Approved February 3, 1986
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Chairman Joe Knopp at
Chairperson

3:30 ~~xxx~~./p.m. on January 28, 1986 in room 313-S of the Capitol.

All members were present except:

Committee staff present:

Mike Heim, Legislative Research Department

Jan Sims, Committee Secretary

Conferees appearing before the committee:

Jerry Slaughter, Kansas Medical Society
Don Strole, Kansas Board of Healing Arts
Norman Miller, M.D., University of Kansas Medical Center
Kathleen Sebelius, Kansas Trial Lawyers Association
Ron Smith, Kansas Bar Association

Jerry Slaughter of the Kansas Medical Society appeared before the Committee reviewing in general the provisions of HB2661 relating to peer review, reporting procedures and risk management. He said that the Kansas Medical Society supports all 26 provisions of the bill relating to these areas. He stated that the idea of physicians not policing themselves is a myth. He said that we must have responsibility in policing from physicians but it must also come from the Board of Healing Arts. The system as it is now will not right itself if all the bad doctors are kept from practicing. Of the 115 doctors who had the most claims filed against them, those claims only represented 16% of the payments made from the Fund. He noted that 75% of all claims made result in no indemnity payment. He stated that this bill provides for the first time a link between the Board of Healing Arts and association review committees. The Kansas Medical Society generally agrees with the governor's position but notes that the governor's position is silent on tort reform. Mr. Slaughter presented the society's position on the proposed amendments (Attachments 1 and 2).

Don Strole of the Board of Healing Arts introduced Dr. Normal Miller of the University of Kansas Medical Center who spoke to the Committee on the Impaired Physicians Statute. Dr. Miller stated that impaired physicians is a problem in Kansas and perhaps more of a problem than most realize. He estimated that from 20 to 40% of the practicing physicians are impaired in one or more of four major categories: alcohol, drugs, dimentia and mental illnesses of a serious nature. He diferentiated between mental illness and the inability to handle personal life crises, stress, etc. The relationship between the impaired physician and malpractice is not clear but impairments do affect the quality of care in that it does affect the individual doctor. Dr. Miller's experiences with the Board of Healing Arts have been positive and he feels that their interests in protecting the public and physicians are equal. He stated that the present law makes it difficult for the Board to act and that a change is needed as relates to confidentiality and the Board.

Kathleen Sebelius of the Kansas Trial Lawyers Association appeared before the Committee. She said that the term malpractice is one defining medical errors. Errors can and do happen to everyone including health care providers. An error does not necessarily mean that one's license should be taken away but negligent providers should be responsible for their mistakes. The filing of a lawsuit does not necessarily mean a provider is incompetent, but repeated suits do. She asked the committee to review the Insurance Department's report September 11, 1985 closed claims report and in particular the sections pertaining to the percentages of payments made on behalf of physicians having multiple claims filed, pointing out that of the 95 doctors who had 3 or more claims filed, which makes .6% of the physicians, those claims made up 50% of claims paid. She said that criteria for removing a physician's license is unknown to the public. She is bothered by the fact that the Board testified before the Committee that malpractice is not as big a problem as the public perceives it to be. She said that there has been a conspiracy of silence in the past, that the current proposals should correct that and the KTLA supports

that but it questions how the Board will handle the increase in reports when they receive them. She said that additional staff will not be enough and suggested that the problem be approached in a manner similar to disciplinary complaints forwarded to the bar and work with a more decentralized system. The Kansas Trial Lawyers Association feel that the tort reform portions of the bill will both accomplish just compensation for damages for victims and act as a deterrent. (Attachment 3)

Ron Smith of the Kansas Bar Association appeared before the Committee and presented the Bar Association's position on the peer review sections of HB2661. He said that the bad doctors do have a considerable impact on the claims paid. The Bar Association generally supports the peer review sections and feels that it will help premiums. He feels that peer review, risk management and the Board of Healing Arts provisions should be put into a separate bill. The challenge to the Board will come when it tries to use its new power and the doctors will fight that power at a faster pace than the constitutional questions pertaining to HB2661 will reach the Supreme Court. He noted what the Bar Association feels is a drafting error wherein nurses are listed in the description of health care providers pointing out that nurses are employed by health care providers but are not providers. Listing nurses as health care providers in this section removes enforcement of the reporting provisions. He said Sec. 8 on page 7 needs to provide for attorney fees for reporters who are not fired but are dead-ended in their jobs as a result of reporting. Sec. 9 extending to non-state agencies creates a very unique law and should be split into a separate bill so as to not jeopardize the constitutionality of the entire law. The Bar Association has a strong concern with Sec. 35 concerning the new definition of professional incompetence and unprofessional conduct. They do not object to the language but question the power given to the Board. They will set the standard of care then make a jury-like decision on whether the standard of care was met. The Bar Association hopes in this regard that the record of the Board with its new power will be better than its past record. He further questioned Sec. 18 regarding industry reports from the insurance company to the Board of Healing Arts.

All conferees responded to questions by Committee members.

The Chairman adjourned the meeting at 5:20 P.M.

1/28 Slaughter

Proposed Amendments to HB 2661 Concerning Peer Review, Risk Management and Reporting

Recommendations of the Kansas Medical Society
January 28, 1986

Amendment No. and Rationale:

1. Purpose Clause. Adding a purpose clause shows that the legislature is acting to solve a crisis situation, which might help in upholding the constitutionality of the bill.

2. This amendment clarifies the section on risk management as it relates to disapproval of a medical care facility's risk management plan.

3. This amendment makes it clear that the legislature does not intend to create a new cause of action against a medical care facility for its risk management activities.

4. This amendment is intended to tie the various reporting requirements of the act together.

5. This amendment makes it clear that it is appropriate for the committee reviewing the incident to make recommendations regarding the privileges of the person in question.

6. This amendment is also intended to tie the various reporting requirements contained throughout the bill together for consistency.

7. This amendment clarifies the fact that a health care provider who is simply acting as a consultant within a medical care facility should not be subject to the reporting requirements of Section 3.

8. This amendment will make it possible for the Board of Healing Arts to know the names of licensees who have been referred to Impaired Provider Committees.

9. This amendment simply gives the Impaired Provider Committee the flexibility to designate someone to conduct the investigation directed by the licensing agency.

10. This amendment makes it clear that even though a facility may not consider the fact a person is participating in an impaired provider program, it may consider the impairment itself and how it affects the person's practice.

Attachment 1
House Judiciary
1-28-86

11. This amendment would broaden the exemption to include all the members of such organizations, not just Impaired Provider Committees.

12. Instead of creating a new statutory action against a medical care facility, this amendment would simply reflect the legislature's intent that employees be free to make the reports required by the act.

13. This amendment is intended to strengthen and clarify the section related to anti-trust immunity. It also makes it clear that such immunity is extended to all types of peer review activity.

14. Subsections (2) and (3) are unreasonably restrictive, and in rural areas could present severe problems in instances when a member of a licensee's family needs a prescription.

15. These three sections all represent additional grounds for discipline by the Board of Healing Arts. They should be deleted because they all contain ambiguities about the types of acts that could be grounds for discipline. The sections are also redundant because physicians are already required to report much of this information. Finally, it is unreasonable to discipline a physician for simply having entered into a settlement, many of which are of nuisance value, and outside the licensee's control.

16. This amendment simply clarifies an ambiguity that existed in the original draft of the bill.

Amendments Suggested By The Healing Arts Board:

Attachment A - The KMS generally supports this new section which is intended to broaden the subpoena power of the Board as it relates to investigations. The amendment suggested on page 2 of Attachment A is intended to clarify that peer review and risk management records are also protected under the Act.

Attachment C - The amendments suggested to the language on Attachment C are merely intended to clarify the sections.

Attachment D - The KMS generally supports the addition of (cc) to Section 34. However, we have reservations about the new section suggested and feel it may be unnecessary since the Board already has the authority to limit a license.

(REPRINT)

Session of 1986

HOUSE BILL No. 2661

By Special Committee on Medical Malpractice

Re Proposal No. 47

12-17

AN ACT concerning certain health care providers; relating to medical malpractice liability and insurance coverage therefor; concerning regulation of certain health care providers; amending K.S.A. 7-121b, 65-430, 65-2809, 65-2812, 65-2813, 65-2814, 65-2822, 65-2833, 65-2836, 65-2837, 65-2838, 65-2840a, 65-2898a, 65-28,121, 65-28,122, 65-4902, 65-4904 and 65-4907 and K.S.A. 1985 Supp. 40-3003, 40-3401, 40-3403, 40-3404 and 40-3408 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. As used in sections 1 through 10:

(a) "Department" means the department of health and environment.

(b) "Health care provider" has the meaning provided by K.S.A. 40-3401 and amendments thereto.

(c) "License," "licensee" and "licensing" include comparable terms which relate to regulation similar to licensure, such as certification or registration.

(d) "Medical care facility" has the meaning provided by K.S.A. 65-425 and amendments thereto.

(e) "Reportable incident" means an act by a health care provider which is or may be below the applicable standard of care.

(f) "Risk manager" means the individual designated by a medical care facility to administer its internal risk management program and to receive reports of reportable incidents within the facility.

(g) "Secretary" means the secretary of health and environment.

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Substantial increases in costs of professional liability insurance for health care providers have created a crisis of availability and affordability. This situation poses a serious threat to the continued availability and quality of health care in Kansas. In the interest of the public health and welfare, new measures are required to assure that affordable professional liability insurance will be available to Kansas health care providers, to assure that injured parties receive adequate compensation for their injuries, and to maintain the quality of health care in Kansas.

New Sec. 2. (a) Each medical care facility shall establish and maintain an internal risk management program which shall consist of:

(1) A system for investigation and analysis of the frequency and causes of reportable incidents within the facility;

(2) measures to minimize the occurrence of reportable incidents and the resulting injuries within the facility; and

(3) a reporting system based upon the duty of all health care providers staffing the facility and all agents and employees of the facility directly involved in the delivery of health care services to report reportable incidents to the chief of the medical staff, chief administrative officer or risk manager of the facility.

(b) Not less than 60 days before the time for renewal of its license in 1987, each medical care facility shall submit to the department its plan for establishing and implementing an internal risk management program. Failure to submit such a plan shall result in denial of the renewal of the facility's license.

(c) Upon review of a plan submitted pursuant to subsection (b), the department shall determine whether the plan meets criteria of this section. If the plan does not meet such criteria, the department shall disapprove the plan and return it to the facility, along with the reasons for disapproval. Within 60 days, the facility shall submit to the department a revised plan which meets the ~~objections of the department~~. No medical care facility shall be granted renewal of its license in 1988 unless its plan has been approved by the department.

New Sec. 3. (a) If a health care provider, or a medical care facility agent or employee who is directly involved in the delivery of health care services, has knowledge that a health care provider has committed an act which is or may be below the applicable standard of care, such health care provider, agent or employee shall report such knowledge as follows:

(1) If the reportable incident did not occur in a medical care facility, the report shall be made to the appropriate state or county professional society or organization, which shall refer the matter to a professional practices review committee duly constituted pursuant to the society's or organization's bylaws. The

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requirements of the statute and any regulations adopted thereunder

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(d) A medical care facility shall not be liable for compliance with or the failure to comply with the provisions of this section, except as provided in section 27 of this act.

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or constitutes grounds for disciplinary action under section 34 of this act,

committee shall investigate all such reports and take appropriate action. The committee shall have the duty to report to the appropriate state licensing agency any finding by the committee that a health care provider acted below the applicable standard of care so that the agency may take appropriate disciplinary measures.

(2) If the reportable incident occurred within a medical care facility, the report shall be made to the chief of the medical staff, chief administrative officer or risk manager of the facility. The chief of the medical staff, chief administrative officer or risk manager shall refer the report to the appropriate executive committee or professional practices peer review committee which is duly constituted pursuant to the bylaws of the facility. The committee shall investigate all such reports and take appropriate action. In making its investigation, the committee may also consider treatment rendered by the health care provider outside the facility. The committee shall have the duty to report to the appropriate state licensing agency any finding by the committee that a health care provider acted below the applicable standard of care so that the agency may take appropriate disciplinary measures.

(3) If the health care provider involved in the reportable incident is a medical care facility, the report shall be made to the chief of the medical staff, chief administrative officer or risk manager of the facility. The chief of the medical staff, chief administrative officer or risk manager shall refer the report to the appropriate executive committee which is duly constituted pursuant to the bylaws of the facility. The executive committee shall investigate all such reports and take appropriate action. The committee shall have the duty to report to the department of health and environment any finding that the facility acted below the applicable standard of care so that appropriate disciplinary measures may be taken.

(b) If a reportable incident is reported to a state agency which licenses health care providers, the agency may investigate the report or may refer the report to a review or executive committee to which the report could have been made under subsection (a)

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, including recommendation of a restriction of privileges at the appropriate health care facility.

for investigation by such committee.

(d)(c) Each review and executive committee referred to in subsection (a) shall submit to the appropriate state licensing agency, at least once every three months, a report summarizing the reports received by the committee pursuant to this section. The report shall include the number of reportable incidents reported, whether an investigation was conducted and any action taken.

(e)(d) If a state agency that licenses health care providers determines that a review or executive committee referred to in subsection (a) is not fulfilling its duties under this section, the agency, upon notice and an opportunity to be heard, may require all reports pursuant to this section to be made directly to the agency.

New Sec. 4. (a) If a report to a state licensing agency pursuant to subsection (a)(1) or (2) of section 3 or any other report or complaint filed with such agency relates to a health care provider's inability to practice the provider's profession with reasonable skill and safety due to physical or mental disabilities, including deterioration through the aging process, loss of motor skill or abuse of drugs or alcohol, the agency may refer the matter to an impaired provider committee of the appropriate state or county professional society or organization.

(b) The state licensing agency shall have the authority to enter into an agreement with the impaired provider committee of the appropriate state or county professional society or organization to undertake those functions and responsibilities specified in the agreement and to provide for payment therefor from moneys appropriated to the agency for that purpose. Such functions and responsibilities may include any or all of the following:

(1) Contracting with providers of treatment programs;

(2) receiving and evaluating reports of suspected impairment from any source;

(3) intervening in cases of verified impairment;

(4) referring impaired providers to treatment programs;

(5) monitoring the treatment and rehabilitation of impaired health care providers;

(6) providing posttreatment monitoring and support of reha-

6)

(c) When a report made under this section is investigated pursuant to the procedure set forth under this section, the reporting entity shall not be liable for any penalty for failure to report as set forth under sections 34, 36, 39, or 40, of this act.

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(f) The provisions of this section shall not apply to a health care provider acting as a consultant or providing review at the request of any person or party.

bilitated impaired health care providers; and

(7) performing such other activities as agreed upon by the licensing agency and the impaired providers committee.

(c) The provider committee shall develop procedures in consultation with the licensing agency for:

(1) Periodic reporting of statistical information regarding impaired provider program activity;

(2) periodic disclosure and joint review of such information as the licensing agency considers appropriate regarding reports received, contacts or investigations made and the disposition of each report, ~~except that the committee shall not disclose any personally identifiable information except as provided in subsections (c)(3) and (c)(4);~~

8) (strike all after the word "report")

(3) immediate reporting to the licensing agency of the name and results of any contact or investigation regarding any impaired provider who is believed to constitute an imminent danger to the public or to self;

(4) reporting to the licensing agency, in a timely fashion, any impaired provider who refuses to cooperate with the committee or refuses to submit to treatment, or whose impairment is not substantially alleviated through treatment, and who in the opinion of the committee exhibits professional incompetence;

(5) informing each participant of the impaired provider committee of the procedures, the responsibilities of participants and the possible consequences of noncompliance.

(d) If the licensing agency has reasonable cause to believe that a health care provider is impaired, the licensing agency may cause an evaluation of such health care provider to be conducted by the provider committee for the purpose of determining if there is an impairment. The provider committee shall report the findings of its evaluation to the licensing agency.

9) or its designee

or its designee

(e) An impaired health care provider may submit a written request to the licensing agency for a restriction of the provider's license. The agency may grant such request for restriction and shall have authority to attach conditions to the licensure of the provider to practice within specified limitations. Removal of a voluntary restriction on licensure to practice shall be subject to

the statutory procedure for reinstatement of license.

(f) A report to the provider committee shall be deemed to be a report to the licensing agency for the purposes of any mandated reporting of provider impairment otherwise provided for by the law of this state.

(g) An impaired provider who is participating in, or has successfully completed, a treatment program pursuant to this section shall not be excluded from any medical care facility staff solely because of such participation.

10) However, the medical care facility may consider any impairment in determining the extent of privileges granted to a health care provider.

(h) Notwithstanding any other provision of law, a state or county professional society or organization and the ~~impaired provider committee~~ members thereof shall not be liable to any person for any acts, omissions or recommendations made in good faith while acting within the scope of the responsibilities imposed pursuant to this section.

11) (delete "impaired provider committee")

New Sec. 5. (a) The following reports and records made pursuant to section 3 or 4 shall be confidential and are not admissible in any civil or administrative action other than a disciplinary proceeding by the appropriate state licensing agency:

(1) Reports and records of executive or review committees of medical care facilities or of a professional society or organization;

(2) reports and records of the chief of the medical staff, chief administrative officer or risk manager of a medical care facility; and

(3) reports and records of any state licensing agency or impaired ~~provider's committee which pertain to impaired providers~~

12) provider committee of a profissional society or organization.

(b) No person in attendance at any meeting of an executive or review committee of a medical care facility or of a professional society or organization while such committee is engaged in the duties imposed by section 3 shall be compelled to testify in any civil, criminal or administrative action, other than a disciplinary proceeding by the appropriate licensing agency, as to any committee discussions or proceedings.

(c) No person in attendance at any meeting of an impaired provider committee shall be required to testify in any civil,

criminal or administrative action, other than a disciplinary proceeding by the appropriate state licensing agency, as to any committee discussions or proceedings.

New Sec. 6. Any person or entity which, in good faith, reports or provides information or investigates any health care provider as authorized by section 3 or 4 shall not be liable in a civil action for damages or other relief arising from the reporting, providing of information or investigation except upon clear and convincing evidence that the report or information was completely false, or that the investigation was based on false information, and that the falsity was actually known to the person making the report, providing the information or conducting the investigation at the time thereof. No claim arising from the making of such report, providing of such information or conduct of such investigation shall proceed to trial unless the court first determines that a substantial probability exists that the person making the claim will prevail.

New Sec. 7. (a) No person or entity shall be subject to liability in a civil action for failure to report as required by section 3 or 4.

(b) The license of a person or entity licensed to practice as a health care provider may be revoked, suspended or limited, or the licensee subjected to public or private censure, by the appropriate state licensing agency if the licensee is found, upon notice and an opportunity to be heard in accordance with the Kansas administrative procedures act, to have willfully and knowingly failed to make any report as required by section 3 or 4.

(c) Willful and knowing failure to make a report required by section 3 or 4 is a class C misdemeanor.

New Sec. 8. ~~(a)~~ No employer shall discharge or otherwise discriminate against any employee for making any report pursuant to section 3 or 4.

~~(b) Any employer who violates the provisions of subsection (a) shall be liable to the aggrieved employee for damages for any wages or other benefits lost due to the discharge or discrimination plus a civil penalty in an amount not exceeding the amount of such damages. Such damages and civil penalty shall be re-~~

13)
(strike lines 262 - 268)

~~coverable in an individual action brought by the aggrieved employee.~~

New Sec. 9. (a) The legislature of the state of Kansas recognizes the importance and necessity of providing and regulating certain aspects of health care delivery in order to protect the public's general health, safety and welfare. Implementation of risk management plans and reporting systems as required by sections 2, 3 and 4 effectuate this policy.

(b) Health care providers and review, executive or impaired provider committees performing their duties under sections 2, 3 and 4 for the purposes expressed in subsection (a) ~~shall be agents of state agencies which license health care providers and all~~ immunity of the state from federal and state antitrust laws ~~shall be~~ extended to such health care providers and committees when carrying out such duties.

(c) Nothing in this section shall be construed to require health care providers or review, executive or impaired provider committees to be subject to or comply with any other law relating to or regulating state agencies, officers or employees.

New Sec. 10. The provisions of sections 1 through 9 shall be supplemental to K.S.A. 65-28,121, 65-28,122 and 65-4909, and amendments thereto, and shall not be construed to repeal or modify those sections.

New Sec. 11. As used in sections 11 through 15:

(a) The words and phrases defined by K.S.A. 1985 Supp. 60-3401 and amendments thereto shall have the meanings provided by that section.

(b) "Current economic loss" means costs of medical care and related benefits, lost wages and other economic losses incurred prior to the verdict.

(c) "Future economic loss" means costs of medical care and related benefits, lost wages, loss of earning capacity or other economic losses to be incurred after the verdict.

(d) "Medical care and related benefits" means all reasonable medical, surgical, hospitalization, physical rehabilitation and custodial services, including drugs, prosthetic devices and other similar materials reasonably necessary to provide medical ser-

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and peer review pursuant to KSA 65-4915 and amandments thereto,

and peer review pursuant to KSA 65-4915 and amendments thereto

and KSA 65-4915 shall have the

shall not be effective until the standardized written summary provided for in this subsection ~~(o)~~ is developed and printed and made available by the board to persons licensed by the board to practice medicine and surgery.

(p) The licensee has cheated on or attempted to subvert the validity of the examination for a license.

(q) The licensee has been found to be mentally ill, disabled, not guilty by reason of insanity or incompetent to stand trial by a court of competent jurisdiction.

(r) The licensee has prescribed, sold, administered, distributed or given a controlled substance: (1) For other than medically accepted therapeutic purposes; (2) ~~*to the licensee's self; (3) to a member of the licensee's family;*~~ *or (4) except as permitted by law, to a habitual user or addict.*

15) (strike (2) and (3))

(s) The licensee has violated a federal law or regulation relating to controlled substances.

(t) The licensee has failed to furnish the board, or its investigators or representatives, any information legally requested by the board.

(u) Sanctions or disciplinary actions have been taken against the licensee by a peer review committee, health care facility or a professional association or society for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

~~*(v) The licensee has failed to report to the board any adverse action taken against the licensee by another state or licensing jurisdiction, a peer review body, a health care facility, a professional association or society, a governmental agency, by a law enforcement agency or a court for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.*~~

16) (strike (v), (y) and (z))

(w) The licensee has surrendered a license or authorization to practice the healing arts in another state or jurisdiction or has surrendered the licensee's membership on any professional staff or in any professional association or society while under investigation for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under

this section.

(x) The licensee has failed to report to the board surrender of the licensee's license or authorization to practice the healing arts in another state or jurisdiction or surrender of the licensee's membership on any professional staff or in any professional association or society while under investigation for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

~~*(y) The licensee has an adverse judgment, award or settlement against the licensee resulting from a medical liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.*~~

~~*(z) The licensee has failed to report to the board any adverse judgment, settlement or award against the licensee resulting from a medical malpractice liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.*~~

(aa) The licensee has failed to maintain a policy of professional liability insurance as required by K.S.A. 40-3402 and amendments thereto.

(bb) The licensee has failed to pay the annual premium surcharge as required by K.S.A. 40-3404 and amendments thereto.

Sec. 35. K.S.A. 65-2837 is hereby amended to read as follows: 65-2837. As used in K.S.A. 65-2836 and amendments thereto and in this section:

(a) "Professional incompetency" means:

(1) One or more instances involving gross negligence~~; or~~, *as determined by the board.*

(2) Repeated instances involving ordinary negligence, *as determined by the board.*

(3) A pattern of practice or other behavior which demonstrates a manifest incapacity or incompetence to practice medicine.

(b) "Unprofessional conduct" means:

(1) Solicitation of professional patronage through the use of

lows: 65-28,121. ~~(a) If the medical staff of any firm, facility, corporation, institution or association which has granted practice privileges to, or which has employed or is employing, any person licensed, registered or certified by the state board of healing arts, recommends that the practice privileges of any such person be terminated, suspended or restricted for reasons relating to such person's professional competence or finds that such person has committed an act which is a ground for the revocation, suspension or limitation of such person's license, registration or certification under law, the chief of the medical staff shall immediately report the same, under oath, to the state board of healing arts. If the medical staff has not made such a recommendation or finding, but the governing board of any such firm, facility, corporation, institution or association has made such recommendation or finding, the chief administrative officer thereof shall immediately report the same, under oath, to the state board of healing arts.~~

~~(b) Any report made pursuant to this section shall contain the name and business address of the chief of the medical staff or the chief administrative officer making the report and of the person named in the report, information regarding the report, and any other information which the chief of the medical staff or the chief administrative officer believes might be helpful in an investigation of the case.~~ *(a) A medical care facility licensed under K.S.A. 65-425 et seq. and amendments thereto shall, and any person may, report under oath to the state board of healing arts any information such facility or person has which appears to show that a person licensed to practice the healing arts has committed an act which may be a ground for disciplinary action pursuant to K.S.A. 65-2836 and amendments thereto.*

(b) A medical care facility shall inform the state board of healing arts whenever the ~~medical care facility recommends that the~~ practice privileges of any person licensed to practice the healing arts be terminated, suspended or restricted or whenever such privileges are voluntarily surrendered or limited for reasons relating to such person's professional competence.

(c) Any medical care facility which fails to report within 30

17)

(strike "medical care facility recommends that the")

ATTACHMENT A

New Section_____

(a) In connection with the investigation by the board, the board or its duly authorized agents or employees shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documents, reports, records or any other physical evidence of any person being investigated, or the reports, records and any other documents maintained by and in possession of any hospital, clinic, physician's office, laboratory, pharmacy or any other public or private agency, and any other medical care facility, if such documents, reports, records or evidence relate to medical competence, unprofessional conduct, or the mental or physical ability of a licensee safely to practice the healing arts.

(b) For the purpose of all investigations and proceedings conducted by the Board:

1. The board may issue subpoenas compelling the attendance and testimony of witnesses, or demanding the production for examination or copying of documents or any other physical evidence if such evidence relates to medical competence, unprofessional conduct, or the mental or physical ability of a licensee safely to practice the healing arts. Within five days after the service of the subpoena on any person requiring the production of any evidence in his possession or under his control such person may petition the board to revoke, limit or modify the subpoena. The board shall revoke, limit or modify such subpoena if in its opinion the evidence required does not relate to unlawful practices covered by this act, is not relevant to the charge which is the subject matter of the hearing or investigation, or does not describe with sufficient particularity the physical evidence whose production is required. Any member of the board, or any agent designated by the board may administer oaths or affirmations, examine witnesses and receive such evidence.

(2) Any person appearing before the board shall have the right to be represented by counsel.

(3) The district court, upon application by the board or by the person subpoened, shall have jurisdiction to issue an order:

(i) requiring such person to appear before the board or the duly authorized agent to produce evidence relating to the matter under investigation; or

(ii) revoking, limiting or modifying the subpoena if in the court's opinion the evidence demanded does not relate to unlawful practices covered by this act, is not relevant to the charge which is the subject matter of the hearing or investigation, or does not describe with sufficient particularity the evidence whose production is required.

(iii) Any failure to obey an order of the court may be punished by the court as contempt.

(c) Patient records, including clinical records, medical reports, laboratory statements and reports, any file, film, any other report or oral statement relating to diagnostic findings or treatment of patients, any information from which a patient or his family might be identified, or information received and records kept by the board as a result of the investigation procedure outlined in this act shall not be available to the public.

, peer review or risk management records,

(d) Nothing in this section or any other provision of law making communications between a physician and his patient a privileged communication shall apply to investigations or proceedings conducted pursuant to this act. The board and its employees, agents and representatives shall keep in confidence the names of any patients whose records are reviewed during the course of investigations and proceedings pursuant to this chapter.

ATTACHMENT C

Amendments to Section 35:

(21) performing tests, examinations or services which ~~are unnecessary or~~ have no legitimate medical purpose. → unnecessary

(22) ~~excessively~~ charging ~~a patient~~ for services rendered. → an excessive fee

(23) prescribing, dispensing, administering, distributing a prescription drug or substance, including all controlled substances in an excessive, improper or inappropriate manner or quantity or not in the course of the physician's professional practice.

(24) repeated failure to practice medicine and surgery or chiropractic with that level of care, skill and treatment which is recognized by a reasonably prudent similar ~~physician~~ as being acceptable under similar conditions and circumstances. → practitioner

(25) obtaining fees by use of fraud, misrepresentation, deceit, trickery or other illegal means.

(26) failing to keep written medical records justifying the course of treatment of the patient, including, but not limited to, patient histories, examination results, and test results.

(27) delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified by training, experience, or licensure to perform them.

(28) using experimental forms of therapy without proper informed patient consent or without conforming to generally accepted criteria, standard protocols, or without keeping detailed legible records, without having periodic analysis of the study and results reviewed by a committee or peers.

ATTACHMENT D

Amendment to Section 34:

(cc) The licensee has practiced in an area of medicine and surgery or has performed a procedure for which the licensee does not have sufficent training or experience.

~~New Section~~

~~The Board may issue a conditional license restricting the licensee to practice only in the area of medicine and surgery consistent with the postgraduate training of the licensee. The Board may also specify by rule and regulation the type and amount of postgraduate training necessary to practice in a particular area of medicine and surgery.~~ (delete new section)

1/28 Slaughter

KANSAS MEDICAL SOCIETY
1300 Topeka Avenue · Topeka, Kansas 66612 · (913) 235-2383

Testimony of the Kansas Medical Society
on the
Peer Review, Risk Management and Reporting Requirements
of HB 2661

January 28, 1986

The Kansas Medical Society appreciates the opportunity to comment on the "quality assurance" provisions contained in HB 2661. We support, and were instrumental in drafting, the various provisions which give the Board of Healing Arts additional authority, require better reporting by health professionals and mandate risk management programs in hospitals. We have suggested several amendments, mostly technical or intended to clarify the sections, which I will discuss in a moment.

Unquestionably, health care providers, regulators, and legislators, all of us, must do everything possible to assure that the health care delivered in this state is of the finest quality. We cannot tolerate incompetent practitioners. The Kansas Medical Society is renewing its commitment to quality assurance activities, and I assure you we will do everything possible to support and participate in the strengthening of the quality assurance network. The peer review, risk management, disciplinary and reporting enhancements contained in HB 2661 probably represent the most comprehensive quality assurance approach found anywhere in the nation. We support these changes and believe they will be beneficial to the public health and welfare. Although we have not seen the bills recommended by the Governor in his legislative message, I believe we will generally support most of his recommendations, including the staff and budgetary enhancements for the Board of Healing Arts.

The quality assurance provisions of this bill create comprehensive systems of accountability for the actions of health care providers. We must also demand accountability from the Board of Healing Arts. Those responsible for its appointment, operations and policies must do their jobs, or share the responsibility for its shortcomings.

Our critics find it convenient to blame the malpractice problem on the "bad doctor." The misguided theory is that a few doctors are causing multiple suits and huge claims which have caused malpractice premiums to skyrocket. The available data just doesn't support that argument, however. Over 40% of all Kansas physicians have been sued at least once for malpractice, but I doubt anyone would concede that four out of ten physicians are incompetent. Almost 2/3 of the obstetricians in this state have been sued for malpractice, and over half of those have been sued 2-4 times. The dramatic increase in suits against obstetricians comes at a time when the infant and maternal death rates in our state have declined by about 50% in the last decade. In fact, our infant and maternal death rates are among the lowest in the nation. These reductions in rates are directly related to improved medical care of high risk mothers and newborns by well trained physicians and support systems and staff.

Attachment # 2
House Judiciary
1-28-86

We analyzed the data provided to the Interim Committee by the Health Care Stabilization Fund concerning the "bad doctors" - those physicians who have multiple claims against them. From the inception of the Fund through 1984, 115 physicians had more than one claim closed against them. The high in the group was a physician with 15 claims, 8 of which resulted in some payment to the patient. The group average was 2.8 claims per physician. Since the inception of the Fund through 1984, these multiple claim physicians accounted for about 16% of all the claims paid out of the Health Care Stabilization Fund, but only about 10% of the total dollars paid by the Fund. From this data we believe it is extremely difficult to conclude that the "bad doctor" theory has any significant affect on claim payments or insurance premiums.

The fact is that, for whatever reason, more suits are filed today than ever before in our history. This year there will be a medical malpractice lawsuit filed every working day. The explosion in the number of suits filed along with the staggering increase in awards and settlements have caused premiums to spiral to the point that we will collect $45-48 million from doctors, hospitals and other health care providers this year.

These statistics underscore the shortcomings of our tort system: there is no objective standard of liability; there is no definite measure of compensation; the entire process is conducted at a high level of emotion and subjectivity; the cost of litigation is enormous; there is no restraint mechanism to prevent unnecessary litigation; there is no encouragement for prompt settlement; and the system encourages higher and higher awards.

HB 2661 provides us with a tremendous opportunity to get a handle on the system. The malpractice problem is complex, and it demands a comprehensive solution. The three-dimensional approach contained in HB 2661 - insurance refinements, tort reform, and quality assurance enhancements - is the only way this problem can be addressed with some hope for success.

The quality assurance sections of the bill which are under discussion today are an important element in solving the malpractice problem. However, even the most rigorous peer review and quality assurance systems won't significantly reduce premiums, affect the frequency and severity of claims or solve the malpractice problem. However, a strong quality assurance system is in the public interest, and it must be done. The strength of this bill is that it for the first time provides a link between the Board of Healing Arts, hospitals, physicians in private practice, and the various professional associations, all for the purpose of better reporting and accountability. Provisions of HB 2661 will allow us to work cooperatively with the Board of Healing Arts in the identification, reporting and disciplining of health care providers. The requirement that hospitals implement risk management programs in conjunction with better reporting of negligence will require hospitals to give up a little autonomy in return for a better, systemwide approach to identification of problem areas.

The sections of the bill which deal with impaired professionals will allow the Board of Healing Arts to utilize the tremendous resources we have available to rehabilitate physicians, and at the same time assure that the public is protected.

Attached to this testimony are several amendments we are suggesting which we believe will improve the bill. We have only included those pages for which amendments are recommended. Additionally, we have included those recommendations of the Board of Healing Arts, with some suggestions, all of which we support. On the cover page to the amendments we have explained our rationale for each recommendation. Thank you for the opportunity to comment on the quality assurance sections of HB 2661.

DOCTOR DISCIPLINE:
A Necessary Cure for the Malpractice Crisis

Doubtless you have read or heard that an "epidemic" of malpractice suits is inflating the cost of health care because patients unavoidably injured in the course of their treatment—and the families of dead patients—are hiring greedy lawyers who take the doctors to court and then collect outrageously large awards.

Don't you believe it. Though precisely this argument is being used to justify anti-consumer changes in state laws that limit both the right of patients and their families to sue physicians and the size of awards for pain and suffering, it is far from the reality and is serving as a smoke screen for what is really going on.

Yes, it is true that there are some parts of the nation where doctors in certain specialties and subspecialties—obstetrics, for example—say they can no longer afford the ever-skyrocketing cost of malpractice insurance and are going out of business or threatening to.

And yes, there is occasionally a suit without merit. At the same time, however, two other things are also true and they are related. One is that the extent of actual doctor negligence—which is what malpractice is—is far greater than the public has been led to believe. The other is that lax discipline of incompetent physicians is largely to blame.

Said another way, soaring malpractice rates are less the product of lawyers and their clients trying to take innocent doctors for all they are worth. Instead, they are largely the result of efforts by organized medicine—chiefly the American Medical Association and its state affiliates—to make lawyers and their clients take the heat for the failure of physicians to hold the feet of their own colleagues to the fire.

Lest you doubt it, consider a Public Citizen-Health Research Group report, *Medical Malpractice: The Need For Disciplinary Reform, Not Tort Reform*, made public last summer. Here are some of the findings of the report:

- Of a total of nearly 400,000 patient care doctors in the United States, only 563 have been put on probation or had their licenses suspended or revoked, according to data collected by the State Federation of Medical Boards. Yet studies suggest that patients are seriously injured or killed by the errors made by doctors at least 136,000 times a year and perhaps as many as 310,000 times annually. Thus there are far more patient injuries than a mere 563 doctors could inflict.
- In a December 1984 story about doctor-owned malpractice insurance companies (in a publication for doctors called *Internal Medical News*), Dr. James Todd of the American Medical Association is quoted as saying that "95 per cent of our indemnity dollars go to pay claims that by medical peer review are indefensible."

In others words what Todd was saying was that, instead of being frivolous, all but five per cent of claims paid for medical malpractice can, to his knowledge, be traced to unforgivable physician errors of judgment and other mistakes.

- A California study, reported last July in *Medical World News* magazine, found that only a tenth of patient injuries in that state that were due to error by doctors ever resulted in a lawsuit. Thus, for every plaintiff award in that state there were ten potential suits which the patient—or the patient's survivors—would probably have won, had the matter been legally raised.

Another way to look at this entire problem is to ask at what rate the various state medical boards are disciplining the doctors within their jurisdictions. The nationwide rate—1.45 disciplinary actions (suspension or revocation of license or probation) per 1,000 physicians—in itself says that incompetent physicians can be pretty sure they can get away with injuring patients or even with downright murder. But more instructive still is a look at the rate of increase in malpractice premium rates in states where the insurance has been particularly costly; especially for doctors in the "high risk" surgical specialties, of which obstetrics is one.

New York and Florida are cases in point. (See the accompanying chart to find out how your state ranks.) Both are states where the insurance is notably costly for such doctors. Yet in New York, the state with the biggest increase in malpractice premiums this year, there were only .49 disciplinary actions for every 1,000 physicians (21 actions per 42,063 M.D.'s) in 1983, the latest year for which figures are available.

By contrast, Florida, in the same year, took 4.15 disciplinary actions per 1,000 physicians. The upshot is that while there have been recent increases in malpractice insurance for Florida physicians, they have not been as steep as those New York practitioners now face.

Or consider the experience in Massachusetts, another state with large increases in the cost of malpractice insurance. There a study of 5,612 surgical admissions to Boston's Peter Bent Brigham Hospital, a distinguished teaching institution affiliated with Harvard Medical School, found that 36 patients suffered adverse outcomes "due to error during care." And surely the track record of many other Massachusetts Hospitals is at least as bad or worse.

Yet, to again cite 1983 figures, only two serious disciplinary actions against doctors were taken in the entire state of Massachusetts. Contrast that with the 71 serious actions taken in the same year in Florida, and it quickly becomes apparent why malpractice premium hikes are lower from a percentage perspective for Florida M.D.s than they are for their Massachusetts counterparts.

There is a link between malpractice insurance rates and how vigorously a state does or does not keep tabs on the quality of medical care. The more that punishment is meted out to incompetent doctors, the less that competent doctors are penalized. And the reverse is also true.

Public Citizen Health Research Group

Attachment 3
House Judiciary
1-28-86

What it all boils down to is that increases in medical malpractice premiums for competent physicians would slow down if steps were taken to tighten the screws on incompetent doctors and so reduce the amount of malpractice.

Specifically, the Public Citizen-Health Research Group recommends that:

1. Annual licensure fees for doctors be raised to at least $500 a year (from $5-150 today, with most states' fees under $100), with all the proceeds used to identify and discipline physicians who are incompetent or otherwise practicing bad medicine. This would create an annual fund of $200 million for states to use for this purpose, far more than they have now.

2. State legislatures enact stronger doctor discipline laws as has already occurred in Florida, Kentucky, California and a few other states. Experience has shown that malpractice premium rates increase less steeply in such states than in the majority of states where discipline of doctors is either nonexistent or lax.

3. Insurance companies be forced to charge doctors whose competence is questionable more for premiums than they charge other physicians. As things now stand, excellent doctors in high risk specialties and subspecialties who have not lost malpractice suits or made settlements out of court—if indeed they have been targets of legal actions at all—must pay premium rates as high as doctors that have been repeat losers in malpractice actions. This unfair practice forces good doctors to subsidize the bad apples and should be changed.

4. Records of lawsuits involving malpractice actions which result in the payment of claims to injured patients (or their families) be turned over in detail to state medical licensing boards. At present, cases are often settled with the proviso that this information not be disclosed to the boards or anyone else. This deprives boards of the data they need to protect the public against incompetent physicians.

5. Information collected on the performances of doctors who take care of Medicare and Medicaid patients also be made a part of the files on every practicing physician kept by state licensing boards. Although every state now has a Professional Review Organization (PRO) that reviews the performance of physicians who participate in Medicare and/or Medicaid, this is not routinely done now.

6. Doctors be required to be periodically recertified on the basis of written exams and an audit of their performance such as a review of a representative sample of their medical records. ■

MEDICAL MALPRACTICE: WHAT CAN YOU DO?

Soaring medical malpractice insurance rates affect the cost of health care for everyone because the premium increases get passed along to the consumer and taxpayer in the fees doctors charge.

But that's only half the story. As importantly, anyone can be needlessly injured, often irreparably, or even killed by an incompetent physician. That could be you or someone you love.

You can do your part to protect yourself and your family against practitioners of bad medicine by writing the people who represent you in your state legislature. When you write, tell them of the six measures we advocate to correct the problem and urge them to enact them into law.

Almost $3 billion a year is now being spent to settle malpractice claims. If just 7 per cent of that sum—$200 million—were made available for disciplining untrustworthy doctors by charging every doctor $500 a year for a license, this alone would make for safer medicine and help to moderate the cost of care.

It would also be a bargain for the vast majority of physicians who are well qualified to practice medicine and do so conscientiously. As things now stand, some pay $10,000 a year and sometimes much more for malpractice insurance. And their rates continue to escalate. It is reasonable to expect that these increases would level off and that premiums might even drop if fewer incompetent physicians were free to inflict injuries on an unsuspecting public.

Following is a chart ranking all states by the rate of serious disciplinary actions taken against doctors. As can be seen, of states reporting one or more disciplinary actions, Utah had the highest rate with 5.20 suspensions, revocations or probations per 1000 doctors. Massachusetts was the lowest of states with any disciplinary actions reported with 0.14 such actions per 1000 physicians. In other words, the rate of doctor discipline in Utah was 37 times higher than it was in Massachusetts. *Where Does Your State Rank?*

Turn the page to find out how inadequately doctors are being disciplined in most of your states . . .

SERIOUS MEDICAL DISCIPLINARY ACTION: REVOCATIONS, SUSPENSIONS & PROBATIONS

IN 1983 BY STATE MEDICAL LICENSING BOARDS[1]

State	Rank	Actions per 1000 Doctors	Total Serious Actions	Revocations	Suspensions	Probations	Non-Federal Patient Care Doctors[3]
UT	1	5.20	12	6	0	6	2306
GA	2	4.25	32	4	9	19	7521
FL	3	4.15	71	36	14	21	17105
AR	4	3.27	9	4	5	0	2753
AZ	5	3.22	15	5	4	6	4665
MI	6	3.00	41	7	21	13	13666
NJ	7	2.83	38	9	20	9	13416
MO	8	2.70	20	5	2	13	7396
CO	9	2.50	13	5	2	6	5209
KY	10	2.32	11	2	2	7	4736
CA	11	2.29	117	29	26	62	50981
VA	12-13	2.26	20	4	3	13	8816
HA	12-13	2.26	4	1	0	3	1766
NM	14	2.11	4	2	0	2	1899
AK	15	2.02	1	1	0	0	493
ME	16	1.84	3	3	0	0	1628
OR	17	1.80	8	1	0	7	4443
WY	18	1.78	1	1	0	0	559
NV	19	1.70	2	0	0	2	1174
LA	20	1.42	9	2	5	2	6322
NE	21	1.37	3	1	1	1	2189
SD	22	1.29	1	1	0	0	775
SC	23	1.27	5	0	5	0	3944
NC	24	1.21	10	7	1	2	8266
IN	25	1.20	8	0	3	5	6675
IA	26	1.15	4	1	0	3	3474
ND	27	1.14	1	0	1	0	870
WI	28	1.11	8	6	2	0	7204
MN	29	1.09	8	3	1	4	7276
CT	30	0.85	6	2	1	3	6986
OH	31	0.65	11	6	5	0	16671
TX	32	0.62	13	7	4	2	21024
OK	33	0.53	2	0	0	2	3786
NY	34	0.49	21	13	3	5	42063
PA	35	0.48	10	3	3	4	20937
IL	36	0.45	9	2	4	3	19842
WA	37	0.43	3	0	1	2	6926
TN	38	0.42	3	1	1	1	6887
MS	39	0.37	1	0	1	0	2672
MD	40	0.30	3	0	0	3	9866
MA	41	0.14	2	1	1	0	13697
DE	42	0.00	0	0	0	0	955
VT	42-51	0.00	0	0	0	0	996
MT	42-51	0.00	0	0	0	0	1003
ID	42-51	0.00	0	0	0	0	1024
NH	42-51	0.00	0	0	0	0	1455
RI	42-51	0.00	0	0	0	0	1797
WV	42-51	0.00	0	0	0	0	2540
DC	42-51	0.00	0	0	0	0	2628
KS	42-51	0.00	0	0	0	0	3472
AL	42-51	0.00	0	0	0	0	4708
TOTALS (all states)		**1.45**	**563**	**181**	**151**	**231**	389467

[1] With the exception of California, all data is from the Federation of State Medical Boards (FSMB). We obtained California data from the California Boards of Medical Quality Assurance and Osteopathic Examiners. Data for Florida, Michigan, Arizona, New Mexico, California, Washington, Pennsylvania, Tennessee and West Virginia combine M.D.'s with D.O.'s (Doctors of Osteopathy).

[2] Public Citizen Health Research Group tabulations are of the most serious disciplinary actions by State Boards (Revocations, suspensions and probations) and therefore do not include reprimands and other less serious actions. In addition, many such less serious actions were not reported to FSMB by every state in 1983. We also do not include voluntary surrender of license, approval or denial of requests for change in disciplinary status or actions taken as a consequence of actions by other states. FSMB included these "actions" in their tabulations.

[3] Number of non-federal patient care doctors as of 12/82 from A.M.A.: Physician Characteristics and Distribution in the U.S.

Case Two: Trying to Start Over

Wichita Eagle-Beacon 12/16/85

Convicted Osteopath Seeks Return to 'First Love'

By Jim Cross
Staff Writer

Thomas Johnston is out of jail and wants to practice medicine in Kansas again.

"That's my first love, helping people," says Johnston, who now works for a Lenexa real estate company.

The Prairie Village osteopath got out of federal prison in April, after serving more than two years on a conviction for using prescriptions to help drug addicts obtain narcotics.

Some people involved in the case say Johnston shouldn't get his license back.

"This kind of activity from a doctor is the lowest of the low," said Prairie Village lawyer Jim Cashin, whose son was a key witness against Johnston in a 1980 drug trial. "It would be a gross miscarriage of justice to allow this guy to assume any kind of position of responsibility again."

The Kansas Board of Healing Arts will decide what to do. And right now, one of the board's lawyers says he doesn't plan to op-

● JOHNSTON, 11A, Col. 1

"I suppose I'd say, yes, I've been rehabilitated, although I never felt like I did that much wrong."

— Thomas Johnston

After Serving Time, Osteopath Wants to Resume Practice

● JOHNSTON, From 1A

pose Johnston's request to get his license back.

"I would say his chances are fairly good, better than 50 percent," said Don Strole, who will advise the board on its legal position in Johnston's case.

STROLE SAID that Johnston, a 57-year-old osteopath who got his medical license in 1965 from the Kansas City College of Osteopathic Medicine, has good references from people who knew him in prison and that "evidently the criminal authorities think he's safe."

If Johnston gets his license back, it won't be the first time the Kansas Board of Healing Arts has waived stiffer penalties and given him another chance:

● While Johnston was on trial in 1980 on nine federal drug charges, the board let him keep his license. Board officials learned of Johnston's case when they saw his name in the newspapers, after criminal charges had been filed.

● When Johnston was convicted on all nine counts, the board still let him keep his license. Prosecutors labeled Johnston "a drug pusher in a white coat." They produced records showing Johnston prescribed more bottles of a heroin-like painkiller in one year than an entire hospital did. But after a judge placed him on probation, Johnston kept his medical license by signing an agreement with the Board of Healing Arts that he would not prescribe any legally restricted drugs.

● Johnston still was legally practicing medicine in March 1983 when he was arrested in a Kansas City park in a misdemeanor sex case that police said involved drugs.

● In November 1983, Johnston's probation had been revoked and he had been in federal prison for six months before the board agreed to drop its efforts to revoke his license if he voluntarily would surrender it.

IN AN interview recently, Johnston said he got out of prison April 2, after serving 25 months. Parts of his sentence were served in various federal penal centers, including Springfield, Mo.; Terre Haute, Ind.; and Sandstone, Minn.

"I suppose I'd say, yes, I've been rehabilitated, although I never felt like I did that much wrong," Johnston said in an interview in October.

Johnston said he never was aware that any of his patients were drug addicts or that they were selling his prescriptions on the streets. "At the time, I wasn't aware of what those people were doing," he said. "It was poor judgment, but I didn't know what was going on and I wasn't part of it."

At least two law enforcement officers who worked on Johnston's case in 1980 say they oppose his efforts to get his license back.

ONE OF them is Terry Woodworth, who is in charge of the Drug Enforcement Administration's effort in Kansas City to track legally restricted drugs that are diverted from legal channels. When Johnston was convicted in 1980, the DEA revoked his "DEA number," a federal permit to prescribe controlled drugs.

"Let me put it this way — as long as I'm here, he'll never get his DEA number back," said Woodworth. "The guy absolutely is not fit to practice medicine."

Richard Darnell, a former undercover agent who worked for the Johnson County investigations squad on Johnston's case, also doesn't think Johnston should get his license back. He criticized the Board of Healing Arts for not revoking Johnston's license when he first was convicted in 1980.

"I had been working closely with the state Board of Pharmacy and the state Board of Nursing," Darnell said recently. "We had a good relationship with them. But the Board of Healing Arts was another story. Talking to them was like talking to a wall. We got no cooperation at all. They said they couldn't do anything because Johnston might appeal or something."

WORKING WITH the Drug Enforcement Administration, police in Johnson County began building a case against Johnston in January 1979. The agents were trying to find out where a group of Prairie Village drug abusers was getting Dilaudid, a heroin-like painkiller designed for terminal cancer patients. The drug was selling for $20 to $50 a pill on the streets.

Clues pointed to Johnston being involved, investigators said. Pharmacy records showed known drug abusers getting his prescriptions. For $15 an office call, drug addicts were returning time and again to Johnston for virtually everthing in the street user's medicine chest: Dilaudid, Demerol, Eskatrol, Percodan, Ritalin, Dexadrine and Biphetamine, according to police and prosecution records.

Sheriff's Detective Vince Werkowitch was assigned to go undercover. He scheduled an appointment with Johnston for the first time in March 1979. "I made

up my story on the way over to his office," Werkowitch said recently.

REPORTS BY Werkowitch and other undercover agents in March and April 1979 show Johnston not only gave them medically unnecessary prescriptions, but also talked openly with them about the drugs' illegal uses.

- "As Dr. Johnston wrote the prescription, he told this officer, 'If you tell anyone, I'll kill you,'" said Werkowitch's March 20, 1979, report. "Dr. Johnston then changed his mind and said, 'I'll just kick your butt.'"
- "Dr. Johnston asked if this officer knew or noticed that Eskatrol had a tendency to keep the user from climaxing so soon," said Werkowitch's March 27, 1979, report. "Dr. Johnston also advised that just before the weekend, all the 'studs come in and get the stuff.'"
- "At one point, Dr. Johnston referred to Biphetamine as 'black beauties,' the street name for biphetamine," said Werkowitch's April 11, 1979, report. "Dr. Johnston said something to the effect that when 'you put one on the table, I'll bet you get a line a mile long.'"

Werkowitch taped a phone conversation on March 30, 1979, in which he asked Johnston for a refill of Eskatrol.

Johnston: You've already gone through that you rascal?

Werkowitch: (laughs).

Johnston: Them truck-drivin' specials, don't sell them or I'm gonna castrate you.

Werkowitch: (laughs) Well, uh ...

Johnston: Well, uh, yeah, you better stutter, you fart.

Johnston's April 1980 trial made sensational headlines in Kansas City newspapers, especially when prosecutors charged that Johnston had traded some prescriptions in return for sex with male patients — and that he had flirted with male undercover drug agents.

"Dr. Johnston referred to this officer as a 'cute little devil,'" said one detective's report from April 17, 1979. "... The entire time that Dr. Johnston was talking to this officer, Dr. Johnston kept pulling on this officer's beard, placing his hand on this officer's thigh and rubbing his groin against this officer's knee."

MORE IMPORTANT was the testimony of Michael Cashin, a 20-year-old waiter who recounted how he and his friends went back to Johnston as many as two or three times a week for refills of drugs they were selling on the streets.

"We always knew (we) had a line on Johnston and whoever else, and (he) would sell a lot of drugs going around at the time," Cashin testified in the trial.

Johnston denied the charges during the trial, but he was convicted, sentenced to 3 years in prison and then placed on probation.

Eight months later, in a December 1980 hearing before the Board of Healing Arts, Johnston again denied any guilt. He said he had been entrapped by the police, tricked by his drug-abusing patients and overwhelmed by his own workload.

"The problem is when you are treating 50 or 60 patients a day, and people come in with these stories, (and) a lot of things — you don't remember whether it was a week ago or two weeks ago or two months ago that you did the prescription," Johnston's lawyer told the board.

THE BOARD found that Johnston had violated Kansas medical-license laws prohibiting doctors from negligently or improperly prescribing controlled substances, but let him keep his license on the condition that he not prescribe any controlled drugs for five years.

Less than three years later, Johnston was in trouble again. On March 15, 1983, police arrested Johnston in Penn Valley Park in Kansas City. He was accused of performing a homosexual act in public. The misdemeanor case probably wouldn't have caused Johnston's probation to be revoked, except that police found drugs in Johnston's car.

"As (Johnston) and the kid were crawling back into the Cadillac, they threw a wad of syringes onto the floorboard," said Woodworth of the Drug Enforcement Administration. "The laboratory found a trace of cocaine in one of them."

JOHNSTON DIDN'T fight when federal prosecutors moved to revoke his probation. "Dr. Johnston and his attorney admitted that Dr. Johnston had injected the other party with whom he was arrested with prescription drugs prior to engaging in the act in public for which he was arrested," said Assistant U.S. Attorney Amanda Meers in a letter to the board.

Johnston's parole was revoked April 13, 1983, and he was ordered to serve out the rest of his original 3-year sentence. Six months later, Johnston was in prison when the Board of Healing Arts received a letter from his attorney, Michael Drape.

"He has advised me that at this time he wishes to surrender said license," Drape wrote on Nov. 3, 1983. "We are looking for the physical license and because of his situation I am not sure we will locate it."

Today, eight months after he left prison, lawyers for the Board of Healing Arts are receiving letters from Johnston's friends and associates supporting his request to get his license back. A date for a hearing on the request has not been set.

Critics say Kansas too easy on incompetent doctors

Kansas - state y -

By Jenny Deam
and Eric Palmer
staff writers

FEB 24 1985 SUN

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The Kansas Board of Healing Arts was created a generation ago for doctors to protect the public against incompetence by policing their own ranks.

But the handling of some recent cases has raised questions about just who is being protected.

Critics contend that the 13-member board takes months, sometimes years, to review public complaints, leaving the public vulnerable against potentially bad doctors.

And even when action is taken, the outcome of disciplinary proceedings has shown an inability or unwillingness by board members to take a firm stand against their peers, say other doctors, patients and their lawyers.

Last year, four doctors out of the 4,188 practicing medical doctors, doctors of osteopathy and chiropractors in Kansas lost licenses, according to board officials.

During the two years before that, only one doctor per year lost his license.

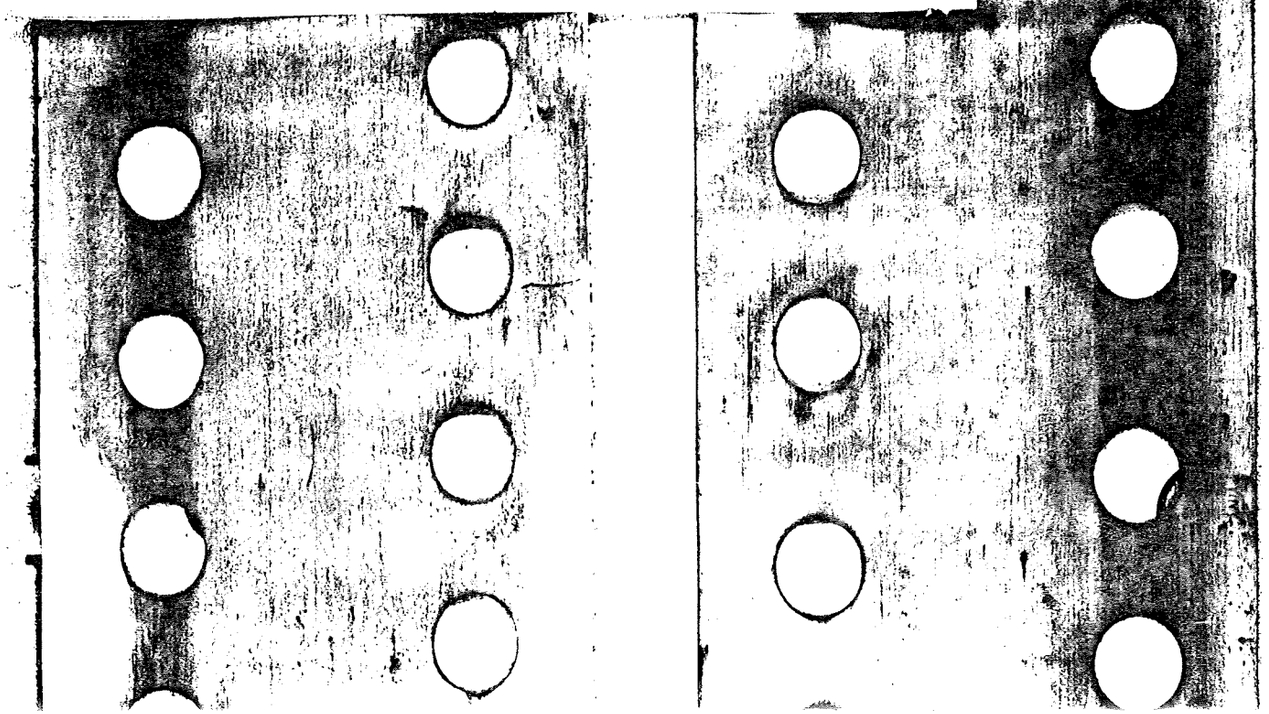
In one 1982 case, the board decided not to discipline a well-known Wichita physician who had been sued five times for performing allegedly unnecessary rectal surgery on small children.

An expert witness from California who came to Kansas to testify at the proceedings found the outcome unsettling.

"The final verdict came down skewed in favor of protecting the doctor," Dr. David Fleisher, a pediatrician from Los Angeles, said in a recent interview.

Board members and staff deny that

See Doctors, pg. 12A, col. 1



they c... ot take a firm stand against doctors when it is appropriate.

"We are not headhunters," said Betty Jo McNett, the board's president and only lay person member. "We investigate any complaint that comes before us but we don't try to find doctors that need discipline.

"All the doctors (on the board) . . . are open-minded and fair and we do protect the public."

Board members and staff say they have taken steps, including the addition of two full-time lawyers in the last two years, to promote a more aggressive stance in disciplining bad doctors.

They concede the board has been slow in handling some cases, but say it does the best it can within the framework allowed by state lawmakers.

The discipline process is slow and "cumbersome" but is necessary to ensure due process rights for accused doctors, board officials say.

"Until we prove the case we can't say someone can't practice medicine," said Donald Strole, the board's general counsel since 1983.

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In 1957 Kansas lawmakers created the medical regulatory board, which is composed almost entirely of doctors and is financed by doctors' license fees.

Currently it is made up of five medical doctors, three doctors of osteopathy, three chiropractors, one podiatrist and one lay person. Each member is appointed by the governor and paid $35 for each of their bimonthly meetings, plus expenses.

During the last year an estimated 150 complaints were lodged against doctors across the state. But board officials say the vast majority of those did not warrant board action.

In the four cases in which licenses were lost, one was surrendered by a doctor already in prison after being convicted of trading drugs for homosexual acts. Another was from a doctor with a drinking problem who gave up his license on the condition his name not be made public. His license has since been reinstated.

A doctor accused of incompetence in obstetrics surrendered his license and now practices in California. The fourth case involved a resident doctor at the University of Kansas Medical Center who submitted false medical school credentials.

By comparison, in Missouri, which has more than twice as many doctors as Kansas, there were seven times as many licenses revoked or surrendered during 1983—28 out of the 8,745 practicing in the state.

And Missouri's Board of Registration for the Healing Arts currently is seeking to restrict the license of the president of the Missouri State Medical Association, who is accused of gross negligence and misconduct.

Gary Clark, executive secretary of the Missouri board, said the process takes more time than he would like but that the most serious cases are always dealt with first to provide the most protection for the public.

"We have a good system in Missouri," he said. "There is no question about it. The public is protected."

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In Kansas, it is not the licenses revoked that have brought the most public comment. It is those that have not been.

For example:

• Dr. Earl Sifers, a general surgeon with offices in Merriam and Kansas City, Kan., has been sued 18 times in the last four years for malpractice. Some of those patients allege he performed unnecessary mastectomies—the surgical removal of a breast—and all claim he botched treatment after the surgery.

He has been barred from performing breast surgery at Bethany Medical Center and his surgery has been restricted at Shawnee Mission Medical Center.

Dr. Sifers has maintained in sworn testimony that he has one of the best surgical records in Kansas City.

Recently he filed a multimillion-dollar suit against Shawnee Mission Medical Center in an attempt to get his privileges there reinstated. He contends the action against him by the hospital was arbitrary and damaged his reputation.

Mr. Strole said the board began reviewing the Sifers case two years ago when it learned malpractice suits had been filed. He said it will still be several months before a decision is rendered on whether there is "probable cause" to call a license revocation hearing.

The board already has required Dr. Sifers to get a psychological and neurological evaluation. The Mayo Clinic in Minnesota gave him a clean bill of health, Mr. Strole said.

The board also has sent pathology reports on some of Dr. Sifers' patients to other doctors for review.

But Mr. Strole said that because Dr. Sifers is no longer doing mastectomies, the case may be dropped.

Ms. McNett said, however, she questions whether the case has moved quickly enough.

"I don't feel the public is being adequately protected in this instance," she said.

Dr. Gordon Maxwell, a Salina obstetrician and gynecologist who has been on the board since 1979, disagrees.

"I'm certain from the public's viewpoint it looks like we're sitting on it, but in real terms, in legal terms, we're doing everything we can," he said.

• Dr. Richard Brownrigg, a Dodge City urologist and former mayor, was convicted last fall of shooting his ex-wife's boyfriend five times. Although Dr. Brownrigg contended he acted in self-defense, he was sentenced to three to 10 years in prison on an aggravated battery charge.

Dr. Brownrigg was summoned to Topeka last December for a license revocation hearing, but the board voted unanimously to allow him to continue his practice. Mr. Strole said the doctor "made a very favorable impression" on the board.

He defended the board's action, saying the shooting did not directly affect Dr. Brownrigg's medical practice and no patients have complained.

But Dan Love, Ford County attorney, said he questions the board's lack of action against a convicted felon. He said that during the trial he pointed to the apparent conflict between shooting a man and a doctor's sworn oath of protecting human life.

Mr. Strole said the board did not see it that way.

"There was no evidence this is anything but an isolated incident," he said.

Dr. Brownrigg is now appealing his conviction. Should he be imprisoned, Mr. Strole said he would urge that the doctor be allowed to continue his practice behind bars.

• Dr. Clifford Jones, a Wichita general practitioner, had his license suspended because of drinking, but it was reinstated with a signed agreement by the doctor not to drink, board members said.

He was called back before the board in March 1981 on new complaints of a drinking problem.

At that hearing, some board members said they believed Dr. Jones' speech was slurred and he appeared intoxicated. It was decided, however, that no action would be taken that day, according to board members.

On his way home from the Topeka hearing, Dr. Jones was killed in a one-car accident on the Kansas Turnpike. Kansas Highway Patrol reports show his blood alcohol level was 0.31 percent—more than three times the legal limit of intoxication.

Dr. Maxwell defended the board's lack of action. "We don't have the power to arrest people," he said.

• Dr. Medo Mirza, a Wichita pediatric surgeon, was called before the board in 1982 after five malpractice suits claiming unnecessary surgery on children were settled out of court.

It took six days of hearings over two months to hear what some call the most emotional case ever to come before the board.

On one side were parents and doctors who alleged that Dr. Mirza had performed rectal surgery after misdiagnosing a rare intestinal condition.

Jan Vyff Payne of Wichita said in an interview that her 2-month-old daughter was taken to the doctor for constipation. Shannon Vyff was diagnosed as having Hirschsprung's disease, or a lack of nerve endings in the lower portion of her large intestine and rectal area. Other doctors testified that she did not have the disease.

Eventually Shannon underwent 23 surgeries by the time she was in the first grade to correct the damage done by the original surgery by Dr. Mirza, her mother said.

On the other side were parents who said the surgeon had saved their children's lives. They believed he was being persecuted.

In the end, the board concluded there was not enough evidence to revoke the doctor's license.

But now, three years later, there has been some rethinking. Ms. McNett concedes all of the evidence may not have been presented because the board's part-time attorney was not fully prepared.

Gerald Michaud, a Wichita lawyer who specializes in malpractice cases, called the proceeding a "whitewash."

Mr. Michaud was the plaintiffs' attorney in the suits against the surgeon and said he was told by the board's appointed attorney that he could assist in its case against the doctor. He contends he had years' worth of evidence about the case that could have been presented.

But the lawyer said he was barred by the board from assisting.

Instead, the case was handled solely by Topeka lawyer Wallace Buck, the board's appointed attorney.

Mr. Buck said in a recent interview he could not recall why Mr. Michaud was not allowed to assist in the case. He said he believed the reason may have been that the presence of Mr. Michaud may have been too inflammatory.

"We weren't in there necessarily to take a doctor's license," he said. "It was to present all the evidence."

He said he believed all of the evidence was indeed presented and the outcome of the case was correct.

Mr. Strole said, however, that the board may have erred in not allowing Mr. Michaud to participate. "Michaud would be in there if I had anything to say about it," he said.

Dr. Fleisher, a clinical professor of pediatrics at the University of California at Los Angeles and pediatrician at Cedars-Sinai Medical Center, testified at the hearing about three of the five children allegedly misdiagnosed by Dr. Mirza. Following their initial surgery by Dr. Mirza, Dr. Fleisher became the children's doctor.

He said he was surprised by the board's decision not to discipline Dr. Mirza. He contended in a recent interview that the board was "working at protecting the rights of the doctor with, perhaps, not enough consideration for the vulnerability of the patients."

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Seeing a problem in disciplining the state's doctors, legislators last year approved a bill designed to bolster the board's effectiveness.

Born out of the Senate's Ways and Means Committee, Senate Bill 507 both added a full-time prosecutor to the board's staff and created independent review panels to decide the merit of complaints against doctors.

But those close to the board see the new law as a mixed blessing.

On one hand they applaud the addition of a prosecutor, a position they say has been needed to aggressively handle cases. But on the other hand, the board sees the review panels as another layer in an already burdensome process.

Prior to last year, the board relied on appointed attorneys to act as prosecutor at discipline hearings. Mr. Strole said that often those attorneys were unfamiliar with the cases they were expected to handle.

In September, Topeka lawyer Larry Buening assumed duties as the board's prosecutor, becoming the board's second full-time staff attorney.

But even with that change, some say the board's problems of inaction are so deeply ingrained that the addition of one lawyer will not solve them.

Staff and board members alike criticize the addition of review panels to the discipline process.

Mr. Strole said the added step will "allow the doctor another vehicle to escape liability."

Currently, when a complaint against a doctor is lodged, it goes first to Mr. Buening and the state's lone investigator for review. By comparison, Missouri has a staff of seven investigators.

If merit is found by Mr. Buening, the complaint is forwarded to the review panel—an independent committee composed of three doctors within the same medical field. If the panel decides there should be further action, the case is sent to the board for a hearing.

"I don't feel the review committees are necessary," said Ms. McNett.

Mr. Strole said the board has recently taken steps to deal with potentially dangerous situations more quickly.

As in the Sifers case, he said the board has begun seeking agreements from doctors to limit their practice or voluntarily cease the part of their practice that is causing complaints. That way, Mr. Strole said, the public is protected but the doctor can keep his license.

Both Mr. Buening and Mr. Strole complain of a lack of cooperation from state agencies as they gather information to launch an investigation.

Mr. Strole said the state Department of Insurance repeatedly has failed to provide information about doctors who are the subject of repeated malpractice cases. He claims the insurance department, which administers the state's malpractice fund, has evidence that would be useful in investigations.

A measure was introduced this year by the state Senate's Judiciary Committee to force the insurance department to turn over documents to the board.

Officials with the insurance department say the only records denied are those about malpractice cases that a court has ordered closed.

Case Three: A Question of Ethics

Wichita Eagle-Beacon 12/17/85

Female Patients Claim Affairs With Psychiatrist

By Jim Cross
Staff Writer

Under oath, Vicki Hyland said she once adored psychiatrist Robert Stein.

She remembered the first time he kissed her, she said, in her room at a Manhattan hospital in 1977.

"I felt a burning sensation in my body and I realized I was feeling, at least at that particular moment and from then on, something more than just a spiritual type of love," said Hyland.

But she later sued Stein, claiming her affair with him while in treatment had broken up her marriage, gotten her excommunicated from her church and deepened her psychological problems. The lawsuit said Stein was the father of her youngest daughter.

Stein denied he was the father of Hyland's child. In fact, he said, he never had sex with Hyland. But Stein's Kansas medical license was revoked in 1980 after the Kansas Board of Healing Arts investigated Hyland's complaint.

Determined to keep practicing, he left Kansas and eventually joined the Army. Hoping for overseas duty that would help put his problems behind him, he said, he didn't tell the Army what had happened in Kansas.

BUT STEIN'S Kansas license problems caught up with him in November when Army officials handed the 56-year-old chief of psychiatry at Fort Carson in Colorado an involuntary discharge.

A series of military investigations into Stein's case — including new allegations he had an affair

● STEIN, 9A, Col. 1

"If the Army had chosen to investigate, they could have found out about the Kansas revocation. All it took was a phone call."

— Dr. Robert Stein

Stein Says Army Didn't Give Him a Fair Hearing

● STEIN, From 1A

with a woman he treated while in the Army — raised controversy in Washington over the Army's procedures for checking doctors' backgrounds.

Public records and interviews with medical officials reveal blind spots and communication gaps — starting in Kansas — in the medical-disciplinary system that has dealt with Stein:

- It wasn't until 10 years after Stein lost his job at a Manhattan psychological clinic in 1970 — over what he says was his first sexual affair with one of his own patients — that the state Board of Healing Arts learned of that case.
- The Board of Healing Arts first investigated Stein in 1980, only after Hyland and another woman sent affidavits to the board saying Stein had sexual affairs with them while he was treating them.
- Stein's medical license was revoked in late 1980. But by the time a Kansas judge in 1981 rejected Stein's appeal to get his license back, Stein already had been given a job as a psychiatrist at a Veterans Administration hospital in Colorado.
- Stein's application for Army active duty in August 1981 was granted without challenge.

"The Army did not know his license had been revoked in Kansas," said Tansill Johnson, spokeswoman for the Army Surgeon General's office in Washington. "His case was one of several that has caused the Army to make the system more strict."

DURING AN interview in October at the hospital on the Fort Carson Army Base in Colorado Springs, Stein had tears in his eyes while talking about his problems with the Army.

He said he'd like to come back to Kansas after he leaves the Army.

"I had hoped to contact the three state hospitals in Kansas to see whether they have an opening and ask for an interview," he said. "I probably will still do that. I consider myself more of a Kansan than anything else because I lived in Kansas from 1956 to 1980."

The Kansas Board of Healing Arts already has sent Stein a letter requesting he come to Kansas for an interview with the staff or the board.

"It will be an attempt to get his side of the story and determine whether there is any evidence he should not be allowed to practice," said Don Strole, one of the board's two lawyers.

STEIN'S AFFAIRS with patients were the subject this year of a series of articles in the Army Times, a suburban Washington newspaper that covers the Army and has widespread readership throughout the country and overseas. Those articles also raised new charges that Stein had sex with a woman he treated after joining the Army.

Stein refused to be interviewed for those articles, but during an interview with The Wichita Eagle-Beacon in October he denied charges of any misconduct while in the Army. Stein said the Army's reaction to publicity over the case is the main reason he was discharged.

"I truly believe I have done nothing wrong or shameful during the period I've been on active duty," he said. "I have to believe the decision was based on political and non-professional reasons."

STEIN HAS been sued twice by female patients in Kansas and has agreed to settlements totaling more than $150,000, according to Board of Healing Arts and court records.

Stein has said under oath that he was in love with Barbara Sigler in 1967, the first time he admitted breaking the American Psychiatric Association's rules of conduct that forbid having sex with a patient. The love affair turned sour, however, and Stein paid $3,000 to Sigler, whose lawsuit claimed his affair with her had pushed her to become an alcoholic.

"At the time, both of us thought we could separate what went on professionally in the office and what went on in our personal lives outside," Stein said in October. "That was wrong, but at the time it seemed that way."

BECAUSE OF Sigler's lawsuit, Stein was forced to resign from his job as medical director of the North Central Kansas Guidance Center in Manhattan in 1970, he said.

He didn't have to explain the problem to the Board of Healing Arts because the case was never reported to the board. State law since then has been made stricter to require reporting in cases like Stein's, but board members say the law still often is ignored.

Stein went into private practice in Manhattan, and by 1980 was working part-time evaluating candidates for police departments in Riley County and Junction City, when two of his patients — Hyland and Margaret Sedlacek — brought up new charges that he mixed sex and therapy.

Hyland, whose medical records show she went to Stein to be treated for depression, insomnia and stresses brought on by a failing marriage, filed a lawsuit against him in November 1979. The lawsuit said Stein frequently had sex with Hyland, beginning in her room at St. Mary's Hospital in Manhattan on Feb. 22, 1977.

In June 1980, Hyland's attorney wrote the Board of Healing Arts about her complaint. The board voted to investigate.

IN AN August 1980 hearing before the board, Stein denied he'd had sex with Hyland, and said she was too sick while in the hospital — suffering from a high fever, headaches and a bad cough — for their affair to have begun then.

"I wouldn't have wanted to kiss anybody in that condition," Stein said in sworn testimony.

Hyland produced a detailed list of dates and places — including several times in the hospital — where she said she and Stein had made love. She went on to describe how her marriage had ended in divorce after she confessed her adultery to her husband, and how she had been excommunicated from the Mormon Church for not breaking off her sexual relationship with Stein.

Stein said in court and before the Board of Healing Arts that he was being falsely accused, and Stein's lawyer questioned Hyland's religious views.

"It is not denied that Vicki Hyland early expressed a 'love' for Dr. Stein, who she believed in her religious zeal had been made available to her by her God and heavenly father, all by way of divine revelation," said Stein's attorney, John Emerson. "... The testimony of such a witness, totally uncorroborated, should not be the basis for condemning Dr. Stein."

HYLAND'S CLAIMS were supported by Sedlacek, one of Stein's former patients who was working as Stein's office nurse while Hyland was a patient. Sedlacek's affidavits to the board said she had been having sex with Stein for years — including a period when she was married and he was treating her as a patient — and had long been suspicious that Stein was having an affair with Hyland, too.

Although Stein still denied having sex with Hyland, he admitted having sex with Sedlacek — despite the fact he, too, was married.

"My marriage had been poor for many years," Stein said in the October interview. "My wife and I had decided to stay together for the sake of the children."

Three months after Hyland's complaint was filed with the board, a hearing panel made up of five members of the Board of Healing Arts made a finding that Stein was guilty of unprofessional conduct for having sex with Sedlacek and Hyland. The panel recommended Stein's license be revoked. In November 1980, the full board approved the revocation.

STEIN, "FOR whatever reason, has become so engulfed with his physical pursuits with his patients that he has overlooked the duties of his profession, the law and licensure requirements," an attorney for the board said in a Sept. 3, 1980, letter to the hearing panel, shortly before the board's decision was announced.

Stein sought to overturn the board's ruling and took the case to Riley County District Court on appeal, saying the board acted arbitrarily in revoking his license. "By its overly harsh ruling, the Board of Healing Arts has stripped this 52-year-old man of his only means of livelihood and support for his family, raising significant constitutional questions," said a Feb. 3, 1981, letter from Stein's lawyer to the judge who was hearing the appeal.

In early 1981, when the judge upheld the board's ruling, Stein already had left Kansas and was working as a psychiatrist at a Vetrans Administration hospital in Fort Lyons, Colo. He had agreed to a $150,000 settlement in Hyland's lawsuit — 20 percent earmarked for the care of Hyland's young daughter.

AN ARMY officer first in the 1950s, Stein applied — and was accepted — to active duty in August 1981. At the time, he held licenses to practice medicine in California and Massachusetts.

Army officials say he didn't tell them about his Kansas license having been revoked, but Stein said the Army didn't ask him.

"If the Army had chosen to investigate, they could have found out about the Kansas revocation," Stein said. "All it took was a phone call."

The Board of Healing Arts in 1980 wrote a letter to the Federation of State Medical Boards — a national clearinghouse for information about doctors — saying Stein's Kansas license was revoked. But spokesmen for the California and Massachusetts licensing boards said recently that they couldn't find any records on Stein losing his license in Kansas.

In 1983, Stein reapplied for his license in Kansas under a state law allowing the board to reinstate a revoked license after a year. His request was granted.

"Hindsight would say the board probably should have done some more investigation in that case, but he received good recommendations from his colleagues and there was no indication he had had any problems in the meantime," said Larry Buening, one of the lawyers for the Board of Healing Arts.

STEIN WAS a psychiatrist at Beaumont Army Medical Center, Fort Bliss, Texas, from 1981 to 1984, when he was transferred to Colorado following an investigation into charges that he had had sex with a woman he treated, Irene Eshelman, and then threatened her husband.

Army officials have declined to discuss the investigation, but Stein said recently that he now is married to the woman. He denied he was sexually involved with her until she divorced her husband and married Stein.

"There was never any involvement between us when we were in a professional relationship, nor was there ever any sexual relationship between us before we married," he said.

Stein said the Army never heard his side of the story before he was discharged last month by the Army's Active Duty Board.

IN A Nov. 1 letter to Stein, the Army said it had "selected you for involuntary release from active duty" under a law that "provides for the involuntary release of officers whenever a significant act of misconduct, moral or professional dereliction has been committed."

Stein said that before the board's ruling, the Army told him the decision would be based on three things — the facts of the Eshelman case, the records of his license revocation in Kansas, and his general performance record since 1981 — but wouldn't let him explain any of those things.

"Now, this board, I believe, just violated my civil rights all over," he said. "I was not allowed to appear before the board. I was not even allowed to know when the board was going to meet."

Wichita Eagle-Beacon

DECEMBER 15, 1985

Medical Watchdog System Ailing

malpractice - medical

Monitoring Our Doctors: Does the System Work?

This is the first of three days of stories examining the Kansas Board of Healing Arts, the public agency responsible for monitoring the performance of doctors.

Today's stories look at the board's performance, Monday's will focus on how the board operates, and Tuesday's will examine the growing number of malpractice lawsuits in Kansas.

In addition, each day will look at how the board handled a disciplinary case against a doctor.

By Jim Cross
Staff Writer

Six times a year, a dozen doctors and a saleswoman meet in Topeka to hear complaints against Kansas doctors.

State law requires the group to protect the public from doctors who are sick, poorly trained, whose medical knowledge is outdated, or who otherwise are a risk to their patients.

But a six-month examination by The Wichita Eagle-Beacon shows that the Kansas Board of Healing Arts is not keeping up with the number of complaints and malpractice charges made against doctors.

Repeatedly, state records show, the board has been hampered by lack of information and legal delays that weakened its clout.

As a result, the only agency in the state with the power to revoke a medical license rarely does so.

And because of the secrecy of the process, patients have no way of finding out about complaints against their own doctors. The 336 complaints filed against Kansas doctors in the past two years are closed to the public.

State records show the board repeatedly has moved slowly and leniently for fear of tripping over legal obstacles in dealing with the small percentage of the state's 4,000 practicing doctors who don't meet professional standards. For example:

- A doctor sentenced to three years in federal prison for supplying drug addicts with narcotics was allowed to keep his license to practice medicine.
- A psychiatrist lost his job and was sued twice by women patients before the board investigated their complaints that he was involved with them in sexual affairs during treatment. The doctor's license later was revoked, but he left the state. He joined the Army and was chief of psychiatry at two Army hospitals before the Army learned of the Kansas license problems and discharged him.
- A doctor was banned from practicing at a rural hospital because of charges he neglected critically ill patients. A later investigation found that he made serious and repeated medical mistakes, but the Board of Healing Arts allowed him to keep his license after he agreed to spend a year studying medicine at Wesley Medical Center in Wichita.

MEMBERS OF the board and their staff acknowledge that some Kansas doctors have violated licensing rules and continued practicing, but they say the board is not to blame.

● BOARD, 12A, Col. 1

Critics Say Watchdog Board Is Ineffective

● BOARD, From 1A

"Our immediate reaction to a case of what we consider obvious malpractice or unprofessional conduct might be to take the man's license," said James Croy, a Junction City chiropractor and board president. "But he's going to have attorneys who are ready to challenge that in court. It's sometimes very difficult to stop a person from practicing."

Adds Don Strole, one of two full-time attorneys who work for the ard, "A lot of times either we n't know what's going on or it takes a long time to do something about it."

The board's philosophy as well as its workload have been cited by critics.

"IT SEEMS to me that the board frequently takes the attitude that keeping a doctor in practice is the ultimate goal," said Kathlien Sebelius, head of the Kansas Trial Lawyers Association, whose members often try medical lawsuits.

Across the state, politicians, lawyers, insurance agents — even some doctors themselves — see shortcomings in the Board of Healing Arts, the state's only watchdog for identifying and controlling doctors with problems:

- The board has a budget this year of $511,000 — less than the annual costs of maintaining the state fairgrounds — and only one investigator to check complaints against Kansas doctors.
- Only a handful of complaints against Kansas doctors ever reach a hearing before the 13 board members. Roughly nine out of 10 complaints are rejected without ever going to the full board. The board's attorneys say that's because preliminary checks show the complaints are groundless or outside the board's authority.
- Kansas doctors with various kinds of problems — even those who were fired from their jobs, or banned from their hospitals, or sued as many as 25 times by their patients, or jailed for felony convictions — have continued practicing for years before, during and after the board investigated them.
- Private meetings, confidential reports and agreements struck behind closed doors often keep doctors with problems — and the board — out of the public eye.
- An explosion of lawsuits and insurance claims against Kansas doctors has gone virtually untouched by the Board of Healing Arts. Under state law, the board received copies of those malpractice claims. But as the number of claims filed annually tripled in the past five years, the board compiled a stack of more than 600 lawsuits that it didn't have staff time to investigate. Only now are the board's attorneys beginning to study the lawsuits by focusing on doctors who have three or more suits against them.
- Hospitals and doctors often have ignored a 1983 state law — brought on by increasing numbers of malpractice lawsuits — requiring them to report colleagues whose performance falls below professional standards. But the board has never acted against anyone for failing to report.
- Frustrated when its actions were dragged out for years or overturned in court, the board increasingly has backed away from trying to revoke doctors' licenses. Most of the board's 1984 and 1985 disciplinary actions — 38 of 44 cases — allowed doctors with problems to go on practicing.

"THERE SEEMS to be a general awareness that the Board of Healing Arts isn't doing a terrific job," said Sebelius of the lawyers association.

Nationally, as many as 5 percent to 15 percent of all doctors are not fully competent to practice medicine, either from a deficiency of medical skills or because of impairment from drugs, alcohol or mental illness, according to a March report in the New England Journal of Medicine.

No one can say for certain how many Kansas doctors don't meet

professional and state standards of practice. If national figures apply, at least 200 doctors in Kansas aren't fully competent.

The Kansas Legislature created the Board of Healing Arts in 1957 by combining licensing boards for medical doctors, osteopaths and chiropractors. The board's chief responsibilities include giving examinations for medical licenses and handling discipline cases. State law requires that the board be composed of 13 members — five medical doctors, three osteopaths, three chiropractors, a podiatrist and one member of the general public, all appointed by the governor.

BUT THE board members are only part time. They meet just once every two months and are reimbursed only for travel and time at meetings. Most of the day-to-day decisions are left to the staff and the board's secretary — one board member who is paid about $15,000 a year to work one day a week at the office in Topeka.

The staff and the secretary screen complaints, interview doctors and people who file complaints, reject complaints they deem groundless, schedule cases for hearings by medical review committees or hearing panels, and negotiate with doctors whose problems may never reach a hearing before the board.

Until 1983, the board didn't have a full-time attorney or a full-time investigator. Today, the full-time staff includes two attorneys, an investigator and six clerks. Board attorneys say they will ask the Legislature for more staff next year, but some lawmakers say they aren't convinced the board's weaknesses are just a matter of money.

"It wouldn't do any good to give them a lot more money if they don't know how to use it," said state Sen. Paul Feleciano, D-Wichita, a member of a legislative committee studying the reasons for the growing number of lawsuits against Kansas doctors. "It's been a weak, ineffective board."

AN AUDIT conducted last summer for the Legislature found signs of disorganization: missing or incomplete files, and recent years when the number of complaints had to be estimated because not all of them were recorded.

"The board's handling of complaints can be improved," said the audit, prepared by the Legislative Post Audit Division. "Its record keeping does not allow tracking of disciplinary problems over time, and the disciplinary actions taken do not always go far enough to protect the public interest."

The auditors also found uncertainty over who was responsible for managing the board's disciplinary system — the board's secretary, or one of its two attorneys. Also, at a recent meeting, board members spent half an hour asking the two attorneys to explain what they do and how their jobs differ. When the attorneys seemed to disagree, the board voted to have them write job descriptions.

In response to the state audit, the board's attorneys said the **board's secretary had been designated as the person in charge.**

THE BOARD'S secretary, however, is a doctor, and critics have complained that the board already is dominated by the industry it regulates.

"In my opinion, the board has been intimidated by the people it was supposed to be checking on," said Ralph Gundelfinger, a consultant for Providers Insurance, which insures 28 Kansas hospitals. "They've never been tough enough. There's no way they can continue being so passive."

Betty McNett, the only member of the board who is not a doctor, agreed that the board has been too lenient in some cases and said consumers need more representation on the board.

"I feel in some instances we have protected the doctor more than the consumer," she said. "All the people on the board, except me, are doctors. As just one person, I don't have a lot of say-so. I'm outnumbered."

STATE RECORDS show that the Board of Healing Arts disciplined less than 14 percent of the doctors who were the subject of complaints in 1984 and 1985.

The most serious complaints accused doctors of performing unnecessary surgery, failing to care properly for critically ill patients, treating patients while on drugs or drunk, knowingly helping drug addicts get prescriptions for controlled drugs, promising cures they couldn't deliver, lying about their medical credentials, or tangling themselves in unethical affairs with patients.

In an official response to criticism in the state audit, the board argued that its powers are limited by its responsibility to balance public safety against doctors' rights to a fair hearing.

"Although on occasion the scales may be tipped too far one way or the other, it is essential not to lose sight of the fact that in **each and every case these competing interests must be considered and weighed," said the board.**

QUESTIONS ABOUT the board's effectiveness were raised this summer and fall, as Feleciano and other members of the Legislature's Special Committee on Medical Malpractice met in Topeka to look at the problem of lawsuits and insurance claims against doctors, which have almost tripled in five years, from 82 in 1980 to 230 in 1985.

Lawsuits and insurance claims against doctors total 940 in the eight years the state has kept track. Last year alone, a state-run insurance fund paid out $13 million in malpractice cases, assuring that insurance rates, even for doctors who haven't been sued, will continue to increase.

In some of those lawsuits and insurance claims, doctors were accused of negligence and medical errors that caused their patients to suffer, a charge that the board's lawyers admit they have problems doing anything about.

"Medical negligence cases are extremely costly, quite complicated and time-consuming," said the board's response to the state audit. "The Board often has trouble obtaining expert witnesses to review the records and testify. Therefore, medical negligence cases are going to take longer to handle and it will be more difficult to take action against licensees."

STROLE, ONE of the board's two attorneys, said the time and expense — as much as five years and $100,000 in some cases — of pursuing a license revocation through the courts has shifted the board's aim away from revoking licenses. Revoking licenses, he said, often is less practical than negotiating agreements with doctors.

"People seem to think we can revoke a doctor's license at will," said Strole. "People who make these criticisms don't understand the legal process. A full-blown malpractice case takes years. If we tried 20 or 25 of them, the time and money required would be staggering."

Strole and Larry Buening, the board's other attorney, said the board has had difficulty making some of its most severe disciplinary actions stick when challenged in court.

For example, the board tried in 1980 to take the license of John Vakas, a Coffeyville doctor accused of prescribing large amounts of amphetamines to people who didn't need them for medical reasons. But Vakas kept practicing and the board's decision to revoke Vakas' license was overturned in court when a judge ruled he hadn't received a fair hearing from the board.

"THROUGHOUT THESE proceedings, which lasted more than four years, the board continued to receive numerous complaints about the licensee's prescribing habits, but no action was initiated for fear of jeopardizing the board's legal position," said the state audit report.

The board dropped Vakas' case until October, when it once again accused Vakas of giving unnecessary prescriptions to patients. The new case is pending.

Lack of success in Vakas' case and others has caused the board to shift most of its disciplinary actions to agreements called stipulations. Stipulations generally allow doctors to keep practicing if they promise to abide by some restrictions — for example, taking therapy for drug or alcohol problems, giving up practice in a certain specialty, or refraining from prescribing certain drugs.

The state audit study found that 35 out of 44 disciplinary actions by the board in the 24 months from July 1983 through June 1985 were stipulations. Three others were informal admonishments. Six ended in doctors giving up their licenses.

THE BOARD'S attorneys blame part of its problems on hospitals and doctors themselves. Despite a state law requiring the medical industry to report doctors with problems, Strole told a legislative committee last summer that reporting by licensees and hospitals has been "at best low and in some instances nonexistent."

The state reporting law allows the board to limit, suspend or revoke the license of a medical license holder who fails to report a doctor suspected of violating the board's rules.

But Buening said the law is almost impossible to enforce.

"From a practical standpoint, how do we prosecute somebody for something they didn't report?" said Buening. "The easy way out for them is to say they didn't think what happened constituted grounds for the board to revo license."

BUENING AND Strole said they hope the 1986 Legislature will change the law to make it clear that any reasonable suspicion must be reported.

But a flood of new complaints likely would be more than the board could handle. Strole and Buening said they already have more lawsuits on file than they have time to investigate and are trying to tackle the problem by making a list of doctors who have been sued three or more times.

"We have to start somewhere," said Buening. "For us to go back and review all the cases, analyze **them in detail, just seemed too overwhelming."**

Buening said he looks to the Legislature for more money and people.

"The Legislature thinks the board can become a more vital force in rooting out the incompetent physician," Buening said. "I think we can, but there need to be changes and the Legislature would need to come up with the money."

Other State Boards Share Problems

Wichita Eagle-Beacon 12/16/85

Monitoring Nation's 425,000 Doctors a Monumental Task

By Jim Cross
Staff Writer

Health-care industry officials say medical-licensing boards in the 50 states are disorganized, lack the money to do their jobs and often are unable to get hospitals and doctors to report colleagues whose skills fall below professional standards.

Between 5 percent and 15 percent of the nation's 425,000 doctors who deal directly with patients are not fully competent to practice medicine, either because of deficient medical skills or because of impairment from drugs, alcohol or mental illness, according to an article this year in the New England Journal of Medicine, one of the most respected publications in the medical field.

AND THERE is growing concern nationally among doctors themselves that state licensing boards are missing a significant number of doctors whose practices don't meet professional standards.

"All the evidence suggests that most if not all the states have been too lax — not too strict — in their enforcement of medical professional standards," said Arnold Relman, a Harvard Medical School professor who has more than 30 years' experience in practice and is the editor of the New England Journal of Medicine.

A look at the nationwide situation shows:

• The state licensing boards vary greatly in the number of doctors they discipline each year. The rate in 1984 varied from as high as 18.3 doctors in every thousand in Nevada to zero per thousand in Hawaii, the District of Columbia, Alaska and Delaware, according to the Federation of State Medical Boards, a national clearinghouse for medical information. Kansas ranked 16th in the federation's figures, with a rate of 4.8 disciplinary actions per 1,000 doctors.

• No central authority exists with the power to keep track of doctors who have license problems. Licensing doctors is strictly a state — not a federal — authority. The federation has records of about 13,000 doctors who have been disciplined, but it says the list is far from complete because it has no authority to require states, hospitals or medical societies to report.

• Lack of communication between states makes it easy for doctors with license problems to leave their troubles behind them. The federation said recently it discovers 30 doctors a month who were disciplined in one state and then moved to another to practice.

STATES VARY greatly in how much money and staff they give their medical-licensing boards. California, with 50 full-time investigators, is the biggest operation with an annual budget of $11 million. Divided by that state's total of 55,000 physicians, the California board's spending amounts to $200 per doctor.

New York, with 45,000 doctors, has 25 investigators and a budget of about $3 million, which breaks down to about $67 per doctor.

The Kansas Board of Healing Arts, with a budget of $511,543, licenses about 7,500 doctors — about 4,000 of them actively practicing in the state — spending about $68.20 per doctor. The Kansas board has two lawyers and one investigator.

The state medical-licensing boards typically are so tightly budgeted they can't afford to go looking for doctors with problems. Most of the state boards — including Kansas' — get their information mainly from complaints by the public, other government agencies or hospital officials and medical license-holders.

THE PUBLIC, however, often takes complaints to court instead of reporting to licensing boards, and hospital officials and doctors often are reluctant to complain about incompetent colleagues for fear of being sued themselves.

"Few physicians relish the idea of being a policeman, and fewer still are willing to assume that role by initiating a formal complaint against an errant colleague," said an editorial by Relman in the March issue of the New England Journal of Medicine.

In Kansas, state law requires hospitals and doctors to report colleagues whose performance falls short of state medical-licensing standards. But a state Board of Healing Arts lawyer told a legislative committee this summer that reports from doctors and hospitals were "at best low and in some cases non-existent."

National studies also show that state boards frequently lose track of doctors who stay one step ahead of their problems by moving from state to state. A report this year for the federal General Accounting Office found that 33 of 181 doctors who had been disciplined in three states moved elsewhere and continued to practice.

KENNETH NELSON, medical adviser to the inspector general of the federal Health and Human Services Department, quoted recently in national news articles, compared communication between state boards to "a Tower of Babel."

Donald Foster, deputy chief of the Justice Department's fraud section, was quoted recently saying that that problems develop because "no one anywhere has direct jurisdiction in this whole area." Licensing of doctors and other professionals in most fields has traditionally been left to the states. There is no federal licensing procedure.

In one case that drew national attention earlier this year, a Manhattan, Kan., psychiatrist whose license was revoked for ethical misconduct left the state and entered the Army, where he resumed the practice of psychiatry.

THE NATION'S medical-licensing boards came under sharp criticism this summer in a report by the Public Citizen Health Research Group, one of several groups spawned by consumer activist Ralph Nader. Public Citizen's study concluded that only 563 of the nation's 425,000 doctors had their licenses revoked or suspended or were put on probation in 1983, a national average 1.45 serious disciplinary actions per 1,000 doctors.

The group's report said the state boards don't revoke or suspend enough licenses and the states should "greatly expand the size and strength" of medical-licensing boards to get control over the "dangerously inadequate discipline of doctors."

In the past two years, the Kansas Board of Healing Arts has not revoked a doctor's license.

Eight Kansas doctors in the past two years agreed to surrender their licenses or had their licenses suspended by the state. During the same time, the Board of Healing Arts handled 38 of a total 44 discipline cases with agreements, restrictions or admonishments that allowed those doctors to continue practicing.

Complaints Handled Behind Closed Doors

Wichita Eagle-Beacon 12/16/85

Monitoring Our Doctors: Does the System Work?

This is the second of three days of stories examining the Kansas Board of Healing Arts, the one public agency responsible for monitoring the performance of doctors in Kansas.

Tuesday's stories will examine the growing number of malpractice lawsuits in Kansas.

By Jim Cross
Staff Writer

Most complaints against Kansas doctors are handled far from public view.

Information obtained by the Kansas Board of Healing Arts rarely is widely circulated — especially while doctors are under investigation. And state law makes most records confidential even after investigations are closed.

Typically, doctors with complaints against them are guaranteed secret investigations, closed-door meetings and confidential reports.

In a case that became public late in 1984, for example, the Board of Healing Arts gave a Haysville doctor 48 hours to close his practice and turn his patients over to another doctor.

Until then, however, the doctor's patients had no official way of knowing that the licensing board and the federal Drug Enforcement Administration had been looking into the case for more than a year.

"You do not want to harm the reputation of a doctor based on

● QUIET, 10A, Col. 1

● QUIET, From 1A

unfounded allegations," said Don Strole, one of the board's two attorneys. "By the mere fact we're investigating a doctor, some people would assume he's guilty of something."

The Board of Healing Arts has received 336 complaints against doctors in the past two years. And 230 lawsuits and insurance claims against doctors were recorded by the state Insurance Department in a recent 12-month period.

BOTH OF those kinds of complaints, however, leave only a sparse trail of information for the public. State law makes formal complaints to the board — even when they are found to be valid — confidential.

Investigations by the Board of Healing Arts typically take weeks or months, sometimes even years. During that time, the board's attorneys and staff may work behind the scenes with doctors who are under investigation for alcohol or drug abuse, deficient medical skills or other complaints.

Protected by a legal blanket of confidentiality, doctors and their attorneys may exchange letters with the board's staff, schedule closed-door meetings to discuss the allegations, appear before medical review committees, even hammer out agreements allowing them to go on practicing, all before the case becomes public.

STROLE SAID consumers who call the Board of Healing Arts with questions about their doctors won't get much information, except in cases where the board has taken a formal action in public session.

"It's sort of a gray area," he said. "Usually we will tell people if there are no complaints filed. If complaints have been filed we may not tell them that. State law says we can't disclose the substance of the complaints."

Recently, for example, a Wichita Eagle-Beacon reporter called the Board of Healing Arts to ask about a doctor who is practicing now under restrictions. Last year, that doctor surrendered his license for a time to enter therapy for drug addiction.

"He is a licensed physician," a clerk for the Board of Healing Arts told the reporter who called.

Only after repeated questions about the doctor's record was the reporter's call transferred to one of the board's two attorneys. He explained that the doctor had successfully completed drug treatment and cautioned, "Actually, there was nothing related to his medical practice. . . . He just had a drug problem."

STROLE SAID he sees few signs the public wants more information than it has been getting.

"If complaints were made open from the word go, I suspect the only people who would pay attention would be attorneys and other doctors who are just curious," said Strole. "The general public doesn't really seem to be that interested in the board."

The Kansas Medical Society estimates that the state's 2.3 million people see their doctors 7 million times a year — about three times a year per person, on the average. Yet the Board of Healing Arts, the only state agency responsible for monitoring how well doctors serve the public, is largely an unknown.

"They've been operating pretty much behind the scenes," said Kathlien Sebelius, director of the Kansas Trial Lawyers Association. "What they do and how they do it is still a mystery to most people."

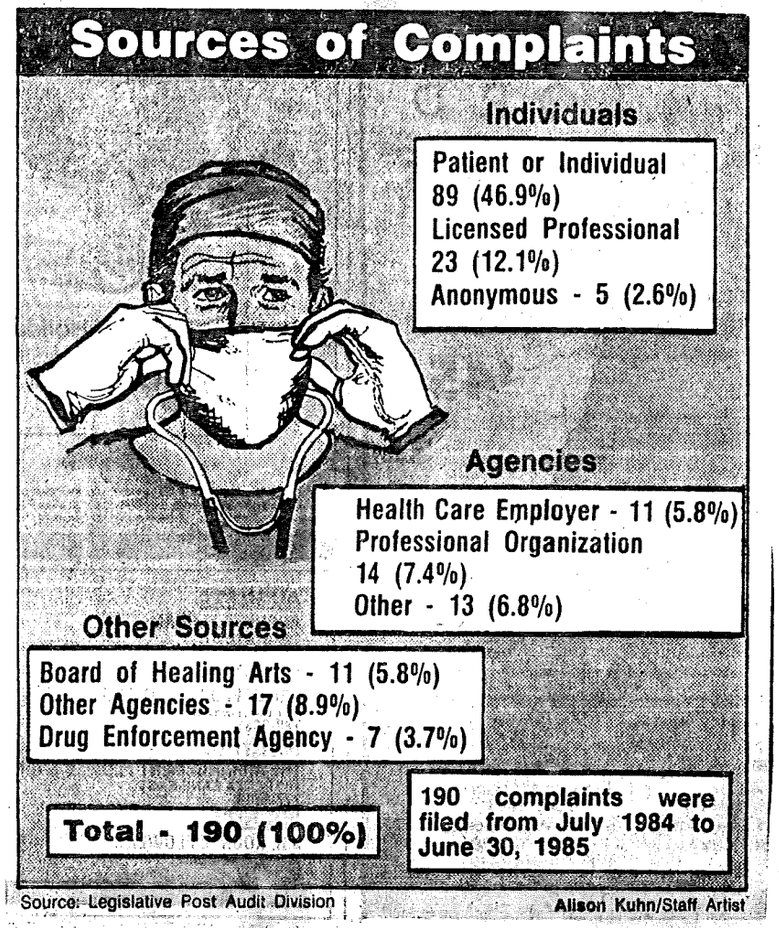
THE BOARD'S office, in a state-owned building in downtown Topeka, rarely is visited by the public. The 13 board members — 12 of them doctors — don't run for public election; they are appointed by the governor. Few members of the public, except doctors who have business with the state, attend the board's meetings.

The board members serve only part-time, and live and work in various parts of the state. Most of the day-to-day work is handled by the board's staff.

The staff files the paperwork of complaints and investigations involving doctors — a job it has not done well, according to a recent report by the Kansas Legislative Post Audit Division.

"The auditors found that files for a single licensee were often stored in three separate offices, and there was no index to indicate how many files had been created or what they contained," said the August report to the Legislature.

MOST OF those files aren't open to the public, anyway, because few complaints ever reach a public hearing. Nine out of 10 complaints are rejected by the staff as groundless or outside the board's authority, said Strole.



Complaints that are not dismissed by the staff usually are studied by review committees of doctors appointed by the board. Those three-member panels meet privately and send their findings to the board, which makes the final decision. If the board takes no action on a review committee's recommendation, there is no public record of the case.

Complaints also can be referred to hearing panels, which in recent years usually consisted of about five members of the board. Those meetings are open but rarely receive much public attention.

EVEN PUBLIC hearings before the full board may not attract public attention.

Confidential Investigations Protect Accused

> "They've been operating pretty much behind the scenes. What they do and how they do it is still a mystery to most people."
>
> — Kathlien Sebelius, Kansas Trial Lawyers Association

In 1983, for example, the Board of Healing Arts reinstated the license of a psychiatrist whose license had been revoked two years earlier. The doctor had lost his license over complaints by two women patients that he had sex with them during treatment. The two patients, however, later complained they were not notified of the public hearing to reinstate the doctor's license.

The two other places a complaint about a Kansas doctor generally winds up — at the state Insurance Department or in court — are equally likely to operate under rules restricting the public's access to important facts.

A recent state report found that about 870 Kansas doctors were sued or had insurance claims filed against them by patients since the state started keeping track in 1977. Most of the lawsuits and claims never actually went to court. Even those in which patients collected settlements in the six-figure range generally left little information on the public record.

"Very, very few went to trial," said Larry Buening, an attorney for the Board of Healing Arts. "Less than 10 percent. The vast majority of the remainder were settled for anything from $329 up to $300,000."

OFTEN THE amounts of the settlements are kept confidential by agreement of both sides and the court. Also, in most settlements, neither party claimed victory nor admitted defeat, a standard practice in civil lawsuits of all kinds.

Public records, for instance, show that former Wichita pediatric surgeon Mido Mirza was sued five times by patients, most of them claiming he performed dangerous surgeries that weren't needed. Another surgeon, Earl Sifers of Johnson County, was sued 25 times, with many of those lawsuits claiming he performed breast-removal surgeries on patients who didn't have cancer requiring the surgeries.

Most of those cases haven't gone to trial. In those that were settled, public records do not show how much money was involved.

The Insurance Department is the only agency in the state that keeps track of exactly how much doctors agree to pay in lawsuits they settle or lose in court. Lawsuits and insurance claims against doctors are reported to the department, which operates a state-run insurance fund for doctors. Any lawsuit or insurance claim for more than $200,000 may be paid, at least partly, out of the fund.

ATTORNEYS FOR the Insurance Department repeatedly have told everyone who asks — including Kansas legislators — that they will not make public a list that names doctors and how much they have paid. The department's lawyers have cited several reasons, mostly legal arguments, for keeping Kansas doctors — who have lost a total of $34.9 million in lawsuits and insurance claims since 1980 — out of the public eye.

That position has drawn criticism from some legislators. "The Insurance Department has done a horrible job of putting together the information we need to make an informed decision," said state Sen. Paul Feleciano, D-Wichita, who is on a committee studying malpractice laws.

The department defends its position.

"We decided it's not in the best interest of the fund to release that information," said Derenda Mitchell, an Insurance Department attorney who testified before the malpractice committee. "Publicity can be harmful to the value of the cases."

Care for Due Process Slows Handling of Complaints

By Jim Cross
Staff Writer

Few complaints against Kansas doctors ever get a public hearing.

In fact, most complaints are ruled groundless long before they reach the 13 members of the Kansas Board of Healing Arts.

And even what state medical investigators consider valid complaints most often wind up in agreements allowing doctors to continue practicing.

A survey last summer by state auditors was the first effort to examine the effectiveness of the board. It showed that nearly 87 percent — 292 out of 336 complaints in the 1984 and 1985 budget years — were rejected without any action by the full board.

IN 35 of the remaining 44 cases — about 80 percent — the board accepted stipulations, agreements with doctors who said they would take steps to solve their problems if allowed to keep their licenses and continue practicing.

According to state law, the duty of the Board of Healing Arts is to investigate when a doctor is suspected of professional incompetency, unprofessional conduct or "any other matter which may result in the revocation, suspension or limitation of a license."

The law allows the board to revoke, suspend or restrict a doctor's license for such things as medical negligence, immoral or unprofessional conduct, addiction to alcohol or drugs, fraud or false advertising, and felony convictions.

THE BOARD'S staff of two lawyers and one investigator work with the board's secretary — who devotes one day a week to board work — to handle investigations. In most cases, complaints never go beyond that initial investigation.

"The total board does not see the vast majority of complaints," said Don Strole, one of the board's two lawyers. "It's by necessity. They don't have time to. There's also a legal problem in letting them see everything when later they have to hear the cases and make an impartial decision."

A growing number of lawmakers, insurance industry representatives and in some cases even doctors have questioned whether the board's system of collecting information and handling complaints needs an overhaul.

"The problems the board has attacked were the really outrageous situations," said Ralph Gundelfinger, a consultant for Providers Insurance Company of Kansas City, which insures 28 Kansas hospitals. "They've slapped a few wrists, but many of the problems have been overlooked."

THE STATE'S Legislative Post Audit Division report this summer said the Board of Healing Arts had been lenient in some cases: "While the board has performed well in some areas, a number of its procedures have not served to protect the public."

Board members say legality, not leniency, limits what they can do about complaints against doctors. They say the board must balance its power to protect the public against its obligation to give doctors a fair hearing.

"While it is true that the public interest is most important, it is necessary to remember the duty of the state to treat a licensee fairly and to provide him or her all the due process rights," said the Board of Healing Arts' official response to the state audit report.

Lawyers for the board say the board shouldn't be judged on how many licenses it revokes each year.

THE LAWYERS say negotiating to get doctors to improve their practices and correct their problems usually works better than revoking licenses. Doctors whose licenses are revoked often take the cases to court on appeal, a process that can take years, lawyers said.

"People have no concept of what is required to pursue a revocation case," said Strole. "Most people assume we can revoke a doctor's license at will. They don't understand the legal process."

Only six Kansas doctors gave up their licenses to practice medicine in the two years ending June 30, according to the state's audit report on the board's 44 disciplinary orders in that time.

Four of those six were classified as voluntary surrenders, two were suspensions. In three other cases, doctors received informal admonishments.

THE REMAINING 35 cases ended in stipulations — typically agreements that doctors would accept certain restrictions in return for being allowed to go on practicing.

According to the audit report, 15 of those stipulation agreements involved limitations on a doctor's right to prescribe medicine. Eight cases involved doctors who agreed to seek help for problems brought on by alcohol or drugs.

Four cases involved limits on the doctor's scope of practice, such as prohibitions against performing surgery or practicing a certain specialty. Other cases involved professional or ethical misconduct, criminal charges or convictions and false advertising.

Lawyers for the board say stipulation agreements save time and money.

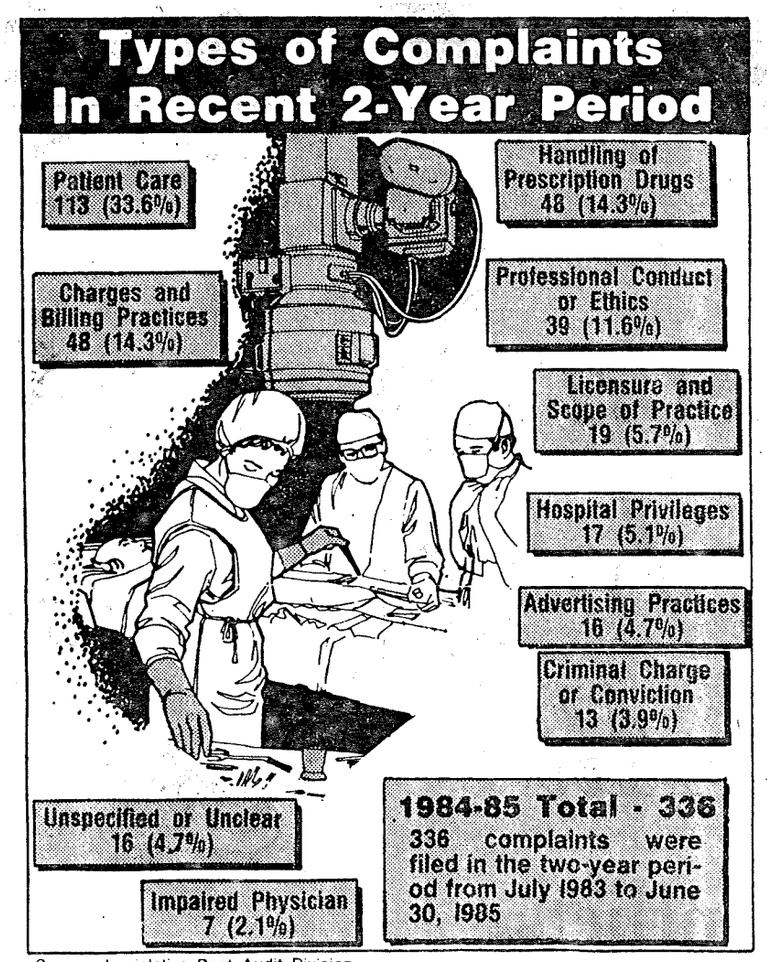
THE TIME it takes the board's system to handle complaints varies greatly from case to case. In one sample of 15 cases reviewed by state auditors, complaints took from two weeks to more than 16 months to resolve.

That time lag doesn't include the weeks — or even years — it takes for the board to first learn about some doctors who are suspected of having problems. According to the audit report, one doctor's problems were investigated by a hospital committee five years before the board launched an investigation.

State figures show that patients are the largest source of complaints against doctors. The audit this summer said that 89 of 190 complaints — almost 47 percent — in the state's 1985 budget year came from patients or other private individuals.

OTHER COMPLAINTS were made by doctors, professional organizations, hospitals, law enforcement agencies and the board's own staff.

Patients with complaints are required to fill out a form naming the doctor and describing the



Source: Legislative Post Audit Division

Alison Kuhn/Staff Artist

problem. The forms — which generally include the names of the people making the complaint — are closed to the public under state law.

Complaints that doctors didn't care properly for patients were the most common type of problem reported — totaling 113 out of 336 complaints filed in the past two years.

In other cases, doctors were investigated — to varying degrees — over complaints they abused drugs or wrote unnecessary prescriptions. Some were accused of fraud in their billing practices or advertising. Others were charged with or convicted of a felony. Still other cases involved sexual misconduct or psychiatric problems.

STROLE AND the board's other attorney, Larry Buening, work with the Richard Uhlig, an osteopath in his second term as the board's secretary, to screen complaints.

"Nine out of 10 complaints have no merit," said Strole. "They're complaints from patients who say they were charged $50 for something that should have cost $25, or that a doctor was rude to them. Some of them, quite frankly, are wild accusations."

The board's lone investigator, Robert McGuire, works with Buening and Strole to gather information on cases. At the direction of the board's secretary and attorneys, McGuire interviews witnesses and the doctor who is the subject of the complaint. He also collects medical records.

The next step — unless the case is rejected as groundless by the attorneys and the board's secretary — usually puts the complaint before a three-member committee of doctors who study medical records and make a recommendation to the board's lawyers and secretary.

MEMBERS OF the review committees are doctors who have experience in the medical specialty of the doctor under investigation. They are not members of the board.

Review committees met about 20 times between October 1984 and September 1985. The public wasn't notified of those meetings because state law makes the meetings confidential and closes the review committees' records to the public.

When complaints survive the review committees, the board's attorneys file formal charges and the board sets a time for a public hearing on the case. A hearing by the board resembles a trial, in which doctors usually are represented by lawyers. One of the board's attorneys presents the case against the doctor.

After the hearing, the board may vote to take no action, or to revoke, suspend or limit a doctor's license.

Case One: M.D. Sent To Study

Doctor Spends Year at Wesley

By Jim Cross
Staff Writer

Nurses at Horton Community Hospital stated it plainly — Hatsuka Gardner and her baby should have survived.

"The worst night of my life was Nov. 12, 1979. Hatsuka Gardner ...owed in death her stillborn ...," said one nurse's affidavit. "A ...ction could have saved both ...her and son."

...years later, Robert Wood, the doctor who handled Gardner's case, was investigated by the state agency that oversees doctors.

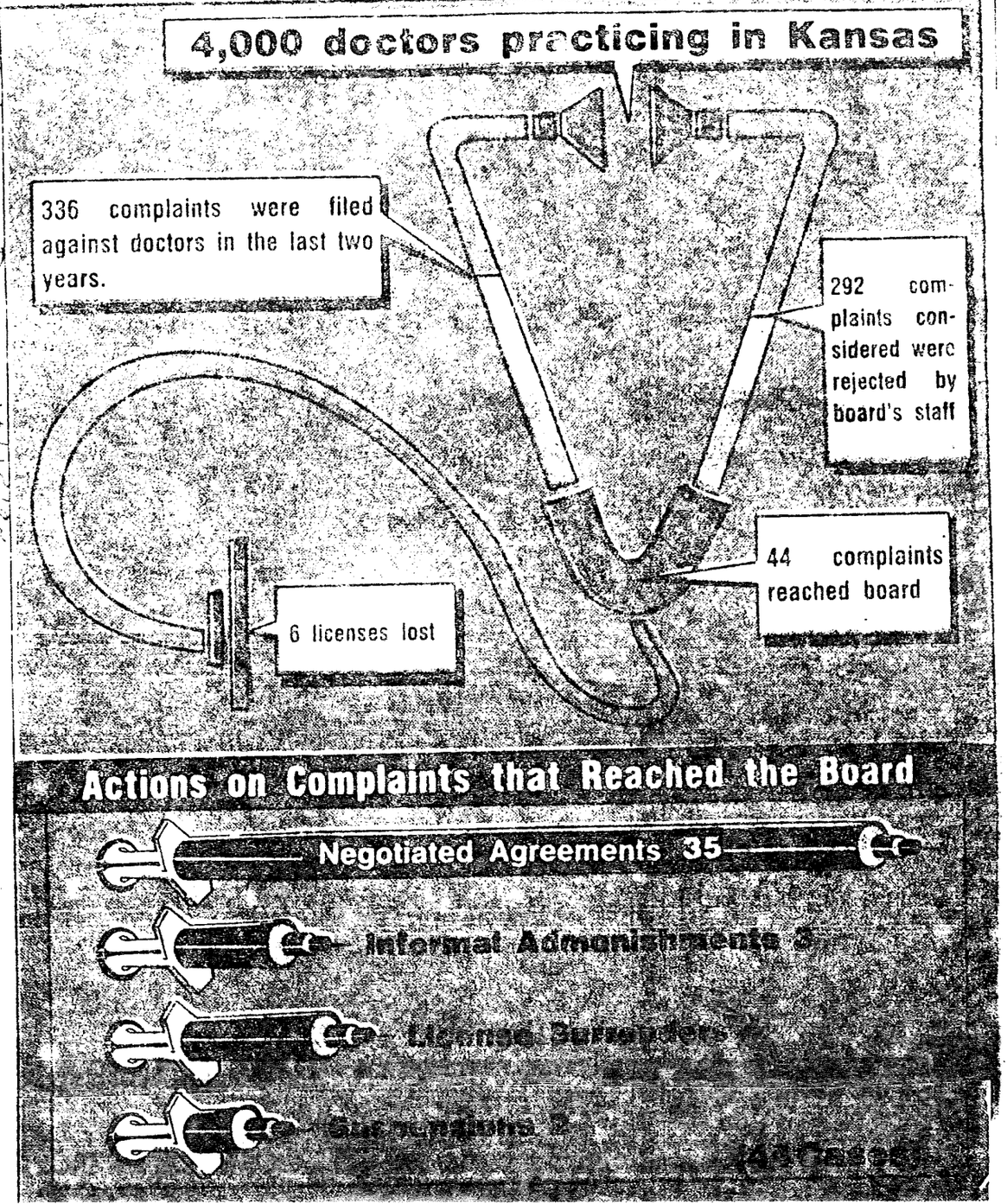
A hearing panel made up of five members of the Kansas Board of Healing Arts studied Wood's medical records and concluded that Wood had made serious medical errors. The panel recommended the board revoke his license.

BUT THE full 13-member board disagreed.

Four years later, Wood, a 1953 graduate of the University of Kansas School of Medicine in Kansas City, Kan., is practicing in emergency rooms across the state.

"My license was never lifted," the 59-year-old Wood said at the beginning of a recent interview in ...ita. "Nothing ever happened ...."

Complaints Against Doctors: The Outcome



A foot-thick stack of records on Wood's case tells in detail what happened during the past four years of Wood's 30-year career as a small-town doctor in northeast Kansas.

● WOOD, 11A, Col. 1

● WOOD, From 1A

STATE RECORDS show the Board of Healing Arts:

● First heard of Wood in 1977, when the board's secretary and staff rejected a complaint that he had prescribed two aspirin and refused to go to the emergency room to examine a man who died two hours later on the way to another hospital.

● Took up Wood's case again in 1981, several months after Gardner had died; after a group of nurses had resigned from the Horton Community Hospital in protest over the way Wood treated patients, and after hospital administrators had suspended Wood's hospital privileges.

● Investigated Wood in 1981 and then set aside its own hearing panel's recommendation that Wood should lose his license. The hearing panel said that Wood repeatedly failed to diagnose life-threatening problems, ordered too few medical tests, failed to properly instruct nurses who cared for his patients, and failed to recognize when he should have gotten a second opinion or transferred patients to a better-equipped hospital.

Instead of taking Wood's license, the board voted to accept a stipulation agreement in which he promised to take a year's fellowship to study medicine in the family practice program at Wesley Medical Center in Wichita. Records show four board members voted against accepting the stipulation.

"AS I recall it, the board just felt that Wood hadn't kept up and ...needed an intensive refresher course," said Richard Uhlig, a Harington osteopath who serves as secretary of the board. "I think it did him a world of good."

Wood himself discounts the year he spent as a resident at Wesley, and says the fact his license wasn't revoked is proof he didn't do anything wrong.

"I think the state Board of Healing Arts probably gave me the year of fellowship as a hand-slap," said Wood, who decorates his small home in Wichita's Comotara neighborhood with ceramic figurines of country doctors. "I'm not sure they needed to. I'm not sure they thought I'd done anything wrong, either."

In January 1983, Wood completed the year at Wesley. He submitted letters of reference from colleagues at Wesley and obtained the board's permission to practice again with no restrictions.

"I BELIEVE that he is as competent to practice medicine as many physicians currently practicing in the state of Kansas," said David Miller, associate director of the KU medical school's family-practice program at Wesley, in a Feb. 7, 1983 letter to the board.

Wood now works for Spectrum Emergency Care, a company that sends him on weekends and holidays to fill in for emergency-room doctors in Great Bend, Dodge City, Pratt, Arkansas City and other Kansas towns.

Wood's malpractice insurance — something he says he couldn't afford on his own after "that hoorah in Horton" — is paid for by Spectrum.

"There were several lawsuits filed against me and they (the insurance company) didn't fight them," he said.

Monitoring Our Doctors

Board Gave Wood a 'Hand-Slap'

STATE RECORDS show one insurance claim filed against Wood and his insurer since 1978. Insurance Department records show the claim was filed in 1981 by members of Gardner's family. Wood said the case was settled with a payment by his insurance company but said he could not remember the amount. Attorneys for the Insurance Department wouldn't reveal the amount, saying their records are confidential by state law.

Throughout the Board of Healing Arts' investigation in 1981, Wood said that his problems were brought on by a Horton hospital administrator who was "trying to get me" and by a group of nurses who were hostile and uncooperative.

In letters and affidavits to the board, nurses and hospital administrators told a different story:

- "I arrived at the hospital one morning and heard Dr. Wood yelling at my nursing staff and throwing charts and banging the chart rack into things," said David Bauman, administrator of Horton Community Hospital in a letter to the board.
- "Numerous times Dr. Wood either refuses to come and see patients or makes no effort to hurry up if he is needed immediately," said nurse Mary Bedenhousen.
- "It was always futile to call him concerning a patient's condition," said nurse Elma Yaussi. "Dr. Wood never ordered anything of consequence. If he came to see the patient, he never did anything."

IN OCTOBER 1981, the board's hearing panel found that Wood had been negligent in his treatment of Gardner and other patients of his: Jeanne Schuetz, 51, whose temperature climbed to 106 on Dec. 2, 1980, before Wood transferred her to another hospital for surgery; Jane Tritch, 68, who died of a cardiac arrest March 31, 1980, a few days after Wood put her in the hospital; Alexis Dahl, 33, a drug overdose victim who stopped breathing but survived after four hours on a respirator; and Marguerite Norris, 64, who the hearing panel said didn't get proper care from Wood during 11 days in the hospital in 1978.

In the Gardner case, the board's hearing panel found that Wood should have used X-rays to determine that Gardner's baby was too large to pass through the mother's birth canal, that he should have transferred Gardner to a better-equipped hospital, that he should have more closely monitored the condition of the infant, and that he should have spent more time handling Gardner's case.

In a sworn statement, Horton Community Hospital nurse Francis Bergan recalled the roughly 24 hours Gardner spent in the hospital, the stillbirth of her 11-pound, 8-ounce baby, and her death at 6:20 a.m. Nov. 13, 1979.

"ALL THE nurses felt Mrs. Gardner needed a C-section to prevent her and the baby's death," Bergan said. "One of the 11 p.m.-to-7 a.m. nurses said that the doctor just pulled and pulled on the baby and the baby was entirely too large for vaginal delivery."

Ralph Gundelfinger, a consultant for Providers Insurance, which insured the Horton hospital when Wood was there, said cases such as Wood's illustrate a frequent complaint by insurance companies that rural doctors aren't monitored as closely by peers as doctors who practice at larger hospitals in bigger cities.

"Many of the problems we've seen came from rural doctors. Some of them are the only doctors in their towns and they are literally their own masters," he said.

IN NOVEMBER 1980, directors of the Horton hospital appointed a committee of doctors to investigate Gardner's case and seven others handled by Wood. In a letter dated Dec. 16, 1980, the hospital's internal review committee recommended mainly that Wood order more tests and seek advice more often from other doctors "to protect Dr. Wood from adverse criticism in cases that do not have a desirable outcome."

The Board of Healing Arts didn't find out about the hospital's investigation until more than six months later, when the hospital board of directors filed a complaint with the board on June 10, 1981. By then, the hospital had suspended Wood's hospital privileges over new charges of negligence.

"I felt Dr. Wood violated almost every recommendation that the ad hoc committee had made," Bauman, the hospital administrator, said later in a July 1981 letter to the board. "They (the hospital directors) then voted to suspend Dr. Wood and directed me to file a complaint with the Board of Healing Arts."

FOUR YEARS before that complaint was filed, however, the

● WOOD, 13A, Col. 1

● WOOD, From 11A

board's staff already had received a complaint about Wood.

In 1977, the board's secretary and staff briefly investigated — and then rejected — a complaint against Wood over the death of Pascal Samqua, a Kickapoo Indian who was turned away from the Horton hospital a few hours before he died.

According to the board's record, Samqua became seriously ill about dawn March 20, 1977, and went to the police for help.

"Sammy came from his apartment across the street from City Hall, came in the police station, great pain, beads of sweat on his face, pains across his stomach, both shoulders and arms hurting, wanted to see a doctor," a police dispatcher recorded.

POLICE DROPPED him off at the Horton Community Hospital emergency room about 6:15 a.m. Wood was at home, not scheduled to come in until morning rounds at 9 a.m.

"Nurse Yaussi, RN on duty, phoned Dr. Wood," said David

> "I think the state Board of Healing Arts probably gave me the year of fellowship as a hand-slap. I'm not sure they needed to. I'm not sure they thought I'd done anything wrong, either."
>
> — Dr. Robert Wood

Wood Is Bitter But Says He Has Been Exonerated

The board's secretary and staff briefly investigated but rejected a complaint against Wood in 1977 over the death of Pascal Samqua, a Kickapoo Indian.

Bradshaw, chairman of the hospital's board of directors, in an Aug. 6, 1981, letter. "He prescribed two aspirins and said he would check him when he came in to make rounds. He was not admitted to the hospital."

Samqua refused the aspirins and kept complaining about pain, and Yaussi called Wood again.

"Dr. Wood's response was for her to make him comfortable in the lobby," said Bradshaw.

Samqua waited an hour, then went back to the police for help. The police called Virgil Allen, a friend of Samqua who agreed to drive him to a hospital in Holton, 20 miles away.

"THE HORTON police called my wife about 7:45 and said Pascal wanted me to take him to Holton to see a doctor," Allen said in a signed statement. "... They thought he was having a heart attack. ... When we were eight miles out of town, Pascal put his arms in the air and his face turned red and was sweating. I asked him to lock his door, but he fell over on the seat."

Samqua was dead on arrival at the Holton hospital. Doctors said he died of an aneurysm, a blood-filled dilatation of a blood vessel.

Three days later, the chairman of the United Tribes of Kansas and Southeast Nebraska wrote to the Board of Healing Arts, saying she wanted an investigation of "the recent events which culminated in the death" of Samqua, a Kickapoo tribal member.

The board's secretary wrote to Wood asking for an explanation. Wood wrote back saying Samqua had not complained of pains in the chest or arms and saying Samqua had left the hospital on his own accord.

THE BOARD'S investigator spent one day interviewing Wood and Indian authorities. "A review of the report by the investigator doesn't indicate probable cause for action against Dr. Wood exists," the board's secretary said in a letter to Indian officials on May 9, 1977.

Today, looking back over the problems in Horton, Wood is bitter over what he regards as a personal conflict with hospital administrators who caused him to have to give up a thriving practice that he has little hope of regaining.

He comforts himself with knowing that he never lost his license.

"I feel completely exonerated," he said.

chance to tie into the future of the auto industry.

"This is the cutting edge," says Joseph Ferran, official with the Texas Economic Development Commission. "We want to be in on it."

State officials like Mr. Ferran are tripping over each other to sell GM on their states. On state and city economic development boards, where a new factory offering only a few score jobs can

tury.

In Michigan, they're talking about their commitment to the "automobile culture" and vow to beat any offer.

There's tough talk in Missouri, too.

"Missouri is the No. 2 automaker, and we plan to be No. 1," said Randy Sissel, press secretary to Gov. John Ashcroft. "So we have to be very aggressive in our

See Saturn, pg. 10A, col. 1

No. 1

Tiffany Chin, of the San Diego Figure Skating Club, skates to victory in the Seniors Ladies U.S. Figure Skating Championships competition at Kemper Arena Saturday. See story on Page 1 Sports. (staff photo by Jim McTaggart)

program are not cheating, though they do admit that Jenkins and Stapleton's is among perhaps dozens of firms in Missouri and Kansas with dubious claims to minority and female ownership.

The problem is by no means limited to Kansas and Missouri.

See Firms, pg. 14A, col. 1

Breast removal and implant: Did the doctor know best?

By Eric Palmer and Jenny Deam
staff writers

Dr. Earl Churchill Sifers had a vision. With the zeal of a medical pioneer, he wanted to rid women of the horror of breast cancer.

His theory was unconventional and unproven—remove a woman's breast at the first suspicion of cancer, even without solid proof of the disease. Then, to keep her self-esteem intact, implant an artificial breast.

But the vision would bring its own horror to some.

Of the 222 women on whom he has operated since 1969, 16 have sued the Mission Hills general surgeon in the last four years, claiming malpractice and negligence.

They claimed in their lawsuits to suffer for months—sometimes years—from serious infection that kept wounds from healing and fears from subsiding. Some claimed that second and third surgeries were necessary to repair the damage when silicone implants broke through the skin.

All who filed suit claimed to be permanently scarred, both physically and emotionally.

Of the women who claimed Dr. Sifers failed to heal them, 13 say they are victims of a double tragedy. They have said in their lawsuits, and experts have testified in some cases, that the surgeries were unnecessary because cancer was not detected.

(A Merriam woman describes complications she suffered after having a mastectomy and getting artificial breast implants. Page 12A.)

Dr. Sifers has conceded in testimony that two-thirds of all the women he operated on did not have cancer. He also testified that in 40 of the women he treated, breast implants broke through the skin—a rate considered exceedingly high by other medical experts.

But he has denied in sworn testimony any negligence and stated that his surgery record is one of the best in Kansas City.

Dr. Sifers, 60, would not agree to an interview for this story on the recommendation of his attorneys. His attorneys also declined comment because cases are pending.

His comments in this story were drawn from his court testimony in one lawsuit and his sworn deposition in another.

Six of the 16 lawsuits have been settled for more than $1.5 million before they reached trial. The rest are expected to be resolved this year, lawyers say.

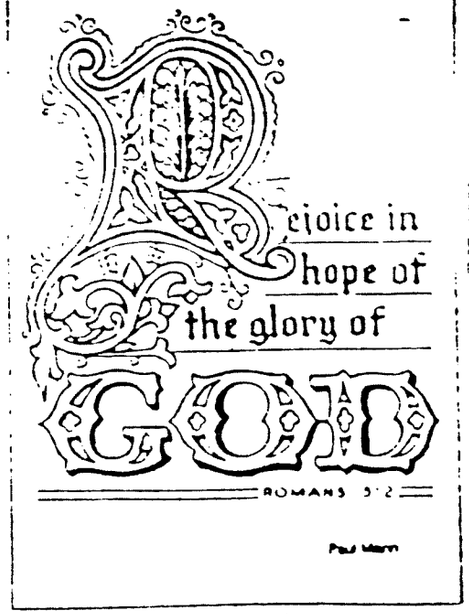
In the one lawsuit that went to trial, a Johnson County jury found Dr. Sifers partly negligent and awarded $443,000 to his patient. That 1982 case, with its explicit and gruesome testimony, is believed by lawyers to have prompted the other women to come forward with similar stories.

With the wave of litigation facing him, Dr. Sifers now has more malpractice suits filed against him than any other physician in Kansas by a margin of more than two to one, according to a comprehensive study by the Kansas Trial Lawyers Association. General surgeons average nationally one claim every four years, according to St. Paul Fire and Marine Insurance, the largest medical malpractice insurer in the country.

On four occasions pathologists—doctors who analyze tissue samples—filed complaints against Dr. Sifers alleging to an overview committee that he had done "inappropriate surgery," according to court testimony.

Meanwhile, Dr. Sifers has been re-

See Doctor, pg. 13A, col. 1



Doctor continued from pg. 1A

stricted by Bethany Medical Center from performing mastectomies—the medical term for removal of breast tissue—and has stopped practicing altogether at Shawnee Mission Medical Center, the hospital where he performed most of the mastectomies.

And the Kansas Board of Healing Arts, concerned about the lawsuits, sent Dr. Sifers for neurological and emotional analysis at the Mayo Clinic in the fall of 1983. He received a clean bill of health.

Some say Dr. Sifers' problems may have been as simple as pride—an inability to ask for help from medical specialists when he needed it.

"He was zealous in his fight against breast cancer," says Dr. John Young, a friend of Dr. Sifers and a surgeon himself. "He is a man who had practiced 30 years and seen many, many women die from breast cancer . . . I think he was sincere and felt this was a way to prevent these women from going through a painful death.

"The problem was not in the way he had done the operations, only in the way he had taken care of the complications . . . It was pride I think that kept him from seeking help."

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Even early in his career, Dr. Sifers sought to realize his vision of ridding women of breast cancer.

Two women in his own family suffered from the disease, he has testified. He knew the odds: One of 11 women is stricken with the disease and about 38,000 die from it every year.

In 1947 he was graduated from the University of Kansas Medical School and did his residency at the Cleveland Clinic, a nationally known hospital in Ohio.

In 1955, Dr. Sifers returned to Kansas—his childhood home—to practice surgery and teach at KU Medical Center. He eventually would have offices both in Merriam and Kansas City, Kan.

He served in top positions of area surgical organizations and was chief of surgery and chief of staff at Bethany Medical Center in Kansas City, Kan.

He also became chairman of the Kansas City Blue Shield board of directors and a member of the national Blue Shield board, where he worked on limiting medical costs.

From his early work at the Cleveland Clinic, he knew that despite the widely different surgical methods of treating breast cancer, none was better at saving lives. At that time options were primarily limited to either modified radical mastectomies, the removal of almost all breast tissue, or to radical mastectomies, removal of all breast tissue and some chest muscle.

The survival rate is about 70 percent—a rate that has not changed in recent history, according to the American Cancer Society.

"Women were dying at the same rate in 1975 as they were 100 years ago," Dr. Sifers has testified. "We should be looking for marks to do earlier surgery . . . to save women from this since it's a primary cause of death in this nation."

From that sprang his vision—a series of mastectomies that he hoped would pioneer a prevention for breast cancer.

Dr. Sifers believed there had to be cell changes in breast tissue that could be identified before a tumor formed. He thought that some forms of breast disease were "premalignant," and that removing the breast early was a woman's best chance of avoiding cancer.

To ease women's fear of being disfigured by the procedure, he believed that artificial implants should replace the breasts.

Dr. Sifers was a general surgeon, not a cosmetic, or plastic, surgeon. He has testified that most of his training for doing implants came from reading.

He undertook his study in earnest.

"I thought I had an original contribution to make," he testified.

"I will present a paper ultimately to the College of Surgeons confirming earlier work indicating that this type of surgery will reduce breast cancer by 95 percent."

In order to prove his theory to the College of Surgeons, he testified, he believed he had to present evidence of at least 50 successful surgeries. He called his plan his "breast series."

By the 1980s, says Dr. Young, Dr. Sifers was probably doing more mastectomies than anyone else in Johnson and Wyandotte counties.

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For a dozen years he had been performing mastectomies followed by implants without challenge.

Then came a 45-year-old Shawnee housewife named Carol McGuire.

At the 1982 trial of her malpractice suit against Dr. Sifers, gruesome details about post operative complications came to public attention for the first time.

She testified she had gone to Dr. Sifers with fibrocystic disease, or hardened tissue or lumps in the breasts. Dr. Sifers diagnosed her as "premalignant" and operated.

She said the surgery was followed by a 16 month infection that would not heal. Her silicone implants repeatedly broke through the skin. Eventually her nipples sloughed off.

The question was raised whether Mrs. McGuire even needed surgery. Doctors testified on her behalf that she had no signs of cancer and was never a candidate for surgery.

Dr. Young, the only doctor to testify in Dr. Sifers' behalf, said the operation was valid, however, because of recurring lumps in Mrs. McGuire's breasts.

Dr. Earl Sifers . . . sought to pioneer a prevention for breast cancer

The jury found that Mrs. McGuire w 35 percent negligent in the case becau she didn't take as much bed rest as D Sifers had directed.

But the jury still awarded her $443,0 for actual damages—lost wages, med cal expenses, pain and suffering, a permanent disfigurement.

Other women contacted attorneys say that they, too, had been Dr. Sifer patients and also had suffered.

Jay Thomas, an attorney whose fir is handling 13 of the cases, says the pa tern has been fairly consistent: Wome with fibrocystic disease went to Dr. Si ers; he told them they had a one-in-thre chance of developing cancer; he urge them to undergo a mastectomy; infec tion set in afterward, forcing additiona surgery.

Only after their lawyers gathered ev dence about post-operative problem did many of the women learn there wer alternatives that might have saved thei breasts, he said.

"This is the single hardest momen because we have to be the ones to breal the news to them," he said.

Dr. Sifers has testified, however, tha he believed the women were "premalig nant"—that their fibrocystic disease might someday turn into cancer.

He also testified that he looked for a family history of breast cancer as well as considering patients' requests for surgery because of an overriding fear of cancer. But he testified that sometimes he operated when the only criteria they met was having fibrocystic disease.

Other medical experts say that fibrocystic disease might be an indication for surgery only when the disease is advanced and the patient also has a family history of breast cancer. And then, they say, surgery would not always be necessary.

A study published in *The New England Journal of Medicine* in January showed that 70 percent of the women who have fibrocystic disease are no more likely to get breast cancer than women without it.

Fibrocystic disease has no cure, according to the National Cancer Institute, but it is usually treated with diet and medication for pain. Sometimes lumps can be removed surgically without removing the breast.

The same factors that cause fibrocystic disease probably cause cancer, said

Dr. H. Stephen Gallager, a professor of pathology at the M.D. Anderson Hospital and Tumor Institute in Houston, which is noted for cancer treatment. He said, however, that he doesn't believe anybody knows at what point the disease turns into cancer, so he could never recommend preventive surgery.

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For some of Dr. Sifers' patients, problems did not begin until months after they left the operating room. For others, they began before Dr. Sifers closed the incision.

The most common complaint was of a post-operative infection that would not heal. Most of the women told in their lawsuits of infections that sometimes lingered for more than a year, turned their skin black and produced open sores.

Other complaints later surfaced in lawsuits:

- Breasts that were too hard, sometimes like softballs.
- Implants that protruded through the skin and had to be surgically replaced.
- The discovery that up to half of the breast tissue was left after the mastectomy even though Dr. Sifers concedes that common medical procedure for mastectomy calls for the removal of at least 90 percent.
- Breast implants that were too large. In one case, according to attorneys, a patient's bra size increassed from a 32A to a 32D after her surgery.

Sometimes one and two subsequent surgeries plus dozens of office visits were needed to correct the problems.

"He would sew me up and it would just come apart again," recalled Aleta Witt, a Merriam woman who for nine months watched holes the size of nickles repeatedly tear through the infected skin of her right breast. "I was just about out of my mind."

Dr. Sifers' testimony shows he was having his own private doubts. In Mrs. Witt's case, he testified that he believed her condition was "horrendous."

Dr. Sifers' experience with implant protrusion—40 out of 222—far exceeds the less than 1 percent rate that usually is expected, said Dr. Carroll L. Zaborsky, a plastic surgeon who did follow-up surgery on four of the women and testified for two of them.

Dr. Sifers said the problem might be the brand of implants he used.

He also claimed the implants were not too large, but he testified that he never made a precise measurement of the excised breast tissue before selecting an implant. At any rate, he said he didn't make his patients' breasts smaller.

"Everybody wants, the patients always want to be maybe a tad larger," he testified.

Once complications appeared, Dr. Sifers testified, he sought help from other doctors. Among those was his son, Dr. Tim Sifers, who was in practice with him.

A notation made by Dr. Tim Sifers on Mrs. McGuire's medical chart read: "Draining again. Someday Daddy is going to learn how to fix this, we hope."

That notation was followed by one from his father saying, "No one else knows how to fix this either."

Dr. Sifers defended his surgery record in a deposition.

"I don't believe there is a surgeon in Kansas who has lost only one set of nipples in 200 operations," he testified. "It's the best record in Kansas City."

Dr. Zaborsky said in an interview that he found Dr. Sifers' procedures to be incomplete.

"A major problem with what Dr. Sifers did was that the surgery was not completed," Dr. Zaborsky said. "We found 30 to 50 percent of the breast tissue had not been removed when we reoperated on them."

He said general surgeons like Dr. Sifers take risks when they work in areas of medicine in which they are not specialists.

Even Dr. Sifers' friend and colleague, Dr. Young, agreed outside help should have been sought.

"We all have complications, but those should be limited to a certain percentage," Dr. Young said. "I think he didn't know how to handle complications from the implant."

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After the Carol McGuire trial surgical committees at Bethany Hospital and Shawnee Mission Medical Center began to review Dr. Sifers' cases. Bethany suspended his privilege to perform the breast procedure. He quit practicing at Shawnee Mission altogether when he and hospital officials could not agree on his standing.

Donald Strole, attorney for the Kansas Board of Healing Arts, said that after learning of the suspensions the board interviewed Dr. Sifers. A pathologist is reviewing some of the cases to see if surgery was justified.

"The big question is whether this kind of preventive surgery should be done at all," Mr. Strole said. "My personal feeling is that he probably did too many surgeries on too many women that were unjustified."

Even if the board decides some of the mastectomies were unnecessary, it probably would take no action other than to get a formal agreement with Dr. Sifers that he would not do the procedure any longer, Mr. Strole said.

Dr. Sifers has, in part, already made that vow.

He testified in one deposition that this phase of his medical career is behind him. His breast series is complete.

"I have done the work and it's finished," Dr. Sifers said.

Ron Smith 1/28

HB 2661
Board of Healing Arts & Peer Review Sections

Mr. Chairman. Members of the House Judiciary Committee. I am Ron Smith, Legislative Counsel for KBA.

KBA believes that peer review, risk management, and the strengthening the Board of Healing Arts' supervisory role on the medical profession may be the most important parts of HB 2661.

KBA generally supports the sections dealing with these subjects. Those sections may have the best long-term positive impact on physician malpractice insurance premiums we can think of.

We do have several items for you to consider, however.

I.

The role the Board of Healing Arts in peer review is important--important enough that we think you should consider putting all sections in HB 2661 dealing with the Board of Healing Arts and risk management into one bill.

If you consider how challenges to this new authority for the Board of Healing Arts may arise, the challenge may come from a health care provider long before litigation testing limit on awards.

Physicians subjected to the new Healing Arts powers can immediately challenge this stronger peer review by alleging unconstitutionality of HB 2661 because it violates Article II, Section 16, of the state constitution.[1]

This potential constitutional flaw was recognized by the Legislative Counsel, Bob Coldsnow, during the last meeting of the interim committee, and the warning against two subject problems is contained prominently in the minutes of that meeting.[2] While I understand Mr. Coldsnow's opinion is not binding on the Kansas Supreme Court, the potential use of that argument can be lessened by putting the sections pertaining to the Board of Healing Arts and risk management into separate bills.

Attachment 4
House Judiciary
1-28-88
Presented after approval of minutes

II.

There is a drafting problem that I can't reconcile.

Page 2, lines 71 through 76, not only requires health care providers but also "medical care facility agents" or an "employee who is directly involved in the delivery of health care services" to report any "knowledge that a health care provider has committed an act" below the applicable standard of care. Nurses and certain other health care professionals are not "health care providers" by definition, but they might be an "employee" under this section.

Over on Page 7, New Section 7, however, we make it a Class "C" misdemeanor not to make a Section 3 report, as well as indicate that only the license of the health care provider may be revoked, suspended or limited . . . "by the appropriate state licensing agency" if they willfully and knowingly fail to make a Section 3 or 4 report.

In other words, you require "employees involved in health care services" to make reports (under what one member of the Citizens Committee has called the Medical Rat Rule), but only the license of a health care provider is in jeopardy for for willfully and knowingly failing to report.

A nurse who sees improper operating room activity under Section 3 must report it, but there is no sanction if she willfully does not. You may want to reexamine the policy behind these changes and consider changing Section 7 to reflect this apparent difference.

III.

Section 8 at page 7 is a new cause of action for wrongful discharge or discrimination. The purpose of Section 8 is to insure against retaliatory actions of employers because the employee complies with reporting requirements in Sections 3 and 4.

Section 8 was a recommendation of the Citizens Committee that Fletcher Bell appointed last January. However, you may want to examine Section 8 in light of whether its intent is toothless.

Let's assume a nurse sees inappropriate medical care in a hospital operating room and makes a report required under Section 3(a). Then she is shifted to a new job, with less responsibility, at the same pay but knowledge that future wage increases probably will not be made. Chances of promotion are dim. Her employer has not fired her; but that employer has "dead-ended" her career.

There are some practical considerations against her seeking legal help the way Section 8 is worded.

The legislature makes public policy. If it is your policy that such retaliatory actions by employers are inappropriate, then you've got to give employees the means by which to do self-enforcement of Section 8.

Most persons can't afford to hire an attorney by the hour for what is often complex "wrongful discharge" litigation. Especially where money is not involved, a contingent fee arrangement is usually not available.

I don't know whether this type of employer retaliation creates a cause of action under the U.S. Civil Rights laws. If federal law applies, then you don't need Section 8. If it doesn't, then you've got to put some teeth into Section 8.

You may want to consider the "teeth" Congress placed into the civil rights act: the successful plaintiff's right to attorneys fees, similar to 42 U.S.C. @1988.[3]

The theory is IF the employer was wrong, and the employer's action causes the lawsuit; the employer should pay the attorneys fees necessary to right the wrong. You may want to consider a section similar to the federal attorneys fee provision if Section 8 is to be enforced and used as envisioned by the Citizen's Committee.

Clearly the plaintiff would have no right to attorneys fees if the plaintiff loses the lawsuit. But a logical question is the defendant employer protected against harassing lawsuits? Perhaps so. Based on a U.S. Supreme Court decision last summer, Kansas' Offer of Judgment statute may now be in a position to be construed to penalize plaintiffs who take lawsuits beyond a reasonable settlement offer.[4]

IV.

Section 9 is a unique legislative attempt to extend to peer review committees of the Kansas Medical Society and other peer review committees the federal antitrust exemptions enjoyed by state governments.

KBA does not oppose this extension. However, I would point out that this concept came from some Oregon case law but, to my knowledge, no other state has enacted similar legislation.

Because it is unique, the first time this section is used by a peer review board to dismiss an antitrust challenge by a physician against a peer review board, its constitutionality will be argued.

I don't know anyone who is opposed to trying the concept on a public policy basis. This appears to be another argument for moving this section into a separate bill to avoid two-subject problems.

V.

Finally, KBA wants me to relay to you our strong concern with Section 35 beginning on page 35 which makes a new definition of "professional incompetency" and adds 8 new items which might constitute "unprofessional conduct." If a licensee of the Board of Healing Arts is professionally incompetent or engages in unprofessional conduct, the Board has grounds to revoke licenses.

KBA does not object to the new language of this section. We do want you to understand what public policy is being proposed here.

Last night, Don Strole and I discussed how the Board views settlements with regard to licensing. He indicated, for example, that in the most recent celebrated case before the Board, the surgeon only had one verdict against him. That is true, but that same surgeon has had several settlements rendered which have cost insurers hundreds of thousands of dollars.

The ordinary settlement usually contains a confidentiality clause and boilerplate that the settlement is not to be construed as an admission of liability on the underlying claim.

The Board's problem is they can use a verdict to show evidence of deviation from the standard of care, but not a private settlement. The facts behind a claim resulting in a legal settlement must be individually reconstructed and presented to the Board, who then makes a decision on whether there was deviation from the standard of care.

Don indicated the Board was waiting to see the results of pending lawsuits against this surgeon, and at that time his license might again be reviewed. As I understood the summer's discussion, the purpose of all these expanded powers of the Board was so they would not have to wait on the "outcome of litigation" before rendering a licensing decision. If you carry this policy out to its logical conclusion, if the surgeon settled every pending case with the usual stipulations, there will be no future verdicts upon which to render a license decision. The Board will still have to reexamine the underlying standard of care of each settled claim in order to determine whether Section 35(a) "repeated instances of ordinary negligence" have occurred.

While the action on this "wait-and-see" order against this surgeon may have saved the Board the costs of a full licensing hearing, if pending claims are settled, those costs will be incurred anyway.

That's the way I read this statute, based on what Don tells me the Administrative Procedures Act says regarding the method of operation of the Board.

Don indicated yesterday the Board wants the power to set standards of care. Section 35(a) also gives the board the power to determine when "gross" or "ordinary negligence" has occurred.

These is a dual functions--one medical, and one legal--within the same licensing board's jurisdiction. These functions are very interesting. The board sets standards of care, sometimes after hiring its own expert for advice. On the other hand, once they've chosen a standard of care, they can make a decision like a jury there has been a deviation from that standard of care, and that "ordinary negligence" has occurred. This dual authority is important.[6]

If the Board takes on this dual function, we hope they exercise this new authority with advice of experts and with advice of counsel, and exercise it well.

The agency's recent track record regarding determination of what medical care constitute "repeated instances of ordinary negligence" in one instance is not good, and is of concern to KBA's governing body.

We hope with this new authority, peer review will improve. Again, KBA supports a strong peer review process as a vital part of this entire solution to higher premiums.

Footnotes

1. This section makes it constitutionally impermissible to include more than one subject in a single bill, a term the court has called "logrolling."

2. Page 6 of the 1985 Interim Committee on Medical Malpractice, November 20-21, 1985, states: "Senator Gaines asked Bob Coldsnow, Legislative Counsel, for his recommendation regarding the number of bills that would be needed. Mr. Coldsnow said five or six separate bills would probably be needed to insure the two subject prohibition of Article 2, Section 16 of the Kansas Constitution was not violated. He said all the committee recommendations should not be included in one bill. Mr. Coldsnow briefly reviewed a few of the recent cases interpreting the new Article 2 . . . He said the Court, while recognizing the mandate for a more liberal construction of Article 2, Section 16, indicates the principles enunciated in earlier cases interpreting this section still control and there is a continuing concern regarding any evidence of 'logrolling.'"

3. An applicable addition to HB 2661, Section 8, that is similar to 42 U.S.C. @1988 would be in line 268 by adding the following sentence: "If the aggrieved employee substantially prevails on any of the allegations contained in the pleadings in an action allowed by this section, the court, in its discretion, may allow the employee a reasonable attorney's fee as part of the costs."

4. Kansas has an Offer of Judgment statute (KSA 60-2002(b)) which allows "costs" incurred by the a person defending a claim from the date of that person's rejected offer to be paid by the person who rejected the offer. This statute was enacted through a 1974 rule of the Kansas Supreme Court, and mirrors Federal Rule of Civil Procedure #68. The key question is whether "costs" to be paid under this Kansas Offer of Judgment statute includes attorney fees. That answer is debatable. In Marek v. Chesny, No. 83-1437, 53 United States Law Week 4903, decided June 27, 1985, Chief Justice Burger, wrote for the Court: " . . . The second question we address is whether the term 'costs' in Rule 68 includes attorney's fees awardable under 42 U.S.C. @1988. . . . under the American Rule, each party had (ordinarily) been required to bear its own attorney's fees. . . . Against this background of varying definitions of 'costs', the drafters of Rule 68 did not define the term; nor is there any explanation whatever as to its intended meaning in the history of the Rule. . . . the most reasonable inference is the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. . . . Thus, absent Congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorneys fees, we are satisfied such fees are to be included as costs for purposes of Rule 68. . . . " (53 LW 4905). Further, the court said: "Moreover, Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits. Civil rights plaintiffs-- along with other plaintiffs--who reject an offer more favorable than what is thereafter recovered at trial will not recover attorneys fees for services performed after the offer was rejected." (53 LW 4906) Unless Congress changes FRCP 68, Marek will be the Court's interpretation for some time to come.

It is dangerous to speculate on what a Supreme Court will do, but it raises an interesting question of whether the Kansas Supreme Court, which borrowed FRCP 68 in enacting our Offer of Judgment statute, might conform future decisions under this statute with Marek. If they do, the defendant medical employer is protected if it makes a good faith offer that is rejected and the plaintiff does not obtain from a judge or jury more than what was offered.

5. See the proposed amendment to KSA 65-2836(b) in line 388 of HB 2661.

6. Generally, expert witnesses in a medical malpractice action do not testify as to whether "ordinary negligence" exists. Their expertise is confined to the question of the applicable medical standard of care relevant to the case. A doctor appearing as an expert witness for either the plaintiff or the defense establish the standard of care, and render a medical opinion whether the defendant deviated from the standard of care. They do not testify as to the existence of "negligence."