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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, *and may only be used for peer review purposes*.

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, except as specified. The bill would specify that a peer review body is entitled to review and make *timely* recommendations to the governing body of a health care facility, *and its designee, if applicable*, regarding quality considerations *relating to clinical services* 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 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 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 additionally require the hearing officer to be an attorney *licensed in California, except as specified*, and to disclose all actual and potential conflicts of interest, as specified. 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

1 and by depriving practitioners of their ability to care for their
2 patients, thereby limiting much needed access to care.

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

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

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

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

30 (10) (A) The Legislature thus finds and declares that the laws
31 of this state pertaining to the peer review of healing arts
32 practitioners shall apply in addition to Chapter 117 (commencing
33 with Section 11101) of Title 42 of the United States Code, because
34 the laws of this state provide a more careful articulation of the
35 protections for both those undertaking peer review activity and
36 those subject to review, and better integrate public and private
37 systems of peer review. Therefore, California exercises its right
38 to opt out of specified provisions of the Health Care Quality
39 Improvement Act relating to professional review actions, pursuant
40 to Section 11111(c)(2)(B) of Title 42 of the United States Code.

1 This election shall not affect the availability of any immunity under
2 California law.

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

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

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

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

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

31 (c) The peer review body of a health care facility shall be entitled
32 to review and make *timely* recommendations to the governing body
33 of the facility *and its designee, if applicable*, regarding quality
34 considerations *relating to clinical services* whenever the selection,
35 performance evaluation, or any change in the retention or
36 replacement of licentiates with whom the health care facility has
37 a contract occurs. The governing body shall give great weight to
38 those recommendations.

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

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

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

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

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

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

(3) To promote impartial peer review.

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

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

(2) "External peer review" means peer review provided by licentiates who ~~are not members of the peer review body~~ *do not practice in the same health care facility as the licentiate under review*, who are impartial, and who have the necessary expertise in the clinical procedure or area under review.

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

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

(b) Upon receipt of reasonable copying *and processing* costs, a peer review body shall respond to the request of another peer review body and produce the records reasonably requested concerning a licentiate under review to the extent not otherwise prohibited by state or federal law. ~~The records produced pursuant to this section~~ *The responding peer review body shall have the discretion to decide whether to produce minutes from peer review body meetings. The records produced by a peer review body pursuant to this section shall be used solely for peer review purposes and shall not be subject to discovery to the extent*

provided in Sections 1156.1 and 1157 of the Evidence Code and any other applicable provisions of law. The peer review body responding to the request shall be entitled to all confidentiality protections and privileges provided by law as to the information and records disclosed pursuant to this section. *The licentiate under review by the peer review body requesting records pursuant to this section shall, upon request, release the responding peer review body, its members, and the health care entity for which the responding peer review body conducts peer review, from liability for the disclosure of records, and the contents thereof, in compliance with this section. If the licentiate does not provide a reasonable release that is acceptable to the responding peer review body, the responding peer review body shall not be obligated to produce records pursuant to this section.*

SEC. 5. Section 809.2 of the Business and Professions Code 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~~

(2) *The hearing officer shall be an attorney licensed to practice law in the State of California. Except This paragraph shall not apply to a hearing held before a panel of a dental professional society peer review body.*

1 (3) *Except as otherwise agreed by the parties, ~~attorneys an~~*
2 *attorney from a firm utilized by the hospital, the medical staff, or*
3 *the involved licentiate within the preceding two years shall not be*
4 *eligible to serve as a hearing officer.*

5 (2)

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

21 (c) The licentiate shall have the right to a reasonable opportunity
22 to voir dire the panel members and any hearing officer, and the
23 right to challenge the impartiality of any member or hearing officer.
24 Challenges to the impartiality of any member or hearing officer
25 shall be ruled on by the presiding officer, who shall be the hearing
26 officer if one has been selected.

27 (d) The licentiate shall have the right to inspect and copy at the
28 licentiate's expense any documentary information relevant to the
29 charges which the peer review body has in its possession or under
30 its control, as soon as practicable after the receipt of the licentiate's
31 request for a hearing. The peer review body shall have the right
32 to inspect and copy at the peer review body's expense any
33 documentary information relevant to the charges which the
34 licentiate has in his or her possession or control as soon as
35 practicable after receipt of the peer review body's request. The
36 failure by either party to provide access to this information at least
37 30 days before the hearing shall constitute good cause for a
38 continuance. The right to inspect and copy by either party does
39 not extend to confidential information referring solely to
40 individually identifiable licentiates, other than the licentiate under

1 review. The arbitrator or presiding officer shall consider and rule
2 upon any request for access to information, and may impose any
3 safeguards the protection of the peer review process and justice
4 requires.

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

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

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

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

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

16 (f) At the request of either side, the parties shall exchange lists
17 of witnesses expected to testify and copies of all documents
18 expected to be introduced at the hearing. Failure to disclose the
19 identity of a witness or produce copies of all documents expected
20 to be produced at least 10 days before the commencement of the
21 hearing shall constitute good cause for a continuance.

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

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

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

34 809.3. (a) During a hearing concerning a final proposed action
35 for which reporting is required to be filed under Section 805, both
36 parties shall have all of the following rights:

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

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

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

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

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

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

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

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

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

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

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

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

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

O