

HB0111S01 compared with HB0111

~~{deleted text}~~ shows text that was in HB0111 but was deleted in HB0111S01.

inserted text shows text that was not in HB0111 but was inserted into HB0111S01.

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~~{COURT-APPOINTED Representative}~~ Jordan D. Teuscher proposes the following substitute bill:

COURT-APPOINTED THERAPISTS AMENDMENTS

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Jordan D. Teuscher

Senate Sponsor: _____

LONG TITLE

General Description:

This bill addresses court-appointed therapists.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ addresses the filing of complaints with the Division of Occupational and Professional Licensing about unlawful or unprofessional conduct by court-appointed therapists;
- ▶ addresses the filing of requests for prelitigation panel reviews for malpractice actions against court-appointed therapists; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

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None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

58-60-112, as enacted by Laws of Utah 1994, Chapter 32

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

78B-3-418, as last amended by Laws of Utah 2016, Chapter 257

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

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

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

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

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

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

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

(b) an individual licensed under this chapter; and

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

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

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

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

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

(A) Title 30, Chapter 3, Divorce;

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

(C) Title 30, Chapter 5, Grandparents;

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

Act;

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

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

Act; or

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

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

(i) the party has ~~notified~~ requested that the court ~~that appointed~~ release the court-appointed therapist from the appointment; and

(ii) the ~~appointing court has made a finding that the proposed complaint is not being filed in bad faith or with the intent to harass~~ court finds good cause to release the court-appointed therapist from the appointment.

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

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

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

(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

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procedures related to prelitigation hearings and the conduct of prelitigation hearings in accordance with Sections 78B-3-416 through 78B-3-420.

(c) The proceedings are informal, nonbinding, and are not subject to Title 63G, Chapter 4, 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.

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

(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 service of a statutory notice of intent to commence action under Section 78B-3-412.

(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) As defined in this Subsection (3):

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

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

(A) Title 30, Chapter 3, Divorce;

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

(C) Title 30, Chapter 5, Grandparents;

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

Act;

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

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

Act; or

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

(iii) "Mental health therapist" means the same as that term is defined in Section 58-60-102.

(b) If a court appoints a court-appointed therapist in a domestic case, a party to the domestic case may not file a request for a prelitigation panel review for a malpractice action

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against the court-appointed therapist during the pendency of the domestic case, unless:

(i) the party has ~~{notified}~~requested that the court ~~{that appointed}~~release the court-appointed therapist from appointment; and

(ii) the ~~{appointing court has made a finding that the proposed complaint is not being filed in bad faith or with the intent to harass}~~court finds good cause to release the court-appointed therapist from the appointment.

(c) If a party is prohibited from filing a request for a prelitigation panel review under Subsection (3)(b), the applicable statute of limitations tolls until the earlier of:

(i) the court releasing the court-appointed therapist from appointment as described in Subsection (3)(b); or

(ii) the court entering a final order in the domestic case.

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

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

(A) an opinion by the prelitigation panel; or

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

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

(b) The division shall:

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

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

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

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

(c) If the prelitigation hearing has not been completed within the time limits established in Subsection ~~[(3)]~~ (4)(b)(ii), the claimant shall:

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

(ii) file an affidavit with the division within 180 days of the request for pre-litigation review, in accordance with Subsection ~~[(3)]~~ (4)(d), alleging that the respondent has failed to reasonably cooperate in scheduling the hearing.

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

(i) within 15 days of the filing of the affidavit under Subsection ~~[(3)]~~ (4)(c)(i), the division shall determine whether either the respondent or the claimant failed to reasonably

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

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

(B) if the division makes a determination other than the determination in Subsection ~~[(3)]~~ (4)(d)(ii)(A), the claimant shall file an affidavit of merit in accordance with Section 78B-3-423, within 30 days of the determination of the division under this Subsection ~~[(3)]~~ (4).

(e) (i) The claimant and any respondent may agree by written stipulation that no 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 10 days after receipt issue a certificate of compliance under Section 78B-3-418, 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)]~~ (5) 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, and who has completed division training regarding conduct of panel hearings;

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

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

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

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

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

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

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

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

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

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

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

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

~~[(6)]~~ (7) 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)]~~ (8) A member of the prelitigation hearing panel may not receive compensation or

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benefits for the member's service, but may receive per diem and travel expenses in accordance with:

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

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

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

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

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

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

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

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

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

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

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

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

(b) for a named respondent, the claimant files an affidavit of merit in accordance with

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Section 78B-3-423 if the opinion under Subsection (1)(a) is non-meritorious under either Subsection (2)(a)(i) or (ii);

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

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

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

78B-3-420. 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 78B, Chapter 11, Utah Uniform Arbitration Act, except for the selection of the panel, which is done as set forth in Subsection 78B-3-416~~(4)~~(5). If the proceeding is considered an arbitration proceeding, the parties are equally responsible for compensation to the members of the panel for services rendered.

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

78B-3-423. Affidavit of merit.

(1) (a) For a cause of action that arises on or after July 1, 2010, before a claimant may receive a certificate of compliance under Sections 78B-3-416 and 78B-3-418, a claimant shall file an affidavit of merit under this section.

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

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

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

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

(ii) within 60 days after the day on which the time limit in Subsection 78B-3-416~~(3)~~(4)(b)(ii) expires, if a pre-litigation hearing is not held within the time limits under Subsection 78B-3-416~~(3)~~(4)(b)(ii); or

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

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

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shall:

- (i) file the affidavit of merit with the division; and
 - (ii) serve each defendant with the affidavit of merit in accordance with Subsection 78B-3-412(3).
- (2) The affidavit of merit shall:
- (a) be executed by the claimant's attorney or the claimant if the claimant is proceeding pro se, stating that the affiant has consulted with and reviewed the facts of the case with a health care provider who has determined after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of a medical liability action; and
 - (b) include an affidavit signed by a health care provider who meets the requirements of Subsection (4):
 - (i) stating that in the health care provider's opinion, there are reasonable grounds to believe that the applicable standard of care was breached;
 - (ii) stating that in the health care provider's opinion, the breach was a proximate cause of the injury claimed in the notice of intent to commence action; and
 - (iii) stating the reasons for the health care provider's opinion.
- (3) The statement required in Subsection (2)(b)(i) shall be waived if the claimant received an opinion that there was a breach of the applicable standard of care under Subsection 78B-3-418(2)(a)(i).
- (4) A health care provider who signs an affidavit under Subsection (2)(b) shall:
- (a) if none of the respondents is a physician or an osteopathic physician, hold a current unrestricted license issued by the appropriate licensing authority of Utah or another state in the same specialty or of the same class of license as the respondents; or
 - (b) if at least one of the respondents is a physician or an osteopathic physician, hold a current unrestricted license issued by the appropriate licensing authority of Utah or another state to practice medicine in all its branches.
- (5) A claimant's attorney or claimant may obtain up to a 60-day extension to file the affidavit of merit if:
- (a) the claimant or the claimant's attorney submits a signed affidavit for extension with notice to the division attesting to the fact that the claimant is unable to submit an affidavit of

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merit as required by this section because:

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

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

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

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

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

(c) A court, or arbitrator under Section 78B-3-421, may award costs and attorney fees under Subsection (6)(a) if the defendant files a motion for costs and attorney fees within 60 days of the judgment or dismissal of the action in favor of the defendant. The person making a motion for attorney fees and costs may depose and examine the health care provider who prepared the affidavit of merit under Subsection (2)(b).

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

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

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

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

(c) for each respondent named in the request:

(i) the respondent's license class;

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

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

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

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

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

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

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

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

(a) a claimant;

(b) a respondent;

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

(d) a medical liability pre-litigation panel.