

1 **HEALTH REFORM - MEDICAL MALPRACTICE**

2 **AMENDMENTS**

3 2009 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Peter C. Knudson**

6 House Sponsor: Roger E. Barrus

7
8 **LONG TITLE**

9 **General Description:**

10 This bill amends the Occupation and Professions Code to regulate the conduct of
11 individuals providing expert medical testimony and to establish the standard of proof
12 necessary for a malpractice claim in an emergency room.

13 **Highlighted Provisions:**

14 This bill:

- 15 ▶ defines terms;
- 16 ▶ establishes a standard of proof of clear and convincing evidence for malpractice
17 actions based on emergency care received in an emergency room;
- 18 ▶ amends the licensing laws to provide oversight of medical expert witnesses by the
19 licensing board; and
- 20 ▶ makes it unprofessional conduct to provide expert medical testimony that is false or
21 without scientific basis.

22 **Monies Appropriated in this Bill:**

23 None

24 **Other Special Clauses:**

25 None

26 **Utah Code Sections Affected:**

27 AMENDS:



28 58-67-102, as last amended by Laws of Utah 2008, Chapter 382

29 58-67-502, as enacted by Laws of Utah 1996, Chapter 248

30 58-68-102, as last amended by Laws of Utah 2008, Chapter 382

31 58-68-502, as enacted by Laws of Utah 1996, Chapter 248

32 ENACTS:

33 58-13-2.5, Utah Code Annotated 1953

34 58-67-301.5, Utah Code Annotated 1953

35 58-68-301.5, Utah Code Annotated 1953



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

38 Section 1. Section 58-13-2.5 is enacted to read:

39 **58-13-2.5. Standard of proof for emergency care when immunity does not apply.**

40 (1) A person ~~§~~ **[licensed under Title 58, Occupations and Professions,]** ~~←§~~ who is a health care
41 provider as defined in Section 78B-3-403 who provides emergency care in good faith, but is
42 not immune from suit because of an expectation of payment, a legal duty to respond, or other
43 reason under Section 58-13-2, may only be liable for civil damages if fault, as defined in
44 Section 78B-5-817, is established by clear and convincing evidence.

45 (2) For purposes of Subsection (1), "emergency care" means the treatment of an
46 emergency medical condition, as defined in Section 31A-22-627, from the time that the person
47 presents at the emergency department of a hospital and including any subsequent transfer to
48 another hospital, until the condition has been stabilized and the patient is either discharged
49 from the emergency department or admitted to another department of the hospital.

50 (3) (a) Nothing in this section may be construed as:

51 (i) altering the applicable standard of care for determining fault; or

52 (ii) applying the standard of proof of clear and convincing evidence to care outside of
53 emergency care and the mandatory legal duty to treat.

54 (b) This section applies to emergency care given after June 1, 2009.

55 Section 2. Section 58-67-102 is amended to read:

56 **58-67-102. Definitions.**

57 In addition to the definitions in Section 58-1-102, as used in this chapter:

58 (1) "ACGME" means the Accreditation Council for Graduate Medical Education of the

59 American Medical Association.

60 (2) "Administrative penalty" means a monetary fine imposed by the division for acts or
61 omissions determined to constitute unprofessional or unlawful conduct, as a result of an
62 adjudicative proceeding conducted in accordance with Title 63G, Chapter 4, Administrative
63 Procedures Act.

64 (3) "Board" means the Physicians Licensing Board created in Section 58-67-201.

65 (4) "Diagnose" means:

66 (a) to examine in any manner another person, parts of a person's body, substances,
67 fluids, or materials excreted, taken, or removed from a person's body, or produced by a person's
68 body, to determine the source, nature, kind, or extent of a disease or other physical or mental
69 condition;

70 (b) to attempt to conduct an examination or determination described under Subsection
71 (4)(a);

72 (c) to hold oneself out as making or to represent that one is making an examination or
73 determination as described in Subsection (4)(a); or

74 (d) to make an examination or determination as described in Subsection (4)(a) upon or
75 from information supplied directly or indirectly by another person, whether or not in the
76 presence of the person making or attempting the diagnosis or examination.

77 (5) "LCME" means the Liaison Committee on Medical Education of the American
78 Medical Association.

79 (6) "Medical assistant" means an unlicensed individual working under the direct and
80 immediate supervision of a licensed physician and surgeon and engaged in specific tasks
81 assigned by the licensed physician and surgeon in accordance with the standards and ethics of
82 the profession.

83 (7) "Physician" means both physicians and surgeons licensed under Section 58-67-301,
84 Utah Medical Practice Act, and osteopathic physicians and surgeons licensed under Section
85 58-68-301, Utah Osteopathic Medical Practice Act.

86 (8) "Practice of medicine" means:

87 (a) to diagnose, treat, correct, administer anesthesia, or prescribe for any human
88 disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real
89 or imaginary, or to attempt to do so, by any means or instrumentality, and by an individual in

90 Utah or outside the state upon or for any human within the state, except that conduct described
 91 in this Subsection (8)(a) that is performed by a person legally and in accordance with a license
 92 issued under another chapter of this title does not constitute the practice of medicine;

93 (b) when a person not licensed as a physician directs a licensee under this chapter to
 94 withhold or alter the health care services that the licensee has ordered, but practice of medicine
 95 does not include any conduct under Subsection 58-67-501(2);

96 (c) to maintain an office or place of business for the purpose of doing any of the acts
 97 described in Subsection (8)(a) whether or not for compensation; [~~or~~]

98 (d) to use, in the conduct of any occupation or profession pertaining to the diagnosis or
 99 treatment of human diseases or conditions in any printed material, stationery, letterhead,
 100 envelopes, signs, or advertisements, the designation "doctor," "doctor of medicine,"
 101 "physician," "surgeon," "physician and surgeon," "Dr.," "M.D.," or any combination of these
 102 designations in any manner which might cause a reasonable person to believe the individual
 103 using the designation is a licensed physician and surgeon, and if the party using the designation
 104 is not a licensed physician and surgeon, the designation must additionally contain the
 105 description of the branch of the healing arts for which the person has a license[-]; or

106 (e) to testify as an expert witness ~~§~~ → **regarding the practice of medicine** ← ~~§~~ in an action
 106a for injury or death against a physician
 107 licensed in this state as provided in Section 58-67-301.5.

108 (9) "Prescription drug or device" means:

109 (a) a drug or device which, under federal law, is required to be labeled with either of
 110 the following statements or their equivalent:

111 (i) "CAUTION: Federal law prohibits dispensing without prescription"; or

112 (ii) "CAUTION: Federal law restricts this drug to use by or on the order of a licensed
 113 veterinarian"; or

114 (b) a drug or device that is required by any applicable federal or state law or rule to be
 115 dispensed on prescription only or is restricted to use by practitioners only.

116 (10) "SPEX" means the Special Purpose Examination of the Federation of State
 117 Medical Boards.

118 (11) "Unlawful conduct" is as defined in Sections 58-1-501 and 58-67-501.

119 (12) "Unprofessional conduct" is as defined in Sections 58-1-501 and 58-67-502, and
 120 as may be further defined by division rule.

121 Section 3. Section **58-67-301.5** is enacted to read:

122 **58-67-301.5. Board oversight of medical expert witnesses.**

123 **§→ [A] Notwithstanding Subsection 58-67-305(8) and Section 58-1-307, a ←§** person
 123a who is licensed to practice medicine in another state and who testifies as an
 124 expert witness §→ regarding the practice of medicine ←§ in any action for injury or death
 124a against a physician licensed in this state arising
 125 out of the provision of or failure to provide health care services is:

126 (1) considered to have a temporary license to practice medicine in this state for the
 127 limited purpose of testifying in the action for injury or death against a physician; and

128 (2) subject to the authority and disciplinary actions of the board.

129 Section 4. Section **58-67-502** is amended to read:

130 **58-67-502. Unprofessional conduct.**

131 "Unprofessional conduct" includes~~[-; in addition to]~~:

132 (1) the conduct described in the definition in Section 58-1-501[-];

133 (2) using or employing the services of any individual to assist a licensee in any manner
 134 not in accordance with the generally recognized practices, standards, or ethics of the
 135 profession, state law, or division rule[-]; or

136 (3) providing expert medical testimony:

137 (a) on a contingency fee basis in any action for injury or death arising out of the
 138 provisions of or failure to provide health care services; or

139 (b) that is false or completely without medical foundation, including:

140 (i) without a thorough review of the medical records of the claimant;

141 (ii) without a physical examination of the claimant where appropriate or convenient; §→ [-or] ←§

142 (iii) without foundation in accepted science-based medical research §→ ; or

142a (iv) **not based on current standards of care for Utah ←§ .**

143 Section 5. Section **58-68-102** is amended to read:

144 **58-68-102. Definitions.**

145 In addition to the definitions in Section 58-1-102, as used in this chapter:

146 (1) "ACGME" means the Accreditation Council for Graduate Medical Education of the
 147 American Medical Association.

148 (2) "Administrative penalty" means a monetary fine imposed by the division for acts or
 149 omissions determined to constitute unprofessional or unlawful conduct, as a result of an
 150 adjudicative proceeding conducted in accordance with Title 63G, Chapter 4, Administrative
 151 Procedures Act.

152 (3) "AOA" means the American Osteopathic Association.

153 (4) "Board" means the Osteopathic Physicians Licensing Board created in Section
154 58-68-201.

155 (5) "Diagnose" means:

156 (a) to examine in any manner another person, parts of a person's body, substances,
157 fluids, or materials excreted, taken, or removed from a person's body, or produced by a person's
158 body, to determine the source, nature, kind, or extent of a disease or other physical or mental
159 condition;

160 (b) to attempt to conduct an examination or determination described under Subsection
161 (5)(a);

162 (c) to hold oneself out as making or to represent that one is making an examination or
163 determination as described in Subsection (5)(a); or

164 (d) to make an examination or determination as described in Subsection (5)(a) upon or
165 from information supplied directly or indirectly by another person, whether or not in the
166 presence of the person making or attempting the diagnosis or examination.

167 (6) "Medical assistant" means an unlicensed individual working under the direct and
168 immediate supervision of a licensed osteopathic physician and surgeon and engaged in specific
169 tasks assigned by the licensed osteopathic physician and surgeon in accordance with the
170 standards and ethics of the profession.

171 (7) "Physician" means both physicians and surgeons licensed under Section 58-67-301,
172 Utah Medical Practice Act, and osteopathic physicians and surgeons licensed under Section
173 58-68-301, Utah Osteopathic Medical Practice Act.

174 (8) "Practice of osteopathic medicine" means:

175 (a) to diagnose, treat, correct, administer anesthesia, or prescribe for any human
176 disease, ailment, injury, infirmity, deformity, pain, or other condition, physical or mental, real
177 or imaginary, or to attempt to do so, by any means or instrumentality, which in whole or in part
178 is based upon emphasis of the importance of the musculoskeletal system and manipulative
179 therapy in the maintenance and restoration of health, by an individual in Utah or outside of the
180 state upon or for any human within the state, except that conduct described in this Subsection
181 (8)(a) that is performed by a person legally and in accordance with a license issued under
182 another chapter of this title does not constitute the practice of medicine;

183 (b) when a person not licensed as a physician directs a licensee under this chapter to
 184 withhold or alter the health care services that the licensee has ordered, but practice of medicine
 185 does not include any conduct under Subsection 58-68-501(2);

186 (c) to maintain an office or place of business for the purpose of doing any of the acts
 187 described in Subsection (8)(a) whether or not for compensation; [~~or~~]

188 (d) to use, in the conduct of any occupation or profession pertaining to the diagnosis or
 189 treatment of human diseases or conditions, in any printed material, stationery, letterhead,
 190 envelopes, signs, or advertisements, the designation "doctor," "doctor of osteopathic medicine,"
 191 "osteopathic physician," "osteopathic surgeon," "osteopathic physician and surgeon," "Dr.,"
 192 "D.O.," or any combination of these designations in any manner which might cause a
 193 reasonable person to believe the individual using the designation is a licensed osteopathic
 194 physician, and if the party using the designation is not a licensed osteopathic physician, the
 195 designation must additionally contain the description of the branch of the healing arts for which
 196 the person has a license[-]; or

197 (e) to testify as an expert witness ~~§~~ **→ regarding the practice of medicine ←** ~~§~~ in this state
 197a in an action for injury or death against a
 198 physician or osteopathic physician as provided in Section 58-68-301.5.

199 (9) "Prescription drug or device" means:

200 (a) a drug or device which, under federal law, is required to be labeled with either of
 201 the following statements or their equivalent:

202 (i) "CAUTION: Federal law prohibits dispensing without prescription"; or

203 (ii) "CAUTION: Federal law restricts this drug to use by or on the order of a licensed
 204 veterinarian"; or

205 (b) a drug or device that is required by any applicable federal or state law or rule to be
 206 dispensed on prescription only or is restricted to use by practitioners only.

207 (10) "SPEX" means the Special Purpose Examination of the Federation of State
 208 Medical Boards.

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 211 may be further defined by division rule.

212 Section 6. Section **58-68-301.5** is enacted to read:

213 **58-68-301.5. Board oversight of medical expert witnesses.**

214 ~~§~~ → [A] Notwithstanding Subsection 58-68-305(8) and Section 58-1-307, a ← ~~§~~ person
 214a who is licensed to practice osteopathic medicine in another state and who
 215 testifies as an expert witness in this state ~~§~~ → regarding the practice of medicine ← ~~§~~ in any action
 215a for injury or death against a physician or
 216 osteopathic physician, whether in contract or tort, arising out of the provision of or failure to
 217 provide health care services is:

218 (1) considered to have a temporary license to practice osteopathic medicine in this state
 219 for the limited purpose of testifying in the action for injury or death against a physician or
 220 osteopathic physician; and

221 (2) subject to the authority and disciplinary actions of the board.

222 Section 7. Section **58-68-502** is amended to read:

223 **58-68-502. Unprofessional conduct.**

224 "Unprofessional conduct" includes~~[-, in addition to]:~~

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226 (2) using or employing the services of any individual to assist a licensee in any manner
 227 not in accordance with the generally recognized practices, standards, or ethics of the
 228 profession, state law, or division rule[-]; or

229 (3) providing expert medical testimony:

230 (a) on a contingency fee basis in any action for injury or death arising out of the
 231 provisions of or failure to provide health care services; or

232 (b) that is false or completely without medical foundation, including:

233 (i) without a thorough review of the medical records of the claimant;

234 (ii) without a physical examination of the claimant where appropriate or convenient; ~~§~~ → [or] ← ~~§~~

235 (iii) without foundation in accepted science-based medical research ~~§~~ → ; or

235a (iv) not based on current standards of care for Utah ← ~~§~~ .

Legislative Review Note
 as of 2-4-09 4:41 PM

Office of Legislative Research and General Counsel

S.B. 79 - Health Reform - Medical Malpractice Amendments

Fiscal Note

2009 General Session

State of Utah

State Impact

Enactment of this bill will not require additional appropriations.

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals and local governments. Businesses may be impacted due to changes in the proposed statute.
