

NURSING HOMES: REVISE 'CORPORATE PRACTICE OF MEDICINE' DOCTRINE

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Senate Bill 65 reported from House committee as H-1
Senate Bill 66 reported from committee as S-1
Senate Bill 67 reported from committee as S-1
Sponsor: Sen. Goeff Hansen
House Committee: Health Policy
Senate Committee: Families, Seniors, and Human Services

Analysis available at
<http://www.legislature.mi.gov>

Complete to 7-15-15 *(Enacted as Public Acts 156, 157, and 158 of 2015)*

BRIEF SUMMARY: The three bills would allow for-profit nursing homes to directly hire (rather than merely contract with) those who are members of "learned professions," including dentists, osteopathic physicians, physicians, and surgeons.

FISCAL INFORMATION: Senate Bills 65, 66, and 67 would not have a significant fiscal impact on the state or local units of government.

THE APPARENT PROBLEM:

Currently in Michigan, only not-for-profit nursing homes may employ physicians (M.D.s or D.O.s) to provide direct medical care to residents. The policy is based on a century-old doctrine—the *learned professions doctrine*, also known as the *corporate practice of medicine doctrine* (CPOM).

The practice of medicine has long been considered a *learned profession*. Historically, the *learned professions doctrine* or CPOM has held that a physician's medical decisions should be based on what is in the best interest of the patient and not on any money-making interest of the doctor.

For that reason, nursing homes that are organized as for-profit corporations may not lawfully directly hire physicians, and instead are limited to contractual arrangements. By contrast, not-for-profit, or nonprofit, nursing facilities are able to employ physicians based on a 1993 Michigan Attorney General Opinion (No. 6770) that concluded the learned professions doctrine did not apply to nonprofit corporations because the primary concerns underlying the doctrine (e.g., commercialization, limited liability) were addressed by formation as a nonprofit and also by Michigan case law pertaining to nonprofit corporations.

Some, however, say that the doctrine as it relates to medicine no longer fits how short-term and long-term care services in nursing homes are provided. For example, nursing homes increasingly provide care to people who used to be hospitalized. A person recovering from knee replacement or heart surgery customarily stayed in the hospital for several weeks while receiving rehabilitative care. Now, those patients are discharged to nursing facilities. Further, residents of nursing homes who used to be transferred to a hospital for

more highly skilled care now often remain in place and receive that care in the nursing home. Additionally, the number of dementia patients, who often have multiple medical complaints, has changed the landscape of long-term care facilities. Finally, providing appropriate care without duplicative services remains a challenge for "dual eligibles," persons who qualify under both Medicaid and Medicare.

One solution that has been offered is to create an exception to the learned professions/CPOM doctrine to allow *any* nursing home—either non-profit or for-profit—to employ physicians and dentists to serve their residents.

THE CONTENT OF THE BILLS:

The three bills would amend various statutes to update the manner in which nursing homes give their residents services and care, and in particular would allow for-profit nursing homes to directly hire (rather than contract with) those who are members of "learned professions," including dentists, osteopathic physicians, physicians, and surgeons.

All three bills would go into effect 90 days after being enacted into law. However, Senate Bills 66 and 67 are tie-barred to Senate Bill 65, so that neither bill could go into effect unless Senate Bill 65 also were enacted.

A detailed description of each bill follows.

Senate Bill 65 (H-1) would amend the 'Facilities and Agencies' section (Article 17) of the Public Health Code (MCL 333.20109 et al) to do the following:

- Specify that "medical treatment," a phrase within the definition of "nursing home," would include treatment by an employee or independent contractor licensed or otherwise authorized to engage in a health profession under Part 170 of the Code, entitled "Medicine," or Part 175 of the Code, entitled "Osteopathic Medicine and Surgery."
- Require a nursing home to provide a program of planned and continuing nursing care under the charge of a registered nurse and a program of planned and continuing medical treatment under the charge of physicians.
- Allow a nursing home to employ or contract with an individual licensed or otherwise authorized to engage in a health profession under Part 170 or Part 175 to provide nursing care and medical treatment. [Part 170 licenses allopathic physicians (M.D.s) and Part 175 licenses doctors of osteopathic medicine and surgery (D.O.s). Parts 170 and 175 also authorize the use of Physician's Assistants under the supervision of a physician.]
- Authorize a nursing home to provide dental treatment under the supervision of a dentist.
- Allow a nursing home, regardless of its status as a legal entity, to employ or contract with a dentist licensed under Part 166 of the Code, entitled "Dentistry."

Senate Bill 66 (S-1) would amend the Michigan Limited Liability Company Act (MCL 450.4102) to modify the definition of the phrase "services in a learned profession."

Now under the act, the phrase means services rendered by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at-law. Senate Bill 66 would retain this definition. However, the bill clarifies that the term "services in a learned profession" would *not include services provided to residents of a nursing home* by a dentist, osteopathic physician, physician, or surgeon who was an employee or independent contractor of the nursing home.

Senate Bill 67 (S-1) would amend the Business Corporation Act (MCL 450.1109) to do the same.

BACKGROUND INFORMATION:

A similar three-bill package of legislation passed the Michigan House of Representatives on May 14, 2014 by a vote of 109 to 0. Those bills were House Bills 5375, 5476, and 5377. Although the bills were reported from the Senate Health Policy Committee on August 13, 2014, they died on the Senate calendar at the end of the two-year legislative session. The current Senate bills differ from the earlier bills by also including dentists.

HOUSE COMMITTEE ACTION:

The House Health Policy Committee reported out the Senate-passed versions of Senate Bill 66 (S-1) and Senate Bill 67 (S-1) without amendments.

The House Health Policy committee reported out a substitute version of Senate Bill 65 (H-1). The substitute eliminates from the title of the bill any reference to Section 333.31703. That section, in the Senate-passed version of Senate Bill 65 (S-3), defined "resident" as an individual who receives care or services in a nursing home. Further, that section referred throughout to nursing home "residents" rather than to nursing home "patients." Both the definition of "resident", and also the change from "patient" to "resident" have been eliminated in Senate Bill 65 (H-1).

ARGUMENTS:

For:

Proponents of the bills argue that a rapidly aging population, coupled with the needs of people with disabling medical conditions or injuries from accidents, are straining the long-term care health system. In addition, hospitals are increasingly discharging patients to nursing facilities for post-surgical and rehabilitative care that once was provided in a hospital setting. Nursing homes must therefore adopt efficient and cost-effective measures to increase the quality of care, improve resident outcomes, and contain health care costs. One way nursing homes can achieve this is to hire staff physicians.

Rather than running a private practice and making rounds at hospitals and nursing homes, a physician could simply work full- or part-time at a nursing home. The benefit is that staff physicians may get to know patients and their families better, enabling changes in a resident's condition to be recognized earlier, leading to receiving appropriate treatment sooner. Having doctors on site, like many hospitals and not-for-profit nursing homes do, should result in prompt treatment of emerging conditions, which in turn should reduce trips to the hospital for evaluations and reduce hospital readmissions.

For:

Proponents of the bills say for-profit nursing homes should be treated the same as non-profit nursing homes. They argue that non-profit nursing homes already are able under Michigan laws to hire staff physicians to provide direct medical care to residents, while for-profit nursing homes cannot. Those who support the bills say this discrepancy no longer fits an evolving system of long-term care services. Taken together, these bills would grant the same authority to for-profit nursing facilities to directly hire physicians, as is already enjoyed by non-profit entities.

Against:

The reason for the disparity goes back more than a century to a philosophy and legal doctrine that holds that a practitioner of a learned profession—such as clergy, lawyers, or physicians—has incentives to compromise the quality of care or service rendered and has divided loyalties if serving as an employee of a profit-making entity. Opponents of the bills argue that the long-held learned professions doctrine should be preserved, as any exception could erode the protections it gives to the public.

They argue this legislation is bad policy, both for physicians and for their patients who reside in nursing homes. As one physician-member of the House Health Policy Committee noted, when physicians are employed by a corporate entity, their behavior changes. Specifically, a physician who is primarily accountable to the corporation must meet productivity quotas. Profit-maximizing production goals can impair the sacrosanct doctor-patient relationship that now is protected by the 'learned professions doctrine.'

Response:

Proponents note that the bills are permissive: a for-profit nursing home could choose the best option for its size and patient needs—either continuing with contractual arrangements, or hiring staff physicians. Further, it should be noted that there are safeguards in place to protect the interests of the public from abuses by those in regulated professions, regardless of the setting in which they practice or the nature of their relationship with an institution.

POSITIONS:

The Michigan County Medical Care Facilities Council supports the bills. (5-19-15)

The Michigan Dental Association supports the bills. (5-19-15)

The Health Care Association of Michigan supports the bills. (5-19-15)

The Department of Licensing and Regulation supports the bills. (5-19-15)

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