Editorial

Sham Peer Review: When the Hospital Will Not Allow Your Attorney to Speak

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A physician who is a victim of sham peer review and is about to encounter a peer review hearing may be shocked to learn that some medical staff bylaws prohibit the physician's attorney from speaking at the peer review hearing. The physician's attorney will not be allowed to act or speak on the physician's behalf, raise objections, examine or cross-examine witnesses. Fear sets in when the physician realizes he will be forced to act as his own attorney, a task which he is not trained or equipped to perform. No one is there to act and speak on his behalf to protect his rights.

Meanwhile, the attorney representing the Medical Executive Committee (MEC)/ hospital, typically will have met with the "prosecutor" (usually the chief medical officer or vice president of medical affairs) to coach the prosecutor on how best to proceed so as to obtain a "guilty" verdict. The MEC/hospital attorney may also have met with the hearing panel ahead of time (ex parte) letting them know that it is never easy to take needed disciplinary action against a fellow colleague, but whatever adverse action they take is in the best interest of the hospital and patients. Both the prosecutor and hearing panel members will be well rehearsed in parroting the phrase, "we are just following the bylaws."

In the quasi-judicial peer review hearing, the modus operandi is "anything goes." In a practice environment where the majority of physicians practicing in hospitals may be employees of the hospital or employees of a physician group that is exclusively contracted with the hospital, the physician cannot be assured of an impartial hearing panel. Physicians who are thus financially dependent on the hospital may look for ways to please their employer by doing what they believe their employer wants them to do. This usually involves viewing the evidence in a light most favorable to the hospital so as to arrive at a "guilty" verdict. Likewise, the hearing officer, who may be an attorney and is paid by the hospital, may typically look for ways to rule in the hospital's favor because he anticipates more opportunities in the future to earn a lucrative fee for serving as a hearing officer.

The information presented below is based on my study and experience working as an expert in sham peer review for more than 20 years. 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 opinions.

What Does the Health Care Quality Improvement Act (HCQIA) Require?

As a threshold matter, it should be noted that Health Care Quality Improvement Act (HCQIA) applies in all the states. Some have advanced the argument that HCQIA does not apply in California, for instance, because California opted out of HCQIA in 1989 and enacted its own peer review procedures known as Business & Professions Code Section 809. The Court in the *Bhandari* case, however, put an end to that faulty notion. The Court stated:

> We reject Bhandari's suggestion that the HCQIA does not apply in California….In December 1989, the federal law was amended to eliminate the state opt-out provision (Pub. L. 101-239, (Dec. 19, 1989) 103 Stat. 2106, 2208; see *Smith v. Selma Community Hospital* (2010) 188 Cal. App. 4th 1. 27, fn.22.) Currently, HCQIA provides for immunity with respect to *all* state laws in *all* states as long as the requirements of the federal law are satisfied. (42 U.S.C. § 11111 (c); *Fox v. Good Samaritan L.P.* (N.D. Cal. 2010) 801 F.Supp. 2d 883, 892 ["California Business & Professions Code § 809… does not serve to override HCQIA immunity now".]) Bhandari suggests California's decision to opt out of the HCQIA in 1989 was unaffected by the later repeal of the federal opt-out language, but we see no ambiguity in the current federal and state regulatory scheme.[1]

So, states can provide additional due process protections, but they cannot preempt the core due process protections of HCQIA.

The due process requirements of HCQIA in a peer review hearing are clearly stated in 42 U.S.C. § 11112(b)(3)(c)(i), which states in part: "In the hearing the physician involved has the right to representation by an attorney or other person of the physician's choice."[2]

Note that it does not state that the attorney can only be present at the peer review hearing but cannot speak. Moreover, the due process requirement under 42 U.S.C. 11112(b)(3)(c)(iii), stating the right "to call, examine, and cross-examine witnesses," clearly implies the function of an attorney. Obviously, if an attorney is not allowed to speak at the peer review hearing, he cannot call, examine, or cross-examine witnesses.

A physician's due process rights in a peer review hearing are among the issues most frequently challenged in court. A law review article explained:

> Of the four prongs, the physician's procedural rights prong is one of the most litigated. In *Hurwitz v. AHS Hosp. Corp.*, the court determined that a fair peer review proceeding occurs when: (1) the physician is given multiple opportunities to provide written submissions to the hospital's reviewers and decision-makers; (2) the physician is notified of the specific patient cases that would be the subject of review before the formal hearing was conducted by the hearing panel; (3) the physician is represented in the internal hearings by able and experienced counsel

who is a certified trial attorney; and (4) the physician testifies and also presents his own expert witness.[3]

The conclusion is clear. Medical staff bylaws that prohibit a physician's attorney to speak at a peer review hearing are in violation of HCQIA.

Medical staff bylaws, which are typically drafted by attorneys, often adopt provisions which make it look as if the bylaws comply with HCQIA, but allow the option of prohibiting the physician's attorney from speaking at the peer review hearing. One example from actual medical staff bylaws (anonymity preserved) provides:

> If the affected Practitioner desires to be represented by an attorney at a hearing pursuant to this Section, his or her request for hearing must so state. The request for hearing must also include the name, address and phone number of the attorney. The hearing committee may preclude participation by legal counsel in the hearing or adjourn the hearing for a period not to exceed 20 days if the Practitioner fails to notify the hearing committee in accord with this Section. The MEC or Governing Body may also be represented by an attorney. While legal counsel may attend and assist the respective parties, hearing proceedings are not judicial in form but a forum for professional evaluation and discussion. Accordingly, the hearing committee retains the right to limit the role of counsel's active participation in the hearing.

Neither the MEC, hearing committee nor the Governing Body, however, has the authority to circumvent federal law (HCQIA).

Finally, it should be noted that HCQIA provides a physician the right to representation at a peer review hearing but not at other non-hearing venues—e.g., the physician appearing before an ad hoc investigative committee or MEC to explain his care or conduct prior to a peer review hearing.

What Does Representation by an Attorney Mean?

The *Cambridge Advanced Learner's Dictionary* defines representation as: "a person or organization that speaks, acts, or is present officially for someone else."[4]

The *Merriam-Webster Dictionary* defines representation as: "the action or fact of one person standing for another so as to have the rights and obligations of the person represented."[5]

WordNet 3.1 by Princeton University defines representation as: "The act of representing; standing in for someone or some group and speaking with authority in their behalf."[6]

The *Free Dictionary* defines representation as: "The state or condition of serving as an official delegate, agent, or spokesperson."[7]

Power Thesaurus defines representation as: "action or speech on behalf of a person, group, business house, state, or the like by an agent, deputy, or representative."[8]

The *Legal Terms Dictionary* defines representation as: "Representation means having someone speak or act on your behalf, like a lawyer advocating for your rights in a legal situation…. The lawyer speaks for the client, making arguments and presenting evidence. In this case, the lawyer is the representative, and the client is the person being represented. This concept is essential because it allows individuals to have their interests protected, especially when they may not fully understand the legal process involved."[9]

Note that all the definitions emphasize *acting* or *speaking* on behalf of the person who is represented. And, while the peer review hearing is often described as a quasi-judicial proceeding because it does not follow the rules of evidence that would apply in a court of law, taken as a whole, the peer review process is a *legal situation*. If a peer review hearing panel finds the physician "guilty," and sustains an adverse action against the physician's privileges, then the hospital is *legally obligated* to report that adverse action to the National Practitioner Date Bank (NPDB) after the appeals process has been completed. Moreover, the peer review process is not merely a legal situation, but it is a legal situation that can have severe consequences for the physician under review. The physician's career can be ruined or ended by an adverse action report to the NPDB. Having an attorney represent the physician at the peer review hearing is essential to protecting the physician's right to due process and fundamental fairness. As noted in the *Legal Terms Dictionary* definition of representation, having an attorney represent the client is especially needed when the client may not fully understand the legal processes involved. This is particularly applicable to a peer review hearing where a physician may not fully understand due process requirements.

Attorneys generally know what they can and cannot get away with in a court of law. But, in a proceeding like a peer review hearing, rules that would apply in a court of law may not apply. The "prosecutor" in a peer review hearing is typically advised and coached by the attorney representing the MEC. In this setting, the prosecutor may be coached to use tactics designed to place the physician at severe disadvantage. A physician, whose attorney is not allowed to speak at the peer review hearing, and who thus must act as his own attorney, may not recognize these tactics designed to deprive him of due process. Unlike an attorney, the physician may not know when to raise an objection or explain the reason for the objection.

An Attorney is Needed to Protect a Physician's Rights at a Peer Review Hearing

Attorneys who represent MECs and hospitals are well-versed in advancing the argument as to why an attorney should not be allowed to speak on behalf of his client at a peer review hearing. They claim that a peer review hearing is an intra-professional review process and when attorneys get involved it creates an adversarial and contentious environment. However, in sham peer review where the hospital is intent on ending the physician's career and livelihood and where the physician is trying to save his career, it is very much an adversarial situation. The peer review hearing is not a friendly, educational, or collegial discussion. Improper motives to end the physician's career, having nothing to do with professional competence or conduct, are ubiquitous. The current environment also includes many

physicians who are employed by hospitals and who, when serving on a peer review hearing panel, may feel obligated to follow the directives of their employer if they wish to preserve their job.

Possible Remedies

The physician may be able to obtain a declaratory judgment so as to establish and clarify that under federal law (HCQIA) the physician has the right to be represented by an attorney at a peer review hearing. This is a complex area of law that the physician must discuss with and seek advice from his attorney.

The Legal Clarity Team summarizes and explains the Declaratory Judgement Function as follows:

> Federal courts have the authority to issue declaratory judgments under 28 U.S.C. 2201, allowing parties to seek a legal determination of their rights without waiting for a full lawsuit or enforcement action. This mechanism is often used in disputes where uncertainty over legal obligations could lead to significant consequences.[10]

This certainly would apply where a hospital takes the position that it need not comply with due process requirements of HCQIA and the physician holds the opposite view. Uncertainty over this legal obligation could certainly lead to severe adverse consequences for the physician.

The Legal Clarity Team goes on to explain:

> Statutory jurisdiction must also be satisfied. Federal question jurisdiction under 28 U.S.C. 1331 allows a declaratory judgment action if it arises under federal law.…[10]

It should be noted that a declaratory judgment finding that an attorney must be allowed to represent and speak on behalf of his client at a peer review hearing will not automatically result in a court order forcing the hospital to comply with HCQIA. Once a court has held that a hospital's prohibiting the physician's attorney from speaking at a peer review hearing is not in compliance with HCQIA, if the hospital disregards or ignores the court's finding then the physician can use that legal determination to obtain injunctive relief or hold the hospital accountable via litigation.[10] The declaratory judgment provides definitive evidence that the hospital violated §11112(a)(3) of HCQIA, which requires adequate notice and hearing procedures be afforded to the physician or other such procedures as are fair to the physician under the circumstances.[2] This should result in the hospital losing immunity under HCQIA.

In summary, a declaratory judgment of this type could prevent the catastrophic consequences of a physician's rights being violated and may avoid the matter from escalating to a costly lawsuit.[11]

If the physician is unable or unsuccessful in obtaining a declaratory judgment, he must spend time with his attorney preparing to represent himself at the peer review hearing. The physician's attorney needs to educate the physician as to common objections that may apply. Specific objections should be typed on individual notecards. At the peer review hearing, the attorney can point to the specific notecard that applies, and the objection can be read aloud by the physician thereby putting it on the official hearing record. The physician should practice this method with his attorney prior to the peer review hearing so that he feels comfortable raising and articulating objections. Entering objections into the record at the peer review hearing preserves them for later use in litigation if necessary. The physician must also study and learn his rights specified in the medical staff bylaws.

Some common objections the physician should prepare for include:

- First and foremost, state on the record (while the transcriptionist is typing what is being said) that the physician requested that his attorney be able to represent the physician at this hearing but was denied that right to counsel and told that the attorney was not allowed to speak. State that the physician is not trained or comfortable in representing himself and is not fully knowledgeable of the legal procedures and requirements.
- Overly restrictive time limits for presenting his case—not making an objectively reasonable effort to obtain the facts of the matter;
- Biases of hearing panel member(s) (lack of impartial hearing panel);
- Failure to disclose conflicts of interest of hearing panel member(s);
- Supplying requested information to the physician at the last minute, allowing insufficient time for physician to prepare his defense;
- Presenting anonymous complaints (such as from incident reporting software) as "evidence" while not naming the complainant and making the complainant available at the peer review hearing for cross examination (one cannot cross examine an "anonymous" witness);
- The hospital's entering its expert's report into evidence at the peer review hearing but refusing to make the expert who authored the report available for cross examination (one cannot cross-examine a written report, which should thus be excluded);
- The hospital's refusal to make available an employee who has relevant information for questioning at the peer review hearing;
- A physician testifying for the hospital or a hearing committee evaluating a treatment or procedure which is outside the scope of his competence/practice without the benefit of an expert report and testimony in the accused physician's specialty;
- Failure to comply with the medical staff bylaws in providing peer review;
- Adding new patient cases or charges against the physician at or just before the peer review hearing, thus depriving the physician of adequate notice so the physician can prepare for his defense (an ambush tactic).

Conclusions

Under federal law (HCQIA), a physician has the right to representation by an attorney at a peer review hearing. That means that the attorney must be allowed to act and speak on the physician's behalf at the hearing. Medical staff bylaws

that prohibit a physician's attorney from speaking at a peer review hearing are in violation of HCQIA.

In a situation where medical staff bylaws prohibit a physician's attorney from speaking at a peer review hearing, the physician should seek a declaratory judgment in federal court. If the physician is not able to obtain a declaratory judgment, he must diligently prepare with his attorney to represent himself at the peer review hearing.

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