

EXPLOITING 'FEAR ITSELF' – THE MEDICAL LOBBY'S
CHALLENGE TO PATIENTS' RIGHTS

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It seems organized and institutional medicine want it both ways. The medical lobby claims that secret “peer review procedures in hospitals” and “informal exchange” in which “doctors try to raise the bar for errant physicians,” provide adequate checks and balances to ensure patient safety and “uphold strict standards for the medical community.” See The Scranton Times, “A Dire Diagnosis” January 20, 2002, pg. 10. Undermining this claim, the Institute of Medicine has established that there is a national epidemic of deaths in hospitals in the United States and cite **44,000 - 98,000 preventable deaths in hospitals alone annually**. “To Err Is Human: Building A Safer Health System” (National Academy Press, 1999); JAMA, “Institute of Medicine Medical Error Figures Are Not Exaggerated”; Vol. 284, July 5, 2000, Leape, M.D. Lucian, of The Harvard School of Public Health. See also, Blendon, Sc.D., et al., “Views of Practicing Physicians And the Public on Medical Errors”, N. Engl. J. Med. 2002; Vol. 347, No. 24:1933-40, (“Thirty-five percent of physicians and forty-two percent of the public reported that they had experienced error in their own care or that of a family member.”), Barker, et al., “Medication Errors Observed in 36 Health Care Facilities,” 162 Arch Intern. Med. 1897 (2002). Bates, et al., “The Costs of Adverse Drug Events in Hospitalized Patients,” 277 JAMA 307 (1997). Michael Moss, “Spotting Breast Cancer: Doctors Are Weak Link” New York Times, June 27, 2002. USA Today, “In Shielding Addicted Doctors, Programs Put Patients At Risk”, 7/13/04.

Certain segments of organized medicine have shifted gears and now claim that legal liability fears pose an impediment to safety. Millions of dollars have been invested by the medical lobby to promote the premise that the medical establishment cannot competently study the systems within which doctors and health care professionals make errors unless accountability is eliminated for unreasonable failures to adhere to appropriate standards of medical care. The medical lobby argues that doctors and health care workers will not tell the truth about medical errors unless “external accountability systems” are eliminated. Organized and institutional medicine claim “fear of litigation is a strong disincentive for medical professionals to report, discuss and learn from errors.”

Physicians have a duty to first “do no harm.” It has long been a physician’s fiduciary duty to their patients to tell the truth about injury suffered as a result of preventable medical mistakes and to place the interest of the patient before self-serving fears of legal liability. ¹

¹Chervenak, M.D., et al., Responding to the ethical challenges posed by the business tools of managed care in the practices of obstetrics and gynecology, Am. J Ostet, Gynecol., Sept. 1996; Vol. 175,

Broken Promises: Misplaced Trust In “Peer Review”

The medical profession has previously been afforded privileged legal status based upon its assurances that patient safety would be enhanced by granting peer review protection from legal discovery. The Pennsylvania Medical Society has recently acknowledged that Pennsylvania peer review systems are broken because physicians will not police their local colleagues because of local politics. At The ACHE Symposium, at the University of Scranton on April 12, 2003, Pennsylvania Medical Society official, Roger Mecum, cited the failure of Pennsylvania peer review process because of local politics, as a rationale for PMS backed creation of a statewide peer review system in order to enhance patient safety. Former Pennsylvania Medical Society President Ed Dench, M.D., “ said a statewide peer review process in which physicians could refer certain questionable medical mistakes and practices is needed. Local review boards simply pose the ‘type of conflict of interest’ that protects mistake prone, negligent or bad doctors.” Williamsport Sun Gazette, 11/24/03, Reuther, Mike, “Do State Hospital Peer Reviews Really Work for Patient Safety”. A-1. Also, Dr. John Combes, Chief Senior Medical Advisor with the Hospital and Health Association of Pennsylvania has conceded that “peer reviews are perhaps not always as ‘rigorous’ as they should be.”

This unfortunate state of affairs evidences a misplaced trust in a so-called self-policing peer review system as Pennsylvania’s primary healthcare policing mechanism. In exchange for a promise to self police their own, institutional medicine was granted a privilege and protection from discovery from legal process for “peer review committee” activities. This secrecy shields the medical lobby from legitimate liability under the misguided notion that hospitals and the medical societies will police their own. The Pennsylvania Medical Society officials now acknowledge that this promise has been broken. This secrecy and lack of health care transparency further burdens the pursuit of legitimate claims for just compensation because ... “[m]any important events in patient care are not recorded in the medical record.... [M]any adverse events and errors are never recorded in the medical record, either because they are concealed or not recognized.” JAMA, Vol. 284 No. 1, July 5, 2000, Leape, M.D. “Institute of Medicine Medical Error Figures Are Not Exaggerated”.

p. 523-527; (In the English speaking world the concept of medicine as a fiduciary profession was the creation of two physicians in the Eighteenth Century, John Gregory (1724-1773) in Scotland and Thomas Percival (1740-1803) in England.); ACOG Committee on Ethics opinion, entitled “Deception”, Number 87, Nov. 1990 (Insofar as physicians possess greater knowledge about the intricacies of diagnosis and treatment, they have a fiduciary responsibility to patients); Gregory J. Lectures on the duties and qualifications of a physician. London: W. Strahan & T. Cadell, 1772; Percival T., Medical Ethics, or a code of institutes and precepts adapted to the professional conduct of physicians and surgeons. Manchester: S. Russell, 1803. See also AMA Council on Ethical and Judicial Affairs Code of Medical Ethics, 8.12 entitled “Patient Information” (“It is a fundamental ethical requirement that a physician should at all times deal honestly and openly with patients...Concern about legal liability which might result following truthful disclosure should not affect the physician’s honesty with a patient.”) Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d 142, 146 (1962) “We are of the opinion that members of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients.”)

While the medical lobby attacks the legal system, the shifting sands of the positions of organized and institutional medicine implicitly acknowledge that legal liability is an external deterrent that promotes patient safety. The Institute of Medicine concedes that liability in tort “serves a legitimate role in holding people responsible for their actions.” *Id.* It is recognized that liability awards against healthcare providers in part resulted in patient safety standards for anesthesia, the founding of the National Patient Safety Foundation and the creation of the Institute of Medicine Committee. *Id.* Indeed, organized and institutional medicine cite legal liability for defensive medicine. Maybe a little defensive medicine in a system, that is admittedly not functioning properly, is a good thing.

Although the medical lobby frequently claim that fear of litigation has prompted physicians to perform additional tests resulting in higher costs and risks to patients, both the Congressional Budget Office (CBO) and General Accounting Office (GAO) and Office of Technology Assessment have concluded that there is an absence of reliable data to establish the defensive medicine theory. Congressional Budget Office, Cost Estimate for H.R.5, Health Act of 2003, ordered by the House Committee on the Judiciary, submitted March 10, 2003; United States General Accounting Office, Report GAO-03-836, “Medical Malpractice: Implications of Rising Premiums on Access to Health Care,” p. 27, 29-30, August, 2003, 29-30. Available at <http://www.gao.gov/new.items/d0386.pdf>, Office of Technology Assessment, U.S. Congress (OTA, US), “Defensive Medicine and Medical Malpractice” (Washington, D.C., U.S. Government Printing Office, July, 1994, OTA-H-602). Not a single peer reviewed study documenting purely defensive medicine can be found in the medical literature, although innumerable studies document the high incidence of preventable medical errors. See Public Citizen, Congress Watch, March, 2004: The Facts About Medical Malpractice in Pennsylvania, p. 23-25. There is no empirical evidence that establishes that doctors are actually practicing defensive medicine. The high rates of wrong patient/site surgery, medication error rates, hospital infection and mammography errors refute this theory. *Id.*²

“Fee for service” provides a powerful incentive to physicians to over utilize testing. Public Citizen: Congress Watch, March, 2004; The Facts About Medical Malpractice in Pennsylvania, p. 24-25. The medical lobby frequently cites defensive medicine for symptoms of what really is caused by the “fee for services incentive” to over utilize services. The GAO reported that “a Montana hospital association said that revenue-enhancing motives can encourage the utilization of certain types of diagnostic tests....” United States General Accounting Office, Report GAO-03-836, “Medical Malpractice: Implications of Rising Premiums on Access to Health Care,” p. 27, August, 2003. Former Pennsylvania Medical Society president, Dr. Edward Dench, Jr., has been quoted that “Hospitals don’t want anyone to interfere with physicians making money for the hospital.” *Williamsport Sun Gazette*, 11/24/03 “Blanket of Fear”, Reuther, Mike, A-1; “Pa. State, Hospital Peer Review Really Work for Patient Safety” A-1; *Williamsport Sun Gazette*,

²In April, 2004, the United States Justice Department, Bureau of Justice Statistics published a survey of state cases that were decided at trial in 2001, the most recent data available, concluding that: “The number of civil trials held in the nation’s 75 largest counties dropped by 47 percent from 1992 to 2001. In jury trials in which the plaintiff was successful, the median award shrank from \$65,000 in 1992 to \$37,000 in 2001. Winning plaintiffs were awarded punitive damages only 6 percent of the time – with the median punitive damage award only \$50,000.” *Allentown Morning Call*, “Statistics don’t support Bush’s bashing of trial lawyers,” July 13, 2004.

Reuther, Mike, A-1; Blanket of Fear, Williamsport Sun Gazette, 11/24/03 Reuther, Mike, A-1. Site Reveals Problem Physicians, A-1. See also, The Wall Street Journal, "Attacking Rise In Health Costs, Big Company Meets Resistance", Fuhrmans, 7/13/04.

A member of the Pennsylvania Patient Safety Board has stated that strong whistle blower protection is needed ... state lawmakers "are unwilling to take on the powerful hospital lobby..." Furthermore, Dench said in signing contracts with hospitals, "doctors become beholden to their employer, when their first obligation should always be with patients." See Williamsport Sun Gazette, 11/24/03 "Woe to the Honest Doctors Out There", A-1-A-4. "The state Medical Care Accountability and Reduction of Errors Act, passed in 2002, requires health care workers to report incidents to either their hospital's patient safety officer or the Patient Safety Authority. The problem with that law is that it forbids them from taking the problem to an outside authority such as the government. Williamsport Sun Gazette, 11/24/03, "Woe to the "Honest" Doctors out There; Reuther, Mike, A-4.

Dench, who says he was targeted by Centre Community Hospital authorities for coming forward regarding questionable medical practices there, said he believes that doctors continue to have a hard time reporting questionable incidents for fear of reprisal from their employers.

Some hospitals, Dench said or stated, will even contract out for peer review services after authorities learn of something wrong. "It happens more than you think," he said. "Of course, its outrageous." The idea is for the hospital to hand pick the review panel as a means of getting the answers it wants. Id.

The state of peer review in Pennsylvania demonstrates that privilege has been extended to the medical community premised on a pledge to effectively self police their own but that promise has been broken.

Patients' natural and fundamental right to fair compensation for preventable life altering injuries, resulting from the negligence of their caregivers, should not be sacrificed on an altar of broken promises and "fear itself." The fiduciary duty to place the interest of their patients first is now being undermined by the medical lobby's drive for immunity from liability. "Fear itself," letting emotions drive policy, is the only thing we really need to fear.