

State of Arkansas
91st General Assembly
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As Engrossed: S3/20/17
A Bill

SENATE BILL 611

By: Senator Bledsoe

For An Act To Be Entitled

*AN ACT TO AMEND THE ARKANSAS PEER REVIEW FAIRNESS ACT
TO PROVIDE CLARITY ON WHEN AN INVESTIGATION BEGINS,
TO ESTABLISH STANDARDS FOR EXTERNAL REVIEWS, TO
PROVIDE FOR UNBIASED PEER REVIEW HEARING PANELS, AND
TO CLARIFY LEGAL REMEDIES; TO DECLARE AN EMERGENCY;
AND FOR OTHER PURPOSES.*

Subtitle

*TO AMEND THE ARKANSAS PEER REVIEW
FAIRNESS ACT; AND TO DECLARE AN
EMERGENCY.*

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code §§ 20-9-1302 – 20-9-1304 are amended to read as follows:

20-9-1302. Findings and intent.

(a) The General Assembly finds that:

(1) The peer review process is well established as ~~the most important and effective~~ an acceptable means of monitoring quality and improving care within an institution;

(2)(A) ~~Peer review is essential to preserving the highest standards of medical practice~~ The peer review process faces unique challenges in the hospital setting compared to other healthcare settings due to the interdependent relationship between the hospital and medical staff, which can impact professional review activities.

(B) ~~However, peer~~ Peer review that is not conducted fairly



results in harm to both patients and physicians by limiting access to care and patient choice; and

(3) It is necessary to balance carefully the rights of patients who benefit by properly conducted peer review with the rights of those who may be harmed by improper peer review.

(b) The General Assembly intends that peer review be conducted fairly for the benefit of the citizens of the State of Arkansas.

20-9-1303. Definitions.

As used in this subchapter:

(1) "Adversely affect", when used in reference to clinical privileges or medical staff membership, means deny, reduce, restrict, suspend, revoke, or fail to renew;

(2) ~~"Governing body" means a hospital's board of directors, board of trustees, or other body, or duly authorized subcommittee thereof, which has authority to take final action regarding a professional review action~~ "Conflict of interest" means a personal or financial interest that would lead an objective person to conclude that it would be difficult for the person in those circumstances to make a fair and impartial decision in a professional review activity with regard to a particular physician;

(3) "Hospital" means a ~~health care~~ healthcare facility licensed as a hospital by the Division of Health Facilities Services under § 20-9-213;

(4)(A) "Investigation" means a process conducted by a professional review body to:

~~(i) obtain facts related to a concern or complaint about a physician in order~~ Obtain and make a detailed examination of the facts related to an identified concern about a specific physician; and

~~(ii) Determine to determine~~ whether a professional review action should be requested or recommended.

(B) "Investigation" does not include the following:

(i) A preliminary review to obtain basic information related to a concern or complaint about a physician in order to determine whether an investigation should commence;

(ii) Routine quality assurance, case review, utilization review, and performance improvement activities that take place within a hospital; or

(iii) Collegial interventions, ongoing physician practice evaluations and focused physician practice evaluations, and other peer-to-peer performance improvement interventions that are not intended to, and do not, impact a physician's clinical privileges or hospital medical staff membership;

(5) "Medical staff" means the physicians ~~and other licensed practitioners~~ who are approved and given privileges to provide health care to patients in the hospital;

(6) "Professional review action" means an action or recommendation of a professional review body that is taken or made in the conduct of professional review activity and that:

(A) Is based on an individual physician's competence or professional conduct that adversely affects or could adversely affect the health or welfare of a patient or patients; and

(B) Adversely affects or may adversely affect the ~~hospital membership~~ medical staff membership or clinical privileges of the physician;

(7)(A) "Professional review activity" means an activity with respect to an individual physician:

(i) To determine whether the physician may have clinical privileges at a hospital or membership ~~in~~ on the hospital's medical staff;

(ii) To determine the scope or conditions of ~~such~~ clinical privileges or medical staff membership; or

(iii) To change or modify such clinical privileges or medical staff membership.

(B) "Professional review activity" includes an investigation, as defined in this section; and

(8)~~(A)~~ "Professional review body" means a hospital, its governing body, or its medical staff when any of these bodies are conducting a professional review activity.

~~(B) "Professional review body" includes, without limitation, a peer review committee of a hospital as defined by § 20-9-501, and any committee or subcommittee or third party contractor of the hospital, medical staff, or governing board, when performing or assisting in the performance of a professional review activity.~~

20-9-1304. Standards for professional review actions and professional review activities.

(a) Professional review activity shall be conducted and professional review actions shall be taken in compliance with the requirements of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 et seq., and the additional requirements of this subchapter.

~~(b)(1) A physician shall be notified promptly when he or she is referred for an investigation for a possible professional review action.~~

~~(2) A physician has an absolute right to seek legal representation and engage an attorney to advise and assist the physician concerning any phase of a professional review activity.~~

~~(c)(1)(A) If at any stage of a professional review activity, an attorney is participating on behalf of a peer review body, then the physician under review also shall be permitted to have independent legal counsel participating in the peer review activity.~~

~~(B) This provision does not entitle the physician's attorney to appear at any proceeding where an attorney participating on behalf of the peer review body is not present, except as provided in subdivision (g)(1) of this section.~~

~~(2)(A) If the attorney representing or advising a professional review body is employed by the hospital or from a firm regularly utilized by the hospital, the physician may request that the peer review body use an attorney not employed by the hospital or from a firm regularly utilized by the hospital.~~

~~(B) If the peer review body declines to do so, and if review is had under § 20-9-1307, the court shall consider the impact of this decision, if any, in determining whether to grant equitable relief.~~

~~(d) The hospital shall provide all relevant information to the professional review body and the physician, whether inculpatory or exculpatory to the hospital or physician.~~

~~(e) During an investigation, the physician under review shall be given the opportunity to discuss the case with the individual or individuals conducting a professional review activity prior to any recommendation or decision that adversely affects, or may affect, the physician.~~

~~(f) A physician who is the subject of a proposed professional review action shall be given notice of the proposed professional review action, the~~

~~basis for the proposed professional review action, and the right to a hearing.~~

~~(g)(1) If a hearing is held in connection with a professional review action, the physician who is the subject of the professional review action has the right to:~~

~~(A) Be present and present evidence on his or her own behalf; and~~

~~(B) Be represented by an attorney or another individual of the physician's choice at the hearing.~~

~~(2) If the professional review body uses a hearing officer or arbitrator for a proceeding related to a professional review action, the individual serving in this role shall be independent and shall not be employed by the hospital or from a firm that regularly represents either the hospital or the physician who is under review.~~

~~(h) If a professional review body determines that it is appropriate under the circumstances, the professional review body may:~~

~~(1) Engage independent legal counsel to review a professional review action before a final recommendation is made or final professional review action is taken; or~~

~~(2) Engage an independent and qualified third party to assist with conducting all or part of the professional review activity.~~

~~(i) A physician under review shall be afforded a reasonable opportunity to challenge the impartiality of a hearing officer, arbitrator, or member of a hearing panel for a professional review action.~~

(b)(1) If at any meeting or hearing held in the course of a professional review activity, an attorney is participating on behalf of a professional review body and the physician under review is present, then the physician under review shall be permitted to have the attorney of the physician present.

(2) Subdivision (b)(1) of this section does not:

(A) Entitle the attorney of the physician to appear at any meeting or hearing where an attorney participating on behalf of the peer review body is not present, except as provided in § 20-9-1310;

(B) Prohibit confidential attorney-client communications by any party; or

(C) Prohibit a professional review body from meeting in

private with its attorney.

(c) The General Assembly encourages:

(1) Professional review bodies to use separate legal counsel from the legal counsel used by the hospital; and

(2) Medical staff to obtain independent legal counsel to review medical staff bylaws to ensure that the bylaws contain provisions that comply with this subchapter.

(d)(1) A physician engaged in professional review activities shall exercise unbiased, independent, and professional judgment when evaluating another physician.

(2) A hospital shall not take action against or otherwise retaliate against a physician for exercising unbiased, independent, and professional judgment when evaluating another physician during the course of a professional review activity.

SECTION 2. Arkansas Code § 20-9-1305 is repealed.

~~20-9-1305. Medical staff bylaws.~~

~~The General Assembly encourages medical staffs to obtain independent counsel to review medical staff bylaws to ensure that they contain provisions that comply with this subchapter.~~

SECTION 3. Arkansas Code § 20-9-1306(c)(2), concerning suspensions within the Arkansas Peer Review Fairness Act, is amended to read as follows:

(2) The professional review body shall follow the notice parties shall comply with § 20-9-1309 and all other applicable provision of this subchapter; and

SECTION 4. Arkansas Code § 20-9-1307 is repealed.

~~20-9-1307. Actions for equitable relief permitted.~~

~~(a) A physician may seek an injunction or other equitable relief to correct an erroneous decision or procedure under this subchapter. The review shall be limited to a review of the record.~~

~~(b)(1) If a physician prevails under subsection (a) of this section, the physician shall be entitled to reasonable attorney's fees and costs as determined by the court.~~

~~(2) A defendant who prevails shall be entitled to reasonable~~

~~attorney's fees and costs as determined by the court to the extent permitted under the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11113.~~

~~(c) Except as otherwise expressly permitted by law:~~

~~(1) No professional review body or any of its members, agents, or employees shall be subject to liability for civil damages as a result of making a decision or recommendation in good faith and without malice in connection with a professional review activity or professional review action; and~~

~~(2) No individual or entity shall be subject to liability for civil damages as a result of acting in good faith and without malice in furnishing any records, information, or assistance to a professional review body in connection with a professional review activity.~~

SECTION 5. Arkansas Code § 20-9-1308 is amended to read as follows:

20-9-1308. Relationship to other laws and regulations.

(a)(1) ~~All~~ Except as provided to subsection (b) of this section, professional review activities are proceedings and records related to a professional review activity, including all meetings, interviews, reports, statements, minutes, memoranda, notes, investigative compilations and the contents thereof, and all other information and materials relating to professional review activities shall be confidential and are included within the categories of records and proceedings that are exempt from discovery and disclosure pursuant to under state law, including without limitation § 16-46-105(a)(1) and § 20-9-503.

(2) ~~Nothing in this subchapter shall~~ This subchapter does not affect the admissibility in evidence in any action or proceeding of the medical records of any patient.

(b) ~~Nothing in this subchapter shall be construed to~~ This subchapter does not:

(1) Abrogate the immunity abrogate the immunities or confidentiality provisions of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 et seq., or the confidentiality or immunity provisions of § 16-46-105, § 17-1-102, or § 20-9-501 et seq.; or

(2) Prevent discovery and admissibility of evidence from the professional review activities if the legal action is brought by a physician who has been subjected to the professional review activity or action.

SECTION 6. Arkansas Code Title 20, Chapter 9, Subchapter 13, is amended to add additional sections to read as follows:

20-9-1309. Standards for investigations.

(a) A physician shall be informed in writing within five (5) business days of the date that the physician becomes a subject of an investigation.

(b) Before a professional review body makes a recommendation as a result of an investigation, the physician under review shall be given an opportunity to have a meeting with the professional review body to discuss the matter without the presence of attorneys.

(c)(1)(A) If the professional review body decides to use an external review during the investigation, physicians serving on the professional review body that is conducting the investigation are responsible for selecting any external reviewers and the method of selecting cases for review.

(B) However, the physicians serving on the professional review body may seek input regarding the selection described under subdivision (c)(1)(A) of this section from the physician under review or other individuals.

(2) The physician under review shall be included on any substantive communications by any party with the external reviewers selected under subdivision (c)(1)(A) of this section.

(d) At the conclusion of the investigation, the physician under review shall be informed of the determination of the professional review body.

20-9-1310. Standards for hearings and related matters.

(a)(1) A physician who is the subject of a proposed professional review action shall be given notice of the proposed professional review action, the basis for the proposed professional review action, and the right to a hearing.

(2) Subdivision (a)(1) of this section does not entitle a physician to a hearing if the proposed professional review action will not adversely affect the physician's clinical privileges or medical staff membership.

(b)(1) A hearing shall be held before a hearing officer, arbitrator, hearing panel, or combination of hearing officer, arbitrator, or hearing

panel.

(2) A hearing officer or arbitrator shall:

(A) Be independent of all parties involved;

(B) Have no conflict of interest; and

(C) Not:

(i) Have served as an attorney for the hospital or the physician under review at any time within two (2) years prior to the hearing date; or

(ii) Be affiliated with a law firm that has represented the hospital or the physician under review at any time within two (2) years prior to the hearing date.

(3)(A) The medical staff bylaws shall govern the appointment of members of a hearing panel subject to the requirements of this subsection.

(B) The members of a hearing panel may be members of the medical staff of the hospital.

(C) The members of the hearing panel shall:

(i) Disclose any potential conflicts of interest before the hearing; and

(ii) Agree to exercise unbiased, independent, and professional judgment when evaluating the competence or professional conduct of the physician under review.

(4)(A) A physician under review shall have a reasonable opportunity to raise the issue of a potential conflict of interest or other concern related to a hearing officer, arbitrator, or member of a hearing panel.

(B) The medical staff bylaws shall establish a process for considering and resolving any potential conflicts of interest.

(c)(1) Before the hearing, the professional review body and the physician under review shall provide the opposing party with a list of any witnesses expected to testify and copies of any documents expected to be introduced at the hearing.

(2) In advance of the hearing, the hospital administration, professional review body, and the physician under review shall disclose all relevant information to each other.

(d) At the hearing, the physician under review shall have the right to:

- (1) Be present and present evidence on his or her own behalf;
- (2) Be represented by an attorney or another individual of the physician's choice at the hearing;
- (3) Call, examine, and cross-examine witnesses; and
- (4) Submit a written statement.

(e) Upon completion of the hearing, the physician under review has a right to receive:

- (1) The written recommendation of the hearing officer, arbitrator, or hearing panel, including a statement of the basis of the recommendation; and
- (2) A copy of the record of the hearing upon request and payment of any reasonable charges for the preparation of the record.

(f) After the hospital takes final action on the recommendation from the hearing, the physician under review is entitled to receive a written decision, including a statement of the basis for the decision.

(g) Any dispute over the relevancy or method of discovery or any other dispute that arises during the hearing process shall be resolved by the hearing officer, arbitrator, or hearing panel.

20-9-1311. Nonwaivable.

(a) Unless part of a mutually agreed upon mediation or settlement, a provision in an agreement, policy, procedure, or contract, including bylaws, that purports to waive any provision of this subchapter is void.

(b) However, the time periods for compliance with procedural requirements may be waived by mutual consent of the parties on a case by case basis.

20-9-1312. Applicability.

On and after the effective date of this subchapter, this subchapter shall apply to any investigation or professional review activity at any stage.

SECTION 7. Arkansas Code Title 20, Chapter 9, Subchapter 13, is amended to add an additional section to read as follows:

20-9-1313. Remedy.

(a) Within sixty (60) days of a final decision that adversely affects

a physician, a physician may file a petition to remedy a violation of this subchapter by filling the petition in:

(1) The circuit court of the county in which the professional review activity occurred; or

(2) The circuit court of an adjoining county.

(b)(1) After receiving a petition, the court shall review the record of the professional review activities and professional review action.

(2) The record shall consist of:

(A) The transcripts and minutes of any meetings or hearings;

(B) Correspondence;

(C) Internal and external reviews; and

(D) All other relevant information pertaining to the matter before the professional review body.

(3) The hospital shall transmit the record, but the court may require or permit subsequent corrections or additions to the record.

(4) The review conducted by the court shall be confined to the record, except upon a showing of good cause to go beyond the record.

(5) The court may hear, upon request, oral arguments and receive written briefs.

(6) Absent a showing of bad faith, a member of the medical staff who participated in the professional review activity shall not be compelled to testify in court under this subsection.

(c) Except as provided in subsection (e) of this section, the court may order any relief within the purview of the circuit court to remedy the violation of this subchapter.

(d)(1) If a physician prevails under this section, the physician shall be entitled to reasonable attorney's fees, costs, and expenses as determined by the court.

(2) A defendant who prevails shall be entitled to reasonable attorney's fees, costs, and expenses as determined by the court to the extent permitted under the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11113, as existing on January 1, 2017.

(e) Except as expressly permitted by state law or federal law, a professional review body or its members, agents, or employees are not liable for civil damages as a result of making a decision or recommendation in good

faith in connection with a professional review activity or professional review action or furnishing any records, information, or assistance in good faith to a professional review body in connection with a professional review activity.

(f)(1) The remedies provided for in this section do not supplant any other remedy available under law to a physician.

(2) If a physician has more than one (1) cause of action, all causes of action may be joined in the same pleading.

SECTION 8. DO NOT CODIFY. SEVERABILITY CLAUSE. If any provision of this act or the application of this act to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end, the provisions of this act are declared severable.

SECTION 9. EMERGENCY CLAUSE. It is found and determined by the General Assembly of the State of Arkansas that without legislative action, participants in medical staff peer review proceedings will continue to be confused and uncertain as to what remedies are available to address an unfair peer review proceeding and the scope of judicial review; that the standards established in SECTION 7 of this act will help remedy the confusion and uncertainty, prevent harm to physicians and physician-patient relationships, and promote fair independent medical judgment; and that SECTION 7 of this act is immediately necessary to provide a fair process to the physician under review while still providing immunity to individuals serving on professional review bodies. Therefore, an emergency is declared to exist, and SECTION 7 of this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on:

(1) The date of its approval by the Governor;

(2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.

/s/Bledsoe

APPROVED: 04/07/2017