

Peer Review In Focus

Dentistry's Dispute Resolution Program: A Peer Review Process

**A Complete Guide to the Process
and Related Considerations**

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ETHICAL FOUNDATION OF PEER REVIEW

Dentistry holds a special position of trust within society. This position is fostered by the profession's commitment to high ethical standards of professional conduct, which has the benefit of the patient as their primary goal. Peer review serves the public and profession by providing an alternate means of achieving resolution of disputes between patients and dentists. The following sections from the ADA *Principles of Ethics and Code of Professional Conduct* provide the ethical foundation for peer review

Section 3-PRINCIPLE: BENEFICENCE ("do good"). The dentist has a duty to promote the patient's welfare.

This principle expresses the concept that professionals have a duty to act for the benefit of others. Under this principle, the dentist's primary obligation is service to the patient and the public-at-large. The most important aspect of this obligation is the competent and timely delivery of dental care within the bounds of clinical circumstances presented by the patient, with due consideration being given to the needs, desires and values of the patient. The same ethical considerations apply whether the dentist engages in fee-for-service, managed care or some other practice arrangement. Dentists may choose to enter into contracts governing the provision of care to a group of patients; however, contract obligations do not excuse dentists from their ethical duty to put the patient's welfare first.

Section 3.B.GOVERNMENT OF A PROFESSION.

Every profession owes society the responsibility to regulate itself. Such regulation is achieved largely through the influence of the professional societies. All dentists, therefore, have the dual obligation of making themselves a part of a professional society and of observing its rules of ethics.

BACKGROUND AND DISCLAIMER

This manual was prepared by the Council on Dental Benefit Programs of the American Dental Association to assist the many constituent and component dental societies in their development of an effective and efficient peer review process. This manual should not be considered as creating a standard for this process. Rather, each dental society must consult with its own legal counsel to assure that its peer review program complies with applicable law, bylaw provisions and insurance protection. This is particularly true with respect to sample forms contained in this Manual, which have **not** been reviewed with respect to state laws. The Association hopes that peer review committees will follow similar procedures to achieve consistency within the mechanism.

The information contained in this Manual is a compilation of many fine peer review programs throughout the country and incorporates all of the policies and procedures for peer review that have been approved by the House of Delegates of the American Dental Association.

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PREFACE

The dental profession has assumed both a special obligation to the patients it serves and a responsibility to itself to maintain its high standards and professional integrity. No activity in organized dentistry demands as much of a commitment to this obligation and responsibility as peer review.

Peer review challenges the individual committee member's sense of fairness and objectivity, sound judgment and clinical skills. It also demands a commitment from the dental society to act with efficiency, expediency and responsiveness. Most important, however, peer review provides the most tangible opportunity for the dental profession to demonstrate its overriding concern: the provision of quality dental care to the patient.

A successful peer review process imposes established and consistently applied standards of procedure and practice that engender the respect of the dental community, public trust and the willingness of third party payers, patients and others, to use it.

INTRODUCTION

The American Dental Association developed this manual primarily for two reasons: to suggest the types of policies and procedures that can be adopted and implemented to ensure the systems' success; and to encourage a reasonable degree of consistency and uniformity of procedure among the component societies within a state, as well as among states.

A successful peer review process is efficient, expeditious, and is perceived to be unbiased and credible. Its success is never more undermined than through inconsistent, arbitrary procedures and policies.

Consumer health care awareness, the dental benefit marketplace, and the dental practice environment, have changed considerably since organized dentistry first recognized the need for, and benefits of, patient grievance committees. The ability of dental societies to recognize and respond to the varied demands imposed on individual dentists and the dental profession has evolved into a sophisticated and effective process.

The Association first established policy on peer review in 1970 with the adoption of the statement on Dental Society Review Committees. That statement outlined the purpose and functions of review committees and clearly specified that such committees were to be established for prepayment programs. Other committees, such as patient grievance, patient relations, or patient counseling, dealt with disputes between patients and dentists.

Since 1970, other policies have been adopted that gave peer review committees the right to review radiographs and other treatment records (1971); encouraged third parties to use the peer review process (1972); urged constituent societies to seek statutory exemption from civil damage liability for peer review committee members (1973); acknowledged the prerogative and duty of the dental profession to conduct all necessary review of dental services through its established mechanisms, including peer review (1975); supported the combining of responsibilities for grievance and peer review committees under the auspices of a single "peer review committee" (1977); urged constituent societies to cooperate in the resolution of interjurisdictional cases (1979); amended the Bylaws definition of member in good standing to include, among other things, cooperation with dental society peer review bodies (1980); urged constituent societies to change or otherwise modify their peer review systems in accordance with the Association's provisions (1981).

In 1987, policies on peer review were revised to reflect the current practices in peer review and the changing nature of the different relationships that exist in the delivery of dental care.

All insurance carriers, service corporations, alternative benefit plans and government programs were urged to use the dental profession's established peer review process to address issues or disputes concerning dental treatment.

The majority of the remaining peer review policies were modified where necessary and incorporated into a statement, *Guidelines on the Structure, Functions and Limitations of the Peer Review Process*. That statement was revised and adopted in 1992 by the ADA House of Delegates. It appears in *Appendix A*.

As policy addressing the different dimensions of the peer review process was adopted, the Council on Dental Benefit Programs sought every opportunity to assist and support the efforts of constituent and component dental societies in peer review. Informational material and assistance programs have provided valuable resources in training new committee appointees, the conduct of peer review, administrative procedures, and the promotion of peer review to those within the dental community and those with a tangible role in dental treatment.

This manual represents the most recent ADA effort to encourage peer review by providing a useful resource to those actively involved in the peer review process. The appendices include samples of forms and letters and other items important for peer review. Also, to facilitate the process for the peer review committee chair and dental society staff, a Quick Reference Procedure Outline is located later in the manual.

We note that this is not the last word on peer review. Experience at the constituent and component levels, coupled with legislative and regulatory developments will shape the evolution of peer review in the future.

PARTICIPANTS IN THE PEER REVIEW PROCESS

The process of peer review in organized dentistry provides a means for resolving differences of opinion between a dentist and patient or between a dentist and a third party, such as an insurance carrier, a dental service corporation, an administrator of a health and welfare trust, an alternative benefit plan, a government agency, or an employer who has implemented a self-funded and self-administered dental plan.

The peer review process is managed and administered cooperatively by constituent and component dental societies, and is available to the public, the dental profession and third parties. Because a dental society has a responsibility to both the public and the dental profession, dentists who are not members of the constituent and component societies should have access to the peer review process and, when possible, should be notified of this opportunity.

MATTERS FOR REVIEW

A peer review committee is established to review matters concerning, but not limited to, appropriateness of care, quality of care, and sometimes, when acting in an advisory capacity, fees. A committee acts on appropriate request, usually from a patient, a dentist, or an insurance carrier.

Appropriateness of Care

Appropriateness of care can be defined as the professional acceptability of planned or completed diagnostic evaluation and treatments, to include the necessity and consistency with patient complaint or diagnosis.

Quality of Care

Quality of care concerns an evaluation of the treatment provided using the standards that generally prevail within the professional community by those who routinely perform the treatment in question.

Fees

Fees are the third general category for possible review. The committee may determine from the evidence made available to it whether the fee in question is the dentist's usual fee for a given procedure. If the fee charged appears not to be the dentist's usual fee, the committee may determine whether the fee is reasonable concerning the degree of difficulty or complexity of the dental procedure employed. Peer review committees must exercise great care in handling cases involving fees, to avoid violating federal antitrust laws. The Federal Trade Commission issued an advisory opinion on the review of fees by peer review committees. The complete text of the opinion is found in *Appendix L* and is more fully discussed in this manual in the section titled *Legal and Liability Issues: Antitrust Considerations: Fee Review*.

MATTERS NOT WITHIN THE PURVIEW OF PEER REVIEW

The peer review process was not designed to handle every type of situation or problem that may arise between patients, dentists, and third parties.

Cases in Litigation

It is not within the authority of the committee to review cases in litigation. Therefore, a case is ineligible for consideration by a peer review committee if an involved party has initiated formal litigation proceedings concerning any aspect of the dental services under review. A case is determined to be formally in litigation when a party to a dispute files a complaint instituting a civil action in court. A patient consultation with an attorney should not be automatically interpreted to mean that the case is in litigation and, therefore, ineligible for review.

The one exception involves cases in which a dentist has initiated litigation against a patient for the collection of fees. In such cases, a component society should be able to exercise discretion in determining whether peer review would be beneficial. The benefits to the patient inherent in peer review are not necessarily lost merely because the dentist has initiated legal action for the collection of fees.

Dentist to Dentist Complaints

The current peer review system is not intended to handle a complaint initiated by one dentist against another. Such complaints are likely to be adversarial in nature, so consideration should be given to the referral of these complaints. If the peer review process were to open a case on the basis of an evaluation or allegation of one dentist regarding the treatment rendered by the other, a patient examination or evaluation would have to be completed by yet another dentist. The peer review committee would then have to make a decision based on the patient evaluation. In brief, patient cooperation would be required. If this in fact can be obtained, there would appear to be no reason not to pursue the matter as a patient initiated complaint. This approach coincides with the obligation of the dentist to inform the patient of the status of his or her oral health. Having done this, the dentist has done all that is required except in cases of gross or continual faulty treatment.

In such cases, societies should follow the Association's recommendations which state that "... request(s) submitted by a dentist for review of treatment by another dentist should be channeled to that agency which the constituent society has determined should review allegations of gross or continual faulty treatment by a dentist. This could be the judicial committee or committee on ethics, or some combination thereof. It could

also be the state board of dentistry." The key phrase is "Which the constituent society has determined..."

Judicial committees are most familiar with this type of proceeding and should have the necessary procedural structure to handle them. They should be given the specific authority or jurisdiction over such matters. If they have not, referral to the state board may be the best course. Referral to a committee on ethics would be appropriate only if procedures have been established for the committee to handle this type of complaint. The scope of authority of an ethics committee depends entirely on the defined function in a particular state.

Alleged Fraud and Other Violations of State Dental Practice Acts

Peer review chairs, committee members and dental society staff should be sensitive to the actual issues raised in a complaint submitted for review. Many times a case that appears clear-cut on its face may have ramifications beyond the peer review process. Such a situation may occur when a case involves possible violations of the state dental practice act.

Review of cases involving alleged or suspected fraud (e.g., billing for work not done, falsifying treatment dates, etc.) is not within the purview of peer review committees. These cases should be reported to the constituent society for possible referral to the state board of dentistry or other appropriate authority.

Suspected violations of the state dental practice act may become evident in the course of the committee's review. These types of cases, when identified, should also be referred to the constituent society for possible referral to the state board of dentistry or other appropriate authority. Depending on the nature of the case, the committee may be permitted to proceed with the review if it concerns a matter of the quality or appropriateness of care that will not be addressed by the state board of dentistry. If the state board is addressing the same issue that peer review would address, peer review should terminate the case, allowing it to be fully addressed by the state board. In general, the specific concerns of peer review are different from those of the state boards of dentistry, but they may often overlap in some areas. State dental societies are urged to utilize communication and working relationships with state dental boards to effectively and efficiently resolve patient's complaints about oral health care.

THE PEER REVIEW COMMITTEE

The peer review committee should be a permanent committee of the dental society with appropriate status and ties to other related committees. It can be formed as a freestanding committee or, alternatively, a subcommittee of the body within the society that concerns itself with dental care programs. In some states, the peer review and ethics committees operate under a single organizational umbrella.

Committee Composition

The committee membership should be composed primarily of general practitioners who have the qualifications and experience to render a considered opinion as to the dental standards of the community. Terms on the committee should be staggered to ensure continuity of experience. The appointment of a layperson to serve on the peer review committee is encouraged.

The committee should have specialists as resources who can be appointed if the dentist being reviewed is a specialist and requests a committee composed of like specialists. All specialists under review should be informed of this option, but the decision whether to grant such a request is within the sound discretion of the chair and may depend on the complexity of the case, among other factors. If the committee feels the need for additional expertise, other members may be appointed on an ad hoc basis.

Serving on a peer review committee is both challenging and demanding. It is a commitment that requires a great sense of ethical responsibility to the public and the dental profession. It requires a willingness to make an investment of time. These individuals believe strongly in the worth of peer review and are committed to the success of the process. They should be chosen to serve on peer review committees based on their ability to be:

- unbiased
- even-tempered
- objective
- level-headed
- a good listener
- caring

An individual who serves on a constituent society body responsible for hearing appeals should be excluded from serving on a component committee because of the potential conflict of interest. Similarly, individuals should be excused who have an interest in the outcome of the case that might cloud their impartial judgment. Whenever possible, component society officers should also refrain from participation.

Committee Size

The size of the committee should reflect the geographic area covered, the dental population of the component, and the caseload. To ensure continuity, members should serve staggered terms of three to five years. Ideally, committees should have at least five members. But flexibility to meet community needs or dental society limitations should be the deciding factor in committee size. For instance, in communities where there are few practicing dentists, it may be difficult to maintain a larger committee. In such cases a smaller body could satisfy the situation, but consideration should be given to bringing in dentists from other components for the committee review to insure impartiality.

Lay Representative

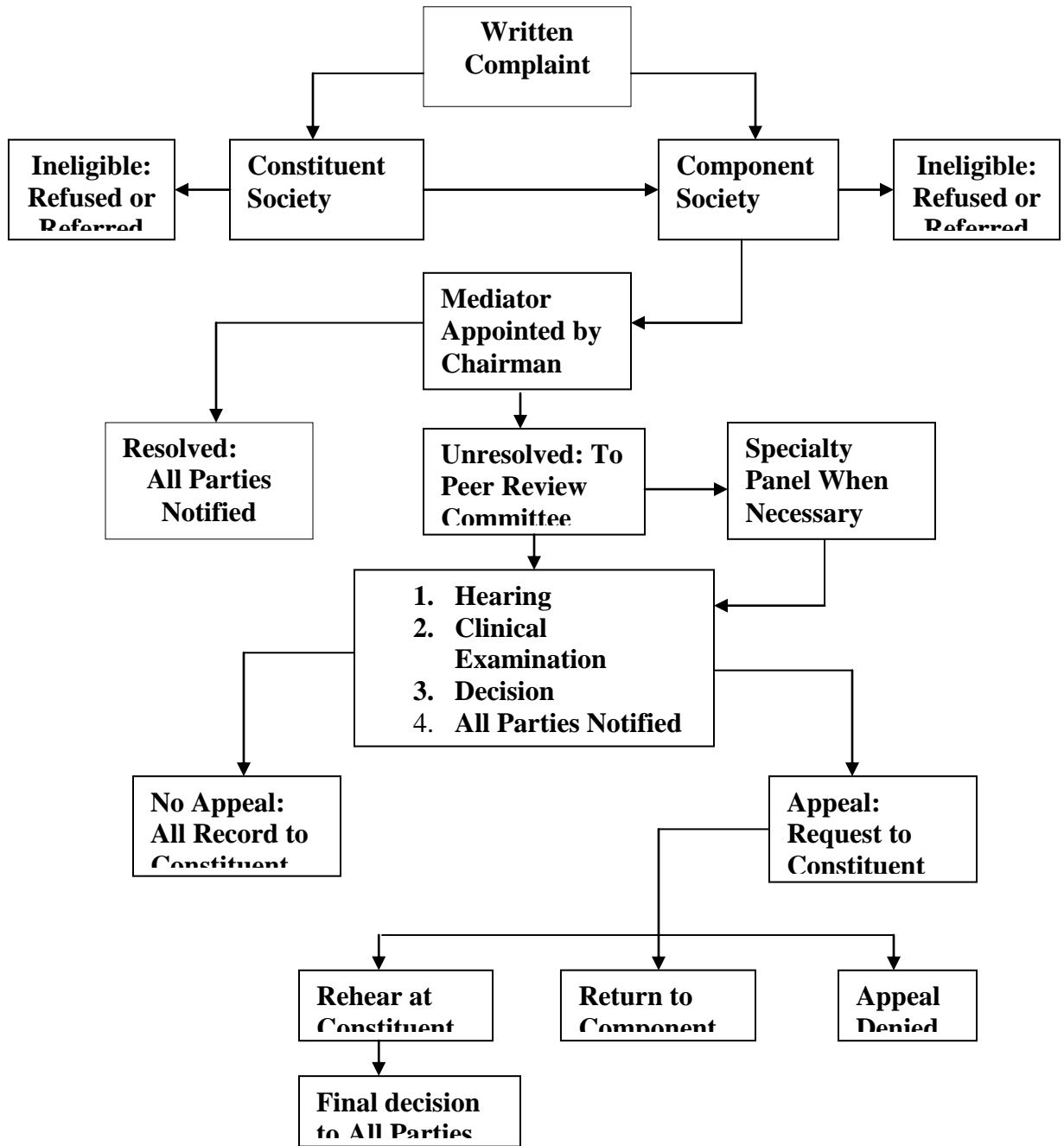
As mentioned above, the committee should try to include a layperson who is trusted and well respected in his or her community. Although this individual may have no prior knowledge of the peer review process, and no familiarity with clinical dentistry, a layperson lends credibility to the committee proceedings by monitoring peer review procedures and representing the interest of the public. It is not a requirement that a layperson have expertise in any particular field to serve on a peer review committee. When utilizing laypersons in the peer review process, it is recommended that these individuals serve on a routine basis, if possible, rather than participating only in selected peer review cases.

Specialists

As mentioned above, the committee should also have specialists as resources who can be appointed on an ad hoc basis. This is especially important if the dentist being reviewed is a specialist and requests a committee composed of like specialists, or if the committee feels the need for additional expertise. The methods for selecting specialists to serve vary from society to society. Some constituent societies predetermine individual specialists to serve; in other instances the specialty organizations themselves are called upon to suggest who should participate. Regardless of how they are chosen, any additional members appointed on an ad hoc basis should have the same status, for the particular case, as do permanent members of the peer review committee. They should also have the same general qualifications to serve on the committee as the other members, including freedom from bias.

Prior to the review, any of the involved parties may ask to know the names of the committee members reviewing the case and may also submit a properly documented request that the chair dismiss a committee member for cause. The chair, with the advice of the committee, should be empowered to accept or reject this request, giving the reasons for such action.

PEER REVIEW FLOW CHART



QUICK REFERENCE PROCEDURE OUTLINE

- 1) The written complaint is received by constituent or component society.
 - a) The complaint is reviewed for appropriateness by the peer review chair and/or staff.
 - i) If appropriate for peer review, it is referred to the component or processed by the component chair.
 - ii) If not appropriate for peer review, request is denied and the initiator is so notified (complaint may be referred to the appropriate dental society committee or outside agency.)
- 2) The component chair appoints a mediator-who contacts all parties within 10 days.
- 3) When mediation is successful, the complaint is resolved
 - a) The mediator submits a written report to the chair.
 - b) The chair notifies all parties of the resolution (this should be completed within 30 days of receipt of complaint.)
- 4) When mediation is unsuccessful, the complaint is not resolved and the case may proceed to peer review.
 - a) The mediator submits a written report to the chair.
 - b) The Peer Review Request Form with its cover letter is sent to all parties.
 - c) All parties are contacted to obtain a mutually agreed date and time for the committee review.
 - d) All parties are notified by mail of the date, time and place of the hearing/examination.
- 5) Chair organizes a committee to review the case
 - a) Three or four committee members are selected for the review (it is suggested that committee members be selected on a rotating basis.)
 - b) If a specialist is being reviewed, a committee of like specialists is appointed when requested and appropriate.
- 6) The review and/or examination is scheduled.
 - a) The clinical examination can be performed at this time by each of the committee members independently.
 - b) The committee reviews all documents and then interviews each party to the dispute separately.
 - c) The committee decision is reached in closed session
- 7) All parties are notified of the decision and informed of their right to appeal within 30 days.
 - a) When monies are being returned as part of the decision, a release form should be sent with the above letter.
- 8) When there is no appeal, all records and documents are sent to the constituent society office for filing (all dental records are returned to the dentist.)
- 9) When there is an appeal, the appeal form is directed to the constituent society.

- a) The Constituent Committee reviews request and may take one of the following actions:
 - i) Deny the appeal if there is no basis (the appellant is notified that the decision of the component is upheld and that the case is closed).
 - ii) Refer the appeal back to the component for cause with the request that the case be reheard to correct the deficiencies.
 - iii) Rehear the case at the constituent level using the same basic peer review procedures as outlined above.
- 10) All parties are notified and the decision of this peer review panel is final.

THE REVIEW PROCESS

This section lays out the framework for a peer review process that should serve the needs of most dental societies. The appendices contain sample letters and forms that will help in the administration of the review process. They are arranged in the order they would normally be used. The dental society should review this process and the sample forms with its attorney and make any changes needed to conform them to state law or local conditions. *Appendix B* contains a sample peer review process checklist for the peer review chair. The use of such a checklist, with all the notations made on a timely basis, is encouraged.

A request for peer review initially starts out as a telephone contact to the dental society office. Even though these telephone contacts aren't formal complaints, these calls should be logged, so that a more accurate report of peer review activities may be prepared at year's end.

The Request for Review

All parties wishing to initiate peer review must make the request in writing to appropriate constituent or component societies. It is recommended that the pamphlet "Dentistry's Dispute Resolution Program: A Peer Review Process" accompany the mediation request form and its cover letter (see *Appendix C*.) The request for review should be accompanied by supporting documents and other pertinent information and must include a signed release of patient information to the committee.

Third-party payers, in their request for initiation of peer review, must document that the dentist's office has been contacted for clarification of clerical and/or reporting problems. In matters of professional judgment or contract interpretation, it must be documented that the carrier's dental consultant has personally contacted the dentist for additional information and clarification.

Screening

Peer review chairs, committee members and dental society staff should be sensitive to the actual issues raised in the complaint. The determination must be made, at the outset, that the request deals with an area over which the committee has jurisdiction. Another factor that should be used in this screening process is the time elapsed between the dental treatment and the filing of the complaint. A long time span could alter the clinical conditions and cloud accurate detailing of the procedures performed. While statutes of limitations are not binding on peer review committees, many

constituents have used these laws as guidelines for the time period in which peer review cases will be accepted.

Acknowledgement

Once it has been established that the complaint is eligible for peer review, it is recommended that a copy of the complaint be sent to the other party with a request for their side of the story (see *Appendix C.*) This practice of obtaining written statements from all parties can be very helpful to the mediator.

MEDIATION

Mediation, the initial step in peer review, is one of the most important steps in the peer review process. If a constituent dental society includes mediation in its peer review program, mediation is the initial step in peer review and is one of the most important steps in the peer review process. Properly conducted, this process can reestablish communication and trust so as to resolve problems expeditiously.

When a request for review is received, the chair appoints one member to act as the mediator. The chair balances several competing priorities in assigning the responsibility of mediation. Mediation requires special skills that are often acquired through experience coupled with personal aptitude. An individual who serves as the mediator may thus be a unique member of the peer review program who benefits the parties in a case and the program itself; In some instances, such an individual may wish to continue serving as the peer review program's mediator. In other instances, such an individual may wish to have a respite from doing mediation because virtually all peer review cases are first attempted through mediation, giving mediators a relatively greater burden of work. Also, other peer review committee members may wish to develop mediation skill and experience and the peer review program needs to have a cadre of skilled mediators. These priorities require continual attention and balance.

To be effective in the role of the mediator, he or she must:

- Assist each party to define his or her specific demands and requests.
- Identify those demands and requests that can and cannot be addressed in the mediation process.
- Clarify areas in which the parties agree and those in which they differ.
- Facilitate parties in creating options.
- Encourage each party to make some concessions in order to achieve some gains.

In addition, the mediator must use good listening and communication skills and should:

- Allow the parties to tell their stories without interruption
- Ask for information or clarification by using open-ended questions, rather than interrogation-like "why" questions or questions that require a yes or no answer. Poorly worded questions may sound accusatory and must be avoided.

An important factor in the mediation process is the timeliness of the mediator's follow up. It is imperative that complaints be acted upon promptly--preferably within 10 days of receipt of the request. Using the above skills, the mediator should contact all parties and try to resolve the problem. All of these contacts should be carefully documented using the "report of mediation" form found in *Appendix D*.

When mediation is successful, the mediator submits a written report to the chair who then notifies all parties of the agreement in writing. (The mediator's report and agreement letter are found in *Appendix D*).

When mediation is unsuccessful, all parties are notified by letter that review by the peer review committee is necessary. The letter and the agreement for submission of the case to peer review (see *Appendix E*) are sent to the involved parties. These forms explain the process in lay language and give the committee permission to conduct a clinical examination.

COMMITTEE REVIEW AND APPEALS

Structuring the Committee

If mediation was unsuccessful and review by the peer review committee is necessary, the chair appoints a minimum of three members of the committee to review the case. The mediator should not be included on the committee because he or she will be called upon to report prior efforts in resolving the case.

If the peer review committee feels that additional expertise is needed in a specific case, it can request that specialists or other appropriate individuals be appointed to serve on an ad hoc basis. Any additional members appointed on an ad hoc basis should have the same status, for that particular case, as do permanent members of the committee.

Review of a Specialist

If the dentist being reviewed is a specialist, he or she may request that the chair appoint a committee of at least three like specialists. The chair to whom this request is directed should consider whether fairness requires granting this request. The complexity of the procedure at issue will have a bearing on this. The chair should have available resources for identifying the specialists to serve on a committee. In some instances, the constituent society may have identified specialists to serve; in others, the specialty organization may have established a procedure to identify individuals to serve in this capacity.

With respect to review of cases involving treatment in specialty areas, most peer review committees follow the underlying principle that there is one standard of care, regardless of whether it is a general dentist or specialist who provides the care.

Conducting the Review and Clinical Examination

Committee review of a case is initiated with the mediator's written report. After this report has been reviewed, the committee interviews each party to the case separately in closed session.

If the committee feels that a clinical examination is necessary, the patient must give formal written permission for the examination, if he or she has not already done so prior to the review (see *Appendix E*). The patient's dentist is also notified by mail that an examination will be conducted. If the patient refuses to submit to an examination, the review is terminated with a written explanation of the reason for termination sent to all parties involved (see the termination letter in *Appendix G*).

The primary duty of peer review is evaluate the complaint. However, if in the course of the review of the complaint it is noted that there is any aspect of the patient's condition that is potentially detrimental to the patient's health, the patient should be advised and urged to seek necessary care, with assistance from the component society if requested.

During the clinical examination and the committee review, it is recommended that attorneys not participate and that no verbatim transcripts or report of the proceedings should be made. It is imperative that each examiner conduct an independent examination and that each examiner not compare notes until he or she has had the chance to make an independent decision prior to reconvening the committee. It is most important that the examiner not discuss any findings or other aspects of the patient's oral condition with the patient. This information will be appropriately communicated in the committee's written report.

A sample worksheet for the clinical examination and a sample form for the report of the peer review committee are found in *Appendix H*.

The Committee's Decision and Report

After review of the documentation and completion of the interview, the committee, in closed session, considers the information it has gathered and forms its decision. A majority vote constitutes the decision of the committee. A written minority opinion should be permitted and may be included with the final report.

The peer review report is an internal document of the committee and should not be sent out to any of the involved parties. Its use is to help the committee reach a consensus and conclusion that can be put into letterform. Sharing the report with others could compromise the confidentiality protection afforded by state law.

The committee should notify all parties in writing of its decision and recommendations. The information provided should be specific about the issues raised in the review process and should exclude extraneous or unnecessary comment, or personal opinion regarding the case.

The report or accompanying letter should include an explanation of the right to appeal to the constituent peer review committee. Examples of letters, conveying the committee's decision and recommendations are found in *Appendix I*. If the Committee's decision involves an exchange of money, a release and satisfaction of claims form should be signed by all parties to release all parties from further liability or other claims (see *Appendix I* for a sample release and satisfaction of claims form.)

A separate letter should be sent to both the dentist and patient if a condition that is potentially detrimental to the patient's health was noticed (consistent with applicable law).

The committee's decision and recommendation should be conveyed to all parties as promptly as possible, and certainly within ten days of the clinical examination or the committee review. All copies of documents and records obtained during the review process, including the final decision, must be kept confidential and should be forwarded to the constituent society's executive offices for proper keeping. All clinical records, including patient charts, radiographs and models, should be returned to the dentist involved in the peer review case.

It is most important that the entire review process be completed within 60-90 days of the initiation of the review.

The Appeal Process

Any involved party should be permitted to appeal decisions of the committee, usually within 30 days of notification. The request for an appeal should be sent in writing to the constituent society's peer review committee or other appropriately designated body.

The basis for the appeal should be stated in the request and may include:

1. The matter was not an appropriate subject for peer review
2. Members of the peer review committee were not qualified to decide the case.
3. Proper procedures were not followed in the process.
4. Additional information has become available which, either because it was not available at the time of the component's review, or for some good cause was not presented to the component, or was not considered by the component committee.
5. The decision of the committee appears contrary to the information presented.

The chair of the constituent peer review committee initiates a review of the appeal. The constituent committee considers all facts in the case and determines from the written request what further action is necessary. The committee may:

1. Decide that an appeal is unwarranted and the component decision stands.
2. Send the case back to the component committee for further review if the initial review is considered inadequate or incomplete.
3. Agree to hear the appealed case.

If the constituent committee reviews the case, it follows the same basic procedures used by the component committee in notifying the parties involved of its decision.

The decision of the constituent committee is final within the peer review context. Examples of a letter to a party requesting an appeal, an appeal request form, and a confirmation letter to the party requesting an appeal are found in *Appendix J*.

Committee Jurisdiction and Interjurisdictional Cases

A peer review case is the responsibility of the component society where the service in question has been performed. This also applies to cases where the treating dentist no longer practices in the locality where the original treatment was provided.

Occasionally a request for peer review may involve a situation where the service in question was performed within the jurisdiction of one component society, and the patient resides in an area within the jurisdiction of another component society.

Cases involving more than one component or constituent society require special consideration and cooperation between dental societies and peer review committees. Certain guidelines should be followed so that the case is correctly reviewed and is completed in a timely manner. These are:

- **Primary jurisdiction:** When a request is received by the dental society office, a determination should be made about which dental society has primary jurisdiction and which dental society will be asked to cooperate.
- **Communication:** The request for review and supporting documentation, as well as all subsequent communication, should be forwarded to the headquarters of the dental society or societies involved. If reasonable, the dental society may consider encouraging the patient to return to the component society where treatment was originally performed.
- **Related arrangements:** Appropriate procedures should be established to arrange for a clinical examination of the patient, if necessary, in the area where the patient resides, as well as arrangements for obtaining information from, or consulting with, any of the involved parties.
- **Time considerations:** Interjurisdictional cases should be given priority attention. The reports of decisions and/or recommendations should be made within 120 days of the initiation of the review.
- **Final report:** The final report should be provided to all involved parties. It should be specific and limited to the problem and the concerns that have been raised. The report should not include any editorial comment.
- **Appeals:** Appeals should be directed to the constituent society whose component has primary jurisdiction. All constituent committees should be prepared to review cases that have been appealed based on one of the following criteria: questions of procedure; new information which was not available at the time of review; or the validity of the original decision. Decisions of the appeal committee are final.

Referral to Ethics and Judicial Committees

In some states, the failure to comply with peer review can result in disciplinary action by a duly authorized ethics or judicial committee if the dental society has established peer review compliance as an ethical or bylaw requirement. Constituent and component societies have such authority pursuant to ADA *Bylaws*, Chapter I. MEMBERSHIP, Section 30. “DEFINITION OF GOOD STANDING, “ which states in relevant part:

Section 30. DEFINITION OF “IN GOOD STANDING.” A member of this Association whose dues and special assessments for the current year have been paid shall be in good standing; provided, however, that a member in good standing who is under disciplinary sentence of suspension shall be designated as a “member in good standing temporarily under suspension” until the member’s disciplinary sentence has terminated and provided further that a member, to remain in good standing, *may be required, under the bylaws of the member’s constituent or component society, to meet standards of continuing education, pay special assessments, cooperate with peer review bodies or committees on ethics, or attend, if a newly admitted member, a stated number of membership meetings between the date of admission and the completion of the first calendar year of active membership...*

Before any member can be disciplined, the ADA *Bylaws* provide that the accused is entitled to a hearing, conducted in accordance with the procedures set forth in Chapter XII, Section 20. Where the basis for the disciplinary action concerns peer review, a judicial panel will look to ensure the peer review committee and the appellate body below followed all of its established procedures in convening and conducting the review before imposing a disciplinary penalty. Thus, while the decisions of the appeal committee of peer review are final, there can be an intersection between peer review and judicial matters which, for the dentist, can trigger further proceedings.

Charges and Costs for Peer Review

Access to the peer review process should be made available to patients, members and third parties, as well as non-member dentists. Making peer review more readily available, however, may require additional administrative resources. To compensate for such additional administrative costs, it may be appropriate to charge a fee for the use of the peer review process (e.g., by third parties and non-members.) This fee could reflect an estimate of the pro rata administrative costs; any fee in excess of that amount should be charged only after consultation with legal counsel.

Consideration must be given to the amount because an unreasonable fee may discourage individuals from using the process. It would also be a detriment to the intent and purpose of the peer review system.

Release and Consent Forms

If the final recommendation in a peer review case specifies an exchange of money, the return of money, or the forgiveness of a debt, and the disputing parties accept the recommendation, an agreement in a written release form should be used. Such a form generally releases the dentist from any further liability upon returning the stipulated amount of money, or it cancels a remaining balance. The form should be accompanied by a concluding letter outlining or restating the financial arrangements, and should be signed by all parties in triplicate, one copy for the patient, one for the dentist, and one for the constituent society record files.

Before a particular form is adopted for use, however, it is essential that the dental society's legal counsel review the content of the form. The requirements for a legally binding release of liability vary from state to state. An example of a release form is found in *Appendix I*.

When a recommendation is not accepted by one of the parties, both the release form signed by the agreeing party and the concluding letter is sent to the dissenting party with the request for reconsideration of reply of intent within 30 days. If there is no response within that period of time, the case is closed and all parties are so advised by letter.

Binding Arbitration

Peer review generally serves as a voluntary and informal process to resolve problems and disputes. However, it may also provide for a more formal approach whereby a signed agreement is used to bind the disputing parties to the recommendations of the peer review committee. A sample of such an agreement is found in *Appendix F*.

An arbitration agreement is a legally binding contract between two or more parties to submit their dispute to an impartial third party. A contract to enter into an arbitration agreement is only enforceable if it meets the requirements of state law. Most state law is to the effect that signing such an agreement relinquishes any right to initiate legal action. Noncompliance with the peer review decision in light of this agreement may constitute a breach of contract.

Most state courts give a good deal of deference to an arbitrator's decision and will enforce it even though it is clear that a court proceeding would have resulted in a different decision. However, courts will examine the arbitration hearing for basic fairness or procedural due process. Therefore, if a constituent society desires to implement use of a binding arbitration agreement, state statutes and court decisions

must be examined to assure that there is no conflict between the established peer review process and state law requirements. Areas that deserve special attention the right of the parties to have legal counsel at the hearing, the method of choosing arbitrators (the peer review panel), and the relief which can be afforded. At a minimum, the parties should be fully apprised of these aspects of the peer review procedure before signing the arbitration agreement.

It is most important that before a binding arbitration agreement, or similar approach, is used in the peer review process, all agreement forms be revised by legal counsel for compliance with applicable law. Use of binding arbitration to resolve fee disputes may, depending on the facts, violate Federal Trade Commission or other regulations.

LEGAL AND LIABILITY ISSUES

The Nature of Peer Review

Dental society peer review¹ is traditionally an informal process through which problems or disputes can be resolved by mediation or committee review. It is neither a court of law nor a punitive action hearing.

For peer review to be effective, it must follow rules to ensure that the process is conducted in an impartial and consistent manner. Cases must be handled efficiently and competently, and above all, the committee must be perceived as fair. A peer review committee is responsible for investigating the complaint; conducting the review; defining the roles, rights, and obligations of all parties; and, when possible, determining an appropriate resolution to the conflict.

Peer review committees co-exist with courts of law because they are acting in the interest of the public. They also offer a unique opportunity for recourse because practitioners have the expertise to evaluate the care provided by members of their own profession. Additionally, resolution of claims through peer review proceedings avoids further overcrowding of court dockets and high costs associated with litigation.

The following discussion provides an overview of the legal implications of peer review. This information should be reviewed with your attorney for issues that are specific to your state law and local situation.

¹ The term “dental peer review” is used in this section to describe organized dentistry’s dispute resolution system for dentists, patients and third parties. A very small number of dental practice acts may provide for utilizing a society’s peer review system as an extension of the dental board for fact finding purposes. Such structures could present economic issues similar to the Patrick decision discussed later in this section and are not within the scope of this section.

General Legal Considerations

The peer review process poses certain inherent legal risks that need to be understood by the dental society as an organization and those members and staff who perform the committee functions. These risks are clearly manageable by structuring the program to comply with applicable legal provisions and by maintaining appropriate liability insurance coverage. In this way, in the rare situation in which a lawsuit is filed, the position of the dental society and the committee members should be defensible and the defense covered by insurance.

Most states provide protection through immunity statutes for peer review activity that is conducted in good faith. At the same time, lawsuits involving dental society peer review have been rare. However, this does not guarantee that a lawsuit will not be filed, which could present potential financial problems for the dental society that fails to carry adequate liability insurance coverage. Therefore, each society must review its coverage carefully.

As an extreme example: assume that a peer review committee decides to refer a case that it in good faith believes involve a violation of the dental practice act to the state board of dental examiners. The dentist appeals that decision to the state peer review committee, which upholds the decision. The case is referred to the state board of dental examiners. In response, the charged dentist is incensed and retains an attorney. The dentist then sues the constituent and component dental societies and each member of the component peer review committee.

Even if the lawsuit was unfounded and there was protection under an immunity statute, the lawsuit would still need to be defended and the court would need to be satisfied that the immunity statute offered protection in the particular case. All parties must protect themselves with liability insurance against this risk, albeit extremely rare, because the expenses for all parties involved could be significant.

Potential Bases for Suit Under State Law

There are several possible state law causes of action that could be brought against members of peer review committees and the dental society itself. While unlikely, there is a possibility that committee members and societies could be sued because confidential information in a patient's dental record is reviewed by the committee and staff without appropriate authorization. Since the patient is generally a party to the peer review process, however, the patient will have consented expressly or implicitly to a review of his or her dental records, if appropriate forms and procedures have been used. Special care should be taken to obtain written patient consent in those exceptional cases where the patient is not a party.

Further, there is the possibility that statements made to the committee, or the proceedings or minutes of the proceedings, may be considered defamatory (that is, injurious to a person's reputation). The state's immunity statute should provide protection, but the possibility of such charges underscores the importance of acting reasonably and in good faith.

The law recognizes the right of dentists and other professionals to practice their profession free from malicious interference by others. Since malice must be alleged in this type of action, state statutes providing immunity for actions without malice would not prevent these suits from being brought against peer review committee members or the dental society.

Another possible cause of action is intentional interference with a business relationship. While proof of malice is generally not required, the dentist would need to show that the committee or society interfered for an improper purpose or used improper means to effect its interference, with the result of significant monetary loss to the dentist. The likelihood of a dentist prevailing in this type of action seems remote, unless intentional interference and actual damages were proven.

The best defense against such allegations is for the society to assure that the peer review proceedings are conducted fairly and in good faith, and that care is taken to avoid inflammatory or derogatory statements in the course of the proceedings. Also, the findings of the peer review committee should be strictly limited to the parties involved.

Immunity for Peer Review Activity

State laws vary considerably on this subject. Nearly all states afford statutory protection from civil liability for actions taken in good faith. However, it must be noted that some state statutes protect only the individual members of the committee but may not extend their protection to the society as an organization. In addition, state law would normally not provide immunity from liability under federal law, including federal antitrust laws.

While it is difficult to generalize, state statutes usually require dentists to act within the scope of their reviewing duties in order to qualify for liability protection. Also, peer review must be performed in good faith without malice, and a reasonable effort must be made to ascertain the truth of the facts on which the decision is based.

The federal Health Care Quality Improvement Act of 1986 purports to provide peer review committees with immunity from state as well as certain federal laws. But, this act has limited application to dental society peer review, as discussed more fully in Other Federal Statutes, below.

Confidentiality for Peer Review Records

Most states have laws protecting the confidentiality of peer review records and proceedings. Their intent is to preclude the disclosure of peer review information in judicial proceedings, such as a lawsuit between the patient and the dentist, since this would be contrary to the purpose of peer review as a nonadversarial system of dispute resolution.

Past experience in some states has demonstrated the limitations that may be inherent in such statutes. For example, the statute may not prevent a state licensing board from subpoenaing peer review records if administrative proceedings are not specifically mentioned in the statute. In another instance, a federal district court held that state law providing confidentiality did not prevent a federal court from subpoenaing records in a federal antitrust action.

Because these laws vary considerably from one state to the next, dental societies should always consult their own attorneys concerning the protection afforded by their own state's laws.

Sample state legislation, providing immunity from liability for peer review activity and confidentiality for peer review records and proceedings, is contained in *Appendix K*. It must be reviewed with the dental society's attorney before any attempt is made to amend existing statutes or enact new laws.

Justifiable Criticism

Often, the primary catalyst for litigation in health care is adverse comments by professionals regarding treatment received by patients from other professionals. Peer review committees are occasionally faced with the problem of disparaging remarks and the question of the proper manner in which a dentist should apprise a patient of the quality of prior treatment.

The *ADA Principles of Ethics and Code of Professional Conduct* ("Code") while permitting justifiable criticism, disapproves of disparaging remarks as follows:

Code, 4.C. Justifiable Criticism

Dentists shall be obliged to report to the appropriate reviewing agency, as determined by the local component or constituent society, instances of gross and continual faulty treatment by other dentists. Patients should be informed of their present oral health status without disparaging

comment about prior services. Dentists issuing a public statement with respect to the profession shall have a reasonable basis to believe that the comments made are true.

An advisory opinion issued by the ADA Council on Ethics, Bylaws and Judicial Affairs interpreting section 4.C reads as follows:

ADVISORY OPINION

Code, 4.C.1. Meaning of Justifiable

A dentist's duty to the public imposes a responsibility to report instances of gross or continual faulty treatment. However, the heading of this section is "Justifiable Criticism." Therefore, when informing a patient of the status of his or her oral health, the dentist should exercise care that the comments made are justifiable. For example, a difference of opinion as to preferred treatment should not be communicated to the patient in a manner that would imply mistreatment. There will necessarily be cases where it will be difficult to determine whether the comments made are justifiable. Therefore, this section is phrased to address the discretion of dentists and advises against disparaging statements against another dentist. However, it should be noted that, where comments are made which are obviously not supportable and therefore unjustified, such comments could be the basis for the institution of a disciplinary proceeding against the dentist making such statements.

Federal Antitrust Liability

The question of federal antitrust liability must also be considered. A 1988 United States Supreme Court decision (*Patrick v. Burget*) held that state immunity statutes do not immunize peer review activities from federal antitrust scrutiny.

Application of the Supreme Court's *Patrick* decision to dentistry cannot be made without placing the decision in its proper context. The case involved peer review in a hospital setting. This is significant because of the potential economic impact of what was at stake in the proceeding: loss of hospital privileges. Also, the case presented an egregious set of facts. The peer review committee involved members of a clinic where Dr. Patrick worked before he opened an independent surgical practice in competition with the clinic. The peer review was commenced at the request of one of the clinic's surgeons. The chair of the peer review committee was a doctor who had earlier filed a complaint against Dr. Patrick with the state medical board. The committee refused to allow Dr. Patrick to question the members about potential personal bias against him. Based on this record, the court had no difficulty finding substantial evidence that the defendants had acted in bad faith in the peer review process.

The jury found that Dr. Patrick had suffered damages in the amount of \$650,000 as a result of his loss of hospital privileges. Since this was an antitrust case, the law

provided that the damages were trebled, resulting in a judgment in Dr. Patrick's favor of \$1,950,000. The law also entitled Dr. Patrick to reimbursement of his attorney's fees and court costs from the defendants.

A similar judgment would be unlikely in a case involving a dental society peer review because it would typically lack the economic impact on the practitioner that is present in medical or hospital peer review. The ultimate penalty in dental peer review might be loss of membership in the dental society, which lacks the economic impact of the loss of hospital privileges. Although the *Patrick* case should serve as a common sense warning of obvious dangers to be avoided in the peer review process, it need not be viewed as creating unmanageable risk when peer review is conducted properly.

To analyze the exposure of dental society peer review under the federal antitrust laws, it is necessary to determine what type of peer review a society conducts. Generally, there are three types:

1. Mandatory - all member dentists must participate in peer review and abide by the decision of the peer review panel.
2. Participatory - all members are required to participate in peer review, but compliance with the decision is optional.
3. Optional - cooperation with the peer review panel and compliance with any order or recommendations is voluntary.

Peer review of professional fees is an especially sensitive issue. Accordingly, the subject is treated separately below.

Antitrust laws prohibit activity, which hinders the competitive process. They are concerned with the process of competition, not the protection of individual competitors. In the context of the *Patrick* case it can easily be seen how the elimination of a competitor in a restricted market harmed the competitive process. It is very difficult to see how dental peer review would have such an effect, since it is unlikely to prevent continued practice and competition by the subject dentist.

Moreover, the vast majority of disputes brought to peer review cannot be determined without an assessment of the quality of care provided. This assessment of quality provides the dental patient or third party with information on the dental treatment. Under antitrust theory, the provision of information is generally looked upon as procompetitive because it makes the competitive process more efficient.

Peer review activity, even if it involves the issue of a specific fee, should not affect the price or availability of services to the general public. Therefore, while it might harm a particular competitor, it is difficult to envision, except in perhaps an extremely sparsely populated area, how peer review could affect the process of competition. As shown in

Patrick, antitrust cases are fact specific. It is therefore difficult to generalize circumstances under which a case could be formulated or liability be present. However, keeping this in mind, it is hard to envision how a process that is completely voluntary could result in a "restraint" of trade.

There is, perhaps, some degree of greater risk where participation, but not compliance, is required. However, one would think that even in this circumstance, liability would only arise where there were repeated cases against an individual dentist or dental practice which were not commenced in good faith. Therefore, in the instance of participatory peer review (voluntary compliance) or purely voluntary peer review, there should be ample warning flags to alert the society before the threshold of antitrust liability is crossed.

This leaves mandatory peer review. (This is perhaps a misnomer. It could be contended that even 'mandatory' peer review is voluntary, since there is always the option of not joining the society which requires peer review participation.) Again, however, it is very difficult to imagine a dentist or a group of dentists financing expensive antitrust litigation over issues commonly treated in peer review.

There are, obviously, issues in dentistry that are fraught with potential legal conflict. Some current examples are: professional advertising, dental amalgam, denturism, and TMJ treatment. Any case implicating these kinds of issues should be carefully scrutinized, regardless of the voluntary or mandatory nature of the proceeding, to assure that the society and the peer review panel do not inadvertently get into sensitive areas. When present, care should be taken to assure that the proceeding is restricted to the quality of care provided in the situation presented, and not extended to control the activities or practice of a larger group of dentists or some other group.

In summary, large antitrust judgments against dental societies or individual peer review committee members are unlikely if due process is given and the focus of the hearing is a determination of the quality of care.

Antitrust Considerations: Fee Review

Peer review committees must exercise great care in reviewing cases involving fees, for fear of violating antitrust laws. The U.S. Supreme Court held in *Union Labor Life Insurance Co. v. Pireno* (1982) that peer review committees that aid insurers in evaluating claims are not exempt from antitrust scrutiny. The ruling resulted from a case involving an insurance company's use of a professional chiropractic association's peer review committee to determine the company's responsibility for "reasonable" charges for "necessary" chiropractic services. While it held that such activity was subject to review under the antitrust laws, the Court also pointed out that this did not

mean that such activity necessarily violated the law. Therefore, if an election is made to become involved in fee issues, these issues must be considered under parameters designed to assure that the process is lawful.

Fortunately, in 1982, the ADA obtained an advisory opinion from the Federal Trade Commission establishing guidelines for resolving cases concerning fees. This opinion is set forth in full in *Appendix L*. It should be carefully reviewed in its entirety with the dental society's attorney before any review of fees is undertaken. In summary, the opinion offers the following guidelines regarding the review of fees:

1. Peer review of fees should be conducted as a means of resolving specific fee disputes---not as a process for the collective sanctioning of fee levels of particular practices.
2. A committee's decision should be based upon the facts and circumstances of the particular case, not upon similar cases and decisions.
3. The difficulty and complexity of a procedure should be evaluated by the committee members on the basis of their own knowledge and judgment.
4. To the extent that any reference is made to external factors or benchmarks, such as relative value scales, these sources should be limited to those that are independent of constituent or component societies.
5. Dissemination of decisions should be limited only to that necessary for appellate or administrative purposes.
6. Dental societies should not collect information on fees, or conduct surveys relating to fee schedules.
7. Very importantly, both the doctor and the patient must voluntarily agree to review of fees.

Antitrust violations resulting in charges of restraint of competition can be avoided by peer review. However, peer review committees are not immune from such scrutiny and special care must be taken with all cases involving disputed fees.

Insurance Coverage

The subject of insurance coverage is a specialty of the law unto itself. There are literally thousands of cases concerning whether a particular loss or claim was covered under an insurance policy.

This does not make for exact answers. However, two general principles can be stated. First, if an insurance company is contacted with a request to clarify whether a particular circumstance is covered under a policy, the normal response of the company is to clarify by excluding coverage, in the absence of an additional premium. Secondly, the courts universally hold that any ambiguity in the policy is construed against the insurance company, since the function of the insurance company is to insure, and because the insurance company drafted the contract or policy. Therefore, you should consult with your lawyer and insurance agent concerning the advisability of seeking further clarification from the insurance company if the language of your policy appears to cover your situation.

Dental societies and members can expect that insurance companies will resist payment of any antitrust judgment. They will do this on several grounds. First, most policies specifically exclude coverage for willful or criminal acts. Violation of the antitrust laws can be a crime. It can also be a civil wrong. It would be a very complex issue to determine whether civil violation of the antitrust laws was "willful." Moreover, the complexity of the issue is compounded by the fact that civil damages in antitrust law are trebled against the defendants. The purpose of treble damages in antitrust cases is to dissuade persons from violating the antitrust laws by adding this additional civil penalty. Insurance companies maintain that to insure against violations of the antitrust laws is contrary to public policy.

The comments made below regarding certain aspects of insurance policies are limited only to coverage for peer review committee activity. Also, very importantly, the comments as to coverage are for discussion only and are not a legal opinion. Policy language changes from year to year. Endorsements can be added or dropped which change the underlying policy. Identical language can result in different coverage because of differences in state law. Therefore, your reliance for coverage should be based upon the independent analysis of your policy by your lawyer and insurance agent. Additionally, there may be other coverages in these policies, which counterbalance the limitations on peer review coverage. The dental society with its attorney and insurance agent should do a complete review of policies available.

Society Coverage

Insurance coverage which would protect a society and the volunteers serving on the society's peer review and other committees is generally referred to as "errors and omissions" or "directors and officers" liability policies. The insurance policies for such coverage are generally entitled "non-profit organizational/association professional liability insurance" or "association professional liability insurance policy," or similar titles.

One policy of this type has a willful violation of criminal statute exclusion. But, this policy would appear to provide defense costs to a society and the members in civil antitrust suits resulting from peer review or disciplinary proceedings.

Other insurance policies may also provide for defense costs, either with or without the limitation that the insured is found not guilty. Because substantive antitrust violations are easily avoided in properly conducted peer review this defense coverage is important. It protects against the specious, ill-founded antitrust allegations, which are the real hazard. Some societies have chosen to contribute the equivalent of an insurance premium into a sinking fund, and essentially becoming self-insured against this type of suit. In this way, the society has a contingency fund, which would be available for defense costs for the society and its members.

Individual Dental Malpractice Policies

As is the case with policies for associations, individual dental malpractice policies also differ in their coverages. However, most, if not all specifically exclude actual or alleged involvement in any antitrust violation or restraint of trade. Even defense costs are usually not covered.

OTHER FEDERAL STATUTES

Health Care Quality Improvement Act

In 1986, federal legislation was signed enacting Public Law 99-660, the Health Care Quality Improvement Act of 1986 (Act). The intent of the Act was to encourage greater efforts in professional peer review and to restrict the ability of incompetent practitioners to move from state to state without discovery of previous substandard performance or unprofessional conduct. To accomplish this, the Act directed the establishment of the National Practitioner Data Bank and provided immunity for professional review actions that meet certain criteria.

National Practitioner Data Bank

The National Practitioner Data Bank (NPDB) is an information clearinghouse that collects information related to the professional competence and conduct of physicians, dentists and, in some cases, other health care practitioners and releases it to eligible entities. The NPDB web site can be accessed online at <http://www.npdb-hipdb.hrsa.gov/>

The NPDB is primarily an alert or flagging system whose principal purpose is to facilitate a more comprehensive review of professional credentials by state licensing boards, hospitals and other health care entities. Data received from the NPDB is designed to be used in combination with information from other sources in making determinations on granting clinical privileges or in employment, affiliation or licensure decisions

The NPDB collects information from a number of sources. State licensing boards must report to the NPDB certain disciplinary actions they take related to professional competence or conduct. Hospitals and other eligible entities must report adverse actions involving clinical privileges that relate to professional competence or conduct.

Professional societies, which engage in formal professional review activity, must report any professional review action that adversely affects the practitioner's membership in the society—if the action is related to the member's professional competence or conduct. In addition, the NPDB collects reports of medical malpractice payments made on behalf of health care practitioners.

Most dental society peer review actions do not adversely affect the dentist's membership in the dental society. However, in some states, where participation in peer review is mandatory, failure to cooperate with peer review bodies may result in referral to the society's ethics or judicial committee for possible disciplinary action. If the referral results in an adverse action affecting membership, that action *might* be reportable to the

NPDB, depending on a number of factors. These factors are beyond the scope of this discussion, but dental societies are encouraged to consult their attorneys about any NPDB reporting obligations related to their ethics or judicial committees.

Of more concern to dental society peer review committees is the category of medical malpractice payments. Depending on the facts and circumstances of the case, a fee refund resulting from peer review could be a medical malpractice payment, reportable to the NPDB by the dental society or the dentist, whoever makes the payment.

A “medical malpractice payment,” as interpreted by the U.S. Department of Health and Human Services (HHS) is: (1) any payment of money; (2) by an entity; (3) for or for the benefit of a health care practitioner; (4) resulting from a written claim or demand for payment; and (5) based on the provisions of, or failure to provide, services. Each of these elements must be present in order for a reporting obligation to exist.

For example, a fee waiver is not a medical malpractice payment. Neither is simply redoing the work, since no payment of money is involved. An oral request for payment does not result in a medical malpractice payment, since the claim or demand must be in writing. A written complaint about the quality of the dentist’s work that does not ask for a fee refund is not a claim or demand for payment.

The American Dental Association obtained an interpretation of NPDB reporting requirements as they relate to dental society peer review. In 1990, under an interim agreement with HHS, the Association revised the dental society “Mediation Request Form,” which is submitted by a patient to the dental society, so that the form does not constitute a written demand for payment and so, by itself, does not trigger a reporting requirement. The memo from the Association to the constituent societies announcing this agreement is contained in *Appendix M*. The revised Mediation Request Form can be found in *Appendix C*.

Although the interim agreement also called for the use of dental society escrow funds to handle fee refunds, it is important to note that at least one official with the agency responsible for administering the NPDB (Health Resources and Services Administration, or HRSA) has taken the position that the mere fact that payment is made from an escrow fund does not exempt the transaction from NPDB reporting requirements (see *Appendix M*). According to a letter from this official to a local dental society:

The source of the money paid into the escrow account determines reportability if that money subsequently is refunded to the patient. If the money refunded to the patient from the escrow account was paid into it by a business entity (e.g., a professional corporation composed of a sole practitioner), for the benefit of a

practitioner, the payment *is* reportable. However, if the refund was paid into the escrow account from the personal funds of an individual practitioner, it is *not* reportable.

The Association succeeded through litigation in limiting the scope of the reporting requirement to *entities* that make medical malpractice payments. The original regulation implementing the NPDB required reporting by each *person or entity* that made a payment. This meant that individual dentists would have been required to report medical malpractice payments they made from their individual accounts.

In 1993, the U.S. Court of Appeals for the District of Columbia Circuit agreed with the Association that Congress did not intend to encompass an individual dentist as an “entity” that must report medical malpractice payments to the NPDB (*American Dental Association v. Shalala*). HHS subsequently revised the regulation to distinguish between payments made by a professional corporation or other business entity comprised of a sole practitioner (reportable, if all other criteria are met) and payments made by an individual practitioner (not reportable).

As the discussion above indicates, compliance with the NPDB reporting requirements depends on an understanding of the technical definitions used in the Act as they apply to the facts and circumstances of the particular case. Failure to report as required by the Act may result in a civil penalty of up to \$10,000. Dental societies should, therefore, consult their legal counsel to determine their reporting obligations, if any, to the NPDB. Legal counsel will also be able to advise the dental society on how to structure its peer review process to minimize any reporting requirements.

The National Practitioner Data Bank (NPDB) should not be confused with the Healthcare Integrity and Protection Data Bank, or HIPDB. The HIPDB collects information from federal and state government agencies and health plans bearing on potential fraud and abuse by health care practitioners.

Immunity for Professional Review Actions

The Health Care Quality Improvement Act of 1986 purports to grant immunity to professional associations for their peer review activities. Activities with respect to enforcement of ethical canons or advertising not related directly to quality of care are specifically excluded. Unfortunately, this legislation, while it encompasses dentistry, was drafted to address the jury decision in the *Patrick* case. Therefore, the statute really addresses hospital peer review and shows a definite lack of appreciation for the procedures in dental peer review.

Hospital peer review is concerned primarily with privileges, which can have a very telling economic effect on the individual. Dental peer review is essentially a dispute resolution system, which seeks to avoid the complexity of the courts. In law, where a decision has the potential to have a significant ramification, economic or otherwise, procedural safeguards tend to increase. The Health Care Quality Improvement Act of 1986 is no exception. It devotes much attention to procedural safeguards in the peer review proceeding, so that the peer review process, which results, approaches a court case in complexity. This is probably a recognition by the drafters of this legislation of the large dollar issues involved in hospital privilege cases and their belief that this required extensive safeguards.

The Act does not require that all these safeguards be present for immunity to exist. It permits "such other procedures are fair." 12 U.S.C. Sec.1112 (a)(3). While the Act presumes that due process is afforded by a peer review proceeding, it goes on to provide a list, which, if met, conclusively establishes that the hearing is adequate. However, a question arises under this type of draftsmanship whether **not** providing one or more of the listed items weakens or rebuts the presumption. Such questions will probably be resolved by court cases. Thus the extent of the immunity actually granted depends on future litigation.

The Act provides that "notice" of the action is conclusively presumed to be adequate if the subject of the hearing is informed of:

1. The reasons for the action;
2. The right to request a hearing;
3. The place, time and date of the hearing; and
4. The witnesses expected to testify before the Peer Review Committee at the hearing.

The "hearing" is conclusively presumed to be adequate if:

1. It is before an arbitrator, hearing officer or panel of individuals not in direct competition with the subject;
2. The subject is permitted to be represented by an attorney or anyone else of his choice;
3. The subject has a right to a record of the proceedings;
4. The subject is permitted to cross-examine witnesses;
5. The subject can present evidence;
6. The subject can submit a written statement at the hearings; and,
7. The subject has a right to a written decision from the panel.

Because dental peer review is designed to avoid the complexity of litigation, most dental peer review falls short of meeting these elements listed by the Act for a "conclusive presumption." Usually, the dentist has only the right to be informed of the time, place and date of the hearing, the reasons for the peer review proceeding, the right to submit evidence and the right to a written decision. There is an innate right to an unbiased panel, but whether this requires persons not in "direct competition" is an open question. Determining who is, and who is not, in direct competition is a complex issue itself. There is usually no right to be represented by an attorney, to cross-examine witnesses or to a record of the proceedings in dental peer review.

Moreover, in addition to the due process requirements, the Act provides immunity only for actions taken in the belief that they are in the interest of quality care, and after a reasonable effort has been made to obtain the facts. As with the requirements of due process, a refutable presumption is created that peer review activities meet these requirements. However, this again creates issues for litigation.

Also, very importantly, the Act does not provide immunity from antitrust damages for actions brought by state attorney's general or by federal law enforcement agencies. Nor does it apply to actions for damages for violations of federal civil rights law. It also does not address actions for injunctions by individuals which do not seek damages and liability for the successful plaintiff's lawyer's fees and costs in injunction cases. These can be significant.

Finally, to obtain the immunity provided by the Act the society must participate in the malpractice-reporting program, which is to be established pursuant to the provisions of this Act.

In summary, before a dental society peer review committee relies on the immunity provisions of the Health Care Quality Improvement Act, it should obtain an opinion from the dental society's attorney that these provisions apply to the specific peer review activities carried on by the committee.

OTHER RELATED CONSIDERATIONS IN PEER REVIEW

The Role of the Referring Dentist

Questions have been raised concerning the role of a treating dentist who refers a patient to another specialist or practitioner, later to discover that the patient has initiated a complaint against the dentist to whom he or she was referred.

If a patient has initiated a peer review complaint against a second treating dentist, the referring dentist is generally not involved as a direct party to the peer review case. Based on the review process and the determination of the committee, however, the original dentist may be asked to provide the committee with the appropriate records indicating patient diagnosis and reasons for referral to the second treating dentist. This information could be used to assess how clearly the diagnosis and proposed treatment had been communicated to the second treating dentist and any subsequent communications between the two practitioners. In sum, the committee should have discretion to seek direct participation of the referring dentist when will assist the committee in making the most appropriate decision based on the information presented.

Repeat Adverse Decisions Against the Same Practitioner

The peer review committee, through the review process, become aware of possible continual faulty treatment patterns by a practitioner. As such, the peer review process assumes an obligation to the public and the profession.

Many states have established criteria for handling repeat adverse peer review decisions against the same dentist. Since the peer review process has no disciplinary authority and cannot impose any type of sanctions, nor can it make any determinations about possible violations of the state dental practice act, concerns regarding continual faulty treatment, or a single very serious case, should be referred out of the peer review process.

The criteria that are currently used in many states specify the number of repeat adverse decisions within a designated period of time, such as three decisions, or a single case of gross mistreatment, within a two-year period. Based on such criteria, then, it becomes the responsibility of the constituent dental society to take appropriate action.

Serious cases, whether they involve repeat adverse decisions or a single case of gross mistreatment, will most likely be handled by referring the problem to the state board of dentistry. This body, then, can assume its responsibility to investigate the circumstances. For less serious cases, some dental societies have implemented requirements for remedial education for the dentist.

All constituent dental societies are encouraged to develop criteria for handling repeat adverse decisions, and to vest their component societies with the obligation to comply with such criteria. Any guidelines that are developed for handling repeat adverse decisions must recognize and respect the confidentiality of the peer review process; any referral that is made should not be accompanied by confidential information obtained in the review process.

While there may be concerns attendant to developing an approach to handling these types of situations, the potential risks to the dental society of not having such a process in place far outweigh any possible justification for not implementing such procedures. Apart from any legal and liability risks, the public's perception of the dental profession would be seriously compromised should the peer review process knowingly neglect its responsibility to protect the safety and health care interest of the patient.

Peer Review and Alternative Benefit Programs

A peer review committee should conduct its review and make its recommendation as it would for any case, irrespective of the payment mechanism involved. It may be that having made a determination as to appropriateness of care, the particular contractual provisions which bind the benefit plan, patient and/or dentist do not lend themselves to a simple and satisfactory solution concerning the standard of care provided is an important public service and must be determined within the context of providing quality dental care.

Recruitment and Retention of Peer Review Committee Members

In the development of an effective program to recruit and retain peer review committee members, or to enhance a program already in place, the following ideas should be considered:

Use of Role Models

Individuals who have served on peer review committees for a long period of time (more than five years) and have a breadth of expertise and knowledge of the process can serve as role models in the recruitment of committee members. A respected dental colleague, in this capacity, is the ideal individual to attest to the benefits of peer review. A cadre of these seasoned committee members should be asked to appear at component or constituent society meetings to share their experiences and discuss the value of serving on a peer review committee.

Education of the Membership

Dental societies should educate their members about the peer review process to 1. assist those who may be a party to the peer review case; and 2. to provide information to members interested in serving on a peer review committee.

The constituent or component societies which hold periodic meetings of peer review committee members, or those constituent societies which plan to hold a peer review assistance program sponsored by the American Dental Association, may want to include practicing dentists who are interested in getting involved in peer review. Also, newsletters and other regular forms of communication can be used to educate and motivate potential committee members.

Development of Information Packet

It should be the state dental society's responsibility to develop informational material on the peer review process and the duties and responsibilities of committee members and make it available to dentists in the community who may be asked to serve on a committee. This will ensure consistency and accuracy in the information about peer review as it exists in the state.

Preventing "Burnout"

The key to retaining valuable peer review committee members is to recognize their other commitments and limitations as practicing dentists. For example, no single committee member should be repeatedly, and disproportionately, requested to serve as a mediator. Similarly, assignments to serve in the review of cases should be rotated equally among committee members.

Attention to these considerations by the committee chair will avoid feelings of frustration, over-commitment and burnout among committee members.

An Ounce of Prevention for the Practitioner

Peer review can achieve many positive outcomes-not the least of which is its potential to effect improvements in dental practice management. Such improvements not only enhance the dentist-patient relationship, but also may obviate the need for peer review. Good patient communication and careful record keeping are the cornerstones of a sound relationship between a dentist and his or her patients.

Patient Communication

Consumer interest in the quality of health care, including dentistry, has become an important issue in contemporary American life. Patients are more sensitive to the question of quality health care, and the correlation between quality and cost. The

patient's perception of quality can be enhanced through effective communication by the dentist regarding all facets of treatment. Good communication includes:

- Educating the patient about treatment alternatives and their implications;
- Encouraging the patient's participation in treatment decisions;
- Making sure that the patient's expectations for the treatment are realistic;
- Making sure all questions are answered;
- Explaining costs and obtaining agreement prior to treatment
- Soothing anxieties regarding treatment or possible treatment failure;
- Addressing psychological attitudes toward health care;
- Providing a caring response to the patient as a person.

Even the best dental treatment can be seriously undermined through lack of good communication with the patient-possibly leaving the patient frustrated or resentful. Patients who have become dissatisfied for whatever reason are more likely to have complaints and seek recourse through various means, including the peer review process.

Record Keeping

Well-kept records not only support the clinical aspects of the treatment, but the dentist/patient relationship as well. They become invaluable in answering patient questions as well as addressing any concerns or complaints. They are also an invaluable resource should a dispute come before a peer review committee.

In addition to clinical notations about the actual treatment, other comments concerning patient questions, resolution of problems, suggested alternative treatment plans, and satisfactory remarks made by the patient can be important in substantiating the care provided. Once an entry is made in the patients record, it becomes documented evidence of what has transpired.

EPILOGUE

Skill and expertise in serving as a peer review committee member can only be gained through experience. Dental societies can, however, prepare dentists for committee membership through an organized training program. The American Dental Association offers a special peer review assistance program which may be helpful to dental societies in their peer review efforts. This program as well as other information and assistance in peer review, is available upon request from the Council on Dental Care Programs.

APPENDICES

APPENDIX A

AMERICAN DENTAL ASSOCIATION POLICIES ON PEER REVIEW

The following pages contain American Dental Association policies regarding peer review.

Guidelines on the Structure, Functions and Limitations of the Peer Review Process (1992:37, 603)

The function of a peer review committee is to review matters regarding the appropriateness of care and/or quality of treatment. Peer review committees also may, acting in an advisory capacity, provide for the appropriate review of fees.

Dental societies should establish peer review committees, which provide for the review of differences of opinion between a dentist and a patient, or a dentist and a third-party agency. Third-party agencies may include insurance carriers, dental service corporations, administrators of health and welfare trusts, alternative benefit plans, government agencies, and employers who have implemented self-funded and self-administered dental plans.

Requests submitted by a dentist for review of treatment rendered by another dentist should be channeled to that agency which the constituent or component society has determined should review allegations of gross or continual faulty treatment by a dentist. This could be the judicial committee or committee on ethics, or some combination thereof. It could also be the state board of dentistry.

In all instances, the peer review committee should carry out its responsibilities within a reasonable period of time that makes its efforts effective.

To guide dental societies in establishing peer review committees, consideration of the following principles is recommended:

Directives

1. The constituent society is responsible for establishing peer review committees.
2. The committee membership should be composed primarily of general practitioners who have the qualifications and experience to render a considered opinion as to the dental standards of the community.

3. The committee should consider problems submitted by patients, dentists and third-party agencies.
4. The committee will not review any case without access to the treatment records.
5. The committee is not vested with disciplinary authority, but should provide recommendations for remedial action where appropriate.
6. The committee should utilize standard procedures and forms in obtaining data required for adequate evaluation.
7. Constituent dental societies should develop standardized review criteria for use by peer review committees during the clinical examination stage of the peer review process.
8. The committee may not consider cases in litigation.
9. The committee should have a clearly outlined process for dealing with repeat adverse decisions against a practitioner and for handling requests for appeal.
10. Constituent societies should have appropriate liability insurance to protect all members of peer review committees, as well as the societies sponsoring the peer review activity.
11. Constituent societies should have appropriate statutory protection for immunity from liability for all members of peer review committees, the societies sponsoring the peer review activity and for confidentiality of records.

Recommendations

1. Review of problems involving practicing dentists who are not members of the dental society is encouraged.
2. The committee should establish a policy that parties appearing before it do not have the right to be represented by an attorney.
3. Information on the purpose, function and availability of the peer review process should be communicated to dental society members, the public and other interested agencies.

The following guidelines are suggested to assist dental societies in implementing the foregoing principles.

Organization: The peer review committee should be a permanent committee of the dental society with appropriate status and liaison with related committees. It could be a freestanding committee, or subcommittee of the Committee, or Council on Dental Care Programs or other body charged with the responsibility for managing issues regarding dental benefit plans.

Composition: The committee membership should be composed primarily of general practitioners who have the qualifications and experience to render a considered opinion as to the dental standards of the community. Terms on the committee should be staggered to ensure continuity of experience. The appointment of a layperson to serve on the peer review committee is encouraged.

The committee should have specialists as resources who can be appointed if the dentist being reviewed is a specialist and requests a committee composed of like specialists. If the committee feels the need for additional expertise, other members may be appointed on an ad hoc basis.

Submission Procedures: All requests for peer review will be submitted in writing, accompanied by supporting records and other appropriate consent forms and pertinent information, to the constituent or component dental society. All parties to a peer review case should be asked to agree in writing to abide by the peer review committee's recommendation.

In cases involving a third-party payer, the payer should first have made an attempt to contact the dental office for clarification on a clerical or claim reporting problem, or to have had its dental consultant contact the dentist on issues involving professional judgment or contract interpretation.

The payer should notify the patient of a delay in payment of a claim, with further explanation that the case has been submitted for review.

Constituent dental societies are urged to cooperate in every appropriate way to resolve peer review cases in which the parties involved reside in different states or in different jurisdictions within the same state.

Mediation: The component peer review committee chair should appoint a committee member to serve as mediator. All contacts made by the mediator should be carefully documented. The mediator submits a written report to the chair stating only the facts of the case. The mediator will advise whether mediation was successful.

Review Panel: The committee chair will appoint a minimum of three members to review the case. Panel members should have the opportunity to evaluate the specifics of the case, individually conduct a clinical examination if necessary, and make final recommendations to the committee chair reflecting the collective opinion of the panel members.

Communications and Record Keeping: The chairperson of the committee shall report the decision and recommendations to all parties within 60-90 days from initiation of the review. While original documents and records should be returned, copies of all documents and records obtained during the review process, including the decision and any recommendations, must remain confidential and should be immediately forwarded to the constituent society executive offices. An attorney should be consulted to determine individual state provisions for retention of case records.

Appeal Mechanism: Within 30 days of receipt of a component dental society's peer review committee decision, all parties have the right to appeal, in writing, to the constituent dental society peer review committee, which generally serves as the appellate body. An appeal can only be considered if it is shown that (a) proper procedure was not followed, (b) information previously unavailable at the time of review has become available or (c) the decision was perceived to have been contrary to any evidence and testimony presented. The decision of the appellate body is final within the peer review context.

Considerations for Peer Review and Dental Plans: The quality of the dental treatment provided under dental plans is the logical concern of the dental profession and questions regarding that quality are within the purview of the peer review process.

Review of the dental treatment provided under a dental plan should include a determination that the services were performed and that the treatment was appropriate and rendered in a satisfactory manner.

In the course of peer review function, specific deficiencies or problems prevalent in a particular plan may become evident. General information regarding the administrative or other aspects of the plan should be communicated, as appropriate, to the constituent society body vested with the responsibility for monitoring dental benefit plans.

Use of Peer Review Process by Patients and Third-Party Payers (1990:534)

Resolved, that patients and third-party payers be encouraged to use the dental profession's peer review process to address issues or disputes concerning dental treatment provided under dental benefits programs, and be it further

Resolved, that the Council on Dental Care Programs work with third-party payers, plan purchasers, benefits consultants and government agencies to include the following paragraph in the "claim appeals" section of the Summary Plan Description provided to dental benefits plan subscribers:

State and local dental societies provide an impartial means of dispute resolution regarding your dental treatment. This process, called peer review, may be available to you in addition to the (insert name of benefit plan or benefit administrator) appeal process. For more information about peer review, contact your local dental society.

Dentist Participation in Peer Review Organizations (PROs) (1987:502)

Resolved, that the Association encourage the constituent dental societies to take action to assure full and equitable participation of dentists as members of their governing boards as long as dental services are being reviewed.

Constituent Society Peer Review Mechanisms (1981:573)

Resolved, that constituent dental societies be urged to effect all necessary changes in their peer review systems to establish those systems in accordance with the provisions of the Association's peer review procedure manual.

APPENDIX B

PEER REVIEW PROCESS CHECKLIST FOR THE PEER REVIEW CHAIR

It is prudent that the peer review chair maintain a checklist, making notations about the progress of a peer review case. The checklist also serves as a reminder of the necessary steps involved in bringing a peer review case to closure.

The use of a checklist is strongly encouraged, and every effort should be made to include notations on a timely basis.

SAMPLE
Peer Review Process Checklist for the Peer Review Chair

CONFIDENTIAL

Today's date: _____
Case# _____

1. Date complaint received:

2. Complaint(s):

3. Dentist(s) or other party
identified in complaint:

_____ <> Patient
_____ <> Dentist
_____ <> Carrier
_____ <> Other (specify)

7. Written notification to
parties involved _____
(date: _____)

4. Type of complaint:
<> Appropriateness of
treatment received: _____
<> Quality of care _____
<> Fees _____
<> Other _____

8. Mediator's report
Date written report

5. Carrier and contact
person:
Company: _____

Contact: _____

9. Committee appointed
(names): _____

6. Mediator appointed
(date: _____)
Name of Mediator: _____

10. If appropriate,
written agreement
abiding by committee
decision signed:
 Patient
 Dentist
 Other

16. If appropriate,
written release forms
signed:
 Patient
 Dentist
 Other

11. Refer to Committee
 Set meeting
(date: _____)
 All parties notified
of meeting

17. Request for appeal:
 No Yes
(date: _____)

12. Clinical exam necessary:
 No Yes
 Release form signed
 Exam conducted
(date: _____)

18. If yes, appeal
forwarded to
Constituent Dental
Society:
Date: _____

13. Committee review process
 Mediator's report
 Meeting held
(Date: _____)
 With patient
 With dentist
 With other involved
party
 With specialists or
other experts

19. All records and
documentation furnished to Committee
Constituent Society
Date _____

14. Concluding letters sent:
 Patient
 Dentist(s)
 Carrier
 Other

15. Acceptance of recommendations
 Patient
 Dentist(s)
 Carrier
 Other

APPENDIX C

INITIAL PATIENT RESPONSE LETTER AND MEDIATION REQUEST FORM

A response letter should be sent to the patient who has made an initial complaint against a dentist; the purpose of the response letter is to acknowledge the patient's complaint and request for mediation. It should be accompanied by an appropriate pamphlet (either one developed by the constituent society or the American Dental Association's "Dentistry's Dispute Resolution Program: A Peer Review Process") and the request for mediation form.

A letter should also be sent to the other involved party (usually the dentist) to notify him or her that a complaint has been made and to solicit his or her comments regarding the complaint/problem.

Please see the samples of these letters and a mediation request form on the pages that follow.

SAMPLE
Response Letter to Accompany the Mediation Request Form

CONFIDENTIAL

Date

Name

Address

City, State Zip

Dear _____,

Thank you for your request for mediation by the _____ Dental Society peer review committee.

The enclosed mediation form must be filled out in its entirety and signed for the process to proceed. We have also enclosed the pamphlet "Dentistry's Dispute Resolution Program: A Peer Review Process" which fully explains the process. We request that you read it fully.

Should you have any questions, you may contact me at _____.

Sincerely,

Peer Review Chair

(Continued)

Thank you for addressing your concerns to the _____ Dental Society.

Please provide below a phone number and the best time of day when the mediator will be able to contact you. If you have any questions in the meantime, please do not hesitate to contact the _____ Dental Society, (_____)_____.

Day Phone (_____)_____ Time: _____

Night Phone (_____)_____ Time: _____

In order that a complete review is performed, I authorize the release to this committee, of any dental records or information by anyone who has examined me previously. I further give my permission for the committee to perform a clinical examination if necessary.

Signature

SAMPLE
Letter to the Other Involved Party to Solicit Information

CONFIDENTIAL

Date

Name

Address

City, State Zip

Dear _____,

This is to advise you that a request for mediation has been filed with _____ Peer Review Committee. A copy of that request is enclosed.

This request has been assigned to a member of the committee. It would be helpful if you could state your side of this problem on the bottom of this letter and return it within 3 days to the committee.

For your information, a copy of the ADA publication "Dentistry's Dispute Resolution Program: A Peer Review Process" is enclosed. It will explain the peer review process.

Should you have any questions, you may contact me at _____.

Sincerely,

Peer Review Chair

APPENDIX D

REPORT OF MEDIATION AND AGREEMENT LETTER AFTER SUCCESSFUL MEDIATION

Report of Mediation

A report of the mediation should be written by the committee member appointed to mediate a peer review case. The form allows for all significant notations and, when completed, should be forwarded to the committee chair. A sample report of mediation can be found on the pages that follow.

Agreement Letter After Successful Mediation

This letter is sent to all involved parties when mediation has been successful. Please see the sample letter in the pages that follow. If the resolution involves exchange of money, the sentence at the bottom of the letter should be included and the letter should be accompanied by a form for release and satisfaction of claims. A sample release form is found in *Appendix I*.

**SAMPLE
Report of Mediation**

CONFIDENTIAL

Initiating party:

Name _____
Address _____
Phone _____

Other party(ies) involved:

Name _____
Address _____
Phone _____

Contacts made (correspondence, letters & telephone conversations)

1. Date _____
Person contacted _____
Summary of discussion: _____

2. Date _____
Person contacted _____
Summary of discussion: _____

SAMPLE
Agreement Letter to the Dentist and Patient After Successful Mediation

CONFIDENTIAL

Date

Name

Address

City, State Zip

RE: Dr. _____

Ms. _____

Dear Ms. _____:

The Peer Review Committee of the _____ Dental Society has investigated your complaint dated _____, with the following results. Both you and Dr. _____ have agreed to:

The _____ Dental Society's Peer Review Committee therefore considers the matter closed. Thank you for your cooperation, and for using the peer review mechanism.

Sincerely,

_____ D.D.S.

Chair

Peer Review Committee

cc: (all involved parties)

Note: When money is being returned to resolve the problem the following sentence should be added before the last paragraph:

Dr. _____ has agreed to return \$ _____ upon return of a properly executed Release and Satisfaction of Claims Form which is enclosed. (Please return within 5 days.)

APPENDIX E

UNSUCCESSFUL MEDIATION AND SUBMISSION OF THE CASE TO PEER REVIEW

Letter after unsuccessful mediation

When mediation has been unsuccessful in resolving the problem a letter is sent to all involved parties by the peer review committee. Please see the sample letter on the pages that follow. The parenthetical references to the presence of a layperson should be used only when such procedure is followed.

Agreement for submission of case to peer review

When mediation has not been successful and the case is being submitted for peer review, the form for agreement to submit the case to peer review is sent to all involved parties. Please see the sample form on the pages that follow. This agreement secures release of records for review, agreement to cooperate and abide by the decision of the peer review committee, and permission for a clinical examination.

SAMPLE
Letter to the Dentist and Patient When Mediation is Unsuccessful

CONFIDENTIAL

Date

Name

Address

City, State, Zip

Dear _____:

All attempts by the mediator of the _____ Dental Society's Peer Review Committee to resolve your problem have been unsuccessful. In an effort to bring this problem to an equitable conclusion, the following procedures will occur if all parties agree:

1. A panel of at least three dentist members of the peer review committee will conduct a) a clinical examination if necessary and b) a hearing, to obtain all the facts and c) make a decision.
2. (A lay member of the committee may be present at the hearing if available).
3. The decision may be appealed for just cause to the State Peer Review Committee.

All parties are asked to sign the enclosed "Agreement for Submission of Case to Peer Review" form. The initiator of the complaint must sign this form for the review to proceed. This must be returned within ten days or the review will be terminated.

Sincerely,

D.D.S.
Peer Review Chair

Enclosure: Agreement for Submission of Case to Peer Review form

SAMPLE
Agreement for Submission of the Case to Peer Review (of the _____ Dental Society)

Note: This form is only a sample. Any such form, or similar agreement or approach, must be carefully reviewed by legal counsel for compliance with state law.

CONFIDENTIAL

1. This agreement is made by the following parties:

Patient
Name
Address
Telephone

Dentist
Name
Address
Telephone

Third Party
Name
Address
Telephone

2. The parties understand that peer review is a voluntary program designed to identify the facts of a particular case, to facilitate communications between the parties, and to make recommendations as to:

- The necessity of dental care
- The appropriateness of diagnosis of treatment
- The need for additional treatment, whether performed by the original dentist or another dentist
- The responsibility for payment of completed or additional treatment
- The refund of fees paid
- Whether the fee charged was in accordance with the usual, reasonable and customary fees for the procedure in this geographic area.

3. The parties agree to submit the case outlined below to the peer review process of the _____Dental Society. They understand and agree that their proceeding will be conducted according to the rules of the _____Dental Society. They also acknowledge receiving and reading the publication "Dentistry's Dispute Resolution Program: A Peer Review Process"
4. The following is a statement of the case submitted by the party seeking the peer review. That party is (name).
5. It is understood and agreed that by agreeing to this peer review, the responding parties are making no comment or admission concerning the statements set forth above in paragraph 4.
6. The parties understand that the Peer Review Panel and its staff must review all dental and insurance records pertaining to this case in order to determine its facts. Therefore, the patient grants permission for release of these records to the Peer Review Panel.
7. The parties also understand that should the Peer Review Panel decide that a dental examination is necessary, they will ask the patient to attend such an examination at a mutually agreeable time and place. Therefore, if the Panel requests a dental examination, the patient agrees to permit the examination by dentists designated by the Panel.
8. All parties agree that they will cooperate fully with the Peer Review Panel to assist them in reaching a decision. They also agree that they will abide by the recommendations of the Peer Review Panel, unless the case is appealed to the Peer Review Committee of the _____ State Dental Society within ___days of the Panel's decision. The grounds for appeal are:
 1. Procedural error;
 2. New evidence;
 3. Perception of decision contrary to evidence.

The decision of the appellate body is final within the peer review context.

9. The proceedings of the Peer Review Panel are kept strictly confidential in order to facilitate communications that help to resolve this case. That includes statements of the parties and any witnesses; information and material presented during the proceedings; and any findings, recommendations evaluations,

examinations, opinions or other actions of the Panel, its members, consultants and staff. The parties agree that if this case becomes the subject of civil litigation, Panel members, consultants and staff shall not be asked to testify, nor shall proceedings and records of the Panel be subject to subpoena.

Signifying their acceptance of this agreement for submission of their case to peer review, the parties have signed this agreement on the day and year indicated.

Date

Patient

Date

Dentist

Date

Third Party

APPENDIX F

BINDING ARBITRATION

A binding arbitration agreement obligates the disputing parties to comply with the judgment or recommendations of an impartial party. Where such a provision does exist in a state, it generally does not specifically apply to peer review, but rather to any situation where dissenting parties submit to the judgment of an arbitrator. This sample form is used in one state for the initiator of a complaint, and makes the acceptance of binding arbitration optional.

Where binding arbitration exists as state law, it imposes certain requirements, which if applied to peer review, must be incorporated into the peer review procedures. As such, a contract to enter into a binding arbitration agreement is legally enforceable in those states.

The form on the following page is only a sample, and only for those states where statutory arbitration exists. Legal counsel must carefully review any such form, or similar agreement or approach.

**SAMPLE
Binding Arbitration Form**

Note: This form is only a sample, and only for those states where statutory arbitration exists. Any such form, or similar agreement or approach, must be carefully reviewed by legal counsel for compliance with state law.

CONFIDENTIAL

This form must be returned within thirty (30) days.

Date_____ Case #_____ Name_____ Phone # () _____ Address
City_____ State____ Zip

Review initiated against

Name_____ Phone#() _____ Address_____ City_____ State____ Zip

I hereby agree to submit the matter which is in dispute to the ____ Dental Society Peer Review Committee.

I understand that this agreement constitutes an arbitration contract under (**) and that by entering into this agreement and submitting this dispute to Peer Review, I am voluntarily and knowingly waiving my right to have this dispute settled by a court of law.

I understand that this reviewing committee will be composed of three dentists from the dental district in which the dispute arose; that there may be one lay person on the committee and I will, in the absence of proof to the contrary, consider them to be impartial for the purpose of arbitration. I also understand that no party to the dispute will be entitled to have legal counsel present any hearing conducted by the reviewing committee.

Any monetary awards recommended by the local peer review committee shall be limited to the amount charged by the dentist for the service in question by refund or payment of such amount or the elimination of liability for such amount.

I understand that the decision rendered by the peer review committee is binding upon me and enforceable under (**). I further understand that I may appeal this decision to the State Sub council on Peer Review for just cause and that the decision by that body is final.

Signature

I do not choose to accept binding arbitration

** (Specify state statute or other reference to state law)

APPENDIX G

TERMINATION LETTER AND LETTER ON THE TIME AND PLACE OF THE HEARING

Termination Letter

A termination letter should be sent to advise the initiator of a complaint that any additional action on the request will be terminated. Please see sample letter on the pages that follow.

Letter Regarding Time and Place of Hearing

A letter is sent to all parties to acknowledge the mutually agreed time and place of the hearing. Please see sample letter on the pages that follow.

**SAMPLE
Termination Letter**

CONFIDENTIAL

Date

Name

Address

City, State Zip

Dear _____:

The peer review committee of the _____ Dental Society has decided to terminate any additional action on your mediation request date _____, for the following reasons.

- 1.
- 2.
- 3.

Should you have any additional questions, you can contact me at _____.

Sincerely,

Peer Review Chair

SAMPLE
Letter to All Parties to Acknowledge the Mutually Agreed Time and Place of the Hearing

Date

Name

Address

City, State Zip

Dear _____:

Pursuant to your request for Peer Review dated _____, the peer review committee has scheduled the review and/or examination to take place at _____, at _____.

All parties have previously agreed to this time and place. Inasmuch as this is not a legal proceeding, we do not allow attorneys to participate in this process. We also do not allow any tape recorders.

Should you have any questions or desire additional information, you may contact me at

.

Sincerely,

____ D.D.S.
Peer Review Chair

APPENDIX H

CLINICAL EXAMINATION AND REPORT BY THE PEER REVIEW COMMITTEE

Worksheet for Clinical Examination by the Peer Review Committee

The sample worksheet on the following page is for use by the committee when the patient is examined. The committee must ascertain that the patient has given written permission for an examination before the examination is conducted.

Report of the Peer Review Committee

A report is completed by each committee member who examined the patient to be used as an internal document for the committee to reach a consensus and conclusion. Please see the sample report form on the pages that follow. **It should not be sent to any party.**

**SAMPLE
Worksheet for Clinical Examination**

CONFIDENTIAL

Date

Component

Case #

Patient

Dentist

Carrier (or other third party)

Initiator of review

X-rays taken

Complaints (specific areas)

1. _____ 2. _____ 3. _____ 4. _____

Examination findings

Areas of complaint

1. _____ 2. _____ 3. _____ 4. _____

Please complete back side

Health of patient

Tissue

Bone

Caries

Dental attitude

Other:

Please complete back side

X-ray findings & data:

Comments of examiner:

Conclusion of examiner:

Recommendations of examiner:

(Please print name)

Signature

SAMPLE
Report of the Peer Review Committee

Note: This is an internal document of the committee used to reach a consensus and conclusion. It should not be sent to any party.

CONFIDENTIAL

Date
Component
Case number
Patient
Dentist
Others

Brief outline of problem:

Committee members conducting the review:

Clinical findings:

Conclusions:

Recommendations:

Peer Review Chair

Please use the back if necessary

APPENDIX I

Sample
Letter Notifying the Patient of a Condition Outside of the Peer Review Complaint
CONFIDENTIAL

Date
Name
Address
City, State, Zip

Dear _____:

To assist you in resolving the complaint you brought on (date) to the _____ Dental Society, the Peer Review Committee conducted a limited oral health examination of you focused solely on your complaint. In conducting that exam, the Committee noticed what may be evidence of [or "signs of"] _____, which is an oral health condition unrelated to your initial complaint. However, it is a condition for which you should seek immediate evaluation and, if necessary, treatment. The _____ Dental Society will assist you with a referral to a _____ upon your request. To request such assistance, please contact _____ (name of individual and contact info). Regarding your initial complaint, the recommendations of the Peer Review Committee will be sent to you separately.
Sincerely,

Signature of Committee Chair

cc. The dentist who is a party in the case

Dr _____, Chair, Dental Society Peer Review (if different from Committee Chair)

APPENDIX J

CONCLUDING LETTER AND FORM FOR RELEASE AND SATISFACTION OF CLAIMS

Concluding Letter and Letter to Accompany Peer Review Recommendation

A concluding letter should be sent to the parties involved to convey the decision and recommendations of the peer review committee. These letters should be clear and concise without extensive clinical detail. Sample concluding letters are in the pages that follow.

If there is to be an exchange of money, the release and satisfaction of claims form should accompany the letter.

Form for Release and Satisfaction of Claims

The form for release and satisfaction of claims should be used whenever the committee recommendation involves an exchange of money. A sample of the form is in the pages that follow. If, for example, the dentist involved in the case is asked to refund all or any part of the fee paid, such a form is intended to release the dentist from any further liability or other claims.

SAMPLE
Concluding Letter on the Committee's Recommendations

CONFIDENTIAL

Date
Name
Address
City, State Zip

Dear _____:

The Peer Review Committee of the _____Dental Society met on (date) to consider your complaint against Dr. _____.
_____. Both you and Dr. _____ met with the committee.

In summary, you complained that the bridge placed by Dr. ___was made incorrectly and that you now have decay in that area.

The committee recommends that the bridge be replaced. And, since you do not wish to return to Dr. _____ for treatment, it is further recommended that Dr. _____reimburse you in full the fee you paid for the bridge (\$_____).

Dr. _____ is asked to send me a check made out to you in the amount specified above. You are asked to sign all copies of the enclosed release forms, which will release Dr. _____ from any further liability in the matter. Return all copies of the release forms to me. I will forward Dr. _____'s check to you along with one of the release forms. The second goes to Dr. _____. The third is kept on file.

You have the right to appeal this decision to the Peer Review Committee of (constituent society), (address), (city, state, zip). The request for appeal must be made within thirty days of your receipt of this report.

Thank you for your cooperation.

Signature of Committee Chair

cc: Dr. _____
Chair
_____ Dental Society Peer Review

SAMPLE
Letter to All Parties, to Accompany the Concluding Letter
(To All Involved Parties)

Date

Name
Address
City, State Zip

Dear _____:

The Peer Review Committee of the _____ District Dental Society has completed its review of the case involving _____.

Enclosed please find the recommendations and findings of the Committee. I remind you of your right of appeal to the (Statewide Council on Peer Review.)

Your appeal must be based on one or more of the following:

1. Procedural error;
2. New evidence;
3. Perception of decision contrary to evidence.

An appeal must be made within thirty (30) days of your receipt of this report to the _____ Dental Association (insert address).

Thank you for using the _____ Dental Association Peer Review Mechanism.

Sincerely,

_____ D.D.S.

Chair
Peer Review Committee

**SAMPLE
Release Form**

NOTE: This release may or may not satisfy applicable state law. It is imperative that parties relying on this form consult with their counsel to modify this release as necessary to comply with applicable law.

RELEASE

I, _____ (hereinafter the patient) for the sum of dollars (\$_____) paid to me on this date by _____ [name of dentist and/or professional corporation], the receipt of which is hereby acknowledged, fully release _____ [name of dentist and/or professional corporation] (hereinafter the released party or parties) from any liability or claims of whatever nature, known or unknown, including, without limitation, claims for personal injury and disability, pain, suffering, mental anguish, loss of income and _____ arising from dental treatment provided to me by [name of dentist and/or professional corporation], including without limitation _____

[describe treatment dates, procedures, surgeries (if any), complications (if any), and dates of those complications].

[Optional paragraph]: I understand that this release shall bind me and my heirs, legal representatives and assigns, and that it shall insure to the benefit of the released party or parties, and to [his, hers and/or its] heirs, legal representatives, successors and assigns. I also understand that the coverage of this release shall extend to _____

_____ [name of the released party's insurer] and to any and all partners, staff and employees of the released party or parties.]

I understand that the receipt of this payment constitutes a final and full release and settlement of any claim I might have against _____ [name of dentist and/or professional corporation]. I also understand that the payment made is not to be construed as an admission of liability on the part of the party or parties hereby released by whom liability is expressly denied. I have read this release, understand the terms used in it and their legal significance, and have executed it voluntarily.

CAUTION: THIS IS A RELEASE - READ BEFORE SIGNING

(patient) _____

(witness) _____

(date) _____

APPENDIX K

LETTER TO PARTY REQUESTING AN APPEAL

A letter should be sent to any party requesting appeal of the local dental society's peer review committee decision. The party in a peer review case to whom the committee decision was unfavorable will have been informed of the availability of appeal and advised of the process and the time limitations when the committee decision was conveyed.

The letter and the Appeal Request Form are sent in response to a request for an appeal. The individual requesting the appeal is asked to provide written justification for the request and to clearly state expectations.

Samples of these materials are contained in the pages that follow.

SAMPLE
Letter to Party Requesting an Appeal

Date

Name of party requesting appeal
Address

City, State Zip

Dear _____:

The _____ Dental Association (Statewide Council on Peer Review) received your request for appeal of the findings of the _____ District Dental Society Peer Review Committee in the case involving Dr. _____.

Please fill out the enclosed (Statewide Council on Peer Review) Appeal Request Form and return it within thirty (30) days. Your appeal must be based on one or more of the following:

1. Procedural error;
2. New evidence;
3. Perception of decision contrary to evidence.

If the enclosed form has not been received by the _____ Executive Office within thirty (30) days, the appeal will be terminated.

Sincerely,

_____ D.D.S.

Chair
Council on Peer Review

**SAMPLE
Appeal Request Form (State Dental Association)**

CONFIDENTIAL

Please type or print legibly

Initiator of appeal

_____ Phone # (____)_____

Address _____

City _____ State _____ Zip _____

Appeal of the decision _____ Peer Review Committee
(Local Dental Society)

Involved parties:

Name _____ Phone # (____)_____

Address _____

City _____ State _____ Zip _____

Name _____ Phone # (____)_____

Address _____

City _____ State _____ Zip _____

Your Appeal must be based on one or more of the following:

1. Procedural error;
2. New evidence;
3. Perception of decision contrary to evidence.

Please explain the basis of your request for appeal (be specific):

_____ No request for relief should be included on this form. While a refund of the charges you have paid is one of the options that may be recommended by the committee, a request for a refund should not be made in writing or on this form.

To the best of my knowledge the above information is true.

Signature

SAMPLE
Confirmation Letter to Party Requesting an Appeal

CONFIDENTIAL

Date

Name

Address

City, State Zip

Dear _____:

The _____ Dental Association Statewide Peer Review Committee has received your request for appeal of the findings for the _____ Dental Society Peer Review Committee in the case involving _____.

Your appeal will be reviewed at the next meeting of the Statewide Peer Review Committee on _____.

Sincerely,

Chair

Statewide Peer Review Committee

APPENDIX L

SAMPLES OF STATE LEGISLATION

Several samples of legislation can be found in the pages that follow. The first sample legislation has been drafted as an example of the language that may be used in state statutes for peer review activities.

Sections 1, 2 and 3 authorize the establishment of peer review committees, grant immunity from the liability for committee members, and protect the confidentiality of peer review proceedings from discovery, respectively.

The second example speaks solely to immunity from liability and confidentiality in brief and concise statutory language.

All constituent dental societies are strongly urged to ensure adequate statutory protection for their peer review activities. The dental society's attorney should be consulted before any effort is made to amend existing statutes or to seek enactment of such statutes.

SAMPLES Legislation

SAMPLE 1

Section 1: Peer review committees

A society or an association of persons licensed to practice dentistry pursuant to (citation to dental practice act) whose membership includes not less than one-(third/half) of the persons licensed to practice dentistry pursuant to (citation to dental practice act) residing in this state, or any component organization of such society or association, may establish one or more peer review committees pursuant to this section for the purpose of determining the relevancy of a dentist's usual and reasonable fees or treatment procedures to the terms of a contract, or of assessing the quality of services rendered.

Section 2: Immunity from liability

- a. Any society or association which has established a peer review committee pursuant to section 1 of this Act, any member of such committee, any staff member of such society or association assisting such peer review committee, any witness or consultant appearing before or presenting information to such peer review committee shall be immune from liability in any civil or criminal action sought by a licensee who is the subject of a peer review investigation or proceeding conducted by such a committee, if such a society or association, committee member, staff person, witness or consultant acts in good faith within the scope of the function of such committee; has made a reasonable effort to obtain the facts of the matter as to which the society or association or he or she acts; and acts in the reasonable belief that the action taken is warranted by the facts.
- b. Any entity, organization or person acting without malice in making any report or other information available to such peer review committee or who assists in the origination, investigation or preparation of such information, or assists such committee in carrying out any of its duties or functions, shall be immune from civil or criminal liability for any such actions.

Section 3: Confidentiality of records

Any communications or information relating to peer review committee investigations or proceedings as provided in sections 1 and 2 of this Act, and the proceedings and records of the peer review committee related thereto, shall be held in confidence and shall not be subject to discovery or introduced into evidence in any civil action or

administrative proceeding against a dentist arising out of matters which are the subject of evaluation and review by the peer review committee. No person who was in attendance at a meeting of the peer review committee shall be permitted or required to testify in any such civil action or administrative proceeding as to any evidence or other matters produced or presented during such meeting of the peer review committee or as to any findings, recommendations, evaluations, opinions, or other actions of the peer review committee or any members thereof or consultants thereto. However, information, documents, or records otherwise available from original sources are not to be constructed as immune from discovery or use in any such action or proceeding merely because they were presented during proceedings of the peer review committee, and any documents or records which have been presented to the peer review committee by any witness shall be returned to the witness, if requested by him or her or if ordered to be produced by a court of competent jurisdiction in any action, with copies thereof to be retained by the peer review committee at its discretion. Any person who testifies before the peer review committee cannot be asked about his or her testimony before the peer review committee or opinions formed by him or her as a result of such hearings.

SAMPLE 2

Immunity from liability and confidentiality of records

No member of a dental peer review committee of a state or local dental society shall be deemed liable in damages to any person for any action taken or recommendation made within the scope of the functions of such committee, if such committee member acts without malice and in reasonable belief that such action or recommendation is warranted by the facts known to him or her after reasonable effort to obtain the facts of the matter as to which such action is taken or recommendation is made.

The dental peer review committee and its records shall be exempt from discovery proceedings.

APPENDIX M

FEDERAL TRADE COMMISSION ADVISORY OPINION ON PEER REVIEW OF DENTAL FEES

The attached advisory opinion was issued by The Federal Trade Commission in 1982 in response to the intent of the Iowa Dental Association and its component peer review committees to undertake the review of fee questions and fee-related disputes. The opinion clearly outlines the parameters of fee review activity that would not be in violation of the antitrust laws.

The appropriate review of fee-related disputes is a valid responsibility of the peer review process and the majority of constituent dental societies conduct such review. However, because the exchange of fee information at the constituent society level can have implications under the antitrust laws, peer review fee issues should be handled in strict accordance with the terms of the FTC's letter.

It must also be stressed that a member should be given the option of not to participate in peer review of fees and fee issues

All constituent and component dental society peer review committees are urged to carefully review this advisory opinion and to fully understand the parameters defined in it. Any questions should be discussed with the dental society's attorney.

Federal Trade Commission

Peter M. Sfikas, Esq.
200 East Randolph
Suite 7300
Peterson, Ross, Schloerb & Seidel
Chicago, Illinois 60601

Dear Mr. Sfikas,

This is in response to your request for an advisory opinion concerning a proposed program for peer review of dental fees by the Iowa Dental Association ("IDA" or "Association") and its component district dental societies.

It is the Commission's understanding that IDA wishes to institute a peer review program to aid the cost containment efforts of third-party payors¹ and assist patients in the resolution of fee-related disputes with dentists. Under the proposed IDA peer review program, a patient, a third party payer or a dentist involved in a particular fee dispute may request a determination by a peer review panel of an IDA component district dental society as to the appropriateness of the fee charged in that particular case. Participation in the program will purely voluntary (with no proceeding held unless each of the disputants agrees to participate)² and all determinations will be purely advisory in nature. Furthermore, the decision of each peer review panel will not be disseminated beyond the patient, third party payer, and dentist involved in the case. Similarly, distribution of decisions internally will be limited to the dissemination required to perform appellate and administrative functions, and the Association will neither collect information on dental fees nor conduct survey relating to such fees.

Based on its understanding of the fee peer review program as it is outlined above and further detailed in your submissions, it is the Commission's opinion that operation of the program could not, in and of itself, be violative of Section 5 of the Federal Trade Commission Act.

The Commission is of the view, however, that great care must continually be taken in carrying out the program to assure that its purpose remains legitimate and that it does not produce significant anti competitive effects and thereby run afoul of the antitrust laws³. Proffered guidance given under the auspices of a major professional society can readily become coercive if the voluntary and advisory nature of the program is not perceived and sustained by all participants. Likewise, joint action relating to fees can

readily threaten independent pricing, if determinations about particular past prices become generalized in future fee or reimbursement decisions.

IDA should avoid antitrust risk, therefore, by vigilantly safeguarding the voluntary and advisory nature of the fee peer review process, and the limited scope of each proceeding, to prevent a lessening of price competition or innovation and to avoid unlawful coercion.

Competition will be best protected if all concerned parties view fee peer review as a means of mediating specific fee disputes, rather than a process for the collective sanctioning of fee levels or particular practices. The Commission believes that limited dissemination of fee decisions by the peer review panels is crucial if the program is to serve as a mediation service, rather than a means to facilitate price fixing or coercion. Serious antitrust concerns would therefore arise if IDA, district societies, Association members, or the disputants involved in a particular peer review proceeding allowed panel decisions to become widely known.

Of equal importance, the difficulty and complexity of a procedure should be evaluated based on the individual expertise and judgment of the panel members. To the extent that any reference is made to external factors or benchmarks, such as relative value scales, consideration should be limited to fee information not sponsored or sanctioned by the Association or a component dental society. Likewise, peer review of fees would be subject to antitrust challenge if it were used either to discipline dentists who engage in advertising or other forms of competition or to discourage innovative practices not officially approved or widely used within the professional community. The Association should take no steps to discipline either panelists who do not follow IDA's policies or member dentists who decline to utilize the peer review process or accept its guidance.

To prevent unlawful coercion of third-party payors, IDA should make it clear that the Association is neither conferring preferred status on insurers and other companies that participate in the program and accept panel recommendations, nor urging member dentists to avoid or pressure companies that fail to participate in the program and acquiesce in panel recommendations. Furthermore, antitrust concern would be triggered if a fee schedule or reimbursement program is sufficient or reasonable-the likelihood that the program would have anticompetitive effects would be minimized if it only determines the appropriateness of a particular dental fee charged in a particular case. Likewise, the fee review program may not be used to pressure third-party payors into accepting or standardizing particular definitions of what is a "usual" or "customary" fee. When a dispute involves one of those terms, antitrust risk would be reduced if the panel takes the third-party payer's definition as given.

Furthermore, a dentist-patient dispute needs to be handled with special care when a third-party is involved. A third-party payer independently establishes its own general-contractual criteria and standards for reimbursement and is often able to make an independent appraisal of the overall fairness of the peer review process and of individual peer review decisions. A patient bringing a claim to the program will have no previously established criteria or payment formula and will usually be unable to make such appraisals. And, unlike the third-party payers, the patient may not have the financial ability or incentive to defend his or her position in court if dissatisfied with peer review determination. Where no insurance contract or prior fee agreement between dentist and patient exists, IDA should be particularly careful not to let the peer review process be used to set or sanction "reasonable" or "customary" fee levels for general use by members. Also, it is most important that the patient be made aware of the voluntary and advisory nature of the process and, if he or she chooses to participate, be given a fair hearing. IDA must specifically advise patients that peer review determinations are based on the experience and 2Thus, when a dispute is between a third-party payer and a dentist, both the third-party payer and the dentist must agree to participate in the particular proceeding. Likewise, when the dispute is between a patient and his or her dentist, both the patient and dentist must agree to participate for the peer review process to be utilized.

3The Supreme Court will clarify in a pending case the extent to which peer review is within the antitrust exemption for the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C S1011 et seq. *Pireno v. New York State Chiropractic Association*, 650 F.2d 387 (2d Cir. 1981), cert. granted, U.S. (Sup. Ct. Nos. 81-389-390 Nov. 16, 1981). It therefore does not seem warranted for the Commission to offer its own advice to IDA on this issue at this time.

4This Advisory Opinion, like all those issued by the Commission, is limited to the proposed conduct described in the petition being considered. It does not, of course, constitute approval for the specific operations of any particular peer review program that may be or become the subject of litigation before the Commission or any court.

APPENDIX N

LEGAL AND LIABILITY CONSIDERATIONS

Reportability of Peer Review Refunds to the National Practitioner Data Bank

The letters in this appendix relate to the question of whether, and under what circumstances, a refund made to a patient as a result of a peer review proceeding might be reportable as a “medical malpractice payment” to the National Practitioner Data Bank. See the section on Legal & Liability Issues: Other Federal Statutes: National Practitioner Data Bank for discussion of this issue.

Date: August 15, 1990
To: Constituent Society Peer Review Chairpersons
From: Dr. Stuart B. Fountain, Chairman, Council on Dental Care Programs
Subject: National Practitioner Data Bank Implementation of Interim Agreement

The purpose of this communication is to clarify the interim agreement relative to the National Practitioner Data Bank (Data Bank) and to help you implement the changes. As you will see from the attached copy of the letter sent by the Health Resources and Services Administration (HRSA) to our Washington office, the agreement is divided into two parts:

- The Association has revised the dental society “Mediation Request Form,” pages 59-60 of the Association’s manual Peer Review in Focus, so that the form will no longer represent a “medical malpractice action or claim” as defined in the Data Bank regulations. This form is to be completed by the patient and submitted to the dental society.
- Dental Societies should now require a dentist who agrees to refund fees as a result of dental society peer review to make such payments in the form of a check directly to the dental society. The dental society will place the check in an “escrow” (see page 2, paragraph #3) account and held until payment is to be made to the patient or another dentist for work redone.

In accordance with the interim agreement, the Council recommends that state dental societies consider taking the following actions:

1. The mediation request form has been revised and is now entitled “Patient Request for Mediation,” a copy of which is attached. This form specifically advises patients not to request a refund in writing or on the form. The form contains no questions that would encourage the patient to make a written request for a refund of fees. In order to preserve the peer review system, it will be necessary to use this form.

Example:

When a patient calls the state or local dental society to request a peer review, do not ask the patient to write a letter detailing the problem. Instead, consider taking the

patient's name and address and informing him/her that the society will send a "Patient Request for Mediation" form immediately.

2. There may be an instance when the patient ignores the advice contained on the form and makes a written request for a refund of fees. In such event, the dental society can either provide a new form for the patient to complete, or can explain to the patient that the society will be unable to process the mediation request. Otherwise, refunds made in response to such written request will be reportable to the data bank.

Example:

You might encourage the patient to complete a new form being direct about the reason and trying to keep the matter within the peer review process.

3. The escrow account has prompted many questions from state society leadership and staff. The Association does not interpret HRSA's directive to mean that a formal escrow account should be established to comply with the fiduciary responsibilities outlined in state laws. Rather, based on our discussions with HRSA, we believe it means that the money to be returned by a dentist to a patient be handled through the state dental society with a separate bank account to be used solely for this purpose.

Example:

Establish a separate checking account to be used solely for receiving monies from dentists to be forwarded to patients or to the re-treating dentists. If a peer review decision favors the patient, the peer review chairperson would inform the dentist that he/she should make his/her check payable to the state dental society. The dental society then would draw a check on the separate account made payable to the patient or to the re-treating dentist up to the amount of the original dentist's fee.

4. According to the Data Bank guidelines, dentists who receive written requests for refunds or other monetary payments are required to report any such payment made directly to patients or a new treating dentist.

Example:

Where appropriate, dental societies should suggest to members that they consider referring any dissatisfied patients to dental society peer review for resolution, after a full discussion with the dentist about the data bank.

5. Clearly, there is a problem with peer review cases initiated prior to September 1, 1990 that will not be settled until after September 1, 1990. Any cases in process where the patient, in writing, has requested a refund of fees should be dealt with immediately.

Example:

In some cases, you may be able to transfer the appropriate information to a "Patient Request for Mediation" form and send it to the patient for signature. A simple cover letter to the patient explaining compliance with new federal regulations required that the new form become a part of the peer review records should suffice. If the patient already has made a written request for a refund as a part of peer review, HRSA's

interpretation of the law is that any refunds made in response to a written claim after the September 1 start-up date are reportable.

HRSA has acknowledged that this interim agreement represents a short-term solution to the problems that Data Bank has created for the profession. The agency has indicated a willingness to cooperate in finding long-range solutions after the Data Bank becomes operational on September 1, 1990. In the meantime, the interim agreement will exempt dental society peer review if handled in accordance with HRSA's requirements. The Association will, of course, continue to work with pertinent government agencies to achieve a more acceptable and permanent solution.

The Division of Legal Affairs is continuing to research possible causes of action that might be filed against HRSA in a lawsuit relating to this problem. We will keep you posted in that regard, but we would like to reiterate the potential downside to filing a lawsuit at the present time. We believe the Congressional sponsors of the data bank legislation, together with the data bank staff, would be very reluctant to work with the Association toward an amendment to the statute or regulations if a lawsuit were filed. There is still an opportunity at the present time to work with these groups for an amendment that would resolve the problem. In addition, there is the possibility that a court ruling might be more unfavorable than the interim agreement from HRSA.

Litigation certainly has not been ruled out, but timing of any litigation is critical and should not be pursued until the other avenues have been exhausted.

Many state societies have expressed a preference for informing their component societies of the changes that they will institute in order to comply with the interim agreement. Therefore, this memorandum is being sent only to the state dental society peer review chairpersons with copies to the state dental society presidents and executive directors. If, however, you would like Council's assistance in disseminating this information to component societies, please contact the Council office immediately. If you have any questions regarding the Data Bank, please call the Chicago office, Tom Conway, extension 2752.

We urge you to seek advice from your attorneys in the implementation of these new procedures, in order to protect your peer review program and the members who participate in it.

Mr. Leonard Wheat
Director of Government Relations
American Dental Association
1111 14th Street, N.W.
Suite 1200
Washington, D.C. 20005

Dear Mr. Wheat:

I found the meeting with you and Ms. Carole Frings on May 9 regarding the National Practitioner Data Bank quite useful. I appreciate the follow-up information you provided about the dental peer review process.

As you know, the Data Bank Executive Committee met on May 22 to discuss Data Bank progress and issues. During the meeting Ms. Frings raised the American Dental Association's (ADA) concern about reporting to the Data Bank (as a malpractice payment) a cash refund agreed to by a dentist as part of an informal dental society peer review mediation process. I believe we were able to resolve the issue to the satisfaction of the ADA and the Executive Committee and want to restate our understanding of the two actions to be taken by the ADA.

The ADA will revise the dental society "Mediation Request Form," submitted by a patient to the dental society, so that the form will no longer constitute a medical malpractice action or claim as defined in the Data Bank regulations at 45 CFR Part 60. Second, the ADA will require a dentist who agrees to a cash refund as a result of a dental society mediation process to refund the fee for the dental service to the dental society. The dental society will hold the refund in "escrow" until the patient has the dental service redone by another dentist, or alternatively, upon the request of the patient, the dental society will send the refund to the patient.

We are aware that this solution does not directly address the ADA's concern that a cash refund made by a dentist as part of a dental society peer review process not be required to be reported to the Data Bank. A long range solution would be to set a floor below which malpractice payments of a certain dollar level would not be required to be reported to the Data Bank. A long range solution would be to set a floor below which malpractice payments of a certain dollar level would not be required to be reported to the Data Bank. As required by the Congress, we plan to do a study on the reporting of "small" malpractice payments to the Data Bank approximately one year following its opening. A somewhat shorter-term solution would be the possibility of amending the regulations.

I trust we have restated accurately the actions to be taken by the ADA on this issue. If your understanding is different, please contact me (443-5794) or Stan Bastacky, D.M.D., (443-2300) of the Division of Quality Assurance and Liability Management immediately. I appreciate the concern of the ADA on this issue and look forward to continued cooperation between the ADA and the Bureau of Health Professions.

Sincerely,

Fitzhugh Mullan, M.D.
Director

Laurance Jerrold, D.D.S., J.D.
New York County Dental Society
6 East 43rd Street
New York, New York 10017

Dear Doctor Jerrold:

This is in response to your letter of March 29 to the Division of Quality Assurance concerning the New York County Dental Society procedures and their applicability to the National Practitioner Data Bank (NPDB) reporting requirements for medical malpractice payments. Your questions were reviewed by the Health Resources and Services Administration (HRSA) Office of the General Counsel and I hope the following information will clarify the issues you presented.

1. Does HRSA consider this “agreement” a “writing” for the purposes of fulfilling the writing requirements for the reporting statute?

Yes. The Health Care Quality Improvement Act of 1986, the statute governing the NPDB, requires each entity making a payment in settlement of, or satisfaction of a judgment in, a medical malpractice action or claim to report such payment (42 USC 11131(a)). A “medical malpractice action or claim” is defined under the statute at 11151(7) as “a written claim or demand for payment based on a health care provider’s furnishing (or failure to furnish) health care services...” Your “Agreement to Submit to Peer Review” is a written claim or demand for payment (a refund of fees paid is a “payment”) based on a dentist’s provision or failure to provide dental care.

2. Does HRSA consider this a written request for “return of fees (payment of money)” related to the provision of professional services such that the reporting requirements would be triggered if a refund were to be given a patient?

Yes. A refund is considered a “payment.” However, it is only reportable if it is made by an entity (including an incorporated sole practitioner) for the benefit of a health care practitioner. Refunds (or other payments) made by an individual practitioner out of his or her personal funds do not trigger the reporting requirement. Please also note that, under the NPDB regulations at 45 CFR 60.7(a), a waiver of outstanding fees or debt is not a payment and, therefore, is not reportable.

3. Does HRSA consider the NYCDS to be a medical malpractice payer?

Yes. The NYCDS is an entity which makes payment in settlement or partial settlement of a medical malpractice action or claim and, therefore, is required under 42 USC 11131(a) to report such payments. There is no statutory requirement that the payment be from the reporting entity's own funds.

4. Is the incident reportable if the Doctor gives a personal check as opposed to a business check?

As explained in response to Question #2 above, the source of the money paid into the escrow account determines reportability if that money subsequently is refunded to the patient. If the money refunded to the patient from the escrow account was paid into it by a business entity (e.g., a professional corporation composed of a sole practitioner), for the benefit of a practitioner, the payment is reportable. However, if the refund was paid into the escrow account from the personal funds of an individual practitioner, it is not reportable.

I hope this information is helpful. Please do not hesitate to contact me again should you require further clarification.

Sincerely,

Vivian Chen, Sc. D., M.S.W.
Associate Director for Policy
Division of Quality Assurance

APPENDIX O

INDIVIDUAL PEER REVIEW CASE FORM: NATIONAL REPORTING SYSTEM

A form was developed for use by component dental societies (peer review committees) to track individual peer review cases. The information on the form parallels the information requested in the Council's Annual National Peer Review Reporting System survey. This form, then, provides an easy method to monitor the status of a peer review case and facilitates the collection of important data by the constituent society and the Association.

The form is made available to dental societies upon request.

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