

Risk Factors for Sham Peer Review

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Over the years, through numerous contacts with physician victims on our AAPS Sham Peer Review Hotline, it has become possible to identify certain factors that can place a physician at risk for sham peer review.

In evaluating risk factors, it is important to recognize that peer review in hospitals does not happen in a vacuum. It often occurs in an environment of politics, power struggles, personality conflicts, turf battles (anti-competitive motives), disputes, professional jealousy, discrimination, personal animus, and conflicts of interest.

As noted by a wise and ancient king, "There is nothing new under the sun" (Ecclesiastes 1:9). Evil has been around for a very long time, and men have always done evil things to harm other men. The underlying motives of evildoers have been remarkably consistent over centuries. Those whom evildoers perceive as weak and vulnerable become their targets.

Solo Physicians, Physicians in Small Groups, New Physicians

Solo physicians, physicians in small groups, and new physicians are at risk for sham peer review, the common feature being that they lack political power and connections in the hospital to protect them from attack. There is some security in the "herd."

In the animal world, predators isolate and cut an animal out of the herd, then gang up on it to achieve the kill. Those who perpetrate a sham peer review often use the same strategy.

A large group of physicians in a hospital may have the clout to stop the hospital from attacking one of its members if it chooses to do so. The phrase, if it chooses to do so, reflects the harsh reality that sometimes the herd will throw one of its members to the wolves if it judges there is some benefit to the herd in doing so.

Economic Competitors

Hospitals generally do not like competition. In particular, hospitals do not like physicians who compete against them in some service or tests the hospital provides. For instance, a physician who decides to open his own independent MRI center or ambulatory surgery center is a prime candidate for sham peer review. If the attack is successful, the hospital ends the physician's career, and permanently eliminates the competition. It also dissuades other physicians from competing with the hospital.

Physician Whistleblowers

Physicians who advocate strongly and vociferously for safe care and quality care in the hospital are often subject to retaliation via sham peer review. Hospital administrators do not always like to hear about patient safety problems or problems with poor care, and will seek to "kill the messenger" rather than address and fix the underlying problem.

Once a physician whistleblower has been attacked and silenced, other physicians working in the hospital get the message that if they advocate too strongly on behalf of patients,

their careers too may be ended. If there are patient safety or quality issues in the hospital that need to be addressed and corrected, it is far better for a group of physicians rather than an individual to bring the issue to the attention of hospital officials. Again, there is some safety in numbers.

Economic Outliers

If a physician treats patients who are sicker than "average" patients, the hospital may suffer financial loss in those cases, and may seek to mitigate its losses by eliminating from the medical staff, by sham peer review, the physician who attracts and treats the sickest of the sick.

The vast majority of hospitals are paid based on Diagnosis-Related Groups (DRGs). Medicare and other third-party payers pay the hospital according to the patient's diagnosis, based on the average number of days in the hospital needed to treat patients with that condition. Patients who are sicker and who remain in the hospital beyond the typical number of DRG days result in financial loss for a hospital.

Failure to Meet Revenue Goals of a Hospital-Physician Contract

Hospitals that seek to add a new "service line" or specialty-care physician will often make a lucrative offer to the physician in a Professional Service Agreement (contract) with the expectation that the physician will generate a certain amount of revenue for the hospital. When the newly recruited physician fails to meet the anticipated revenue goal, a hospital may use sham peer review to avoid any monetary liability associated with early termination of the physician's contract. Physician Service Agreements typically contain a provision requiring the physician to maintain medical staff privileges. If the physician loses medical staff privileges through sham peer review, the contract is automatically terminated. Hospitals enjoy very strong immunity under the Health Care Quality Improvement Act (HCQIA), and it costs the hospital little or nothing to instigate and prosecute a sham peer review against a targeted physician.

High-Risk Specialties

Physicians in certain specialties tend to get attacked more frequently than physicians in other specialties. Specialties in which physicians tend to get attacked more frequently tend to be, but are not always, highly remunerative. Some physicians, looking for a larger market share and more money, often use sham peer review to eliminate the competition. Although not an exhaustive or all-inclusive list, high-risk specialties include neurosurgery, orthopedic surgery, orthopedic spine surgery, cardiothoracic surgery, general surgery and other surgical specialties, emergency physicians, trauma surgeons, cardiology (especially interventional cardiology), anesthesia, and psychiatry.

Foreign Physicians

Physicians whose ethnic origins are outside the United States may be vulnerable to attack and may be viewed as being less likely to fight back against a sham peer review. Irrespective of ethnicity, physicians in general tend to want to blend in, avoid confrontation, and go along to get along. Unfortunately, the “predators” out there, who use sham peer review as a weapon, tend to perceive those characteristics as weakness. As in the animal kingdom, weakness often invites attack.

Innovators/Entrepreneurs

Physicians who are highly innovative and who develop new surgical procedures that have lower morbidity and mortality rates, or who develop new effective treatments, may incur the wrath of jealous competitors in the community. Physicians who do not possess the skill or training to offer the new surgeries or treatments may look to eliminate the competitive advantage of the innovator by ending his career with a sham peer review. Patients, unfortunately, suffer decreased access to the most innovative and effective care available when this type of attack is successful.

Highly Competent

For the same reason that jealous competitors hate innovators, they also tend to hate physicians who are highly competent and well-liked by their patients. Lacking the same level of skill and competency or bedside manner of their highly competent colleague, jealous competitors often seek to use their power in the hospital to teach the highly competent physician a lesson, bring him down a peg or two, or eliminate him from the medical staff.

Independent Physicians

In recent years physicians have increasingly sought hospital employment as a means to escape some of the oppressive and costly bureaucracy foisted on them by government and other entities. This has allowed hospitals to gain more control over physicians and how they practice, often with a goal of cost containment and generating more revenue by forcing physicians to treat more patients per day.

Ideally, hospitals would like to have all physicians on staff employed by the hospital so as to achieve total control. In furtherance of the hospital's agenda, independent physicians who have no contract with the hospital are prime targets for elimination from staff. Hospitals have methods to eliminate independent physicians, including sham peer review. Making unreasonable and impossible-to-comply-with coverage demands of the independent physician is another common method. Such hospitals frequently prohibit hospital-employed physicians from providing cross-coverage for independent physicians on staff.

Third-Party-Free Physicians

Physicians who have opted out of Medicare and are third-party-free often experience a hate-envy response from colleagues, who may envy the third-party-free physicians' escape from the oppressive bureaucratic morass and restrictive price controls and hate the fact that the third-party-free physicians

are not forced to suffer as they suffer. Some physicians who fully participate in the third-party-payment scheme believe that all physicians should suffer bureaucracy and fee restrictions equally. They see it as unfair that some are able to escape this oppression, and they may seek to inflict suffering on the third-party-free physician by conducting a sham peer review against him. In the hospital setting, it seems there is always someone seeking to teach someone else a lesson for being different or for doing things differently, even if that person has better outcomes and/or more satisfied patients.

Older Physicians

Like foreign physicians, older physicians may be viewed as more vulnerable and less likely to fight back against a sham peer review. With some honorable exceptions, younger physicians tend to be more accepting of hospital employment and the authority wielded by hospital officials. Older physicians, on the other hand, may be more likely to question whether certain hospital initiatives would best serve the needs of patients. As physicians approach retirement age, they may not be willing to spend their life's savings and retirement funds to defend against a hospital's sham peer review attack. This, of course, increases their vulnerability to attack.

Personal Animus

If someone feels slighted, disrespected, or mistreated by a physician, that person will frequently look for some means to “get back” at the physician. This personal animus, which may be based on inaccurate perception or falsehoods, might involve hospital employees, patients, or family of a patient. Accusations made by those harboring personal animus against the physician are often vicious and shocking. The accusations are frequently designed to destroy the physician. Charges of professional incompetence, professional misconduct, boundary violations, sexual harassment, and disruptive behavior can lead to sham peer review proceedings and the end of a physician's career. Even if the physician is ultimately exonerated of any wrongdoing, the accusations still carry a stigma that may persist and severely damage the physician's good reputation in the eyes of the public and other colleagues.

Conclusion

Although the foregoing is not an exhaustive, all-inclusive list of risk factors for sham peer review, it is hoped that by making physicians aware of these risk factors, they can take appropriate action to protect themselves, insofar as is possible, from a future sham peer review attack.¹ Anything that makes a physician different from the rest of the hospital “herd” can make the physician a target for sham peer review.

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REFERENCE

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