

## MEMORANDUM

**TO:** Senate Judiciary Committee Members  
**FROM:** Michael Lebenbom – Health Care Association of Michigan  
**DATE:** May 7, 2013  
**SUBJECT:** House Bills 4382, 4383, 4384

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Good afternoon, my name is Michael Lebenbom. I am here in my capacity as legal counsel for the Health Care Association of Michigan in support of the bills. HCAM is a statewide trade association representing for and not-for-profit, county medical care and hospital-based nursing and rehabilitation facilities. The profession consists of more than 400 facilities caring for more than 35,000 residents throughout state.

I'd like to illustrate the real world problems that we feel will be in great part resolved by this legislation. As legal counsel to HCAM and more than a hundred facilities across the state, we get at least 2 to 3 calls every week from nursing facilities facing Do-Not-Resuscitate (DNR) issues. Typically, the resident is incompetent, there is no advance directive/patient advocate designation, and the family and physician believe CPR would be futile and unnecessary. When these situations arise, even where a DNR would be in the resident's best interests, we cannot advise our clients to honor a DNR, for fear of liability and regulatory sanctions.

In 2010, we represented a nursing facility in a case in where a public guardian agency demanded DNR orders across-the-board for all of its wards in the facility, without regard to the wards' expressed wishes or their current condition, and despite the fact that none of the wards had made an advance directive. The guardian threatened to immediately remove the residents if the facility failed to honor the DNR requests. We were compelled to rush to probate court and obtain emergency injunctions in each of the cases, while the issue of the guardian's authority to direct a DNR order was decided.

The court ultimately held that guardians lacked that authority to authorize DNR orders without a separate court order. However, the probate court's jurisdiction is limited to the specific case before it and does not bind any other court in the state or any other judge, even within the same county. I have appeared in 58 of the State's Probate Courts and I can assure you there is a split of opinion on this issue. Thus the issue is still unresolved and we must continue to advise our clients not to honor DNR orders authorized by guardians.

### What's at stake for nursing facilities and their residents?

- CPR does not work for a vast majority of residents.
- When it does work, there are significant risks of injury and pain associated with administration of CPR.

- Facilities risk citation by state inspectors, leading to heavy civil fines, non-payment for new admissions, and possible decertification and/or delicensure.
- Facilities face the risk of lawsuits if they comply with guardian DNR requests when there is no "clear and convincing evidence" of a resident's wishes. [Current law in Michigan is set forth in In Re: Martin, 538 N.W. 2d 399, 450 Mich. 204, 538 N.W.2d 399 (1995)]
- Probate courts are split across the state on whether guardians have authority to authorize DNR orders, leading to confusion and uncertainty.

What the DNRPA and EPIC Amendments will do to remedy this:

- Expand the locations where the citizens of Michigan can sign a DNR order to include nursing facilities, hospice agencies and other healthcare and residential settings outside of hospitals.
- Provide guardians with an opportunity to prevent the needless administration of CPR to those who are unlikely to benefit from CPR.
- Establish a procedure for patients and their patient advocates and guardians to insure that patients' rights concerning DNR orders are honored.
- Create certainty throughout the healthcare system that properly authorized DNR orders can be followed without fear of criminal or civil liability.

Just as importantly, the amendments will provide strong safeguards to protect the rights of incapacitated individuals. The bills will NOT:

- Affect any procedure other than CPR.
- Change the current law relating to withdrawal or withholding of life sustaining measures.
- Alter or amend a person's rights under EPIC to appoint and empower a patient advocate.
- Allow anyone other than a patient, a patient advocate or guardian to authorize a DNR order.

This is important legislation that will positively affect the lives of nursing facility residents and their loved ones, and it will serve to give them reassurance and peace of mind.

Thank you and I would be glad to answer any questions.