Commentary: The Case of *Poliner v. Texas Health Systems*

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Fear of litigious reprisal may deter potential peer reviewers from participation in the medical peer review process. The federal Health Care Quality Improvement Act of 1986, as elucidated in *Poliner v. Texas Health Systems*, encourages effective peer review by conferring immunity on peer reviewers, so long as they ensure adequate due process. The American Psychiatric Association's "Procedures for Handling Complaints of Unethical Conduct " offers a system for peer review that promotes improvements in quality of care, fairness to respondent physicians, and protection for peer reviewers.

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In their article, Meyer and Price[1]examine the medical peer review process as it applies to physician respondents, complainants, state licensing authorities, and peer reviewers. The purpose of this commentary is twofold: first, to describe the specific legal protections afforded to peer reviewers, as outlined in federal statute and case law, and second, to present a hypothetical situation that elucidates the peer review process under the American Psychiatric Association's "Procedures for Handling Complaints of Unethical Conduct." This commentary will endeavor to demystify some of the legal complexities related to peer review, as a means of encouraging conscientious participation in the review process.

Appropriate and progressive peer review facilitates early resolution of problems through education and monitoring. The American Medical Association[2] and the American Psychiatric Association promote the medical peer review process and uphold peer review as a primary means of ensuring quality medical care. Despite consensus on its importance and efficacy, Meyer and Price observe that peer review is "a task that more often loses than makes friends in an organization" (Ref. 1, p 200). Reluctance to become a peer reviewer can arise for any number of interpersonal reasons, but is perhaps most often driven by fear of litigious reprisal, including fear of exposure to liability, entanglement in malpractice litigation, and loss of referrals from other doctors.[3] Indeed, the court has observed "review by one's peers within a hospital is not only time consuming, unpaid work, it is also likely to generate bad feelings and result in unpopularity."[4]

Poliner v. Texas Health Systems[5] was a landmark case that clarified the legal protections provided both to peer reviewers and doctors undergoing review. After 10 years of litigation in the federal courts, a jury trial, reversal by the Fifth Circuit Court, and petitions to the U.S. Supreme Court, the final *Poliner* opinion resoundingly promotes vigorous and balanced peer review. It provides guidelines and protections for peer reviewers, all while retaining injunctive remedies in the case of unjustified negative peer review.

In 1996, Dr. Lawrence R. Poliner gained privileges as an interventional cardiologist at Presbyterian Hospital of Dallas. On May 12, 1998, he performed an angioplasty on a patient's right coronary artery but failed to diagnose or treat the life-threatening blockage of the patient's left anterior descending artery. The following day, the chairman of the internal medicine department consulted with the chief of cardiology and the director of the catheterization laboratory to discuss appropriate disciplinary action. They subsequently met with Dr. Poliner and agreed on an immediate temporary abeyance (the abeyance)

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of privileges pending investigation. An *ad hoc* committee of six cardiologists then reviewed 44 of Dr. Poliner's patient charts and recommended suspension (the suspension) of privileges pending a hearing. A peer review hearing panel affirmed the suspension, then reinstated Dr. Poliner's privileges with conditions (the reinstatement).

In 2000, Dr. Poliner brought suit in federal court against the hospital, the chairman of the internal medicine department, the chief of cardiology, the director of the catheterization laboratory, the six reviewing cardiologists, and the hearing panel members. He sought monetary damages claiming defamation, mental anguish, injury to career, breach of contract, deceptive trade practices, and federal and state antitrust violations, among others.

The defendants filed a motion for summary judgment to dismiss Dr. Poliner's suit, claiming immunity under the Health Care Quality Improvement Act (HCQIA).[6] Congress enacted HCQIA in 1986 as a national effort to improve medical care. The Act encourages medical peer review to curb substandard care and to improve patient outcomes. The statutory scheme addresses the "overriding national need to provide incentive and protection for physicians engaging in effective professional peer review."[7] To ensure fundamental fairness for physicians being reviewed, HCQIA articulates specific procedures to ensure due process and grants immunity to reviewers who follow its requirements.[8]

The *Poliner* defendants' summary judgment motion was granted in part and denied in part.[9] The central question was whether the defendants (all considered peer reviewers under HCQIA) ensured due process to Dr. Poliner throughout the disciplinary process. The judge separately examined the abeyance, the suspension, and the reinstatement to determine HCQIA compliance. He concluded that the suspension procedures followed by the committee of six cardiologists and the reinstatement procedures followed by the hearing panel fully complied with HCQIA; the court granted summary judgment for those defendants. However, the judge denied summary judgment to the defendants involved in the abeyance, citing insufficient evidence of compliance.

In 2004, Dr. Poliner's case against the hospital, chairman of internal medicine, chief of cardiology and director of the catheterization laboratory went to trial. The question before the jury was whether the notice given before the doctor's abeyance met the due process standards of HCQIA. The defendants argued that the entire hospital disciplinary process, including the abeyance, offered adequate due process to Dr. Poliner. In an unprecedented decision, the jury found the defendants noncompliant and awarded Dr. Poliner more than $360 million in damages.

The hospital and the chairman of internal medicine appealed the verdict, claiming HCQIA immunity from monetary damages (the chief of cardiology and the director of the catheterization laboratory settled with Dr. Poliner out of court). In 2008, the Fifth Circuit Court of Appeals reversed the trial court decision, vacated the entire damage award, and rendered judgment upholding HCQIA immunity for the hospital and the remaining defendant. The opinion eloquently clarifies the balance of interests protected by HCQIA and establishes a strong precedent protecting peer reviewers and patient safety.

> The immunity from money damages may work harsh outcomes in certain circumstances, but that results from Congress' decision that the system-wide benefit of robust peer review in rooting out incompetent physicians, protecting patients, and preventing malpractice outweighs those occasional harsh results: that giving physicians access to the courts to assure procedural protections while denying a remedy of money damages strikes the balance of remedies essential to Congress' objective of vigorous peer review.[10]

Dr. Poliner appealed the decision to the U.S. Supreme Court, which declined to consider his petition.[11]

The case of *Poliner v. Texas Health Systems* supports peer review by conferring immunity on reviewers so long as they ensure that adequate due process is afforded to the respondent physician. *Poliner* also recognizes that a respondent physician may be able to demonstrate that HCQIA-compliant peer reviewers nonetheless violated a duty or obligation. Instead of monetary damages, the Act provides for injunctive or declaratory relief, which is usually rendered by institutions rather than by individuals. Under the Act, a physician can seek an injunction compelling a hospital to reinstate privileges if the disciplinary action is based on contract violation. A physician may be granted a cease-and-desist order preventing a hospital from making a report to the state medical board or the National Practitioner Data Bank.

Poliner v. Texas Health Systems demonstrates the federal protections afforded peer reviewers and respondent physicians. The specific elements of the peer review disciplinary process vary among institu-

tions and organizations. The following hypothetical is provided to demonstrate the peer review process as applied by a typical state psychiatric society (SPS), adhering to the "Procedures for Handling Complaints of Unethical Conduct " of the American Psychiatric Association (the Procedures).[12]

A patient, Mr. Martin, sees a psychiatrist, Dr. Spears, for weekly visits in her suburban office. When Mr. Martin is abruptly discharged from care, he calls the main office of the state psychiatric society to lodge a complaint against his psychiatrist. He (the complainant) states that Dr. Spears discharged him without a referral to another provider and without sufficient prescriptions. The complainant then submits a written complaint to the SPS Ethics Committee (EC). Upon receipt of the letter, the EC first reviews the jurisdictional issues, determining that Dr. Spears is a current member of the SPS and APA, and that the alleged unethical actions occurred within the past 10 years, as required in the Procedures, Part I A.

A member of the Ethics Committee next makes a preliminary determination of "whether a recognized ethics violation is alleged assuming the facts of the complaint are true" (Part II A 2). The initial reviewer determines that Mr. Martin's facts describe a violation of one or more of the Principles of Medical Ethics, including Principle 1, "A physician shall be dedicated to providing competent medical care with compassion and respect for human dignity and rights," and Principle 8, "A physician shall, while caring for a patient, regard responsibility to the patient as paramount" (Ref. 12, pp 3–10).

To permit further review, Mr. Martin now executes HIPAA-complaint authorizations to release his protected health information and psychiatric notes to the EC, SPS, and APA (Part III A 3), along with a confidentiality agreement that all communications throughout the proceedings will remain confidential (Part II A 4). (Peer reviewers should be aware that while HCQIA does not protect peer review documents[13] from disclosure, many state statutes do prohibit disclosure.[14])

The chairman of the EC now appoints two additional members to the review team to conduct preliminary review (Part II B 1– 8). The review team gathers information and requests additional information from the complainant in writing, by telephone, or in person. A reviewer personally interviews Mr. Martin to gain an understanding of the events leading to his discharge from treatment and medication regimen. Often the reviewers are able to gather sufficient information to make an initial determination without formal notice to the accused member. If the team decides that the additional facts show no basis to proceed, then no further action is taken.

After the interview with Mr. Martin, the review team decides to continue the preliminary investigation. The Chairman of the EC issues a letter informing Dr. Spears of the complaint and the ongoing preliminary inquiry by the review team (Part II B 6). The accused member is invited to provide additional information to the reviewers before proceeding with a formal investigation. If the team decides that the additional facts show no basis to proceed with peer review then no further action is taken. After a meeting with Dr. Spears, the review team determines that sufficient ethics-related questions remain and recommends opening a formal investigation.

The decision to open a formal investigation triggers the due process requirements of HCQIA. A hearing panel is created, excluding the review team members. To preserve HCQIA immunity, the EC carefully follows the due process standards of HCQIA[15] as mirrored in the procedures (Part III A–D). These include adequate notice to Dr. Spears, providing the written complaint and the Procedures, the right to a hearing before a nonbiased panel, the right to counsel, adequate time to prepare, and the right to present evidence. HCQIA permits some due process exceptions only in the event of imminent danger to patients.[16]

State Ethics Committee hearings follow many of the formalities of an administrative hearing. In our hypothetical, Dr. Spears attends the hearing accompanied by her lawyer. The complainant, although permitted to obtain legal counsel, chooses to attend with his wife. Counsel for the hearing panel provides assistance with any legal questions that may arise during the hearing. Mr. Martin and his wife present testimony and evidence to show patient abandonment, and cross examination is conducted by Dr. Spears' lawyer. Dr. Spears presents evidence arguing appropriate referral and adherence to Ethical Principle 6: "A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care." Panel members question Mr. Martin, Dr. Spears, and the witnesses. Mr. Martin and Dr. Spears' lawyer

then present closing arguments. When the chairman ascertains that the parties have no additional evidence to present, the hearing is closed.

At any time before a final decision, a complaint may be resolved by the education option (Part III E). This option often takes the form of supplementary training, education, or mentoring that "will facilitate the Accused Member's understanding of the ethical issues raised by the complaint." For example: if, after the close of the hearing, but before the issuance of the decision, Dr. Spears indicates her willingness to explore the education option, the EC will determine an educational opportunity that applies specifically to the matter in question. Upon the submission of evidence of successful completion of the course, training or mentoring, the proceeding against Dr. Spears will be terminated.

If, however, Dr. Spears does not choose to pursue the education option, the hearing panel must now carefully weigh the evidence presented. Once the parties are dismissed, the panel members discuss the allegations, the evidence presented, and the specific ethics rules involved. At the close of the discussion, the panel prepares a succinct written determination of whether the accused member violated the ethics principles and, if so, what sanction is appropriate. The scope of sanctions includes an APA reprimand, which remains confidential. Suspension or revocation of membership requires publication in the APA newsletter and notification of the State Medical Board and the National Practitioner Data Bank.

In 1986 Congress recognized that "the need to improve the quality of medical care has become a nationwide problem . . . that can be remedied through effective peer review."[17] The *Poliner* decision affirms that the need for candid and conscientious peer review will be met by providing immunity to peer reviewers and assuring due process to respondent physicians. Individual institutions and organizations may vary in the detail of procedures followed; however, careful adherence to HCQIA standards is paramount. It is to the benefit of us all, patient and practitioner alike, that we encourage and protect participation in this essential professional activity.

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