

2015 DRAFTING REQUEST

Bill

Received: **2/2/2015** Received By: **swalkenh**
 For: **Christine Sinicki (608) 266-8588** Same as LRB:
 May Contact: By/Representing: **Ann DeGarmo**
 Subject: **Health - miscellaneous** Drafter: **swalkenh**
 Addl. Drafters:
 Extra Copies:

Submit via email: **YES**
 Requester's email: **Rep.Sinicki@legis.wisconsin.gov**
 Carbon copy (CC) to: **sarah.walkenhorstbarber@legis.wisconsin.gov**
tamara.dodge@legis.wisconsin.gov

Pre Topic:

No specific pre topic given

Topic:

Requiring hospitals to allow patients to elect audio and visual recording of surgical procedures

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	swalkenh 2/27/2015	wjackson 2/27/2015	_____			
/P1	swalkenh 4/7/2015	jmurphy 2/27/2015	_____	srose 2/27/2015		
/P2	swalkenh 4/21/2015	jmurphy 4/8/2015	_____	sbasford 4/8/2015		

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/P3	swalkenh 4/22/2015	wjackson 4/21/2015	_____	lparisi 4/21/2015		State
/P4	swalkenh 4/22/2015	wjackson 4/22/2015	_____	mbarman 4/22/2015		State
/P5	swalkenh 5/4/2015	csicilia 4/22/2015	_____	mbarman 4/22/2015		State
/P6	swalkenh 5/6/2015	csicilia 5/4/2015	_____	srose 5/4/2015		State
/P7	swalkenh 5/8/2015	wjackson 5/6/2015	_____	sbasford 5/6/2015		State
/P8	swalkenh 5/8/2015	wjackson 5/8/2015	_____	lparisi 5/8/2015		State
/1		wjackson 5/8/2015	_____	srose 5/8/2015	lparisi 5/19/2015	State

FE Sent For:

<END>

STATE OF WISCONSIN – LEGISLATIVE REFERENCE BUREAU

LRB

Research (608-266-0341)

Library (608-266-7040)

Legal (608-266-3561)

LRB

5/8

Per Rep. Sinicki's office, please
convert to a /1

Drafting Instructions from 3/18 meeting

- Video system to include video of surgery but also time/date video monitoring of entry/exit from surgical suite
- Tapes to be admissible in ct of law?
- Admissible by prosecutor?
- Crime to tamper with the video recording, or system
Crime re medical records? Check on this.
- Probably covered by medical records provisions.
- Possible Driver's License sticker to "opt-in" to videotaping
- Insurance coverage? Check into

Follow up

3/30

1

- Leave out insurance coverage issue for now
- Instead of license sticker, provide advance directive - type option and form prior to surgery

Walkenhorst Barber, Sarah

From: Rose, Laura
Sent: Monday, February 02, 2015 2:30 PM
To: Dodge, Tamara; Walkenhorst Barber, Sarah
Cc: Matthias, Mary; Dumas, Aaron
Subject: drafting request from Rep. Sinicki
Attachments: 15sinicki_ad.pdf

Dear Tami and Sarah,

We have done some research for Rep. Sinicki on the issue of requiring hospitals to permit a surgical patient to have a video recording made of their surgical procedure. The purpose of this proposal is to allow the patient to document any surgical mistakes that might be made.

The attached memo was written by Aaron Dumas, our health policy intern. It contains a brief description of the proposal, as well as some safeguards that might be included in such a proposal.

I met with Rep. Sinicki about two weeks ago about this proposal. Another item we thought should be added would be to create standards for such recordings, so that they are done in a professional manner by a reputable individual or company, and that the video recording is of such a quality that it could accurately portray what took place during the surgery.

I am requesting a preliminary draft of this proposal, on her behalf. I am including her aide, Ann DeGarmo, on this email, as she will be the contact person in that office for this proposal.

In addition, Mary Matthias will be the contact person at Leg Council for this proposal, since my last day in the office is this coming Friday, February 6th. Until then, however, please let me know if you have any questions.

Thanks very much,

Laura

Laura D. Rose, Deputy Director
Wisconsin Legislative Council
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Madison, WI 53701-2536
tel: 608.266.9791
fax: 608.266-3830
laura.rose@legis.wisconsin.gov



WISCONSIN LEGISLATIVE COUNCIL

*Terry C. Anderson, Director
Laura D. Rose, Deputy Director*

TO: REPRESENTATIVE CHRISTINE SINICKI

FROM: Aaron Dumas, Intern

RE: Legality Under HIPAA of Visual and Audio Recording of Surgical Procedures

DATE: January 15, 2015

This memorandum, prepared at your request, discusses the legality under the Health Insurance Portability and Accountability Act (HIPAA) privacy rules [5 C.F.R. s. 164.500 et seq.] of a legislative proposal involving the audio and visual recording of surgeries. Specifically, the proposal would require that all surgery patients be given the option of having their surgical procedure recorded so that if medical errors occur that result in patient injury or death, the recording could be used to document the errors. In short, HIPAA would not pose a barrier to such legislation, as long as appropriate safeguards were instituted.

HIPAA exists to protect the privacy of patients, not the privacy of health care providers. Therefore, HIPAA implications are likely to arise not directly from the recording of surgery or its disclosure to the patient, but rather from the possibility of individuals **other** than the patient accessing the recording. If a recording were created that contained or was labeled with any protected health information (PHI)¹ identifying a patient, it would be considered to be part of the patient's medical record, and the patient would be legally entitled to demand access to, and

¹ 45 C.F.R. s. 160.103 provides: protected health information means individually identifiable health information: (1) Except as provided in paragraph (2) of this definition, that is: (i) transmitted by electronic media; (ii) maintained in electronic media; or (iii) transmitted or maintained in any other form or medium.

(2) Protected health information excludes individually identifiable health information: (i) in education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g; (ii) in records described at 20 U.S.C. 1232g(a)(4)(B)(iv); (iii) In employment records held by a covered entity in its role as employer; and (iv) regarding a person who has been deceased for more than 50 years.

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and: (1) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) that identifies the individual; or (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.

use of, that information. On the other hand, if there is no patient identifying information on a record, then the record's use is not restricted by HIPAA.

A provider may use records that contain PHI internally without patient authorization for an educational or quality enforcement purpose. However, use for any other purpose, or disclosure to outside individuals, requires the patient's written authorization. The nature and purpose of the disclosure must be identified in the authorization. Record-keeping for the purpose of the proposed law most likely falls outside the bounds of educational and quality enforcement purposes. Therefore, it may be advisable that if patients elect to have their operations recorded, they be required to sign an authorization covering any record-keeping activities. Many hospitals already include an authorization for the creation of surgery videos and pictures as part of their standard hospital consent form.

It should be noted that, even if a patient authorizes some PHI disclosure, HIPAA requires that providers do their best to disclose the least possible amount of it. Therefore, if the proposal became law, it would be advisable for health care providers to implement other safeguards in addition to the written authorization. Such safeguards might include any of the following:

- Using camera angles and image border controls that avoid recognition of individuals, or blur patients' facial features.
- Removing patient identifiers from paperwork associated with video records.
- Strictly limiting access to records (for example, by requiring authorization card swipe access; or storing records under lock and key, and only for as long as required before their destruction).
- Performing risk analysis for their recording practices to identify potential patient privacy risks, and then implementing controls, policies, and procedures to mitigate or remove those risks.
- Reviewing information security and privacy policies on an annual basis and whenever major organizational changes occur or operating room (OR) practices change.
- Including information security and privacy training within new employee orientation and also in regular training and ongoing awareness communications, and targeting OR staff with training specific to their activities.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

AD:ty

Telephone conference w/ A. DeGarmo

2/2015

- Re standards and quality of recording - refer to DHS to extent possible
- Hospitals to provide the equipment, make the recording
- charge patients, but at reasonable rates (not \$2000)
- Exception for emergency / trauma situations where not feasible
- video should belong to the patient / part of their record



State of Wisconsin
2015 - 2016 LEGISLATURE

IN 2/27/15
WANTED TODAY if possible

LRB-1589
SWB:.....

WJ

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Gen Cat

1 **AN ACT** ...; **relating to:** video recording of surgical procedures and requiring the
2 exercise of rule-making authority.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

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

3 **SECTION 1.** 50.373 of the statutes is created to read:

4 **50.373 Video recording of surgical procedures.** (1) In this section:

5 (a) "Surgical patient" means a patient ^{eb} [✓] ^{who} that is scheduled to undergo a surgical
6 procedure.

7 (b) "Incapacitated" means unable to receive and evaluate information
8 effectively or to communicate decisions to such an extent that ^{ea} (the) individual lacks
9 the capacity to manage his or her health care decisions.

1 (2) A hospital shall provide a surgical patient the option to have the hospital
2 or the hospital's designee make a video recording, including both audio and video, of
3 the patient's surgical procedure at the patient's expense as described under sub. (8).

4 (3) A hospital shall have available appropriate video recording equipment and
5 technical assistance as determined by the department in rules promulgated under
6 sub. (6) to comply with a patient request for a recording of his or her surgical
7 procedure.

8 (4) If a patient is incapacitated, a person authorized by the patient under s.
9 146.81 (5) may request a video recording made of the patient's surgical procedure
10 under sub. (2).

11 (5) Notwithstanding sub. (2), a hospital is not required to provide the option
12 of a video recording under this section if the health care provider determines that,
13 in the exercise of his or her professional judgment, an emergency makes it
14 impracticable and could delay necessary treatment to the detriment of the patient's
15 health.

****NOTE: The Wisconsin Legislative Council memorandum suggests some additional safeguards for providers should a provider decide he or she wants to use videos for purposes outside the educational or quality enforcement realm. You could add a provision requiring the department of health services to promulgate rules establishing minimum standards for such a circumstance. However, as the memorandum notes, many hospitals already have an authorization incorporated into their forms. Further, regardless of whether this bill includes a statement regarding such safeguards, providers are bound by the limitations on use of protected health information under ch. 146 and federal law (specifically, HIPAA).

16 (6) The department shall promulgate rules establishing standards for video
17 recording of surgical procedures and the use of video recording equipment in the
18 surgery setting to ensure such recordings are professional and of sufficient quality
19 to accurately portray what takes place during a surgical procedure.

****NOTE: This provision requires the department of health services to exercise rule-making authority to establish the standards relating to videotaping surgeries. You should be aware that requiring the department to promulgate rules can sometimes take

awhile and, as a result, you may want to consider when you'd like the requirement for videotaping to be effective. In addition, you may also receive some feedback from the agency regarding what rules you are asking the agency to establish.

1 (7) After the recording of a surgical procedure under this section is complete,
2 the hospital or its designee promptly shall do all of the following:

3 (a) Preserve the recording as part of the patient's health care record, which may
4 include both a copy in the patient's health care record and any electronic backup of
5 health care records kept in the normal course of business.

6 (b) Except as provided under par. (a), delete copies of the recording from the
7 recording device or any other electronic device, including any memory card or flash
8 drive.

9 (8) (a) A hospital may charge a reasonable fee, as determined by the
10 department, for its videography services provided under this section and its storage
11 of the recording of the surgical procedure.

12 (b) A hospital may charge fees as set forth in s. 146.83 (3f) for providing copies
13 from a patient's health care record of a recording under this section, except that the
14 hospital shall provide, upon request, one copy of any recording taken under this
15 section to a patient or a person authorized by the patient free of charge.

****NOTE: As drafted, this provision allows the hospital to charge fees for the services involved in creating the recording, as well as for providing copies. However, as drafted, this provision requires the hospital to provide the first copy for free, since you indicated in your instructions that you wanted the recording to be the patient's. This provision allows the patient a copy, but also retains a copy in the patient's health care records. After the first copy, individuals can obtain additional copies as provided under s. 146.83 (3f), but fees will apply. Note also that s. 146.83 (3f) allows some other service charges relating to records that might apply to video recordings, just as they would for other medical records. The amounts in the draft are placeholders and can be modified. Please let me know if you want to modify these provisions.

16 SECTION 2. 146.83 (3f) (b) 3m. of the statutes is created to read:

17 146.83 (3f) (b) 3m. Except as provided ^{ein} under s. 50.373, for a copy of an ^{er} video
18 recording of a surgical procedure, \$35 per copy.

****NOTE: This draft includes a dollar amount as a placeholder. Please let me know what you would like to include for a cost. DHS might be able to provide input on cost, as it is unclear how the other costs in this section were set. This provision, as the others in s. 146.83 (3f) (b) would be subject to adjustment every year by DHS.

1

(END)



State of Wisconsin
2015 - 2016 LEGISLATURE

LRB-1589/P1

SWB:wlj/jm

stays

(Wed)
3/8 AM Please if possible

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

INSERT

1 **AN ACT to create** 50.373 and 146.83 (3f) (b) 3m. of the statutes; **relating to:** video
2 recording of surgical procedures ^{2/5} (and) requiring the exercise of rule-making
3 authority ^{and providing a penalty}.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

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

4 **SECTION 1.** 50.373 of the statutes is created to read:
5 **50.373 Video recording of surgical procedures.** (1) In this section:
6 (a) "Incapacitated" means unable to receive and evaluate information
7 effectively or to communicate decisions to such an extent that an individual lacks the
8 capacity to manage his or her health care decisions.

(c) DEFINITIONS

9 (b) "Surgical patient" means a patient who is scheduled to undergo a surgical
10 procedure.

INS
1-8

INS
1-10

SECTION 1

surgical facility

(5) OPTION FOR RECORDING.

surgical facility

1 (2) A hospital shall provide a surgical patient the option to have the hospital
2 or the hospital's designee make a video recording, including both audio and video, of
3 the patient's surgical procedure at the patient's expense as described under sub. (8).

(4) EQUIPMENT AND TECHNICAL ASSISTANCE.

surgical facility

INS
2-3

4 (3) A hospital shall have available appropriate video recording equipment and
5 technical assistance as determined by the department in rules promulgated under
6 sub. (6) to comply with a patient request for a recording of his or her surgical
7 procedure.

(7)

(5) INCAPACITY.

8 (4) If a patient is incapacitated, a person authorized by the patient under s.
9 146.81 (5) may request a video recording made of the patient's surgical procedure
10 under sub. (2).

(2)

(6) EXCEPTION FOR EMERGENCIES.

surgical facility

11 (5) Notwithstanding sub. (2), a hospital is not required to provide the option
12 of a video recording under this section if the health care provider determines that,
13 in the exercise of his or her professional judgment, an emergency makes it
14 impracticable and could delay necessary treatment to the detriment of the patient's
15 health.

***NOTE: The Wisconsin Legislative Council memorandum suggests some additional safeguards for providers should a provider decide he or she wants to use videos for purposes outside the educational or quality enforcement realm. You could add a provision requiring the Department of Health Services to promulgate rules establishing minimum standards for such a circumstance. However, as the memorandum notes, many hospitals already have an authorization incorporated into their forms. Further, regardless of whether this bill includes a statement regarding such safeguards, providers are bound by the limitations on use of protected health information under ch. 146 and federal law (specifically, HIPAA).

(B)

(7) RULES.

16 (6) The department shall promulgate rules establishing standards for video
17 recording of surgical procedures and the use of video recording equipment in the
18 surgery setting to ensure such recordings are professional and of sufficient quality
19 to accurately portray what takes place during a surgical procedure.

***NOTE: This provision requires the Department of Health Services to exercise rule-making authority to establish the standards relating to videotaping surgeries. You should be aware that requiring the department to promulgate rules can sometimes take

awhile and, as a result, you may want to consider when you'd like the requirement for videotaping to be effective. In addition, you may also receive some feedback from the agency regarding what rules you are asking the agency to establish.

⑥

⑧ PRESERVATION AND DESTRUCTION, ⑥

1 (7) After the recording of a surgical procedure under this section is complete,
2 the ~~hospital~~ ^{surgical facility} or its designee shall promptly do all of the following:

3 (a) Preserve the recording as part of the patient's health care record, which may
4 include both a copy in the patient's health care record and any electronic backup of
5 health care records kept in the normal course of business.

6 (b) Except as provided under par. (a), delete copies of the recording from the
7 recording device or any other electronic device, including any memory card or flash
8 drive.

⑨ (A) FEES, ⑥

9 (8) (a) A ~~hospital~~ ^{surgical facility} may charge a reasonable fee, as determined by the
10 department, for ~~its~~ ^{the surgical facility's} videography services provided under this section and its storage
11 of the recording of the surgical procedure.

12 (b) A ~~hospital~~ ^{surgical facility} may charge fees as set forth in s. 146.83 (3f) for providing copies
13 from a patient's health care record of a recording under this section, except that the
14 hospital shall provide, upon request, one copy of any recording taken under this
15 section to a patient or a person authorized by the patient free of charge.

***NOTE: As drafted, this provision allows the hospital to charge fees for the services involved in creating the recording, as well as for providing copies. However, as drafted, this provision requires the hospital to provide the first copy for free, since you indicated in your instructions that you wanted the recording to be the patient's. This provision allows the patient a copy, but also retains a copy in the patient's health care record. After the first copy, individuals can obtain additional copies as provided under s. 146.83 (3f), but fees will apply. Note also that s. 146.83 (3f) allows some other service charges relating to records that might apply to video recordings, just as they would for other medical records. The amounts in the draft are placeholders and can be modified. Please let me know if you want to modify these provisions.

INS
3-16

16 SECTION 2. 146.83 (3f) (b) 3m. of the statutes is created to read:

17 146.83 (3f) (b) 3m. Except as provided in s. 50.373, for a copy of a video
18 recording of a surgical procedure, \$35 per copy.

****NOTE: This draft includes a dollar amount as a placeholder. Please let me know what you would like to include for a cost. DHS might be able to provide input on cost, as it is unclear how the other costs in this section were set. This provision, as the others in s. 146.83 (3f) (b), would be subject to adjustment every year by DHS.

1

(END)

INSERT

2015-2016 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1589/P2ins
SWB:wlj:jm

INSERT 1-8

1 (b) "Surgical facility" means a hospital^g as defined underⁱⁿ s. 50.33 (2), an
2 ambulatory surgical center as defined in 42 CFR 416.2, or any other place where a
3 surgical procedure is performed.

(END INSERT 1-8)

INSERT 1-10

4 (d) "Surgical procedure" means a surgical procedure for which a patient is given
5 a general anesthetic.

(END INSERT 1-10)

INSERT 2-3

6 (3) ENTRY AND EXIT RECORDING. If a patient requests to have his or her surgical
7 procedure recorded under sub. (2), the surgical facility shall also make a video
8 recording, including display of the time and date, of any entryway to or exit from the
9 surgical suite in which the surgical procedure being recorded is taking place during
10 the time from which the patient being recorded enters the suite until the patient exits
11 the suite. A surgical facility is not required to record audio in making the recording
12 under this paragraph^{e Subsection}

(END INSERT 2-3)

INSERT 3-16

13 (10) ADMISSIBILITY OF RECORDING. For purposes of admissibility in a civil or
14 criminal action or proceeding, an audiovisual recording created under this section
15 is a patient health care record under s. 146.81 and shall be treated as other patient

1 health care records under ss. 908.03 (6m) and 909.02 (11). If certified by an
2 appropriate record custodian, recordings under this section shall be admissible in
3 evidence in any civil or criminal action or proceeding arising out of the acts
4 committed by a person relating to the events depicted in the recording.

subsection

5 (11) ADVANCE REQUESTS FOR RECORDING. (a) *Definition.* In this section,
6 "principal" means an individual who executes an advance request for surgical
7 procedure recording.^{instrument}

8 (b) *Advance requests for recording.* 1. An individual who is of sound mind and
9 has attained age 18 may voluntarily execute an advance request for surgical
10 procedure recording.^{instrument} An individual for whom an adjudication of incompetence and
11 appointment of a guardian of the person^{individual} is in effect in this state is presumed not to
12 be of sound mind for purposes of this subsection^{and for} executing an advance request for
13 surgical procedure recording.^{instrument}

14 2. The desires of a principal who does not have incapacity supersede the effect
15 of his or her advance request for surgical procedure recording^{instrument} at all times.

16 STBT 3. ^{advance request} The department shall prepare and provide copies of an advance request for
17 surgical procedure recording^{instrument} and accompanying information for distribution in
18 quantities to health care professionals, hospitals and other surgical facilities, county
19 clerks^g and local bar associations and individually to private persons. The
20 department shall determine the form of the request form and accompanying
21 instructions. The department shall include on the form both an option for requesting
22 ^{the} recording of a specific single surgical procedure and an option for requesting
23 ^{the} recording of all future surgical procedures appropriate under this section.

24 (c) *Advance request for recording; execution.* A valid ^{advance} request for surgical
25 procedure recording shall be all of the following:

- 1 1. In writing.
- 2 2. Dated and signed by the principal or by an individual who has attained age
- 3 18, at the express direction and in the presence of the principal.
- 4 3. Signed in the presence of a witness, who is an individual who has attained
- 5 the age 18.
- 6 4. Voluntarily executed.

7 (d) *Revocation*. A principal may revoke his or her advance request for surgical
 8 procedure recording ^{instrument} at any time by doing any of the following:

- 9 1. Canceling, defacing, obliterating, burning, tearing ^{or} or otherwise destroying
- 10 the advance request for surgical procedure recording instrument or directing
- 11 another in the presence of the principal to so destroy the advance request for surgical
- 12 procedure recording. ^{instrument}
- 13 2. Executing a statement, in writing, that is signed and dated by the principal,
- 14 expressing the principal's intent to revoke the advance request for surgical procedure
- 15 recording. ^{instrument}
- 16 3. Verbally expressing the desire to revoke the advance request for surgical
- 17 procedure recording, ^{instrument} in the presence of a witness.
- 18 4. Executing a subsequent advance request for surgical procedure recording
- 19 instrument that replaces an existing advance request for surgical procedure
- 20 recording instrument.

****NOTE: While based upon the provisions relating to advance directives and powers of attorney for health care, the execution and revocation requirements here are not as restrictive as those included in those chapters, based on the nature of the decision making at issue. These requirements can be modified to be more or less restrictive if you want.

21 (12) PENALTIES. (a) Except as provided under sub. (6), a health care provider
 22 who knowingly and willfully refuses to comply with a patient request to have his or

1 her surgical procedure recorded, may be fined not more than \$25,000 or imprisoned
2 for not more than 9 months or both.

****NOTE: This draft includes a penalty provision for failing to make the required video. The penalty included is one similar to some listed under s. 146.84 (2), which has penalties for violations relating to patient health care records. This can be modified if you want something else. I did not include provisions here (in s. 50.373) for tampering with the video recordings or other related records because if the videos are patient health records as we have discussed, they will be subject to the penalties already set forth under s. 146.84 for violations related to patient health care records.

3 (b) Whoever intentionally conceals, cancels, defaces, obliterates, damages or
4 destroys an advance request for surgical procedure recording instrument created
5 under sub. (11) without the consent of the principal for that instrument may be fined
6 not more than \$500 or imprisoned for not more than 30 days or both.

7 ~~SECTION 146.81~~ (4) of the statutes is amended to read:

8 146.81 (4) "Patient health care records" means all records related to the health
9 of a patient prepared by or under the supervision of a health care provider; all video
10 recordings under s. 50.373 related to the patient; and all records made by an
11 ambulance service provider, as defined in s. 256.01 (3), an emergency medical
12 technician, as defined in s. 256.01 (5), or a first responder, as defined in s. 256.01 (9),
13 in administering emergency care procedures to and handling and transporting sick,
14 disabled, or injured individuals. "Patient health care records" includes billing
15 statements and invoices for treatment or services provided by a health care provider
16 and includes health summary forms prepared under s. 302.388 (2). "Patient health
17 care records" does not include those records subject to s. 51.30, reports collected
18 under s. 69.186, records of tests administered under s. 252.15 (5g) or (5j), 343.305,
19 938.296 (4) or (5) or 968.38 (4) or (5), records related to sales of pseudoephedrine
20 products, as defined in s. 961.01 (20c), that are maintained by pharmacies under s.

- 1 961.235, fetal monitor tracings, as defined under s. 146.817 (1), or a pupil's physical
- 2 health records maintained by a school under s. 118.125.

History: 1979 c. 221; 1981 c. 39 s. 22; 1983 a. 27; 1983 a. 189 s. 329 (1); 1983 a. 535; 1985 a. 315; 1987 a. 27, 70, 264; 1987 a. 399 ss. 403br, 491r; 1987 a. 403; 1989 a. 31, 168, 199, 200, 229, 316, 359; 1991 a. 39, 160, 269; 1993 a. 27, 32, 105, 112, 183, 385, 443, 496; 1995 a. 27 s. 9145 (1); 1995 a. 77, 98, 352; 1997 a. 27, 67, 75, 156, 175; 1999 a. 9, 32, 151, 180, 188; 2001 a. 38, 70, 74, 80, 89; 2005 a. 262, 387; 2007 a. 108; 2009 a. 28, 165, 209, 355; s. 35.17 correction in (1) (dg).

(END INSERT 3-16)

Instructions from LC on behalf of Rep. Sinicki's office

- ① Video must be color
- ② Require mandatory notice of the option for videotaping, make sure person authorized receives notice if patient incapacitated
- ③ Entry/Exit video should be started with prep; i.e. any time associated with that patient in the surgical suite
- ④ Boost to higher standard for emergencies exception
- ⑤ Add language to sub. (7) on Rules explaining what authority DHS will have
- ⑥ Amend sub. (10) admissibility provision to cover acts or omissions and broadly cover what is depicted on video
- ⑦ Add in sub. (12) a penalty provision for hospital facilities failing to give mandatory notice; should be smaller penalty than refusal



State of Wisconsin
2015 - 2016 LEGISLATURE

LRB-1589/P2
SWB:wlj:fm

1/13
WJ

ASAP / Now please

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

INSERT

Regan

1
2
3

AN ACT *to amend* 146.81 (4); and *to create* 50.373 and 146.83 (3f) (b) 3m. of the statutes; **relating to:** video recording of surgical procedures, requiring the exercise of rule-making authority, and providing a penalty.

criminal penalties

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

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

4
5
6
7
8
9

SECTION 1. 50.373 of the statutes is created to read:

50.373 Video recording of surgical procedures. (1) DEFINITIONS. In this section:

(a) "Incapacitated" means unable to receive and evaluate information effectively or to communicate decisions to such an extent that an individual lacks the capacity to manage his or her health care decisions.

1 (b) "Surgical facility" means a hospital, as defined in s. 50.33 (2), an ambulatory
2 surgical center, as defined in 42 CFR 416.2, or any other place where a surgical
3 procedure is performed.

4 (c) "Surgical patient" means a patient who is scheduled to undergo a surgical
5 procedure.

6 (d) "Surgical procedure" means a surgical procedure for which a patient is given
7 a general anesthetic.

8 INS
2-7

(2) OPTION FOR RECORDING. A surgical facility shall provide a surgical patient
9 the option to have the surgical facility or the surgical facility's designee make a video
10 recording, including both audio and video, of the patient's surgical procedure at the
11 patient's expense as described under sub. (9).

12 (3) ENTRY AND EXIT RECORDING. If a patient requests to have his or her surgical
13 procedure recorded under sub. (2), the surgical facility^(a) shall also make a^{color} video
14 recording, including display of the time and date, of any entryway to or exit from the
15 surgical suite in which the surgical procedure being recorded is taking place^{during}
16 the time from which the patient being recorded enters the suite^{surgical suite is being prepared for the surgery of the} until the patient exits^{that surgical}
17 the suite. A surgical facility is not required to record audio in making the recording
18 under this subsection.

19 (4) EQUIPMENT AND TECHNICAL ASSISTANCE. A surgical facility shall have
20 available appropriate video recording equipment and technical assistance as
21 determined by the department in rules promulgated under sub. (7) to comply with
22 a patient request for a recording of his or her surgical procedure.

23 (5) INCAPACITY. If a patient is incapacitated, a person authorized by the patient
24 under s. 146.81 (5) may request that a video recording be made of the patient's
25 surgical procedure under sub. (2).

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3-1

1 (6) EXCEPTION FOR EMERGENCIES. Notwithstanding sub. (2), a surgical facility
2 is not required to provide the option of a video recording under this section if the
3 health care provider determines that, in the exercise of his or her professional
4 judgment, an emergency makes it impracticable and could delay necessary
5 treatment to the detriment of the patient's health.

6 (7) RULES. ^(a) The department shall promulgate rules establishing standards for
7 video recording of surgical procedures and the use of video recording equipment in
8 the surgery setting to ensure such recordings are professional and of sufficient
9 quality to accurately portray what takes place during a surgical procedure.

INS
3-9

10 (8) PRESERVATION AND DESTRUCTION. After the recording of a surgical procedure
11 under this section is complete, the surgical facility or its designee shall promptly do
12 all of the following:

13 (a) Preserve the recording as part of the ^{surgical} patient's health care record, which may
14 include both a copy in the patient's health care record and any electronic backup of
15 health care records kept in the normal course of business.

16 (b) Except as provided under par. (a), delete copies of the recording from the
17 recording device or any other electronic device, including any memory card or flash
18 drive.

19 (9) FEES. (a) A surgical facility may charge a reasonable fee, as determined
20 by the department, for the surgical facility's videography services provided under
21 this section and its storage of the recording of the surgical procedure.

22 (b) A surgical facility may charge fees as set forth in s. 146.83 (3f) for providing
23 copies from a patient's health care record of a recording under this section, except
24 that the surgical facility shall provide, upon request, one copy of any recording taken
25 under this section to a ^{surgical} patient or a person authorized by the patient ^{under s. 146.81 (5)} free of charge.

1 (10) ADMISSIBILITY OF RECORDING. For purposes of admissibility in a civil or
2 criminal action or proceeding, an audiovisual recording created under this section
3 is a patient health care record under s. 146.81 and shall be treated as other patient
4 health care records under ss. 908.03 (6m) and 909.02 (11). If certified by an
5 appropriate record custodian, recordings under this section shall be admissible ⁱⁿ as
6 evidence in any civil or criminal action or proceeding ~~arising out of the acts~~
7 ~~committed by a person relating to the events depicted in the recording.~~ ^{related to any alleged act or omission}

8 (11) ADVANCE REQUESTS FOR RECORDING. (a) *Definition.* In this subsection,
9 “principal” means an individual who executes an advance request for surgical
10 procedure recording instrument.

11 (b) *Advance requests for recording.* 1. An individual who is of sound mind and
12 has attained age 18 may voluntarily execute an advance request for surgical
13 procedure recording instrument. An individual for whom an adjudication of
14 incompetence and appointment of a guardian of the individual is in effect in this state
15 is presumed not to be of sound mind for purposes of this subsection and for executing
16 an advance request for surgical procedure recording instrument.

17 2. The desires of a principal who does not have incapacity supersede the effect
18 of his or her advance request for surgical procedure recording instrument at all
19 times.

20 3. The department shall prepare and provide copies of an advance request for
21 surgical procedure recording instrument and accompanying information for
22 distribution in quantities to health care professionals, hospitals and other surgical
23 facilities, county clerks, and local bar associations and individually to private
24 persons. The department shall determine the form of the request form and
25 accompanying instructions. The department shall include on the form both an option

1 for requesting the recording of a specific single surgical procedure and an option for
2 requesting the recording of all future surgical procedures appropriate under this
3 section.

4 (c) *Advance request for recording; execution.* A valid advance request for
5 surgical procedure recording shall be all of the following:

6 1. In writing.

7 2. Dated and signed by the principal or by an individual who has attained age
8 18, at the express direction and in the presence of the principal.

9 3. Signed in the presence of a witness who is an individual who has attained
10 the age 18.

11 4. Voluntarily executed.

12 (d) *Revocation.* A principal may revoke his or her advance request for surgical
13 procedure recording instrument at any time by doing any of the following:

14 1. Canceling, defacing, obliterating, burning, tearing, or otherwise destroying
15 the advance request for surgical procedure recording instrument or directing
16 another in the presence of the principal to so destroy the advance request for surgical
17 procedure recording instrument.

18 2. Executing a statement, in writing, that is signed and dated by the principal,
19 expressing the principal's intent to revoke the advance request for surgical procedure
20 recording instrument.

21 3. Verbally expressing the desire to revoke the advance request for surgical
22 procedure recording instrument in the presence of a witness.

23 4. Executing a subsequent advance request for surgical procedure recording
24 instrument that replaces an existing advance request for surgical procedure
25 recording instrument.

***NOTE: While based upon the provisions relating to advance directives and powers of attorney for health care, the execution and revocation requirements here are not as restrictive as those included in those chapters, based on the nature of the decision making at issue. These requirements can be modified to be more or less restrictive if you want.

1 (12) PENALTIES. (a) Except as provided under sub. (6), a health care provider
 2 who knowingly and willfully refuses to comply with a ^{surgical} patient request to have his or
 3 her surgical procedure recorded may be fined not more than \$25,000 or imprisoned
 4 for not more than 9 months or both.

INS
6-4

***NOTE: This draft includes a penalty provision for failing to make the required video. The penalty included is one similar to some listed under s. 146.84 (2), which has penalties for violations relating to patient health care records. This can be modified if you want something else. I did not include provisions here (in s. 50.373) for tampering with the video recordings or other related records because if the videos are patient health records as we have discussed, they will be subject to the penalties already set forth under s. 146.84 for violations related to patient health care records.

5

(b) ^{g (c)} Whoever intentionally conceals, cancels, defaces, obliterates, damages, or
 6 destroys an advance request for surgical procedure recording instrument created
 7 under sub. (11) without the consent of the principal for that instrument may be fined
 8 not more than \$500 or imprisoned for not more than 30 days or both.

9 SECTION 2. 146.81 (4) of the statutes is amended to read:

10 146.81 (4) "Patient health care records" means all records related to the health
 11 of a patient prepared by or under the supervision of a health care provider; all video
 12 recordings under s. 50.373 related to the ^{surgical} patient; and all records made by an
 13 ambulance service provider, as defined in s. 256.01 (3), an emergency medical
 14 technician, as defined in s. 256.01 (5), or a first responder, as defined in s. 256.01 (9),
 15 in administering emergency care procedures to and handling and transporting sick,
 16 disabled, or injured individuals. "Patient health care records" includes billing
 17 statements and invoices for treatment or services provided by a health care provider
 18 and includes health summary forms prepared under s. 302.388 (2). "Patient health
 19 care records" does not include those records subject to s. 51.30, reports collected

1 under s. 69.186, records of tests administered under s. 252.15 (5g) or (5j), 343.305,
2 938.296 (4) or (5) or 968.38 (4) or (5), records related to sales of pseudoephedrine
3 products, as defined in s. 961.01 (20c), that are maintained by pharmacies under s.
4 961.235, fetal monitor tracings, as defined under s. 146.817 (1), or a pupil's physical
5 health records maintained by a school under s. 118.125.

6 **SECTION 3.** 146.83 (3f) (b) 3m. of the statutes is created to read:

7 146.83 **(3f)** (b) 3m. Except as provided in s. 50.373, for a copy of a video
8 recording of a surgical procedure, \$35 per copy.

9 (END)

INSERT

2015-2016 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1589/P3ins
SWB:wlj:jm

INSERT ANALYSIS

This bill creates a requirement for surgical facilities to offer surgical patients the option to have their surgical procedures videotaped. For purposes of this bill, a surgical procedure is one for which a patient is given a general anesthetic. If a patient makes a request to have a surgical procedure recorded, this bill requires that the hospital facility, or its designee, record the surgical procedure itself with both audio and color video, and record with color video any entryway to or exit from the surgical suite during the time period reserved for the surgery of the requesting patient, including preparation time. If the patient is incapacitated, the surgical facility is required to provide a person authorized by the patient with notice of the option for video recording. Under the bill, in certain limited emergency circumstances, surgical facilities are not required to provide the option of recording.

Video recordings of surgical procedures created under this bill must be treated as patient health care records and are subject to the same protections as other medical records. The bill specifies that once a recording is complete, the surgical facility or its designee must preserve the recording as part of the patient's health care records but delete copies of the recording from the recording device and elsewhere. The Department of Health Services (DHS) is required under this bill to promulgate rules establishing standards relating to the recording equipment, the recording, and fees to be charged for completing the recording and for obtaining copies of the recording. Upon request from the patient or a person authorized by the patient, the surgical facility must provide one copy of the recording free of charge. Recordings completed under this bill are admissible as evidence in any civil or criminal action or proceeding related to any alleged act or omission depicted in the recording.

Under this bill, a patient may complete an advance request for recording, which permits an individual who is of sound mind and over the age of 18 to request videotaping for future surgical procedures. The individual may complete an advance request for a single specific surgical procedure or for all future surgical procedures to which this bill would apply. An advance request must be completed voluntarily, and must be in writing and signed and dated in the presence of a witness over the age of 18. The advance request may be revoked at any time. DHS must promulgate any rules necessary for implementation of the advance request process.

This bill provides that a health care provider who knowingly and willfully refuses to comply with a patient request for recording is subject to a fine of up to \$25,000 or imprisonment for not more than 9 months, or both. A surgical facility that fails to provide a required notice of the option for recording is subject to a forfeiture of up to \$20,000 for each violation. Finally, whoever intentionally conceals, cancels, defaces, obliterates, damages, or destroys an advance request for recording without consent may be fined up to \$500, imprisoned for 30 days, or both.

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Recording

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For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

(END INSERT ANALYSIS)

INSERT 2-7

1 (2) OPTION FOR RECORDING. (a) A surgical facility shall provide a surgical
2 patient the option to have the surgical facility or the surgical facility's designee make
3 a color video recording, including both audio and video, of the patient's surgical
4 procedure at the patient's expense as described under sub. (9).

5 (b) A surgical facility shall notify a surgical patient or, if the surgical patient
6 is incapacitated, a person authorized by the patient of the option to have a recording
7 made under par. (a).^{under s. 146.81(5)}
^

(END INSERT 2-7)

INSERT 3-1

8 (6) EXCEPTION FOR EMERGENCIES. (a) Notwithstanding sub. (2), a surgical
9 facility is not required to provide the option of a video recording under this section
10 if the health care provider determines in the exercise of his or her professional
11 judgment that either of the following is true:

- 12 1. Immediate surgery is necessary to avert death.
13 2. Other circumstances exist such that videotaping^{recording} would cause a delay that
14 would create a serious risk of substantial and irreversible impairment of one or more
15 of the surgical patient's bodily functions.

16 (b) The health care provider shall inform the patient, or person authorized by
17 the patient,^{under s. 146.81(5)} if applicable, of the medical indications supporting the health care
^
surgical
^

1 provider's reasonable medical judgment that either of the emergency conditions
2 under par. (a) exist.^s
^

(END INSERT 3-1)

INSERT 3-9

3 (b) The department shall promulgate rules establishing the fees under sub. (9)^(a)
4 and any rules the department determines are necessary for implementation of sub.
5 (11).
^

(END INSERT 3-9)

INSERT 6-4

6 (b) Except as provided under sub. (6), a surgical facility that fails to provide the
7 notice required under sub. (2)^(b) may be subject to a forfeiture of not more than \$20,000
8 for each violation.
^

(END INSERT 6-4)

Call w/ Rep. Sinicki

4/21

- ① Add definition of general anesthetic or general anesthesia
- ② Add specific language to allow parent/guardian of minor child to request video
- ③ Modify penalties to be ~~penalties~~ w/ high \$\$
- all at \$25,000
- ④ Make clear in analysis that penalties of ch. 146 (146.84) apply