

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

# A Bill

SENATE BILL 611

5 By: Senator Bledsoe  
6

## For An Act To Be Entitled

8 AN ACT TO AMEND ARKANSAS PEER REVIEW FAIRNESS ACT TO  
9 PROVIDE CLARITY ON WHEN AN INVESTIGATION BEGINS, TO  
10 ESTABLISH STANDARDS FOR EXTERNAL REVIEWS, TO PROVIDE  
11 FOR UNBIASED PEER REVIEW HEARING PANELS, AND TO  
12 CLARIFY LEGAL REMEDIES; TO DECLARE AN EMERGENCY; AND  
13 FOR OTHER PURPOSES.  
14  
15

## Subtitle

16 TO AMEND ARKANSAS PEER REVIEW FAIRNESS  
17 ACT; AND TO DECLARE AN EMERGENCY.  
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21 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
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23 SECTION 1. Arkansas Code §§ 20-9-1302 – 20-9-1304 are amended to read  
24 as follows:

25 20-9-1302. Findings and intent.

26 (a) The General Assembly finds that:

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

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

35 (B) ~~However, peer~~ Peer review that is not conducted fairly  
36 results in harm to both patients and physicians by limiting access to care



1 and patient choice; and

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

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

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8 20-9-1303. Definitions.

9 As used in this subchapter:

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

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

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

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

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

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

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

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

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

36 (iii) Collegial interventions, ongoing physician

1 practice evaluations and focused physician practice evaluations, and other  
2 peer-to-peer performance improvement interventions that are not intended to,  
3 and do not, impact a physician’s clinical privileges or hospital medical  
4 staff membership;

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

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

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

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

16 (7)(A) “Professional review activity” means an activity with  
17 respect to an individual physician:

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

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

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

25 (B) “Professional review activity” includes an  
26 investigation, as defined in this section; and

27 (8)(A) “Professional review body” means a hospital, its  
28 governing body, or its medical staff when any of these bodies are conducting  
29 a professional review activity.

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

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36 20-9-1304. Standards for professional review actions and professional

1 review activities.

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

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

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

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

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

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

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

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

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

34 ~~(f) A physician who is the subject of a proposed professional review  
35 action shall be given notice of the proposed professional review action, the  
36 basis for the proposed professional review action, and the right to a~~

1 hearing.

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

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

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

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

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

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

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

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

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

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

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

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

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

1        (c) The General Assembly encourages:

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

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

7                (d)(1) A physician engaged in professional review activities shall  
8 exercise unbiased, independent, and professional judgment when evaluating  
9 another physician and reach a decision based on the evidence.

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

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

16        ~~20-9-1305. Medical staff bylaws.~~

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

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

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

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 (c) ~~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.~~

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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,  
16 professional review activities are proceedings and records related to a  
17 professional review activity, including all meetings, interviews, reports,  
18 statements, minutes, memoranda, notes, investigative compilations and the  
19 contents thereof, and all other information and materials relating to  
20 professional review activities shall be confidential and are included within  
21 the categories of records and proceedings that are exempt from discovery and  
22 disclosure pursuant to under state law, including without limitation § 16-46-  
23 105(a)(1) and § 20-9-503.

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

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

29 (1) Abrogate ~~abrogate~~ the immunities or confidentiality  
30 provisions of the Health Care Quality Improvement Act of 1986, 42 U.S.C. §  
31 11101 et seq., or the confidentiality or immunity provisions of § 16-46-105,  
32 § 17-1-102, or § 20-9-501 et seq.; and

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

36

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

3 20-9-1309. Standards for investigations.

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

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

10 (c)(1) If the professional review body decides to use an external  
11 review, the external reviewer shall be mutually agreed upon by the  
12 professional review body and the physician under review.

13 (2) The professional review body, the hospital administration,  
14 and the physician shall not communicate with the external reviewer without  
15 the other parties knowledge.

16 (3) The professional review body and the physician under review  
17 shall mutually agree upon the method of selecting cases for review.

18 (4) Failure to mutually agree or other disputes concerning the  
19 external review shall be resolved by a hearing officer or arbitrator chosen  
20 in compliance with the process described in § 20-9-1310.

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

23  
24 20-9-1310. Standards for hearings and related matters.

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

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

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

36 (2) A hearing officer or arbitrator shall:



1 (A) Be independent of all parties involved;

2 (B) Have no conflict of interest; and

3 (C) Not:

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

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

10 (3) The physician under review shall have a reasonable  
11 opportunity to challenge the independence and impartiality of a hearing  
12 officer or arbitrator.

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

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

16 (i) Agree to exercise unbiased, independent, and  
17 professional judgment;

18 (ii) Not be in direct economic competition with the  
19 physician under review or have conflicts of interest, unless waived in  
20 writing by the physician under review; and

21 (iii) Disclose all conflicts of interest before the  
22 final selection.

23 (C)(i) The professional review body and the physician  
24 under review shall mutually agree on the members of the hearing panel.

25 (ii) However, if the professional review body and  
26 the physician under review are unable to agree on the members of the hearing  
27 panel, the hearing officer or arbitrator shall make the selection after  
28 considering any objections by the parties.

29 (c) If a professional review action is subject to review by another  
30 panel before final action by the hospital board of directors or other  
31 authority, the hearing panel shall be constituted in the same manner as  
32 provided in subdivision (b)(3) of this section.

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

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

4           (B) If the professional review body independently obtains  
5 relevant information, the professional review body shall disclose the  
6 relevant information to the physician under review.

7           (e) At the hearing, the physician under review shall have the right  
8 to:

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

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

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

13           (4) Submit a written statement.

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

16           (1) The written recommendation of the hearing officer,  
17 arbitrator, or hearing panel, including a statement of the basis of the  
18 recommendation; and

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

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

24           (h) Any dispute over the relevancy or method of discovery or any other  
25 dispute that arises shall be resolved by the hearing officer, arbitrator, or  
26 hearing panel.

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28           20-9-1311. Remedy.

29           (a) Within sixty (60) days of a final decision of the hospital that  
30 adversely affects a physician, a physician may file a petition to remedy a  
31 violation of this subchapter by filing the petition in:

32           (1) The circuit court of the county in which the professional  
33 review body is located; or

34           (2) The Pulaski County Circuit Court.

35           (b) The filing of the petition does not automatically stay enforcement  
36 of the professional review action, but the professional review body or the

1 court may stay the enforcement based on just grounds.

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

4 (2) The record shall consist of:

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

7 (B) Correspondence;

8 (C) Internal and external reviews; and

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

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

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

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

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

20 (d) Except as provided in subsection (f) of this section, the court  
21 may order any relief within the purview of the circuit court to remedy the  
22 violation of this subchapter.

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

26 (2) A defendant who prevails shall be entitled to reasonable  
27 attorney's fees, costs, and expenses as determined by the court to the extent  
28 permitted under the Health Care Quality Improvement Act of 1986, 42 U.S.C. §  
29 11113, as existing on January 1, 2017.

30 (f) Except as expressly permitted by state law or federal law, a  
31 professional review body or its members, agents, or employees are not liable  
32 for civil damages as a result of making a decision or recommendation in good  
33 faith in connection with a professional review activity or professional  
34 review action or furnishing any records, information, or assistance in good  
35 faith to a professional review body in connection with a professional review  
36 activity.

1        (g)(1) The remedies provided for in this section do not supplant any  
 2 other remedy available under law to a physician, including the right to  
 3 preliminary injunctive relief to correct an erroneous decision or procedure  
 4 if warranted.

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

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 8        20-9-1312. Nonwaivable.

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

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

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 16        20-9-1313. Applicability.

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

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 21        SECTION 7. DO NOT CODIFY. SEVERABILITY CLAUSE. If any provision of  
 22 this act or the application of this act to any person or circumstance is held  
 23 invalid, the invalidity shall not affect other provisions or applications of  
 24 this act which can be given effect without the invalid provision or  
 25 application, and to this end, the provisions of this act are declared  
 26 severable.

27  
 28        SECTION 8. EMERGENCY CLAUSE. It is found and determined by the  
 29 General Assembly of the State of Arkansas that without legislative action,  
 30 hospital peer review proceedings will continue to be marked by an imbalance  
 31 of power and conflicts of interest which disrupt physician-patient  
 32 relationships and threaten independent medical judgment; that the standards  
 33 established in this act will help remedy the imbalance of power and stop  
 34 conflicts of interest from occurring; and that this act is immediately  
 35 necessary to provide a fair process to the physician under review while still  
 36 providing immunity to those individuals serving on professional review

1 bodies. Therefore, an emergency is declared to exist, and this act being  
2 immediately necessary for the preservation of the public peace, health, and  
3 safety shall become effective on:

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

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

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

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