State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX -

PLEASE DO NOT REMOVE FROM DRAFTING FILE

Date Transfer Requested: 02/02/2006 (Per: RLR)

☞Appendix A

☞ The 2003 drafting file for LRB 03–4322

has been copied/added to the 2005 drafting file for

LRB 05–1965

☞ The attached 2005 draft was incorporated into the new 2005 draft listed above. For research purposes, this cover sheet and the attached drafting file were copied, and added, as a appendix, to the new 2005 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

☞ This cover sheet was added to rear of the original 2005 drafting file. The drafting file was then returned, intact, to its folder and filed.

2003 DRAFTING REQUEST

Bill

Received: **02/20/2004**

Received By: **pkahler**

Wanted: **Soon**

Identical to LRB:

For: **Gregg Underheim (608) 266-2254**

By/Representing: **Randy Thorson**

This file may be shown to any legislator: **NO**

Drafter: **pkahler**

May Contact:

Addl. Drafters:

Subject: **Health - miscellaneous**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Underheim@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Health care quality review

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	pkahler 02/20/2004 pkahler 03/01/2004	kfollett 03/03/2004	chaugen 02/23/2004	_____ _____ _____ _____			
/P1			rschluet 03/03/2004	_____ _____	mbarman 03/03/2004		

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/P2	pkahler 03/05/2004	kfollett 03/10/2004	jfrantze 03/10/2004	_____ _____	sbasford 03/10/2004		

FE Sent For:

<END>

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/P1			rschluet 03/03/2004 3/10 9:3 3/10	_____ _____	mbarman 03/03/2004		

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/?	pkahler	IPI kf 3/3	3/3	4 pb			

FE Sent For:

<END>

Kahler, Pam

From: Leitch, Laura [LLeitch@wha.org]
Sent: Friday, February 20, 2004 11:50 AM
To: pam.kahler@legis.state.wi.us
Subject: 146.38

Quality Review Statute 022004 ...

Pam,

Attached is the most recent version. Thanks for your work on this.

Laura

<<Quality Review Statute 022004 sent to drafter_.doc>>

Laura Leitch
Vice President and General Counsel
Wisconsin Hospital Association
P 608-274-1820
F 608-274-8554

Pam: repeal 146.37 + RC 146.38 -4322

146.38 - Health care quality review; confidentiality of information; immunity.

(1) Findings and Purpose. The State recognizes the need for a culture of quality and safety among the health care community in order to promote the highest quality, lowest cost, and safest health care for its citizens. It is declared to be the public policy of this State to encourage activities that help create, while at the same time discouraging activities that inhibit, a culture of quality and safety in the health care community. The State finds that Public Reporting Activity--which increases public awareness of health care quality--and Quality Review Activity--through which the health care community identifies and learns from successes and adverse events--encourages a culture of quality and safety. The State therefore declares that the following Wisconsin statute should be liberally construed in identifying and protecting Quality Review Activity and Public Reporting Activity. These findings and declarations are premised upon the following:

(a) Effective quality review requires that all who participate are able to candidly and objectively communicate in writing and orally and that all related products of Quality Review Activity are afforded protection from discovery in litigation and elsewhere;

(b) Effective quality review is hampered without statutory and judicial assurances of confidentiality and immunity from liability, due also as to the fear of involuntary future participation in litigation arising from good faith review;

(c) Fear of future involvement in litigation in the absence of statutory confidentiality and immunity also lessens the willingness of individuals to participate in the process;

(d) Judicial decisions in Wisconsin contain some inconsistencies, having been premised upon narrowly construing existing statutory immunities and restrictions upon access to quality review information for discovery purposes; and

(e) Legislation is needed to provide clear and consistent assurances that Quality Review Activity defined in the following statute be confidential and be immune from both discovery and admissibility in litigation; and that assurances are provided that involuntary participation in judicial proceedings will not be required of those who participate in Quality Review Activity.

(2) In this section:

(a) "Adverse Quality Review Action" means an action or recommendation based upon past, present, or anticipated Quality Review Activity to reduce, restrict, suspend, deny, revoke or fail to grant or renew a Health Care Entity's:

1. Membership, clinical privileges, clinical practice authority, or professional certification in a hospital, medical staff, or other Health Care Entity;
2. Participation on a Health Care Entity's provider panel; or
3. Accreditation, licensure, or certification.

(b) "Health Care Entity" includes a health care provider, as defined in s. 146.81(1); an entity or person that provides or arranges for health care services, including mental health services; and an entity or person that furnishes the services of health care providers to another health care entity.

(c) "Public Reporting Activity" means receiving, aggregating, or organizing Quality Review Records, patient information, or health care data of one or more Health Care Entities or Quality Review Entities when a purpose of such activity includes:

1. Presenting, at some contemplated time in the future, the received, aggregated, or organized items to Health Care Entities, Quality Review Entities, consumers, purchasers, businesses, or the general public to inform Health Care Entities, Quality Review Entities, consumers, purchasers, businesses, or the general public about the quality, cost, utilization, or safety of health care; or

Intent stmt - out

2. Presenting, at some contemplated time in the future, the received, aggregated, or organized items to one or more Public Reporting Entities.

(d) "Public Reporting Document" means a document, report, or any other communication containing aggregated or reorganized Quality Review Records, patient information, or health care data of one or more Health Care Entities or Quality Review Entities that is with proper authority presented and communicated to the general public for the purpose of informing patients about the quality, cost, utilization, or safety of health care.

(e) "Public Reporting Entity" means an entity or person that undertakes Public Reporting Activity.

(f) "Quality Review Activity" means any study, review, evaluation, investigation, recommendation, action, corrective action, process, or monitoring of or relating to one or more Health Care Entities that is conducted to:

1. Maintain or improve the quality of care or those services having any impact on care;
2. Reduce morbidity or mortality;
3. Pursue or enforce or improve standards of qualification, competence, conduct, or performance;
4. Maintain or improve the appropriate or cost-effective use of health care services and resources;
5. Comply with or pursue compliance with applicable legal, ethical, or behavioral standards;
6. Comply with or pursue compliance with credentialing, accreditation, or regulatory activities, requirements, or standards. Such activities include the submission of the Joint Commission on Accreditation of Healthcare Organizations' periodic performance review and activities related to that submission;
7. Credential or approve the credentialing of Health Care Entities;
8. Address the health or performance of individuals who are Health Care Entities;
9. Measure progress toward or compliance with goals and standards used to further the foregoing criteria, such as through quality improvement studies, morbidity and mortality studies, or utilization management studies; or
10. Aggregate or organize Quality Review Records, health care data, or patient information.

(g) Quality Review Activity may involve continuous or periodic data collection and may, for example, relate to either the structure, process, or outcome of health care provided by the Health Care Entity or its personnel.

(h) "Quality Review Entity" means any of the following:

1. An individual or entity, such as a medical staff officer, department chair, quality assurance or improvement committee, or other administrators, departments, or committees, that are given responsibility by a Health Care Entity or a Quality Review Entity for conducting Quality Review Activity.
2. Any individual or entity with which a Quality Review Entity or Health Care Entity contracts or arranges to perform or assist in performing Quality Review Activity.
3. Joint committees of two or more Health Care Entities or Quality Review Entities when performing Quality Review Activity.
4. An individual or entity that performs Quality Review Activity on or for a separate Health Care Entity where that Health Care Entity is the subject of the Quality Review Activity. Such entities include accreditation entities, licensure entities, and regulatory entities.
5. The governing body and committees of the governing body of a Health Care Entity when engaging in Quality Review Activity.

6. The officers, directors, employees, members, agents, consultants, attorneys and staff of a Quality Review Entity when engaging or assisting in Quality Review Activity.

(i) "Quality Review Records" shall include in any type of media, including oral communications, and whether in statistical form or otherwise, the minutes, files, notes, records, reports, statements, memoranda, data bases, proceedings, findings, work product, images and any other records, that are:

1. Collected or developed by a Health Care Entity for the purpose of reporting to a Quality Review Entity for Quality Review Activity,
2. Reported to a Quality Review Entity for Quality Review Activity,
3. Requested by a Quality Review Entity (including the contents of such request) for Quality Review Activity,
4. Reported to a Health Care Entity by a Quality Review Entity for Quality Review Activity,
5. Collected or developed by a Quality Review Entity for Quality Review Activity,
6. Reported among Quality Review Entities, after obtaining authorization,
7. Received by a Public Reporting Entity,
8. A product of Public Reporting Activity, or
9. Information related to oversight, monitoring, corrective actions, or other activities taken in response to Quality Review Activity.

(j) The term Quality Review Records does not include:

1. Records maintained by or for a Health Care Entity for the particular purpose of diagnosing, treating, or documenting the care provided to an individual patient and available from a source other than a Quality Review Entity, or
2. Public Reporting Documents.

2 (3) Confidentiality of quality review records.

(a) Except as otherwise provided by this section 146.38, all Quality Review Records are privileged and confidential and shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity, or be admissible as evidence in any criminal, civil, judicial, or administrative proceeding. Information contained in Quality Review Records shall not be admissible or discoverable.

(b) This section's protections exist in any criminal, civil, judicial or administrative proceeding. This section's protection of Quality Review Records cannot be waived or destroyed by any authorized or unauthorized disclosure of Quality Review Records to any party.

(c) Sub. (3) (a) shall not apply in any state or federal criminal, civil, judicial, or administrative proceeding in which a Health Care Entity contests an Adverse Quality Review Action against him or her or it by a Quality Review Entity, but the discovery, use and introduction of Quality Review Records in such a proceeding shall not constitute a waiver of sub. (3) (a) with respect to subsequent publication, release, use, discovery, subpoena or other means of legal compulsion, or admissibility of such records.

(d) Furnishing Quality Review Records to another Quality Review Entity, a Public Reporting Entity, a state regulatory, licensing or certifying body, other state or federal agencies, a national accrediting body, or to an individual health care provider or his or her representatives, shall not constitute a waiver of sub. (3) (a) with respect to subsequent publication, release, use, discovery, subpoena, or other means of legal compulsion, or admissibility of such records.

(e) A state regulatory, licensing or certifying body, or a state agency, may not compel the disclosure of or access to Quality Review Records.

3 (4) Release of Quality Review Records.

(a) A Quality Review Entity may, but shall not be required to unless sub. (4)(d) or (4)(e) applies, disclose Quality Review Records to other Quality Review Entities, Public Reporting Entities, or any other person or entity for purposes of Quality Review Activity or Public Reporting Activity. Such a disclosure shall not waive any privilege against disclosure under sub. (3).

(b) A Quality Review Entity may, but shall not be required to unless sub. (4)(e) applies, furnish Quality Review Records, summaries or information to, or act as a witness and furnish testimony before, Quality Review Entities, state or federal governmental agencies, and national accrediting bodies. Such a disclosure shall not waive any privilege against disclosure under sub. (3).

(c) Quality Review Records that are not related to Adverse Quality Review Action may, but shall not be required to unless sub. (4)(d) applies, be disclosed by the Quality Review Entity to a Health Care Entity who is a subject of the Quality Review Activity contained in the Quality Review Record. Such a disclosure shall not waive any privilege against disclosure under sub. (3).

(d) When a Quality Review Entity gives a Health Care Entity notice stating that an Adverse Quality Review Action has been proposed to be taken against the Health Care Entity, the Quality Review Entity shall, upon request, disclose to the affected Health Care Entity and, if requested, his or her or its attorneys, agents, and representatives the Quality Review Records relating to the Adverse Quality Review Action that are possessed by the Quality Review Entity conducting the Adverse Quality Review Action. At any time prior to such a notice a Quality Review Entity may, but shall not be required to, disclose to the affected Health Care Entity and his or her or its attorneys, agents and representatives some, all, or none of the Quality Review Records relating to the Adverse Quality Review Action that are possessed by the Quality Review Entity conducting the Adverse Quality Review Action. Such disclosures shall not waive any privilege against disclosure under sub. (3).

(e) An authorized person or entity shall disclose in an authorized manner those Quality Review Records that person or entity reasonably believes are specifically required by Wisconsin or Federal law to be disclosed by that person or entity. Such a disclosure shall not waive any privilege against disclosure under sub. (3).

(f) If a Quality Review Entity making a disclosure under sub. (4) is formed by or has a contract or arrangement with a Health Care Entity to perform Quality Review Activity, then the Quality Review Entity must receive written authorization from that Health Care Entity before making a permitted disclosure under sub. (4), unless the Health Care Entity has made a specific written waiver of its right to authorize such disclosures.

(g) If a Public Reporting Entity has been formed by or has a contract or arrangement with a Health Care Entity to perform Public Reporting Activity, then the Public Reporting Entity may, but shall not be required to unless sub. 4(e) applies, disclose Quality Review Records containing information relating to that Health Care Entity to one or more Health Care Entities, Quality Review Entities, or Public Reporting Entities, but the Public Reporting Entity may only make such a disclosure if the Public Reporting Entity receives written authorization from that Health Care Entity before such a disclosure, unless that Health Care Entity has made a specific written waiver of its right to authorize such a disclosure.

(h) Any receipt of Quality Review Records or summaries shall not be subject to public records laws, including s. 19.35. No entity or individual who receives Quality Review Records or summaries thereof under sub. (4) may disclose such records unless otherwise authorized in sub. (4).

4 (5) Immunity.

(a) Any individual or entity, including a Quality Review Entity, acting in good faith that participates in Quality Review Activity shall not be liable in damages as a result of any act or omission by such individual or entity in the course of Quality Review Activity. Acts and omissions to which this subsection applies include, but are not limited to, acts or omissions by Quality Review Entities in censuring, reprimanding, limiting or revoking hospital staff privileges or notifying the medical examining board or podiatrists affiliated credentialing board under s. 50.36 or taking any other disciplinary action against a Health Care Entity.

(b) The good faith of any individual or entity specified in sub. (5)(a) shall be presumed in any civil action. Any individual or entity who asserts that such an individual or entity has not acted in good faith has the burden of proving that assertion by clear and convincing evidence.

(c) In determining whether an individual or entity has acted in good faith under sub. (5)(a), the court shall consider whether the individual or entity has sought to prevent the Health Care Entity that is the subject of the Quality Review Activity and its counsel from examining the documents and records used in the Quality Review Activity, from presenting witnesses, establishing pertinent facts and circumstances, questioning or refuting testimony and evidence, confronting and cross–examining adverse witnesses or from receiving a copy of the final report or recommendation of the Quality Review Entity.

(d) Any individual or entity, including a Quality Review Entity, that reports information to a Public Reporting Entity shall not be liable in damages as a result of any act or omission by such individual or entity in the course of such reporting.

repeal & recreate + repeal 146.37

Laura Leach
268-1823
newer version coming

146.38 - Health care quality review; confidentiality of information; immunity.

(1) Findings and Purpose. The State recognizes the need for a culture of quality and safety among the health care community in order to promote the highest quality, lowest cost, and safest health care for its citizens. It is declared to be the public policy of this State to encourage activities that help create, while at the same time discouraging activities that inhibit, a culture of quality and safety in the health care community. The State finds that Public Reporting Activity--which increases public awareness of health care quality--and Quality Review Activity--through which the health care community identifies and learns from successes and adverse events--encourages a culture of quality and safety. The State therefore declares that the following Wisconsin statute should be liberally construed in identifying and protecting Quality Review Activity and Public Reporting Activity. These findings and declarations are premised upon the following:

(a) Effective quality review requires that all who participate are able to candidly and objectively communicate in writing and orally and that all related products of Quality Review Activity are afforded protection from discovery in litigation and elsewhere;

(b) Effective quality review is hampered without statutory and judicial assurances of confidentiality and immunity from liability, due also as to the fear of involuntary future participation in litigation arising from good faith review;

(c) Fear of future involvement in litigation in the absence of statutory confidentiality and immunity also lessens the willingness of individuals to participate in the process;

(d) Judicial decisions in Wisconsin contain some inconsistencies, having been premised upon narrowly construing existing statutory immunities and restrictions upon access to quality review information for discovery purposes; and

(e) Legislation is needed to provide clear and consistent assurances that Quality Review Activity defined in the following statute be confidential and be immune from both discovery and admissibility in litigation; and that assurances are provided that involuntary participation in judicial proceedings will not be required of those who participate in Quality Review Activity.

(2) In this section:

(a) "Adverse Quality Review Action" means an action or recommendation based upon past, present, or anticipated Quality Review Activity to reduce, restrict, suspend, deny, revoke or fail to grant or renew a Health Care Entity's:

1. Membership, clinical privileges, clinical practice authority, or professional certification in a hospital, medical staff, or other Health Care Entity;
2. Participation on a Health Care Entity's provider panel; or
3. Accreditation, licensure, or certification.

(b) "Health Care Entity" includes a health care provider, as defined in s. 146.81(1); an entity or person that provides or arranges for health care services, including mental health services; and an entity or person that furnishes the services of health care providers to another health care entity.

(c) "Public Reporting Activity" means the process of gathering Quality Review Records, health care data, or patient information from one or more Health Care Entities or Quality Review Entities, then aggregating or organizing such records, data, or information, and then presenting the aggregated or organized items to Health Care Entities, Quality Review Entities, consumers, purchasers, businesses, or the general public for the purpose of informing Health Care Entities, Quality Review Entities, consumers, purchasers, businesses, or the general public about the quality, cost, utilization, or safety of health care.

(d) "Public Reporting Document" means a document, report, or any other communication containing aggregated or reorganized Quality Review Records, health care data, or patient

information from one or more Health Care Entities or Quality Review Entities that is rightfully and with proper authority presented and communicated to consumers, purchasers, businesses, or the general public for the purpose of informing Health Care Entities, Quality Review Entities, consumers, purchasers, businesses, or the general public about the quality, cost, utilization, or safety of health care.

(e) "Public Reporting Entity" means an entity or person that undertakes Public Reporting Activity.

(f) "Quality Review Activity" means any study, review, evaluation, investigation, recommendation, action, corrective action, or monitoring of one or more Health Care Entities that is conducted to:

1. Maintain or improve the quality of care or those services having any impact on care;
2. Reduce morbidity or mortality;
3. Pursue or enforce or improve standards of qualification, competence, conduct, or performance;
4. Maintain or improve the appropriate or cost-effective use of health care services and resources;
5. Comply with or pursue compliance with applicable legal, ethical, or behavioral standards;
6. Comply with or pursue compliance with credentialing, accreditation, or regulatory activities, requirements, or standards. Such activities include the submission of the Joint Commission on Accreditation of Healthcare Organizations' periodic performance review and activities related to that submission;
7. Credential or approve the credentialing of Health Care Entities;
8. Measure progress toward or compliance with goals and standards used to further the foregoing criteria, such as through quality improvement studies, morbidity and mortality studies, or utilization management studies; or
9. Address the health or performance of individuals who are Health Care Entities.

(g) Quality Review Activity may involve continuous or periodic data collection and may, for example, relate to either the structure, process, or outcome of health care provided by the Health Care Entity or its personnel.

(h) "Quality Review Entity" means any of the following:

1. An individual or entity, such as a medical staff officer, department chair, quality assurance or improvement committee, or other administrators, departments, or committees, that are given responsibility by a Health Care Entity or a Quality Review Entity for conducting Quality Review Activity.
2. Any individual or entity with which a Quality Review Entity or Health Care Entity contracts or arranges to perform or assist in performing Quality Review Activity.
3. Joint committees of two or more Health Care Entities or Quality Review Entities when performing Quality Review Activity.
4. An individual or entity that performs Quality Review Activity on or for a separate Health Care Entity where that Health Care Entity is the subject of the Quality Review Activity. Such entities include accreditation entities, licensure entities, and regulatory entities.
5. The governing body and committees of the governing body of a Health Care Entity when engaging in Quality Review Activity.
6. The officers, directors, employees, members, agents, consultants, attorneys and staff of a Quality Review Entity when engaging or assisting in Quality Review Activity.

(i) "Quality Review Records" shall include in any type of media, including oral communications, and whether in statistical form or otherwise, the minutes, files, notes,

records, reports, statements, memoranda, data bases, proceedings, findings, work product, images and any other records, that are:

1. Collected or developed by a Health Care Entity for the purpose of reporting to a Quality Review Entity for Quality Review Activity,
2. Reported to a Quality Review Entity for Quality Review Activity,
3. Requested by a Quality Review Entity (including the contents of such request) for Quality Review Activity,
4. Reported to a Health Care Entity by a Quality Review Entity for Quality Review Activity,
5. Collected or developed by a Quality Review Entity for Quality Review Activity,
6. Reported among Quality Review Entities, after obtaining authorization,
7. Collected by a Quality Review Entity or Health Care Entity and submitted to a Public Reporting Entity, or
8. Information related to oversight, monitoring, corrective actions, or other activities taken in response to Quality Review Activity.

(j) The term Quality Review Records does not include:

1. Records maintained by or for a Health Care Entity for the particular purpose of diagnosing, treating, or documenting the care provided to an individual patient and available from a source other than a Quality Review Entity, or
2. Public Reporting Documents.

(3) Confidentiality of quality review records.

(a) Except as otherwise provided by this section 146.38, all Quality Review Records are privileged and confidential and shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity, or be admissible as evidence in any criminal, civil, judicial, or administrative proceeding. Information contained in Quality Review Records shall not be admissible or discoverable.

(b) This section's protections exist in any criminal, civil, judicial or administrative proceeding. This section's protection of Quality Review Records cannot be waived or destroyed by any authorized or unauthorized disclosure of Quality Review Records to any party.

(c) Sub. (3) (a) shall not apply in any state or federal criminal, civil, judicial, or administrative proceeding in which a Health Care Entity contests an Adverse Quality Review Action against him or her or it by a Quality Review Entity, but the discovery, use and introduction of Quality Review Records in such a proceeding shall not constitute a waiver of sub. (3) (a) with respect to subsequent publication, release, use, discovery, subpoena or other means of legal compulsion, or admissibility of such records.

(d) Furnishing Quality Review Records to another Quality Review Entity, a state regulatory, licensing or certifying body, other state or federal agencies, a national accrediting body, or to an individual health care provider or his or her representatives, shall not constitute a waiver of sub. (3) (a) with respect to subsequent publication, release, use, discovery, subpoena, or other means of legal compulsion, or admissibility of such records.

(e) A state regulatory, licensing or certifying body, or a state agency, may not compel the disclosure of or access to Quality Review Records.

(4) Release of Quality Review Records.

(a) A Quality Review Entity may, but shall not be required to unless sub. (4)(d) or (4)(e) applies, disclose Quality Review Records to other Quality Review Entities, Public Reporting Entities, or any other person or entity for purposes of Quality Review Activity. Such a disclosure shall not waive any privilege against disclosure under sub. (3).

(b) A Quality Review Entity may, but shall not be required to unless sub. (4)(e) applies, furnish Quality Review Records, summaries or information to, or act as a witness and furnish

testimony before, Quality Review Entities, state or federal governmental agencies, and national accrediting bodies. Such a disclosure shall not waive any privilege against disclosure under sub. (3).

(c) Quality Review Records that are not related to Adverse Quality Review Action may, but shall not be required to unless sub. (4)(d) applies, be disclosed by the Quality Review Entity to a Health Care Entity who is a subject of the Quality Review Activity contained in the Quality Review Record. Such a disclosure shall not waive any privilege against disclosure under sub. (3).

(d) When a Quality Review Entity gives a Health Care Entity notice stating that an Adverse Quality Review Action has been proposed to be taken against the Health Care Entity, the Quality Review Entity shall, upon request, disclose to the affected Health Care Entity and, if requested, his or her or its attorneys, agents, and representatives the Quality Review Records relating to the Adverse Quality Review Action that are possessed by the Quality Review Entity conducting the Adverse Quality Review Action. At any time prior to such a notice a Quality Review Entity may, but shall not be required to, disclose to the affected Health Care Entity and his or her or its attorneys, agents and representatives some, all, or none of the Quality Review Records relating to the Adverse Quality Review Action that are possessed by the Quality Review Entity conducting the Adverse Quality Review Action. Such disclosures shall not waive any privilege against disclosure under sub. (3).

(e) An authorized person or entity shall disclose in an authorized manner those Quality Review Records that person or entity reasonably believes are specifically required by Wisconsin or Federal law to be disclosed by that person or entity. Such a disclosure shall not waive any privilege against disclosure under sub. (3).

(f) If a Quality Review Entity making a disclosure under sub. (4) is formed, arranged, or contracted by a Health Care Entity to perform Quality Review Activity, then the Quality Review Entity must receive written authorization from that Health Care Entity before making a permitted disclosure under sub. (4), unless the Health Care Entity has made a specific written waiver of its right to authorize such disclosures.

(g) Any receipt of Quality Review Records or summaries shall not be subject to public records laws, including s. 19.35. No entity or individual who receives Quality Review Records or summaries thereof under sub. (4) may disclose such records unless otherwise authorized in sub. (4).

(5) Immunity.

(a) Any individual or entity, including a Quality Review Entity, acting in good faith that participates in Quality Review Activity shall not be liable in damages as a result of any act or omission by such individual or entity in the course of Quality Review Activity. Acts and omissions to which this subsection applies include, but are not limited to, acts or omissions by Quality Review Entities in censuring, reprimanding, limiting or revoking hospital staff privileges or notifying the medical examining board or podiatrists affiliated credentialing board under s. 50.36 or taking any other disciplinary action against a Health Care Entity.

(b) The good faith of any individual or entity specified in sub. (5)(a) shall be presumed in any civil action. Any individual or entity who asserts that such an individual or entity has not acted in good faith has the burden of proving that assertion by clear and convincing evidence.

(c) In determining whether an individual or entity has acted in good faith under sub. (5)(a), the court shall consider whether the individual or entity has sought to prevent the Health Care Entity that is the subject of the Quality Review Activity and its counsel from examining the documents and records used in the Quality Review Activity, from presenting witnesses, establishing pertinent facts and circumstances, questioning or refuting testimony and

evidence, confronting and cross–examining adverse witnesses or from receiving a copy of the final report or recommendation of the Quality Review Entity.

(d) Any individual or entity, including a Quality Review Entity, that reports information to a Public Reporting Entity shall not be liable in damages as a result of any act or omission by such individual or entity in the course of such reporting.

State of Wisconsin
2003 – 2004 LEGISLATURE

LRB-4322/P1
PJK:kg:

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

D-note (by Wed, if possible)

AN ACT ...; **relating to:** health care quality review.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 146.37 of the statutes is repealed.

SECTION 2. 146.38 of the statutes is repealed and recreated to read:

146.38 Health care quality review; confidentiality of information; immunity. **(1)** DEFINITIONS. In this section:

(a) "Adverse quality review action" means any action or recommendation based on past, present, or anticipated quality review activity to reduce, restrict, suspend, deny, revoke, or fail to grant or renew any of the following:

****NOTE: In an effort to shorten and simplify: is it necessary to include "past, present, or anticipated," and are "deny" and "fail to grant" the same thing?

1. A health care entity's membership, clinical privileges, clinical practice authority, or professional certification in a hospital, medical staff, or other health care entity.

2. A health care entity's participation on a provider panel.

3. A health care entity's accreditation, licensure, or certification.

(b) "Health care entity" means any of the following:

1. A health care provider.

2. A person that provides or arranges for health care services, including mental health services.

3. A person that furnishes the services of health care providers to another health care entity.

****NOTE: I changed this definition to say "means" rather than "includes." Is this okay? Generally, when "includes" is used in a definition instead of and without "means," the examples given are those that one might not normally consider to be examples of the defined term.

(c) "Health care provider" has the meaning given in s. 146.81 (1).

(d) "Public reporting activity" means receiving, aggregating, or organizing quality review records, patient information, or health care data of one or more health care entities or quality review entities if a purpose of such activity includes any of the following:

1. Presenting, at some contemplated time in the future, the received, aggregated, or organized items to health care entities, quality review entities, consumers, purchasers, businesses, or the general public to inform health care entities, quality review entities, consumers, purchasers, businesses, or the general public about the quality, cost, utilization, or safety of health care.

****NOTE: Once again in the interest of shortening and simplification, are "consumers" and "purchasers" the same thing? Could "general public" cover both of those terms? Also, do you mean "consumers" and "purchasers" of health care?

2. Presenting, at some contemplated time in the future, the received, aggregated, or organized items to one or more other public reporting entities.

****NOTE: Is my addition of "other" before "public reporting entities" okay?

(e) "Public reporting document" means a document, report, or any other communication containing aggregated or reorganized quality review records, patient information, or health care data of one or more health care entities or quality review entities that is with proper authority presented and communicated to the general public for the purpose of informing patients about the quality, cost, utilization, or safety of health care.

(f) "Public reporting entity" means a person that undertakes public reporting activity.

(g) "Quality review activity" means any monitoring of, or study, review, evaluation, investigation, recommendation, action, or process relating to, one or more health care entities that is conducted for any of the following purposes:

****NOTE: Since "action, or process relating to" is so broad, could those terms take the place of all of the rest of the terms?

1. To maintain or improve the quality of care or those services having an impact on care.

2. To reduce morbidity or mortality.

3. To pursue or enforce or improve standards of qualification, competence, conduct, or performance.

4. To maintain or improve the appropriate or cost–effective use of health care services and resources.

5. To comply (determine compliance????) with applicable legal, ethical, or behavioral standards.

6. To comply (determine compliance????) with credentialing, accreditation, or regulatory activities, requirements, or standards, including periodic performance review and related activities by the Joint Commission on Accreditation of Healthcare Organizations.

****NOTE: Should subds. 5. and 6. be "to determine compliance with" instead of "to comply with"? It seems to me that the entity that performs quality review activities would want to determine whether the health care entity is complying with the requirements.

7. To credential, or approve the credentialing of, health care entities.

8. To address the health or performance of individuals who are health care entities.

9. To measure progress toward or compliance with goals and standards used to further the foregoing criteria, such as through quality improvement studies, morbidity and mortality studies, or utilization management studies.

****NOTE: By the phrase "foregoing criteria," do you mean any of subds. 1. to 8.? If so, would it be possible to specify the applicable subdivision numbers rather than using the phrase "foregoing criteria"?

10. To aggregate or organize quality review records, patient information, or health care data.

(h) "Quality review entity" means any of the following:

1. A person, including a department or committee, that is given responsibility by a health care entity or quality review entity for conducting quality review activity.

2. A person with which a health care entity or quality review entity contracts or arranges to perform or assist in performing quality review activity.

3. Joint committees of 2 or more health care entities or quality review entities when performing quality review activity.

4. A person that performs quality review activity for or with respect to a health care entity that is the subject of the quality review activity, including an accreditation entity, licensing entity, or regulatory entity.

5. The governing body and committees of the governing body of a health care entity when engaging in quality review activity.

6. The officers, directors, employees, members, agents, consultants, attorneys, and staff of a quality review entity when engaging or assisting in quality review activity.

****NOTE: Is this subdivision redundant to subd. 2.?

(i) 1. Except as provided in subd. 2., "quality review records" means any medium used for communication, including oral communication, whether in statistical form or otherwise, minutes, files, notes, records, reports, statements, memoranda, data bases, proceedings, findings, work product, images, or any other records that are:

a. Collected or developed by a health care entity for the purpose of reporting to a quality review entity for quality review activity;

b. Reported to a quality review entity for quality review activity;

c. Requested by a quality review entity, including the contents of the request, for quality review activity;

d. Reported to a health care entity by a quality review entity for quality review activity;

e. Collected or developed by a quality review entity for quality review activity;

f. Reported among quality review entities after obtaining authorization;

g. Received by a public reporting entity;

h. A product of public reporting activity; or

i. Information related to oversight, monitoring, corrective actions, or other activities taken in response to quality review activity.

2. "Quality review records" does not include any of the following:

a. Records maintained by or for a health care entity for the particular purpose of diagnosing, treating, or documenting the care provided to an individual patient and available from a source other than a quality review entity.

b. Public reporting documents.

(2) CONFIDENTIALITY OF QUALITY REVIEW RECORDS. (a) Except as provided in par. (e), all quality review records are privileged and confidential and are not subject to discovery, subpoena, or other means of legal compulsion for their release to any person, and are not admissible as evidence in any judicial or administrative proceeding. Information contained in quality review records is not admissible or discoverable.

(b) Except as provided in par. (e), the protections under this section apply in any judicial or administrative proceeding. The protections afforded to quality review records under this section are not waived or destroyed by any disclosure, whether authorized or unauthorized, of quality review records to any person, including any disclosure under sub. (4).

****NOTE: Are the "protections" that are referred to the ones in this *subsection*, or is *section* correct?

****NOTE: If "including any disclosure under sub. (4)" is added at the end, as drafted, the last sentences in sub. (4) (a), (b), (c), (d), and (e) may be deleted.

(c) Furnishing quality review records to another quality review entity, to a public reporting entity, to a state regulatory, licensing, or certifying body, to a state or federal agency, to a national accrediting body, or to an individual health care provider or his or her representatives does not constitute a waiver of par. (a) with

respect to subsequent publication, release, use, discovery, subpoena or other means of legal compulsion, or admissibility of the records.

****NOTE: Is this paragraph redundant since par. (b) says that the protections of par. (a) are not waived by *any* disclosure to *any* person? under this section

(d) A state regulatory, licensing, or certifying body or a state agency may not compel the disclosure of or access to quality review records.

(e) Paragraph (a) does not apply in any state or federal judicial or administrative proceeding in which a health care entity contests an adverse quality review action against the health care entity by a quality review entity, but the discovery, use, and introduction of quality review records in such a proceeding does not constitute a waiver of par. (a) with respect to any subsequent publication, release, use, discovery, subpoena or other means of legal compulsion, or admissibility of the records.

(3) RELEASE OF QUALITY REVIEW RECORDS. (a) A quality review entity may, but unless par. (d) or (e) applies is not required to, disclose quality review records to other quality review entities, public reporting entities, or any other person for purposes of quality review activity or public reporting activity. A disclosure under this paragraph does not waive any privilege against disclosure under sub. (2).

****NOTE: This last sentence may be deleted if the clause in the last sentence in sub. (2) (b) remains.

(b) A quality review entity may, but unless par. (e) applies is not required to, furnish quality review records, summaries, or information to, or act as a witness and furnish testimony before, quality review entities, state or federal governmental agencies, or national accrediting bodies. A disclosure under this paragraph does not waive any privilege against disclosure under sub. (2).

****NOTE: This last sentence may be deleted if the clause in the last sentence in sub. (2) (b) remains.

(c) Quality review records that are not related to adverse quality review action may be, but unless par. (d) or (e) applies are not required to be, disclosed by a quality review entity to the health care entity that is the subject of the quality review activity contained in the quality review record. A disclosure under this paragraph does not waive any privilege against disclosure under sub. (3).

****NOTE: This last sentence may be deleted if the clause in the last sentence in sub. (3) (b) remains.

(d) When a quality review entity gives a health care entity notice stating that an adverse quality review action is proposed to be taken against the health care entity, the quality review entity shall, upon request, disclose to the affected health care entity and, if requested, to the health care entity's attorneys, agents, or representatives the quality review records relating to the adverse quality review action that are possessed by the quality review entity conducting the adverse quality review action. At any time prior to such a notice a quality review entity may, but is not required to, disclose to the affected health care entity and its attorneys, agents, or representatives any or all of the quality review records relating to the adverse quality review action that are possessed by the quality review entity conducting the adverse quality review action. Disclosures under this paragraph do not waive any privilege against disclosure under sub. (3).

****NOTE: This last sentence may be deleted if the clause in the last sentence in sub. (3) (b) remains.

(e) A person authorized to disclose shall disclose in an authorized manner those quality review records that the person reasonably believes are specifically required by Wisconsin or federal law to be disclosed by that person. A disclosure under this paragraph does not waive any privilege against disclosure under sub. (3).

****NOTE: This last sentence may be deleted if the clause in the last sentence in sub. (3) (b) remains.

(f) If a quality review entity has been formed by or has a contract or arrangement with a health care entity to perform quality review activity, the quality review entity must receive written authorization from that health care entity before making a disclosure that is permitted under this subsection unless the health care entity has made a specific written waiver of its right to authorize such disclosures.

(g) If a public reporting entity has been formed by or has a contract or arrangement with a health care entity to perform public reporting activity, the public reporting entity may, but unless par. (e) applies is not required to, disclose quality review records containing information relating to that health care entity to one or more health care entities, quality review entities, or public reporting entities, but the public reporting entity may make the disclosure only if the public reporting entity receives written authorization from that health care entity before making the disclosure, unless that health care entity has made a specific written waiver of its right to authorize such a disclosure.

****NOTE: As this is drafted, a public reporting entity is authorized to disclose under this paragraph only if it was formed by or has a contract with a health care entity to perform public reporting activity. Is it your intention that other public reporting entities (if there are others) would never have authorization to disclose quality review records?

(h) Quality review records or summaries are not public records subject to subch. II of ch. 19. No person that receives quality review records or summaries of the records under this subsection may further disclose the records unless otherwise authorized to do so under this subsection.

(4) IMMUNITY. (a) Any person, including a quality review entity, acting in good faith that participates in quality review activity shall not be liable in damages as a result of any act or omission by the person in the course of the quality review activity. Acts or omissions to which this subsection applies include acts or omissions by

quality review entities in censuring, reprimanding, limiting or revoking hospital staff privileges, notifying the medical examining board or podiatrists affiliated credentialing board under s. 50.36, or taking any other disciplinary action against a health care entity.

****NOTE: Since this subsection does not specifically address disclosures under sub. (3) it is unclear how this subsection relates to disclosures under sub. (3). Is a person not liable for an unauthorized disclosure if made in good faith *during* the course of the quality review activity but they are liable if they make an unauthorized disclosure, in good faith or not, *after* the quality review activity is concluded? Does this subsection not apply to disclosures?

(b) The good faith of any person specified in par. (a) shall be presumed in any civil action. Any person who asserts that a person has not acted in good faith has the burden of proving that assertion by clear and convincing evidence.

(c) In determining whether a person has acted in good faith under par. (a), the court shall consider whether the person has sought to prevent the health care entity that is the subject of the quality review activity or its counsel from examining the documents and records used in the quality review activity, from presenting witnesses, establishing pertinent facts and circumstances, questioning or refuting testimony or evidence, or confronting and cross–examining adverse witnesses, or from receiving a copy of the final report or recommendation of the quality review entity.

(d) Any person, including a quality review entity, that reports information to a public reporting entity shall not be liable in damages as a result of any act or omission by the person in the course of the reporting.

****NOTE: Is good faith required for the immunity under this paragraph?

SECTION 3. 146.55 (7) of the statutes is amended to read:

146.55 **(7)** INSURANCE. A physician who participates in an emergency medical services program under this section or as required under s. 146.50 shall purchase

health care liability insurance in compliance with subch. III of ch. 655, except for those acts or omissions of a physician who, as a medical director, reviews the performance of emergency medical technicians or ambulance service providers~~, as specified under s. 146.37 (1g)~~.

History: 1989 a. 102 ss. 15 to 17, 23, 25, 26, 60; 1991 a. 39, 269; 1993 a. 16, 251, 399, 491; 1997 a. 27, 79; 2001 a. 16, 109.

****NOTE: Because of the changes to ss. 146.37 and 146.38, I suspect that you will want to make a more substantial change to s. 146.55 (7).

SECTION 4. 187.33 (3) (a) 5. of the statutes is amended to read:

187.33 **(3)** (a) 5. Proceedings based upon a cause of action for which the volunteer is immune from liability under s. 146.31 (2) and (3), ~~146.37~~ 146.38 (4), 895.44, 895.48, 895.482, 895.51, or 895.52.

History: 1989 a. 306; 1991 a. 318; 1993 a. 213.

SECTION 5. 187.43 (3) (a) 5. of the statutes is amended to read:

187.43 **(3)** (a) 5. Proceedings based upon a cause of action for which the volunteer is immune from liability under s. 146.31 (2) and (3), ~~146.37~~ 146.38 (4), 895.44, 895.48, 895.482, 895.51, or 895.52.

History: 1995 a. 260.

SECTION 6. 655.27 (1m) (title) of the statutes is amended to read:

655.27 **(1m)** (title) ~~PEER~~ QUALITY REVIEW ACTIVITIES.

History: 1975 c. 37, 79, 199; 1977 c. 29, 131; 1979 c. 34, 194; 1981 c. 20; 1983 a. 27, 158; 1985 a. 340; 1987 a. 27, 186, 247, 399; 1989 a. 102, 187, 332; 1991 a. 214, 315; 1993 a. 473; 1995 a. 10; 2001 a. 65; 2003 a. 111.

SECTION 7. 655.27 (1m) (b) of the statutes is amended to read:

655.27 **(1m)** (b) A health care provider who engages in ~~the activities described in s. 146.37 (1g) and (3)~~ quality review activities, as defined in s. 146.138 (1) (g), shall be liable for not more than the limits expressed under s. 655.23 (4) or the maximum liability limit for which the health care provider is insured, whichever limit is greater, if he or she is found to be liable under s. ~~146.37~~ 146.38, and the fund shall pay the excess amount, unless the health care provider is found not to have acted in

good faith during those activities and the failure to act in good faith is found by the trier of fact, by clear and convincing evidence, to be both malicious and intentional.

History: 1975 c. 37, 79, 199; 1977 c. 29, 131; 1979 c. 34, 194; 1981 c. 20; 1983 a. 27, 158; 1985 a. 340; 1987 a. 27, 186, 247, 399; 1989 a. 102, 187, 332; 1991 a. 214, 315; 1993 a. 473; 1995 a. 10; 2001 a. 65; 2003 a. 111.

SECTION 8. 655.27 (5) (a) 1. of the statutes is amended to read:

655.27 **(5)** (a) 1. Any person may file a claim for damages arising out of the rendering of medical care or services or participation in ~~peer~~ quality review activities under s. ~~146.37~~ 146.38 within this state against a health care provider or an employee of a health care provider. A person filing a claim may recover from the fund only if the health care provider or the employee of the health care provider has coverage under the fund, the fund is named as a party in the action, and the action against the fund is commenced within the same time limitation within which the action against the health care provider or employee of the health care provider must be commenced.

History: 1975 c. 37, 79, 199; 1977 c. 29, 131; 1979 c. 34, 194; 1981 c. 20; 1983 a. 27, 158; 1985 a. 340; 1987 a. 27, 186, 247, 399; 1989 a. 102, 187, 332; 1991 a. 214, 315; 1993 a. 473; 1995 a. 10; 2001 a. 65; 2003 a. 111.

SECTION 9. 655.27 (5) (a) 2. of the statutes is amended to read:

655.27 **(5)** (a) 2. Any person may file an action for damages arising out of the rendering of medical care or services or participation in ~~peer~~ quality review activities under s. ~~146.37~~ 146.38 outside this state against a health care provider or an employee of a health care provider. A person filing an action may recover from the fund only if the health care provider or the employee of the health care provider has coverage under the fund, the fund is named as a party in the action, and the action against the fund is commenced within the same time limitation within which the action against the health care provider or employee of the health care provider must be commenced. If the rules of procedure of the jurisdiction in which the action is brought do not permit naming the fund as a party, the person filing the action may

recover from the fund only if the health care provider or the employee of the health care provider has coverage under the fund and the fund is notified of the action within 60 days of service of process on the health care provider or the employee of the health care provider. The board of governors may extend this time limit if it finds that enforcement of the time limit would be prejudicial to the purposes of the fund and would benefit neither insureds nor claimants.

History: 1975 c. 37, 79, 199; 1977 c. 29, 131; 1979 c. 34, 194; 1981 c. 20; 1983 a. 27, 158; 1985 a. 340; 1987 a. 27, 186, 247, 399; 1989 a. 102, 187, 332; 1991 a. 214, 315; 1993 a. 473; 1995 a. 10; 2001 a. 65; 2003 a. 111.

(END)

D-note

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4322/P1dn
PJK:...:...

Date

1. This is a preliminary version so that you can begin reviewing it while I am reviewing the case law and working on an analysis.

2. This draft contains numerous embedded NOTES with questions, comments, and drafting suggestions.

3. Note that I have changed "individual or entity" in numerous places to "person," which is the term used to mean both natural persons and corporate or governmental entities. See s. 990.01 (26). s. 990.01 (26) ← LRS-should be this

4. Please review the sections outside of s. 146.38 that I have amended in this draft to make sure that they are amended as you want them to be.

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LRB–4322/P1dn
PJK:kjf:rs

March 3, 2004

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