

Sept. 28 2004

Dr. Hinnant's letter to **Sydney Olson, Director, Department of Government Relations, American Osteopathic Association**

September 28, 2004

Mr. Sydney Olson
Director, Department of Government Relations
American Osteopathic Association
1090 Vermont Avenue, NW, Ste. 510
Washington , DC 20005-4949

Dear Mr. Olson:

Drs. John Payne and Roland Chalifoux have kindly shared your letter of September 22, 2004 , with me as a healthcare peer review attorney and officer of the Semmelweis Society. Specifically, they have inquired as to recommendations for improvements in the peer review process which would assure physicians of procedural due process and prevent the undue influence of economic competitors.

While there is no one solution to fit all the peer review problems that exist in our country today, I do believe that there are several recommendations that I could make which would insulate physicians from the fear of sham peer review. As an attorney, I can tell you that this phenomenon is increasing in an exponential fashion. I can also state that 90% of the cases which I review have no merit whatsoever insofar as having anything to do with assuring quality healthcare. They are typically predicated on:

- Economic competition;
- Personality differences and differences of opinion among physicians as to patient management;
- Political issues inherent in the hospital's internal structure such that the administration favors some physicians over others and the favored physicians choose to eliminate the unfavored, sometimes acting as the henchmen of the often unethical administration;
- Whistle blowing and expressing concerns related to patient care which are at odds with the opinion of the administration and so called "medical staff leaders"; and
- Failing to agree to the hospital or health plan's purchase of the physician's practice or some proposed administrative services arrangement utilizing the physician's personal services.

I have seen all of these lead to sham peer review in addition to racial and ethnic issues and, of particular concern to you, the favoring of medical doctors over doctors of osteopathy in some hospitals. I think that proper professional peer review should be of utmost concern to osteopathic physicians throughout this country as I am sure that practically all of them at some point in their careers have felt that they have been adversely treated based on their holding a DO as opposed to an MD degree.

I have attached a draft version of amendments to the Health Care Quality Improvement Act of 1986, 42 U.S.C. Section 11101 et seq. which I believe would substantially improve the present process. I also believe that it is imperative that the following changes be made so as to assure due process to the physician in these matters.

- The chosen peer review committee should contain members mutually acceptable to both the Medical Executive Committee and the accused physician. This is akin to voir dire of the jury as is utilized in our American judicial system. This assures fundamental fairness and assures a hearing panel acceptable to both the accuser and the accused.

- The burden of proof before a hearing panel at present is placed on the accused. He or she must prove his case to the panel by a clear and convincing standard in order to avoid sanctions imposed by the MEC. This is fundamentally unfair and completely denies the fundamental principle of “innocent until proven guilty”. In this regard an accused criminal has far more rights than an accused physician.
- Matters heard by peer review committees should never be returned to the MEC for their approval and should always proceed directly to the Board level with the Board being expected to approve those findings of the peer review committee absent some substantial abuse of discretion. The very idea that the accuser has a “second shot” at the accused is simply unreasonable and again violative of every fundamental principle of due process established through American case law and statute. Most states contain case law disallowing the MEC to reconsider the matter, however, this process continues and needs to be governed through a Federal mandate.
- There must be an appellate mechanism for peer review that gets the matter outside the hospital. While Drs. Payne and Chalifoux would likely disagree with me, the Board of Medical Examiners is one body which could supply effective appellate process so as to truly assure a nonbiased panel. Texas is a state where the Board is rather exceptional in its substantially punitive actions and certainly Drs. Payne and Chalifoux's opinions, with all due respect, do seem to be to a large degree confined to the Texas situation and perhaps a few other jurisdictions. In lieu of an appellate process governed by the Medical Board, two more reasonable options would be the usage of an appointed commission, akin to a Workers' Compensation Commission to hear matters involving hospital peer review.
- Finally, and probably most acceptable would be an appellate review by an Administrative Law Judge. Practically all jurisdictions now have formed Administrative Law Judge divisions by statute and these judges are well equipped to hear these matters and remand or reverse the hospital's actions.

It is imperative, Mr. Olson that our professional associations such as yours as well as our various specialty societies, be they the medical or osteopathic variants, stand behind professionalism, character and due process in the peer review arena. We need the backing of organizations such as yours as well as the associated osteopathic specialty societies and those recognized specialty societies aligned with the AMA. I would very much like the opportunity to speak to any officer of your organization or the AMA concerning this problem. The very core of professionalism in medical care turns on this issue. It is the highest calling of a professional to be able to objectively evaluate the work of his colleagues and to realize that all physicians occasionally have bad outcomes and occasionally are victims of errors in judgment. The very nature of medical practice makes it an inexact science and while we utilize that quote commonly in the malpractice and tort reform arenas, we do not apply it in a fundamentally fair fashion to peer review. A substantial number of physicians simply choose to allow greed, politics, ego and in some cases, the pressure of a hospital administration, to supercede professionalism and ethics.

The peer review system at present is broken and it must be fixed. Certainly, your input would be highly helpful in achieving the change needed to assure integrity in the peer review system.

I look forward to hearing from your regarding this matter and again would be happy to correspond with your or any officer of the AOA. Please review the attached proposed amendments to HCQIA and do feel free to call or contact me at the above address and/or phone number at any time.

With best regards, I remain

Sincerely yours,

Medicolegal consultants, llc

C. William Hinnant, Jr., MD JD DABU

Attorney at Law

Fellow, American College of Legal Medicine