Editorial

Sham Peer Review: More Options for Fighting Back

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One cannot win a war solely by playing defense. One must play offense. And, make no mistake, evildoers who conduct a sham peer review against a physician have "declared war" on the physician with the intent of destroying his reputation and ability to earn a living working as a physician.

Playing offense needs to be aggressive and multifaceted. Filing a lawsuit against the perpetrators is a good start but is not sufficient. A prior editorial suggested some other methods to fight back.[1] In this editorial, additional options will be discussed. Individual circumstances will determine which options are applicable.

Those who perpetrate a sham peer review need to experience some of the anxiety and stress that victims of sham peer review experience. Evildoers are accustomed to and may even enjoy inflicting emotional distress on others but are not accustomed to being on the receiving end of a full-on counterattack. In one case, a vice president of medical affairs, who instigated and choreographed a sham peer review against a physician, gleefully boasted to the physician victim: "Your income is going to go down" (personal and confidential knowledge working as an expert in sham peer review in the case).

Suing perpetrators, including attorneys representing hospitals, for fraud, where circumstances warrant it, places the perpetrators in a very vulnerable position since there is no immunity for fraud under the Health Care Quality Improvement Act (HCQIA) or any other law.[2] It sends a clear message that the physician is serious about holding evildoers accountable.

The information presented below is not intended as legal advice or opinion. It derives from my extensive study of court documents and relevant literature, and from my own experience serving as an expert in sham peer review for more than 20 years. Physicians should seek legal advice and opinion from their attorneys.

Violation of the Americans with Disabilities Act (ADA)

In a prior editorial, widespread abuse of referrals for psychiatric and neuropsychological assessment (fitness for duty evaluations), which violate ADA, was discussed.[3] According to the U.S. Department of Justice ADA.gov website:

> The Department of Justice enforces the ADA through lawsuits and settlement agreements to achieve greater access, inclusion, and equal opportunity for people with disabilities…. Our matters are both large and small.[4]

An article published by allthingsinspector.com detailed the penalties for violating ADA:

> Civil penalties: The ADA allows for the Equal Employment Opportunity Commission to impose civil penalties up to $50,000 for the first violation if your failure to make reasonable accommodations violates the ADA.
>
> Additionally, if you continue to violate the ADA and you know about the violation, the EEOC can impose an additional penalty of up to $100,000 for a second violation.
>
> Criminal penalties: If you knowingly violate the ADA, you could be charged with a crime and face jail time as well as a hefty fine.
>
> Liability of your company: If you violate the ADA, and this violation hurts a disabled person, your company could be liable for damages.
>
> Liability of your managers and supervisors: Your managers and supervisors could also be held liable if they knowingly violate the ADA.[5]

Equal Employment Opportunity Commission (EEOC): Discrimination

Over the past 20 years, I have encountered sham peer review cases where discrimination was an underlying motive. In situations in which the physician is employed by a hospital, charges of discrimination can be pursued via the EEOC.

According to the EEOC website:

> EEOC's Public Portal (https://publicportal.eeoc.gov/portal/) enables individuals to submit online inquiries and online requests for intake interviews with EEOC, and to submit and receive documents and messages related to their EEOC charge of discrimination…. EEOC's Public Portal is for individuals who believe they have experienced employment discrimination by a private employer, state or local government, union, or employment agency…. The laws enforced by the EEOC, except for the Equal Pay Act, require you to file a charge (https://www.eeoc.gov/filing-charge-discrimination) before you can file a lawsuit for unlawful discrimination. There are strict time limits for filing a charge (https://www.eeoc.gov/time-limits-filing-charge).[6]

A charge of discrimination can be based on "race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information."[7]

A charge of discrimination can be filed online at the EEOC public portal or can be filed at a local EEOC office (https://www.eeoc.gov/field-office). EEOC recommends discussing the charges with a staff member prior to filing a charge to make sure filing a charge of discrimination is the appropriate path to pursue. States and local jurisdictions may have their own law and if the subject decides to file under a Fair Employment Practice Agency (FEPA), the charge will automatically be filed with the EEOC (dual filed). Fair Employment Practice Agencies can be found at https://www.eeoc.gov/fair-employment-practices-agencies-fepas-and-dual-filing.[7]

Following an investigation by the EEOC, the EEOC will decide whether or not to issue a Notice of Right to Sue letter. This Notice of Right to Sue is required before filing a lawsuit in state or federal court. In some cases, a Notice of Right to Sue can be requested

prior to the EEOC completing its investigation. Importantly, once the Notice is received, a lawsuit must be filed within ninety days.[8]

Age discrimination lawsuits under the Age Discrimination in Employment Act of 1969 (ADEA) do not require a Notice of Right to Sue letter before filing a lawsuit but must be filed after 60 days have elapsed since the charge was filed and no later than 90 days after EEOC has concluded its investigation.[8]

The EEOC can itself file a lawsuit if it finds there is reasonable cause to believe that discrimination occurred and it is not able to resolve the matter through a process called "conciliation." However, the EEOC litigates only a small percentage of the charges filed.[8]

Civil Rights Violations: Discrimination

According to the Cornell Law School Legal Information Institute:

A civil right is an enforceable right or privilege, which if interfered with by another gives rise to an action for injury.

> Discrimination occurs when the civil rights of an individual are denied or interfered with because of the individual's membership in a particular group or class. Various jurisdictions have enacted statutes to prevent discrimination based on a person's race, sex, religion, age, previous condition of servitude, physical limitation, national origin, and in some instances sexual orientation.[9]

According to the Cornell Law School Legal Information Institute, Title VII of the Civil Rights Act is a federal law that prohibits discrimination and provides employees with a private right to action against employers.[10] A hostile work environment is an example of discrimination and "exists when the workplace is 'permeated with discriminatory, intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment.'"[10] Title VII also imposes an obligation on an employer to make reasonable accommodations, such as a leave of absence for religious reasons.[10]

Discrimination based on age is also unlawful under 29 U.S.C. §623.[11]

States may also have their own laws which prohibit discrimination (e.g., New York Executive Law Section 296).[12]

Under 42 U.S.C. §1985, it is also unlawful for two or more persons to engage in conspiracy to interfere with or deprive another person of civil rights.[13]

Also, under 42 U.S.C. §1981, all persons have equal rights under the law, including the right to make and enforce contracts.[14] This includes the "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[14] It is noted that in most states, medical staff bylaws are a contract between physicians on staff and the board of directors of a hospital.

The U.S. Department of Justice enforces federal laws that protect individuals from discrimination based on race, color, natural origin, disability status, sex, and religion.[15]

The U.S. Department of Health and Human Services also has an Office for Civil Rights (OCR) and will investigate complaints of civil rights violations that occur in entities that receive federal funding (e.g. hospitals).[16] Information on how to file a complaint online is provided on their website, noting that the claim should be filed within 180 days of the event.[17]

In a shocking case of discrimination against an Asian Indian American surgeon, who was also subjected to a sham peer review in a hospital, the surgeon was forced to work in a very hostile environment in the operating room (personal and confidential knowledge working as an expert in sham peer review in the case). Operating room staff repeatedly made highly derogatory and insulting comments to him, including "You Indians are stupid" or "You bunch of stupid Indians." One OR tech also made derogatory comments to him more than 50 times, stating: "The best Indian is a dead Indian." The surgeon complained to the supervisor of the OR a number of times and nothing was done to stop the egregious discriminatory harassment. Incredibly, the vice president of medical affairs testified under oath that he knew about these discriminatory comments made in the OR but dismissed them as mere "banter." Therefore, he took no action to stop the harassment of the surgeon. The fact that the hospital had a clear zero tolerance anti-harassment policy prohibiting jokes and banter involving discriminatory comments about a physician's national origin, race, or ethnicity made no difference. After the surgeon complained, someone placed a plastic R.I.P. tombstone on his front lawn. The sham peer review in this case was likely because the surgeon had complained about discriminatory harassment.

A number of published cases of discrimination lawsuits filed by physicians against hospitals have been highlighted in the media.[18-21]

Medicare Fraud: False Claims Act (FCA)

Prior to filing Medicare fraud complaints, a consultation with an attorney is highly recommended. Hospital-employed coders are often under pressure to maximize revenue in choosing billing codes for services provided by physicians in hospitals, and the physician needs to make sure the hospital has not entangled the physician in potential fraud (e.g., attestation to codes chosen by the hospital coder as accurate). The hospital often puts pressure on its coders to maximize revenue by choosing higher levels of service than actually provided. The hospital also puts pressure on its employed physicians (under threat of being fired) and on independent physicians (under imminent threat of sham peer review for being "disruptive" and interfering with operations of the hospital) to attest that all of the service codes chosen by the hospital coders are accurate. If the physician balks at approving all of these up-codes, there will be a major problem for that physician. Likewise, if the physician fails to go along with a diagnosis code chosen by a hospital coder so as to justify a higher level service or procedure, there will be problems for that physician. This is coercion. By coercing the physician to participate in a fraudulent scheme designed by the hospital, the hospital hopes to ensure the physician's silence. Much like suborning perjury, this is akin to inducing participation in a fraudulent scheme created by the hospital. To re-emphasize: ***before filing a complaint for fraud the physician should consult an attorney***.

Documentation is key. In addition, the physician needs to recognize that after filing Medicare fraud complaints, the likelihood of being targeted for a sham peer review is very high.

The Department of Health and Human Services (HHS) Office of Inspector General (OIG) operates a Medicare Fraud Hotline.[22] The types of complaints investigated include false or fraudulent claims submitted to Medicare or Medicaid, kickbacks or inducements for referrals by Medicare or Medicaid providers, and failure of a hospital to evaluate and stabilize an emergency patient."[22]

Information needed to report Medicare Fraud and Abuse is provided on the Medicare.gov website. The HHS OIG Fraud Hotline is 1-800-633-4227.[23]

Under 42 CFR §420.405, the Center for Medicare and Medicaid Services (CMS) pays a monetary reward for information leading to the recovery of at least $100 and is authorized to provide a reward of 10 percent of overpayments recovered or $1,000, whichever is less.[24]

Qui tam (in the name of the king) whistleblower lawsuits are also possible and may lead to much higher rewards, but depending on the entity the "error threshold" may be extraordinarily high and the process can be fraught with difficulties.[25]

According to the Department of Justice (DOJ) website:

> In 1986, Congress strengthened the act [False Claims Act] by increasing incentives for whistleblowers to file lawsuits alleging false claims on behalf of the government. These whistleblower, or *qui tam*, actions comprise a significant percentage of the False Claims Act cases that are filed. If the government prevails in a qui tam action, the whistleblower, also known as the relator, typically receives a portion of the recovery ranging between 15% and 30%. Whistleblowers filed 598 *qui tam* suits in fiscal year 2021, and this past year the department reported settlements and judgments exceeding $1.6 billion in these and earlier-filed suits.[26]

A number of high-profile qui tam cases were reported in 2020 and 2021, one of which resulted in a $90 million settlement.[27-29]

States also have their own False Claims Act statutes for Medicaid.

A relatively new type of liability under the False Claims Act is something known as "implied false certification."

In a case decided by the U.S. Supreme Court in 2016, the Court established "implied false certification" as a basis for liability under the False Claims Act.[30] The Court explained its decision as follows:

> This case concerns a theory of False Claims Act liability commonly referred to as "implied false certification." According to this theory, when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement, so the theory goes, the defendant has made a misrepresentation that renders the claim "false or fraudulent" under §3729(a)(1)(A)…. We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability. Specifically, liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement. In these circumstances, liability may attach if the omission renders those representations misleading. We further hold that False Claims Act liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment…. Defendants can be liable for violating requirements even if they were not expressly designated as conditions of payment. A "claim" now includes direct requests to the Government for payment as well as reimbursement requests made to the recipients of federal funds under federal benefits programs. See § 3729 (b)(2)(A)…. Defendants are subjected to treble damages plus civil penalties of up to $10,000 per false claim. §3729(a); 28 CFR §85.3(a)(9) (2015) (adjusting penalties for inflation).[30]

Medicare Conditions of Participation (CoP)

Hospitals must comply with Medicare Conditions of Participation in order to bill Medicare and Medicaid. According to information published by NCBI Bookshelf (a service of the National Library of Medicine, National Institutes of Health):

> Section 1861 of the Social Security Act has stated that hospitals participating in Medicare must meet certain requirements specified in the act and that the Secretary of the Department of Health, Education and Welfare (HEW) [now the Department of Health and Human Services (DHHS)] may impose additional requirements found necessary to ensure the health and safety of Medicare beneficiaries receiving services in hospitals… promulgated in 1966 and substantially revised in 1986…. Also, since 1965, under the authority of Section 1865 of the Social Security Act, hospitals accredited by The Joint Commission on Accreditation of Healthcare Organizations (JCAHO or The Joint Commission) or the American Osteopathic Association (AOA) have been automatically "deemed" to meet all the health and safety requirements for participation except the utilization review requirement, the psychiatric hospital special conditions, and the special requirements for hospital providers of long-term care services.[31]

Under Title 42 Public Health § 482.22(b)(4)(ii), hospital medical staff bylaws must have "peer review policies and due process rights guarantees."[32] Unfortunately, as will be discussed below, The Joint Commission has no *specifically stated* requirement that hospitals must have peer review policies with due process rights guarantees.

Down East Community Hospital (DECH) Story—Machias, Maine

Failure to comply with Medicare Conditions of Participation can result in loss of a hospital's ability to bill Medicare and Medicaid.

In an article published by the *Bangor Daily News* on October 21, 2008:

> A local committee that says it's trying to put the "community" back in Down East Community Hospital has invited a nationally recognized expert to speak about the practice and potential pitfalls of doctor peer review. Dr. Lawrence Huntoon, a New York neurologist, will hold an informational session to discuss peer review, a phenomenon some feel is alienating competent physicians in Washington County…. Huntoon was invited by the Committee to Save Our Hospital, a local group that formed in response to growing discord in recent months among staff at the hospital. Some physicians feel they have been victimized by a poor peer review process that pits doctors who side with the administration against those who do not.[33]

The article noted that one physician, Dr. James Whalen, filed a lawsuit against the hospital claiming that his hospital privileges

were wrongfully revoked. A Court subsequently granted a temporary restraining order that overturned the revocation of privileges. Commenting on that decision, Dr. Whalen stated: "It basically said that the hospital was so poorly run that a court had to intervene."[33] Another physician, Dr. Lowell Gerber, reported that the hospital had fired him "because he challenged the administration with new ideas."[33]

Hospital administrators and all members of the board of trustees of the hospital were invited to an open forum to discuss the situation. Instead, they sent a letter (missive) stating they would not attend because they felt AAPS's "platform is dangerous to the health and well-being of communities like ours." They asked that the letter be read aloud to those in attendance at the forum.[34]

True to their missive, no one from the hospital administration or board of trustees showed up at the open forum to discuss what was going on at their hospital. A front-page article in the *Machias Valley News Observer* displayed a picture of a row of empty chairs on stage, each with the names of administrators and board members.[35]

The *Bangor Daily News* also reported the conspicuous absence of hospital officials:

> Noticeably absent from the public forum was anyone representing the hospital, although many administrators and members of the board of trustees were extended invitations. Instead, board Chairman Walter Plaut sent a letter.[36]

In addition to the missive sent by the chairman of the board of trustees, a hospital-employed echocardiographic technician showed up at the open forum and passed out yellow sheets to attendees containing accusations designed to smear Dr. Huntoon, AAPS, and our Journal. Dr. Jane Orient detailed the "smear attack" on our AAPS website.[37] After I publicly exposed the falsehoods printed in the yellow "smear sheets," the hospital employee sat down and had nothing more to say. Some attendees ripped up the yellow "smear" sheets in utter disgust at the attempt to hijack the open forum and prevent any discussion of what was going on at their hospital.[35]

Following the town hall forum, the citizens of Machias developed and circulated a petition calling for a receiver to be appointed to take over Down East Community Hospital.[38]

As a result of whistleblower complaints, the Maine Department of Health and Human Services (DHHS) conducted an investigation to determine whether DECH was in compliance with Medicare Conditions of Participation and with Maine licensing standards for hospitals.[39] The *Quoddy Tides* reported:

> Federal officials notified DECH by letter on December 22 [2008] that the hospital was found to be out of compliance with certain Medicare "Conditions of Participation" (CoP). In a letter dated December 24, state officials notified DECH that DHHS would modify the hospital's license to "conditional" for a period of up to one year. Both federal and state agencies cited deficiencies found in four areas: pharmacy, clinical records, standards of care, and quality and patient safety.[39]

So, as a result of whistleblower complaints, which included physician whistleblowers, the hospital's state license was officially restricted to "conditional," and it lost its ability to bill Medicare and Medicaid.[40] And, on July 1, 2009, a receiver was appointed, and a new CEO was named to run the hospital.[41]

The Joint Commission

The Joint Commission is the main accrediting agency for hospitals. The Joint Commission website provides the following description of its mission and vision:

> The mission of The Joint Commission is to continuously improve health care for the public, in collaboration with other stakeholders, by evaluating health care organizations and inspiring them to excel in providing safe and effective care of the highest quality and value.[42]

Given that mission, one might presume that The Joint Commission would require vigorous and fair peer review procedures in hospitals so as to assure safe and quality care for patients. On March 28, 2024, I contacted The Joint Commission and asked: Does The Joint Commission have standards that specify due process requirements of hospital peer review, and can you send them to me? The question was referred to a Joint Commission Standards Expert. On April 4, 2024, I received an answer (M. Jankusky, email communication, Apr 4, 2024). The response was quite shocking:

> The Joint Commission does not specifically require peer review….
>
> MS.05.01.01 EP8: The medical staff is actively involved in the measurement, assessment, and improvement of the following: Significant departures from established patterns of clinical practice.
>
> MS.08.01.01 requires Focused Professional Practitioner Evaluation. The focused evaluation process is defined by the organized medical staff….
>
> EP 4. Focused professional practice evaluation is consistently implemented in accordance with the criteria and requirements defined by the organized medical staff (personal communication).

Although their standards expert informed me that "The Joint Commission does not specifically require peer review," the associate director of the Standards Interpretation Group informed me on Apr 1, 2011, citing MS.08.01.01: "In addition The Joint Commission terminology for peer review is "Focused Professional Practice Evaluation (FPPE)" (J. Herringer, email communication, Apr 1. 2011).

Noting that peer review hearing and appeals provisions in medical staff bylaws of necessity mirror the requirements of the Health Care Quality Improvement Act (HCQIA), and that The Joint Commission MS.08.01.01 EP4 requires that FPPEs (peer review) be conducted consistently in accordance with the criteria and requirements defined by the organized medical staff [as defined in the medical staff bylaws], one must conclude that The Joint Commission requires due process as defined in HCQIA in order to meet The Joint Commission Standard MS.08.01.01 EP4.

A physician victim of sham peer review, where the hospital/reviewing entity failed to follow its own medical staff bylaws in providing due process in peer review, and thus failed to follow due process requirements in HCQIA (42 USC §11112(b)—Adequate Notice and Hearing; §11112(b)(3)—Conduct of Hearing and Notice) could file a complaint with The Joint Commission stating that the entity failed to meet Joint Commission Standard MS.08.01.01 EP4, which requires that peer review (FPPE) be "consistently implemented in accordance with the criteria and requirements defined by the organized medical staff." The complaint should point out that elimination of a competent physician from a hospital medical staff via sham peer review does

not serve the interest of continuously improving health care for the public, nor does it insure safe and effective care of the highest quality and value.

Information on how to file a complaint with The Joint Commission, including online filing, is provided on their website.[43]

Whistleblower Protection Laws: Are You Protected?

The term physician whistleblower refers to physicians who are strong advocates for quality care and safe care for their patients and who, based on their professional ethical obligation, report problems or deficiencies they discover that could place patients at risk for harm.

When whistleblowing occurs in the hospital setting, hospitals will frequently retaliate against the whistleblower instead of addressing and fixing the deficiency. The weapon of choice that hospitals use in this circumstance is sham peer review.

Legal protections afforded physician whistleblowers is a very complex area of the law, and physicians would benefit by consulting an attorney who specializes in whistleblower retaliation lawsuits. Consulting such an attorney prior to filing a whistleblower complaint is highly recommended.

Whistleblower protection laws are often very narrow in scope (e.g., addressing financial concerns and false claims). Moreover, these anti-retaliation laws apply mainly to employed physicians. Protection for independent, non-hospital-employed physicians is largely nonexistent. Government employees, however, are covered by fairly robust whistleblower protection laws.

Shockingly, there are no federal private-sector whistleblower laws that cover patient safety complaints or threats to public health.[44] "Employees at hospitals, nursing homes, and community health clinics lack federal whistleblower protections if they file complaints about patient safety or threats to public health."[44]

In 2004, AAPS passed a resolution calling for expansion of whistleblower protections for all physicians in the country.[45]

In 2007, I provided input to Congress on behalf of AAPS at a hearing on "Private Sector Whistleblowers: Are There Sufficient Legal Protections?" Comments and recommendations were provided to the Committee on Labor and Education, Workforce Protections Subcommittee, U.S. House of Representatives on May 15, 2007.[46]

As sham peer review is typically the method hospitals use to retaliate against physician whistleblowers, AAPS recommended that the Government Accountability Office investigate bad faith peer review (sham peer review) and the associated costs, both economic and in lost lives.[46]

To date, Congress has failed to take action to protect physician whistleblowers from retaliation when patient safety and quality care concerns are reported. This inaction places patients at risk.

False Claims Act (FCA) Anti-Retaliatory Provisions

The False Claims Act has anti-retaliatory provisions under 31 U.S.C. §3730(h)(1):

> (1) In General—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of the subchapter.[47]

Note that the FCA pertains to Medicare/Medicaid fraud, not to patient care concerns. False claims would include such actions as routinely up-coding claims, illegal kickbacks, billing for services not provided, falsifying diagnosis codes so as to bill for medically unnecessary services, falsifying documentation (cutting and pasting sections of a patient record in the electronic health record from one encounter to another where those portions of the history or physical examination were not actually performed), and others.

States have what can best be described as a hodgepodge of whistleblower protections, either their own version of the FCA, or remedies under common law. A list of states that provide common law protection under the public policy exception, a list of states that have a comprehensive Whistleblower Protection Act, and a list of states and major cities with a False Claims Act is available in a recently published book for whistleblowers.[48]

The public policy exception under common law refers to retaliatory actions which are contrary to public policy. Protected conduct would include "Reporting violations of law for the public benefit."[48]

A free online library to keep abreast of changes in whistleblower protection laws is available at kkc.com/law-library.

Conclusions

When a physician is attacked via sham peer review, an aggressive multifaceted "counterattack" is needed so as to hold the perpetrators accountable. Individual circumstances dictate which options for fighting back may be applicable (e.g., ADA, EEOC, Civil Rights, FCA, Medicare Conditions of Participation, and The Joint Commission).

Whistleblower complaints concerning failure of a hospital to meet Medicare Conditions of Participation can result in devastating consequences for a hospital including loss of ability to bill Medicare and Medicaid. Hospitals that conduct sham peer review against physicians have no hesitation about destroying a physician's reputation, career and livelihood. Such hospitals are likely horrified when a physician whistleblower is able to eliminate a major revenue stream for the hospital and "bring the hospital to its knees."

Whistleblowing in a hospital setting frequently leads to retaliation against the physician whistleblower. The hospital's weapon of choice is sham peer review. Physicians need to understand what, if any, anti-retaliation whistleblower laws are applicable, including common law remedies, and need to consult with an attorney who specializes in whistleblower retaliation cases prior to filing a whistleblower complaint.

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