

Editorial

Sham Peer Review: Violations of Due Process and Fundamental Fairness

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

There is a lot of overlap between the tactics that are characteristic of sham peer review and factors that are built into the peer review process itself. The tactics used against physician victims are the same worldwide.^{1,2}

The list of factors built into the process of peer review that violate due process and fundamental fairness and that place physician victims at disadvantage include provisions of medical staff bylaws, so-called fair hearing procedures and the Health Care Quality Improvement Act (HCQIA) law itself. The list below is non-exhaustive as new ways to deprive physicians of due process are continually being developed.

Hospital Acts as Judge, Jury, and Executioner

Peer review in hospitals is not an independent impartial process. The hospital controls the selection of the judge, jury, and executioner. The judge (hearing officer) is frequently an attorney hired by the hospital. Attorneys who serve as hearing officers at peer review hearings often anticipate future lucrative business with the hospital. Financial reward tends to incentivize them to rule in favor of the hospital as often as possible in the course of conducting the so-called fair hearing.

The jury (hearing panel) is also selected by the hospital. Hospitals frequently stack the jury with physicians who can be counted on to find the targeted physician "guilty."

The executioner (medical executive committee and hospital board) is also frequently under the control of the hospital. Medical executive committees consist of the heads of the various clinical departments in the hospital. Increasingly, the chairs of the clinical departments are either hospital-employed physicians or physicians who have an exclusive contract with the hospital. As such, they are loath to bite the hand that feeds them. Hospital boards often receive the bulk of their information about what is going on in the hospital from the hospital CEO. If the hospital CEO tells the board that a specific physician needs to be eliminated from the hospital, then the board nearly always follows that directive.

No Voir Dire

Most medical staff bylaws and policies for peer review do not allow for voir dire in selecting the hearing panel. In the rare instances where medical staff bylaws allow for voir dire, the hearing officer appointed by the hospital ultimately makes the decision whether or not biased or conflicted panel members will be allowed to serve on the hearing panel. In cases where no voir dire exists, an attorney representing a targeted physician can object to certain physicians serving on the hearing panel, but again the decision on whether or not to seat hearing panel members rests with the hearing officer.

No Consequence for Hospital in Medical Staff Bylaws for Failing to Meet Deadlines

Medical staff bylaws and hearing policies typically provide specific deadlines for the hospital to provide hearing and appeal procedures to physicians targeted in peer review. The bylaws usually provide that if a targeted physician does not request a hearing or appeal within the specified time period, then the physician automatically waives his right to the hearing or appeal. However, there is often no parallel provision in the bylaws applicable to the hospital that fails to provide a hearing or appeal within the specified timeframe. Hospitals may view these deadlines as merely aspirational. In a court of law, however, failure to abide by the medical staff bylaws/hearing policies constitutes a breach of contract.

No Subpoena Power

Under HCQIA, the physician has the right to call, examine, and cross-examine witnesses.³ However, if a hospital decides to refuse to produce a witness under its control for cross-examination at a peer review hearing (usually because the witness might provide testimony favorable to the physician's case), there is usually no recourse for the targeted physician under the medical staff bylaws/hearing policies. A physician and his attorney have no subpoena power in hospitals to force hospital-controlled witnesses, who have information relevant to the case, to appear at the hearing and be subject to questioning by the physician's attorney. Fortunately, there are pioneering attorneys like our AAPS general counsel Andrew Schlafly, who have gone to court to compel hospitals to produce witnesses at peer review hearings.

Attorney Not Allowed to Represent His Physician Client

Although HCQIA establishes the right of a physician to representation by an attorney at peer review hearings,⁴ hospitals have found ways to deprive physicians of this right under their medical staff bylaws. Under the guise of seeking to provide a professional forum for evaluation and discussion of clinical issues, medical staff bylaws may allow hearing officers or hearing panels to prohibit a physician's attorney from speaking at or participating in questioning at a peer review hearing. The physician's attorney is allowed to be present at the hearing, but cannot raise any objections and is subject to a strict gag order. If an attorney violates the gag order, the hospital can immediately terminate the hearing.

A hospital-imposed gag order on the physician's attorney places the targeted physician in the position of having to act as his own attorney. Physicians who do not have a dual M.D.,

J.D. degree are not equipped to function as attorneys to protect their rights. It is fundamentally unfair to place physicians in a situation in which their entire medical career rests on their ability to function as an attorney. And, if the hearing officer decides he does not like the way the physician is asking questions or raising objections, the hearing officer can unilaterally terminate the hearing even before the physician has the opportunity to present his case.

An attorney cannot truly represent his client and protect his client's rights if the attorney is not allowed to speak at a peer review hearing.

Severe Artificial Time Restrictions Imposed on Peer Review Hearing

Medical staff bylaws usually allow the hearing officer and/or hearing panel to set the rules for a peer review hearing. One of the ways hospitals have found to deprive targeted physicians of due process is by severely limiting the time for a hearing. This limits the physician's ability to present evidence and facts to support his case, and sends the message that the hearing panel does not really want to hear the physician's side of the story. Thus, severe time restrictions on a peer review hearing violate the requirement under HCQIA for the hospital to make a reasonable effort to obtain the facts of the matter.⁵

Failure to Timely Provide Documents to Targeted Physician

Like hearing and appeals time requirements, hospitals may set deadlines for the exchange of exhibits/documents that will be presented at a peer review hearing. If a physician does not supply such documents to the hospital within the set time frame, the physician may be prohibited from using the documents at his peer review hearing. However, hospitals frequently give themselves a pass if they fail to provide the targeted physician with documents to be presented at the hearing within the required timeframe. In some cases, the hospital will wait until only a few days prior to the hearing to provide documents to a physician, or even wait to supply documents until the time of the hearing itself. This makes it virtually impossible for the accused physician to properly prepare a defense.

Presumption of Guilt and Ex-Parte Meetings

Medical staff bylaws parallel the provisions of HCQIA,⁶ which create a presumption that a physician is "guilty" unless and until he can prove his innocence. HCQIA shifts the burden to the accused physician to prove that the hospital failed to meet one or more of the reasonableness standards by a preponderance of the evidence.⁷ Hospitals frequently further disadvantage physicians at a peer review hearing level or appeals level by requiring that the physician demonstrate by clear and convincing evidence (a higher burden of proof than preponderance of the evidence) that the adverse action taken by the hospital was unreasonable, arbitrary, or capricious. And, in some cases, a hospital attorney may advise his client that the clear and convincing standard is equivalent to beyond a reasonable doubt.

The presumption of "guilt," combined with ex-parte meetings where the hearing panel is told that the accused is a dangerous physician and must be eliminated from the hospital, assures

the outcome desired by the hospital. Confirmatory bias, which is promoted and encouraged by such ex-parte meetings, is nearly impossible to overcome by actual facts. There is usually no prohibition, in the bylaws or in statutory law, of ex-parte meetings between a hospital administrator or the choreographer of a sham peer review and the hearing panel.

Allowing an Expert Report into Evidence without Opportunity for Cross-Examination

Attorneys hired by hospitals to serve as hearing officers have at times allowed the hospital to present an expert report, unfavorable to the accused physician, without producing the expert who authored the report for cross-examination at the hearing. Thus, the physician's attorney is deprived of the opportunity to confront and question the expert about his report or credentials. One cannot cross-examine a written report.

'Star Chamber' Proceedings

Some hospitals have developed special "star chamber" proceedings through which the hospital is allowed to impose requirements and punishments on an accused physician without any opportunity for any fair hearing or appeal. Medical staff bylaws that establish these proceedings allow a select group of physicians to meet in secret behind closed doors and simply proclaim "guilt" of the targeted physician and inflict perpetual punishments. In those circumstances the only "hearing" allowed is a hearing to determine whether or not the physician has complied with the sanctions and punishments.

The Moving Target

HCQIA and medical staff bylaws require that the accused physician be given adequate written notice of the proposed adverse action or adverse action already taken and the specific reasons for the proposed adverse action.⁸ However, when a hospital's case against a targeted physician begins to fall apart because the facts and evidence do not support the accusations, then hospitals will frequently shift the alleged reasons for the adverse action to more subjective reasons like the physician's conduct, communication, and even perceived thought processes. In violation of the requirement to provide advance notice of the specific reasons for the proposed adverse action, the physician is left with the impossible task of defending against a constantly moving target.

The 'Thought Police'

When a hospital decides to shift prosecutorial theories midstream in a peer review, it is not uncommon to see the emergence of the "thought police." Participants in the sham peer review, who are intent on eliminating the physician from the hospital, may act to interpret and "spin" what they believe to be the targeted physician's thought process relative to patient care. A physician who attempts to correct their misperception of his thought processes is overruled as the "thought police" believe they know what the physician is actually thinking. Actions based on findings of the "thought police" are impossible for the accused physician to rebut.

HCQIA's Provisions for Conduct of Hearing—a Mockery of Due Process

HCQIA sets forth specific requirements for the conduct of peer review hearings.⁹ However, after delineating the specific requirements for the conduct of peer review hearings, HCQIA makes a mockery of due process by stating: "A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a) (3) of this section."¹⁰

This "license" to violate a physician's due process rights is further compounded by the Fifth Circuit *Poliner* decision, which allowed a hospital to qualify for immunity under HCQIA despite the fact a hospital fails to abide by its own medical staff bylaws.¹¹ One state, Illinois, provides immunity to hospitals in peer review matters unless someone at the hospital physically assaults the physician under review.¹²

Hearsay

As codified in medical staff bylaws, under the quasi-judicial process of peer review in hospitals, the rules of evidence that apply in a court of law need not be enforced in conducting a peer review hearing. The typical standard for evidence in hospital peer review is any information upon which responsible persons may rely in considering serious matters. Although hearsay is not admissible evidence in a court of law because it is unreliable, it may be deemed to be perfectly admissible in a peer review hearing in a hospital. What is determined to be unreliable in a formal due process setting somehow dons the cloak of reliability in the hospital setting. Hospitals then present such hearsay evidence as: Nurses consider Doctor X to be incompetent, slow to respond to their concerns, and uncaring; and colleagues consider him to be behind the times, often choosing treatments that are suboptimal or even dangerous.

No Recourse for False and Defamatory National Practitioner Data Bank Reports (NPDB)

The National Practitioner Data Bank (NPDB), established by HCQIA, provides no mechanism for determining the truth or

falsity of the information filed by hospitals against physicians—it presumes that all information supplied by a hospital is factual and truthful.¹³ Expensive litigation is required to remove false and defamatory information from the NPDB. Successful challenges are few and far between.

Conclusion

Many practices in the peer review process violate physicians' right to due process and fundamental fairness and place them at a severe disadvantage in defending a wrongful adverse privileging action. These built-in provisions invite abuse of peer review known as sham peer review. Physicians need to be aware of these factors and need to retain the assistance of a knowledgeable, well-qualified attorney to help fight back against blatant violations of due process and fundamental fairness.

Lawrence R. Huntoon, M.D., Ph.D., is a practicing neurologist and editor-in-chief of the *Journal of American Physicians and Surgeons*. Contact: editor@jpands.org.

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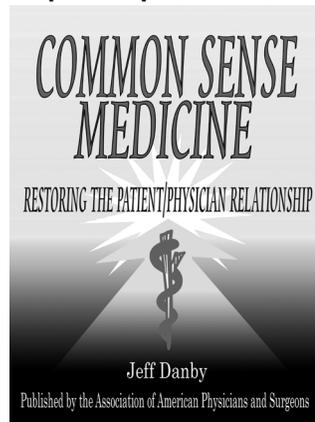
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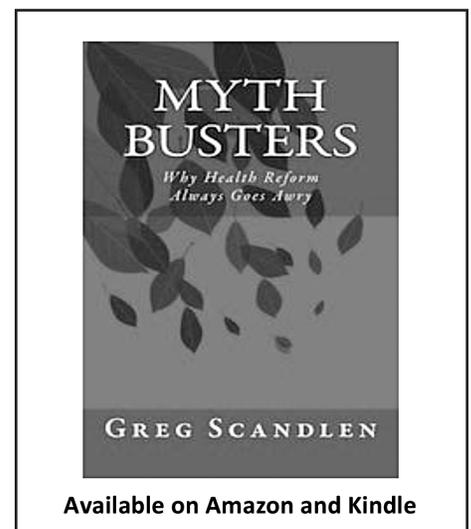
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