How Law Ignores Medicine

By: Lee S. Goldsmith

A recent headline in these pages reported a Supreme Court decision as "Curtailing the Right to Counsel: Hospital Resident Can Be Fired Without a Lawyer, Poritz Court Rules." **This decision follows a long line of cases in which this Court and others have avoided entering into the internal decision making process of hospitals as it relates to physicians. It is a line of cases that is easily understood as a lawyer but unfathomable as a physician.**

As a lawyer reviewing the Supreme Court decisions in Garrow v. Elizabeth General Hospital or now in Hernandez v. Overlook Hospital it is clear that the courts want the medical community to resolve their own problems. **The courts are willing to look into the procedural due process aspects of a case but not the substantive due process portions of the same case**. This selective attention makes the process much easier but not necessarily fair to physician litigants. In a medical malpractice action the entire judicial process is outside of the control of physicians and hospitals. Clearly there is a great deal of suspicion as to the abilities of any given patient to receive a fair review of his or her complaints by the medical community. Melvin Belli in his 1946 article complained of the "Conspiracy of Silence" and how it was hard to get physicians to testify as to the errors of their colleagues.

Indeed, there was and still is a stigma placed upon the physician who testifies against colleagues in malpractice cases. However, the patient can seek out the assistance of an attorney, the attorney can do discovery, present the facts before an impartial jury and obtain a decision. The court and jury will hear both sides of the case.

This process does not apply to the internal squabbles within a hospital. However, the situation of the attending physician or resident may be no different from the patient wanting to bring a malpractice action.

The resident has obtained the hospital position based on an application that had been made, recommendations that had been received, an interview that had been conducted and a contract that had been signed. That employment contract is not negotiable. It is given to the resident for signature. If the resident does not like the contract, the hours that are required, the living conditions that are offered, there is only one alternative: reject the position. However, residency positions are being reduced and therefore more in demand. Once the position is taken there is no opportunity for complaint, and indeed, the complaining resident is considered

to be a troublemaker. The resident is evaluated both subjectively and objectively. Physical abuse in the form of excessive hours and demands is common. Such demands affect the individual's performance on the job, ability to study for in service examinations and perform in standardized situations.

The New York case of Zion v. New York Hospital is an excellent example. Here two residents who were on duty for more than 36 hours were called in to care for a patient. They were fatigued, their decision-making abilities were impaired and their care of the patient was negligent. The actions of the residents led to reformation of resident work rules limiting the number of hours that the individuals could be forced to work without relief and rest. While those restrictive regulations are in effect in New York they have not been adopted in other states, other residents can and do find themselves in similar compromising situations.

Manipulating Conditions

Any resident can be set up to fail. If an in service examination is given after the individual has been on duty for 48 hours or has had two days off, the results will be affected. If other residents know that the director of the residency program is displeased with the individual, that the director wants that individual out of the program, their evaluations will affected. There is the clear opportunity for internal politics and the application of inappropriate pressure. Many specialty boards have dropped the oral portions of the examination because of the abuses involved.

That so few residents are discharged from programs across the country may be an indication of the small number of problem cases. However, improper pressure exists and current case law will not allow it to be exposed.

As the young resident is completing the residency program consideration will be given as to where a practice will be located. There is always going to be crowding and economic competition. Crowding has never bothered physicians but there is a fierce amount of competition for patients which has been accentuated in this time of managed health care and decreased payment for services. In many university medical centers a physician must have an appointment to the medical school as a prerequisite to joining the university hospital staff. An unwanted applicant simply will not be given a medical school appointment and is eliminated.

An applicant to a community hospital staff is treated differently. At times the application for staff appointment is not sent. This omission is meant to let the resident know that he or she is not wanted. If the resident does not take the hint, there will be a meeting with the department chairman, who will bluntly tell the individual that the application will not be reviewed favorably. Most physicians will take the "advice" and not apply but a few will still apply. They know that if they are not admitted to the staff that this fact will be reported to the National

Practitioner Data Bank and to the State Board of Medical Examiners and will have to be on each and every application thereafter made to any hospital or licensing board any where in the United States. Those that do apply and are admitted know that they will then be under the "extra scrutiny" of the chairman who may look for any excuse to harm the individual's practice.

Powerful Chairmen

Every physician is going to have problem cases. Some of them are inexcusable and would constitute malpractice using anyone's lexicon. Others, and these constitute the majority, will fall into the grey area. If the chairman wants to find faults with an individual these grey area cases may take on new life, provide reason for morbidity and mortality conferences and subsequent action before internal peer review bodies. All physicians are not handled equally and all cases are not reviewed equally. A death resulting from negligent care by the chairman of the department will never be reviewed but the same death caused by a competitor will be microscopically examined.

In one Long Island hospital a new chairman of the Division of Cardiac Surgery was hired. He was given a large salary which had to be justified. The surgeon had to have cases. The full time cardiologists were told not to refer cases to the other non-full-time cardiac surgeons. The other cardiac surgeons were then individually brought up on charges of professional incompetence. They knew if they had a problem case, it would be reviewed and that steps would be taken to reduce or remove their privileges. One by one the other surgeons were eliminated from the staff and the chairman hired an associate.

Competency charges are brought by the chairman of the department. The chairman will appoint an ad hoc committee to review the charges and hold the hearing. At times the selection may be indirect, in that the names come from the medical executive committee but it is usually done with the approval of the relevant chairman. It is the equivalent of one side picking the jury in a civil action without the knowledge of the opposing side. The individuals selected know that at a later point in time that their chairman will be reviewing their cases.

On the surface the affected physician is receiving due process -- procedural due process. There will be a review of the cases before an ad hoc committee. The decision of that committee can be appealed to the medical executive committee and ultimately there will be a review by the board of trustees of the hospital. There is the required hearing and an appeal process. <u>Procedural</u> due process is supplied.

Due Process?

In an Arkansas case the original complainant was the hospital's pathologist. The medical executive committee convened a committee which found that the surgeon's actions were inappropriate in 53 of 56 cases. After the decision, which was totally unexpected, the chairman of the department of surgery convened a new committee for his colleague, which found that 53 of the 56 cases constituted appropriate care. The second decision was reviewed by the medical executive committee which included departmental chairmen and the hospital pathologist was fired. The internal process can be structured to produce any desired result.

The department chairmen all sit on the Medical Executive Committee. They work together setting hospital policy and support each other within the hospital. When it comes to personnel within individual departments, there is usually a tacit agreement that each individual chairman can have those physicians within the department that he or she desires. There is to be no interference. Therefore when the report of the ad hoc committee comes to the Medical Executive Committee the likelihood of reversal is usually nil. The decision of the Medical Executive Committee is then sent onto the Board of Trustees which generally does not like to interfere with the internal decisions.

As economic pressures increase, there will be more attacks on physicians in the name of competence. As economic centers are identified independent practitioners will be forced to become employees or eliminated. At one point in time most anesthesiologists and radiologists were independent practitioners receiving fee-for-service income. Those practitioners have been discharged and replaced with employees, which has resulted in increased incomes for hospitals. Independent oncology and ophthalmological practices are being sold and have become corporate centers.

The judicial avoidance of reviewing **substantive** due process issues, while fairly standard, is problematic. A resident who is discharged from a residency program has not just lost a position. An attending physician dismissed from a hospital staff has not just lost a staff position. Both physicians have probably lost professional careers.

The author, an attorney and medical doctor, is a partner with Goldsmith Richman & Harz in Englewood. His Health Care Law column appears monthly in the Law Journal.