

## Affirming science and peer-review publishing

The March 15, 2007, issue of *AJHP* included an article that compared the performance of five devices used in the compounding of sterile products.<sup>1</sup> The manufacturer of one of the devices brought suit against ASHP (the publisher of *AJHP*) and the authors of the paper, claiming that it was defamed through the criticism and test results published in the article.

Sworn depositions were required of the *Journal's* editor in chief and the senior editor, who had managed the submitted manuscript. Among other items of evidence demanded by the plaintiff were the peer reviewers' comments, names, credentials, experience, and all communications between the corresponding editor and the authors. *AJHP* chose to submit reviewers' comments because they were directly relevant as evidence that *AJHP* editors had no reason to think that the manuscript included falsities or reckless disregard for the truth. This defamation case was fundamentally different from a recent drug product liability case in which reviewers' comments were successfully withheld from evidence because the court considered them irrelevant to the adverse effects of a specific drug.<sup>2</sup> To protect the reviewers, *AJHP* redacted their comments to remove everything that could reveal their identities before surrendering the reviews as evidence.

On March 26, 2009, the *Journal's* and authors' motions to dismiss all claims were granted in favor of the *Journal* and the authors.<sup>3</sup> The federal court ruled that there was no actual malice and thus no basis for the suit: There was neither "knowledge of actual falsity, nor reckless indifference to truth or falsity." An Indiana statute, which applied in this case, provides special protection from civil liability for people who exercise their federal and state constitutional rights to free speech. The "teeth" in the statute is that it requires the court to award attorney fees and costs to the defendant if it prevails.

Within the scientific community, including the publishers who make researchers' findings public, the decision in this case is profound at several levels. First, it upholds the rights of scientists to state that they found product A superior to—or at least substantially different from—product B without fear of retribution from the makers of product B. Imagine the state

of scientific exploration if researchers felt constrained from publicly reporting such differences.

For publishers, the decision defends the sanctity of the time-honored peer-review process in helping decide what merits publication. In this case, four expert reviewers independently advised the *Journal's* editors that publishing the findings would be important in helping ensure patient safety. Throughout the case, there was concern that the expert reviewers would be drawn into the fray. It was their opinions, after all, that strongly influenced the editors to publish the paper. Reviewers were not named as defendants, and their names were removed from all documents provided to the plaintiff by *AJHP*, but if the case had been decided in favor of the plaintiff, it is easy to imagine that reviewers could have faced some legal action by the plaintiff. If that had happened, the foundation of peer-reviewed publications would have been damaged irreparably. What expert would dare praise an article that expressed the opinion that product B appeared to be inferior to product A, if he or she could imagine a lawsuit subsequent to conveying this assessment to journal editors? Hardly anyone would accept an invitation to review; the risk would outweigh the concern for scientific validity.

The judgment noted that "if ASHP honestly thought that the authors' process was appropriate and that the authors honestly interpreted those results to show that [the plaintiff's] device is inferior, then stating those 'opinions' is not defamation." The correct remedy was not an award of damages but rather the plaintiff's submission of a rebuttal to the *Journal* for publication consideration. To date, no such rebuttal has been submitted. In the court's language, "a suit for defamation merely chills attempts at open scientific debate." From a publisher's perspective, one of the most rewarding opinions of the court was stated just before the conclusion: "Quite simply, this battle should take place in the pages of the ASHP journal and similar publications, not in a court." This view upholds the societal value of peer-reviewed scientific journals.

1. Peters GF, McKeon MR, Weiss WT. Potential for airborne contamination in turbulent- and unidirectional-airflow compounding aseptic isolators. *Am J Health-Syst Pharm.* 2007; 64:622-31.
2. Curfman GD, Morrissey S, Annas GJ et al. Peer review in the balance. *N Engl J Med.* 2008; 358:2276-7. Editorial.
3. 2009 U.S. Dist. LEXIS 25421.

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