

CMA - House of Delegates - 10/06

REFERENCE COMMITTEE F

Health Professions & Facilities

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1
2 **RESOLVED:** That physicians performing utilization review of the care
3 provided to patients in California be licensed in California; and
4 be it further

5 **RESOLVED:** That the physician performing utilization review has training,
6 competence and experience comparable to that of the treating
7 physician in treating the medical condition for which the review
8 is being performed; and be it further

9 **RESOLVED:** That utilization review requests be processed within applicable
10 legally-mandated time frames and also within a time frame that
11 does not negatively impact patient care, and that reviewers be
12 available for consultation at times convenient to the treating
13 physician.
14

15 Reason(s) for Recommendation:

- 16 A. There was testimony strongly in support of the first two resolves.
17 B. Testimony outlined some major inconveniences experienced by physicians attempting
18 to obtain authorization from insurers, warranting the addition of the third resolved.
19
20

21 **7. Resolution 603-06: REVIEWED PHYSICIAN'S RIGHT TO LEGAL**
22 **REPRESENTATION**

23 Author: Gerald N. Rogan, MD

24 **RESOLVED:** That CMA support legislation and seek a sponsor to amend California
25 Business and Professions Code §809.3 (c), and add or amend other
26 appropriate state law, to establish and protect a physician's right to be
27 represented by an attorney at every level of an administrative proceeding
28 of hospitals' and hospital affiliated facilities' medical peer review
29 process, in conformity with the federal Health Care Quality Improvement
30 Acts of 1986 and 1989 as amended, and the Model Medical Staff Bylaws
31 of the California Medical Association.
32

33 **RECOMMENDED ACTION:** YOUR REFERENCE COMMITTEE RECOMMENDS
34 APPROVAL OF THE FOLLOWING SUBSTITUTE
35 RESOLUTION (FOR RESOLUTION #603-06) AND
36 ASKS FOR A "YES" VOTE ON IT.
37

38 **RESOLVED:** That CMA sponsor legislation, when politically appropriate and
39 feasible, to permit a physician to be represented by an attorney of
40 his or her choosing during all peer review proceedings arising
41 from charges filed against the physician under California peer
42 review statutes (Business & Professions Code §§809 et seq.).

Reason(s) for Recommendation:

- 1
2 A. This assures the physician's right to an attorney in peer review hearings governed by
3 Business & Professions Code §809.
4 B. Addition of the language "when politically appropriate and feasible" permits CMA the
5 latitude for appropriate political assessment as to the timing and potential success or
6 failure of such a bill.
7
8

8. Resolution 604-06: FUNDING AND STAFFING PEER REVIEW HEARINGS

Author: Gerald N. Rogan, MD

11 RESOLVED: That CMA support and seek a sponsor for legislation specifying that the
12 payment for the cost of peer review hearings in California shall be
13 administered by a California government entity; and be it further

14 RESOLVED: That all those who work in or benefit from health care in California shall
15 pay an equitable users' fee to fund the peer review hearing process; and
16 be it further

17 RESOLVED: That California state government work with CMA to develop peer review
18 panels for each specialty of medicine, which panels shall be made
19 available to hospital and medical staff to staff the peer review hearing at
20 the request of either the hospital or the accused physician.
21

22 RECOMMENDED ACTION: YOUR REFERENCE COMMITTEE RECOMMENDS
23 DISAPPROVAL OF RESOLUTION #604-06 AND
24 ASKS FOR A "NO" VOTE ON IT.
25

Reason(s) for Recommendation:

- 27 A. Involving a government bureaucracy only increases the expense needed to operate the
28 system.
29 B. This may open the door for the Medical Board to control physician peer review.
30 C. It seems infeasible to require all Californians ("those who benefit from healthcare") to
31 somehow pay directly into a peer review system.
32

9. Resolution 605-06: APPOINTMENT OF PEER REVIEW HEARING PRESIDING OFFICER

Author: Gerald N. Rogan, MD

36 RESOLVED: That CMA support and seek a sponsor for legislation to amend California
37 Business and Professions Code §809.2, and add or amend other
38 appropriate state law, so that (1) the presiding officer (a.k.a. hearing
39 officer) in a medical peer review hearing must be mutually agreed upon
40 by the accused physician and the hospital's peer review body; (2) the
41 presiding officer may not be an attorney who or a member of a law firm
42 that represents the hospital, an affiliated hospital, health system, or

1 facility, or the hospital medical staff; and (3) if a hearing officer is not
2 agreed upon within the time required to complete the peer review
3 procedure, either party may apply to a court of competent jurisdiction to
4 appoint a presiding officer; and be it further
5 **RESOLVED:** That the presiding officer may serve a peer review hearing only once in a
6 lifetime.

7
8 **Resolution 619-06: HEARING OFFICER IN PEER REVIEW HEARINGS**

9 Author: Organized Medical Staff Section

10 **RESOLVED:** That the California Medical Association consider drafting legislation to
11 amend California law to include safeguards against selection of a biased
12 peer review hearing officer, such as the following:

- 14 1. If a hearing officer is selected to preside at a hearing held before a
15 panel, the hearing officer shall be mutually acceptable to the
16 licentiate and the peer review body;
- 17 2. That where the parties in a peer review proceeding are unable to
18 mutually agree on the selection of a hearing officer, that the law
19 permit an alternate process for selection of the hearing officer that
20 avoids concerns of financial bias based on expectation of future
21 employment as discussed in Haas and Yaqub;
- 22 3. The hearing officer shall not act or have acted as an advocate for the
23 peer review body or as legal counsel for hospital for some specified
24 period of time before the peer review proceeding;
- 25 4. If the hearing officer has been challenged and refuses to be
26 disqualified, either party may apply to a court of competent
27 jurisdiction on an expedited basis to select another hearing officer.

28
29 **RECOMMENDED ACTION:** YOUR REFERENCE COMMITTEE RECOMMENDS
30 APPROVAL OF THE FOLLOWING SUBSTITUTE
31 RESOLUTION (FOR RESOLUTIONS #605-06 and
32 #619-06) AND ASKS FOR A "YES" VOTE ON IT.

33
34 **RESOLVED:** That CMA sponsor legislation, when politically appropriate and
35 feasible, to amend California law to ensure the selection of an
36 unbiased peer review hearing officer, consistent with the
37 following principles:

- 38 1. If a hearing officer is selected to preside at a hearing held
39 before a panel, the hearing officer shall be mutually
40 acceptable to the licentiate and the peer review body;
- 41 2. Where the parties in a peer review proceeding are unable to
42 mutually agree on the selection of a hearing officer, that there
43
44

1 be an alternative process for the selection of the hearing
2 officer that avoids concerns of financial bias based on
3 expectation of future employment as discussed in *Haas v.*
4 *County of San Bernadino* (2002) 27 Cal.4th 1017, and *Yaqub v.*
5 *Salinas Valley Mem. Healthcare System* (2004) 122 Cal.App.4th
6 474;

- 7
8 3. That neither the hearing officer, nor the law firm of the
9 hearing officer, shall act or have acted as an advocate for the
10 peer review body or as a legal counsel for the hospital or an
11 affiliated facility or health system for a defined period for
12 time before the peer review proceeding.

13
14 Reason(s) for Recommendation:

- 15 A. The deleted last resolved does not provide safeguards against inappropriate use of the
16 courts in order to delay proceedings. That issue is complex and is currently being
17 studied by CMA in talks with stakeholders.
18 B. An appropriate mutual selection process would necessarily include full disclosure
19 regarding potential conflicts of interest of the hearing officer.
20 C. Addition of the language "when politically appropriate and feasible" grants CMA the
21 latitude for appropriate political assessment as to the timing and potential success or
22 failure of such a bill.

23
24 **10. Resolution 606-06: PROTECTION OF PHYSICIAN WHISTLEBLOWERS**

25 Author: Gerald N. Rogan, MD

26 **RESOLVED:** That CMA support and seek a sponsor for legislation to amend California
27 Health and Safety Code §1278.5(a), Business and Professions Code
28 §2056, and add or amend other appropriate state law, to extend
29 whistleblower protections to a physician on the medical staff of a
30 hospital, hospital-owned facility, affiliated hospital, or affiliated hospital-
31 owned facility when that physician submits a complaint or report to the
32 hospital or government agency, or initiates or cooperates with a
33 government investigation or proceeding, regarding a quality issue in a
34 health care facility, congruent to the protections currently assured to an
35 employee of the facility.

36
37 **RECOMMENDED ACTION:** YOUR REFERENCE COMMITTEE RECOMMENDS
38 APPROVAL OF THE FOLLOWING SUBSTITUTE
39 RESOLUTION (FOR RESOLUTION #606-06) AND
40 ASKS FOR A "YES" VOTE ON IT.

41
42 **RESOLVED:** That CMA sponsor legislation, when politically appropriate and
43 feasible, to extend whistleblower protections to a physician on the

1 **medical staff of a hospital or any of its affiliates, when that**
 2 **physician (1) submits a complaint or report to the hospital or a**
 3 **government agency, or to a private or governmental health care**
 4 **accreditation agency, or (2) initiates or cooperates with a**
 5 **government or private accreditation agency investigation or**
 6 **proceeding regarding a quality issue in a health care facility,**
 7 **congruent with the protections currently assured to an employee**
 8 **of the facility.**

9
 10 Reason(s) for Recommendation:

- 11 A. Deletion of references to specific statute sections permits CMA the latitude to
 12 determine which laws need changing or must be added.
 13 B. Addition of the language "when politically appropriate and feasible" permits CMA the
 14 latitude for appropriate political assessment as to the timing and potential success or
 15 failure of such a bill.
 16 C. The additional language expands the protections to include prohibition against
 17 retaliation based on complaints made to any private or governmental accreditation
 18 organization, such as JCAHO.
 19

20 **11. Resolution 601-06: HOSPITAL CONTRACTORS IN PEER REVIEW HEARINGS**

21 Author: Ronald A. Allison, MD

22 **RESOLVED:** That pathologists, hospitalists, emergency room physicians,
 23 anesthesiologists and radiologists who have written or de facto contracts
 24 with hospitals shall not be permitted to sit in judgment on judicial review
 25 panels reviewing other physicians within the hospital who do not have
 26 such contracts.
 27

28 **RECOMMENDED ACTION:** YOUR REFERENCE COMMITTEE RECOMMENDS
 29 **DISAPPROVAL OF RESOLUTION #601-06 AND**
 30 **ASKS FOR A "NO" VOTE ON IT.**
 31

32 Reason(s) for Recommendation:

- 33 A. While it is possible that a hospital contract could result in some level of bias, these
 34 issues should be dealt with on a case-by-case basis as with any other potential bias that
 35 could affect fairness in peer review hearings.
 36 B. The resolution is divisive of the House of Medicine.
 37

38 **12. Resolution 602-06: MEDICAL STAFF BYLAWS AND WAIVER OF DUE PROCESS**

39 Author: Ronald A. Allison, MD

40 **RESOLVED:** The CMA forbid any medical staff bylaws to have any informed consent
 41 to restrict in advance one's constitutional rights and especially her due