

Senator John L. Valentine proposes the following substitute bill:

HEALTH REFORM - MEDICAL MALPRACTICE

AMENDMENTS

2009 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Peter C. Knudson

House Sponsor: _____

LONG TITLE

General Description:

This bill amends the Occupation and Professions Code to make it unprofessional conduct to provide false or misleading expert medical testimony and to establish the standard of proof necessary for a malpractice claim against certain health care providers in an emergency room.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ establishes a standard of proof of clear and convincing evidence for malpractice actions based on emergency care received in an emergency room; and
- ▶ makes it unprofessional conduct to provide expert medical testimony that is false or without scientific basis.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:



26 AMENDS:

27 **58-67-102**, as last amended by Laws of Utah 2008, Chapter 382

28 **58-67-502**, as enacted by Laws of Utah 1996, Chapter 248

29 **58-68-102**, as last amended by Laws of Utah 2008, Chapter 382

30 **58-68-502**, as enacted by Laws of Utah 1996, Chapter 248

31 ENACTS:

32 **58-13-2.5**, Utah Code Annotated 1953

33 **58-67-301.5**, Utah Code Annotated 1953

34 **58-68-301.5**, Utah Code Annotated 1953



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

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

38 **58-13-2.5. Standard of proof for emergency care when immunity does not apply.**

39 (1) For purposes of this section:

40 (a) "Emergency care" means the treatment of an emergency medical condition, as
41 defined in Section 31A-22-627, from the time that the person presents at the emergency
42 department of a hospital and including any subsequent transfer to another hospital, until the
43 condition has been stabilized and the patient is either discharged from the emergency
44 department or admitted to another department of the hospital.

45 (b) (i) "Health care provider" means a person who:

46 (A) is licensed under Chapter 67, Utah Medical Practice Act" or Chapter 68, "Utah
47 Osteopathic Medical Practice Act"; and

48 (B) is called into the emergency department to consult on the emergency care for a
49 patient.

50 (ii) Health care provider does not include:

51 (A) a person licensed in accordance with Subsection (1)(b)(i) who is staffing the
52 emergency department of a hospital as an emergency department physician; or

53 (B) a health care facility that is providing emergency care for a patient.

54 (2) A health care provider who provides emergency care in good faith, but is not
55 immune from suit because of an expectation of payment, a legal duty to respond, or other
56 reason under Section 58-13-2, may only be liable for civil damages if fault, as defined in

57 Section 78B-5-817, is established by clear and convincing evidence.

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

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

60 (ii) applying the standard of proof of clear and convincing evidence to care outside of

61 emergency care and the mandatory legal duty to treat.

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

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

64 **58-67-102. Definitions.**

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

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

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

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

73 (4) "Diagnose" means:

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

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

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

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

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

87 (6) "Medical assistant" means an unlicensed individual working under the direct and

88 immediate supervision of a licensed physician and surgeon and engaged in specific tasks
89 assigned by the licensed physician and surgeon in accordance with the standards and ethics of
90 the profession.

91 (7) "Physician" means both physicians and surgeons licensed under Section 58-67-301,
92 Utah Medical Practice Act, and osteopathic physicians and surgeons licensed under Section
93 58-68-301, Utah Osteopathic Medical Practice Act.

94 (8) "Practice of medicine" means:

95 (a) to diagnose, treat, correct, administer anesthesia, or prescribe for any human
96 disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real
97 or imaginary, or to attempt to do so, by any means or instrumentality, and by an individual in
98 Utah or outside the state upon or for any human within the state, except that conduct described
99 in this Subsection (8)(a) that is performed by a person legally and in accordance with a license
100 issued under another chapter of this title does not constitute the practice of medicine;

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

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

106 (d) to use, in the conduct of any occupation or profession pertaining to the diagnosis or
107 treatment of human diseases or conditions in any printed material, stationery, letterhead,
108 envelopes, signs, or advertisements, the designation "doctor," "doctor of medicine,"
109 "physician," "surgeon," "physician and surgeon," "Dr.," "M.D.," or any combination of these
110 designations in any manner which might cause a reasonable person to believe the individual
111 using the designation is a licensed physician and surgeon, and if the party using the designation
112 is not a licensed physician and surgeon, the designation must additionally contain the
113 description of the branch of the healing arts for which the person has a license[~~;~~]; or

114 (e) to testify as an expert witness regarding the practice of medicine in an action for
115 injury or death against a physician licensed in this state as provided in Section 58-67-301.5.

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

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

- 119 (i) "CAUTION: Federal law prohibits dispensing without prescription"; or
- 120 (ii) "CAUTION: Federal law restricts this drug to use by or on the order of a licensed
- 121 veterinarian"; or
- 122 (b) a drug or device that is required by any applicable federal or state law or rule to be
- 123 dispensed on prescription only or is restricted to use by practitioners only.
- 124 (10) "SPEX" means the Special Purpose Examination of the Federation of State
- 125 Medical Boards.
- 126 (11) "Unlawful conduct" is as defined in Sections 58-1-501 and 58-67-501.
- 127 (12) "Unprofessional conduct" is as defined in Sections 58-1-501 and 58-67-502, and
- 128 as may be further defined by division rule.

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

130 **58-67-301.5. Board oversight of medical expert witnesses.**

131 Notwithstanding Section 58-1-307 and Subsection 58-67-305(8), a person who is
132 licensed to practice medicine in another state and who testifies as an expert witness regarding
133 the practice of medicine in any action for injury or death against a physician licensed in this
134 state arising out of the provision of or failure to provide health care services is:

- 135 (1) considered to have a temporary license to practice medicine in this state for the
- 136 limited purpose of testifying in the action for injury or death against a physician; and
- 137 (2) subject to the authority and disciplinary actions of the board.

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

139 **58-67-502. Unprofessional conduct.**

140 "Unprofessional conduct" includes~~[-, in addition to];~~

- 141 (1) the conduct described in the definition in Section 58-1-501[-];
- 142 (2) using or employing the services of any individual to assist a licensee in any manner
143 not in accordance with the generally recognized practices, standards, or ethics of the
144 profession, state law, or division rule[-]; or
- 145 (3) providing expert medical testimony:
 - 146 (a) on a contingency fee basis in any action for injury or death arising out of the
147 provisions of or failure to provide health care services; or
 - 148 (b) that is false or completely without medical foundation, including:
 - 149 (i) without a thorough review of the medical records of the claimant;

- 150 (ii) without a physical examination of the claimant where appropriate or convenient;
- 151 (iii) without foundation in accepted science-based medical research; or
- 152 (iv) not based on current standards of care for Utah.

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

154 **58-68-102. Definitions.**

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

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

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

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

163 (4) "Board" means the Osteopathic Physicians Licensing Board created in Section
164 58-68-201.

165 (5) "Diagnose" means:

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

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

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

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

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

181 (7) "Physician" means both physicians and surgeons licensed under Section 58-67-301,
182 Utah Medical Practice Act, and osteopathic physicians and surgeons licensed under Section
183 58-68-301, Utah Osteopathic Medical Practice Act.

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

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

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

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

198 (d) to use, in the conduct of any occupation or profession pertaining to the diagnosis or
199 treatment of human diseases or conditions, in any printed material, stationery, letterhead,
200 envelopes, signs, or advertisements, the designation "doctor," "doctor of osteopathic medicine,"
201 "osteopathic physician," "osteopathic surgeon," "osteopathic physician and surgeon," "Dr.,"
202 "D.O.," or any combination of these designations in any manner which might cause a
203 reasonable person to believe the individual using the designation is a licensed osteopathic
204 physician, and if the party using the designation is not a licensed osteopathic physician, the
205 designation must additionally contain the description of the branch of the healing arts for which
206 the person has a license[-]; or

207 (e) to testify as an expert witness regarding the practice of medicine in this state in an
208 action for injury or death against a physician or osteopathic physician as provided in Section
209 58-68-301.5.

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

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

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

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

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222 may be further defined by division rule.

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226 licensed to practice osteopathic medicine in another state and who testifies as an expert witness
227 in this state regarding the practice of medicine in any action for injury or death against a
228 physician or osteopathic physician, whether in contract or tort, arising out of the provision of or
229 failure to provide health care services is:

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

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

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

235 **58-68-502. Unprofessional conduct.**

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

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

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

241 (3) providing expert medical testimony:

242 (a) on a contingency fee basis in any action for injury or death arising out of the

243 provisions of or failure to provide health care services; or

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

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

246 (ii) without a physical examination of the claimant where appropriate or convenient;

247 (iii) without foundation in accepted science-based medical research; or

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