 (ii) the appointing court has made a finding that the proposed complaint is not being
114 filed in bad faith or with the intent to harass the court-appointed therapist.

115 ~~[(3)]~~ (4) (a) The filing of a request for prelitigation panel review under this section tolls
116 the applicable statute of limitations until the later of:

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

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

119 (B) a certificate of compliance under Section [78B-3-418](#); or

120 (ii) the expiration of the time for holding a hearing under Subsection ~~[(3)]~~ (4)(b)(ii).

121 (b) The division shall:

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

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

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

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

126 (c) If the prelitigation hearing has not been completed within the time limits

127 established in Subsection [~~(3)~~] (4)(b)(ii), the claimant shall:

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

129 (ii) file an affidavit with the division within 180 days of the request for pre-litigation

130 review, in accordance with Subsection [~~(3)~~] (4)(d), alleging that the respondent has failed to

131 reasonably cooperate in scheduling the hearing.

132 (d) If the claimant files an affidavit under Subsection [~~(3)~~] (4)(c)(ii):

133 (i) within 15 days of the filing of the affidavit under Subsection [~~(3)~~] (4)(c)(ii), the

134 division shall determine whether either the respondent or the claimant failed to reasonably

135 cooperate in the scheduling of a pre-litigation hearing; and

136 (ii) (A) if the determination is that the respondent failed to reasonably cooperate in the

137 scheduling of a hearing, and the claimant did not fail to reasonably cooperate, the division

138 shall, issue a certificate of compliance for the claimant in accordance with Section 78B-3-418;

139 or

140 (B) if the division makes a determination other than the determination in Subsection

141 [~~(3)~~] (4)(d)(ii)(A), the claimant shall file an affidavit of merit in accordance with Section

142 78B-3-423, within 30 days of the determination of the division under this Subsection [~~(3)~~] (4).

143 (e) (i) The claimant and any respondent may agree by written stipulation that no useful

144 purpose would be served by convening a prelitigation panel under this section.

145 (ii) When the stipulation is filed with the division, the division shall within 10 days

146 after receipt issue a certificate of compliance under Section 78B-3-418, as it concerns the

147 stipulating respondent, and stating that the claimant has complied with all conditions precedent

148 to the commencement of litigation regarding the claim.

149 [~~(4)~~] (5) The division shall provide for and appoint an appropriate panel or panels to

150 hear complaints of medical liability and damages, made by or on behalf of any patient who is

151 an alleged victim of medical liability. The panels are composed of:

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

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

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

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

169 [~~(5)~~] (6) (a) Each person listed as a health care provider in Section 78B-3-403 and
170 practicing under a license issued by the state, is obligated as a condition of holding that license
171 to participate as a member of a medical liability prelitigation panel at reasonable times, places,
172 and intervals, upon issuance, with advance notice given in a reasonable time frame, by the
173 division of an Order to Participate as a Medical Liability Prelitigation Panel Member.

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

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

180 (d) A licensee whom the division finds intentionally or repeatedly failed to appear and
181 participate as a panel member when so ordered, without adequate explanation or justification
182 and without being excused for cause by the division, may be assessed an administrative fine not

183 to exceed \$5,000, and is guilty of unprofessional conduct.

184 (e) All fines collected under Subsections [~~(5)~~] (6)(c) and (d) shall be deposited [in] into
185 the Physicians Education Fund created in Section 58-67a-1.

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

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

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

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

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

194 [~~(6)~~] (7) Each person selected as a panel member shall certify, under oath, that he has
195 no bias or conflict of interest with respect to any matter under consideration.

196 [~~(7)~~] (8) A member of the prelitigation hearing panel may not receive compensation or
197 benefits for the member's service, but may receive per diem and travel expenses in accordance
198 with:

199 (a) Section 63A-3-106;

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

201 (c) rules made by the Division of Finance pursuant to Sections 63A-3-106 and
202 63A-3-107.

203 [~~(8)~~] (9) (a) In addition to the actual cost of administering the licensure of health care
204 providers, the division may set license fees of health care providers within the limits
205 established by law equal to their proportionate costs of administering prelitigation panels.

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

208 Section 3. Section 78B-3-418 is amended to read:

209 **78B-3-418. Decision and recommendations of panel -- No judicial or other review.**

210 (1) (a) The panel shall issue an opinion and the division shall issue a certificate of
211 compliance with the pre-litigation hearing requirements of this part in accordance with this
212 section.

213 (b) A certificate of compliance issued in accordance with this section is proof that the

214 claimant has complied with all conditions precedent under this part prior to the commencement
215 of litigation as required in Subsection 78B-3-412(1).

216 (2) (a) The panel shall render its opinion in writing not later than 30 days after the end
217 of the proceedings, and determine on the basis of the evidence whether:

- 218 (i) each claim against each health care provider has merit or has no merit; and
- 219 (ii) if a claim is meritorious, whether the conduct complained of resulted in harm to the
220 claimant.

221 (b) There is no judicial or other review or appeal of the panel's decision or
222 recommendations.

223 (3) The division shall issue a certificate of compliance to the claimant, for each
224 respondent named in the intent to file a claim under this part, if:

225 (a) for a named respondent, the panel issues an opinion of merit under Subsections
226 (2)(a)(i) and (ii);

227 (b) for a named respondent, the claimant files an affidavit of merit in accordance with
228 Section 78B-3-423 if the opinion under Subsection (1)(a) is non-meritorious under either
229 Subsection (2)(a)(i) or (ii);

230 (c) the claimant has complied with the provisions of Subsections 78B-3-416~~(3)~~(4)(c)
231 and (d); or

232 (d) the parties submitted a stipulation under Subsection 78B-3-416~~(3)~~(4)(e).

233 Section 4. Section 78B-3-420 is amended to read:

234 **78B-3-420. Proceedings considered a binding arbitration hearing upon written**
235 **agreement of parties -- Compensation to members of panel.**

236 Upon written agreement by all parties, the proceeding may be considered a binding
237 arbitration hearing and proceed under Title 78B, Chapter 11, Utah Uniform Arbitration Act,
238 except for the selection of the panel, which is done as set forth in Subsection
239 78B-3-416~~(4)~~(5). If the proceeding is considered an arbitration proceeding, the parties are
240 equally responsible for compensation to the members of the panel for services rendered.

241 Section 5. Section 78B-3-423 is amended to read:

242 **78B-3-423. Affidavit of merit.**

243 (1) (a) For a cause of action that arises on or after July 1, 2010, before a claimant may
244 receive a certificate of compliance under Sections 78B-3-416 and 78B-3-418, a claimant shall

245 file an affidavit of merit under this section.

246 (b) The claimant shall file an affidavit of merit:

247 (i) within 60 days after the day on which the pre-litigation panel issues an opinion, if
248 the claimant receives a finding from the pre-litigation panel in accordance with Section
249 78B-3-418 of non-meritorious for either:

250 (A) the claim of breach of applicable standard of care; or

251 (B) that the breach of care was the proximate cause of injury;

252 (ii) within 60 days after the day on which the time limit in Subsection

253 78B-3-416~~[(3)]~~(4)(b)(ii) expires, if a pre-litigation hearing is not held within the time limits
254 under Subsection 78B-3-416~~[(3)]~~(4)(b)(ii); or

255 (iii) within 30 days after the day on which the division makes a determination under
256 Subsection 78B-3-416~~[(3)]~~(4)(d)(ii)(B), if the division makes a determination under Subsection
257 78B-3-416~~[(3)]~~(4)(d)(ii)(B).

258 (c) A claimant who is required to file an affidavit of merit under Subsection (1)(a)
259 shall:

260 (i) file the affidavit of merit with the division; and

261 (ii) serve each defendant with the affidavit of merit in accordance with Subsection
262 78B-3-412(3).

263 (2) The affidavit of merit shall:

264 (a) be executed by the claimant's attorney or the claimant if the claimant is proceeding
265 pro se, stating that the affiant has consulted with and reviewed the facts of the case with a
266 health care provider who has determined after a review of the medical record and other relevant
267 material involved in the particular action that there is a reasonable and meritorious cause for
268 the filing of a medical liability action; and

269 (b) include an affidavit signed by a health care provider who meets the requirements of
270 Subsection (4):

271 (i) stating that in the health care provider's opinion, there are reasonable grounds to
272 believe that the applicable standard of care was breached;

273 (ii) stating that in the health care provider's opinion, the breach was a proximate cause
274 of the injury claimed in the notice of intent to commence action; and

275 (iii) stating the reasons for the health care provider's opinion.

276 (3) The statement required in Subsection (2)(b)(i) shall be waived if the claimant
277 received an opinion that there was a breach of the applicable standard of care under Subsection
278 78B-3-418(2)(a)(i).

279 (4) A health care provider who signs an affidavit under Subsection (2)(b) shall:

280 (a) if none of the respondents is a physician or an osteopathic physician, hold a current
281 unrestricted license issued by the appropriate licensing authority of Utah or another state in the
282 same specialty or of the same class of license as the respondents; or

283 (b) if at least one of the respondents is a physician or an osteopathic physician, hold a
284 current unrestricted license issued by the appropriate licensing authority of Utah or another
285 state to practice medicine in all its branches.

286 (5) A claimant's attorney or claimant may obtain up to a 60-day extension to file the
287 affidavit of merit if:

288 (a) the claimant or the claimant's attorney submits a signed affidavit for extension with
289 notice to the division attesting to the fact that the claimant is unable to submit an affidavit of
290 merit as required by this section because:

291 (i) a statute of limitations would impair the action; and

292 (ii) the affidavit of merit could not be obtained before the expiration of the statute of
293 limitations; and

294 (b) the claimant or claimant's attorney submits the affidavit for extension to each
295 named respondent in accordance with Subsection 78B-3-412(3) no later than 60 days after the
296 date specified in Subsection (1)(b)(i).

297 (6) (a) A claimant or claimant's attorney who submits allegations in an affidavit of
298 merit that are found to be without reasonable cause and untrue, based on information available
299 to the plaintiff at the time the affidavit was submitted to the division, is liable to the defendant
300 for the payment of reasonable expenses and reasonable attorney fees actually incurred by the
301 defendant or the defendant's insurer.

302 (b) An affidavit of merit is not admissible, and cannot be used for any purpose, in a
303 subsequent lawsuit based on the claim that is the subject of the affidavit, except for the purpose
304 of establishing the right to recovery under Subsection (6)(c).

305 (c) A court, or arbitrator under Section 78B-3-421, may award costs and attorney fees
306 under Subsection (6)(a) if the defendant files a motion for costs and attorney fees within 60

307 days of the judgment or dismissal of the action in favor of the defendant. The person making a
308 motion for attorney fees and costs may depose and examine the health care provider who
309 prepared the affidavit of merit under Subsection (2)(b).

310 (7) If a claimant or the claimant's attorney does not file an affidavit of merit as required
311 by this section, the division may not issue a certificate of compliance for the claimant and the
312 malpractice action shall be dismissed by the court.

313 (8) For each request for prelitigation panel review under Subsection 78B-3-416(2)(b),
314 the division shall compile the following information:

315 (a) whether the cause of action arose on or after July 1, 2010;

316 (b) the number of respondents named in the request; and

317 (c) for each respondent named in the request:

318 (i) the respondent's license class;

319 (ii) if the respondent has a professional specialty, the respondent's professional
320 specialty;

321 (iii) if the division does not issue a certificate of compliance at the conclusion of the
322 prelitigation process, the reason a certificate was not issued;

323 (iv) if the division issues a certificate of compliance, the reason the certificate of
324 compliance was issued;

325 (v) if an affidavit of merit was filed by the claimant, for each health care provider who
326 submitted an affidavit under Subsection (2)(b):

327 (A) the health care provider's license class and professional specialty; and

328 (B) whether the health care provider meets the requirements of Subsection
329 78B-3-416[(4)](5)(b); and

330 (vi) whether the claimant filed an action in court against the respondent.

331 (9) The division may require the following persons to submit the information to the
332 division necessary for the division to comply with Subsection (8):

333 (a) a claimant;

334 (b) a respondent;

335 (c) a health care provider who submits an affidavit under Subsection (2)(b); and

336 (d) a medical liability pre-litigation panel.