State of Wisconsin
2003 – 2004 LEGISLATURE

LRB–4322/P2
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PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

D-note
(by Wed 3-10)
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AN ACT *to repeal* 146.37; *to amend* 146.55 (7), 187.33 (3) (a) 5., 187.43 (3) (a) 5., 655.27 (1m) (title), 655.27 (1m) (b), 655.27 (5) (a) 1. and 655.27 (5) (a) 2.; and *to repeal and recreate* 146.38 of the statutes; **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SECTION 1. 146.37 of the statutes is repealed.

SECTION 2. 146.38 of the statutes is repealed and recreated to read: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 ~~[illegible]~~ or anticipated quality review activity to reduce, restrict, suspend, deny, revoke, or fail to ~~[illegible]~~ renew any of the following:

quality review activity

****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: ~~Okay to~~ 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. (3).

****NOTE: Are the "protections" that are referred to the ones in this *subsection* or even only *par. (a)*, or is *section* correct?

****NOTE: If "including any disclosure under sub. (3)" is added at the end, as drafted, the last sentences in sub. (3) (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 under this section are not waived by *any* disclosure to *any* person?

(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. (2).

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

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

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

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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)~~.

****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 (2), 895.44, 895.48, 895.482, 895.51, or 895.52.

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 (2), 895.44, 895.48, 895.482, 895.51, or 895.52.

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

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

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.

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

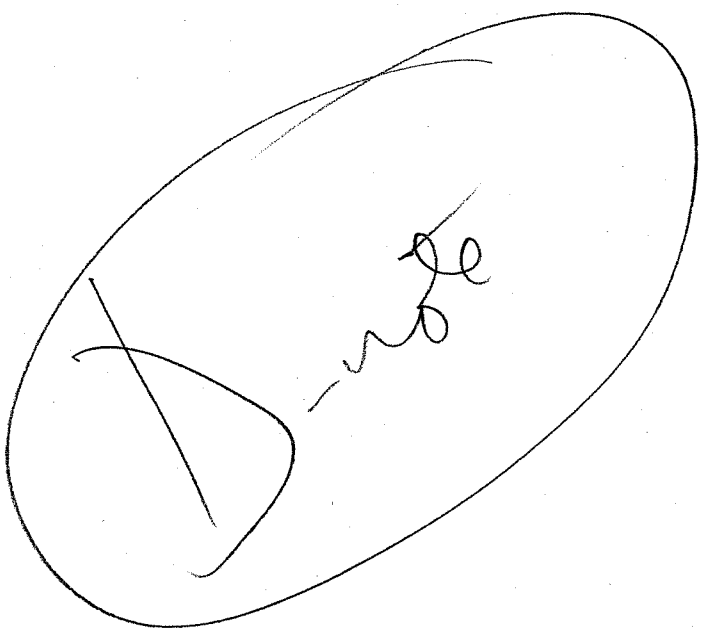
655.27 **(5)** (a) 1. Any person may file a claim for damages arising out of the rendering of medical care or services or participation in ~~peer~~ quality review activities under s. ~~146.37~~ 146.38 within this state against a health care provider or an employee of a health care provider. A person 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.

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.

(END)



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****NOTE: "A person that performs quality review activity with respect to a health care entity that is the subject of the quality review activity" covers all of the definitions included in this paragraph and is tautological. "Any person that performs or assists in performing quality review activity" could take the place of subds. 1. to 6.

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(2) IMMUNITY FOR ACTS OR OMISSIONS. (a) Any person 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: Does this subsection apply to unauthorized disclosures of records under sub. (3)?

(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 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.

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

(3) QUALITY REVIEW RECORDS. (a) *Confidentiality.* 1. Except as provided in subd. 4., 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. A state regulatory, licensing, or certifying body or a state agency may not compel the disclosure of or access to quality review records. Information contained in quality review records is not admissible or discoverable.

2. 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 par. (b).

****NOTE: Should this say "unless otherwise authorized *or required* to do so under par. (b) *or (c)*"?

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

4. Subdivision 1. 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 subd. 1. or 2. with respect to any subsequent publication, release, use, discovery, subpoena or other means of legal compulsion, or admissibility of the records.

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(b) *Permitted disclosure.* 1. Subject to par. (d) 1., a quality review entity may, but unless par. (c) 1. or 2. applies is not required to, disclose quality review records to any person for purposes of quality review activity or public reporting activity.

2. Subject to par. (d) 1., a quality review entity may, but unless par. (c) 2. 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.

3. Quality review records that are not related to adverse quality review action may be, but unless par. (c) 1. or 2. 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.

(c) *Required disclosure.* 1. 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.

2. A person authorized to disclose quality review records under this subsection shall disclose in an authorized manner those quality review records that the person

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reasonably believes are specifically required by Wisconsin or federal law to be disclosed by that person.

****NOTE: Does this mean that, if there is a state or federal law that is in conflict with par. (a), the other law always has priority?

(d) *Authorization needed for permitted disclosure.* 1. 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.

2. 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. (c) 2. 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.

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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4322/P2dn
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Date

I have been working on improving the organization of the draft to facilitate comprehension. This version reorganizes the provisions related to confidentiality and disclosure of quality review records, removes some the redundancies in those provisions, and places the immunity provision first so that it stands alone more than before. In many respects, the separation in current law of the two concepts into two separate sections makes sense.

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DRAFTER'S NOTE
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March 10, 2004

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(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:

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(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.

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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.

****NOTE: "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" covers all of the definitions included in this paragraph and is tautological. "Any person that performs or assists in performing quality review activity" could take the place of subds. 1. to 6.

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) IMMUNITY FOR ACTS OR OMISSIONS. (a) Any person 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: Does this subsection apply to unauthorized disclosures of records under sub. (3)?

(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 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?

(3) QUALITY REVIEW RECORDS. (a) *Confidentiality.* 1. Except as provided in subd. 4., 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. A state regulatory, licensing, or certifying body or a state agency may not compel the disclosure of or access to quality review records. Information contained in quality review records is not admissible or discoverable.

2. 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 par. (b).

****NOTE: Should this say "unless otherwise authorized *or required* to do so under par. (b) *or (c)*"?

3. Except as provided in subd. 4., the protections under this paragraph apply in any judicial or administrative proceeding. The protections afforded to quality review records under this paragraph are not waived or destroyed by any disclosure,

whether authorized or unauthorized, of quality review records to any person, including any disclosure under par. (b) or (c).

4. Subdivision 1. 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 subd. 1. or 2. with respect to any subsequent publication, release, use, discovery, subpoena or other means of legal compulsion, or admissibility of the records.

(b) *Permitted disclosure.* 1. Subject to par. (d) 1., a quality review entity may, but unless par. (c) 1. or 2. applies is not required to, disclose quality review records to any person for purposes of quality review activity or public reporting activity.

2. Subject to par. (d) 1., a quality review entity may, but unless par. (c) 2. 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.

3. Quality review records that are not related to adverse quality review action may be, but unless par. (c) 1. or 2. 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.

(c) *Required disclosure.* 1. 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.

2. A person authorized to disclose quality review records under this subsection 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.

******NOTE: Does this mean that, if there is a state or federal law that is in conflict with par. (a), the other law always has priority?**

(d) *Authorization needed for permitted disclosure.* 1. 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.

2. 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. (c) 2. 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.

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)~~.

****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 (2), 895.44, 895.48, 895.482, 895.51, or 895.52.

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 (2), 895.44, 895.48, 895.482, 895.51, or 895.52.

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

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

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.

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.

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.

(END)