

Louisiana State Board of Medical Examiners

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June 29, 2012

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Executive Director

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Re: Advisory Opinion Reply

At its April 2012 meeting the Louisiana State Board of Medical Examiners (the "Board") considered your inquiries concerning: (1) whether serving as a Medical Review Officer ("MRO") for drug and alcohol testing programs would be considered the practice of medicine; (2) whether MROs may access the state's Prescription Monitoring Program ("PMP") when performing their duties; and (3) whether issuance of a prescription for medical oxygen for a volunteer fire department, ambulance service, clinic or company constitutes the practice of medicine so as to require a license to practice medicine in this state. Following its initial review, the Board requested additional information to clarify your inquiries, which you subsequently provided to our legal counsel. With apologies for the delay in responding, the Board asked that I acknowledge and reply to your communication as supplemented by the additional information provided.

We appreciate that your primary concern in posing Question Nos. 1 and 3, revolve around the issue of whether or not the extent to which the actions of a physician serving as a Medical Review Officer ("MRO") for drug testing purposes fall within the ambit of protection afforded by the Louisiana Medical Malpractice Act, La. Rev. Stat. §40:1299.41 *et seq.* (the "Act"), particularly with regard to qualification for the limitation of liability for a qualified provider under the Louisiana Patients' Compensation Fund ("PCF").¹

As you correctly observe, the duties of an MRO may require medical interpretation and evaluation to determine whether there is a legitimate medical explanation for a positive drug screen. Because arriving at this evaluation (or diagnosis) constitutes the practice of medicine, the federal regulations that you cite make clear that only a physician licensed to practice medicine may serve as an MRO.² Similarly, Louisiana law concerning drug testing in this state also requires that a MRO must be a licensed physician.³

¹La. Rev. Stat. §40:1299.42(B).

²The Omnibus Transportation Employee Testing Act is a federal law that established federal drug and alcohol testing programs for mass transportation employees. 49 U.S.C.A. §5331. Federal regulations provide that an MRO must be licensed as a "M.D. in any one state, or province in the U.S., Canada, or Mexico . . ." 49 CFR §§40.121(a). Federal law

However, federal regulations provide that by serving in the capacity of an MRO the physician *does not create a physician-patient relationship* with the individual being tested.⁴ Louisiana courts have reached a similar conclusion finding that while an act of malpractice can occur during the rendition of an MRO's professional services, they are not covered by the Act because the individual being drug tested is not a "patient" *e.g.*, a person who is receiving or should have received "health care" as such terms are defined by the Act. Therefore, the limitation on liability otherwise afforded to qualified providers by the PCF does not apply.⁵

In short, in reply to Question No. 1 (and 3), the Board is of the view that while the duties of an MRO fall within the practice of medicine, as such term is defined by Louisiana law⁶ the courts of this state have held that a MRO's negligent rendition of professional services do not fall within the scope of the Act. Further, given the status of the case law on the topic, it appears that any remedy must necessarily derive from the legislature.⁷

Your next inquiry relates to the laws and rules governing MROs, as well as those applicable to the Health Insurance Portability and Accountability Act ("HIPAA"),⁸ and the Louisiana Prescription Monitoring Program ("PMP").⁹

Louisiana law governing access to PMP prescription data proves that those who may access prescription information includes, among others, "Persons authorized to prescribe, or dispense

also provides that a state or local government 'may not prescribe, issue or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this section. . . .' See 49 U.S.C.A. 5331(f)(1).

³La. Rev. Stat §49:1001(4) defines a *Medical Review Officer* for drug testing purposes as 'A licensed physician responsible for receiving laboratory results generated by employer or testing entity's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate the individual's positive test results together with his medical history and any other relevant biomedical information.'

⁴ '[W]hile you provide medical review of employees' tests results, this part does not deem that you have established a doctor-patient relationship with the employees whose tests you review.' 49 CFR §40.123(d).

⁵See: *Price vs. City of Bossier City*, 693 So. 2d 1169, 96-2408 (La. 1997). A similar holding was reached with respect to an alleged negligently performed phlebotomy in connection with a blood donation, *Delcambre vs. Blood Systems, Inc*, 893 So. 2d. 23, 2004-0562 (La. 2005). Should the courts determine that the professional services provided by physicians issuing prescriptions for medical oxygen or defibrillators are not delivered to a patient who is receiving or who should have received health care, a result similar to *Price* and *Delcambre* may follow. Copies of these decisions are annexed for ease of reference as Ex. 1.

⁶La. Rev. Stat §37:1261-1292. In pertinent part, as defined by the Act, the "practice of medicine" means

the holding out of one's self to the public as being engaged in the business of, or the actual engagement in, the diagnosing, treating curing, or relieving of any bodily or mental disease, condition, infirmity, deformity, defect, ailment, or injury in any human being...whether by the use of any drug, instrument or force...or any other agency or means; or the examining...of any person or material from any person for such purpose....

⁷We note that Louisiana law provides that a physician who prescribes a defibrillator '... shall not be liable for any civil damages arising from any act or omission of acts related to the operation or the failure to operate an AADE that do not amount to willful or wanton misconduct or gross negligence.' La. Rev. Stat §40:1236.14.

⁸The information that you originally provided from federal regulators indicates that HIPAA rules do not apply to MROs carrying out their verification process duties under 49 CFR Part 40. *Corr.*, Robert Bourgeois, M.D. to La. St. Board of Med. Exam.

⁹La. Rev. Stat §40:1001-1014.

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controlled substances or drugs of concern, for the purpose of providing medical or pharmaceutical care for their patients,¹⁰ or for verifying their prescribing records.” Given that the PMP does not fall within the law or regulations administered by the Board, we would suggest that you direct this question to the U.S. Department of Transportation, which administers the Omnibus Transportation Employee Testing Act, the U.S. Department of Health & Human Services respecting HIPAA, and/or the Louisiana Board of Pharmacy concerning the PMP.

While we understand that the above may not be the response for which you had hoped we trust that it is nevertheless responsive. If not, or if we may be of further assistance, please feel free to contact us.

Sincerely,

**LOUISIANA STATE BOARD
OF MEDICAL EXAMINERS**



Robert L. Marier, M.D.
Executive Director

¹⁰La. Rev. Stat §40:1001(1), emphasis supplied. A *patient* is defined under the PMP as ‘... the person or animal who is the ultimate user of a controlled substance or drug monitored by the program for whom a prescription is issued and for whom a controlled substance or drug is dispensed.’ La. Rev. Stat §40:1003(10).