Editorial

Sham Summary Suspension: Injunctions to Prevent Irreparable Harm

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A summary suspension is the harshest action a hospital can take against a physician. In a summary suspension, the "punishment" is administered first, and due process occurs later. A summary suspension that is implemented as part of a sham peer review is particularly devastating for a physician who has done nothing wrong.

The information presented below is derived from what I have learned while participating as an expert in sham peer review throughout the nation, manning the AAPS Sham Peer Review Hotline for 17 years, and from my intensive study of sham peer review. I am not an attorney and do not provide legal advice or opinion. Physicians are encouraged to consult with their attorneys for legal advice and opinion.

It should also be noted that this is not a comprehensive review of requirements for injunctions, which can vary somewhat among various jurisdictions and states. An attorney representing a physician will need to investigate the specific requirements in his jurisdiction or state, as well as how courts in his jurisdiction have interpreted or applied the factors necessary to obtain an injunction.

It is also noted that the Health Care Quality Improvement Act (HCQIA) has no immunity for declarative or injunctive relief. Some states, notably Florida (Fl. Stat. §395.0191(7)) and Minnesota (Minn. Stat. §145.63, subd.1) do extend immunity to include injunctive relief absent a showing of intentional fraud (Florida) or malice (Minnesota.)[1]

Once a summary suspension has been imposed, the clock is ticking. A summary suspension (includes precautionary suspension and voluntary abeyance) that is in effect for more than 30 days is reportable to the National Practitioner Data Bank (NPDB).[2] Once a summary suspension (Adverse Action) is reported to the NPDB, the physician's career is permanently ruined.

As soon as a sham summary suspension is imposed, the physician needs to retain an attorney immediately. The physician's attorney will need to accomplish a huge amount of work in a very short time. This likely will include:

- An emergency motion for a temporary restraining order (TRO) and preliminary injunction (PI), to prevent defendant(s) from filing a report with the NPDB and to prevent defendant(s) from further disparaging the physician. This emergency motion may also include a request to show cause why the TRO/PI should not be granted.
- Verified complaint
- Affidavits – physician's attorney, physician, and possibly experts and others
- Brief in support of the emergency motion.

The physician's attorney may also consider filing a Motion for Expedited Discovery, which in federal court is covered in Federal Rules of Civil Procedure (FRCP) Rule 26(d).[3] States have similar provisions. The physician's attorney may need expedited discovery to obtain evidence from the hospital to support his emergency motion for TRO/PI. The physician's attorney also has subpoena power and can compel those who participated in the sham summary suspension at the hospital to testify at evidentiary hearings. This presents a valuable opportunity for the physician's attorney to lock down key testimony at a very early stage, perhaps before these witnesses have had extensive coaching by the attorney representing the hospital.

The emergency motion for a TRO/PI will be followed by evidentiary hearings (e.g., show cause hearing) where the moving party and non-moving party argue why the TRO/PI should or should not be granted. Occasionally, a hospital will stipulate to a TRO pending a hearing on the PI.

These evidentiary hearings present the physician's attorney with an opportunity to put on his best case. As one of the factors the physician's attorney must prove to obtain a PI is a likelihood of prevailing on the merits, these evidentiary hearings can be viewed as a mini-bench trial, a preview of the actual trial later. If the physician's attorney puts on a strong case, demonstrating likelihood that the physician will prevail on the case's merits, it is possible to achieve a favorable settlement at this stage. This saves the physician years of stress and tens of thousands, if not hundreds of thousands of dollars.

There are prohibitive injunctions and mandatory injunctions. As the name implies, a prohibitive injunction provides what the defendant shall not do. A mandatory injunction provides what a defendant shall do (specific performance). Prohibitive injunctions tend to maintain the status quo pending further litigation, while mandatory injunctions upset the status quo pending further litigation. Mandatory injunctions are typically disfavored by courts.[4] A motion to prevent a hospital from filing a report with the NPDB is a prohibitive injunction. Sometimes, a motion for TRO/PI is mixed—a prohibitive injunction to prevent the hospital from reporting to the NPDB, and a mandatory injunction seeking an order for the hospital to reinstate the physician's privileges.

There are three types of injunctions:[5]

- Temporary restraining order (TRO), sometimes referred to as a temporary injunction or immediate injunction
- Preliminary injunction (PI)
- Permanent injunction.

TROs and PIs are about obtaining equitable relief. In law, "equitable" basically means doing what is just and fair. The concept of equitable relief has its roots in England where there were two different types of courts—courts of equity and courts of law.[6] The Judiciary Act of 1789 conferred the power

on federal courts to grant equitable relief.[4] In the United States, all courts have the discretion to provide equitable relief.

Since a TRO/PI is "not a cause of action or a lawsuit in and of itself,"[7] a motion for a TRO/PI must have a contemporaneous underlying lawsuit, hence the need for a verified complaint at the time a motion for TRO/PI is filed. As the Supreme Court of South Dakota in *Long Prairie Packing Co. v. United Nat. Bank*, stated: "Injunctive relief, whether by way of temporary restraining order or otherwise, posits the existence of an underlying action by the applicant for such relief against the party to be affected by the proposed restraint."[8] Without a contemporaneous underlying lawsuit, a court does not have jurisdiction to issue a TRO/PI.[8]

Temporary Restraining Order (TRO)

The main goal of a TRO is to preserve the status quo pending a hearing for a PI. There are two types of TROs: with notice, and without. TROs without notice to the non-moving party (ex parte) are disfavored by courts and are granted only in "extremely limited circumstances."[9] Therefore, notice is provided to the attorney representing the hospital in the overwhelming majority of motions for a TRO in cases attempting to prevent a hospital from reporting a sham summary suspension to the NPDB. In order to establish that notice was provided to the defendant hospital, the physician's attorney should so state in an affidavit or declaration accompanying the motion for TRO/PI.

The sole requirement for obtaining a TRO is that the plaintiff demonstrate to the judge that the physician will suffer irreparable harm if the TRO is not issued. As explained by the Legal Information Institute of the Cornell Law School, "Irreparable harm is harm that would not be adequately compensated by monetary damages or an award of damages that cannot be provided with adequate compensation months later. It is a requirement for the issuance of a preliminary injunction and temporary restraining order. The movant usually needs to prove that he or she will suffer irreparable harm if the preliminary injunction or temporary restraining order is not granted."[10] Permanent damage to a physician's reputation, as caused by a hospital wrongfully filing an Adverse Action report in the NPDB, is a prime example of irreparable harm. No amount of money will restore the physician's good reputation or make him whole again.

Once irreparable harm has been established and a TRO has been issued, the physician's attorney will have met one of the four factors required to obtain a PI.

As the name implies, TROs are only temporary until a hearing for PI can be held, and strict time limits apply. The duration of a TRO in federal court is 14 days (FRCP 65(b)(2)).[9] In most state courts it is 10 days. A TRO can be extended beyond the initial period with agreement of both parties, or by request of the non-moving party who may need more time for discovery, and to prepare for the evidentiary hearing.[9] Other circumstances may affect the duration of a TRO. Following the backlog of court cases caused by COVID-19 shutdowns, for instance, some TROs have been extended for months pending the scheduling of a PI hearing. Judges' decisions on whether to issue a TRO are difficult to appeal,[11] but some states allow such appeals when filed very quickly. In federal court a defendant can move to dissolve a TRO by filing a request for hearing within two days of receiving the order based on a change in circumstances.[9] Denials or grants of PIs can be appealed.[9]

Preliminary Injunction (PI)

The purpose of a PI is to maintain the status quo pending completion of litigation.[12] The status quo generally consists of the last actual, peaceable, lawful, and non-contested status that predated litigation.[13] In federal court, FRCP 65(a) governs PIs.[9] The standards for obtaining a PI, and in particular balancing tests, vary across jurisdictions.[5] Some courts also take into account whether a party is acting in good faith. "[I]f the court believes the defendant is acting in bad faith, the court will show little sympathy and rule in favor of permanent injunction."[5]

Once a TRO has been issued in federal court and lasts more than 28 days (absent a granted exception), it can be treated as a PI.[14]

The "*Winter* Factors"

The U.S. Supreme Court, in the case of *Winter v. Natural Resources Defense Council, Inc.*, sought to establish a universal standard in federal court for PIs.[15] However, since the manner in which courts have interpreted and applied these standards varies, it is not truly a universal standard.[16]

The "*Winter* Factors" can be summarized/paraphrased as follows:

- Court must determine that the plaintiff is likely to succeed on the merits.
- Court must determine that plaintiff is likely to suffer irreparable harm if the injunction is not granted.
- Court must determine that the balance of harms/equities favors the plaintiff—that is, the plaintiff will suffer greater harm if the injunction is not granted than the harm suffered by the defendant(s) if the injunction is granted.
- Court must determine that granting the injunction will not disserve the public interest.

As analyzed in a law review article, the first three factors were established by the U.S. Supreme Court in the 1800s (*Russell v. Farley*, 105 U.S. 433 (1881)), and the public interest factor was added in 1939 (*Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939)).[4] Although the public interest factor in *Winter* was actually stated as the court making a determination that the injunction is in the public interest, the prevailing interpretation by courts is that the injunction should not harm or disserve the public interest.[16]

In order to obtain a PI, the plaintiff must prove all four factors.[16]

In federal court, the standard of proof for a likelihood of prevailing on the merits is low. As stated by the U.S. Court of Appeals for the 7th Circuit in the *Brunswick Corp. v. Jones, Jr.* case: "Although the plaintiff must demonstrate some probability of

success on the merits, 'the threshold is low. It is enough that 'the plaintiff's chances are better than negligible....'" *Id*. at 387 (quoting *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 123 (7th Cir. 1982)).[17] And, according to the U.S. District Court for the Central District of Illinois, if multiple claims are stated in the lawsuit, the plaintiff need only show a likelihood of prevailing on a single claim.[18]

An *en banc* decision from the 8th Circuit in the Dataphase case also determined that a preponderance of evidence standard (more likely than not, 50.1% of the evidence) does not apply in evaluating the probability of success on the merits:

> Some have read this element of the test to require in every case that the party seeking preliminary relief prove a greater than fifty percent likelihood that he will prevail on the merits. Under this view, even if the balance of the other three factors strongly favored the moving party, preliminary relief would be denied if the movant could not prove a mathematical probability of success at trial. Although this construction of the "probability of success" requirement is technically possible, we reject it.[19]

The court went on to define a flexible, fair, and reasonable interpretation of the Winter Factors, which has been referred to as the "sliding-scale test."[16]

> In balancing the equities no single factor is determinative. The likelihood that plaintiff ultimately will prevail is meaningless in isolation. In every case, it must be examined in the context of the relative injuries to the parties and the public. If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.[19]

Not all courts/jurisdictions have adopted this approach, and some states have adopted a preponderance of the evidence standard.[16]

Bond Requirement

In federal court, the plaintiff seeking a PI is required to post a bond to cover defendant's damages if it is later determined that the PI was erroneously issued (FRCP 65(c)).[9] States often have the same requirement. The requirement for a bond can be waived by agreement of defendants. Courts also have the discretion to set minimal bond or to waive the bond requirement based on financial hardship of the plaintiff, in the public interest or in the interest of justice.[9]

Hospitals' Arguments in Opposition to TRO/PI

Hospitals frequently offer the following arguments in opposition to a motion for TRO/PI.

An Adverse Action Report (AAR) in the NPDB Causes "No Harm"

Hospitals often argue that an AAR in the NPDB causes no harm to the physician and that a claim of harm is purely speculative. This argument defies reality and the real life experiences of many physicians who have wrongfully been reported to the NPDB for a summary suspension or other adverse action.

The irreparable harm and devastating effects of an AAR in the NPDB have been delineated and discussed at length in another editorial in our journal.[20]

Hospitals will also argue that an AAR in the NPDB cannot cause harm because the database is not available to the public. This argument ignores the fact that the NPDB is available to hospitals and other authorized entities, and that hospitals are required to query the NPDB before granting medical staff privileges and every two years before renewing privileges. Medical boards also are required to query the NPDB. An AAR in the NPDB is a red flag indicating "damaged goods," or as one judge noted, "The Data Bank is a resource used throughout the health care industry. An Adverse report to the Data Bank is akin to a 'scarlet letter' that could permanently harm a physician's professional reputation."[21]

The judge in the Levitin case in Illinois noted the same irreparable harm caused by an AAR in the NPDB.

> Finally, I find that Plaintiff is likely to sustain irreparable harm in the absence of injunctive relief because once the termination of her privileges at Northwest Community [Hospital] are [is] reported to the National Practitioner Data Base, there is a domino effect on Plaintiff's reputation and ability to practice medicine elsewhere.[22]

Hospitals will also frequently argue that an AAR in the NPDB can later be corrected, fixed, repaired, or voided if necessary, thus no irreparable harm. However, with Correction Reports or Revision to Action Reports, the highly damaging information in the Initial Report or the Initial Report itself remains in the NPDB for all authorized entities to see. A Correction Report is filed only in the circumstance where the information was determined to be inaccurate as submitted by the reporting entity. Given the liability attached to reporting inaccurate defamatory information to the NPDB, a hospital is not likely to admit to filing an inaccurate report that has ruined a physician's career. With a Revision to Action Report, the Initial Report is retained forever in the NPDB and the Revision to Action Report is treated as a separate action. Both the Initial Report and the Revision to Action Report are part of the disclosable record. Thus, neither a Correction Report nor a Revision to Action Report "fixes" or "repairs" the damage done to a physician by a wrongful report to the data bank.

A Void Report is warranted only where the reporting entity determines that the report was filed in error, did not comply with NPDB reporting guidelines, or an authorized committee has voted to vacate the initial adverse action (e.g., summary suspension). All of these reasons for voiding a damaging report that a hospital has filed with the data bank would place the hospital in a position of significant liability, and thus is not

likely to occur.

Hospitals also frequently make the argument that the fact that a physician can submit a Subject Statement (rebuttal) to be included in the data bank report somehow mitigates any damage that might be done to the physician's professional reputation. Although submitting a rebuttal to the wrongful action taken against him may provide some psychological satisfaction for the physician, vast experience demonstrates that it makes no difference in terms of the damage that the AAR inflicts.

And, finally, in some cases a hospital that has conducted a sham peer review, or implemented a sham summary suspension, will deliberately "leak" highly damaging information to the medical community and to the community at large. In some cases, this may even include making disparaging comments about the physician in the local newspaper, highlighting false and unproven allegations. These deliberate "leaks" of peer review information likely violate state confidentiality statutes and are evidence of bad faith in conducting peer review. Some jurisdictions take into consideration whether a party has acted in good faith, and if a party is determined to have acted in bad faith, that strongly favors granting an injunction.[5] Conducting peer review with malice or bad faith can also eliminate the immunity granted to hospitals and their peer reviewers under state statutes.

Failure to Exhaust Administrative Remedies

Hospitals also often argue that a physician who has failed to exhaust administrative remedies (hospital peer review and appeals procedures) should be barred from filing a lawsuit against a hospital—and, since a TRO and PI require an underlying lawsuit, the TRO/PI should not be issued.

The Supreme Court of South Dakota in the *Johnson v. Kolman* case noted:

> The doctrine of exhaustion of administrative remedies is one of the fundamental principles of administrative law and jurisprudence. The doctrine is broadly stated as the withholding of judicial relief on a claim or dispute cognizable by an administrative agency until the administrative process has run its course.[23]

The Court noted, however, that there are exceptions to the doctrine of exhaustion of administrative remedies, particularly when the administrative remedies are inadequate.

> [T]he facts of the case bring it within one of the exceptions to the exhaustion doctrine. It is well settled that exhaustion is not required when the administrative remedies are inadequate. *N.L.R.B. v. Industrial Union of Marine & Ship Wkrs.*, 391 U.S. 418, 88 S. Ct. 1717, 20 L Ed. 2d 706 (1968); K. Davis, *Administrative Law Treatise* § 26:11 (2d ed. 1983); B. Schwartz, *Administrative Law* § 173 (1976).[23]

Again, if a hospital peer review process results in a summary suspension being discontinued after the 30-day deadline has passed, because it lacks merit, filing a Revision to Action Report with the NPDB does not undo the irreparable damage done to the physician's reputation with the Initial Report remaining in the data bank. The internal hospital peer review process also cannot provide monetary compensation for other damages the physician has suffered from the sham summary suspension.

Another exception to the doctrine of exhaustion of administrative remedies is when the physician is subject to an abusive peer review process (i.e., sham peer review/sham summary suspension).

The Fifth Circuit in the *Poliner* case stated:

> The doors to the courts remain open to doctors who are subjected to unjustified or malicious peer review, and they may seek appropriate injunctive and declaratory relief in response to such treatment. (Citations omitted)[24]

The failure to exhaust administrative remedies argument can be especially problematic when the physician claims in a lawsuit that the hospital breached the contract (medical staff bylaws) by failing to follow the procedures for peer review specified in the bylaws. In some cases, a hospital will argue that a breach of the bylaws early on can be "cured" by following the bylaws later. As noted by the Court in the *Cole* case, a hospital cannot cure its breach of contract by simply following the bylaws after the fact.

> First, the Hospital cannot cure its alleged breach of contract by not following the peer review investigation and recommendation procedures set forth in the Bylaws by simply providing Dr. Cole a hearing and appeal after the fact.[21]

A summary suspension that is upheld by a medical executive committee is often followed by a recommendation that the physician's privileges be revoked. Given that hospital peer review and appeals procedures can sometimes continue for months or even a year or two, waiting for these administrative procedures to be completed can itself cause harm that cannot be adequately remedied should the doctor prevail later. For instance, during a lengthy hospital peer review process, the physician's business may become insolvent, and valued employees may have to be let go, never to return, unless a TRO/PI is promptly issued to prevent this irreparable harm. The public interest is also disserved if the community is wrongfully deprived of the services of a good physician by a sham peer review/sham summary suspension.

Hospital Will be Harmed by Failing to Report a Reportable Event to the NPDB

In the consideration of the balance of harms/equities, hospitals will often argue that they will be harmed if they are prevented from filing a reportable event (e.g., summary suspension) to the NPDB. They point to HCQIA 42 U.S.C. §11111(b):

> If the Secretary has reason to believe that a health care entity has failed to report information in accordance with section 11133 (a) of this title, the Secretary shall conduct an investigation. If, after providing notice of noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 11133 (a) of this title, the Secretary shall

publish the name of the entity in the Federal Register. The protections of subsection (a)(1) of this section shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 3-year period beginning 30 days after the date of publication of the name.

First, a TRO/PI represents only a temporary delay in reporting—a TRO lasts for a specified time period and a PI remains in effect until the completion of litigation. Unless a permanent injunction is issued, and depending on the outcome of litigation, a report could still be made to the data bank later.

Second, the Secretary would have "reason to believe" that a health care entity has failed to report an Adverse Action only if someone raises the issue with the Secretary. The Secretary does not engage in random visits to hospitals to see if they are properly reporting Adverse Actions or not. The question then arises, who would report a hospital's failure to report an Adverse Action to the NPDB? The hospital itself? The physician against whom the hospital implemented an Adverse Action? There is no evidence that the Secretary has ever imposed the penalty specified in §11111(b). There is also no evidence that the Secretary has ever taken any action against a hospital for failing to report an Adverse Action when a court order prohibiting this is in place.

Third, §11111(b) provides a hospital with the opportunity to "correct the noncompliance" and an opportunity for a hearing. Thus, hospitals are treated quite leniently with regard to timely reporting. If a TRO/PI later expires or is terminated, a hospital would be provided with this opportunity to correct the noncompliance of a reportable action in the unlikely event that someone complains to the secretary that the hospital has not complied.

Conclusion

A sham summary suspension that is reported to the NPDB inflicts irreparable harm on the physician victim. A physician who has had a sham summary suspension imposed on him needs to retain an attorney immediately, and the attorney must act quickly to file an emergency motion for TRO/PI to prevent the irreparable harm pending the outcome of litigation.

Because one of the factors the physician's attorney must prove to obtain a PI is a likelihood of prevailing on the merits, the attorney has a unique opportunity to present his best case. If the attorney makes a strong case, it is possible to achieve a favorable settlement at this early stage and avoid the stress and high costs of prolonged litigation. This is especially true if the attorney provides incontrovertible evidence of breach of contract—blatant failure of the hospital to follow peer review procedures as set forth in the medical staff bylaws.

Knowing the arguments hospitals typically present in opposition to a motion for TRO/PI enables the physician's attorney to be well prepared.

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