

# Arkansas Legislature Lifts Some Burdens to Effective Physician Peer Review



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Peer review is the process by which doctors, hospitals, and other health care providers review the performance of their peers to identify potential problems, improve patient care, and, in some instances, remove a physician or other healthcare provider from a hospital's medical staff. Volunteer physicians and health care professionals undertake this important task, which is also required by federal law, in an effort to increase the quality of health care provided to patients in this state.

In 2013, the Arkansas General Assembly passed the Peer Review Fairness Act (PRFA), which imposed significant burdens on the peer review process. Recognizing that the original PRFA created some serious, and, in part, unintended problems, the General Assembly recently passed SB611, which amends the original law and improves some of its worst provisions. Governor Hutchinson signed SB611 into law on April 7, 2017, as Act 975. The law took immediate effect and expressly applies to any pending investigation or professional review activity at any stage.

The following are the most significant provisions of Act 975:

First, it redefined the term "investigation," to make clear that many routine hospital and medical staff quality assurance functions do not implicate the substantive provisions of PRFA, including notice to the physician under review and the right for him or her to meet with the professional review body. The amendments also provide additional standards for investigations.

Second, the amended PRFA sets out the requirements for any hearing officer, arbitrator, or hearing panel. These provisions clarify who may participate at the hearing stage and allow the physician under review to raise concerns related to a participant's potential conflict of interest.

Last, the new law allows a physician to file a petition in court to remedy any violation of the PRFA within 60 days of a final decision that adversely affects his or her medical staff membership or privileges to practice at a hospital.

These changes are discussed in more detail below.

## Investigations

The 2013 law created confusion because all of its substantive requirements applied to "investigations," and that term was broadly, and circularly, defined in the statute. Under the new, amended PRFA, an investigation is "a process conducted by a professional review body to obtain and make a detailed examination of the facts related to an identified concern about a specific physician; and determine whether a professional review action should be requested or recommended."

Importantly, the new definition makes clear that the following are not “investigations”:

- A preliminary review to obtain basic information related to a concern or complaint about a physician in order to determine whether an investigation should commence;
- Routine quality assurance, case review, utilization review, and performance improvement activities that take place within a hospital; and
- Collegial interventions, ongoing physician practice evaluations, and focused physician practice evaluations, and other peer-to-peer performance improvement interventions that are not intended to, and do not, impact a physician’s clinical privileges or hospital medical staff membership.

The new PRFA also sets out specific standards for investigations. A physician must be informed in writing within five business days of the date he or she becomes the subject of an investigation. And, before the professional review body makes a recommendation after an investigation, the physician must be given an opportunity to have a meeting with the professional review body to discuss the matter without the presence of attorneys.

Additionally, if the professional review body uses an external review during an investigation, the physicians on the professional review body will select the external reviewer and the method of case selection for review. However, these physicians may seek input from the physician under review, and the physician must be copied on all substantive communications between the professional review body and the external reviewer.

At the conclusion of the investigation, the physician under review must be informed of the determination of the professional review body.

#### Hearings

If the professional review body recommends an action that may adversely affect the physician’s medical staff membership or privileges to practice at a hospital, the physician may request a hearing. Federal law sets out standards for these hearings, and the 2013 PRFA tracked those to a large degree. The new PRFA keeps many of the standards in tact, although the statute was reorganized substantially. The new law does make some changes, however, with regard to the composition of the hearing officer(s) and hearing panel.

A hearing must be held before a hearing officer, arbitrator, hearing panel, or combination of these. The hearing officer or arbitrator must:

- Be independent of all parties involved;
- Have no conflict of interest, which defined as “a personal or financial interest that would lead an objective person to conclude that it would be difficult for the person in those circumstances to make a fair and impartial decision in a professional review activity with regard to a particular physician”; and
- Not (1) have served as an attorney for the hospital or the physician under review within the previous two years or (2) be affiliated with a law firm that has represented the hospital or the physician under review for the previous two years.

The medical staff bylaws will govern the selection of a hearing panel, provided that the members must disclose any potential conflict of interest before the hearing and agree to exercise unbiased, independent, and professional judgment.

In addition, the physician under review must have a reasonable opportunity to raise the issue of a potential conflict of interest related to a hearing officer, arbitrator, or member of a hearing panel, and the medical staff bylaws must include a process for considering and resolving any potential conflict of interest.

#### Legal Action

The new PRFA made significant changes to subsequent legal action following an adverse professional review action. Within sixty days of a final decision that adversely affects a physician, he or she may file a petition in court to remedy a violation of the PRFA. The petition may be filed in the county where the professional review activity occurred or the circuit court of an adjoining county.

The court's review will be limited to the record, which consists of the following:

- Transcripts and minutes of any meetings or hearings;
- Correspondence;
- Internal and external reviews; and
- All other relevant information pertaining to the matter before the professional review body.

Absent bad faith, no member of the medical staff who participated as a peer reviewer will be called to testify in court. If a physician prevails, under the legal challenge, he or she will be entitled to attorney's fees and costs, but not civil damages.

The peer review process is critically important to ensuring quality patient care. There are detailed federal requirements designed to provide fairness to physicians under review. The 2013 PRFA made the process much more difficult in Arkansas. Act 975 provides welcome relief to some of the worst parts of the original PRFA.