

Sham Peer Review: Fighting Back

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Having suffered irreparable harm to professional reputation and career, a physician victim of sham peer review (SPR) has an understandable desire to hold those who initiated or participated in it accountable.

Pursuing litigation against the perpetrators is one option for fighting back. A physician who pursues this option often faces a lengthy and expensive battle with an uncertain outcome.¹ All it takes is one adverse decision by a judge, and the case is over.

Given the strong immunity provided by the Health Care Quality Improvement Act of 1986 (HCQIA) and state laws, SPR perpetrators may have good reason to believe they will never be held accountable in a court of law for their wrongful actions.²

There is, however, another option for fighting back—filing complaints with professional boards against SPR perpetrators for professional misconduct.

I base this information on my study and experience, and it is not intended as legal advice or legal opinion. Physicians should consult their own attorneys for legal advice and opinion. It is also strongly recommended that a physician check with his attorney before filing any complaint to make sure it is worded appropriately.

AAPS Resolution Condemning Sham Peer Review (61-01)

The General Assembly passed a resolution opposing SPR on Oct 16, 2004, at the 61st Annual AAPS Meeting.

WHEREAS: the Association of American Physicians and Surgeons supports fair and unbiased peer review in the interest of improving the safety and quality of patient care; and

WHEREAS: the Health Care Quality Improvement Act (HCQIA) of 1986 has created an environment in which those who conduct or participate in sham peer review (bad faith peer review) enjoy substantial immunity; and

WHEREAS: substantive due process in peer review corrective actions is often lacking in the hospital setting; and

WHEREAS: physicians who raise quality of care concerns in the hospital setting are often targeted for retaliation via sham peer review, and careers are often ruined as a result; and

WHEREAS: in recognition of the fact that sham peer review is a growing problem nationwide,

BE IT THEREFORE RESOLVED that the Association of American Physicians and Surgeons condemns the practice of sham peer review, and;

BE IT FURTHER RESOLVED that the Association of American Physicians and Surgeons declares that those who conduct or participate in sham peer review are engaging in unethical and/or professional misconduct, and;

BE IT FURTHER RESOLVED that AAPS supports extending existing “whistleblower” and “patient advocate” laws in effect for physicians who are employees of hospitals, managed care organizations, states and federal institutions, to all physicians in the country.³

Professional Misconduct

Physicians who initiate, promote, conduct, or participate in SPR are committing professional misconduct. Knowingly bringing

false/fabricated charges against a physician in peer review is professional misconduct. Knowingly violating medical staff bylaws that are intended to provide due process/fundamental fairness to the accused physician, thus violating the accused physician’s rights, is professional misconduct. Knowingly hiding behind medical staff bylaws that inherently violate due process and fundamental fairness, is professional misconduct. Using tactics characteristic of SPR, which inherently violate due process/fundamental fairness, is evidence of professional misconduct.^{4,5} Leaking confidential peer review information outside of peer review committees so as to harm or disparage the accused physician is professional misconduct. Making standard-of-care decisions in peer review outside the scope of the peer reviewer’s training and expertise, in the absence of consultation with a physician who possesses the training and expertise to make such evaluations, is professional misconduct. Physicians who wrongfully make such standard-of-care decisions outside the scope of their training and expertise are practicing medicine outside the scope of their abilities.

Physicians who make standard-of-care decisions outside the scope of their training and expertise endanger the public because their peer-review decisions ultimately affect patients. All these are elements of professional misconduct, and should be emphasized in filing SPR complaints with professional boards.

Physicians who participate in SPR have no immunity against having to explain their actions to a medical board, and if found culpable, be sanctioned accordingly. A medical board (M.D./D.O.) is required to process all complaints it receives. After a preliminary review, a medical board may decide to dismiss the complaint (due to lack of merit or being outside the scope of its authority) or it may decide to open a formal investigation. If an investigation is opened, it is likely that the physician will have to hire his own attorney to represent him before the medical board. This may come as a shock to a bad-faith peer reviewer who assumed he was beyond being held accountable for his actions. Unaccustomed to having his actions questioned by a medical board, the perpetrator may find himself subject to stress, anxiety, and personal cost associated with trying to defend his actions.

Elements to Emphasize in Filing Complaints

In filing a complaint against a bad-faith peer reviewer with a medical board, it is important to first review the elements of professional misconduct as stated above. A medical board’s website may provide additional information about professional misconduct, and whenever possible one should use the precise wording from the medical board’s website. The website will typically list the board’s mission, vision, and core values. The complaint should emphasize that bad-faith peer reviewers did not meet these values. The website also describes the procedure for filing complaints.

After reviewing the elements of professional misconduct, the physician victim of SPR should express his “concern” that the bad-faith peer reviewer did not meet professional standards of conduct. This is preferable to making accusations, and implies that the medical board can and should investigate to make their own determination.

It should also be emphasized that this is a legitimate issue of

professional misconduct, and that the physician victim of SPR is not asking the medical board to review the merits or lack thereof of the peer-review action.

It is very important to explain to the medical board how this professional misconduct by bad-faith peer reviewers adversely affects patients. When a competent, ethical physician has his privileges removed by a hospital, it deprives patients of the services of a good physician. If the physician provided a special service or procedure not being offered by other physicians in the community, then this may force some patients to travel a great distance to obtain the service or procedure. Some patients may not be able to travel or may be so inconvenienced by travel outside the community that they may decide to forgo the service or procedure and simply suffer the consequences.

Supporting documentation should be provided. The physician should check with his attorney to make sure that documents forwarded to the medical board are appropriate. Certain documents associated with the peer review, including relevant patient charts, can be cited in the complaint with the notation that the medical board can request these documents from the hospital. Medical boards generally have the authority to request information that would otherwise be protected by confidentiality requirements.

American College of Healthcare Executives (ACHE)

SPR is frequently a collaborative effort between unethical physicians and unethical hospital administrators. Hospital administrators may play a formal role in conducting SPR.

Hospital administrators often belong to the American College of Healthcare Executives (ACHE). The hospital administrator's credentials may be listed on the hospital's website. The credentials may also be listed in a press release when the administrator joined the hospital.

The ACHE has posted a Code of Ethics it expects its members to follow.⁶ This code applies to the executive's relationship with patients, colleagues, and all members of the hospital organization including physicians. The executives are expected to function as "moral advocates and models."⁶ The code also states: "Since every management decision affects the health and well-being of both individuals and communities, healthcare executives must carefully evaluate the possible outcomes of their decisions."⁶

Under Section I(B) of the code, it states: "Conduct professional activities with honesty, integrity, respect, fairness, and good faith in a manner that will reflect well upon the profession."⁶

Under Section I(J), the code states: "Refrain from participating in any activity that demeans the credibility and dignity of the healthcare management profession."⁶

Under Section II(F), it states: "Be truthful in all forms of professional and organizational communication, and avoid disseminating information that is false, misleading or deceptive."⁶

Under Section II(J), it states: "Implement an organizational code of ethics and monitor compliance."⁶

Under Section VI, it states: "A member of ACHE who has reasonable grounds to believe that another member has violated this Code has a duty to communicate such facts to the Ethics Committee."⁶

The ACHE has posted its grievance procedure on its website.⁷ The complaint must be filed with the ACHE Ethics Committee within three years of the date of discovery. The complaint should be supported with documentation. It is important that the physician check with his attorney to make sure that all documents forwarded to the ACHE Ethics Committee are not subject to peer-review confidentiality. Documents that arise from the peer review process can be cited in the complaint with the notation that such documents can be requested from the hospital. Patient names, of course,

should not be listed in the complaint. It should be emphasized how the executive's actions in the SPR adversely affect patients.

Like medical board complaints, the complaint to ACHE should first review the elements of its Code of Ethics. The complainant should then express his "concern" that the hospital executive may have failed to abide by the code. Specific examples falling under the various sections of the Code of Ethics as described above should be cited.

Like medical boards, ACHE has a responsibility to process all complaints. After preliminary review, ACHE may decide to dismiss the complaint, or may decide to refer it for formal investigation. Following a hearing and appeals process, an executive found to have breached the Code of Ethics may be censured, suspended, or expelled from the ACHE.

Other Professional Boards

Complaints can also be filed against licensees of other professional boards, such as the nursing and pharmacy boards. Nurses who have personal animus against a physician have at times been known to file false or fabricated complaints against a physician. Pharmacists have also filed false complaints against physicians. Following the same template procedure discussed above, the physician victim should check with the appropriate board website for information about professional misconduct and the specific complaint procedure. If a patient has been directly affected by the professional misconduct of the licensee, the patient should be encouraged and assisted, if necessary, in filing a complaint against the licensee.

Summary

In an SPR conducted in a hospital, the physician victim is undeservedly put on the defensive. But the time comes for the accused physician to play offense. This includes filing a lawsuit against the hospital and named perpetrators of the SPR, and it can include filing complaints against the perpetrators with medical boards, ACHE, nursing boards, and pharmacy boards where appropriate.

Licensees/members are expected to comply with a professional code of conduct and/or professional ethics. When licensees/members violate the code, they must be held accountable in the interest of justice, and for the health and well-being of patients.

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