

AMENDED IN ASSEMBLY APRIL 13, 2009

AMENDED IN ASSEMBLY MARCH 26, 2009

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

ASSEMBLY BILL

No. 120

Introduced by Assembly Member Hayashi

January 15, 2009

An act to amend Sections 809, 809.2, and 809.3 of, and to add Sections 809.04, 809.07, and 809.08 to, the Business and Professions Code, relating to healing arts.

LEGISLATIVE COUNSEL'S DIGEST

AB 120, as amended, Hayashi. Healing arts: peer review.

Existing law provides for the professional review of specified healing arts licentiates through a peer review process conducted by peer review bodies, as defined.

This bill would encourage a peer review body of a health care facility to obtain external peer review, as defined, for the evaluation or investigation of an applicant, privilege holder, or member of the medical staff of the facility in specified circumstances.

This bill would require a peer review body to respond to the request of another peer review body and produce the records requested concerning a licentiate under review. The bill would specify that the records produced pursuant to this provision are not subject to discovery, ~~a subpoena, or a subpoena duces tecum, and are not admissible as evidence in a civil action as specified.~~

Existing law requires the governing body of acute care hospitals to give great weight to the actions of peer review bodies and authorizes the governing body to direct the peer review body to investigate in

specified instances. Where the peer review body fails to take action in response to that direction, existing law authorizes the governing body to take action against a licentiate.

This bill would prohibit a member of a medical or professional staff from being required to alter or surrender staff privileges, status, or membership solely due to the termination of a contract between that member and a health care facility. The bill would specify that a peer review body is entitled to review and make recommendations to the governing body of a health care facility regarding the quality implications of the selection, performance evaluation, and any change in the retention or replacement of licensees with whom the facility has a contract and would prohibit the governing body from unreasonably withholding approval of those recommendations, as specified.

Existing law provides various due process rights for licentiates who are the subject of a final proposed disciplinary action of a peer review body, including authorizing a licensee to request a hearing concerning that action. Under existing law, the hearing must be held before either an arbitrator mutually acceptable to the licensee and the peer review body or a panel of unbiased individuals, as specified. Existing law prohibits a hearing officer presiding at a hearing held before a panel from, among other things, gaining direct financial benefit from the outcome.

This bill would give the licensee the choice of having the hearing before a mutually acceptable arbitrator or a panel of unbiased individuals. The bill would require the hearing officer presiding at a hearing before a panel to meet certain requirements and to disclose all actual and potential conflicts. The bill would specify that the hearing officer is entitled to determine the procedure for presenting evidence and argument and would give the hearing officer authority to make all rulings pertaining to law, procedure, or the admissibility of evidence.

Existing law gives parties at the hearing certain rights, including the right to present and rebut evidence. Existing law requires the peer review body to adopt written provisions governing whether a licensee may be represented by an attorney.

This bill would give both parties the right to be represented by an attorney, except as specified.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 809 of the Business and Professions Code
2 is amended to read:

3 809. (a) The Legislature hereby finds and declares the
4 following:

5 (1) In 1986, Congress enacted the Health Care Quality
6 Improvement Act of 1986 (Chapter 117 (commencing with Section
7 11101) Title 42, United States Code), to encourage physicians to
8 engage in effective professional peer review, but giving each state
9 the opportunity to “opt-out” of some of the provisions of the federal
10 act.

11 (2) Because of deficiencies in the federal act and the possible
12 adverse interpretations by the courts of the federal act, it is
13 preferable for California to “opt-out” of the federal act and design
14 its own peer review system.

15 (3) Peer review, fairly conducted, is essential to preserving the
16 highest standards of medical practice.

17 (4) It is essential that California’s peer review system generate
18 a culture of trust and safety so that health care practitioners will
19 participate robustly in the process by engaging in critically
20 important patient safety activities, such as reporting incidents they
21 believe to reflect substandard care or unprofessional conduct and
22 serving on peer review, quality assurance, and other committees
23 necessary to protect patients.

24 (5) It is the policy of the state that evaluation, corrective action,
25 or other forms of peer review only be conducted for patient safety
26 and the improvement of quality patient care.

27 (6) Peer review that is not conducted fairly results in harm both
28 to patients and healing arts practitioners by wrongfully depriving
29 patients of their ability to obtain care from their chosen practitioner
30 and by depriving practitioners of their ability to care for their
31 patients, thereby limiting much needed access to care.

32 (7) Peer review, fairly conducted, will aid the appropriate state
33 licensing boards in their responsibility to regulate and discipline
34 errant healing arts practitioners.

35 (8) To protect the health and welfare of the people of California,
36 it is the policy of the State of California to exclude, through the
37 peer review mechanism as provided for by California law, those
38 healing arts practitioners who provide substandard care or who

engage in professional misconduct, regardless of the effect of that exclusion on competition.

(9) It is the intent of the Legislature that peer review of professional health care services be done efficiently, on an ongoing basis, and with an emphasis on early detection of potential quality problems and resolutions through informal educational interventions. It is further the intent of the Legislature that peer review bodies be actively involved in the measurement, assessment, and improvement of quality and that there be appropriate oversight by the peer review bodies to ensure the timely resolution of issues.

(10) Sections 809 to 809.8, inclusive, shall not affect the respective responsibilities of the organized medical staff or the governing body of an acute care hospital with respect to peer review in the acute care hospital setting. It is the intent of the Legislature that written provisions implementing Sections 809 to 809.8, inclusive, in the acute care hospital setting shall be included in medical staff bylaws that shall be adopted by a vote of the members of the organized medical staff and shall be subject to governing body approval, which approval shall not be withheld unreasonably.

(11) (A) The Legislature thus finds and declares that the laws of this state pertaining to the peer review of healing arts practitioners shall apply in lieu of Chapter 117 (commencing with Section 11101) of Title 42 of the United States Code, because the laws of this state provide a more careful articulation of the protections for both those undertaking peer review activity and those subject to review, and better integrate public and private systems of peer review. Therefore, California exercises its right to opt out of specified provisions of the Health Care Quality Improvement Act relating to professional review actions, pursuant to Section 11111(c)(2)(B) of Title 42 of the United States Code. This election shall not affect the availability of any immunity under California law.

(B) The Legislature further declares that it is not the intent or purposes of Sections 809 to 809.8, inclusive, to opt out of any mandatory national data bank established pursuant to Subchapter II (commencing with Section 11131) of Chapter 117 of Title 42 of the United States Code.

(b) For the purpose of this section and Sections 809.1 to 809.8, inclusive, “healing arts practitioner” or “licentiate” means a

1 physician and surgeon, podiatrist, clinical psychologist, marriage
2 and family therapist, clinical social worker, or dentist; and “peer
3 review body” means a peer review body as specified in paragraph
4 (1) of subdivision (a) of Section 805, and includes any designee
5 of the peer review body.

6 SEC. 2. Section 809.04 is added to the Business and Professions
7 Code, to read:

8 809.04. (a) It is the public policy of the state that licentiates
9 who may be providing substandard care be subject to the peer
10 review hearing and reporting process set forth in this article.

11 (b) To ensure that the peer review process is not circumvented,
12 a member of a medical or professional staff, by contract or
13 otherwise, shall not be required to alter or surrender staff privileges,
14 status, or membership solely due to the termination of a contract
15 between that member and a health care facility.

16 (c) The peer review body of a health care facility shall be entitled
17 to review and make recommendations to the governing body of
18 the facility regarding the quality implications of the selection,
19 performance evaluation, and any change in the retention or
20 replacement of licentiates with whom the health care facility has
21 a contract. The governing body shall not unreasonably withhold
22 approval of those recommendations.

23 (d) This section shall not impair a governing body’s ability to
24 take action against a licentiate pursuant to Section 809.05.

25 SEC. 3. Section 809.07 is added to the Business and Professions
26 Code, to read:

27 809.07. (a) It is the policy of the state that in certain
28 circumstances, external peer review may be necessary to promote
29 and protect patient care in order to eliminate perceived bias, obtain
30 needed medical expertise, or respond to other particular
31 circumstances.

32 (b) A peer review body is encouraged to obtain external peer
33 review for the evaluation or investigation of an applicant, privilege
34 holder, or member of the medical staff in the following
35 circumstances:

36 (1) Committee or department reviews that could affect ~~an~~
37 ~~individual’s~~ a licentiate’s membership or privileges do not provide
38 a sufficiently clear basis for action or inaction.

39 (2) No current medical staff member can provide the necessary
40 expertise in the clinical procedure or area under review.

1 (3) To promote impartial peer review.

2 (4) Upon the reasonable request of the licentiate.

3 (c) Under no circumstances may any organization external to
4 the peer review body that provides quality improvement activities
5 perform any activities at the health care facility without the
6 concurrence of and input from the peer review body.

7 (d) For purposes of this section, the following definitions apply:

8 (1) "Peer review body" has the meaning provided in paragraph
9 (1) of subdivision (a) of Section 805.

10 (2) "External peer review" means peer review provided by an
11 external objective organization engaged in quality improvement
12 activities that has the ability to perform review by licentiates who
13 are not members of the peer review body.

14 SEC. 4. Section 809.08 is added to the Business and Professions
15 Code, to read:

16 809.08. (a) The Legislature hereby finds and declares that the
17 sharing of information between peer review bodies is essential to
18 protect the public health.

19 (b) A peer review body shall respond to the request of another
20 peer review body and produce the records requested concerning
21 a licentiate under review to the extent not otherwise prohibited by
22 state or federal law. The records produced pursuant to this section
23 shall not be subject to discovery, a subpoena, or a subpoena duces
24 tecum, and shall not be admissible as evidence in a civil action. *to*
25 *the extent provided in Section 1157 of the Evidence Code.* The
26 peer review body responding to the request shall be entitled to all
27 other confidentiality protections and privileges otherwise provided
28 by law as to the information and records disclosed pursuant to this
29 section.

30 SEC. 5. Section 809.2 of the Business and Professions Code
31 is amended to read:

32 809.2. If a licentiate timely requests a hearing concerning a
33 final proposed action for which a report is required to be filed
34 under Section 805, the following shall apply:

35 (a) The hearing shall be held before a trier of fact, and the
36 licentiate shall have the choice of hearing by either of the
37 following:

38 (1) An arbitrator or arbitrators selected by a process mutually
39 acceptable to the licentiate and the peer review body.

1 (2) A panel of unbiased individuals who shall gain no direct
2 financial benefit from the outcome, who have not acted as an
3 accuser, investigator, factfinder, or initial decisionmaker in the
4 same matter, and which shall include, where feasible, an individual
5 practicing the same specialty as the licentiate.

6 (b) (1) If a hearing officer is selected to preside at a hearing
7 held before a panel, the hearing officer shall gain no direct financial
8 benefit from the outcome, shall disclose all actual and potential
9 conflicts of interest, shall not act as a prosecuting officer or
10 advocate, and shall not be entitled to vote. The hearing officer
11 shall also meet both of the following requirements:

12 (A) Be mutually acceptable to the licentiate and the peer review
13 body. If the licentiate and peer review body are unable to agree,
14 they shall utilize the services of the American Arbitration
15 Association or other mutually agreed upon dispute resolution
16 organization.

17 (B) Be an attorney licensed to practice law in the State of
18 California and qualified to preside over a quasi-judicial hearing.
19 Attorneys from a firm utilized by the hospital, the medical staff,
20 or the involved licentiate within the preceding two years shall not
21 be eligible.

22 (2) The hearing officer shall endeavor to ensure that all parties
23 maintain proper decorum and have a reasonable opportunity to be
24 heard and present all relevant oral and documentary evidence. The
25 hearing officer shall be entitled to determine the order of, or
26 procedure for, presenting evidence and argument during the hearing
27 and shall have the authority and discretion to make all rulings on
28 questions pertaining to matters of law, procedure, or the
29 admissibility of evidence. The hearing officer shall also take all
30 appropriate steps to ensure a timely resolution of the hearing, but
31 may not terminate the hearing process.

32 (c) The licentiate shall have the right to a reasonable opportunity
33 to voir dire the panel members and any hearing officer, and the
34 right to challenge the impartiality of any member or hearing officer.
35 Challenges to the impartiality of any member or hearing officer
36 shall be ruled on by the presiding officer, who shall be the hearing
37 officer if one has been selected.

38 (d) The licentiate shall have the right to inspect and copy at the
39 licentiate's expense any documentary information relevant to the
40 charges which the peer review body has in its possession or under

1 its control, as soon as practicable after the receipt of the licentiate's
2 request for a hearing. The peer review body shall have the right
3 to inspect and copy at the peer review body's expense any
4 documentary information relevant to the charges which the
5 licentiate has in his or her possession or control as soon as
6 practicable after receipt of the peer review body's request. The
7 failure by either party to provide access to this information at least
8 30 days before the hearing shall constitute good cause for a
9 continuance. The right to inspect and copy by either party does
10 not extend to confidential information referring solely to
11 individually identifiable licentiates, other than the licentiate under
12 review. The arbitrator or presiding officer shall consider and rule
13 upon any request for access to information, and may impose any
14 safeguards the protection of the peer review process and justice
15 requires.

16 (e) When ruling upon requests for access to information and
17 determining the relevancy thereof, the arbitrator or presiding officer
18 shall, among other factors, consider the following:

19 (1) Whether the information sought may be introduced to
20 support or defend the charges.

21 (2) The exculpatory or inculpatory nature of the information
22 sought, if any.

23 (3) The burden imposed on the party in possession of the
24 information sought, if access is granted.

25 (4) Any previous requests for access to information submitted
26 or resisted by the parties to the same proceeding.

27 (f) At the request of either side, the parties shall exchange lists
28 of witnesses expected to testify and copies of all documents
29 expected to be introduced at the hearing. Failure to disclose the
30 identity of a witness or produce copies of all documents expected
31 to be produced at least 10 days before the commencement of the
32 hearing shall constitute good cause for a continuance.

33 (g) Continuances shall be granted upon agreement of the parties
34 or by the arbitrator or presiding officer on a showing of good cause.

35 (h) A hearing under this section shall be commenced within 60
36 days after receipt of the request for hearing, and the peer review
37 process shall be completed within a reasonable time, after a
38 licentiate receives notice of a final proposed action or an immediate
39 suspension or restriction of clinical privileges, unless the arbitrator
40 or presiding officer issues a written decision finding that the

1 licentiate failed to comply with subdivisions (d) and (e) in a timely
2 manner, or consented to the delay.

3 SEC. 6. Section 809.3 of the Business and Professions Code
4 is amended to read:

5 809.3. (a) During a hearing concerning a final proposed action
6 for which reporting is required to be filed under Section 805, both
7 parties shall have all of the following rights:

8 (1) To be provided with all of the information made available
9 to the trier of fact.

10 (2) To have a record made of the proceedings, copies of which
11 may be obtained by the licentiate upon payment of any reasonable
12 charges associated with the preparation thereof.

13 (3) To call, examine, and cross-examine witnesses.

14 (4) To present and rebut evidence determined by the arbitrator
15 or presiding officer to be relevant.

16 (5) To submit a written statement at the close of the hearing.

17 (6) To be represented by an attorney of the party's choice at the
18 party's expense, subject to subdivision (c).

19 (b) The burden of presenting evidence and proof during the
20 hearing shall be as follows:

21 (1) The peer review body shall have the initial duty to present
22 evidence which supports the charge or recommended action.

23 (2) Initial applicants shall bear the burden of persuading the
24 trier of fact by a preponderance of the evidence of their
25 qualifications by producing information which allows for adequate
26 evaluation and resolution of reasonable doubts concerning their
27 current qualifications for staff privileges, membership, or
28 employment. Initial applicants shall not be permitted to introduce
29 information not produced upon request of the peer review body
30 during the application process, unless the initial applicant
31 establishes that the information could not have been produced
32 previously in the exercise of reasonable diligence.

33 (3) Except as provided above for initial applicants, the peer
34 review body shall bear the burden of persuading the trier of fact
35 by a preponderance of the evidence that the action or
36 recommendation is reasonable and warranted.

37 (c) No peer review body shall be represented by an attorney if
38 the licentiate is not so represented, except dental professional

- 1 society peer review bodies may be represented by an attorney,
- 2 even if the licentiate declines to be represented by an attorney.