AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 6-7, 1989
RECOMMENDATION

BE IT RESOLVED, That the American Bar Association urges the Department of Health and Human Services to remedy its failure to comply with the mandate of the Freedom of Information Act by providing that:

1) The office of Hearings and Appeals ("OHA") Appeals Council within HHS should, on a continuing basis, prepare a list of Medicare and Medicaid decisions that come to the Appeals Council's attention.

2) OHA's Appeals Council should prepare lists of Medicare and Medicaid decisions that are handed down by the Appeals Council.
3) The OHA Chief Administrative Law Judge ("ALJ") in each of the ten HHS regions should prepare a docket or list of each Medicare/Medicaid case to which an ALJ is assigned. The dockets of each region should be kept up-to-date and show which cases result in formal written ALJ opinions and which are subsequently appealed to the Appeals Council. A compilation of all dockets should be prepared in the HHS Central Office.

4) The Health Care Financing Administration ("HCFA") office in Baltimore and each HCFA regional office should prepare a docket list of each case in which an ALJ hearing was requested.

5) To avoid confusion as to whether OHA or HCFA is responsible, the Secretary of HHS should quickly determine which of these agencies will be required to store and catalogue lists and the decisions and pleadings filed in administrative hearings.

6) HHS should not invoke or rely on 5 USC § 552(a)(2) as a basis for refusing to disclose under § 552(a)(3) indexes or final opinions, whether precedential or not, as well as transcripts and pleadings filed in agency litigation, since that subsection does not support the withholding of any government information.

7) HHS should amend 42 CFR § 401.118, which requires deletion of the names of parties to cases in which the opinion, order or other statement is published, by adding at the end thereof "where disclosure would constitute a clearly unwarranted invasion of personal privacy".
REPORT

The Health Care Financing Administration ("HCFA"), an agency within The Department of Health and Human Services ("HHS"), has responsibility for assuring enforcement of federal Medicare and Medicaid regulations against certain health care providers including hospitals and nursing homes. HHS inspectors or state inspectors acting in place of HHS inspectors make on-site surveys of health providers. If violations of federal law are substantiated, HCFA has authority to cease making Medicare and Medicaid payments, i.e., to decertify providers.

Within HHS, proceedings by which providers contest decertification decisions by HCFA are heard by HHS Administrative Law Judges ("ALJs"). Appeals of ALJs' decisions are to the HHS Appeals Council. Both the ALJs and the Appeals Council are within the Office of Hearings and Appeals ("OHA"), which is within the Social Security Administration ("SSA"), which is within HHS. HCFA has traditionally not had ALJs and has "borrowed" them from SSA. Both the ALJs and the Appeals Council issue written decisions on various classes of cases -- only one of which is Medicare and Medicaid provider decertification cases.

ALJs from OHA generally hear the following types of cases:

1. Medicare and Medicaid Health Insurance, Reimbursement and Peer Review.
2. Medicare and Medicaid Provider Compliance.
3. Disability Insurance.
4. Retirement and Insured Status.

OHA Headquarters has estimated that every year there are approximately 1,300 Medicare and Medicaid cases, of which 1,250 are Health Insurance, Reimbursement and Peer Review cases and 50 to 100 are Provider Compliance cases. In contrast, every year OHA ALJs handle several hundred thousand Disability, Retirement, and Insured Status cases. These are not typically "adversary cases" in that a government attorney is not present and often the claimant is not represented by a lawyer. On the other hand, Provider Compliance cases are adversarial. Both HHS and the provider are represented by attorneys before the ALJ. These cases are typically quite complex and are important in monetary terms. In 1985, 61,000 cases of all kinds were appealed to OHA's Appeals Council.

Being able to review lists of the ALJ and Appeals Council decisions and to read these decisions is important to litigants, including health care providers, and to their attorneys. Under current HHS procedures, access to the lists and to the decisions themselves is limited.
The Freedom of Information Act, Section 5 USC 552(a)(2),
reads in part as follows:

Each agency, in accordance with published rules, shall
make available for public inspection and copying -

(A) final opinions, including concurring and
dissenting opinions, as well as orders, made in the
adjudication of cases;

(B) those statements of policy and interpretations
which have been adopted by the agency and are not
published in the Federal Register; and

(C) administrative staff manuals and instructions
to staff that affect a member of the public;

unless the materials are promptly published and copies
offered for sale...Each agency shall also maintain and
make available for public inspection and copying current
indexes providing identifying information for the
public...(Emphasis added.)

After the Freedom of Information Act became law, HHS
promulgated regulations which list documents HHS must make
available for public inspection and copying. The pertinent
regulation - 45 CFR 5.13(b), reads in part:

The Department shall, in accordance with this part and
applicable regulations, make available for public
inspection and copying:

(1) All final opinions (including concurring and
dissenting opinions) and all orders made in the
adjudication of cases (initial decisions and reconsidera-
tions thereof in matters that are not the result of
administrative proceedings such as hearings or formal
appeals -- for example, initial decisions and recon-
siderations on claims for benefits -- are not "opinions
and orders in the adjudication of cases")

Notwithstanding the above language, HHS was not making
available indexes or decisions it referred to as "non-
precedential." The OIA's reasoning for not wanting to publish
indexes and decisions is summarized in a U.S. Government
Accounting Office ("GAO") Report to a U.S. House of Representa-
tives subcommittee, as follows:

The Office informed us that literal compliance with the
subsection could result in considerable administrative
burden and cost. The office told us that over 250,000
decisions are issued annually and that few of these are published as precedential decisions. The Office estimated that the cost to collect and file all non-precedential decisions, delete personally identifying information, and index the issues covered by each decision could exceed $10,000,000 annually.


OHA and its parent, HHS, have also argued that Medicare and Medicaid providers have no need to read ALJ decisions or Appeals Council decisions because these cases are not precedential, i.e., they affect only the specific parties in the case and are not precedents for use in other hearings. At the same time, however, HCFA attorneys occasionally cite these decisions in their briefs in provider cases in front of ALJs. In any event, we note that the Internal Revenue Service ("IRS") systematically makes available to the public both general Revenue Rulings and specific Private Letter Rulings. The latter are non-precedential and only apply to the party to whom written. Nevertheless, the IRS (unlike HHS) makes these types of non-precedential decisions available to the public.

Moreover, the GAO Report disputes the HHS interpretation of its disclosure obligations under Section 552(a) of the Freedom of Information Act as being limited to precedential decisions:

In our view, subsection (a)(2) provides that all final opinions in the adjudication of cases be made available for inspection and copying and indexed whether or not an agency considers them to be precedential. Our view is also consistent with a federal court decision, National Prison Project of the American Civil Liberties Union Foundation, Inc. v. Sigler, 390 F. Supp. 789 (1975). The District Court in the Sigler case held that the working of the provision requiring agencies to make their final opinions and orders available to the public is "too straightforward and unambiguous to be diluted by defendants' proposed construction" that only precedential opinions and orders are subject to the provisions' reach. The Court rejected the defendant's argument that the last sentence of (a)(2) which states that "a final order, opinion ... may be ... cited as precedent ... only if it has been indexed and either made available for published as provided by this paragraph" limits the scope of (a)(2)(A) to only those opinions or orders which have precedential value. In the Court's view, the fact that an agency may not use an order or opinion as precedent does not compel the conclusion that only orders and opinions having
the precedential potential are subject to the requirements of subsection (A)(2)(A).

(GAO Report, at page 17.)

Beginning in October of 1987, HHS began to index decisions and to make the texts of decisions available for one class of HCFA proceedings -- Medicare and Medicaid provider decertification cases. The practice was prospective only, and it did not apply to other classes of contested HHS cases. We therefore recommend that HHS revise its regulations and make available all final opinions, whether precedential or not.

In addition, HHS should compile an index of ALJ decisions and Appeals Council decisions in Medicare and Medicaid cases both before and after October 1, 1987.

The OGC attorneys assigned by HHS to prosecute these cases are presumably aware of the decisions which affect HHS, but because of the wide variety and number of different private attorneys throughout the country who defend these cases, no private lawyer or trade association knows of all of the HHS decisions.

Finally, HHS should amend 42 CFR 401.118, which states:

When HCFA publishes or otherwise makes available an opinion or order, statement of policy, or other record which relates to a private party or parties, the name or names or other identifying details will be deleted.

The effect of this regulation is to frustrate compilation of an index because parties names are deleted and there is no way remaining to identify the case. We recognize that there are exceptions for invasions of personal privacy but only in those instances should the names be deleted.

Respectfully submitted,

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GENERAL INFORMATION FORM

No. ________________

Submitting Entity: Illinois State Bar Association and Section of Administrative Law and Regulatory Practice

Submitted by: Jerome Mirza and Sally Katzen

1. Summary of Recommendation.

The recommendation requests that the U.S. Department of Health and Human Services ("HHS") implement the Freedom of Information Act by providing public access to texts of certain administrative appeals decisions and to lists of these cases.

2. Approval by Submitting Entity.

The ISBA Board of Governors approved the Report with Recommendations at a regularly scheduled meeting. On October 15, 1988, the Council of the Section of Administrative Law and Regulatory Practice, at a regularly scheduled meeting approved the document with revisions. The revised Report with Recommendations was subsequently passed at a regularly scheduled meeting of the ISBA Board of Governors on November 18, 1988.

3. Previous submission to the House or relevant Association position.

None.

4. Need for Action at This Meeting.

This has been a continuing problem, and it is believed the ABA position will facilitate resolution of the issue.
5. **Status of Legislation.**
   Not applicable.

6. **Cost to the Association.**
   None.

7. **Disclosure of Interest.**
   Not applicable.

8. **Referrals.**
   A copy of the Report with Recommendations was sent to all Section and Division Chairs in December, 1988.

9. **Contact Person.**
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