

Senator J. Stuart Adams proposes the following substitute bill:

MEDICAL MALPRACTICE AMENDMENTS

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: J. Stuart Adams

House Sponsor: _____

LONG TITLE

General Description:

This bill amends the Utah Health Care Malpractice Act.

Highlighted Provisions:

This bill:

- ▶ amends the cap on non-economic damages that may be awarded in a malpractice action;
- ▶ requires an affidavit of merit from a health care professional to proceed with an action if the pre-litigation panel makes a finding of non-meritorious; and
- ▶ limits the liability of a health care provider, in certain circumstances, for the acts or omissions of an ostensible agent.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78B-3-410, as renumbered and amended by Laws of Utah 2008, Chapter 3

78B-3-412, as renumbered and amended by Laws of Utah 2008, Chapter 3



26 78B-3-416, as renumbered and amended by Laws of Utah 2008, Chapter 3

27 78B-3-418, as renumbered and amended by Laws of Utah 2008, Chapter 3

28 ENACTS:

29 78B-3-423, Utah Code Annotated 1953

30 78B-3-424, Utah Code Annotated 1953

31

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

33 Section 1. Section 78B-3-410 is amended to read:

34 **78B-3-410. Limitation of award of noneconomic damages in malpractice actions.**

35 (1) In a malpractice action against a health care provider, an injured plaintiff may
36 recover noneconomic losses to compensate for pain, suffering, and inconvenience. The amount
37 of damages awarded for noneconomic loss may not exceed:

38 (a) for a cause of action arising before July 1, 2001, \$250,000;

39 (b) for a cause of action arising on or after July 1, 2001 and before July 1, 2002, the
40 limitation is adjusted for inflation to \$400,000; ~~and~~

41 (c) for a cause of action arising on or after July 1, 2002, and before May 15, 2010 the
42 \$400,000 limitation described in Subsection (1)(b) shall be adjusted for inflation as provided in
43 Subsection (2)~~[-]; and~~

44 (d) for a cause of action arising on or after May 15, 2010, \$450,000.

45 (2) (a) Beginning July 1, 2002 and each July 1 thereafter until July 1, 2009, the limit
46 for damages under Subsection (1)(c) shall be adjusted for inflation by the state treasurer.

47 (b) By July 15 of each year until July 1, 2009, the state treasurer shall:

48 (i) certify the inflation-adjusted limit calculated under this Subsection (2); and

49 (ii) inform the Administrative Office of the Courts of the certified limit.

50 (c) The amount resulting from Subsection (2)(a) shall:

51 (i) be rounded to the nearest \$10,000; and

52 (ii) apply to a cause of action arising on or after the date the annual adjustment is made.

53 (3) As used in this section, "inflation" means the seasonally adjusted consumer price
54 index for all urban consumers as published by the Bureau of Labor Statistics of the United
55 States Department of Labor.

56 (4) The limit under Subsection (1) does not apply to awards of punitive damages.

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

58 **78B-3-412. Notice of intent to commence action.**

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

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

63 (b) except for an action against a dentist, the plaintiff receives a certificate of
64 compliance from the division in accordance with Section 78B-3-418.

65 (2) The notice shall include:

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

67 (b) the persons involved;

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

69 (d) the circumstances surrounding the claim;

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

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

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

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

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

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

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

87 **78B-3-416. Division to provide panel -- Exemption -- Procedures -- Statute of**

88 **limitations tolled -- Composition of panel -- Expenses -- Division authorized to set license**
89 **fees.**

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

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

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

98 (c) The proceedings are informal, nonbinding, and are not subject to Title 63G, Chapter
99 4, Administrative Procedures Act, but are compulsory as a condition precedent to commencing
100 litigation.

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

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

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

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

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

111 (A) an opinion by the prelitigation panel[-]; or [60 days following the termination of
112 jurisdiction by the division as provided in this subsection.]

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

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

115 (b) The division shall:

116 (i) send any opinion issued by the panel to all parties by regular mail[-]; and

117 [(b) (i)] (ii) [The division shall] complete a prelitigation hearing under this section

118 within:

119 (A) 180 days after the filing of the request for prelitigation panel review[;]; or
120 (B) within any longer period as agreed upon in writing by all parties to the review.
121 ~~[(i)]~~ (iii) If the prelitigation hearing has not been completed within the time limits
122 established in Subsection (3)(b)~~[(i)]~~(ii), the ~~[division has no further jurisdiction over the matter~~
123 ~~subject to review and the claimant is considered to have complied with all conditions precedent~~
124 ~~required under this section prior to the commencement of litigation.]~~ claimant shall:
125 (A) file an affidavit of merit under the provisions of Section 78B-3-423; or
126 (B) file an affidavit with the division in accordance with Subsection (3)(c) alleging that
127 the respondent has not cooperated in scheduling the hearing.
128 (c) If the claimant files an affidavit under Subsection (3)(b)(iii)(B), the division shall:
129 (i) within 15 days of the filing of the affidavit under Subsection (3)(b)(iii)(B),
130 determine whether the respondent failed to cooperate in the scheduling of a prelitigation
131 hearing; and
132 (ii) (A) if the determination is that the respondent failed to cooperate in the scheduling
133 of a hearing, issue a certificate of compliance for the claimant in accordance with Section
134 78B-3-418; or
135 (B) if the division determines that the respondent did not fail to cooperate in the
136 scheduling of a hearing, the claimant shall file an affidavit of merit in accordance with Section
137 78B-3-423, within 30 days of the finding of the division under Subsection (3)(c)(i).
138 ~~[(e)]~~ (d) (i) The claimant and any respondent may agree by written stipulation that no
139 useful purpose would be served by convening a prelitigation panel under this section.
140 (ii) When the stipulation is filed with the division, the division shall within 10 days
141 after receipt ~~[enter an order divesting itself of jurisdiction over the claim]~~ issue a certificate of
142 compliance under Section 78B-3-418, as it concerns the stipulating respondent, and stating that
143 the claimant has complied with all conditions precedent to the commencement of litigation
144 regarding the claim.
145 (4) The division shall provide for and appoint an appropriate panel or panels to hear
146 complaints of medical liability and damages, made by or on behalf of any patient who is an
147 alleged victim of medical liability. The panels are composed of:
148 (a) one member who is a resident lawyer currently licensed and in good standing to
149 practice law in this state and who shall serve as chairman of the panel, who is appointed by the

150 division from among qualified individuals who have registered with the division indicating a
151 willingness to serve as panel members, and a willingness to comply with the rules of
152 professional conduct governing lawyers in the state of Utah, and who has completed division
153 training regarding conduct of panel hearings;

154 (b) (i) one member who is a licensed health care provider listed under Section
155 78B-3-403, who is practicing and knowledgeable in the same specialty as the proposed
156 defendant, and who is appointed by the division in accordance with Subsection (5); or

157 (ii) in claims against only hospitals or their employees, one member who is an
158 individual currently serving in a hospital administration position directly related to hospital
159 operations or conduct that includes responsibility for the area of practice that is the subject of
160 the liability claim, and who is appointed by the division; and

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

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

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

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

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

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

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

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

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

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

190 Section 4. Section **78B-3-418** is amended to read:

191 **78B-3-418. Decision and recommendations of panel -- No judicial or other review.**

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

194 (b) A certificate of compliance issued in accordance with this section is proof that the
195 claimant has complied with all conditions precedent under this part prior to the commencement
196 of litigation as required in Subsection 78B-3-412(1).

197 (2) (a) The panel shall render its opinion in writing not later than 30 days after the end
198 of the proceedings[~~-. The panel shall~~]; and

199 (i) determine on the basis of the evidence whether;

200 (A) each claim against each health care provider has merit or has no merit; and[;]

201 (B) if a claim is meritorious, whether the conduct complained of resulted in harm to the
202 claimant.

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

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

207 (a) for a named respondent, the panel issues an opinion of merit under Subsections
208 (2)(a)(i)(A) and (B);

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

212 (c) the claimant has complied with the provisions of Subsections 78B-3-416(3)(b)(iii)
213 and (c); or

214 (d) the parties submitted a stipulation under Subsection 78B-3-416(3)(d).

215 Section 5. Section **78B-3-423** is enacted to read:

216 **78B-3-423. Affidavit of merit.**

217 (1) (a) Before a plaintiff may receive a certificate of compliance under Sections
218 78B-3-616 and 78B-3-418, a plaintiff shall file an affidavit of merit under this section if:

219 (i) the plaintiff receives a finding from the pre-litigation panel in accordance with
220 Section 78B-3-418 of non-meritorious for either:

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

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

223 (ii) a pre-litigation hearing is not held within the time limits under Section
224 78B-3-416(3)(b)(ii).

225 (b) A plaintiff who is required to file an affidavit of merit under Subsection (1)(a)
226 shall:

227 (i) file the affidavit of merit with the division within:

228 (A) 60 days of:

229 (I) the expiration of the time limit in Section 78B-3-416(3)(b)(i);

230 (II) the date of the panel's opinion under Subsection 78B-3-418(2)(b); or

231 (B) within 30 days of the division's order under Subsection 78B-3-416(3)(c); and

232 (ii) serve each defendant with the affidavit of merit in accordance with Subsection
233 78B-3-412(3).

234 (2) The affidavit of merit shall:

235 (a) be filed with the division;

236 (b) be executed by the plaintiff's attorney or the plaintiff if the plaintiff is proceeding

237 pro se, stating that the affiant has consulted with and reviewed the facts of the case with a

238 health care provider who has determined after a review of the medical record and other relevant

239 material involved in the particular action that there is a reasonable and meritorious cause for

240 the filing of a medical liability action; and

241 (c) include an affidavit signed by a health care provider who meets the requirements of

242 Subsection (3), which states that in the health care provider's opinion:

243 (i) there are reasonable grounds to believe that the applicable standard of care was
244 breached;

245 (ii) the breach was a proximate cause of the injury claimed in the notice of intent to
246 commence action; and

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

248 (3) A health care provider who signs the affidavit of merit under Subsection (2) shall:

249 (a) if none of the defendants is a physician licensed under Title 58, Chapter 67, Utah
250 Medical Practice Act, or an osteopathic physician licensed under Title 58, Chapter 68, Utah
251 Osteopathic Medical Practice Act, hold a current unrestricted license issued by the appropriate
252 licensing authority of Utah or another state in the same specialty or of the same class of license
253 as the defendants; or

254 (b) if at least one of the defendants is a physician licensed under Title 58, Chapter 67,
255 Utah Medical Practice Act, or an osteopathic physician licensed under Title 58, Chapter 68,
256 Utah Osteopathic Medical Practice Act, hold a current unrestricted license issued by the
257 appropriate licensing authority of Utah or another state to practice medicine in all its branches.

258 (4) A plaintiff's attorney or plaintiff may obtain up to a 60-day extension to file the
259 affidavit of merit if:

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

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

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

266 (b) the plaintiff or plaintiff's attorney submits the affidavit for extension to each named
267 defendant in accordance with Subsection 78B-3-412(3) no later than 60 days after the date
268 specified in Subsection (1)(b)(i).

269 (5) (a) A plaintiff or plaintiff's attorney who submits allegations in an affidavit of merit
270 that are found to be without reasonable cause and untrue, based on information available to the
271 plaintiff at the time the affidavit was submitted to the division, is liable to the defendant for the
272 payment of reasonable expenses and reasonable attorney fees actually incurred by the defendant
273 or the defendant's insurer.

274 (b) An affidavit of merit is not admissible, and cannot be used for any purpose, in a
275 subsequent lawsuit based on the claim that is the subject of the affidavit, except for the purpose
276 of establishing the right to recovery under Subsection (5)(c).

277 (c) A court, or arbitrator under Section 78B-3-421, may award costs and attorney fees
278 under Subsection (5)(a) if the defendant files a motion for costs and attorney fees within 60
279 days of the judgment or dismissal of the action in favor of the defendant. The person making a
280 motion for attorney fees and costs may depose and examine the health care provider who
281 prepared the affidavit of merit.

282 (6) If a plaintiff or the plaintiff's attorney does not file an affidavit of merit as required
283 by this section, the division may not issue a certificate of compliance for the plaintiff and the
284 malpractice action shall be dismissed by the court.

285 (7) This section applies to a cause of action that arises on or after July 1, 2010.

286 Section 6. Section **78B-3-424** is enacted to read:

287 **78B-3-424. Limitation of liability for ostensible agent.**

288 (1) For purposes of this section:

289 (a) "Agent" means a person who is an "employee," "worker," or "operative," as defined
290 in Section 34A-2-104, of a health care provider.

291 (b) "Ostensible agent" means a person:

292 (i) who is not an agent of the health care provider; and

293 (ii) who the plaintiff reasonably believes is an agent of the health care provider because
294 the health care provider intentionally, or as a result of a lack of ordinary care, caused the
295 plaintiff to believe that the person was an agent of the health care provider.

296 (2) A health care provider named as a defendant in a medical malpractice action is not
297 liable for the acts or omissions of an ostensible agent if:

298 (a) the ostensible agent has privileges with the health care provider, but is not an agent
299 of the healthcare provider;

300 (b) the health care provider has by policy or practice, ensured that a person providing
301 professional services has insurance of a type and amount required, if any is required, by the
302 rules or regulations as established in:

303 (i) medical staff by-laws for a health care facility; or

304 (ii) other health care facility contracts, indemnification agreements, rules or

305 regulations;

306 (c) the insurance required in Subsection (2)(a) is in effect at the time of the alleged act
307 or omission of the ostensible agent; and

308 (d) if there is a claim of agency or ostensible agency in a plaintiff's notice of intent to
309 commence an action, the healthcare provider, within 60 days of the service of the notice of
310 intent to commence an action, each person identified by the plaintiff who the provider claims is
311 not an ostensible agent of the provider.

312 (3) This section applies to a cause of action that arises on or after July 1, 2010.