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HOUSE BILL 2839

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State of Washington

54th Legislature

1996 Regular Session

By Representatives Dyer, Sherstad, Thompson, McMahan, Goldsmith, Huff, Carlson, Robertson and Johnson

Read first time 01/22/96. Referred to Committee on Health Care.

1 AN ACT Relating to health care liability reform; amending RCW  
2 5.60.060, 70.02.050, 4.16.190, 4.16.350, 7.70.110, and 43.70.075;  
3 adding a new section to chapter 4.24 RCW; adding a new section to  
4 chapter 74.08 RCW; adding a new section to chapter 4.16 RCW; and  
5 creating new sections.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 **PART 1--CERTIFICATE OF MERIT**

8 NEW SECTION. **Sec. 1.** A new section is added to chapter 4.24 RCW  
9 to read as follows:

10 (1) The claimant's attorney shall file the certificate specified in  
11 subsection (2) of this section within ninety days of filing or service,  
12 whichever occurs later, of any action for damages arising out of the  
13 negligence of a person licensed, registered, or certified under Title  
14 18 RCW and subject to chapter 18.130 RCW or a health care facility as  
15 defined in RCW 48.43.005.

16 (2) The certificate issued by the claimant's attorney shall  
17 declare:

18 (a) That the attorney has reviewed the facts of the case;

1 (b) That the attorney has consulted with at least one qualified  
2 expert who the attorney reasonably believes is knowledgeable in the  
3 relevant issues involved in the particular action and who:

4 (i) Holds a license, certificate, or registration issued by this  
5 state or another state in the same profession as that of the defendant  
6 and who practices in the same specialty or subspecialty as the  
7 defendant; or

8 (ii) Has expertise in those areas requiring expert testimony in an  
9 action against a health care facility;

10 (c) The identity of the expert and the expert's license,  
11 certification, or registration;

12 (d) That the expert is willing and available to testify to  
13 admissible facts or opinions; and

14 (e) That the attorney has concluded on the basis of such review and  
15 consultation that there is reasonable and meritorious cause for the  
16 filing of such action.

17 (3) Where a certificate is required under this section, and where  
18 there are multiple defendants, the certificate or certificates must  
19 state the attorney's conclusion that on the basis of review and expert  
20 consultation, there is reasonable and meritorious cause for the filing  
21 of such action as to each defendant.

22 (4) The provisions of this section shall not be applicable to a pro  
23 se plaintiff until such a time as an attorney appears on the  
24 plaintiff's behalf.

25 (5) Violation of this section shall be grounds for either dismissal  
26 of the case or sanctions against the attorney, or both, as the court  
27 deems appropriate.

28 NEW SECTION. **Sec. 2.** Section 1 of this act applies to all actions  
29 for damages arising out of professional negligence filed on or after  
30 the effective date of this section.

## 31 **PART 2--EQUAL ACCESS TO MEDICAL WITNESSES**

32 **Sec. 3.** RCW 5.60.060 and 1995 c 240 s 1 are each amended to read  
33 as follows:

34 (1) A husband shall not be examined for or against his wife,  
35 without the consent of the wife, nor a wife for or against her husband  
36 without the consent of the husband; nor can either during marriage or

1 afterward, be without the consent of the other, examined as to any  
2 communication made by one to the other during marriage. But this  
3 exception shall not apply to a civil action or proceeding by one  
4 against the other, nor to a criminal action or proceeding for a crime  
5 committed by one against the other, nor to a criminal action or  
6 proceeding against a spouse if the marriage occurred subsequent to the  
7 filing of formal charges against the defendant, nor to a criminal  
8 action or proceeding for a crime committed by said husband or wife  
9 against any child of whom said husband or wife is the parent or  
10 guardian, nor to a proceeding under chapter 70.96A or 71.05 RCW:  
11 PROVIDED, That the spouse of a person sought to be detained under  
12 chapter 70.96A or 71.05 RCW may not be compelled to testify and shall  
13 be so informed by the court prior to being called as a witness.

14 (2) An attorney or counselor shall not, without the consent of his  
15 or her client, be examined as to any communication made by the client  
16 to him or her, or his or her advice given thereon in the course of  
17 professional employment.

18 (3) A member of the clergy or a priest shall not, without the  
19 consent of a person making the confession, be examined as to any  
20 confession made to him or her in his or her professional character, in  
21 the course of discipline enjoined by the church to which he or she  
22 belongs.

23 (4) Subject to the limitations under RCW 70.96A.140 or 71.05.250,  
24 a physician or surgeon or osteopathic physician or surgeon shall not,  
25 without the consent of his or her patient, be examined in a civil  
26 action as to any information acquired in attending such patient, which  
27 was necessary to enable him or her to prescribe or act for the patient,  
28 except as follows:

29 (a) In any judicial proceedings regarding a child's injury,  
30 neglect, or sexual abuse or the cause thereof; and

31 (b) Ninety days after (~~filing an action~~) making a claim in  
32 writing for personal injuries or wrongful death, the claimant shall be  
33 deemed to waive the physician-patient privilege. Waiver of the  
34 physician-patient privilege for any one physician or condition  
35 constitutes a waiver of the privilege as to all physicians or  
36 conditions, subject to such limitations as a court may impose pursuant  
37 to court rules. Where the privilege has been waived under this  
38 section, ex parte interviews with such physicians may be conducted in  
39 the same manner as with any other witness.

1 (5) A public officer shall not be examined as a witness as to  
2 communications made to him or her in official confidence, when the  
3 public interest would suffer by the disclosure.

4 (6)(a) A peer support group counselor shall not, without consent of  
5 the law enforcement officer making the communication, be compelled to  
6 testify about any communication made to the counselor by the officer  
7 while receiving counseling. The counselor must be designated as such  
8 by the sheriff, police chief, or chief of the Washington state patrol,  
9 prior to the incident that results in counseling. The privilege only  
10 applies when the communication was made to the counselor while acting  
11 in his or her capacity as a peer support group counselor. The  
12 privilege does not apply if the counselor was an initial responding  
13 officer, a witness, or a party to the incident which prompted the  
14 delivery of peer support group counseling services to the law  
15 enforcement officer.

16 (b) For purposes of this section, "peer support group counselor"  
17 means a:

18 (i) Law enforcement officer, or civilian employee of a law  
19 enforcement agency, who has received training to provide emotional and  
20 moral support and counseling to an officer who needs those services as  
21 a result of an incident in which the officer was involved while acting  
22 in his or her official capacity; or

23 (ii) Nonemployee counselor who has been designated by the sheriff,  
24 police chief, or chief of the Washington state patrol to provide  
25 emotional and moral support and counseling to an officer who needs  
26 those services as a result of an incident in which the officer was  
27 involved while acting in his or her official capacity.

28 **Sec. 4.** RCW 70.02.050 and 1993 c 448 s 4 are each amended to read  
29 as follows:

30 (1) A health care provider may disclose health care information  
31 about a patient without the patient's authorization to the extent a  
32 recipient needs to know the information, if the disclosure is:

33 (a) To a person who the provider reasonably believes is providing  
34 health care to the patient;

35 (b) To any other person who requires health care information for  
36 health care education, or to provide planning, quality assurance, peer  
37 review, or administrative, legal, financial, or actuarial services to  
38 the health care provider; or for assisting the health care provider in

1 the delivery of health care and the health care provider reasonably  
2 believes that the person:

3 (i) Will not use or disclose the health care information for any  
4 other purpose; and

5 (ii) Will take appropriate steps to protect the health care  
6 information;

7 (c) To any other health care provider reasonably believed to have  
8 previously provided health care to the patient, to the extent necessary  
9 to provide health care to the patient, unless the patient has  
10 instructed the health care provider in writing not to make the  
11 disclosure;

12 (d) To any person if the health care provider reasonably believes  
13 that disclosure will avoid or minimize an imminent danger to the health  
14 or safety of the patient or any other individual, however there is no  
15 obligation under this chapter on the part of the provider to so  
16 disclose;

17 (e) Oral, and made to immediate family members of the patient, or  
18 any other individual with whom the patient is known to have a close  
19 personal relationship, if made in accordance with good medical or other  
20 professional practice, unless the patient has instructed the health  
21 care provider in writing not to make the disclosure;

22 (f) To a health care provider who is the successor in interest to  
23 the health care provider maintaining the health care information;

24 (g) For use in a research project that an institutional review  
25 board has determined:

26 (i) Is of sufficient importance to outweigh the intrusion into the  
27 privacy of the patient that would result from the disclosure;

28 (ii) Is impracticable without the use or disclosure of the health  
29 care information in individually identifiable form;

30 (iii) Contains reasonable safeguards to protect the information  
31 from redisclosure;

32 (iv) Contains reasonable safeguards to protect against identifying,  
33 directly or indirectly, any patient in any report of the research  
34 project; and

35 (v) Contains procedures to remove or destroy at the earliest  
36 opportunity, consistent with the purposes of the project, information  
37 that would enable the patient to be identified, unless an institutional  
38 review board authorizes retention of identifying information for  
39 purposes of another research project;

1 (h) To a person who obtains information for purposes of an audit,  
2 if that person agrees in writing to:

3 (i) Remove or destroy, at the earliest opportunity consistent with  
4 the purpose of the audit, information that would enable the patient to  
5 be identified; and

6 (ii) Not to disclose the information further, except to accomplish  
7 the audit or report unlawful or improper conduct involving fraud in  
8 payment for health care by a health care provider or patient, or other  
9 unlawful conduct by the health care provider;

10 (i) To an official of a penal or other custodial institution in  
11 which the patient is detained;

12 (j) To provide directory information, unless the patient has  
13 instructed the health care provider not to make the disclosure;

14 (k) In the case of a hospital or health care provider to provide,  
15 in cases reported by fire, police, sheriff, or other public authority,  
16 name, residence, sex, age, occupation, condition, diagnosis, or extent  
17 and location of injuries as determined by a physician, and whether the  
18 patient was conscious when admitted; or

19 (l) Made after a deemed waiver of the physician-patient privilege  
20 under RCW 5.60.060(4)(b).

21 (2) A health care provider shall disclose health care information  
22 about a patient without the patient's authorization if the disclosure  
23 is:

24 (a) To federal, state, or local public health authorities, to the  
25 extent the health care provider is required by law to report health  
26 care information; when needed to determine compliance with state or  
27 federal licensure, certification or registration rules or laws; or when  
28 needed to protect the public health;

29 (b) To federal, state, or local law enforcement authorities to the  
30 extent the health care provider is required by law;

31 (c) Pursuant to compulsory process in accordance with RCW  
32 70.02.060.

33 (3) All state or local agencies obtaining patient health care  
34 information pursuant to this section shall adopt rules establishing  
35 their record acquisition, retention, and security policies that are  
36 consistent with this chapter.

37 NEW SECTION. Sec. 5. Sections 3 and 4 of this act do not apply to  
38 claims, hearings, appeals, or any other proceedings under Title 51 RCW.

1 **PART 3--ABUSIVE TRUSTS**

2 NEW SECTION. **Sec. 6.** A new section is added to chapter 74.08 RCW  
3 to read as follows:

4 (1) The legislature finds inappropriate the practice of  
5 establishing a trust for a minor or incompetent from an award or  
6 settlement of a personal injury claim that has the effect of making the  
7 minor eligible for public assistance when the minor otherwise would not  
8 be eligible for such assistance. In these cases, limited public  
9 resources are provided to persons with substantial assets, not the  
10 truly needy, and the ultimate benefit of these trusts generally goes to  
11 the families of these minors. The legislature intends to limit the  
12 ability to establish this type of trust solely to obtain public  
13 assistance.

14 (2) The department shall review its policies and rules and, as  
15 necessary and to the extent allowed by federal law, revise existing  
16 rules or adopt new rules to limit the ability of minors who receive  
17 substantial personal injury awards or settlements to use trusts to  
18 become eligible for public assistance.

19 **PART 4--LIMITATION OF ACTIONS**

20 **Sec. 7.** RCW 4.16.190 and 1993 c 232 s 1 are each amended to read  
21 as follows:

22 If a person entitled to bring an action mentioned in this chapter,  
23 except for a penalty or forfeiture, or against a sheriff or other  
24 officer, for an escape, be at the time the cause of action accrued  
25 either under the age of eighteen years, or incompetent or disabled to  
26 such a degree that he or she cannot understand the nature of the  
27 proceedings, such incompetency or disability as determined according to  
28 chapter 11.88 RCW, or imprisoned on a criminal charge prior to  
29 sentencing, the time of such disability shall not be a part of the time  
30 limited for the commencement of action.

31 This section does not apply to any civil action for damages for  
32 injury occurring as a result of health care.

33 NEW SECTION. **Sec. 8.** A new section is added to chapter 4.16 RCW  
34 to read as follows:

1 Any civil action for damages for injury occurring as a result of  
2 health care provided after June 25, 1976, and before the effective date  
3 of this act that has not accrued before the effective date of this act  
4 and that was previously tolled by RCW 4.16.190 accrues on the effective  
5 date of this act.

6 **Sec. 9.** RCW 4.16.350 and 1988 c 144 s 2 are each amended to read  
7 as follows:

8 Any civil action for damages for injury occurring as a result of  
9 health care which is provided after June 25, 1976 against:

10 (1) A person licensed by this state to provide health care or  
11 related services, including, but not limited to, a physician,  
12 osteopathic physician, dentist, nurse, optometrist, (~~podiatrist~~)  
13 podiatric physician and surgeon, chiropractor, physical therapist,  
14 psychologist, pharmacist, optician, physician's assistant, osteopathic  
15 physician's assistant, nurse practitioner, or physician's trained  
16 mobile intensive care paramedic, including, in the event such person is  
17 deceased, his estate or personal representative;

18 (2) An employee or agent of a person described in subsection (1) of  
19 this section, acting in the course and scope of his employment,  
20 including, in the event such employee or agent is deceased, his estate  
21 or personal representative; or

22 (3) An entity, whether or not incorporated, facility, or  
23 institution employing one or more persons described in subsection (1)  
24 of this section, including, but not limited to, a hospital, clinic,  
25 health maintenance organization, or nursing home; or an officer,  
26 director, employee, or agent thereof acting in the course and scope of  
27 his employment, including, in the event such officer, director,  
28 employee, or agent is deceased, his estate or personal representative;  
29 based upon alleged professional negligence shall be commenced within  
30 three years of the act or omission alleged to have caused the injury or  
31 condition, or one year of the time the patient or his representative  
32 discovered or reasonably should have discovered that the injury or  
33 condition was caused by said act or omission, whichever period expires  
34 later, except that in no event shall an action be commenced more than  
35 eight years after said act or omission: PROVIDED, That the time for  
36 commencement of an action is tolled upon proof of fraud, intentional  
37 concealment, or the presence of a foreign body not intended to have a  
38 therapeutic or diagnostic purpose or effect.



1 subjected to workplace reprisal or retaliatory action has the remedies  
2 provided under chapter 49.60 RCW.

3 (2)(a) "Improper quality of care" means any practice, procedure,  
4 action, or failure to act that violates any state law or rule of the  
5 applicable state health licensing authority under Title 18 or chapters  
6 70.41, 70.96A, 70.127, 70.175, 71.05, 71.12, and 71.24 RCW, and  
7 enforced by the department of health. (~~Each health disciplinary  
8 authority as defined in RCW 18.130.040 may, with consultation and  
9 interdisciplinary coordination provided by the state department of  
10 health, adopt rules defining accepted standards of practice for their  
11 profession that shall further define improper quality of care.~~)  
12 Improper quality of care shall not include good faith personnel actions  
13 related to employee performance or actions taken according to  
14 established terms and conditions of employment.

15 (b) "Reprisal or retaliatory action" means but is not limited to:  
16 Denial of adequate staff to perform duties; frequent staff changes;  
17 frequent and undesirable office changes; refusal to assign meaningful  
18 work; unwarranted and unsubstantiated report of misconduct pursuant to  
19 Title 18 RCW; letters of reprimand or unsatisfactory performance  
20 evaluations; demotion; reduction in pay; denial of promotion;  
21 suspension; dismissal; denial of employment; and a supervisor or  
22 superior encouraging coworkers to behave in a hostile manner toward the  
23 whistleblower.

24 (c) "Whistleblower" means a consumer, employee, or health care  
25 professional who in good faith reports alleged quality of care concerns  
26 to the department of health.

27 (3) Nothing in this section prohibits a health care facility from  
28 making any decision exercising its authority to terminate, suspend, or  
29 discipline an employee who engages in workplace reprisal or retaliatory  
30 action against a whistleblower.

31 (4) The department shall adopt rules to implement procedures for  
32 filing, investigation, and resolution of whistleblower complaints that  
33 are integrated with complaint procedures under Title 18 RCW for health  
34 professionals or health care facilities.

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**PART 7--MISCELLANEOUS**

1        NEW SECTION.    **Sec. 12.**    Part headings used in this act do not  
2    constitute any part of the law.

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