HOUSE BILL REPORT
HB 1861

As Reported by House Committee On:
Judiciary

Title: An act relating to encouraging early resolution of health care claims under chapter 7.70 RCW.

Brief Description: Encouraging early resolution of health care claims under chapter 7.70 RCW.

Sponsors: Representatives Lantz, Flannigan, Morrell, Springer, Cody, Kirby, Williams, Miloscia, Schual-Berke, Upthegrove, Linville, O'Brien, Campbell, Wood and Kagi.

Brief History:
Committee Activity:
Judiciary: 2/14/05, 2/28/05 [DP].

Brief Summary of Bill

- Requires 90 days notice to a defendant before a medical malpractice action may be commenced.
- Provides that all medical malpractice claims are subject to mandatory mediation unless the claim is submitted to arbitration or another dispute resolution process.
- Establishes provisions for offers of settlement in medical malpractice actions, with the potential for prevailing party attorneys' fees.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 6 members: Representatives Lantz, Chair; Williams, Vice Chair; Campbell, Kirby, Springer and Wood.

Minority Report: Without recommendation. Signed by 3 members: Representatives Priest, Ranking Minority Member; Rodne, Assistant Ranking Minority Member; and Serben.

Staff: Edie Adams (786-7180).

Background:

Medical malpractice actions are civil tort actions for the recovery of damages for injury or death resulting from the provision of health care. There are three grounds on which a health care provider may be found liable in a medical malpractice action: (1) the health care provider failed to follow the standard of care; (2) the health care provider promised that the

injury suffered would not occur; or (3) the injury resulted from health care to which the patient did not consent.

The statute of limitations for medical malpractice actions has varying time periods depending on the circumstances, but the general rule is that an action must be brought within three years of the alleged act or omission or within one year of discovery that the injury was caused by the alleged act or omission. There is no requirement that a plaintiff provide a defendant with prior notice of his or her intent to institute a suit.

Alternative Dispute Resolution

Alternative dispute resolution allows parties to a lawsuit to resolve the dispute in an informal and less adversarial atmosphere than the courtroom. Alternative dispute resolution involves use of a neutral third-party to facilitate agreement between the parties to a dispute and is generally less costly, less time consuming, and less adversarial than litigation. Mediation and arbitration are two forms of alternative dispute resolution. In mediation, the mediator facilitates negotiations between the participants to achieve a voluntary settlement. In arbitration, the arbitrator has authority to decide the case.

Mandatory Mediation: Medical malpractice claims are subject to mandatory mediation in accordance with court rules adopted by the Washington Supreme Court. The court rule provides deadlines for commencing mediation proceedings, the process for appointing a mediator, and the procedure for conducting mediation proceedings. The rule allows mandatory mediation to be waived upon petition of any party that mediation is not appropriate.

Arbitration: Parties to a dispute may voluntarily agree in writing to enter into binding arbitration to resolve the dispute. A procedural framework for conducting the arbitration proceeding is provided in statute, including provisions relating to appointment of an arbitrator, attorney representation, witnesses, depositions, and awards. The arbitrator's decision is final and binding on the parties, and there is no right of appeal. A court's review of an arbitration decision is limited to correction of an award or vacation of an award under limited circumstances.

Mandatory Arbitration: Parties to a lawsuit may be required to participate in mandatory arbitration in some instances. Mandatory arbitration generally is required in civil actions where the sole relief requested does not exceed $35,000. An award by an arbitrator may be appealed to the superior court. The superior court will hear the appeal "de novo," which means that the court will conduct a trial on all issues of fact and law as if the arbitration had not occurred. Amounts awarded on appeal are not subject to any dollar limits.

Offers of Settlement

An offer of settlement statute is a mechanism to encourage the parties to a civil lawsuit to reach a settlement and avoid a lengthy and costly trial. An existing offer of settlement statute applies to actions in district court where the amount pleaded is $10,000 or less. This statute provides that the prevailing party who has made an offer of settlement is entitled to payment of reasonable attorneys' fees. Prevailing party means a party who makes an offer of

settlement and who receives a judgment in the trial that is greater than his or her offer of settlement.

Summary of Bill:

Medical malpractice actions are subject to a requirement of 90 days prior notice to the defendant of the intent to file suit and a requirement that the parties participate in mandatory mediation or another form of alternative dispute resolution. An offer of settlement process is created for medical malpractice claims.

Pre-Suit Notice

A medical malpractice action may not be commenced unless the plaintiff has provided the defendant with 90 days prior notice of the intention to file a suit. The 90-day notice requirement does not apply if the defendant's name is unknown at the time of filing the complaint or if the plaintiff cannot find the defendant within the state after a due and diligent search. If the notice is served within 90 days of the expiration of the statute of limitations, the time for commencing the action must be extended for 90 days from the date of service of the notice.

Alternative Dispute Resolution

Medical malpractice claims are subject to mandatory mediation unless the action is subject to mandatory arbitration or the parties agree, after the claim arises, to submit the claim to arbitration or to any other form of alternative dispute resolution. The Supreme Court rules implementing the mandatory mediation requirement may not provide any other exceptions to the mandatory mediation requirement. The Legislature requests the Supreme Court to adopt procedures for the parties to certify the manner of mediation, arbitration, or other form of dispute resolution used by the parties.

Offers of Settlement

An offer of settlement provision is created for medical malpractice actions. In an action where a party made an offer of settlement that is not accepted by the opposing party, the court may, in its discretion, award prevailing party attorneys' fees. "Prevailing party" means a party who makes an offer of settlement that is not accepted by the opposing party and who improves his or her position at trial relative to his or her offer of settlement.

When determining whether an award of attorneys' fees should be made to a prevailing party, the court may consider:

- whether the party who rejected the offer of settlement was substantially justified in bringing the case to trial;
- the extent to which additional relevant and material facts became known after the offer was rejected;
- whether the offer of settlement was made in good faith;
- the closeness of questions of fact and law at issue in the case;
- whether a party engaged in conduct that unreasonably delayed the proceedings;

- whether the circumstances make an award unjust; and
- any other factor the court deems appropriate under the circumstances of the case.

The offer of settlement must be made in writing and served on the opposing party at least 15 days before trial and not more than 30 days after the suit is commenced. The offer must remain open for at least 10 days. An offer of settlement may not be presented to the court or trier of fact until after judgment is entered.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: The fundamental focus of these bills is protecting access and improving affordability of health care. We've worked for years on compromises, and it is time to work together to move forward and get the job done.

(With concerns) Early notice is a good concept but the issues should be addressed as a package as in Initiative 330. Mandatory mediation is a good provision, but there are concerns about loser pays and the 90-day notice requirement.

(Neutral) Doctors don't want to go to court. It is too costly. We need stronger arbitration procedures and penalties to enforce it.

Testimony Against: The provision allowing attorneys' fees to prevailing parties is objectionable and is an exception to our "American rule" that each party pays his or her own attorneys' fees. Because of the economic disparity between plaintiffs and defendants, this provision presents an access to justice issue. However small the risk is that the plaintiff will have to pay attorneys' fees, it is too great a risk that plaintiffs won't be able to take.

Persons Testifying: (In support) Representative Lantz, prime sponsor.

(With concerns) John Budlong, Washington State Trial Lawyers' Association; and Barbara Shickich, Washington State Hospital Association.

(Opposed) Mark Johnson, Washington State Bar Association; and Cliff Webster, Washington State Medical Association.

(Neutral) Kerry Watrin, family practitioner.

Persons Signed In To Testify But Not Testifying: None.