

PRELITIGATION PANEL HEARINGS

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Utah Health Care Malpractice Act

The governing law appears in Title 78B, Chapter 3, Part 4 of the Utah Code.

The prelitigation panel portion of the law has existed for almost 40 years, having been adopted in 1985.

Back then, panels were appointed through the Department of Business Regulation.

Today, they are handled through the Department of Commerce, Division of Professional Licensing (DOPL).



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Who is a health care provider?

The general rule is, if you have to ask, you are one.

PROVIDERS INCLUDE THE FOLLOWING:

- Audiologists
- Dental hygienists
- Birthing centers
- Midwives
- Hospices

DOCTORS, NURSES, HOSPITALS, CLINICS

- Social workers
- Marriage & family therapists
- Counselors
- Licensed athletic trainers
- And anyone similar

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Statutory Definition of Provider

“any person, partnership, association, corporation, or other facility or institution who causes to be rendered or who renders health care or [related] professional services”

U.C.A. § 78B-3-403(13)



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Statute of Limitations for a Timely Panel

To Make A Claim and get to a panel, you cannot wait forever.

2 years from discovery of the injury.

No more than 4 years from the date of the act, omission, neglect or occurrence.

1 year from discovery of a foreign object in the body.

1 year from discovery of fraudulent concealment of a claim.

(or from when the injured party should have discovered the claim)

U.C.A. § 78B-3-404



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Notice of Intent to Commence Action

The prelitigation panel process begins with documents called Notice of Intent to Commence Action and Request for Prelitigation Panel Review.

They are filed with the Division and served on the health care professional.

The Notice sets forth the basic facts giving rise to a claim and a request for relief.

If the provider is a government entity, like the University of Utah Hospital, then the claimant still has to comply with all additional notices required by the Governmental Immunity Act.

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I received a Notice. Now what?

Report it immediately to your malpractice insurance carrier. The carrier will typically provide you with counsel to defend you.

File a notice of appearance with DOPL within 10 days. (This is typically handled by your counsel.)

You have the option of filing a written response called an Answer, but that is not required or even advisable in many cases.

Answers can help flesh out situations that are convoluted and difficult to explain simply. For simple matters, an Answer simply allows the claimant extra time and information to attack your positions.

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How to prepare for the panel hearing.

After filing an appearance with DOPL, the next step is setting a date all can agree upon. There is a time window for panel hearings to occur.

You will receive a list of panelists, so that you may object that persons have the wrong specialties or are somehow biased.

You will be creating a timeline of treatment.

You will be sending proposed subpoenas to DOPL to get the medical records relevant to the claim.

You may consult with other professionals on the standard of care.

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Does the Panel Hearing matter?

The prelitigation panel does not make or break any case.

It is informal.

It is non-binding.

It is confidential and closed to the public.

It is inadmissible and closed to discovery requests in subsequent litigation.

Dentists are immune from panel hearings by statute (but their practices are not).

If all parties agree, you may waive the panel hearing.

The parties may have a mandatory arbitration agreement.

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If the decision of the panel is non-binding, why do it?

- 1) Panels do resolve a number of cases. The percentage is not high, but if you can avoid having a court case, that is a big benefit. The panel gives claimants a taste of litigation. Claimants also get to hear more than just the biased view of their attorney.
- 2) Panels allow providers to gather information on claimants and on their risk at a very early stage. Providers may subpoena through DOPL medical records of the claimant (but not work, education, or other records). This tends to make discovery faster and cheaper than it would have been without the panel process. Providers can be preparing their experts from the outset of a claim.
- 3) You can get a sense of what others think of your position early on.
- 4) Manages expectations of the parties.

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Who is on the panel?

- 1) Lawyer who has completed Division training.
 - Represents the viewpoints of a judge.
- 2) A lay member of the community who has completed Division training.
 - Represents the viewpoints of a jury.
- 3) Licensed health care provider of the same specialty as the provider complained of or a facility administrator for the type of facility at issue.
 - Represents the viewpoint of an expert witness.
 - Can weigh in on the standard of care.

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What happens at a panel hearing?

Panel hearings are held at the Heber Wells building in a conference room.

After introductions, the claimants present their side of the alleged malpractice.

Then the provider presents the other side, typically going through the claimants' medical records obtained by DOPL subpoena to show compliance with the standard of care. Typically, attorneys do most of the talking, and the provider has little to say.

There is no cross-examination. Panel members may ask questions (typically clarifying) of the parties, but the parties may not ask any questions of each other.

The panel excuses the parties and makes a decision.

Usually, the panel hearing lasts less than 2 hours.

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The panel found no merit. Am I done?

No, the panel decision has no finality about it.

Even if the panel finds no merit, claimants may still bring suit. However, they may lose the attorney that was representing them or decide that they don't want to spend so much time and money on a claim others already found non-meritorious.

If the panel finds the claim is meritorious, that alone is not a reason to panic. Sometimes panelist are self-proclaimed perfectionists and feel that only their own definition of perfection meets the standard of care. That will not be the standard at trial.

The time to file a complaint is simply on hold during prelitigation.

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Duties to serve on panels.

As a condition of the health care license, you can be obligated to serve as a panelist on prelitigation panel hearings. U.C.A. § 78B-3-416(6)

You can be excused for unreasonable burden or hardship.

Failure to appear can lead to fines of up to \$5,000.

Repeated or intentional failure to appear is “unprofessional conduct” and may have ramifications against the license.

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