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# GENERAL SURGERY *NEWS*

June 2004

## Shammed I Am, in Peer Review



### Due Process Does Not Apply for Physicians Facing Sham Peer Review

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By William M. Johnston

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Outside, the temperature would peak at 78 degrees, a bit balmy even for Charleston, S.C. in mid-February. Inside the waiting room of Roper Hospital, it was considerably more clement, but four hours is a long time to cool your heels with old magazines—especially for an elderly man with an abdominal aortic aneurysm waiting to be admitted to hospital for surgery.

Thursday, February 11, 1999 began inauspiciously enough for this elderly patient. But for his physician, general surgeon Thomas Wieters, MD, it would be the many other things that went wrong that day, and things that had been going wrong at the hospital for years, that would ultimately bring his career crashing down around him.

During the course of that day, Dr. Wieters gave approximately 50 orders over the phone to the nursing staff as he completed other cases. When Dr. Wieters visited the patient at 6:30 that evening—more than 11 hours after he had presented and six after he had been admitted—the man still had no chart. No nurse had been assigned to him and no blood work or cardiogram had been completed even though major surgery was scheduled for the next day.

In fact, the *only* order that had been carried out by the nursing staff was the administration of the bowel preparation GoLYTELY. This was given at a dosage of 4,000 cc—double that called for—causing severe diarrhea and potassium deficiency in a rather frail patient on cardiac drugs and requiring the administration of intravenous fluids. Dr. Wieters found the rest of his

orders discarded in the garbage, along with old newspapers, mail-order catalogs and take-out food menus.

When approached, the charge nurse had no idea the patient was even on the floor. Dr. Wieters went to the administrator on call, who happened to be the hospital CEO. "I invited him to join me on the fifth floor of his hospital," Dr. Wieters recalls. "I began to politely ask him why my aneurysm had been there for 11 hours and 20 minutes, had had no lab work done or even been given his cardiac medicines," Dr. Wieters said in a weary, well-measured drawl. "I was met with an attitude of arrogance and a general attack on physicians."

The situation escalated, although it never became physical. "Clearly, I had verbally embarrassed the CEO—these were the words he used," he added. Dr. Wieters spent the rest of the night prepping the patient for surgery and was able to complete the procedure six hours later than scheduled.

Two weeks later, Dr. Wieters received a certified letter charging him with "disruptive behavior." A committee drawn from the ranks of the surgery department at Roper Hospital later concluded that this and other incidents of "disruptive" behavior, including claims by some on the nursing staff that Dr. Wieters was "condescending," did not merit disciplinary action, as Dr. Wieters' admonishments were always directed at failures to provide standard of care.

Members of the medical executive committee disagreed with this assessment. "You're a problem," Dr. Wieters was told, as they mandated psychiatric evaluation and placed him on probation for one year. As his hearings continued, Dr. Wieters continued to write incident reports detailing examples of negligent care. "These were my patients, and I would not look the other way," he explained.

The CEO of Roper Hospital summarily suspended him in January 2000.

Summary suspension is supposed to be reserved for instances when a physician poses an imminent danger to a patient or patients. Not only does a summary suspension deliver a blow to a physician's professional standing, but it also results in the immediate cessation of income in the face of significant legal expenses for self-defense.

Hospital administrators ignored a petition signed by 36 members of staff calling for Dr. Wieters' reinstatement. Notice of Dr. Wieters' summary suspension was forwarded to the National Practitioner Data Bank (NPDB), where he joined the ranks of physicians black-listed for malpractice, incompetence and dependency problems as a threat to the safety of patients. To be "data-banked" is to be issued a professional death sentence, as the NPDB was established for the very purpose of preventing listed physicians from restarting their practice across town or across the country.

Dr. Wieters sued the hospital, but a U.S. District Court judge ruled against him in November 2001, citing federal law that grants hospitals wide discretionary powers in disciplinary matters. "[The judge] said, 'I don't care what

you people did to this doctor. It doesn't matter. You have total and complete immunity under the federal statute,'" Dr. Wieters related, recalling the judge's summation. "Think about that for a moment. Do you know of anyone else in America who has total and complete immunity? I don't."

## Due Process Does Not Apply

Bereft of most procedural protections that apply in other legal disputes, the victim of sham peer review finds him- or herself alone in the ring with an opponent whose resources far exceed his or her own, and who is unfettered by such legal niceties as the rules of evidence.

The present framework of the peer review process goes back nearly 20 years, but only recently has abuse of the system emerged as a problem so widespread that several states, led by Oregon and Pennsylvania, are now considering local laws governing the process.

Peer review is an integral part of the federal Health Care Quality Improvement Act (HCQIA), which was enacted in 1986 and took effect in 1990. Among its many provisions, the HCQIA grants immunity to testimony given in internal hospital investigations of physicians. In theory, this is intended to allow open discussion in proceedings by protecting the participants from recrimination by the physician whose conduct is under review.

In practice, however, the broad immunity and confidentiality it grants participants in these quasi-judicial proceedings also allow procedural methods that have been verboten in the legal system since the days of the Star Chamber. Physicians facing peer review typically defend themselves without legal representation in the earliest stages of the process. The committee that sits as judge and jury may be appointed by, or may consist of, the very people who have brought forward allegations of medical or professional misconduct. Hearsay may be entered into evidence, while other evidence, including patient charts, may be suppressed. In some cases, physicians have had to obtain court orders to regain access to basic elements of their own defense.

Again and again, the courts have upheld this system. In 1989, in *Simon J. Pinbas, MD v. Midway Hospital*, the Supreme Court found that immunity of testimony applies if the peer review process meets certain requirements, including such things as adequate notice, a right to legal representation, a right to cross-examine and a right to a transcript of the proceedings.

"The HCQIA has become a club, a sword that allows hospitals to do whatever they want to do: lie, cheat, embellish, ameliorate, alter records, commit fraud," Dr. Wieters said. "People who have successfully sued hospitals over these issues have done so only in state courts, using pleas that have been drafted to avoid the protection of federal statute offered to hospitals. As long as the hospital meets those four major administrative criteria, no federal judge in America will touch any action by a hospital." Indeed, despite a court victory that established the administrative criteria now applied to peer review, Dr.

Pinhas himself had his medical license revoked on the basis of the same charges involved in a peer review that the Supreme Court had cited for restraint of trade.

## Judged by Your Rivals

Verner S. Waite, MD, a retired general surgeon in Lynwood, Calif., had his brush with sham peer review in 1979, and the events that followed would dominate the next five years of his life. Dr. Waite contends that he was targeted by competitors when they viewed a hospital computer printout and discovered that his caseload was twice their own. "At the time, I was working longer hours than they were. I took care of gunshot wounds and indigent patients," Dr. Waite said. "My numbers were larger, and they wanted to put a stop to that."

Late one night, Dr. Waite's rivals on staff got the wedge they needed to force him out when a six-year-old comatose boy with an epidural hematoma presented at the hospital. After the case was refused by three neurosurgeons, Dr. Waite successfully cajoled a fourth out of bed so that he might assist him in the evacuation of the hematoma. Although he had only assisted on the case, and had 19 emergency neurosurgical cases under his belt, Dr. Waite was subsequently accused of operating outside his area of competence.

The hospital's surgery department held a fact-finding meeting. The fact-finding meeting was tape-recorded, but the tape never made it to the formal peer review that was convened two days later. "The tape was favorable to my case, so the hospital CEO ordered the evidence to be destroyed. I saw the tape in pieces in front of me on the table." Dr. Waite's hospital privileges were maintained for the interim, but other accusations followed, and he was eventually forced off medical staff.

## With Clean Hands

Fortunately for Dr. Waite, in the pre-HCQIA era there was no immunity for false testimony presented in peer reviews. Documents generated in peer reviews were also discoverable and admissible in court when he sued his accusers in 1984. Although the trial was to involve only six surgical cases, in the two months before the suit made it to court the hospital made an additional 75 charges of wrongdoing. "This is a typical tactic used by sham peer reviewers to intimidate the victim," he said.

At trial, the judge ordered the hospital to produce a transcript of the destroyed tape from the fact-finding hearing. The full transcript went 12 pages, but the copy

provided to Dr. Waite and his attorney was only two pages long. The missing 10 pages contained details that supported the actions of Dr. Waite, who was able to watch with satisfaction as testimony that did not fit the facts of the case was provided by at least one witness unaware that the entire transcript had been released. The court was also told that Dr. Waite's patients had the highest rates of complication, infection and mortality and the longest hospital stays at the facility—statements inconsistent with the hospital's own records. "The exact opposite was true," he said.

Dr. Waite was awarded a \$559,000 judgment against the hospital for slander. A state accreditation committee subsequently examined the 75 additional charges brought by the hospital and found the care he had provided to be laudable in those cases as well. Although he remained on the medical staff, the hospital threatened an endless round of appeals unless Dr. Waite agreed to go on courtesy staff and then resign within a year. Given the less than welcoming environment he was now working within, he agreed to the terms.

Although he remained on the medical staff, the hospital threatened an endless round of appeals unless Dr. Waite agreed to go on courtesy staff and then resign within a year. Given the less than welcoming environment he was now working within, he agreed to the terms.

The publicity surrounding his case later brought Dr. Waite attention of a wholly different sort, and launched him on a crusade that

continues to this day. Other physicians who had been "shammed" began contacting him, and Dr. Waite learned that sham peer review was a widespread, and growing, phenomenon. "I would say it is happening at 90% of the hospitals of America," he said.

Dr. Waite used part of his settlement to found the Semmelweis Society, which provides referrals, court testimony and counsel free of charge to physicians facing malicious peer review ([www.semmelweissociety.net](http://www.semmelweissociety.net)).

The society takes its name from Ignaz Semmelweis, a 19th-century Hungarian-born physician who crusaded for sterile conditions at the Vienna General Hospital. At the time, women who delivered in one obstetric clinic in the hospital faced a maternal and infant mortality rate of nearly 13% from puerperal fever. Mysteriously, a second obstetric clinic in the same hospital had a rate of only 2%.

Despite resistance from colleagues who simply accepted this discrepancy, Dr. Semmelweis commenced a search for the cause. After several weeks of observation, Dr. Semmelweis concluded that he and others had been carrying infection on their hands from a neighboring autopsy room to the women they examined during labor. (Midwives who had no contact with cadavers staffed the second obstetric clinic.)



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—Thomas Wieters, MD

Over the protests of staff, he instituted the practice of hand washing with a solution of chlorinated lime between autopsy work and the examination of patients. Within a month, the mortality rates of both obstetric clinics were nearly identical. Some time later, Dr. Semmelweis's superior, who had consistently opposed Dr. Semmelweis's work, refused to reappoint him to the faculty. The guiding principle of the society Dr. Waite founded in Semmelweis's name is that peer review should always be done "with clean hands."

## Lying Admitted, Facts Irrelevant

For their part, the medical societies have largely washed their hands of the matter of "shammed" physicians, and routinely argue in favor of complete immunity for peer reviewers in all circumstances. The California Medical Association (CMA), for example, has successfully lobbied for the concept of absolute immunity in quasi-judicial proceedings at hospitals and medical associations. In February 2003, the CMA filed a brief in the California Supreme Court in a medical credentialing case, *Hassan v. Mercy American River Hospital*. The CMA argued that a previous judgment by an appeals court against the hospital had improperly eliminated the application of immunity "in those situations where information is communicated with 'knowledge of falsity' of the information or where the information is 'patently irrelevant.'" The CMA brief went on to argue that a 1990 law passed by the state legislature had intended immunity to be *absolute*, "regardless of the subjective intent of the communicator."

Courts throughout America have repeatedly decided in favor of protecting the absolute immunity of testimony in peer review. Even so, upon his suspension, Dr. Wieters wrote a letter to the South Carolina Department of Health and Environmental Control (DHEC) explaining the negligent care offered by his former hospital. DHEC curtly responded that the agency did not embroil itself in lawsuits. But Dr. Wieters persisted, and tracked down the only physician member of the DHEC board of directors. "I sat down with him, and I told him that I had an impeccable record. I told him that I wasn't running for office, and I just wanted to provide the kind of care that 'you and your family would want if you were in that bed. I want you to listen to what I'm going to tell you,'" Dr. Wieters said.

He did. Dr. Wieters later received a courtesy call, itself highly irregular, from a staff member at DHEC. The agency had presented itself unannounced at Roper Hospital, and not only substantiated all of Dr. Wieters' claims but also found other examples of negligence, including two instances ending in death and another that left a 15-year-old with brain damage. Ultimately, DHEC threatened punitive sanctions against Roper Hospital—the suspension of its Medicare funding unless the facility took corrective action.

This moral victory failed to translate into a legal one, however. The federal judge who heard his lawsuit against Roper Hospital told Dr. Wieters that the fact that

he'd uncovered substandard care was *irrelevant* to his summary suspension under the act that purports to further that very goal.

## Physicians Taking a Stand

If fact is irrelevant, what is a shammed physician to do? In their brief, the CMA's answer is that a physician who believes he or she has been injured by "adverse action not warranted by [his or her] current competence" is to hold the *recipients*, not the communicators, of false information liable for having relied on it. In essence, the aggrieved physician can try to seek redress from a hospital, an HMO, or an insurance company or other body if he or she can prove it acted on lies, but cannot seek redress from those who presented the false testimony in the first place. Yet most sham peer review cases are brought against solo practitioners who, once rendered unemployed and often *unemployable*, can ill afford to take on a deep-pocketed adversary.

"If you can maintain an office-based practice and maintain your income, you may have recourse in court. But you don't hire the lawyer who handled your divorce," said Dr. Waite. "It can cost hundreds of dollars per hour to educate a lawyer about the sham peer review process and medical care, and this can take literally hundreds of hours."

Perhaps the most pernicious obstacles to overcome on the road to peer review reform is the reluctance of physicians themselves to stand with one of their colleagues who is targeted by a sham review. While Dr. Wieters' experience was unique in that many colleagues *did* protest his summary suspension to hospital administrators, he holds few illusions. "I think that American physicians have lost character. They've certainly lost their willingness to challenge the system, particularly when this would economically harm their practices. I guess what I'm telling you is that I don't really like doctors that much anymore."

Dr. Waite's assessment is more hopeful. "Sham peer review needs to be exposed whenever it occurs. Physicians should demand a high standard of proof of wrongdoing before adverse actions are taken and a physician's career and livelihood are destroyed. Medical staff bylaws must provide meaningful due process for accused physicians." To this end, Dr. Waite recommends that physicians hire their own legal counsel to review the medical staff bylaws and any proposed changes to them rather than deferring to the hospital's attorney, as is often the case.

Dr. Wieters is slowly rebuilding his life and his practice, making use of courtesy staff credentials at a sympathetic hospital in rural South Carolina. "I am starting over again at 56 years of age, but I am successfully doing it. There's a general surgeon in Salt Lake City who waits on tables to feed his family. Most people have just gone away," he lamented. "But I'm a hard dog to keep under the porch. There will be other litigation. I'm prepared to fight these bastards until the day I die. But I don't want to spend the rest of my life in a courtroom."