

Sham Peer Review: A Legal Perspective

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Five Actual Scenarios

1. A competitor of you tells you that he is going to “get you” through a bad faith “sham” peer review. He then does exactly what he said he would, and you lose privileges.

Can you sue the hospital and your competitor for this?

2. A nurse is lazy and incompetent, but intimidating. She refuses to improve, despite many attempts by you to encourage her improvement. She then reports you as somehow being disruptive, and fabricates allegations against you.

Can you protect yourself?

3. You see many examples at the hospital of wrongdoing and poor care, yet the hospital administration will not correct the problems. Eventually you are subpoenaed to testify against the hospital in a malpractice case that resulted from the negligence. You tell the truth at trial, and then the hospital retaliates against your privileges.

Can you sue the hospital?

4. A doctor at the hospital is doing a home-made movie and you agree to appear and respond to general questions. To your surprise the movie appears in local theaters as a documentary and makes the hospital look bad. The hospital administrators are furious and they retaliate against your privileges.

What is your legal protection?

5. You are from a foreign country and you agree to practice at a rural hospital. After you move there you realize that the prior physicians having your national origin ended up losing their privileges. Then a sham peer review is instituted against you.

What rights do you have?

In all five scenarios the answer is the same:

YOU HAVE FEW LEGAL RIGHTS.

Federal courts have repeatedly held that physicians cannot recover for bad faith in peer review. A hospital can tell you it will “get you,” and then destroy your career with a sham peer review, and in most cases you will not be able to recover a single dime for it.

WHAT ARE THE
HISTORICAL ROOTS OF SHAM PEER REVIEW?

LOOK BACK TO THE 1930s



HOW HOSPITALS PLAY THIS GAME

All a hospital needs to do in order to enjoy complete immunity for sham peer review is:

- 1) Comply with the simple peer review procedures established by HCQIA (even if they conflict with your bylaws)
- 2) Find some objective basis, no matter how unrepresentative of your record, for restricting your privileges.

Let's look at each point separately.

HCQIA Procedures merely require that peer review be taken:

- (1) in the reasonable belief that the action was in the furtherance of quality health care,
- (2) after a reasonable effort to obtain the facts of the matter,

NOTE: evidence of "bad faith" is considered irrelevant to what is "reasonable"

- (3) after adequate notice and hearing procedures are afforded to the physician involved 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).

HCQIA includes a presumption that a professional review [action] meets the standards for immunity, 'unless the presumption is rebutted by a preponderance of the evidence.'"

The Fifth Circuit recently held in the *Poliner* decision that:

"We agree with our sister circuits that the HCQIA's 'reasonableness requirements were intended to create an objective standard of performance, rather than a subjective good faith standard.'"

BAD FAITH IS IRRELEVANT!

Federal Courts have held that federal law, HCQIA, trumps requirements set forth in the bylaws, in order to create "a uniform set of national standards."

A failure to comply with the medical staff bylaws does not defeat a peer reviewer's right to HCQIA immunity from damages!

The brings us to the second point: the hospital need only find some objective basis, no matter how unrepresentative of your record, for restricting your privileges.

If you are a surgeon, the hospital can always look and find a few unfortunate outcomes out of thousands of successes, and that will suffice to satisfy the “objective basis” requirement.

A representative sample of your record is NOT required.

The harm caused by HCQIA:

- Surgeons now avoid risky surgery
- Physicians are afraid to speak out
- Administrators bully physicians
- Anti-competitive misuse of peer review
- Lack of accountability for hospitals

Overall result: Patient care suffers!

WHAT CAN BE DONE?

Point I

HCQIA does not prevent “injunctive relief” as in reinstatement of a physician or orders relating to the entry in the National Practitioners Data Bank.

You can sue to obtain your privileges back, but the law often prevents recovery of your damages for all the harm you suffered.

Point II

Know your “venue” (choice of court). Some state courts (e.g., Michigan, Montana and Nevada) have been increasingly receptive to claims of sham peer review, while other courts (e.g., Fifth Circuit) have moved in the opposite direction.

A plaintiff is allowed to choose his optimal venue, so make that choice wisely.

Point III

Public relations and political efforts may be more successful than litigation.

For example, the astronomical salaries of some hospital administrators who perpetrate sham peer review are easily obtainable and can be published, and the community is shocked when it reads about those salaries in the local newspaper.

Town hall meetings have been very effective in exposing overall hospital abuse of peer review (beware not to disclose confidential information).

Point IV

Identify the problem early and get out of that hospital (or take most of your cases elsewhere) BEFORE an investigation starts:

- Look at your hospital file to see if administrators are setting you up with a paper trail of lies.
- Be “street smart” to recognize that you are about to be “mugged”, and get out before the mugging can occur
- **BUT DO NOT QUIT DURING AN INVESTIGATION WITHOUT CONSULTING AN ATTORNEY, BECAUSE THAT TRIGGERS A NPDB ENTRY**

Point V

If you are a minority, use Title VI of the Civil Rights Act to protect yourself against discrimination by a hospital that receives federal funds (nearly all hospitals do).

Most attorneys sue under Title VII, but that requires an employment relationship and often staff privileges are not considered to be employment. Title VI offers similar protections against discrimination without requiring an employment relationship.

Point VI

Introduce resolutions to your medical associations urging that HCQIA be reformed to hold hospitals and competitors liable for sham peer review.

Point VII

Recognize the difference between a public hospital, which is restricted by the Constitution against retaliation against you for speaking out, and a private hospital, which is not so restricted.

Know which kind of hospital you work at before you speak out.

Always remember ...

There are many people who enjoy bringing down a good and outspoken doctor. They include:

- Hospital administrators
- Competitors
- Jealous and incompetent staff
- Sometimes even newspapers

Know your rights, know who your adversaries are ...
and protect yourself!