

**Representative Marsha Judkins** proposes the following substitute bill:

**FORMER OFFENDER EMPLOYMENT AMENDMENTS**

2022 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Marsha Judkins**

Senate Sponsor: Michael S. Kennedy

**LONG TITLE**

**General Description:**

This bill addresses employment and licensing of a former offender as a mental health professional.

**Highlighted Provisions:**

This bill:

- ▶ creates and modifies definitions;
- ▶ when hiring a mental health professional, prohibits certain public employers and public employer contractors from:
  - considering certain arrests or criminal convictions;
  - denying employment based on certain criminal convictions; and
  - denying certain employment based on the mental health professional's

participation in substance use treatment;

- ▶ when hiring a mental health professional, prohibits a private employer from ~~to~~ [:-

\_\_\_\_\_] ~~to~~ excluding an applicant ~~to~~ **from an interview** ~~to~~ for certain arrests

~~to~~ [:-] ~~to~~ a juvenile adjudication ~~to~~ [~~and~~] , **or** ~~to~~

~~to~~ [:-] ~~to~~ **making an inquiry regarding an applicant's** an ~~to~~ expunged criminal

~~to~~ [:-] ~~to~~ **offense** ~~to~~ ;

- ▶ prohibits the Division of Occupational and Professional Licensing from:

- considering certain criminal convictions when taking certain actions regarding a mental health professional's license; and

**2nd Sub. H.B. 192**



- 26 • refusing certain mental health professionals' licenses based on participation in
- 27 substance use treatment; and
- 28 ▶ makes technical and conforming changes.

29 **Money Appropriated in this Bill:**

30 None

31 **Other Special Clauses:**

32 None

33 **Utah Code Sections Affected:**

34 AMENDS:

- 35 **34-52-102**, as last amended by Laws of Utah 2019, Chapter 371
- 36 **34-52-201**, as last amended by Laws of Utah 2019, Chapters 371 and 479
- 37 **58-1-401**, as last amended by Laws of Utah 2021, Chapter 404
- 38 **58-1-501**, as last amended by Laws of Utah 2020, Chapters 289 and 339
- 39 **58-60-108**, as last amended by Laws of Utah 2021, Chapter 404
- 40 **58-60-110**, as last amended by Laws of Utah 2019, Chapter 419

41 ENACTS:

42 **34-52-302**, Utah Code Annotated 1953



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

45 Section 1. Section **34-52-102** is amended to read:

46 **34-52-102. Definitions.**

47 As used in this chapter:

48 (1) "Applicant" means an individual who provides information to a public employer or  
49 private employer for the purpose of obtaining employment.

50 (2) (a) "Criminal conviction" means a verdict or finding of guilt after a criminal trial or  
51 a plea of guilty or nolo contendere to a criminal charge.

52 (b) "Criminal conviction" does not include an expunged criminal conviction.

53 (3) "Juvenile adjudication" means:

54 (a) a finding by a court that the facts in a petition or criminal information alleging an  
55 individual committed an offense when the individual was younger than 18 years old have been  
56 proved; or

57 (b) an admission or plea of no contest under Section 80-6-306.  
 58 (4) "Mental health professional applicant" means an individual who:  
 59 (a) is licensed under Title 58, Chapter 60, Mental Health Professional Practice Act; and  
 60 (b) provides information to a public employer or private employer for the purpose of  
 61 obtaining employment that requires a license under Title 58, Chapter 60, Mental Health  
 62 Professional Practice Act.

63 [~~3~~] (5) (a) "Private employer" means a person who has one or more employees  
 64 employed in the same business, or in or about the same establishment, under any contract of  
 65 hire, express or implied, oral or written.

66 (b) "Private employer" does not include a public employer.

67 [~~4~~] (6) "Public employer" means an employer that is:

68 (a) the state or any administrative subunit of the state, including a department, division,  
 69 board, council, committee, institution, office, bureau, or other similar administrative unit of  
 70 state government;

71 (b) a state institution of higher education; or

72 (c) a municipal corporation, county, municipality, school district, local district, special  
 73 service district, or other political subdivision of the state.

74 Section 2. Section **34-52-201** is amended to read:

75 **34-52-201. Public employer requirements -- Exceptions for hiring a mental health**  
 76 **professional.**

77 (1) [~~A~~] Except as provided in Subsections (3) and (6), a public employer may not:

78 (a) exclude an applicant from an initial interview because of:

79 (i) a past criminal conviction[-]; or

80 (ii) if the applicant is a mental health professional applicant, because of an arrest that  
 81 occurred when the mental health professional was younger than 18 years old or a past juvenile  
 82 adjudication;

83 (b) make an inquiry related to an applicant's expunged criminal history;

84 (c) when making a hiring decision regarding a mental health professional applicant,  
 85 consider:

86 (i) an arrest described in Subsection (1)(a);

87 (ii) an arrest not followed by a criminal conviction or juvenile adjudication;

88           (iii) a juvenile adjudication; or  
89           (iv) a past criminal conviction if:  
90           (A) the mental health professional applicant's sentence for the criminal conviction  
91 terminated; and  
92           (B) for a criminal conviction for which the mental health professional was  
93 incarcerated, at least three years have passed since the last day on which the mental health  
94 professional applicant was incarcerated for the criminal conviction; or  
95           (d) deny a mental health professional applicant employment based on a past criminal  
96 conviction that does not bear a direct relationship to the mental health professional applicant's  
97 ability to safely or competently perform the duties of employment.  
98           (2) A public employer excludes an applicant from an initial interview under Subsection  
99 (1)(a) if the public employer:  
100           (a) requires an applicant to disclose, on an employment application, a criminal  
101 conviction, or, if the applicant is a mental health professional applicant, an arrest described in  
102 Subsection (1)(a) or a juvenile adjudication;  
103           (b) requires an applicant to disclose, before an initial interview, a criminal conviction,  
104 or, if the applicant is a mental health professional applicant, an arrest described in Subsection  
105 (1)(a) or a juvenile adjudication; or  
106           (c) if no interview is conducted, requires an applicant to disclose, before making a  
107 conditional offer of employment, a criminal conviction[-], or, if the applicant is a mental health  
108 professional, an arrest described in Subsection (1)(a) or a juvenile adjudication.  
109           (3) Notwithstanding Subsection (1)(d), a public employer may not deny a mental health  
110 professional applicant employment that requires the mental health professional applicant to  
111 provide substance use treatment based on:  
112           (a) the mental health professional applicant's participation in substance use treatment;  
113 or  
114           (b) a past criminal conviction for a nonviolent drug offense if:  
115           (i) the mental health professional applicant's sentence for the criminal conviction  
116 terminated; and  
117           (ii) for a criminal conviction for which the mental health professional was incarcerated,  
118 at least three years have passed since the last day on which the mental health professional

119 applicant was incarcerated for the criminal conviction.

120 ~~[(3) (a) A public employer may not make any inquiry related to an applicant's~~  
 121 ~~expunged criminal history.]~~

122 ~~[(b)]~~ (4) An applicant seeking employment from a public employer may answer a  
 123 question related to an expunged criminal record as though the action underlying the expunged  
 124 criminal record never occurred.

125 ~~[(4) Subject to]~~ (5) Except as provided in Subsections (1) through (3), ~~[nothing in this~~  
 126 ~~section prevents]~~ this section does not prevent a public employer from:

127 (a) asking an applicant for information about an applicant's criminal conviction history  
 128 during an initial interview or after an initial interview; or

129 (b) considering an applicant's criminal conviction history when making a hiring  
 130 decision.

131 ~~[(5)]~~ (6) (a) Subsections (1) through ~~[(3)]~~ (4) do not apply:

132 ~~[(a)]~~ (i) if federal, state, or local law, including corresponding administrative rules,  
 133 requires the consideration of an applicant's criminal conviction history;

134 ~~[(b)]~~ (ii) to a public employer that is a law enforcement agency;

135 ~~[(c)]~~ (iii) to a public employer that is part of the criminal or juvenile justice system;

136 ~~[(d)]~~ (iv) to a public employer seeking a nonemployee volunteer;

137 ~~[(e)]~~ (v) to a public employer that works with children or vulnerable adults;

138 ~~[(f)]~~ (vi) to the Department of Alcoholic Beverage Control created in Section

139 [32B-2-203](#);

140 ~~[(g)]~~ (vii) to the State Tax Commission;

141 ~~[(h)]~~ (viii) to a public employer whose primary purpose is performing financial or  
 142 fiduciary functions; ~~[and]~~ or

143 ~~[(i)]~~ (ix) to a public transit district hiring or promoting an individual for a safety  
 144 sensitive position described in Section [17B-2a-825](#).

145 (b) Subsections (1)(c)(iv) and (1)(d) do not apply to a criminal conviction for:

146 (i) a violent felony as defined in Section [76-3-203.5](#); or

147 (ii) a felony related to a criminal sexual act under Title 76, Chapter 5, Part 4, Sexual  
 148 Offenses, or Title 76, Chapter 5b, Sexual Exploitation Act.

149 (c) Subsections (1)(a)(ii), (1)(c), (1)(d), and (3) apply to a person under contract with a

150 public employer.

151 Section 3. Section **34-52-302** is enacted to read:

152 **34-52-302. Private employer requirements when hiring a mental health**

153 **professional.**

154 (1) Except as provided in Subsection (4), a private employer may not ~~Ĥ→~~ [;

155 ~~—(a) ←Ĥ~~ exclude a mental health professional applicant from an initial interview because of  
155a ~~Ĥ→~~ ; ←Ĥ

156 ~~Ĥ→~~ (a) ←Ĥ an arrest that occurred when the mental health professional applicant was  
156a younger than 18

157 years old ~~Ĥ→~~ [~~or~~] ;

157a (b) ←Ĥ a juvenile adjudication; or

158 ~~Ĥ→~~ [~~(b) make an inquiry related to a mental health professional applicant's~~] (c) an ←Ĥ  
158a expunged

159 criminal ~~Ĥ→~~ [~~history~~] offense ←Ĥ .

160 (2) A private employer excludes a mental health professional applicant from an initial  
161 interview under Subsection (1) ~~Ĥ→~~ [~~(a)~~] ←Ĥ if the private employer:

162 (a) requires the mental health professional applicant to disclose, on an employment  
163 application, a juvenile adjudication ~~Ĥ→~~ , **an expunged criminal offense,** ←Ĥ or an arrest  
163a described in Subsection (1) ~~Ĥ→~~ [~~(a)~~] ←Ĥ ;

164 (b) requires the mental health professional applicant to disclose, before an initial  
165 interview, a juvenile adjudication ~~Ĥ→~~ , **an expunged criminal offense,** ←Ĥ or an arrest described  
165a in Subsection (1) ~~Ĥ→~~ [~~(a)~~] ←Ĥ ; or

166 (c) if no interview is conducted, requires the mental health professional applicant to  
167 disclose, before making a conditional offer of employment, a juvenile adjudication ~~Ĥ→~~ , **an**  
167a **expunged criminal offense,** ←Ĥ or an arrest  
168 described in Subsection (1) ~~Ĥ→~~ [~~(a)~~] ←Ĥ .

169 (3) Except as provided in Subsections (1) and (2), this section does not prevent a  
170 private employer from:

171 (a) asking a mental health professional applicant for information about the mental  
172 health professional applicant's criminal conviction history during an initial interview or after an  
173 initial interview; or

174 (b) considering a mental health professional applicant's criminal conviction history  
175 when making a hiring decision.

176 (4) Subsections (1) and (2) do not apply:

- 177           (a) if federal, state, or local law, including corresponding administrative rules, requires  
178 the consideration of an applicant's criminal conviction history;  
179           (b) to a private employer that is part of the criminal or juvenile justice system;  
180           (c) to a private employer seeking a nonemployee volunteer;

- 181 (d) to a private employer that works with children or vulnerable adults; or
- 182 (e) to a private employer whose primary purpose is performing financial or fiduciary
- 183 functions.

184 Section 4. Section **58-1-401** is amended to read:

185 **58-1-401. Grounds for denial of license -- Disciplinary proceedings -- Time**  
186 **limitations -- Sanctions.**

187 (1) The division shall refuse to issue a license to an applicant and shall refuse to renew  
188 or shall revoke, suspend, restrict, place on probation, or otherwise act upon the license of a  
189 licensee who does not meet the qualifications for licensure under this title.

190 (2) The division may refuse to issue a license to an applicant and may refuse to renew  
191 or may revoke, suspend, restrict, place on probation, issue a public reprimand to, or otherwise  
192 act upon the license of a licensee for the following reasons:

193 (a) subject to [~~the provisions of~~] Subsection (7), the applicant or licensee has engaged  
194 in unprofessional conduct, as defined by statute or rule under this title;

195 (b) the applicant or licensee has engaged in unlawful conduct as defined by statute  
196 under this title;

197 (c) the applicant or licensee has been determined to be mentally incompetent by a court  
198 of competent jurisdiction; or

199 (d) subject to Subsections [58-31b-401\(7\)](#), [58-60-108\(2\)](#), [58-61-401\(2\)](#), [58-67-401\(2\)](#),  
200 [58-68-401\(2\)](#), [58-70a-401\(2\)](#), and Section [58-81-105](#), the applicant or licensee is unable to  
201 practice the occupation or profession with reasonable skill and safety because of illness,  
202 drunkenness, excessive use of drugs, narcotics, chemicals, or other type of material, or as a  
203 result of a mental or physical condition, when the condition demonstrates a threat or potential  
204 threat to the public health, safety, or welfare.

205 (3) A licensee whose license to practice an occupation or profession regulated by this  
206 title has been suspended, revoked, placed on probation, or restricted may apply for  
207 reinstatement of the license at reasonable intervals and upon compliance with conditions  
208 imposed upon the licensee by statute, rule, or terms of the license suspension, revocation,  
209 probation, or restriction.

210 (4) The division may issue cease and desist orders to:

211 (a) a licensee or applicant who may be disciplined under Subsection (1) or (2);



212 (b) a person who engages in or represents that the person is engaged in an occupation  
213 or profession regulated under this title; and

214 (c) a person who otherwise violates this title or a rule adopted under this title.

215 (5) The division may impose an administrative penalty in accordance with Section  
216 [58-1-502](#).

217 (6) (a) The division may not take disciplinary action against a person for  
218 unprofessional or unlawful conduct under this title, unless the division enters into a stipulated  
219 agreement or initiates an adjudicative proceeding regarding the conduct within four years after  
220 the conduct is reported to the division, except under Subsection (6)(b).

221 (b) (i) The division may not take disciplinary action against a person for unprofessional  
222 or unlawful conduct more than 10 years after the occurrence of the conduct, unless the  
223 proceeding is in response to a civil or criminal judgment or settlement and the proceeding is  
224 initiated within one year following the judgment or settlement.

225 (ii) Notwithstanding Subsection (6)(b)(i), the division may refuse to issue a license due  
226 to unprofessional or unlawful conduct that occurred more than 10 years before a request or  
227 application for licensure is made.

228 (7) When the division is determining whether to refuse to issue a license to an  
229 applicant, or to refuse to renew the license of a licensee, based solely on the criminal  
230 conviction of an applicant or licensee, the division shall:

231 (a) provide individualized consideration to the applicant or licensee;

232 (b) except as provided in Subsection [58-60-108\(2\)](#), determine whether the criminal  
233 conviction bears a substantial relationship to the applicant's or licensee's ability to safely or  
234 competently practice the occupation or profession; and

235 (c) consider the applicant's or licensee's current circumstances, which may include any  
236 of the following:

237 (i) the age of the applicant or licensee when the applicant or licensee committed the  
238 offense;

239 (ii) the time that has elapsed since the applicant or licensee committed the offense;

240 (iii) whether the applicant or licensee has completed the applicant's or licensee's  
241 criminal sentence;

242 (iv) whether the applicant has completed or is actively participating in rehabilitative

243 drug or alcohol treatment;

244 (v) any testimonials or recommendations from other individuals provided by the  
245 applicant or licensee, including a progress report from the applicant's or licensee's probation or  
246 parole officer;

247 (vi) other evidence of rehabilitation provided by the applicant or licensee;

248 (vii) the education and training of the applicant or licensee;

249 (viii) the employment history of the applicant or licensee; and

250 (ix) other relevant information provided by the applicant or licensee.

251 Section 5. Section **58-1-501** is amended to read:

252 **58-1-501. Unlawful and unprofessional conduct.**

253 (1) "Unlawful conduct" means conduct, by any person, that is defined as unlawful  
254 under this title and includes:

255 (a) practicing or engaging in, representing oneself to be practicing or engaging in, or  
256 attempting to practice or engage in any occupation or profession requiring licensure under this  
257 title if the person is:

258 (i) not licensed to do so or not exempted from licensure under this title; or

259 (ii) restricted from doing so by a suspended, revoked, restricted, temporary,  
260 probationary, or inactive license;

261 (b) (i) impersonating another licensee or practicing an occupation or profession under a  
262 false or assumed name, except as permitted by law; or

263 (ii) for a licensee who has had a license under this title reinstated following disciplinary  
264 action, practicing the same occupation or profession using a different name than the name used  
265 before the disciplinary action, except as permitted by law and after notice to, and approval by,  
266 the division;

267 (c) knowingly employing any other person to practice or engage in or attempt to  
268 practice or engage in any occupation or profession licensed under this title if the employee is  
269 not licensed to do so under this title;

270 (d) knowingly permitting the person's authority to practice or engage in any occupation  
271 or profession licensed under this title to be used by another, except as permitted by law;

272 (e) obtaining a passing score on a licensure examination, applying for or obtaining a  
273 license, or otherwise dealing with the division or a licensing board through the use of fraud,

274 forgery, or intentional deception, misrepresentation, misstatement, or omission;

275 (f) (i) issuing, or aiding and abetting in the issuance of, an order or prescription for a  
276 drug or device to a person located in this state:

277 (A) without prescriptive authority conferred by a license issued under this title, or by  
278 an exemption to licensure under this title; or

279 (B) with prescriptive authority conferred by an exception issued under this title or a  
280 multistate practice privilege recognized under this title, if the prescription was issued without  
281 first obtaining information, in the usual course of professional practice, that is sufficient to  
282 establish a diagnosis, to identify underlying conditions, and to identify contraindications to the  
283 proposed treatment; and

284 (ii) Subsection (1)(f)(i) does not apply to treatment rendered in an emergency, on-call  
285 or cross coverage situation, provided that the person who issues the prescription has  
286 prescriptive authority conferred by a license under this title, or is exempt from licensure under  
287 this title; or

288 (g) aiding or abetting any other person to violate any statute, rule, or order regulating  
289 an occupation or profession under this title.

290 (2) "Unprofessional conduct" means conduct, by a licensee or applicant, that is defined  
291 as unprofessional conduct under this title or under any rule adopted under this title and  
292 includes:

293 (a) violating any statute, rule, or order regulating an occupation or profession under this  
294 title;

295 (b) violating, or aiding or abetting any other person to violate, any generally accepted  
296 professional or ethical standard applicable to an occupation or profession regulated under this  
297 title;

298 (c) subject to [~~the provisions of Subsection (4);~~] Subsections (4) and 58-60-110(4),  
299 engaging in conduct that results in conviction, a plea of nolo contendere, or a plea of guilty or  
300 nolo contendere that is held in abeyance pending the successful completion of probation with  
301 respect to a crime of moral turpitude or any other crime that, when considered with the  
302 functions and duties of the occupation or profession for which the license was issued or is to be  
303 issued, bears a substantial relationship to the licensee's or applicant's ability to safely or  
304 competently practice the occupation or profession;

305 (d) engaging in conduct that results in disciplinary action, including reprimand,  
306 censure, diversion, probation, suspension, or revocation, by any other licensing or regulatory  
307 authority having jurisdiction over the licensee or applicant in the same occupation or profession  
308 if the conduct would, in this state, constitute grounds for denial of licensure or disciplinary  
309 proceedings under Section 58-1-401;

310 (e) engaging in conduct, including the use of intoxicants, drugs, narcotics, or similar  
311 chemicals, to the extent that the conduct does, or might reasonably be considered to, impair the  
312 ability of the licensee or applicant to safely engage in the occupation or profession;

313 (f) practicing or attempting to practice an occupation or profession regulated under this  
314 title despite being physically or mentally unfit to do so;

315 (g) practicing or attempting to practice an occupation or profession regulated under this  
316 title through gross incompetence, gross negligence, or a pattern of incompetency or negligence;

317 (h) practicing or attempting to practice an occupation or profession requiring licensure  
318 under this title by any form of action or communication which is false, misleading, deceptive,  
319 or fraudulent;

320 (i) practicing or attempting to practice an occupation or profession regulated under this  
321 title beyond the scope of the licensee's competency, abilities, or education;

322 (j) practicing or attempting to practice an occupation or profession regulated under this  
323 title beyond the scope of the licensee's license;

324 (k) verbally, physically, mentally, or sexually abusing or exploiting any person through  
325 conduct connected with the licensee's practice under this title or otherwise facilitated by the  
326 licensee's license;

327 (l) acting as a supervisor without meeting the qualification requirements for that  
328 position that are defined by statute or rule;

329 (m) issuing, or aiding and abetting in the issuance of, an order or prescription for a  
330 drug or device:

331 (i) without first obtaining information in the usual course of professional practice, that  
332 is sufficient to establish a diagnosis, to identify conditions, and to identify contraindications to  
333 the proposed treatment; or

334 (ii) with prescriptive authority conferred by an exception issued under this title, or a  
335 multi-state practice privilege recognized under this title, if the prescription was issued without

336 first obtaining information, in the usual course of professional practice, that is sufficient to  
337 establish a diagnosis, to identify underlying conditions, and to identify contraindications to the  
338 proposed treatment;

339 (n) violating a provision of Section 58-1-501.5; or

340 (o) violating the terms of an order governing a license.

341 (3) Unless otherwise specified by statute or administrative rule, in a civil or  
342 administrative proceeding commenced by the division under this title, a person subject to any  
343 of the unlawful and unprofessional conduct provisions of this title is strictly liable for each  
344 violation.

345 (4) The following are not evidence of engaging in unprofessional conduct under  
346 Subsection (2)(c):

347 (a) an arrest not followed by a conviction; or

348 (b) a conviction for which an individual's incarceration has ended more than seven  
349 years before the date of the division's consideration, unless:

350 (i) after the incarceration the individual has engaged in additional conduct that results  
351 in another conviction, a plea of nolo contendere, or a plea of guilty or nolo contendere that is  
352 held in abeyance pending the successful completion of probation; or

353 (ii) the conviction was for:

354 (A) a violent felony as defined in Section 76-3-203.5;

355 (B) a felony related to a criminal sexual act [~~pursuant to~~] under Title 76, Chapter 5,  
356 Part 4, Sexual Offenses, or Title 76, Chapter 5b, Sexual Exploitation Act; or

357 (C) a felony related to criminal fraud or embezzlement, including a felony [~~pursuant to~~]  
358 under Title 76, Chapter 6, Part 5, Fraud, or Title 76, Chapter 6, Part 4, Theft.

359 Section 6. Section 58-60-108 is amended to read:

360 **58-60-108. Grounds for action regarding license -- Disciplinary proceedings.**

361 (1) Subject to Subsection (2), the division's grounds for refusing to issue a license to an  
362 applicant, for refusing to renew the license of a licensee, for revoking, suspending, restricting,  
363 or placing on probation the license of a licensee, for issuing a public or private reprimand to a  
364 licensee, and for issuing a cease and desist order are under Section 58-1-401.

365 (2) The division may not:

366 (a) refuse, revoke, suspend, or in any way restrict an [~~applicant~~] applicant's or

367 licensee's license under this chapter solely because the applicant or licensee seeks or  
368 participates in mental health or substance abuse treatment[-];

369 (b) refuse an applicant's license under Part 5, Substance Use Disorder Counselor Act,  
370 because the applicant was convicted of a nonviolent drug offense if:

371 (i) the applicant's incarceration for the offense ended more than three years before the  
372 day on which the applicant sought licensure under Part 5, Substance Use Disorder Counselor  
373 Act; or

374 (ii) in the case the applicant was not incarcerated for the offense, the conviction  
375 occurred more than three years before the day on which the applicant sought licensure under  
376 Part 5, Substance Use Disorder Counselor Act.

377 Section 7. Section **58-60-110** is amended to read:

378 **58-60-110. Unprofessional conduct.**

379 (1) As used in this chapter, "unprofessional conduct" includes:

380 (a) using or employing the services of any individual to assist a licensee in any manner  
381 not in accordance with the generally recognized practices, standards, or ethics of the profession  
382 for which the individual is licensed, or the laws of the state;

383 (b) failure to confine practice conduct to those acts or practices:

384 (i) in which the individual is competent by education, training, and experience within  
385 limits of education, training, and experience; and

386 (ii) which are within applicable scope of practice laws of this chapter;

387 (c) disclosing or refusing to disclose any confidential communication under Section  
388 [58-60-114](#) or [58-60-509](#); and

389 (d) a pattern of failing to offer a patient the opportunity to waive the patient's privacy  
390 rights under the Standards for Privacy of Individually Identifiable Health Information, 45  
391 C.F.R., Parts 160 and 164.

392 (2) "Unprofessional conduct" under this chapter may be further defined by division  
393 rule.

394 (3) Notwithstanding Section [58-1-401](#), the division may not act upon the license of a  
395 licensee for unprofessional conduct under Subsection (1)(d).

396 (4) (a) Except as provided in Subsection (4)(b), the following are not evidence of  
397 engaging in unprofessional conduct under Subsection [58-1-501\(2\)\(c\)](#):

398            (i) a conviction for which an applicant's incarceration ended more than three years  
399 before the date of the division's consideration; or

400            (ii) a conviction for which the applicant was not incarcerated that occurred more than  
401 three years before the date of the division's consideration.

402            (b) Subsection (4)(a) does not apply to a conviction described in Subsection  
403 [58-1-501\(4\)\(b\)\(ii\)](#).