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# UTAH DEPARTMENT OF COMMERCE

## Division of Professional Licensing

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## INFORMATION FOR PRELITIGATION PANEL MEMBERS

### General Process Overview/What to Expect

Panel members are provided a Per Diem in the amount of \$60. In the event a panel member is serving more than one hearing on one day, the amount increases to \$90. Panel members will be emailed an "Oath of Office" document to sign the day or two prior to the hearing date which will initiate payment.

Prelitigation hearings are held electronically through Google Meets. An invitation to join the meeting will be emailed to you approx. two weeks prior to the hearing. Please accept this invitation to confirm your attendance/add to your Google Calendar. You will be asked to sign in to the meeting prior to the start time so that we may solve any unforeseen technical issues. Please be sure to have a working camera and microphone.

Confirmed Panel Members will be provided a copy of the "Notice of Intent" and "Request for Prelitigation Hearing" which will outline the facts of the Petitioners case.

A Panel consist of a Chairperson, a Lay member, and typically (but not always) a Hospital Administrator, along with any Specialty Provider(s) requested by the Petitioner or Respondents.

The hearing will be administered by the Chairperson, who is an attorney. The chairperson will provide a quick overview of the process at the beginning of each hearing. If you have any questions they will be available to assist you at that time. The panel will hear from the Petitioner first, then the Respondent, with the Petitioner making a final rebuttal statement before panel deliberations.

It is possible you will receive supporting documentation or evidence the day before, or morning of the hearing, via the email address you provided to the division.

The panel will be allowed to ask questions either during or after evidence has been presented. Please try not to interrupt or use the "raise hand" feature on Google Meets.

Once the parties have been dismissed, the panel remain to discuss the case and determine whether the claims are meritorious or non-meritorious by filling out the "Opinion Form". The Opinion Form" is an Adobe Sign doc that will be populated to the email address you provided, on the day of the hearing. The Chairperson will sign the document first, and offer direction at that time regarding what order the signatures will be in. This will conclude the hearing.

For more detailed information please visit the Prelitigation webpage:

Prelitigation webpage can be found here: <https://dopl.utah.gov/prelitigation/>

Prelitigation Laws and Rules can be found here: <https://dopl.utah.gov/prelitigation/laws-and-rules/>

## RESPONSIBILITIES OF A PANEL MEMBER

The primary purpose of the Prelitigation Section is to expedite early evaluation and settlement, or other appropriate disposition, of malpractice claims

Prelitigation panel hearings are helpful to the parties in evaluating the strengths and weaknesses of their cases. Having a panel of impartial panelists review the evidence and assess the merits of each party's claims affords the parties and their attorneys an opportunity to make valuable decisions on whether or how to continue to pursue or defend a case.

### Meritorious or Non-Meritorious Claim

To make a determination whether a claim is meritorious or non-meritorious a panel member should consider the following:

1. The applicable standard of care;
2. Whether the respondent health care provider breached that standard of care in their treatment of the patient;
3. Whether the breach of care was a "proximate cause" of harm

#### A1. Standard of Care

Generally speaking, the "standard of care" means the degree of learning, care, skill and treatment ordinarily possessed and exercised, under similar circumstances, by other qualified health care providers in the same field of practice as the respondent. The standard of care along the Wasatch Front is the same as that practiced in other large metropolitan areas around the country. Whether the standard of care is the same in more rural communities depends upon the particulars of the situation at issue, e.g. the availability of a specialist for referral or a particular piece of diagnostic equipment.

#### A2. Breach

After the panel has determined the appropriate standard of care, it must decide whether the respondent health care provider met that standard of care or "breached" the standard of care. The medical specialist(s) on the panel should help the other panel members understand what the standard of care requires in the circumstances of a particular claim.

#### A3. Proximate Cause

An important issue in many cases is whether or not the injuries complained of resulted or were "proximately caused" by a breach of the standard of care. Simply defined, the "proximate cause" of an injury is that cause which in an unbroken "chain of events" led to the harm. It is the cause, without which, an injury would not have occurred.

*Care which is sub-standard does not always cause harm. For example, although a diagnosis of cancer may not have been made in a case, it may not be medical malpractice if at the time the patient was seeing the care provider, and it was already so advanced that a timely diagnosis would not have changed the outcome. Similarly, it may not be medical malpractice if the*

*petitioner's injury is an unavoidable or natural consequence of the patient's condition or the treatment received.*

## **B. Concurrent Causes and Patient Negligence**

There may be more than one "proximate cause" of the same injury. If the panel determines that the negligence of two or more respondents proximately caused the injury of the petitioner, then these respondents must share liability for the resulting injury, in proportion to their individual negligence.

A patient has an affirmative duty to exercise reasonable care for his/her own health and safety. The failure to exercise reasonable care is negligence. A patient's failure to seek treatment, to follow a physician's reasonable instructions and to give an accurate medical history are examples of conduct that may be negligence in some circumstances. If it is determined that the patient's negligence is equal to or greater than the negligence of the health care provider from whom recovery of damages is sought, the patient's claim for medical malpractice is barred in a court of law. The respondent must establish that the patient was negligent and that such negligence was a proximate cause of the patient's injury.

## **C. Res Ipsa Loquitur**

The literal meaning of the phrase "res ipsa loquitur" is "the thing speaks for itself." It is a doctrine which may arise in certain situations to ease the petitioner's ability to establish a particular claim of medical malpractice. To make the doctrine applicable in a case, the petitioner must establish that: (1) the event or treatment in question is commonly known and does not usually occur in the absence of negligence; (2) the instrumentalities which could have caused the injury were within the exclusive control of the respondent(s) at the time in question; and (3) the patient did not participate in causing the injury.

## **D. Expert Testimony**

In a Prelitigation hearing, the proffer of a supporting expert opinion is not required to establish a meritorious claim. However, supporting expert opinions may be proffered by the parties in verbal or written form in an effort to convince the panel members of the merit or lack of merit of the medical malpractice claim. The role of the medical specialist(s) on the panel includes helping the other panel members understand what the standard of care requires in the circumstances of the particular claim. The medical panel members can also help evaluate whether the claimed damage resulted from a breach of the standard of care or if it was the natural consequence of the patient's condition or the treatment received. It is important to remember, however, that it is the general standard of care which is relevant in reviewing respondent's care and the personal preference of the medical specialist on the panel is irrelevant and should not be a factor in the panel's decision.

## **E. Informed Consent**

"Informed consent" means that the care provided by a health care provider is authorized by the patient after the patient has been fully informed of all material risks associated with a particular

plan of treatment. Utah law presumes that all care provided to a patient is authorized by the patient. Therefore, a petitioner in a certain case may raise a separate claim against the respondent(s) for failure to obtain the patient's informed consent. This is a claim based on certain statutory provisions and is distinct from an allegation of medical malpractice. When this claim is raised, the panel chair will explain the elements of proof required by law to establish a valid claim for failure to obtain informed consent and the defenses which can be raised by the respondent health care provider.

#### **F. Confidentiality of Prelitigation Proceedings**

Panel members must remember at all times that the Prelitigation proceedings are confidential and closed to the public. Therefore, panel members must not discuss the proceedings with any third parties or disclose any information obtained during a hearing.