

AMENDED IN ASSEMBLY MAY 18, 2009

AMENDED IN ASSEMBLY MAY 7, 2009

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
(Coauthor: Assembly Member Emmerson)**

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 to obtain external peer review, as defined, for the evaluation or investigation of an applicant, privilegeholder, or member of the medical staff 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 reasonably requested concerning a licentiate under review, as specified. The bill would specify that the records produced pursuant to this provision are not subject to discovery, 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 licensee.

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, except as specified. 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 quality considerations when the selection, performance evaluation, or any change in the retention or replacement of licensees with whom the facility has a contract occurs. The bill would require the governing body to give great weight to those recommendations.

Existing law provides various due process rights for licensees 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 *selected by a process* 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 require the hearing officer to, among other things, be selected by a process that provides a reasonable opportunity for selection of a mutually acceptable hearing officer and would set forth a process that would satisfy that requirement. 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. The bill would authorize the hearing officer to recommend termination of the hearing in certain circumstances.

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 and prohibits a peer review body from being represented by an attorney where a licensee is not so represented, except as specified.

This bill would give both parties the right to be represented by an attorney but would prohibit a peer review body from being represented if the licensee notifies the peer review body within a specified period of time that he or she has elected to not be represented, 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) of Title 42 of the United States Code), to encourage
8 physicians to engage in effective professional peer review, but
9 giving each state the opportunity to “opt-out” of some of the
10 provisions of the federal 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) Peer review that is not conducted fairly results in harm both
25 to patients and healing arts practitioners by wrongfully depriving
26 patients of their ability to obtain care from their chosen practitioner
27 and by depriving practitioners of their ability to care for their
28 patients, thereby limiting much needed access to care.

1 (6) Peer review, fairly conducted, will aid the appropriate state
2 licensing boards in their responsibility to regulate and discipline
3 errant healing arts practitioners.

4 (7) To protect the health and welfare of the people of California,
5 it is the policy of the State of California to exclude, through the
6 peer review mechanism as provided for by California law, those
7 healing arts practitioners who provide substandard care or who
8 engage in professional misconduct, regardless of the effect of that
9 exclusion on competition.

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

18 (9) Sections 809 to 809.8, inclusive, shall not affect the
19 respective responsibilities of the organized medical staff or the
20 governing body of an acute care hospital with respect to peer
21 review in the acute care hospital setting. It is the intent of the
22 Legislature that written provisions implementing Sections 809 to
23 809.8, inclusive, in the acute care hospital setting shall be included
24 in medical staff bylaws that shall be adopted by a vote of the
25 members of the organized medical staff and shall be subject to
26 governing body approval, which approval shall not be withheld
27 unreasonably.

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

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

6 (b) For the purpose of this section and Sections 809.1 to 809.8,
7 inclusive, “healing arts practitioner” or “licentiate” means a
8 physician and surgeon, podiatrist, clinical psychologist, marriage
9 and family therapist, clinical social worker, or dentist; and “peer
10 review body” means a peer review body as specified in paragraph
11 (1) of subdivision (a) of Section 805, and includes any designee
12 of the peer review body.

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

15 809.04. (a) It is the public policy of the state that licentiates
16 who may be providing substandard care be subject to the peer
17 review hearing and reporting process set forth in this article.

18 (b) To ensure that the peer review process is not circumvented,
19 a member of a medical or professional staff, by contract or
20 otherwise, shall not be required to alter or surrender staff privileges,
21 status, or membership solely due to the termination of a contract
22 between that member and a health care facility. However, with
23 respect to services that may only be provided by members who
24 have, or who are members of a medical group that has, a current
25 exclusive contract for those *identified* services, termination of the
26 contract, or termination of the member’s employment by the
27 medical group holding the contract, may result in the member’s
28 ineligibility to provide the services covered by the contract.

29 (c) The peer review body of a health care facility shall be entitled
30 to review and make recommendations to the governing body of
31 the facility regarding quality considerations whenever the selection,
32 performance evaluation, or any change in the retention or
33 replacement of licentiates with whom the health care facility has
34 a contract occurs. The governing body shall give great weight to
35 those recommendations.

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

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

1 809.07. (a) It is the policy of the state that in certain limited
2 circumstances, external peer review may be necessary to promote
3 and protect patient care in order to eliminate perceived bias, obtain
4 needed medical expertise, or respond to other particular
5 circumstances.

6 (b) A peer review body is encouraged to obtain external peer
7 review for the evaluation or investigation of an applicant,
8 privilegeholder, or member of the medical staff in the following
9 circumstances:

10 (1) Committee or department reviews that could affect a
11 licentiate's membership or privileges do not provide a sufficiently
12 clear basis for action or inaction.

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

15 (3) To promote impartial peer review.

16 (c) For purposes of this section, the following definitions apply:

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

19 (2) "External peer review" means peer review provided by
20 licentiates who are not members of the peer review body, who are
21 impartial, and who have the necessary expertise in the clinical
22 procedure or area under review.

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

25 809.08. (a) The Legislature hereby finds and declares that the
26 sharing of information between peer review bodies is essential to
27 protect the public health.

28 (b) Upon receipt of reasonable copying costs, a peer review
29 body shall respond to the request of another peer review body and
30 produce the records reasonably requested concerning a licentiate
31 under review to the extent not otherwise prohibited by state or
32 federal law. The records produced pursuant to this section shall
33 not be subject to discovery to the extent provided in Sections
34 1156.1 and 1157 of the Evidence Code and any other applicable
35 provisions of law. The peer review body responding to the request
36 shall be entitled to all confidentiality protections and privileges
37 provided by law as to the information and records disclosed
38 pursuant to this section.

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

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

(a) The hearing shall be held, as determined by the peer review body, before a trier of fact, which shall be an arbitrator or arbitrators selected by a process mutually acceptable to the licentiate and the peer review

body, or before a panel of unbiased individuals who shall gain no direct financial benefit from the outcome, who have not acted as an accuser, investigator, factfinder, or initial decisionmaker in the same matter, and which shall include, where feasible, an individual practicing the same specialty as the licentiate.

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

(A) (i) Be selected through a process that provides a reasonable opportunity for selection of a hearing officer who is mutually acceptable to the licentiate and the peer review body. ~~For~~ *Without limiting the foregoing, for* purposes of this subparagraph, the following process shall be deemed to constitute a reasonable opportunity for selection of a mutually acceptable hearing officer:

(I) If the licentiate and the peer review body are unable to agree on a hearing officer within 10 business days of the date the peer review body receives the request for a hearing, they shall utilize the services of a third party selection service, as set forth in the ~~applicable bylaws of the peer review body~~ *healthcare facility's medical staff bylaws*, or if none is specified, that is determined by mutual agreement of the parties within 15 business days of the date the peer review body receives the request for a hearing.

(II) If the licentiate and the peer review body are unable to agree on a third party selection service within the period of time required under subclause (I), each party shall have five business days to provide a list of five names of individuals meeting the requirements of subparagraph (B). After receiving this list, each party shall have three business days to strike *up to* two names from the list and to rank the remaining names in order of preference by assigning the

numeral one to the name with the strongest preference. No name shall be left blank. The candidate with the lowest combined score whose name has not been stricken by either party shall be invited to serve as the hearing officer. In the event of a tie, the matter shall be resolved by lot, which means the drawing from the names of the two candidates with the lowest combined score. If this candidate is not available to serve, the other candidate with the lowest combined score shall be asked to serve. If neither of these two candidates is able to serve, the peer review body may select a hearing officer, who need not be one of the individuals remaining on the lists created pursuant to this clause.

(ii) The timeframe within which a hearing is ~~required to occur~~ *to be commenced* under subdivision (h) shall be tolled for purposes of complying with this subparagraph provided that the parties are engaging in a good faith attempt to achieve a mutually acceptable selection of the hearing officer.

(B) Be an attorney licensed to practice law in the State of California. Except as otherwise agreed by the parties, attorneys from a firm utilized by the hospital, the medical staff, or the involved licentiate within the preceding two years shall not be eligible.

(2) The hearing officer shall endeavor to ensure that all parties maintain proper decorum and have a reasonable opportunity to be heard and present all relevant oral and documentary evidence. The hearing officer shall be entitled to determine the order of, or procedure for, presenting evidence and argument during the hearing and shall have the authority and discretion to make all rulings on questions pertaining to matters of law, procedure, or the admissibility of evidence. The hearing officer shall also take all appropriate steps to ensure a timely resolution of the hearing, but may not terminate the hearing process. However, in the case of flagrant noncompliance with the procedural rules governing the hearing process or egregious interference with the orderly conduct of the hearing, the ~~hearing officer~~ *officer* may recommend that the hearing panel terminate the hearing, provided that this activity is authorized by the applicable bylaws of the ~~peer review body~~ *medical staff*.

(c) The licentiate shall have the right to a reasonable opportunity to voir dire the panel members and any hearing officer, and the right to challenge the impartiality of any member or hearing officer.

1 Challenges to the impartiality of any member or hearing officer
2 shall be ruled on by the presiding officer, who shall be the hearing
3 officer if one has been selected.

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

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

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

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

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

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

33 (f) At the request of either side, the parties shall exchange lists
34 of witnesses expected to testify and copies of all documents
35 expected to be introduced at the hearing. Failure to disclose the
36 identity of a witness or produce copies of all documents expected
37 to be produced at least 10 days before the commencement of the
38 hearing shall constitute good cause for a continuance.

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

(h) A hearing under this section shall be commenced within 60 days after receipt of the request for hearing, and the peer review process shall be completed within a reasonable time, after a licentiate receives notice of a final proposed action or an immediate suspension or restriction of clinical privileges, unless the arbitrator or presiding officer issues a written decision finding that the licentiate failed to comply with subdivisions (d) and (e) in a timely manner, or consented to the delay.

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

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

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

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

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

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

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

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

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

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

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

(3) Except as provided above for initial applicants, the peer review body shall bear the burden of persuading the trier of fact

1 by a preponderance of the evidence that the action or
2 recommendation is reasonable and warranted.

3 (c) (1) Except as provided in paragraph (3), a peer review body
4 shall not be represented by an attorney if the licentiate notifies the
5 peer review body in writing no later than 15 days prior to the
6 hearing that he or she has elected to not be represented by an
7 attorney. Except as otherwise agreed by the parties, this election
8 shall be binding.

9 (2) If the licentiate does not provide the written notice described
10 in paragraph (1) within the required timeframe, the peer review
11 body may be represented by an attorney even if the licentiate later
12 elects to not be represented by an attorney.

13 (3) Dental professional society peer review bodies may be
14 represented by an attorney, even if the licentiate declines to be
15 represented by an attorney.