



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-0422/1  
SWB:jld&kjf

## 2017 ASSEMBLY BILL 863

January 19, 2018 - Introduced by Representatives SINICKI, BERCEAU, HORLACHER,  
C. TAYLOR, TUSLER and ZEPNICK. 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 — referred to in the bill as surgical facilities — to offer surgical patients the option to have their surgical procedures and discharge instructions 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 or discharge instructions recorded, this bill requires that the surgical facility, or its designee, record the surgical procedure or discharge instructions with both audio and color video. When recording of a surgical procedure is requested, the facility must 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

**ASSEMBLY BILL 863**

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. A health care provider who provides the patient with discharge instructions may also request that those instructions, as provided, be recorded. A surgical facility must comply with these requests 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 health care provider or surgical practitioner that is a subject of the video recording. 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. Under the bill, a surgical facility may charge a surcharge of up to \$25 for each recording of a surgical procedure or discharge instructions. 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 without an additional 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 set of discharge instructions, or for all future surgical procedures and discharge instructions 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.

**ASSEMBLY BILL 863**

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 is required to promulgate rules establishing standards relating to the recording equipment and the recording. The department 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) “Discharge instructions” means care instructions provided to a patient at
- 5 or near the time of a patient’s exit or release from a surgical facility after a surgical
- 6 procedure.
- 7           (b) “General anesthesia” means a temporary status commonly produced by the
- 8 administration of certain intravenous drugs and inhaled gases that cause a patient
- 9 to be unconscious and unable to feel pain during a medical procedure.
- 10          (c) “Health care provider” means a person or entity described under s. 146.81
- 11 (1) (a) to (p) and includes any surgical facility.
- 12          (d) “Incapacitated” means unable to receive and evaluate information
- 13 effectively or to communicate decisions to such an extent that an individual lacks the
- 14 capacity to manage his or her health care decisions.
- 15          (e) “Patient health care records” has the meaning given in s. 146.81 (4).

**ASSEMBLY BILL 863**

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

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

6 (h) "Surgical practitioner" means a physician, surgeon, or osteopath under s.  
7 990.01 (28), an individual licensed to practice dentistry under ch. 447, and any other  
8 individual who holds a valid license or other credential that allows him or her to  
9 perform a surgical procedure.

10 (i) "Surgical procedure" means a surgical procedure for which a patient is under  
11 general anesthesia.

12 **(2) OPTION FOR RECORDING.** (a) A surgical facility shall provide a surgical  
13 patient the option to have the surgical facility or the surgical facility's designee make  
14 a color video recording, including both audio and video and display of the time and  
15 date, of the patient's surgical procedure. A surgical facility shall also provide a  
16 surgical patient the option to have his or her discharge instructions, as given by the  
17 patient's doctor or other health care provider, videotaped as described under this  
18 paragraph.

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

23 2. If the surgical patient is a minor child, the surgical facility shall notify the  
24 minor child's parent, guardian, or legal custodian of the option to have a recording

**ASSEMBLY BILL 863**

1 made under par. (a) and of the procedures, fees, conditions, the surgical practitioner's  
2 request option, and the advance request option.

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

7 1. The requesting surgical practitioner has informed the patient or, if  
8 applicable, a parent, guardian, legal custodian, or a person authorized by the patient,  
9 of the surgical practitioner's request for video recording and the reason the surgical  
10 practitioner has requested that recording.

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

14 (d) A patient's doctor or other health care provider who will administer a  
15 patient's discharge instructions may request that the patient's discharge  
16 instructions, as given by the health care provider, be video recorded under the  
17 procedures described in this subsection. The surgical facility shall comply with the  
18 health care provider's request if all of the following are true:

19 1. The requesting health care provider has informed the patient or, if  
20 applicable, a parent, guardian, legal custodian, or a person authorized by the patient,  
21 of the health care provider's request for video recording and the reason the health  
22 care provider has requested that recording.

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

**ASSEMBLY BILL 863**

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

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

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

**ASSEMBLY BILL 863**

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 under sub. (2)  
3 (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 or discharge instructions 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 standards  
21 for video recording of surgical procedures, video recording of discharge instructions,  
22 and the use of video recording equipment in the surgery and discharge settings to  
23 ensure such recordings are professional and of sufficient quality to accurately  
24 portray what takes place during a surgical procedure or when discharge instructions  
25 are given.

**ASSEMBLY BILL 863**

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

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

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

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

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

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

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

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

19 **(10) FEES.** A surgical facility may charge a surcharge of up to \$25 for each  
20 recording made of a surgical procedure or discharge instructions to offset the costs  
21 of creating and providing a video recording. The surgical facility shall provide, upon  
22 request by the surgical patient, a person authorized by the surgical patient under s.  
23 146.81 (5), or a parent, guardian, or legal custodian of a minor surgical patient, one  
24 copy of each recording for which a request is made without additional charge. The



**ASSEMBLY BILL 863**

1 surgical facility may charge fees as described under s. 146.83 (3f) (b) 3m. for  
2 additional copies of the recordings.

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

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

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

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

22 3. The department shall prepare and provide copies of an advance request for  
23 surgical procedure recording instrument and accompanying information for  
24 distribution in quantities to health care professionals, hospitals and other surgical  
25 facilities, county clerks, and local bar associations and individually to private

**ASSEMBLY BILL 863**

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

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

20 1. In writing.

21 2. Dated and signed by the principal or by an individual who has attained age  
22 18, at the express direction and in the presence of the principal.

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

25 4. Voluntarily executed.

**ASSEMBLY BILL 863**

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 or discharge instructions recorded may be subject to a forfeiture  
18 of not more than \$25,000 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.

**ASSEMBLY BILL 863**

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) (e) 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

**ASSEMBLY BILL 863**

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, as affected by 2017 Wisconsin Act 12, is  
8 amended to read:

9 146.81 (4) "Patient health care records" means all records related to the health  
10 of a patient prepared by or under the supervision of a health care provider; all video  
11 recordings under s. 50.373 related to the surgical patient; and all records made by  
12 an ambulance service provider, as defined in s. 256.01 (3), an emergency medical  
13 services practitioner, as defined in s. 256.01 (5), or an emergency medical responder,  
14 as defined in s. 256.01 (4p), in administering emergency care procedures to and  
15 handling and transporting sick, disabled, or injured individuals. "Patient health  
16 care records" includes billing statements and invoices for treatment or services  
17 provided by a health care provider and includes health summary forms prepared  
18 under s. 302.388 (2). "Patient health care records" does not include those records  
19 subject to s. 51.30, reports collected under s. 69.186, records of tests administered  
20 under s. 252.15 (5g) or (5j), 343.305, 938.296 (4) or (5) or 968.38 (4) or (5), records  
21 related to sales of pseudoephedrine products, as defined in s. 961.01 (20c), that are  
22 maintained by pharmacies under s. 961.235, fetal monitor tracings, as defined under  
23 s. 146.817 (1), or a pupil's physical health records maintained by a school under s.  
24 118.125.

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

**ASSEMBLY BILL 863**

1           146.83 **(3f)** (b) 3m. Except as provided in s. 50.373, for a copy of a video  
2 recording of a surgical procedure or discharge instructions, \$25 per copy.

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

4           655.27 **(1g)** DEPOSIT OF FORFEITURES. Forfeitures paid under s. 50.373 (13) shall  
5 be deposited in the fund under sub. (1).

6           **SECTION 5. Nonstatutory provisions.**

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

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

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

25

(END)