

Editorial:

Sham Peer Review: The Poliner Verdict

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

Background

The Poliner case¹ is one of the most egregious cases of sham peer review in recent history. The case involved the unwarranted summary abeyance/suspension of Dr. Lawrence Poliner's cardiac cath lab privileges in 1998. Dr. Poliner sued Presbyterian Hospital of Dallas and three physicians, Dr. James Knochel, Dr. Charles Levin, and Dr. John F. Harper. In his lawsuit Dr. Poliner claimed that the defendants "improperly and maliciously used the peer-review process to summarily suspend [his] privileges, thereby causing damage to his interventional cardiology practice."²

The Jury's Verdict

A jury trial commenced on Aug 12, 2004. On Aug. 27, 2004, an eight-member jury rendered a unanimous verdict against all defendants. The jury awarded damages in the amount of \$366,211,159.30. Dr. Poliner subsequently settled with Drs. Levin and Harper, who were then dismissed from the lawsuit. On Mar 27, 2006, the court upheld the jury's evidentiary findings.

The jury demonstrated an astute ability to see beyond the smokescreen of the defendants' meritless arguments to the underlying ugliness of sham peer review.

The jury first found that Defendants' actions were not immune from civil liability under the federal or state peer review statutes. The jury also found in favor of Plaintiffs on all of their claims, including breach of contract, defamation, business disparagement, tortious interference with a contract, and intentional infliction of emotional distress. The jury further found that Defendants had acted maliciously and without justification or privilege.²

The defendants were found to have violated medical staff bylaws. The jury further found that the defendants failed to comply with reasonableness standards of the Health Care Quality Improvement Act (HCQIA) (42 U.S.C. § 11112(a)). And, in an egregious violation of due process and fundamental fairness, "There was also evidence that Dr. Knochel told Dr. Poliner that he was not permitted to consult an attorney." Moreover, "defendants would not discuss the patient cases with Dr. Poliner prior to his summary suspension and did not provide Dr. Poliner with any opportunity to be heard or any hearing of any kind prior to his summary suspension."² These blatant violations of fundamental fairness were further compounded by the fact that Dr. Knochel testified that "...he did not have enough information to assess whether Dr. Poliner posed a present danger to his patients at the time...he threatened Dr. Poliner with suspension of his privileges."² Evidence of imminent danger to patients is what is required to implement a legitimate summary suspension.

Defendants' Callous Attitude Toward Dr. Poliner

In discussing the size of the jury award, the court noted the following: "The jury's attitude and award was influenced by Defendants' unwillingness to acknowledge their own wrongdoing and their callous attitude toward Dr. Poliner at the time of the abeyance/suspension and at trial."²

A ruthless and callous attitude toward the targeted victim, and total lack of any remorse for ruining the career, or attempting to ruin the career, of a good physician, typifies the sham peer review process.

After defaming Dr. Poliner and damaging his career and reputation with sham peer review, the defendants argued that there was no quantifiable evidence that such actions caused Dr. Poliner any mental anguish or damaged his career in any way. The court noted the following: "Defendants also make the disingenuous argument there was no evidence of the 'nature, duration, or severity of the plaintiff's mental anguish'...[or] quantifiable evidence of injury to reputation/career." The jury and the court disagreed.

Sham Peer Review Tactics Discredited

A number of common sham peer review tactics were exposed and discredited as a result of the Poliner trial. The jury found that when a physician is asked to agree to an abeyance and suspend his practice at the hospital, under threat of immediate summary suspension if he does not sign a letter of abeyance, that constitutes duress and the agreement is not enforceable. A primary effect of this sham peer review tactic is that it deprives the targeted physician of any due process or appeal rights.

The boilerplate releases of liability in hospital application forms promoted by the hospital bar were also found to be invalid when the hospital and its physician collaborators act in bad faith with malice. And, the sham peer review tactic of utilizing cases from months prior to justify an alleged immediate danger to patients was found to be unjustified and lacking any merit.

New Sham Peer Review Tactics on the Horizon

Following the Poliner judgment, the hospital bar wasted no time in proposing ways to ensure a better outcome for hospitals and physicians who engage in sham peer review.

We anticipate seeing an increased emphasis on hospital-proposed changes to medical staff bylaws, which will more strongly favor hospitals while placing physicians at a greater disadvantage with respect to due process in the hospital.

We also anticipate that there will be an increased emphasis on the hospital meeting the reasonableness standards of HCQIA, at least on paper. The hospital bar has always placed a high priority on building a better "paper trail," in which the "appearance" of

reasonableness is paramount. And, as a result of the Poliner verdict, it is likely that we will see an expansion of abuse of process in the hospital in the form of a new theory for summary suspension called a “precautionary suspension.” The “precautionary suspension” will supplant the failed “voluntary” agreement not to practice in the hospital under threat of immediate summary suspension—a tactic that was fully discredited during the Poliner trial. No evidence will be required to implement a “precautionary suspension.” The only requirement for implementing a “precautionary suspension” will be the unsupported claim that the physician “might” pose a danger to patients. Physicians should be vigilant so that this extremely dangerous new sham peer review tactic does not find its way into medical staff bylaws.

AAPS Takes Action

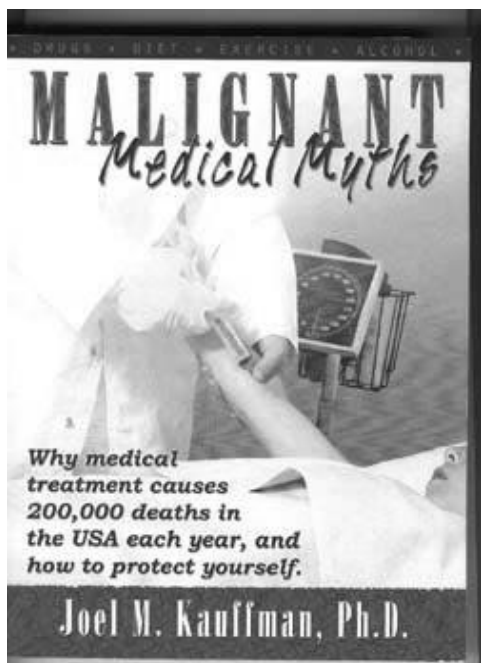
On March 7, 2006, AAPS filed a formal complaint with the Texas State Board of Medical Examiners (TSBME) against the three Texas physicians who were defendants in this case.³ As per the resolution AAPS passed in 2004, our view is that “those who conduct or participate in sham peer review are engaging in unethical and/or professional misconduct.”⁴ In our complaint to the TSBME, we stated unequivocally that “professional misconduct should not and must not be tolerated by the medical profession ... [and] it is offensive to ethical physicians everywhere to allow physicians, who

have so egregiously breached basic medical ethics of professional conduct, to practice medicine in any state.”³ In three letters, dated April 17, 2006, the Texas Board informed us that “[a]n investigation was not filed” because the actions complained of did not “fall below the acceptable standard of care” and did “not rise to the level of a violation of the Medical Practice Act.” We were further informed that the “Texas Medical Board does not have jurisdiction over civil matters.” Therefore, at least in Texas, sham peer review appears to be officially within the accepted standard of care.

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REFERENCES

- ¹ *Lawrence Poliner, M.D. v. Texas Health Systems, a Texas Non-Profit Corporation d/b/a/ Presbyterian Hospital of Dallas, James Knochel, M.D., Charles Levin, M.D., and John Harper, M.D.*, United States District Court for the Northern District of Texas, Dallas Division 3-00-CV-1007-P.
- ² *Lawrence Poliner, M.D. v. Texas Health Systems et al.* 2006 WL 770425 (N.D.Tex.).
- ³ AAPS. Letter to Texas State Board of Medical Examiners, Mar 7, 2006. Available at: www.aapsonline.org/judicial/tsbme.pdf. Accessed Apr 20, 2006.
- ⁴ AAPS. Resolution 61-01: Sham peer review. Available at: www.aapsonline.org/resolutions/2004-1.htm. Accessed Apr 20 2006.



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TOPICS

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“...The message of the book is extremely important, and the explanations of complex data, articles, and statistical analysis support your conclusions very convincingly... Your analysis of these 11 medical myths is masterful... You have contributed a great service to the health professions and to the regulatory apparatus regarding delivery of health care and prevention...”

--Kilmer S. McCully, AB, MD

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