

WASHINGTON STATE MEDICAL ASSOCIATION
HOUSE OF DELEGATES

Subject: Fair and Professional Medical Staff Peer Review

Introduced by: Yakima County Medical Society

WHEREAS, after five years of litigation, Smigaj vs. Yakima Valley Memorial Hospital was settled in 2014, in favor of the plaintiff physician. This is the only such case in Washington in the 25 year history of the current peer review statute. The hospital's actions were particularly egregious, but have not been disavowed by the Washington State Hospital Association, which submitted an amicus brief to the Washington Supreme Court on the hospital's behalf. This courageous physician lost her practice and spent four years in bankruptcy. The case misspent greater than \$1 million in attorney fees and created a bitter polarization in the Yakima medical community. This could happen in other communities¹; and

WHEREAS, Resolution B-4, A Directive for WSMA to Take a More Active Role in Protecting the Integrity of Medical Staff Peer Review, was adopted unanimously by the 2012 House of Delegates and directs the WSMA to "actively promote legislation to specify what constitutes a fair and professional peer review process". That mandate is not fulfilled. Senate Bill 5666 (2013) specified that hospital QI processes must be conducted according to medical staff bylaws and hospital bylaws. However, the legislation did not require that the process be fair, and did not alter the "reasonable belief" evidence standard which is inadequate to insure fairness; and

WHEREAS, Resolution B-5, Medical Staff Bylaws and Physician Contracts, adopted by the 2012 House of Delegates, established as HOD policy that WSMA will oppose unfair and inappropriate hospital retaliation against physicians for "disruptive behavior", and oppose the use of the term "disruptive physician" when the physician's behavior meets the standards of the WSMA Model Medical Staff Bylaws. That mandate is not fulfilled, even though the Law and Justice Committee of the Washington State Senate wisely struck the term "disruptive physician" from SB 5666, requested a statewide standard definition of "disruptive physician behavior", and wrote model language that would exclude acts of whistleblowing and acts of conscience²; and

WHEREAS, Resolution B-1 (A-13), Fair and Professional Medical Staff Peer Review, adopted by the 2013 House of Delegates, even more explicitly directs that the Washington State Medical Association "will continuously advocate for state law which will protect the right of physicians to a fair and professional Peer

¹ *Settlement is Landmark for Medical Peer Review*, Yakima Herald-Republic, July 18, 2014
<http://www.yakimaherald.com/news/yhr/friday/2345048-8/settlement-is-landmark-for-medical-peer-review#print>

² 1436 AMS LAW S2454.2
<http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Amendments/Senate/1436%20AMS%20LAW%20S2454.2.pdf>

Review process” as a necessary condition for hospital immunity from physician suit (Reaffirm HOD Policy), and specifies six necessary elements of fairness. WSMA failed to act on that mandate; and

WHEREAS, instead, the WSMA Board of Trustees created a Peer Review Committee which began educational efforts, but did not include lobbying for the legislation necessary to fulfill the House of Delegates policy mandate. This committee created the 2014 WSMA survey of Washington physicians which returned 722 electronic responses and 35% of those answered “Yes” to the question: “Do you feel that there is a problem with the peer review process in your community?”; demonstrating the broad concern that Washington physicians have with the integrity of hospital Peer Review. As part of their education mission, this committee organized a *WSMA Medical Staff Leaders Peer Review Workshop*. The course fee was set at \$850 for 6 CME credits and the course was subsequently canceled because of inadequate registration. No other education has been offered.

WHEREAS, the WSMA bylaws explicitly state that the House of Delegates sets the policies of the organization and that the Board of Trustees is "subject...to the provisions of the Bylaws and all resolutions...of the House of Delegates"³ ; therefore, WSMA failure to fulfill the mandate of Resolution B-1 is a violation of WSMA bylaws. And,

WHEREAS, hospital employees, as in every workplace, may experience distress or discontent with supervision; however, employee distress alone is not sufficient evidence that a physician has been “disruptive” to patient safety. Hospital employees sometimes make errors which harm patients and distress physicians. When friction results, the hospital administration has a legal responsibility to assess the impact of employee errors and, with medical staff governance, document a fair attribution of blame; THEREFORE BE IT

RESOLVED, that the WSMA reaffirm existing policy on peer review (Reaffirm HOD Policy); and BE IT FURTHER

RESOLVED, the WSMA request that the Judicial Council evaluate pertinent peer review cases, particularly Smigaj vs Yakima Valley Memorial Hospital, according to the six elements of fairness of Resolution B-1 (A-13) and educate WSMA members on what constitutes fair and professional peer review with affordable fees for CME (Directive to Take Action); and BE IT FURTHER

RESOLVED, that the WSMA establish quick response resources for physicians with questions about peer review including the six elements of fairness of Resolution B-1 (A- 13). (Directive to Take Action)

Current WSMA Policy B-1 from 2013:

RESOLVED, that the WSMA will continuously advocate for state law which will protect the right of physicians to a fair and professional peer review and will amend RCW 7.71 to protect the right of physicians

³ WSMA Bylaws. ARTICLE VIII BOARD OF TRUSTEES, Section 1. General Powers
https://www.wsma.org/doc_library/AboutWSMA/Policies/Bylaws_12.pdf

to a fair and professional Peer Review process as a necessary condition for hospital immunity from physician suit. That bill must include these six elements:

- 1) Medical Staff and Hospital Bylaws must be followed. RCW 70.41.200 and 2007 c 273 s 22 and 2007 c 261 s 3 have been amended to include this provision, but RCW 7.71 should also be amended.
- 2) The legislative intention of HCQIA and WA RCW 7.71 is to "foreclose federal antitrust actions" which were the basis of 1988 US Sup Ct decision, Patrick v. Burgetts, but the intention was not to endorse "economic credentialing" in the absence of substandard physician performance. Financial bias is a prohibited motive in physician peer review.
- 3) "Fairness" requires that the peer review body actively demonstrate that all department members are under equal scrutiny continuously and held to the same standard.
- 4) "Professionalism" requires that peer review body decisions conform with standard medical practice and outside expert review. WSMA will continue to develop resources for unbiased expert review.
- 5) WSMA supports Rights of Conscience in physician decision making.
- 6) When "disruptive physician behavior" is cited in peer review sanction, quality of care complaints that are not disruptive must be excluded. This is defined in the amendment written by the Senate Law & Justice Committee. (Reaffirm HOD Policy); and BE IT FURTHER