Arizona College of Emergency Physicians

ARIZONA EMERGENCY NURSES ASSOCIATION

Arizona Hospital and Healthcare Association

ARMA ARIZONA MEDICAL ASSOCIATION

Arizona Nurses Association

AOMA Arizona Osteopathic Medical Association

Responding to Arizona's Emergency Care Crisis:
SB 1351 — Limited Liability; Emergency Treatment

Hospital emergency departments (EDs) are the backbone of Arizona's healthcare safety net and its emergency care system. Our EDs—by mission and mandate—care for all those seeking medical services, from trauma to the flu. A 2004 study of ED use sponsored by St. Luke's Health Initiatives noted that consumers turn to EDs in part because of the quality of care they provide. Many Arizona hospitals are expanding both their EDs and inpatient facilities in order to meet the needs of a rapidly growing population. However, our emergency care system is severely hampered by:

- a critical shortage of physicians of all types, decreasing availability of "on-call" physician specialists and hospital-based nurses;
- a new and increasing shortage of emergency physicians and nurses with specialized training for emergency and intensive care;
- increasing numbers of people who seek care in the ED, due in large part to a lack of primary care availability; and
- a lack of inpatient hospital beds, forcing hospitals to "board" inpatients in already crowded EDs.

Further, the federal Emergency Medical Treatment and Labor Act (EMTALA) requires hospitals to medically screen and treat any patient who comes to the ED, without consideration of the patient's ability to pay. Failure to comply with EMTALA may result in severe penalties and monetary fines. Simply refusing to see "non-emergencies" is not an option.

Modeled after legislation the Arizona Legislature already enacted for emergency obstetrical care, SB 1351 is a direct response to Arizona's emergency care crisis. The bill raises the burden of proof from a preponderance of evidence to clear and convincing evidence for civil claims against physicians and other healthcare providers who render emergency services required under EMTALA or following a disaster.

***How critical is Arizona's physician shortage*?** Arizona's physician to population ratio of 207 per 100, 000 is 37 percent below the national average of 283. This shortage hits our state's rural communities particularly hard, given that approximately 86 percent of Arizona physicians practice in either Maricopa or Pima Counties. Arizona's physician shortage is at its worst—48 per 100,000 population—in Apache County.

The physician shortage impacts hospital EDs the hardest. More than half of the state's EDs that need on-call neurosurgeons, hand surgeons, vascular surgeons, plastic surgeons, ENT specialists, and gastroenterologists say their needs are not being met. Further, the specialists needed to care for serious injuries and life-threatening emergency medical conditions are often not available at some hospitals. **These physicians most often cite liability concerns when they opt out of hospital ED on-call rosters**.

Arizona's physician shortage has been well documented for more than a decade in numerous studies, including:

- *Keeping the Doctor Away: What Makes Arizona Unattractive to Physicians*, Goldwater Institute, 2001;
- *The Arizona Physician Workforce Study, Part I: The Numbers of Practicing Physicians 1992-2004*, The Flinn Foundation, St. Luke's Health Initiatives and BHHS Legacy Foundation, 2005; and
- *The Shortage of On-Call Specialist Physician Coverage in U.S. Hospitals*, Robert Wood Johnson Foundation and the Johns Hopkins University School of Public Health, 2005.

More recently, the American College of Emergency Physicians (ACEP) has taken these studies a step further by evaluating the public policies that impact a given state's emergency care system. Unfortunately, Arizona did not fare well in this state-by-state evaluation, receiving an overall grade of D^+ and a D^- for our liability environment.*

This report did **not evaluate individual caregivers, such as EMS providers, hospital EDs, nurses, or physicians.*

A Recommended Response to Arizona's Emergency Care Crisis

To ensure access to emergency services, the Arizona chapter of ACEP, Arizona Hospital and Healthcare Association, Arizona Medical Association, Arizona Osteopathic Association, Arizona Nurses Association, and Arizona Emergency Nurses Association recommend that the state enact SB 1351 to help bring liability exposure more in line with the level of services provided by on-call specialists, emergency physicians, nurses and other healthcare providers who deliver EMTALA-mandated care and emergency services.

We believe SB 1351 represents good public policy because it acknowledges the stark difference and unique challenges of providing episodic emergency care versus care with the benefit of an ongoing relationship between a patient and physician. In the ED, physicians and other medical providers do not have established relationships with patients, often medical records are not available and the patient's underlying condition and/or circumstances may render him or her unable to communicate. Moreover, ED care is mandated by federal law. These and other factors place hospitals and healthcare professionals in a precarious position, and are increasingly forcing many providers to avoid emergency services or do so in a state with more reasonable liability standards.

To ensure the full availability of emergency care in Arizona, we *must* improve the medical liability legal process to make it realistic and equitable for those who provide emergency services in Arizona, and to halt the loss of doctors and their services due to unmanageable risk.

By raising the burden of proof for emergency services, SB 1351 will improve access to emergency care for all Arizonans.

REFERENCE TITLE: burden of proof; emergency treatment

State of Arizona
Senate
Forty-seventh Legislature
Second Regular Session
2006

SB 1351

Introduced by
Senators Allen, Arzberger, Bennett, Huppenthal, Tibshraeny;
Representatives Quelland, Reagan, Weiers J: Senators Cheuvront, Gray

AN ACT

AMENDING TITLE 12, CHAPTER 5.1, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTION 12-572; TRANSFERRING AND RENUMBERING SECTION 32-1473, ARIZONA REVISED STATUTES, FOR PLACEMENT IN TITLE 12, CHAPTER 5.1, ARTICLE 1, ARIZONA REVISED STATUTES, AS SECTION 12-573; AMENDING SECTION 12-573, ARIZONA REVISED STATUTES, AS TRANSFERRED AND RENUMBERED BY THIS ACT; RELATING TO HEALTH CARE ACTIONS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Title 12, chapter 5.1, article 1, Arizona Revised Statutes, is amended by adding section 12-572, to read:

12-572. Burden of proof for treatment in emergency departments or rendered by on-call providers; definition

A. UNLESS THE ELEMENTS OF PROOF CONTAINED IN SECTION 12-563 ARE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE, A HEALTH PROFESSIONAL AS DEFINED IN SECTION 32-3201 WHO PROVIDES OR WHO IS CONSULTED TO PROVIDE EMERGENCY SERVICES TO A PATIENT WHO IS REGISTERED WITH OR ADMITTED THROUGH THE EMERGENCY DEPARTMENT OF A LICENSED HOSPITAL IS NOT LIABLE FOR ANY CIVIL OR OTHER DAMAGES AS A RESULT OF ANY ACT OR OMISSION.

B. UNLESS THE ELEMENTS OF PROOF CONTAINED IN SECTION 12-563 ARE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE REGARDING THE ACTS OR OMISSIONS OF A LICENSED HOSPITAL OR ITS AGENTS AND EMPLOYEES IN CASES THAT ARE COVERED BY SUBSECTION A OF THIS SECTION, THE HOSPITAL IS NOT LIABLE FOR ANY CIVIL OR OTHER DAMAGES AS A RESULT OF ANY ACT OR OMISSION.

C. FOR THE PURPOSES OF THIS SECTION, "EMERGENCY SERVICES" MEANS ANY OF THE FOLLOWING:

1. SERVICES THAT ARE REQUIRED BY THE EMERGENCY MEDICAL AND LABOR ACT (P.L. 99-272; 100 STAT. 164; 42 UNITED STATES CODE SECTION 1395DD).

2. UNSCHEDULED MEDICAL SERVICES THAT ARE DEEMED NECESSARY TO TREAT AN IMMEDIATE THREAT TO THE LIFE OR HEALTH OF A PATIENT.

3. MEDICAL SERVICES THAT ARE PROVIDED DURING OR AS A RESULT OF A DISASTER.

Sec. 2. Section 32-1473, Arizona Revised Statutes, is transferred and renumbered for placement in title 12, chapter 5.1, article 1, as section 12-573 and, as so renumbered, is amended to read:

12-573. Limited liability for treatment related to delivery of infants; exception; definition

A. Unless the elements of proof contained in section 12-563 are established by clear and convincing evidence, a physician licensed to practice pursuant to ~~this chapter or~~ TITLE 32, chapter 13 OR 17 ~~of this title~~ is not liable to the pregnant female patient, the child or children delivered, or their families for medical malpractice related to labor or delivery rendered on an emergency basis if the patient was not previously treated for the pregnancy by the physician, by a physician in a group practice with the physician or by a physician, physician assistant or nurse midwife with whom the physician has an agreement to attend the labor and delivery of the patient.

B. Unless the elements of proof contained in section 12-563 are established regarding the acts or omissions of a licensed health care facility or its employees in cases THAT ARE covered by ~~the provisions of~~ subsection A of this section by clear and convincing evidence, the health care facility is not liable to the female patient, the child or children

delivered or their families for medical malpractice related to labor or delivery.

C. This section does not apply to treatment THAT IS rendered in connection with labor and delivery if the patient has been seen regularly by or under the direction of a licensed health care provider or a licensed physician from whom the patient's medical information is ~~reasonably~~ IMMEDIATELY available to the physicians attending the patient during labor and delivery.

D. For the ~~purpose~~ PURPOSES of this section, "emergency" means when labor has begun or a condition exists requiring the delivery of the child or children.