

## INTERPRETIVE STATEMENT

### IMMUNITY AND DEFENSE FOR MEDICAL FACULTY AGAINST PROFESSIONAL MALPRACTICE CLAIMS

*Issued by the Office of the Vice President and General Counsel  
The University of Tennessee*

#### **Background**

State law provides that all state employees, including employees of The University of Tennessee, have immunity from liability for acts or omissions within the scope of their employment, unless the acts or omissions are willful, malicious, criminal, or done for personal gain. Tenn. Code Ann. § 9-8-307(h) (emphasis added).

The exception for “acts or omissions . . . done for personal gain” includes incidents arising out of the ordinary practice of medicine and incidents arising in a teaching setting in which the physician, or one acting on his behalf, billed or could have billed for his or her services. A physician cannot elect retrospectively to forego billing for services and thus allow the services to come within the immunity provided by state law. The University recognizes that encounters between a physician and a patient in a teaching setting (i.e., those in which a resident or student participates) have a potential element of gain to the University (State) as well as the potential for personal gain to the physician. Therefore, in distinguishing between a private practice encounter and an encounter primarily within the scope of University (State) employment, the University largely relies upon the standards set forth in federal regulations promulgated by the Health Care Financing Administration (HFCA) of the U.S. Department of Health and Human Services (42 C.F.R. 415, Subparts A-E), which define the requirements applicable to a supervising physician billing as a teaching physician.

## **Governing Principles**

1. Full-time employees of the University, including residents, who do not, or could not, bill for or receive any monies from patient encounters, will be entitled to raise the immunity defense of Tenn. Code Ann. § 9-8-307(h), unless their acts or omissions are done for personal gain or are otherwise outside the scope of their employment, willful, malicious, or criminal.
2. All faculty who engage in the practice of medicine and bill for their services in any patient encounter must obtain professional liability insurance coverage or sign a statement that they understand that they are personally responsible for actions brought against them while engaged in the practice of medicine.
3. Full, part-time or volunteer faculty are responsible for securing and maintaining professional liability insurance coverage for patient encounters outside a teaching setting for which the faculty member bills or receives monies.
4. For patient encounters that take place within a teaching setting (i.e., with residents or students participating in patient care) and meet the criteria for billing set forth in the applicable HFCA regulations, the faculty member is responsible for obtaining professional liability insurance coverage, except in the following circumstances:
  - (a) When the intent not to bill is set forth in a prior agreement between the faculty member and the University; or
  - (b) When any right or interest in billings is transferred by the faculty member to the University by prior agreement.

These exceptions are based on the premise that the intent of the faculty physician in these circumstances is to participate in those patient encounters solely for teaching purposes. Therefore, even if the HFCA criteria for billing are satisfied, the immunity of Tenn. Code Ann. § 9-8-307(h) could be raised on behalf of faculty member unless the acts or omissions were otherwise done for personal gain or were outside the scope of employment, willful, malicious, or criminal.

5. Services provided to patients within a teaching setting that do not meet the criteria for billing set forth in the applicable HFCA regulations are assumed to be carried out solely for teaching purposes under the employment agreement with the University, and thus the immunity of Tenn. Code Ann. § 9-8-307(h) could be raised by the faculty member unless the acts or omissions were otherwise done for personal gain or were outside the scope of employment, willful, malicious, or criminal. An example of this kind of activity is the supervision of residents in a clinic or hospital setting in which the patient/physician relationship according to the applicable HFCA regulations is not established and thus billing could not or does not take place.
6. When the immunity defense of Tenn. Code Ann. § 9-8-307(h) appears to be applicable, University counsel will request authorization from the Attorney General to appear on behalf of the physician and raise the immunity defense.