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**HEARING ON BARRIERS TO CONSUMER ACCESS TO HEALTH INFORMATION**
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## History of Organized Medicine's Resistance to Public Access

Today's National Practitioner Data Bank battle and other battles between the public right and desire to know more about doctors in whose hands they entrust their lives and health versus organized medicine's wishes to keep secret such information has a long history.

Exactly 20 years ago, in July 1973, as the Health Research Group collected data from doctors in Prince George's County (in suburban Washington. D.C.) for what was the first doctor's directory for consumers in the United States, the Executive Director of the Maryland Medical Society successfully intimidated many doctors who were willing to give us information into non-cooperation by threatening them with loss of their medical license. Referring to then-existing state laws including one in Maryland, ultimately derived from the AMA's Code of Ethics, he said that any directory of doctors that contains "information that would point out differences between doctors " is prohibited by Maryland law.

More recently, a reporter for New York Newsday had to file a lawsuit against the New York State Health Department to obtain data showing doctor-specific differences in risk-adjusted coronary bypass death rates. The state argued unsuccessfully, on behalf of New York doctors, that disclosure of these data to the public constituted an "unwarranted invasion of the personal privacy" of the heart surgeons. The court soundly rejected this self-serving argument and the data were released and published.

## Current Battle to Open the National Practitioner Data Bank

Thanks to implicit threats that the AMA would not support passage of the 1986 legislation which established the data bank, the valuable information which it contains is not only kept secret from patients but from doctors as well. If I want to refer Congressman Wyden or anyone else to another physician and wish to know if he or she has had their hospital admitting privileges suspended or restricted, has had one or more malpractice payouts against them or has been the subject of other disciplinary actions, I, as a physician with a fiduciary duty to my patients, along with all of the patients who want to find out about this am excluded by law from obtaining doctor-identified information from the data bank.

Whereas we strongly support legislation to open the data bank, the American Medical Association's House of Delegates earlier this

month passed a resolution stating: "RESOLVED, That the American Medical Association...call for the dissolution of the National Practitioner Data Bank."

As we move rapidly towards the millennium and the twenty-first century, the American Medical Association is clearly acting in this instance as a crude, self-interested trade association no better than the many others poisoning Washington. By seeking the "dissolution" of the data bank, the AMA wants to protect the minority of American doctors about whom there is information in the data bank from the scrutiny of either their own patients or other physicians.

**Data in the National Practitioner Data Bank as of June 18, 1993**

The most recent report from the data bank, reflecting all data accumulated since it became operational on September 1, 1990 shows the following:

1. 6,435 practitioners (approximately 3/4 physicians and 1/4 dentists) have reports of adverse actions, including 7,065 state licensure actions (in some cases there is more than one action per practitioner), 2,660 clinical privilege actions (mainly loss or restriction of hospital privileges)and 119 professional society membership actions.

2. 41,556 practitioners have one or more malpractice payment reports in the data bank, 95.3% of these reports concerning physicians.

**Examples of the Kind of Data in the Data Bank**

The Public Citizen Health Research Group has been keeping its own data bank, based mainly on reports we obtain of state medical board actions. According to data received as of January 1992 the kinds of actions included probation, 22%, revocation, 14%, suspension, 13%, surrender of license, 10%, fine, 5%, reprimand, 5%, and other actions, 33%.

The 6,097 state disciplinary actions for which the states told us the doctors' offenses which had led to the actions included:

* Misprescribing or overprescribing of drugs, 14%
* Substandard care, incompetence or negligence, 11%
* Personal history of drug or alcohol abuse, 10%
* Criminal Conviction, 10%
* Professional Misconduct, 7%
* Providing false information to the board, 3%
* Mental or physical impairment, 3%
* Sexual abuse of or sexual misconduct with a patient, 2%

Despite the seriousness of many of these offenses, the licenses of the physicians who committed them are often neither revoked nor suspended and many of these doctors are practicing

medicine, seeing patients who are completely in the dark about what the state boards have concluded.

For the physicians found to be incompetent, negligent, or giving substandard care, 65% or 450 cases did not result in suspension or revocation and the doctors are still practicing.

For the offense of overprescribing or misprescribing of drugs, 71% or in 598 cases the doctors are still practicing. For personal history of drug or alcohol abuse, 76% or 484 doctors are still practicing and for criminal conviction, 38% or 385 are still practicing.

The point is not necessarily that the licenses of all or even most of these doctors should have been suspended or revoked -- although for certain offenses some states are stricter than others -- but the patients who go to these doctors have a right to know more about them than they read in the yellow pages or see on the diplomas on the doctors' walls. More fully informed means more protected.

**Why public access to the data bank is important:**

1. Patients need a full range of data in order to make informed decisions in choosing health care providers. This is especially important in the current reform climate that emphasizes consumers' role in the "marketplace" under all types of national health insurance proposals. Consumers currently have more information when choosing cars than doctors.

2. Physicians and others acting as "agents" of patients need a full range of data to make conscientious referrals to other providers. Such information would protect hospitals and other corporate entities by enabling them to screen out negligent colleagues whose actions could expose the entity to liability. Thus, the Data Bank should be viewed as a resource by the medical community rather than as a threat.

3. The importance of the ability to "shop around" is more than academic. Harvard studies estimate one percent of all hospitalized patients are injured or killed each due to physician negligence. Yet only a fraction of substandard doctors are penalized by state medical boards. By combining state board actions with other data, the Data Bank offers the best information available.

4. While some of the disciplinary information in the Data Bank is available through other sources, it is very difficult for most people to obtain. The Data Bank is the only resource that presents the whole spectrum of a provider's record, which is crucial to understanding the value of any individual action. In fact, the opportunity to view each action in context argues against claims that malpractice settlements will be inappropriately weighed by consumers or that the data will be otherwise misunderstood.

5. Public scrutiny increases accountability of the system, e.g. revealing incidents that should have been but were not reported to the Data Bank.

**Why the Data Bank's function should not be left to the private sector:**

1. A federal-level public program provides a single collection point for uniform data that the private sector could not achieve. Consistent nationwide data are valuable for many reasons, including consumer mobility, system-wide policy development and budgeting, quality oversight, etc.

2. Selective private sector distribution of "comparative" data is vulnerable to being used as an "advertisement" for the compiling entity, e.g. the recent "consumer report card" by United HealthCare Corporation, praised by Sen. Durenberger as a "model for industry [and] focus for national health care reform debate."

**STATUTORY AMENDMENT FOR PUBLIC ACCESS TO THE DATA BANK**

As currently drafted, Title IV of the Health Care Quality Improvement Act of 1986 deems all information submitted to the Data Bank "confidential" (except for information that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient), and places strict limitations on the use of such data. This means that members of the public, including other physicians, may not gain access to information in the Data Bank, and those that improperly release such information are subject to strict penalties.

The goal of this proposed amendment to the Act is to eliminate the current legal barrier to public access to the Data Bank. The amendment follows the current language of the statute as closely as possible, while shifting the focus from confidentiality of practitioner data to preserving the confidentiality of patients.

PROPOSED AMENDMENT

Delete current 42 U.S.C. § 11137(b)(1) in its entirety and replace it with the following:

> Information reported under this subchapter that permits the identification of any patient is considered confidential and shall not be disclosed (other than to the physician, practitioner, or patient involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations promulgated by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a) of this section. Nothing in this subsection shall prevent the disclosure of such

information by a party which is otherwise authorized, under applicable state law, to make such disclosure. Information reported under this part that does not permit the identification of a patient shall not be considered confidential. The Secretary (or the agency designated under section 11134(b) of this title), on application by any person, shall disclose all non-confidential information reported under this subchapter.

Delete current 42 U.S.C. § 11137(b)(3) in its entirety, and renumber the following subsections accordingly.