

## Rules of fair play don't always apply

In going up against hospitals, physicians find the deck is stacked against them

Monday, October 27, 2003

By Steve Twedt, Post-Gazette Staff Writer

Dr. Gil Mileikowsky, an obstetrician-gynecologist and fertility specialist, was abruptly suspended from an Encino, Calif., hospital nearly three years ago after he agreed to testify on behalf of a woman whose fallopian tubes had been removed without her consent.

Today, Mileikowsky, 52, still is waiting to get a full administrative hearing on possible restoration of his credentials. Two earlier hearings ended in disputes over procedural matters. He hasn't delivered a baby since December 2000.

Dr. David Gearhart was fired in 1998 for breach of contract, one month after he appeared on a St. Louis television program and criticized his hospital's decision to eliminate eight nurse surgical assistants.

Gearhart, 58, was dismissed even though his department chairman had approved his TV appearance. Hospital officials then damaged his practice further by not giving patients his new phone number, delaying payments owed to him and turning over unpaid patient bills to a collection agency.

A troubling thread connects the stories of these two physicians and dozens of others in recent years. When these doctors have run afoul of hospital administrators, they've found that the traditional guarantees of due process or even fair play do not necessarily apply.

During the past 10 months, the Pittsburgh Post-Gazette has interviewed many physicians who say they've faced vague or fabricated allegations, sometimes from unnamed staff members, of incompetence or "disruptive behavior." The doctors say their real offense was speaking up too often, or perhaps too loudly, on behalf of patients.

But instead of a timely opportunity to defend themselves, these doctors found themselves out on the street, like Gearhart, or, like Mileikowsky, waiting months to get a hearing before a hospital-appointed panel or officer.

The hearings were held behind closed doors, and often, the doctors did not have an opportunity to confront their accusers or have their attorneys present. And if the doctors felt they were wronged, the hospital representatives had broad protections under federal law that made it difficult for the doctors to win any lawsuits.

When it comes to hospital peer review panels, "there's no state agency that supervises them. It's a free-for-all fight. You have a judge who's favorable to the hospital. You have a jury who's favorable to the hospital. You



John Beale/Post-Gazette

**From his office in Pittsburgh's Oakland section, attorney John Horthy represents hospitals around the United states in cases involving physicians."The courts tend to defer to the hospital because most courts just don't want to take the responsibility of what might happen in the institution," he said.**

can guess what the verdict will be," said Dr. Verner Waite, of Cypress, Calif.

### **Doctors lose power**

Waite, now retired, used the \$550,000 he won in a lawsuit in 1984 for being wrongly punished by a hospital review panel to found the Semmelweis Society, named for a 19th century Viennese physician who faced severe reprisals after suggesting that doctors' handwashing could reduce fatal infections among new mothers. The society has one aim -- to stop unfair peer review of doctors. It has more than 2,000 members, and Waite estimated that he receives about 25 new calls a year from physicians facing peer review.

Another group, The Center for Peer Review Justice, based in Louisiana, offers consulting and other services to physicians who believe they've been subjected to unfair reviews.

The existence of these groups says a lot about the changes that have taken place in American medicine.

It used to be that doctors were the major force in hospitals, said John Blum, of Loyola University of Chicago, who has done extensive research on the hospital-physician relationship.

At one time, Blum said, hospitals operated almost as hotels, providing a place for doctors to treat patients and making sure there were enough medications, equipment, linens, food and other supplies.

"The whole notion, when you look at the origin of American hospitals, has been one of the ... self-governance of the medical staff and the feeling that it was responsible for the quality of medical care," he said.

But once courts began holding hospitals legally responsible for the care provided inside their walls, the shift of power began.

"That expanded the inroad of administration into medical practice. Compounded with market changes, it has really eroded the power of the medical staff and reduced the professional independence of physicians," Blum said. "Now they're like engineers working for large companies."

As their influence and standing have diminished, so has their ability to advocate for patients, many doctors say.

"What people don't understand is that now no one will ever be able to publicly say there's a problem," said Dr. Scott Plantz, an emergency medicine specialist who once surveyed more than 400 colleagues and found that 23 percent had either lost a job, or had their job threatened, after they raised patient care concerns.

"There are not a lot of venues for physicians to come out and speak," added Dr. Mark Murfin who, with a colleague, faced accusations of being disruptive after they went public about their Illinois hospital's uneven quality of care.

Physicians "have fewer rights than almost anyone in a judicial proceeding. Physicians can lose their license based on very little proof, and with inadequate due process," said Andy Schlafly, legal counsel for the American Association of Physicians and Surgeons.

Schlafly's organization has called for changes to ensure doctors can fairly defend themselves, including the right to a public hearing, the right to question their accusers and requiring that hospitals meet a "clear and convincing" burden of proof rather than the more common "preponderance of evidence."

### **Hospital protections**

The practice of having doctors review the actions of their colleagues has been around for a long time.

But the Health Care Quality Improvement Act of 1986 made a subtle but important change in that process by giving broad legal immunity to hospitals and panels reviewing physicians' performance.

Ironically, that protection was added partly because of a doctor who believed he had been mistreated by a hospital.

Pittsburgh lawyer John Harty, who is nationally known for his work on hospital legal issues, said the immunity provision in the health care act came out of discussions he'd had with former U.S. Rep. Ron Wyden, D-Ore., and later Rep. Henry Waxman, D-Calif., because of lawsuits such as the one brought by Oregon physician Dr. Timothy Patrick to overturn an unfavorable peer review ruling.

Not long after Patrick moved to Astoria, Ore., he declined an offer to join a private clinic and set up his own practice. A short time later, the clinic doctors reported Patrick to the state medical board for an alleged act of poor care. Then, in their roles with the hospital's peer review committee, they tried to revoke his admitting privileges to the only local hospital.

Patrick sued, citing antitrust violations, and a jury awarded him \$2.2 million in damages. The U.S. Court of Appeals reversed that, saying peer review had civil immunity from lawsuits because it was a "state action." But the Supreme Court unanimously backed Patrick, noting the state did not supervise hospital peer review.

Faced with the specter of large numbers of peer review rulings being challenged, and physicians refusing to serve on panels for fear of being sued, the Health Care Quality Improvement Act granted peer review panels immunity as long as they acted "in the reasonable belief that the action was in the furtherance of quality health care."

Harty co-authored that section of the law and he remembers taking extra care to include protections for physicians, to improve its chances of being passed. When Oregon's Wyden introduced the bill, he trumpeted it as legal protection "for doctors who 'blow the whistle' to peer review bodies on colleagues they believe are delivering substandard care."

Now, physicians say, the law is sometimes used against whistleblowers whom hospitals want to silence, and the immunity provisions most of the time protect the hospitals in any later legal action.

### **A rare victory**

A rare exception occurred two years ago, when psychiatrist Kenneth Clark of Reno, Nev., persuaded a court to overturn a peer review finding that had stripped him of privileges because he was disruptive. Clark had offended his hospital by reporting poor patient care to outside agencies. The hospital argued that it had immunity under the federal law, but the Nevada Supreme Court disagreed.

"To punish a physician for reporting potentially dangerous practices ... cannot logically be construed to be an action that one believes [is] in furtherance of quality health care," the court ruled.

But most physicians who challenge the peer review process in court don't win.

"The courts tend to defer to the hospital because most courts just don't want to take the responsibility of what might happen in the institution," Harty said.

And while the law also refers to adequate notice of a hearing, providing an accused doctor with a list of witnesses and giving the doctor a right to question his accusers, those are suggested standards, not requirements.

Encino physician Mileikowsky, for example, asked for a meeting with the medical executive committee after his suspension. He said the committee kept him outside the hearing room for an hour while it discussed charges that he had "exhibited a pattern of disruptive, threatening and noncooperative behavior." Finally allowed in, he had 30 minutes to rebut accusations he was hearing for the first time.

"The deck is stacked against the physician in so many ways," said Paul Gluck, of the University of Miami School of Medicine, who has researched hospital peer review. "The hospital holds most of the cards because, as a doctor, you've got to make a living, whereas the hospital is going to keep doing business."

Some states, including Pennsylvania, have separate laws that give a physician the right to sue if he can show that a negative peer review was motivated by malicious intent. But the burden of proof is on the doctor, and even those physicians who prevail in court can spend years of their professional lives and hundreds of thousands of dollars trying to get their credentials back.

That's why many who have witnessed the fallout say fighting for patients may be the right thing for physicians to do, but not the wise thing.

If hospitals accuse doctors of causing problems, "it's better for them to say, 'fine' and leave. That's what I advise them," said Plantz, the emergency medicine specialist.

"If the doctor tries to fight, they're fighting a multimillion-dollar operation against their little dinky business. I've seen 20 doctors fight this, and they've all gone bankrupt."

---

[Return to "The Cost of Courage:" Day Two](#)

---

(Steve Twedt can be reached at [stwedt@post-gazette.com](mailto:stwedt@post-gazette.com) or 412-263-1963.)

[Back](#)

---

Copyright ©1997-2002 PG Publishing Co., Inc. All Rights Reserved.