

Editorial:

Sham Peer Review: The Fifth Circuit Poliner Decision

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In a sham peer review hearing, the truth and the facts do not matter because the outcome is predetermined and the process is rigged. In a court of law, where hospitals and peer reviewers are granted absolute immunity, the truth and the facts do not matter, because the outcome is predetermined and the process is rigged.

On July 23, 2008, the U.S. Court of Appeals for the Fifth Circuit reversed the judgment of the district court in the Poliner case,¹ and essentially granted absolute immunity to the defendants. In so doing, the court destroyed the intent of the Health Care Quality Improvement Act (HCQIA), which was to provide qualified and limited immunity to peer reviewers, and it opened the doors wide to further abuse of peer review. Absolute immunity, like absolute power, corrupts absolutely and invites abuse.

Malice and Bad Faith Motives Are Irrelevant

On Aug 27, 2004, after hearing all of the evidence presented, a jury rendered a unanimous verdict in favor of Dr. Lawrence R. Poliner, finding that "...Defendants had acted maliciously and without justification or privilege."² Defendants were found to have violated medical staff bylaws, and the jury found that defendants failed to comply with the reasonableness standards of HCQIA.³ In commenting on the size of the jury award (\$366 million), the court stated: "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."⁴

Although the jury made a factual determination that defendants had not complied with the reasonableness standards of HCQIA, the Fifth Circuit found that bad-faith motives of peer reviewers are irrelevant. The court stated:

Poliner's urging of purported bad motives or evil intent or that some hospital officials did not like him provides no succor...the inquiry is, as we have explained, an objective one. Our sister circuits have roundly rejected the argument that such subjective motivations overcome HCQIA immunity, as do we...^{1, pp 18-19} It bears emphasizing that "the good or bad faith of the reviewers is irrelevant [internal citation omitted]..."^{1, pp 16-17}

Courts that narrowly apply this "objective test" to the reasonableness standards of HCQIA fail to consider that biased peer reviewers are likely to present biased or false information and act in a biased manner in conducting a peer review against the targeted physician. Instead, courts that apply the "objective test" simply accept a hospital/peer reviewers' version of the case as truth and as objective fact—i.e. the judicial doctrine of non-review. The combination of the "objective test" and the judicial doctrine of non-review creates a steel-reinforced shield of immunity for hospitals and peer reviewers, which victims of sham peer review can never overcome.

Truth Does Not Matter

The truth cannot be revealed and justice cannot be served when courts employ the judicial doctrine of non-review and refuse to consider the evidence. In its decision, the Fifth Circuit Court stated:

To allow an attack years later upon the ultimate "truth" of judgments made by peer reviewers supported by objective evidence would drain all meaning from the statute.... [A]s our sister circuit explains, "the intent of [the HCQIA] was not to disturb, but to reinforce, the preexisting reluctance of courts to substitute their judgment on the merits for that of health care professionals and of the governing bodies of hospitals in an area within their expertise [internal citation omitted]."^{1, p 27}

If this same standard were applied in the criminal justice system, courts would automatically defer to prosecutors because they have expertise in the area of criminal law, with no need for either judge or jury to consider the actual evidence. Motives matter, and the objectivity of evidence presented by prosecutors and peer reviewers should not be assumed, but should be subject to fair and impartial consideration of the actual evidence.

Improvement of Quality of Care Does Not Matter

Although the intent of HCQIA was to improve the quality of care by encouraging peer review, the Fifth Circuit Court stated:

"[T]he Act does not require that the professional review result in an actual improvement of the quality of health care," nor does it require that the conclusions reached by the reviewers were in fact correct [internal citation omitted].^{1, p 16}

Potential Harm to Patients Does Not Matter

Punishing a physician who is acting in the best interest of his patients by exercising his best clinical judgment, by subjecting him to a sham peer review and harming his reputation and career, is not in the public interest and does not further quality health care. Protecting a steel-reinforced shield of absolute immunity for peer reviewers, including bad-faith peer reviewers, at the expense of potential harm to patients, is contrary to the intent of HCQIA. In its decision, the Fifth Circuit Court stated:

Poliner defends the jury's verdict by arguing that the evidence demonstrates that had Poliner "actually administered the purported 'care' demanded by the critics, he would have affirmatively *endangered* his patients..."^{1, p 17} [T]his focuses on whether Defendants' beliefs proved to be *right*. But the statute does not ask that question; rather it asks if the beliefs of Poliner's peers were objectively reasonable under the facts they had at the time.^{1, p 18}

However, the jury that heard the evidence determined that defendants did not comply with the reasonableness standards of HCQIA—i.e. in effect, the jury determined that the beliefs of Dr.

Poliner's peers were not objectively reasonable given the facts they had at the time. In fact, one of the defendants, 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."⁴

Compliance with Medical Staff Bylaws Does Not Matter

Although medical staff bylaws provide the framework for due process in peer review proceedings, the Fifth Circuit Court found that peer reviewers need not comply with medical staff bylaws in order to obtain immunity under HCQIA. The Fifth Circuit Court stated:

Poliner's latter argument is unavailing because HCQIA immunity is not coextensive with compliance with an individual hospital's bylaws. Rather, the statute imposes a uniform set of national standards. Provided that a peer review action as defined by the statute complies with those standards, a failure to comply with hospital bylaws does not defeat a peer reviewer's right to HCQIA immunity from damages.^{1,p20}

Although HCQIA sets forth standards for the conduct of peer review hearings, failure to comply with those standards of fairness and due process does not itself result in loss of immunity for peer reviewers. Under HCQIA, "A professional review body's failure to meet the conditions described in this section shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section."⁵ Thus, the so-called uniform set of national standards to which the Court refers represent nothing more than a hollow aspirational standard with which no hospital need comply in order to obtain complete immunity.

It Is Acceptable to Harm Innocent Physicians So As to Ensure that None of the Guilty Ones Escape Punishment

The modus operandi in sham peer review is to apply punishment to the targeted physician irrespective of the truth and the facts. Innocence or guilt is irrelevant. In this regard, the Fifth Circuit had no sympathy for the innocent physician so harshly mistreated. The Fifth Circuit Court stated:

The immunity from money damages may work harsh outcomes in certain circumstances, but that results from Congress' decision that the system-wide benefit of robust peer review in rooting out incompetent physicians, protecting patients, and preventing malpractice outweighs those occasional harsh results....^{p.21}

But, how does allowing a competent physician to be punished and harmed by a sham peer review root out incompetent physicians, protect patients, or prevent malpractice? Imagine what would happen if the Fifth Circuit's view of harming the innocent so as to make sure that all of the guilty were punished was applied to cases involving the death penalty? Sham peer review is no less lethal to a physician's medical career.

Guilty Unless Proven Innocent

Physicians who are victims of sham peer review are essentially presumed "guilty" unless they can prove their "innocence" by a preponderance of the evidence. However, as many courts refuse to even look at the evidence, this is a legal burden that shammed physicians can never meet. The Fifth Circuit Court stated:

The Act includes a presumption that a professional review [action] meets the standards for immunity, "unless the presumption is rebutted by a preponderance of the evidence."^{1,p14}

Injunctive Relief

Although the Fifth Circuit had no sympathy for physicians harshly mistreated and harmed by a sham peer review, it offered an overly optimistic view of the ability of abused physicians to obtain injunctive relief, so as to console those physicians who, in the court's view, are victims of a truly unjustified, malicious, and abusive peer review. The Court opined:

The doors to the courts remain open to doctors who are subjected to unjustified or malicious peer review, and they may seek appropriate injunctive and declaratory relief in response to such treatment.^{1,p21}

Although HCQIA allows for injunctive relief, in practice injunctive relief is not easy to obtain. Many courts refuse to "interfere" with the peer-review process until the process has been completed. The case of Dr. Jimmie Crow is a prime example.⁶ And of course, once the peer-review process has run its course in the hospital, many courts refuse to "interfere," based on the judicial doctrine of non-review. The Court also made it clear that monetary compensation for victims of sham peer review should not be tolerated.

The doctor may not recover money damages, but can access the court for other relief preventive of an abusive peer review. It is no happenstance that this congressional push of peer review came in a period of widespread political efforts at the state level to achieve tort reform and protect medical doctors from the debilitating threat of money damages. It would have been quixotic at best if those efforts were accompanied by tolerance of money damages suits by doctors facing peer review—where tort reformers assured that discipline of doctors would be found.^{1,p21}

Conclusions

In summary, the Fifth Circuit decision indicates that malice and bad faith of peer reviewers is irrelevant, the truth does not matter, improvement of quality care does not matter, potential harm to patients does not matter, compliance with medical staff bylaws is not necessary to obtain immunity, a hospital/peer reviewers' version of the story should be accepted as objective truth and fact, and accused physicians are presumed guilty unless they can prove their innocence, which is a feat not possible under the judicial doctrine of non-review.

The Fifth Circuit has thus opened the doors wide to abusive bad-faith peer review, and the new sign over the doctors' entrance to hospitals reads, "Abandon All Hope Ye Who Enter Here."

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REFERENCES

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- ² *Lawrence R. Poliner, M.D. v. Texas Health Systems 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 (2004).
- ³ 42 U.S.C. §1112(a) 1-4
- ⁴ *Lawrence R. Poliner, M.D. v. Texas Health Systems et al.* 2006 WL 770425 (N.D. Tex.) 5. 42 U.S.C. §1112(b)(3)(D)(ii).
- ⁵ 42 U.S.C. §1112(b)(3)(D)(ii).
- ⁶ Sorrell AL. Colorado Supreme Court rules no lawsuits until peer review finished. *AM News*, Nov 19, 2007.