INITIATIVE MEASURE 336

PROPOSED TO THE LEGISLATURE

Official Ballot Title:

Initiative Measure No. 336 concerns medical malpractice, including insurance, health care provider licensing, and lawsuits.

This measure would require notices and hearings on insurance rate increases, establish a supplemental malpractice insurance program, require license revocation proceedings after three malpractice incidents, and limit numbers of expert witnesses in lawsuits.

Should this measure be enacted into law?

Yes [ ] No [ ]

Note: The Official Ballot Title and Explanatory Statement were written by the Attorney General as required by law. The Fiscal Impact Statement was written by the Office of Financial Management. For more in-depth Office of Fiscal Management analysis, visit www.ofm.wa.gov/initiatives/default.htm . The complete text of Initiative Measure 336 begins on page 40.

Fiscal Impact Statement

Summary of Fiscal Impact

Initiative 336 would result in additional costs in the state Office of the Insurance Commissioner ranging from $384,000 to more than $639,000 a year due largely to changes in requirements affecting field examinations of insurers. The Initiative also is expected to increase by $58,000 the state Department of Health's costs for licensing health care providers. The Initiative also could prompt an increase or decrease in court filings or hearings, but conflicting research offers no clear guidance for estimating the magnitude of the Initiative's fiscal impact on courts.

Assumptions for Fiscal Analysis of I-336

Higher costs in the Office of the Insurance Commissioner would result mostly from new responsibilities that the Initiative places with the Insurance Commissioner, and which are related to the Supplemental Malpractice Insurance Program (SMIP) and its Board of Governors. These new responsibilities would result in new costs for conducting full examinations of all insurers' finances and operations at least once every three years, collecting and distributing to the Department of Health all medical malpractice claims data, and preparing annual reports of all medical malpractice claims data. In addition, the Office of the Insurance Commissioner would incur new costs related to public notice and/or public hearings for certain insurance rate filings, and from potential, additional judicial proceedings.

Higher costs in the Department of Health are due in part to the Initiative's requirements for investigation and regulation of health care professionals found liable in court for three or more medical malpractice claims paid within the most recent five-year period in amounts of $50,000 or more. In addition, new costs would arise from new requirements related to processing medical malpractice claims data from the Office of the Insurance Commissioner and reports of medical malpractice verdicts or settlements in excess of $100,000 from the courts.

The Initiative may impact court system litigation costs. Various studies have been conducted to determine how changes in law affecting tort liability and insurance can affect costs for courts, insurance premiums and health care. However, individual study results vary widely, predicting no change or both lower and higher costs in these areas. Due to the conflicting research, there is no clear guidance for estimating the magnitude of the fiscal impact of potential reductions on court costs or insurance premiums.

Sections of the Initiative that have the potential to increase court activity include: conferring standing on any person to file an action challenging the decision of the Insurance Commissioner on a requested health insurance rate increase; failure of providers to supply, upon request, information regarding the provider's experience with particular treatments, if violations result in civil liability; allowing a process to increase the number of experts; and allowing sanctions for violation of the attorney certification requirements.

Sections of the Initiative that have the potential to decrease court activity include: requirements that attorneys certify their claims are not frivolous; limits on the number of expert witnesses to two for each side; and requirements that medical malpractice actions be supported by an expert's certificate of merit.

INITIATIVE MEASURE 336

Explanatory Statement

The law as it presently exists:

A person injured by negligently provided health care services may recover damages from the health care provider in an action commonly known as a "medical malpractice" lawsuit. Presently, one basis for such a lawsuit is that the injured patient was not adequately informed concerning the medical procedure that caused the injury, and if adequately informed, the injured patient would not have consented to it.

Health care providers may purchase malpractice insurance from private insurance companies to protect against the risk of the costs associated with a medical malpractice lawsuit. Companies offering medical malpractice insurance policies in this state are required to file their rates with the Insurance Commissioner for review and approval. The Insurance Commissioner may reject rates found to be excessive, inadequate, or unfairly discriminatory. The Insurance Commissioner is a statewide elected official.

Health care providers, such as doctors, dentists, and nurses, are licensed and regulated by the state of Washington. It is illegal to provide health care services without an appropriate license. The disciplinary boards for each profession may act upon complaints regarding health care services provided by licensed professionals under their jurisdiction. The boards may discipline health care providers for professional misconduct, including the revocation of a provider's license.

Court rules prohibit attorneys from pursuing frivolous claims and defenses in all types of lawsuits, including medical malpractice lawsuits. By signing a complaint or other claim, an attorney, or a self-represented party, certifies that to the best of her or his knowledge a claim or defense is well grounded in fact and law and that it is not filed for an improper purpose.

The effect of the proposed measure, if it becomes law:

This measure consists of three parts. **Part I** of the Initiative would enact new requirements related to the Insurance Commissioner's review of medical malpractice insurance rates and would establish a new supplemental malpractice insurance program.

The Initiative would require public notice of medical malpractice insurance rate increases proposed by insurers. If an insurer proposes a rate increase of less than 15 percent, the Insurance Commissioner would be required to notify the public of the proposed change and, depending on the circumstances, may hold a public hearing on the increase. A public hearing would be required if the proposed rate increase is more than 15 percent. If a hearing is commenced, the rate increase would be suspended until it is resolved. All materials filed by an insurer with respect to a requested rate increase would be open to the public. The Initiative would permit any person to participate in proceedings related to the rate increase, and may receive an award of attorney fees and other expenses from the insurer under some circumstances.

The Initiative would also establish a new supplemental malpractice insurance program to pay claims and related defense costs on behalf of health care facilities or providers who are eligible and choose to participate in the program. With specified limitations, the program would pay claims that exceed the policy limits of the participants' other insurance or self-insurance. To obtain coverage under this new program, a facility or provider would be required to document required levels of insurance coverage or self-insurance for malpractice claims.

The program would be a separate and distinct legal entity, not a state agency. The Legislature, however, would be permitted to appropriate money for the program.

A board of governors consisting of seven members would oversee the program. The Insurance Commissioner would appoint a total of five members, and the Washington State Medical Association and the Washington State Hospital Association would each appoint one member. The board would be required to adopt a plan for the program, including details of operation. The program would charge annual premiums to health care facilities and providers who decide to buy excess malpractice liability insurance from the program. The program would also be allowed to require facilities to pay additional sums, in addition to the annual premium, in order to be eligible to buy or renew coverage from the program, subject to approval by the Insurance Commissioner. The program would be required to report annually to the Insurance Commissioner regarding the program's transactions, financial condition, and operations.

The Initiative would also establish eligibility requirements for health care facilities and providers to buy coverage from the program, including requiring that they be properly licensed in Washington. Health care facilities or providers would be excluded from the program if they do not provide proof of financial responsibility or meet criteria established by the board. Federal employees, and facilities operated by the state or federal governments, would also be excluded.

The Initiative would permit the board to establish minimum requirements for underlying medical malpractice insurance which covered health care providers or facilities must purchase in order to be eligible to the program. The Initiative would specify the

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Explanatory Statement *(continued)*

The effect of the proposed measure, if it becomes law: *(continued)*

dollar amounts of coverage that this underlying insurance must provide. The program would provide coverage only for damage awards that exceed the limits of underlying insurance policies, up to maximum limits set forth in the Initiative.

The review and approval of the Insurance Commissioner would be required for the rates that the program charges to health care providers and facilities. The Initiative sets forth criteria for the Commissioner to follow in deciding whether to approve or reject rates.

The Initiative would also prohibit health care providers or health care facilities from rejecting certain settlement offers. If a claimant (such as a plaintiff in a medical malpractice lawsuit) and either the program or another insuring or self-insuring entity agree to a settlement, the provider or facility may not reject it. If a provider or facility believes that a claim was without merit and payment of the claim results in a premium increase, the provider or facility can appeal to the board for reconsideration of the premium increase.

The Initiative would also require insurance companies to report monthly to the Insurance Commissioner with regard to medical malpractice claims that result in judgments or settlements in any amount, or are otherwise resolved. The Insurance Commissioner would be required to produce annual reports, beginning in 2007, summarizing data from the monthly reports and summarizing the medical malpractice insurance market in the state. The Initiative would require the Department of Health to thoroughly investigate a health care professional with three malpractice claims paid within a five-year period totaling $50,000 or more.

Part II of the Initiative would amend existing laws related to regulation and discipline of licensed health care providers. It would add two additional public members (to bring the total public members to six) to the Washington State Medical Quality Assurance Commission, which regulates the practice of medicine. At least two of the public members would be required to be representatives of patient advocacy groups or organizations, not from the health care industry.

The Initiative would also prohibit the Medical Quality Assurance Commission from licensing, or continuing to license, a person found to have committed three or more incidents of medical malpractice within a ten-year period, as demonstrated by final judgments entered in a court of law. The board may find mitigating circumstances as described in the Initiative.

The Initiative would amend current law to provide that the failure of a health care provider to disclose the provider's experience with the injury-causing treatment in response to the patient's request, including treatment outcomes, would establish a medical malpractice claim based on lack of informed consent.

The Initiative would require that malpractice verdicts or settlements exceeding $100,000 must be reported to the Department of Health. Health care facilities or providers would also be required to provide patients, or the immediate family members of deceased patients, with records made or received in the course of business by a health care facility or provider. State law making certain disciplinary reports confidential would be amended to make reports available to such requesters.

Part III of the Initiative would limit each side in medical malpractice lawsuits to two expert witnesses on an issue, unless they can show that more are necessary. It would also require attorneys who draft, assist in drafting, or file medical malpractice lawsuits or related documents in such a suit to certify in writing that there is a reasonable basis for the claims asserted. Within 120 days of filing a medical malpractice lawsuit, the attorney or plaintiff would be required to certify that the attorney or plaintiff has consulted at least one qualified expert who believes that the claim satisfies at least one basis for recovery under the law.

Statement For Initiative Measure 336

I-336 FOR BETTER, SAFER HEALTH CARE – HOLDS HMOs, THE INSURANCE INDUSTRY, LAWYERS AND DOCTORS ACCOUNTABLE

• *I-336 is the only initiative to:* Crack down on doctors whose negligence has been found to cause serious injury or death three or more times

• End secrecy in legal proceedings so the public can learn the safety records of hospitals, clinics, and doctors

• Require insurers to pass savings to consumers

• Increase patient safety

• Require lawyers to have doctors certify a lawsuit as legitimate before filing a medical negligence lawsuit

• Punish lawyers who file frivolous lawsuits

Three Strikes and You're Out

I-336 prohibits doctors from practicing medicine in Washington if their negligence has been found by a court of law to have seriously injured or killed at least three patients.

I-336 WOULD FINALLY GIVE YOU THE RIGHT TO KNOW GOOD DOCTORS FROM BAD

Currently, you have no right to know about negligent HMOs, hospitals, or doctors. The insurance industry, HMOs, and hospitals can keep serious medical negligence a secret by forcing injured patients into "gag orders." I-336 would change that by giving you the right to know about negligent HMOs, hospitals, and doctors.

INSURANCE COMPANIES WOULD HAVE TO JUSTIFY RATE INCREASES, HOLDING INSURANCE RATES DOWN

The insurance industry would have to open their books to the public to justify rate increases. The Insurance Commissioner could deny unwarranted increases.

I-336 is the only initiative that cracks down on frivolous lawsuits.

Other initiatives treat serious lawsuits over true medical negligence that causes severe injuries the same way as frivolous lawsuits. I-336 is the only initiative cracking down on frivolous lawsuits without closing the courtroom doors on true and serious medical negligence cases where someone lost a child, or is confined to a wheelchair for life.

VOTE YES I-336 – THE ONLY INITIATIVE THAT PROTECTS PATIENTS AND LOWERS INSURANCE RATES FOR DOCTORS

For more information, visit www.bettersafercare.org or call 206.250.2746.

Rebuttal of Statement Against

Here are just a few of those supporting I-336: • Many leading nurses and health care professionals • Major senior organizations • Veterans • Firefighters.

Why? Because I-336 is the *only* measure that will actually reduce insurance rates and improve patient care. Other measures help the insurance industry at patients' expense.

Join a growing coalition of health care professionals, seniors, and emergency rescue workers. Vote *yes* on I-336.

Voters' Pamphlet Argument Prepared by:

DYLAN MALONE, Chair, Better Safer Health Care; HONORABLE TOM CAMPBELL, past Co Chair, House Health Care Committee; HONORABLE KAREN KEISER, Chair, Senate Health Care Committee; RICK BENDER, President, Washington State Labor Council; STEVE DZIELAK, Washington State Alliance for Retired Americans; CHERYL MARSHALL, member Washington ARC, King County Parent Coalition.

Statement Against Initiative Measure 336

I-336 IS A PERSONAL INJURY LAWYER INITIATIVE

Just when voters are being asked to enact meaningful reform to lower malpractice costs, greedy personal injury lawyers have responded with a cynical attempt to punish good doctors and make even more money from lawsuits. I-336 helps the lawyers: they wrote it, they lobbied for it, and personal injury lawyer money funds it. *According to the State Public Disclosure Commission, I-336 has received nearly every dollar of funding from one source: the Washington State Trial Lawyers Association!*

Behind the smoke screen, I-336 will reduce access to care and drive more doctors out of state. Its sole purpose is to benefit personal injury lawyers! The lawyers wrote I-336 to guarantee themselves even more money filing lawsuits against good doctors even those who've done nothing wrong.

I-336 CREATES MORE BUREAUCRACY

I-336 establishes a new state-run, taxpayer-financed, "supplemental" insurance program. Doctors would pay a second "excess" liability premium. It creates another deep pocket for personal injury lawyers to sue that's why they're willing to spend whatever it takes to pass I-336.

I-336 PUTS PERSONAL INJURY LAWYERS FIRST, PATIENTS LAST

I-336 does nothing to change the legal system that is driving good doctors out of practice and away from Washington. I-336 is a smoke-and-mirrors solution to a life-and-death problem. *The bottom line: this initiative was written by lawyers, for lawyers if it passes lawyers win, patients, doctors, and nurses lose.*

Vote No on I-336.

For more information, visit www.yesoni330.org or call (toll free) 877.740.0177.

Rebuttal of Statement For

The "three-strikes rule" won't actually "crack down" on bad doctors or frivolous lawsuits. The standard for "frivolous" lawsuits is so high it's nearly meaningless. The rule for doctors is nothing more than an effort to extort more money from good physicians for the benefit of personal injury lawyers. Like most of I-336, "three strikes" is just another soundbite masquerading as reform. Put patients first: choose real reform. Vote *yes* on I-330 *no* on I-336.

Voters' Pamphlet Argument Prepared by:

KENNETH ISAACS, M.D., Doctors, Nurses and Patients for a Healthy Washington; MARIANNE TEFFT, concerned patient; CYNTHIA MARKUS, M.D., J.D., concerned physician and attorney; DANA WALLACE, R.N., Chair, Nurses For I 330/Against I 336; TIMOTHY SHELDON, State Senator (D Potlatch).

Complete Text of
INITIATIVE MEASURE NO. 330
(continued)

arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

Sec. 17. RCW 4.22.015 and 1981 c 27 s 9 are each amended to read as follows:

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

A comparison of fault for any purpose under RCW 4.22.005 through ((~~4.22.060~~)) 4.22.070 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

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

NEW SECTION. **Sec. 19.** Sections 1 through 3, 7, 10 through 14, 16, and 17 of this act apply to all causes of action, whether filed or not, that the parties have not settled or in which judgment has not been entered before the effective date of this section.

NEW SECTION. **Sec. 20.** Sections 5, 8, and 9 of this act apply to all causes of action filed on or after the effective date of this section.

Complete Text of
INITIATIVE MEASURE NO. 336

AN ACT Relating to health care quality protection; amending RCW 18.71.015, 7.70.050, 18.71.0195, and 70.02.010; adding a new section to chapter 48.19 RCW; adding a new section to chapter 18.130 RCW; adding a new section to chapter 18.71 RCW; adding new sections to chapter 7.70 RCW; adding a new section to chapter 70.02 RCW; adding a new chapter to Title 48 RCW; creating a new section; and prescribing penalties.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

PART I - Medical Liability Insurance Transparency and Market Options

NEW SECTION. **Sec. 101.** The legislature declares that the business and practice of health care vitally affects the public interest. The legislature finds that increases in rate filings in insurance have widespread impact in the availability and affordability of medical malpractice liability insurance. In some cases, excessive rate increases result in limiting the availability of affordable insurance in markets, which in turn threatens the viability of the services or products that are to be insured. The legislature further finds that there are several contributing causes to the current medical liability problem, and addressing these causes requires reducing medical errors while increasing patient safety and information and reducing the cost of our medical liability system. It is in the public interest to maintain an efficient and expeditious regulatory environment in which to conduct the business of insurance. This interest must be balanced by the equally important public interest in promoting a greater range of medical liability insurance options to increase accessibility and affordability of this insurance and increase transparency when excessive rate filings impact the very health care practices and businesses that are to be insured. Therefore, it is the intent of the legislature to increase consumer access to information regarding medical malpractice liability and insurance and to reduce costs by increasing patient safety and information.

NEW SECTION. **Sec. 102.** (1) The insurance commissioner shall notify the public of any rate filing by an insurer for a rate change affecting medical malpractice that is less than fifteen percent of the then applicable rate. The filing is approved forty-five days after public notice unless:

(a) A consumer or his or her representative requests a hearing within thirty days of public notice and the commissioner grants the hearing;

(b) The commissioner on his or her own motion determines to hold a hearing; or

(c) The commissioner disapproves the filing.

(2) If the rate filing increase is fifteen percent or greater,

the commissioner shall order a public hearing. Any person shall have the right to intervene and participate as a party or have the right to comment at the public hearing.

(3) If rate hearings are commenced under subsection (1) or (2) of this section, the applicant may not use the rates until the commissioner approves the filing, either as originally submitted or as amended, after the public hearing and consistent with the requirements of this section.

(4) If a judicial proceeding directly involving the rate filing and initiated by the insurer or an intervener begins, the commissioner has thirty days after conclusion of the judicial proceedings to approve or disapprove the rate filing. The commissioner may disapprove an application without a hearing if a stay is in effect barring the commissioner from holding a hearing.

(5) Upon a final determination of a disapproval or amendment of a rate filing under this section, the insurer must issue an endorsement changing the rate to comply with the commissioner's disapproval. The endorsement is effective on the date the rate is no longer effective.

(6) The public notice required under subsections (1) and (2) of this section must be made via distribution to the news media, posting on the web site maintained by the commissioner, and by mail to any member of the public who requests placement on a mailing list maintained by the commissioner for this purpose.

(7) All medical malpractice insurance rate filings and related material submitted to the commissioner by the insurer under this section are available for public inspection pursuant to the public disclosure act, chapter 42.17 RCW.

(8) Hearings and other administrative proceedings arising under this section must be conducted under chapter 34.05 RCW.

NEW SECTION. **Sec. 103.** A new section is added to chapter 48.19 RCW to read as follows:

(1) With respect to administrative or legal proceedings authorized by or arising under section 102 of this act, any person may:

(a) Initiate or intervene as a party, or comment in writing or in person at any public hearing on the proceedings; or

(b) Challenge any action of the insurance commissioner.

(2) The commissioner or a court shall award reasonable advocacy and witness fees and expenses to any person who demonstrates that:

(a) The person represents the interests of consumers; and

(b) The person made a substantial contribution to the adoption of any order, rule, or decision by the commissioner or a court.

(3) When an award of fees or expenses under this section occurs in a proceeding related to a rate application, the award must be paid by the applicant.

NEW SECTION. **Sec. 104.** The definitions in this section apply throughout this chapter unless the context requires otherwise.

(1) "Board" means the board of governors created under section 107 of this act.

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

(a) Two or more claims arising out of a single injury or incident of medical malpractice is one claim.

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

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

(4) "Commissioner" means the insurance commissioner.

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

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

(7) "Health care provider" or "provider" means a health care provider as defined in RCW 48.43.005.

(8) "Insuring entity" means:

(a) An insurer;

(b) A joint underwriting association;

(c) A risk retention group; or

(d) An unauthorized insurer that provides surplus lines coverage.

(9) "Intervener" means any person, including every individual, firm, company, corporation, association, or organization, engaging in the activities described in section 103 of this act.

(10) "Medical malpractice" means a negligent act, error, or omission in providing or failing to provide professional health care services, subject to chapter 7.70 RCW.

(11) "Program" means the supplemental malpractice insurance program created under section 105 of this act.

(12) "Retained limit" means the dollar amount of loss retained by a facility or provider. A provider or facility may finance claim payments that fall within a retained limit by self-insuring or buying insurance from an insuring entity. Under this chapter, the amount of a retained limit means:

(a) If the facility or provider bought insurance from an insuring entity, the higher of:

(i) The retained limits required under section 116 of this act; or

(ii) Alternative higher limits of underlying coverage purchased by the facility or provider; or

(b) If a provider or facility self-insured medical malpractice claims, the higher of:

(i) The retained limits required under section 116 of this act; or

(ii) Alternative higher retained limits selected by a facility or provider as part of its risk financing program.

(13) "Tail coverage" means extended reporting period coverage.

(14) "Underlying insurance" means any liability insurance policy that provides primary or excess liability insurance

coverage for medical malpractice claims.

NEW SECTION. **Sec. 105.** (1) A supplemental malpractice insurance program is created to provide an excess layer of liability coverage for medical malpractice claims. Subject to subsection (2) of this section, the program will pay claims and related defense costs on behalf of a covered health care facility or provider if the claim is first made against the facility or provider:

(a) After 12:01 a.m. on January 1, 2006; or

(b) The effective date of coverage under the program, if later than 12:01 a.m. on January 1, 2006.

(2) The program will not pay claims:

(a) That the board excludes from coverage when it establishes coverage specifications under section 108(1)(b) of this act;

(b) That fall within the applicable retained limits, subject to subsection (3) of this section;

(c) That exceed the limits of liability coverage purchased by the facility or provider as described in section 116 of this act;

(d) That result from a provider or employee operating a motor vehicle;

(e) That result from a crime, as defined in RCW 7.69.020(1), that is subject to a finding of intent. This exclusion applies whether or not the criminal conduct is the basis for a medical malpractice claim;

(f) Made against an employee of a covered provider or facility if the employee:

(i) Acts outside the scope of his or her employment; or

(ii) Provides health care services without the collaboration, direction, or supervision of a covered provider; or

(g) Made against a partnership or professional corporation organized by health care providers, if the board determines that it is not the primary purpose of the partnership or corporation to provide the health care services. For the purposes of this subsection, if fifty percent or more of the partners, owners, or shareholders are health care providers, the board must determine that it is the entity's primary purpose to provide health care services.

(3) If an aggregate limit of underlying insurance purchased from an insuring entity is exhausted due to claim payments, the program will pay claims that fall within the retained limit. This subsection does not:

(a) Increase the limits of liability provided by the program; or

(b) Apply to self-insurers qualified under section 114 of this act.

(4) The obligation of the program to pay related defense costs under subsection (1) of this section ends when the program pays the applicable limit of liability purchased by the facility or provider.

(5)(a) To obtain coverage under the program for a medical malpractice claim, a facility or provider must provide documentation to the program of the insurance or self-insurance program in effect at the time the incident occurred and meet the other requirements of this chapter.

(b) All medical malpractice liability insurance purchased by a facility or provider that is applicable to a claim covered by the program must be paid before the program will provide coverage, even if the insurance limits exceed the retained limits.

NEW SECTION. **Sec. 106.** (1) The program has the general corporate powers and authority granted under the laws of Washington state.

(2) The program is not an insurer as defined in RCW 48.01.050, and is exempt from filing:

(a) Forms under RCW 48.18.100 and 48.18.103; and

(b) Rates, except as provided under section 122 of this act.

(3) The program is a separate and distinct legal entity. Liability or a cause of action may not arise against the following for any acts or omissions made in good faith while performing their duties under this chapter:

(a) The program or any member of the board;

(b) The commissioner, any of the commissioner's staff, or any authorized representative of the commissioner;

(c) The secretary of the department of health, any of the department's staff, or any authorized representative of the secretary;

(d) Any person or entity, its agents, or employees reporting data required by sections 125 through 127 of this act.

(4) The program is not a state agency.

(a) The state is not liable for any debts or obligations of the program.

(b) The legislature may appropriate money at its discretion for deposit into the program.

(5) The program is exempt from payment of all fees and all taxes levied by this state or any of its subdivisions, except taxes levied on real or personal property.

(6) The program is not a member of the Washington insurance guaranty association under chapter 48.32 RCW. The Washington insurance guaranty association, Washington state, and any political subdivisions of this state are not responsible for losses sustained by the program.

NEW SECTION. **Sec. 107.** A board of governors will oversee the operations of the program. The management and operations of the program are subject to the supervision and approval of the board.

(1) The commissioner and associations must appoint representatives to the board within thirty days:

(a) After the effective date of this act; or

(b) A vacancy occurs on the board.

(2) The board must comprise:

(a) The commissioner or a designated representative employed by the office of the insurance commissioner, who will serve as chairperson of the board;

(b) Three members of the public appointed by the

commissioner for staggered three-year terms;

(c) A person with relevant insurance or risk management experience appointed by the commissioner for a three-year term;

(d) A person selected by the Washington state medical association; and

(e) A person selected by the Washington state hospital association.

(3) The program may reimburse board members for their actual expenses to attend meetings, subject to per diem rates and rules established by the office of financial management.

(4) The program must reimburse the commissioner for any staff services provided at the request of the board or the program.

NEW SECTION. **Sec. 108.** (1) The board must adopt a program plan of operation within sixty days after the members are appointed. The plan of operation must include:

(a) A schedule for meetings;

(b) Specifications for program coverage provisions, including but not limited to:

(i) Types of claims that the program will not cover;

(ii) Limits of coverage available from the program;

(iii) Eligibility criteria for providers and facilities that want to buy excess medical malpractice coverage from the program;

(iv) Circumstances under which a retroactive date will be applied for injuries that occurred before 12:01 a.m. on January 1, 2006; and

(v) Rules the program will follow when it provides tail coverage;

(c) Rules requiring a specific duration of tail coverage that must be offered by insuring entities and self-insurers who provide proof of financial responsibility under section 114 of this act;

(d) Criteria under which the program may purchase reinsurance;

(e) A process that health care facilities and providers must follow to buy coverage from the program;

(f) A process for billing and collecting annual premiums from facilities and providers who buy coverage from the program; and

(g) Any other administrative activities or procedures needed to establish and operate the program.

(2) The plan of operation is subject to approval by the commissioner before it takes effect.

(3) The board may amend the plan of operation as needed. All amendments are subject to approval by the commissioner before they take effect.

NEW SECTION. **Sec. 109.** (1) The board must appoint an administrator to manage the program.

(2) The administrator may:

(a) Hire staff to operate the program; or

(b) Contract for all or part of the services needed to operate the program.

(3) At least annually, each contractor must report to the board. The report must provide information on all expenses incurred and all subcontracting arrangements.

(4) The program must pay for all administrative and contracted services, subject to review and approval of the board.

NEW SECTION. **Sec. 110.** (1) The program must charge an annual premium to health care facilities and providers who decide to buy excess medical malpractice liability coverage from the program. The program must use this money to pay claims, administrative costs, and other expenses of the program.

(2) In addition to authority granted under subsection (1) of this section, the program may increase its surplus by issuing a capital call. A capital call requires facilities and providers to pay a sum, in addition to the annual premium, to be eligible to buy or renew coverage from the program. If a facility or provider does not pay the amount of a call, the program may not cancel coverage or deny benefits of existing coverage that are in effect at the time of the capital call. Before issuing a capital call, the program must:

(a) Notify the commissioner at least ninety days before the capital call. This notice must state the:

(i) Specific purpose or purposes of the capital call and the amount of money the program has budgeted for each stated purpose;

(ii) Total amount of money the program intends to raise by issuing the capital call;

(iii) Analytical and factual basis used by the program to determine a capital call is the best option available to the program for raising capital; and

(iv) Alternative method or methods of raising capital the program considered and the reasons the program rejected each alternative in favor of the capital call;

(b) Provide any additional information that the commissioner determines is useful or necessary in evaluating the merits of the proposed capital call; and

(c) Receive approval of the commissioner for the capital call. The commissioner may disapprove a capital call if he or she does not believe it is in the best interest of the program, its participating facilities and providers, or the citizens of the state of Washington. In making this determination, the commissioner may consider:

(i) The financial health of the program and the impact on the medical malpractice marketplace;

(ii) The possible use of other means to raise capital;

(iii) The frequency of previous capital calls by the program;

(iv) The effect of raising premiums instead of a capital call;

(v) The impact on state revenue; and

(vi) Any other factor the commissioner decides is relevant.

(3) All money collected by the program belongs to the program.

(4) The state investment board must:

(a) Manage the assets of the program;

(b) Invest program assets in a manner consistent with chapter 48.13 RCW; and

(c) Charge the program reasonable fees for services provided under this section.

NEW SECTION. **Sec. 111.** (1) The program must file an annual statement with the commissioner by March 1st of each year. The statement must contain information about the program's transactions, financial condition, and operations during the past calendar year. The commissioner may establish rules for the form and content of this statement. The statement must:

(a) Be in the form and according to instructions adopted by the national association of insurance commissioners for property and casualty insurers; and

(b) Include any additional information requested by the commissioner.

(2) The program must maintain its records according to the accounting practices and procedures manual adopted by the national association of insurance commissioners.

(3) The program must provide the commissioner with free access to all the books, records, files, papers, and documents that relate to the operation of the program. The commissioner may call, qualify, and examine all persons having knowledge of the program's operations.

(4) The commissioner may enter and examine the operation and experience of the program at any time.

(a) The commissioner must examine the transactions, financial condition, and operations of the program at least once every three years.

(b) The commissioner must conduct each examination using the procedures prescribed for insurance companies in chapter 48.03 RCW. The program must reimburse the commissioner for the cost of each examination.

NEW SECTION. **Sec. 112.** (1) A health care facility is eligible to buy coverage from the program if the facility is located in Washington state and:

(a) Is licensed by Washington state; or

(b) Ends business operations after January 1, 2006, and needs to buy tail coverage. The facility must maintain financial responsibility as required under section 114 of this act to buy tail coverage.

(2) A health care provider is eligible to buy coverage from the program if:

(a) The provider is licensed by and maintains a principal place of practice in Washington state;

(b) The provider's principal place of practice is Idaho or Oregon and:

(i) The provider is a resident of Washington state;

(ii) The provider is licensed in Washington state; and

(iii) The provider performs procedures in an Idaho or Oregon facility. In this subsection, "Idaho or Oregon facility" means a facility located in Idaho or Oregon that is an affiliate of a corporation organized under the laws of Washington state and maintains:

(A) Its principal office in Washington state; and

(B) A facility in Washington state that is covered by the program;

(c) The provider retires or ceases business operations after January 1, 2006, and needs to buy tail coverage. The provider must maintain financial responsibility as required under section 114 of this act to buy tail coverage; or

(d) The provider meets the description in section 113(2) of this act, but practices his or her profession outside the scope of the exclusion. Coverage under the program applies only to claims arising out of the practice of medicine that is outside the scope of the exclusion in section 113(2) of this act.

NEW SECTION. **Sec. 113.** A health care facility or provider is not eligible for coverage under the program if:

(1) The facility or provider:

(a) Has not provided proof of financial responsibility to the program as required by section 114 of this act; or

(b) Does not meet the criteria established by the board to be eligible for coverage by the program. Any facility or provider denied coverage by the program may appeal the decision to the board;

(2) The provider is a federal employee or contractor covered under the federal tort claims act and is acting within the scope of his or her employment or contractual duties; or

(3) The health care facility is operated by state or federal government.

NEW SECTION. **Sec. 114.** To obtain coverage from the program, each eligible health care facility or provider must provide the program with proof of financial responsibility to pay medical malpractice claims that fall within the retained limits. Financial responsibility must include the facility or provider and all officers, agents, and employees while acting in the course and scope of their employment with the facility or provider. A facility or provider may establish proof of financial responsibility by:

(1) Qualifying as a self-insurer under criteria established by the board that will result in financial responsibility equivalent to the retained limits established in section 116 of this act; or

(2) Buying medical malpractice insurance in amounts equal to the retained limits listed in section 116 of this act from an insuring entity accepted by the program.

NEW SECTION. **Sec. 115.** (1) Each insuring entity or self-insurer that provides medical malpractice insurance to health care facilities or providers in Washington state must offer limits of coverage equal to those specified under section 116 of this act.

(2) Each insuring entity or self-insurer that provides certification under section 116(1) of this act:

(a) Must provide medical malpractice tail coverage that meets the criteria established by the board under section 108(1)(c) of this act;

(b) May not cancel or nonrenew coverage unless the facility or provider is given written notice of:

(i) Fifteen days if coverage is canceled for nonpayment of premiums; or

(ii) Ninety days if coverage is canceled or nonrenewed for any reason other than nonpayment of premiums;

(c) Must provide the program with the same notice as required under (b) of this subsection; and

(d) Must keep a copy of each notice issued under (c) of this subsection for at least ten years from the date of mailing or delivery.

NEW SECTION. **Sec. 116.** (1) If a health care facility or provider buys insurance to establish proof of financial responsibility, the insuring entity that provides underlying coverage must certify in writing to the program that the facility or provider has medical malpractice coverage with limits of liability as specified in this section. The limits set forth in this section apply to any joint liability of a provider and his or her corporation or partnership.

(2) The minimum retained limits of liability are:

(a) For health care providers:

(i) Two hundred fifty thousand dollars per claim; and

(ii) Annual aggregate limits of seven hundred fifty thousand dollars;

(b) For facilities with fewer than twenty-five employees that do not provide surgical services:

(i) Two hundred fifty thousand dollars per claim; and

(ii) Annual aggregate limits of one million two hundred fifty thousand dollars;

(c)(i) For hospitals with a capacity of less than one hundred beds:

(A) Five hundred thousand dollars per claim; and

(B) Annual aggregate limits of five million dollars;

(ii) For hospitals with a capacity of one hundred or more beds:

(A) Five hundred thousand dollars per claim; and

(B) Annual aggregate limits of eight million dollars;

(d)(i) For health maintenance organizations that do not provide hospital services:

(A) Five hundred thousand dollars per claim; and

(B) Annual aggregate limits of five million dollars;

(ii) For health maintenance organizations that provide hospital services:

(A) Five hundred thousand dollars per claim; and

(B) Annual aggregate limits of eight million dollars; and

(e) For all other types of health care facilities:

(i) Five hundred thousand dollars per claim; and

(ii) Annual aggregate limits of three million dollars.

(3) The program must establish alternative rates for facilities or providers who elect to maintain higher retained limits.

(4)(a) Retained limits of liability apply only to claim payments. Each insuring entity and self-insurer that provides certification under subsection (1) of this section must pay defense costs as supplementary payments.

(b) If a medical malpractice claim is large enough that the program must make claim payments, the insuring entity or self-insurer and the program will share defense costs on a pro rata basis based on the total amount of claim payments.

NEW SECTION. **Sec. 117.** Subject to the terms, conditions, and exclusions of its contract with a facility or provider, an insuring entity or self-insurer that provides certification under section 116(1) of this act agrees to pay the following costs:

(1) Attorney fees and other costs incurred in the settlement or defense of any claims; and

(2) Any settlement, arbitration award, or judgment imposed against a facility or provider under this chapter up to the retained limits or the limits of all available underlying insurance.

NEW SECTION. **Sec. 118.** (1) Subject to exclusions established by the board, the limitations established in section 105 of this act, and the retained limits agreed to by the facility or provider, the program will pay all sums a covered facility or provider is legally obligated to pay as damages up to the limits of liability purchased from the program.

(2) The coverage limits under this subsection are excess of the retained limits.

(a) The basic limits of excess liability coverage under the program for a health care provider, including providers who provide services in a partnership or as part of a professional corporation, are:

(i) One million dollars per claim; and

(ii) An annual aggregate limit of three million dollars.

(b) The basic limits of excess liability coverage for a health care facility are:

(i) Two million dollars per claim; and

(ii) An annual aggregate limit of six million dollars.

(3) In addition to the basic limits described in subsection (2) of this section, the program must offer higher limits of coverage to those providers and facilities that are willing to pay additional premiums. The board will determine the limits of liability available through the program based on the limits available in the voluntary medical malpractice insurance market.

(4) Program coverage is always excess to the retained limits provided by the facility or provider.

NEW SECTION. **Sec. 119.** From January 1, 2006, through December 31, 2006, the annual program premium billed to each participating facility or provider will be determined by the commissioner based on:

(1) An analysis of rates and rating plans used by medical malpractice insurers;

(2) Claims experience for medical malpractice insurance; and

(3) Any other factors the commissioner determines are relevant.

NEW SECTION. **Sec. 120.** Beginning January 1, 2007,

program premiums charged to facilities and providers must be based on the rates and rating plans adopted by the board and accepted by the commissioner under section 122 of this act.

(1) The board must contract with an actuary experienced in developing medical malpractice rates and rating plans to develop annual funding estimates.

(2) By July 1st of each year, the actuary must submit to the board the classifications, rates, and rating plan the program will use to determine premiums for the next calendar year. The rates and rating plan must consider:

(a) Past and prospective loss experience in Washington state for experience periods acceptable to the commissioner. If data from Washington state are not available or are not statistically credible, the program may use loss experience from those states that are likely to produce loss experience similar to that in Washington state;

(b) Past and prospective operating expenses;

(c) Past and prospective investment income;

(d) A contingency factor to protect the program from adverse loss development; and

(e) All other relevant factors within and outside Washington state.

(3) The classifications, rates, and rating plan used to develop premiums for individual facilities and providers must consider:

(a) Past and prospective loss and expense experience for different types of medical care offered by participating facilities or providers, including:

(i) The amount of surgery performed by a facility or provider; and

(ii) The risk of diagnostic and therapeutic services provided or procedures performed;

(b) The bed capacity and occupancy rates in a health care facility;

(c) Differences in financial risk, if any, to the program if a facility or provider is self-insured;

(d) The risk factors for providers who are semiretired or part-time professionals;

(e) If a health care provider is a partnership or professional corporation, the risk factors and past and prospective loss and expense experience of the partners and employees of that provider;

(f) If a provider's principal place of practice is Oregon or Idaho, any differences in risk or expense to reflect the fact the provider's practice is not located in Washington state;

(g) Higher retained limits selected by a facility or provider; and

(h) Higher limits of liability coverage purchased from the program by a facility or provider.

NEW SECTION. **Sec. 121.** The rating plan used by the program must include experience and schedule rating plans. The program must apply these plans equitably to all facilities and providers.

(1) The experience rating plan:

(a) Must consider the past loss and loss adjustment expense experience of a facility or an individual provider;

(b) May consider paid medical malpractice claims if the claims result from negligence on the part of:

(i) A facility;

(ii) A health care provider; or

(iii) An employee of a facility or health care provider; and

(c) May consider medical malpractice claims:

(i) Paid on behalf of a facility or provider by the program, an insuring entity, or a self-insurer; and

(ii) Paid on behalf of a facility or provider before or after the program is established.

(2) The schedule rating plan must consider the effect of:

(a) Risk management programs based on evidence-based practices that improve patient safety. Practices that have been identified and recommended by governmental and private organizations, including:

(i) The federal agency for health quality and research;

(ii) The federal institute of medicine;

(iii) The joint commission on accreditation of health care organizations;

(iv) The national quality forum; or

(v) Any other evidence-based program accepted by the board; and

(b) Other objective criteria approved by the board that is expected to reduce either losses or expenses incurred by the program.

NEW SECTION. **Sec. 122.** (1) Before the rates and rating plans described in sections 120 and 121 of this act become effective, the commissioner's staff must independently evaluate the rates and rating plan and agree that:

(a) The rates and rating plan will result in premiums that are not excessive, inadequate, or unfairly discriminatory; and

(b) The annual funding estimate is actuarially sound.

(2) The program may collect the premiums that are in effect for the previous year if the classifications, rates, and rating plan have not been approved by the board and the commissioner by September 30th. If new classifications, rates, and a rating plan are later approved, the program must collect or refund the balance of the premium from the provider or facility.

(a) To collect or refund the premium, the program may adjust any outstanding semiannual or quarterly installment payments, if applicable.

(b) To save administrative expenses, the program may decide not to collect, refund, or adjust for nominal amounts of premium.

NEW SECTION. **Sec. 123.** Each facility or provider must pay an annual premium to buy excess medical malpractice coverage from the program.

(1) Facilities or providers may pay program premiums annually, or in semiannual or quarterly installments. Semiannual and quarterly installments must include the prorated premium and a fee that covers unearned interest

or investment income and administrative costs incurred because the facility or provider has decided to pay premium in installments.

(2) A facility or provider must pay premiums to their selected insuring entity within thirty days of the billing date. If the insuring entity does not receive the premium due within thirty days, coverage under the program ends at 12:01 a.m. on the thirty-first day. The program and the insuring entity are not required to provide additional notice of cancellation for nonpayment of premium.

(3) An insuring entity must bill and collect program premiums the same way it collects premiums for underlying insurance or coverage within the retained limit. The insuring entity must pay premium to the program within twenty days after receipt from a facility or provider.

(4) If the insuring entity does not pay premium to the program on time:

(a) The commissioner may suspend the certificate of authority, charter, or license of the insuring entity until the premium is paid;

(b) The insuring entity or surplus lines producer responsible for the delinquency is liable for the premium due plus a penalty equal to ten percent of the amount of the overdue premium.

(5) A self-insurer must pay premium to the program within thirty days after the program sends the self-insurer a premium bill. If the program does not receive the premium due within thirty days, coverage under the program ends at 12:01 a.m. on the thirty-first day. The program is not required to provide additional notice of cancellation for nonpayment of premium.

NEW SECTION. **Sec. 124.** (1)(a) To encourage prompt payment of claims and control defense costs, a facility or provider may not reject any settlement agreed upon between a claimant and:

(i) The program; or

(ii) An insuring entity or self-insurer that provides certification under section 116 of this act.

(b) If a facility or provider feels a claim paid under (a) of this subsection was without merit and the payment results in a higher premium charge through application of the experience rating plan, the provider or facility may appeal to the board for reconsideration of the premium increase. In evaluating the appeal, the board must consider:

(i) The merits of the claim and the likelihood the program would prevail at trial;

(ii) Actual claim payments and defense costs incurred by the program;

(iii) The estimated cost of defense for a particular claim; and

(iv) The likelihood further negotiation or litigation would result in lower payments for claim and defense costs by the program.

(2) A provider or facility, the program, an insuring entity, or a self-insurer that provides medical malpractice coverage may voluntarily make payments for medical expenses prior to any determination of fault. These payments:

(a) Are not an admission of fault;

(b) Are not admissible as evidence of fault in a formal or informal legal proceeding;

(c) Will be deducted from any judgment, settlement, or arbitration award; and

(d) Will not be repaid by the claimant regardless of the amount of judgment, settlement, or award.

(3) Subsection (2) of this section does not restrict a right of contribution or indemnity under the laws of Washington state.

NEW SECTION. **Sec. 125.** (1) Each insuring entity or self-insurer that provides medical malpractice coverage to a facility or provider covered by the program must notify the program if it establishes a loss reserve for a claim that exceeds one hundred twenty-five thousand dollars.

(2) Each facility or provider that is self-insured must notify the program if a claim is made that exceeds one hundred twenty-five thousand dollars.

(3) Notices required under subsections (1) and (2) of this section must be sent by certified mail to the program within ten working days after the date:

(a) The loss reserve is established; or

(b) The facility or provider is notified of the claim.

(4) Notices and all related communications and correspondence provided under this section are confidential and are not available to any person or any public or private agency.

(5) The program may elect to participate in the defense of a facility or provider. If the program has the right but not the duty to defend and decides to participate in the defense the program will:

(a) Pay its expenses; and

(b) Not contribute to the expenses of the facility, provider, insuring entity, or self-insurer until the applicable retained limit has been paid.

NEW SECTION. **Sec. 126.** (1) Beginning on March 1, 2006, every insuring entity or self-insurer that provides medical malpractice insurance to any facility or provider in Washington state must report to the commissioner by the 1st of each month any claim related to medical malpractice, if the claim resulted in a final:

(a) Judgment in any amount;

(b) Settlement in any amount; or

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

(2) If a claim is not reported by an entity listed in subsection (1) of this section, the facility or provider must report the claim to the commissioner.

(a) Reports under this subsection must be filed with the commissioner within thirty days after the claim is resolved.

(b) If a facility or provider violates the requirements of this subsection, the facility or provider license is subject to a fine or disciplinary action by the department.

(3) The reporting requirements under this section apply to

all:

(a) Insuring entities and self-insurers; and

(b) Providers and facilities, regardless of whether they buy coverage from the program.

(4) The commissioner may impose a fine of two hundred fifty dollars per day per case against any insuring entity or surplus lines producer that violates the requirements of this subsection. The total fine per case may not exceed ten thousand dollars.

(5) The commissioner will provide the department with electronic access to all information received under this section related to licensed facilities and providers.

NEW SECTION. **Sec. 127.** The reports required under section 126 of this act must contain the following data in a form prescribed by the commissioner:

(1) The health care provider's name, address, provider professional license number, and type of medical specialty for which the provider is insured;

(2) The provider or facility policy number or numbers;

(3) The name of the facility, if any, and the location within the facility where the injury occurred;

(4) The date of the loss;

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

(6) The name and address of the claimant. This claimant information is confidential and exempt from public disclosure, but may be disclosed:

(a) Publicly, if the claimant provides written consent;

(b) To the department at any time; or

(c) To the commissioner at any time for purpose of identifying multiple or duplicate claims arising out of the same occurrence;

(7) The date of suit, if filed;

(8) The claimant's age and sex;

(9) The names and professional license numbers if applicable of all defendants involved in the claim;

(10) Specific information about the judgment or settlement including:

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

(b) Whether the settlement:

(i) Was the result of an arbitration, judgment, or mediation; and

(ii) Occurred before or after trial;

(c)(i) The loss adjustment expense paid to defense counsel; and

(ii) All other paid allocated loss adjustment expenses;

(d) If there is no judgment or settlement:

(i) The date and reason for final disposition; and

(ii) The date the claim was closed; and

(e) Any other information required by the commissioner;

(11) A summary of the occurrence that created the claim, which must include:

(a) The final diagnosis for which the patient sought or received treatment, including the actual condition of the patient;

(b) A description of any misdiagnosis made by the provider of the actual condition of the patient;

(c) The operation, diagnostic, or treatment procedure that caused the injury;

(d) A description of the principal injury that led to the claim; and

(e) The safety management steps the facility or provider has taken to make similar occurrences or injuries less likely in the future; and

(12) Any other information required by the commissioner, by rule, that helps the commissioner or department analyze and evaluate the nature, causes, location, cost, and damages involved in medical malpractice cases.

NEW SECTION. **Sec. 128.** The commissioner must prepare aggregate statistical summaries of closed claims based on calendar year data submitted under section 126 of this act.

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

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

NEW SECTION. **Sec. 129.** Beginning in 2007, the commissioner must prepare an annual report by June 30th that summarizes and analyzes the closed claim reports for medical malpractice filed under section 126 of this act and the annual financial reports filed by insurers writing medical malpractice insurance in this state. The report must include:

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

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

(b) The types of medical malpractice for which claims have been paid; and

(c) Any other information the commissioner determines illustrates trends in closed claims;

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

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

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

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

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

(4) A summary of the rate filings for medical malpractice that have been approved by the commissioner for the prior

calendar year, including an analysis of the trend of direct and incurred losses as compared to prior years;

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

(6) The commissioner may adopt rules that require persons and entities required to report under section 126 of this act to report data related to:

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

(b) The amounts reserved for incurred claims;

(c) Changes in reserves from the previous reporting period;

(d) Any other information that helps the commissioner monitor losses and claims development in the Washington state medical malpractice insurance market; and

(e) Any additional information requested by the department or the board.

NEW SECTION. **Sec. 130.** The commissioner may adopt all rules needed to implement this chapter.

NEW SECTION. **Sec. 131.** Sections 101, 102, and 104 through 130 of this act constitute a new chapter in Title 48 RCW.

NEW SECTION. **Sec. 132.** A new section is added to chapter 18.130 RCW to read as follows:

(1) As used in this section:

(a) "Claim" has the same meaning as in section 104(2) of this act.

(b) "Health care professional" means a person engaged in a profession listed in RCW 18.130.040.

(c) "Supplemental malpractice insurance program" has the same meaning as in section 104(11) of this act.

(2) The department must provide the program with any available information needed to set premiums, including data on hospital bed capacity and occupancy rates.

(3) The department must thoroughly investigate a health care professional if:

(a) A health care professional has three claims paid within the most recent five-year period; and

(b) The total indemnity payment for each claim was fifty thousand dollars or more.

(4) The department may adopt any rules needed to implement this section.

NEW SECTION. **Sec. 133.** The legislature may appropriate for the biennium ending June 30, 2007, any sum of money it deems necessary to the department of health to:

(1) Provide capital and surplus to the supplemental malpractice insurance program; and

(2) Pay administrative expenses incurred to establish the supplemental malpractice insurance program.

PART II - Patient Safety and Patient Right to Know

Sec. 201. RCW 18.71.015 and 1999 c 366 s 4 are each amended to read as follows:

The Washington state medical quality assurance commission is established, consisting of thirteen individuals licensed to practice medicine in the state of Washington under this chapter, two individuals who are licensed as physician assistants under chapter 18.71A RCW, and ((~~four~~)) six individuals who are members of the public. At least two of the public members shall not be from the health care industry and shall be representatives of patient advocacy groups or organizations. Each congressional district now existing or hereafter created in the state must be represented by at least one physician member of the commission. The terms of office of members of the commission are not affected by changes in congressional district boundaries. Public members of the commission may not be a member of any other health care licensing board or commission, or have a fiduciary obligation to a facility rendering health services regulated by the commission, or have a material or financial interest in the rendering of health services regulated by the commission.

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

Each member of the commission must be a citizen of the United States, must be an actual resident of this state, and, if a physician, must have been licensed to practice medicine in this state for at least five years.

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

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

Each member of the commission shall be compensated in accordance with RCW 43.03.265 and in addition thereto shall be reimbursed for travel expenses incurred in carrying out

the duties of the commission in accordance with RCW 43.03.050 and 43.03.060. Any such expenses shall be paid from funds appropriated to the department of health.

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

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

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

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

Sec. 202. RCW 7.70.050 and 1975-'76 2nd ex.s. c 56 s 10 are each amended to read as follows:

(1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his or her representatives against a health care provider:

(a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;

(b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately caused injury to the patient.

(2)(a) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether or not to submit to the proposed treatment.

(b) The failure of a health care provider to disclose, upon patient request, the provider's experience with the treatment, including treatment outcomes, is a violation of this section.

(3) Material facts under the provisions of this section which must be established by expert testimony shall be either:

(a) The nature and character of the treatment proposed and administered;

(b) The anticipated results of the treatment proposed and administered;

(c) The recognized possible alternative forms of treatment; or

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

(4) If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his or her consent to required treatment will be implied.

NEW SECTION. **Sec. 203.** A new section is added to chapter 18.71 RCW to read as follows:

(1) No person who has been found to have within a ten-year period committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the commission to practice medicine.

(2) The disciplining authority may make a finding of mitigating circumstances against a licensee on any of the following circumstances:

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

(b) There is a strong potential that remedial education and training will prevent future harm to the public.

(3) Nothing in this section limits the authority of the disciplining authority to revoke a license or take other disciplinary action when the license holder has committed only one or two acts of unprofessional conduct.

(4) For the purposes of this section:

(a) "Medical malpractice" means both the failure to practice medicine with that level of care, skill, and treatment recognized under chapter 7.70 RCW and any similar wrongful act, neglect, or default in other states which are considered medical malpractice; and

(b) "Found to have committed" means that the malpractice has been found in a final judgment entered in a court of law.

NEW SECTION. **Sec. 204.** A new section is added to chapter 7.70 RCW to read as follows:

In any action under this chapter where a verdict or settlement is recorded or reported to the court in an amount in excess of one hundred thousand dollars, the clerk of the court shall report such verdict to the department of health.

Sec. 205. RCW 18.71.0195 and 1998 c 132 s 2 are each amended to read as follows:

(1) The contents of any report filed under RCW 18.130.070 shall be confidential and exempt from public disclosure pursuant to chapter 42.17 RCW, except that it may be reviewed by: (a) ((~~by~~)) The licensee involved or his or her counsel or authorized representative who may submit any additional exculpatory or explanatory statements or other information, which statements or other information shall be included in the file((~~, or~~)); (b) ((~~by~~)) a representative of the commission, or investigator thereof, who has been assigned

to review the activities of a licensed physician; (c) a patient requesting information relating to adverse medical incidents under section 206 of this act; or (d) the immediate family members of a deceased or disabled patient requesting information relative to adverse medical incidents under section 206 of this act.

Upon a determination that a report is without merit, the commission's records may be purged of information relating to the report.

(2) Every individual, medical association, medical society, hospital, medical service bureau, health insurance carrier or agent, professional liability insurance carrier, professional standards review organization, agency of the federal, state, or local government, or the entity established by RCW 18.71.300 and its officers, agents, and employees are immune from civil liability, whether direct or derivative, for providing information to the commission under RCW 18.130.070, or for which an individual health care provider has immunity under the provisions of RCW 4.24.240, 4.24.250, or 4.24.260.

NEW SECTION. **Sec. 206.** A new section is added to chapter 70.02 RCW to read as follows:

Upon receipt of a written request from a patient or an immediate family member of a deceased or disabled family member to examine or copy records made or received in the course of business by a health care facility or provider relating to any adverse medical incident, the health care facility or provider, as promptly as required by the circumstances, but not later than fifteen working days after receiving the request, shall:

(1) Make the information available for examination during regular business hours and provide a copy, if requested, to the patient or an immediate family member of a deceased or disabled family member. In providing such access, the identity of patients involved in the incidents shall not be disclosed, and any privacy restrictions imposed by federal law shall be maintained; or

(2) Inform the patient or an immediate family member of a deceased or disabled patient if the information does not exist or cannot be found.

Sec. 207. RCW 70.02.010 and 2002 c 318 s 1 are each amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adverse medical incident" means medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any government agency or body, and incidents that are reported to or reviewed by the Washington state medical quality assurance commission.

(2) "Audit" means an assessment, evaluation, determination, or investigation of a health care provider by a person not employed by or affiliated with the provider to determine compliance with:

(a) Statutory, regulatory, fiscal, medical, or scientific standards;

(b) A private or public program of payments to a health care provider; or

(c) Requirements for licensing, accreditation, or certification.

((~~(2)~~)) (3) "Directory information" means information disclosing the presence, and for the purpose of identification, the name, residence, sex, and the general health condition of a particular patient who is a patient in a health care facility or who is currently receiving emergency health care in a health care facility.

((~~(3)~~)) (4) "General health condition" means the patient's health status described in terms of "critical," "poor," "fair," "good," "excellent," or terms denoting similar conditions.

((~~(4)~~)) (5) "Health care" means any care, service, or procedure provided by a health care provider:

(a) To diagnose, treat, or maintain a patient's physical or mental condition; or

(b) That affects the structure or any function of the human body.

((~~(5)~~)) (6) "Health care facility" means a hospital, clinic, nursing home, laboratory, office, or similar place where a health care provider provides health care to patients.

((~~(6)~~)) (7) "Health care information" means any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care, including a patient's deoxyribonucleic acid and identified sequence of chemical base pairs. The term includes any record of disclosures of health care information.

((~~(7)~~)) (8) "Health care provider" means a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession.

((~~(8)~~)) (9) "Institutional review board" means any board, committee, or other group formally designated by an institution, or authorized under federal or state law, to review, approve the initiation of, or conduct periodic review of research programs to assure the protection of the rights and welfare of human research subjects.

((~~(9)~~)) (10) "Maintain," as related to health care information, means to hold, possess, preserve, retain, store, or control that information.

((~~(10)~~)) (11) "Patient" means an individual who receives or has received health care. The term includes a deceased individual who has received health care.

((~~(11)~~)) (12) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

((~~(12)~~)) (13) "Reasonable fee" means the charges for

duplicating or searching the record, but shall not exceed sixty-five cents per page for the first thirty pages and fifty cents per page for all other pages. In addition, a clerical fee for searching and handling may be charged not to exceed fifteen dollars. These amounts shall be adjusted biennially in accordance with changes in the consumer price index, all consumers, for Seattle-Tacoma metropolitan statistical area as determined by the secretary of health. However, where editing of records by a health care provider is required by statute and is done by the provider personally, the fee may be the usual and customary charge for a basic office visit.

((~~(13)~~)) (14) "Third-party payor" means an insurer regulated under Title 48 RCW authorized to transact business in this state or other jurisdiction, including a health care service contractor, and health maintenance organization; or an employee welfare benefit plan; or a state or federal health benefit program.

PART III - Medical Liability Cost Savings

NEW SECTION. **Sec. 301.** A new section is added to chapter 7.70 RCW to read as follows:

In any action under this chapter, each side shall presumptively be entitled to only two expert witnesses on an issue, except upon a showing of necessity. Where there are multiple parties on a side and the parties cannot agree as to which experts will be called on an issue, the court, upon a showing of necessity, shall allow additional experts on an issue to be called as the court deems appropriate.

NEW SECTION. **Sec. 302.** A new section is added to chapter 7.70 RCW to read as follows:

(1) In any action under this section, an attorney that has drafted, or assisted in drafting and filing an action, counterclaim, cross-claim, third-party claim, or a defense to a claim, upon signature and filing, certifies that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is not frivolous, and is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause frivolous litigation. If an action is signed and filed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the action, counterclaim, cross-claim, third-party claim, or a defense to a claim, including a reasonable attorney fee. The procedures governing the enforcement of RCW 4.84.185 shall apply to this section.

(2) Within one hundred twenty days after filing a lawsuit under this chapter, the attorney of record, or the plaintiff if pro se, must file a certificate of merit. The certificate must state that the attorney or pro se plaintiff has consulted with a qualified expert who believes on a more probable than not basis that the claim set forth satisfies at least one of the basis for recovery under this chapter. Upon a showing of good cause, a court may extend the time frame for filing the certificate for a period not to exceed sixty days.

PART IV - Severability

NEW SECTION. **Sec. 401.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

PLEASE NOTE

In the text of the measures, any language in double parentheses with a line through it is existing state law and will be taken out of the law if the measure is approved by voters. Any underlined language does not appear in current state law but will be added to the law if the measure is approved by voters.