COMPARISON OF WASHINGTON INITIATIVES 330 AND 336
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INITIATIVE 336

The Washington State Trial Lawyers Association (WSTLA) sponsored this initiative. This initiative has a severability clause that provides that any parts of the initiative not challenged in court ("severed") will go into effect upon passage. If approved by voters, the initiative would change state law by:

1. Creating a state-run malpractice insurance program.

This program will supplement commercially available malpractice insurance. Initiative 336 also provides for the creation of a Board of Governors to oversee the operations of the state run malpractice program.

2. Requiring insurance companies to disclose their rating factors and criteria when a rate change occurs which impacts medical malpractice rates.

3. Changing the membership of the Medical Quality Assurance Commission to include two additional public members. Two of the Commission's six public members would have to be representatives of patient advocacy groups.

4. Imposing a "three strikes" provision on doctors and other health care providers which would require disciplinary action up to and including loss of license for a final judgment of negligence in three medical (health care professional) malpractice suits within a ten year period:

The assessment of "medical malpractice" would include both the failure to practice medicine with that level of care, skill and treatment recognized under RCW chapter 7.70 and any similar wrongful act, neglect or default in other states. Medical malpractice must be found in a final judgment entered in a court of law (mediation/settlements don't count for this provision; however, see 6 below).

Mitigation of penalty imposed is possible if the licensee demonstrates a strong potential for rehabilitation or if there is a strong potential that remedial education or training will prevent future harm to the public.

5. Providing that a health care facility or provider may not reject any settlement agreed upon between a claimant and the state insurance program (or underwriter or self-insurer):

Section provides for an appeals process of this decision to the Board of Governors.

6. Requiring that any verdict or settlement over $100,000 must be reported to the Washington State Department of Health (by the Clerk of Court).

Other reporting requirements: Sec 126-127 requires that insuring entity or self-insurer report the details of a judgment or settlement to the Insurance Commissioner on a monthly basis. This data will be compiled and analyzed on an annual basis by the Insurance Commissioner under Sec 128.

Sec 130 requires that the Department of Health "thoroughly investigate" any HCP who has had three claims of $50,000 or more paid within the previous five year period.

7. Requiring that a doctor fully disclose, upon patient request, a doctor's experience during the process of obtaining informed consent:

Modifies the "Informed Consent" provision of RCW 7.70.050 to add:

b) "The failure of a health care provider to disclose, upon patient's consent, the provider's experience with the treatment, including treatment outcomes, is a violation of…." (the informed consent provision).

8. Allowing a patient or family member access to information related to adverse medical incidents:

Gives patient access to business records of a facility or HCP relating to any adverse medical incident (chilling effect on incident reports, peer review, QA reports)?

9. Limiting the number of expert witnesses in a malpractice claim to two unless more experts are shown to be necessary (determined by the court).

This could allegedly hold down costs in medical malpractice cases, but could not apply in any complex claim involving multiple types of practitioners (e.g. a hospital error that involved an MD writing an erroneous Rx, an RPh who filled it without catching the error, and an RN who administered it without catching the error. Each practitioner would require an expert to testify to the individual profession's standard of care).

10. **Adding a section requiring that attorney filing malpractice claim sign a "certificate of merit".**

This portion of the initiative refers to RCW 4.84.185, which allows the court to impose costs for frivolous actions or defenses.

See also Washington Superior Court Rule 11, which requires that attorneys filing any claims with the court provide the same assurances and gives the court the power to:
"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 pleading, motion, or legal memorandum, including a reasonable attorney fee."

Sanctions from the court under Rule 11 are rarely imposed.

This section of the initiative seems redundant to existing law, as it does not gives courts additional powers of enforcement, nor does it give the power of enforcement to another entity.

11. Expanding the legal definition of an adverse medical incident:

Sec 207(1) adds a laundry list of definitions to the existing health care practitioner negligence statute (RCW 7.70) including:

"Adverse medical incident" means medical negligence, intentional misconduct, and any other act, neglect, 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.

(No immunity for mandatory reporting requirements or quality assurance activities!)

TACTICS FOR "TORT REFORM" USED IN OTHER STATES:

1. Adopting caps and/or formulas for awarding non-economic damages;
2. Changes in the statute of limitations (and tolling of the running of the statute);

3. Changes in the statutes governing negligence;
4. Revising vicarious liability (liability of an employer for the acts of an employee) and;
5. Joint and several liability reform.

INITIATIVE 330:

The Washington State Medical Association (WSMA) sponsored this initiative. This initiative is limited only to medical liability and does not affect general tort reform. The Association is preparing to fight expected court challenges, including those filed on constitutional and equal protection grounds, against the initiative. This initiative also has a severability clause, and provides for a constitutional amendment to be introduced if the state supreme court rules that the cap on non-economic damages is unconstitutional.

If approved by voters, the initiative would change state law by:

1. Restricting non-economic "pain and suffering" damages to between $350,000 and $1,050,000:

Currently no caps or formulas that allow judges to calculate a cap are permitted.

In *Sofie vs. Fiberboard* 112 Wn. 2d 636 (1989), the Washington Supreme Court held:

1. Determination of damage: a plaintiff in a civil action has a right under Washington Constit. Art 1, 21, to have the jury determine the factual issue of the amount of damages sustained.
2. Legislative authority: the legislature has no authority to intrude upon the constitutional jury function of determining the amount of plaintiff's damages.
3. Validity of RCW 4.56.250, which required a trial judge to apply a formula based on age to reduce the non-economic damages awarded to a personal injury or wrongful death plaintiff, unconstitutional under 1) above.

RCW 4.56.250: (overturned by ruling in *Sofie vs. Fiberboard*)

(2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (2) of this section.

Note that Sec. 1 of I-330 replicates the identical form and format of RCW 4.56.250, so a constitutional challenge to this section would be necessary. Sec. 2 imposes monetary caps on noneconomic damages and would also be unconstitutional.

2. Changing the suspension of the running of the statute of limitations ("SOL") for filing a claim on behalf of a minor child from age 18 to age eight:

Current law: "tolls" (stops) the running of the SOL for a negligence claim for a minor until s/he reaches age 18 (see RCW 4.16.190). However, note that even under the current law, knowledge of the custodial parent or guardian is imputed to the child and the regular SOL applies for medical negligence (see RCW 4.16.350).

Effectively eliminating the discovery provision of statute of limitations and confining all med mal actions to no more than 3 years after act or omission.

Current RCW 4.16.350: must file claim within 3 years of act/omission or within 1 year of discovery, whichever expires later. (However, no claim may be filed more than 8 years after act/omission).

3. Limiting attorneys' fees to 40% of the first $50,000 of a court award, 33 1/3% of the next $50,000, 25% of the next $500,000, 15% of any amount over $600,000.

4. Modifying the joint and several liability laws so that defendants are held strictly accountable for their share of liability in contributing to their own injury:

Joint liability allows an injured person to file a claim against, and collect money from, a number of people within one lawsuit; several liability means that several people in the lawsuit are liable for their portion of the claim based on the amount of liability or fault assigned to each person. In practice, this doctrine allows enforcement of an entire monetary judgment against any one of the individuals who was found at fault.

Section (13) limits joint and several liability: "A person who is a health care provider… shall not be personally liable for any act or omission of any other health care provider who was not the person's actual agent or employee or who was not acting under the person's direct supervision or control at the time of the act or omission."

5. Changing the vicarious liability statute so that hospitals, doctors and other healthcare providers are responsible for only their own share, or their employees' share, of liability.

New section (11) would reverse the ruling in *Adamski v. Tacoma General Hospital*, 20 Wn. App. 98 (1978), where the Washington Court of Appeals held that hospitals may be held liable for physician's acts or omissions under the theories of "apparent agency" or "ostensible agency".

Holding in *Adamski:* Whether or not a hospital may be vicariously liable for the negligent acts of a physician committed at, or as a result of a patient's visit to, a hospital is determined by examining the facts and circumstances involved to determine the significance of the hospital physician relationship. Factors which may apply are whether: the patient initially sought treatment primarily from the hospital; the hospital undertook to provide medical treatment or merely a place for a physician to administer to his patients; the patient or the hospital engaged the physician's services; and, the physician or the hospital provided and administered the working spaces, support personnel, supplies, and bookkeeping. The compensation arrangement with the physician; the nature and duration of the hospital-physician service agreement, if any; and the degree to which the physician's services represent an inherent hospital function without which the hospital could not achieve its purpose may also be examined to determine their effect on the relationship.

New section (12) reads: "A public or private hospital shall be held liable for an act or omission of a health care provider granted privileges to provide health care at the hospital only if the health care provider is an actual agent or employee of the hospital and the act or omission of the health care provider occurred while the health care provider was acting within the course and scope of the health care provider's agency or employment with the hospital."