# Accusation Is Proof: "the Fix Is In"

William K. Summers, M.D.

*"But why would you be accused, Doctor, if you had not done the crime?"*
–W.K. Summers, 2005

The proof was in the accusation during the Great Soviet Purge of the 1930s, in the show trials orchestrated by Joseph Stalin.[1] Accusation as proof became the evidentiary standard of the U.S.S.R. The Moscow trials existed to establish Stalin's dominance over the population. Stalin's principal victims were those with institutional political memory, the surviving Bolsheviks and the leadership of the Soviet secret police.

In 1956, after Stalin's death, Nikita Khrushchev revealed that the verdicts were predetermined, and then publicly justified.[2] Coerced confessions and the suppression of conflicting evidence that favored the defendant were standard methods. Accusation became proof. The fix was in.

The same Stalinist standard seems to hold for the fraudulent peer reviews conducted by corporations against independent physicians. Corporate sham peer review (SPR) is epidemic.[3-6] Corporate peer reviews are power plays. They establish corporate dominance over independent physicians. SPR is used to rid the political landscape of "old" physicians who struggle to adhere to the principle of primacy of physician judgment. The juggernaut of managed care and the leviathan of corporate-government partnerships strive to control all funding in the "healthcare system."

## A Case History

As I recall, I saw "Patient B" in consultation, as requested, for a "suicide threat." The hospitalist had decided to ignore her objection to being discharged. The hospital needed a physician to take responsibility for something it was doing to a patient—hence the psychiatric consultation.

She had been admitted for vague medical complaints. Her psychiatric diagnosis was heroin addiction. My interview further established the diagnosis of hysteria (somatization disorder; Briquet's syndrome; DSM III 300.81). Because of her history of heroin addiction, a proper evaluation required asking about prostitution—although this inquiry was later said to be "strange." In psychiatry, there are few reasons not to take a sexual history. Everything about this patient suggested that the actual suicidal risk was nonexistent.

Relying, in the old-fashioned way, on my own judgment and training, I discharged the patient, and continued on to other tasks in my busy day. Later events confirmed my diagnostic skills. However, the corporate administrators still used this case as part of their SPR, even though their own biased investigation confirmed that Patient B did not kill herself.

## The Sham Peer Review

The trigger for my SPR was my continuing conflict with the caseworkers, who routinely took patients whom I had admitted to the corporation hospitalists, and discharged them to other physicians.[7,8]

I had twice written to the hospital administrator about my concerns, because my patients often had both medical and psychiatric problems with unique needs. I am an internist and psychiatrist. I recall being wary when I sent my third letter documenting an untimely death of one of my former patients, owing to what I considered an unethical referral by the caseworkers.

Based on hearsay and speculation, the hospital chief executive officer (CEO), whom we will call Mr. Friendly, took a special, purportedly compassionate interest in the case of Patient B. He ordered the caseworkers to dig for dirt. He formed a secret ad hoc committee in the department of internal medicine and the department of psychiatry. The latter had no substantive complaints. However, the hospital-paid physician in charge of the internal medicine ad hoc committee had criticisms of six cases. Of note is the fact that this employee hospitalist had repeatedly urged me to refer all of my medical in-patients to his service. Whether the CEO received the typical bonuses from the productivity of his hospitalists was never allowed to be discovered. Bad faith is apparently irrelevant.

Mr. Friendly sent a messenger saying that the hospital had suspended my privileges in internal medicine. The administration violated the medical staff bylaws in suspending my privileges. Mr. Friendly, however, cheerfully encouraged me to admit more patients to the hospital psychiatric unit, where they were chronically under census. As a casual aside, the messenger mentioned I could object to their summary suspension from the department of internal medicine.

I hired an excellent attorney. I demanded a hearing, which surprised the CEO, who then delayed the process for a full year. Of course, I recall the pseudo-remorse expressed to my attorney that the National Practitioner Data Bank (NPDB) required the hospital to report my suspension.

My good reputation was sullied, and I had no opportunity to defend myself.

A year later, the "fair hearing" convened with four physicians as judges. All four were financially dependent on the HMO. Six medical cases were presented, with accusations. Each accusation was shown to be inaccurate, incomplete, and/or based on misrepresented information from the ad hoc committee. The CEO had found a psychiatrist to add to the ad hoc committee. The caseworkers had follow-up by allegedly calling Patient B. The CEO's committee relied solely on a caseworker's notes about

Patient B for evidence. They did not care to question the case-worker. They did not question Patient B. The notes appeared tailored to tell the tale of an unhappy heroin addict who complained about me for alleged inappropriate conduct.

The SPR verdict was unsurprising. They sustained the suspension of internal medicine privileges. They further decided to suspend my psychiatric privileges. The corporation appeal was a travesty. The top administrators for each of the three local hospitals in the HMO network were the appellate judges. None of these businessmen had any medical training. They allowed a one-hour lunch and presentation by my attorney and me. As expected, the appeal affirmed the show-trial verdict.

### *Summers v. Ardent/Lovelace*

On Dec 1, 2006, *William K. Summers, M.D. Plaintiff-Respondent, v. Ardent Health Services, L.L.C. and Lovelace Health System, Inc.; and William J. Mitchell, M.D., Defendants*, was filed.[9] Before a single moment of discovery could be logged, the corporate attorneys filed a motion for summary judgment. The trial court, based on the simple initial complaint and response (before discovery), found disputed issues of material fact between the parties. The trial court denied the corporation's motion for summary judgment.

The corporation appealed. The New Mexico Court of Appeals also found disputed issues of material fact between the parties in the initial filings alone. The appellate court denied the corporation's motion for summary judgment. The corporation appealed to the New Mexico Supreme Court.

### The New Mexico Supreme Court

On Oct 12, 2010, six years after suspension of my privileges by the corporation, the New Mexico Supreme Court heard oral arguments on the corporation's summary judgment motion. The argument shocked me. Corporation attorneys basically asserted that judges were too stupid to comprehend the technical issues surrounding the hospital's peer-review process. The Supreme Court justices batted the argument back and forth in a theatrical way.

The Court is led by Chief Justice Charles Daniels, who is currently embroiled in a statewide pay-to-play-judge bribery scandal.[10-12] Judge Daniels, who had never served as a judge before his appointment as chief justice, is married to an aggressive trial lawyer who gave more than $120,000 to Democrats during Gov. Bill Richardson's tenure (2003-2011).[13] She purportedly helped raise $1 million for the former governor. Allegations are that Richardson's appointment of Daniels as chief justice was related to these contributions. Further allegations that Daniels consulted with the governor on cases have been denied by Daniels.[14]

I should have suspected that the fix was in because it would have been easy for the Court to simply refuse to hear the case. I was initially amazed that it took until Apr 12, 2011, for the court to publish its decision.

The published decision[15] demonstrated why it took 6 months. The facts were tortured and twisted. The eight-page document gives a "background" with many factual errors. For example, the justices focused entirely on Patient B and another psychiatric case concerning Patient A, which had been settled years ago and was not in dispute. Both examples involved distortions of fact. The medical cases were ignored.

The section labeled "Analysis" is confusing at best. Basically, the old standard of review for Motions for Summary Judgment (disputed issues of material fact) was labeled obsolete in peer review. The new standard of review, citing the Health Care Quality Improvement Act (HCQIA), permits mere accusations by a hospital to be deemed facts regardless of their origin or truthfulness. The Court held: "The burden-shifting provision of HCQIA immunity provides a twist on the typical summary judgment standard."[15] Such a Stalinist ruling eliminates the process of discovery and depositions in which hidden facts become known.

The crux of this decision was the claim that the physician-plaintiff did not rebut the defendants' reasonable efforts. Citing *Poliner*, the Court writes that "a physician is entitled only to a reasonable investigation." There is a presumption of reasonableness, which "is not overcome by simply identifying one piece of factually questionable evidence upon which the peer review committee relied." Rather, "***the physician must show that the fact-finding process is unreasonable in its totality*** [emphasis added]."[15]

The papers presented to the court were necessarily abbreviated. Only a limited number of disputed facts were listed because a complete list could not have been produced without discovery and depositions. Such was not permitted.

### Analysis and Impact

It is now "open season" on physicians in New Mexico. A corporate hospital's accusations now are taken as fact. Subpoenas, to uncover truth through discovery and depositions, are denied to physicians accused by the corporation. Misinterpretation of immunity under HCQIA as discussed by Kadar[6] is the course the New Mexico Supreme Court took.

Justice could occur in such circumstances only if judges were infallible and incorruptible. The actual situation—hubris, the political influence, and even insanity of U.S. Supreme Court Justices—has been exposed by author and talk radio host Mark Levin.[16] Gross errors by the U.S. Supreme Court seem to be corrected by later disruptive social upheavals. Levin notes that the 1856 Dred Scott decision was a preamble to the Civil War and the 13th through 15th Amendments to the Constitution, and that the 1896 *Plessy v. Ferguson* decision institutionalized segregation. The response was Rev. Martin Luther King, Jr., and the Civil Rights Act of 1964.

Kadar reviewed the adverse effect of fallible and corruptible judges on American medicine.[6] Physicians become chattel. Stalinist show trials are mimed by SPR. The best and brightest physicians are eliminated. Richard Willner, president of the Center for Peer Review Justice, estimates that 500 of the best and brightest physicians have already been professionally destroyed by SPR.[3] The ultimate result is that silencing physicians by subjecting them to SPR adversely affects patient care.

Disaster preparedness is helpful only if physicians believe that SPR exists, and that it could happen to them.[17] Many physicians, of course, believe they would never be affected because they are

good physicians who practice good medicine. Pursuing a legal remedy is unquestionably an uphill battle.[6,17,18]

In 2005, after my experience of SPR, I wondered, "But why would you be accused, comrade… if you had not done the crime?" The events reminded me strongly of Franz Kafka's classic, *The Trial*.[19]

Legal recourse ends at the U.S. Supreme Court, where odds are slim. What's left is political and economic action. Where possible, the wise physician should withdraw from hospital practice. Perhaps new hospitals can be established that are controlled by physicians with fair, well publicized bylaws. In such hospitals, the administrators should be subservient to the medical staff. In doctors' hospitals, administrators should not be chosen from the pool of university-trained businessmen.

Political activism is needed. Physicians can no longer leave matters to career politicians in elective office or organized medicine. Physicians and other citizens need to work at all levels from local to national to defend our individual rights. Attend city council and school board meetings. Run for office or support good candidates who truly support limited powers of government.

Yes, it will take years to correct this injustice. The completion of the task may be left to the next generation of physicians. But start we must.

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