

R156. Commerce, Occupational and Professional Licensing.

R156-78B. Prelitigation Panel Review Rule.

R156-78B-1. Title.

This rule is known as the "Prelitigation Panel Review Rule".

R156-78B-2. Definitions.

In addition to the definitions in Section 78B-3-403, which shall apply to this rule:

- (1) "Answer" means a responsive answer to a request.
- (2) "Date of the panel's opinion", "issuance of an opinion", and "issue an opinion", as used in Subsections 78B-3-423(1)(a)(i), 78B-3-416(3)(a)(i)(A), and 78B-3-418(1)(a), respectively, mean the date the Division issues a panel opinion filed with the Division by a prelitigation panel.
- (3) "Director" means the Director of the Division of Occupational and Professional Licensing.
- (4) "File", "filing", or "filed" means a pleading or document filed with the Division with service to all parties as required in Section R156-78B-7.
- (5) "Findings", "conclusions", "determinations", or "results", as used in Section 78B-3-419, means a written outcome of a prelitigation panel whether each claim against each health care provider has merit, and if meritorious, whether the conduct complained of resulted in harm to the claimant.
- (6) "HIPAA" means the Health Insurance Portability and Accountability Act of 1996, enacted by Congress in Pub. L. No 104-91 as implemented by 45 CFR Parts 160 and 164, as amended.
- (7) "Issue" or "issued", as it relates to a written action or notice permitted or required from the Division, means the finalization of an action or notice by the Division as reflected by an authorized signature and date on the action or notice.
- (8) "Meritorious claim" means that there is a basis in fact and law to conclude that the standard of care has been breached and the petitioner has been injured thereby, such that the petitioner has a reasonable expectation of prevailing at trial.
- (9) "Motion" means a request for any action or relief permitted under Sections 78B-3-416 through 78B-3-420 or this rule.
- (10) "Nonmeritorious claim" means that the evidence before the panel is insufficient to conclude that the case is meritorious, but does not necessarily mean the case is frivolous.
- (11) "Notice" means a notice of intent to commence action under Section 78B-3-412.
- (12) "Panel" means the prelitigation panel appointed in accordance with Subsection 78B-3-416(4) to review a request.
- (13) (a) "Panel opinion" or "opinion" as shortened in context with reference to a panel opinion, as used in Sections 78B-3-418, 78B-3-419, and 78B-3-423, means the supplemental memorandum opinion rendered by the prelitigation panel as required by Subsection R156-78B-14(2), that articulates the basis for the panel's findings, determinations or results as to whether each claim against each health care provider has merit and, if meritorious, whether the conduct complained of resulted in harm to the claimant.
(b) If a supplemental memorandum opinion is not timely rendered by the prelitigation panel, "panel opinion" or "opinion" means the prelitigation panel findings, conclusions, determinations, or results.
- (14) "Party" means a petitioner or respondent.
- (15) "Person" means any natural person, sole proprietorship, joint venture, corporation, limited liability company, association, governmental subdivision or agency, or organization of any type.
- (16) "Petitioner" means any person who files a request with the Division.
- (17) "Pleadings" include the requests, answers, motions, briefs and any other documents filed by the parties to a request.
- (18) "Request" means a request for prelitigation panel review under Section 78B-3-416.
- (19) "Respondent" means any health care provider named in a request.
- (20) "Service" means service as set forth in Subsection R156-78B-7.

R156-78B-3. Authority - Purpose.

This rule is adopted by the Division under the authority of Subsection 78B-3-416(1)(b) to define, clarify, and establish the process and procedures which govern prelitigation panel reviews.

R156-78B-4. General Provisions.

(1) Purpose.

This rule is intended to secure the just, speedy and economical determination of all issues presented to the Division.

(2) Deviation from Rule.

Except as otherwise required by Title 78B, Chapter 3, the Division may permit a deviation from this rule when it finds compliance to be impractical or unnecessary.

(3) Computation of Time.

The time within which any act shall be done, as herein provided, shall be computed by excluding the first day and including the last, unless the last day is Saturday, Sunday or a state holiday, and then it is excluded and the period runs until the end of the next day which is a scheduled workday for the Division. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three days shall be added to the prescribed period.

R156-78B-5. Representations - Appearances.

(1) Representation of Parties.

(a) A party may be represented by counsel or may represent onself individually, or if not an individual, may represent itself through an officer or employee. For the purpose of this provision, the term "counsel" means active members of the Utah State Bar or active members of any other state bar.

(b) Counsel from a foreign licensing state shall submit a notice of appearance to the presiding officer along with a certificate of good standing from the foreign licensing state.

(2) Entry of Appearance of Representation.

Parties shall promptly enter their appearances by giving their names and addresses and stating their positions or interests in the proceeding. When possible, appearances shall be entered in writing concurrently with the filing of the request for petitioner and no later than 10 days from service of the request for respondent.

R156-78B-6. Pleadings.

(1) Docket Number and Title.

Upon receipt of a timely Request for Prelitigation Review, the Division shall assign a two letter code identifying the matter as involving this type of request (PR), a two digit code indicating the year the request was filed, a two digit code indicating the month the request was filed, and another number indicating chronological position among requests filed during the month. The Division shall give the matter a title in substantially the following form:

TABLE I

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

John Doe,
Petitioner

Request for
Prelitigation Review

-vs-

Richard Roe,

No. PR-XX-XX-XXX

Respondent

(2) Form and Content of Pleadings.

Pleadings must be double-spaced and typewritten and presented on standard 8 1/2" x 11" white paper. They must identify the proceeding by title and docket number, if known, and shall contain a clear and concise statement of the matter relied upon as a basis for the pleading, together with an appropriate prayer for relief when relief is sought. A request shall, by affirmation, set forth the date that the required notice was served, shall include a copy of the notice and shall reflect service of the request upon all parties named in the notice and request. When a petitioner fails to attach a copy of the notice to petitioner's request, the Division shall return the request to the petitioner with a written notice of incomplete request and conditional denial thereof. The notice shall advise the petitioner that his request is incomplete and that the request is denied unless the petitioner corrects the deficiency within the time period specified in the notice and otherwise meets all qualifications to have the request granted.

(3) Signing of Pleadings.

Pleadings shall be signed by the party or their counsel of record and shall indicate the addresses of the party and, if applicable, their counsel of record. The signature shall be deemed to be a certification that the signer has read the pleading and that, to the best of his knowledge and belief, there is good ground to support it.

(4) Answers.

A respondent named in a request may file an answer relative to the merits set forth in the petitioner's notice. Affirmative defenses shall be separately stated and numbered in an answer or raised at the time of the hearing. Any answer must be filed no later than 15 days following the filing of the request.

(5) Motions.

(a) Motions to be Filed in Writing.

Motions shall be in writing unless the motion could not have been anticipated prior to the prelitigation panel hearing.

(b) Time Periods for Filing Motions and Responding Thereto.

(i) Motions to Withdraw a Request.

Any motion to withdraw a request shall be filed no later than five days before the prelitigation panel hearing.

(ii) Motions Directed Toward a Request.

Any motion directed toward a request shall be filed no later than 15 days after service of the request.

(iii) Motions Directed Toward the Composition of a Panel.

Any motion directed toward the composition of a panel shall be filed no later than five days after discovering a basis therefore.

(iv) Motions to Dismiss.

Any motion to dismiss shall be filed no later than five days after discovering a basis therefore.

(v) Extraordinary Motions for Discovery or Perpetuation of Evidence.

Any motion seeking discovery or perpetuation of evidence for good cause shown demonstrating extraordinary circumstances shall be filed no later than 15 days before the prelitigation panel hearing.

(vi) Response to a Motion.

A response to a motion shall be filed no later than five days after service of the motion and any final reply shall be filed no later than five days after service of the response to the motion.

(c) Affidavits and Memoranda.

The Division or panel shall permit and may require affidavits and memoranda, or both, in support or contravention of a motion.

(d) The Division or panel may permit or require oral argument on a motion.

R156-78B-7. Filing and Service.

(1) Filing of Pleadings. All pleadings shall be filed with the Division with service thereof to all parties named in the notice. The Division may refuse to accept pleadings if they are not filed in accordance with the requirements of this rule.

(2) Process for Service.

(a) All pleadings and documents issued by the Division or panel that are required to be served shall at the option of the Division be served by personal service, first class mail, registered mail, certified mail, or by express mail. Personal service shall be made upon a party in accordance with the Utah Rules of Civil Procedure by any peace officer within the State of Utah or by any person specifically designated by the Division.

(b) A request for a prelitigation proceeding filed by a petitioner shall be served in accordance with the same process for service required for a notice of intent as set forth in Subsection 78B-3-412(3). All other pleadings or documents filed by a party shall at the option of the party be served by personal service, first class mail, registered mail, certified mail, or by express mail.

(c) When an attorney has entered an appearance on behalf of any party, service upon that attorney constitutes service upon the party so represented.

(3) Proof of Service.

(a) There shall appear on all pleadings or documents required to be served a certificate of service certifying the appropriate method of service as set forth in Subsection (2), in substantially the following form:

TABLE II

I hereby certify that I have this day served the foregoing document upon the parties of record in this proceeding set forth below (by delivering a copy thereof in person) (by mailing a copy thereof, properly addressed by first class mail) (by registered mail) (by certified mail) (by certified mail, return receipt requested) (by type of express mail):

(Name of parties of record)
(addresses)

Dated this (day) day of (month), (year).

(Signature)
(Title)

(b) Any pleading or document filed with the Division shall be accompanied by documentation of the service reflected in the certificate of service.

(4) Date of Service.

Pleadings or documents shall be considered served on the date of personal service or mailing date, as set forth in Subsection (2).

R156-78B-8. Panel Selection and Compensation.

(1) The Division shall commence the selection and appointment of panel members following the issuance of a notice of hearing pursuant to this rule.

(2) The selection and appointment of panel members shall be in accordance with Subsections 78B-3-416(4) and (5).

(3) (a) In accordance with Subsection 78B-3-416(4), whenever multiple respondents are identified in a request, the Division shall select and appoint a panel to sit in consideration of all claims against any respondent as follows:

(i) one lawyer member who is the chairman in accordance with Subsection 78B-3-416(4) (a);

(ii) one lay panelist member in accordance with Subsection 78B-3-416(4) (c);

(iii) one licensed health care provider who is practicing and knowledgeable for each specialty represented by the respondents in accordance with Subsection 78B-3-416(4) (b) (i); and

(iv) if a hospital or their employees are named as a respondent, one member who is an individual currently serving in a hospital administration position directly related to hospital operations or conduct that includes responsibility for the area of practice that is the subject of the liability claim, in accordance with Subsection 78B-3-416(4) (b) (ii).

(b) The distinction between a hospital administrator and a person serving in a hospital administration position referenced in Subsection 78B-3-416(4) (b) (ii) is significant and is hereby emphasized.

(c) The person serving in a hospital administration position referenced in Subsection 78B-3-416(4)(b)(ii) shall be from a different facility than the facility which is the subject of the alleged medical liability case, but may be from the same umbrella organization provided the panel member certifies under oath that he is free from bias or conflict of interest with respect to any matter under consideration as required by Subsection 78B-3-416(6).

(d) Petitioner and respondent may stipulate concerning the type of health care provider to be selected and appointed by the Division, unless the stipulation is in violation with the panel composition requirements set forth in Subsection 78B-3-416(4)(b).

(4) Upon stipulation of all parties, a motion to evaluate damages may be submitted to the Division whereupon the Division may appoint an additional panel member to assist in evaluating damages.

(5) The Division shall ensure that panelists possess all qualifications required by statute and this rule.

(6) Upon appointment to a prelitigation panel, each member thereof shall sign a written affirmation in substantially the following form:

TABLE III

I, (panel member), hereby affirm that, as a member of a prelitigation panel, I will discharge my responsibilities without bias towards any party. I also affirm that, to the best of my knowledge, no conflict of interest exists as to any matter which will be entrusted to my consideration as a panel member.

Dated this (day) day of (month), (year).

(Signature)

(7) Panel members shall be entitled to per diem compensation and travel expenses according to a schedule as established and published by the Division.

R156-78B-9. Action upon Request - Scheduling Procedures - Continuances.

(1) Action upon Request.

Upon receiving a request, the Division shall issue an order approving or denying the request.

(2) Criteria for Approving or Denying a Request.

The criteria for approving or denying a request shall be whether:

(a) the request is timely filed in accordance with Subsection 78B-3-416(2)(a);

(b) the request includes a copy of the notice in accordance with Subsection 78B-3-416(2)(b) and documentation that the notice was served in accordance with Section 78B-3-412; and

(c) the request has been mailed to all health care providers named in the notice and request as required by Subsection 78B-3-416(2)(b).

(3) Legal Effect of Denial of Request.

The denial of a request restarts the running of the applicable statute of limitations until an appropriate request is filed with the Division.

(4) Scheduling Procedures.

(a) If a request is approved, the order approving the request shall direct the party who made the request to contact all parties named in the request and notice to determine by agreement of the parties:

(i) what type of health care provider panelists are requested;

(ii) at least two dates acceptable to all parties on which a prelitigation panel hearing may be scheduled; and

(iii) whether or not the case will be submitted in accordance with Section R156-78B-13 and if so, the nature of the submission.

(b) The order shall direct the party who made the request to file the scheduling information with the Division, on forms available from the Division, no later than 20 days following the issuance of the order.

(c) If the party so directed fails to comply with the directive without good cause, the Division may schedule the hearing without further input from the party.

(d) No later than five days following the filing of the approved form, the Division shall issue a notice of hearing setting a date, time and a place for the prelitigation panel hearing. No hearing shall take place within the 35 day period immediately following the filing of a Request for Prelitigation Review, unless the parties and the Division consent to a shorter period of time.

(e) The Division shall thereafter promptly select and appoint a panel in accordance with Subsections 78B-3-416(4) and (5) and this rule.

(5) Continuances.

(a) Standard.

In order to prevail on a motion for a continuance the moving party must establish:

(i) that the motion was filed no later than five days after discovering the necessity for the motion and at least two days before the scheduled hearing;

(ii) that extraordinary facts and circumstances unknown and uncontrollable by the party at the time the hearing date was established justify a continuance;

(iii) that the rights of the other parties, the Division, and the panel will not be unfairly prejudiced if the hearing is continued; and

(iv) that a continuance will serve the best interests of the goals and objectives of the prelitigation panel review process.

(b) If a continuance is granted, the order shall direct the party who requested the continuance to contact all parties named in the request and notice to establish no less than two dates acceptable to all parties, on which the prelitigation panel hearing may be rescheduled.

(c) The order shall direct the party who requested the continuance to file the scheduling information with the Division, on forms approved by the Division, no later than five days following the issuance of the order.

(d) If a party so directed is the petitioner and the petitioner fails to comply with the directive without good cause, the Division shall dismiss the request without prejudice. Upon issuance of the order of dismissal by the Division, the applicable statute of limitations on the cause of action shall no longer be tolled. The petitioner shall be required to file another request prior to the scheduling of any further proceeding and, until this request is filed, the statute of limitations shall continue to run.

(e) If a party so directed is the respondent and the respondent fails to comply with the directive without good cause, the Division may establish a date for the prelitigation panel hearing acceptable to petitioner and disallow any further motions for continuances from respondent.

(f) No later than three days following the filing of the dates, the Division shall issue a notice of hearing resetting a date, time and a place for the prelitigation panel hearing.

(6) Requests Made By Incarcerated Person.

(a) If a request, notice, or other documentation indicates that the alleged malpractice occurred while the petitioner was incarcerated and the alleged malpractice claim is against the State of Utah, its agencies or employees, the request shall be denied based upon Subsection 63G-7-301(5)(j).

(b) Subsequent requests by or communications from a petitioner whose request has been denied under this subsection will not receive response unless the petitioner files an amended request and notice that demonstrates:

(i) that the alleged malpractice did not occur while the petitioner was incarcerated; or

(ii) that the alleged malpractice claim is not against the State of Utah, its agencies or employees or as provided in Section 63G-7-202.

R156-78B-10. Consequences of Failure to Appear at a Scheduled Hearing.

(1) Except as provided by Section R156-78B-13:

(a) If a party or a representative appointed by the party fails to appear for a hearing without good cause after due notice has been provided as to the scheduling of the hearing, the hearing shall proceed in the party's absence and the party shall lose the right to present any further evidence to the panel.

(b) If neither party nor their representatives appear for a hearing without good cause after due notice has been provided as to the scheduling of the hearing, the

Division shall dismiss the request without prejudice. The dismissal shall terminate the tolling of the applicable statute of limitations under Subsection 78B-3-416(3).

R156-78B-11. Prehearing Conferences.

The Division may, in exceptional circumstances as approved by a panel chair, upon written notice to all parties of record, schedule a prehearing conference with the panel for the purposes of formulating or simplifying the issues, obtaining admissions of fact and genuineness of documents which will avoid unnecessary proof, and agreeing to other matters as may expedite the orderly conduct of the prelitigation proceeding or the settlement thereof. Agreements reached during the conference shall be recorded in an appropriate order unless the parties enter into a written stipulation on the matters or agree to a statement thereof made on the record by the chairman of the panel.

R156-78B-12. Hearing Procedures.

(1) Authority Governing Hearing Procedures.

Prelitigation panel hearings are informal as provided by Subsection 78B-3-416(1)(c) and are not governed by Title 63G, Chapter 4, Utah Administrative Procedures Act, and they are closed to the public as provided by Subsection 78B-3-417(5)(a).

(2) Duration of Prelitigation Hearings.

The duration of a prelitigation hearing shall be limited to two hours except as otherwise permitted to be extended in duration by the panel chair.

(3) Hearings Closed to the Public.

In accordance with Subsection 78B-3-417(5)(a), prelitigation hearings are closed to the public.

(4) Attendance of Panel Members.

Except where a case is submitted in written form in accordance with Section R156-78B-13, all panel members appointed shall be present during the entire hearing.

(5) Order of Presentation of Evidence.

Unless otherwise directed by the panel at the hearing, the order of procedure and presentation of evidence will be as follows:

(a) Petitioner;

(b) Respondent; and

(c) Petitioner, if the panel chair permits petitioner to present rebuttal evidence.

(6) Method of Presentation of Evidence.

Evidence may be presented by any party on a narrative basis or through direct examination of said party by their counsel of record. The panel may make inquiry of any party pertinent to the issues to be addressed. If a motion to evaluate damages has been granted, the panel may properly take evidence as to that issue. As set forth in Section 78B-3-417, no party has the right to cross-examine, rebut, or demand that customary formalities of civil trials and court proceedings be followed. The panel may, however, request special or supplemental participation of some or all parties in particular respects, including oral argument, evidentiary rebuttal, or submission of briefs.

(7) Rules of Evidence.

Formal rules of evidence are not applicable. Any relevant evidence may be admitted if it is the type of evidence commonly relied upon by prudent people in the conduct of their affairs. The panel shall give effect to the rules of privilege recognized by law. Irrelevant, immaterial, and unduly repetitious evidence shall be excluded.

(8) Burden of Proof.

The petitioner shall be responsible for establishing a meritorious claim against any respondent, and if the issue of damages is presented, the amount of damages.

(9) Standard of Proof.

The standard of proof for prelitigation hearings is a preponderance of the evidence.

(10) Use of Evidence.

Use of evidence, documents, and exhibits submitted to a panel shall be in accordance with Subsection 78B-3-417(1) and Section 78B-3-418.

(11) Record of Hearing.

On its own motion, the panel may record the proceeding for the sole purpose of assisting the panel in its subsequent deliberation and issuance of an opinion. The

record may be made by means of tape recorder or other recording device. No tape recorder or other device shall be used by anyone otherwise present during the proceeding to record the matter. Upon issuance by the panel of its opinion, the record of the proceeding shall be destroyed.

(12) Subpoenas - Discovery and Perpetuation of Testimony.

(a) Subpoenas for Medical Records Authorized - Discovery and Perpetuation of Testimony Prohibited.

The Division may issue subpoenas for the production of medical records directly related to a claim of medical liability in accordance with Subsection 78B-3-417(2) and (3). However, except as permitted by Subsection 78B-3-417(2) and (3) and in accordance with Subsection 78B-3-417(4), there is not discovery or perpetuation of testimony in prelitigation panel hearings, except upon special order of the panel, and for good cause shown demonstrating extraordinary circumstances.

(b) Requirements and Process for Issuance of Subpoenas for Medical Records.

A request for a subpoena for medical records shall be prepared by the person requesting it in proper form for issuance by the Division and shall be supported by:

- (i) a written release for the medical records signed by the individual who is the subject of the medical record or by that individual's guardian or conservator; or
- (ii) an affidavit prepared by the person requesting the subpoena which shall include the indicated text:

TABLE IV

I hereby certify:

(1) that the medical record subject to the requested subpoena is believed by the person requesting the subpoena ("requester") to be directly related to the medical liability claim to which the subpoena is related;

(2) that the requester will comply with the requirements of HIPAA as set forth in 45 CFR 164.512(e), which governs the release of protected health information in the course of administrative proceedings;

(3) that more specifically with regard to the requirements of HIPAA, the requester will provide a written statement and documentation to the covered entity from whom the medical records are sought demonstrating satisfactory assurances that:

(a) the requestor provided the subject of the records notice of the subpoena, information about the governing prelitigation proceeding, a time period to object to the release of the subject's medical records, and that either no objections were filed or that objections were filed but resolved by a court of competent jurisdiction and the subpoena is consistent with the resolution, as specified in 45 CFR 164.512(e)(1)(ii)(A) and detailed in 45 CFR 164.512(e)(1)(iii); or

(b) the parties to the prelitigation proceeding have agreed to a qualified protective order and have presented it to a court of competent jurisdiction or the requestor has requested a qualified protective order from a court of competent jurisdiction, as specified in CFR 164.512(e)(1)(ii)(B) and detailed in 45 CFR 164.512(3)(1)(iv); and

(4) that if the recipient of the subpoena for medical records fails or refuses to comply with the subpoena, the requester understands that resolution of the issues regarding the subpoena needs to be through a court of competent jurisdiction.

R156-78B-13. Submission of Case in Written Form, by Proffer, or a Combination thereof - Requirements.

(1) A full prelitigation panel hearing is not required if the parties enter into a stipulation that no useful purpose would be served by convening a panel hearing as to any or all respondents or if the parties agree to submit their case as to any or all respondents to the panel in written form, by proffer of evidence, or by a combination thereof.

(2) Any case submitted in writing must include a legal argument addressing the relevant evidence and law with regard to the issues presented in the case.

R156-78B-14. Determination - Supplemental Opinion - Issuance of Panel Opinion -

Certificate of Compliance.

(1) Panel Determination.

As soon as is reasonably practicable following the conclusion of a hearing or submission of a case to the panel in accordance with Section R156-78B-13, and, if applicable, submission of briefs by the parties, the panel shall render and file with the Division a determination whether each claim against each health care provider has merit or has no merit, and if meritorious whether the conduct complained of resulted in harm to the claimant. If applicable, the determination shall also reflect the panel's evaluation of the damages sustained by the petitioner.

(2) Supplementary Memorandum Opinion.

Within 30 days after filing its determination, the panel shall render and file with the Division a memorandum opinion explaining the panel's determination. The chairman of the panel shall be responsible for the preparation of the memorandum opinion of the panel, but may delegate the initial preparation of the opinion to another member of the panel.

(3) Issuance of Panel Determination and Opinion.

In accordance with Subsections 78B-3-416(3)(a)(i)(A) and 78B-3-418(1)(a), it is the responsibility of a prelitigation panel to render its panel determination and opinion and file them with the Division, and the Division's responsibility to issue the panel determination and opinion.

(4) Certificate of Compliance.

(a) The Director or designee shall issue a certificate of compliance which recites that the petitioner has fully complied with the prelitigation panel requirements of Title 78B, Chapter 3, as follows:

(i) in the case of a meritorious finding or determination, the Division shall issue the certificate of compliance to the petitioner within 15 days after:

(A) the filing of the panel's memorandum opinion; or

(B) in the case of the panel's memorandum opinion not being filed, within 15 days after the deadline for the filing of the memorandum opinion;

(ii) in the case of a determination made under Subsection 78B-3-416(3)(d)(ii)(A), within 15 days after petitioner's filing of an affidavit of respondent's failure to reasonably cooperate in the scheduling of a prelitigation hearing;

(iii) in the case of a submission of a written stipulation that no useful purpose would be served by convening a prelitigation panel submitted under Subsection 78B-3-416(3)(e), within 15 days after the filing of the stipulation; and

(iv) in all other cases where an affidavit of merit is required as specified by Section 78B-3-423, within 15 days after the timely filing of the affidavit of merit.

(b) The Division shall include with its service of a certificate of compliance copies of supporting documentation including the applicable panel determination or finding, supplemental memorandum opinion, determination on petitioner's affidavit of respondent's failure to reasonably cooperate in the schedule of a prelitigation hearing, required affidavits of merit, etc.

(c) In accordance with Subsection 78B-3-423(6), a certificate of compliance shall not be issued to a person who fails to timely file a required affidavit of merit.

R156-78B-15. Affidavits alleging Failure to Reasonably Cooperate in Scheduling a Hearing.

(1) As required by Subsection 78B-3-416(3)(c)(ii), an affidavit submitted by a petitioner alleging a respondent's failure to reasonably cooperate in scheduling a prelitigation hearing shall be submitted within 180 days of petitioner's request for prelitigation panel review.

(2) The affidavit alleging respondent's failure to reasonably cooperate in scheduling a prelitigation hearing filed under Subsection (1) shall set forth specific factual allegations that:

(a) respondent failed to reasonably cooperate in scheduling a hearing; and

(b) the hearing could not be held within the jurisdictional time frame of 180 days from the date of the request for prelitigation review.

(3) Failure to reasonably cooperate in scheduling a hearing may include one or more of the following reasons:

(a) a respondent failed to agree upon a first and second choice of dates for a

prelitigation hearing;

(b) a respondent failed to reasonably participate in determining the type of health care providers requested for the prelitigation hearing panel; or

(c) a respondent submitted a motion for and obtained a continuance of the prelitigation hearing and failed to timely submit a notice of availability for a rescheduled hearing.

(4) An affidavit alleging failure to reasonably cooperate in scheduling a prelitigation hearing shall comply with Section R156-78B-6 governing pleadings and Section R156-78B-7 governing filing and service.

(5) A respondent may file a response to an affidavit alleging failure to reasonably cooperate in scheduling a prelitigation hearing within five days after the service of the affidavit. Any response shall be in the form of a counter affidavit.

(6) The Division shall review petitioner's affidavit alleging failure to reasonably cooperate in scheduling a hearing and respondent's counter affidavit, if any, and make a written determination within 15 days of the filing of petitioner's affidavit, under either Subsections 78B-3-416(3)(d)(ii)(A) or (B). The written determination shall be accompanied by a certificate of compliance or a notice to file an affidavit of merit, as appropriate.

R156-78B-16a. Affidavits of Merit - In General.

(1) The required affidavit of merit under Subsection 78B-3-423(1) shall consist of two or more affidavits, one executed by counsel or by a pro se claimant as required by Subsection 78B-3-423(2)(a) and one or more signed by an appropriate health care provider or providers as required by Subsections 78B-3-423(2)(b) and (3).

(2) The required affidavits shall comply with Section R156-78B-6 governing pleadings and Section R156-78B-7 governing filings and service.

R156-78B-16b. Affidavits of Merit - Affidavit of Counsel.

Each affidavit of merit executed by counsel or by a pro se claimant as required by Subsections 78B-3-423(1) and (2)(a) shall include the following text immediately prior to the affiant's signature:

TABLE V

I hereby certify that the affiant has consulted with and reviewed the facts of the case with an appropriate health care provider (or providers) and that the provider (or providers) has (have) determined after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of a medical liability action. The affidavit(s) of merit are attached.

R156-78B-16c. Affidavits of Merit - Affidavit of Health Care Provider or Providers.

(1) Each affidavit of merit signed by a health care provider as required by Subsections 78B-3-423(1) and (2)(b) shall include the following text immediately prior to the affiant's signature:

TABLE VI

I hereby certify that I am an appropriate health care provider qualified to render an affidavit of merit in this medical malpractice case as specified by Subsection 78B-3-423(3).

I further certify that I have reviewed the medical records and other relevant material involved in this medical malpractice case and have determined that in my opinion:

(1) There are reasonable grounds to believe that the applicable standard of care was breached.

(2) The breach was a proximate cause of the injury claimed in the notice of intent to commence action.

(3) The specific reasons for my opinion are as follows (explanation).

(2) As provided by Subsection 78B-3-423(2)(c), the statement that there are

reasonable grounds to believe that the applicable standard of care was breached shall be waived if the claimant received an opinion that there was a breach of the applicable standard of care under Subsection 78B-3-418(2) (a) (i).

R156-78B-16d. Affidavits of Merit - Appropriate Health Care Provider Affiant or Affiants.

The appropriate health care provider who is required to issue an affidavit of merit under Subsection 78B-3-423(3) and R156-78B-16c is clarified as follows. The health care provider shall:

(1) if none of the respondents is a physician under Title 58, Chapter 67, Utah Medical Practice Act, or an osteopathic physician under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act, be one or more health care providers who hold an active and in good standing license in Utah or another state in the same specialty or the same class of license as the respondents; or

(2) if at least one of the respondents is a physician under Title 58, Chapter 67, Utah Medical Practice Act, or an osteopathic physician under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act, be exclusively a physician who is licensed and in good standing in Utah or another state to practice medicine in all of its branches.

R156-78B-16e. Affidavits of Merit - Request for 60-day Extension to File.

(1) In accordance with Subsection 78B-3-423(4), a petitioner's request for a 60-day extension to file an affidavit of merit shall be supported by an affidavit signed by the petitioner's or petitioner's attorney that includes the following text immediately prior to the affiant's signature:

TABLE VII

I hereby certify that the claimant is unable to timely submit an affidavit of merit as required by Subsection 78B-3-423(1) because:

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

(2) the affidavit of merit could not be obtained before the expiration of the statute of limitations for the following reason or reasons (describe).

I further certify that this affidavit has been served on each respondent in accordance with Section R156-78B-7 on the earlier of:

(a) the required time frame specified in Subsection 78B-3-423(1)(b)(i); or

(b) the date this affidavit was filed with the Division.

(2) Any respondent may submit a response to a request for extension to file an affidavit of merit within five days after the service of the affidavit. Any response shall be in the form of a counter affidavit.

(3) The Division shall review a petitioner's affidavit in support of petitioner's request for a 60-day extension to file an affidavit of merit and respondent's counter affidavit, if any, and render a determination within 15 days after the filing of the request.

KEY: medical malpractice, prelitigation, certificate of compliance, affidavit of merit
Date of Enactment or Last Substantive Amendment: November 8, 2011
Notice of Continuation: February 2, 2012
Authorizing, and Implemented or Interpreted Law: 78B-3-416(1) (b)

**PRELITIGATION PANEL
REVIEW RULE**

**R156-78B
Utah Administrative Code
Issued November 8, 2011**

Disclaimer: The statute/rule above is an unofficial version provided for convenience only and may not be identical to the official versions on the Utah State Legislature (www.le.utah.gov) and the Utah Division of Administrative Rules (www.rules.utah.gov) websites.