

2009 DRAFTING REQUEST

Bill

Received: **10/08/2009**

Received By: **phurley**

Wanted: **As time permits**

Identical to LRB:

For: **Jon Richards (608) 266-0650**

By/Representing: **Brett Blomme**

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

Drafter: **phurley**

May Contact:

Addl. Drafters:

Subject: **Courts - torts**
Courts - civil procedure

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Richards@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Insurance companies and tort discovery

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>
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/P1	phurley 11/04/2009	bkraft 11/18/2009	phenry 11/18/2009	_____	cduerst 11/18/2009		
/P2	phurley 01/22/2010	bkraft 01/25/2010	rschluet 01/26/2010	_____	mbarman 01/26/2010		
/P3	phurley	bkraft	rschluet	_____	cduerst		

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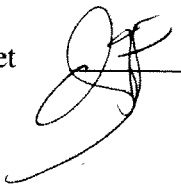
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Handwritten notes:
/P3 bjk²/3
2/10
phurley

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FE Sent For:

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3655



STATE REPRESENTATIVE
JON RICHARDS

WISCONSIN STATE ASSEMBLY

MEMO

TO: Peggy Hurley
FROM: Brett Blomme, Rep. Richard's Office
RE: Patient Privacy Reform Legislation
DATE: October 8, 2009

Please find enclosed information about the bill that we discussed on the phone earlier today. Please don't hesitate to get in touch with me at 6-0650 or brett.blomme@legis.wi.gov if you have any questions.

Thanks!

tlc from Brett 10/9: Put into hold for now. New instructions may be coming at a later date.

*10-20: retrieve from hold to draft
10-30: tlc*



804.10 Physical and mental examination of parties; inspection of medical

documents. (1) (a) When the mental or physical condition, including the blood group or the ability to pursue a vocation, of a party is in issue, the court in which the action is pending may order the party to submit to one a physical, one mental or one vocational examination. ~~The order may be made on motion for cause shown and upon motion and~~ notice to all parties by the adverse party or parties united in interest. The order shall specify the time, place, manner, conditions and scope of the examination and the person or persons ~~by whom it is made,~~ conducting the examination subject to the following requirements: ~~by whom it is to be made.~~

Why take out "for cause shown"?

1. The party undergoing the examination may electronically record the examination and have witnesses present at the examination.
2. The person conducting the examination may not inquire into any issue bearing on liability. *keep in for now; will discuss w/ constituent*
3. The adverse party requesting the examination shall schedule the examination within 100 miles of the home of the person being examined unless good cause is shown.
4. The adverse party requesting the examination shall pay the reasonable expenses of the person being examined, including mileage at the rate set by the internal revenue service under 26 U.S.C. 162 (a) (2), hourly wage reimbursement or \$30/hour, whichever is greater, and child care reimbursement. *keep in for now S.M. 67*

(b) The Court may order additional examinations upon good cause shown, subject to the requirements under par. (a).

Pl in that report must be delivered here.

(3) (a) ~~No evidence obtained by an adverse party by a court-ordered examination under sub. (1) or inspection under sub. (2) shall be admitted upon the trial by reference or otherwise unless true copies of all reports prepared pursuant to such examination or inspection and received by such adverse party have been delivered to the other examined party or his or her attorney not later than 1015 days after the reports are received by the adverse party. The party claiming damages shall deliver to the adverse party, in return for copies of reports based on court-ordered examination or inspection, a true copy of all reports of each person who has examined or treated the claimant with respect to the injuries for which damages are claimed. examination is completed. If the person conducting the examination is not called to testify by the adverse party requesting the examination, the party claiming damages may call the person conducting the examination to testify and the report must still be delivered as set forth above and is admissible at trial.~~

Insurance Company Review of Patient's Medical Records

Right to Notification and Reports.

If an insurance company or any other third-party obtains the health care records of a person by authorization and/or as an evaluation of a claim to recover damages for personal injury and subsequently has an employee, a third-party consultant or any other person review such health care records, within 20 days after the review, the insurance company or other third-party must notify the person in writing and disclose to the person the name and position of those who have reviewed or are reviewing the person's health care records and must also provide the oral or written report generated by the employee, third-party consultant or person conducting the review.

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10/5/09

Discovery of Patient Records

§ 804.10 (2) (a) In any action brought to recover damages for personal injuries, the court shall ~~also may~~ order the claimant, upon such terms as are just, to give to the other party or any physician named in the order, within a specified time, consent and the right to inspect only X-rays, photographs, records or reports taken in the course of the diagnosis or treatment of the claimant for the injuries for which damages are claimed. All other records remain privileged pursuant to s. 905.04 (2). The court shall also ~~may~~ order the claimant to ~~give consent and the right to inspect and copy any hospital, medical or other records and reports that are within the scope of discovery under s. 804.01 (2).~~

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(b) A court may not order ^{consent} ~~release~~ of a person's psychiatric or psychological records except in cases involving a claim of psychiatric or psychological injury, and then subject to the limits of sub. (a). A court may not order the release of psychiatric or psychological records for a claim for loss of society and companionship, pain and suffering; humiliation; embarrassment; worry; emotional distress; loss of enjoyment of the normal activities, benefits and pleasures of life; loss of physical health, well-being or bodily functions; loss of consortium; or loss of love and affection. The records remain privileged pursuant to s. 905.04 (2). = damages

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(c) If the other party seeks to expand its request for X-rays, photographs, records or reports beyond those that arise from the injuries for which the damages were claimed, a hearing must be held to have the additional items released and the other party must establish at a hearing by evidence that is clear, satisfactory and convincing, to a reasonable certainty that the records relate to treatment of a specific preexisting condition

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identical or substantially similar to the one for which damages are claimed and that disclosure is essential to a defense relating to the cause of injury.

(d) Notwithstanding this section, X-ray, photographs, records, reports older than 10 years before the date from which the injuries for which damages are claimed are not subject to discovery.

Common Sense and Patient Privacy Reform

Common Sense Statute of Limitations

Amend the medical malpractice statute of limitations so a person has three years to file a medical malpractice claim from the date of death.

It has long been the law in Wisconsin that a wrongful death claim begins on the date of death. However, the majority opinion in *Estate of Genrich v. OHIC Ins. Co., et al.*, 2009 WI 67, held that was not the case in a medical malpractice case. Instead, the Court ruled the medical malpractice wrongful death cause of action begins when the injury occurs. As Justice Crooks noted in his dissent in *Genrich*, "The approach adopted by the majority in this case — that a three-year statute of limitations on a wrongful death claim somehow runs before three years have elapsed after the date of death — unfortunately may foster a public perception that common sense sometimes is lacking in court decisions."

It seems too simplistic to say, but in order to have a wrongful death claim someone must have died. However, the majority on the Supreme Court said that was not the case. This could lead to the absurd result of someone being injured in a hospital, languishing for three years and one day and then dying. Under *Genrich*, the statute of limitations for the injury would already run by the date of death so it was already too late to file a wrongful death claim. This lacks common sense.

Not only is this nonsensical, it only applies in medical malpractice cases. The majority of the court once again carved out an exception for the medical profession. It smacks of inequality to treat someone who dies as a result of medical malpractice different than someone who dies as the result of a car accident. The legislature should ensure that when someone dies due to the negligence of another, the same time to file a claim applies in every instance.

Patient Privacy

Prevent unlimited access by insurance companies to an injured party's medical records. The injured party will turn over records related to the injury. It protects psychiatric and psychological records from discovery unless a psychiatric or psychological injury is claim. Medical records greater than 10 years before the accident in question are not discoverable.

Imagine you are in an automobile accident and your leg is broken. The accident was caused by the negligence of another driver. You end up having to sue the other driver and his insurance company to pay for your injuries. When the insurance company asks to see your medical records, they request them going back to your birth. This is now a routine request by insurers.

This is an incredible invasion of privacy. If you happen to be a 70-year-old woman with six children, why would 30-year-old birthing records relate to her injuries?

The current law allows unwarranted fishing expeditions into people's medical records. Marriage counseling records, treatment for depression or other mental health problem, records of a teenage abortion or HIV testing could also be exposed. Allowing unlimited access to a person's medical records is a breach of patient privacy.

The better standard is one where the records relating to the accident must be turned over. There is also a higher burden to getting psychiatric and psychological records. Unless a psychiatric or psychological injury is claimed, the records remain privileged. Medical records older than 10 years from the date of the accident would not be subject to discovery.

The goal is to stop unnecessary snooping into one's medical history.

Protecting Injured Parties from Insurance Companies

Insurance company medical examinations of injured parties should be conducted fairly.

Whenever a person is injured in an automobile accident and they make a claim for damages to an insurance company, the insurance company can request the injured person undergo another medical examination. This means the insurance company hires a doctor to examine the injured patient.

Right now there aren't many rules governing the examination. Some people want to have another person in the room during the examination or be allowed to record it. Sometimes that is not allowed. Other times, the insurance company wants to do more than one examination and make the injured person travel very far to have it done. There is no standard that applies and judges are often asked to decide what can be done.

The insurance company examinations need to be conducted fairly and limits placed on them.

1. Limit the insurance examination to one physical, and one vocational exam unless the insurance company can give a good reason for more. The insurance company is allowed one mental examination if the request is justified.
2. Allow the injured party to record/video exam and/or have another person present with them.
3. The examination should not be more than 100 miles from the home of the injured party unless the insurance company can show a good reason.
4. Make sure that the injured party is reimbursed for undergoing the examination, including mileage, wages and child care.
5. Do not allow the doctor to ask the injured person questions about who caused the accident.
6. Make sure the injured person receives the insurance company doctor's examination report within 15 days of exam and allow the injured party to use the report and testimony of doctor even if insurance company doesn't call him or her at trial.

Insurance companies should notify people when they review their medical records.

If an insurance company reviews someone's health care records, they should notify the person of the review within 21 days telling them who conducted the review and any report that was created during or after the review.

Doctors who treat injured patients should testify at trial about the person's injuries.

As a general rule, no person can refuse to give evidence at trial. Parties in litigation are entitled to every person's evidence to reach the truth. The only exception is when a person has a privilege that is recognized by statute, rule or the constitution. A commonly recognized privilege is spouses are not required to testify against each other.

Recently, doctors have been claiming a privilege of not testifying in personal injury cases. This often means an injured party cannot have his or her own doctor testify why the treatments were needed. This creates a wall of distrust between the patient and the doctor and means an injured party must go out and hire another expert doctor, rather than rely on his or her own doctor. This makes no sense.

Expert reports may not be required unless paid for or the expert is willing to testify to the information in the report.

Most cases rely on an expert to establish liability in a personal injury case. Sometimes the expert writes out a report, but not always. There is some confusion as to whether a court can require a written report of an expert. A report should only be required if the opposing party agrees to pay all associated costs with producing it and agrees not to require any other testimony from the expert. Otherwise let the opposing party question the expert about the report at a deposition or at trial.

Protecting Privacy

Surveillance of a person by an insurance company should be disclosed within 21 days of the surveillance and if it is not disclosed, the insurance company cannot use the surveillance at trial.

In this day and age cameras are everywhere – in our phones, at bank ATM machines, and at street intersections. Sometimes cameras are there to protect our safety, but sometimes they intrude on our privacy. This may be the case in surveillance videos. If someone files a personal injury lawsuit, an insurance company may hire someone to follow the person and videotape their activities. Right now the insurance company does not have to disclose this surveillance and may use it at trial. This creates an ambush situation. If the insurance company does follow someone and videotapes them, they should disclose it to the other party within 21 days of the surveillance otherwise be barred from using it at trial.

Consumer Protection

Allow a 10-day period after an accident before an insurance company can settle with an injured party.

If someone buys a consumer product that costs more than \$25, they have a right to cancel the sale within three days. The same does not apply to someone offering money to someone after an automobile accident. In addition, in a personal injury action, no statement made in writing and signed by the injured person within 72 hours of the accident is generally admissible unless it is a present sense impression, excited utterance or a statement of then existing mental, emotional or physical condition. Again, this does not apply to a settlement.

Insurance companies representing the person at fault have been attempting to settle with injured parties shortly after the accident. There should be a 10-day cooling off period before any settlement can legally take effect.

Require insurance companies to disclose the policy limits.

Insurance companies are not required to disclose to an injured person the policy limits of the person causing the accident unless a lawsuit is filed. This would simply require the insurance company to let the injured party know when a request for the information is made without having to file a lawsuit.

Protecting Trial by Jury

The same jury should hear issues of liability and damages.

There is a general rule that does not permit separate trials on the issues of liability and damages before separate juries. Some insurance companies are asking for separate trials before **separate juries** when liability is contested and then there is a question of whether an injured party can collect interest on a judgment when the insurance company doesn't timely pay a valid damage claim. The same jury should hear both claims to avoid inconsistent verdicts, undue burden on our courts and excessive costs of litigation.



bjk

SOON

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

SA
X-ref

11-4-09

1 AN ACT ^{gen.} relating to: physical examinations and discovery of patients' records
2 in civil actions.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

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

3 SECTION 1. 804.10 (1) of the statutes is renumbered 804.10 (1) (a) and amended
4 to read:

5 804.10 (1) (a) When the mental or physical condition, including the blood group
6 or the ability to pursue a vocation, of a party is in issue, the court in which the action
7 is pending may order the party to submit to a single physical, mental, or vocational
8 examination. ~~The order may be made on motion for cause shown and upon motion~~

9 and notice to all parties by the moving party or parties united in interest, unless good
10 cause is shown to order an additional examination. ^{move} ~~and~~ The order shall specify the

plain

- 1) time, place, manner, conditions, and scope of the examination and ~~the person or~~
- 2) persons by whom it is to be made the person who will conduct the examination.

History: Sup. Ct. Order, 67 Wis. 2d 585, 680 (1975); 1975 c. 218; 1993 a. 424; 1995 a. 345.

3 SECTION 2. 804.10 (1) (b) of the statutes is created to read:

4 804.10 (1) (b) Any order issued under par. (a) shall:

- 5 1. Allow the party being examined to record the examination electronically and
- 6 have one or more witnesses present at the examination.
- 7 2. Forbid the person conducting the examination from inquiring into any issue
- 8 bearing on any party's liability in the underlying action.

> ****NOTE: Please review this language. As worded, it would prevent the doctor from asking the plaintiff if the defendant's actions caused the injury. Δ Δ

- 9 3. Require the examination be conducted at any place within 100 miles from
- 10 the place where the party being examined resides, is employed, or transacts business
- 11 in person.

> ****NOTE: This language is close to the language found in s. 804.05 (3) (b), which governs where depositions may be held, except that s. 804.05 (3) (b) allows a judge to order a deposition in the Δ county where the action is commenced. I didn't think it was your intent to include that language; please let me know if I should include that language. Δ Δ

- 12 4. Require the adverse party or parties united in interest who request the
- 13 examination to pay the reasonable expenses of the person being examined, including
- 14 travelling expenses at the rate established by 26 USC 162, an hourly wage
- 15 reimbursement of \$30 or the person's actual hourly wage, whichever is greater, and
- 16 reimbursement for child care expenses. Δ Δ

>> ****NOTE: Please review this section. Under current law, in s. 814.67, witnesses are paid 20 cents per mile and \$5 a day for appearing before a municipal judge, arbiter, or any officer, board, or committee, and \$16 a day for appearing before a circuit or appellate court. Please let me know if you want this section to mirror current law for witnesses' expenses. Δ Δ

17 SECTION 3. 804.10 (2) of the statutes is renumbered 804.10 (2) (a) and amended
18 to read:

1 804.10 (2) (a) ~~In~~ Except as provided in par. (b) or sub. (5), in any action brought
 2 to recover damages for personal injuries, the court ~~shall also~~ may order the claimant,
 3 upon such terms as are just, to give to the other party or any physician named in the
 4 order, within a specified time, consent and the right to inspect any X-ray photograph
 5 or hospital, medical, or other record taken in the course of the diagnosis or treatment
 6 of the claimant for the injuries for which the claimant seeks damages. The court shall
 7 also ~~order the claimant to give consent and the right to inspect and copy any hospital,~~
 8 ~~medical or other records and reports that are within the scope of discovery under s.~~
 9 ~~804.01 (2)~~ plain

History: Sup. Ct. Order, 67 Wis. 2d 585, 680 (1975); 1975 c. 218; 1993 a. 424; 1995 a. 345.

10 SECTION 4. 804.10 (2) (b) of the statutes is created to read:

11 804.10 (2) (b) ~~A~~ court may not order the claimant to give the other party or any
 12 physician named in its order consent to inspect the claimant's psychiatric or
 13 psychological records unless all of the following are true:

14 1. ~~The~~ claimant's action seeks to recover damages for a psychiatric or
 15 psychological injury.

16 2. The psychiatric or psychological records were taken in the course of the
 17 diagnosis or treatment of the claimant for the injuries for which damages are
 18 claimed.

19 3. The other party is not seeking discovery of the psychiatric or psychological
 20 records because of the claimant's claim for loss of society and companionship, pain
 21 and suffering, humiliation, embarrassment, worry, emotional distress, loss of
 22 enjoyment of normal activities, loss of benefits and pleasures of life, loss of physical
 23 health, well-being, or bodily functions, loss of consortium, or loss of love and
 24 affection.

***NOTE: Please review subdivision 3. It seems to me that the list of excluded psychological damages is so broad as to deny discovery of these items in almost all personal injury cases that seek any form of psychological damages. Is that your intent?

SECTION 5. 804.10 (2m) of the statutes is created to read:

804.10 (2m) If a party seeks discovery that is beyond the scope of sub. (2), the court shall hold a hearing to determine whether to allow discovery. The party seeking discovery bears the burden of establishing by clear and convincing evidence that the discovery it seeks relates to treatment of the claimant for a specific condition that is identical to or substantially similar to the injury for which the claimant seeks damages and that predates the injury for which the claimant seeks damages.

***NOTE: Please review this subsection. You may want to eliminate the requirement that the identical or similar injury "predates" the injury for which the claimant seeks damages. As worded, this subsection would preclude a defendant from seeking discovery of a medical record related to an injury that a claimant suffers after the injury for which he is seeking damages.

SECTION 6. 804.10 (3) (a) of the statutes is amended to read:

804.10 (3) (a) ~~Within~~ ^{No} 15 days after a court-ordered examination under sub. (1) or an inspection under sub. (2) takes place, the party adverse to the claimant shall deliver a true copy of any oral or written report made pursuant to the examination or inspection. No party adverse to the claimant may introduce evidence obtained by an the adverse party by a court-ordered examination under sub. (1) or inspection under sub. (2) shall be admitted upon the trial by reference or otherwise unless true copies of all reports prepared pursuant to such examination or inspection and received by such adverse party have been delivered to the other party claimant or to his or her attorney not later than 10 15 days after the reports are received by the adverse party. The party claiming damages shall deliver to the adverse party, in return for copies of reports based on court-ordered examination or inspection, a true copy of all reports of each person who has examined or treated the claimant with

1 ~~respect to the injuries for which damages are claimed~~ examination or inspection
2 takes place. The claimant may introduce evidence obtained by the examination
3 under sub. (1) or inspection under sub. (2) regardless of whether the adverse party
4 seeks to introduce the evidence. *plain*

History: Sup. Ct. Order, 67 Wis. 2d 585, 680 (1975); 1975 c. 218; 1993 a. 424; 1995 a. 345.

5 **SECTION 7.** 804.10 (5) of the statutes is created to read:

6 804.10 (5) The court may not order the claimant to give consent to the other
7 party or any physician named in its order consent to inspect an X-ray photograph
8 or hospital, medical, or other record or report that was created more than 10 years
9 prior to the date of the injury for which the claimant seeks damages. *ee*

10 **SECTION 8.** 804.10 (6) of the statutes is created to read:

11 ~~804.06~~ ¹⁰ (6) Any X-ray photograph or hospital, medical, or other record that is
12 not discoverable under sub. (2), (2m), or (4) remains privileged under s. 905.04.

13 **SECTION 9.** 905.04 (4) (c) of the statutes is amended to read:

14 905.04 (4) (c) *Condition an element of claim or defense.* There is no privilege
15 under this section as to communications relevant to or within the scope of discovery
16 examination allowed under s. 804.10 of an issue of the physical, mental, or emotional
17 condition of a patient in any proceedings in which the patient relies upon the
18 condition as an element of the patient's claim or defense, or, after the patient's death,
19 in any proceeding in which any party relies upon the condition as an element of the
20 party's claim or defense.

History: Sup. Ct. Order, 59 Wis. 2d R121; 1975 c. 393; 1977 c. 61, 418; 1979 c. 32 s. 92 (1); 1979 c. 221, 352; 1983 a. 400, 535; 1987 a. 233, 264; Sup. Ct. Order, 151 Wis. 2d xxi (1989); 1991 a. 32, 39, 160; 1993 a. 98; 1995 a. 77, 275, 436; 1997 a. 292; 1999 a. 22; 2001 a. 80; 2005 a. 387, 434; 2005 a. 443 s. 265; 2007 a. 53, 97, 130.

****NOTE: I amended this section to limit the exception to the generally privileged information to discovery that is allowed under s. 804.10. Please let me know if you do not want this section amended, or if you think it should be amended in another way. *ee*

>
21

(END)

paragraph
paragraph

Hurley, Peggy

From: Ruth Simpson [rsimpson@wisjustice.org]
Sent: Thursday, January 21, 2010 12:29 PM
To: Hurley, Peggy
Subject: Email from LRB Website
Attachments: Response to LRB draft 3655.doc

Rep. Richards' office shared with us some of your questions on bill draft 3655/P1. A written response is attached. If you have questions, either I or Keith Clifford will try and answer.

Ruth Simpson
Research Director
Wisconsin Association for Justice
(formerly the Wisconsin Academy of Trial Lawyers)
44 E. Mifflin St., Suite 402
Madison, WI 53703
Phone: 608-257-5741 Fax: 608-255-9285
Email: rsimpson@wisjustice.org
Webpage: www.wisjustice.org

Response to LRB draft 3755-P1

Page 2, Section 2. Number 2, line 9, instead of the word "forbid" replace with "prohibit."
In answer to your question, we do not want the doctor to asking questions about who caused the injury.

Question on page 2, after line 13, the answer is we do not want the other language included.

Question on page 2, after line 18, the answer is we do not want to mirror current law for witnesses' fee.

Page 3, line 6, there should be a comma after X-Ray and before photograph.

Page 3, Section 4 should be deleted.

Page 4, Section 5 should be rewritten.

804.10 (2b) If a party seeks discovery that is beyond the scope of sub. (2a), the court shall hold a hearing to determine whether to allow the additional discovery. The party seeking discovery bears the burden of establishing by clear, satisfactory and convincing evidence to a reasonable certainty that the additional discovery it seeks relates to treatment-the injury of the claimant for a specific preexisting condition that is identical to or substantially similar to the injury for which the claimant seeks damages and disclosure is essential to the defense relating to the cause of the injury that predates the injury for which the claimant seeks damages.

A new section should then be inserted:

(2m) If a party seeks discovery that is beyond the scope of sub. (2a) for psychological and psychiatric injuries, the court shall hold a hearing to determine whether to allow the discovery. The party seeking discovery bears the burden of establishing by clear, satisfactory and convincing evidence to a reasonable certainty that the discovery it seeks relates to the injury of the claimant for which the claimant seeks damages and disclosure is essential to the defense relating to the cause of the injury.

Page 5, Section 7 should be deleted.

Page 5, Section 8, line 13, there should be a comma between X-ray and photograph.

Question on page 5, after line 22. The insertion is fine in 905.04 (4) (c).

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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1 AN ACT *to renumber and amend* 804.10 (1) and 804.10 (2); *to amend* 804.10
2 (3) (a) and 905.04 (4) (c); and *to create* 804.10 (1) (b), 804.10 (2) (b), 804.10 (2m),
3 804.10 (5) and 804.10 (6) of the statutes; **relating to:** physical examinations
4 and discovery of patients' records in civil actions.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

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

5 SECTION 1. 804.10 (1) of the statutes is renumbered 804.10 (1) (a) and amended
6 to read:

7 804.10 (1) (a) When the mental or physical condition, including the blood group
8 or the ability to pursue a vocation, of a party is in issue, the court in which the action
9 is pending may order the party to submit to a single physical, mental, or vocational
10 examination. ~~The order may be made on motion for cause shown and upon motion~~

1 and notice to all parties and by the moving party or parties united in interest, unless
2 good cause is shown to order an additional examination. The order shall specify the
3 time, place, manner, conditions, and scope of the examination and the person or
4 persons by whom it is to be made who will conduct the examination.

5 SECTION 2. 804.10 (1) (b) of the statutes is created to read:

6 804.10 (1) (b) Any order issued under par. (a) shall:

7 1. Allow the party being examined to record the examination electronically and
8 have one or more witnesses present at the examination.

9 2. ~~Forbid~~ ^{Prohibit} the person conducting the examination from inquiring into any issue
10 bearing on any party's liability in the underlying action.

***NOTE: Please review this language. As worded, it would prevent the doctor from asking the plaintiff if the defendant's actions caused the injury.

11 3. Require the examination be conducted at any place within 100 miles from
12 the place where the party being examined resides, is employed, or transacts business
13 in person.

***NOTE: This language is close to the language found in s. 804.05 (3) (b), which governs where depositions may be held, except that s. 804.05 (3) (b) allows a judge to order a deposition in the county where the action is commenced. I didn't think it was your intent to include that language; please let me know if I should include that language.

14 4. Require the adverse party or parties united in interest who request the
15 examination to pay the reasonable expenses of the person being examined, including
16 travelling expenses at the rate established by 26 USC 162, an hourly wage
17 reimbursement of \$30 or the person's actual hourly wage, whichever is greater, and
18 reimbursement for child care expenses.

***NOTE: Please review this paragraph. Under current law, in s. 814.67, witnesses are paid 20 cents per mile and \$5 a day for appearing before a municipal judge; arbiter; or any officer, board, or committee, and \$16 a day for appearing before a circuit or appellate court. Please let me know if you want this paragraph to mirror current law for witnesses' expenses.

Please change component. → 1

SECTION 3. 804.10 (2) of the statutes is renumbered 804.10 (2) (a) and amended to read:

804.10 (2) (a) In no strike Except as provided in par. (b) or sub. (5), in any action brought to recover damages for personal injuries, the court shall also may order the claimant, upon such terms as are just, to give to the other party or any physician named in the order, within a specified time, consent and the right to inspect any X-ray photograph or hospital, medical, or other record taken in the course of the diagnosis or treatment of the claimant. ~~The court shall also order the claimant to give consent and the right to inspect and copy any hospital, medical or other records and reports that are within the scope of discovery under s. 804.01 (2) for the injuries for which the claimant seeks damages.~~

SECTION 4. 804.10 (2) (b) of the statutes is created to read:

804.10 (2) (b) A court may not order the claimant to give the other party or any physician named in its order consent to inspect the claimant's psychiatric or psychological records unless all of the following are true:

1. The claimant's action seeks to recover damages for a psychiatric or psychological injury.
2. The psychiatric or psychological records were taken in the course of the diagnosis or treatment of the claimant for the injuries for which damages are claimed.
3. The other party is not seeking discovery of the psychiatric or psychological records because of the claimant's claim for loss of society and companionship; pain and suffering; humiliation; embarrassment; worry; emotional distress; loss of enjoyment of normal activities; loss of benefits and pleasures of life; loss of physical

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1 health, well-being, or bodily functions; loss of consortium; or loss of love and
2 affection.

3 ~~****NOTE: Please review subdivision 3. It seems to me that the list of excluded
4 psychological damages is so broad as to deny discovery of these items in almost all
5 personal injury cases that seek any form of psychological damages. Is that your intent?~~

injuries

6 SECTION 5. 804.10 (2m) of the statutes is created to read:

7 804.10 (2m) If a party seeks discovery that is beyond the scope of sub. (2), the
8 court shall hold a hearing to determine whether to allow the additional discovery. The party
9 seeking discovery bears the burden of establishing by clear and convincing evidence
10 that the discovery it seeks relates to the injury of the claimant for a pre-existing condition
11 that is identical to or substantially similar to the injury for which the claimant seeks
12 damages and that predates the injury for which the claimant seeks damages.

psychiatric
satisfactory

13 ~~****NOTE: Please review this subsection. You may want to eliminate the
14 requirement that the identical or similar injury "predates" the injury for which the
15 claimant seeks damages. As worded, this subsection would preclude a defendant from
16 seeking discovery of a medical record related to an injury that a claimant suffers after the
17 injury for which he is seeking damages.~~

insert
A

18 SECTION 6. 804.10 (3) (a) of the statutes is amended to read:

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20 (1) or an inspection under sub. (2) takes place, the party adverse to the claimant shall
deliver a true copy of any oral or written report made pursuant to the examination
or inspection. No party adverse to the claimant may introduce evidence obtained by
an the adverse party by a court-ordered examination under sub. (1) or inspection
under sub. (2) shall be admitted upon the trial by reference or otherwise unless true
copies of all reports prepared pursuant to such examination or inspection and
received by such adverse party have been delivered to the other party claimant or to
his or her attorney not later than 10 15 days after the reports are received by the
adverse party. The party claiming damages shall deliver to the adverse party, in

or
(2m)

plain space

1 return for copies of reports based on court-ordered examination or inspection, a true
 2 copy of all reports of each person who has examined or treated the claimant with
 3 respect to the injuries for which damages are claimed examination or inspection
 4 takes place. The claimant may introduce evidence obtained by the examination
 5 under sub. (1) or inspection under sub. (2) ^{of (2m)} regardless of whether the adverse party
 6 seeks to introduce the evidence.

7 **SECTION 7.** 804.10 (5) of the statutes is created to read:
 8 804.10 (5) The court may not order the claimant to give to the other party or
 9 any physician named in its order consent to inspect an X-ray photograph or hospital,
 10 medical, or other record or report that was created more than 10 years prior to the
 11 date of the injury for which the claimant seeks damages.

12 **SECTION 8.** 804.10 (6) of the statutes is created to read:
 13 804.10 (6) Any X-ray photograph or hospital, medical, or other record that is
 14 not discoverable under sub. (2), (2m), or (4) remains privileged under s. 905.04.

15 **SECTION 9.** 905.04 (4) (c) of the statutes is amended to read:
 16 905.04 (4) (c) *Condition an element of claim or defense.* There is no privilege
 17 under this section as to communications relevant to or within the scope of discovery
 18 examination allowed under s. 804.10 of an issue of the physical, mental, or emotional
 19 condition of a patient in any proceedings in which the patient relies upon the
 20 condition as an element of the patient's claim or defense, or, after the patient's death,
 21 in any proceeding in which any party relies upon the condition as an element of the
 22 party's claim or defense.

****NOTE: I amended this paragraph to limit the exception to the generally privileged information to discovery that is allowed under s. 804.10. Please let me know if you do not want this paragraph amended, or if you think it should be amended in another way.

**2009-2010 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3655/P2ins
PJH:bjk:

INSERT A:

^{NO}_Q and disclosure is essential to the defense relating to the cause of the injury

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3655/P2dn

PJH:bjk:

Date

Brett:

Please review this draft to ensure that it is consistent with your intent. Please note that ~~that~~ as used in s. 804.10 (2), under current law, and in s. 804.10 (6), as created in this ~~bill~~ "X-ray photograph" is one phrase. If you want the sections to say "X-ray or photograph, or hospital, medical, or other record," please let me know. Under current law, "X-ray" is used without the word "photograph." elsewhere in the statutes, but not in current s. 804.10 (2) (a).

Please also note that s. 804.10 (2m), as created in this ~~bill~~ includes "physical, psychological, or psychiatric" discovery instead of separating "physical" and "psychological or psychiatric" into two subsections. I did this to comply with our drafting standards and avoid unnecessary repetition. As drafted, this section requires "clear, satisfactory, and convincing evidence." As we discussed, this standard of proof is used six times in current law. The standard of "clear and convincing evidence" is used 140 times in current law. The suggested standard of "clear, satisfactory, and convincing evidence" is used in conjunction with the phrase "to a reasonable certainty" twice in current law. If you want me to use a different phrase from what is in this draft, please > let me know.

If you have any other questions, concerns, or comments about the draft, please let me > know.

Peggy Hurley
Legislative Attorney
Phone: (608) 266-8906
E-mail: peggy.hurley@legis.wisconsin.gov

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

LRB-3655/P2dn
PJH:bjk:rs

January 26, 2010

Brett:

Please review this draft to ensure that it is consistent with your intent. Please note that, as used in s. 804.10 (2), under current law, and in s. 804.10 (6), as created in this draft, "X-ray photograph" is one phrase. If you want the sections to say "X-ray or photograph, or hospital, medical, or other record," please let me know. Under current law, "X-ray" is used without the word "photograph," elsewhere in the statutes, but not in current s. 804.10 (2).

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If you have any other questions, concerns, or comments about the draft, please let me know.

Peggy Hurley
Legislative Attorney
Phone: (608) 266-8906
E-mail: peggy.hurley@legis.wisconsin.gov

Response to LRB draft 3655-P2

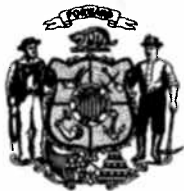
Issue one: the section should read “X-ray or photograph or hospital, medical or other record.”

Issue two: The section should read:

SECTION 4. 804.10 (2m) of the statutes is created to read:

804.10 **(2m)** If a party seeks discovery for physical, psychological, or psychiatric injuries that is beyond the scope of sub. (2), the court shall hold a hearing to determine whether to allow the additional discovery. The party seeking discovery bears the burden of establishing by clear, satisfactory, and convincing evidence to a reasonable certainty that the discovery it seeks relates to ~~the injury of the claimant~~ for a pre-existing condition that is identical to or substantially similar to the injury for which the claimant seeks damages and that predates the injury for which the claimant seeks damages, and disclosure is essential to the defense relating to the cause of the injury.

The burden of proof language mirrors civil jury instruction 205.



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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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1 AN ACT *to renumber and amend* 804.10 (1) and 804.10 (2); *to amend* 804.10
2 (3) (a) and 905.04 (4) (c); and *to create* 804.10 (1) (b), 804.10 (2) (b), 804.10 (2m),
3 804.10 (5) and 804.10 (6) of the statutes; **relating to:** physical examinations
4 and discovery of patients' records in civil actions.

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This is a preliminary draft. An analysis will be provided in a later version.

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5 SECTION 1. 804.10 (1) of the statutes is renumbered 804.10 (1) (a) and amended
6 to read:
7 804.10 (1) (a) When the mental or physical condition, including the blood group
8 or the ability to pursue a vocation, of a party is in issue, the court in which the action
9 is pending may order the party to submit to a single physical, mental, or vocational
10 examination. ~~The order may be made on motion for cause shown and upon motion~~

1 and notice to all parties and by the moving party or parties united in interest, unless
 2 good cause is shown to order an additional examination. The order shall specify the
 3 time, place, manner, conditions, and scope of the examination and the person or
 4 persons by whom it is to be made who will conduct the examination.

5 **SECTION 2.** 804.10 (1) (b) of the statutes is created to read:

6 804.10 (1) (b) Any order issued under par. (a) shall:

7 1. Allow the party being examined to record the examination electronically and
 8 have one or more witnesses present at the examination.

9 2. Prohibit the person conducting the examination from inquiring into any
 10 issue bearing on any party's liability in the underlying action.

11 3. Require the examination be conducted at any place within 100 miles from
 12 the place where the party being examined resides, is employed, or transacts business
 13 in person.

14 4. Require the adverse party or parties united in interest who request the
 15 examination to pay the reasonable expenses of the person being examined, including
 16 travelling expenses at the rate established by 26 USC 162, an hourly wage
 17 reimbursement of \$30 or the person's actual hourly wage, whichever is greater, and
 18 reimbursement for child care expenses.

19 **SECTION 3.** 804.10 (2) of the statutes is amended to read:

20 804.10 (2) In any action brought to recover damages for personal injuries, the
 21 court ~~shall also~~ may order the claimant, upon such terms as are just, to give to the
 22 other party or any physician named in the order, within a specified time, consent and
 23 the right to inspect any X-ray ^{or} photograph or hospital, medical, or other record taken
 24 in the course of the diagnosis or treatment of the claimant. ~~The court shall also order~~
 25 ~~the claimant to give consent and the right to inspect and copy any hospital, medical~~

1 ~~or other records and reports that are within the scope of discovery under s. 804.01~~
2 ~~(2) for the injuries for which the claimant seeks damages.~~

3 SECTION 4. 804.10 (2m) of the statutes is created to read:

4 804.10 (2m) If a party seeks discovery for physical, psychological, or
5 psychiatric injuries that is beyond the scope of sub. (2), the court shall hold a hearing
6 to determine whether to allow the additional discovery. The party seeking discovery
7 bears the burden of establishing by clear, satisfactory, and convincing evidence that
8 the discovery it seeks relates to the injury of the claimant for a pre-existing condition
9 that is identical to or substantially similar to the injury for which the claimant seeks
10 damages and that predates the injury for which the claimant seeks damages, and
11 disclosure is essential to the defense relating to the cause of the injury.

to a reasonable certainty

12 SECTION 5. 804.10 (3) (a) of the statutes is amended to read:

13 804.10 (3) (a) ~~No~~ Within 15 days after a court-ordered examination under sub.
14 (1) or an inspection under sub. (2) or (2m) takes place, the party adverse to the
15 claimant shall deliver a true copy of any oral or written report made pursuant to the
16 examination or inspection. No party adverse to the claimant may introduce evidence
17 obtained by ~~an~~ the adverse party by a court-ordered examination under sub. (1) or
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20 inspection and received by such adverse party have been delivered to the other party
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12 condition as an element of the patient's claim or defense, or, after the patient's death,
13 in any proceeding in which any party relies upon the condition as an element of the
14 party's claim or defense.

15 (END)



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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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AN ACT to renumber and amend 804.10 (1); to amend 804.10 (2), 804.10 (3) (a) and 905.04 (4) (c); and to create 804.10 (1) (b), 804.10 (2m) and 804.10 (6) of the statutes; relating to: physical examinations and discovery of patients' records in civil actions.

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11 3. Require the examination be conducted at any place within 100 miles ^{of} ~~from~~
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14 4. Require the adverse party or parties united in interest who request the
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22 other party or any physician named in the order, within a specified time, consent and
23 the right to inspect any X-ray or photograph or hospital, medical, or other record
24 taken in the course of the diagnosis or treatment of the claimant. ~~The court shall also~~
25 ~~order the claimant to give consent and the right to inspect and copy any hospital,~~

1 ~~medical or other records and reports that are within the scope of discovery under s.~~
2 ~~804.01 (2) for the injuries for which the claimant seeks damages.~~

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5 psychiatric injuries that is beyond the scope of sub. (2), the court shall hold a hearing
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8 reasonable certainty that the discovery ~~it seeks~~ relates to a pre-existing condition
9 that is identical to or substantially similar to the injury for which the claimant seeks
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16 examination or inspection. No party adverse to the claimant may introduce evidence
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19 or (2m) unless true copies of all reports prepared pursuant to such examination or
20 inspection and received by such adverse party have been delivered to the other party
21 claimant or to his or her attorney not later than 10 15 days after the reports are
22 received by the adverse party. The party claiming damages shall deliver to the
23 adverse party, in return for copies of reports based on court-ordered examination or
24 inspection, a true copy of all reports of each person who has examined or treated the
25 claimant with respect to the injuries for which damages are claimed examination or

1 inspection takes place. The claimant may introduce evidence obtained by the
2 examination under sub. (1) or inspection under sub. (2) or (2m) regardless of whether
3 the adverse party seeks to introduce the evidence.

4 **SECTION 6.** 804.10 (6) of the statutes is created to read:

5 804.10 (6) Any X-ray or photograph or hospital, medical, or other record that
6 is not discoverable under sub. (2), (2m), or (4) remains privileged under s. 905.04.

7 **SECTION 7.** 905.04 (4) (c) of the statutes is amended to read:

8 905.04 (4) (c) *Condition an element of claim or defense.* There is no privilege
9 under this section as to communications relevant to or within the scope of discovery
10 examination allowed under s. 804.10 of an issue of the physical, mental, or emotional
11 condition of a patient in any proceedings in which the patient relies upon the
12 condition as an element of the patient's claim or defense, or, after the patient's death,
13 in any proceeding in which any party relies upon the condition as an element of the
14 party's claim or defense.

15 (END)

to the claimant

→ inspection takes place. If a defending party fails to do so, the defending party may not introduce at trial any evidence that the defending party obtained from the examination or inspection. Under the bill, a claimant may introduce evidence obtained from the examination or inspection, regardless of whether the defending party seeks to introduce the evidence.

Duerst, Christina

From: Blomme, Brett
Sent: Wednesday, February 10, 2010 1:18 PM
To: LRB.Legal
Subject: Draft Review: LRB 09-3655/1 Topic: Insurance companies and tort discovery

Please Jacket LRB 09-3655/1 for the ASSEMBLY.