

1 State of Arkansas
2 91st General Assembly
3 Regular Session, 2017
4

As Engrossed: H3/13/17

A Bill

HOUSE BILL 2060

5 By: Representative Hammer
6

For An Act To Be Entitled

8 AN ACT TO AMEND THE ARKANSAS PEER REVIEW FAIRNESS ACT
9 TO ASSURE DUE PROCESS FOR PHYSICIANS AND TO PROTECT
10 PATIENTS; AND FOR OTHER PURPOSES.
11

Subtitle

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13
14 TO AMEND THE ARKANSAS PEER REVIEW
15 FAIRNESS ACT TO ASSURE DUE PROCESS FOR
16 PHYSICIANS AND TO PROTECT PATIENTS.
17

18
19 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

20
21 *SECTION 1. Arkansas Code §§ 20-9-1302 – 20-9-1304 is amended to read*
22 *as follows:*

23 *20-9-1302. Findings and intent.*

24 *(a) The General Assembly finds that:*

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

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

30 ~~*(B) However, peer review that is not conducted fairly*~~
31 ~~*results in harm to both patients and physicians by limiting access to care*~~
32 ~~*and patient choice; and*~~

33 ~~*(3) It is necessary to balance carefully the rights of patients*~~
34 ~~*who benefit by peer review with the rights of those who may be harmed by*~~
35 ~~*improper peer review.*~~

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



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

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

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

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

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

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

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

22 (b) The General Assembly intends that peer review be safeguarded as an
23 essential tool for protecting patients and be conducted fairly for the
24 benefit of the citizens of the State of Arkansas.

25
26 20-9-1303. Definitions.

27 As used in this subchapter:

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

31 (2) "Governing body" means a hospital's board of directors,
32 board of trustees, or other body, or duly authorized subcommittee thereof,
33 which has authority to take final action regarding a professional review
34 action;

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

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

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

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

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

16 (B) "Investigation" does not include:

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

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

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

28 ~~(5)(6)~~ "Medical staff" means the physicians and other licensed
29 ~~practitioners~~ who are approved and given privileges to provide health care to
30 patients in the hospital;

31 ~~(6)(7)~~ "Professional review action" means an action or
32 recommendation of a professional review body that is taken or made in the
33 conduct of professional review activity and that:

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

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

3 ~~(7)(A)(8)(A)~~ (A) "Professional review activity" means an activity
4 with respect to an individual physician:

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

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

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

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

14 ~~(8)(A)(9)~~ (9) "Professional review body" means a hospital, its
15 governing body, or its medical staff when any of these bodies are conducting
16 a professional review activity.

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

22
23 20-9-1304. Standards for professional review actions and professional
24 review activities.

25 (a) Professional review ~~activity~~ activities shall be conducted and
26 professional review actions shall be taken in compliance with the
27 requirements of the Health Care Quality Improvement Act of 1986, 42 U.S.C. §
28 11101 et seq., and the additional requirements of this subchapter.

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

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

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

1 ~~participating in the peer review activity.~~

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

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

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

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

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

21 ~~(f) A physician who is the subject of a proposed professional review~~
22 ~~action shall be given notice of the proposed professional review action, the~~
23 ~~basis for the proposed professional review action, and the right to a~~
24 ~~hearing.~~

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

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

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

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

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

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

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

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

11 (b)(1) If during the course of a professional review activity, a
12 professional review body holds a meeting with the physician under review and
13 the professional review body has its legal counsel present at the meeting,
14 the physician under review has the right to have legal counsel present at the
15 meeting.

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

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

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

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

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

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

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

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

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

4
5 SECTION 2. Arkansas Code § 20-9-1305 is repealed.

6 ~~20-9-1305. Medical staff bylaws.~~

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

10
11 SECTION 3. Arkansas Code § 20-9-1306(c), concerning suspensions within
12 the Arkansas Peer Review Fairness Act, is amended to read as follows:

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

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

18 and

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

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

26
27 SECTION 4. Arkansas Code § 20-9-1307 is repealed.

28 ~~20-9-1307. Actions for equitable relief permitted.~~

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

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

35 ~~(2) A defendant who prevails shall be entitled to reasonable~~
36 ~~attorney's fees and costs as determined by the court to the extent permitted~~

1 ~~under the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11113,~~

2 ~~(e) Except as otherwise expressly permitted by law:~~

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

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

12
13 SECTION 5. Arkansas Code § 20-9-1308 is amended to read as follows:

14 20-9-1308. Relationship to other laws and regulations.

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

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

26 (b) A physician has the right to obtain information from a
27 professional review activity relating to the physician's own clinical
28 privileges or medical staff membership for use in an action filed under § 20-
29 9-1308, subject to the court's discretion as to relevancy and admissibility
30 in the action.

31 (c) ~~Nothing in this subchapter shall be construed to abrogate the~~
32 ~~immunities or confidentiality provisions of~~ This subchapter does not limit
33 the rights, protections, privileges, and immunities afforded to professional
34 review bodies and those who participate in or assist professional review
35 bodies with professional review activities under the Health Care Quality
36 Improvement Act of 1986, 42 U.S.C. § 11101 et seq., or the confidentiality or

1 immunity provisions of § 16-46-105, § 17-1-102, or § 20-9-501 et seq.
2

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

5 20-9-1309. Standards for investigations.

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

8 (b) Before a professional review body makes a recommendation as a
9 result of an investigation, the physician under review shall be given an
10 opportunity to have a meeting with the professional review body to discuss
11 the matter.

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

16 (d) At the conclusion of the investigation, the physician under review
17 shall be informed of the determination of the professional review body.
18

19 20-9-1310. Standards for hearings and other matters.

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

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

28 (b)(1) A hearing may be held before an arbitrator, hearing officer, or
29 a hearing panel.

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

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

34 (i) Have represented the hospital or the physician
35 under review at any time within two (2) years prior to the hearing date; or

36 (ii) Be affiliated with a law firm that has

1 represented the hospital or the physician under review at any time within two
2 (2) years prior to the hearing date.

3 (3)(A) The members of a hearing panel may be members of the
4 medical staff of the hospital.

5 (B) The members of a hearing panel shall:

6 (i) Disclose any potential conflicts of interest;
7 and

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

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

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

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

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

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

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

25 (1) Be present and present evidence on his or her own behalf;

26 (2) Be represented by an attorney or another individual of the
27 physician's choice at the hearing;

28 (3) Call, examine, and cross-examine witnesses; and

29 (4) Submit a written statement.

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

32 (1) The written recommendation of the hearing officer,
33 arbitrator, or hearing panel, including a statement of the basis of the
34 recommendation; and

35 (2) A copy of the record of the hearing upon request and payment
36 of any reasonable charges for the preparation of the record.

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

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

4 (1) The Arkansas State Medical Board as required by § 17-95-104;
5 and
6 (2) The National Practitioner Data Bank as required by the
7 Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 et seq. as it
8 existed on January 1, 2017, and relevant federal regulations existing on
9 January 1, 2017.

10
11 20-9-1311. Remedy.

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

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

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

22 (3) The record shall consist of:

23 (A) Minutes of meetings;

24 (B) Transcripts of any meetings if available;

25 (C) Transcripts of any hearings;

26 (D) Correspondence; and

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

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

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

35
36 /s/Hammer