LAW OFFICES
PAUL M. HITTELMAN

11999 SAN VICENTE BLVD., SUITE 350
LOS ANGELES, CALIFORNIA 90049 -5073
TEL (310) 471-7600 FAX (310) 471-7855
E-mail: pmhpc@earthlink.net

FACSIMILE TRANSMISSION

DATE:	**August 13, 2011**	**TELEPHONE:**	
TO:	**Assembly Member Mary Hayashi Chair, California Assembly Committee on Business, Professions and Consumer Protections**	**FAX NO.:**	**916 319 3306**
FROM:	**Paul M. Hittelman**	**FILE NO:**	
RE:		**DOCUMENT ATTACHED:**	**LETTER OF AUGUST 13, 2011**

We are sending 8 pages via telephone transmittal, including this cover page. If you do not receive the number of pages indicated or if there is any other transmittal problem, please contact the sender at (310) 471-7600.

* * * * * * * **MESSAGE** * * * * * * *

LETTER OF THIS DATE AND ENCLOSURE ARE TRANSMITTER HEREWITH

LAW OFFICES
PAUL M. HITTELMAN

11999 SAN VICENTE BLVD., SUITE 350
LOS ANGELES, CALIFORNIA 90049 -5073
TEL (310) 471-7600 FAX (310) 471-7655
E-mail: pmhpc@earthlink.net

August 13, 2011

VIA FAX (916-319-3306) AND E-MAIL

Assembly Member Mary Hayashi
Chair, California Assembly Committee on
Business, Professions and Consumer Protections

Re: ***Opposition to A. B. 655***

Dear Assembly Member Hayashi:

Please incorporate this letter and its attachment into the Legislative History of A.B. 655.

This letter is written to express my opposition to A. B. 655 as presently drafted on the grounds that it would perpetuate unfairness to physicians in peer review proceedings and thereby imperil the quality of patient care by limiting patients' choices of practitioners.

I addressed the California Senate's Business and Professions Committee on March 9, 2009 in its public hearing concerning the state of medical peer review in California and presented my credentials and my views concerning problems and inequities inherent in the peer review system as it impacts California physicians.

Attached hereto is a verbatim transcript of my remarks to the Senate committee, transcribed at the chairperson's request, this spells out in careful detail my thoughts with respect to the issues affecting peer review in California.

One the primary problems with A. B. 655 is found in section (e), which does not, as drafted, make it mandatory that any peer review information communicated from one hospital to another be first presented to the practitioner under circumstances in which he has the opportunity to respond and assure that the information transmitted is fairly presented and is accurate.

LAW OFFICES
PAUL M. HITTELMAN

Simply stated, section (e) does not prohibit a responding peer review body from voluntarily providing information without the knowledge of, or a release from, the practitioner.

A suggested revision of section 655(e) would consist of striking the words "is not obligated to" and replacing them with "may not" so that the section as rewritten would state:

> "e) The responding peer review body ~~is not obligated to~~ may not produce the relevant peer review information pursuant to this section unless both of the following conditions are met:
>
> (1) The licentiate provides a release, as described subdivision
>
> (2), that is acceptable to the responding peer review body."

Without making appropriate changes in the language of A. B. 655, it would fail in its objective of improving the peer review system, as the present language leaves room for transmittal of inappropriate, even erroneous, peer review communications motivated by such factors as personal animus, medical staff politics, or anti-competitive considerations. Such communications would be inimical to the interests of improving the quality of patient care.

Very truly yours,

Paul M. Hittelman

PMH:dls
Enclosure

cc: Ross Warren (Via Email)
Angela Mapp (Via Email)

PMH SPEECH BEFORE THE CALIFORNIA SENATE
BUSINESS & PROFESSIONS COMMITTEE
MONDAY, MARCH 9, 2009

My name is Paul Hittelman, I am an attorney. My office is in Los Angeles. Ordinarily I would love to send the jury off for the day with my words ringing in their ears. This is not such a time. I intend to be brief. I intend to speak for the doctors.

I am a member of a medical family, my father was a physician who practiced in Los Angeles for over 50 years. My brother was a medical educator in San Francisco at the University of California, San Francisco. Liking neither blood nor chemistry, I am a lawyer.

I have been representing doctors before the Medical Board and in medical staff discipline hearings for several years and I rise to speak for the doctors in connection with what, it occurs to me, is a bit wrong about the peer review system. I preface that by saying I am a very, very strong believer in due process, due notice and fair procedure and I think there are a number of things that have gone sideways or astray with respect to the peer review process.

One of the things that I heard today, by the way, from Ms. O'Connor, the attorney who spoke for the Peer Review Task Force, I thought was very interesting because she repeated here something I heard over the dinner table many times as a youngster growing up in a medical family: when a doctor was perceived by his brothers to be doing

something less than cleaving to the highest standards of care, he was taken aside by his peers and, in private, told to clean up his act, tender his resignation or find a way to get retrained. I find that the wheel has turned a full circle when a group of doctors and lawyers and hospital administrators have come to the same suggestion and call it "voluntary corrective action." I think it is a good suggestion but I think it is something that skirts around the present interest of the legislature and the people of California in making sure that those who do not practice appropriate standards of medicine are reported and appropriately dealt with. I am for that also, but the system that is in place, I think, has been at least abused if not betrayed.

That has been done by a couple of things but one of the most telling is the notion that many of the gentlemen who represented hospitals here today spoke of: the imposition of a summary suspension when there is a claimed danger to patients. I haven't handled a case in recent years involving medical staff discipline in which it has not been contended that the doctor whom I represented posed an imminent peril to his patients and the public and, in at least four of those cases, my client didn't even have a patient in the hospital, or my client didn't have a planned procedure in hospital, or my client had not done anything that endangered a patient before or since.

One of those hospitals that use that methodology was, in fact, Cedars Sinai Medical Center, the place where I was born and where my father was on the staff for 55 years. It is a convenient abuse. Something must be done.

Other suggestions have been made and these I would endorse although some of

them may seem cumbersome or may seem difficult from the standpoint of harmonizing the needs for patient safety with respecting the rights of a doctor for whom the merest report publication destroys his career, not temporarily, not locally, but for all time and for all places. An 805 report will destroy a doctor's right to practice forever and anywhere, unless perhaps he wants to go to the Dominican Republic or someplace else, but if he wants to stay in this county or perhaps even in the northern hemisphere, he is done. So here are some reforms that we would suggest on behalf of doctors. The first is: disinterested panel members. In smaller hospitals, particularly, it is impossible to have disinterested panel members. All of the people in that hospital know each other and they all have their petty as well as major grievances. They all have their likes and dislikes and there is nothing objective about being reviewed by the guys you see every day in the lunchroom or see you every day in the hospital.

The same is true, by the way, with respect to witnesses. I see all too often that peer review hearings involve witnesses testifying as experts who are on the same medical staff. And, again, this happens in both smaller and in larger hospitals. How can that witness be considered to be impartial? We couldn't get away with it in a civil trial if we brought in to testify an expert who has been close to the case, has treated the patient or has in fact treated me, an advocate. It can't happen.

Perhaps the most pernicious aspect of the way peer review is conducted now is that, at least in this state, we are not required in our peer review proceedings to have the right of counsel for judicial review hearings, which are the first step of a peer review

process. So, what happens is that the doctor says "OK, I can't have a lawyer. I'll represent myself or I'll try to find one of the other staff members to represent me in hearings" and at the same time the hospital staff is represented by the highest quality lawyers from large law firms who do nothing but this. That doctor is nothing more than a victim of an abuse. That happens all too frequently. The law should be changed. It's simple for me to say: require in any peer review hearing under section 805 or 809 that the doctor be permitted to have counsel. The bar that represents hospitals and hospital medical staffs has lobbied those medical staffs, we have heard one of its representatives today, and they have written model bylaws for hospitals. The model bylaws that have been written for hospitals by these industry groups invariably contain a provision that says the physician can only be represented by counsel in hearing at the hospital when the medical staff is so represented. So a charade is played out. The doctor, believing that there will not be attorneys opposing him and being gravely threatened economically and probably at the limit of being able to afford a lawyer -- we lawyers don't come cheap for this kind of work -- shows up. He has no lawyer. He attempts to represent himself. The medical staff and the advocates for the medical staff who are members of the medical staff have their experienced lawyers sitting in the next room or down the hall and, to put it as eloquently as I can, they pound him to a pulp. This is not fair. It is not consistent with American principles of due process and fair procedure and it ought to be done away with.

Lastly, I will comment on one other point. I heard someone make the suggestion

here today that maybe we ought to think about expanding the powers of hearing officers. No suggestion could more defy the central fundamental notion of peer review -- that it be conducted by licentiates, that it be conducted by people who know a bit about the science, who know a bit about medicine. A movement is afoot among those who represent medical staffs to elevate hearing officers to the status of judges and to create situations in which hearing officers act as judges and in fact dismiss the practitioners' hearing rights. Dr. Milikowsky has a case pending before the Supreme Court involving that very principle and I have handled two or three others where exactly the same thing has happened. I wrote that part of Dr. Milikowsky's brief that says what I just said to you: how can it be that a procedure that should be conducted by folks who have M.D. after their name can be taken away from them by a hearing officer, a lawyer who says I want to act like a judge and find some procedural impropriety committed by the practitioner who is representing himself, is without counsel, and throw him out. I urge you not to give even the slightest amount to a suggestion that would expand the powers of hearing officers.

I think my last point, excuse me, is the question about expanding immunity. We already have privileges and immunities for those who participate in peer review that insulate them from liability for all but the most egregious kinds of conduct in which they do sometimes engage, as we have heard. It would be entirely inappropriate to expand those immunities or privileges.

Thank you. I wish you all good health and extend my thanks to you for indulging me.

August 9, 2011