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CONFERENCE COMMITTEE REPORT ADOPTED -- NOT PRINTED

June 19, 2012

**H. 4008**

Introduced by Reps. Harrison, H.B. Brown, G.R. Smith, Knight, Atwater, Branham, Viers, Bannister, Dillard, Erickson, Hamilton, Hearn, Hosey, Limehouse, D.C. Moss, Patrick, Pinson, Sandifer, G.M. Smith, J.R. Smith, Stringer, Toole, Willis, Bingham and Clemmons

S. Printed 6/6/12--S.

Read the first time March 27, 2012.

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 44‑7‑390 SO AS TO PROVIDE THAT THERE IS NO MONETARY LIABILITY, AND NO CAUSE OF ACTION IS CREATED, BY A HOSPITAL UNDERTAKING OR PERFORMING CERTAIN ACTS IF NOT DONE WITH MALICE; BY ADDING SECTION 44‑7‑392 SO AS TO PROVIDE THAT CERTAIN HOSPITAL PROCEEDINGS AND DATA, DOCUMENTS, RECORDS, AND INFORMATION RESULTING FROM THESE PROCEEDINGS ARE CONFIDENTIAL AND NOT SUBJECT TO DISCOVERY OR SUBPOENA AND MAY NOT BE USED AS EVIDENCE IN A CIVIL ACTION UNLESS THE HOSPITAL HAS WAIVED CONFIDENTIALITY OR THE DATA, DOCUMENTS, RECORDS, OR INFORMATION ARE OTHERWISE AVAILABLE AND SUBJECT TO DISCOVERY; TO PROVIDE THAT THE OUTCOME OF A PRACTITIONER’S APPLICATION FOR HOSPITAL STAFF MEMBERSHIP OR CLINICAL PRIVILEGES, INCLUDING THE PRIVILEGES REQUESTED OR APPROVED, IS NOT CONFIDENTIAL, THAT THE APPLICATION AND SUPPORTING DOCUMENTS ARE CONFIDENTIAL, AND THAT THE APPLICATION MAY BE OBTAINED FROM THE PHYSICIAN OR FROM THE PRACTICE WHERE THE PHYSICIAN WORKS; TO PROVIDE THAT A PRACTITIONER SUBJECT TO A DISCIPLINARY PROCEEDING MAY RECEIVE DATA, DOCUMENTS, RECORDS, AND INFORMATION RELATING TO THE PRACTITIONER, EVEN IF OTHERWISE CONFIDENTIAL, TO PROVIDE THAT RELEASE OF SUCH DATA, DOCUMENTS, RECORDS, AND INFORMATION IS NOT A WAIVER OF CONFIDENTIALITY, AND TO PROHIBIT DISCLOSURE BY THE PRACTITIONER TO THIRD PARTIES, OTHER THAN COUNSEL; TO PROVIDE THAT DISCLOSURE OF CERTAIN INFORMATION BY A HOSPITAL THROUGH REPORTS TO THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, THE JOINT COMMISSION, THE BOARD OF MEDICAL EXAMINERS, OR THE NATIONAL PRACTITIONER DATA BANK IS NOT A WAIVER OF A PRIVILEGE OR CONFIDENTIALITY; AND TO PROVIDE THAT AN AFFECTED PERSON MAY FILE AN ACTION TO ASSERT A CLAIM OF CONFIDENTIALITY AND A MOTION TO ENJOIN THE HOSPITAL FROM RELEASING DATA, DOCUMENTS, RECORDS, OR INFORMATION TO THE DEPARTMENT, THE BOARD OF MEDICAL EXAMINERS, THE NATIONAL PRACTITIONER DATA BANK, OR THE JOINT COMMISSION THAT ARE NOT REQUIRED BY LAW TO BE RELEASED AND TO PROVIDE PROCEDURES TO FURTHER ADDRESS SUCH CLAIMS, INCLUDING AN AWARD OF ATTORNEYS FEES WHEN SUCH A CLAIM IS UNREASONABLY ASSERTED; BY ADDING SECTION 44-7-394 SO AS TO PROVIDE PROCEDURES WHEN A CLAIM OF CONFIDENTIALITY IS ASSERTED IN A JUDICIAL PROCEEDING, INCLUDING AN AWARD OF ATTORNEYS FEES WHEN SUCH A CLAIM IS UNREASONABLY ASSERTED; AND TO PROVIDE RESTRICTIONS ON AND PROCEDURES FOR OFFERING TESTIMONY IN A MEDICAL OR HOSPITAL MALPRACTICE CASE BY A PERSON WHO WAS A WITNESS TO THE CARE THAT IS THE SUBJECT OF THE MALPRACTICE CASE; AND TO AMEND SECTION 40‑71‑10, RELATING TO IMMUNITY FROM LIABILITY FOR MEMBERS OF CERTAIN PROFESSIONAL SOCIETY STANDARDS COMMITTEES, HOSPITAL MEDICAL STAFF COMMITTEES, AND COMMITTEES APPOINTED BY THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO REVIEW PATIENT RECORDS, SO AS TO EXCLUDE FROM IMMUNITY MEMBERS OF A HOSPITAL MEDICAL STAFF COMMITTEE AND TO INCLUDE IMMUNITY FOR MEMBERS OF COMMITTEES APPOINTED BY THE DEPARTMENT OF MENTAL HEALTH TO STUDY PATIENT RECORDS.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Article 3, Chapter 7, Title 44 of the 1976 Code is amended by adding:

“Section 44‑7‑390. There is no monetary liability on the part of, and no cause of action for damages arising against, a hospital licensed under this article, its parent, subsidiaries, health care system, physician practices owned by the hospital (its parent or subsidiaries), directors, officers, agents, employees, medical staff members, external reviewers, witnesses, or a member of any committee of a licensed hospital, whether permanent or ad hoc, including the hospital’s governing body, for any act or proceeding undertaken or performed without malice, made after reasonable effort to obtain the facts, and the action taken was in the belief that it is warranted by the facts known, arising out of or relating to:

(1) sentinel event investigations or root cause analyses, or both, as prescribed by the joint commission or any other organization under whose accreditation a hospital is deemed to meet the Centers for Medicare and Medicaid Services’ conditions of participation;

(2) investigations into the competence or conduct of hospital employees, agents, members of the hospital’s medical staff or other practitioners, relating to the quality of patient care, and any disciplinary proceedings or fair hearings related thereto, provided the medical staff operates pursuant to written bylaws that have been approved by the governing body of the hospital;

(3) quality assurance reviews;

(4) the medical staff credentialing process, provided the medical staff operates pursuant to written bylaws that have been approved by the governing body of the hospital;

(5) reports by a hospital to its insurance carriers;

(6) reviews or investigations to evaluate the quality of care provided by hospital employees, agents, members of the hospital’s medical staff, or other practitioners; or

(7) reports or statements, including, but not limited to, those reports or statements to the National Practitioner Data Bank and the South Carolina Board of Medical Examiners, that provide analysis or opinion (including external reviews) relating to the quality of care provided by hospital employees, agents, members of the hospital’s medical staff, or other practitioners.

Section 44‑7‑392. (A)(1) All proceedings of, and all data, documents, records, and information prepared or acquired by, a hospital licensed under this article, its parent, subsidiaries, health care system, committees, whether permanent or ad hoc, including the hospital’s governing body, or physician practices owned by the hospital (its parent or subsidiaries), relating to the following are confidential:

(a) sentinel event investigations or root cause analyses, or both, as prescribed by the joint commission or any other organization under whose accreditation a hospital is deemed to meet the Centers for Medicare and Medicaid Services’ conditions of participation;

(b) investigations into the competence or conduct of hospital employees, agents, members of the hospital’s medical staff or other practitioners, relating to the quality of patient care, and any disciplinary proceedings or fair hearings related thereto;

(c) quality assurance reviews;

(d) the medical staff credentialing process;

(e) reports by a hospital to its insurance carriers;

(f) reviews or investigations to evaluate the quality of care provided by hospital employees, agents, members of the hospital’s medical staff, or other practitioners; or

(g) reports or statements, including, but not limited to, those reports or statements to the National Practitioner Data Bank and the South Carolina Board of Medical Examiners, that provide analysis or opinion (including external reviews) relating to the quality of care provided by hospital employees, agents, members of the hospital’s medical staff, or other practitioners; or

(h) incident or occurrence reports and related investigations, unless the report is part of the medical record.

(2) The proceedings and data, documents, records, and information described in subsection (A)(1) may be shared with a parent corporation, subsidiaries, other hospitals in the health care system, directors, officers, employees, and agents of the hospital and if shared, remain confidential. These proceedings and data, documents, records, and information in subsection (A)(1) are not subject to discovery, subpoena, or introduction into evidence in any civil action unless the hospital and any affected person who is a party to such action waives the confidentiality in writing. Notwithstanding the foregoing, however, in the event an affected person asserts a claim in any civil action against a hospital, its parent, affiliates, directors, officers, agents, employees, or member of any committee of a licensed hospital, relating to any proceeding identified in subsection (A)(1), the hospital may, without consultation with the affected person, waive confidentiality in that civil action. Likewise, if a hospital asserts a claim in any civil action against an affected person relating to any proceeding identified in subsection (A)(1) in which the affected person was a party, the affected person may use information in the affected person’s possession that is otherwise confidential under this section in that civil action.

(3) Data, documents, records, or information which are otherwise available from original sources are not confidential and are not immune from discovery from the original source under this section or use in a civil action merely because they were acquired by the hospital.

(4) This subsection does not make confidential the outcome of a practitioner’s application for medical staff membership or clinical privileges, nor does it make confidential the list of clinical privileges requested by the practitioner or the list of clinical privileges that were approved. However, the practitioner’s application for medical staff membership or clinical privileges, and all supporting documentation submitted or requested for the application are confidential. Nevertheless, the application itself may be obtained from the physician requesting privileges or the practice where the physician works as an employee or an independent contractor.

(5) If a practitioner is the subject of a disciplinary proceeding or fair hearing, this subsection does not, subject to the provisions of the medical staff bylaws, prohibit the practitioner from receiving data, documents, records, and information relating to this practitioner that is relevant to the proceeding or fair hearing, even if the data, documents, records, and information are otherwise confidential under this section. Such a disclosure to a practitioner in a disciplinary proceeding or fair hearing must not be considered a waiver of any privilege or confidentiality provided for in subsection (A)(1). The practitioner must not, however, without the written consent of the hospital, publish to any third party, other than legal counsel or a person retained for the purposes of representing the practitioner in a disciplinary proceeding or fair hearing, the data, documents, records, or information that were disclosed to him as part of the disciplinary proceeding or fair hearing.

(6) There is nothing in this section which makes any part of a patient’s medical record confidential from the patient, including any redactions, corrections, supplements, or amendments to the patient’s record, whether electronic or written.

(B) The confidentiality provisions of subsection (A) do not prevent committees appointed by the Department of Health and Environmental Control from issuing reports containing solely non-identifying data and information.

(C) Nothing in this section affects the duty of a hospital licensed by the Department of Health and Environmental Control to report accidents or incidents pursuant to the department’s regulations. However, anything reported pursuant to the department’s regulations must not be considered a waiver of any privilege or confidentiality provided in subsection (A).

(D) Any data, documents, records or information that is reported to or reviewed by the joint commission or other accrediting bodies must not be considered a waiver of any privilege or confidentiality provided for in subsection (A).

(E) Any data, documents, records, or information of an action by a hospital to suspend, revoke, or otherwise limit the medical staff membership or clinical privileges of a practitioner that is submitted to the South Carolina Board of Medical Examiners pursuant to a report required by Section 44‑7‑70 or the National Practitioner Data Bank must not be considered a waiver of any privilege or confidentiality provided for in subsection (A).

(F) An affected person may file a civil action to assert a claim of confidentiality before a court of competent jurisdiction and file a motion to request the court to issue an order to enjoin a hospital from releasing data, documents, records, or information to the department, the South Carolina Board of Medical Examiners, the National Practitioner Data Bank, and the joint commission or other accrediting bodies that are not required by law or regulation to be released by a hospital. The data, documents, records, or information in controversy must be filed under seal with the court having jurisdiction over the pending action and are subject to judicial review. If court finds that a party acted unreasonably in unsuccessfully asserting the claim of confidentiality under this subsection, the court shall assess attorney’s fees against that party.

(G) For purposes of this section, an ‘affected person’ means a person, other than a patient, who is a subject of a proceeding enumerated in subsection (A)(1).

Section 44‑7‑394. (A) If a hospital or affected person asserts a claim of confidentiality over documents pursuant to Section 44‑7‑392 and the party seeking the documents objects, then upon motion to the court having jurisdiction over the pending action the court shall review the documents under seal to determine if any of the documents are subject to discovery. The court may order production of the documents to the requesting party. If the court finds that a hospital or affected person acted unreasonably in unsuccessfully asserting the claim of confidentiality, the court may assess attorney’s fees against that party for any fees incurred by the requesting party in obtaining the documents.

Further, a party to a medical or hospital malpractice case shall not offer testimony of a person who was a witness to the medical or hospital care that is the subject of the medical or hospital malpractice case if their testimony would be inconsistent with a prior written, electronic, video, or audio statement of fact submitted by the person and that is confidential under Section 44-7-392 unless such prior inconsistent statement of fact is first produced to all parties in the medical or hospital malpractice case. Upon request by a party, a privilege log shall be provided by a hospital to all parties in the medical or hospital malpractice case identifying any prior written, electronic, video, or audio statements of fact relating to the medical or hospital care that is the subject of the medical or hospital malpractice case that were given by a witness who is identified in discovery and may testify at trial. Upon motion of any party, a prior statement of fact, whether written, electronic, video, or audio, that is confidential under Section 44-7-392, may be reviewed by the court in camera to determine whether the prior statement of fact is inconsistent with the trial testimony offered in the medical or hospital malpractice case. If the court concludes that the prior statement of fact is inconsistent, the court shall order that the prior written statement of fact be produced to the moving party.

(B) For purposes of this section an ‘affected person’ means a person, other than a patient, who is a subject of a proceeding enumerated in Section 44‑7‑392(A)(1).

(C) If the court orders a hospital or affected person to produce documents to a third party under this Section, the hospital or affected person shall have the right to immediately appeal that order, and the filing of the appeal shall stay the enforcement of the order compelling the production.”

SECTION 2. Section 40‑71‑10(B) of the 1976 Code is amended to read:

“(B) There is no monetary liability on the part of, and no cause of action for damages arising against, a member of an appointed committee which is formed to maintain professional standards of a state or local professional society as defined in this section or ~~an appointed member of a committee of a medical staff of a licensed hospital, provided the medical staff operates pursuant to written bylaws that have been approved by the governing board of the hospital, or~~ a committee appointed by the Department of Mental Health, or a committee appointed by the Department of Health and Environmental Control to review patient medical and health records in order to study the causes of death and disease for any act or proceeding undertaken or performed within the scope of the functions of the committee if the committee member acts without malice, has made a reasonable effort to obtain the facts relating to the matter under consideration, and acts in the belief that the action taken by him is warranted by the facts known to him.”

SECTION 3. This act take effect upon approval by the Governor and apply to any investigative action undertaken as provided herein where the underlying event giving rise to the investigation occurs on or after the effective date.

/s/Sen. Harvey S. Peeler, Jr. /s/Rep. James H. Harrison

/s/Sen. Raymond E. Cleary III /s/Rep. F.G. Delleney, Jr.

/s/Sen. Joel Lourie /s/Rep. Eric M. Bedingfield

On Part of the Senate. On Part of the House.

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