House
Legislative
Analysis
Section

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HEALTH PROFESSIONALS: 0.05 BAC

House Bill 4655 (Substitute H-1)
House Bill 4656 (Substitute H-2)
First Analysis (10-8-03)

Sponsor: Rep. Gary A. Newell
Committee: Health Policy

THE APPARENT PROBLEM:

Legislation is being offered to address a concern regarding health professionals engaging in the practice of their professions while under the influence of alcohol or controlled substances. Details are sketchy, but apparently, in one such situation, a dentist in Hastings performed dental procedures while intoxicated. His behavior on one day, which included hugging a patient, resulted in the police being called. Reportedly, the dentist fled the office, but was found later at home by the police. The police escorted him to a local hospital where a blood test confirmed a bodily alcohol content (BAC) of 0.25 grams, which, at that time, was more than twice the legal limit for drunk driving. Though the county prosecutor charged the dentist with assault and battery, there currently is no criminal law against practicing medicine or dentistry while intoxicated. More than a year after the incident, the dentist was still in practice.

In testimony given before the House Health Policy Committee, a current member of the House of Representatives related the events that led to his sister's death. In the 1980s, a dentist who was either intoxicated or under the influence of a controlled substance gave the young woman an overdose of valium and nitrous oxide during a procedure to remove two wisdom teeth. Her heart stopped and she was unable to be resuscitated later at a hospital. Reportedly, a year later, the dentist was still practicing, although he had lost privileges at the local hospital.

Such examples underscore the threat to public safety when health professionals perform procedures while drunk or under the influence of controlled substances. The stories also reveal victims' frustrations over what appears to be slow or lax responses from licensing boards regarding license suspensions or revocations. In the first example, by the time the police arrived at the dentist's home, he had already called the Health Professionals Recovery Program (HPRP) and enrolled as a voluntary participant. The program, meant to help protect the public from health care delivered by impaired providers while encouraging and monitoring the recovery of the provider, is seen by some as a shield behind which impaired providers can hide and escape public exposure or administrative sanctions (e.g., license restriction, suspension, or revocation and or fines). (For more information on the HPRP, see the *Background Information* section.) Some feel that the confidentiality granted to voluntary participants in the HPRP may block accessibility to records and information needed to bring a successful action for negligence or malpractice, and can make it harder for the department to levy administrative sanctions in a timely manner.

Though behaviors which constitute criminal offenses such as battery, assault, and negligent homicide are prosecutable even if a health care professional enters the HPRP, some feel that protection for the public could be increased if a proactive stance was taken before a patient was harmed. Therefore, it has been suggested that it be a criminal offense for a health professional to practice with a bodily alcohol content of 0.05 percent or higher, or if he or she is visibly impaired due to the illegal use of a controlled substance.

THE CONTENT OF THE BILLS:

The Michigan Penal Code makes it a criminal offense for a physician or other person to prescribe a drug, medication, or poison while intoxicated. The bills would amend the penal and public health laws to, respectively, replace the prohibition on prescribing medication while intoxicated with a prohibition on engaging in the practice of a health care profession with a bodily alcohol content (BAC) of .05 or more or while under the influence of a controlled substance exhibiting visual impairment, expand the prohibition to apply to all licensed and registered health professionals, and provide for administrative

sanctions. The bills are tie-barred to each other and would do the following:

House Bill 4656 would amend the Michigan Penal Code (MCL 750.430) to prohibit a licensed health care professional from 1) engaging in the practice of his or her profession with a BAC of .05 or higher; or 2) engaging in the practice of his or her health profession while under the influence of a controlled substance when, due to the illegal or improper use of the controlled substance, his or her ability to safely and skillfully engage in the practice of the health profession was visibly impaired. The current prohibition on prescribing a poison, drug, or medication while intoxicated would be eliminated. The penalty for a violation would remain the same – a misdemeanor punishable by up to one year imprisonment, a fine of not more than $1,000, or both. In lieu of being charged with, convicted of, or sentenced for a violation under the bill, a person could be charged with, convicted of, or sentenced for any other violation of law arising out of the same transaction. "Licensed health care professional" would mean an individual who was licensed or registered under Article 15 of the Public Health Code.

Chemical testing. A peace officer who had reasonable cause to believe that a health professional violated the above prohibition could require the person to submit to a chemical analysis of his or her breath, blood, or urine. Before being required to submit to such testing, the person would have to be informed by the peace officer that he or she could refuse the chemical analysis and that the officer could obtain a court order to require the person to undergo one. The person would also have to be informed that if he or she submits to a chemical analysis, he or she could obtain the analysis from a person of his or her choice.

However, the results of the chemical analysis would not be inadmissible as evidence in any criminal, civil, or administrative proceeding for a violation of the bill because the officer failed to inform the person of the above. Further, the collection and testing of specimens would have to be conducted in the same manner as under the Michigan Vehicle Code for alcohol-related and controlled substance-related driving violations.

Health Professional Recovery Program. A court would have to order an individual convicted under the bill to participate in the Health Professional Recovery Program established under Section 16167 of the Public Health Code (MCL 333.16167).

Exemption. The bill would not apply to a licensed health care professional who – at the scene of an emergency – rendered emergency care in good faith and without compensation, unless his or her acts or omissions in rendering the care amounted to gross negligence or willful and wanton misconduct.

(Note: The following health professionals must be licensed or registered under Article 15 of the Public Health Code: chiropractors; dentists, dental assistants, and dental hygienists; allopathic (M.D.) and osteopathic (D.O.) physicians; nurses – R.N., L.P.N., or trained attendant; nursing home administrators; optometrists; pharmacists; physical and occupational therapists; physician's assistants; podiatrists; sanitarians; veterinarians; and marriage and family therapists, professional counselors, psychologists, and social workers. House Bill 4236, which has passed the House and Senate but has not yet been enrolled, would require the registration of respiratory therapists. See the *Background Information* section for more information on the Health Professional Recovery Program.)

House Bill 4655 would amend the Public Health Code (MCL 333.16221 and 333.16226) so that a violation of the prohibition on practicing with a BAC of .05 or higher would be grounds for action by a disciplinary subcommittee. A certified copy of the court record would be conclusive evidence of a conviction. A sanction imposed by the disciplinary subcommittee could include a fine, community service, probation, restitution, or license sanctions such as limitation, suspension, revocation, or denial.

BACKGROUND INFORMATION:

Health Professional Recovery Program (HPRP). The Health Professional Recovery Program has a dual goal of protecting the public from health services delivered by impaired health care professionals while encouraging and monitoring the treatment and recovery of that health care professional. The program, created by Public Act 80 of 1993, operates under the oversight of the Health Professional Recovery Committee, which contracts with the Michigan Health Professional Recovery Corporation (MHPRC) for the day-to-day operations of doing intakes for persons referred to the program and monitoring their recovery and treatment. The Department of Consumer and Industry Services (CIS) provides funding (derived in part from licensing and registration fees) for the contract with the MHPRC and also provides administrative services to the committee. The HPRP is open to all health care professionals licensed or registered under Article 15

of the Public Health Code. Since Emergency Medical Services (EMS) personnel are not regulated under Article 15, they are eligible for services only for regulatory referrals.

The MHPRC separates the referrals into two categories – voluntary and regulatory. A voluntary participant may have been self-referred or referred by a colleague, coworker, employee, employer, patient, friend, or family member. Anyone can refer a health care professional suspected or known to have an impairment due to alcohol, drug use, or a mental or emotional disorder by calling 1-800-453-3784. The health code requires members of regulated health professions to report any licensed or registered health care professional that they have a reasonable cause to believe is impaired as well as report any licensee or registrant with a mental or physical inability reasonably related to and adversely affecting that person's ability to practice in a safe and competent manner. The name of the person who reports or refers a licensee or registrant to the HPRP is kept confidential unless testimony is needed at a later disciplinary hearing.

At the intake, the licensee is evaluated to see if he or she has a qualifying diagnosis (substance abuse disorder and/or mental/emotional disorder). A licensee or registrant with a qualifying diagnosis is then required to enter treatment and referred to an approved provider. The HPRP works with the licensee or registrant to develop a written recovery monitoring agreement (RMA) that defines the requirements of participation (e.g., treatment; limitations on practice; random drug or alcohol screens; group or individual therapy; medical oversight; and regular reports by the participant, providers of services, and worksite monitors). A monitoring agreement is typically in place for between one and three years. Failure to voluntarily enter the program after a qualifying diagnosis was determined to exist is deemed as noncompliance, as is failure to abide by the individualized RMA. All non-compliant participants are reported to the CIS for potential regulatory action.

A regulatory participant may be a voluntary participant who has stopped complying with the requirements of his or her RMA, or may be a licensee or registrant who, because of misconduct, incompetence, certain criminal convictions, and so forth, has been ordered by the department to participate in the HPRP. The important difference between being a voluntary or regulatory participant is that all records and documentation pertaining to a voluntary participant are confidential. This means that as long as a voluntary participant complies with the RMA until successful completion and discharge from the program, he or she is not reported to his or her licensing board or the department for disciplinary action (e.g., administrative fines, license revocation or suspension, etc.). On the other hand, the records and documentation pertaining to a regulatory participant are matters of public record and accessible through the Freedom of Information Act.

An important part of the intake process, whether for a voluntary or regulatory participant, is that a preliminary judgment must be made about the risk posed by the person being referred based on the information available at that time. A practitioner determined to be at "high risk" is requested to refrain from professional practice until an evaluation is received from an approved HPRP evaluator. Failure to refrain from practice can result in referral to the CIS for non-compliance. The individualized RMA can also request that the health care professional refrain from working until he or she has been stabilized and is determined safe to practice.

According to a recent report issued by CIS on the program for the period April 1, 1994 through March 31, 2002, almost 2,000 health care professionals had been referred to the program. Nurses, physicians, dentists, and pharmacists have accounted for 92 percent of the participants. The overall compliance rate for this period was 70 percent.

Good Samaritan Law. The Good Samaritan Law provides immunity from civil liability for physicians, nurses, and physician's assistants who provide medical care in emergency situations, unless their acts or omissions amount to gross negligence or willful and wanton misconduct. The emergency medical aid provided must be uncompensated. The immunity from civil actions extends only to emergency medical care given to persons with whom the health care provider does not have a health professional/patient relationship. The law also provides civil immunity to physicians, physician's assistants, or nurses who in good faith perform physical examinations without compensation for student-athletes or render medical assistance to a student-athlete at the site of a school athletic event. The law is designed to encourage bystanders who are medical professionals to offer on-site care or assistance in an emergency situation and to volunteer to provide medical services to student-athletes without being exposed to a civil action claim by the people they attempt to assist.

Under the law, immunity from civil actions is provided to a wide range of health professionals whose hospital duties do not require responding to emergency situations if the health professional responds to a request for emergency assistance in a life-threatening emergency within a hospital or other licensed medical care facility. This exemption from liability does not apply to a physician, nurse, or physician's assistant if there was a health professional/patient relationship prior to the emergency, nor does the exemption apply to acts or omissions resulting from gross negligence or willful and wanton misconduct.

Regarding members of the general public, the Good Samaritan Law provides civil immunity to individuals who, in good faith and having no duty to do so, perform cardiopulmonary resuscitation (CPR) or use an automated external defibrillator (AED) on another person. The immunity regarding AEDs also is extended to persons who instruct others in the use of an AED; physicians who provide medical authorization for use of an AED; and individuals or entities who own, occupy, or manage the premises where an AED is used or operated (e.g., a fitness center, golf course, or shopping mall). Block parent volunteers, who render assistance to minors during emergencies and members of the National Ski Patrol System are also protected under the Good Samaritan Law. In all cases, acts involving gross negligence or willful and wanton misconduct would still be subject to tort actions.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, House Bill 4655 would have no fiscal impact on the Department of Consumer and Industry Services. The bills would have no fiscal impact on the Department of Corrections and would have an indeterminate impact on local units of government. If House Bill 4656 made it more likely that misdemeanor convictions were obtained, the bill could increase local correctional costs and/or increase collections of fines. (10-1-03)

ARGUMENTS:

For:

Currently, it is against the law for a physician or other person to prescribe a drug, medication, or poison while intoxicated, but it is not a criminal offense *per se* to engage in the practice of a health profession while intoxicated. Most would agree that a surgery performed while one or more of the medical team was drunk or high poses a significant risk of injury to the patient, as would rendering any medical care or counseling services. Indeed, studies by the national Institute of Medicine reveal thousands of cases a year in which mistakes by medical staff in hospitals kill or injure patients. In fact, by 2000, death from a medical error was the eighth leading cause of death, meaning that a person in the U.S. was more likely to die as a result of a medical error than from a car accident, breast cancer, or AIDS.

There are some available remedies when a patient suffers harm, such as criminal charges of assault or battery, aggravated assault, criminal sexual conduct, or negligent homicide as well as tort actions such as malpractice or negligence suits and administrative sanctions. However, some feel that the licensing boards and the Department of Consumer and Industry Services (CIS) are slow to discipline providers with a substance abuse problem or a mental or emotional disorder, especially if a patient has not been physically harmed.

Eight years ago, the Health Professional Recovery Program (HPRP) was established to provide help to impaired licensed or registered health care professionals. The CIS can order a licensee or registrant to enroll in the program, in which case the provider's records are open to public scrutiny. If, however, a health care provider voluntarily participates in the program, the records are sealed even to his or her licensing board and the CIS. Some health care providers have entered the program several times. Reportedly, a dentist in Hastings has been in the program as a voluntary participant three times. This has led people to believe that some health professionals may volunteer as participants to avoid coming under the regulatory – and very public – arm of the CIS.

Therefore, the bills would address a potentially serious threat to the public safety. By making it a criminal offense to engage in the practice of one's health profession while drunk or impaired due to the illegal or improper use of a controlled substance, a health professional who has been in denial of his or her problem could be held responsible regardless of whether or not a patient was actually harmed. Moreover, since an arrest or conviction must be reported to the appropriate licensing board, the bills may result in a health care professional being ordered to undergo evaluation for the HPRP at an earlier date than waiting for the professional to self-refer or be referred by a colleague, coworker, employer, or patient. It is logical to assume that such a proactive stance may encourage earlier self-reporting or

reporting by others as a means of sparing the health professional from criminal sanctions. It surely will result in preventing harm to some unsuspecting patients.

For:

The bills would only apply when a licensed or registered health care professional engaged in the practice of his or her profession. Therefore, the bills would not infringe on a licensee's or registrant's personal life. The Good Samaritan Law (see the *Background Information* section) exempts doctors, nurses, and physician's assistants who render medical care without compensation at the scene of an accident from tort liability. The bill would provide a similar exemption from the criminal penalties under House Bill 4656. This would mean that if a licensee or registrant had been drinking socially or was under the influence of a controlled substance and came upon the scene of an accident, he or she could render emergency medical care without fear of criminal penalties and the resulting administrative sanctions that would be triggered by a conviction.

Response:

While it is reasonable to include an exemption for a health care professional who had been drinking socially to be able to respond to a medical emergency, the language pertaining to a health care professional being under the influence of a controlled substance specifies that criminal penalties would apply if illegal or improper use of the substance led to the person's ability to safely and skillfully engage in the practice of his or her health profession being visibly impaired. It is not illegal to drink, even excessively, as long as a person does not drive. But it is illegal to use certain controlled substances under any circumstances. For a health professional, obtaining or possessing a controlled substance, or even attempting to do so, is grounds for a disciplinary subcommittee to impose administrative sanctions. However, the bill almost seems to sanction the illegal use of a controlled substance as long as the provider's abilities are not visibly impaired. Also, the exemption for rendering emergency care as it relates to the illegal use of a controlled substance appears to protect health professionals under the influence of cocaine or other illegal drugs from criminal or administrative penalties just because, while high, they rendered emergency medical care at the scene of an accident.

Against:

The bills purport to be a consumer protection initiative, but the public is better served when impaired health care professionals are steered into treatment and allowed to practice (albeit under strict supervision) while they complete their recovery. Many areas in the state are underserved by nurses and specialists; therefore, the public cannot afford to have doctors, dentists, counselors, and other health care professionals lose their ability to practice due to the criminalization of a disease. Alcoholism and drug abuse are relapsing diseases, and certain mental or emotional disorders, such as depression and bi-polar, may need time to find an appropriate medication. Needing more than one experience in rehabilitation or several trials with different medication is not unusual. However, with proper treatment, supervision, and support, most impaired health care professionals can be stabilized and returned to delivering health care safely. This is true whether the impairment is due to substance abuse or a mental or emotional disorder.

Against:

The bills appear to stem from frustration with the licensing boards and CIS being slow to respond to sanctioning impaired health care professionals, allowing them to continue to practice even after patients suffer harm. If this is true, a better approach would be to concentrate on improving the efficiency of CIS and the licensing boards, as well as improving communication between them and the Health Professional Recovery Program. For example, as a compromise, the health code or the HPRP committee policies could be amended to require the HPRP to report to the appropriate board and CIS when a licensee or registrant has multiple entries into the HPRP. Obviously, a health care professional with two or more relapses could pose a risk to the public safety and may ultimately benefit from regulatory oversight. CIS also should be appropriately funded so that enforcement units can be adequately staffed.

Further, many health care professionals are unaware that the health code requires them to refer colleagues, coworkers, employees, employers, or friends with known or suspected cases of substance abuse or impairment due to a mental or emotional disorder. Theoretically, a licensee or registrant who fails to do so can also be subject to penalties under the code. Perhaps if this was enforced on a consistent basis, more health care professionals would be less reticent about referring other providers with an impairment. The public could also be better educated about the HPRP and that anybody can refer an impaired health care provider to the program. Seeking early and successful treatment can hardly be deemed as using the HPRP as a shield to escape regulatory oversight and public disclosure. When impaired health professionals are diagnosed, treated, and returned to

the safe delivery of health care, everyone wins. Criminalizing a disease may do little more than put a chill on both self-reporting and reporting by colleagues – better to fix problems with the internal mechanisms of reporting and regulation than to ruin careers through the public disclosure that comes with regulatory action.

Against:

The bills are unnecessary. The HPRP is working. Significant positive results have been demonstrated in the first eight years of the program. However, if a criminal penalty is going to be added, at the very least, House Bill 4656 needs to have a diversion component added, especially if no harm had been done to patients. Diversion would allow a person charged under the bill to voluntarily enter the HPRP. Upon successful completion, the charges would be dropped. If a diversion component were added, the bills could be seen as adding incentive for the impaired health professional to seek necessary treatment.

Against:

The bills appear to be singling out health care professionals and subjecting them to a higher standard than other regulated professionals. Also, there has been little discussion about the impact on malpractice suits and the cost of malpractice insurance if the bills are enacted. Perhaps this should be explored a bit further.

Response:

Professions are regulated when the lack of oversight and accountability puts the public at risk for harm or when consumers could be financially harmed (e.g., builders, real estate salespersons, investment advisors, etc.). The scope of practice of health care professionals, even those in the counseling professions, enables them to do great benefit or great harm to those in their care. Therefore, it is reasonable and preferable to hold them to a greater standard for delivery of services. Besides, other professionals can face criminal and/or administrative penalties associated with drinking and drunk use. For example, pilots are under strict federal laws pertaining to alcohol or drug consumption within a certain number of hours before a flight. Commercial truckers are prohibited from operating their vehicles with a bodily alcohol content of 0.04 percent or more – less than what the bills would set for health care professionals.

POSITIONS:

The Michigan Health and Hospital Association supports the bills. (10-3-03)

The Michigan Dental Association supports the bills. (10-3-03)

The Michigan State Medical Society supports the bills. (10-3-03)

The Barry County Prosecutors Office supports the bills. (10-3-03)

The Michigan Health Professional Recovery Corporation is neutral on the bills. (9-30-03)

The Michigan Psychiatric Society shares the concerns addressed by the bills, but does not support the approach taken. The MPS feels that it is essential that the bills be amended to include a diversion prior to conviction so that the incentives and sanctions are aligned toward treatment and maintenance of recovery. (10-3-03)

Analyst: S. Stutzky

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.