

Regular Session, 2012

HOUSE BILL NO. 866

BY REPRESENTATIVE ABRAMSON

HEALTH CARE: Provides relative to informed consent for medical treatment and creates the La. Medical Disclosure Panel

1 AN ACT

2 To amend and reenact R.S. 36:802(introductory paragraph), Part XXII of Chapter 5 of Title
3 40 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 40:1299.39.5
4 through 1299.39.7, and R.S. 40:1299.58(C), 1299.131(A)(3), and 1300.11, and to
5 enact R.S. 36:259(MM), relative to consent to medical treatment; to provide for
6 methods by which informed consent may be obtained; to provide for definitions; to
7 create the Louisiana Medical Disclosure Panel; to provide for membership, powers,
8 and duties of such panel; to provide for attendance via telecommunications; to
9 provide for limitations on liability; to provide for medical disclosure lists; to provide
10 for exceptions to obtaining informed consent; to provide for the promulgation of
11 rules and regulations; to provide for placement of the Louisiana Medical Disclosure
12 Panel within the Department of Health and Hospitals; to provide for an effective
13 date; and to provide for related matters.

14 Be it enacted by the Legislature of Louisiana:

15 Section 1. R.S. 36:802(introductory paragraph) is hereby amended and reenacted and
16 R.S. 36:259(MM) is hereby enacted to read as follows:

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

18 * * *

19 MM. The Louisiana Medical Disclosure Panel (R.S. 40:1299.39.6) is placed
20 within the Department of Health and Hospitals and shall exercise and perform its

1 powers, duties, functions, and responsibilities in the manner provided for agencies
2 transferred in accordance with the provisions of R.S. 36:802.

3 * * *

4 §802. Transfer; retention of policymaking and rulemaking functions

5 The agencies transferred by the provisions of R.S. 36:209(Q), 239(E),
6 259(B), 259(T), 259(MM), 309(B), 359(B), 409(C), 459(B), 509(B), 610(B), 629(I),
7 and 769(C) shall continue to be composed and selected as provided by law, and each
8 shall continue to exercise all of the powers, duties, functions, and responsibilities
9 provided or authorized for each by the constitution or laws which are in the nature
10 of policymaking, rulemaking, licensing, regulations, enforcement, or adjudication
11 and also shall continue to exercise all advisory powers, duties, functions, and
12 responsibilities provided by law. Such powers, duties, functions, and responsibilities
13 shall be exercised independently of the secretary and any assistant secretary, except
14 that:

15 * * *

16 Section 2. Part XXII of Chapter 5 of Title 40 of the Louisiana Revised Statutes of
17 1950, comprised of R.S. 40:1299.39.5 through 1299.39.7, and R.S. 40:1299.58(C),
18 1299.131(A)(3), and 1300.11 are hereby amended and reenacted to read as follows:

19 PART XXII. UNIFORM CONSENT LAW

20 ~~§1299.40~~ 1299.39.5. Consent to medical treatment; ~~exception; availability of lists~~
21 ~~to establish necessity and degree~~ methods of obtaining consent

22 A.(1) Notwithstanding any other law to the contrary, written consent to
23 medical treatment means the voluntary permission of a patient, through signature,
24 marking, or affirmative action through electronic means pursuant to R.S.
25 40:1299.40.1, to any medical or surgical procedure or course of procedures which
26 sets forth in general terms the nature and purpose of the procedure or procedures,
27 together with the known risks, if any, of death, brain damage, quadriplegia,
28 paraplegia, the loss or loss of function of any organ or limb, of disfiguring scars
29 associated with such procedure or procedures; acknowledges that such disclosure of

1 information has been made and that all questions asked about the procedure or
2 procedures have been answered in a satisfactory manner; and is evidenced by a
3 signature, marking, or affirmative action through electronic means, by the patient for
4 whom the procedure is to be performed, or if the patient for any reason lacks legal
5 capacity to consent, by a person who has legal authority to consent on behalf of such
6 patient in such circumstances. Such consent shall be presumed to be valid and
7 effective, in the absence of proof that execution of the consent was induced by
8 misrepresentation of material facts.

9 ~~(2) In addition to the information required to be disclosed in Paragraph (1)~~
10 ~~of this Subsection, where the medical treatment involves the surgical implantation~~
11 ~~of "Norplant" contraceptive devices, the explanation to the patient shall include the~~
12 ~~known and significant or other material risks, the known adverse results, and~~
13 ~~alternative methods of contraception.~~

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

17 C. Where consent to medical treatment from a patient, or from a person
18 authorized by law to consent to medical treatment for such patient, is secured other
19 than in accordance with Subsection A ~~above~~ of this Section, the explanation to the
20 patient or to the person consenting for such patient shall include the matters set forth
21 in ~~Paragraph (1) of Subsection A above~~ Subsection A of this Section, and an
22 opportunity shall be afforded for asking questions concerning the procedures to be
23 performed which shall be answered in a satisfactory manner. Such consent shall be
24 valid and effective and is subject to proof according to the rules of evidence in
25 ordinary cases.

26 ~~D.(1) Notwithstanding this Section or any other law to the contrary,~~
27 ~~whenever it is determined by the hospital infection control committee or equivalent~~
28 ~~body that an agent or employee of a hospital, or a physician having privileges at the~~
29 ~~hospital, has been exposed to the blood or bodily fluids of a patient, in such a manner~~

1 as to create any risk that the agent, employee, or physician may become infected with
2 the human immunodeficiency virus or other infectious agent if the patient is infected
3 with the human immunodeficiency virus or other infectious agent, in accordance
4 with the infectious disease exposure guidelines of the Centers for Disease Control
5 or the infectious disease exposure standards of the health care facility where the
6 exposure occurred, then the hospital infection control committee may, without the
7 consent of the patient, conduct such tests on blood previously drawn or body fluids
8 previously collected as are necessary to determine whether the patient is, in fact,
9 infected with the virus or other agent believed to cause acquired immune deficiency
10 syndrome or other infectious disease. If no previously drawn blood or collected
11 bodily fluids are available or are suitable, the hospital may order, without the consent
12 of the patient, that blood, bodily fluids, or both be drawn and collected from the
13 patient to conduct the necessary tests.

14 (2) Notwithstanding this Section or any other law to the contrary, whenever
15 it is determined by the infectious disease control officer of any law enforcement, fire
16 service, or emergency medical service agency or organization that an agent or
17 employee of the agency or organization has been exposed to the blood or bodily
18 fluids of a patient while rendering emergency medical services, transporting, or
19 treating an ill or injured patient in such a manner as to create any risk that the agent
20 or employee may become infected with the human immunodeficiency virus or other
21 infectious agent if the patient is infected with the human immunodeficiency virus or
22 other infectious agent, in accordance with the infectious disease exposure guidelines
23 of the Centers for Disease Control or the infectious disease exposure standards of the
24 agency or organization, then the infectious disease control officer of the agency or
25 organization may present the facts to the infection control committee of the hospital
26 or other health care facility to which the patient has been transported. If the hospital
27 infection control committee agrees that there has been a potential exposure to the
28 agency or organization personnel, then the hospital infection control committee may,

1 while the patient is in such hospital and without the consent of the patient, conduct
2 such tests as are provided for in R.S. 40:1299.40(D)(1):

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

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

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

14 (6) ~~Nothing herein shall be construed to require the hospital to perform the~~
15 ~~test described herein.~~

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

18 (2)(a) D. In a suit against a physician or other health care provider involving
19 a health care liability or medical malpractice claim which is based on the failure of
20 the physician or other health care provider to disclose or adequately to disclose the
21 risks and hazards involved in the medical care or surgical procedure rendered by the
22 physician or other health care provider, the only theory on which recovery may be
23 obtained is that of negligence in failing to disclose the risks or hazards that could
24 have influenced a reasonable person in making a decision to give or withhold
25 consent.

26 (b) E. Consent to medical treatment may be evidenced according to the
27 provisions of Subsections A and C of this Section or, as an alternative, a physician
28 or other health care provider may choose to avail himself of the lists established by
29 the secretary Louisiana Medical Disclosure Panel pursuant to the provisions of ~~this~~

1 ~~Subsection R.S. 40:1299.39.6~~ as another method by which to evidence a patient's
2 consent to medical treatment.

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

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

12 ~~(b) The secretary shall prepare separate lists of those medical treatments and~~
13 ~~surgical procedures that do and do not require disclosure and for those treatments~~
14 ~~and procedures that do require disclosure shall establish the degree of disclosure~~
15 ~~required and the form in which the disclosure will be made.~~

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

27 ~~(d) At least annually, or at such other period as the secretary may determine,~~
28 ~~the secretary shall identify and examine any new medical treatments and surgical~~
29 ~~procedures that have been developed since its last determinations, shall assign them~~

1 to the proper list, and shall establish the degree of disclosure required and the form
2 in which the disclosure shall be made. The secretary shall also review and examine
3 such treatments and procedures for the purpose of revising lists previously published.
4 These determinations shall be published in the same manner as described in
5 Subparagraph (c) of this Paragraph.

6 (5) ~~Before a patient or a person authorized to consent for a patient gives~~
7 ~~consent to any medical or surgical procedure that appears on the list requiring~~
8 ~~disclosure, the physician or other health care provider shall disclose to the patient,~~
9 ~~or person authorized to consent for the patient, the risks and hazards involved in that~~
10 ~~kind of care or procedure. A physician or other health care provider may choose to~~
11 ~~utilize the lists prepared by the secretary and shall be considered to have complied~~
12 ~~with the requirements of this Subsection if disclosure is made as provided in~~
13 ~~Paragraph (6) of this Subsection.~~

14 (6) ~~Consent to medical care that appears on the secretary's list requiring~~
15 ~~disclosure shall be considered effective under this Subsection, if it is given by the~~
16 ~~patient or a person authorized to give the consent and by a competent witness, and~~
17 ~~if the consent specifically states, in such terms and language that a layman would be~~
18 ~~expected to understand, the risks and hazards that are involved in the medical care~~
19 ~~or surgical procedure in the form and to the degree required by the secretary under~~
20 ~~Paragraph (4) of this Subsection.~~

21 (7)(a) ~~In a suit against a physician or other health care provider involving a~~
22 ~~health care liability or medical malpractice claim which is based on the negligent~~
23 ~~failure of the physician or other health care provider to disclose or adequately to~~
24 ~~disclose the risks and hazards involved in the medical care or surgical procedure~~
25 ~~rendered by the physician or other health care provider.~~

26 (i) ~~Both the disclosure made as provided in Paragraph (5) of this Subsection~~
27 ~~and the failure to disclose based on inclusion of any medical care or surgical~~
28 ~~procedure on the secretary's list for which disclosure is not required shall be~~
29 ~~admissible in evidence and shall create a rebuttable presumption that the~~

1 requirements of Paragraphs (5) and (6) of this Subsection have been complied with,
2 and this presumption shall be included in the charge to the jury; and

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

12 (b) ~~If medical care is rendered or a surgical procedure performed with~~
13 ~~respect to which the secretary has not made a determination regarding a duty of~~
14 ~~disclosure, the physician or other health care provider is under the general duty to~~
15 ~~disclose otherwise imposed by this Section.~~

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

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

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

25 (iii) ~~Disclose reasonable therapeutic alternatives and risks associated with~~
26 ~~such alternatives;~~

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

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

5 F. Notwithstanding the provisions of Subsection E of this Section, consent
6 for dental treatment rendered by dentists not performing oral and maxillofacial
7 surgery in a hospital setting shall be governed exclusively by the provisions of R.S.
8 40:1299.131.

9 §1299.39.6. Louisiana Medical Disclosure Panel; creation; membership; powers;
10 duties

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

12 (1) "Panel" means the Louisiana Medical Disclosure Panel.

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

14 B.(1) The Louisiana Medical Disclosure Panel is hereby created within the
15 department to determine which risks and hazards related to medical care and surgical
16 procedures must be disclosed by a physician or other health care provider to a patient
17 or person authorized to consent for a patient and to establish the general form and
18 substance of such disclosure.

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

21 (a) Two members licensed to practice dentistry. One member who
22 specializes in oral and maxillofacial surgery who shall be selected from a list of
23 nominees submitted to the governor by the Louisiana Society of Oral and
24 Maxillofacial Surgeons. The other member shall be selected from a list of nominees
25 submitted to the governor by the Louisiana Dental Association.

26 (b) Four members licensed to practice law in this state of whom three shall
27 be selected from a list of nominees submitted to the governor by the Louisiana
28 Association for Justice and one shall be selected from a list of nominees submitted
29 to the governor by the Louisiana Association of Defense Counsel.

1 (c) Six members licensed to practice medicine in this state who shall be
2 selected from a list of nominees submitted to the governor by the Louisiana State
3 Medical Society.

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

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

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

11 (1) The dentist who specializes in oral and maxillofacial surgery, the
12 chiropractic physician, the podiatrist, one attorney, and two physicians shall serve
13 a term of two years, or until a successor is appointed and qualified.

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

16 (3) One attorney and two physicians shall serve a term of six years, or until
17 a successor is appointed and qualified.

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

21 D. Any member of the panel who is absent for three consecutive meetings
22 without the consent of a majority of the panel at each such meeting may be removed
23 by the governor at the request of the panel present submitted in writing and signed
24 by the chairman. Upon the death, resignation, or removal of any member, the
25 governor shall fill the vacancy by selection for the unexpired portion of the term.

26 E. Members of the panel shall not be entitled to per diem or any other
27 compensation for their service, but shall be entitled to reimbursement of any
28 necessary and reasonable expense incurred in the performance of their duties on the
29 panel, including travel expenses.

1 F. Meetings of the panel shall be held at the call of the chairman or on
2 petition of at least three members of the panel.

3 G. At the first meeting of the panel each year after its members assume their
4 positions, the panelists shall select one of the panel members to serve as chairman
5 and one of the panel members to serve as vice chairman, and each such officer shall
6 serve for a term of one year. The chairman shall preside at meetings of the panel,
7 and in his absence, the vice chairman shall preside.

8 H. The department shall provide administrative assistance to and serve as the
9 staff for the panel.

10 I. The governor shall appoint the initial members of the panel no later than
11 October 1, 2012, and the panel shall convene its first meeting no later than
12 November 1, 2012.

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

22 (2) The panel shall prepare separate lists of those medical treatments and
23 surgical procedures that do and do not require disclosure and for those treatments
24 and procedures that do require disclosure shall establish the degree of disclosure
25 required and the form in which the disclosure will be made.

26 (3) Lists prepared pursuant to the provisions of this Section together with
27 written explanations of the degree and form of disclosure shall be promulgated in
28 accordance with the provisions of the Administrative Procedure Act. The form of

1 the disclosure and manner in which such disclosure will be made shall be subject to
2 legislative oversight by the House and Senate health and welfare committees.

3 K. The lists compiled and published and rules promulgated relative to the
4 form and manner of disclosure according to the provisions of this Section and
5 evidence of such disclosures or failure to disclose by a physician or other health care
6 provider as provided in this Section, shall be admissible in a health care liability suit
7 or medical malpractice claim involving medical care rendered or a surgical
8 procedure performed.

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

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

25 N. Consent to medical care that appears on the panel's list requiring
26 disclosure shall be considered effective pursuant to the provisions of this Section, if
27 it is given in writing, signed by the patient or a person authorized to give the consent
28 and by a competent witness, and if the written consent specifically states, in such
29 terms and language that a layman would be expected to understand, the risks and

1 hazards that are involved in the medical care or surgical procedure in the form and
2 to the degree required by the panel pursuant to the provisions of this Section.

3 O.(1) All the following requirements shall apply in a suit against a physician
4 or other health care provider involving a health care liability or medical malpractice
5 claim which is based on the negligent failure of the physician or other health care
6 provider to disclose or adequately to disclose the risks and hazards involved in the
7 medical care or surgical procedure rendered by the physician or other health care
8 provider:

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

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

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

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

4 (1) Disclose the risks and hazards in the form and to the degree required by
5 the panel.

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

10 (3) Disclose reasonable therapeutic alternatives and risks associated with
11 such alternatives.

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

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

18 Q. The department shall maintain a searchable database of all current
19 medical disclosure lists and make such database available to the public on the
20 website of the department.

21 R. Notwithstanding the provisions of the Open Meetings Law, R.S. 42:11 et
22 seq., or any other law, if any member of the panel is physically present at a meeting,
23 any number of the other members of the panel may attend the meeting by use of
24 telephone conference call, videoconferencing, or other similar telecommunication
25 methods for purposes of establishing a quorum or voting or for any other meeting
26 purpose allowing a panel member to fully participate in any panel meeting. The
27 provisions of this Subsection shall apply without regard to the subject matter
28 discussed or considered by the panel at the meeting. A meeting held by telephone
29 conference call, videoconferencing, or other similar telecommunication method:

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

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

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

6 (4) Shall provide two-way audio communication between all panel members
7 attending the meeting during the entire meeting, and, if the two-way audio
8 communication link with any member attending the meeting is disrupted at any time,
9 the meeting may not continue until the two-way audio communication link is
10 reestablished.

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

16 §1299.39.7. Exception to obtaining informed consent; human immunodeficiency
17 virus or other infectious agents

18 A. Notwithstanding the provisions of R.S. 40:1299.39.5 or any other law to
19 the contrary, whenever it is determined by the hospital infection control committee
20 or equivalent body that an agent or employee of a hospital, or a physician having
21 privileges at the hospital, has been exposed to the blood or bodily fluids of a patient,
22 in such a manner as to create any risk that the agent, employee, or physician may
23 become infected with the human immunodeficiency virus or other infectious agent
24 if the patient is infected with the human immunodeficiency virus or other infectious
25 agent, in accordance with the infectious disease exposure guidelines of the Centers
26 for Disease Control or the infectious disease exposure standards of the health care
27 facility where the exposure occurred, then the hospital infection control committee
28 may, without the consent of the patient, conduct such tests on blood previously
29 drawn or body fluids previously collected as are necessary to determine whether the

1 patient is, in fact, infected with the virus or other agent believed to cause acquired
2 immune deficiency syndrome or other infectious disease. If no previously drawn
3 blood or collected bodily fluids are available or are suitable, the hospital may order,
4 without the consent of the patient, that blood, bodily fluids, or both be drawn and
5 collected from the patient to conduct the necessary tests.

6 B. Notwithstanding the provisions of R.S. 40:1299.39.5 or any other law to
7 the contrary, whenever it is determined by the infectious disease control officer of
8 any law enforcement, fire service, or emergency medical service agency or
9 organization that an agent or employee of the agency or organization has been
10 exposed to the blood or bodily fluids of a patient while rendering emergency medical
11 services, transporting, or treating an ill or injured patient in such a manner as to
12 create any risk that the agent or employee may become infected with the human
13 immunodeficiency virus or other infectious agent if the patient is infected with the
14 human immunodeficiency virus or other infectious agent, in accordance with the
15 infectious disease exposure guidelines of the Centers for Disease Control or the
16 infectious disease exposure standards of the agency or organization, then the
17 infectious disease control officer of the agency or organization may present the facts
18 to the infection control committee of the hospital or other health care facility to
19 which the patient has been transported. If the hospital infection control committee
20 agrees that there has been a potential exposure to the agency or organization
21 personnel, then the hospital infection control committee may, while the patient is in
22 such hospital and without the consent of the patient, conduct such tests as are
23 provided for in this Section.

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

1 to retain the full trust and confidence of persons at risk, the state has an interest both
2 in assuring that HIV test results are not improperly disclosed and in having clear and
3 certain rules for the disclosure of such information. By providing additional
4 protection for the confidentiality of HIV test results, the legislature intends to
5 encourage the expansion of voluntary confidential testing for HIV so that individuals
6 may come forward, learn their health status, make decisions regarding the
7 appropriate treatment, and change behaviors that put them and others at risk of
8 infection. The legislature also recognizes that confidentiality protections can limit
9 the risk of discrimination and the harm to an individual's interest in privacy that
10 unauthorized disclosure of HIV test results can cause. It is not the intent of the
11 legislature to create any new right, right of action, or cause of action or eliminate any
12 right, right of action, or cause of action existing under current law. It is further not
13 the intent of the legislature that this Chapter repeal, amend, or in any way affect the
14 provisions of R.S. ~~40:1299.40(D)~~ 40:1299.39.7 relative to the ability of a physician
15 or employee of a hospital who may become infected with the human
16 immunodeficiency virus to test the blood of a patient without the patient's consent.
17 It is the intent of the legislature that in the case of a person applying for or already
18 insured under an insurance policy, who will be or has been the subject of a test to
19 determine infection for human immunodeficiency virus (HIV), all facets of insurers'
20 practices in connection with HIV related testing and HIV test results and all facets
21 of other entities' and individuals' interactions with insurers relating to HIV related
22 testing or HIV test results shall be governed exclusively by Title 22 of the Louisiana
23 Revised Statutes of 1950 and any regulations promulgated pursuant thereto by the
24 commissioner of the Department of Insurance who shall have the authority to
25 promulgate such regulations.

26 Section 3. All existing medical disclosure lists duly promulgated by either a prior
27 Louisiana Medical Disclosure Panel or the secretary of the Department of Health and
28 Hospitals shall remain effective and shall be deemed to have been promulgated by the newly

1 created Louisiana Medical Disclosure Panel until such time as those lists may be updated
2 and repromulgated pursuant to the provisions of this Act.

3 Section 4. This Act shall become effective upon signature by the governor or, if not
4 signed by the governor, upon expiration of the time for bills to become law without signature
5 by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If
6 vetoed by the governor and subsequently approved by the legislature, this Act shall become
7 effective on the day following such approval.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

Abramson

HB No. 866

Abstract: Provides for methods of obtaining informed consent for medical treatment and creates the La. Medical Disclosure Panel within DHH.

Present law provides for the transfer of agencies and functions to DHH.

Proposed law retains present law and adds the La. Medical Disclosure Panel.

Proposed law retains present law which allows the use of medical disclosure lists by health care providers as an acceptable method of obtaining informed consent for medical treatment.

Proposed law deletes present law providing special requirements which apply only to medical treatment involving implantation of "Norplant" contraceptive devices.

Present law provides that the secretary of the Dept. of Health and Hospitals (DHH) 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 person authorized to consent for a patient and to establish the general form and substance of such disclosure. Present law further requires the secretary of DHH, on at least an annual basis, to identify and examine any new treatments and procedures that have been developed, assign them to the proper disclosure list, and establish the degree of disclosure required and the form in which the disclosure shall be made. Proposed law revises present law to rescind these duties from the DHH secretary and assign them to the La. Medical Disclosure Panel created by proposed law.

Proposed law provides that the La. Medical Disclosure Panel created by proposed law shall be comprised of the following members:

- (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 La. Society of Oral and Maxillofacial Surgeons. The other member shall be selected from a list of nominees submitted to the governor by the La. 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 La. Trial Lawyers

Association and one shall be selected from a list of nominees submitted to the governor by the La. 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 La. State Medical Society.
- (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 La.
- (5) One member licensed to practice podiatry in the state who shall be selected from a list of nominees submitted to the governor by the Louisiana Podiatric Medical Association.

Proposed law provides that the initial members of the panel shall have the following terms:

- (1) The dentist who specializes in oral and maxillofacial surgery, the chiropractic physician, the podiatrist, 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 panel meetings, the filling of a vacancy on the panel, and for the removal of a panel member for failure to attend meetings.

Proposed law provides that 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 procedures relative to medical disclosure lists and the required content of such lists.

Proposed law provides that the medical disclosure lists shall be duly promulgated according to the provisions of the APA.

Proposed law retains present law which provides that the medical disclosure lists shall be admissible in a health care liability suit or medical malpractice claim involving medical care rendered or a surgical procedure performed.

Proposed law retains present law which 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 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 a disclosure 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.
- (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.

Proposed law retains present law which 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 La. 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 requires DHH to maintain a searchable database of all current medical disclosure lists and make such database available on the department's website.

Proposed law authorizes participation in meetings by telephone conference call, videoconferencing, or other similar telecommunication methods if at least one member is physically present at a meeting, and provides that if a meeting is held via telecommunications, the Open Meeting Law provisions of R.S. 42:11 et seq. apply.

Proposed law limits liability of the department, its agents or employees resulting from a health care provider attempting to obtain or obtaining informed consent.

Present law (R.S. 40:1299.40(D)(1)) provides an exception to the requirement of obtaining informed consent and permits a hospital infection control committee to conduct certain tests when it is determined 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 (HIV) or other infectious agent if the patient is infected with HIV 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 and relocates such provisions to a new Section of statute created by proposed law.

Proposed law provides that all existing medical disclosure lists duly promulgated by either a prior medical disclosure panel or the secretary of DHH shall remain effective and shall be deemed to have been promulgated by the La. Medical Disclosure Panel created by proposed law until such time as those lists may be updated and repromulgated pursuant to the provisions of proposed law.

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

(Amends R.S. 36:802(intro. para.) and R.S. 40:1299.39.5-1299.39.7, 1299.58(C), 1299.131(A)(3), and 1300.11; Adds R.S. 36:259(MM))

Summary of Amendments Adopted by House

Committee Amendments Proposed by House Committee on Civil Law and Procedure to the original bill.

1. Added a dentist and chiropractic physician to the panel.
2. Authorized participation in meetings by telephone conference call, videoconferencing, or other similar telecommunication methods if at least one member is physically present at a meeting, and provides that if a meeting is held via telecommunications, the Open Meeting Law requirements shall apply.
3. Limited liability of the department, its agents, or employees resulting from a health care provider attempting to obtain or obtaining informed consent.

House Floor Amendments to the engrossed bill.

1. Added provision placing the La. Medical Disclosure Panel within DHH.
2. Added a podiatrist as a member of the La. Medical Disclosure Panel.