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BILL ANALYSIS

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Senate Bills 71 and 72 (as introduced 2-16-23)
Sponsor: Senator Roger Hauck (S.B. 71)
Senator Kristen McDonald Rivet (S.B. 72)
Committee: Civil Rights, Judiciary, and Public Safety

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INTRODUCTION

Taken together, the bills would require a health profession licensee and a health facility or agency to expressly state in a patient's medical record that vaginal or anal penetration was performed during a medical service, unless the service met certain conditions, such as being performed to measure a patient's temperature. They also would require the retention of these medical records for at least 15 years and prescribe administrative fines and penalties, including misdemeanors and felonies, for not complying with the bills' requirements.

Senate Bill 72 is tie-barred to Senate Bill 71. Each bill would take effect 90 days after its enactment.

BRIEF FISCAL IMPACT

A violation of provisions in Senate Bill 71 could result in revenues and costs for the State and local governments. Violations could result in administrative fines ranging from $2,500 to $10,000, depending on the violation. Revenue from administrative fines would go to The Department of Licensing and Regulatory Affairs (LARA).

Additionally, the bill also would have a negative fiscal impact on the State and local government. New felony arrests and convictions under the bill could increase resource demands on law enforcement, court systems, community supervision, jails, and correctional facilities where the average annual cost of housing a prisoner is an estimated $45,700.

Finally, Senate Bill 72 would have no fiscal impact on local government and an indeterminate fiscal impact on the State, depending on judicial decisions.

PREVIOUS LEGISLATION

(Please note: The information in this summary provides a cursory overview of previous legislation and its progress. It does not provide a comprehensive account of all previous legislative efforts on the relevant subject matter.)

Senate Bills 71 and 72 are similar to House Bills 5783 and 5784, respectively, of the 2017-2018 Legislative Session. House Bills 5783 and 5784 passed the House and were reported by the Senate Committee on Judiciary but received no further action.

MCL 333.16213 et al. (S.B. 71)
777.13n (S.B. 72)

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CONTENT

Senate Bill 71 would amend the Public Health Code to do the following:

- **Require a health profession licensee to indicate in a patient's medical record that a medical service involving vaginal or anal penetration was performed unless the service met one of several circumstances.**
- **Require a health facility or agency to ensure that a patient's medical record stated that a medical service involving vaginal or anal penetration was performed unless the service met one of several circumstances.**
- **Require a health profession licensee, or a health facility or agency, to keep and retain a medical record for a service that involved vaginal or anal penetration of a patient for at least 15 years from the date of service.**
- **Prescribe administrative fines and criminal penalties for a violation of the documentation requirements.**
- **Allow a licensee or his or her personal representative, or a health facility or agency to destroy or dispose of a medical record for a service that involved vaginal or anal penetration of a patient only after maintaining it for 15 years.**
- **Require various health profession boards to create a document that provided guidance to licensees on generally accepted standards of practice for services involving vaginal or anal penetration.**

Senate Bill 72 would amend the Code of Criminal Procedure to include the felonies proposed by Senate Bill 71.

Senate Bill 71

Retention of Record

The Public Health Code requires a licensee to keep and maintain a record for each patient that the licensee has provided with medical services and treatment. A licensee must keep each record for a minimum of seven years from the date of service unless a longer retention period is required by State or Federal law or generally accepted standards of medical practice.

Under the bill, if a medical service provided to a patient on or after the bill's effective date involved the vaginal or anal penetration of the patient, a licensee would have to state expressly in the record that vaginal or anal penetration was performed unless the medical service met any of the circumstances described in the list below. A licensee would have to retain a record for such a medical service for a minimum of 15 years from the date of service to which the record pertained. The bill specifies that these provisions would not apply to a record for any of the following:

-- A medical service that primarily related to the patient's urological, gastrointestinal, reproductive, gynecological, or sexual health.
-- A medical service that was necessary and association with or incident to a medical emergency, meaning a circumstance that, in the licensee's good-faith medical judgement, created an immediate threat of serious risk to the life or physical health of the patient.
-- A medical service performed for the purpose of rectally administering a drug or medicine.
-- A medical service performed to measure a patient's temperature.

Destruction of Records

A licensee or health facility or agency may destroy a record that is less than seven years old only if both of the following are satisfied: a) the licensee, facility, or agency sends a written

notice to the patient at his or her last known address informing him or her that the record is about to be destroyed, offering the patient the opportunity to request a copy of that record, and requesting the patient's written authorization to destroy it; and b) the licensee receives written authorization from the patient or his or her authorized representative agreeing to the destruction of the record. Under the bill, this would apply except as provided below.

The Code prohibits a licensee from abandoning records required under the Code if the licensee ceases to practice. In this instance, a licensee, or a personal representative of a deceased licensee, must send a written notice to the LARA specifying who will have custody of the medical records and how patients can access them. The licensee or representative also must either transfer the records or send a written notice to the last known address of each patient for whom the licensee provided medical services

Under the bill, the option to destroy the records would apply except as otherwise provided below.

Generally, medical records may be destroyed or otherwise disposed of after seven years. Under the bill, this would apply to a record other than a record for a medical service performed on or after the bill's effective date that involved the vaginal or anal penetration of the patient, which could be destroyed or otherwise disposed of after 15 years. A licensee or health facility or agency could destroy a record for a medical service that involved the vaginal or anal penetration of the patient only in accordance with the Code's requirements for destruction of those records.

Administrative Fines & Criminal Penalties; Licensees

Generally, a person who fails to comply with requirements relating to the retention of medical records is subject to a maximum administrative fine of $10,000 if the failure was the result of gross negligence or willful and wanton misconduct. Under the bill, except as provided for a violation involving gross negligence or intent, if a person violated the bill's requirement for documentation in a patient's medical record of a medical service involving vaginal or anal penetration, the person would be subject to an administrative fine or guilty of a crime as follows:

-- For a first violation, an administrative fine of up to $1,000.
-- For a second violation, an administrative fine of up to $2,500.
-- For a third or subsequent violation, a misdemeanor punishable by up to 180 days' imprisonment or a maximum fine of $5,000, or both.

A person who violated the bill's documentation requirement would be guilty of a misdemeanor punishable by up to 180 days' imprisonment or a maximum fine of $5,000, or both, if the violation were the result of gross negligence. A person who intentionally violated the bill's documentation requirement would be guilty of a felony punishable by up to two years' imprisonment or a maximum fine of $7,500, or both.

The bill specifies that it would not limit any other sanction or additional action a disciplinary subcommittee would be authorized to impose or take.

Guidance to Licensees

The bill would require the Michigan Board of Chiropractic, the Michigan Board of Medicine, the Michigan Board of Osteopathic Medicine and Surgery, the Michigan Board of Physical Therapy, and the Michigan Athletic Trainer Board each to prepare guidance to licensees on generally accepted standards of practice for services involving vaginal or anal penetration, including

internal pelvic floor treatments. The guidance prepared by the Boards of Medicine and Osteopathic Medicine and Surgery would exclude medical services that primarily related to a patient's urological, gastrointestinal, reproductive, gynecological, or sexual health, that were performed to measure a patient's temperature, or that were performed for the purpose of rectally administering a drug or medicine. In creating the guidance document, each Board would have to consult with appropriate professional associations and other interested stakeholders.

Each Board would have to make its guidance document publicly available within one year after the bill's effective date.

Records for Health Facilities & Agencies

The Code requires a health facility or agency to keep and maintain a record for each patient, including a complete record of tests and examinations performed, observations made, treatments provided, and, in the case of a hospital, the purpose of hospitalization. Under the bill, if a medical service provided to a patient on or after the bill's effective date involved the vaginal or anal penetration of the patient, the facility or agency would have to ensure that the patient's medical record expressly stated that vaginal or anal penetration was performed unless the medical service met any of the circumstances under which a record would not have to be retained for 15 years.

The Code's record retention requirement for health facilities and agencies is the same as the requirement for licensees. As proposed for licensees, the bill would create a 15-year retention requirement for records that included a medical service involving the vaginal or anal penetration of a patient, subject to the same exceptions.

The bill also would require a record to be retained for 15 years from the date of a service performed on or after the bill's effective date if the patient had filed a complaint with the health facility or agency alleging sexual misconduct by an individual who was employed by, under contract to, or granted privileges by the facility or agency. "Sexual misconduct" would mean the conduct described in Section 90, 136, 145a, 145b, 145c, 520b, 520c, 520d, 520e, or 520g of the Michigan Penal Code, regardless of whether the conduct resulted in a criminal conviction. (Those sections prohibit the following conduct, respectively: sexual intercourse under the pretext of medical treatment, female genital mutilation, accosting or soliciting child for immoral purpose, accosting or soliciting a minor for immoral purposes after a prior conviction, child sexually abusive activity, first-, second-, third-, and fourth-degree criminal sexual conduct (CSC), and assault with intent to commit CSC.)

Administrative Fines & Criminal Penalties; Health Facility or Agency

Generally, a person that fails to comply with requirements relating to the retention of a facility's or agency's medical records is subject to a maximum administrative fine of $10,000 if the failure was the result of gross negligence or willful and wanton misconduct.

Under the bill, except as provided for a failure resulting from gross negligence or intent, a person that violated the bill's requirement for a facility or agency to document a medical service involving vaginal or anal penetration in a patient's medical record would be subject to an administrative fine or guilty of a crime as follows:

-- For a first violation, an administrative fine of up to $2,500.
-- For a second violation, an administrative fine of up to $5,000.
-- For a third or subsequent violation, a misdemeanor punishable by up to 180 days' imprisonment or a maximum fine of $7,500, or both.

A person that violated the bill's documentation requirement would be guilty of a misdemeanor punishable by up to 180 days' imprisonment or a maximum fine of $10,000, or both, if the violation were the result of gross negligence. A person who intentionally violated the documentation requirement would be guilty of a felony punishable by up to two years' imprisonment or a maximum fine of $10,000, or both. The bill specifies that it would not limit any other sanction that LARA would be authorized to impose.

Senate Bill 72

Under the bill, a health professional's, or a health facility's' or agency's, intentional omission of certain medial services from a medical record would be a class G felony against the public trust with a statutory maximum of two years' imprisonment.

FISCAL IMPACT

Senate Bill 71

Except as otherwise provided, a violation of Section 16213(1) requiring documentation of procedures involving vaginal or anal penetration could result in an administrative fine of not more than $1,000 for a first violation and not more than $2,500 for a second violation. Any additional violation would be classified as a misdemeanor and could result in a fine of not more than $5,000, imprisonment for not more than 180 days, or both. If a violation were the result of gross negligence, it would automatically be considered a misdemeanor and could be subject to the fine of not more than $5,000, imprisonment for not more than 180 days, or both. An intentional violation could result in a fine of not more than $7,500, imprisonment for not more than two years, or both. A disciplinary subcommittee could impose additional fines.

Similarly, a violation of Section 20175(1) could result in an administrative fine of not more than $2,500 for a first violation and not more than $5,000 for a second violation. A subsequent violation could result in a fine of not more than $7,500, imprisonment for not more than 180 days, or both. A grossly negligent or intentional violation could result in a fine of not more than $10,000, imprisonment for not more than 180 days (negligent) or two years (intentional), or both. A disciplinary subcommittee could impose additional fines.

The bill also would have a negative fiscal impact on the State and local government. New felony arrests and convictions under the proposed bill could increase resource demands on law enforcement, court systems, community supervision, jails, and correctional facilities. However, it is unknown how many people would be prosecuted under provisions of the bill. The average cost to State government for felony probation supervision is approximately $4,200 per probationer per year. For any increase in prison intakes the average annual cost of housing a prisoner in a State correctional facility is an estimated $45,700. Per diem rates range from a low of $98 to a high of $192 per day, depending on the security level of the facility. Any associated increase in fine revenue would increase funding to public libraries.

Senate Bill 72

The bill would have no fiscal impact on local government and an indeterminate fiscal impact on the State, in light of the Michigan Supreme Court's July 2015 opinion in *People v. Lockridge*, in which the Court ruled that the sentencing guidelines are advisory for all cases. This means that the addition to the guidelines under the bill would not be compulsory for the sentencing judge. As penalties for felony convictions vary, the fiscal impact of any given felony conviction depends on judicial decisions.

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