



Health Law Section

The Mississippi Bar

Winter 2018

Message from the Chair

Happy Holidays from your Chair! It is hard to believe 2019 is almost here. It has been and is an honor to serve as the Chair of the Health Law Section. I want to give a special thanks to each of the members of the Executive Committee who volunteer their time and talents to make our Section a success.

This Fall, the Health Law Section approved the Section's grant of scholarships in the amount of \$750 each to be given to a University of Mississippi School of Law student and to a Mississippi College School of Law student.

To close out the year, the Health Law Section will host a teleseminar entitled "Changing The Way Physicians Prescribe Opioids." The 1-hour CLE teleseminar is FREE for section members and \$25 for non-members. Right now, there is an estimated 2.6 million addicts in the United States. Every day over 100 Americans die after overdosing on opioids. Drug overdoses now kill more people than

gun homicide and car crashes combined. The United States is the world's leading consumer of opioids. As our Section continues to highlight this issue, we hope you will join us on this teleseminar as we hear from Stan Ingram, a member of Biggs, Ingram and Solop, PLLC and Complaint Counsel for both the Mississippi State Board of Medical Licensure and Mississippi State Board of Dental Examiners, as he shares with us steps the MS Board of Medical Licensure is taking to help fight this crisis. Mr. Ingram has graciously provided highlights of the new regulations in this newsletter. More information on how to register for this event is set forth below.

We are planning the program for the Spring. The Health Law Section will offer a six hour CLE Program. Save the date of March 29, 2019 to attend this program. The Health Law Executive Committee will meet in January to slate the speakers for this program. We encourage anyone who has



Julie Mitchell

a topic of interest to submit their proposal to speak on or before December 31, 2018. The Health Law Section is for the benefit of its members. I encourage each member to become involved through contributing articles for newsletters, giving seminars as CLE presenters, and presenting teleseminars. If you are interested in participating in one of these ways, or some other way, please submit your proposal to me at jbmitchell@mitchellday.com or Conner Reeves at conner@mclaughlinpc.com

As the end of the year approaches, I wish you and your families happy holidays and blessings for the new year. Again, thank you for the opportunity to serve as the Chair of our Section.

Changing the Way Physicians Prescribe Opioids Teleseminar Tuesday, December 4, 2018 from 11:45 am - 1:00 pm

FREE Teleseminar for Health Law Section Members

The Health Law Section will host a teleseminar entitled "Changing the Way Physicians Prescribe Opioids" on Tuesday, December 4, 2018, to address recent amendments to Regulation 2640 of the Mississippi State Board of Medical Licensure governing the prescribing, administering and dispensing of controlled substances, effective October 29, 2018. The teleseminar will highlight the significant amendments which will impact how lawyers advise their physician and healthcare clients. Stan Ingram is a member of Biggs, Ingram & Solop, PLLC. His practice includes general health law but with emphasis on licensure law, inasmuch as he serves as Complaint Counsel for both the Mississippi State Board of Medical Licensure and Mississippi State Board of Dental Examiners. The CLE teleseminar will provide 1.0 hour of CLE credit and is free to Section members. \$25 for non-Section members.

[To download the registration form with additional information, click here.](#)

Changing The Way Physicians Prescribe Opioids

Recent Changes to the Controlled Substance Regulations Adopted by the Mississippi State Board of Medical Licensure

By: Stan Ingram - Biggs, Ingram & Solop, PLLC

On December 4, 2018, the Mississippi Health Lawyers' Association will sponsor a teleseminar which will address the recent changes adopted by the Mississippi State Board of Medical Licensure to its rules and regulations governing the prescribing, administering and dispensing of controlled substances and other medications. The following are highlights of the most notable amendments, which of course pertain to the prescribing, administering and dispensing of controlled substances by those licensed to practice medicine (M.D., D.O., P.A. and Podiatric physicians). The Mississippi State Board of Nursing is currently considering the adoption of similar rules and regulations.



Stan Ingram

- **Mississippi Prescription Monitoring Program:** The rules will require enhanced utilization of the Mississippi Prescription Monitoring Program (PMP). As written, all licensees must register with the PMP. Whether or not running a PMP is required in each instance when a controlled substance is prescribed varies depending upon the medication prescribed. For example, all licensees must review the PMP at each encounter when an opioid is prescribed for acute or chronic non-cancer/non-terminal pain. As to non-opioids, providers/licensees must review the PMP upon initial contact with new patients and every three months thereafter. There are exemptions to these requirements, the most notable being that PMP is not required when treating patients in a hospital inpatient setting. However, a PMP is required if and when the patient is discharged with a controlled substance prescription
- **Chronic Pain vs. Acute Pain:** For obvious reasons, the manner in which controlled substances are prescribed varies depending upon whether the licensee is treating acute pain vs. chronic pain. When prescribing for acute pain, the licensee can prescribe anywhere from a 3 day to 10 day supply (3 days recommended). A licensee can provide the patient with an additional maximum 10 day supply if clearly documented. As for chronic pain, the rules provide that the licensee should use the lowest effective dose, i.e. not to exceed 90 Morphine Milligram Equivalent (MME) daily, and if greater than 100 MME, the prescription must be generated from a registered pain clinic.
- **Benzodiazepines:** Opioids are not the only drugs of abuse. The use of benzodiazepines is an important part of the regulations. Prescribing benzodiazepines is limited to a one month supply with two refills or a 90 day supply maximum. Prescribing of opioids concurrently with benzodiazepines and/or Soma may be allowed only under very limited circumstances.

Changing The Way Physicians Prescribe Opioids, *continued*

- **Drug testing/screening:** Point of service drug testing must be done at least three times per year when a Schedule II medication is written for the treatment of chronic non-cancer/non-terminal pain. Point of service drug testing is also required at least three times a year for patients prescribed benzodiazepines for chronic medical and/or psychiatric conditions. Drug screening must test for, at a minimum, opioids, benzodiazepines, amphetamines, cocaine and cannabis. Point of service drug testing is not required for inpatient and hospice treatment.
- **Pain Management Clinics:** The rules define what constitutes a pain management clinic, i.e., if 50% of the patients receive controlled substances for chronic pain, the clinic must register as a pain clinic. If a licensee advertises as a pain clinic, it must register regardless of the percentage. Licensees who operate or work in a pain management clinic must check the PMP every time a controlled substance is prescribed.
- **Exemptions:** As with any regulation, the newly-adopted regulations provide certain exemptions. The requirements of drug testing and running PMP reports do not apply to hospice patients, inpatients (nursing home, rehab), prescriptions for pseudoephedrine, Lomotil, Lyrica and testosterone, and amphetamines prescribed for patients under 16 years of age for treatment of ADHD.

The above is only a brief summary of the regulations as amended. The teleseminar will go into much more detail. Lawyers who represent physicians, clinics or hospitals who wish more detail regarding the recent changes to the Board regulations (Part 2640) pertaining to the prescribing, administering and dispensing of controlled substances, should register for the upcoming teleseminar.

Stan T. Ingram , Biggs Ingram & Solop, PLLC - Jackson, MS

[Link to bio information](#)

Binding Patients To Arbitration Agreements

By: Margaret H. Williams - Wise Carter Child & Caraway

The United States Supreme Court recently stated in the case of *Kindred Nursing Centers v. Clark*, 137 S.Ct.1421 (2017) that the Federal Arbitration Act requires courts to place arbitration agreements on equal footing with all other contracts. Thus, the Court determined that an agreement to arbitrate contained in a nursing home contract signed by a person holding a general power of attorney for a nursing home resident cannot be voided just because the power of attorney did not specifically call out a right to waive a jury trial or to settle disputes as a right given to the designated agent holding the general power of attorney for the resident. This same outcome would have likely been reached by the Mississippi Supreme Court based upon its rulings and a Fifth Circuit case decided before the May 15, 2017 ruling in *Kindred Nursing Centers*.



Margaret H. Williams

In *GGNSC Batesville, LLC, v. Johnson*, 109 So. 3d 562 (Miss. 2013), the Mississippi Supreme Court laid out the test to determine if an arbitration agreement was binding when signed by one party on behalf of another individual. The Mississippi Court acknowledged that it must follow the Federal Arbitration Act and its two-prong analysis to determine whether arbitration should be compelled. (quoting *Grenada Living Ctr., LLC v. Coleman*, 961 So.2d 33, 36 (Miss. 2007)). The first prong was to determine if the parties agreed to arbitrate the dispute, and secondly whether external legal constraints foreclosed arbitration of the claims. Courts apply principles of contract law to determine if the first prong is met. The elements of a contract are (1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with the legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation. The arbitration agreement in dispute was signed by Johnson, on Cooper's behalf, and it explicitly stated that it was between GGNSC and Johnson.

The Mississippi Court began to look for evidence of Johnson's capacity to sign and bind Cooper. The Court stated, "absent a formal power of attorney that vests an individual with actual authority, or a classification as a health-care surrogate, the court must determine whether the individual that signed the agreement had apparent authority to do so." The party asserting an agency relationship has the burden of proving it. To do so, the party must "put forth sufficient evidence of (1) acts or conduct of the principal indicating agent's authority, (2) reasonable reliance upon those acts by a third party, and (3) a detrimental change in position by the third person as a result of that reliance." *Id.* (quoting *Adams Cmty. Ctr., LLC v. Reed*, 37 So.3d 1155, 60 (Miss. 2010) (emphasis added)). In the case of *GGNSC Batesville, LLC, v. Johnson*, the Court noted that the record was completely devoid of evidence pointing to acts or conduct of Cooper indicating that Johnson was his agent. *Id.*; see also, (*Eaton v. Porter*, 645 So.2d 1323, 1325 (Miss. 1994)). After a review of the record, no evidence was found to satisfy the first prong test of showing that Johnson had authority to sign the agreement for Cooper. Therefore, the Court did not have to address prongs two and three in order to find the arbitration agreement was not enforceable against Cooper.

Binding Patients To Arbitration Agreements, *continued*

In *Gross v. GGNSC*, the Fifth Circuit court interpreted the 2013 Johnson ruling, and other similar cases to determine whether an attorney-in-fact had the power to create a binding arbitration agreement with a nursing home. The circuit court overruled the lower court's holding that a "formal legal device," such as a "formal power of attorney or statutory health-care surrogacy" was required to confer actual authority to sign a nursing home arbitration agreement on behalf of another individual. *Gross v. GGNSC Southaven L.L.C.*, 817 F. 3d 169, 175 (5th Cir. 2016). Because Johnson and other similar cases contained no evidence on the issue of actual agency, the circuit court made an Erie guess as to what the Mississippi Supreme court would do regarding a "formal-device" requirement. The circuit court determined that the Mississippi Supreme Court would not adopt a "formal-device" requirement and would instead permit parties to establish the existence of an agency relationship with other types of evidence. The Fifth Circuit court reasoned that a formal device requirement stood in tension with the Federal Arbitration Act. The Fifth Circuit court noted that the Mississippi Supreme Court had emphasized that "courts must place arbitration agreement on an equal footing with other contracts and enforce them according to their terms." *Id.*; (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, (2011)). The Fifth Circuit left open the question as to whether the nursing home had in fact established (1) that Gross had express authority to act on his mother's behalf and (2) that the power to execute an arbitration agreement – that is, the power to relinquish rights, was within the scope of that authority. This was left open because an actual agency relationship is a question of fact. (quoting *Engle Acoustic & Tile, Inc. v. Grenfell*, 223 So.2d 613, 617-18 (Miss. 1969).

In conclusion, it seems likely that Mississippi case law before May 15, 2017, allowed for a designated representative holding a general power of attorney to bind the principal party, such as a nursing home resident, to an arbitration agreement with a nursing home. This conclusion is based in part on the Fifth Circuit Gross ruling that a formal device such as a specific power of attorney addressing arbitration or dispute resolution – would not be needed for a legal representative to sign an arbitration agreement. Mississippi statutes address authority of persons to delegate health care and other decisions in MISS. CODE. ANN. § 41-41-205(1) (Rev. 2009) "Directions Concerning Individual Health Care; Power of Attorney; Persons Authorized to Make Health Care Decisions" under the "Uniform Health-Care Decisions Act." And in MISS. CODE. ANN. § 41-41-211 "Surrogate Requirements" under the "Uniform Health-Care Decisions Act." However, formal documents in compliance with these statutes would not be required in order to render an arbitration agreement signed by an attorney-in-fact under the either Fifth Circuit Gross ruling or the more recent United States Supreme Court ruling in *Kindred Nursing Centers*.

Margaret H. Williams, Wise Carter Child & Caraway - Jackson, MS

[Link to bio information](#)

Health Law Section

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We are on the
web!

Click [here](#)

Upcoming Events

Tuesday, December 4, 2018
Heath Law Section Teleseminar
[Click here for registration information](#)

Friday, March 29, 2019
Heath Law Section Annual CLE Seminar
MS Bar Center - Jackson, MS
SAVE THE DATE!

Thursday, July 11, 2019
Health Law Section Annual Meeting
Sandestin Hilton - Destin, Florida

Write for the Health Law Section Newsletter

The Health Law Section newsletter is now accepting articles on health law topics for publication in the newsletter. If you have an idea for an article, you may submit it to Health Law Section Newsletter Editor Conner Reeves at conner@mclaughlinpc.com

Please include a short description of the article. The Health Law Section Committee will consider your proposal and will notify you of whether your proposal has been accepted. The committee reserves the right to reject proposals. Please note that when you submit your article for publication in the newsletter, you will be granting The Mississippi Bar the nonexclusive right to publish your article.

Health Law Section 2018-2019 Executive Committee

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