

Editorial:

Sham Peer Review: Disaster Preparedness and Defense

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Physicians who practice in hospitals today need to be aware of the environment in which they practice and the risks that exist as a result of a trend in which hospitals seek to exert increasing control over staff physicians. Physicians who oppose and/or speak out against this trend, or who fail to adhere to one-size-fits-all hospital-mandated treatment protocols, may be at risk for being targeted for sham peer review.

This editorial addresses what physicians can do to improve their practice environments so as to discourage use of sham peer review by a bad-actor hospital. With adequate preparation, the physician can become less of a target and be in position to combat and survive sham peer review. But a disclaimer is necessary: If unethical hospital administrators and/or unethical physician colleagues are committed to ruining or ending a physician's medical career by sham peer review, there may be nothing the targeted physician can do that will be totally effective in preventing it. Nonetheless, there are actions a physician can take to avoid inviting trouble, and to be prepared.

The SICKLE Approach to General Preparedness

General preparedness begins with the **SICKLE** approach:

- S** – Support
- I** – Information
- C** – Conduct
- K** – Knowledge
- L** – Lifestyle
- E** – Education

Support: Ethical physicians need to support good-faith peer review. Both AAPS and the author of this editorial fully support peer review that is conducted in good faith for the purpose of improving quality care and protecting patients. Proper peer review is essential to ensuring safe and high quality care for patients. Likewise, ethical physicians should strongly oppose peer review that is conducted in bad faith for some purpose other than the furtherance of quality health care.

Good faith peer review should be:

- Collegial
- Educational
- Fair
- Done for the purpose of improving quality care and protecting patients
- Conducted in a manner that incorporates substantive as well as procedural due process for the physician under review.

Ethical physicians should also provide mutual aid when one of their own is being attacked with sham peer review. Sham peer review has a lot in common with the psychology of bullying, and

sometimes it only takes a few bystanders speaking out against the bullies to stop the abuse.

Information: Physicians need to educate themselves about the tactics some hospitals use to conduct sham peer reviews, and the factors that may place physicians at risk. Our journal published the “hospital playbook” on tactics used by hospitals in conducting sham peer reviews,¹ and the corresponding talk has also been posted on the AAPS website.² These characteristic tactics have been validated by hundreds of physician peers by surveys conducted during talks on sham peer review.

Factors that may increase a physician's risk of being targeted for a sham peer review include, but are not limited to being in solo practice or a small group or being new on staff—the common factor being that these physicians lack political power and connections in the hospital.

Others at risk include economic competitors of the hospital, economic outliers (those physicians who treat patients who are sicker than the so-called “average patient”), and physician whistleblowers (physicians who are outspoken and strong in their advocacy of high-quality and safe patient care). Anything that makes a physician different from most other physicians in a hospital may also place a physician at risk for sham peer review. Foreign-born physicians, innovators/entrepreneurs, physicians who are extraordinarily competent and who provide highly successful treatments, and third-party-free physicians (who refuse to compromise patient care based on third-party payer requirements) are at higher risk.

Older physicians who are approaching retirement are also at risk, as bad-actor hospitals may view them as being less likely to fight back. Physicians in certain medical specialties also tend to be attacked with sham peer review more often than physicians in other specialties. These high-risk specialties include cardiology, especially interventional cardiology; surgery and surgical subspecialties, especially neurosurgery and obstetrics/gynecology; anesthesia; ER physicians; and psychiatrists.

Conduct: Physicians always need to be attentive to their conduct in a hospital and in any professional setting to avoid inviting trouble. Mutual respect and treating others according to the Golden Rule will go a long way toward improving the work environment for everyone, and thus reduce the risk of a physician being targeted for retaliation by someone who believes he has been mistreated. Physicians need to act professionally and be patient-centered in their approach to practicing medicine. Physicians need to stay current in their field, and when new treatments are being implemented, the physician needs to keep highly organized files of pertinent medical literature to support the new treatments being offered.

Most importantly, physicians should never let anger control their actions. Physicians need to think before acting, reacting, or speaking out in a hospital. Physicians need to be cognizant of the Sham Peer Review Miranda Warning—anything you say or do in a hospital can and will be used against you in the kangaroo court of sham peer review. Hospital employees and others, who may dislike the physician or who wish to eliminate the physician from the hospital, may be highly adept at knowing which “buttons” to push so as to elicit an angry outburst, often well-justified, from the targeted physician. The physician’s justified expression of anger can then be used to prosecute the physician for being disruptive, or used to justify subjecting the targeted physician to psychiatric evaluation, drug testing, counseling, and treatment for anger management.

The physician needs to be aware of and avoid common problem areas including boundary violations, prescribing violations, and billing/record-keeping violations.

Knowledge: Physicians need to read and study their medical staff bylaws, so they will know what rights they have in peer review hearings and appeal proceedings. Physicians need contact information for medical executive committee (MEC) members and members of the hospital board. If the physician is attacked with sham peer review, this information may be needed to obtain information about secret hospital meetings (ex-parte communications disfavoring the physician) and to allow a means of providing truthful and factual information to those who may have the ability to derail a sham peer review.

Physicians need to be aware of financial relationships MEC physicians and hospital board members may have with the hospital. Physicians also need to be vigilant for any proposed changes to the medical staff bylaws, policies, or procedures that affect credentialing and peer review.

Medical staffs should vote to de-authorize their MEC to act on behalf of the medical staff with respect to any proposed changes to the medical staff bylaws, rules, regulations, and policies that affect peer review and credentialing. This may help protect physicians’ due process in hospitals where the administration has gained majority control of an MEC through physician employment, exclusive contracts, paid directorships, and other arrangements which make MEC physicians financially dependent on the hospital administration. This de-authorization of the MEC is fully compliant with the new Joint Commission Standard—MS.01.01.01.

The medical staff also needs to retain its own independent counsel to advise the staff on any proposed changes to medical staff bylaws, rules, regulations, policies, or procedures so as to protect medical staff self-governance and quality care.

Lifestyle: General preparedness entails living beneath your means so as to save money and allow for the establishment of a multipurpose fund that can be used if a sham peer review attack occurs. It takes money to fight a hospital, and without sufficient funds, the physician has little, if any, chance of prevailing against a bad-actor hospital. It is always prudent for physicians to have a current and updated will, and to have adequate life insurance so as to protect the physician’s family. Sham peer review is one of

many reasons, as it can sometimes end in death of the accused due to stress or suicide.

Education: Physicians need to educate themselves and their colleagues about sham peer review. Physicians who participate in peer review in a hospital need to be aware of the tactic used by some hospitals, whereby a “choreographer” typically leads the peer reviewers to the desired outcome by strategic omissions of exculpatory information and biased presentation of information against the physician who is targeted for removal. Physicians who participate in peer review of another physician should perform due diligence and independently investigate allegations being made against the physician under review. A colleague’s medical career and livelihood are often at stake, and the physician under review deserves a complete, unbiased, impartial review that complies with substantive as well as procedural due process and fundamental fairness.

Specific Preparedness

Specific preparedness is also important. A physician should select an attorney who is knowledgeable and competent in the area of sham peer review before becoming entangled in one. Likewise, a physician should choose three experts in his specialty, maintain their contact information on file, and familiarize himself with the work of these experts. The physician should contact these selected experts to confirm that they are, in fact, working as experts in the physician’s specialty area.

A physician also needs to be aware of his political surroundings. Sham peer review is about politics and abuse of power. A physician needs to be aware of political and economic alliances that exist in the hospital, and ongoing turf battles.

A physician should volunteer to serve on strategic committees of his local medical society—committees that support high ethical standards of conduct. A physician should also maintain good community relations by volunteering to serve as a resource for local media and media-sponsored “ask the doctor” educational programs.

Maintaining a Professional Constructive Approach: Physicians should maintain a professional and constructive approach to problem solving with respect to quality care deficiencies and patient safety issues that may exist in their hospital. Physicians should always try to enlist the help of other ethical physicians in the hospital when addressing deficiencies and patient safety issues with the hospital administration.

Any concerns about substandard care or patient safety should be conveyed in writing to the hospital administration by certified mail with return receipt. The physician should keep careful records of evidence that substantiates substandard or unsafe care in the hospital. Physicians need to take reasonable progressive steps in an attempt to obtain corrective action by the hospital. Never threaten or harass anyone when attempting to correct substandard or unsafe care in a hospital. And, if a hospital refuses to take appropriate corrective action, ethical physicians are duty-bound to report the hospital deficiencies to outside agencies so as to protect patients.

Hardware: Having the appropriate equipment available, in advance of a sham peer review attack, can be critical. Physicians who practice in hospitals should carry a small concealable audio-video recorder on their person at all times, with cell phone and land line connectivity capabilities. Sham peer review attacks often occur quickly and unexpectedly. Those who are participating in sham peer review sometimes make candid admissions orally or by phone, admissions that may be critical if the matter ends up in court.

Physicians should also obtain a high quality, concealable, audio-video device with date/time stamp capability to be used in the event the physician is invited to a so-called "informal friendly" meeting in the office of the hospital chief executive officer (CEO). The physician often does not know who will be present or the topic of concern to be discussed. He needs to be prepared for the "ambush tactic."

A wide spectrum of high-quality, concealable audio-video devices can be found by doing an Internet search on the term "body worn cameras." Special concealed wireless devices are also available so as to enable the physician's attorney to listen in during these so-called "informal friendly" meetings in the CEO's office, and to covertly provide advice to the physician via a concealed wireless earpiece during the meeting in those cases in which the hospital forbids the physician to have his attorney physically present at the meeting.

Physicians should practice using these devices so that they will be proficient in their use should the need suddenly arise. Summary of consent requirements for taping telephone conversations is posted on the AAPS website (www.aapsonline.org/judicial/telephone.htm), and the physician should check with his attorney if there are any questions about the legality of covert recording in the physician's state. The physician should also refrain from sharing the information that a covert recording has been made with anyone other than the physician's attorney.

Documentation: All physicians should document in patient charts meticulously. This is essential if the physician deviates from a hospital-mandated treatment protocol for the purpose of providing optimal patient care. Specific reason(s) for deviation from protocol should be extensively documented. Meticulous documentation is also essential in high-risk situations, such as if a patient signs out against medical advice, if a complaint is lodged by a patient or patient's family, if there is a bad outcome, or if there is disagreement with a colleague over optimal treatment of a patient. Always document in a positive and factual manner and avoid engaging in "chart wars" with nurses or other physicians.

Planning for an Alternate Source of Income: Being prepared includes planning for an alternate source of income in case a sham peer review attack succeeds. This should include consideration of both medical and nonmedical sources of income. Maintain good relationships with those who run independent ambulatory surgery centers if you are a surgeon or anesthesiologist, and maintain good relationships with physicians with whom you have trained in the past, as they may be key to a practice opportunity. Physicians also need to consider

how they would earn a living if a sham peer review results in an adverse action by a medical board.

A Written Emergency Defense Plan. A physician needs to develop a step-by-step written plan with names and contact information for strategic persons the physician needs to contact in case of a sham peer review attack. The physician should annually review and update this plan to ensure that all information is current. Also, the physician should practice running through this plan in his mind on an annual basis to be certain that everything necessary is included, creating a "fire drill" for the physician's career.

Defense

Once a sham peer review attack has been launched against a physician, the physician's battle for survival begins. If the physician has taken the steps listed above, he will likely be in a much better position to fight back. Although such attacks are often vicious and personal, the targeted physician should remain professional in responding to all allegations, including false and fraudulent charges against him. A professional demeanor and response allows for the possibility, at an early stage in the attack, of a resolution that may not ruin or end the physician's medical career.

Although physicians are trained to respect facts and the scientific method, they need to recognize that in a sham peer review, the truth and the facts do not matter, because the outcome is predetermined and the process is rigged.

Turning to the courts for justice is also often very disappointing. There are no guaranteed wins in such cases, as hospitals and peer reviewers enjoy nearly absolute immunity based on the Health Care Quality Improvement Act (HCQIA), the judicial doctrine of non-review, and something in case law known as the "objective test," which courts apply to the reasonableness standards of HCQIA (42 U.S.C. §11112(a)(1-4)).

Implementation of the Planned Written Defense Plan: Once a sham peer review attack has been launched against the targeted physician, the physician should immediately implement the step-by-step written defense plan.

The "War Room": Physicians need to keep all of their important records and documents related to the sham peer review in one location so as to maintain focus and organization. Practicing attorneys often set up a "war room" when they are preparing to go to trial, and physicians who are victimized by a sham peer review need to do the same. The targeted physician needs to recognize that his professional reputation, medical career, medical license, livelihood, and ability to provide for his family are often at stake, and he needs to fight back accordingly.

Reconnaissance and Documentation: Where the law permits, physician victims of sham peer review should carry concealable audio-video recorders with them at all times. The physician needs to make sure that his office and home phones are appropriately equipped with recording devices, and that office staff and family know how to use them.

If the physician has a network of ethical physicians in the hospital, it may be possible to have a trusted colleague carry a concealed recording device, especially if the physician friend participates in meetings involving the hospital administration, or if the colleague may encounter physicians who are participating in the sham peer review.

Audio-video files should be organized by person, date, and topic, and should be transferred to the physician's home computer on a daily basis so that the files can be quickly located when needed. Files on the physician's home computer should be backed up on a regular basis, and audio-video files should be given to the physician's attorney on a weekly basis. An off-site back-up is critical in case of a computer crash, seizure of files, or other mishap.

A physician should not discuss or reveal the existence of covert audio-video recordings with anyone other than his attorney. And, the physician victim should not communicate with anyone about his case on hospital phones or using hospital-based e-mail.

Factual Summary and Timeline: Nothing will help the physician's attorney and experts more than creating an organized information package. This should include a brief two-to-three-page factual summary of what happened, and a list of key players and documents.

The physician victim of sham peer review needs to keep a diary of daily conversations and occurrences related to the case.

The physician victim should keep his ethical colleagues fully informed of what the hospital and unethical peer reviewers are doing, noting that the secrecy of bad-faith peer review protects the accusers rather than the accused.

The physician victim should also organize materials for a possible "going public" campaign to expose what the hospital and unethical peer reviewers are doing—a communications campaign aimed at the media, patients, and ethical MEC and hospital board members. Negative publicity may impact the bad-actor hospital's decision-making process much more than the threat of a lawsuit.

An Independent Record: Physician victims need to demand that a court reporter record all peer review hearings and appeals, even if the physician has to pay for the court reporter himself. An independent record is invaluable, should it be necessary to file a lawsuit against the hospital in the future. Hospitals may attempt to coerce the physician to accept an official record of peer review proceedings made by the hospital, but this is akin to allowing a prosecutor in a court of law to keep the official record of court proceedings. It is a blatant violation of due process and fundamental fairness. If a hospital refuses to allow an independent court reporter, paid for by the physician, then the physician's attorney should file a strong written objection with the hearing officer, and the physician victim should use a concealed audio-video recorder as state law permits. A transcript can then be created based on the actual recording of the proceeding. Such transcripts may be instrumental in exposing "sanitization" or alteration of records that sometimes occurs at bad-actor hospitals.

Expert Testimony: Physicians should immediately contact their pre-selected experts to assure their availability. Experts need sufficient time to review medical records and documents and to produce a professional expert report. Experts also need sufficient advance notice if depositions or live testimony will be needed.

Allies: Physicians should stay in close contact with friendly MEC and hospital board members. Hospitals that conduct sham peer reviews frequently hold secret meetings in which biased, unfavorable, or outright false things are said about the targeted physician. Friendly contacts can help update the physician regarding these unfair ex-parte communications, and may provide an opportunity to obtain a covert recording of false and defamatory statements or evidence of bias against the targeted physician.

Practicing at the Bad-Actor Hospital: The physician victim who is still practicing at the bad-actor hospital during sham peer review proceedings should remember the Sham Peer Review Miranda Warning.

A physician victim needs to recognize that it is dangerous to continue practicing medicine in the bad-actor hospital. If possible, surgeries and patients should be treated at other facilities so as to minimize the targeted physician's exposure to further attacks in the hospital. The physician should maintain good relations with other hospitals and should be forthright with other hospitals concerning the sham peer review. The physician victim needs to be aware that bad-actor hospitals that use sham peer review as a tool to eliminate good physicians often defame or "blackball" the physician victim in communicating with other hospitals or potential employers.

A physician victim who continues to practice in the bad-actor hospital should use the "back to the future" approach to chart documentation—i.e., if someone were to try and use a patient case against the targeted physician in the future, the physician should think about what things the physician would like to have documented in the patient's chart.

A physician who survives a sham peer review attack also needs to think about the future. A bad-actor hospital that was not successful in its attempt to "kill" the physician's medical career last time likely will try again in the future, and may be more successful next time. Leaving the hospital safely is key. Prior to tendering a letter of resignation (certified mail return receipt), the physician's attorney should write to the CEO of the hospital to confirm that there are no open investigations. Hospitals sometimes conduct secret investigations that can go on for months, and if the physician resigns while a secret investigation remains open, the hospital will likely file an adverse action report with the National Practitioner Data Bank, which could end the physician's medical career.

Sham Peer Review Tactics: The physician victim should review the tactics characteristic of sham peer review throughout the attack's course. If the physician victim recognizes any of these tactics being used against him, he should consult his attorney about the possibility of filing a lawsuit against the hospital, seeking a preliminary injunction based on abuse of the peer review process. A physician victim should organize evidence that demonstrates that a tactic characteristic of sham peer review is being employed

by a hospital, so it can be used to expose the hospital's abuse of process in any future lawsuit against the hospital.

Safety Precautions: Reports from physician victims of sham peer review suggest that it is prudent for the physician victim to be appropriately cautious in his activities of daily life, especially if the physician is suing the hospital for sizable monetary damages. For example, he should check the tires for evidence of tampering before driving his vehicle, and he should avoid any circumstance that may place himself or his family at risk for physical harm. Family members of the physician victim should be apprised that they too may be at risk, so that appropriate safety measures can be implemented.

Going on the Offense: Hospitals that conduct sham peer reviews against physicians are accustomed to playing offense, engaging in a war of attrition, attempting to spend-down the physician to a point where he can no longer afford to fight back, but they may not be accustomed to playing defense against an aggressive offense. If the physician victim has kept careful records that document quality of care deficiencies or patient safety problems in the hospital, the physician may want to bring that evidence to the attention of outside authorities—the Center for Medicare and Medicaid Services (CMS), the state health department, and the Office of the Inspector General, agencies that may investigate and lead to a correction of those hospital deficiencies and problems. The media should be kept fully apprised of all complaints filed with these outside agencies.

Personal Health and Relationships: When a physician is attacked with sham peer review, it is an extremely stressful event that takes a heavy physical and emotional toll on the physician's spouse and children as well. At times, sham peer review has

destroyed marital and family relationships, and has even ended in the death of the physician victim. Physician victims should schedule weekly relaxation time with spouse and children, in addition to maintaining adequate sleep and nutrition. And, when it looks as though the entire process is stacked against the physician, such that the physician perceives he does not have a prayer of surviving, he might say one.

Summary

Physicians who practice in hospitals increase their chances of surviving a sham peer review attack by being well prepared. Once a hospital launches such an attack, the physician should stay focused and organized, maintain professional conduct, and adopt a multi-pronged approach to fighting back, including an aggressive defense, aggressive offense, and an aggressive communications campaign. The physician should be appropriately cautious in his daily living activities, should maintain personal health and valued relationships, and take steps to maintain financial viability.

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