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Colorado General Assembly

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MEMORANDUM

TO: Jean Martin and Alethia E. Morgan
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 15, 2024
SUBJECT: Proposed initiative measure 2023-24 #228, concerning patient access to information related to adverse medical incidents

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purpose of the proposed amendment to the Colorado Revised Statutes appears to be:

1. To provide a patient, a patient's representative, including a minor patient's parent, or a patient's legal representative with the right to access, including the right to inspect and copy upon request, the patient's medical record, medical information, or medical communication made or received in the course of

business, treatment, or evaluation of prior or ongoing treatment by a health-care institution or health-care professional relating to any adverse medical incident that caused or could have caused injury to or the death of the patient.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado Constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. The language of subsection (1) of the proposed initiative may be interpreted to mean that a patient or the patient's representative has a right to access the medical records of any patient, not just the medical records of the patient who is submitting the request or on whose behalf the representative is submitting the request. If your intention is to apply the right of access to medical records only to the medical records of the patient who is submitting the request or on whose behalf the request is being submitted, we recommend changing the highlighted "a" in the excerpt below to "the."

In addition to any other similar rights provided in law, a patient or the patient's representative, including a parent of a minor child, or the patient's legal representative, have a right to access, including inspection and copying, upon request, any medical record, medical information, or medical communication made or received in the course of business, treatment, or evaluation of prior or ongoing treatment of **a** patient by a health-care institution or health-care professional relating to any adverse medical incident that caused or could have caused injury to or death of the patient. **[Emphasis added]**

3. With regard to another person who represents the patient pursuant to subsection (1) of the proposed initiative:
 - a. In addition to a minor patient's parent, you might consider adding "or legal guardian."
 - b. How does a patient's representative who is not the patient's legal representative or a minor patient's parent demonstrate to the health-care institution or health-care professional that they represent the patient?
4. If a health-care institution or health-care professional charged a patient or the patient's representative a fee to inspect and copy the patient's records, would such fee be consistent with the "right to access" required in subsection (1) of the proposed initiative?

5. Regarding an "adverse medical incident" referenced in subsection (1) and defined in subsection (3)(a) of the proposed initiative:
 - a. Because a health-care institution or health-care professional is required to share the patient's medical record, medical information, or medical communication only if it is determined that an adverse medical incident occurred, does the act of allowing access to such medical information under subsection (1) itself constitute an admission that a medical incident caused or could have caused injury or death?
 - b. The phrase "adverse medical incident" is defined in part in subsection (3)(a) to mean "medical negligence, breach of the professional standard of care, intentional misconduct, and any other act, neglect, or default of a health-care institution or health-care professional that caused or could have caused injury to or death of the patient." The reference to "any other act" is very broad and could include acts that are not negligent and do not amount to misconduct or a breach of the professional standard of care. Is it your intention to include in the definition *any* act that could result in injury to or the death of the patient?
 - c. The word "injury" is not defined for the proposed initiative.
 - i. Would a common side effect of a medical treatment or procedure constitute an injury?
 - ii. If a medical treatment or procedure has a known risk of injury and the patient is notified of the risk and consents to the medical treatment or procedure despite the risk, would it constitute "injury" under the proposed initiative if the known risk occurs?
6. Section 13-90-107 (1)(d), C.R.S., prevents certain medical professionals from testifying as witnesses without the consent of the patient, with specified exceptions. Because the patient controls the disclosure of these medical records and provides consent to testify, are there medical records or information that you intend to remain privileged or confidential pursuant to this section?
7. Subsection (3)(b) of the proposed initiative has the following definition:

"Health-care institution" has the same meaning as provided in section 13-64-202, and additionally includes any facility licensed or certified by the department of public health and environment as defined in section 25-1.5-103.

If your intention is to include facilities licensed or certified by the department of public health and environment in this definition, we recommend changing "as defined in" to "pursuant to."

8. In subsection (3)(c) of the proposed initiative, you use the language "as used in this article." What is the purpose of this clause?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. Each section of the Colorado Revised Statutes has a section number followed by a headnote. Each section number should end with a period as follows:

25-1-804. Disclosure of adverse medical incidents to patients – definitions.

2. Toward the beginning of subsection (1) of the proposed initiative, there appears to be a subject-verb agreement issue. The sentence reads, in part, "... a patient or the patient's representative ... or the patient's legal representative have a right to access" Because there is an "or" between "patient," "patient representative," and "patient's legal representative," the subject is singular and needs a singular verb, which in this case would be "has" instead of "have."

In addition, please review the comma after "a patient's legal representative." Is it being used to set off the phrase "a patient's legal representative"? If it is meant to be one of three subjects in the list – a patient, the patient's representative, or the patient's legal representative – the sentence needs to be punctuated differently. For example:

"... a patient, the patient's legal representative, including a parent of a minor child, or the patient's legal representative has"

Note that a comma has been added after "patient," the word "or" has been removed from before the phrase "the patient's legal representative," and the comma has been removed between the words "representative" and "has."

3. At the end of subsection (1) of the proposed initiative, in the phrase "that caused or could have caused injury to or death of the patient," the word "the" is

needed before the word "death," so that the sentence is understood as reading "caused or could have caused injury to the patient" and "caused or could have caused *the* death of the patient."

4. It is standard drafting practice to hyphenate:
 - a. In subsection (2)(a) of the proposed initiative, the words "health" and "care" in the phrase "health-care providers"; and
 - b. In subsection (2)(j) of the proposed initiative, the words "attorney" and "client" in the phrase "attorney-client privilege."
5. In subsection (2)(i) of the proposed initiative, the cross-reference to the "Colorado Candor Act," which reads "article 51 of title 25," should instead read "article 51 of this title 25"; the "this" is needed before "title 25" because the proposed initiative is adding a section to title 25, C.R.S.

Similarly, it is standard drafting practice when referencing an article, part, or title to include the number of the article, part, or title. In subsection (3)(c) of the proposed initiative, the phrase "this article" should be changed to "this article 1." Please note that this language would apply to all of article 1 of title 25, C.R.S.; if you intend for the definition to apply only to the initiative, you should change it to "this section."

6. Please consider changing the language in subsection (3) introductory portion of the proposed initiative, which now reads "As used in this section, the following terms have the following meanings," to match the standard language of definitions subsections in the Colorado Revised Statutes, which is "As used in this section, unless the context otherwise requires:".
7. In subsection (3)(d) of the proposed initiative, it is standard drafting practice to spell out "United States" rather than abbreviating it as "U.S."
8. It is standard drafting practice to not use a slash (/) to designate separate titles or phrases. In subsection (3)(f) of the proposed initiative, the titles "physician assistants" and "physician associates" should be separated by an "and" or an "or," and the word "physician" should be added before "associates."
9. In subsections (3)(e) and (3)(f) of the proposed initiative, please add a space between the section number and the subsection number. For example, the cross-reference in subsection (3)(e) of the proposed initiative should read "section 18-4-412 (2)(b)."