DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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This redraft adds an analysis. I made no changes to the statutory language other than adding a comma on page 3, line 4, of the /P4.

Immunity provisions:

1. The bill retains some of the examples from s. 146.37 of reviews to which the immunity provision applies and redacts others. Since all of the examples are covered as quality improvement activities, what will a court make of the selective retention?

2. Proposed s. 146.38 (2) uses the term "hospital staff privileges," which is not used elsewhere in the bill. Elsewhere the bill refers to "clinical privileges," "clinical practice authority," or "membership on a medical staff."

Confidentiality/privilege

1. Should proposed s. 146.38 (3) (b) be prefaced with, "Except as provided in sub. (4)"? Otherwise, the mandated reporting, adverse action, and written authorization exceptions will not apply.

2. Similarly, should the first sentence under proposed s. 146.38 (3) (c) be prefaced with "Except as provided in sub. (4)"?

3. The exception to confidentiality and privilege under proposed s. 146.38 (4) (c) for adverse actions refers to both disclosure and admissibility of evidence. The exceptions for mandated reports, under proposed sub. (4) (b), and for written authorizations, under proposed sub. (4) (d), refer only to disclosure. Is this problematic? Do you want the bill to address when records and information that are disclosed in compliance with a federal or state mandate may be admitted as evidence? Should a person be able to affect admissibility in a written authorization under proposed sub. (4) (d)?

Construction: We discussed, but never resolved, whether to delete "inadmissible as evidence" from the provision on construction under proposed s. 146.38 (5).

Quality improvement activities related to public entities:

In the context of drafting proposed s. 146.38 (3) (d), Laura, Matthew, Dick, and I discussed the question of how the confidentiality and privilege provisions in the draft intersect with the public records law when the subject of a quality improvement activity is a public agency, for example, a county nursing home. Proposed s. 146.38 (3)

(d) specifies that if a state agency reviews a health care entity at the request of the health care entity, the records of the review are not subject to public inspection or copying if the health care entity is not a public agency. This may create an inference that the public records law does apply if the health care entity that requested the review is a public agency. In addition, the bill is silent on how the public records law applies to a review of a public health care entity conducted by someone other than a state agency. It is my understanding that WHA does not intend to change current law with respect to public access to records relating to health care entities that are public agencies.

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