

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1189/1dn  
CTS:kjf:rs

December 9, 2004

Representative Hundertmark:

This is a preliminary redraft of 2003 AB 67 based on instructions provided by Mary Klaver of Wisconsin Right to Life, Inc. (WRL). The following issues should be resolved before introduction:

1. I have not included WRL's proposed s. 111.337 (1r) (c), because it appears to be a statement of legislative intent. Such statements may be included in a draft only in very limited circumstances that do not seem to be present here.
2. WRL's proposed definition of "health care facility" (proposed s. 253.09 (1g) (a)) may be problematic. A court may conclude, based on the statute's identification of several specific entities that constitute health care facilities, that anything not so identified is not a health care facility. This could happen — in one instance, *has* happened — even if an enumeration of specifics is preceded by language to the effect of "including, but not limited to." For this reason, your intent may be better captured by a broad description of what a health care facility does or what happens at a health care facility.
3. By including both public and private institutions in the definition of "health care facility," WRL's language seems to contemplate civil actions against the state under proposed s. 253.09 (5) (a). Is this correct? If so, the draft should include language that unambiguously indicates an intention to waive the state's sovereign immunity from suit.
4. The draft creates a conflict with existing statutes. Under current s. 154.07 (1) (a) 3., "failure by a physician to comply with a declaration of a qualified patient constitutes unprofessional conduct if the physician refuses or fails to make a good faith attempt to transfer the qualified patient to another physician who will comply with the declaration." For purposes of s. 154.07, a declaration of a qualified patient may contain instructions to withhold or withdraw nutrition or hydration from an individual who is diagnosed and certified by at least two physicians as afflicted with a terminal condition, or who is in a persistent vegetative state. Similarly, current s. 155.50 (1) (b) provides that it is unprofessional conduct if a physician: 1) fails to comply with a power of attorney for health care instrument or the decision of a health care agent, and 2) refuses or fails to make a good faith attempt to transfer the principal to another physician who will comply. A power of attorney for health care instrument may also authorize the principal to consent to the withdrawal of nutrition or hydration, if it is not orally administered.

Current law therefore provides that a physician engages in unprofessional conduct if he or she: 1) fails to comply with a directive in a declaration or from a health care agent to withhold nutrition or hydration from a patient in a persistent vegetative state; and 2) fails to make a good faith effort to transfer the patient.

Under the draft, various health care professionals, including physicians, may not be disciplined for refusing to participate in any of eight practices, including “intentionally causing the death of an individual who is not in a terminal condition, as defined in s. 154.01 (8), by withholding or withdrawing nutrition or hydration” (proposed s. 111.337 (1r) (b) 7.). Under the draft, “participates in” includes, in the draft, to “make referrals for” (proposed s. 111.337 (1g) (c)). Because a person in a persistent vegetative state may not be in a terminal condition, the draft appears to prohibit discipline against a physician who refuses to comply with a valid directive to cause the death of an individual who is in a persistent vegetative state by withholding nutrition or hydration, even if the physician makes no effort to transfer the patient.

Please call me if you would like to discuss this further or if you would like to make any changes to the draft.

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