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**“Supporting Fair and Proper Due Process in Medical Peer Review while
Ensuring Proper Medical Ethics and Patient Care”**

**SEMMELWEIS SOCIETY INTERNATIONAL
POSITION PAPER**

PEER REVIEW

Peer review is the time-honored process by which doctors evaluate medical care provided by other doctors so as to assure quality in medicine. Congress passed the Health Care Quality Improvement Act (HCQIA) in 1986 with the support of the AMA and the American Hospital Association. The goal of this legislation was to establish legal protections for health care providers who perform good faith evaluation of peers in the interest of improving the quality of care provided to patients. The hope was that by improving the delivery of medical care, one would also see a decrease in malpractice cases. Essentially, the peer review process was formed to investigate and remedy the medical care rendered by a colleague in order to determine whether the accepted standard of care has been met. If the peer review committee found that the doctor departed from accepted standards, they could recommend limiting or terminating the doctor’s privileges or requiring that the doctor obtain further training. The law also required that any adverse actions of a peer review committee be reported to the newly created National Practitioner’s Data Bank. In essence, Congress gave hospitals and doctors the power to “police themselves”. Unfortunately, there is no current federal statute that requires peer review committees to observe due process. This system of “policing” has in fact removed basic doctor due process rights as well as a doctor’s right to appeal and investigate any biased and/or false accusations by an accuser or competitor who may be using this law to eliminate competition. Since its inception in 1986, there has been increasing concerns

and complaints voiced against HCQIA such that certain unscrupulous doctors now appear to be utilizing key positions on hospital committees, including Medical Executive, Credentials, and Quality Assurance, to conduct bad faith (sham) peer reviews. Underlying motives range from a hospital administration's desire to achieve more control over doctors so as to control costs to limiting or eliminating doctors who compete with hospital-favored doctors.

The immunity provided to those who conduct peer review under HCQIA was felt to be important so as to minimize any liability from lawsuits for good doctors performing fair and unbiased peer review. Unfortunately, this same immunity is granted to those who offer false claims and who provide or use false testimony against the accused. Unlike our U.S. criminal justice system which seeks to err on the side of not punishing innocent persons, some, however, including the AMA, feel that protection of the accusers, even in cases of sham peer review, should be given higher priority.

Solo practitioners appear to be particularly vulnerable to sham peer review. This is especially true with respect to new graduates and newcomers to a hospital since they lack the political support and often the financial means to defend themselves. Moreover, nonconformists and/or hospital whistle blowers who attempt to bring quality issues to a hospital administrator's attention often become victims of retaliation via the sham peer review process. Economic credentialing has also been utilized by hospitals in order to remove doctors who are treating "sicker patients" than average.

The use of summary suspension has become a "weapon of choice" for hospitals that have actively embraced sham peer review as a "tool" to further their objectives. Summary suspension as initially defined by HCQIA was to be utilized only for those doctors who were chemically or mentally impaired and who posed an imminent danger to patients. Now, however, it is used to cause immediate interruption of a targeted doctor's income and to damage the targeted doctor's reputation, as well as a "shock and awe" affect so as to paralyze the doctor's ability to practice medicine.

Currently legal recourse available to doctors who are victims of sham peer review is insufficient at best. The accuser can be factually wrong and still enjoy nearly complete immunity under HCQIA. The Hospital and its peer review committees can also be factually wrong and still be immune from lawsuit so long as a “hearing” was performed according to the basic requirements of HCQIA. These requirements include that adequate notice be given to the accused doctor, and that the accused doctor be advised of his right to legal representation, cross-examination of witnesses, and a transcript of the proceedings. Although legal recourse does exist for peer reviews performed in bad faith or with malice, the legal proof required by the accused doctor represents an almost insurmountable barrier to obtaining justice in these cases. An accumulation of false charges or accusations made against the doctor are insufficient in establishing bad faith or malice.

The recommended changes by SEMMELWEIS SOCIETY INTERNATIONAL in order to effectively improve medical peer review are as follows:

1. Medical staff bylaws must provide “meaningful” due process for accused doctors. This means proper notification of all “alleged” charges at the time of the initial notification.
2. The medical staff of each hospital is strongly advised to hire its own independent attorney and not utilize the hospital’s attorney in order to draft or make changes to medical staff bylaws. Currently, many medical staff bylaws are written by the hospitals’ attorneys who draft bylaws in favor of the hospital often at the expense of doctor’s due process rights.
3. Accused doctors should be given the same presumption of innocence until proven guilty as is the Constitutional right of accused criminals under our U.S. system of justice. The burden of proof should rest squarely with the accusers to prove guilt, not on the accused doctor to prove innocence.
4. Medical staff bylaws need to be written and enforced whereby a random lottery is conducted on an annual basis so as to determine the members of every committee in the hospital.

5. Peer Review hearing panels need to be as independent as possible. The best case scenario would be to have an administrative law judge preside over the hearing, thereby insuring that the “Rules of Evidence” be utilized in this procedure. The process needs to require hospitals to get outside independent expert reviewers acceptable to both parties to review the alleged cases and not base the evidence on what the accusers/competitors have stated. Accusers should be allowed to testify and be cross-examined as well as present outside evidence which they are using against the accused. Accusers/competitors must never be allowed to serve on investigative committees or hearing panels.
6. Rules of binding arbitration should apply such that independent and unbiased peer review decisions should not be able to be overturned by the Medical Executive Committee or by the Board of Directors of the hospital.
7. Following this hearing, should the information be sent to the State Medical Board and the accused doctor is cleared, then he or she should be reinstated on the medical staff without any further negative repercussions.
8. Additionally, the hospital should remove any adverse action it has submitted to the data bank if the accused doctor is subsequently cleared by the State Board of Medical Examiners.
9. False testimony of any kind should be considered as unethical and professional misconduct, subject to sanctions. Those who knowingly make false and damaging accusations against doctor’s colleagues should be held fully accountable for their actions so as to ensure the integrity of the peer review process. If it is determined that the accusers were arbitrary, capricious or provided false testimony these individuals should forfeit any and all immunity and be subject to civil suit. Additionally, should these individuals be practicing doctors, they should be investigated by the State Medical Board and face possible sanctions.
10. A high standard of proof needs to be demanded before any adverse action is taken. In its current form without any changes in federal regulation, SEMMELWEIS SOCIETY INTERNATIONAL also recommends creating a method of allowing sanctioned doctors and healthcare providers to appeal a decision to an independent review board outside the hospital. If on the other hand

it detected that the hospital or medical institution have erred in disciplining the doctor or healthcare provider, then they would have his/her credentials restored.

11. Should any member of a hospital staff or academic institution be found to be involved in conducting or cooperating with bad faith peer review against another doctor or health care worker, that member should automatically be sent to the State Medical Board and/or appropriate body for investigation and disciplined for unethical behavior and trying to defraud the public. Should the State Medical Board investigative committee determine that the member performed a bad faith, sham peer review, and then it will be up to the State Medical Board to discipline that individual and send that disciplinary action to the National Practitioner Data Bank?

In conclusion, it is the opinion of SEMMELWEIS SOCIETY INTERNATIONAL that bad faith peer review deprives the public of good doctors. It is SEMMELWEIS SOCIETY INTERNATIONAL'S position that care provided by any doctor should be evaluated by proper and fair Peer review process/system. SEMMELWEIS SOCIETY INTERNATIONAL also reaffirms its current position that should any doctor or healthcare provider knowingly bear false witness against another, then that person(s) should face disciplinary actions from both the State Medical Board as well as disciplinary sanctions from their specialty societies or institution. It is Semmelweis Society International intent and goal to increase and maintain high standard, integrity and credibility in a proper and fair peer review process for the doctors, healthcare providers and academicians for the safety of the patients and public.

Sincerely

Roland F. Chalifoux Jr., DO

President

SEMMELWEIS SOCIETY INTERNATIONAL

March 11, 2008

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