

Regular Session, 2012

SENATE BILL NO. 239

BY SENATOR MURRAY

HEALTH CARE. Provides the methods of obtaining informed consent and creates the Louisiana Medical Disclosure Panel. (gov sig)

1 AN ACT

2 To amend and reenact Part XXII of Chapter 5 of Title 40 of the Louisiana Revised Statutes

3 of 1950, to be comprised of R.S. 40:1299.39.5 through 1299.39.7, 1299.58(C),

4 1299.131(A)(3), and 1300.11, to enact R.S. 36:259(MM), and to repeal R.S.

5 40:1299.40, relative to informed consent; to provide for methods in which informed

6 consent may be obtained; to create the Louisiana Medical Disclosure Panel within

7 the Department of Health and Hospitals; to provide for definitions; to provide for

8 membership and terms; to provide for powers and duties; to provide for medical

9 disclosure lists; to provide for exceptions to obtaining informed consent; to provide

10 for attendance of meetings via telecommunications; to provide for limitations of

11 liability; to provide for the promulgation of rules and regulations; to provide for an

12 effective date; and to provide for related matters.

13 Be it enacted by the Legislature of Louisiana:

14 Section 1. R.S. 36:259(MM) is hereby enacted to read as follows:

15 §259. Transfer of agencies and functions to Department of Health and Hospitals

16 * * *

17 **MM. The Louisiana Medical Disclosure Panel (R.S. 40:1299.39.6) is**

1 ~~alternative methods of contraception.~~

2 B. Except as provided in Subsection A of this Section, no evidence shall be
3 admissible to modify or limit the authorization for performance of the procedure or
4 procedures set forth in such consent.

5 C. Where consent to medical treatment from a patient, or from a person
6 authorized by law to consent to medical treatment for such patient, is secured other
7 than in accordance with Subsection A above, the explanation to the patient or to the
8 person consenting for such patient shall include the matters set forth in ~~Paragraph (1)~~
9 ~~of Subsection A~~ **of this Section** above, and an opportunity shall be afforded for
10 asking questions concerning the procedures to be performed which shall be answered
11 in a satisfactory manner. Such consent shall be valid and effective and is subject to
12 proof according to the rules of evidence in ordinary cases.

13 ~~D.(1) Notwithstanding this Section or any other law to the contrary,~~
14 ~~whenever it is determined by the hospital infection control committee or equivalent~~
15 ~~body that an agent or employee of a hospital, or a physician having privileges at the~~
16 ~~hospital, has been exposed to the blood or bodily fluids of a patient, in such a manner~~
17 ~~as to create any risk that the agent, employee, or physician may become infected with~~
18 ~~the human immunodeficiency virus or other infectious agent if the patient is infected~~
19 ~~with the human immunodeficiency virus or other infectious agent, in accordance~~
20 ~~with the infectious disease exposure guidelines of the Centers for Disease Control~~
21 ~~or the infectious disease exposure standards of the health care facility where the~~
22 ~~exposure occurred, then the hospital infection control committee may, without the~~
23 ~~consent of the patient, conduct such tests on blood previously drawn or body fluids~~
24 ~~previously collected as are necessary to determine whether the patient is, in fact,~~
25 ~~infected with the virus or other agent believed to cause acquired immune deficiency~~
26 ~~syndrome or other infectious disease. If no previously drawn blood or collected~~
27 ~~bodily fluids are available or are suitable, the hospital may order, without the consent~~
28 ~~of the patient, that blood, bodily fluids, or both be drawn and collected from the~~
29 ~~patient to conduct the necessary tests.~~

1 ~~(2) Notwithstanding this Section or any other law to the contrary, whenever~~
2 ~~it is determined by the infectious disease control officer of any law enforcement, fire~~
3 ~~service, or emergency medical service agency or organization that an agent or~~
4 ~~employee of the agency or organization has been exposed to the blood or bodily~~
5 ~~fluids of a patient while rendering emergency medical services, transporting, or~~
6 ~~treating an ill or injured patient in such a manner as to create any risk that the agent~~
7 ~~or employee may become infected with the human immunodeficiency virus or other~~
8 ~~infectious agent if the patient is infected with the human immunodeficiency virus or~~
9 ~~other infectious agent, in accordance with the infectious disease exposure guidelines~~
10 ~~of the Centers for Disease Control or the infectious disease exposure standards of the~~
11 ~~agency or organization, then the infectious disease control officer of the agency or~~
12 ~~organization may present the facts to the infection control committee of the hospital~~
13 ~~or other health care facility to which the patient has been transported. If the hospital~~
14 ~~infection control committee agrees that there has been a potential exposure to the~~
15 ~~agency or organization personnel, then the hospital infection control committee may,~~
16 ~~while the patient is in such hospital and without the consent of the patient, conduct~~
17 ~~such tests as are provided for in R.S. 40:1299.40(D)(1).~~

18 ~~(3) The results of the test shall not become a part of the patient's medical~~
19 ~~record and shall be confidential, except that the hospital may inform the exposed~~
20 ~~employee, agent, or physician, or the infectious disease control officer of the law~~
21 ~~enforcement, fire service, or emergency medical service agency of the results of the~~
22 ~~test.~~

23 ~~(4) In the event that the test is performed, and the results of the test are~~
24 ~~positive, the hospital shall inform the patient of the results and shall provide such~~
25 ~~follow-up testing and counseling as may be required according to the accepted~~
26 ~~standard of medical care.~~

27 ~~(5) The patient shall not be charged for any tests performed under this~~
28 ~~Subsection.~~

29 ~~(6) Nothing herein shall be construed to require the hospital to perform the~~

1 test described herein:

2 E.(1) ~~As used in this Subsection, "secretary" means the secretary of the~~
3 ~~Department of Health and Hospitals.~~

4 (2)(a) **D.** In a suit against a physician or other health care provider involving
5 a health care liability or medical malpractice claim which is based on the failure of
6 the physician or other health care provider to disclose or adequately to disclose the
7 risks and hazards involved in the medical care or surgical procedure rendered by the
8 physician or other health care provider, the only theory on which recovery may be
9 obtained is that of negligence in failing to disclose the risks or hazards that could
10 have influenced a reasonable person in making a decision to give or withhold
11 consent.

12 (b) **E.** Consent to medical treatment may be evidenced according to the
13 provisions of Subsections A and C of this Section or, as an alternative, a physician
14 or other health care provider may choose to avail himself of the lists established by
15 the secretary **Louisiana Medical Disclosure Panel** pursuant to the provisions of ~~this~~
16 ~~Subsection~~ **R.S. 40:1299.39.6** as another method by which to evidence a patient's
17 consent to medical treatment.

18 (3) ~~The secretary shall determine which risks and hazards related to medical~~
19 ~~care and surgical procedures must be disclosed by a physician or other health care~~
20 ~~provider to a patient or person authorized to consent for a patient and to establish the~~
21 ~~general form and substance of such disclosure.~~

22 (4)(a) ~~To the extent feasible, the secretary shall identify and make a thorough~~
23 ~~examination of all medical treatments and surgical procedures in which physicians~~
24 ~~and other health care providers may be involved in order to determine which of those~~
25 ~~treatments and procedures do and do not require disclosure of the risks and hazards~~
26 ~~to the patient or person authorized to consent for the patient.~~

27 (b) ~~The secretary shall prepare separate lists of those medical treatments and~~
28 ~~surgical procedures that do and do not require disclosure and for those treatments~~
29 ~~and procedures that do require disclosure shall establish the degree of disclosure~~

1 required and the form in which the disclosure will be made:

2 (c) Lists prepared under Subparagraph (b) of this Paragraph together with
3 written explanations of the degree and form of disclosure shall be promulgated
4 according to the Administrative Procedure Act. The form of the disclosure and
5 manner in which such disclosure will be made shall be subject to legislative
6 oversight by the House and Senate health and welfare committees. The lists
7 compiled and published and rules promulgated relative to the form and manner of
8 disclosure according to the provisions of this Subsection and evidence of such
9 disclosures or failure to disclose by a physician or other health care provider as
10 provided in Paragraphs (5) and (6) of this Subsection shall be admissible in a health
11 care liability suit or medical malpractice claim involving medical care rendered or
12 a surgical procedure performed on or after March 1, 1991.

13 (d) At least annually, or at such other period as the secretary may determine,
14 the secretary shall identify and examine any new medical treatments and surgical
15 procedures that have been developed since its last determinations, shall assign them
16 to the proper list, and shall establish the degree of disclosure required and the form
17 in which the disclosure shall be made. The secretary shall also review and examine
18 such treatments and procedures for the purpose of revising lists previously published.
19 These determinations shall be published in the same manner as described in
20 Subparagraph (c) of this Paragraph.

21 (5) Before a patient or a person authorized to consent for a patient gives
22 consent to any medical or surgical procedure that appears on the list requiring
23 disclosure, the physician or other health care provider shall disclose to the patient,
24 or person authorized to consent for the patient, the risks and hazards involved in that
25 kind of care or procedure. A physician or other health care provider may choose to
26 utilize the lists prepared by the secretary and shall be considered to have complied
27 with the requirements of this Subsection if disclosure is made as provided in
28 Paragraph (6) of this Subsection.

29 (6) Consent to medical care that appears on the secretary's list requiring

1 disclosure shall be considered effective under this Subsection, if it is given by the
2 patient or a person authorized to give the consent and by a competent witness, and
3 if the consent specifically states, in such terms and language that a layman would be
4 expected to understand, the risks and hazards that are involved in the medical care
5 or surgical procedure in the form and to the degree required by the secretary under
6 Paragraph (4) of this Subsection.

7 (7)(a) In a suit against a physician or other health care provider involving a
8 health care liability or medical malpractice claim which is based on the negligent
9 failure of the physician or other health care provider to disclose or adequately to
10 disclose the risks and hazards involved in the medical care or surgical procedure
11 rendered by the physician or other health care provider:

12 (i) Both the disclosure made as provided in Paragraph (5) of this Subsection
13 and the failure to disclose based on inclusion of any medical care or surgical
14 procedure on the secretary's list for which disclosure is not required shall be
15 admissible in evidence and shall create a rebuttable presumption that the
16 requirements of Paragraphs (5) and (6) of this Subsection have been complied with,
17 and this presumption shall be included in the charge to the jury; and

18 (ii) The failure to disclose the risks and hazards involved in any medical care
19 or surgical procedure required to be disclosed under Paragraphs (5) and (6) of this
20 Subsection shall be admissible in evidence and shall create a rebuttable presumption
21 of a negligent failure to conform to the duty of disclosure set forth in Paragraphs (5)
22 and (6) of this Subsection, and this presumption shall be included in the charge to the
23 jury; but failure to disclose may be found not to be negligent, if there was an
24 emergency as defined in R.S. 40:2113.6(C) or, if for some other reason, it was not
25 medically feasible to make a disclosure of the kind that would otherwise have been
26 negligence.

27 (b) If medical care is rendered or a surgical procedure performed with respect
28 to which the secretary has not made a determination regarding a duty of disclosure,
29 the physician or other health care provider is under the general duty to disclose

1 otherwise imposed by this Section.

2 (c) ~~In order to be covered by the provisions of this Subsection, the physician~~
3 ~~or other health care provider who will actually perform the contemplated medical or~~
4 ~~surgical procedure shall:~~

5 (i) ~~Disclose the risks and hazards in the form and to the degree required by~~
6 ~~the secretary;~~

7 (ii) ~~Disclose additional risks, if any, particular to a patient because of a~~
8 ~~complicating medical condition, either told to the physician or other health care~~
9 ~~provider by the patient or his representative in a medical history of the patient or~~
10 ~~reasonably discoverable by such physician or other health care provider;~~

11 (iii) ~~Disclose reasonable therapeutic alternatives and risks associated with~~
12 ~~such alternatives;~~

13 (iv) ~~Relate that he is obtaining a consent to medical treatment pursuant to the~~
14 ~~lists formulated by the secretary; and~~

15 (v) ~~Provide an opportunity to ask any questions about the contemplated~~
16 ~~medical or surgical procedure, risks, or alternatives and acknowledge in writing that~~
17 ~~he answered such questions, to the patient or other person authorized to give consent~~
18 ~~to medical treatment, receipt of which shall be acknowledged in writing.~~

19 F. Notwithstanding the provisions of Subsection E of this Section, consent
20 for dental treatment rendered by dentists not performing oral and maxillofacial
21 surgery in a hospital setting shall be governed exclusively by the provisions of R.S.
22 40:1299.131.

23 **§1299.39.6. Louisiana Medical Disclosure Panel; creation; membership;**
24 **powers; duties**

25 **A. As used in this Section, the following terms shall mean:**

26 **(1) "Panel" means the Louisiana Medical Disclosure Panel.**

27 **(2) "Department" means the Department of Health and Hospitals.**

28 **B. (1) The Louisiana Medical Disclosure Panel is hereby created within**
29 **the department to determine which risks and hazards related to medical care**

1 and surgical procedures must be disclosed by a physician or other health care
2 provider to a patient or person authorized to consent for a patient and to
3 establish the general form and substance of such disclosure.

4 (2) The panel shall be comprised of the following members who shall be
5 appointed by the governor and submitted to the Senate for confirmation:

6 (a) Two members licensed to practice dentistry. One Member who
7 specializes in oral and maxillofacial surgery shall be selected from a list of
8 nominees submitted to the governor by the Louisiana Society of Oral and
9 Maxillofacial Surgeons. The other member shall be selected from a list of
10 nominees submitted to the governor by the Louisiana Dental Association.

11 (b) Four members licensed to practice law in this state of whom three
12 shall be selected from a list of nominees submitted to the governor by the
13 Louisiana Association for Justice, and one shall be selected from a list of
14 nominees submitted to the governor by the Louisiana Association of Defense
15 Counsel.

16 (c) Six members licensed to practice medicine in this state who shall be
17 selected from a list of nominees submitted to the governor by the Louisiana
18 State Medical Society. One of the six physicians shall be a hospital employed
19 physician.

20 (d) One member licensed to practice chiropractic in this state who shall
21 be selected from a list of nominees submitted to the governor by the
22 Chiropractic Association of Louisiana.

23 (e) One member licensed to practice podiatry in this state who shall be
24 selected from a list of nominees submitted to the governor by the Louisiana
25 Podiatric Medical Association.

26 (f) One member licensed to practice optometry in this state who shall be
27 selected from a list of nominees submitted to the governor by the Optometry
28 Association of Louisiana.

29 C. The initial members of the panel shall have the following terms:

1 **(1) The dentist who specializes in oral and maxillofacial surgery, the**
2 **chiropractic physician, the podiatrist, the optometrist, one attorney, and two**
3 **physicians shall each serve a term of two years, or until a successor is appointed**
4 **and qualified.**

5 **(2) Two attorneys, two physicians, and one dentist shall each serve a**
6 **term of four years, or until a successor is appointed and qualified.**

7 **(3) One attorney and two physicians shall each serve a term of six years,**
8 **or until a successor is appointed and qualified.**

9 **(4) Thereafter, at the expiration of the term of each member of the panel,**
10 **the governor shall appoint a successor and such successor shall serve for a term**
11 **of six years, or until his successor is appointed and qualified.**

12 **D. Any member of the panel who is absent for three consecutive meetings**
13 **without the consent of a majority of the panel at each such meeting may be**
14 **removed by the governor at the request of the panel. Such request shall be in**
15 **writing, signed by the chairman, and approved by the panel. Upon the death,**
16 **resignation, or removal of any member, the secretary of the department shall**
17 **fill the vacancy by selection, subject to Senate confirmation, for the unexpired**
18 **portion of the term.**

19 **E. Members of the panel shall not be entitled to per diem or any other**
20 **compensation for their service but shall be entitled to reimbursement of any**
21 **necessary and reasonable expense incurred in the performance of their duties**
22 **on the panel, including travel expenses.**

23 **F. Meetings of the panel shall be held at the call of the chairman or on**
24 **petition of at least three members of the panel.**

25 **G. At the first meeting of the panel each calendar year, the panelists shall**
26 **select one of the panel members to serve as chairman and one of the panel**
27 **members to serve as vice chairman, and each such officer shall serve for a term**
28 **of one year. The chairman shall preside at meetings of the panel, and in his**
29 **absence, the vice chairman shall preside.**

1 **H. The department shall provide administrative assistance to and serve**
2 **as the staff for the panel.**

3 **I. The governor shall appoint the initial members of the panel no later**
4 **than October 1, 2012, and the panel shall convene its first meeting no later than**
5 **November 1, 2012.**

6 **J. (1) To the extent feasible, the panel shall identify and make a thorough**
7 **examination of all medical treatments and surgical procedures in which**
8 **physicians and other health care providers may be involved in order to**
9 **determine which of those treatments and procedures do and do not require**
10 **disclosure of the risks and hazards to the patient or person authorized to**
11 **consent for the patient. Initially, the panel shall examine all existing medical**
12 **disclosure lists and update and repromulgate those lists under the authority**
13 **vested in this Section. The dentist member of the panel shall only participate**
14 **in the panel's deliberation, determination, and preparation of lists of dental**
15 **treatments and procedures that do and do not require disclosure.**

16 **(2) The panel shall prepare separate lists of those medical treatments and**
17 **surgical procedures that do and do not require disclosure. For those treatments**
18 **and procedures that do require disclosure, the panel shall establish the degree**
19 **of disclosure required, and the form in which the disclosure shall be made.**

20 **(3) Lists prepared under this Section, together with the written**
21 **explanations of the degree and form of disclosure, shall be promulgated**
22 **according to the Administrative Procedure Act. The form of the disclosure and**
23 **manner in which such disclosure shall be made shall be subject to legislative**
24 **oversight by the House and Senate health and welfare committees.**

25 **K. The lists compiled and published and rules promulgated relative to**
26 **the form and manner of disclosure according to the provisions of this Section**
27 **and evidence of such disclosures or failure to disclose by a physician or other**
28 **health care provider as provided in this Section shall be admissible in a health**
29 **care liability suit or medical malpractice claim involving medical care rendered**

1 **or a surgical procedure performed.**

2 **L. At least annually or at such other time period as the panel may**
3 **determine, the panel shall identify and examine any new medical treatments**
4 **and surgical procedures that have been developed since its last determinations,**
5 **assign them to the proper list, establish the degree of disclosure required, and**
6 **the form in which the disclosure shall be made. The panel shall review and**
7 **examine such treatments and procedures for the purpose of revising lists**
8 **previously published. These determinations shall be published in the same**
9 **manner as described in Paragraph (J)(3) of this Section.**

10 **M. Before a patient or a person authorized to consent for a patient gives**
11 **consent to any medical or surgical procedure that appears on the panel's list**
12 **requiring disclosure, the physician or other health care provider shall disclose**
13 **to the patient or a person authorized to consent for the patient the risks and**
14 **hazards involved in that kind of care or procedure. A physician or other health**
15 **care provider may choose to utilize the lists prepared by the panel and shall be**
16 **considered to have complied with the requirements of this Subsection if**
17 **disclosure is made as provided in Subsection N of this Section.**

18 **N. Consent to medical care that appears on the panel's list requiring**
19 **disclosure shall be considered effective under this Subsection if it is given in**
20 **writing; signed by the patient or a person authorized to give the consent and by**
21 **a competent witness; and in such terms and language that a layman would be**
22 **expected to understand if the written consent specifically requires the risks and**
23 **hazards that are involved in the medical care or surgical procedure in the form**
24 **and to the degree required by the panel under this Section.**

25 **O. (1) In a suit against a physician or other health care provider**
26 **involving a health care liability or medical malpractice claim which is based on**
27 **the negligent failure of the physician or other health care provider to disclose**
28 **or adequately to disclose the risks and hazards involved in the medical care or**
29 **surgical procedure rendered by the physician or other health care provider:**

1 **(a) Both the disclosure made as provided in Subsection M of this Section**
2 **and the failure to disclose based on inclusion of any medical care or surgical**
3 **procedure on the panel's list for which disclosure is not required shall be**
4 **admissible in evidence and shall create a rebuttable presumption that the**
5 **requirements of Subsections M and N of this Section have been complied with,**
6 **and this presumption shall be included in the charge to the jury.**

7 **(b) The failure to disclose the risks and hazards involved in any medical**
8 **care or surgical procedure required to be disclosed under Subsections M and**
9 **N of this Section shall be admissible in evidence and shall create a rebuttable**
10 **presumption of a negligent failure to conform to the duty of disclosure set forth**
11 **in Subsections M and N of this Section. This presumption shall be included in**
12 **the charge to the jury, but failure to disclose may be found not to be negligent,**
13 **if there was an emergency as defined in R.S. 40:2113.6(C); or, if for some other**
14 **reason, it was not medically feasible to make a disclosure of the kind that would**
15 **otherwise have been negligence.**

16 **(2) If medical care is rendered or a surgical procedure performed with**
17 **respect to which the panel has not made a determination regarding a duty of**
18 **disclosure, the physician or other health care provider is under the general duty**
19 **to disclose otherwise imposed by R.S. 40:1299.39.5.**

20 **P. In order to be covered by the provisions of this Section, the physician**
21 **or other health care provider who will actually perform the contemplated**
22 **medical or surgical procedure shall:**

23 **(1) Disclose the risks and hazards in the form and to the degree required**
24 **by the panel.**

25 **(2) Disclose additional risks, if any, particular to a patient because of a**
26 **complicating medical condition, either told to the physician or other health care**
27 **provider by the patient or his representative in a medical history of the patient**
28 **or reasonably discoverable by such physician or other health care provider.**

29 **(3) Disclose reasonable therapeutic alternatives and risks associated with**

1 such alternatives.

2 (4) Relate that he is obtaining a consent to medical treatment pursuant
3 to the lists formulated by the Louisiana Medical Disclosure Panel.

4 (5) Provide an opportunity to ask any questions about the contemplated
5 medical or surgical procedure, risks, or alternatives and acknowledge in writing
6 that he answered such questions, to the patient or other person authorized to
7 give consent to medical treatment, receipt of which shall be acknowledged in
8 writing.

9 Q. The department shall maintain a searchable database of all current
10 medical disclosure lists that is available to the public through the department's
11 website.

12 R. Notwithstanding the provisions of the Open Meetings Law, R.S. 42:11
13 et seq., or any other law to the contrary, if any member of the panel is physically
14 present at a meeting, any number of the other members of the panel may attend
15 the meeting by use of telephone conference call, videoconferencing, or other
16 similar telecommunication methods for purposes of establishing a quorum or
17 voting or for any other meeting purpose allowing a panel member to fully
18 participate in any panel meeting. The provisions of this Subsection shall apply
19 without regard to the subject matter discussed or considered by the panel at the
20 meeting. A meeting held by telephone conference call, videoconferencing, or
21 other similar telecommunication method:

22 (1) Shall be subject to the notice requirements of R.S. 42:11 et seq.

23 (2) Shall not be held unless the notice of the meeting specifies the location
24 of the meeting at which a member of the panel will be physically present.

25 (3) Shall be open to the public and audible to the public at the location
26 specified in the notice.

27 (4) Shall provide two-way audio communication between all panel
28 members attending the meeting during the entire meeting, and if the two-way
29 audio communication link with any member attending the meeting is disrupted

1 at any time, the meeting may not continue until the two-way audio
2 communication link is reestablished.

3 S. The Department of Health and Hospitals, its agents or employees, or
4 any person serving as a member of the panel shall not be liable to any person,
5 firm or entity, public or private, for any act or omission to act arising out of a
6 health care provider attempting to obtain or obtaining informed consent
7 pursuant to the provisions of this Section.

8 §1299.39.7. Exception to obtaining informed consent; human immunodeficiency
9 virus or other infectious agents

10 A. Notwithstanding the provisions of R.S. 40:1299.39.5 or any other law
11 to the contrary, whenever it is determined by the hospital infection control
12 committee or equivalent body that an agent or employee of a hospital, or a
13 physician having privileges at the hospital, has been exposed to the blood or
14 bodily fluids of a patient, in such a manner as to create any risk that the agent,
15 employee, or physician may become infected with the human immunodeficiency
16 virus or other infectious agent if the patient is infected with the human
17 immunodeficiency virus or other infectious agent, in accordance with the
18 infectious disease exposure guidelines of the Centers for Disease Control or the
19 infectious disease exposure standards of the health care facility where the
20 exposure occurred, then the hospital infection control committee may, without
21 the consent of the patient, conduct such tests on blood previously drawn or
22 bodily fluids previously collected as are necessary to determine whether the
23 patient is, in fact, infected with the virus or other agent believed to cause
24 acquired immune deficiency syndrome or other infectious disease. If no
25 previously drawn blood or collected bodily fluids are available or are suitable,
26 the hospital may order, without the consent of the patient, that blood, bodily
27 fluids, or both be drawn and collected from the patient to conduct the necessary
28 tests.

29 B. Notwithstanding the provisions of R.S. 40:1299.39.5 or any other law

1 to the contrary, whenever it is determined by the infectious disease control
2 officer of any law enforcement, fire service, or emergency medical service
3 agency or organization that an agent or employee of the agency or organization
4 has been exposed to the blood or bodily fluids of a patient while rendering
5 emergency medical services, transporting, or treating an ill or injured patient
6 in such a manner as to create any risk that the agent or employee may become
7 infected with the human immunodeficiency virus or other infectious agent if the
8 patient is infected with the human immunodeficiency virus or other infectious
9 agent, in accordance with the infectious disease exposure guidelines of the
10 Centers for Disease Control or the infectious disease exposure standards of the
11 agency or organization, then the infectious disease control officer of the agency
12 or organization may present the facts to the infection control committee of the
13 hospital or other health care facility to which the patient has been transported.
14 If the hospital infection control committee agrees that there has been a potential
15 exposure to the agency or organization personnel, then the hospital infection
16 control committee may, while the patient is in such hospital and without the
17 consent of the patient, conduct such tests as are provided for in this Section.

18 C. The results of the test shall not become a part of the patient's medical
19 record and shall be confidential, except that the hospital may inform the
20 exposed employee, agent, or physician, or the infectious disease control officer
21 of the law enforcement, fire service, or emergency medical service agency of the
22 results of the test.

23 D. In the event that the test is performed, and the results of the test are
24 positive, the hospital shall inform the patient of the results and shall provide
25 such follow-up testing and counseling as may be required according to the
26 accepted standard of medical care.

27 E. The patient shall not be charged for any tests performed under this
28 Section.

29 F. Nothing herein shall be construed to require the hospital to perform

1 infection. The legislature also recognizes that confidentiality protections can limit
2 the risk of discrimination and the harm to an individual's interest in privacy that
3 unauthorized disclosure of HIV test results can cause. It is not the intent of the
4 legislature to create any new right, right of action, or cause of action or eliminate any
5 right, right of action, or cause of action existing under current law. It is further not
6 the intent of the legislature that this Chapter repeal, amend, or in any way affect the
7 provisions of R.S. ~~40:1299.40(D)~~ **40:1299.39.7** relative to the ability of a physician
8 or employee of a hospital who may become infected with the human
9 immunodeficiency virus to test the blood of a patient without the patient's consent.
10 It is the intent of the legislature that in the case of a person applying for or already
11 insured under an insurance policy, who will be or has been the subject of a test to
12 determine infection for human immunodeficiency virus (HIV), all facets of insurers'
13 practices in connection with HIV related testing and HIV test results and all facets
14 of other entities' and individuals' interactions with insurers relating to HIV related
15 testing or HIV test results shall be governed exclusively by Title 22 of the Revised
16 Statutes of 1950 and any regulations promulgated pursuant thereto by the
17 commissioner of the Department of Insurance who shall have the authority to
18 promulgate such regulations.

19 Section 3. R.S. 40:1299.40 is hereby repealed.

20 Section 4. All existing medical disclosure lists duly promulgated by either a prior
21 Louisiana Medical Disclosure Panel or the secretary of the Department of Health and
22 Hospitals shall remain effective and shall be deemed to have been promulgated by the newly
23 created Louisiana Medical Disclosure Panel until such time as those lists may be updated
24 and repromulgated pursuant to the provisions of this Act.

25 Section 5. This Act shall become effective upon signature by the governor or, if not
26 signed by the governor, upon expiration of the time for bills to become law without signature
27 of the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If
28 vetoed by the Governor and subsequently approved by the Legislature, this Act shall become
29 effective on the day following such approval.

The original instrument and the following digest, which constitute no part of the legislative instrument, were prepared by Christopher D. Adams.

DIGEST

Murray (SB 239)

Present law provides the use of medical disclosure lists by health care providers as an acceptable method of obtaining informed consent.

Present law provides that the secretary of the Department of Health and Hospitals shall determine which risks and hazards related to medical care and surgical procedures must be disclosed by a physician or other health care provider to a patient or a person authorized to consent for a patient. Present law provides that the secretary of the Department of Health and Hospitals shall establish the general form and the substance of such disclosure. Present law further provides that the secretary of the Department of Health and Hospitals shall at least annually, or at such other period as the secretary may determine, identify and examine any new medical treatments and surgical procedures that have been developed and shall assign them to the proper disclosure list, establish the degree of disclosure required, and establish the form in which the disclosure shall be made.

Present law required the Norplant contraceptive device to be included in the uniform consent law. Proposed law removes this requirement.

Proposed law removes this duty from the secretary and places the duty into the newly created Louisiana Medical Disclosure Panel, which is made part of the Department of Health and Hospitals.

Proposed law provides for the following membership of the Louisiana Medical Disclosure Panel:

1. Two members licensed to practice dentistry. One member who specializes in oral and maxillofacial surgery who shall be selected from a list of nominees submitted to the governor by the Louisiana Society of Oral and Maxillofacial Surgeons. The other member shall be selected from a list of nominees submitted to the governor by the Louisiana Dental Association.
2. Four members licensed to practice law in this state of whom three shall be selected from a list of nominees submitted to the governor by the Louisiana Association for Justice, and one shall be selected from a list of nominees submitted to the governor by the Louisiana Association of Defense Counsel.
3. Six members licensed to practice medicine in this state who shall be selected from a list of nominees submitted to the governor by the Louisiana State Medical Society. One of the six physicians shall be hospital employed.
4. One member licensed to practice chiropractic in this state who shall be selected from a list of nominees submitted to the governor by the Chiropractic Association of Louisiana.
5. One member licensed to practice podiatry in this state who shall be selected from a list of nominees submitted to the governor by the Louisiana Podiatric Medical Association.
6. One member licensed to practice optometry in this state who shall be selected from a list of nominees submitted to the governor by the Optometry Association of Louisiana.

Proposed law provides the initial members of the Louisiana Medical Disclosure Panel shall have the following terms:

1. The dentist who specializes in oral and maxillofacial surgery, the chiropractic physician, the podiatrist, the optometrist, one attorney, and two physicians shall serve a term of two years, or until a successor is appointed and qualified.
2. Two attorneys, two physicians, and one dentist shall serve a term of four years, or until a successor is appointed and qualified.
3. One attorney and two physicians shall serve a term of six years, or until a successor is appointed and qualified.
4. Thereafter, at the expiration of the term of each member of the panel, the governor shall appoint a successor and such successor shall serve for a term of six years, or until his successor is appointed and qualified.

Proposed law provides for the procedure for meetings, the filling of a vacancy, and for the removal of a member for failure to attend meetings.

Proposed law provides members of the panel shall not be entitled to per diem or any other compensation for their service, but shall be entitled to reimbursement of any necessary and reasonable expense incurred in the performance of their duties on the panel, including travel expenses.

Proposed law provides that the panel shall identify and make a thorough examination of all medical treatments and surgical procedures in which physicians and other health care providers may be involved in order to determine which of those treatments and procedures do and do not require disclosure of the risks and hazards to the patient or person authorized to consent for the patient.

Proposed law provides that the dentist member of the panel shall only participate in the panel's deliberation, determination, and preparation of lists of dental treatments and procedures that do and do not require disclosure.

Proposed law provides for the procedure and content of the medical disclosure lists.

Proposed law provides that the lists shall be promulgated according to the Administrative Procedure Act.

Present law provides that the lists shall be admissible in a health care liability suit or medical malpractice claim involving medical care rendered or a surgical procedure performed. Present law further provides that in a suit against a physician or other health care provider involving a health care liability or medical malpractice claim which is based on the negligent failure of the physician or other health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or other health care provider:

1. Both the disclosure made and the failure to disclose based on inclusion of any medical care or surgical procedure on the panel's list for which disclosure is not required shall be admissible in evidence and shall create a rebuttable presumption that the requirements of informed consent have been complied with and this presumption shall be included in the charge to the jury; and
2. The failure to disclose the risks and hazards involved in any medical care or surgical procedure required to be disclosed shall be admissible in evidence and shall create a rebuttable presumption of a negligent failure to conform to the duty of disclosure and this presumption shall be included in the charge to the jury, but failure to

disclose may be found not to be negligent, if there was an emergency as defined in present law or; if for some other reason, it was not medically feasible to make a disclosure of the kind that would otherwise have been negligence.

Present law provides that in order to be covered by the provisions of present law, the physician or other health care provider who will actually perform the contemplated medical or surgical procedure shall:

1. Disclose the risks and hazards in the form and to the degree required by the panel.
2. Disclose additional risks, if any, particular to a patient because of a complicating medical condition, either told to the physician or other health care provider by the patient or his representative in a medical history of the patient or reasonably discoverable by such physician or other health care provider.
3. Disclose reasonable therapeutic alternatives and risks associated with such alternatives.
4. Relate that he is obtaining a consent to medical treatment pursuant to the lists formulated by the Louisiana Medical Disclosure Panel.
5. Provide an opportunity to ask any questions about the contemplated medical or surgical procedure, risks, or alternatives and acknowledge in writing that he answered such questions, to the patient or other person authorized to give consent to medical treatment, receipt of which shall be acknowledged in writing.

Proposed law retains present law.

Proposed law requires the department to maintain a searchable database of all current medical disclosure lists that is available to the public through the department's website.

Proposed law provides an exception the open meetings laws whereby if any member of the panel is physically present at a meeting, any number of the other members of the panel may attend the meeting by use of telephone conference call, videoconferencing, or other similar telecommunication methods for purposes of establishing a quorum or voting or for any other meeting purpose allowing a panel member to fully participate in any panel meeting. The proposed law shall apply without regard to the subject matter discussed or considered by the panel at the meeting. A meeting held by telephone conference call, videoconferencing, or other similar telecommunication method:

1. Shall be subject to the notice requirements of present law.
2. Shall not be held unless the notice of the meeting specifies the location of the meeting at which a member of the panel will be physically present.
3. Shall be open to the public and audible to the public at the location specified in the notice.
4. Shall provide two-way audio communication between all panel members attending the meeting during the entire meeting, and if the two way audio communication link with any member attending the meeting is disrupted at any time, the meeting may not continue until the two-way audio communication link is reestablished.

Proposed law provides the Department of Health and Hospitals, its agents or employees, or any person serving as a member of the panel shall not be liable to any person, firm or entity, public or private, for any act or omission to act arising out of a health care provider attempting to obtain or obtaining informed consent pursuant to the provisions of the proposed law.

Present law provides an exception to the requirement of obtaining informed consent and may conduct certain tests when it is determined by the hospital infection control committee or equivalent body that an agent or employee of a hospital, or a physician having privileges at the hospital, has been exposed to the blood or bodily fluids of a patient, in such a manner as to create any risk that the agent, employee, or physician may become infected with the human immunodeficiency virus or other infectious agent if the patient is infected with the human immunodeficiency virus or other infectious agent, in accordance with the infectious disease exposure guidelines of the Centers for Disease Control or the infectious disease exposure standards of the health care facility where the exposure occurred.

Proposed law retains present law but moves present law into its own statutory section.

Effective upon signature of the governor or lapse of time for gubernatorial action.

(Amends R.S. 40:1299.39.5 through 1299.39.7, 1299.58(C), 1299.131(A)(3), and 1300.11; adds R.S. 36:259(MM); and repeals R.S. 40:1299.40)

Summary of Amendments Adopted by Senate

Committee Amendments Proposed by Senate Committee on Health and Welfare to the original bill

1. Adds a second dentist, a general chiropractic physician, a podiatrist, and an optometrist to the panel.
2. Provides an exception to the open meetings law.
3. Provides a limitation of liability to DHH.