Editorial:

Sham Peer Review and the Courts

Lawrence R. Huntoon, M.D., Ph.D.

Hospital peer review has been likened to a "kangaroo court."[1]

The terms Star Chamber, professional assassination, private execution, racketeering, and lynching have also been used to describe the corruption and abuse of hospital peer review that has come to be called sham peer review.

Sham peer review is rampant. It threatens not only quality care for all of our patients, but the very integrity of the medical profession. In the hospital, the process is cloaked in secrecy, so as to protect the accusers, and it is manipulated and controlled entirely by the hospital administration and its unethical physician collaborators.

The final adjudicating committee, the medical executive committee that decides the physician's fate and sends recommendations to the board of directors, often has a strategic majority that is bought and paid for by the hospital administration—with exclusive contracts, paid directorships, and other financial arrangements.

Court Review Limited

Seeking redress in the courts, physician victims often encounter the reality of a deliberate blindness that does not serve justice. Judicial review is superficial at best and, at a time when the physician victim desperately needs impartiality and fundamental fairness, the judicial review often shows deference to the kangaroos.

Courts typically focus entirely on the technical peer review procedure itself: Was proper notice given, was a hearing held, and were the medical staff bylaws followed? Many courts presume that if a hospital hearing was held, it was fair. This presumption of fairness and due process is bolstered by the fact that the Health Care Quality Improvement Act (HCQIA) itself contains a powerful provision that presumes that if the hospital complied with procedural due process as outlined in the law, then the outcome was just.

Courts have generally been unwilling to judge a sham peer review case on its merits. Courts often express their lack of qualifications as a reason to avoid "second-guessing" the hospital, or substituting its own judgment for the judgment of hospital professionals—those whom courts see as having superior qualifications in these specialized matters.

Many courts will defer to the hospital in the interest of public policy, reasoning that the public interest is best served by deferring to those who are most qualified to make such decisions. "Most qualified," however, does not equate to moral integrity. Justice is not served when fundamental fairness and moral integrity are absent.

Some courts claim that, absent blatant fraud or bad faith, they have no jurisdiction to review a private hospital's management. Fraud and bad faith are notoriously difficult to prove because secrecy surrounds the process, the hospital controls the records, and certain records are protected from the discovery process. With emphasis on "blind" (see no evil) justice, this is called the "rule of non-review." This has also been called the "business judgment rule," acknowledging that the governing board of a private entity, like a hospital, has the right to determine and direct its own internal business and medical affairs.

Hospital Incentives

Being somewhat naïve as to the politics and corruption pervasive in hospital peer review matters today, some courts may question why a hospital would ever retaliate against a physician who brings a quality of care or patient safety issue to the hospital administration's attention. Courts are likely to view hospitals as virtuous entities that are solely interested in quality care and protecting patients, and, therefore, would want to discover and address errors, problems, and safety issues in the hospital so that they could be prevented or corrected.

The reality is that there are incentives for the hospital to do the opposite. By keeping errors quiet, and silencing the messenger by retaliation against a physician whistleblower, a hospital might avoid a costly malpractice suit. At the very least, creating an environment in which physicians are afraid to come forward and report errors in the hospital would also strongly discourage any staff physician from siding with a patient in a malpractice action against the hospital.

In addition, because of the diagnosis-related-group (DRG) system of hospital compensation (under which hospitals receive a fixed amount per each medical diagnosis), mistakes that result in patient complications are often profitable to the hospital. The more comorbid diagnoses a hospital can include on the patient's claim form, the higher the third-party payment to the hospital. Complications often require further procedures, and these also mean increased payment to the hospital—even if the complications are iatrogenic.

The Broad Repercussions of Sham Peer Review

Sham peer review isn't just a "private matter" between hospital and physician. In the pre-HCQIA days, a physician who was the victim of a sham peer review attack could go to another hospital and continue the practice of medicine. With the implementation of HCQIA's National Practitioner Databank (NPDB), however, a successful sham peer review attack by a hospital often results in a professional death sentence for the targeted physician. The resultant adverse entry in the NPDB essentially prevents the physician from obtaining staff privileges at any other hospital in the nation, and it often places his license to practice medicine in jeopardy as well.

More importantly, sham peer review isn't strictly a private internal hospital matter because it involves a physician's property

rights. Courts have held that a physician's license[2,3] and hospital privileges[4,5] represent a property interest. A physician does not lose his ownership of private property by virtue of his location inside or association with a hospital. The protection of private property is such an important principle to our republic that it is included in two separate Amendments to the U.S. Constitution: the Fifth and the Fourteenth. Both Amendments provide that private property shall not be taken from anyone without due process of law.

Hospitals operate under state licenses, and the states should comply with federal statutes like HCQIA and with federal due process requirements under the U.S. Constitution. Although some states, notably California and Maryland, chose to "opt out" of HCQIA (as per provisions of the initial HCQIA law), Congress eliminated this "opt out" provision in 1989. All states and their hospitals should now comply with federal HCQIA law and with due process protections in the Constitution.

Mileikowsky v. Tenet

In December 2005, the AAPS filed an extraordinary amicus curiae brief with the U.S. Supreme Court in the longest running sham peer review action in the country: *Gil N. Mileikowsky v. Tenet Healthsystem et al.* The amicus brief, authored by law professor Alan Dershowitz, and the Petition for Writ of Certiorari, authored by Andrew Schlafly, are posted on the AAPS website (http://www.aapsonline.org/Mileikowsky). Both documents are well worth reading.

Although more than 50,000 attorneys signed on to the amicus brief (the Association of Trial Lawyers in America and the Consumer Attorneys of California), neither the AMA nor any state or specialty medical organization expressed to the high court its support of due process for physicians. Other amici included the Union of American Physicians and Dentists, the Semmelweis Society International, and the Government Accountability Project.

The wide coalition that supported this landmark amicus brief speaks volumes about the egregious injustice that was done in this case and to the extreme importance this issue has for the American public. Prof. Dershowitz expressed this best in the brief:

> The American public, as medical patients, will be the biggest loser if physicians are compelled to choose between their own livelihoods and speaking out on behalf of wronged patients. Whenever fewer physicians are willing to criticize the medical community out of fear of the dire consequences of a fundamentally unfair, bad faith peer review, an essential prong in the checks and balances integral to a successful health care program will be silenced.

Unfortunately, the Supreme Court denied the petition for Writ of Certiorari, so the lower court's decision stands in this case. However, given the widespread prevalence and increasing frequency of sham peer review, we anticipate that more cases will come before the Supreme Court. The injustice done to good physicians and the adverse effect sham peer review has on our patients are simply too great for the highest court to ignore forever. Sadly, in the meantime, our patients will suffer.

AAPS Objectives

By filing amicus briefs, AAPS strives to help physicians victimized by injustice; to prevent bad precedents that hurt patients and the medical profession; and to help judges understand issues of high importance to physicians and our patients.

We often enjoy little company in these pursuits, and sometimes fail, yet we remain unwavering in our support of the patient-doctor relationship, ethical medicine, and fair treatment of our colleagues.

Lawrence R. Huntoon, M.D., Ph.D., is a practicing neurologist and editor-in-chief of the *Journal of American Physicians and Surgeons*. Contact: editor@jpands.org

REFERENCES

1. Townend D. Hospital peer review is a kangaroo court. *Medical Economics* 2000;3:133.
2. *Gray v. Superior Court*, 125 Cal. App.4th 629, 636, 23 Cal.Rptr.3d 50, 54 (1st Dist. 2005).
3. *Smith v. Board of Medical Quality Assurance*, 202 Cal.App.3d, 248 Cal.Rptr.704 (1st Dept. 1989).
4. *Anton v. San Antonio Community Hosp*., 19 Cal.3d 802, 823, 140 Cal.Rptr. 442 (1977).
5. *Sahlolbei v. Providence Healthcare, Inc.*, 112 Cal.App.4th 1137, 1155, 5 Cal.Rptr.3d 598 (4th Dist. 2003).

THE PRACTICE OF MEDICINE IS UNDER ATTACK...

AAPS is fighting back!

Help us spread the word.
After you've used your issue of JP&S...

Pass it along to a colleague...
Clip an article and give to your patients...
Feature it in your reception area...

Sponsor a subscription for your library or medical society...only $75!

THE AAPS MISSION

Since 1943, AAPS has been the only national association of physicians in all specialties dedicated to preserving and protecting the sanctity of the patient-physician relationship and promoting the practice of private medicine.

We're working to keep third parties – whether the government, insurance companies, or healthcare plans – out of the examining room and medical records.

WHY WE'RE EFFECTIVE

- We're dues-supported.
- We accept no special interest money.
- We advise influential legislators. (Members in Congress!)
- The media listens to us.
- We mobilize public action.
- We defend individual doctors.

AAPS GETS RESULTS

- ✓ Fights increased government control of the practice of medicine
- ✓ Opposes increased government prosecution of physicians
- ✓ Supports unrestricted private contracting with Medicare patients
- ✓ Opposes national provider ID & central patient database
- ✓ Sued the government to stop enforcement of HIPAA regulations
- ✓ Helps doctors win legal battles in court, admin hearings & peer review.

See our website for other ways to get the word out to the public and decision makers.

Or email, phone or fax with your ideas or to sponsor a JP&S subscription:

EMAIL: aaps@aapsonline.org
www.aapsonline.org
800-635-1196 520-325-4230 Fax

Association of American Physicians & Surgeons
The Voice for Private Physicians Since 1943