



State of Wisconsin  
2015 - 2016 LEGISLATURE

LRB-1589/P6

SWB:wlj&cjs:cs

stays

RM/le/wj

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

INSERT

IN 5/6  
Requested ASAP  
Thursday 5/7

- 1 AN ACT *to amend* 146.81 (4); and *to create* 50.373, 146.83 (3f) (b) 3m. and 655.27
- 2 (1g) of the statutes; **relating to:** video recording of surgical procedures,
- 3 *granting rule-making authority,* requiring the exercise of rule-making authority, and providing penalties.

*hospitals, ambulatory surgical centers, or any other places where surgical procedures*

**Analysis by the Legislative Reference Bureau**

*are performed (surgical facilities)*

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 surgical facility, or its designee, record the surgical procedure with both audio and color video, and record with color video any entryway to or exit from the surgical suite during the time reserved for the surgery of the requesting patient, including preparation time. If the surgical patient is incapacitated, the surgical facility is required to provide a person authorized by the patient with notice of the option for video recording, and that person may request that a recording be made. Similarly, if the surgical patient is a minor, the surgical facility must notify a parent, guardian, or legal custodian of the option for video recording and allow that person to make a request for a recording on behalf of the minor. The bill also allows physicians to request that a recording be made, and a surgical facility must comply with the request so long as certain conditions are met, including that the surgical patient or person authorized by the patient does not object. Under the bill, in certain limited emergency circumstances, surgical facilities are not required to provide the option of recording.

In return for exercising the option to have a surgical procedure recorded, under the bill, the surgical patient or, if applicable, parent, guardian, legal custodian, or

person authorized by the patient may disclose the recording only to limited authorized individuals unless confidentiality is waived by the physician. Video recordings of surgical procedures created under this bill are otherwise treated as patient health care records and are subject to the same protections as other medical records including all criminal and civil penalties for improper disclosure or destruction. 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 record 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 the fees to be charged for completing the recording and for obtaining copies of the recording. Upon request, the surgical facility must provide to the patient, person authorized by the patient, or parent, guardian, or legal custodian of the patient one copy of the recording free of charge. Recordings 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.

DHS must also promulgate rules regarding recording and may promulgate rules as necessary to implement and administer the provisions of the bill.

Under this bill, a surgical 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 video recording 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 refuses to comply with a patient request for recording is subject to a forfeiture of up to \$25,000 for each violation. A surgical facility that fails to provide a required notice of the option for recording is subject to a forfeiture of up to \$25,000 for each violation. Whoever intentionally conceals, cancels, defaces, obliterates, damages, or destroys an advance request for recording without consent may be subject to a forfeiture of up to \$25,000 for each violation. Finally, a patient, parent, guardian, legal custodian, or person authorized by a patient who knowingly violates the confidentiality provision and discloses a video to an unauthorized individual is subject to a forfeiture of up to \$25,000 for each violation.

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

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

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

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

3           (a) “General anesthesia” means a temporary status commonly produced by the  
4 administration of certain intravenous drugs and inhaled gases that cause a patient  
5 to be unconscious and unable to feel pain during a medical procedure.

6           (b) “Health care provider” means a person or entity described under s. 146.81  
7 (1) (a) to (p) and includes any surgical facility under par. (e).

8           (c) “Incapacitated” means unable to receive and evaluate information  
9 effectively or to communicate decisions to such an extent that an individual lacks the  
10 capacity to manage his or her health care decisions.

11           (d) “Patient health care records” has the meaning given in s. 146.81 (4).

12           (e) “Surgical facility” means a hospital, as defined in s. 50.33 (2), an ambulatory  
13 surgical center, as defined in 42 CFR 416.2, or any other place where a surgical  
14 procedure is performed.

15           (f) “Surgical patient” means a patient who is scheduled to undergo a surgical  
16 procedure.

17           (g) “Surgical procedure” means a surgical procedure for which a patient is  
18 under general anesthesia.

19           **(2) OPTION FOR RECORDING.** (a) A surgical facility shall provide a surgical  
20 patient the option to have the surgical facility or the surgical facility’s designee make  
21 a color video recording, including both audio and video and display of the time and  
22 date, of the patient’s surgical procedure at the patient’s expense as described under  
23 sub. (10).

1 (b) 1. A surgical facility shall notify a surgical patient or, if the surgical patient  
2 is incapacitated, a person authorized by the patient under s. 146.81 (5) of the option  
3 to have a recording made under par. (a).

4 2. If the surgical patient is a minor child, the surgical facility shall notify the  
5 minor child's parent, guardian, or legal custodian of the option to have a recording  
6 made under par. (a).

7 (c) A physician who is scheduled to participate as a physician in a surgical  
8 patient's surgical procedure may request that the procedure be video recorded under  
9 the procedures described in this subsection. The surgical facility shall comply with  
10 the physician's request if all of the following are true:

11 1. The requesting physician has informed the patient or, if applicable, a parent,  
12 guardian, legal custodian, or a person authorized by the patient, of the physician's  
13 request for video recording and the reason the physician has requested that  
14 recording.

15 2. The surgical patient, or if applicable, the parent, guardian, legal custodian,  
16 or person authorized by the patient under s. 146.81 (5), does not object to the video  
17 recording.

18 (d) If a physician requests video recording under par. (c), the surgical facility  
19 may not charge the surgical patient any fees under sub. (10) (a).

20 (e) A surgical patient, or if applicable, parent, guardian, legal custodian, or  
21 person authorized by the patient under s. 146.81 (5), may not disclose, unless the  
22 physician or physicians involved waive confidentiality, the content of a video  
23 recording created under this section except to health care providers providing care  
24 to the surgical patient, to immediate family members or a person authorized by the  
25 patient under s. 146.81 (5), or to an attorney or an attorney's staff for the purpose of

1 obtaining legal advice. If legal action is taken, the surgical patient may disclose the  
2 video recording to additional individuals if necessary for the case, but it shall be filed  
3 under seal if permitted. In all other respects, recordings under this section shall be  
4 treated as patient health care records.

5 **(3) ENTRY AND EXIT RECORDING.** If a surgical patient requests to have his or her  
6 surgical procedure recorded under sub. (2) (a), the surgical facility or its designee  
7 shall also make a color video recording, including display of the time and date, of any  
8 entryway to or exit from the surgical suite in which the surgical procedure being  
9 recorded is taking place, during the time from which the surgical suite is being  
10 prepared for the surgery of the patient being recorded until that surgical patient  
11 exits the suite. A surgical facility is not required to record audio in making the  
12 recording under this subsection.

13 **(4) EQUIPMENT AND TECHNICAL ASSISTANCE.** A surgical facility shall have  
14 available appropriate video recording equipment and technical assistance as  
15 determined by the department in rules promulgated under sub. (8) to comply with  
16 a surgical patient request for a recording of his or her surgical procedure.

17 **(5) INCAPACITY.** If a surgical patient is incapacitated, a person authorized by  
18 the patient under s. 146.81 (5) may request that a recording be made of the patient's  
19 surgical procedure under sub. (2) (a).

20 **(6) MINORS.** If a surgical patient is a minor child, a parent, guardian, or legal  
21 custodian may request that a recording be made of the minor child's surgical  
22 procedure under sub. (2) (a).

23 **(7) EXCEPTION FOR EMERGENCIES.** (a) Notwithstanding sub. (2), a surgical  
24 facility is not required to provide the option of a video recording under this section

1 if the health care provider determines in the exercise of his or her professional  
2 judgment that either of the following is true:

- 3 1. Immediate surgery is necessary to avert death.
- 4 2. Other circumstances exist such that video recording would cause a delay that  
5 would create a serious risk of substantial and irreversible impairment of one or more  
6 of the surgical patient's bodily functions.

7 (b) The health care provider shall inform the surgical patient, or the parent,  
8 guardian, or legal custodian or person authorized by the patient under s. 146.81 (5),  
9 if applicable, of the medical indications supporting the health care provider's  
10 reasonable medical judgment that either of the emergency conditions under par. (a)  
11 exists.

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6-11

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

16 (b) The department shall promulgate rules establishing the fees under sub. (10)  
17 (a) and any rules the department determines are necessary for implementation of  
18 sub. (12).

19 (9) PRESERVATION AND DESTRUCTION. After the recording of a surgical procedure  
20 under this section is complete, the surgical facility or its designee shall promptly do  
21 all of the following:

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

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

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

7 (b) A surgical facility may charge fees as set forth in s. 146.83 (3f) for providing  
8 copies from a surgical patient's health care record of a recording under this section,  
9 except that the surgical facility shall provide, upon request, one copy of any recording  
10 taken under this section to a surgical patient, a person authorized by the surgical  
11 patient under s. 146.81 (5), or a parent, guardian, or legal custodian of a minor  
12 surgical patient free of charge.

13 (11) 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  
16 health care records under ss. 908.03 (6m) and 909.02 (11). If certified by an  
17 appropriate record custodian, recordings under this section shall be admissible as  
18 evidence in any civil or criminal action or proceeding related to any alleged act or  
19 omission depicted in the recording.

20 (12) ADVANCE REQUESTS FOR RECORDING. (a) *Definition.* In this subsection,  
21 "principal" means an individual who executes an advance request for surgical  
22 procedure recording instrument.

23 (b) *Advance requests for recording.* 1. An individual who is of sound mind and  
24 has attained age 18 may voluntarily execute an advance request for surgical  
25 procedure recording instrument. An individual for whom an adjudication of

1 incompetence and appointment of a guardian of the individual is in effect in this state  
2 is presumed not to be of sound mind for purposes of this subsection and for executing  
3 an advance request for surgical procedure recording instrument.

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

7 3. The department shall prepare and provide copies of an advance request for  
8 surgical procedure recording instrument and accompanying information for  
9 distribution in quantities to health care professionals, hospitals and other surgical  
10 facilities, county clerks, and local bar associations and individually to private  
11 persons. The department shall determine the form of the request form and  
12 accompanying instructions. The department shall include on the form both an option  
13 for requesting the recording of a specific single surgical procedure and an option for  
14 requesting the recording of all future surgical procedures appropriate under this  
15 section. The department shall also include on the form a statement to the effect that  
16 a principal who exercises the option for video recording either a single surgical  
17 procedure or all future surgical procedures agrees that, unless the physician or  
18 physicians involved waive confidentiality, a video recording created under this  
19 section is confidential and the principal or, if applicable, a parent, guardian, legal  
20 custodian, or person authorized by a patient under s. 146.81 (5), may disclose it only  
21 to health care providers providing care to the principal, to immediate family  
22 members or a person authorized by the patient under s. 146.81 (5), or to an attorney  
23 or an attorney's staff for the purpose of obtaining legal advice, and if legal action is  
24 taken, the principal may disclose the video recording to additional individuals if  
25 necessary for the case, but it must be filed under seal if permitted.



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

3 1. In writing.

4 2. Dated and signed by the principal or by an individual who has attained age  
5 18, at the express direction and in the presence of the principal.

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

8 4. Voluntarily executed.

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

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

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

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

20 4. Executing a subsequent advance request for surgical procedure recording  
21 instrument that replaces an existing advance request for surgical procedure  
22 recording instrument.

23 (13) PENALTIES. (a) Except as provided under sub. (7), a health care provider  
24 who knowingly refuses to comply with a surgical patient request to have his or her

1 surgical procedure recorded may be subject to a forfeiture of not more than \$25,000  
2 for each violation.

3 (b) Except as provided under sub. (7), a surgical facility that fails to provide a  
4 notice required under sub. (2) (b) may be subject to a forfeiture of not more than  
5 \$25,000 for each violation.

6 (c) Whoever intentionally conceals, cancels, defaces, obliterates, damages, or  
7 destroys an advance request for surgical procedure recording instrument created  
8 under sub. (12) without the consent of the principal for that instrument may be  
9 subject to a forfeiture of not more than \$25,000 for each violation.

10 (d) A surgical patient, parent, guardian, legal custodian, or person authorized  
11 by a patient under s. 146.81 (5) who knowingly violates sub. (2) (e) may be subject  
12 to a forfeiture of not more than \$25,000 for each violation.

13 (14) FORFEITURE PROCEDURE. (a) The department may directly assess  
14 forfeitures provided for under sub. (13). If the department determines that a  
15 forfeiture should be assessed for a particular violation, the department shall send a  
16 notice of assessment to the health care provider. The notice shall specify the amount  
17 of the forfeiture assessed, the violation and the statute or rule alleged to have been  
18 violated, and shall inform the hospital of the right to a hearing under par. (b).

19 (b) A health care provider may contest an assessment of a forfeiture by sending,  
20 within 30 days after receipt of notice under par. (a), a written request for a hearing  
21 under s. 227.44 to the division of hearings and appeals created under s. 15.103 (1).  
22 The administrator of the division may designate a hearing examiner to preside over  
23 the case and recommend a decision to the administrator under s. 227.46. The  
24 decision of the administrator of the division shall be the final administrative  
25 decision. The division shall commence the hearing within 60 days after receipt of the

1 request for a hearing and shall issue a final decision within 30 days after the close  
2 of the hearing. Proceedings before the division are governed by ch. 227. In any  
3 petition for judicial review of a decision by the division, the party, other than the  
4 petitioner, who was in the proceeding before the division shall be the named  
5 respondent.

6 (c) All forfeitures shall be paid to the department within 30 days after receipt  
7 of notice of assessment or, if the forfeiture is contested under par. (b), within 30 days  
8 after receipt of the final decision after exhaustion of administrative review, unless  
9 the final decision is appealed and the order is stayed by court order. The department  
10 shall remit all forfeitures paid to the secretary of administration for deposit in the  
11 injured patients and families compensation fund under s. 655.27.

12 (d) The attorney general may bring an action in the name of the state to collect  
13 any forfeiture imposed under sub. (13) if the forfeiture has not been paid following  
14 the exhaustion of all administrative and judicial reviews. The only issue to be  
15 contested in any such action shall be whether the forfeiture has been paid.

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

17 146.81 (4) “Patient health care records” means all records related to the health  
18 of a patient prepared by or under the supervision of a health care provider; all video  
19 recordings under s. 50.373 related to the surgical patient; and all records made by  
20 an ambulance service provider, as defined in s. 256.01 (3), an emergency medical  
21 technician, as defined in s. 256.01 (5), or a first responder, as defined in s. 256.01 (9),  
22 in administering emergency care procedures to and handling and transporting sick,  
23 disabled, or injured individuals. “Patient health care records” includes billing  
24 statements and invoices for treatment or services provided by a health care provider  
25 and includes health summary forms prepared under s. 302.388 (2). “Patient health

**SECTION 2**

1 care records” does not include those records subject to s. 51.30, reports collected  
2 under s. 69.186, records of tests administered under s. 252.15 (5g) or (5j), 343.305,  
3 938.296 (4) or (5) or 968.38 (4) or (5), records related to sales of pseudoephedrine  
4 products, as defined in s. 961.01 (20c), that are maintained by pharmacies under s.  
5 961.235, fetal monitor tracings, as defined under s. 146.817 (1), or a pupil’s physical  
6 health records maintained by a school under s. 118.125.

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

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

10 **SECTION 4.** 655.27 (1g) of the statutes is created to read:

11 655.27 (1g) DEPOSIT OF FORFEITURES. Forfeitures paid under s. 50.373 (13) shall  
12 be deposited in the fund under sub. (1).

13 **SECTION 5. Effective date.**

14 (1) This act takes effect on the first day of the 13th month beginning after  
15 publication.

16 (END)

*INSERT*

INSERT 6-11

1           **(8) RULES.** (a) The department shall promulgate rules establishing all of the  
2 following:

3           1. Standards for video recording of surgical procedures and the use of video  
4 recording equipment in the surgery setting to ensure such recordings are  
5 professional and of sufficient quality to accurately portray what takes place during  
6 a surgical procedure.

7           2. The fees under sub. (10) (a).

8           (b) The department may promulgate rules, as necessary, to implement and  
9 administer this section, including any of the following:

10           1. Establishing criteria and procedures for providing notice and the option for  
11 video recording under sub. (2).

12           2. Implementing the requirements regarding preservation and destruction of  
13 recordings under sub. (9).

14           3. Establishing standards, procedures, and forms for advance requests for  
15 recording under sub. (12).

16           4. Implementing the forfeiture procedures under sub. (14).

**(END INSERT 6-11)**

Per Rep. Sinicki's office - Instructions 5/7

- ① Pg 4/<sup>sub. 2(b)</sup> and other places where notice referenced, include as appropriate that notice must include the details related to the option under the bill - the conditions (disclosure limits), advance option, practitioner option to request, etc.
- ② Move rules description in analysis to 2nd to last ¶, need only one reference to fees
- ③ Take out section 2(d)
- ④ Modify use of term physician to something more inclusive as needs to include more than MDs - others that do surgical procedures with patient under general anesthesia
- ⑤ Add something to allow for scenario that DHS rules might not be done by effective date, i.e., emergency rule procedures.



State of Wisconsin  
2015 - 2016 LEGISLATURE

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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1 AN ACT to amend 146.81 (4); and to create 50.373, 146.83 (3f) (b) 3m. and 655.27  
2 (1g) of the statutes; relating to: video recording of surgical procedures,  
3 granting rule-making authority, requiring the exercise of rule-making  
4 authority, and providing penalties.

providing an exemption  
from emergency rule procedures

Analysis by the Legislative Reference Bureau

This bill creates a requirement for hospitals, ambulatory surgical centers, or any other places where surgical procedures are performed (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 surgical facility, or its designee, record the surgical procedure with both audio and color video, and record with color video any entryway to or exit from the surgical suite during the time reserved for the surgery of the requesting patient, including preparation time. If the surgical patient is incapacitated, the surgical facility is required to provide a person authorized by the patient with notice of the option for video recording, and that person may request that a recording be made. Similarly, if the surgical patient is a minor, the surgical facility must notify a parent, guardian, or legal custodian of the option for video recording and allow that person to make a request for a recording on behalf of the minor. The bill also allows physicians to request that a recording be made, and a surgical facility must comply with the request so long as certain conditions are met, including that the surgical patient or person authorized by the patient does not object. Under the bill, in certain

Surgical facilities must provide notice of the option and add the related conditions set forth in the bill.

→ a physician or certain other individual who holds a valid license or other credential allowing him or her to perform surgical procedures for which a patient is under general anesthesia (surgical practitioner) and is scheduled to perform a surgical patient's surgical procedure who

that allows

limited emergency circumstances, surgical facilities are not required to provide the option of recording.

In return for exercising the option to have a surgical procedure recorded, under the bill, the surgical patient or, if applicable, parent, guardian, legal custodian, or person authorized by the patient may disclose the recording only to limited authorized individuals unless confidentiality is waived by the physician. Video recordings of surgical procedures created under this bill are otherwise treated as patient health care records and are subject to the same protections as other medical records including all criminal and civil penalties for improper disclosure or destruction. 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 record but delete copies of the recording from the recording device and elsewhere.

*surgical practitioners*

The Department of Health Services (DHS) is required under this bill to promulgate rules establishing standards relating to the recording equipment, the recording, and the fees to be charged for completing the recording and for obtaining copies of the recording. DHS must also promulgate rules regarding fees and may promulgate additional rules as necessary to implement and administer the provisions of the bill.

*Map to  
INS A  
(as modified)*

Upon request, the surgical facility must provide to the patient, person authorized by the patient, or parent, guardian, or legal custodian of the patient one copy of the recording free of charge. Recordings 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 surgical 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 video recording 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.

This bill provides that a health care provider who knowingly refuses to comply with a patient request for recording is subject to a forfeiture of up to \$25,000 for each violation. A surgical facility that fails to provide a required notice of the option for recording is subject to a forfeiture of up to \$25,000 for each violation. Whoever intentionally conceals, cancels, defaces, obliterates, damages, or destroys an advance request for recording without consent may be subject to a forfeiture of up to \$25,000 for each violation. Finally, a patient, parent, guardian, legal custodian, or person authorized by a patient who knowingly violates the confidentiality provision and discloses a video to an unauthorized individual is subject to a forfeiture of up to \$25,000 for each violation.

*including information regarding the procedures, the conditions, the surgical practitioners request option and the advance request option*

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

*New A: Under this bill, the INS A*

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



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

2 50.373 Video recording of surgical procedures. (1) DEFINITIONS. In this  
3 section:

4 (a) "General anesthesia" means a temporary status commonly produced by the  
5 administration of certain intravenous drugs and inhaled gases that cause a patient  
6 to be unconscious and unable to feel pain during a medical procedure.

7 (b) "Health care provider" means a person or entity described under s. 146.81  
8 (1) (a) to (p) and includes any surgical facility under par. (e).

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

12 (d) "Patient health care records" has the meaning given in s. 146.81 (4).

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

16 (f) "Surgical patient" means a patient who is scheduled to undergo a surgical  
17 procedure.

18 (g) "Surgical procedure" means a surgical procedure for which a patient is  
19 under general anesthesia.

20 (2) OPTION FOR RECORDING. (a) A surgical facility shall provide a surgical  
21 patient the option to have the surgical facility or the surgical facility's designee make  
22 a color video recording, including both audio and video and display of the time and  
23 date, of the patient's surgical procedure at the patient's expense as described under  
24 sub. (10).

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(g) (h)

SECTION 1

1 (b) 1. A surgical facility shall notify a surgical patient or, if the surgical patient  
2 is incapacitated, a person authorized by the patient under s. 146.81 (5) of the option  
3 to have a recording made under par. (a). *and of the procedures, fees, conditions, the surgical  
practitioner's request option, and the advance  
request option*

4 2. If the surgical patient is a minor child, the surgical facility shall notify the  
5 minor child's parent, guardian, or legal custodian of the option to have a recording,  
6 made under par. (a). *and of the procedures, fees, conditions, the surgical practitioner's  
request option, and the advance request  
option*

7 (c) A physician *e* who is scheduled to participate as a physician *e* in a surgical  
8 patient's surgical procedure may request that the procedure be video recorded under  
9 the procedures described in this subsection. The surgical facility shall comply with  
10 the physician's *e surgical practitioner's* request if all of the following are true:

11 1. The requesting physician *e surgical practitioner* has informed the patient or, if applicable, a parent,  
12 guardian, legal custodian, or a person authorized by the patient, of the physician's  
13 *surgical practitioner's* request for video recording and the reason the physician *e surgical practitioner* has requested that  
14 recording.

15 2. The surgical patient, or if applicable, the parent, guardian, legal custodian,  
16 or person authorized by the patient under s. 146.81 (5), does not object to the video  
17 recording.

18 (d) If a physician requests video recording under par. (c), the surgical facility  
19 may not charge the surgical patient any fees under sub. (10) (a).

20 (e) *(d)* A surgical patient, or if applicable, parent, guardian, legal custodian, or  
21 person authorized by the patient under s. 146.81 (5), may not disclose, unless the  
22 physician or physicians *e surgical practitioner* involved waives confidentiality, the content of a video  
23 recording created under this section except to health care providers providing care  
24 to the surgical patient, to immediate family members or a person authorized by the  
25 patient under s. 146.81 (5), or to an attorney or an attorney's staff for the purpose of

1 obtaining legal advice. If legal action is taken, the surgical patient may disclose the  
2 video recording to additional individuals if necessary for the case, but it shall be filed  
3 under seal if permitted. In all other respects, recordings under this section shall be  
4 treated as patient health care records.

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

13 (4) EQUIPMENT AND TECHNICAL ASSISTANCE. A surgical facility shall have  
14 available appropriate video recording equipment and technical assistance as  
15 determined by the department in rules promulgated under sub. (8) to comply with  
16 a surgical patient request for a recording of his or her surgical procedure.

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

20 (6) MINORS. If a surgical patient is a minor child, a parent, guardian, or legal  
21 custodian may request that a recording be made of the minor child's surgical  
22 procedure under sub. (2) (a).

23 (7) EXCEPTION FOR EMERGENCIES. (a) Notwithstanding sub. (2), a surgical  
24 facility is not required to provide the option of a video recording under this section

1

if the health care provider<sup>e surgical practitioner</sup> determines in the exercise of his or her professional judgment that either of the following is true:

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

(b) The health care provider shall inform the surgical patient, or the parent, guardian, or legal custodian or person authorized by the patient under s. 146.81 (5), if applicable, of the medical indications supporting the health care provider's<sup>e surgical practitioners</sup> reasonable medical judgment that either of the emergency conditions under par. (a) exists.

(8) RULES. (a) The department shall promulgate rules establishing all of the following:

- 1. Standards for video recording of surgical procedures and the use of video recording equipment in the surgery setting to ensure such recordings are professional and of sufficient quality to accurately portray what takes place during a surgical procedure.
- 2. The fees under sub. (10) (a).

(b) The department may promulgate rules, as necessary, to implement and administer this section, including any of the following:

- 1. Establishing criteria and procedures for providing notice and the option for video recording under sub. (2).
- 2. Implementing the requirements regarding preservation and destruction of recordings under sub. (9).

1           3. Establishing standards, procedures, and forms for advance requests for  
2 recording under sub. (12).

3           4. Implementing the forfeiture procedures under sub. (14).

4           **(9) PRESERVATION AND DESTRUCTION.** After the recording of a surgical procedure  
5 under this section is complete, the surgical facility or its designee shall promptly do  
6 all of the following:

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

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

13          **(10) FEES.** (a) A surgical facility may charge a reasonable fee, as determined  
14 by the department, for the surgical facility's videography services provided under  
15 this section and its storage of the recording of the surgical procedure.

16          (b) A surgical facility may charge fees as set forth in s. 146.83 (3f) for providing  
17 copies from a surgical patient's health care record of a recording under this section,  
18 except that the surgical facility shall provide, upon request, one copy of any recording  
19 taken under this section to a surgical patient, a person authorized by the surgical  
20 patient under s. 146.81 (5), or a parent, guardian, or legal custodian of a minor  
21 surgical patient free of charge.

22          **(11) ADMISSIBILITY OF RECORDING.** For purposes of admissibility in a civil or  
23 criminal action or proceeding, an audiovisual recording created under this section  
24 is a patient health care record under s. 146.81 and shall be treated as other patient  
25 health care records under ss. 908.03 (6m) and 909.02 (11). If certified by an

1 appropriate record custodian, recordings under this section shall be admissible as  
2 evidence in any civil or criminal action or proceeding related to any alleged act or  
3 omission depicted in the recording.

4 (12) ADVANCE REQUESTS FOR RECORDING. (a) *Definition.* In this subsection,  
5 “principal” means an individual who executes an advance request for surgical  
6 procedure recording instrument.

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

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

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

1 procedure or all future surgical procedures agrees that, unless the physician or  
2 physicians <sup>e surgical practioner(s)</sup> involved waive confidentiality, a video recording created under this  
3 section is confidential and the principal or, if applicable, a parent, guardian, legal  
4 custodian, or person authorized by a patient under s. 146.81 (5), may disclose it only  
5 to health care providers providing care to the principal, to immediate family  
6 members or a person authorized by the patient under s. 146.81 (5), or to an attorney  
7 or an attorney's staff for the purpose of obtaining legal advice, and if legal action is  
8 taken, the principal may disclose the video recording to additional individuals if  
9 necessary for the case, but it must be filed under seal if permitted.

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

- 12 1. In writing.
- 13 2. Dated and signed by the principal or by an individual who has attained age  
14 18, at the express direction and in the presence of the principal.
- 15 3. Signed in the presence of a witness who is an individual who has attained  
16 the age 18.
- 17 4. Voluntarily executed.

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

- 20 1. Canceling, defacing, obliterating, burning, tearing, or otherwise destroying  
21 the advance request for surgical procedure recording instrument or directing  
22 another in the presence of the principal to so destroy the advance request for surgical  
23 procedure recording instrument.

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

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

6           4. Executing a subsequent advance request for surgical procedure recording  
7           instrument that replaces an existing advance request for surgical procedure  
8           recording instrument.

9           **(13) PENALTIES.** (a) Except as provided under sub. (7), a health care provider  
10          who knowingly refuses to comply with a surgical patient request to have his or her  
11          surgical procedure recorded may be subject to a forfeiture of not more than \$25,000  
12          for each violation.

13          (b) Except as provided under sub. (7), a surgical facility that fails to provide a  
14          notice required under sub. (2) (b) may be subject to a forfeiture of not more than  
15          \$25,000 for each violation.

16          (c) Whoever intentionally conceals, cancels, defaces, obliterates, damages, or  
17          destroys an advance request for surgical procedure recording instrument created  
18          under sub. (12) without the consent of the principal for that instrument may be  
19          subject to a forfeiture of not more than \$25,000 for each violation.

20          (d) A surgical patient, parent, guardian, legal custodian, or person authorized  
21          by a patient under s. 146.81 (5) who knowingly violates sub. (2) <sup>(d)</sup> ~~(e)~~ may be subject  
22          to a forfeiture of not more than \$25,000 for each violation.

23          **(14) FORFEITURE PROCEDURE.** (a) The department may directly assess  
24          forfeitures provided for under sub. (13). If the department determines that a  
25          forfeiture should be assessed for a particular violation, the department shall send a



1 notice of assessment to the health care provider. The notice shall specify the amount  
2 of the forfeiture assessed, the violation and the statute or rule alleged to have been  
3 violated, and shall inform the hospital of the right to a hearing under par. (b).

4 (b) A health care provider may contest an assessment of a forfeiture by sending,  
5 within 30 days after receipt of notice under par. (a), a written request for a hearing  
6 under s. 227.44 to the division of hearings and appeals created under s. 15.103 (1).  
7 The administrator of the division may designate a hearing examiner to preside over  
8 the case and recommend a decision to the administrator under s. 227.46. The  
9 decision of the administrator of the division shall be the final administrative  
10 decision. The division shall commence the hearing within 60 days after receipt of the  
11 request for a hearing and shall issue a final decision within 30 days after the close  
12 of the hearing. Proceedings before the division are governed by ch. 227. In any  
13 petition for judicial review of a decision by the division, the party, other than the  
14 petitioner, who was in the proceeding before the division shall be the named  
15 respondent.

16 (c) All forfeitures shall be paid to the department within 30 days after receipt  
17 of notice of assessment or, if the forfeiture is contested under par. (b), within 30 days  
18 after receipt of the final decision after exhaustion of administrative review, unless  
19 the final decision is appealed and the order is stayed by court order. The department  
20 shall remit all forfeitures paid to the secretary of administration for deposit in the  
21 injured patients and families compensation fund under s. 655.27.

22 (d) The attorney general may bring an action in the name of the state to collect  
23 any forfeiture imposed under sub. (13) if the forfeiture has not been paid following  
24 the exhaustion of all administrative and judicial reviews. The only issue to be  
25 contested in any such action shall be whether the forfeiture has been paid.

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

2 146.81 (4) "Patient health care records" means all records related to the health  
3 of a patient prepared by or under the supervision of a health care provider; all video  
4 recordings under s. 50.373 related to the surgical patient; and all records made by  
5 an ambulance service provider, as defined in s. 256.01 (3), an emergency medical  
6 technician, as defined in s. 256.01 (5), or a first responder, as defined in s. 256.01 (9),  
7 in administering emergency care procedures to and handling and transporting sick,  
8 disabled, or injured individuals. "Patient health care records" includes billing  
9 statements and invoices for treatment or services provided by a health care provider  
10 and includes health summary forms prepared under s. 302.388 (2). "Patient health  
11 care records" does not include those records subject to s. 51.30, reports collected  
12 under s. 69.186, records of tests administered under s. 252.15 (5g) or (5j), 343.305,  
13 938.296 (4) or (5) or 968.38 (4) or (5), records related to sales of pseudoephedrine  
14 products, as defined in s. 961.01 (20c), that are maintained by pharmacies under s.  
15 961.235, fetal monitor tracings, as defined under s. 146.817 (1), or a pupil's physical  
16 health records maintained by a school under s. 118.125.

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

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

20 SECTION 4. 655.27 (1g) of the statutes is created to read:

21 655.27 (1g) DEPOSIT OF FORFEITURES. Forfeitures paid under s. 50.373 (13) shall  
22 be deposited in the fund under sub. (1).

23 SECTION 5. Effective date. <sup>6</sup> <sup>5</sup> <sup>1</sup> Not  
INS  
12-22  
Fixed comp

1

(1) This act takes effect on the first day of the 13th month beginning after publication except as follows:

2

3

~~SECTION 5 (1)~~

of this act takes effect on the day after publication.

(END)

Use A.R. 1

Use A.R. 2

INSERT

INSERT 3-17

1 (g) "Surgical practitioner" means a physician, surgeon, or osteopath under s.  
2 990.01 (28), an individual license to practice dentistry under ch. 447, and any other  
3 individual who holds a valid license or other credential allowing him or her to  
4 perform a surgical procedure.

that allows

(END INSERT 3-17)

INSERT 12-22

create A.R. 2  
5 **SECTION 1. Nonstatutory provisions.**

6 create A.R. 2 (1) EMERGENCY RULES. Using the procedure under section 227.24 of the statutes,  
7 the department of health services shall promulgate the rules required under section  
8 50.373 of the statutes, as created by this act, for the period before the effective date  
9 of the permanent rules promulgated under section 50.373 of the statutes, as created  
10 by this act, but not to exceed the period authorized under section 227.24 (1) (c) of the  
11 statutes, subject to extension under section 227.24 (2) of the statutes.  
12 Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of the statutes, the department  
13 of health services is not required to provide evidence that promulgating a rule under  
14 this paragraph <sup>or subsection</sup> as an emergency rule is necessary for the preservation of the public  
15 peace, health, safety, or welfare and is not required to provide a finding of emergency  
16 for a rule promulgated under this subsection. Notwithstanding section 227.24 (1) (e)  
17 1d. of the statutes, the department of health services is not required to prepare a  
18 statement of the scope of the rules promulgated under this subsection.  
19 Notwithstanding section 227.24 (1) (e) 1g. of the statutes, the department of health

1 services is not required to present the rules promulgated under this subsection to the  
2 governor for approval.

**(END INSERT 12-22)**



State of Wisconsin  
2015 - 2016 LEGISLATURE

stays  
LBB-1589/P8  
SWB:wlj&cjs:wj  
1  
RMR

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

No changes  
ASAP TODAY  
please

1 **AN ACT to amend** 146.81 (4); and **to create** 50.373, 146.83 (3f) (b) 3m. and 655.27  
2 (1g) of the statutes; **relating to:** video recording of surgical procedures,  
3 providing an exemption from emergency rule procedures, granting  
4 rule-making authority, requiring the exercise of rule-making authority, and  
5 providing penalties.

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***Analysis by the Legislative Reference Bureau***

This bill creates a requirement for hospitals, ambulatory surgical centers, or any other places where surgical procedures are performed (surgical facilities) to offer surgical patients the option to have their surgical procedures videotaped. Surgical facilities must provide notice of the option and all related procedures and conditions set forth in the bill. 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 surgical facility, or its designee, record the surgical procedure with both audio and color video, and record with color video any entryway to or exit from the surgical suite during the time reserved for the surgery of the requesting patient, including preparation time. If the surgical patient is incapacitated, the surgical facility is required to provide a person authorized by the patient with notice of the option for video recording, and that person may request that a recording be made. Similarly, if the surgical patient is a minor, the surgical facility must notify a parent, guardian, or legal custodian of the option for video recording and allow that person to make a request for a recording on behalf of the

minor. The bill also allows a physician or certain other individual who holds a valid license or other credential that allows him or her to perform surgical procedures for which a patient is under general anesthesia (surgical practitioner) and who is scheduled to perform a surgical patient's surgical procedure to request that a recording be made, and a surgical facility must comply with the request so long as certain conditions are met, including that the surgical patient or person authorized by the patient does not object. Under the bill, in certain limited emergency circumstances, surgical facilities are not required to provide the option of recording.

In return for exercising the option to have a surgical procedure recorded, under the bill, the surgical patient or, if applicable, parent, guardian, legal custodian, or person authorized by the patient may disclose the recording only to limited authorized individuals unless confidentiality is waived by the surgical practitioner. Video recordings of surgical procedures created under this bill are otherwise treated as patient health care records and are subject to the same protections as other medical records including all criminal and civil penalties for improper disclosure or destruction. 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 record but delete copies of the recording from the recording device and elsewhere. Upon request, the surgical facility must provide to the patient, person authorized by the patient, or parent, guardian, or legal custodian of the patient one copy of the recording free of charge. Recordings 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 surgical 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 video recording 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.

This bill provides that a health care provider who knowingly refuses to comply with a patient request for recording is subject to a forfeiture of up to \$25,000 for each violation. A surgical facility that fails to provide a required notice of the option for recording, including information regarding the procedures, fees, conditions, the surgical practitioner's request option, and the advance request option, is subject to a forfeiture of up to \$25,000 for each violation. Whoever intentionally conceals, cancels, defaces, obliterates, damages, or destroys an advance request for recording without consent may be subject to a forfeiture of up to \$25,000 for each violation. Finally, a patient, parent, guardian, legal custodian, or person authorized by a patient who knowingly violates the confidentiality provision and discloses a video to an unauthorized individual is subject to a forfeiture of up to \$25,000 for each violation.

Under this bill, the Department of Health Services (DHS) is required to promulgate rules establishing standards relating to the recording equipment, the recording, and the fees to be charged for completing the recording and for obtaining

copies of the recording. DHS may promulgate additional rules as necessary to implement and administer the provisions of the bill.

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

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

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

2           **50.373 Video recording of surgical procedures.** (1) **DEFINITIONS.** In this  
3 section:

4           (a) “General anesthesia” means a temporary status commonly produced by the  
5 administration of certain intravenous drugs and inhaled gases that cause a patient  
6 to be unconscious and unable to feel pain during a medical procedure.

7           (b) “Health care provider” means a person or entity described under s. 146.81  
8 (1) (a) to (p) and includes any surgical facility under par. (e).

9           (c) “Incapacitated” means unable to receive and evaluate information  
10 effectively or to communicate decisions to such an extent that an individual lacks the  
11 capacity to manage his or her health care decisions.

12           (d) “Patient health care records” has the meaning given in s. 146.81 (4).

13           (e) “Surgical facility” means a hospital, as defined in s. 50.33 (2), an ambulatory  
14 surgical center, as defined in 42 CFR 416.2, or any other place where a surgical  
15 procedure is performed.

16           (f) “Surgical patient” means a patient who is scheduled to undergo a surgical  
17 procedure.

18           (g) “Surgical practitioner” means a physician, surgeon, or osteopath under s.  
19 990.01 (28), an individual licensed to practice dentistry under ch. 447, and any other



1 individual who holds a valid license or other credential that allows him or her to  
2 perform a surgical procedure.

3 (h) “Surgical procedure” means a surgical procedure for which a patient is  
4 under general anesthesia.

5 (2) OPTION FOR RECORDING. (a) A surgical facility shall provide a surgical  
6 patient the option to have the surgical facility or the surgical facility’s designee make  
7 a color video recording, including both audio and video and display of the time and  
8 date, of the patient’s surgical procedure at the patient’s expense as described under  
9 sub. (10).

10 (b) 1. A surgical facility shall notify a surgical patient or, if the surgical patient  
11 is incapacitated, a person authorized by the patient under s. 146.81 (5) of the option  
12 to have a recording made under par. (a) and of the procedures, fees, conditions, the  
13 surgical practitioner’s request option, and the advance request option.

14 2. If the surgical patient is a minor child, the surgical facility shall notify the  
15 minor child’s parent, guardian, or legal custodian of the option to have a recording  
16 made under par. (a) and of the procedures, fees, conditions, the surgical practitioner’s  
17 request option, and the advance request option.

18 (c) A surgical practitioner who is scheduled to participate in a surgical patient’s  
19 surgical procedure may request that the procedure be video recorded under the  
20 procedures described in this subsection. The surgical facility shall comply with the  
21 surgical practitioner’s request if all of the following are true:

22 1. The requesting surgical practitioner has informed the patient or, if  
23 applicable, a parent, guardian, legal custodian, or a person authorized by the patient,  
24 of the surgical practitioner’s request for video recording and the reason the surgical  
25 practitioner has requested that recording.

1           2. The surgical patient, or if applicable, the parent, guardian, legal custodian,  
2 or person authorized by the patient under s. 146.81 (5), does not object to the video  
3 recording.

4           (d) A surgical patient, or if applicable, parent, guardian, legal custodian, or  
5 person authorized by the patient under s. 146.81 (5), may not disclose, unless the  
6 surgical practitioner involved waives confidentiality, the content of a video recording  
7 created under this section except to health care providers providing care to the  
8 surgical patient, to immediate family members or a person authorized by the patient  
9 under s. 146.81 (5), or to an attorney or an attorney's staff for the purpose of obtaining  
10 legal advice. If legal action is taken, the surgical patient may disclose the video  
11 recording to additional individuals if necessary for the case, but it shall be filed under  
12 seal if permitted. In all other respects, recordings under this section shall be treated  
13 as patient health care records.

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

22           **(4) EQUIPMENT AND TECHNICAL ASSISTANCE.** A surgical facility shall have  
23 available appropriate video recording equipment and technical assistance as  
24 determined by the department in rules promulgated under sub. (8) to comply with  
25 a surgical patient request for a recording of his or her surgical procedure.

**SECTION 1**

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

4           **(6) MINORS.** If a surgical patient is a minor child, a parent, guardian, or legal  
5 custodian may request that a recording be made of the minor child's surgical  
6 procedure under sub. (2) (a).

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

11           1. Immediate surgery is necessary to avert death.

12           2. Other circumstances exist such that video recording would cause a delay that  
13 would create a serious risk of substantial and irreversible impairment of one or more  
14 of the surgical patient's bodily functions.

15           (b) The health care provider shall inform the surgical patient, or the parent,  
16 guardian, or legal custodian or person authorized by the patient under s. 146.81 (5),  
17 if applicable, of the medical indications supporting the surgical practitioner's  
18 reasonable medical judgment that either of the emergency conditions under par. (a)  
19 exists.

20           **(8) RULES.** (a) The department shall promulgate rules establishing all of the  
21 following:

22           1. Standards for video recording of surgical procedures and the use of video  
23 recording equipment in the surgery setting to ensure such recordings are  
24 professional and of sufficient quality to accurately portray what takes place during  
25 a surgical procedure.

1           2. The fees under sub. (10) (a).

2           (b) The department may promulgate rules, as necessary, to implement and  
3 administer this section, including any of the following:

4           1. Establishing criteria and procedures for providing notice and the option for  
5 video recording under sub. (2).

6           2. Implementing the requirements regarding preservation and destruction of  
7 recordings under sub. (9).

8           3. Establishing standards, procedures, and forms for advance requests for  
9 recording under sub. (12).

10          4. Implementing the forfeiture procedures under sub. (14).

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

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

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

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

23          (b) A surgical facility may charge fees as set forth in s. 146.83 (3f) for providing  
24 copies from a surgical patient's health care record of a recording under this section,  
25 except that the surgical facility shall provide, upon request, one copy of any recording

1 taken under this section to a surgical patient, a person authorized by the surgical  
2 patient under s. 146.81 (5), or a parent, guardian, or legal custodian of a minor  
3 surgical patient free of charge.

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

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

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

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

23 3. The department shall prepare and provide copies of an advance request for  
24 surgical procedure recording instrument and accompanying information for  
25 distribution in quantities to health care professionals, hospitals and other surgical

1 facilities, county clerks, and local bar associations and individually to private  
2 persons. The department shall determine the form of the request form and  
3 accompanying instructions. The department shall include on the form both an option  
4 for requesting the recording of a specific single surgical procedure and an option for  
5 requesting the recording of all future surgical procedures appropriate under this  
6 section. The department shall also include on the form a statement to the effect that  
7 a principal who exercises the option for video recording either a single surgical  
8 procedure or all future surgical procedures agrees that, unless the surgical  
9 practitioner involved waives confidentiality, a video recording created under this  
10 section is confidential and the principal or, if applicable, a parent, guardian, legal  
11 custodian, or person authorized by a patient under s. 146.81 (5), may disclose it only  
12 to health care providers providing care to the principal, to immediate family  
13 members or a person authorized by the patient under s. 146.81 (5), or to an attorney  
14 or an attorney's staff for the purpose of obtaining legal advice, and if legal action is  
15 taken, the principal may disclose the video recording to additional individuals if  
16 necessary for the case, but it must be filed under seal if permitted.

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

- 19 1. In writing.
- 20 2. Dated and signed by the principal or by an individual who has attained age  
21 18, at the express direction and in the presence of the principal.
- 22 3. Signed in the presence of a witness who is an individual who has attained  
23 the age 18.
- 24 4. Voluntarily executed.

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

3 1. Canceling, defacing, obliterating, burning, tearing, or otherwise destroying  
4 the advance request for surgical procedure recording instrument or directing  
5 another in the presence of the principal to so destroy the advance request for surgical  
6 procedure recording instrument.

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

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

12 4. Executing a subsequent advance request for surgical procedure recording  
13 instrument that replaces an existing advance request for surgical procedure  
14 recording instrument.

15 (13) PENALTIES. (a) Except as provided under sub. (7), a health care provider  
16 who knowingly refuses to comply with a surgical patient request to have his or her  
17 surgical procedure recorded may be subject to a forfeiture of not more than \$25,000  
18 for each violation.

19 (b) Except as provided under sub. (7), a surgical facility that fails to provide a  
20 notice required under sub. (2) (b) may be subject to a forfeiture of not more than  
21 \$25,000 for each violation.

22 (c) Whoever intentionally conceals, cancels, defaces, obliterates, damages, or  
23 destroys an advance request for surgical procedure recording instrument created  
24 under sub. (12) without the consent of the principal for that instrument may be  
25 subject to a forfeiture of not more than \$25,000 for each violation.

1 (d) A surgical patient, parent, guardian, legal custodian, or person authorized  
2 by a patient under s. 146.81 (5) who knowingly violates sub. (2) (d) may be subject  
3 to a forfeiture of not more than \$25,000 for each violation.

4 (14) FORFEITURE PROCEDURE. (a) The department may directly assess  
5 forfeitures provided for under sub. (13). If the department determines that a  
6 forfeiture should be assessed for a particular violation, the department shall send a  
7 notice of assessment to the health care provider. The notice shall specify the amount  
8 of the forfeiture assessed, the violation and the statute or rule alleged to have been  
9 violated, and shall inform the hospital of the right to a hearing under par. (b).

10 (b) A health care provider may contest an assessment of a forfeiture by sending,  
11 within 30 days after receipt of notice under par. (a), a written request for a hearing  
12 under s. 227.44 to the division of hearings and appeals created under s. 15.103 (1).  
13 The administrator of the division may designate a hearing examiner to preside over  
14 the case and recommend a decision to the administrator under s. 227.46. The  
15 decision of the administrator of the division shall be the final administrative  
16 decision. The division shall commence the hearing within 60 days after receipt of the  
17 request for a hearing and shall issue a final decision within 30 days after the close  
18 of the hearing. Proceedings before the division are governed by ch. 227. In any  
19 petition for judicial review of a decision by the division, the party, other than the  
20 petitioner, who was in the proceeding before the division shall be the named  
21 respondent.

22 (c) All forfeitures shall be paid to the department within 30 days after receipt  
23 of notice of assessment or, if the forfeiture is contested under par. (b), within 30 days  
24 after receipt of the final decision after exhaustion of administrative review, unless  
25 the final decision is appealed and the order is stayed by court order. The department



1 shall remit all forfeitures paid to the secretary of administration for deposit in the  
2 injured patients and families compensation fund under s. 655.27.

3 (d) The attorney general may bring an action in the name of the state to collect  
4 any forfeiture imposed under sub. (13) if the forfeiture has not been paid following  
5 the exhaustion of all administrative and judicial reviews. The only issue to be  
6 contested in any such action shall be whether the forfeiture has been paid.

7 **SECTION 2.** 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 surgical patient; and all records made by  
11 an 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.  
21 961.235, fetal monitor tracings, as defined under s. 146.817 (1), or a pupil’s physical  
22 health records maintained by a school under s. 118.125.

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

24 146.83 (3f) (b) 3m. Except as provided in s. 50.373, for a copy of a video  
25 recording of a surgical procedure, \$35 per copy.



**Parisi, Lori**

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**From:** DeGarmo, Ann  
**Sent:** Tuesday, May 19, 2015 12:01 PM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB -1589/1 Topic: Requiring hospitals to allow patients to elect audio and visual recording of surgical procedures

Please Jacket LRB -1589/1 for the ASSEMBLY.