

MINUTES OF THE SENATE COMMITTEE ON WAYS AND MEANSThe meeting was called to order by Senator Paul Hess at  
Chairperson11:00 a.m./p.m./on January 24, 1984 in room 123-S of the Capitol.All members were present except:  
Senator Bogina

## Committee staff present:

Research Department: Ed Ahrens, Mary Galligan, Lynne Holt, Gloria Timmer,  
Carolyn Rampey  
Revisor's Office: Norman Furse, Jim Wilson  
Committee Office: Mark Skinner, Doris Fager

## Conferees appearing before the committee:

Fletcher Bell, State Commissioner of Insurance  
Ron Todd, Assistant Commissioner of Insurance  
Jerry Slaughter, Kansas Medical Society  
Sister Elizabeth Stover, St. Joseph Hospital, Concordia, Kansas Hospital Ass'n.  
Harold Riehm, Association of Osteopathic Medicine  
John Brookens, Kansas Bar Association  
Don Strole, Board of Healing Arts  
Sherman Parks, Kansas Chiropractic Association  
Larry Magill, Independent Insurance Agents  
Gerald Michaud, Kansas Trial Lawyers Association  
Steve Blaes, Attorney, Kansas Hospital Association  
Dr. James GleasonSB 507 - Health Care Providers Insurance Availability Act

Senator Hess reminded the committee that the issue in question was considered during the 1983 legislative session, and some temporary changes were made in the law. The Insurance Commissioner was asked to attempt to bring interested parties together to make more changes concerning the insurance providers' fund. Senator Hess introduced the Commissioner and asked him to explain what has been accomplished during the interim.

Commissioner Bell explained that SB 507 addresses three major areas: (1) Funding for medical malpractice suits; (2) Disciplining of providers of health care; (3) Peer review Committee and its function.

Commissioner Bell explained that meetings were held during the interim, and resulted in the present proposal, which is a series of compromises. Mr. Bell indicated he supports the bill because it will take care of the foreseeable future as far as funding for the medical malpractice insurance is concerned. Groups invited to participate in the meetings were providers, Kansas Bar Association, Kansas Trial Lawyers Association, and insurance agents. All participated, but that does not mean that all are in agreement with the proposal.

When asked by Senator Hess if something needs to be done in the area of health care providers insurance this session, Mr. Bell answered in the affirmative. Senator Gaines complimented Commissioner Bell and others who participated in forming SB 507.

Mr. Todd reviewed the bill, section by section. Committee members questioned him during his presentation. In answer to one of those questions, Mr. Todd said the Insurance Commissioner has had the authority to set a surcharge, but SB 507 removes restrictions and allows this to be done on an incurred basis. This would be decided annually.

Mr. Slaughter distributed an Explanation of Proposed Statutory Changes (Attachment A) and Background and Issues (Attachment B). He reviewed the attachments and answered questions from committee members.

SB 507 - Continued

Dr. Gleason commented that gynecologists are in a high category of health insurance premiums, and that his peers felt the \$300,000 limit was not enough for them. He noted that the first part of the bill certainly is a compromise. He further commented that doctors can accept the stability of the fund.

Concerning the proposal on peer review, Dr. Gleason expressed the opinion that case conferences are the cornerstone of teaching medical students. He said he is on the staff of the University of Kansas Medical Center and in his teaching there he takes specific decisions and has the students study them from all circumstances so that a definition can be made for all methods of treatment. At this point, criticism is made for teaching purposes. Dr. Gleason said if that method of teaching does not continue to occur, the Medical Center may have a difficult time in its teaching mission. These remarks were made regarding confidentiality of records.

Dr. Gleason referred to the last part of SB 507, concerning the administrator, and indicated this toughens up areas which may now be weak. He assured the committee that physicians are attempting to do a quality job in the practice of medicine, and would not like anything to happen which would change this.

Senator Gaines suggested that he was not sure doctors should have lay people on their peer review committee. Dr. Gleason answered that doctors do not feel they need a consumer but are not trying to hide anything, so they have no problems with that provision.

There was an extended discussion concerning confidentiality of peer review records, and when the records may become available to an attorney representing a patient.

Sister Elizabeth Stover distributed her prepared remarks (Attachment C) and read from those remarks. Following her presentation, she urged passage of SB 507 in its present form.

Mr. Riehm distributed his prepared statement, and read from that statement. (See Attachment D) Committee members were given opportunity to question him.

Mr. Parks indicated the Kansas Chiropractic Association feels the Insurance Commissioner has done an excellent job in preparing SB 507. He said he has been assured that there will be insurance available for chiropractors. He further indicated that he had convinced his organization of the importance of disciplinary measures similar to those used by lawyers. Mr. Parks stated that chiropractors agree with amendments which will be suggested at the afternoon meeting.

The meeting was recessed until after Senate Adjournment today.

Explanation of Proposed  
Statutory Changes

NEW SECTION 1.

This is a statement of legislative intent.

SECTION 2.

This section increases the basic limits required on each policy of professional liability insurance. The present requirements for each policy are minimum limits of \$100,000 per occurrence and \$300,000 annually for all claims made during the policy period. The proposed change would require that each policy of professional liability insurance provide for coverage of at least \$200,000 per occurrence and \$600,000 annual aggregate.

This section also includes a clause which guarantees that an insurer will not be liable for greater than the statutory limits in effect at the time the policy was issued.

SECTION 3.

Subsection (b) is entirely new. It creates a "board of governors" made up of the Commissioner of Insurance, or his designee; one member from the public at large; three members appointed from nominees of the Kansas Medical Society; three members appointed from nominees of the Kansas Hospital Association; two members appointed from nominees of the Kansas Association of Osteopathic Medicine; one member appointed from nominees of the Kansas Chiropractic Association; and two members representing other categories of health care providers. The function of the proposed board of

governors is essentially to provide advice and assistance to the Commissioner with regard to the administration of the Health Care Stabilization Fund. The board of governors is also expected to study and evaluate the Fund and make recommendations to the Legislature.

Subsection (c)(6) of Section 2 changes the law to allow the Commissioner of Insurance, instead of the committee on surety bonds and insurance, to purchase reinsurance for the Fund. Under this subsection, such purchase would not be subject to the bidding requirements of K.S.A. 75-3738 to K.S.A. 75-3744. Actuarial expenses incurred in administering the Fund would also be exempt from these requirements.

Subsection (e) of Section 2 limits the liability of the Health Care Stabilization Fund to \$3,000,000 pursuant to any one judgment or settlement against any one health care provider after July 1, 1984. This subsection also limits the amount the Fund must pay for claims against any one health care provider during any one fiscal year to \$6,000,000.

Subsection (g) of Section 2 provides for the termination of the Fund's liability with regard to a particular health care provider when the board of governors determines that health care provider presents a material risk of significant future liability to the Fund. There are no such provisions under the current law.

#### SECTION 4.

This section makes changes in the method by which the premium surcharge, which is used to supply monies for the Health Care Stabilization Fund, is determined. Presently, there is a

minimum surcharge of 25% of the annual premium paid by the health care provider for basic coverage and a maximum surcharge of 65% of the same figure. Current law also requires that for the first two years of his professional liability policy, a health care provider is subject to a 45% minimum surcharge.

Section 3 does away with these set amounts and states that the premium surcharge "shall be an amount deemed sufficient by the commissioner to fund anticipated claims based upon reasonably prudent actuarial principles."

#### SECTION 5.

Presently, the law states that unless a health care provider obtains insurance for excess amounts, his insurer will only be liable for the first \$100,000 of any one malpractice claim against him or \$300,000 of all claims against the health care provider in one year. This section raises those figures to \$200,000 per claim and \$600,000 annual aggregate. It also guarantees that these changes will not affect claims made prior to July 1, 1984.

#### SECTION 6.

This section adds the board of governors created by SECTION 2 to the list of entities authorized and directed to consult with and assist each other in maintaining compliance with the Health Care Provider Insurance Availability Act.

#### NEW SECTION 7.

This section establishes a privilege for records of "peer review committees." Under this section, the records of a peer

review committee, which is defined as any group meeting any one of the five tests described in subsection (b), are not subject to "discovery, subpoena or other means of legal compulsion," and are not "admissible in evidence in any judicial or administrative proceeding."

There are several limitations on the privilege created by this section. First, the privilege would be claimed by the legal entity creating the peer review committee. Second, the privilege would not apply to proceedings in which a health care provider contests the revocation, denial or restriction of his license or staff privileges. Finally, the authority of health care provider licensing or disciplinary boards to require a peer review committee to report to it is ensured, as is the authority of the board of governors when examining the possibility of termination of the Fund pursuant to § 3(g).

There is no present Kansas law regarding privilege for peer review committee records.

#### NEW SECTION 8.

This section directs the board of healing arts to appoint a disciplinary administrator who would have the duty to investigate complaints of professional incompetency and unprofessional conduct against board licensees.

#### NEW SECTION 9.

This section is a continuation of NEW SECTION 7. It provides that once the disciplinary administrator finishes his investigation of a complaint he must make a recommendation regarding

further action to a review committee. The review committee will then examine the matter and determine whether the complaint should be dismissed or referred for a hearing. The review committee may also recommend informal admonition of the licensee.

NEW SECTION 10.

This section establishes the composition of the review committee referred to in NEW SECTION 8. Such committees shall be appointed by the board of healing arts and shall be composed of three members including one lay person; one member of the same branch of the healing arts as the person whose conduct is being investigated; and one member of the same specialty as the person under investigation.

NEW SECTION 11.

This section states that the disciplinary administrator shall prosecute all complaints that proceed to hearing before the board of healing arts. If the review committee recommends such a hearing, the disciplinary administrator must file a complaint with the board of healing arts. This section also provides that prior to the time of the filing of such a petition, all information in the possession of the disciplinary administrator or review committee is confidential.

NEW SECTION 12.

This is the repealer section.

NEW SECTION 13.

This is a severability clause.

SECTION 14.

This section states the effective date of the act.



MEDICAL MALPRACTICE: SB 507

BACKGROUND and ISSUES

Prepared by Kansas Medical Society  
January 1984

BACKGROUND

The package of bills enacted in 1976 provided stability to the volatile medical malpractice situation. However, increasing frequency of claims and severity of awards has brought the problem to very serious proportions again. This bill does not solve the complex problem, but it does several things which should help considerably. A few facts about the current situation:

1. The Health Care Stabilization Fund, to which doctors, hospitals and other providers pay surcharges for coverage, is in an unstable financial position. Experts estimate a deficit of several million dollars unless changes are made this year.
2. Since 1976, \$19.5 million in claims have been paid or accrued by the Fund. Between 30-40% of that amount has gone into the pockets of attorneys who take most of the suits on a contingent fee basis.
3. The threat of malpractice suits causes doctors to order more tests and procedures to protect themselves from liability. National studies show that about 30-35% of all tests ordered are the result of defensive medicine. This inflates medical and hospital costs significantly.
4. The average award or settlement in Kansas is almost \$300,000, and growing.
5. If something is not done to solve the overall problem soon, our system of compensating injured patients will be bankrupt.
6. National studies show that total malpractice costs contribute significantly to rising health costs, inflating them as much as 25-30%.
7. The trends for the future point to even higher awards, insurance premiums and overall costs to the public. Malpractice costs have tripled since 1974, and will probably triple again within five years.

SB 507: MAJOR PROVISIONS

HCSF AMENDMENTS

1. The basic insurance required for health care providers is doubled from \$100,000 per occurrence, to \$200,000.
2. A Board of Governors is created to advise the Insurance Commissioner. The Board would be composed of health providers, with public representation.
3. The Board of Governors may drop a health care provider from the Fund who presents a significant risk to the financial integrity of the Fund.
4. The bill authorizes the purchase of reinsurance for the Fund.

AHB  
1-24-84  
11:00 a.m.



5. The Fund's liability is limited to \$3 million per claim. Providers wanting additional excess limits will have to purchase it from the commercial market.
6. The surcharge minimum and maximum percentages are removed, and the Commissioner is given authority to levy a surcharge that will fund anticipated claims in the future.

#### PEER REVIEW COMMITTEES

Records of Peer Review Committees are granted privilege from discovery, and are not admissible in court. There are several limitations on the privilege, including when such information is used by the licensing agency in disciplinary hearings.

#### DISCIPLINARY ADMINISTRATOR: HEALING ARTS BOARD

An independent disciplinary administrator is created to handle complaints and matters involving competence to practice, which come before the Healing Arts Board. This provision parallels the disciplinary system for attorneys, and should result in more effective handling of complaints and matters of competency.

#### ISSUES

Will this bill result in higher malpractice premiums for doctors and hospitals?

Yes. However, in order to avert a catastrophic financial collapse of the Fund, this action is necessary.

Does this bill limit awards in malpractice?

No. The Fund's liability is limited to \$3 million per claim, and providers seeking higher limits of coverage must buy it on the commercial market.

Does this bill limit attorneys fees?

No. Plaintiffs attorneys will still be able to take cases for contingency fees ranging on average from 33%-50%, plus expenses, of the award or settlement.

Why shouldn't records of peer review committees be subject to discovery?

It is a difficult question that requires balancing arguments on both sides. Opponents of the privilege provision argue that such records should be available to help complete the necessary information to evaluate a malpractice case. Proponents argue if such information was subject to subpoena, that the peer review process would cease. Physicians are not likely to participate with candor if they fear what they say may end up in court. The educational process inherent in peer review would become sanitary and meaningless. Efforts to increase quality of care through the peer review process would be diminished significantly. Consequently, an effective means of increasing competence through professional review would be lost.

Do other states grant protection to peer review committees?

Yes. Forty-six (46) states afford such protection, as does the United States government in VA hospitals.

Is this contrary to the philosophy to the open records law recently enacted?

No. First, these peer review proceedings are not functions of government. Second, peer review activities have largely been voluntarily initiated by doctors and hospitals to improve the quality of care. Their primary purpose is educational, and as such needs an environment of open and candid discussion. The facts of life are that good peer review requires physicians to be candidly critical of other physicians, and opening committee records to malpractice lawyers will have a stifling effect on that candor.

Would such records be available to the Healing Arts Board in its investigations?

Yes. The board has authority to obtain such records for use in its investigations into a provider's competency to practice.

What does this protection have to do with the overall malpractice situation?

It is an important element in improving the care rendered in hospitals. There should be fewer instances of malpractice as professional competency improves through this educational process.

TESTIMONY OF THE KANSAS HOSPITAL ASSOCIATION

Before the Senate Ways & Means Committee

Senate Bill 507

January 24, 1984

I am Sister Elizabeth Stover, President of St. Joseph Hospital, Concordia, Kansas. I am here today, as Chairwoman of the Kansas Hospital Association Board of Directors, to present the position of the Kansas Hospital Association on Senate Bill 507.

The Kansas Hospital Association and its member hospitals wholeheartedly support Senate Bill 507. The bill is a result of many long hours of study and meetings between health care providers and the Insurance Department. The Kansas Hospital Association was pleased to participate in these meetings and appreciates the opportunity we had to assist in the development of this legislation.

HEALTH CARE STABILIZATION FUND

Sections 1 through 6 of this bill amend the law relating to the Health Care Stabilization Fund, which provides liability coverage for health care providers. It is generally agreed by those involved that the Fund faces some serious financial problems. This committee heard testimony to that effect last year and as a result passed Senate Bill 284. Senate Bill 284 made some amendments to the Health Care Provider Insurance Liability Act but these were seen as a "band-aid" to the problem. Your committee directed the Insurance Department and health care providers to meet during the interim and find a more long-term solution. We believe the provisions of Senate Bill 507 will go far to alleviate many of the problems the Fund now faces.

AHC  
1-24-84  
11:00 a.m.

Section 2(a) increases the primary coverage limit to \$200,000 per occurrence, with a \$600,000 annual aggregate. We believe this is a more realistic figure and that it will make the primary insurance carrier more concerned about defending the initial claim. Section 3(b) creates a Board of Governors to provide technical assistance, expertise and advice to the Commissioner. This section is important as it makes providers and public representatives involved in the administration of the Fund.

Section 3(e) limits the liability of the Fund to \$3 million per claim. The Fund's liability must be limited if it is to stay solvent and \$3 million per claim seems more than adequate. Section 4(c) removes the statutory maximum on premium surcharges. This allows the Commissioner the flexibility to assess the surcharge at a level that will assure the Fund's solvency.

We believe that the amendments noted above will be very beneficial to the financial condition of the Fund.

#### QUALITY ASSURANCE/PEER REVIEW COMMITTEES

New Section 7 creates a statutory privilege protecting peer review committee minutes and proceedings from discovery in most litigation. We believe it is essential that the Legislature create this privilege in order to insure that high quality health care continues to be maintained in Kansas hospitals.

As you are probably aware, hospitals establish peer review committees to assure quality health care in the institution. These committees also provide an important educational forum for physicians. In order for peer review committees to function effectively, an atmosphere conducive to

candid and open discussion must be created. Prior to September of 1983, I believe most of our physicians felt comfortable being candid in peer review committee meetings since there was a regulation of the Department of Health & Environment protecting records of these committees from review by other than medical staff members.

In September, 1983, the Kansas Supreme Court held the Department regulation invalid, saying that the Department did not have statutory authority to promulgate the regulation. The decision has created much concern among hospital administrators and physicians that peer review committees will no longer be able to function effectively unless the proceedings and the participants in the peer review process have protection. We, therefore, are asking the Legislature to create a statutory privilege for peer review proceedings and records of the same.

Forty-six of the fifty other states have created this privilege by statute. We believe that to insure the continuation of quality health care for Kansas citizens, this Legislature must act this session to protect the candid atmosphere necessary for effective medical peer review. Section 7 of Senate Bill 507 affords this protection, while at the same time assuring that the records and proceedings are available to the Board of Healing Arts for its use in disciplinary investigations and actions.

#### HEALING ARTS BOARD - DISCIPLINARY PROCEEDINGS

New Sections 8 through 11 relate to disciplinary proceedings by the Board of Healing Arts. The Kansas Hospital Association supports the changes in these sections and applauds the Board of Healing Arts and the Kansas Medical Society for developing these proposals.

In summary, the Kansas Hospital Association supports Senate Bill 507 and urges this committee to pass it in its present form.

Thank you for the opportunity to appear today and express the position of the Kansas Hospital Association.





# Kansas Association of Osteopathic Medicine

January 24, 1984

STATEMENT OF BUDDY L. HULSMAN, D.O. (PARSONS) PRESIDENT OF THE KANSAS ASSOCIATION OF OSTEOPATHIC MEDICINE, TO THE COMMITTEE ON WAYS AND MEANS OF THE KANSAS SENATE -- REGARDING S.B. 507.

Mr. Chairman and Members of the Committee:

On behalf of members of the Kansas Association of Osteopathic Medicine, may I state our support for S.B. 507 and urge your support. I emphasize our support for all of the major parts of S.B. 507, for all are aimed at maintaining either the integrity of the health care professions affected, the financial viability of being a practitioner, the public perception of the practice of medicine--or all three of these.

Those sections dealing with changes in the health care stabilization fund are important in maintaining the fiscal integrity of that fund, which in turn provides a service to both those covered and the public.

I also want to give special emphasis to the Association's support for the provisions of the Bill that provide confidentiality to the process of peer review. It is both a condition of human nature and a characteristic of most any peer review process, that diligence and honesty occurs best under conditions that encourage candor. It is the feeling of the Association, that this works best when operative under conditions of confidentiality such as are provided in S.B. 507. It is also our feeling that this works best not only for those involved in the peer review process, but also for the public.

Lastly, the Association supports the addition of the Board of Governors to provide expertise and assistance to the Insurance Commissioner in the administration of the malpractice fund, and to the creation of the position of disciplinary administrator for the staff of the Board of Healing Arts. Both of these changes offer the opportunity for enhancement of the self-policing characteristic of the health professions. Both also offer sufficient opportunity for due process in the course of their prescribed operations. And, both offer, in our opinion, enhanced protection to the public.

It would be nice, Mr. Chairman, if situations necessitating such changes never occurred. But the practice of modern medicine has become increasingly complex and ever more closely scrutinized by both recipients of the care and those who ultimately represent them in the pursuit of claims. As osteopathic physicians, we welcome increased scrutiny as long as the process is fair, free from frivolity, and aimed only at the goal of protecting the public. S.B. 507 appears to be a step in that direction.

1325 TOPEKA BOULEVARD  
TOPEKA, KANSAS 66612, (913) 234-5563

HAROLD E. RIEHM, EXECUTIVE DIRECTOR



Chairman and Members, Senate Committee on Ways and Means  
Statement of Buddy L. Hulsman, D.O., President, KAOM  
January 24, 1984

Under terms of S.B. 507, practicing the healing arts will be more expensive and will require greater self-policing than in the past. Yet, it is our hope that the emphasis upon this self-policing will impress upon the public the dedication and commitment to health care excellence that we think characterizes the overwhelming preponderance of health care practitioners in Kansas.

I conclude this statement by stating that there are other issues related specifically to malpractice claims that should be addressed by the Kansas Legislature in future sessions. In S. B. 507, and such other measures as might be addressed at a later date, we wish to indicate our interest in support of reason

Buddy L. Hulsman, D.O.  
President, Kansas association of Osteopathic Medicine