

2005 ASSEMBLY BILL 993

February 7, 2006 – Introduced by Representatives UNDERHEIM, GIELOW, MOULTON, KRAWCZYK, HAHN, WIECKERT, HUNDERTMARK, ALBERS, STRACHOTA, VRUWINK and SHILLING, cosponsored by Senators KANAVAS, ROESSLER, DARLING, COWLES and ERPENBACH. Referred to Committee on Health.

1 **AN ACT to repeal** 146.37; **to amend** 146.55 (7), 187.33 (3) (a) 5., 187.43 (3) (a)
2 5., 655.27 (1m) (b) and 655.27 (5) (a) 1. and 2.; and **to repeal and recreate**
3 146.38 of the statutes; **relating to:** confidentiality of health care review records
4 and immunity.

Analysis by the Legislative Reference Bureau

Current law confidentiality and peer review provisions

Under current law a person who participates in a review or evaluation of the services of a health care provider (a review or evaluation) may not disclose any information acquired in connection with the review or evaluation. Further, records that an organization or evaluator keeps of investigations, inquiries, proceedings and conclusions in connection with a review or evaluation are confidential and may not be used in a civil action for personal injuries against the health care provider. (An “evaluator” is defined as a medical director or registered nurse who coordinates review of an emergency medical services program. “Organization” is not defined. Current law specifies that three particular types of providers are “health care providers,” but does not otherwise define “health care provider.”)

Current law provides several exceptions to the confidentiality provisions for records and information related to reviews or evaluations, which allow release of information or records to the health care provider who is the subject of the review; to others if the subject of the review or evaluation consents to release; and to the person who requested the review, for use for certain purposes, including improving

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the quality of health care. Other exceptions to confidentiality allow the release of information that is subpoenaed in a criminal action, the release of information to an examining or licensing board, and the release of information in a statistical report. Current law provides that information or records presented during a review or evaluation are not immune from discovery or use in a civil action simply because they were presented for the review or evaluation. Further, a person who participates in a review or evaluation may testify in a civil action as to matters within his or her knowledge, but may not testify regarding information obtained through the review or evaluation or regarding conclusions of the review or evaluation.

The courts have ruled that records of a review or evaluation conducted by an organization are confidential only if: 1) the review or evaluation is part of a program organized and operated to improve the quality of care of a health care provider; and 2) the person or entity conducting the review or evaluation is part of, or acting on behalf of, a group with relatively constant membership, officers, a purpose, and a set of regulations. The courts have found that the following types of information and records are not confidential or protected: information learned by a hospital administrator in investigating care provided to a patient in a particular incident; a physician's application for reappointment to a hospital staff; information as to whether a hospital investigated a physician or whether the physician's medical privileges were ever limited; and a letter written by a doctor on staff at a hospital to the supervisor of the hospital's residency program that concerned an investigation initiated by the hospital of a resident's performance during a particular incident (in this case, the hospital peer review committee was not convened to investigate). Courts have determined that a review or evaluation by a hospital credentials committee or by the Joint Commission on Accreditation of Healthcare Organizations (a private accrediting body) is confidential and protected.

Finally, current law provides that a person who discloses records or information of a review or evaluation in violation of the confidentiality or privilege provisions is civilly liable for the disclosure.

Bill provisions concerning confidentiality and privilege

This bill repeals the confidentiality and privilege provisions related to a review or evaluation of the services of a health care provider and creates a new confidentiality and privilege provision for records and information related to a quality improvement activity. "Quality improvement activity" is defined as any action, such as a review, study, investigation, corrective action, or recommendation, relating to a health care entity and concerning certain topics, including: quality of care; qualifications, competence, and performance of providers; compliance with credentialing, accreditation, or regulatory standards; compliance with legal, ethical, or behavioral standards; utilization of resources; costs; the approval or credentialing of a health care provider or organization; and morbidity or mortality.

Protection afforded. The bill provides several forms of protection for records of quality improvement activities. Under the bill, records of quality improvement activities, and information in those records, are confidential and privileged, are not subject to discovery, subpoena, or other means of legal compulsion requiring release

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or permitting inspection; and are not admissible in evidence in a civil or criminal action or administrative proceeding.

The protections extend to records or information that is created, collected, reported, aggregated, or organized as part of a quality improvement activity. The protections also extend to a request for records or information made as part of a quality improvement activity and notice to a health care entity that the entity is or will be the subject of a quality improvement activity. Finally, the protections generally are not waived by an unauthorized or authorized disclosure of records or information.

Who is the subject of a quality improvement activity. The bill broadly defines who may be the subject of a quality improvement activity. Potential subjects or, “health care entities,” include:

1. Individuals who must obtain licensure or some other form of certification before providing health care services, such as doctors, nurses, pharmacists, emergency medical technicians, first responders, dieticians, and various therapists.
2. People in training to obtain certification to serve as a health care provider, such as residents.
3. Organizations that provide health care, such as hospitals, clinics, nursing homes, home health agencies, and hospices.
4. People or organizations that are certified by the Department of Health and Family services to provide services under the Medical Assistance program, such as personal care workers and providers of transportation by specialized medical vehicle.
5. A parent organization, subsidiary, or affiliate of a health care entity, such as a company that owns multiple hospitals or clinics.

Who conducts a quality improvement activity. The records of a quality improvement activity are protected if the person who conducts the activity has a responsibility by statute, regulation, bylaw, policy, or resolution or as a condition of accreditation to conduct the activity. Also, records of a quality improvement activity conducted by a person whom a health care entity has charged to conduct the quality improvement activity are protected.

Exceptions to confidentiality and privilege. The bill creates several exceptions to the protections afforded to records and information concerning quality improvement activities. The bill specifies that records or information created apart from a quality improvement activity and maintained by a health care entity for the particular purpose of diagnosing, treating, or documenting care provided to an individual patient are not protected. The bill provides that a person who is mandated by federal or state law to report information may disclose quality improvement records and information in the records to the extent necessary to make the report and provides that once reported such records or information are no longer confidential or privileged. Under the bill, a person who, as a result of a quality improvement activity, takes action to limit or deny a health care entity’s ability to serve as a health care entity must disclose to the health care entity records and information that are relevant to the action, and such records are admissible in judicial and administrative proceedings. Further, the bill specifies that the fact that a person took action to limit

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or deny a health care entity's ability to serve as a health care entity is not confidential or privileged information.

The bill allows a person who has a responsibility to conduct a quality improvement activity to release records of the activity. Also, a person who is charged by a health care entity to conduct a quality improvement activity may release records of the activity if the health care entity provides written authorization for release. Further, the bill provides that if records are widely distributed under these two exceptions to persons who are not health care providers, the records are no longer confidential or privileged.

Finally, the bill provides that if a person planning to conduct a quality improvement activity waives confidentiality and privilege for records of the quality improvement activity before initiating the activity, then the records are not confidential or privileged.

The bill does not make a person who discloses records or information of a quality improvement activity in violation of the confidentiality and privilege provisions civilly liable for the disclosure.

Immunity provisions

Under current law, a person acting in good faith is immune from civil liability for acts or omissions taken while participating in a review or evaluation of the services of health care providers or facilities or of charges for services if the review or evaluation is conducted in connection with a program organized and operated to help improve the quality of health care, to avoid improper utilization of services, or to determine reasonable charges.

The bill provides that a person is immune from civil liability for good faith acts or omissions taken while participating in a quality review activity described above.

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

1 **SECTION 1.** 146.37 of the statutes is repealed.

2 **SECTION 2.** 146.38 of the statutes is repealed and recreated to read:

3 **146.38 Health care quality improvement activity. (1) DEFINITIONS.** In this
4 section:

5 (a) "Adverse action" means any action or recommendation to reduce, restrict,
6 suspend, deny, revoke, or fail to renew any of the following:

7 1. A health care entity's clinical privileges or clinical practice authority at a
8 hospital or other health care entity.

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1 2. A health care entity's membership on a medical staff that is organized under
2 by-laws or in another health care entity.

3 3. A health care entity's participation in a defined network plan, as defined in
4 s. 609.01 (1b).

5 4. The accreditation, licensure, or certification of a health care entity.

6 (b) "Health care entity" means any of the following:

7 1. A health care provider, as defined in s. 146.81 (1), an ambulatory surgery
8 center as defined in s. 153.01 (1), a home health agency, as defined in s. 50.49 (1) (a),
9 a home health aide, as defined in s. 146.40 (1) (bm), a hospice aide, as defined in s.
10 146.40 (1) (bp), a nurse's assistant, as defined in s. 146.40 (1) (d), an ambulance
11 service provider, as defined in s. 146.50 (1) (c), an emergency medical technician, as
12 defined in s. 146.50 (1) (e), a first responder, as defined in s. 146.50 (1) (hm), or any
13 other person who is licensed, certified, or registered to provide health care services
14 including mental health services.

15 2. An individual who is enrolled in an education or training program that the
16 individual must complete in order to obtain credentials required of an individual
17 under subd. 1.

18 3. A person who is certified as a provider of medical assistance under s. 49.45
19 (2) (a) 11.

20 4. A parent organization, subsidiary, or affiliate of a person described under
21 subd. 1. or 3.

22 (d) "Quality improvement activity" means an evaluation, review, study,
23 assessment, investigation, recommendation, monitoring, corrective action, adverse
24 action, or any other action, which may include one-time, continuous, or periodic data
25 collection, relating to any of the following subjects:

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1 1. The quality of care provided by a health care entity or the quality of services
2 provided by a health care entity that have an impact on care.

3 2. Morbidity or mortality related to a health care entity.

4 3. The qualification, competence, conduct, or performance of a health care
5 entity.

6 4. The cost or use of health care services and resources of a health care entity.

7 5. Compliance with applicable legal, ethical, or behavioral standards for a
8 health care entity.

9 6. Compliance with credentialing, accreditation, or regulatory standards for a
10 health care entity and performance of credentialing, accreditation, or regulatory
11 activities, including compliance with or performance of periodic performance
12 reviews and related activities for the Joint Commission on Accreditation of
13 Healthcare Organizations.

14 7. The approval or credentialing of a health care entity.

15 (e) “Records” includes minutes, files, notes, reports, statements, memoranda,
16 databases, findings, work products, and images, regardless of the type of
17 communications medium or form, including oral communications, and whether in
18 statistical form or otherwise.

19 (f) “State agency” means a department, board, examining board, affiliated
20 credentialing board, commission, independent agency, council, or office in the
21 executive branch of state government.

22 **(2) IMMUNITY FOR ACTS OR OMISSIONS.** (a) No person acting in good faith who
23 participates in a quality improvement activity described under sub. (3) (a) 1. is liable
24 for civil damages as a result of any act or omission by the person in the course of the
25 quality improvement activity.

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1 (b) The good faith of any person participating in a quality improvement activity
2 described under sub. (3) (a) 1. shall be presumed in any civil action. Any person who
3 asserts that a person has not acted in good faith has the burden of proving that
4 assertion by clear and convincing evidence.

5 **(3) CONFIDENTIALITY AND PRIVILEGE.** (a) Except as provided in sub. (4), all of the
6 following are confidential and privileged; are not subject to discovery, subpoena, or
7 any other means of legal compulsion requiring release or permitting inspection,
8 including compulsion by a state agency; and are not admissible as evidence in any
9 civil, criminal, or other judicial or administrative proceeding:

10 1. Records and information contained in records that are created, collected,
11 reported, aggregated, or organized by any person as part of a quality improvement
12 activity that is conducted by any person, organization, department, single or joint
13 committee, governing body, or committee of a governing body that is any of the
14 following:

15 a. A person that has responsibility by statute, regulation, condition of
16 accreditation, bylaw, policy, or resolution to conduct the quality improvement
17 activity, except for a state agency.

18 b. A person that is charged by a health care entity to conduct the quality
19 improvement activity.

20 2. A request for records or information made as part of a quality improvement
21 activity described under subd. 1. by a person conducting the quality improvement
22 activity.

23 3. Notice to a health care entity that the entity is or will be the subject of a
24 quality improvement activity described under subd. 1.

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1 (b) Except as provided in sub. (4) (c) and(g), the confidentiality and privilege
2 afforded to records and information under par. (a) is not waived by unauthorized or
3 authorized disclosure of records or information.

4 (c) Records relating to a quality improvement activity described under par. (a)
5 1. are not subject to inspection or copying under s. 19.35 (1).

6 **(4) EXCEPTIONS TO CONFIDENTIALITY AND PRIVILEGE.** (a) Subsection (3) does not
7 apply to records or information created apart from the quality improvement activity
8 that are maintained by or for a health care entity for the particular purpose of
9 diagnosing, treating, or documenting care provided to an individual patient.

10 (b) Subsection (3) does not apply to the fact of the failure to renew or the
11 reduction, restriction, suspension, denial, or revocation of any thing described under
12 sub. (1) (a) 1. to 4.

13 (c) A person mandated by Wisconsin or federal law to report may disclose a
14 record or information from a record that is confidential and privileged under sub. (3)
15 to make the mandated report. A record received by a person pursuant to this
16 paragraph is not subject to par. (a), (b), (d), (e), (f), (g), or (h) or sub. (3).

17 (d) If a person takes an adverse action against a health care entity as part of
18 a quality improvement activity described under sub. (3) (a) 1., or notifies the health
19 care entity of a proposed adverse action, the person shall, upon request by the health
20 care entity, disclose to the health care entity any records in the person's possession
21 relating to the adverse action or proposed adverse action. Records relating to the
22 adverse action are admissible in any criminal, civil, or other judicial or
23 administrative proceeding in which the health care entity contests the adverse
24 action. A person who has authority to take an adverse action against a health care
25 entity as part of a quality improvement activity described under sub. (3) (a) 1. may

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1 at any time disclose to the health care entity records relating to a proposed adverse
2 action against the health care entity.

3 (e) A person conducting a quality improvement activity pursuant to sub. (3) (a)
4 1. a. may disclose the records and information that are confidential and privileged
5 pursuant to sub. (3).

6 (f) A person conducting a quality improvement activity pursuant to sub. (3) (a)
7 1. b. may disclose the records and information that are confidential and privileged
8 pursuant to sub. (3) if there is written authorization to make the disclosure from the
9 health care entity that charged the person to conduct the quality improvement
10 activity.

11 (g) The confidentiality and privilege afforded to records and information under
12 sub. (3) is waived for records that are widely disclosed under par. (e) or (f) to persons
13 that are not health care entities.

14 (h) An entity planning an activity that would be a quality improvement activity
15 under sub. (3) (a) 1. may in advance of the activity designate in writing that sub. (3)
16 shall not apply to the records and information created, collected, reported,
17 aggregated, or organized by any person as part of the designated activity.

18 **(5) CONSTRUCTION.** This section shall be liberally construed in favor of
19 identifying records and information as confidential, privileged, and inadmissible as
20 evidence.

21 **SECTION 3.** 146.55 (7) of the statutes is amended to read:

22 146.55 (7) INSURANCE. A physician who participates in an emergency medical
23 services program under this section or as required under s. 146.50 shall purchase
24 health care liability insurance in compliance with subch. III of ch. 655, except for
25 those acts or omissions of a physician who, as a medical director, reviews as defined

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1 in s. 146.50 (1) (j), conducts a quality improvement activity relating to the
2 performance of emergency medical technicians or ambulance service providers, as
3 specified under s. 146.37 (1g) 146.38 (2).

4 **SECTION 4.** 187.33 (3) (a) 5. of the statutes is amended to read:

5 187.33 **(3)** (a) 5. Proceedings based upon a cause of action for which the
6 volunteer is immune from liability under s. 146.31 (2) and (3), ~~146.37~~ 146.38 (2),
7 895.44, 895.48, 895.482, 895.51, or 895.52.

8 **SECTION 5.** 187.43 (3) (a) 5. of the statutes is amended to read:

9 187.43 **(3)** (a) 5. Proceedings based upon a cause of action for which the
10 volunteer is immune from liability under s. 146.31 (2) and (3), ~~146.37~~ 146.38 (2),
11 895.44, 895.48, 895.482, 895.51, or 895.52.

12 **SECTION 6.** 655.27 (1m) (b) of the statutes is amended to read:

13 655.27 **(1m)** (b) A health care provider who engages in ~~the activities described~~
14 ~~in s. 146.37 (1g) and (3)~~ a quality improvement activity under 146.38 shall be liable
15 for not more than the limits expressed under s. 655.23 (4) or the maximum liability
16 limit for which the health care provider is insured, whichever limit is greater, if he
17 or she is found to be liable under s. ~~146.37~~ 146.38, and the fund shall pay the excess
18 amount, unless the health care provider is found not to have acted in good faith
19 during those activities and the failure to act in good faith is found by the trier of fact,
20 by clear and convincing evidence, to be both malicious and intentional.

21 **SECTION 7.** 655.27 (5) (a) 1. and 2. of the statutes are amended to read:

22 655.27 **(5)** (a) 1. Any person may file a claim for damages arising out of the
23 rendering of medical care or services or participation in ~~peer review activities~~ a
24 quality improvement activity under s. ~~146.37~~ 146.38 within this state against a
25 health care provider or an employee of a health care provider. A person filing a claim

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1 may recover from the fund only if the health care provider or the employee of the
2 health care provider has coverage under the fund, the fund is named as a party in
3 the action, and the action against the fund is commenced within the same time
4 limitation within which the action against the health care provider or employee of
5 the health care provider must be commenced.

6 2. Any person may file an action for damages arising out of the rendering of
7 medical care or services or participation in ~~peer review activities~~ a quality review
8 activity under s. ~~146.37~~ 146.38 outside this state against a health care provider or
9 an employee of a health care provider. A person filing an action may recover from
10 the fund only if the health care provider or the employee of the health care provider
11 has coverage under the fund, the fund is named as a party in the action, and the
12 action against the fund is commenced within the same time limitation within which
13 the action against the health care provider or employee of the health care provider
14 must be commenced. If the rules of procedure of the jurisdiction in which the action
15 is brought do not permit naming the fund as a party, the person filing the action may
16 recover from the fund only if the health care provider or the employee of the health
17 care provider has coverage under the fund and the fund is notified of the action
18 within 60 days of service of process on the health care provider or the employee of the
19 health care provider. The board of governors may extend this time limit if it finds
20 that enforcement of the time limit would be prejudicial to the purposes of the fund
21 and would benefit neither insureds nor claimants.

22 (END)