

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas
91st General Assembly
Regular Session, 2017

As Engrossed: H3/13/17

A Bill

HOUSE BILL 2060

By: Representative Hammer

For An Act To Be Entitled

AN ACT TO AMEND THE ARKANSAS PEER REVIEW FAIRNESS ACT
TO ASSURE DUE PROCESS FOR PHYSICIANS AND TO PROTECT
PATIENTS; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND THE ARKANSAS PEER REVIEW
FAIRNESS ACT TO ASSURE DUE PROCESS FOR
PHYSICIANS AND TO PROTECT PATIENTS.

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

SECTION 1. Arkansas Code §§ 20-9-1302 – 20-9-1304 is 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 means of monitoring quality and improving care within an institution;*~~

~~*(2)(A) Peer review is essential to preserving the highest standards of medical practice.*~~

~~*(B) However, 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 peer review with the rights of those who may be harmed by improper peer review.*~~

(1) Through peer review, a hospital's medical staff acts to



maintain and enhance quality patient care with the protection of patients as the primary focus of the process;

(2) Effective peer review is essential to ensuring and improving quality health care for hospital patients;

(3) In order to ensure the effectiveness of peer review, physicians engaging in the peer review process must be open and honest in their assessment and review of the quality of care provided by their peers;

(4) Due process protections for physicians under review are also important in an effective peer review system;

(5) The federal Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 et seq., and related Arkansas law provide immunity and confidentiality protections for peer review to encourage physicians to speak freely about their concerns in patient care to improve quality while ensuring due process protections for physicians under review;

(6) Without immunity and confidentiality, physicians would be reticent to participate in the process and share critical information needed to protect patients, so great care must be taken to not undermine the purpose of existing federal and state protections for peer review; and

(7) It is crucial to protect the peer review process from overly burdensome laws and rules that harm the goal of a free exchange of information to facilitate improvements in care and protection of patients.

(b) The General Assembly intends that peer review be safeguarded as an essential tool for protecting patients and 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;

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

(4) "Informal peer review" means activities that are intended to improve quality of medical care provided through examination and improvement of systems within a hospital or through targeted interventions that do not impact the medical staff membership or clinical privileges of a physician and that include without limitation activities listed in subdivision (5)(B) of this section;

(5)(A) "Investigation" means a formal process defined in a hospital's medical staff bylaws and conducted to: ~~by a professional review body to obtain facts related to a concern or complaint about a physician in order to determine whether a professional review action should be requested or recommended~~

(i) Obtain and make a detailed examination of the facts related to an identified concern about a specific physician; and

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

(B) "Investigation" does not include:

(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, 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)(6) "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)(7) "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 or clinical privileges of the physician;

~~(7)(A)~~ (8)(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)~~ (9) "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~~ activities 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 during the course of a professional review activity, a professional review body holds a meeting with the physician under review and the professional review body has its legal counsel present at the meeting, the physician under review has the right to have legal counsel present at the meeting.

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

(A) Entitle the attorney of the physician to appear at any meeting where an attorney participating on behalf of the peer review body is not present;

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

(C) Prohibit a professional review body from meeting in private with its attorney.

(c)(1) The physicians serving on a professional review body shall exercise unbiased, independent, and professional judgment when evaluating another physician's competence or professional conduct in the course of a professional review activity.

(2) A hospital shall not take action against any physician for exercising unbiased, independent, and professional judgment when evaluating another physician's competence or professional conduct in the course of a professional review activity.

(d)(1) Informal peer review may lead to an investigation if circumstances warrant a formal and focused review on the activities of a particular physician.

(2) However, an informal peer review does not have to be conducted before an investigation or other formal action or review.

(e) This subchapter does not regulate, burden, or otherwise impact professional review activity that falls into the category of informal peer review.

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), concerning suspensions within the Arkansas Peer Review Fairness Act, is amended to read as follows:

(c) In the case of a suspension or restriction of clinical privileges, for a period of not longer than fourteen (14) days, during which an investigation is being conducted to determine the need for a professional review action:

(1) No hearing is required to be held regarding the suspension;

and

(2) This subchapter shall apply to the investigation and any subsequent proceedings ~~The professional review body shall follow the notice provision of this subchapter; and~~

~~(3) The physician shall be given the opportunity to discuss the case with the individual or individuals conducting the investigation during the fourteen (14) days before any recommendation or decision is made about continuing the suspension or restriction.~~

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, all 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) A physician has the right to obtain information from a professional review activity relating to the physician's own clinical privileges or medical staff membership for use in an action filed under § 20-9-1308, subject to the court's discretion as to relevancy and admissibility in the action.~~

~~(c) Nothing in this subchapter shall be construed to abrogate the immunities or confidentiality provisions of~~ This subchapter does not limit the rights, protections, privileges, and immunities afforded to professional review bodies and those who participate in or assist professional review bodies with professional review activities under 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.

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.

(c) If the professional review body decides to use an independent or external reviewer during an investigation, the reviewer and the method of selecting cases for review shall be approved by the professional review body conducting the investigation.

(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 other 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 may be held before an arbitrator, hearing officer, or a hearing panel.

(2)(A) A hearing officer or arbitrator shall have no financial or personal interest in the outcome of the hearing.

(B) If a hearing officer or arbitrator is an attorney, the hearing officer or arbitrator shall not:

(i) Have represented 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 members of a hearing panel may be members of the medical staff of the hospital.

(B) The members of a hearing panel shall:

(i) Disclose any potential conflicts of interest;
and

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

(4) A physician under review has the right to a reasonable opportunity to challenge the impartiality of a hearing officer, arbitrator, or member of a hearing panel.

(c)(1) Before the hearing, the physician under review and the professional review body shall:

(A) Provide each other with a list of any witnesses expected to testify; and

(B) Exchange documents and other relevant written information upon which the party expects to rely upon at the hearing.

(2) Exchange of information under subdivision (c)(1) of this section does not waive any privilege or confidentiality protection applicable to the information.

(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) The physician shall be notified of the final decision by the hospital.

(g) A hospital shall report professional review actions to:

(1) The Arkansas State Medical Board as required by § 17-95-104;
and

(2) The National Practitioner Data Bank as required by the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 et seq. as it existed on January 1, 2017, and relevant federal regulations existing on January 1, 2017.

20-9-1311. Remedy.

(a) To the extent allowed under applicable law, within sixty (60) days after the date that a physician has exhausted all remedies or procedures available at the hospital level, the physician may file a petition for injunctive or other equitable relief in circuit court to remedy substantial noncompliance with the due process protections of this subchapter.

(b)(1) A physician has a substantive right to have a professional review body make a determination as to the physician's competence or professional conduct in the context of a professional review activity.

(2) To accommodate the physician's right under subdivision (b)(1) of this section, the court shall be limited to a review of the record.

(3) The record shall consist of:

(A) Minutes of meetings;

(B) Transcripts of any meetings if available;

(C) Transcripts of any hearings;

(D) Correspondence; and

(E) All other relevant information considered by the professional review body in making a decision concerning the physician under review.

(c) To the extent permitted by federal law, a party who prevails under this section shall be entitled to reasonable attorney's fees and costs as determined by the court.

(d) The remedy provided for in this section is in addition to and cumulative of any other remedies available under law to any party.

/s/Hammer