
SENATE BILL 6087

State of Washington

59th Legislature

2005 Regular Session

By Senators Brown, Kline, Keiser, Fairley, Weinstein, Rockefeller and Kohl-Welles

Read first time 03/15/2005. Referred to Committee on Judiciary.

1 AN ACT Relating to improving health care by increasing patient
2 safety, reducing medical errors, reforming medical malpractice
3 insurance, and resolving medical malpractice claims fairly without
4 imposing mandatory limits on damage awards or fees; amending RCW
5 5.64.010, 4.24.260, 18.71.015, 18.130.160, 18.130.172, 43.70.510,
6 48.18.290, 48.18.2901, 48.18.100, 48.18.103, 48.19.043, 48.19.060,
7 4.16.190, 7.04.010, and 7.70.080; reenacting and amending RCW
8 69.41.010; reenacting RCW 4.16.350; adding a new section to chapter
9 18.130 RCW; adding new sections to chapter 7.70 RCW; adding a new
10 section to chapter 42.17 RCW; adding a new section to chapter 48.19
11 RCW; adding a new section to chapter 48.18 RCW; adding a new chapter to
12 Title 70 RCW; adding a new chapter to Title 48 RCW; adding a new
13 chapter to Title 7 RCW; creating new sections; prescribing penalties;
14 and providing for submission of this act to a vote of the people.

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

16 NEW SECTION. **Sec. 1.** The legislature finds that access to safe,
17 affordable health care is one of the most important issues facing the
18 citizens of Washington state. The legislature further finds that the
19 rising cost of medical malpractice insurance has caused some

1 physicians, particularly those in high-risk specialties such as
2 obstetrics and emergency room practice, to be unavailable when and
3 where the citizens need them the most. The answers to these problems
4 are varied and complex, requiring comprehensive solutions that
5 encourage patient safety practices, increase oversight of medical
6 malpractice insurance, and making the civil justice system more
7 understandable, fair, and efficient for all the participants. The
8 legislature finds that neither of the initiatives, Initiative 330 or
9 Initiative 336, contain comprehensive, real solutions to the problems
10 they are attempting to solve, and for this reason, offers the following
11 single alternative to both of these initiatives to the citizens of this
12 state.

13 It is the intent of the legislature to prioritize patient safety
14 and the prevention of medical errors above all other considerations as
15 legal changes are made to address the problem of high malpractice
16 insurance premiums. Thousands of patients are injured each year as a
17 result of medical errors, many of which can be avoided by supporting
18 health care providers, facilities, and carriers in their efforts to
19 reduce the incidence of those mistakes. It is also the legislature's
20 intent to provide incentives to settle cases before resorting to court,
21 and to provide the option of a more fair, efficient, and streamlined
22 alternative to trials for those for whom settlement negotiations do not
23 work. Finally, it is the intent of the legislature to provide the
24 insurance commissioner with the tools and information necessary to
25 regulate medical malpractice insurance rates and policies so that they
26 are fair to both the insurers and the insured.

27 PART I - PATIENT SAFETY

28 Encouraging Patient Safety Through Communications With Patients

29 **Sec. 101.** RCW 5.64.010 and 1975-'76 2nd ex.s. c 56 s 3 are each
30 amended to read as follows:

31 (1) In any civil action against a health care provider for personal
32 injuries which is based upon alleged professional negligence ((and
33 which is against:

34 (1) A person licensed by this state to provide health care or
35 related services, including, but not limited to, a physician,

1 osteopathic physician, dentist, nurse, optometrist, podiatrist,
2 chiropractor, physical therapist, psychologist, pharmacist, optician,
3 physician's assistant, osteopathic physician's assistant, nurse
4 practitioner, or physician's trained mobile intensive care paramedic,
5 including, in the event such person is deceased, his estate or personal
6 representative;

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

11 (3) An entity, whether or not incorporated, facility, or
12 institution employing one or more persons described in subsection (1)
13 of this section, including, but not limited to, a hospital, clinic,
14 health maintenance organization, or nursing home; or an officer,
15 director, employee, or agent thereof acting in the course and scope of
16 his employment, including, in the event such officer, director,
17 employee, or agent is deceased, his estate or personal
18 representative;)), or in any arbitration or mediation proceeding
19 related to such civil action, evidence of furnishing or offering or
20 promising to pay medical, hospital, or similar expenses occasioned by
21 an injury is not admissible ((to prove liability for the injury)).

22 (2)(a) Except as provided for in (c) of this subsection, in a civil
23 action against a health care provider for personal injuries that is
24 based upon alleged professional negligence, or in any arbitration or
25 mediation proceeding related to such civil action, a statement,
26 affirmation, gesture, or conduct identified in (b) of this subsection
27 is inadmissible as evidence if:

28 (i) More than twenty days before commencement of trial it was
29 conveyed by a health care provider to the injured person, or to a
30 person specified in RCW 7.70.065(1) if the injured person was not
31 competent; and

32 (ii) It relates to the discomfort, pain, suffering, injury, or
33 death of the injured person as the result of the alleged professional
34 negligence.

35 (b) (a) of this subsection applies to:

36 (i) Any statement, affirmation, gesture, or conduct expressing
37 apology, fault, sympathy, commiseration, condolence, compassion, or a
38 general sense of benevolence; or

1 (ii) Any statement or affirmation regarding remedial actions that
2 may be taken to address the act or omission that is the basis for the
3 allegation of negligence.

4 (c) Subject to an in-camera review by the court, a previous
5 statement of fault may be admissible if subsequent testimony on issues
6 of fact made by the witness in the civil action, arbitration, or
7 mediation directly contradicts the previous statement of fault made by
8 the witness to the injured person, or to a person specified in RCW
9 7.70.065(1) if the injured person was not competent. The party wishing
10 to use the previous statement of fault must first demonstrate by clear
11 and convincing evidence that the witness, in testimony provided in
12 deposition or at trial in the present proceeding, has directly
13 contradicted the previous statement of fault on an issue of fact
14 material to the present proceeding. In that case, the party may use
15 only such excerpt or excerpts as are necessary to demonstrate the
16 contradiction.

17 **Encouraging Reports of Unprofessional Conduct or Lack of**
18 **Capacity to Practice Safely**

19 **Sec. 102.** RCW 4.24.260 and 1994 sp.s. c 9 s 701 are each amended
20 to read as follows:

21 ~~((Physicians licensed under chapter 18.71 RCW, dentists licensed~~
22 ~~under chapter 18.32 RCW, and pharmacists licensed under chapter 18.64~~
23 ~~RCW)) Any member of a health profession listed under RCW 18.130.040
24 who, in good faith, makes a report, files charges, or presents evidence
25 against another member of ((their)) a health profession based on the
26 claimed ((incompetency or gross misconduct)) unprofessional conduct as
27 provided in RCW 18.130.180 or inability to practice with reasonable
28 skill and safety to consumers by reason of any physical or mental
29 condition as provided in RCW 18.130.170 of such person before the
30 ~~((medical quality assurance commission established under chapter 18.71~~
31 ~~RCW, in a proceeding under chapter 18.32 RCW, or to the board of~~
32 ~~pharmacy under RCW 18.64.160)) agency, board, or commission responsible~~
33 for disciplinary activities for the person's profession under chapter
34 18.130 RCW, shall be immune from civil action for damages arising out
35 of such activities. A person prevailing upon the good faith defense~~

1 provided for in this section is entitled to recover expenses and
2 reasonable attorneys' fees incurred in establishing the defense.

3 **Medical Quality Assurance Commission Consumer Membership**

4 **Sec. 103.** RCW 18.71.015 and 1999 c 366 s 4 are each amended to
5 read as follows:

6 The Washington state medical quality assurance commission is
7 established, consisting of thirteen individuals licensed to practice
8 medicine in the state of Washington under this chapter, two individuals
9 who are licensed as physician assistants under chapter 18.71A RCW, and
10 ~~((four))~~ six individuals who are members of the public. At least two
11 of the public members shall not be from the health care industry and
12 shall be representatives of patient advocacy groups or organizations.

13 Each congressional district now existing or hereafter created in the
14 state must be represented by at least one physician member of the
15 commission. The terms of office of members of the commission are not
16 affected by changes in congressional district boundaries. Public
17 members of the commission may not be a member of any other health care
18 licensing board or commission, or have a fiduciary obligation to a
19 facility rendering health services regulated by the commission, or have
20 a material or financial interest in the rendering of health services
21 regulated by the commission.

22 The members of the commission shall be appointed by the governor.
23 Members of the initial commission may be appointed to staggered terms
24 of one to four years, and thereafter all terms of appointment shall be
25 for four years. The governor shall consider such physician and
26 physician assistant members who are recommended for appointment by the
27 appropriate professional associations in the state. In appointing the
28 initial members of the commission, it is the intent of the legislature
29 that, to the extent possible, the existing members of the board of
30 medical examiners and medical disciplinary board repealed under section
31 336, chapter 9, Laws of 1994 sp. sess. be appointed to the commission.
32 No member may serve more than two consecutive full terms. Each member
33 shall hold office until a successor is appointed.

34 Each member of the commission must be a citizen of the United
35 States, must be an actual resident of this state, and, if a physician,

1 must have been licensed to practice medicine in this state for at least
2 five years.

3 The commission shall meet as soon as practicable after appointment
4 and elect officers each year. Meetings shall be held at least four
5 times a year and at such place as the commission determines and at such
6 other times and places as the commission deems necessary. A majority
7 of the commission members appointed and serving constitutes a quorum
8 for the transaction of commission business.

9 The affirmative vote of a majority of a quorum of the commission is
10 required to carry any motion or resolution, to adopt any rule, or to
11 pass any measure. The commission may appoint panels consisting of at
12 least three members. A quorum for the transaction of any business by
13 a panel is a minimum of three members. A majority vote of a quorum of
14 the panel is required to transact business delegated to it by the
15 commission.

16 Each member of the commission shall be compensated in accordance
17 with RCW 43.03.265 and in addition thereto shall be reimbursed for
18 travel expenses incurred in carrying out the duties of the commission
19 in accordance with RCW 43.03.050 and 43.03.060. Any such expenses
20 shall be paid from funds appropriated to the department of health.

21 Whenever the governor is satisfied that a member of a commission
22 has been guilty of neglect of duty, misconduct, or malfeasance or
23 misfeasance in office, the governor shall file with the secretary of
24 state a statement of the causes for and the order of removal from
25 office, and the secretary shall forthwith send a certified copy of the
26 statement of causes and order of removal to the last known post office
27 address of the member.

28 Vacancies in the membership of the commission shall be filled for
29 the unexpired term by appointment by the governor.

30 The members of the commission are immune from suit in an action,
31 civil or criminal, based on its disciplinary proceedings or other
32 official acts performed in good faith as members of the commission.

33 Whenever the workload of the commission requires, the commission
34 may request that the secretary appoint pro tempore members of the
35 commission. When serving, pro tempore members of the commission have
36 all of the powers, duties, and immunities, and are entitled to all of
37 the emoluments, including travel expenses, of regularly appointed
38 members of the commission.

1 **Health Care Provider Discipline**

2 **Sec. 104.** RCW 18.130.160 and 2001 c 195 s 1 are each amended to
3 read as follows:

4 Upon a finding, after hearing, that a license holder or applicant
5 has committed unprofessional conduct or is unable to practice with
6 reasonable skill and safety due to a physical or mental condition, the
7 disciplining authority may consider the imposition of sanctions, taking
8 into account any prior findings of fact under RCW 18.130.110, any
9 stipulations to informal disposition under RCW 18.130.172, and any
10 action taken by other state disciplining authorities, and issue an
11 order providing for one or any combination of the following:

- 12 (1) Revocation of the license;
- 13 (2) Suspension of the license for a fixed or indefinite term;
- 14 (3) Restriction or limitation of the practice;
- 15 (4) Requiring the satisfactory completion of a specific program of
16 remedial education or treatment;
- 17 (5) The monitoring of the practice by a supervisor approved by the
18 disciplining authority;
- 19 (6) Censure or reprimand;
- 20 (7) Compliance with conditions of probation for a designated period
21 of time;
- 22 (8) Payment of a fine for each violation of this chapter, not to
23 exceed five thousand dollars per violation. Funds received shall be
24 placed in the health professions account;
- 25 (9) Denial of the license request;
- 26 (10) Corrective action;
- 27 (11) Refund of fees billed to and collected from the consumer;
- 28 (12) A surrender of the practitioner's license in lieu of other
29 sanctions, which must be reported to the federal data bank.

30 Except as otherwise provided in section 106 of this act, any of the
31 actions under this section may be totally or partly stayed by the
32 disciplining authority. In determining what action is appropriate, the
33 disciplining authority must first consider what sanctions are necessary
34 to protect or compensate the public. Only after such provisions have
35 been made may the disciplining authority consider and include in the
36 order requirements designed to rehabilitate the license holder or
37 applicant. All costs associated with compliance with orders issued

1 under this section are the obligation of the license holder or
2 applicant.

3 The licensee or applicant may enter into a stipulated disposition
4 of charges that includes one or more of the sanctions of this section,
5 but only after a statement of charges has been issued and the licensee
6 has been afforded the opportunity for a hearing and has elected on the
7 record to forego such a hearing. The stipulation shall either contain
8 one or more specific findings of unprofessional conduct or inability to
9 practice, or a statement by the licensee acknowledging that evidence is
10 sufficient to justify one or more specified findings of unprofessional
11 conduct or inability to practice. The stipulation entered into
12 pursuant to this subsection shall be considered formal disciplinary
13 action for all purposes.

14 **Sec. 105.** RCW 18.130.172 and 2000 c 171 s 29 are each amended to
15 read as follows:

16 (1) Except for those acts of unprofessional conduct specified in
17 section 106 of this act, prior to serving a statement of charges under
18 RCW 18.130.090 or 18.130.170, the disciplinary authority may furnish a
19 statement of allegations to the licensee or applicant along with a
20 detailed summary of the evidence relied upon to establish the
21 allegations and a proposed stipulation for informal resolution of the
22 allegations. These documents shall be exempt from public disclosure
23 until such time as the allegations are resolved either by stipulation
24 or otherwise.

25 (2) The disciplinary authority and the applicant or licensee may
26 stipulate that the allegations may be disposed of informally in
27 accordance with this subsection. The stipulation shall contain a
28 statement of the facts leading to the filing of the complaint; the act
29 or acts of unprofessional conduct alleged to have been committed or the
30 alleged basis for determining that the applicant or licensee is unable
31 to practice with reasonable skill and safety; a statement that the
32 stipulation is not to be construed as a finding of either
33 unprofessional conduct or inability to practice; an acknowledgement
34 that a finding of unprofessional conduct or inability to practice, if
35 proven, constitutes grounds for discipline under this chapter; and an
36 agreement on the part of the licensee or applicant that the sanctions
37 set forth in RCW 18.130.160, except RCW 18.130.160 (1), (2), (6), and

1 (8), may be imposed as part of the stipulation, except that no fine may
2 be imposed but the licensee or applicant may agree to reimburse the
3 disciplinary authority the costs of investigation and processing the
4 complaint up to an amount not exceeding one thousand dollars per
5 allegation; and an agreement on the part of the disciplinary authority
6 to forego further disciplinary proceedings concerning the allegations.
7 A stipulation entered into pursuant to this subsection shall not be
8 considered formal disciplinary action.

9 (3) If the licensee or applicant declines to agree to disposition
10 of the charges by means of a stipulation pursuant to subsection (2) of
11 this section, the disciplinary authority may proceed to formal
12 disciplinary action pursuant to RCW 18.130.090 or 18.130.170.

13 (4) Upon execution of a stipulation under subsection (2) of this
14 section by both the licensee or applicant and the disciplinary
15 authority, the complaint is deemed disposed of and shall become subject
16 to public disclosure on the same basis and to the same extent as other
17 records of the disciplinary authority. Should the licensee or
18 applicant fail to pay any agreed reimbursement within thirty days of
19 the date specified in the stipulation for payment, the disciplinary
20 authority may seek collection of the amount agreed to be paid in the
21 same manner as enforcement of a fine under RCW 18.130.165.

22 NEW SECTION. **Sec. 106.** A new section is added to chapter 18.130
23 RCW to read as follows:

24 (1) The disciplining authority shall revoke the license of a
25 license holder who is found, in three unrelated orders under RCW
26 18.130.110 in a ten-year period, to have engaged in three separate
27 courses of unprofessional conduct based upon any combination of the
28 following:

29 (a) Any violation of RCW 18.130.180(4) that causes or substantially
30 contributes to the death of or severe injury to a patient or creates a
31 significant risk of harm to the public;

32 (b) Any violation of RCW 18.130.180(6) that creates a significant
33 risk of harm to the public;

34 (c) Any violation of RCW 18.130.180(7) that causes or substantially
35 contributes to the death of or severe injury to a patient or creates a
36 significant risk of harm to the public;

37 (d) Any violation of RCW 18.130.180(9);

1 (e) Any violation of RCW 18.130.180(17), except gross misdemeanors;
2 (f) Any violation of RCW 18.130.180(23) that causes or
3 substantially contributes to the death of or severe injury to a patient
4 or creates a significant risk of harm to the public;

5 (g) Any violation of RCW 18.130.180(24) based upon an act of abuse
6 to a client or patient; and

7 (h) Any violation of RCW 18.130.180(24) based upon sexual contact
8 with a client or patient.

9 (2) For the purposes of subsection (1) of this section, a ten-year
10 period commences upon the completion of all conditions and obligations
11 imposed for the acts identified in subsection (1)(a) through (h) of
12 this section.

13 (3) An order that includes a finding of mitigating circumstances
14 for an act of unprofessional conduct may be issued and, except for (a)
15 of this subsection, applied one time for any license holder or
16 applicant for a license, and if so, that order does not count as one of
17 the three orders that triggers a license revocation for purposes of
18 this section. A finding of mitigating circumstances under (a) of this
19 subsection may be issued and applied as many times as the license
20 holder meets the criteria for such a finding and does not count as one
21 of the three orders that triggers the revocation of a license for the
22 purposes of this section. Except for (a) of this subsection, after a
23 finding of mitigating circumstances is issued and applied, no
24 subsequent orders under this section may consider any mitigating
25 circumstances. The following mitigating circumstances may be
26 considered:

27 (a) For subsection (1)(a) of this section, the act involved a high-
28 risk procedure, there was no lower-risk alternative to that procedure,
29 the patient was informed of the risks of the procedure and consented to
30 the procedure anyway, and prior to the institution of disciplinary
31 actions the license holder took appropriate remedial measures;

32 (b) There is a strong potential for rehabilitation of the license
33 holder; or

34 (c) There is a strong potential for remedial education and training
35 to prevent future harm to the public.

36 (4) Nothing in this section limits the ability of the disciplining
37 authority to impose any sanction, including revocation, for a single
38 violation of any subsection of RCW 18.130.180.

1 (5) Notwithstanding RCW 9.96A.020(1), revocation of a license under
2 this section is not subject to a petition for reinstatement under RCW
3 18.130.150.

4 (6) Revocation of a license under this section is subject to appeal
5 as provided in RCW 18.130.140.

6 **Increasing Patient Safety Through**
7 **Disclosure and Analysis of Adverse Events**

8 NEW SECTION. **Sec. 107.** The definitions in this section apply
9 throughout this chapter unless the context clearly requires otherwise.

10 (1) "Adverse event" means any of the following events or
11 occurrences:

12 (a) An unanticipated death or major permanent loss of function, not
13 related to the natural course of a patient's illness or underlying
14 condition;

15 (b) A patient suicide while the patient was under care in the
16 hospital;

17 (c) An infant abduction or discharge to the wrong family;

18 (d) Sexual assault or rape of a patient or staff member while in
19 the hospital;

20 (e) A hemolytic transfusion reaction involving administration of
21 blood or blood products having major blood group incompatibilities;

22 (f) Surgery performed on the wrong patient or wrong body part;

23 (g) A failure or major malfunction of a facility system such as the
24 heating, ventilation, fire alarm, fire sprinkler, electrical,
25 electronic information management, or water supply which affects any
26 patient diagnosis, treatment, or care service within the facility; or

27 (h) A fire which affects any patient diagnosis, treatment, or care
28 area of the facility.

29 The term does not include an incident.

30 (2) "Ambulatory surgical facility" means any distinct entity that
31 operates exclusively for the purpose of providing surgical services to
32 patients not requiring hospitalization, whether or not the facility is
33 certified under Title XVIII of the federal social security act.

34 (3) "Childbirth center" means a facility licensed under chapter
35 18.46 RCW.

1 (4) "Correctional medical facility" means a part or unit of a
2 correctional facility operated by the department of corrections under
3 chapter 72.10 RCW that provides medical services for lengths of stay in
4 excess of twenty-four hours to offenders.

5 (5) "Department" means the department of health.

6 (6) "Health care worker" means an employee, independent contractor,
7 licensee, or other individual who is directly involved in the delivery
8 of health services in a medical facility.

9 (7) "Hospital" means a facility licensed under chapter 70.41 RCW.

10 (8) "Incident" means an event, occurrence, or situation involving
11 the clinical care of a patient in a medical facility which:

12 (a) Results in unanticipated injury to a patient that is less
13 severe than death or major permanent loss of function and is not
14 related to the natural course of the patient's illness or underlying
15 condition; or

16 (b) Could have injured the patient but did not either cause an
17 unanticipated injury or require the delivery of additional health care
18 services to the patient.

19 The term does not include an adverse event.

20 (9) "Medical facility" means an ambulatory surgical facility,
21 childbirth center, hospital, psychiatric hospital, or correctional
22 medical facility.

23 (10) "Psychiatric hospital" means a hospital facility licensed as
24 a psychiatric hospital under chapter 71.12 RCW.

25 NEW SECTION. **Sec. 108.** (1) Each medical facility shall report to
26 the department the occurrence of any adverse event. The report must be
27 submitted to the department within forty-five days after occurrence of
28 the event has been confirmed.

29 (2) The report shall be filed in a format specified by the
30 department after consultation with medical facilities. It shall
31 identify the facility but shall not include any identifying information
32 for any of the health care professionals, facility employees, or
33 patients involved. This provision does not modify the duty of a
34 hospital to make a report to the department of health or a disciplinary
35 authority if a licensed practitioner has committed unprofessional
36 conduct as defined in RCW 18.130.180.

1 (3) Any medical facility or health care worker may report an
2 incident to the department. The report shall be filed in a format
3 specified by the department after consultation with medical facilities
4 and shall identify the facility but shall not include any identifying
5 information for any of the health care professionals, facility
6 employees, or patients involved. This provision does not modify the
7 duty of a hospital to make a report to the department of health or a
8 disciplinary authority if a licensed practitioner has committed
9 unprofessional conduct as defined in RCW 18.130.180.

10 (4) If, in the course of investigating a complaint received from an
11 employee of a licensed medical facility, the department determines that
12 the facility has not undertaken efforts to investigate the occurrence
13 of an adverse event, the department shall direct the facility to
14 undertake an investigation of the event. If a complaint related to a
15 potential adverse event involves care provided in an ambulatory
16 surgical facility, the department shall notify the facility and request
17 that they undertake an investigation of the event. The protections of
18 RCW 43.70.075 apply to complaints related to adverse events or
19 incidents that are submitted in good faith by employees of medical
20 facilities.

21 NEW SECTION. **Sec. 109.** The department shall:

22 (1) Receive reports of adverse events and incidents under section
23 108 of this act;

24 (2) Investigate adverse events;

25 (3) Establish a system for medical facilities and the health care
26 workers of a medical facility to report adverse events and incidents,
27 which shall be accessible twenty-four hours a day, seven days a week;

28 (4) Adopt rules as necessary to implement this act;

29 (5) Directly or by contract:

30 (a) Collect, analyze, and evaluate data regarding reports of
31 adverse events and incidents, including the identification of
32 performance indicators and patterns in frequency or severity at certain
33 medical facilities or in certain regions of the state;

34 (b) Develop recommendations for changes in health care practices
35 and procedures, which may be instituted for the purpose of reducing the
36 number and severity of adverse events and incidents;

1 (c) Directly advise reporting medical facilities of immediate
2 changes that can be instituted to reduce adverse events and incidents;

3 (d) Issue recommendations to medical facilities on a facility-
4 specific or on a statewide basis regarding changes, trends, and
5 improvements in health care practices and procedures for the purpose of
6 reducing the number and severity of adverse events and incidents.
7 Prior to issuing recommendations, consideration shall be given to the
8 following factors: Expectation of improved quality care,
9 implementation feasibility, other relevant implementation practices,
10 and the cost impact to patients, payers, and medical facilities.
11 Statewide recommendations shall be issued to medical facilities on a
12 continuing basis and shall be published and posted on the department's
13 publicly accessible web site. The recommendations made to medical
14 facilities under this section shall not be considered mandatory for
15 licensure purposes unless they are adopted by the department as rules
16 pursuant to chapter 34.05 RCW; and

17 (e) Monitor implementation of reporting systems addressing adverse
18 events or their equivalent in other states and make recommendations to
19 the governor and the legislature as necessary for modifications to this
20 chapter to keep the system as nearly consistent as possible with
21 similar systems in other states;

22 (6) Report no later than January 1, 2007, and annually thereafter
23 to the governor and the legislature on the department's activities
24 under this act in the preceding year. The report shall include:

25 (a) The number of adverse events and incidents reported by medical
26 facilities on a geographical basis and their outcomes;

27 (b) The information derived from the data collected including any
28 recognized trends concerning patient safety; and

29 (c) Recommendations for statutory or regulatory changes that may
30 help improve patient safety in the state.

31 The annual report shall be made available for public inspection and
32 shall be posted on the department's web site;

33 (7) Conduct all activities under this section in a manner that
34 preserves the confidentiality of documents, materials, or information
35 made confidential by section 111 of this act.

36 NEW SECTION. **Sec. 110.** (1) Medical facilities licensed by the
37 department shall have in place policies to assure that, when

1 appropriate, information about unanticipated outcomes is provided to
2 patients or their families or any surrogate decision makers identified
3 pursuant to RCW 7.70.065. Notifications of unanticipated outcomes
4 under this section do not constitute an acknowledgment or admission of
5 liability, nor can the fact of notification or the content disclosed be
6 introduced as evidence in a civil action.

7 (2) Beginning January 1, 2006, the department shall, during the
8 annual survey of a licensed medical facility, ensure that the policy
9 required in subsection (1) of this section is in place.

10 NEW SECTION. **Sec. 111.** When a report of an adverse event or
11 incident under section 108 of this act is made by or through a
12 coordinated quality improvement program under RCW 43.70.510 or
13 70.41.200, or by a peer review committee under RCW 4.24.250,
14 information and documents, including complaints and incident reports,
15 created specifically for and collected and maintained by a quality
16 improvement committee for the purpose of preparing a report of an
17 adverse event or incident shall be subject to the confidentiality
18 protections of those laws and RCW 42.17.310(1)(hh).

19 **Coordinated Quality Improvement Programs**

20 **Sec. 112.** RCW 43.70.510 and 2004 c 145 s 2 are each amended to
21 read as follows:

22 (1)(a) Health care institutions and medical facilities, other than
23 hospitals, that are licensed by the department, professional societies
24 or organizations, health care service contractors, health maintenance
25 organizations, health carriers approved pursuant to chapter 48.43 RCW,
26 and any other person or entity providing health care coverage under
27 chapter 48.42 RCW that is subject to the jurisdiction and regulation of
28 any state agency or any subdivision thereof may maintain a coordinated
29 quality improvement program for the improvement of the quality of
30 health care services rendered to patients and the identification and
31 prevention of medical malpractice as set forth in RCW 70.41.200.

32 (b) All such programs shall comply with the requirements of RCW
33 70.41.200(1) (a), (c), (d), (e), (f), (g), and (h) as modified to
34 reflect the structural organization of the institution, facility,
35 professional societies or organizations, health care service

1 contractors, health maintenance organizations, health carriers, or any
2 other person or entity providing health care coverage under chapter
3 48.42 RCW that is subject to the jurisdiction and regulation of any
4 state agency or any subdivision thereof, unless an alternative quality
5 improvement program substantially equivalent to RCW 70.41.200(1)(a) is
6 developed. All such programs, whether complying with the requirement
7 set forth in RCW 70.41.200(1)(a) or in the form of an alternative
8 program, must be approved by the department before the discovery
9 limitations provided in subsections (3) and (4) of this section and the
10 exemption under RCW 42.17.310(1)(hh) and subsection (5) of this section
11 shall apply. In reviewing plans submitted by licensed entities that
12 are associated with physicians' offices, the department shall ensure
13 that the exemption under RCW 42.17.310(1)(hh) and the discovery
14 limitations of this section are applied only to information and
15 documents related specifically to quality improvement activities
16 undertaken by the licensed entity.

17 (2) Health care provider groups of five or more providers may
18 maintain a coordinated quality improvement program for the improvement
19 of the quality of health care services rendered to patients and the
20 identification and prevention of medical malpractice as set forth in
21 RCW 70.41.200. For purposes of this section, a health care provider
22 group may be a consortium of providers consisting of five or more
23 providers in total. All such programs shall comply with the
24 requirements of RCW 70.41.200(1) (a), (c), (d), (e), (f), (g), and (h)
25 as modified to reflect the structural organization of the health care
26 provider group. All such programs must be approved by the department
27 before the discovery limitations provided in subsections (3) and (4) of
28 this section and the exemption under RCW 42.17.310(1)(hh) and
29 subsection (5) of this section shall apply.

30 (3) Any person who, in substantial good faith, provides information
31 to further the purposes of the quality improvement and medical
32 malpractice prevention program or who, in substantial good faith,
33 participates on the quality improvement committee shall not be subject
34 to an action for civil damages or other relief as a result of such
35 activity. Any person or entity participating in a coordinated quality
36 improvement program that, in substantial good faith, shares information
37 or documents with one or more other programs, committees, or boards
38 under subsection (6) of this section is not subject to an action for

1 civil damages or other relief as a result of the activity or its
2 consequences. For the purposes of this section, sharing information is
3 presumed to be in substantial good faith. However, the presumption may
4 be rebutted upon a showing of clear, cogent, and convincing evidence
5 that the information shared was knowingly false or deliberately
6 misleading.

7 (4) Information and documents, including complaints and incident
8 reports, created specifically for, and collected, and maintained by a
9 quality improvement committee are not subject to discovery or
10 introduction into evidence in any civil action, and no person who was
11 in attendance at a meeting of such committee or who participated in the
12 creation, collection, or maintenance of information or documents
13 specifically for the committee shall be permitted or required to
14 testify in any civil action as to the content of such proceedings or
15 the documents and information prepared specifically for the committee.
16 This subsection does not preclude: (a) In any civil action, the
17 discovery of the identity of persons involved in the medical care that
18 is the basis of the civil action whose involvement was independent of
19 any quality improvement activity; (b) in any civil action, the
20 testimony of any person concerning the facts that form the basis for
21 the institution of such proceedings of which the person had personal
22 knowledge acquired independently of such proceedings; (c) in any civil
23 action by a health care provider regarding the restriction or
24 revocation of that individual's clinical or staff privileges,
25 introduction into evidence information collected and maintained by
26 quality improvement committees regarding such health care provider; (d)
27 in any civil action challenging the termination of a contract by a
28 state agency with any entity maintaining a coordinated quality
29 improvement program under this section if the termination was on the
30 basis of quality of care concerns, introduction into evidence of
31 information created, collected, or maintained by the quality
32 improvement committees of the subject entity, which may be under terms
33 of a protective order as specified by the court; (e) in any civil
34 action, disclosure of the fact that staff privileges were terminated or
35 restricted, including the specific restrictions imposed, if any and the
36 reasons for the restrictions; or (f) in any civil action, discovery and
37 introduction into evidence of the patient's medical records required by

1 rule of the department of health to be made regarding the care and
2 treatment received.

3 (5) Information and documents created specifically for, and
4 collected and maintained by a quality improvement committee are exempt
5 from disclosure under chapter 42.17 RCW.

6 (6) A coordinated quality improvement program may share information
7 and documents, including complaints and incident reports, created
8 specifically for, and collected and maintained by a quality improvement
9 committee or a peer review committee under RCW 4.24.250 with one or
10 more other coordinated quality improvement programs maintained in
11 accordance with this section or with RCW 70.41.200 or a peer review
12 committee under RCW 4.24.250, for the improvement of the quality of
13 health care services rendered to patients and the identification and
14 prevention of medical malpractice. The privacy protections of chapter
15 70.02 RCW and the federal health insurance portability and
16 accountability act of 1996 and its implementing regulations apply to
17 the sharing of individually identifiable patient information held by a
18 coordinated quality improvement program. Any rules necessary to
19 implement this section shall meet the requirements of applicable
20 federal and state privacy laws. Information and documents disclosed by
21 one coordinated quality improvement program to another coordinated
22 quality improvement program or a peer review committee under RCW
23 4.24.250 and any information and documents created or maintained as a
24 result of the sharing of information and documents shall not be subject
25 to the discovery process and confidentiality shall be respected as
26 required by subsection (4) of this section and RCW 4.24.250.

27 (7) The department of health shall adopt rules as are necessary to
28 implement this section.

29 **Prescription Legibility**

30 NEW SECTION. **Sec. 113.** The legislature finds that prescription
31 drug errors occur because the pharmacist or nurse cannot read the
32 prescription from the physician or other provider with prescriptive
33 authority. The legislature further finds that legible prescriptions
34 can prevent these errors.

1 **Sec. 114.** RCW 69.41.010 and 2003 c 257 s 2 and 2003 c 140 s 11 are
2 each reenacted and amended to read as follows:

3 As used in this chapter, the following terms have the meanings
4 indicated unless the context clearly requires otherwise:

5 (1) "Administer" means the direct application of a legend drug
6 whether by injection, inhalation, ingestion, or any other means, to the
7 body of a patient or research subject by:

8 (a) A practitioner; or

9 (b) The patient or research subject at the direction of the
10 practitioner.

11 (2) "Community-based care settings" include: Community residential
12 programs for the developmentally disabled, certified by the department
13 of social and health services under chapter 71A.12 RCW; adult family
14 homes licensed under chapter 70.128 RCW; and boarding homes licensed
15 under chapter 18.20 RCW. Community-based care settings do not include
16 acute care or skilled nursing facilities.

17 (3) "Deliver" or "delivery" means the actual, constructive, or
18 attempted transfer from one person to another of a legend drug, whether
19 or not there is an agency relationship.

20 (4) "Department" means the department of health.

21 (5) "Dispense" means the interpretation of a prescription or order
22 for a legend drug and, pursuant to that prescription or order, the
23 proper selection, measuring, compounding, labeling, or packaging
24 necessary to prepare that prescription or order for delivery.

25 (6) "Dispenser" means a practitioner who dispenses.

26 (7) "Distribute" means to deliver other than by administering or
27 dispensing a legend drug.

28 (8) "Distributor" means a person who distributes.

29 (9) "Drug" means:

30 (a) Substances recognized as drugs in the official United States
31 pharmacopoeia, official homeopathic pharmacopoeia of the United States,
32 or official national formulary, or any supplement to any of them;

33 (b) Substances intended for use in the diagnosis, cure, mitigation,
34 treatment, or prevention of disease in man or animals;

35 (c) Substances (other than food, minerals or vitamins) intended to
36 affect the structure or any function of the body of man or animals; and

37 (d) Substances intended for use as a component of any article

1 specified in (a), (b), or (c) of this subsection. It does not include
2 devices or their components, parts, or accessories.

3 (10) "Electronic communication of prescription information" means
4 the communication of prescription information by computer, or the
5 transmission of an exact visual image of a prescription by facsimile,
6 or other electronic means for original prescription information or
7 prescription refill information for a legend drug between an authorized
8 practitioner and a pharmacy or the transfer of prescription information
9 for a legend drug from one pharmacy to another pharmacy.

10 (11) "In-home care settings" include an individual's place of
11 temporary and permanent residence, but does not include acute care or
12 skilled nursing facilities, and does not include community-based care
13 settings.

14 (12) "Legend drugs" means any drugs which are required by state law
15 or regulation of the state board of pharmacy to be dispensed on
16 prescription only or are restricted to use by practitioners only.

17 (13) "Legible prescription" means a prescription or medication
18 order issued by a practitioner that is capable of being read and
19 understood by the pharmacist filling the prescription or the nurse or
20 other practitioner implementing the medication order. A prescription
21 must be hand printed, typewritten, or electronically generated.

22 (14) "Medication assistance" means assistance rendered by a
23 nonpractitioner to an individual residing in a community-based care
24 setting or in-home care setting to facilitate the individual's self-
25 administration of a legend drug or controlled substance. It includes
26 reminding or coaching the individual, handing the medication container
27 to the individual, opening the individual's medication container, using
28 an enabler, or placing the medication in the individual's hand, and
29 such other means of medication assistance as defined by rule adopted by
30 the department. A nonpractitioner may help in the preparation of
31 legend drugs or controlled substances for self-administration where a
32 practitioner has determined and communicated orally or by written
33 direction that such medication preparation assistance is necessary and
34 appropriate. Medication assistance shall not include assistance with
35 intravenous medications or injectable medications, except prefilled
36 insulin syringes.

37 (15) "Person" means individual, corporation, government or

1 governmental subdivision or agency, business trust, estate, trust,
2 partnership or association, or any other legal entity.

3 (16) "Practitioner" means:

4 (a) A physician under chapter 18.71 RCW, an osteopathic physician
5 or an osteopathic physician and surgeon under chapter 18.57 RCW, a
6 dentist under chapter 18.32 RCW, a podiatric physician and surgeon
7 under chapter 18.22 RCW, a veterinarian under chapter 18.92 RCW, a
8 registered nurse, advanced registered nurse practitioner, or licensed
9 practical nurse under chapter 18.79 RCW, an optometrist under chapter
10 18.53 RCW who is certified by the optometry board under RCW 18.53.010,
11 an osteopathic physician assistant under chapter 18.57A RCW, a
12 physician assistant under chapter 18.71A RCW, a naturopath licensed
13 under chapter 18.36A RCW, a pharmacist under chapter 18.64 RCW, or,
14 when acting under the required supervision of a dentist licensed under
15 chapter 18.32 RCW, a dental hygienist licensed under chapter 18.29 RCW;

16 (b) A pharmacy, hospital, or other institution licensed,
17 registered, or otherwise permitted to distribute, dispense, conduct
18 research with respect to, or to administer a legend drug in the course
19 of professional practice or research in this state; and

20 (c) A physician licensed to practice medicine and surgery or a
21 physician licensed to practice osteopathic medicine and surgery in any
22 state, or province of Canada, which shares a common border with the
23 state of Washington.

24 (17) "Secretary" means the secretary of health or the secretary's
25 designee.

26 **PART II - INSURANCE INDUSTRY REFORM**

27 **Medical Malpractice Closed Claim Reporting**

28 NEW SECTION. **Sec. 201.** The definitions in this section apply
29 throughout this chapter unless the context clearly requires otherwise.

30 (1) "Claim" means a demand for payment of a loss caused by medical
31 malpractice.

32 (a) Two or more claims, or a single claim naming multiple health
33 care providers or facilities, arising out of a single injury or
34 incident of medical malpractice is one claim.

1 (b) A series of related incidents of medical malpractice is one
2 claim.

3 (2) "Claimant" means a person filing a claim against a health care
4 provider or health care facility.

5 (3) "Closed claim" means a claim concluded with or without payment
6 and for which all administrative activity has been finalized by the
7 insuring entity or self-insurer.

8 (4) "Commissioner" means the insurance commissioner.

9 (5) "Health care facility" or "facility" means a clinic, diagnostic
10 center, hospital, laboratory, mental health center, nursing home,
11 office, surgical facility, treatment facility, or similar place where
12 a health care provider provides health care to patients.

13 (6) "Health care provider" or "provider" means a physician licensed
14 under chapter 18.71 RCW, an osteopathic physician licensed under
15 chapter 18.57 RCW, a podiatric physician licensed under chapter 18.22
16 RCW, a dentist licensed under chapter 18.32 RCW, a chiropractor
17 licensed under chapter 18.25 RCW, an advance registered nurse
18 practitioner licensed under chapter 18.79 RCW, a physician assistant
19 licensed under chapter 18.71A RCW, and a naturopath licensed under
20 chapter 18.36A RCW.

21 (7) "Insuring entity" means:

- 22 (a) An insurer;
- 23 (b) A joint underwriting association;
- 24 (c) A risk retention group; or
- 25 (d) An unauthorized insurer that provides surplus lines coverage.

26 (8) "Medical malpractice" means a negligent act, error, or omission
27 in providing or failing to provide professional health care services
28 that is actionable under chapter 7.70 RCW.

29 (9) "Self-insurer" means any health care provider, facility, or
30 other individual or entity that assumes operational or financial risk
31 for claims of medical malpractice.

32 NEW SECTION. **Sec. 202.** (1) Beginning April 1, 2006, every self-
33 insurer or insuring entity that provides medical malpractice insurance
34 to any facility or provider in Washington state must report to the
35 commissioner any closed claim related to medical malpractice, if the
36 claim resulted in a final:

- 37 (a) Judgment in any amount;

1 (b) Settlement or payment in any amount; or

2 (c) Disposition of a medical malpractice claim resulting in no
3 indemnity payment on behalf of an insured.

4 (2) If a claim is not reported by an insuring entity or self-
5 insurer under subsection (1) of this section due to limitations in the
6 medical malpractice coverage of a facility or provider, the facility or
7 provider must report the claim to the commissioner.

8 (3) Reports under this section must be filed with the commissioner
9 within sixty days after the claim is closed by the insuring entity or
10 self-insurer.

11 (4)(a) The commissioner may impose a fine of up to two hundred
12 fifty dollars per day per case against any insuring entity that
13 violates the requirements of this section. The total fine per case may
14 not exceed ten thousand dollars.

15 (b) The department of health may impose a fine of up to two hundred
16 fifty dollars per day per case against any facility or provider that
17 violates the requirements of this section. The total fine per case may
18 not exceed ten thousand dollars.

19 NEW SECTION. **Sec. 203.** The reports required under section 202 of
20 this act must contain the following data in a form and with coding
21 prescribed by the commissioner for each claim:

22 (1) A unique number assigned to the claim by the insuring entity or
23 self-insurer to serve as an identifier for the claim;

24 (2) The type of health care provider, including the provider's
25 medical specialty; the type of facility, if any, and the location
26 within the facility where the injury occurred;

27 (3) The date of the event that resulted in the claim;

28 (4) The county or counties in which the event that resulted in the
29 claim occurred;

30 (5) The date the claim was reported to the insuring entity, self-
31 insurer, facility, or provider;

32 (6) The date of suit, if filed;

33 (7) The claimant's age and sex;

34 (8) Specific information about the judgment or settlement
35 including:

36 (a) The date and amount of any judgment or settlement;

37 (b) Whether the settlement:

1 (i) Was the result of a judgment, arbitration, or mediation; and
2 (ii) Occurred before or after trial;
3 (c) For claims that result in a verdict or judgment that itemizes
4 damages:
5 (i) Economic damages, such as incurred and anticipated medical
6 expense and lost wages;
7 (ii) Noneconomic damages; and
8 (iii) Allocated loss adjustment expense, including but not limited
9 to court costs, attorneys' fees, and costs of expert witnesses;
10 (d) For claims that do not result in a verdict or judgment that
11 itemizes damages:
12 (i) Total damages; and
13 (ii) Allocated loss adjustment expense, including but not limited
14 to court costs, attorneys' fees, and costs of expert witnesses; and
15 (e) If there is no judgment or settlement:
16 (i) The date and reason for final disposition; and
17 (ii) The date the claim was closed; and
18 (9) The reason for the medical malpractice claim. The commissioner
19 shall use the same coding of reasons for malpractice claims as those
20 used for mandatory reporting to the national practitioner data bank, in
21 the federal department of health and human services, as provided in 42
22 U.S.C. Secs. 11131 and 11134, as amended.

23 NEW SECTION. **Sec. 204.** The commissioner must prepare aggregate
24 statistical summaries of closed claims based on calendar year data
25 submitted under section 202 of this act.

26 (1) At a minimum, data must be sorted by calendar year and calendar
27 incident year. The commissioner may also decide to display data in
28 other ways.

29 (2) The summaries must be available by March 31st of each year.

30 (3) Information included in an individual closed claim report
31 submitted by an insurer or self-insurer under this chapter is
32 confidential, is exempt from public disclosure, and may not be made
33 available by the commissioner to the public.

34 NEW SECTION. **Sec. 205.** Beginning in 2006, the commissioner must
35 prepare an annual report by June 30th that summarizes and analyzes the

1 closed claim reports for medical malpractice filed under section 202 of
2 this act and the annual financial reports filed by insurers writing
3 medical malpractice insurance in this state. The report must include:

4 (1) An analysis of closed claim reports of prior years for which
5 data are collected and show:

6 (a) Trends in the frequency and severity of claims payments;

7 (b) An itemization of economic and noneconomic damages;

8 (c) An itemization of allocated loss adjustment expenses;

9 (d) The types of medical malpractice for which claims have been
10 paid; and

11 (e) Any other information the commissioner determines illustrates
12 trends in closed claims;

13 (2) An analysis of the medical malpractice insurance market in
14 Washington state, including:

15 (a) An analysis of the financial reports of the insurers with a
16 combined market share of at least ninety percent of net written medical
17 malpractice premium in Washington state for the prior calendar year;

18 (b) A loss ratio analysis of medical malpractice insurance written
19 in Washington state; and

20 (c) A profitability analysis of each insurer writing medical
21 malpractice insurance;

22 (3) A comparison of loss ratios and the profitability of medical
23 malpractice insurance in Washington state to other states based on
24 financial reports filed with the national association of insurance
25 commissioners and any other source of information the commissioner
26 deems relevant;

27 (4) A summary of the rate filings for medical malpractice that have
28 been approved by the commissioner for the prior calendar year,
29 including an analysis of the trend of direct and incurred losses as
30 compared to prior years;

31 (5) The commissioner must post reports required by this section on
32 the internet no later than thirty days after they are due; and

33 (6) The commissioner may adopt rules that require insuring entities
34 and self-insurers required to report under section 202(1) of this act
35 to report data related to:

36 (a) The frequency and severity of open claims for the reporting
37 period;

38 (b) The aggregate amounts reserved for incurred claims;

- 1 (c) Changes in reserves from the previous reporting period; and
- 2 (d) Any other information that helps the commissioner monitor
- 3 losses and claims development in the Washington state medical
- 4 malpractice insurance market.

5 NEW SECTION. **Sec. 206.** The commissioner shall adopt all rules
6 needed to implement this chapter. To ensure that claimants, health
7 care providers, health care facilities, and self-insurers cannot be
8 individually identified when data is disclosed to the public, the
9 commissioner shall adopt rules that require the protection of
10 information that, in combination, could result in the ability to
11 identify the claimant, health care provider, health care facility, or
12 self-insurer in a particular claim or collection of claims.

13 NEW SECTION. **Sec. 207.** A new section is added to chapter 7.70 RCW
14 to read as follows:

15 In any action filed under this chapter that results in a final:
16 (1) Judgment in any amount;
17 (2) Settlement or payment in any amount; or
18 (3) Disposition resulting in no indemnity payment,
19 the claimant or his or her attorney shall report to the office of the
20 insurance commissioner on forms provided by the commissioner any court
21 costs, attorneys' fees, or costs of expert witnesses incurred in
22 pursuing the action.

23 NEW SECTION. **Sec. 208.** If the national association of insurance
24 commissioners adopts model medical malpractice reporting standards, the
25 insurance commissioner must analyze the model standards and report to
26 the legislature on or before the December 1st subsequent to the
27 adoption of the model standards. The report must include an analysis
28 of any differences between the model standards and sections 201 through
29 206 of this act and make recommendations, if any, regarding possible
30 legislative changes. The report must be made to the house of
31 representatives committees on health care; financial institutions and
32 insurance; and judiciary and the senate committees on health and long-
33 term care; financial institutions, housing and consumer protection; and
34 judiciary.

1 NEW SECTION. **Sec. 209.** A new section is added to chapter 42.17
2 RCW to read as follows:

3 Information in a closed claim report filed under section 203 of
4 this act that alone or in combination could result in the ability to
5 identify a claimant, health care provider, health care facility, or
6 self-insurer involved in a particular claim is exempt from disclosure
7 under this chapter.

8 **Underwriting Standards**

9 NEW SECTION. **Sec. 210.** A new section is added to chapter 48.19
10 RCW to read as follows:

11 (1) For the purposes of this section, "underwrite" means the
12 process of selecting, rejecting, or pricing a risk, and includes each
13 of these processes:

14 (a) Evaluation, selection, and classification of risk;

15 (b) Application of rates, rating rules, and classification plans to
16 risks that are accepted; and

17 (c) Determining eligibility for:

18 (i) Coverage provisions;

19 (ii) Providing or limiting the amount of coverage or policy limits;
20 or

21 (iii) Premium payment plans.

22 (2) Each medical malpractice insurer must file its underwriting
23 rules, guidelines, criteria, standards, or other information the
24 insurer uses to underwrite medical malpractice coverage. However, an
25 insurer is excluded from this requirement if the insurer is ordered
26 into rehabilitation under chapter 48.31 or 48.99 RCW.

27 (a) Every filing of underwriting information must identify and
28 explain:

29 (i) The class, type, and extent of coverage provided by the
30 insurer;

31 (ii) Any changes that have occurred to the underwriting standards;
32 and

33 (iii) How underwriting changes are expected to affect future
34 losses.

35 (b) The information under (a) of this subsection must be filed with

1 the commissioner at least thirty days before it becomes effective and
2 is subject to public disclosure upon receipt by the commissioner.

3 NEW SECTION. **Sec. 211.** A new section is added to chapter 48.18
4 RCW to read as follows:

5 (1) For the purposes of this section:

6 (a) "Adverse action" includes, but is not limited to, the
7 following:

8 (i) Cancellation, denial, or nonrenewal of medical malpractice
9 insurance coverage;

10 (ii) Charging a higher insurance premium for medical malpractice
11 insurance than would have been charged, whether the charge is by any of
12 the following:

13 (A) Application of a rating rule;

14 (B) Assignment to a rating tier that does not have the lowest
15 available rates; or

16 (C) Placement with an affiliate company that does not offer the
17 lowest rates available to the insured within the affiliate group of
18 insurance companies; or

19 (iii) Any reduction or adverse or unfavorable change in the terms
20 of coverage or amount of any medical malpractice insurance, including,
21 but not limited to, the following: Coverage provided to the insured
22 physician is not as broad in scope as coverage requested by the insured
23 physician but is available to other insured physicians of the insurer
24 or any affiliate.

25 (b) "Affiliate" has the same meaning as in RCW 48.31B.005(1).

26 (c) "Claim" means a demand for payment by an allegedly injured
27 third party under the terms and conditions of an insurance contract.

28 (d) "Tier" has the same meaning as in RCW 48.18.545(1)(h).

29 (2) When an insurer takes adverse action against an insured, the
30 insurer may consider the following factors only in combination with
31 other substantive underwriting factors:

32 (a) An insured has inquired about the nature or scope of coverage
33 under a medical malpractice insurance policy;

34 (b) An insured has notified the insurer, pursuant to the provisions
35 of the insurance contract, about a potential claim, which did not
36 ultimately result in the filing of a claim; or

37 (c) A claim was closed without payment.

1 **Cancellation or Nonrenewal of Liability Insurance Policies**

2 **Sec. 212.** RCW 48.18.290 and 1997 c 85 s 1 are each amended to read
3 as follows:

4 (1) Cancellation by the insurer of any policy which by its terms is
5 cancellable at the option of the insurer, or of any binder based on
6 such policy which does not contain a clearly stated expiration date,
7 may be effected as to any interest only upon compliance with the
8 following:

9 (a)(i) For policies other than medical malpractice liability
10 insurance: Written notice of such cancellation, accompanied by the
11 actual reason therefor, must be actually delivered or mailed to the
12 named insured not less than forty-five days prior to the effective date
13 of the cancellation (~~((except for cancellation of insurance policies~~
14 ~~for))~~);

15 (ii) For policies that provide medical malpractice liability
16 insurance: Written notice of such cancellation, accompanied by the
17 actual reason therefore, must be actually delivered or mailed to the
18 named insured not less than ninety days prior to the effective date of
19 the cancellation;

20 (iii) For policies canceled due to nonpayment of premiums,
21 ((which)) written notice ((shall be)) must be actually delivered or
22 mailed to the named insured not less than ten days prior to ((such date
23 and except for cancellation of fire insurance policies)) the effective
24 date of the cancellation; and

25 (iv) For fire insurance policies canceled under chapter 48.53 RCW,
26 ((which)) written notice ((shall not be)) must be actually delivered or
27 mailed to the named insured not less than five days prior to ((such
28 date)) the effective date of the cancellation;

29 (b) Like notice must also be so delivered or mailed to each
30 mortgagee, pledgee, or other person shown by the policy to have an
31 interest in any loss which may occur thereunder. For purposes of this
32 subsection (1)(b), "delivered" includes electronic transmittal,
33 facsimile, or personal delivery.

34 (2) The mailing of any such notice shall be effected by depositing
35 it in a sealed envelope, directed to the addressee at his or her last
36 address as known to the insurer or as shown by the insurer's records,
37 with proper prepaid postage affixed, in a letter depository of the
38 United States post office. The insurer shall retain in its records any

1 such item so mailed, together with its envelope, which was returned by
2 the post office upon failure to find, or deliver the mailing to, the
3 addressee.

4 (3) The affidavit of the individual making or supervising such a
5 mailing, shall constitute prima facie evidence of such facts of the
6 mailing as are therein affirmed.

7 (4) The portion of any premium paid to the insurer on account of
8 the policy, unearned because of the cancellation and in amount as
9 computed on the pro rata basis, must be actually paid to the insured or
10 other person entitled thereto as shown by the policy or by any
11 endorsement thereon, or be mailed to the insured or such person as soon
12 as possible, and no later than forty-five days after the date of notice
13 of cancellation to the insured for homeowners', dwelling fire, and
14 private passenger auto. Any such payment may be made by cash, or by
15 check, bank draft, or money order.

16 (5) This section shall not apply to contracts of life or disability
17 insurance without provision for cancellation prior to the date to which
18 premiums have been paid, or to contracts of insurance procured under
19 the provisions of chapter 48.15 RCW.

20 **Sec. 213.** RCW 48.18.2901 and 2002 c 347 s 1 are each amended to
21 read as follows:

22 (1) Each insurer shall be required to renew any contract of
23 insurance subject to RCW 48.18.290 unless one of the following
24 situations exists:

25 (a) The insurer gives the named insured at least forty-five or
26 ninety days' notice in writing as provided for in RCW 48.18.290(1)(a)
27 (i) or (ii), that it (~~proposes to refuse to renew~~) will not renew the
28 insurance contract upon its expiration date; and sets forth in that
29 writing the actual reason for refusing to renew;

30 (b) At least twenty days prior to its expiration date, the insurer
31 has communicated, either directly or through its agent, its willingness
32 to renew in writing to the named insured and has included in that
33 writing a statement of the amount of the premium or portion thereof
34 required to be paid by the insured to renew the policy, and the insured
35 fails to discharge when due his or her obligation in connection with
36 the payment of such premium or portion thereof;

1 (c) The insured has procured equivalent coverage prior to the
2 expiration of the policy period;

3 (d) The contract is evidenced by a written binder containing a
4 clearly stated expiration date which has expired according to its
5 terms; or

6 (e) The contract clearly states that it is not renewable, and is
7 for a specific line, subclassification, or type of coverage that is not
8 offered on a renewable basis. This subsection (1)(e) does not restrict
9 the authority of the insurance commissioner under this code.

10 (2) Any insurer failing to include in the notice required by
11 subsection (1)(b) of this section the amount of any increased premium
12 resulting from a change of rates and an explanation of any change in
13 the contract provisions shall renew the policy if so required by that
14 subsection according to the rates and contract provisions applicable to
15 the expiring policy. However, renewal based on the rates and contract
16 provisions applicable to the expiring policy shall not prevent the
17 insurer from making changes in the rates and/or contract provisions of
18 the policy once during the term of its renewal after at least twenty
19 days' advance notice of such change has been given to the named
20 insured.

21 (3) Renewal of a policy shall not constitute a waiver or estoppel
22 with respect to grounds for cancellation which existed before the
23 effective date of such renewal, or with respect to cancellation of fire
24 policies under chapter 48.53 RCW.

25 (4) "Renewal" or "to renew" means the issuance and delivery by an
26 insurer of a contract of insurance replacing at the end of the contract
27 period a contract of insurance previously issued and delivered by the
28 same insurer, or the issuance and delivery of a certificate or notice
29 extending the term of a contract beyond its policy period or term.
30 However, (a) any contract of insurance with a policy period or term of
31 six months or less whether or not made continuous for successive terms
32 upon the payment of additional premiums shall for the purpose of RCW
33 48.18.290 and 48.18.293 through 48.18.295 be considered as if written
34 for a policy period or term of six months; and (b) any policy written
35 for a term longer than one year or any policy with no fixed expiration
36 date, shall, for the purpose of RCW 48.18.290 and 48.18.293 through
37 48.18.295, be considered as if written for successive policy periods or
38 terms of one year.

1 (5) A midterm blanket reduction in rate, approved by the
2 commissioner, for medical malpractice insurance shall not be considered
3 a renewal for purposes of this section.

4 **Prior Approval of Medical Malpractice Insurance Rates**

5 **Sec. 214.** RCW 48.18.100 and 1997 c 428 s 3 are each amended to
6 read as follows:

7 (1) No insurance policy form other than surety bond forms, forms
8 exempt under RCW 48.18.103, or application form where written
9 application is required and is to be attached to the policy, or printed
10 life or disability rider or endorsement form shall be issued,
11 delivered, or used unless it has been filed with and approved by the
12 commissioner. This section shall not apply to policies, riders or
13 endorsements of unique character designed for and used with relation to
14 insurance upon a particular subject.

15 (2) Every such filing containing a certification, in a form
16 approved by the commissioner, by either the chief executive officer of
17 the insurer or by an actuary who is a member of the American academy of
18 actuaries, attesting that the filing complies with Title 48 RCW and
19 Title 284 of the Washington Administrative Code, may be used by such
20 insurer immediately after filing with the commissioner. The
21 commissioner may order an insurer to cease using a certified form upon
22 the grounds set forth in RCW 48.18.110. This subsection shall not
23 apply to certain types of policy forms designated by the commissioner
24 by rule.

25 (3) Except as provided in RCW 48.18.103, every filing that does not
26 contain a certification pursuant to subsection (2) of this section
27 shall be made not less than thirty days in advance of any such
28 issuance, delivery, or use. At the expiration of such thirty days the
29 form so filed shall be deemed approved unless prior thereto it has been
30 affirmatively approved or disapproved by order of the commissioner.
31 The commissioner may extend by not more than an additional fifteen days
32 the period within which he or she may so affirmatively approve or
33 disapprove any such form, by giving notice of such extension before
34 expiration of the initial thirty-day period. At the expiration of any
35 such period as so extended, and in the absence of such prior
36 affirmative approval or disapproval, any such form shall be deemed

1 approved. The commissioner may withdraw any such approval at any time
2 for cause. By approval of any such form for immediate use, the
3 commissioner may waive any unexpired portion of such initial thirty-day
4 waiting period.

5 (4) The commissioner's order disapproving any such form or
6 withdrawing a previous approval shall state the grounds therefor.

7 (5) No such form shall knowingly be so issued or delivered as to
8 which the commissioner's approval does not then exist.

9 (6) The commissioner may, by order, exempt from the requirements of
10 this section for so long as he or she deems proper, any insurance
11 document or form or type thereof as specified in such order, to which
12 in his or her opinion this section may not practicably be applied, or
13 the filing and approval of which are, in his or her opinion, not
14 desirable or necessary for the protection of the public.

15 (7) Every member or subscriber to a rating organization shall
16 adhere to the form filings made on its behalf by the organization.
17 Deviations from such organization are permitted only when filed with
18 the commissioner in accordance with this chapter.

19 (8) Medical malpractice insurance form filings are subject to the
20 provisions of this section.

21 **Sec. 215.** RCW 48.18.103 and 2003 c 248 s 4 are each amended to
22 read as follows:

23 (1) It is the intent of the legislature to assist the purchasers of
24 commercial property casualty insurance by allowing policies to be
25 issued more expeditiously and provide a more competitive market for
26 forms.

27 (2) Commercial property casualty policies may be issued prior to
28 filing the forms. All commercial property casualty forms shall be
29 filed with the commissioner within thirty days after an insurer issues
30 any policy using them.

31 (3) If, within thirty days after a commercial property casualty
32 form has been filed, the commissioner finds that the form does not meet
33 the requirements of this chapter, the commissioner shall disapprove the
34 form and give notice to the insurer or rating organization that made
35 the filing, specifying how the form fails to meet the requirements and
36 stating when, within a reasonable period thereafter, the form shall be

1 deemed no longer effective. The commissioner may extend the time for
2 review another fifteen days by giving notice to the insurer prior to
3 the expiration of the original thirty-day period.

4 (4) Upon a final determination of a disapproval of a policy form
5 under subsection (3) of this section, the insurer shall amend any
6 previously issued disapproved form by endorsement to comply with the
7 commissioner's disapproval.

8 (5) For purposes of this section, "commercial property casualty"
9 means insurance pertaining to a business, profession, occupation,
10 nonprofit organization, or public entity for the lines of property and
11 casualty insurance defined in RCW 48.11.040, 48.11.050, 48.11.060, or
12 48.11.070, but does not mean medical malpractice insurance.

13 (6) Except as provided in subsection (4) of this section, the
14 disapproval shall not affect any contract made or issued prior to the
15 expiration of the period set forth in the notice of disapproval.

16 (7) In the event a hearing is held on the actions of the
17 commissioner under subsection (3) of this section, the burden of proof
18 shall be on the commissioner.

19 **Sec. 216.** RCW 48.19.043 and 2003 c 248 s 7 are each amended to
20 read as follows:

21 (1) It is the intent of the legislature to assist the purchasers of
22 commercial property casualty insurance by allowing policies to be
23 issued more expeditiously and provide a more competitive market for
24 rates.

25 (2) Notwithstanding the provisions of RCW 48.19.040(1), commercial
26 property casualty policies may be issued prior to filing the rates.
27 All commercial property casualty rates shall be filed with the
28 commissioner within thirty days after an insurer issues any policy
29 using them.

30 (3) If, within thirty days after a commercial property casualty
31 rate has been filed, the commissioner finds that the rate does not meet
32 the requirements of this chapter, the commissioner shall disapprove the
33 filing and give notice to the insurer or rating organization that made
34 the filing, specifying how the filing fails to meet the requirements
35 and stating when, within a reasonable period thereafter, the filing
36 shall be deemed no longer effective. The commissioner may extend the

1 time for review another fifteen days by giving notice to the insurer
2 prior to the expiration of the original thirty-day period.

3 (4) Upon a final determination of a disapproval of a rate filing
4 under subsection (3) of this section, the insurer shall issue an
5 endorsement changing the rate to comply with the commissioner's
6 disapproval from the date the rate is no longer effective.

7 (5) For purposes of this section, "commercial property casualty"
8 means insurance pertaining to a business, profession, occupation,
9 nonprofit organization, or public entity for the lines of property and
10 casualty insurance defined in RCW 48.11.040, 48.11.050, 48.11.060, or
11 48.11.070, but does not mean medical malpractice insurance.

12 (6) Except as provided in subsection (4) of this section, the
13 disapproval shall not affect any contract made or issued prior to the
14 expiration of the period set forth in the notice of disapproval.

15 (7) In the event a hearing is held on the actions of the
16 commissioner under subsection (3) of this section, the burden of proof
17 is on the commissioner.

18 **Sec. 217.** RCW 48.19.060 and 1997 c 428 s 4 are each amended to
19 read as follows:

20 (1) The commissioner shall review a filing as soon as reasonably
21 possible after made, to determine whether it meets the requirements of
22 this chapter.

23 (2) Except as provided in RCW 48.19.070 and 48.19.043:

24 (a) No such filing shall become effective within thirty days after
25 the date of filing with the commissioner, which period may be extended
26 by the commissioner for an additional period not to exceed fifteen days
27 if he or she gives notice within such waiting period to the insurer or
28 rating organization which made the filing that he or she needs such
29 additional time for the consideration of the filing. The commissioner
30 may, upon application and for cause shown, waive such waiting period or
31 part thereof as to a filing that he or she has not disapproved.

32 (b) A filing shall be deemed to meet the requirements of this
33 chapter unless disapproved by the commissioner within the waiting
34 period or any extension thereof.

35 (3) Medical malpractice insurance rate filings are subject to the
36 provisions of this section.

1 PART III - HEALTH CARE LIABILITY REFORM

2 Statutes of Limitations and Repose

3 NEW SECTION. **Sec. 301.** The purpose of this section and section
4 302 of this act is to respond to the court's decision in *DeYoung v.*
5 *Providence Medical Center*, 136 Wn.2d 136 (1998), by expressly stating
6 the legislature's rationale for the eight-year statute of repose in RCW
7 4.16.350.

8 The legislature recognizes that the eight-year statute of repose
9 alone may not solve the crisis in the medical insurance industry.
10 However, to the extent that the eight-year statute of repose has an
11 effect on medical malpractice insurance, that effect will tend to
12 reduce rather than increase the cost of malpractice insurance.

13 Whether or not the statute of repose has the actual effect of
14 reducing insurance costs, the legislature finds it will provide
15 protection against claims, however few, that are stale, based on
16 untrustworthy evidence, or that place undue burdens on defendants.

17 In accordance with the court's opinion in *DeYoung*, the legislature
18 further finds that compelling even one defendant to answer a stale
19 claim is a substantial wrong, and setting an outer limit to the
20 operation of the discovery rule is an appropriate aim.

21 The legislature further finds that an eight-year statute of repose
22 is a reasonable time period in light of the need to balance the
23 interests of injured plaintiffs and the health care industry.

24 The legislature intends to reenact RCW 4.16.350 with respect to the
25 eight-year statute of repose and specifically set forth for the court
26 the legislature's legitimate rationale for adopting the eight-year
27 statute of repose. The legislature further intends that the eight-year
28 statute of repose reenacted by section 302 of this act be applied to
29 actions commenced on or after the effective date of this act.

30 **Sec. 302.** RCW 4.16.350 and 1998 c 147 s 1 are each reenacted to
31 read as follows:

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

34 (1) A person licensed by this state to provide health care or
35 related services, including, but not limited to, a physician,
36 osteopathic physician, dentist, nurse, optometrist, podiatric physician

1 and surgeon, chiropractor, physical therapist, psychologist,
2 pharmacist, optician, physician's assistant, osteopathic physician's
3 assistant, nurse practitioner, or physician's trained mobile intensive
4 care paramedic, including, in the event such person is deceased, his
5 estate or personal representative;

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

10 (3) An entity, whether or not incorporated, facility, or
11 institution employing one or more persons described in subsection (1)
12 of this section, including, but not limited to, a hospital, clinic,
13 health maintenance organization, or nursing home; or an officer,
14 director, employee, or agent thereof acting in the course and scope of
15 his employment, including, in the event such officer, director,
16 employee, or agent is deceased, his estate or personal representative;
17 based upon alleged professional negligence shall be commenced within
18 three years of the act or omission alleged to have caused the injury or
19 condition, or one year of the time the patient or his representative
20 discovered or reasonably should have discovered that the injury or
21 condition was caused by said act or omission, whichever period expires
22 later, except that in no event shall an action be commenced more than
23 eight years after said act or omission: PROVIDED, That the time for
24 commencement of an action is tolled upon proof of fraud, intentional
25 concealment, or the presence of a foreign body not intended to have a
26 therapeutic or diagnostic purpose or effect, until the date the patient
27 or the patient's representative has actual knowledge of the act of
28 fraud or concealment, or of the presence of the foreign body; the
29 patient or the patient's representative has one year from the date of
30 the actual knowledge in which to commence a civil action for damages.

31 For purposes of this section, notwithstanding RCW 4.16.190, the
32 knowledge of a custodial parent or guardian shall be imputed to a
33 person under the age of eighteen years, and such imputed knowledge
34 shall operate to bar the claim of such minor to the same extent that
35 the claim of an adult would be barred under this section. Any action
36 not commenced in accordance with this section shall be barred.

37 For purposes of this section, with respect to care provided after

1 June 25, 1976, and before August 1, 1986, the knowledge of a custodial
2 parent or guardian shall be imputed as of April 29, 1987, to persons
3 under the age of eighteen years.

4 This section does not apply to a civil action based on intentional
5 conduct brought against those individuals or entities specified in this
6 section by a person for recovery of damages for injury occurring as a
7 result of childhood sexual abuse as defined in RCW 4.16.340(5).

8 **Sec. 303.** RCW 4.16.190 and 1993 c 232 s 1 are each amended to read
9 as follows:

10 (1) Unless otherwise provided in this section, if a person entitled
11 to bring an action mentioned in this chapter, except for a penalty or
12 forfeiture, or against a sheriff or other officer, for an escape, be at
13 the time the cause of action accrued either under the age of eighteen
14 years, or incompetent or disabled to such a degree that he or she
15 cannot understand the nature of the proceedings, such incompetency or
16 disability as determined according to chapter 11.88 RCW, or imprisoned
17 on a criminal charge prior to sentencing, the time of such disability
18 shall not be a part of the time limited for the commencement of action.

19 (2) Subsection (1) of this section with respect to a person under
20 the age of eighteen years does not apply to the time limited for the
21 commencement of an action under RCW 4.16.350.

22 **Expert Witnesses**

23 NEW SECTION. **Sec. 304.** A new section is added to chapter 7.70 RCW
24 to read as follows:

25 (1) In an action against a health care provider under this chapter,
26 an expert may not provide testimony at trial unless the expert meets
27 the following criteria:

28 (a) Has expertise in the medical condition at issue in the action;
29 and

30 (b) At the time of the occurrence of the incident at issue in the
31 action, or at the time of retirement in the case of an expert who
32 retired no sooner than five years prior to the time the action is
33 commenced, was either:

34 (i) Engaged in active practice in the same or similar area of
35 practice or specialty as the defendant; or

1 (ii) Teaching at an accredited medical school or an accredited or
2 affiliated academic or clinical training program in the same or similar
3 area of practice or specialty as the defendant, including instruction
4 regarding the particular condition at issue.

5 (2) Upon motion of a party, the court may waive the requirements of
6 subsection (1) of this section and allow an expert who does not meet
7 those requirements to testify at trial if the court finds that:

8 (a) Extensive efforts were made by the party to locate an expert
9 who meets the criteria under subsection (1) of this section, but none
10 was willing and available to testify; and

11 (b) The proposed expert is qualified to be an expert witness by
12 virtue of the person's training, experience, and knowledge.

13 NEW SECTION. **Sec. 305.** A new section is added to chapter 7.70 RCW
14 to read as follows:

15 An expert opinion provided in the course of an action against a
16 health care provider under this chapter must be corroborated by
17 admissible evidence, such as, but not limited to, treatment or practice
18 protocols or guidelines developed by medical specialty organizations,
19 objective academic research, clinical trials or studies, or widely
20 accepted clinical practices.

21 NEW SECTION. **Sec. 306.** A new section is added to chapter 7.70 RCW
22 to read as follows:

23 In any action under this chapter, each party shall presumptively be
24 entitled to only two independent experts on an issue, except upon a
25 showing of good cause. The court, upon a showing of good cause, shall
26 allow additional experts on an issue to be called as the court deems
27 appropriate.

28 NEW SECTION. **Sec. 307.** A new section is added to chapter 7.70 RCW
29 to read as follows:

30 In an action under this chapter, all parties shall submit a
31 pretrial expert report pursuant to time frames provided in court rules.
32 The expert report must disclose the identity of all expert witnesses
33 and state the nature of the opinions the expert witnesses will present
34 as testimony at trial. Further depositions of these expert witnesses
35 is prohibited. The testimony that an expert witness may present at

1 trial is limited in nature to the opinions disclosed to the court as
2 part of the pretrial expert report. The legislature respectfully
3 requests that the supreme court adopt rules to implement the provisions
4 of this section.

5 **Certificate of Merit**

6 NEW SECTION. **Sec. 308.** A new section is added to chapter 7.70 RCW
7 to read as follows:

8 (1) In an action against an individual health care provider under
9 this chapter for personal injury or wrongful death in which the injury
10 is alleged to have been caused by an act or omission that violates the
11 accepted standard of care, the plaintiff must file a certificate of
12 merit at the time of commencing the action. If the action is commenced
13 within forty-five days of the expiration of the applicable statute of
14 limitations, the plaintiff must file the certificate of merit within
15 forty-five days of commencing the action.

16 (2) The certificate of merit must be executed by a health care
17 provider who meets the qualifications of an expert under this chapter.
18 If there is more than one defendant in the action, the person
19 commencing the action must file a certificate of merit for each
20 defendant.

21 (3) The certificate of merit must contain a statement that the
22 person executing the certificate of merit believes, based on the
23 information known at the time of executing the certificate of merit,
24 that there is a reasonable probability that the defendant's conduct did
25 not follow the accepted standard of care required to be exercised by
26 the defendant.

27 (4) Upon motion of the plaintiff, the court may grant an additional
28 period of time to file the certificate of merit, not to exceed ninety
29 days, if the court finds there is good cause for the extension.

30 (5)(a) Failure to file a certificate of merit that complies with
31 the requirements of this section is grounds for dismissal of the case.

32 (b) If a case is dismissed for failure to file a certificate of
33 merit that complies with the requirements of this section, the filing
34 of the claim against the health care provider shall not be used against
35 the health care provider in professional liability insurance rate

1 setting, personal credit history, or professional licensing and
2 credentialing.

3 **Encouraging Offers of Settlement**

4 NEW SECTION. **Sec. 309.** A new section is added to chapter 7.70 RCW
5 to read as follows:

6 (1) In an action under this chapter where a claimant makes an offer
7 of settlement that complies with subsection (2) of this section, or
8 where a defendant makes an offer of settlement that complies with
9 subsection (2) of this section and has previously made a disclosure
10 that complies with subsection (3) of this section, the court may, in
11 its discretion, award reasonable attorneys' fees and statutory costs to
12 a prevailing party. In making the determination of whether or not
13 reasonable attorneys' fees should be awarded to a prevailing party, the
14 court may consider:

- 15 (a) Whether the party who rejected or failed to accept the offer of
16 settlement was substantially justified in bringing the case to trial;
- 17 (b) The extent to which additional relevant and material facts or
18 information became known after the offer was rejected or not accepted;
- 19 (c) Whether the offer of settlement was made in good faith;
- 20 (d) The closeness of questions of fact and law at issue in the
21 case;
- 22 (e) Whether a party engaged in conduct that unduly or unreasonably
23 delayed the resolution of the proceeding;
- 24 (f) Whether the circumstances make an award unjust; and
- 25 (g) Any other factor the court deems appropriate under the
26 circumstances of the case.

27 (2) An offer of settlement must be made in writing and served on
28 the opposing party at least fifteen days before trial and not before
29 thirty days after the completion of the service and filing of the
30 summons and complaint. The offer must remain open for a period of not
31 less than ten days.

32 (3) A defendant has made the disclosure required under subsection
33 (1) of this section if, within seven days after the defendant learned
34 that the claimant suffered an unanticipated outcome resulting from the
35 provision of health care involving the defendant, the defendant
36 disclosed the unanticipated outcome to the claimant, made an apology or

1 expression of sympathy regarding the unanticipated outcome, and
2 provided assurances that steps would be taken to prevent similar
3 occurrences in the future.

4 (4) An offer of settlement shall not be filed with the court or
5 communicated to the trier of fact until after judgment in the case, at
6 which point a copy of the offer of settlement shall be filed with the
7 court for the purpose of allowing the court to determine whether an
8 award of reasonable attorneys' fees is appropriate under the
9 circumstances of the case.

10 (5) If the court determines that an award of reasonable attorneys'
11 fees to a prevailing party is appropriate under this section, the court
12 shall consider the factors in RCW 7.70.070 in determining the amount of
13 reasonable attorneys' fees to be awarded. The award of reasonable
14 attorneys' fees shall be limited to attorneys' fees incurred from the
15 date of commencement of the trial.

16 (6) For the purposes of this section, "prevailing party" means a
17 party who makes an offer of settlement that is either rejected or not
18 accepted by the opposing party, and who improves his or her position at
19 trial relative to his or her offer of settlement.

20 **Voluntary Arbitration**

21 NEW SECTION. **Sec. 310.** This chapter applies to any cause of
22 action for damages for personal injury or wrongful death based on
23 alleged professional negligence in the provision of health care where
24 all parties to the action have agreed to submit the dispute to
25 arbitration under this chapter in accordance with the requirements of
26 section 311 of this act. Any contract or other agreement entered into
27 prior to the commencement of an action that purports to require a party
28 to elect arbitration under this chapter is void and unenforceable.

29 NEW SECTION. **Sec. 311.** (1) Parties in an action covered under
30 section 310 of this act may elect to submit the dispute to arbitration
31 under this chapter only in accordance with the requirements in this
32 section.

33 (a) A claimant may elect to submit the dispute to arbitration under
34 this chapter by including such election in the complaint filed at the
35 commencement of the action. A defendant may elect to submit the

1 dispute to arbitration under this chapter by including such election in
2 the defendant's answer to the complaint. The dispute will be submitted
3 to arbitration under this chapter only if all parties to the action
4 elect to submit the dispute to arbitration.

5 (b) If the parties do not initially elect to submit the dispute to
6 arbitration in accordance with (a) of this subsection, the parties may
7 make such an election at any time during the pendency of the action by
8 filing a stipulation with the court in which all parties to the action
9 agree to submit the dispute to arbitration under this chapter.

10 (2) A party that does not initially elect to submit a dispute to
11 arbitration under this chapter must file a declaration with the court
12 that meets the following requirements:

13 (a) In the case of a claimant, the declaration must be filed at the
14 time of commencing the action and must state that the attorney
15 representing the claimant presented the claimant with a copy of the
16 provisions of this chapter before commencing the action and that the
17 claimant elected not to submit the dispute to arbitration under this
18 chapter; and

19 (b) In the case of a defendant, the declaration must be filed at
20 the time of filing the answer and must state that the attorney
21 representing the defendant presented the defendant with a copy of the
22 provisions of this chapter before filing the defendant's answer and
23 that the defendant elected not to submit the dispute to arbitration
24 under this chapter.

25 NEW SECTION. **Sec. 312.** (1) An arbitrator shall be selected by
26 agreement of the parties no later than forty-five days after: (a) The
27 date all defendants elected arbitration in the answer where the parties
28 elected arbitration in the initial complaint and answer; or (b) the
29 date of the stipulation where the parties agreed to enter into
30 arbitration after the commencement of the action through a stipulation
31 filed with the court. The parties may agree to select more than one
32 arbitrator to conduct the arbitration.

33 (2) If the parties are unable to agree to an arbitrator by the time
34 specified in subsection (1) of this section, each side may submit the
35 names of three arbitrators to the court, and the court shall select an
36 arbitrator from among the submitted names within fifteen days of being

1 notified that the parties are unable to agree to an arbitrator. If
2 none of the parties submit any names of potential arbitrators, the
3 court shall select an arbitrator.

4 NEW SECTION. **Sec. 313.** The arbitrator may conduct the arbitration
5 in such manner as the arbitrator considers appropriate so as to aid in
6 the fair and expeditious disposition of the proceeding subject to the
7 requirements of this section and section 314 of this act.

8 (1)(a) Except as provided in (b) of this subsection, each side is
9 entitled to two experts on the issue of liability, two experts on the
10 issue of damages, and one rebuttal expert.

11 (b) Where there are multiple parties on one side, the arbitrator
12 shall determine the number of experts that are allowed based on the
13 minimum number of experts necessary to ensure a fair and economic
14 resolution of the action.

15 (2)(a) Unless the arbitrator determines that exceptional
16 circumstances require additional discovery, each party is entitled to
17 the following discovery from any other party:

18 (i) Twenty-five interrogatories, including subparts;

19 (ii) Ten requests for admission; and

20 (iii) In accordance with applicable court rules:

21 (A) Requests for production of documents and things, and for entry
22 upon land for inspection and other purposes; and

23 (B) Requests for physical and mental examinations of persons.

24 (b) The parties shall be entitled to the following depositions:

25 (i) Depositions of parties and any expert that a party expects to
26 call as a witness. Except by order of the arbitrator for good cause
27 shown, the length of the deposition of a party or an expert witness
28 shall be limited to four hours.

29 (ii) Depositions of other witnesses. Unless the arbitrator
30 determines that exceptional circumstances require additional
31 depositions, the total number of depositions of persons who are not
32 parties or expert witnesses is limited to five depositions per side,
33 each of which may last no longer than two hours in length. In the
34 deposition of a fact witness, each side is entitled to examine for one
35 hour of the deposition.

36 (3) An arbitrator may issue a subpoena for the attendance of a
37 witness and for the production of records and other evidence at any

1 hearing and may administer oaths. A subpoena must be served in the
2 manner for service of subpoenas in a civil action and, upon motion to
3 the court by a party to the arbitration proceeding or the arbitrator,
4 enforced in the manner for enforcement of subpoenas in a civil action.

5 NEW SECTION. **Sec. 314.** (1) An arbitration under this chapter
6 shall be conducted according to the time frames specified in this
7 section. The time frames provided in this section run from the date
8 all defendants have agreed to arbitration in their answers where the
9 parties elected arbitration in the initial complaint and answer, and
10 from the date of the execution of the stipulation where the parties
11 agreed to enter into arbitration after the commencement of the action
12 through a stipulation filed with the court. The arbitrator shall issue
13 a case scheduling order in every case specifying the dates by which the
14 requirements of (b) through (g) of this subsection must be completed.

15 (a) Within forty-five days, the claimant shall provide stipulations
16 for all relevant medical records to the defendants.

17 (b) Within one hundred twenty days, the claimant shall disclose to
18 the defendants the names and curriculum vitae or other documentation of
19 qualifications of any expert the claimant expects to call as a witness.

20 (c) Within one hundred forty days, each defendant shall disclose to
21 the claimants the names and curriculum vitae or other documentation of
22 qualifications of any expert the defendant expects to call as a
23 witness.

24 (d) Within one hundred sixty days, each party shall disclose to the
25 other parties the name and curriculum vitae or other documentation of
26 qualifications of any rebuttal expert the party expects to call as a
27 witness.

28 (e) Within two hundred forty days, all discovery shall be
29 completed.

30 (f) Within two hundred fifty days, mandatory mediation as required
31 by RCW 7.70.100 shall be completed. The arbitrator for the dispute may
32 not serve as the mediator in the mediation.

33 (g) Within two hundred seventy days, the arbitration hearing shall
34 commence.

35 (2) It is the express public policy of the legislature that
36 arbitration hearings under this chapter be commenced no later than ten
37 months after the parties elect to submit the dispute to arbitration.

1 The arbitrator may grant a continuance of the commencement of the
2 arbitration hearing only where a party shows that exceptional
3 circumstances create an undue and unavoidable hardship on the party.

4 NEW SECTION. **Sec. 315.** (1) The arbitrator shall issue a decision
5 in writing and signed by the arbitrator within fourteen days after the
6 completion of the arbitration hearing and shall promptly deliver a copy
7 of the decision to each of the parties or their attorneys.

8 (2) The arbitrator may not make an award of damages under this
9 chapter that exceeds one million dollars for both economic and
10 noneconomic damages.

11 (3) The arbitrator may not make an award of damages under this
12 chapter under a theory of ostensible agency liability.

13 (4) The arbitrator shall make a finding as to whether a claim,
14 counterclaim, cross-claim, or defense advanced by a party was frivolous
15 as defined in RCW 4.84.185.

16 (5) If the arbitrator makes an award of damages to the claimant,
17 the arbitrator shall make a finding as to whether the claimant suffered
18 serious mental or physical injury as a result of the professional
19 negligence of the defendant or defendants.

20 (6) The arbitrator shall review the reasonableness of each party's
21 attorneys' fees under the provisions of RCW 4.24.005.

22 (7) The fees and expenses of the arbitrator shall be paid by the
23 nonprevailing parties.

24 NEW SECTION. **Sec. 316.** After a party to the arbitration
25 proceeding receives notice of a decision, the party may file a motion
26 with the court for a judgment in accordance with the decision, at which
27 time the court shall issue such a judgment unless the decision is
28 modified, corrected, or vacated as provided in section 317 of this act.

29 NEW SECTION. **Sec. 317.** There is no right to a trial de novo on an
30 appeal of the arbitrator's decision. An appeal of the arbitrator's
31 decision is limited to the bases for appeal provided in RCW 7.04.160
32 (1) through (4) and 7.04.170, or equivalent provisions in a successor
33 statute.

1 NEW SECTION. **Sec. 318.** The provisions of chapter 7.04 RCW do not
2 apply to arbitrations conducted under this chapter except to the extent
3 specifically provided in this chapter.

4 **Sec. 319.** RCW 7.04.010 and 1947 c 209 s 1 are each amended to read
5 as follows:

6 Two or more parties may agree in writing to submit to arbitration,
7 in conformity with the provisions of this chapter, any controversy
8 which may be the subject of an action existing between them at the time
9 of the agreement to submit, or they may include in a written agreement
10 a provision to settle by arbitration any controversy thereafter arising
11 between them out of or in relation to such agreement. Such agreement
12 shall be valid, enforceable and irrevocable save upon such grounds as
13 exist in law or equity for the revocation of any agreement.

14 The provisions of this chapter shall not apply to any arbitration
15 agreement between employers and employees or between employers and
16 associations of employees, and as to any such agreement the parties
17 thereto may provide for any method and procedure for the settlement of
18 existing or future disputes and controversies, and such procedure shall
19 be valid, enforceable and irrevocable save upon such grounds as exist
20 in law or equity for the revocation of any agreement.

21 The provisions of this chapter do not apply to arbitrations under
22 chapter 7.--- RCW (sections 310 through 318 of this act) except to the
23 extent provided in that chapter.

24 Collateral Sources

25 **Sec. 320.** RCW 7.70.080 and 1975-'76 2nd ex.s. c 56 s 13 are each
26 amended to read as follows:

27 Any party may present evidence to the trier of fact that the
28 ((patient)) plaintiff has already been compensated for the injury
29 complained of from any source except the assets of the ((patient, his))
30 plaintiff, the plaintiff's representative, or ((his)) the plaintiff's
31 immediate family((, or insurance purchased with such assets)). In the
32 event such evidence is admitted, the plaintiff may present evidence of
33 an obligation to repay such compensation and evidence of any amount
34 paid by the plaintiff, or his or her representative or immediate
35 family, to secure the right to the compensation. ((Insurance bargained

1 ~~for or provided on behalf of an employee shall be considered insurance~~
2 ~~purchased with the assets of the employee.))~~ Compensation as used in
3 this section shall mean payment of money or other property to or on
4 behalf of the patient, rendering of services to the patient free of
5 charge to the patient, or indemnification of expenses incurred by or on
6 behalf of the patient. Notwithstanding this section, evidence of
7 compensation by a defendant health care provider may be offered only by
8 that provider.

9 **PART IV - MISCELLANEOUS PROVISIONS**

10 NEW SECTION. **Sec. 401.** Part headings and subheadings used in this
11 act are not any part of the law.

12 NEW SECTION. **Sec. 402.** (1) Sections 107 through 111 of this act
13 constitute a new chapter in Title 70 RCW.

14 (2) Sections 201 through 206 of this act constitute a new chapter
15 in Title 48 RCW.

16 (3) Sections 310 through 318 of this act constitute a new chapter
17 in Title 7 RCW.

18 NEW SECTION. **Sec. 403.** If any provision of this act or its
19 application to any person or circumstance is held invalid, the
20 remainder of the act or the application of the provision to other
21 persons or circumstances is not affected.

22 NEW SECTION. **Sec. 404.** This act constitutes an alternative to
23 Initiative 330. The secretary of state shall place this act on the
24 ballot in conjunction with Initiative 330 at the next regular general
25 election.

26 NEW SECTION. **Sec. 405.** This act constitutes an alternative to
27 Initiative 336. The secretary of state shall place this act on the
28 ballot in conjunction with Initiative 336 at the next regular general
29 election.

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