



2015 ASSEMBLY BILL 255

June 4, 2015 – Introduced by Representatives SINICKI, BROSTOFF, QUINN, SARGENT and SUBECK. Referred to Committee on Health.

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.

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

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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

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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.

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

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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.

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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.

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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.

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- 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

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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

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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.

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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.

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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

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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.

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

2 655.27 (1g) DEPOSIT OF FORFEITURES. Forfeitures paid under s. 50.373 (13) shall
3 be deposited in the fund under sub. (1).

4 **SECTION 5. Nonstatutory provisions.**

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

21 **SECTION 6. Effective dates.** This act takes effect on the first day of the 13th
22 month beginning after publication, except as follows:

23 (1) SECTION 5 (1) of this act takes effect on the day after publication.

24

(END)