

## Coppersmith Briefs

# NEW PEER REVIEW DECISIONS CONFIRM BASIC PRINCIPLES AND ANSWER SOME QUESTIONS

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In two related cases before the Arizona Court of Appeals, the Court affirmed important Arizona peer review principles and answered some outstanding questions in this area of law. The predicate for both cases (and a third case, discussed at the end) was the decision of a hospital governing board to revoke the medical staff membership and privileges of a cardiologist (“Physician”) based on patient care issues, disruptive behavior, and alteration of medical records.

- *Sharifi Takieh v. O’Meara*, 252 Ariz. 51 (App. Aug. 10, 2021) (pet. for Arizona Supreme Court review denied Apr. 7, 2022) (“*Takieh*”) was the first published Arizona Court of Appeals decision addressing substantive peer review issues since 2005. The Opinion affirmed the prohibition on discovery of peer review documents and made clear that hospitals cannot be required to prepare privilege logs in connection with claims of peer review confidentiality.
- In *Sharifi v. Banner Health*, 1 CA-CV 20-1001 (Ariz. App. May 13, 2021), 21 WL 1921831 (“*Sharifi*”), a non-published memorandum decision arising from the same peer review proceeding, the Court affirmed that a Physician challenging a hospital peer review decision must bring a statutory claim and may not file a contract action. The Court also made clear that a hearing officer may limit the length of a peer review hearing even without express direction in the fair hearing plan.

Coppersmith Brockelman represented the hospital and hospital-employed defendants in all three cases.

### The *Sharifi* Memorandum Decision

In *Sharifi*, the trial court conducted judicial review of the hospital board’s revocation decision under A.R.S. § 36-445.02. The Court of Appeals upheld the trial court’s ruling affirming the hospital board’s revocation of the Physician’s medical staff membership and privileges. Relying on A.R.S. § 36-445.02, *Hourani v. Benson Hospital*, 211 Ariz. 427, 122 P. 3d 6 (App 2005), and other prior Arizona decisions, the Court noted the

importance of peer review immunity and articulated the standard of review as review of “peer review proceedings for both procedural and substantive errors [employing] a deferential standard of review.”

The appellant Physician contended that there were numerous procedural defects in the in-hospital peer review proceedings. Citing the statute, the Court limited its review of these challenges to the administrative record to determine whether the hospital substantially complied with its Bylaws. In perhaps the most important procedural issue, the Physician challenged the hearing officer’s imposition of a time limit on the hearing. The Court upheld the time limit, noting that the hearing panel members said they felt they had enough information and that any timing problem was “entirely of [the Physician’s] own making.” The Court saw “no evidence that the time allotted was insufficient or resulted in prejudice.”

The Physician also challenged the revocation decision on the merits. The Court agreed with the trial court that it should not substitute its own judgment for the hospital board’s “where expertise is involved,” and upheld the hospital board’s substantive decision,

The Court made short work of the Physician’s separate contract claim. Acknowledging that the medical staff bylaws create a contract with staff, the Court said the statute barred any claims other than a claim for injunctive relief based on the record.

Finally, the Physician contended that he was entitled to a new trial based on declarations he belatedly presented to the trial court – declarations which alleged bias based on race and religion. The Court explained that the Physician needed to “cite to evidence in the record making it affirmatively probable the alleged bias or misconduct changed the outcome of the administrative proceeding.” The Court rejected the Physician’s claim, noting not only that the declarations were late and not in the record, but also that they failed to prove any actual bias.

While *Sharifi* is an unpublished memorandum, it still provides insight into the Court’s view of peer review principles and confirms some critical standards. And while memorandum decisions are not precedential, Arizona Supreme Court Rule 111(c) allows citation of memorandum decisions to in certain circumstances: to establish claim preclusion, issue preclusion, or law of the case; to assist the appellate court in deciding whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review; or for persuasive value if the memorandum was issued on or after January 1, 2015, no opinion adequately addresses the issue before the Court, and the citation is not to a de-published opinion or portion of an opinion.

### **Takieh Opinion**

The Physician also filed a separate state court lawsuit alleging that the Chief of Staff, another cardiologist and cardiology group, the hospital’s chief medical officer, and the hospital’s in-house attorney all had made

defamatory statements about him. The trial court dismissed all but one cardiologist and the in-house attorney from the case, largely because the dismissed defendants' actions and statements were made during peer review proceedings. The Physician did not challenge those dismissals.

However, in an amended complaint, the Physician alleged the following instances of defamation by the remaining defendants:

- That the remaining defendant cardiologist had told another cardiologist the Physician was “an idiot” who had “administered blood thinner ‘to an obvious case of intracerebral hemorrhage.’”
- That the in-house attorney had composed letters and other communications containing false information designed to destroy the Physician’s reputation.

The Physician moved to compel the in-house attorney to disclose several categories of her own correspondence related to the peer review proceedings. The trial court refused to order a privilege log for peer review protected documents.

On the other hand, the trial court did order the in-house attorney to produce a log of her correspondence outside the peer review process. The in-house counsel submitted no log, explaining that all her communications in the matter were protected peer review materials. At this point, after the close of discovery, the Physician for the first time submitted affidavits from two former hospital employees (quite similar to the ones produced in the *Sharifi* case). In one of them, the affiant alleged she had heard the in-house attorney make disparaging remarks about the Physician (that he was a terrible doctor, an idiot, a danger to patients.) The other affiant alleged that she had heard other physicians say the in-house attorney had encouraged them to make false statements about the Physician at the hearing. The in-house attorney moved to strike the affidavits as untimely, and the trial court agreed.

The trial court held on summary judgment that there was no dispute the Physician had administered blood thinners to a patient with a cerebral hemorrhage, and the other cardiologist’s alleged “idiot” statement was opinion and thus not actionable. The trial court further held that the Physician had failed to produce any admissible evidence showing the in-house attorney had made “any comments about him, defamatory or otherwise,” outside the peer review process.

The Court of Appeals affirmed both rulings. With respect to the cardiologist’s alleged comments, the Court agreed with the trial court that the “idiot” statement was opinion, and the record “lacked clear and convincing evidence that a reasonable listener could have understood [the cardiologist’s] ‘obvious’ statement as conveying an objective fact.” Regarding the defamation claim against the in-house attorney, the Court of Appeals affirmed the trial court’s decision refusing to order production of a privilege log for peer review privileged correspondence. The Court cited the “overriding public interest in peer-review proceedings” and the need for

confidentiality to ensure candid peer review. The Court also agreed that the affidavits were not admissible evidence based on the Arizona discovery rules.

Ultimately, the Court affirmed the trial court's conclusion that the Physician's claim against the in-house attorney was groundless and pursued in bad faith. Importantly, the in-house attorney was awarded attorney fees in both the trial court and appellate court.

Interestingly, in the two state court lawsuits arising from the peer review proceeding described in these cases, there were no depositions, no written discovery and no document production. Judicial review of the in-hospital administrative proceedings was limited to a review of the record, as set forth in the statute. While no one can prevent disgruntled physicians from naming individuals in lawsuits arising from peer review, the two cases are reassuring that Arizona law provides strong protection of the integrity of the peer review process.

#### **Postscript: The Federal Court Case**

In addition to the two state court actions discussed above, the Physician filed a complaint in federal court alleging under 42 U.S.C. § 1981 that the hospital system and multiple individuals discriminated against the Physician based on his race in terminating his physician services agreement (PSA). *Takieh v. Banner Health*, 515 F. Supp. 3d 1026 (D. Ariz. 2021), *aff'd* No. 21-15326 (9th Cir. Feb. 16, 2022), 2022 WL 474170. The District Court dismissed the case in an unpublished Order, finding that the Physician himself had alleged numerous non-discriminatory reasons for the termination of the PSA, and taking into account the trial court's decision in *Sharifi*. The District Court refused to allow the Physician to amend his pleading, holding in part based on the *Sharifi* trial court decision that amendment would be futile. The Ninth Circuit Court of Appeals affirmed the District Court's decision and reliance on *Sharifi* because it was relevant and provided non-discriminatory reasons for the PSA termination.

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