

Regular Session, 2008

ACT No. 758

HOUSE BILL NO. 1379 (Substitute for House Bill No. 838 by Representative Tucker)

BY REPRESENTATIVES TUCKER, ARMES, ARNOLD, AUBERT, AUSTIN BADON, BOBBY BADON, BALDONE, BARROW, BILLIOT, TIM BURNS, CHAMPAGNE, CHANEY, CONNICK, CROMER, DIXON, EDWARDS, FANNIN, GALLOT, GISCLAIR, GREENE, MICKEY GUILLORY, GUINN, HAZEL, HINES, HOFFMANN, HONEY, GIROD JACKSON, ROSALIND JONES, KATZ, LAFONTA, LEBAS, LIGI, LOPINTO, LORUSSO, MARCHAND, MCVEA, MILLS, MONICA, MORRELL, NOWLIN, PEARSON, POPE, RICHARD, RICHARDSON, RICHMOND, SCHRODER, JANE SMITH, PATRICIA SMITH, TEMPLET, TRAHAN, WHITE, WILLIAMS, AND WILLMOTT

1 AN ACT

2 To enact R.S. 29:735.3 and R.S. 40:1299.39.3, relative to health care services rendered
3 during an emergency; to provide for legislative findings and intent; to provide for a
4 review of health care services rendered during a state of emergency prior to criminal
5 prosecution; to provide for an Emergency/Disaster Medicine Review Panel; to
6 provide for membership of the review panel; to provide for a procedure for the
7 review of health care services rendered during the state of emergency; to provide for
8 definitions; to provide with respect to confidentiality; and to provide for related
9 matters.

10 Be it enacted by the Legislature of Louisiana:

11 Section 1. R.S. 29:735.3 is hereby enacted to read as follows:

12 §735.3. Legislative purpose, findings, and intent; Emergency/Disaster Medicine

13 Review Panel; establishment

14 A. Purpose and findings

15 The legislature declares that it is in the best interest of the health and safety
16 of the public to encourage adequate disaster response efforts by medical personnel
17 during a declared state of emergency, disaster, or public health emergency and
18 further finds all of the following:

19 (1) When an emergency or disaster strikes, medical personnel are needed to
20 remain in the disaster area to treat the wounded and sick.

1 (2) During such an emergency or disaster, medical personnel are under
2 added duress because of staffing shortages, resource limitations, and damaged
3 infrastructure, and such personnel's clinical decisions may be affected by nonmedical
4 factors including lack of basic human services, loss of communication, necessity to
5 immediately evacuate, and safety concerns for medical personnel.

6 (3) Unnecessarily subjecting medical personnel to a lengthy criminal
7 investigation or prosecution for clinical decisions made during a declared emergency
8 or disaster based on their professional judgment would have a serious detrimental
9 impact on their ability to exercise that judgment, which is contrary to the interest of
10 the public.

11 (4) Clinical judgment by medical personnel during a declared emergency or
12 disaster may involve complex medical issues.

13 (5) An independent Emergency/Disaster Medicine Review Panel is qualified
14 to gauge the conduct of medical personnel with regard to such clinical judgment
15 during declared disasters and, thereby, provide an independent and objective
16 advisory opinion.

17 (6) The coroner of each parish should be a necessary part of the evaluation
18 of such clinical judgment.

19 (7) An advisory opinion by an independent Emergency/Disaster Medicine
20 Review Panel may aid the prosecuting authority in evaluating disaster-related
21 medical conduct.

22 B. Intent

23 (1) The legislature intends that the provisions of the Emergency/Disaster
24 Medicine Review Panel process set forth in Subsection C of this Section be
25 permissive and the review panel opinion be advisory to the prosecuting authority.

26 (2) The legislature intends that the prosecuting authority should utilize the
27 panel review process and opinion as to both of the following:

28 (a) To gauge whether good faith medical judgment was exercised
29 considering the circumstances under which the judgment was rendered.

1 **(b) To avoid detrimental impact on the ability of medical personnel to**
2 **exercise such judgment on future patients in such emergency circumstances.**

3 **(3) The legislature intends that, if the prosecuting authority seeks such a**
4 **panel opinion, the prosecuting authority, after giving due consideration to any**
5 **opinion, may proceed in accordance with the United States Constitution and the**
6 **constitution and laws of this state to prosecute, which prosecution is within the sole**
7 **discretion of the prosecuting authority.**

8 **C. Establishment of an Emergency/Disaster Medicine Review Panel**

9 **(1) An Emergency/Disaster Medicine Review Panel (hereafter referred to as**
10 **the "panel") shall be established and shall include the membership as provided for**
11 **in R.S. 40:1299.39.3(A) and (B).**

12 **(2) The panel shall render an advisory opinion as to whether the clinical**
13 **judgment by the respondent medical personnel was exercised in good faith given the**
14 **circumstances under which the judgment was rendered.**

15 **(3) The panel process is permissive, and any opinion rendered to the**
16 **prosecuting agency is advisory. Upon receipt of the advisory opinion from the panel,**
17 **the prosecuting authority, after giving due consideration to the panel opinion, may**
18 **proceed in accordance with the United States Constitution and constitution and laws**
19 **of this state to prosecute conduct which, in the prosecuting authority's sole**
20 **discretion, is deemed actionable.**

21 **(4) Prior to the institution of criminal prosecution for acts arising out of the**
22 **rendering of or failing to render medical services during a state of disaster, medical**
23 **emergency, or public health emergency, the district attorney or the attorney general,**
24 **whichever is the prosecuting agency, may refer in confidence those portions of the**
25 **investigative file to the panel for a peer review of the clinical judgment of the**
26 **respondent physician, nurse, or other medical personnel to determine whether the**
27 **respondent's judgment was exercised in good faith given the circumstances under**
28 **which such judgment was rendered.**

29 **(5) The composition of the panel and the procedure shall be established in**
30 **accordance with R.S. 40.1299.39.3.**

1 Section 2. R.S. 40:1299.39.3 is hereby enacted and reads as follows:

2 §1299.39.3. Emergency/Disaster Medicine Review Panel; establishment; review
 3 process

4 A. The following panel review process is established to review health care
 5 services of medical personnel, as defined in R.S. 37:1731, during a declared state of
 6 emergency, disaster, or public health emergency.

7 B. An Emergency/Disaster Medicine Review Panel (hereinafter referred to
 8 in this Section as "panel") shall consist of three members and shall include all of the
 9 following:

10 (1) The coroner in the parish where the health care services were rendered,
 11 or if unavailable, his designee with a medical license from the state of Louisiana, or
 12 alternatively, a coroner with a medical license selected from the Louisiana Coroner's
 13 Association. The coroner shall act as its chairperson and preside over the panel.

14 (2) A member of the Louisiana State Medical Society selected by the
 15 Louisiana State Medical Society if the respondent is a physician, or a member of the
 16 Louisiana State Nurse's Association if the respondent is a nurse, or a member of a
 17 peer organization supervising any other respondent medical personnel. Such
 18 organization should be prepared to designate a member within thirty days of any
 19 such emergency or disaster and provide a panel member within ten days of the
 20 prosecuting authority's referral of the matter to the coroner.

21 (3) One member appointed by the governor with expertise in disaster
 22 medicine or, if unavailable, within the time required to form the panel, such an
 23 expert selected by the other two members of the panel.

24 C. Prior to the institution of criminal prosecution for acts arising out of the
 25 rendering of or failing to render health care services during a state of disaster,
 26 medical emergency, or public health emergency, the district attorney or the attorney
 27 general, whichever is the prosecuting agency, may refer in confidence those portions
 28 of the investigative file to the panel created for a peer review of the clinical judgment
 29 of the respondent physician, nurse, or other medical personnel to determine whether

1 the respondent's judgment was exercised in good faith given the circumstances under
2 which such judgment was rendered.

3 D. Emergency/disaster medicine review process

4 (1) The panel shall provide an opportunity to the respondent physician,
5 nurse, or other member of the medical profession to set forth, in writing, the
6 respondent's position with regard to the clinical judgment rendered, including any
7 expert opinion on the matter subject to investigation.

8 (2) The panel shall have the right and duty to request and procure all
9 necessary information regarding the care rendered. The panel may consult with
10 medical authorities and others to become fully informed regarding the issues to be
11 decided. The panel may subpoena medical records consistent with federal and state
12 laws for patient privacy, and any such records shall remain confidential.

13 (3) The panel shall have as its sole duty to express its expert opinion as to
14 whether or not scientific reliable evidence supports the conclusion that the
15 respondent's or respondents' exercise of clinical judgment was in good faith given
16 the circumstances under which the judgment was rendered.

17 (4) The panel shall render one or more of the following expert opinions
18 which shall be in writing and signed by the members of the panel, together with
19 written reasons for their conclusions.

20 (a) The evidence supports the conclusion that the respondent medical
21 personnel exercised good faith clinical judgment given the circumstances under
22 which judgment was rendered.

23 (b) The evidence does not support the conclusion that the respondent medical
24 personnel exercised good faith clinical judgment under the circumstances under
25 which such judgment was rendered.

26 (c) There exists a material issue of fact, not requiring expert opinion, bearing
27 on whether the respondent exercised good faith clinical judgment under the
28 circumstances under which such judgment was rendered.

29 (5) The panel opinion shall be advisory only and shall be submitted in
30 confidence to the prosecutorial authority and the respondent medical personnel.

1 (6) Upon receipt of the advisory opinion from the panel, the prosecuting
2 authority, after giving due consideration to the panel opinion, may proceed in
3 accordance with the United States Constitution and constitution and laws of this state
4 to prosecute conduct which, in the prosecuting authority's sole discretion, is deemed
5 actionable.

6 (7) Other procedures for the panel process and opinion shall be similar to the
7 panel process for civil proceedings provided in R.S. 40:1299.39.1 et seq. but shall
8 be confidential as provided in Subsection F of this Section.

9 (a) The panel members shall take the oath provided for in R.S.
10 40:1299.39.1(C)(5)(a) and (c).

11 (b) The panel deliberations shall be governed by the provisions of R.S.
12 40:1299.39.1(C)(7).

13 (c) Qualification of physicians/medical personnel shall be the same as R.S.
14 40:1299.39.1(C)(3)(f).

15 (d) Costs of the panel shall be paid by the division of administration and
16 compensation for panel members shall be the same as R.S. 40:1299.39.1(I)(1).

17 (e) Evidence to be considered shall be the same as R.S. 40:1299.39.1(D)(1),
18 (2), (5), and (6) except that no depositions may be set or utilized during this process.

19 (8) The procedures for the review shall be on an expedited basis.

20 (a) The district attorney or attorney general may refer, in confidence, the
21 matter to the coroner who will chair and activate the panel within ten days of the
22 receipt of the investigative file. Upon referral to the coroner, the prosecuting
23 authority shall notify the governor and the respective medical peer organization of
24 the need for the appointment of a panel member.

25 (b) After the formation of the panel, the respondent medical personnel shall
26 be given fifteen days notice in order to provide an opportunity for a written response
27 to the matter under investigation. The chair may grant the respondent medical
28 personnel an extension of time for good cause.

29 (c) The panel shall render an opinion within ninety days of the referral, with
30 one extension of thirty days at the panel's option. The panel opinion shall be

1 submitted in confidence to the prosecuting authority and the respondent medical
2 personnel within five days of the panel rendering its opinion.

3 (d) If the panel has been unable to act within one hundred twenty days of
4 referral, the prosecuting authority may withdraw the referral of the matter or in
5 writing extend to a reasonable specified date the time for the panel to render its
6 opinion.

7 (9) The prescriptive period for prosecution shall be suspended from the time
8 period of the prosecuting authority's referral to the coroner until such time as the
9 panel opinion has been rendered or the expiration of the one hundred twenty days or
10 the specific date provided for in Subparagraph (8)(d) of this Subsection.

11 E. The prosecuting authority shall refrain from arresting a respondent until
12 such time as the panel created by this Section has concluded its review, and an
13 advisory opinion has been received by the prosecuting authority, except where there
14 is probable cause to believe the respondent is a risk of flight or delay will adversely
15 affect the investigation.

16 F. The panel review process and panel opinion shall remain confidential and
17 shall not be utilized in subsequent civil or criminal proceedings unless by orders of
18 the court. The respondent medical personnel and the prosecuting authority may
19 agree to the public disclosure of the panel opinion if it is in the public interest.

20 G. For purposes of this Section, the following words shall have the following
21 meanings:

22 (1) "During a declared state of emergency or public health emergency"
23 means during the period of time set forth in a declaration of the governor as provided
24 in R.S. 29:724 or 766 and shall include the time period as set forth in the declaration
25 and shall also be retroactive to the precipitating event requiring the declaration of
26 disaster or public emergency.

27 (2) "Health care services" means any act of diagnosis, treatment, medical
28 evaluation, or advice or such other acts as may be permissible under the applicable
29 health care licensing provisions of the state of Louisiana.

1 (3) "Medical personnel" means any individual or person subject to the
2 provisions of R.S. 37:1731, regardless of compensation.

3 (4) "Scientific reliable evidence" means evidence that will meet the criteria
4 for use of expert evidence as set forth by the United States Supreme Court in
5 *Daubert vs. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____