

Editorial

Sham Peer Review: the Destruction of Medical Careers

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Few physicians fully understand the total destruction of a medical career caused by a sham peer review, unless it happens to them or someone they know. The destructive mechanisms are numerous, with negative consequences at many different levels.

An Adverse Action Report (AAR) in the National Practitioner Data Bank (NPDB) is a prominent mechanism of destruction. Although attorneys who represent hospitals routinely argue that an AAR in the NPDB does not result in any harm to the physician's career, evidence to the contrary is indisputable. Hospital attorneys will claim that it is the underlying competence or conduct issue reported in the NPDB that causes the damage, even when those issues are based on false charges. Hospitals, of course, generally do not admit to bringing false or fabricated charges against a physician in a peer review.

Hospital attorneys will also often seek to confuse juries by pointing out that many physicians have malpractice/settlement reports in the NPDB, yet they continue to practice. This argument is typically used to convince juries that NPDB "reports" are not unduly damaging to the physician. But an AAR is very different from a malpractice/settlement report. Although a malpractice/settlement report in the NPDB is not a good thing, it generally does not end a physician's career. An AAR reliably ruins a physician's career.

Negative consequences of an AAR include inability to obtain or renew medical staff privileges, inability to obtain or renew a medical license, inability to obtain employment as a physician (including locum tenens), termination of medical liability insurance, termination of participation on insurance panels, severe limitation on where a physician might be able to practice (e.g. restricting opportunities to remote areas of the country), and inability to continue practicing in one's specialty. And, if a physician is fortunate enough to obtain a job, the terms and payment may be less favorable due to the AAR. The negative impact a sham peer review has on a physician's psychological and physical wellbeing is also a major negative consequence. Sham peer review has sometimes resulted in exacerbation of underlying illnesses, and even been associated with suicide.

A physician's marriage and family are often destroyed as the stress and financial pressures increase from the loss of a stable, reliable income. Friends and colleagues may distance themselves from the physician victim, causing profound social isolation. The former life the physician and his family knew is gone.

Physician victims, consumed with anger over the injustice inflicted upon them, may pursue years of litigation at great expense in an attempt to hold the wrongdoers accountable

for the destruction they have caused. While physician victims devote their entire being to pursuing justice, their lives are essentially put on hold.

The strong immunity provided by the Health Care Quality Improvement Act (HCQIA) adds insult to injury, as the physician is presumed to be "guilty" unless and until he can overcome the presumption by a preponderance of the evidence.

In litigation, mitigation can cut as a double-edged sword. If the physician victim is fortunate enough to have enough investments or other non-medical means of earning a living, hospital attorneys will argue, "Where is the damage?" Some courts, unfortunately, do not recognize the value to the physician of earning an income practicing medicine as opposed to earning an income by some other means. A physician's psychological identity and perception of self-worth are often indelibly linked to his profession and the practice of medicine.

If the physician does not have an alternative means of earning income, then hospitals will routinely find ways to continually increase litigation expense and "spend down" the physician to the point where the physician no longer has funds to fight back. Severe depression often results.

Blacklisting

The Health Care Quality Improvement Act of 1986 (HCQIA) essentially established a government-maintained "blacklist" database of physicians.¹ Hospitals must query the NPDB prior to granting medical staff privileges, and every two years thereafter to renew physician privileges. An AAR in the NPDB is a red flag, a "Scarlet Letter,"² which lets all who query the databank know that the "blacklisted" physician is "damaged goods." The irreparable harm caused by a sham peer review has been discussed at length in another article published in our journal.³

Rumor and Reputation Smear

Inevitably, rumors begin to spread in the community about the sham peer-review victim. The physician is no longer present and practicing at the hospital, and colleagues and patients wonder why. Speculation and thinly-veiled innuendo contribute to the physician's professional competence and/or conduct being called into question. Referrals dry up, and the physician victim's patients are treated by other physicians when they require hospitalization or surgery. The smear begins to spread like a black ink stain on a white carpet. Irrespective of the litigation outcome, the damage is done.

Blackballing

As the physician victim struggles to support himself and his family, blackballing comes into play. Perhaps even before the peer-review process runs its course in the hospital, the physician is out seeking other jobs and/or staff privileges at other hospitals. In the process of applying for privileges, the hospital administration of the new hospital calls the hospital administration of the bad-actor hospital. After the call, the new hospital often loses interest in the applicant, or if the physician is seeking employment, acts to provide unfavorable pay or contract terms. There is typically no written transcript of the call to prove what was said, and at deposition in litigation, both hospital administrators frequently suffer from “bad memory.”

Tactics Similar to Extortion

In applying for privileges at a new hospital or renewing privileges at an existing hospital, a physician victim often encounters what might be described as an extortion-like tactic. The new hospital, or other hospital where existing privileges need to be renewed, requires the bad-actor hospital to provide information about the physician victim’s practice at the hospital. The bad-actor hospital, however, will frequently refuse to provide any information about the physician victim unless the victim signs a full release, agreeing not to sue the bad-actor hospital for any information pertaining to privileges or peer-review matters. If the physician victim acquiesces and signs this full and absolute release, it provides an open invitation to the bad-actor hospital to provide whatever false, trumped-up, or fabricated information that was used in the sham peer review to the other hospital with impunity. If the physician victim refuses to sign the release, then the new or renewing hospital will simply declare the physician’s application/renewal to be incomplete, and no privileges will be granted or expiring privileges will not be renewed.

An incomplete application is not reportable to the NPDB. That is why I recommend to physician victims to establish a personal connection with the chairman of the credentials committee, so if it looks as though things are not going well for the physician’s chances of obtaining privileges, the

chairman can let the physician know so that the physician can withdraw the application. An application for privileges that is withdrawn before it completes the formal credentialing process is not reportable to the NPDB.

Unfortunately, to date, there does not appear to be any effective litigation procedure to force one hospital to provide accurate and truthful information to another hospital in the course of processing an application for new or renewed privileges.

Conclusion

The evidence is indisputable that an Adverse Action Report in the National Practitioner Data Bank either ruins or ends a physician’s medical career. The negative ramifications of an AAR are well-known to physician victims and their families. The mechanisms for inflicting damage on the physician victim’s career include blacklisting, rumor, smears, blackballing, and a tactic similar to extortion. Physician victims face an uphill battle in pursuing litigation, due to strong immunity provided to peer reviewers and hospitals by the Health Care Quality Improvement Act. Physicians who pursue justice through the courts often expend enormous sums and are consumed by years of chronic stress.

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