Editorial:

Sham Peer Review: the Unjust "Objective Test"

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Definition

Sham peer review is an adverse action taken in bad faith by a professional review body for some purpose other than the furtherance of quality health care, and that is disguised to look like legitimate peer review.

Physicians Presumed Guilty Unless Proven Innocent

In the criminal justice system, even accused serial murders, rapists, and child molesters are presumed innocent until proven guilty. Unfortunately, because of a federal law known as the Health Care Quality Improvement Act (HCQIA), accused physicians in the hospital setting are presumed "guilty" unless they can prove their innocence by a preponderance of the evidence.[1] HCQIA created a presumption that the adverse action taken against the targeted physician was done:

(1) in the reasonable belief the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts,

(3) after adequate notice and hearing procedures are afforded to the physician or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).[2]

Case Law—Bad-faith Motives Are Irrelevant

The injustice of presuming an accused physician is "guilty" is further compounded by courts that have applied a so-called "objective test" in evaluating the four reasonableness standards of HCQIA to determine whether a hospital and peer reviewers qualify for immunity under HCQIA. According to case law, bad-faith motives of a hospital and peer reviewers, including retaliatory, hostile, malicious, discriminatory, anticompetitive motives, intended to harm another physician, are considered irrelevant![3-9]

The result is often trial by "magic words." All a hospital has to do is utter the magic words "peer review" and "objective test" in court, and the hospital and bad-faith peer reviewers receive complete immunity.

Qualified Immunity of HCQIA Converted to Absolute Immunity by Courts: the Template for Legalized Sham Peer Review

Although Congress clearly intended to promote effective peer review in the furtherance of quality health care by providing qualified immunity for those who perform peer review in good faith, courts have opened the floodgates of corrupt and abusive peer review via this objective test combined with the judicial doctrine of non-review. Here's how it works:

- A hospital seeks to eliminate a physician based on some improper, bad-faith motive. This might include retaliation against a physician whistleblower, elimination of a physician who competes against the hospital in some manner, or a variety of other improper motives.
- The hospital finds some pretext on which to attack the physician and acts to disguise the adverse action against the targeted physician by conducting a sham peer review—where the truth and the facts do not matter, because the process is rigged and the outcome is predetermined.
- The hospital eliminates the targeted physician from the hospital, reports the adverse action to the National Practitioner Data Bank and the state licensing board, often destroying the physician's medical career.
- When the physician victim seeks to address the injustice in court, the hospital attorney utters the magic words, "peer review," so as to obtain immunity under HCQIA. The hospital attorney also frequently repeats the magic words, "peer review privilege," so as to prevent the plaintiff physician from discovering and revealing what really happened, in secret, behind closed doors at the hospital.
- The hospital attorney points out that HCQIA presumes that the hospital met all of the reasonableness standards of HCQIA and that the physician is presumed guilty as charged. He also notes that the burden is on the physician to prove otherwise by a preponderance of the evidence—evidence that the plaintiff physician is often unable to obtain because of the hospital's claim of "peer review privilege."
- The physician victim points out that the hearing panel in the hospital consisted of his devoted enemies and fierce competitors, all of whom had openly expressed animosity toward him and a committed desire to eliminate him, by whatever means, from the hospital. He also states that the charges placed against him are totally false and fabricated.
- The hospital attorney then utters the magic words "objective test," and the court declares all of the openly hostile, anticompetitive, and bad-faith motives of the hospital jury to be irrelevant. Although the so-called objective basis of an adverse action taken against a targeted physician is often completely fraudulent, some courts unfortunately perpetuate the fraud by deferring to hospitals in all peer review matters—i.e. the judicial doctrine of non-review.

Sham Peer Review Is Not Objectively Reasonable

Sham peer review is not objectively reasonable, precisely because it is done for some purpose other than the furtherance of quality health care. The underlying purpose of the "peer review action" is relevant, because the underlying purpose colors the entire peer review process in the hospital. This includes the following:

- Selection of the hearing panel
- Selection of the hearing officer
- Control of the "evidence"
  - Admissibility

- Control of availability of patient charts needed for physician's defense
- Unreasonable time constraints placed on accused physician
- Limiting cross examination by accused physician or his attorney
- Not allowing the physician's experts or other witnesses to provide testimony favorable to the physician's case
- Failure of the hospital to disclose exculpatory evidence

- Control of the hearing record—some hospitals forbid a court reporter to transcribe the proceedings
- Bias and control of the flow of information—i.e. prejudicial *ex-parte* meetings of hospital jurists with representatives of the hospital administration where the accused physician is not allowed to be present to defend himself
- Improper interference by hospital attorney in the proceedings
- Noncompliance with medical staff bylaws so as to favor the hospital
- Hospital's utilization of employee "rumor mill," via strategic, well-concealed "leaks," designed to damage the physician's reputation during the hospital peer review proceedings—so as to build consensus that the hospital is ridding itself of a dangerous physician. The other purpose of this action is to ruin the physician's business so that the physician will not have sufficient resources to defend himself against the hospital or take action against the hospital for wrongful termination of his career.

Not only is sham peer review not objectively reasonable, but since the basis for it is often completely fraudulent and done for some purpose other than the furtherance of quality health care, sham peer review does not qualify as a "professional review action" under the definition provided in HCQIA. HCQIA says that "[t]he term 'professional review action' means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could adversely affect the health or welfare of a patient or patients)…"[10] In sham peer review, the basis for the action is a complete ruse and has no valid nexus to professional competence or conduct. Thus, the bad-faith hospital proceedings are nothing more than a sham, and for that reason the hospital and those who participate in the sham should not qualify for immunity, by definition, under HCQIA.

If justice is to be served, courts must question the basis for adverse actions taken against physicians, and not simply perpetuate the fraud by accepting a hospital's word that what was done was legitimate peer review.

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REFERENCES

1 42 U.S.C. §11112(a)(4).
2 42 U.S.C. §11112(a)(1)-(4).
3 *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992).
4 *Bender v. Suburban Hospital, Inc.,* 134 Md. App. 7, 758 A.2d 1090; cert. denied, 362 Md. 34, 762 A.2d 968 (2000).
5 *Cowett v. TCH Pediatrics, Inc.,* 2006 Ohio 5269 (Ohio Ct. App., Mahoning County 2006), 2007 Ohio 724 (2007).
6 *Fox v. Parma Community Hospital,* 60 Ohio App. 3d 409, 419, 2005 Ohio 1665 (Ohio Ct. App., Cuyahoga County 2005).
7 *Pamiantuan v. Naticoke Memorial Hospital,* 192 F.3d 378, 389 (3rd Cir. 1999).
8 *Sugarbaker v. SSN Health Care,* 190 F.3d 905, 914 (8th Cir. 1999).
9 *Zisk v. Quincy Hospital,* 834 N.E.2d 287, 295 Mass. App. (2005).
10 42 U.S.C. §11151(9).