

Approved: 3-6-97  
Date

MINUTES OF THE SENATE COMMITTEE ON PUBLIC HEALTH AND WELFARE.

The meeting was called to order by Chair Sandy Praeger at 10:00 a.m. on February 24, 1997 in Room 526-S of the Capitol.

All members were present except:

Committee staff present: Emalene Correll, Legislative Research Department  
Norman Furse, Revisor of Statutes  
Jo Ann Bunten, Committee Secretary

Conferees appearing before the committee:

Jerry Slaughter, Kansas Medical Society  
Terry Humphrey, Kansas Trial Lawyers Association

Others attending: See attached list

**Action on SB 220 - Supervision and direction of personnel by healing arts licensees**

Jerry Slaughter, KMS, briefed the Committee on a balloon of SB 220 showing proposed amendments that would strike language on page 1, subsection (5), lines 31 through 33, relating to review of patient records, and insert new language on page 2, (d) relating to directing anesthesia care by a registered nurse anesthetist. (See Attachment 1)

Senator Salmans made a motion the Committee adopt the proposed amendments offered by the Kansas Medical Society, seconded by Senator Bleeker. The motion carried.

Senator Lee made a motion the Committee recommend **SB 220 as amended** favorably for passage, seconded by Senator Jones. The motion carried.

**Action on SB 221- Health care providers peer review and risk management**

Jerry Slaughter, Kansas Medical Society, submitted background material to the Committee on the current Kansas peer review and risk management laws. (Attachment 2) Mr. Slaughter also submitted a balloon of SB 221 showing proposed amendments that would insert language "submitted to or generated by" after the word "records" and strike "of" on page 3, line 4 of the bill; and also on page 3, line 26, after the words "attendance at", insert "a closed session held as a part of a" and strike "any"; and on page 5, line 9, after the words "attendance at", insert "a closed session held as a part of a" and strike "any". (See Attachment 3)

Terry Humphrey, Kansas Trial Lawyers Association, noted they were not able to reach a compromise with the Kansas Medical Society or the Kansas Board of Healing Arts on SB 221 as noted in her written testimony. (Attachment 4)

After Committee discussion, Senator Hardenburger made a motion the Committee adopt the proposed amendments offered by the Kansas Medical Society shown in the submitted balloon of **SB 221**, seconded by Senator Bleeker. The motion carried. Senators Lee and Steineger requested their "No" vote be recorded.

Senator Hardenburger made a motion the Committee recommend **SB 221 as amended** favorably for passage, seconded by Senator Bleeker. The motion carried. Senators Lee and Steineger requested their "No" vote be recorded.

**Adjournment**

The meeting was adjourned at 11:00 a.m.

The next meeting is scheduled for February 25, 1997.

# SENATE PUBLIC HEALTH AND WELFARE COMMITTEE GUEST LIST

DATE: 2-24-97

NAME	REPRESENTING
Gianfranco Pezzano, MD	KDHE
Pat Johnson	Bd of Nursing
Don Richard	KRCM
Greg Rosen	KDHE
Andrea Strand	Ks Advocates for Better Care
David Hartzfeld	KS Dental Ass'n
JERRY KESSEBORN	IRCAD SMOOT
David Kehm	KADM
LARRY BUENING	BD OF HEALING ARTS -
E. Behalheim	Assoc. of CMHCs
MEGGAN GRIGGS	KEARNEY LAW OFFICE
Jill Meyer	KS Gov. Consulting
Max Hansen	KMS
JERRY LAUBITER	KMS
Doug Smith	KAPA
John Federico	McGill & Associates
Tarri Roberts	Kansas State Nurses Assn.
Callie Jill Denton	K. Peterson's Assoc.
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS

SENATE PUBLIC HEALTH AND WELFARE COMMITTEE  
GUEST LIST

DATE: 2-24-97

NAME	REPRESENTING
Susan M. Baker	Hein + Weir
Amy Campbell	R. Rice Law Office
Rick Grithie	Health Midwest

# SENATE BILL No. 220

By Committee on Public Health and Welfare

2-6

9 AN ACT concerning the Kansas healing arts act; relating to the supervi-  
10 sion and direction of certain personnel by persons licensed to practice  
11 the healing arts; amending K.S.A. 1996 Supp. 65-2837 and repealing  
12 the existing section.

13  
14 *Be it enacted by the Legislature of the State of Kansas:*

15 New Section 1. (a) Every responsible licensee who directs, super-  
16 vises, orders, refers, accepts responsibility for, enters into practice pro-  
17 tocols with, or who delegates acts which constitute the practice of the  
18 healing arts to other persons shall:

19 (1) Be actively engaged in the practice of the healing arts in Kansas;

20 (2) review and keep current any required practice protocols between  
21 the responsible licensee and such persons, as may be determined by the  
22 board;

23 (3) direct, supervise, order, refer, enter into a practice protocol with,  
24 or delegate to such persons only those acts and functions which the re-  
25 sponsible licensee knows or has reason to believe such person is com-  
26 petent and authorized by law to perform;

27 (4) direct, supervise, order, refer, enter into a practice protocol with,  
28 or delegate to other persons only those acts and functions which are  
29 within the normal and customary specialty, competence and lawful prac-  
30 tice of the responsible licensee;

31 ~~(5) regularly review any required patient records of patients treated~~  
32 ~~by such persons and document such review in the patient record, as may~~  
33 ~~be determined by the board.~~

(delete)

34 (6) provide for a qualified, substitute licensee who accepts responsi-  
35 bility for the direction, supervision, delegation and practice protocols with  
36 such persons when the responsible licensee is temporarily absent.

37 (b) "Responsible licensee" means a person licensed by the state board  
38 of healing arts to practice medicine and surgery or chiropractic who has  
39 accepted responsibility for the actions of persons who perform acts pur-  
40 suant to practice protocols with, or at the order of, or referral, direction,  
41 supervision or delegation from such responsible licensee.

42 (c) Notwithstanding the provisions of this section, K.S.A. 65-2896 to  
43 65-2897b, inclusive, and amendments thereto, shall govern the direction

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1 and supervision of physicians' assistants by persons licensed by the state  
2 board of healing arts to practice medicine and surgery.

3 ~~(4) The board may adopt rules and regulations governing the direc-~~  
4 ~~tion, supervision, order, referral, use of practice protocols and the dele-~~  
5 ~~gation of acts which constitute the practice of the healing arts by respon-~~  
6 ~~sible licensees to other persons. Such rules and regulations shall establish~~  
7 ~~such conditions and limitations as the board determines to be necessary~~  
8 ~~to protect the public health and safety.~~

9 ~~(5) This section shall be part of and supplemental to the Kansas heal-~~  
10 ~~ing arts act.~~

11 Sec. 2. K.S.A. 1996 Supp. 65-2837 is hereby amended to read as  
12 follows: 65-2837. As used in K.S.A. 65-2836, and amendments thereto,  
13 and in this section:

14 (a) "Professional incompetency" means:

15 (1) One or more instances involving failure to adhere to the appli-  
16 cable standard of care to a degree which constitutes gross negligence, as  
17 determined by the board.

18 (2) Repeated instances involving failure to adhere to the applicable  
19 standard of care to a degree which constitutes ordinary negligence, as  
20 determined by the board.

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

23 (b) "Unprofessional conduct" means:

24 (1) Solicitation of professional patronage through the use of fraudu-  
25 lent or false advertisements, or profiting by the acts of those representing  
26 themselves to be agents of the licensee.

27 (2) Representing to a patient that a manifestly incurable disease, con-  
28 dition or injury can be permanently cured.

29 (3) Assisting in the care or treatment of a patient without the consent  
30 of the patient, the attending physician or the patient's legal representa-  
31 tives.

32 (4) The use of any letters, words, or terms, as an affix, on stationery,  
33 in advertisements, or otherwise indicating that such person is entitled to  
34 practice a branch of the healing arts for which such person is not licensed.

35 (5) Performing, procuring or aiding and abetting in the performance  
36 or procurement of a criminal abortion.

37 (6) Willful betrayal of confidential information.

38 (7) Advertising professional superiority or the performance of pro-  
39 fessional services in a superior manner.

40 (8) Advertising to guarantee any professional service or to perform  
41 any operation painlessly.

42 (9) Participating in any action as a staff member of a medical care  
43 facility which is designed to exclude or which results in the exclusion of

(d) Nothing in subsection (a)(4) shall be construed to prohibit a person licensed to practice medicine and surgery from ordering, authorizing or directing anesthesia care by a registered nurse anesthetist pursuant to K.S.A. 1996 Supp. 65-1158.



# KANSAS MEDICAL SOCIETY

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February 21, 1997

TO: Senate Public Health & Welfare Committee

FROM: Jerry Slaughter  
Executive Director

SUBJECT: SB 221; background on the peer review and risk management laws

At the hearing on this legislation the Committee asked for some background information on the current Kansas risk management law, K.S.A. 65-4921 *et seq.* and the current Kansas peer review law, K.S.A. 65-4914 *et seq.*, both of which are amended by SB 221. Following is a brief review of the history of these laws.

Risk management and peer review are processes utilized to assess, monitor and improve the professional competence of licensed practitioners through retrospective reviews which require a frank exchange of opinions and assessments by professional peers. In order for this process to work it must encourage candid analysis by fellow practitioners who are free to be critical without fear of retribution, so long as they act in good faith. The peer review statute was first enacted in 1984 and the risk management statute first enacted in 1986, though the history associated with both statutes goes back to the medical malpractice insurance crisis of the 1970s and 1980s. Malpractice insurance rates for physicians rose to the point that access to necessary medical services was jeopardized. In response to this crisis and to ensure the continued availability of medical care, almost every state enacted some form of tort reform. In Kansas, the Legislature took the following actions:

- The Health Care Provider Insurance Availability Act which created the Health Care Stabilization Fund was enacted in 1976 (K.S.A. 40-3401 *et seq.*);

- Medical malpractice screening panels were established in 1976 (K.S.A. 65-4901 *et seq.*);
- The statute of limitations was shortened as to medical malpractice actions in 1976 (K.S.A. 60-513); and
- The collateral source rule was modified as to medical malpractice actions in 1976 (K.S.A. 60-471). [In 1985 the Kansas Supreme Court invalidated the law]
- The peer review statute was enacted in 1984 (K.S.A. 65-4914);
- A cap was placed on punitive damages in medical malpractice actions in 1985; and
- Another attempt was made at modifying the collateral source rule in medical malpractice actions in 1985. (The court again in 1987 found the modification of the collateral source rule to be a violation of equal protection and invalidated it)
- Medical malpractice screening panel decisions were made admissible at trial in 1986 (K.S.A. 65-4904(c));
- The internal risk management program was created in 1986 (K.S.A. 65-4922); and
- Limitations were placed on qualifications of expert witnesses in medical malpractice actions in 1986 (K.S.A. 60-3412).

Peer review by health care facilities, physicians and licensing boards is recognized as an important function by this state. In the preamble to the peer review statute, the Legislature stated that is a "declared public policy in the state of Kansas that the provision of health care is essential to the well being of its citizens as is the achievement of an acceptable quality of health care. Such goals may be achieved by requiring a system which combines a reasonable means to monitor the quality of health care with the provisions of a reasonable means to compensate patients for the risks related to receiving health care rendered by health care providers licensed by the state of Kansas." (K.S.A. 65-4914) Furthermore, under the risk management laws at K.S.A. 65-4929, the Legislature made a policy statement that it recognized "the importance and necessity of providing and regulating certain aspects of health care delivery in order to protect the public's

general health and safety and welfare. Implementation of risk management plans and reporting systems as required by K.S.A. 65-4922, 65-4923 and 65-4924 and Peer Review, pursuant to K.S.A. 65-4915 and amendments thereto effectuate this policy." The Legislature went on in that same statute to extend the state's antitrust immunity to health care providers and peer review committees when they were performing their duties pursuant to the risk management and peer review laws, which is further evidence the state wanted to encourage and promote the peer review process.

Peer review and risk management provide the means by which physicians and other health care professionals review the care and treatment provided by other physicians and health care professionals. The recognition of the importance of these peer review procedures has been referred to by several courts in a variety of cases to include a "candid and conscientious evaluation of clinical practices" which are important to quality patient care; and that "constructive professional criticism cannot occur in an atmosphere of apprehension"; and "the purpose of the staff meetings is the improvement, through self analysis, of the efficiency of medical procedures and techniques." Furthermore, the courts have recognized that the value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is "undeniable". *Wesley Medical Center v. Clark*, 235 Kan. 13, 20, 669 P.2d 209 (1983).

The importance of peer review and risk management is acknowledged by the accrediting entity that reviews hospitals. The Joint Commission on Accreditation of Healthcare Organizations has as its defined mission to "improve the quality of care provided to the public." The 1996 Comprehensive Accreditation Manual for Hospitals Medical Staff Standard 5.7 states that the credentialing of the medical staff includes the deliberation process by the medical staff in



developing recommendations for appointment to or termination from the medical staff as provided by a peer(s) of the individual. Medical staff standards require continuous surveillance of the professional performance of all individuals who have delineated clinical privileges in the department. Leadership standards score each departmental director in the area of determination of the qualifications and competence of department personnel who provide patient care services, continuously assessing and improving the performance of care and services provided and in the maintaining of quality control programs. These standard are met by the use of effective peer review and risk management programs implemented under Kansas law.

The recognition of the importance of peer review is also seen through the creation of the federal National Practitioner Data Bank. Responsibility for the National Practitioner Data Bank resides with the United States Department of Health and Human Services. Health and Human Services writes that the intent of Title 4 of Public Law 99-660 (Health Care Quality Improvement Act of 1986) is to improve the quality of health care by encouraging physicians, dentists, and other health care practitioners to identify and discipline those who engage in unprofessional behavior; and to restrict the ability of incompetent physicians, dentists and other health care practitioners who move from state to state without disclosure or discovery of the practitioner's previous damaging or incompetent performance. Hospitals are the only health care entities with mandatory requirements for querying the data bank. Furthermore, under the Act health care entities must report adverse actions to the state medical or dental board, as appropriate, in the state in which the health care entity is located within 15 days from the date the adverse action was taken or clinical privileges were voluntarily surrendered.

1 tions.  
 2 (b) Except as provided by K.S.A. 60-437 and amendments thereto  
 3 and by subsections (c) and (d), the reports, statements, memoranda, pro-  
 4 ceedings, findings and other records of peer review committees or officers  
 5 shall be privileged and shall not be subject to discovery, subpoena or other  
 6 means of legal compulsion for their release to any person or entity or be  
 7 admissible in evidence in any judicial or administrative proceeding. In-  
 8 formation contained in such records shall not be discoverable or admis-  
 9 sible at trial in the form of testimony by an individual who participated  
 10 in the peer review process. *The peer review officer or committee creating*  
 11 *or initially receiving the record is the holder of the privilege established*  
 12 *by this section. This privilege may be claimed by the legal entity creating*  
 13 *the peer review committee or officer, or by the commissioner of insurance*  
 14 *for any records or proceedings of the board of governors.*

15 (c) Subsection (b) shall not apply to proceedings in which a health  
 16 care provider contests the revocation, denial, restriction or termination  
 17 of staff privileges or the license, registration, certification or other au-  
 18 thorization to practice of the health care provider. *A licensing agency*  
 19 *conducting a disciplinary proceeding in which admisston of any report*  
 20 *or record under this section is proposed shall hold the hearing in closed*  
 21 *session when any such report or record is disclosed. The licensing agency*  
 22 *shall make all portions of the agency record in which such report or record*  
 23 *is disclosed subject to a protective order prohibiting further disclosure of*  
 24 *such report or record. Such report or record shall not be subject to dis-*  
 25 *covery, subpoena or other means of legal compulsion for their release to*  
 26 *any person or entity. No person in attendance at any disciplinary pro-*  
 27 *ceeding shall be required to testify, nor shall the testimony of such person*  
 28 *be admitted into evidence, in any other civil, criminal or administrative*  
 29 *action, regarding the existence or contents of a report or record under*  
 30 *this section which is disclosed in a disciplinary proceeding.*

31 (d) Nothing in this section shall limit the authority, which may oth-  
 32 erwise be provided by law, of the commissioner of insurance, the state  
 33 board of healing arts or other health care provider licensing or disciplinary  
 34 boards of this state to require a peer review committee or officer to report  
 35 to it any disciplinary action or recommendation of such committee or  
 36 officer; to transfer to it records of such committee's or officer's proceed-  
 37 ings or actions to restrict or revoke the license, registration, certification  
 38 or other authorization to practice of a health care provider; or to terminate  
 39 the liability of the fund for all claims against a specific health care provider  
 40 for damages for death or personal injury pursuant to subsection (i) of  
 41 K.S.A. 40-3403 and amendments thereto. Reports and records so fur-  
 42 nished shall not be subject to discovery, subpoena or other means of legal  
 43 compulsion for their release to any person or entity and shall not be

submitted to or generated by

a closed session held as a part of a



KANSAS MEDICAL SOCIETY

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Jerry Slaughter  
Executive Director

1 act shall be designated a peer review committee or officer pursuant to  
2 K.S.A. 65-4915 and amendments thereto.

3 *(e) A licensing agency conducting a disciplinary proceeding in which*  
4 *admission of any report or record under this section is proposed shall*  
5 *hold the hearing in closed session when any such report or record is*  
6 *disclosed. The licensing agency shall make all portions of the agency rec-*  
7 *ord in which such report or record is disclosed subject to a protective*  
8 *order prohibiting further disclosure of such report or record. No person*  
9 *in attendance at ~~any~~ disciplinary proceeding shall be required to testify,*  
10 *nor shall the testimony of such person be admitted into evidence, in any*  
11 *other civil, criminal or administrative action, regarding the existence or*  
12 *contents of a report or record under this section which is disclosed in a*  
13 *disciplinary proceeding.*

3-2  
a closed session held as a part of a

14 Sec. 3. K.S.A. 65-4925 and K.S.A. 1996 Supp. 65-4915 are hereby  
15 repealed.

16 Sec. 4. This act shall take effect and be in force from and after its  
17 publication in the Kansas register.

MEMO

DATED: 2/21/97

TO: Senate Public Health &  
Welfare Committee

FROM: William J. Pauzauskie ( *Terry Humphrey* )  
of the Kansas Trial Lawyers Association *KTLA*

SUBJECT: Senate Bill 221 - Relating to the Confidentiality  
of Certain Peer Review and Risk Management Reports  
and Records

I regret to inform you that we have not been able to reach agreeable compromisable language with the Kansas Medical Society or the Kansas Board of Healing Arts.

In my opinion, the inability to reach agreement is not based upon the peer review or risk management statutes in and of themselves. We realize that Peer Review and Risk Management is the public policy of the State of Kansas and its the nature and scope of the "privilege" that we are concerned about.

This legislation, in our opinion, has some very "novel" evidentiary rules. Please understand that the licensing agencies hearings are open to the public and they are made for the benefit of the public, just as the licensing rules for lawyers or accountants or engineers are open to the public. Yet, the Medical Society wants a special rule which says the Peer Review or Risk Management Reports will not be admissible in any other civil, administrative or criminal proceeding. To the trial lawyers, representing the consumers, we are at lost as to how an appeal can be held from these "secret" hearings, if the reports are protected by the privilege.

Secondly, we don't know of any good reason for criminal evidence to be withheld from the proper authorities, and that does not hold well as a sound public policy.

Thirdly, the Peer Review statutes have been in effect for eleven years, ever since 1986, and the system has worked for the past eleven years, so we don't think the system is broke and doesn't need to be fixed by the broad expensive language.

Fourthly, as Mr. Slaughter says:

"The current peer review law protects documents generated by the peer review committee, but does not protect and records given to or obtain by the committee from another source."

The law could be used to protect all other reports, statements, memoranda, proceedings,

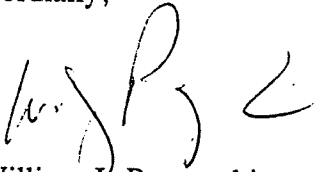
findings, and other records submitted to or generated by the Peer Review Committed and/or other officers. That is what the statute says. Now, the way Kansas Medical Society and the Board of Healing Arts interprets the language is only to allow the Peer Review Committee Report or the Risk Management Report to be confidential. But very simply put, if they only want those "reports" to be confidential, that's what the language should say and they shouldn't represent to the members of the committee, that the injured party can get everything else that he needs. The language that is used has a different result, from what's been verbally portrayed to be the purpose of the law, to the committee.

The nurses, the pharmacists, the doctors, the osteopaths, and the chiropractors have had open disciplinary hearings for eleven years, and we are not aware of why it should be closed beginning in 1997.

The change is monumental and unprecedented for a taxpayer funded quasi judicial body to have secret hearings - and some of the KTLA members think it's probably unconstitutional. Whom, if anyone, may see the "reports" on appeal?

Thank you for your courtesies for giving us additional time to work on these efforts and we have attempted to obtain additional information, and we will close by thanking you for your courtesies.

Cordially,



William J. Pauzauskie

WJP:rk