

1 **CONSENT FOR MEDICAL PROCEDURE AMENDMENTS**

2 2019 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Daniel McCay**

5 House Sponsor: Kim F. Coleman

6 Cosponsor:

7 Deidre M. Henderson

8

9 **LONG TITLE**

10 **General Description:**

11 This bill enacts provisions relating to certain patient examinations.

12 **Highlighted Provisions:**

13 This bill:

- 14 ▶ creates requirements for certain examinations on an unconscious or anesthetized
- 15 patient;
- 16 ▶ amends provisions relating to informed consent for health care procedures; and
- 17 ▶ makes technical changes.

18 **Money Appropriated in this Bill:**

19 None

20 **Other Special Clauses:**

21 None

22 **Utah Code Sections Affected:**

23 AMENDS:

24 **26-8a-503**, as last amended by Laws of Utah 2017, Chapter 326

25 **78B-3-406**, as last amended by Laws of Utah 2017, Chapter 113

26 ENACTS:

27 **58-1-509**, Utah Code Annotated 1953

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

Section 1. Section **26-8a-503** is amended to read:

26-8a-503. Discipline of emergency medical services personnel.

(1) The department may refuse to issue a license or renewal, or revoke, suspend, restrict, or place on probation an individual's license if:

- (a) the individual does not meet the qualifications for licensure under Section [26-8a-302](#);
- (b) the individual has engaged in conduct, as defined by committee rule, that:
 - (i) is unprofessional;
 - (ii) is adverse to the public health, safety, morals, or welfare; or
 - (iii) would adversely affect public trust in the emergency medical service system;
- (c) the individual has violated Section [26-8a-502](#) or other provision of this chapter;
- (d) the individual has violated Section [58-1-509](#);
- ~~(e)~~ (e) a court of competent jurisdiction has determined the individual to be mentally incompetent for any reason; or
- ~~(e)~~ (f) the individual is unable to provide emergency medical services with reasonable skill and safety because of illness, drunkenness, use of drugs, narcotics, chemicals, or any other type of material, or as a result of any other mental or physical condition, when the individual's condition demonstrates a clear and unjustifiable threat or potential threat to oneself, coworkers, or the public health, safety, or welfare that cannot be reasonably mitigated.

(2) (a) An action to revoke, suspend, restrict, or place a license on probation shall be done in:

- (i) consultation with the peer review board created in Section [26-8a-105](#); and
 - (ii) accordance with Title 63G, Chapter 4, Administrative Procedures Act.
- (b) Notwithstanding Subsection (2)(a), the department may issue a cease and desist order under Section [26-8a-507](#) to immediately suspend an individual's license pending an

55 administrative proceeding to be held within 30 days if there is evidence to show that the
56 individual poses a clear, immediate, and unjustifiable threat or potential threat to the public
57 health, safety, or welfare.

58 (3) An individual whose license has been suspended, revoked, or restricted may apply
59 for reinstatement of the license at reasonable intervals and upon compliance with any
60 conditions imposed upon the license by statute, committee rule, or the terms of the suspension,
61 revocation, or restriction.

62 (4) In addition to taking disciplinary action under Subsection (1), the department may
63 impose sanctions in accordance with Section [26-23-6](#).

64 Section 2. Section **58-1-509** is enacted to read:

65 **58-1-509. Patient consent for certain medical examinations.**

66 (1) As used in this section:

67 (a) "Health care provider" means:

68 (i) an individual who is:

69 (A) a healthcare provider as defined in Section [78B-3-403](#); and

70 (B) licensed under this title;

71 (ii) emergency medical service personnel as defined in Section [26-8a-102](#); or

72 (iii) an individual described in Subsection [58-1-307\(1\)\(b\)](#) or (c).

73 (b) "Patient examination" means a medical examination that requires contact with the
74 patient's sexual organs.

75 (2) A health care provider may not perform a patient examination on an anesthetized or
76 unconscious patient unless:

77 (a) the health care provider obtains consent from the patient or the patient's
78 representative in accordance with Subsection (3);

79 (b) a court orders performance of the patient examination for the collection of
80 evidence;

81 (c) the performance of the patient examination is within the scope of care for a

82 procedure or diagnostic examination scheduled to be performed on the patient; or

83 (d) the patient examination is immediately necessary for diagnosis or treatment of the
84 patient.

85 (3) To obtain consent to perform a patient examination on an anesthetized or
86 unconscious patient, before performing the patient examination, the health care provider shall:

87 (a) provide the patient or the patient's representative with a written or electronic
88 document that:

89 (i) is provided separately from any other notice or agreement;

90 (ii) contains the following heading at the top of the document in not smaller than
91 18-point bold face type: "CONSENT FOR EXAMINATION OF PELVIC REGION";

92 (iii) specifies the nature and purpose of the patient examination;

93 (iv) names one or more primary health care providers whom the patient or the patient's
94 representative may authorize to perform the patient examination;

95 (v) states whether there may be a student or resident that the patient or the patient's
96 representative authorizes to:

97 (A) perform an additional patient examination; or

98 (B) observe or otherwise be present at the patient examination, either in person or
99 through electronic means; and

100 (vi) provides the patient or the patient's representative with a series of check boxes that
101 allow the patient or the patient's representative to:

102 (A) consent to the patient examination for diagnosis or treatment and an additional
103 patient examination performed by a student or resident for an educational or training purpose;

104 (B) consent to the patient examination only for diagnosis or treatment; or

105 (C) refuse to consent to the patient examination;

106 (b) obtain the signature of the patient or the patient's representative on the written or
107 electronic document while witnessed by a third party; and

108 (c) sign the written or electronic document.

109 Section 3. Section **78B-3-406** is amended to read:

110 **78B-3-406. Failure to obtain informed consent -- Proof required of patient --**
111 **Defenses -- Consent to health care.**

112 (1) (a) When a person submits to health care rendered by a health care provider, it is
113 presumed that actions taken by the health care provider are either expressly or impliedly
114 authorized to be done.

115 (b) For a patient to recover damages from a health care provider in an action based
116 upon the provider's failure to obtain informed consent, the patient must prove the following:

117 ~~[(a)]~~ (i) that a provider-patient relationship existed between the patient and health care
118 provider;

119 ~~[(b)]~~ (ii) the health care provider rendered health care to the patient;

120 ~~[(c)]~~ (iii) the patient suffered personal injuries arising out of the health care rendered;

121 ~~[(d)]~~ (iv) the health care rendered carried with it a substantial and significant risk of
122 causing the patient serious harm;

123 ~~[(e)]~~ (v) the patient was not informed of the substantial and significant risk;

124 ~~[(f)]~~ (vi) a reasonable, prudent person in the patient's position would not have
125 consented to the health care rendered after having been fully informed as to all facts relevant to
126 the decision to give consent; and

127 ~~[(g)]~~ (vii) the unauthorized part of the health care rendered was the proximate cause of
128 personal injuries suffered by the patient.

129 (2) In determining what a reasonable, prudent person in the patient's position would do
130 under the circumstances, the finder of fact shall use the viewpoint of the patient before health
131 care was provided and before the occurrence of any personal injuries alleged to have arisen
132 from said health care.

133 (3) It shall be a defense to any malpractice action against a health care provider based
134 upon alleged failure to obtain informed consent if:

135 (a) the risk of the serious harm which the patient actually suffered was relatively

136 minor;

137 (b) the risk of serious harm to the patient from the health care provider was commonly
138 known to the public;

139 (c) the patient stated, prior to receiving the health care complained of, that he would
140 accept the health care involved regardless of the risk; or that he did not want to be informed of
141 the matters to which he would be entitled to be informed;

142 (d) the health care provider, after considering all of the attendant facts and
143 circumstances, used reasonable discretion as to the manner and extent to which risks were
144 disclosed, if the health care provider reasonably believed that additional disclosures could be
145 expected to have a substantial and adverse effect on the patient's condition; or

146 (e) the patient or ~~[his]~~ the patient's representative executed a written consent which sets
147 forth the nature and purpose of the intended health care and which contains a declaration that
148 the patient accepts the risk of substantial and serious harm, if any, in hopes of obtaining desired
149 beneficial results of health care and which acknowledges that health care providers involved
150 have explained ~~[his]~~ the patient's condition and the proposed health care in a satisfactory
151 manner and that all questions asked about the health care and its attendant risks have been
152 answered in a manner satisfactory to the patient or ~~[his]~~ the patient's representative.

153 (4) The written consent shall be a defense to an action against a health care provider
154 based upon failure to obtain informed consent unless the patient proves that the person giving
155 the consent lacked capacity to consent or shows by clear and convincing evidence that the
156 execution of the written consent was induced by the defendant's affirmative acts of fraudulent
157 misrepresentation or fraudulent omission to state material facts.

158 (5) This act may not be construed to prevent any person 18 years of age or over from
159 refusing to consent to health care for ~~[his]~~ the patient's own person upon personal or religious
160 grounds.

161 (6) Except as provided in Section [76-7-304.5](#), the following persons are authorized and
162 empowered to consent to any health care not prohibited by law:

- 163 (a) any parent, whether an adult or a minor, for the parent's minor child;
- 164 (b) any married person, for a spouse;
- 165 (c) any person temporarily standing in loco parentis, whether formally serving or not,
166 for the minor under that person's care and any guardian for the guardian's ward;
- 167 (d) any person 18 years of age or over for that person's parent who is unable by reason
168 of age, physical or mental condition, to provide such consent;
- 169 (e) any patient 18 years of age or over;
- 170 (f) any female regardless of age or marital status, when given in connection with her
171 pregnancy or childbirth;
- 172 (g) in the absence of a parent, any adult for the adult's minor brother or sister;
- 173 (h) in the absence of a parent, any grandparent for the grandparent's minor grandchild;
- 174 (i) an emancipated minor as provided in Section [78A-6-805](#);
- 175 (j) a minor who has contracted a lawful marriage; and
- 176 (k) an unaccompanied homeless minor, as that term is defined in the McKinney-Vento
177 Homeless Assistance Act of 1987, Pub. L. 100-77, as amended, who is 15 years of age or older.
- 178 (7) A person who in good faith consents or authorizes health care treatment or
179 procedures for another as provided by this act may not be subject to civil liability.
- 180 (8) Notwithstanding any other provision of this section, if a health care provider fails to
181 comply with the requirement in Section [58-1-509](#), the health care provider is presumed to have
182 lacked informed consent with respect to the patient examination, as defined in Section
183 [58-1-509](#).