

1999 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-AB427)

Received: 11/03/1999

Received By: **kenneda**

Wanted: As time permits

Identical to LRB:

For: **Frank Urban (608) 266-9175**

By/Representing: **Himself**

This file may be shown to any legislator: **NO**

Drafter: **kenneda**

May Contact:

Alt. Drafters:

Subject: **Health - miscellaneous
Mental Health - miscellaneous**

Extra Copies: **ISR, MGD**

Pre Topic:

No specific pre topic given

Topic:

Exempt from patient record confidentiality laws records that do not permit patient identification; records subject to pt. access are only paper records

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	kenneda 11/03/1999	chanaman 11/03/1999		_____			
/1			mclark 11/03/1999	_____	lrb_docadmin 11/03/1999	lrb_docadmin 11/03/1999	
/2	kenneda 11/08/1999	ygeller 11/08/1999	martykr 11/08/1999	_____	lrb_docadmin 11/08/1999	lrb_docadmin 11/08/1999	

FE Sent For:

<END>

1999 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-AB427)

Received: 11/03/1999

Received By: kenneda

Wanted: As time permits

Identical to LRB:

For: Frank Urban (608) 266-9175

By/Representing: Himself

This file may be shown to any legislator: NO

Drafter: kenneda

May Contact:

Alt. Drafters:

Subject: Health - miscellaneous
Mental Health - miscellaneous

Extra Copies: ISR, MGD

Pre Topic:

No specific pre topic given

Topic:

Exempt from patient record confidentiality laws records that do not permit patient identification; records subject to pt. access are only paper records

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	kenneda 11/03/1999	chanaman 11/03/1999		_____			
/1		1/2 1/8 jlg	mclark 11/03/1999	_____	lrb_docadmin 11/03/1999	lrb_docadmin 11/03/1999	
			<i>[Signature]</i>	<i>[Signature]</i>			

FE Sent For:

<END>

1999 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-AB427)

Received: 11/03/1999

Received By: **kenneda**

Wanted: **As time permits**

Identical to LRB:

For: **Frank Urban (608) 266-9175**

By/Representing: **Himself**

This file may be shown to any legislator: **NO**

Drafter: **kenneda**

May Contact:

Alt. Drafters:

Subject: **Health - miscellaneous
Mental Health - miscellaneous**

Extra Copies: **ISR, MGD**

Pre Topic:

No specific pre topic given

Topic:

Exempt from patient record confidentiality laws records that do not permit patient identification; records subject to pt. access are only paper records

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	kenneda	cmh 1 11/3	mrc 11/3	mrc/ct 11/3			

FE Sent For:

<END>

WISCONSIN LEGISLATIVE COUNCIL STAFF
One East Main Street, Suite 401
P.O. Box 2536
Madison, Wisconsin 53701-2536

PLEASE DELIVER TO: *Dehora Kennedy*

FAX number: *4 - 8522*

Date: *10/27/99*

Number of pages, including cover page: *2*

From: Richard Sweet, Senior Staff Attorney [Direct phone number: (608)266-2982]
[E-mail: richard.sweet@legis.state.wi.us]
[FAX (608)266-3830]

Message: *Dehora,*

Rep. Urban would like to request a sub. am. to AB427 that do the following: (1) exempt from the confidentiality requirements of 51.30 and 146.82 records that do not permit identification of the patient; (2) provides that the "varied media" approach to records in the original bill applies only to confidentiality provisions of the 2 laws (e.g. not patient access provisions). I took a stab at a rough draft, which is enclosed. Is it possible to get this by Thurs., 10/28? Thanks. Dick

Sub. Am. to AB427

create 146.82(2)(a)20.

20. If the patient health care records do not contain information that would permit the identification of the patient.

create 146.82(4)

(4) Applicability. This section applies to all ^{print} health care records, including those on which written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved, regardless of physical form or characteristics.

what about
(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (aa), (ab), (ac), (ad), (ae), (af), (ag), (ah), (ai), (aj), (ak), (al), (am), (an), (ao), (ap), (aq), (ar), (as), (at), (au), (av), (aw), (ax), (ay), (az), (ba), (bb), (bc), (bd), (be), (bf), (bg), (bh), (bi), (bj), (bk), (bl), (bm), (bn), (bo), (bp), (bq), (br), (bs), (bt), (bu), (bv), (bw), (bx), (by), (bz), (ca), (cb), (cc), (cd), (ce), (cf), (cg), (ch), (ci), (cj), (ck), (cl), (cm), (cn), (co), (cp), (cq), (cr), (cs), (ct), (cu), (cv), (cw), (cx), (cy), (cz), (da), (db), (dc), (dd), (de), (df), (dg), (dh), (di), (dj), (dk), (dl), (dm), (dn), (do), (dp), (dq), (dr), (ds), (dt), (du), (dv), (dw), (dx), (dy), (dz), (ea), (eb), (ec), (ed), (ee), (ef), (eg), (eh), (ei), (ej), (ek), (el), (em), (en), (eo), (ep), (eq), (er), (es), (et), (eu), (ev), (ew), (ex), (ey), (ez), (fa), (fb), (fc), (fd), (fe), (ff), (fg), (fh), (fi), (fj), (fk), (fl), (fm), (fn), (fo), (fp), (fq), (fr), (fs), (ft), (fu), (fv), (fw), (fx), (fy), (fz), (ga), (gb), (gc), (gd), (ge), (gf), (gg), (gh), (gi), (gj), (gk), (gl), (gm), (gn), (go), (gp), (gq), (gr), (gs), (gt), (gu), (gv), (gw), (gx), (gy), (gz), (ha), (hb), (hc), (hd), (he), (hf), (hg), (hh), (hi), (hj), (hk), (hl), (hm), (hn), (ho), (hp), (hq), (hr), (hs), (ht), (hu), (hv), (hw), (hx), (hy), (hz), (ia), (ib), (ic), (id), (ie), (if), (ig), (ih), (ii), (ij), (ik), (il), (im), (in), (io), (ip), (iq), (ir), (is), (it), (iu), (iv), (iw), (ix), (iy), (iz), (ja), (jb), (jc), (jd), (je), (jf), (jg), (jh), (ji), (jj), (jk), (jl), (jm), (jn), (jo), (jp), (jq), (jr), (js), (jt), (ju), (jv), (jw), (jx), (jy), (jz), (ka), (kb), (kc), (kd), (ke), (kf), (kg), (kh), (ki), (kj), (kk), (kl), (km), (kn), (ko), (kp), (kq), (kr), (ks), (kt), (ku), (kv), (kw), (kx), (ky), (kz), (la), (lb), (lc), (ld), (le), (lf), (lg), (lh), (li), (lj), (lk), (ll), (lm), (ln), (lo), (lp), (lq), (lr), (ls), (lt), (lu), (lv), (lw), (lx), (ly), (lz), (ma), (mb), (mc), (md), (me), (mf), (mg), (mh), (mi), (mj), (mk), (ml), (mm), (mn), (mo), (mp), (mq), (mr), (ms), (mt), (mu), (mv), (mw), (mx), (my), (mz), (na), (nb), (nc), (nd), (ne), (nf), (ng), (nh), (ni), (nj), (nk), (nl), (nm), (nn), (no), (np), (nq), (nr), (ns), (nt), (nu), (nv), (nw), (nx), (ny), (nz), (oa), (ob), (oc), (od), (oe), (of), (og), (oh), (oi), (oj), (ok), (ol), (om), (on), (oo), (op), (oq), (or), (os), (ot), (ou), (ov), (ow), (ox), (oy), (oz), (pa), (pb), (pc), (pd), (pe), (pf), (pg), (ph), (pi), (pj), (pk), (pl), (pm), (pn), (po), (pp), (pq), (pr), (ps), (pt), (pu), (pv), (pw), (px), (py), (pz), (qa), (qb), (qc), (qd), (qe), (qf), (qg), (qh), (qi), (qj), (qk), (ql), (qm), (qn), (qo), (qp), (qq), (qr), (qs), (qt), (qu), (qv), (qw), (qx), (qy), (qz), (ra), (rb), (rc), (rd), (re), (rf), (rg), (rh), (ri), (rj), (rk), (rl), (rm), (rn), (ro), (rp), (rq), (rr), (rs), (rt), (ru), (rv), (rw), (rx), (ry), (rz), (sa), (sb), (sc), (sd), (se), (sf), (sg), (sh), (si), (sj), (sk), (sl), (sm), (sn), (so), (sp), (sq), (sr), (ss), (st), (su), (sv), (sw), (sx), (sy), (sz), (ta), (tb), (tc), (td), (te), (tf), (tg), (th), (ti), (tj), (tk), (tl), (tm), (tn), (to), (tp), (tq), (tr), (ts), (tt), (tu), (tv), (tw), (tx), (ty), (tz), (ua), (ub), (uc), (ud), (ue), (uf), (ug), (uh), (ui), (uj), (uk), (ul), (um), (un), (uo), (up), (uq), (ur), (us), (ut), (uu), (uv), (uw), (ux), (uy), (uz), (va), (vb), (vc), (vd), (ve), (vf), (vg), (vh), (vi), (vj), (vk), (vl), (vm), (vn), (vo), (vp), (vq), (vr), (vs), (vt), (vu), (vv), (vw), (vx), (vy), (vz), (wa), (wb), (wc), (wd), (we), (wf), (wg), (wh), (wi), (wj), (wk), (wl), (wm), (wn), (wo), (wp), (wq), (wr), (ws), (wt), (wu), (wv), (ww), (wx), (wy), (wz), (xa), (xb), (xc), (xd), (xe), (xf), (xg), (xh), (xi), (xj), (xk), (xl), (xm), (xn), (xo), (xp), (xq), (xr), (xs), (xt), (xu), (xv), (xw), (xx), (xy), (xz), (ya), (yb), (yc), (yd), (ye), (yf), (yg), (yh), (yi), (yj), (yk), (yl), (ym), (yn), (yo), (yp), (yq), (yr), (ys), (yt), (yu), (yv), (yw), (yx), (yy), (yz), (za), (zb), (zc), (zd), (ze), (zf), (zg), (zh), (zi), (zj), (zk), (zl), (zm), (zn), (zo), (zp), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz)

Changes to 51.30(4) - create par. (c) that says para. (a), (b) and (c) apply to all health care records, including... (see above) create par. (h)25. - same as 146.82(2)(a)20. also

Questions for Dick Sweet:

① As proposed, s. 146.82(2)(a) 20. would permit a record keeper to orally identify patient for redacted records.

What is purpose of this exception? Not already covered? ~~Dick's purpose is to allow DHS Boards to release info under ch 83~~

② As proposed, s. 1.30 (4)(cm), if applied only to s. 1.30 (4) (a), (b) + (c) used, for instance, allow a person to intentionally falsify visual info. (see s. 1.30(4)(dm) 1.

Should apply (cm) to (dm), (e) and (f) - just not par. (d)

Same is true for 146.83

October 20, 1999

TO:

FROM: Tim Hartin, General Counsel

SUBJECT: AB 427 - Medical Records Confidentiality Definition
AB 428 - Medical Records Confidentiality Penalties

Patient Health Care Records Confidentiality. We agree with the intent of AB 427, as stated in the initial relating clause of the bill, which states that it is a definition of "record for purposes of patient health care and mental health confidentiality statutes." For purposes of § 146.82, Wis. Stats., the statute governing patient health care confidentiality, we agree in principle with the new definition proposed in Section 3 of AB 427. This definition establishes a broad definition of health care record that encompasses information regardless of the medium in which it is stored, and is appropriate for health care confidentiality.

However, this definition is located in § 146.81, Wis. Stats, and is therefore used in other statutory sections, including those governing the preservation or destruction of records¹ and access to health care records.² A few examples:

- Require providers to allow patients or others to have access to the provider's computer system, raising serious security and confidentiality risks.
- Prohibit the routine deletion or destruction of temporary medical records that arise throughout the treatment process, including the routine updating of electronic forms and databases.³

These (and other) unintended consequences are easily avoided by moving the new definition from § 146.81 to § 146.82(1), as follows:

"(1) CONFIDENTIALITY. All patient health care records, including any material on which written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved regardless of physical form or characteristics, shall remain confidential. Patient health care"

¹ § 146.819, Wis. Stats.

² § 146.83, Wis. Stats.

³ See HPS 124.14(2)(c) (requiring retention of records for at least 5 years.)

Inserting the definition into the sentence establishing the right to confidentiality ensures that the definition will be read only to apply to the scope of that right, and avoids creating a definition that will be applied in other, inappropriate circumstances where it would be disruptive. Applying such broad language rigidly in all circumstances eliminates common-sense flexibility from the handling of medical records.

"Patient-Identifiable" Records. In addition, the proposed definition is too broad because it is not limited to records that contain some identification of the patient. Records that lack any patient identification do not threaten any person's privacy or confidentiality, and are essential for epidemiological studies, audits of payment and billing practices, quality review and control work, and a wide range of other purposes. Extending the proposed definition to all "information" on all media could be interpreted to prohibit the use of information extracted from medical records for these purposes. These problems can be avoided by specifically stating that the confidentiality requirements extend to records that are patient-identifiable in some way by adding the following language at the end of §146.82(1):

"This subsection shall apply to those patient health care records that contain information that would permit the identification of the patient to which such records relate."

Mental Health Records. AB 427 would apply the same definitional language in several provisions of the mental health statutes, with similar unintended consequences. For example:

- Require providers to allow patients or others to have access to the provider's computer system.
- Require that a "photostatic" copy be given to the patient after their release of "any and all treatment records," which is impossible with respect to records not kept on paper media.⁴
- Require that "a statement correcting or amending" the record be "inserted" into the record, which may not be possible with respect to records not kept on paper media.⁵

Without the rigid statutory definition, these situations can be handled, as they are now, in a common-sense way by reading these other requirements to apply only to the permanent treatment records of a patient.

As with the patient health care records, we suggest that the definition be inserted into § 51.30(4)(a), Wis. Stats., the confidentiality requirement itself, and that language applying the definition to patient-identifiable records be added, as follows:

⁴ § 51.30(4)(f), Wis. Stats.

⁵ § 51.30(4)(d)3., Wis. Stats.

AB 427/ AB 428
October 20, 1999
Page 3

“(4) ACCESS TO REGISTRATION AND TREATMENT RECORDS.
(a) *Confidentiality of Records.* Except as otherwise provided in this chapter and ss. 118.125(4), 610.70(3) and (5), 905.03 and 905.04, all treatment records, including any material on which written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved regardless of physical form or characteristics, shall remain confidential and are privileged to the subject individual. Such records may . . . This subsection shall apply to those patient health care records that contain information that would permit the identification of the patient to which such records relate.”

Because registration records are a sub-class of treatment records,⁶ there is no language in this statute separately addressing the confidentiality of registration records. Thus, inserting the language as shown will place it where it will protect confidentiality of registration and treatment records without causing unnecessary disruption.

Penalties. We have no objection to imposing steep penalties on the knowing and wilful violation of patient confidentiality. However, the penalty provisions of AB 428 go well beyond punishing malicious wrongdoing and create unnecessary opportunities for disruption and mischief.

These fines and penalties do not exist in a vacuum, but rather will likely be used by plaintiff's attorneys as a club in malpractice cases. Already, the plaintiff's attorneys are seeking in current malpractice cases to disrupt the ordinary quality, risk management, and legal review processes of hospitals and other providers by restricting the access of providers to their own medical records. Exorbitant fines can only exacerbate this problem.

Current law provides for the recovery of actual damages, costs and attorney's fees in cases based on the negligent release of confidential medical records – in other words, current law already provides for making whole anyone who is injured by a violation of confidentiality. Current law also gives the tribunal discretion to impose fines. One wonders what exactly is wrong with current law on this subject that needs fixing.

However, AB 428 authorizes fines of up to \$10,000 “for each violation.” By putting the \$10,000 figure in the statutes, the legislature invites fines at that level. Further, a typical file contains any number of individual records. Thus, the inadvertent release of a single file containing 25 separate records could generate a fine of \$250,000 in addition to any damages, costs and fees. Such a fine would be disproportionate under any circumstances.

⁶ § 51.30(1)(b), Wis. Stats.

AB 427/ AB 428
October 20, 1999
Page 4

Thus, we would propose that the fines and penalties currently in the statute for inadvertent or negligent release of medical records be left intact. We are not aware of any epidemic of medical records releases that needs to be combated with exorbitant fines, and so we would leave the current regime for negligent or inadvertent release in place by eliminating the following from AB 428:

- Section 2 – the revision of § 51.30(9)(a) should be eliminated. The proposed revision increases the applicable fine to \$10,000 for negligent or inadvertent release of mental health information. The revision of § 51.30(9)(b) increasing the fines for knowing and wilful violations, while unnecessary, is not as objectionable.
- Section 4 – the creation of § 51.30(10)(b) imposing a fine for the negligent release of mental health information should be eliminated.
- Section 5 – the revision of § 146.84(1) should be eliminated. The proposed revision limits the good faith defense, allowing providers to be punished in some circumstances even though they acted in good faith.
- Section 7 – the creation of § 146.84(1)(bm) imposing a fine for the negligent release of medical information should be eliminated.
- Section 10 – the creation of § 146.84(2)(b) imposing a fine for the negligent release of medical information should be eliminated.
- Section 11 – the increase in fines from \$1,000 to \$10,000 in § 252.15(8)(a) for negligent release of HIV test results should be eliminated.

These changes would leave AB 428 with a number of provisions increasing the fines and jail time available in cases of knowing and wilful violation, and allowing costs and attorneys fees to be recovered in a few cases where they are not now available. AB 428 would then send a powerful message that the mishandling of confidential medical information by bad actors will not be tolerated in Wisconsin, without creating a new weapon for plaintiff's attorneys in malpractice cases and without imposing potentially enormous penalties for negligent or inadvertent problems.

11/3 conference with Rep. Urban, Tim Hartig + Dick Sweet

Agreed: ① Provide additional exception to release w/o informed consent, in 51.30(4)(b) + 146.82(2)(a) - use Dick's proposed language, but add "or the circumstances of the release"

② Apply all forms of records to 51.30(4)(a), (b), (c), (d) + (e) and to 51.30(5)(a) + (b) + (c) + (d) + (e) and to 146.815, 146.82, 146.83(4) + 146.835



~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~
ASSEMBLY SUBSTITUTE AMENDMENT,
TO 1999 ASSEMBLY BILL 427

1 AN ACT ^{sen cat} relating to: the form of patient health care records and mental health
2 treatment records subject to confidentiality and other restrictions and release
3 without informed consent of patient health care records and mental health
4 treatment records that do not identify the patient.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

5 SECTION 1. 51.30 (4) (b) 25. of the statutes is created to read:
6 51.30 (4) (b) 25. If the treatment records do not contain information or the
7 circumstances of the release do not provide information that would permit the
8 identification of the individual.

9 SECTION 2. 51.30 (4) ~~(b)~~ ^(g) of the statutes is created to read:
10 51.30 (4) ~~(b)~~ ^(g) Applicability. Pars. (a), (b), (c), (dm) and (e) apply to all
11 treatment records, including those on which written, drawn, printed, spoken, visual,

1 electromagnetic or digital information is recorded or preserved, regardless of
2 physical form or characteristics.

3 SECTION 3. 51.30 (5) (f) of the statutes is created to read:

4 51.30 (5) (f) *Applicability*. Pars. (a) and (b) to (e) apply to all treatment
5 records, including those on which written, drawn, printed, spoken, visual,
6 electromagnetic or digital information is recorded or preserved, regardless of
7 physical form or characteristics.

8 SECTION 4. 146.82 (2) (a) 20. of the statutes is created to read:

9 146.82 (2) (a) 20. If the patient health care records do not contain information
10 or the circumstances of the release do not provide information that would permit the
11 identification of the patient.

12 SECTION 5. 146.836 of the statutes is created to read:

13 146.836 *Applicability*. Sections 146.815, 146.82, 146.83 (4) and 146.835
14 apply to all patient health care records, including those on which written, drawn,
15 printed, spoken, visual, electromagnetic or digital information is recorded or
16 preserved, regardless of physical form or characteristics.

17 (END)

TODAY - By 11:00, if possible

1999 - 2000 LEGISLATURE

LRBs0179/182
DAK:cmh:mee

ASSEMBLY SUBSTITUTE AMENDMENT,
TO 1999 ASSEMBLY BILL 427

Regen

1 AN ACT to create 51.30 (4) (b) 25., 51.30 (4) (g), 51.30 (5) (f), 146.82 (2) (a) 20. and
2 146.836 of the statutes; relating to: the form of patient health care records and
3 mental health treatment records subject to confidentiality and other
4 restrictions and release without informed consent of patient health care records
5 and mental health treatment records that do not identify the patient.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

6 SECTION 1. 51.30 (4) (b) 25. of the statutes is created to read:

7 51.30 (4) (b) 25. If the treatment records do not contain information ^{and} the
8 circumstances of the release do not provide information that would permit the
9 identification of the individual.

10 SECTION 2. 51.30 (4) (g) of the statutes is created to read:

11 51.30 (4) (g) Applicability. ^{Paragraphs} ~~Parts~~ (a), (b), (c), (dm) and (e) apply to all treatment
12 records, including those on which written, drawn, printed, spoken, visual,

1 electromagnetic or digital information is recorded or preserved, regardless of
2 physical form or characteristics.

3 **SECTION 3.** 51.30 (5) (f) of the statutes is created to read:

4 51.30 (5) (f) *Applicability.* ~~Parts~~ ^{Paragraphs} (a) and (b) to (e) apply to all treatment
5 records, including those on which written, drawn, printed, spoken, visual,
6 electromagnetic or digital information is recorded or preserved, regardless of
7 physical form or characteristics.

8 **SECTION 4.** 146.82 (2) (a) 20. of the statutes is created to read:

9 ^{and} 146.82 (2) (a) 20. If the patient health care records do not contain information
(10) ~~or~~ the circumstances of the release do not provide information that would permit the
11 identification of the patient.

12 **SECTION 5.** 146.836 of the statutes is created to read:

13 **146.836 Applicability.** Sections 146.815, 146.82, 146.83 (4) and 146.835
14 apply to all patient health care records, including those on which written, drawn,
15 printed, spoken, visual, electromagnetic or digital information is recorded or
16 preserved, regardless of physical form or characteristics.

17 (END)