

2002

HELEN LABELLE, SHEILA CARLSON, LINDA
BUCKLEY and MARILYN PHILLIPS, individuals
and as heirs of Norma Mary Harriman, Plaintiffs
and Appellants, v. MCKAY DEE HOSPITAL
CENTER, INTERMOUNTAIN HEALTH
CARE, INC., Utah corporations, DR. IVAN D.
WRIGHT, DR. HAROLD VONK and DR.
RONALD S. RANKIN, individuals, and JOHN
DOES 1-50 : Brief of Appellant

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Thor B. Roundy; Counsel for Appellants.

Robert G. Wright; Richards, Brandt, Miller & Nelson; Richard W. Campbell; Campbell & Campbell; JoAnn E. Carnahan; Burbidge, Carnahan & White; Counsel for Appellees.

Recommended Citation

Brief of Appellant, *Labelle v. McKay-Dee Hospital*, No. 20020204.00 (Utah Supreme Court, 2002).
https://digitalcommons.law.byu.edu/byu_sc2/2140

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

HELEN LABELLE, SHEILA	)	BRIEF OF THE APPELLANTS
CARLSON, LINDA BUCKLEY and)	
MARILYN PHILLIPS,	)	Appellate Court No.
individuals and as heirs of	)	20020204-SC
Norma Mary Harriman,)	
	)	Argument priority
Plaintiffs and Appellants,	)	classification: 15
)	
v.	)	Appeal from the Third
	)	District Court, Salt Lake
MCKAY DEE HOSPITAL CENTER,	)	County, Judge Timothy R.
INTERMOUNTAIN HEALTH CARE,	)	Hanson.
INC., Utah corporations,)	
DR. IVAN D. WRIGHT, DR.	)	Trial Court No. 010905108
HAROLD VONK and DR. RONALD)	
S. RANKIN, individuals, and	)	Subject to Assignment to
JOHN DOES 1-50,	)	the Court of Appeals
)	
Defendants and Appellees.)	

JoAnn E. Carnahan
BURBIDGE, CARNAHAN, OSTLER & WHITE
1400 Key Bank Tower
50 South Main Street
Salt Lake City, Utah 84144

Robert G. Wright
RICHARDS, BRANDT, MILLER & NELSON
7th Floor Key Bank Tower
50 South Main Street
Salt Lake City, Utah 84144

JUL 18 2002

Richard W. Campbell
CAMPBELL & CAMPBELL
2485 Grant Avenue, Suite 200
Ogden, Utah 84401

Thor B. Roundy
340 East 400 South, Suite 100
Salt Lake City, Utah 84111

JoAnn E. Carnahan
BURBIDGE, CARNAHAN, OSTLER & WHITE
1400 Key Bank Tower
50 South Main Street
Salt Lake City, Utah 84144

Attorneys for Defendants McKay Dee Hospital Center and
Intermountain Health Care, Inc.

Robert G. Wright
RICHARDS, BRANDT, MILLER & NELSON
7th Floor Key Bank Tower
50 South Main Street
Salt Lake City, Utah 84144

Attorneys for Defendant Ivan Wright

Richard W. Campbell
CAMPBELL & CAMPBELL
2485 Grant Avenue, Suite 200
Ogden, Utah 84401

Attorneys for Defendants Harold Vonk and Ronald S. Rankin

Thor B. Roundy
340 East 400 South, Suite 100
Salt Lake City, Utah 84111

Attorney for Plaintiffs Helen Labelle, Sheila Carlson, Linda
Buckley And Marilyn Phillips, individuals and as heirs of
Norma Mary Harriman

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	1
STATUTES, ORDINANCES AND RULES	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE TRIAL COURT HAD JURISDICTION	8
II. THE TRIAL COURT'S APPLICATION OF THE ACT VIOLATED CONSTITUTIONAL PROHIBITIONS	13
III. THE DIVISION VIOLATED PLAINTIFFS' RIGHTS TO DUE PROCESS AND ACCESS TO THE COURTS	20
CONCLUSION	25
SIGNATURE OF COUNSEL	25
CERTIFICATE OF SERVICE	26
ADDENDUM	
Exhibit "A": Minute Entry, dated December 19, 2001.	
Exhibit "B": Order of Dismissal, dated February 4, 2002.	
Exhibit "C": Utah Code Ann., Chapter 78, Title 14.	
Exhibit "D": Utah Administrative Code, Rules R156-78A.	

TABLE OF AUTHORITIES

CASES

<u>Allen v. Intermountain Health Care, Inc.</u> , 635	
P.2d 30 (Utah 1981)	8, 17, 20
<u>Avila v. Winn</u> , 794 P.2d 20 (Utah 1990)	1, 8, 20
<u>Berry by and through Berry v. Beech Aircraft</u> , 717	
P.2d 670 (Utah 1985)	2, 3, 13, 14, 15
<u>Carter v. Milford Valley Memorial Hosp.</u> , 996	
P.2d 1076 (Utah App. 2000)	1, 8, 20
<u>Malone v. Parker</u> , 826 P.2d 132 (Utah 1992)	20
<u>Morris v. Public Service Commission</u> , 321 P.2d 644	
(Utah)	3, 20
<u>Mountain Fuel Supply v. Salt Lake City</u> , 752 P.2d 884	
(Utah 1988)	1, 2, 3
<u>Ryan v. Gold Cross Servs., Inc.</u> , 903 P.2d	
423 (Utah 1995)	2
<u>Spackman Ex Rel Spackman v. Bd. Of Educ.</u> , 16	
P.3d 533 (Utah 2000)	3, 16
<u>State v. Frampton</u> , 737 P.2d 183 (Utah 1987) ...	2, 3, 15

STATUTES

<u>Utah Code Ann.</u> , Section 78-3-4	8
--	---

<u>Utah Code Ann.</u> , Section 78-14-2	3, 7, 12
<u>Utah Code Ann.</u> , Section 78-14-4	10
<u>Utah Code Ann.</u> , Section 78-14-8	9, 10
<u>Utah Code Ann.</u> , Section 78-14-12	1, 3, 9-12, 20

RULES

Utah Rules of Civil Procedure, Rule 60	23, 24
--	--------

OTHER AUTHORITIES

Utah Administrative Rules, Rule R156-78A	1, 5
Utah Administrative Rules, Rule R156-78A-4	12
Utah Administrative Rules, Rule R156-78A-7	23
Utah Administrative Rules, Rule R156-78A-9	23
Utah Constitution, Article I, Section 2	2, 13
Utah Constitution, Article I, Section 7	2, 13, 16
Utah Constitution, Article I, Section 11	2, 13
Utah Constitution, Article I, Section 24	2, 13
Utah Constitution, Article XVI, Section 5 ..	2, 13, 14
United States Constitution, Fifth Amendment	2, 13
United States Constitution, Fourteenth Amendment, Section 1	2, 13

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction in this matter pursuant to Section 78-2-2(3)(j), Utah Code Ann. (1953, as amended). The case has been assigned to the Court of Appeals.

STATEMENT OF THE ISSUES

I. Whether or not the trial court erred in holding that it had no jurisdiction over the action, solely on the basis that the applicable Request for Prelitigation Panel Review was not mailed to the named defendants on the date that it was filed with the Division. Utah Code Ann., Section 78-14-12; Avila v. Winn, 794 P.2d 20 (Utah 1990); Carter v. Milford Valley Memorial Hosp., 996 P.2d 1076 (Utah App. 2000). [R. 157-63, 203-06, 245-48.] With respect to an appeal which presents only questions of law, the trial court's rulings are accorded no deference and are reviewed for correctness. Mountain Fuel Supply v. Salt Lake City, 752 P.2d 884, 887 (Utah 1988).

II. Whether or not Utah Code Ann., Section 78-14-12 and Rule R156-78A of the Utah Administrative Rules, as

applied by the trial court, are unconstitutionally overbroad to the extent that the procedural provisions of the Act serve to limit claims against a special classification, as opposed the achievement of the stated legislative intent to "provide other procedural changes to expedite early evaluation and settlement of claims." State v. Frampton, 737 P.2d 183 (Utah 1987); Berry by and through Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985). [R. 157-161, 163, 204-205, 257, pp. 19-20, 23, 27-31.] A challenge to the constitutionality of a statute presents only questions of law, and the trial court's rulings are accorded no particular deference. Ryan v. Gold Cross Servs., Inc., 903 P.2d 423 (Utah 1995); Mountain Fuel Supply v. Salt Lake City, 752 P.2d 884, 887 (Utah 1988).

III. Whether or not the plaintiffs' constitutional rights under Article I, sections 2, 7, 11 and 24 and Article XVI, section 5 of the Utah Constitution and the Fifth and Fourteenth Amendments of the U.S. Constitution were violated by (1) Utah Administrative Rules, Rule R156, (2) the Division's action in deciding not to open

and process a file with regard to the Notice of Intent and Petition, (3) the Division's failure to provide notice to parties of its decision and actions, and (4) such other action of the Division as should be required by Utah Code Ann., Sections 78-14-2 and 78-14-12 so as to not make Utah Code Ann., Section 78-14-12 unconstitutionally overbroad and to otherwise avoid arbitrarily depriving the plaintiff's of their rights of due process and access to the courts. State v. Frampton, 737 P.2d 183 (Utah 1987); Berry by and through Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985); Spackman Ex Rel Spackman v. Bd. Of Educ., 16 P.3d 533 (Utah 2000); Morris v. Public Service Commission, 321 P.2d 644 (Utah). [R. 157-161, 163, 204-205, 257, pp. 19-20, 23, 27-31.] With respect to an appeal which presents only questions of law, the trial court's rulings are accorded no deference and are reviewed for correctness. Mountain Fuel Supply v. Salt Lake City, 752 P.2d 884, 887 (Utah 1988).

STATUTES, ORDINANCES AND RULES

Utah Code Ann., Section 78-14-12.

Utah Administrative Code, Rules R156-78A.

STATEMENT OF THE CASE

The above-captioned action involves claims of negligence and wrongful death against medical care providers of Norma Mary Harriman.

Following filing of the action in Third District Court, the case was dismissed. Based on matters considered outside the pleadings, the trial court addressed the matter under Utah Rules of Civil Procedure, Rule 56 as a motion for summary judgment. The trial court found that it did not have jurisdiction over the case as a consequence of the provisions of the Utah Health Care Malpractice Act (the "Act").

STATEMENT OF FACTS

Norma Mary Harriman died on or about March 3, 1999. On or about February 14, 2001, her heirs filed a Notice of Intent to Commence Legal Action (the "Notice of Intent") and a Petition for Prelitigation Review (the "Petition") with the Utah Division of Occupational Licensing (the "Division") pursuant to the Act. The Notice of Intent was sent by certified mail to all of the

applicable medical care providers. The Petition was not sent to the named parties, as none of them had yet been served in the action with the Division. [R. 26-35.]

No action was taken by the Division. [R. 73-75.] The Division made a conscious decision (1) not to notify the parties of the opening of a file relative to the Notice of Intent, (2) not to notify the parties that it had not received a copy of the Petition (or that it was lost), (3) not to notify the parties of any requirements of maintaining the action commenced by the filing of the Notice of Intent, (4) not to notify the parties of its decision to close the action commenced by the filing of the Notice of Intent, and (5) and not to provide for any remedy or procedure associated with the foregoing, whether by including the same in Rule R156-78A of the Utah Administrative Rules or informally, so as not to arbitrarily fail to accomplish the intent of Utah Code Ann., section 78-14-2 or Rule R156-78A to provide a process to "expedite early evaluation and settlement of claims," which is the only role of the Division and the

only purpose of filing a Notice of Intent or Petition.
[R. 73-75,]

The plaintiffs filed an action in Third District Court on June 13, 2001, alleging negligence and wrongful death against the medical care providers.

At the hearing held December 19, 2001, the Trial Court held that the failure to mail a copy of the Petition to the named defendants deprived the Trial Court of Jurisdiction. [R. 257.] Pursuant to said decision, on February 4, 2002, the Trial Court executed an Order of Dismissal. [R. 245-48.] Notice of Appeal was filed March 4, 2002. [R. 249-50.]

SUMMARY OF THE ARGUMENT

When a case falls under the Act, the courts in the state of Utah are not thereby deprived of jurisdiction. Jurisdiction with the Division is concurrent, until the jurisdiction of the Division is expires pursuant to Act.

As a condition precedent to commencement of litigation, a plaintiff must file a notice on intent to commence legal action and request a prelitigation panel review with the Division. Minor defects in the form of

the request for prelitigation panel review do not deprive the trial court of jurisdiction, and the Act actually provides that upon the expiration of the jurisdiction of the Division under the conditions of the present case that all prelitigation requirement shall be deemed satisfied.

The stated purpose of the prelitigation panel review, as stated by the Act, is "to provide other procedural changes to expedite early evaluation and settlement of claims." Utah Code Ann., section 78-14-2. To the extent that the Act has been interpreted by the trial court as a mechanism to limit the filing of lawsuits against health care providers, the Act is unconstitutional because its effect is to deprive a classification of equal access to the courts and because it deprives claimants of due process in certain circumstances.

Plaintiffs are entitled to constitutional protections in the administration of their claims by the Division. The Division deprived the plaintiffs in this case of their rights to due process and equal access to the courts.

ARGUMENT

I. THE TRIAL COURT HAD JURISDICTION.

The district courts have jurisdiction over claims of negligence and wrongful death pursuant to Utah Code Ann., Section 78-3-4. Nothing in the Act states any limitation on the jurisdiction of the district courts. The Utah Supreme Court has held that the district court may exercise that jurisdiction, even when certain procedural technicalities in the Act are not followed in the anticipated fashion. See Avila v. Winn, 794 P.2d 20 (Utah 1990) (District court had jurisdiction in action filed prior to completion of prelitigation panel review).

With respect to the prerequisites for filing a medical malpractice lawsuit, the appellate courts have identified (at least in dicta) three requirements provided by the Act with which the plaintiff must comply or face dismissal of the action. Carter v. Milford Valley Memorial Hosp., 996 P.2d 1076, 1079 (Utah App. 2000); Avila, supra; Allen v. Intermountain Health Care, Inc., 635 P.2d 30 (Utah 1981).

First, the plaintiff must file a notice of intent to commence legal action (the "Notice") and serve a copy on the applicable health care providers. See Utah Code Ann., Section 78-14-8. It is undisputed that each of the defendants was served with the notice of intent to commence an action and that the notice was filed with the Division of February 14, 2001. [R. 29-32.]

Second, the plaintiff must file a request for prelitigation panel review (the "Request"). See Utah Code Ann., Section 78-14-12(2). The trial court found a question of fact as to whether or not the Request had been filed by the plaintiff. [R. 245.] As a result of consideration of evidence outside the pleadings, the trial court addressed the matter pursuant to Utah Rules of Civil Procedure, Rule 56, or in other words construing the matter as though the Request had been filed. Under circumstances where the Division convenes a prelitigation panel, the plaintiff must submit to the review by the panel. See Utah Code Ann., Section 78-14-12(1); but see Utah Code Ann., Section 78-14-12(3)(b)(ii) (if prelitigation panel procedures not completed within 180

days of Request, then "the claimant is considered to have complied with all conditions precedent required under this section prior to the commencement of litigation"). The Division did not convene a prelitigation panel, and the plaintiff was thereby released from such requirement pursuant to Utah Code Ann., Section 78-14-12(3)(b)(ii). Moreover, as a result of the failure of the Division to timely complete the prelitigation panel review process, plaintiffs are "considered to have complied with all conditions precedent required under this section prior to the commencement of litigation." Id.

Third, the plaintiff must file the complaint with the district court within the abbreviated two-year statute of limitations period. Utah Code Ann., Section 78-14-4. The complaint must be filed at least 90 days after service of the Notice. Utah Code Ann., Section 78-14-8. Again, it is undisputed that the complaint was timely filed. The only dispute among the parties related to the Request.

Based on the foregoing, it can only be concluded that the trial court had jurisdiction in the action. The trial court had the discretion to either proceed with

litigation or to provide the parties with an opportunity for a prelitigation panel review before proceeding, or otherwise address the circumstances of the parties.

The trial court's finding that it had no jurisdiction because the Request was not mailed to the defendants at the time of filing was reversible error. The trial court took its decision from the language of the Act provided by Utah Code Ann., Section 78-14-12(2)(b), which states in part, "The request shall be mailed to all health care providers named in the notice and request." There is no basis to conclude that such provision is by itself jurisdictional. As stated above, Utah Code Ann., Section 78-14-12(3)(b)(ii) renders the question moot. The only relevant question is whether the Request was filed with the Division.

The parties refer to Utah Code Ann., Section 78-14-12(1)(c) for the proposition that "The proceedings are informal, nonbinding, ... but are compulsory as a condition precedent to commencing litigation." Yet, this provision refers to the conduct of proceedings arranged by the Division in response to a Request and not to the

technical accuracy of issues such as mailing the Request. Section 78-14-12(3)(b)(ii) clearly implies that such technicalities are not jurisdictional. Moreover, the legislative intent of the proceedings is stated in Section 78-14-2 as "to provide other procedural changes to expedite early evaluation and settlement of claims." The implementing rules similarly provide in R156-78A-4(1), "Liberal Construction. These rules shall be liberally construed to secure the just, speedy and economical determination of all issues presented to the division." The purpose of the statute and rules is not to limit medical malpractice claims through a mechanism that allows the Division to deprive claimants of their due process rights. Utah Code Ann., Section 78-14-12(1) makes it the responsibility of the Division to promulgate rules to achieve the purposes stated. This Court has jurisdiction to find that either the appropriate rules or procedures are not in place or that the Division did not otherwise act as they should. As discussed below, the trial court's interpretation of the purpose of the

statute as a mechanism for limiting claims is an unconstitutional interpretation.

Because the trial court has jurisdiction, appellants respectfully request that the order dismissing their claims be reversed and that the matter be remanded to the trial court to determine how to proceed with reference to litigation and/or convening of a prelitigation panel.

II. THE TRIAL COURT'S APPLICATION OF THE ACT VIOLATED CONSTITUTIONAL PROHIBITIONS.

The Utah Constitution provides guarantees in wrongful death cases, open access to the court for all citizens, equal protection and due process. Utah Constitution, and Article I, sections 2, 7, 11 and 24 and Article XVI, section 5. Similar due process rights are guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution.

Article I, Section 11, of the Utah Constitution is generally referred to as the "open courts" provision. Berry by and through Berry v. Beech Aircraft, 717 P.2d 670, 674 (Utah 1985). Among the purposes of Section 11 is the guaranty of "access to the courts and a judicial

procedure based on fairness and equality." Id. at 675. To satisfy the open courts provision of the Utah Constitution, legislation must be substantially equal in value or benefit to any remedy abrogated. Id. at 680. If no substitute remedy is provided, abrogation of the remedy can only be justified if there is a clear social evil to be eliminated and elimination of an existing legal remedy is not an arbitrary or unreasonable means of achieving the objective. Id. at 680. Defining the scope of Section 11 requires careful consideration of related constitutional issues, such as those of due process provided by Article 1, Section 7 of the Utah Constitution. Id. at 680. These protections impose a limitation on powerful groups, such as medical care providers and insurance companies, from using the political process to limit the rights of other groups. See Id. at 676.

Article XVI, section 5, of the Utah Constitution is intended to prevent abolition of the right of action for wrongful death, either in a wholesale or piecemeal fashion. Id. at 684. Application of Section 5 is

considerably more strict than the application of Section 11. Id. at 683.¹ Restrictions which limit the ability of a party to effectively pursue a remedy for wrongful death is "beyond legislative authority." Id. at 684. If such action is beyond legislative authority, then it is certainly beyond the authority of the Division, under the guise of legislative authority, to produce the same effect.

Another related constitutional issue involves substantive due process, guaranteed by the Utah Constitution, and Article I, section 7 and by the Fifth and Fourteenth Amendments of the U.S. Constitution. A statute may be overbroad in its application, and violate the interests of substantive due process, if its effect is to limit rights beyond an intended legitimate purpose. See e.g. State v. Frampton, 737 P.2d 183, 191-192 (Utah 1987).

¹ See Berry by and through Berry v. Beech Aircraft, 717 P.2d 670, 683-85 for a discussion of statutes declared unconstitutional or constitutional with reference to Article XVI, section 5.

All of the foregoing rights do not depend upon or defer to the legislature, but must be upheld as resting upon constitutional authority that is supreme to the legislature. See Spackman Ex Rel Spackman v. Bd. Of Educ., 16 P.3d 533, 535-36 (Utah 2000) (Article I, Section 7 is self executing clause).

At the hearing in question, the trial court specifically stated, "Well, but see, the rules of procedure really don't apply, do they? There are some standards that the legislature, right or wrong, has decided to give special treatment to health care providers. Whether you disagree with that or whether you don't, it's the law, and the Supreme Court says its constitutional, so you have got to jump through all of these hoops. It is like the notice on the governmental immunity act. There are certain things that you have got to do."

The governmental immunity act, referred to by the trial court, is a statute which provides parties with a right to sue certain government institutions in certain cases. Rather than limiting the rights of individuals to

commence litigation, it creates a right of action when certain requirements are met. The Act, on the other hand, serves as a limitation on actions. It must have a purpose other than the arbitrary limitation of access to the courts of a certain classification of plaintiffs. The legislature certainly understood this when they stated that the purpose of the prelitigation panel review, as discussed above, was "to provide other procedural changes to expedite early evaluation and settlement of claims" and not to limit actions against health care providers except by the statute of limitations imposed. The only limitation against filing actions which is provided by the Act that the Courts have confirmed is constitutional is the two-year statute of limitations. See Allen, supra.

The trial court further demonstrated its erroneous construction of the Act when it stated, "That doesn't make sense. If the purpose of it is to avoid filing lawsuits then why are we allowing-then why does the statute allow filing lawsuits in the middle of the prelitigation panel process." Again, the stated purpose

of the procedures involved in the prelitigation panel review process is to expedite the discussion of issues, not prevent Plaintiffs from going forward.

The Act provides no remedy to a plaintiff, only a non-binding forum for discussion of claims. If a purpose of the Act is to eliminate lawsuits against providers of medical care, then the Act cannot stand. Lawsuits against negligent parties is not an evil to be eliminated in society, but is instead an important remedy for injuries, particularly in wrongful death cases. On the other hand, if the purpose of the Act is "to provide other procedural changes to expedite early evaluation and settlement of claims," then the purpose is appropriate as long as the process does not have the unconstitutional effect of depriving parties of the right to bring an action in court, and as long as the Division and the courts adopt rules and administer the process with the purpose of early evaluation and settlement of claims in mind. If rules are adopted or administered, or if the Act is interpreted, in a fashion that eliminates claims without appropriate remedies for circumstances-- even

oversights--that may arise, then the effect of the Act becomes unconstitutional.

In other words, any provision of the Act that were to make strict compliance with filing and mailing the Request jurisdictional, would constitute an unconstitutional limitation on due process and access to the courts for the applicable classification of plaintiffs. Unless the Act is interpreted in the manner suggested by the Appellants in this action, as requiring the Division and permitting the court to convene a prelitigation panel when a filing is lost or in the event of some other irregularity, then the Act is unconstitutional.

In the present case, the circumstances involve the timely filing of the Notice with the Division, a Request which was filed with the Division and lost by the Division, and a Complaint that was timely filed in the District Court. The constitutional issues raised by the Appellants must be resolved in favor of permitting the Appellants to go forward as plaintiffs in this action.

The constitutionality of the Act as a limitation on the right of access to the courts, as well as the due process arguments concerning the Division addressed both above and below, are matters of first impression before this Court.²

III. THE DIVISION VIOLATED PLAINTIFFS' RIGHTS TO DUE PROCESS AND ACCESS TO THE COURTS.

An act by a administrative body which is taken without notice to affected parties violates due process. Morris v. Public Service Commission, 321 P.2d 644 (Utah).

The Division has a responsibility to parties that file a Notice and/or Request. First, the Division has

² Carter, supra, considered the interpretation of the term "health care provider" in the Act. Avila, supra, considered whether the district court had jurisdiction with regard to a prematurely filed complaint where irregularities existed with respect to the request for prelitigation panel review and the completion of such proceedings. The principles of estoppel in Avila, however, do have some application in the present case to the plaintiffs' reliance on the Division's silence. In Malone v. Parker, 826 P.2d 132, 136 (Utah 1992) the Court addressed the necessity of filing an action within 60 days following the service of the Notice. The Court did not consider the necessity of a prelitigation panel review, under a prior version of the statute, because it held that the issue was precluded by collateral estoppel. In Allen, supra, the Court only addressed the constitutionality of a two year statute of limitations.

been given the authority and responsibility to adopt rules implementing the Act in order to achieve the stated purposes of the Act. See Utah Code Ann., Section 78-14-12(1). As discussed above, the purpose of the role played by the Division is "to provide other procedural changes to expedite early evaluation and settlement of claims."

In the present case, the rules adopted by the Division are inadequate to protect the due process rights of claimants and their right of access to the courts. Even to the extent that the rules were adequate at some level, the policies and conduct of the Division, as described in the affidavit of Adele Bancroft, the prelitigation coordinator for the Division, dated July 30, 2001, are not being followed so as to protect the constitutional rights of claimants. [R. 73-75.]

Ms. Bancroft's affidavit seems to indicate that, as actually occurred in the present case, the Division has no procedure whatsoever for notification to claimants with regard to deficiencies in a file, including lost filings. She states,

8. If the Division had received a Request which was deficient for some reason, such as the failure to submit the approved fee, the Division would have denied the Request and would have a record of such denial.

9. Because a Request was not filed with the Division and the required filing fee was not submitted to the Division, no action was taken or required to be taken by the Division in this matter, and no prelitigation review was approved.

In her letter, dated July 12, 2001, Ms. Bancroft further stated, "It is my policy to hold any Notice of Intent to Commence Legal Action that are received without the proper accompanying documents for 60 days. If the appropriate Request and filing fee are not received within that time, the matter is considered "dead" and filed."

Ms. Bancroft makes no reference to any notice or due process procedures involving notification to the parties.³

³ The court should note that Ms. Bancroft had no personal knowledge concerning the filing of the Request. Ms. Bancroft was not the person at the in-take desk who received the request for appointment of a pre-litigation panel. She cannot testify about what happened to the request after it was filed, unless she testifies that she knows what happened to the document in question. Without an affidavit from the person who did the in-take, there was no one to counter the affidavit of Thor B. Roundy stating that the document in question was filed.

There appears to be nothing contained in any procedure that Ms. Bancroft follows aimed at achieving the purpose of providing "other procedural changes to expedite early evaluation and settlement of claims." Instead, it appears that she sees the role of the Division as creating a process barrier to the subsequent filing of litigation. She has adopted her own personal policy for handling filings she considers incomplete.

As another example, Utah Administrative Code R156-78A-7(1) permits the Division to reject pleadings if they are not filed in accordance with the requirements of the rules promulgated under the Act. Utah Administrative Code, Rule R156-78A-9(2) addresses the division's discretion to reject a petition if it is not mailed to all healthcare providers named therein. In the present case, the Division never rejected the Plaintiffs' Request. The Division's failure to reject the Request constitutes the Division's acceptance and affirmation that the petition was acceptable and should have been processed appropriately. However, nothing contained in Rule R156-78A assures the existence of due process or

notice. The courts clearly recognize such provisions as essential to the just administration of claims. For example, the Utah Rules of Civil Procedure, Rule 60, provides the court with broad discretion to address procedural oversights, whether caused by the courts or by the parties and their representatives. Without Rule 60, it would be very difficult to imagine the fair and equitable administration of the courts.

Finally, there is clearly no provision in the rules which provides safeguards for lost filings, notice to claimants of the status of their matter, expectations of the Division with regard to delays or irregularities in processing, and so forth. The present case illustrates how the constitutional rights of claimants are violated by the absence of such provisions and/or the manner in which the Division has chosen to consciously ignore such rights in favor of limiting actions against health care providers instead of providing "other procedural changes to expedite early evaluation and settlement of claims."

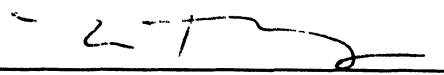
The trial court ignored the constitutional issues such as due process raised by the divisions' failure to

give the plaintiffs notice to the extent that there was a rejection of the Request. The trial court also ignored the failure of the Division to adopt and implement rules that achieved the legislative purpose of providing "other procedural changes to expedite early evaluation and settlement of claims."

CONCLUSION

Based on the foregoing arguments, the appellants respectfully request that this Court issue an Order declaring the trial court to have jurisdiction over the action, and directing the trial court either to proceed with the litigation of the matter pursuant to the Utah Rules of Civil Procedure or to order review by a prelitigation panel, with specific requirement that the plaintiffs be afforded appropriate due process remedies for the loss of the Request filed with the Division.

DATED this 18th day of July, 2002.



Thor B. Roundy
Attorney for Appellants

CERTIFICATE OF SERVICE BY MAIL

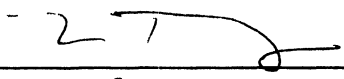
Thor B. Roundy
340 East 400 South, Suite 100
Salt Lake City, Utah 84111
Telephone (801) 364-3229
Bar No. 6435

I, THOR B. ROUNDY, certify that on this 18th day of July, 2002, I served a copy of the attached BRIEF OF THE APPELLANTS, Trial Court No. 010905108, Appellate Court No. 20020204-SC, upon counsel for the appellees in this matter by mailing two copies to each of them by first class mail with sufficient postage prepaid to the following address:

JoAnn E. Carnahan
BURBIDGE, CARNAHAN, OSTLER & WHITE
1400 Key Bank Tower
50 South Main Street
Salt Lake City, Utah 84144

Robert G. Wright
RICHARDS, BRANDT, MILLER & NELSON
7th Floor Key Bank Tower
50 South Main Street
Salt Lake City, Utah 84144

Richard W. Campbell
CAMPBELL & CAMPBELL
2485 Grant Avenue, Suite 200
Ogden, Utah 84401



Thor B. Roundy
Attorney for Appellants

THIRD DISTRICT COURT SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

MARILYN PHILLIPS Et al,	:	MINUTES
Plaintiff,	:	MINUTE ENTRY
	:	
	:	
vs.	:	Case No: 010905108 WD
	:	
JOHN DOES 1-50 Et al,	:	Judge: TIMOTHY R. HANSON
Defendant.	:	Date: December 19, 2001

Clerk: evelynt

PRESENT

Plaintiff's Attorney(s): THOR B ROUNDY
Defendant's Attorney(s): PAUL D VAN KOMEN
ROBERT G WRIGHT

Other Parties: DAVID FERENCE

Video

Tape Number: 12/19/01 Tape Count: 9:07/10:06

HEARING

This case is before the Court for oral argument on defendants' motions to dismiss. Appearances as shown above.

Counsel present arguments to the Court.

The matter is submitted.

Based upon documents submitted, and arguments of counsel, the Court rules as follows:

The Court will consider the motions' as Rule 56 motions in accordance with the rules of civil procedure, and consider the supporting documents in connection thereof.

Based upon arguments of counsel, the Court finds a question of fact on the issue of file of a Pre-litigation Panel Request, the failure to pay filing fees is not dispositive.

Plaintiff acknowledges their failure to to mail the request for Pre-litigation Panel to all the health care providers.

Accordingly this Court has no jurisdiction, and the Court is compeled to dismiss the case, based upon failure to plaintiff to comply with the statute, and legislative mandate.

Case No: 010905108
Date: Dec 19, 2001

Defendant's counsel is to prepare findings of facts and conclusions of law, and an order consistent with the Court's ruling.

having heard oral argument from counsel and having reviewed and considered the memoranda and affidavits submitted by the parties, finds as follows:

1. Because matters outside the pleading were presented and considered by the Court, the motions to dismiss were treated as motions for summary judgment under Rule 12(b) and disposed of as provided in Rule 56.

2. The Court finds that a question of fact exists regarding whether a request for prelitigation panel review was “filed” with the Division of Occupational and Professional Licensing.

3. However, the Court finds that it is undisputed that neither the plaintiffs nor their counsel complied with the requirement of Utah Code Ann. § 78-14-12(2)(b) that the request for prelitigation hearing “shall be mailed to all health care providers named in the notice and request.” In light of the plaintiffs’ failure to mail the request for prelitigation to any of the health care providers, the Court finds that plaintiffs failed to comply with the statutory requirements which “are compulsory as a condition precedent to commencing litigation.”

4. The Court therefore concludes that the Court has no jurisdiction based on the legislative mandates set forth in the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-1 et seq.

5. Because plaintiffs did not satisfy the conditions precedent to commencing litigation, the Court concludes that plaintiffs could not commence their action. Further, because the plaintiffs’ action could not be and was not commenced, this Court lacks jurisdiction and is compelled to dismiss plaintiffs’ complaint.

Therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs

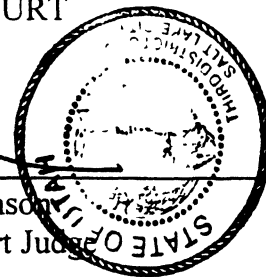
did not satisfy the statutory conditions precedent to commencing litigation and therefore the defendants' Motions to Dismiss are GRANTED and the above-entitled action against the defendants SHALL BE AND IS HEREBY DISMISSED.

DATED this 4 day of February, 2002.

BY THE COURT



Timothy Hanson
District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of January, 2002, I caused to be served by the method indicated below a true and correct copy of the attached and foregoing **proposed ORDER OF DISMISSAL** to the following:

☒ VIA FACSIMILE
☒ VIA HAND DELIVERY
☒ VIA U.S. MAIL
☐ VIA FEDERAL EXPRESS


Thor B. Roundy
275 East South Temple, Suite 150
Salt Lake City, Utah 84111

☐ VIA FACSIMILE
☐ VIA HAND DELIVERY
☒ VIA U.S. MAIL
☐ VIA FEDERAL EXPRESS

Robert G. Wright
Richards Brandt Miller & Nelson
700 Key Bank Tower, 50 South Main Street
P O. Box 2465
Salt Lake City, Utah 84110

☐ VIA FACSIMILE
☐ VIA HAND DELIVERY
☒ VIA U.S. MAIL
☐ VIA FEDERAL EXPRESS

Richard Campbell
Campbell & Campbell
2485 Grant Ave. #200
Ogden Utah. 84401



TITLE 78, CHAPTER 14
MALPRACTICE ACTIONS AGAINST HEALTH CARE PROVIDERS

78-14-1. Short title of act.

This act shall be known and may be cited as the "Utah Health Care Malpractice Act."

78-14-2. Legislative findings and declarations - Purpose of act.

The legislature finds and declares that the number of suits and claims for damages and the amount of judgments and settlements arising from health care has increased greatly in recent years. Because of these increases the insurance industry has substantially increased the cost of medical malpractice insurance. The effect of increased insurance premiums and increased claims is increased health care cost, both through the health care providers passing the cost of premiums to the patient and through the provider's practicing defensive medicine because he views a patient as a potential adversary in a lawsuit. Further, certain health care providers are discouraged from continuing to provide services because of the high cost and possible unavailability of malpractice insurance.

In view of these recent trends and with the intention of alleviating the adverse effects which these trends are producing in the public's health care system, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide health-related malpractice insurance while at the same time establishing a mechanism to ensure the availability of insurance in the event that it becomes unavailable from private companies.

In enacting this act, it is the purpose of the legislature to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluation and settlement of claims.

78-14-3. Definitions.

As used in this chapter:

- (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 58-60-305.
- (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 58-60-305.
- (5) "Commissioner" means the commissioner of insurance as provided in Section 31A-2-102.
- (6) "Dental hygienist" means a person licensed to practice dental hygiene as defined in Section 58-69-102.
- (7) "Dentist" means a person licensed to practice dentistry as defined in Section 58-69-102.
- (8) "Division" means the Division of Occupational and Professional Licensing created in Section 58-1-103.
- (9) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.
- (10) "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) "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, physician, registered nurse, licensed practical nurse, nurse-midwife, dentist, dental hygienist, optometrist, clinical laboratory technologist, pharmacist, physical therapist, 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, 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.

(12) "Hospital" means a public or private institution licensed under Title 26, Chapter 21, Health Care Facility Licensure and Inspection Act.

(13) "Licensed practical nurse" means a person licensed to practice as a licensed practical nurse as provided in Section 58-31b-301.

(14) "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.

(15) "Marriage and family therapist" means a person licensed to practice as a marriage therapist or family therapist under Section 58-60-405.

(16) "Naturopathic physician" means a person licensed to practice naturopathy as defined in Section 58-71-102.

(17) "Nurse-midwife" means a person licensed to engage in practice as a nurse midwife under Section 58-44a-302 or 58-44a-305.

(18) "Optometrist" means a person licensed to practice optometry under Title 58, Chapter 16a, Utah Optometry Practice Act.

(19) "Osteopathic physician" means a person licensed to practice osteopathy under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

(20) "Patient" means a person who is under the care of a health care provider, under a contract, express or implied.

(21) "Pharmacist" means a person licensed to practice pharmacy as provided in Section 58-17a-301.

(22) "Physical therapist" means a person licensed to practice physical therapy under Title 58, Chapter 24a, Physical Therapist Practice Act.

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

(24) "Podiatric physician" means a person licensed to practice podiatry under Title 58, Chapter 5a, Podiatric Physician Licensing Act.

(25) "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.

(26) "Psychologist" means a person licensed under Title 58, Chapter 61, Psychologist Licensing Act, to practice psychology as defined in Section 58-61-102.

(27) "Registered nurse" means a person licensed to practice professional nursing as provided in Section 58-31b-301.

(28) "Representative" means the spouse, parent, guardian, trustee, attorney-in-fact, or other legal agent of the patient.

(29) "Social service worker" means a person licensed to practice as a social service worker under Section 58-60-305.

(30) "Speech-language pathologist" means a person licensed to practice speech-language pathology under Title 58, Chapter 41, Speech-language Pathology and Audiology Licensing Act.

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

78-14-4. Statute of limitations - Exceptions - Application.

(1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence, except that:

(a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs; and

(b) In an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs.

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under Section 78-12-36 or any other provision of the law, and

shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act; provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unelapsed portion of time allowed under former law; but any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

**§-14-4.5. Amount of award reduced by amounts of collateral sources available to plaintiff
No reduction where subrogation right exists - Collateral sources defined - Procedure to preserve subrogation rights - Evidence admissible - Exceptions.**

(1) In all malpractice actions against health care providers as defined in Section §-14-3 in which damages are awarded to compensate the plaintiff for losses sustained, the court shall reduce the amount of such award by the total of all amounts paid to the plaintiff from all collateral sources which are available to him; however, there shall be no reduction for collateral sources for which a subrogation right exists as provided in this section nor shall there be a reduction for any collateral payment not included in the award of damages. Upon a finding of liability and an awarding of damages by the trier of fact, the court shall receive evidence concerning the total amounts of collateral sources which have been paid to or for the benefit of the plaintiff or are otherwise available to him. The court shall also take testimony of any amount which has been paid, contributed, forfeited by, or on behalf of the plaintiff or members of his immediate family to secure his right to any collateral source benefit which he is receiving as a result of his injury, and shall offset any reduction in the award by such amounts. No evidence shall be received and no reduction made with respect to future collateral source benefits except as specified in Subsection (4).

(2) For purposes of this section "collateral source" means payments made to or for the benefit of the plaintiff for:

(a) medical expenses and disability payments payable under the United States Social Security Act, any federal, state, or local income disability act, or any other public program, except the federal programs which are required by law to seek subrogation;

(b) any health, sickness, or income disability insurance, automobile accident insurance that provides health benefits or income disability coverage, and any other similar insurance benefits, except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others;

(c) any contract or agreement of any person, group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services, except benefits received as gifts, contributions, or assistance made gratuitously; and

(d) any contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability.

(3) To preserve subrogation rights for amounts paid or received prior to settlement or judgment, a provider of collateral sources shall serve at least 30 days before settlement or trial of the action a written notice upon each health care provider against whom the malpractice action has been asserted. The written notice shall state the name and address of the provider of collateral sources, the amount of collateral sources paid, the names and addresses of all persons who received payment, and the items and purposes for which payment has been made.

(4) Evidence is admissible of government programs that provide payments or benefits available in the future to or for the benefit of the plaintiff to the extent available irrespective of the recipient's ability to pay. Evidence of the likelihood or unlikelihood at such programs, payments, or benefits will be available in the future is also admissible. The trier of fact may consider such evidence in determining the amount of damages awarded to a plaintiff for future expenses.

(5) No provider of collateral sources is entitled to recover the amounts of such benefits from a health care provider, the plaintiff, or any other person or entity as reimbursement for collateral source payments made prior to settlement or judgment, including any payments made under Title 26, Chapter 19, except to the extent that subrogation rights to amounts paid prior to settlement or judgment are preserved as provided in this section. All policies of insurance providing benefits affected by this section are construed in accordance with this section.

§-14-5. Failure to obtain informed consent - Proof required of patient - Defenses - Informed consent to health care.

(1) When a person submits to health care rendered by a health care provider, it shall be presumed that what the health care provider did was either expressly or impliedly authorized to be done. For a patient to recover damages from a health care provider in an action based upon the provider's failure to obtain informed consent, the patient must prove the following:

(a) that a provider-patient relationship existed between the patient and health care provider;

(b) the health care provider rendered health care to the patient;

(c) the patient suffered personal injuries arising out of the health care rendered;

(d) the health care rendered carried with it a substantial and significant risk of causing the patient serious harm;

(e) the patient was not informed of the substantial and significant risk;

(f) a reasonable, prudent person in the patient's position would not have consented to the health care rendered after having been fully informed as to all facts relevant to the decision to give consent. In determining what a reasonable, prudent person in the patient's position would do under the circumstances, the finder of fact shall use the viewpoint of the patient before health care was provided and before the occurrence of any personal injuries alleged to have arisen from said health care; and

(g) the unauthorized part of the health care rendered was the proximate cause of personal injuries suffered by the patient.

(2) It shall be a defense to any malpractice action against a health care provider based upon alleged failure to obtain informed consent if:

(a) the risk of the serious harm which the patient actually suffered was relatively minor;

(b) the risk of serious harm to the patient from the health care provider was commonly known to the public;

(c) the patient stated, prior to receiving the health care complained of, that he would accept the health care involved regardless of the risk; or that he did not want to be informed of the matters to which he would be entitled to be informed;

(d) the health care provider, after considering all of the attendant facts and circumstances, used reasonable discretion as to the manner and extent to which risks were disclosed, if the health care provider reasonably believed that additional disclosures could be expected to have a substantial and adverse effect on the patient's condition; or

(e) the patient or his representative executed a written consent which sets forth the nature and purpose of the intended health care and which contains a declaration that the patient accepts the risk of substantial and serious harm, if any, in hopes of obtaining desired beneficial results of health care and which acknowledges that health care providers involved have explained his condition and the proposed health care in a satisfactory manner and that all questions asked about the health care and its attendant risks have been answered in a manner satisfactory to the patient or his representative; such written consent shall be a defense to an action against a health care provider based upon failure to obtain informed consent unless the patient proves that the person giving the consent lacked capacity to consent or shows by clear and convincing proof that the execution of the written consent was induced by the defendant's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts.

(3) Nothing contained in this act shall be construed to prevent any person 18 years of age or over from refusing to consent to health care for his own person upon personal or religious grounds.

(4) The following persons are authorized and empowered to consent to any health care not prohibited by law:

(a) any parent, whether an adult or a minor, for his minor child;

(b) any married person, for a spouse;

(c) any person temporarily standing in loco parentis, whether formally serving or not, for the minor under his care and any guardian for his ward;

(d) any person 18 years of age or over for his or her parent who is unable by reason of age, physical or mental condition, to provide such consent;

(e) any patient 18 years of age or over;

(f) any female regardless of age or marital status, when given in connection with her pregnancy or childbirth;

(g) in the absence of a parent, any adult for his minor brother or sister; and

(h) in the absence of a parent, any grandparent for his minor grandchild.

(5) No person who in good faith consents or authorizes health care treatment or procedures for another as provided by this act shall be subject to civil liability.

contract or assurance of result.

No liability shall be imposed upon any health care provider on the basis of an alleged breach of guarantee, warranty, contract or assurance of result to be obtained from any health care rendered unless the guarantee, warranty, contract or assurance is set forth in writing and signed by the health care provider or an authorized agent of the provider.

78-14-7. Ad damnum clause prohibited in complaint.

No dollar amount shall be specified in the prayer of a complaint filed in a malpractice action against a health care provider. The complaint shall merely pray for such damages as are reasonable in the premises.

78-14-7.1. Limitation of award of noneconomic damages in malpractice actions.

In a malpractice action against a health care provider, an injured plaintiff may recover noneconomic losses to compensate for pain, suffering, and inconvenience. In no case shall the amount of damages awarded for such noneconomic loss exceed \$250,000. This limitation does not affect awards of punitive damages.

78-14-7.5. Limitation on attorney's contingency fee in malpractice action.

(1) In any malpractice action against a health care provider as defined in Section 78-14-3, an attorney shall not collect a contingent fee for representing a client seeking damages in connection with or arising out of personal injury or wrongful death caused by the negligence of another which exceeds 33 1/3% of the amount recovered.

(2) This limitation applies regardless of whether the recovery is by settlement, arbitration, judgment, or whether appeal is involved.

78-14-8. Notice of intent to commence action.

No malpractice action against a health care provider may be initiated unless and until the plaintiff gives the prospective defendant or his executor or successor, at least ninety days' prior notice of intent to commence an action. Such notice shall include a general statement of the nature of the claim, the persons involved, the date, time and place of the occurrence, the circumstances thereof, specific allegations of misconduct on the part of the prospective defendant, the nature of the alleged injuries and other damages sustained. 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 deemed to have been served on the date of mailing. Such 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 ninety 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.

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.

78-14-9. Professional liability insurance coverage for providers - Insurance commissioner may require joint underwriting authority.

If the commissioner finds after a hearing that in any part of this state any professional liability insurance coverage for health care providers is not readily available in the voluntary market, and that the public interest requires, he may by regulation promulgate and implement plans to provide insurance coverage through all insurers issuing professional liability policies and individual and group accident and sickness policies providing medical, surgical or hospital expense coverage on either a prepaid or an expense incurred basis, including personal injury protection and medical expense coverage issued incidental to liability insurance policies.

78-14-9.5. Periodic payment of future damages in malpractice actions.

(1) As used in this section:

(a) "Future damages" means 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.

(b) "Periodic payments" means the payment of money or delivery of other property to

the judgment creditor at such intervals as ordered by the court.

(2) In any malpractice action against a health care provider, as defined in Section 78-14-3, the court shall, at the request of any party, order that future damages which equal or exceed \$100,000, less amounts payable for attorney's fees and other costs which are due at the time of judgment, shall be paid by periodic payments rather than by a lump sum payment.

(3) In rendering a judgment which orders the payment of future damages by periodic payments, the court shall order periodic payments to provide a fair correlation between the sustaining of losses and the payment of damages. Lost future earnings shall be paid over the judgment creditor's work life expectancy. The court shall also order, when appropriate, that periodic payments increase at a fixed rate, equal to the rate of inflation which the finder of fact used to determine the amount of future damages, or as measured by the most recent Consumer Price Index applicable to Utah for all goods and services. The present cash value of all periodic payments shall equal the fact finder's award of future damages, less any amount paid for attorney's fees and costs. The present cash value of periodic payments shall be determined by discounting the total amount of periodic payments projected over the judgment creditor's life expectancy, by the rate of interest which the finder of fact used to reduce the amount of future damages to present value, or the rate of interest available at the time of trial on one year U.S. Government Treasury Bills. Before periodic payments of future damages may be ordered, the court shall require a judgment debtor to post security which assures full payment of those damages. Security for payment of a judgment of periodic payments may be in one or more of the following forms:

- (a) a bond executed by a qualified insurer;
- (b) an annuity contract executed by a qualified insurer;
- (c) evidence of applicable and collectable liability insurance with one or more qualified insurers;
- (d) an agreement by one or more qualified insurers to guarantee payment of the judgment; or
- (e) any other form of security approved by the court.

Security which complies with this section may also serve as a supersedeas bond, where one is required.

(4) A judgment which orders payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Those payments may only be modified in the event of the death of the judgment creditor.

(5) If the court finds that the judgment debtor, or the assignee of his obligation to make periodic payments, has failed to make periodic payments as ordered by the court, it shall, in addition to the required periodic payments, order the judgment debtor or his assignee to pay the judgment creditor all damages caused by the failure to make payments, including court costs and attorney's fees.

(6) The obligation to make periodic payments for all future damages, other than damages for loss of future earnings, shall cease upon the death of the judgment creditor. Damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. In that case the court which rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this section.

(7) If security is posted in accordance with Subsection (3), and approved by a final judgment entered under this section, the judgment is considered to be satisfied, and the judgment debtor on whose behalf the security is posted shall be discharged.

78-14-10. Actions under Utah Governmental Immunity Act.

The provisions of this act shall apply to malpractice actions against health care providers which are brought under the Utah Governmental Immunity Act insofar as they are applicable; provided, however, that this act shall in no way affect the requirements for filing notices of claims, times for commencing actions and limitations on amounts recoverable under the Utah Governmental Immunity Act.

78-14-11. Act not retroactive - Exception.

The provisions of this act, with the exception of the provisions relating to the limitation on the time for commencing an action, shall not apply to injuries, death or

ervices rendered which occurred prior to the effective date of this act.

8-14-12. Division to provide panel - Exemption - Procedures - Statute of limitations rolled - 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 78-14-3, except dentists.

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

(ii) The division may establish rules necessary to administer the process and procedures related to prelitigation hearings and the conduct of prelitigation hearings in accordance with Sections 78-14-12 through 78-14-16.

(c) The proceedings are informal, nonbinding, and are not subject to Title 63, Chapter 46b, Administrative Procedures Act, but are compulsory as a condition precedent to commencing litigation.

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

(2) (a) The party initiating a medical liability action shall file a request for prelitigation panel review with the division within 60 days after the filing of a statutory notice of intent to commence action under Section 78-14-8.

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

(3) (a) The filing of a request for prelitigation panel review under this section tolls the applicable statute of limitations until the earlier of 60 days following the division's issuance of an opinion by the prelitigation panel, or 60 days following the termination of jurisdiction by the division as provided in this subsection. The division shall send any opinion issued by the panel to all parties by regular mail.

(b) (i) The division shall complete a prelitigation hearing under this section within 180 days after the filing of the request for prelitigation panel review, or within any longer period as agreed upon in writing by all parties to the review.

(ii) If the prelitigation hearing has not been completed within the time limits established in Subsection (3)(b)(i), the division has no further jurisdiction over the matter subject to review and the claimant is considered to have complied with all conditions precedent required under this section prior to the commencement of litigation.

(c) (i) The claimant and any respondent may agree by written stipulation that a useful purpose would be served by convening a prelitigation panel under this section.

(ii) When the stipulation is filed with the division, the division shall within ten days after receipt enter an order divesting itself of jurisdiction over the claim, as it concerns the stipulating respondent, and stating that the claimant has complied with all conditions precedent to the commencement of litigation regarding the claim.

(4) The division shall provide for and appoint an appropriate panel or panels to hear complaints of medical liability and damages, made by or on behalf of any patient who is an 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 of Utah, and who has completed division training regarding conduct of panel hearings;

(b) (i) one member who is a licensed health care provider listed under Section 78-14-3, who is practicing and knowledgeable in the same specialty as the proposed defendant, and who is appointed by the division in accordance with Subsection (5); or

(ii) in claims against only hospitals or their employees, 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, 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 78-14-3 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 Account created in Section 58-67a-1.

(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) Members of the prelitigation hearing panels shall receive per diem compensation and travel expenses for attending panel hearings as established by rules of the division.

(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 78-14-16.

78-14-13. Proceedings - Authority of panel - Rights of parties to proceedings.

(1) No record of the proceedings is required and all evidence, documents, and exhibits are returned to the parties or witnesses who provided the evidence, documents, and exhibits at the end of the proceedings upon the request of the parties or witnesses who provided the evidence.

(2) The division may issue subpoenas for medical records directly related to the claim of medical liability in accordance with division rule and in compliance with the following:

(a) the subpoena shall be prepared by the requesting party in proper form for issuance by the division; and

(b) the subpoena shall be accompanied by:

(i) an affidavit prepared by the person requesting the subpoena attesting to the fact the medical record subject to subpoena is believed to be directly related to the medical liability claim to which the subpoena is related; or

(ii) by a written release for the medical records to be provided to the person requesting the subpoena, signed by the individual who is the subject of the medical record or by that individual's guardian or conservator.

(3) Per diem reimbursement to panel members and expenses incurred by the panel in the conduct of prelitigation panel hearings shall be paid by the division. Expenses related to subpoenas are paid by the requesting party, including witness fees and mileage.

(4) The proceedings are informal and formal rules of evidence are not applicable. There is no discovery or perpetuation of testimony in the proceedings, except upon special order of the panel, and for good cause shown demonstrating extraordinary circumstances.

(5) (a) A party is entitled to attend, personally or with counsel, and participate in the proceedings, except upon special order of the panel and unanimous agreement of the parties. The proceedings are confidential and closed to the public.

(b) 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.

(c) Communications between the panel and the parties, except the testimony of the parties on the merits of the dispute, are disclosed to all other parties.

(6) The division shall appoint a panel to consider the claim and set the matter for panel review as soon as practicable after receipt of a request.

(7) Parties may be represented by counsel in proceedings before a panel.

78-14-14. Decision and recommendations of panel - No judicial or other review.

The panel shall render its opinion in writing not later than 30 days after the end of the proceedings. The panel shall determine on the basis of the evidence 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.

There is no judicial or other review or appeal of the panel's decision or commendations.

-14-15. Evidence of proceedings not admissible in subsequent action - Panelist may not be compelled to testify - Immunity of panelist from civil liability - Information regarding professional conduct.

(1) Evidence of the proceedings conducted by the medical review panel and its reports, opinions, findings, and determinations are not admissible as evidence in an action subsequently brought by the claimant in a court of competent jurisdiction.

(2) No panelist may be compelled to testify in a civil action subsequently filed with regard to the subject matter of the panel's review. A panelist has immunity from civil liability arising from participation as a panelist and for all communications, findings, opinions, and conclusions made in the course and scope of duties prescribed by this section.

(3) Nothing in this chapter may be interpreted to prohibit the division from considering any information contained in a statutory notice of intent to commence action, request for prelitigation panel review, or written findings of a panel with respect to the division's determining whether a licensee engaged in unprofessional or unlawful conduct.

-14-16. Proceedings considered a binding arbitration hearing upon written agreement of parties - Compensation to members of panel.

Upon written agreement by all parties, the proceeding may be considered a binding arbitration hearing and proceed under Title 78, Chapter 31a, except for the selection of a panel, which is done as set forth in Subsection 78-14-12(4). If the proceeding is considered an arbitration proceeding, the parties are equally responsible for compensation to the members of the panel for services rendered.

-14-17. Arbitration agreements.

(1) After May 2, 1999, for a binding arbitration agreement between a patient and a health care provider to be validly executed or, if the requirements of this Subsection (1) have not been previously met on at least one occasion, renewed:

(a) the patient shall be given, in writing and by verbal explanation, the following information on:

(i) the requirement that the patient must arbitrate a claim instead of having the claim heard by a judge or jury;

(ii) the role of an arbitrator and the manner in which arbitrators are selected under the agreement;

(iii) the patient's responsibility, if any for arbitration-related costs under the agreement;

(iv) the right of the patient to decline to enter into the agreement and still receive health care;

(v) the automatic renewal of the agreement each year unless the agreement is canceled in writing before the renewal date; and

(vi) the right of the patient to have questions about the arbitration agreement answered; and

(b) the agreement shall require that:

(i) one arbitrator shall be collectively selected by all persons claiming damages

(ii) one arbitrator be selected by the health care provider;

(iii) a third arbitrator be jointly selected by all persons claiming damages and the health care provider from a list of individuals approved as arbitrators by the state or federal courts of Utah;

(iv) all parties waive the requirement of Section 78-14-12 to appear before a hearing panel in a malpractice action against a health care provider;

(v) the patient be given the right to rescind the agreement within 30 days of signing the agreement; and

(vi) the term of the agreement be for one year and that the agreement be automatically renewed each year unless the agreement is canceled in writing by the patient or health care provider before the renewal date.

(2) Notwithstanding Subsection (1), a patient may not be denied health care of any kind on the sole basis that the patient or a person described in Subsection (5) refused to enter into a binding arbitration agreement with a health care provider.

(3) A written acknowledgment of having received a written and verbal explanation

of a binding arbitration agreement signed by or on behalf of the patient shall be a defense to a claim that the patient did not receive a written and verbal explanation of the agreement as required by Subsection (1) unless the patient;

(a) proves that the person who signed the agreement lacked the capacity to do so; or

(b) shows by clear and convincing evidence that the execution of the agreement was induced by the health care provider's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts.

(4) The requirements of Subsection (1) do not apply to a claim governed by a binding arbitration agreement that was executed or renewed before May 3, 1999.

(5) A legal guardian or a person described in Subsection 78-14-5(4), except a person temporarily standing in loco parentis, may execute or rescind a binding arbitration agreement on behalf of a patient.

(6) This section does not apply to any arbitration agreement that is subject to the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq.

5. Commerce, Occupational and Professional Licensing.

5-78A. Prelitigation Panel Review Rules.

5-78A-1. Title.

These rules are known as the "Prelitigation Panel Review Rules".

5-78A-2. Definitions.

In addition to the definitions in Section 78-14-3, which shall apply to these rules:

- (1) "Answer" means a responsive answer to a request.
- (2) "Director" means the Director of the Division of Occupational and Professional Licensing.
- (3) "Meritorious claim" means that there is a basis in fact and law to conclude the standard of care has been breached and the petitioner has been injured thereby, that the petitioner has a reasonable expectation of prevailing at trial.
- (4) "Motion" means a request for any action or relief permitted under Sections 78-2 through 78-14-16 or these rules.
- (5) "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.
- (6) "Notice" means a notice of intent to commence action under Section 78-14-8.
- (7) "Panel" means the prelitigation panel appointed in accordance with Subsection 4-12(4) to review a request.
- (8) "Party" means a petitioner or respondent.
- (9) "Person" means any natural person, sole proprietorship, joint venture, corporation, limited liability company, association, governmental subdivision or agency, or organization of any type.
- (10) "Petitioner" means any person who files a request with the division.
- (11) "Pleadings" include the requests, answers, motions, briefs and any other documents filed by the parties to a request.
- (12) "Request" means a request for prelitigation panel review under Section 78-14-16.
- (13) "Respondent" means any health care provider named in a request.

-78A-3. Authority - Purpose.

These rules are adopted by the division under the authority of Subsection 78-14-16(b) to define, clarify, and establish the process and procedures which govern prelitigation panel reviews.

-78A-4. General Provisions.

(1) Liberal Construction.

These rules shall be liberally construed to secure the just, speedy and economical determination of all issues presented to the division.

(2) Deviation from Rules.

The division may permit a deviation from these rules insofar as it may find compliance therewith to be impractical or unnecessary.

(3) Computation of Time.

The time within which any act shall be done, as herein provided, shall be computed excluding the first day and including the last, unless the last day is Saturday, Sunday or state holiday, and then it is excluded and the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. When the period of time prescribed 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 an act within a prescribed period after the service of a notice or other paper upon him, if the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

-78A-5. Representations - Appearances.

(1) Representation of Parties.

A party may represent himself individually, or if not an individual, may represent himself through an officer or employee, or may be represented by counsel.

(2) Entry of Appearance of Representation.

Parties shall promptly enter their appearances by giving their names and addresses 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.

R156-78A-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,
Respondent

No. PR-XX-XX-XXX

(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 nonstrating extraordinary circumstances shall be filed no later than 15 days before the elitigation panel hearing.

(vi) Response to a Motion.

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

(c) Affidavits and Memoranda.

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

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

56-78A-7. Filing and Service.

(1) Filing of Pleadings. All pleadings shall be filed with the division with rvice thereof to all parties named in the notice. The division may refuse to accept eadings if they are not filed in accordance with the requirements of these rules.

(2) Service. Pleadings and documents issued by the division or panel shall be rved either by personal service or by first class mail. Personal service shall be made on a party in accordance with the Utah Rules of Civil Procedure by any peace officer hthin the State of Utah or by any person specifically designated by the division. When attorney has entered an appearance on behalf of any party, service upon that attorney stitutes service upon the party so represented.

(3) Proof of Service. There shall appear on all documents required to be served a rtificate of service in substantially the following form:

TABLE II

I hereby certify that I have this day served the foregoing document upon the parties record in this proceeding set forth below (by delivering a copy thereof in person) (by ling a copy thereof, properly addressed by first class mail):

(Name of parties of record)
(addresses)

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

(Signature)
(Title)

6-78A-8. Panel Selection and Compensation.

(1) The division shall commence the selection and appointment of panel members lowing the issuance of a notice of hearing pursuant to these rules.

(2) The selection and appointment of panel members shall be in accordance with sections 78-14-12(4) and (5).

(3) (a) In accordance with Subsection 78-14-12(4), whenever multiple respondents identified in a request, the division shall select and appoint a panel to sit in sideration of all claims against any respondent as follows:

(i) one lawyer member who is the chairman in accordance with Subsection 78-14-4) (a);

(ii) one lay panelist member in accordance with Subsection 78-14-12(4) (c);

(iii) one licensed health care provider who is practicing and knowledgeable for h specialty represented by the respondents in accordance with Subsection 78-14-4) (b) (i); and

(iv) if a hospital or their employees are named as a respondent, one member who is individual currently serving in a hospital administration position directly related to pital operations or conduct that includes responsibility for the area of practice that the subject of the liability claim, in accordance with Subsection 78-14-12(4) (b) (ii).

(b) The distinction between a hospital administrator and a person serving in a pital administration position referenced in Subsection 78-14-12(4) (b) (ii) is ifificant and is hereby emphasized.

(c) The person serving in a hospital administration position referenced in section 78-14-12(4) (b) (ii) shall be from a different facility than the facility which 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 78-14-12(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 78-14-12(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 these rules.

(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.

R156-78A-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 78-14-12(2)(a);

(b) the request includes a copy of the notice in accordance with Subsection 78-14-12(2)(b); and

(c) the request has been mailed to all health care providers named in the notice and request as required by Subsection 78-14-2(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 R156-78A-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 shall 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 78-14-12(4) and (5) and these rules.

(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 fairly 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 scheduled.
- (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 shall 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.

56-78A-10. Consequences of Failure to Appear at a Scheduled Hearing.

- (1) Except as provided by Section R156-78A-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 78-14-12(3).

56-78A-11. Prehearing Procedure.

The division may, 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 proceedings 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 on the record by the chairman of the panel.

56-78A-12. Hearing Procedures.

- (1) Hearings Closed to the Public.
All hearings are closed to the public.
- (2) Attendance of Panel Members.
Except where a case is submitted in written form in accordance with Section R156-13, all panel members appointed shall be present during the entire hearing.
- (3) 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 permits petitioner to present rebuttal evidence.
- (4) 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 78-14-13, 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.

(5) 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.

(6) 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.

(7) Standard of Proof.

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

(8) Use of Evidence.

Use of evidence, documents, and exhibits submitted to a panel shall be in accordance with Subsection 78-14-13(1) and Section 78-14-14.

(9) 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.

(10) Subpoenas and Fees.

(a) Issuance of Subpoenas.

The division may issue subpoenas for the attendance of witnesses and the production of medical records in accordance with Subsection 78-14-13(2) and (3). However, except as permitted by Subsection 78-14-13(2) and (3) and in accordance with Subsection 78-14-13(4), there is no 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) Payment of Witness Fees.

A subpoenaed witness who appears for a prelitigation panel review shall be entitled to witness fees and mileage to be paid by the requesting party. Witnesses shall receive the same fee and mileage allowed by law to witnesses in a district court. A witness subpoenaed by a party may, at the time of service of the subpoena, demand one day's witness fee and mileage in advance and unless the fee is tendered, the witness shall not be required to appear.

R156-78A-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.

R156-78A-14. Determination - Supplemental 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 R156-78A-13, and, if applicable, submission of briefs by the parties, the panel shall file with the division a determination whether any claim against any respondent is meritorious. 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 file 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

initial preparation of the opinion to another member of the panel.

(3) Certificate of Compliance.

Within 15 days after receiving the panel's memorandum opinion, the director shall issue a certificate of compliance which recites that petitioner has fully complied with requirements of Section 78-14-12. With respect to the tolling of the statute of limitations referenced in Section 78-14-12(3), the 60 day time period mentioned therein shall begin to run as of the date the Director causes the certificate of compliance to be issued, the three day mailing period set forth in Section R156-78A-4(3) to be applied.

medical malpractice, prelitigation*

effective May 16, 1997

78-14-12(1)(b)

effective September 16, 1997