

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

As Engrossed: S3/20/17

A Bill

SENATE BILL 611

5 By: Senator Bledsoe
6

For An Act To Be Entitled

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

Subtitle

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17 *TO AMEND THE ARKANSAS PEER REVIEW*
18 *FAIRNESS ACT; AND TO DECLARE AN*
19 *EMERGENCY.*
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21

22 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
23

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

26 20-9-1302. Findings and intent.

27 (a) The General Assembly finds that:

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

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

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



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

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

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

8

9 20-9-1303. Definitions.

10 As used in this subchapter:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36

1 20-9-1304. Standards for professional review actions and professional
2 review activities.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36 (C) Prohibit a professional review body from meeting in

1 private with its attorney.

2 (c) The General Assembly encourages:

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

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

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

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

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

17 ~~20-9-1305. Medical staff bylaws.~~

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

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

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

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

29 ~~20-9-1307. Actions for equitable relief permitted.~~

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

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

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

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

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

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

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

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

15 20-9-1308. Relationship to other laws and regulations.

16 (a)(1) ~~All~~ Except as provided to subsection (b) of this section,
17 professional review activities are proceedings and records related to a
18 professional review activity, including all meetings, interviews, reports,
19 statements, minutes, memoranda, notes, investigative compilations and the
20 contents thereof, and all other information and materials relating to
21 professional review activities shall be confidential and are included within
22 the categories of records and proceedings that are exempt from discovery and
23 disclosure pursuant to under state law, including without limitation § 16-46-
24 105(a)(1) and § 20-9-503.

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

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

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

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

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

4 20-9-1309. Standards for investigations.

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

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

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

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

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

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

25
26 20-9-1310. Standards for hearings and related matters.

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

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

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

1 panel.

2 (2) A hearing officer or arbitrator shall:

3 (A) Be independent of all parties involved;

4 (B) Have no conflict of interest; and

5 (C) Not:

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

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

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

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

16 (C) The members of the hearing panel shall:

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

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

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

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

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

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

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

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

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

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

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

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

19
20 20-9-1311. Nonwaivable.

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

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

27
28 20-9-1312. Applicability.

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

32
33 SECTION 7. Arkansas Code Title 20, Chapter 9, Subchapter 13, is
34 amended to add an additional section to read as follows:

35 20-9-1313. Remedy.

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

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

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

5 (2) The circuit court of an adjoining county.

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

8 (2) The record shall consist of:

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

11 (B) Correspondence;

12 (C) Internal and external reviews; and

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

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

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

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

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

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

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

30 (2) A defendant who prevails shall be entitled to reasonable
31 attorney's fees, costs, and expenses as determined by the court to the extent
32 permitted under the Health Care Quality Improvement Act of 1986, 42 U.S.C. §
33 11113, as existing on January 1, 2017.

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

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

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

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

9
10 SECTION 8. DO NOT CODIFY. SEVERABILITY CLAUSE. If any provision of
11 this act or the application of this act to any person or circumstance is held
12 invalid, the invalidity shall not affect other provisions or applications of
13 this act which can be given effect without the invalid provision or
14 application, and to this end, the provisions of this act are declared
15 severable.

16
17 SECTION 9. EMERGENCY CLAUSE. It is found and determined by the
18 General Assembly of the State of Arkansas that without legislative action,
19 participants in medical staff peer review proceedings will continue to be
20 confused and uncertain as to what remedies are available to address an unfair
21 peer review proceeding and the scope of judicial review; that the standards
22 established in SECTION 7 of this act will help remedy the confusion and
23 uncertainty, prevent harm to physicians and physician-patient relationships,
24 and promote fair independent medical judgment; and that SECTION 7 of this act
25 is immediately necessary to provide a fair process to the physician under
26 review while still providing immunity to individuals serving on professional
27 review bodies. Therefore, an emergency is declared to exist, and SECTION 7 of
28 this act being immediately necessary for the preservation of the public
29 peace, health, and safety shall become effective on:

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

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

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

36

/s/Bledsoe

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