AMENDED IN SENATE APRIL 1, 2009

SENATE BILL No. 58

Introduced by Senator Aanestad

January 20, 2009

An act to ~~add Section 805.3 to~~ *amend Sections 800, 803.1, 805.5, 809, 809.1, 809.2, 809.3, and 2027 of, and to add Sections 805.3, 809.04, 809.07, 809.08, 809.09, 809.15, and 2191.5 to,* the Business and Professions Code, relating to ~~physicians and surgeons~~ *healing arts*.

LEGISLATIVE COUNSEL'S DIGEST

SB 58, as amended, Aanestad. ~~Physicians and surgeons: peer review.~~ *Peer review: reporting.*

~~Existing~~

(1) Existing law provides for the professional review of specified healing arts licentiates through a peer review process *conducted by peer review bodies, as defined*. ~~Existing law, the Medical Practice Act, provides for the licensure and regulation of physicians and surgeons by the Medical Board of California.~~

This bill would require peer review bodies to annually report to the Medical Board of California on their peer review activities involving licensees of that board and to comply with any requests from the board for more detailed information.

The bill would require peer review bodies of health care facilities or clinics to obtain external peer review from an external peer review organization for the evaluation or investigation of an applicant, privilege holder, or member of the medical staff of the facility or clinic in specified circumstances and would encourage those peer review bodies to obtain that external review in certain other circumstances. The bill would require the external peer review organization to meet certain

requirements, as specified, and would authorize the organization to establish and collect reasonable fees for its services.

The 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 court of law in this state.

Existing law prohibits the exclusion of relevant evidence in a criminal proceeding except as provided by a statute enacted by a ⅔ vote of the Legislature.

Because this bill would provide that certain information is not admissible in a court proceeding, it requires a ⅔ vote of the membership of each house of the Legislature.

(2) 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.

(3) Under existing law, specified persons are required to file a report, designated as an "805 report," with a licensing board if a peer review body takes one of several specified actions against a person licensed by that board. 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.

With respect to physicians and surgeons, this bill would require peer review bodies to administer an early detection and resolution program (EDR) in which a peer review body would, where it deems appropriate,

allow a physician and surgeon to complete certain training, observation, or consultation requirements instead of being subject to disciplinary action and an 805 report. The bill would delay the physician and surgeon's right to a hearing concerning a final proposed action pending his or her completion of EDR. The bill would make the proceedings or records of an EDR assessment or training program inadmissible in a court of law in this state.

Existing law prohibits the exclusion of relevant evidence in a criminal proceeding except as provided by a statute enacted by a ⅔ vote of the Legislature.

Because this bill would provide that certain information is not admissible in a court proceeding, it requires a ⅔ vote of the membership of each house of the Legislature.

Under existing law, a hearing concerning a final proposed disciplinary action 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.

(4) Existing law requires the Medical Board of California to maintain a central file of its licensees containing, among other things, disciplinary information reported through 805 reports and authorizes licensees to submit additional exculpatory or explanatory statements, as specified. Existing law requires the board to disclose an 805 report to specified health care entities and requires the board to post on the Internet, and

to disclose to inquiring members of the public, certain hospital disciplinary actions.

The bill would require the board to include the exculpatory or explanatory statement submitted by licensees regarding 805 reports in disclosures or postings of those reports or of hospital disciplinary actions. The bill would prohibit the board from including certain summary suspension information reported through an 805 report in a licensee's central file, except as specified. The bill would also prohibit the board from reporting or posting, and would require the board to remove from a licensee's central file, certain disciplinary information if a court reverses a disciplinary action reported pursuant to Section 805 or if the board's independent investigation exonerates the licensee from the charges forming the basis of the disciplinary action.

(5) Existing law requires the Medical Board of California to adopt and administer standards for the continuing education of licensed physicians and surgeons.

This bill would require the board to adopt and administer standards allowing a physician and surgeon to receive credit for up to 10 hours of continuing education each year for participating in a peer review body without compensation.

~~This bill require the board to conduct a pilot program to redesign the peer review process applicable to physicians and surgeons based on recommendations made in a specified report. The bill would state the intent of the Legislature to enact legislation that would establish guidelines for the board to follow in conducting that pilot program.~~

Vote: ~~majority~~ *2/3*. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

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

SECTION 1. The Legislature hereby finds and declares all of the following:

(a) The process that physicians and hospitals, among other entities, use to monitor the standard of care for medical practice is known as "peer review."

(b) Peer review is described in Section 805 of the Business and Professions Code. It requires a peer review body to report an adverse action taken against a health care provider for medical disciplinary cause or reason to the provider's licensing entity.

This report can lead to disciplinary action by the licensing entity and may impact future credentialing.

(c) Peer review performed at hospitals works well in most cases, but is sometimes dysfunctional and occasionally dangerous. It is frequently expensive and time-consuming. It can be damaging to the professional careers of the health care providers involved, even those who are cleared of any wrongdoing.

(d) In light of the occasional failures of the peer review process in its purpose to ensure the quality and safety of medical care in California, reform of the peer review process is necessary.

SEC. 2. Section 800 of the Business and Professions Code is amended to read:

800. (a) The Medical Board of California, the Board of Psychology, the Dental Board of California, the Osteopathic Medical Board of California, the State Board of Chiropractic Examiners, the Board of Registered Nursing, the Board of Vocational Nursing and Psychiatric Technicians, the State Board of Optometry, the Veterinary Medical Board, the Board of Behavioral Sciences, the Physical Therapy Board of California, the California State Board of Pharmacy, and the Speech-Language Pathology and Audiology Board shall each separately create and maintain a central file of the names of all persons who hold a license, certificate, or similar authority from that board. Each central file shall be created and maintained to provide an individual historical record for each licensee with respect to the following information:

(1) Any conviction of a crime in this or any other state that constitutes unprofessional conduct pursuant to the reporting requirements of Section 803.

(2) Any judgment or settlement requiring the licensee or his or her insurer to pay any amount of damages in excess of three thousand dollars ($3,000) for any claim that injury or death was proximately caused by the licensee's negligence, error or omission in practice, or by rendering unauthorized professional services, pursuant to the reporting requirements of Section 801 or 802.

(3) Any public complaints for which provision is made pursuant to subdivision (b).

(4) *(A)* Disciplinary information reported pursuant to Section 805.

(B) Notwithstanding subparagraph (A), with respect to a physician and surgeon licensed by the Medical Board of California, all of the following shall apply:

(i) If a court reverses a disciplinary action reported pursuant to Section 805 or if the board's independent investigation exonerates the licensee from the charges forming the basis of the reported disciplinary action, the board shall remove the corresponding disciplinary information described in subparagraph (A) from the licensee's central file.

(ii) The board shall not include a summary suspension of staff privileges, employment, or membership reported pursuant to Section 805 in the licensee's central file unless the board confirms, by independent investigation, that the suspension is supported by substantial evidence of risk to patients.

(b) Each board shall prescribe and promulgate forms on which members of the public and other licensees or certificate holders may file written complaints to the board alleging any act of misconduct in, or connected with, the performance of professional services by the licensee.

If a board, or division thereof, a committee, or a panel has failed to act upon a complaint or report within five years, or has found that the complaint or report is without merit, the central file shall be purged of information relating to the complaint or report.

Notwithstanding this subdivision, the Board of Psychology, the Board of Behavioral Sciences, and the Respiratory Care Board of California shall maintain complaints or reports as long as each board deems necessary.

(c) The contents of any central file that are not public records under any other provision of law shall be confidential except that the licensee involved, or his or her counsel or representative, shall have the right to inspect and have copies made of his or her complete file except for the provision that may disclose the identity of an information source. For the purposes of this section, a board may protect an information source by providing a copy of the material with only those deletions necessary to protect the identity of the source or by providing a comprehensive summary of the substance of the material. Whichever method is used, the board shall ensure that full disclosure is made to the subject of any personal information that could reasonably in any way reflect or convey anything detrimental, disparaging, or threatening to a

licensee's reputation, rights, benefits, privileges, or qualifications, or be used by a board to make a determination that would affect a licensee's rights, benefits, privileges, or qualifications. The information required to be disclosed pursuant to Section 803.1 shall not be considered among the contents of a central file for the purposes of this subdivision.

~~The~~

(d) The licensee may, but is not required to, submit any additional exculpatory or explanatory statement or other information that the board shall include in the central file.

~~Each~~

(e) Each board may permit any law enforcement or regulatory agency when required for an investigation of unlawful activity or for licensing, certification, or regulatory purposes to inspect and have copies made of that licensee's file, unless the disclosure is otherwise prohibited by law.

These disclosures shall effect no change in the confidential status of these records.

SEC. 3. Section 803.1 of the Business and Professions Code is amended to read:

803.1. (a) Notwithstanding any other provision of law, the Medical Board of California, the Osteopathic Medical Board of California, and the California Board of Podiatric Medicine shall disclose to an inquiring member of the public information regarding any enforcement actions taken against a licensee by either board or by another state or jurisdiction, including all of the following:

(1) Temporary restraining orders issued.

(2) Interim suspension orders issued.

(3) Revocations, suspensions, probations, or limitations on practice ordered by the board, including those made part of a probationary order or stipulated agreement.

(4) Public letters of reprimand issued.

(5) Infractions, citations, or fines imposed.

(b) Notwithstanding any other provision of law, in addition to the information provided in subdivision (a), the Medical Board of California, the Osteopathic Medical Board of California, and the California Board of Podiatric Medicine shall disclose to an inquiring member of the public all of the following:

(1) Civil judgments in any amount, whether or not vacated by a settlement after entry of the judgment, that were not reversed on

appeal and arbitration awards in any amount of a claim or action for damages for death or personal injury caused by the physician and surgeon's negligence, error, or omission in practice, or by his or her rendering of unauthorized professional services.

(2) (A) All settlements in the possession, custody, or control of the board shall be disclosed for a licensee in the low-risk category if there are three or more settlements for that licensee within the last 10 years, except for settlements by a licensee regardless of the amount paid where (i) the settlement is made as a part of the settlement of a class claim, (ii) the licensee paid in settlement of the class claim the same amount as the other licensees in the same class or similarly situated licensees in the same class, and (iii) the settlement was paid in the context of a case where the complaint that alleged class liability on behalf of the licensee also alleged a products liability class action cause of action. All settlements in the possession, custody, or control of the board shall be disclosed for a licensee in the high-risk category if there are four or more settlements for that licensee within the last 10 years except for settlements by a licensee regardless of the amount paid where (i) the settlement is made as a part of the settlement of a class claim, (ii) the licensee paid in settlement of the class claim the same amount as the other licensees in the same class or similarly situated licensees in the same class, and (iii) the settlement was paid in the context of a case where the complaint that alleged class liability on behalf of the licensee also alleged a products liability class action cause of action. Classification of a licensee in either a "high-risk category" or a "low-risk category" depends upon the specialty or subspecialty practiced by the licensee and the designation assigned to that specialty or subspecialty by the Medical Board of California, as described in subdivision (f). For the purposes of this paragraph, "settlement" means a settlement of an action described in paragraph (1) entered into by the licensee on or after January 1, 2003, in an amount of thirty thousand dollars ($30,000) or more.

(B) The board shall not disclose the actual dollar amount of a settlement but shall put the number and amount of the settlement in context by doing the following:

(i) Comparing the settlement amount to the experience of other licensees within the same specialty or subspecialty, indicating if

it is below average, average, or above average for the most recent 10-year period.

(ii) Reporting the number of years the licensee has been in practice.

(iii) Reporting the total number of licensees in that specialty or subspecialty, the number of those who have entered into a settlement agreement, and the percentage that number represents of the total number of licensees in the specialty or subspecialty.

(3) Current American Board of Medical Specialty certification or board equivalent as certified by the Medical Board of California, the Osteopathic Medical Board of California, or the California Board of Podiatric Medicine.

(4) Approved postgraduate training.

(5) Status of the license of a licensee. By January 1, 2004, the Medical Board of California, the Osteopathic Medical Board of California, and the California Board of Podiatric Medicine shall adopt regulations defining the status of a licensee. The board shall employ this definition when disclosing the status of a licensee pursuant to Section 2027.

(6) *(A)* Any summaries of hospital disciplinary actions that result in the termination or revocation of a licensee's staff privileges for medical disciplinary cause or reason.

(B) The Medical Board of California shall include in the information disclosed pursuant to subparagraph (A) any exculpatory or explanatory statement regarding the hospital disciplinary action provided by a licensed physician and surgeon pursuant to subdivision (d) of Section 800.

(C) The Medical Board of California shall not disclose the information described in subparagraph (A) with respect to a licensed physician and surgeon if a court reverses the hospital disciplinary action or if the board's independent investigation exonerates the licensee from the charges forming the basis of the hospital disciplinary action.

(c) Notwithstanding any other provision of law, the Medical Board of California, the Osteopathic Medical Board of California, and the California Board of Podiatric Medicine shall disclose to an inquiring member of the public information received regarding felony convictions of a physician and surgeon or doctor of podiatric medicine.

(d) The Medical Board of California, the Osteopathic Medical Board of California, and the California Board of Podiatric Medicine may formulate appropriate disclaimers or explanatory statements to be included with any information released, and may by regulation establish categories of information that need not be disclosed to an inquiring member of the public because that information is unreliable or not sufficiently related to the licensee's professional practice. The Medical Board of California, the Osteopathic Medical Board of California, and the California Board of Podiatric Medicine shall include the following statement when disclosing information concerning a settlement:

"Some studies have shown that there is no significant correlation between malpractice history and a doctor's competence. At the same time, the State of California believes that consumers should have access to malpractice information. In these profiles, the State of California has given you information about both the malpractice settlement history for the doctor's specialty and the doctor's history of settlement payments only if in the last 10 years, the doctor, if in a low-risk specialty, has three or more settlements or the doctor, if in a high-risk specialty, has four or more settlements. The State of California has excluded some class action lawsuits because those cases are commonly related to systems issues such as product liability, rather than questions of individual professional competence and because they are brought on a class basis where the economic incentive for settlement is great. The State of California has placed payment amounts into three statistical categories: below average, average, and above average compared to others in the doctor's specialty. To make the best health care decisions, you should view this information in perspective. You could miss an opportunity for high-quality care by selecting a doctor based solely on malpractice history.

When considering malpractice data, please keep in mind:

Malpractice histories tend to vary by specialty. Some specialties are more likely than others to be the subject of litigation. This report compares doctors only to the members of their specialty, not to all doctors, in order to make an individual doctor's history more meaningful.

This report reflects data only for settlements made on or after January 1, 2003. Moreover, it includes information concerning

those settlements for a 10-year period only. Therefore, you should know that a doctor may have made settlements in the 10 years immediately preceding January 1, 2003, that are not included in this report. After January 1, 2013, for doctors practicing less than 10 years, the data covers their total years of practice. You should take into account the effective date of settlement disclosure as well as how long the doctor has been in practice when considering malpractice averages.

The incident causing the malpractice claim may have happened years before a payment is finally made. Sometimes, it takes a long time for a malpractice lawsuit to settle. Some doctors work primarily with high-risk patients. These doctors may have malpractice settlement histories that are higher than average because they specialize in cases or patients who are at very high risk for problems.

Settlement of a claim may occur for a variety of reasons that do not necessarily reflect negatively on the professional competence or conduct of the doctor. A payment in settlement of a medical malpractice action or claim should not be construed as creating a presumption that medical malpractice has occurred.

You may wish to discuss information in this report and the general issue of malpractice with your doctor."

(e) The Medical Board of California, the Osteopathic Medical Board of California, and the California Board of Podiatric Medicine shall, by regulation, develop standard terminology that accurately describes the different types of disciplinary filings and actions to take against a licensee as described in paragraphs (1) to (5), inclusive, of subdivision (a). In providing the public with information about a licensee via the Internet pursuant to Section 2027, the Medical Board of California, the Osteopathic Medical Board of California, and the California Board of Podiatric Medicine shall not use the terms "enforcement," "discipline," or similar language implying a sanction unless the physician and surgeon has been the subject of one of the actions described in paragraphs (1) to (5), inclusive, of subdivision (a).

(f) The Medical Board of California shall adopt regulations no later than July 1, 2003, designating each specialty and subspecialty practice area as either high risk or low risk. In promulgating these regulations, the board shall consult with commercial underwriters

of medical malpractice insurance companies, health care systems that self-insure physicians and surgeons, and representatives of the California medical specialty societies. The board shall utilize the carriers' statewide data to establish the two risk categories and the averages required by subparagraph (B) of paragraph (2) of subdivision (b). Prior to issuing regulations, the board shall convene public meetings with the medical malpractice carriers, self-insurers, and specialty representatives.

(g) The Medical Board of California, the Osteopathic Medical Board of California, and the California Board of Podiatric Medicine shall provide each licensee with a copy of the text of any proposed public disclosure authorized by this section prior to release of the disclosure to the public. The licensee shall have 10 working days from the date the board provides the copy of the proposed public disclosure to propose corrections of factual inaccuracies. Nothing in this section shall prevent the board from disclosing information to the public prior to the expiration of the 10-day period.

(h) Pursuant to subparagraph (A) of paragraph (2) of subdivision (b), the specialty or subspecialty information required by this section shall group physicians by specialty board recognized pursuant to paragraph (5) of subdivision (h) of Section 651 unless a different grouping would be more valid and the board, in its statement of reasons for its regulations, explains why the validity of the grouping would be more valid.

SEC. 4. Section 805.3 is added to the Business and Professions Code, to read:

805.3. A peer review body shall annually report to the Medical Board of California on its peer review activities involving licensees of that board and shall comply with any requests from that board for more detailed information. The information reported pursuant to this section shall be kept confidential.

SEC. 5. Section 805.5 of the Business and Professions Code is amended to read:

805.5. (a) Prior to granting or renewing staff privileges for any physician and surgeon, psychologist, podiatrist, or dentist, any health facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code, or any health care service plan or medical care foundation, or the medical staff of the institution shall request a report from the Medical Board of California, the Board of Psychology, the Osteopathic Medical

Board of California, or the Dental Board of California to determine if any report has been made pursuant to Section 805 indicating that the applying physician and surgeon, psychologist, podiatrist, or dentist has been denied staff privileges, been removed from a medical staff, or had his or her staff privileges restricted as provided in Section 805. The request shall include the name and California license number of the physician and surgeon, psychologist, podiatrist, or dentist. Furnishing of a copy of the 805 report shall not cause the 805 report to be a public record.

(b) Upon a request made by, or on behalf of, an institution described in subdivision (a) or its medical staff, which is received on or after January 1, 1980, the board shall furnish a copy of any report made pursuant to Section 805. However, the board shall not send a copy of a report (1) if the denial, removal, or restriction was imposed solely because of the failure to complete medical records, (2) if the board has found the information reported is without merit, or (3) if a period of three years has elapsed since the report was submitted. This three-year period shall be tolled during any period the licentiate has obtained a judicial order precluding disclosure of the report, unless the board is finally and permanently precluded by judicial order from disclosing the report. In the event a request is received by the board while the board is subject to a judicial order limiting or precluding disclosure, the board shall provide a disclosure to any qualified requesting party as soon as practicable after the judicial order is no longer in force.

In the event that the board fails to advise the institution within 30 working days following its request for a report required by this section, the institution may grant or renew staff privileges for the physician and surgeon, psychologist, podiatrist, or dentist.

(c) With respect to the Medical Board of California, both of the following shall apply:

(1) In addition to the circumstances identified in subdivision (b), the board shall not send a copy of a report made pursuant to Section 805 if a court reverses the denial, removal, or restriction.

(2) The board shall include with the copy of the 805 report furnished under this section any exculpatory or explanatory statement made regarding the report pursuant to subdivision (d) of Section 800.

~~(c)~~

(d) Any institution described in subdivision (a) or its medical staff that violates subdivision (a) is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars ($200) nor more than one thousand two hundred dollars ($1,200).

SEC. 6. Section 809 of the Business and Professions Code is amended to read:

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

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

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

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

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

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

~~(4)~~

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

~~(5)~~

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

~~(6)~~

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

~~(7)~~

(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.*

~~(8)~~

(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.

~~(9)~~

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

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

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

(b) To ensure that the peer review process is not circumvented, a member of a medical or professional staff, by contract or otherwise, shall not be 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.

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

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

SEC. 8. 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 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, privilege holder, 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) Patient death.

(4) Wrong site procedure.

(5) Wrong patient procedure.

(6) To promote impartial peer review.

(7) Upon the reasonable request of the licentiate.

(c) A peer review body shall obtain external peer review for the evaluation or investigation of an applicant, privilege holder, or member of the medical staff in the following circumstances:

(1) Three patient complaints regarding patient safety or standard of care against a single licentiate in a 24-month period.

(2) Three nursing complaints regarding patient safety or standard of care against a single licentiate in a 24-month period.

(3) Three colleague complaints regarding patient safety or standard of care against a single licentiate in a 24-month period.

(4) Annual billing of a single licentiate or medical group in excess of the 90th percentile for Medicare or Medi-Cal.

(5) Number of procedures or hospital admissions done by a single licentiate or medical group per capita in excess of the 90th percentile for the same specialty.

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

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

(2) "External peer review" means peer review provided by an external peer review organization pursuant to Section 809.08.

SEC. 9. Section 809.08 is added to the Business and Professions Code, to read:

809.08. (a) An external peer review organization shall be a nonprofit organization that is approved by the Medical Board of California and that meets all of the following criteria:

(1) Has no ownership interest in and is not involved in the operation of a health facility, clinic, or peer review body, as defined in Section 805, or in the delivery of health care services to patients.

(2) Has provided review of and consultation to hospital medical staffs with respect to quality improvement and peer review activities for at least three years.

(3) Maintains an available panel of California-licensed healing arts practitioners to perform peer review in at least one licensure category who are credentialed by the external peer review organization and who participate at least annually in a formal educational training program provided by the external peer review organization.

(4) Maintains internal quality management programs to evaluate the performance of its credentialed healing arts practitioners and engages in continuing quality improvement activities, as appropriate.

(b) Within 10 calendar days of receiving a request from a peer review body to provide external peer review pursuant to Section 809.07, the external peer review organization shall designate a fair and impartial panel of healing arts practitioners qualified to evaluate the clinical procedure or area at issue and shall provide the peer review body a copy of each designated healing arts practitioner's curriculum vitae.

(c) After performing external peer review, the panel designated pursuant to subdivision (b) shall recommend a course of action to the peer review body. This recommended course of action may include a recommendation that the licentiate, if a physician and surgeon, participate in an early detection and resolution program pursuant to Section 809.15.

(d) Notwithstanding the recommendations made pursuant to subdivision (c), the peer review body shall have the final decision regarding whether to take disciplinary action against a licentiate.

(e) The external peer review organization shall have the right to establish and collect reasonable fees for its services. It is the intent of the Legislature that these fees be payable by both the peer review body and the licentiate subject to external peer review.

(f) Except as provided in paragraph (1) of subdivision (a), "peer review body," as used in this section, has the meaning provided in subparagraph (A) of paragraph (1) of subdivision (a) of Section 805.

SEC. 10. Section 809.09 is added to the Business and Professions Code, to read:

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

(b) A peer review body shall respond to the request of another peer review body and produce the records requested concerning a licentiate under review to the extent not otherwise prohibited by state or federal law. The records produced pursuant to this section shall not be subject to discovery, a subpoena, or a subpoena duces tecum, and shall not be admissible as evidence in a court of law in this state. The peer review body responding to the request shall be entitled to all other confidentiality protections and privileges otherwise provided by law as to the information and records disclosed pursuant to this section.

SEC. 11. Section 809.1 of the Business and Professions Code is amended to read:

809.1. (a) A licentiate who is the subject of a final proposed action of a peer review body for which a report is required to be filed under Section 805 shall be entitled to written notice as set forth in subdivisions (b) and (c). For the purposes of this section, the "final proposed action" shall be the final decision or recommendation of the peer review body after informal investigatory activity or prehearing meetings, if any, *including external peer review pursuant to Sections 809.07 and 809.08*.

(b) The peer review body shall give the licentiate written notice of the final proposed action. This notice shall include all the following information:

(1) That an action against the licentiate has been proposed by the peer review body which, if adopted, shall be taken and reported pursuant to Section 805.

(2) The final proposed action.

(3) That the licentiate has the right to request a hearing on the final proposed action, *except while he or she participates in or after he or she completes an early detection and resolution program pursuant to Section 809.15*.

(4) The time limit, within which to request such a hearing, *and an explanation that this time limit will be tolled pending completion of an early detection and resolution program pursuant to Section 809.15*.

(5) Whether the licentiate has the option of participating in an early detection and resolution program pursuant to Section 809.15.

(c) If a hearing is requested on a timely basis, the peer review body shall give the licentiate a written notice stating all of the following:

(1) The reasons for the final proposed action taken or recommended, including the acts or omissions with which the licentiate is charged.

(2) The place, time, and date of the hearing.

SEC. 12. Section 809.15 is added to the Business and Professions Code, to read:

809.15. (a) A peer review body shall administer an early detection and resolution program (EDR) in which all of the following occur:

(1) The peer review body, where it deems appropriate, gives a physician and surgeon, who is the subject of a final proposed action for which an 805 report is required to be filed, the option of completing EDR.

(2) The peer review body requires the physician and surgeon participating in EDR to do any of the following for a period of time designated by the peer review body as a condition of completion of EDR:

(A) Be observed during patient care interventions by another physician and surgeon.

(B) Consult another physician and surgeon prior to implementing a course of care.

(C) Complete education or training designated by the peer review body.

(b) The peer review body acting pursuant to subdivision (a) shall not file an 805 report for any action that resulted in referral to EDR while a physician and surgeon participates in EDR or after the physician and surgeon successfully completes EDR.

(c) A physician and surgeon who successfully completes EDR shall not be subject to any disciplinary action by the peer review body acting pursuant to subdivision (a) or the board, as defined in subdivision (j), for any action that resulted in referral to EDR. However, participation in EDR shall not preclude the peer review body or the board from investigating or continuing to investigate, or from taking or continuing to take disciplinary action against,

a physician and surgeon for any unprofessional conduct that does not serve as a basis for referral to EDR.

(d) The time limit for filing an accusation under Section 2230.5 shall be tolled from the date on which a peer review body notifies the board of the physician and surgeon's participation in EDR under subdivision (f) until the date that the board receives notice from the peer review body that the physician and surgeon failed to successfully complete EDR under subdivision (f).

(e) A physician and surgeon participating in EDR shall not establish staff privileges at any new facility while participating in EDR.

(f) A peer review body shall notify the board of a physician and surgeon's participation in EDR. A peer review body shall also provide that notification to health care facilities at which the physician and surgeon has staff privileges. The peer review body shall also notify the board and those health care facilities when that participation has ceased, including whether or not the physician and surgeon successfully completed EDR.

(g) A physician and surgeon may refuse to participate in EDR and request a hearing concerning the final proposed action under Section 809.2.

(h) Costs incurred in connection with EDR shall be the sole responsibility of the participating physician and surgeon.

(i) (1) Except for disclosures to the board and health care facilities required under subdivision (f), a peer review body shall not disclose information obtained in administering EDR that individually identifies patients, participants in EDR, individual health care professionals, peer review bodies, or their committees or members, or individual health care facilities. The proceedings or records of an assessment or training program pertaining to a physician and surgeon's participation in EDR shall not be subject to discovery, nor shall those records or proceedings be admissible in a court of law in this state.

(2) The prohibition on the discovery and admissibility of records and proceedings in paragraph (1) shall not apply to a physician and surgeon participating in EDR who contests a peer review body's determination that he or she failed to successfully complete EDR.

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

(1) "Board" means the Medical Board of California.

(2) "Physician and surgeon" means a physician and surgeon licensed by the board.

SEC. 13. 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~~ *and the licentiate shall have the choice of hearing by either of the following:*

(1) An arbitrator or arbitrators selected by a process mutually acceptable to the licentiate and the peer review~~ body, or before a~~ *body.*

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

(B) Be an attorney licensed to practice law in the State of California and qualified to preside over a quasi-judicial hearing. An attorney or a law 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.

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

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

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

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

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

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

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

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

(g) Continuances shall be granted upon agreement of the parties 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. 14. 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 by a preponderance of the evidence that the action or recommendation is reasonable and warranted.

(c) ~~The peer review body shall adopt written provisions governing whether a licentiate shall have the option of being represented by an attorney at the licentiate's expense.~~ No peer review body shall be represented by an attorney if the licentiate is not so represented, except dental professional society peer review bodies may be represented by an attorney ~~provided that the peer review body grants each licentiate the option of being represented by an attorney at the licentiate's expense~~, even if the licentiate declines to be represented by an attorney.

SEC. 15. Section 2027 of the Business and Professions Code is amended to read:

2027. (a) ~~On or after July 1, 2001, the~~ *The* board shall post on the Internet the following information in its possession, custody, or control regarding licensed physicians and surgeons:

(1) With regard to the status of the license, whether or not the licensee is in good standing, subject to a temporary restraining order (TRO), subject to an interim suspension order (ISO), or subject to any of the enforcement actions set forth in Section 803.1.

(2) With regard to prior discipline, whether or not the licensee has been subject to discipline by the board or by the board of another state or jurisdiction, as described in Section 803.1.

(3) Any felony convictions reported to the board after January 3, 1991.

(4) All current accusations filed by the Attorney General, including those accusations that are on appeal. For purposes of this paragraph, "current accusation" shall mean an accusation that has not been dismissed, withdrawn, or settled, and has not been finally decided upon by an administrative law judge and the Medical Board of California unless an appeal of that decision is pending.

(5) Any malpractice judgment or arbitration award reported to the board after January 1, 1993.

(6) Any hospital disciplinary actions that resulted in the termination or revocation of a licensee's hospital staff privileges for a medical disciplinary cause or reason. *The board shall also post any exculpatory or explanatory statement regarding those hospital disciplinary actions provided by the licensee pursuant to subdivision (d) of Section 800.*

(7) Any misdemeanor conviction that results in a disciplinary action or an accusation that is not subsequently withdrawn or dismissed.

(8) Appropriate disclaimers and explanatory statements to accompany the above information, including an explanation of what types of information are not disclosed. These disclaimers and statements shall be developed by the board and shall be adopted by regulation.

(9) Any information required to be disclosed pursuant to Section 803.1.

(b) (1) From January 1, 2003, the information described in paragraphs (1) (other than whether or not the licensee is in good standing), (2), (4), (5), (7), and (9) of subdivision (a) shall remain posted for a period of 10 years from the date the board obtains possession, custody, or control of the information, and after the end of that period shall be removed from being posted on the board's Internet Web site. Information in the possession, custody, or control of the board prior to January 1, 2003, shall be posted for a period of 10 years from January 1, 2003. Settlement information shall be posted as described in paragraph (2) of subdivision (b) of Section 803.1.

(2) The information described in paragraphs (3) and (6) of subdivision (a) shall not be removed from being posted on the board's Internet Web site. Notwithstanding the provisions of this paragraph, if a licensee's hospital staff privileges are restored and the licensee notifies the board of the restoration, the information pertaining to the termination or revocation of those privileges, as described in paragraph (6) of subdivision (a), shall remain posted for a period of 10 years from the restoration date of the privileges, and at the end of that period shall be removed from being posted on the board's Internet Web site.

(c) Notwithstanding paragraph (2) of subdivision (b), the board shall remove and shall not post the information described in paragraph (6) of subdivision (a) if a court reverses the hospital disciplinary action or if the board's independent investigation exonerates the licensee from the charges forming the basis of the hospital disciplinary action.

~~(c)~~

(d) The board shall provide links to other Web sites on the Internet that provide information on board certifications that meet the requirements of subdivision (b) of Section 651. The board may provide links to other Web sites on the Internet that provide information on health care service plans, health insurers, hospitals, or other facilities. The board may also provide links to any other sites that would provide information on the affiliations of licensed physicians and surgeons.

SEC. 16. Section 2191.5 is added to the Business and Professions Code, to read:

2191.5. The board shall adopt and administer standards allowing a physician and surgeon to receive credit for up to 10 hours of continuing education each year for participating in a peer review body without compensation. For purposes of this section, "peer review body" has the same meaning as that term is defined in Section 805.

~~SECTION 1. Section 805.3 is added to the Business and Professions Code, to read:~~

~~805.3. (a) The Legislature finds and declares all of the following:~~

~~(1) A legislatively mandated report released in July 2008, "Comprehensive Study of Peer Review in California: Final Report," highlighted variations among health care entities in conducting, selecting, and applying criteria for peer review of physicians and surgeons.~~

~~(2) The report indicated that the peer review process fails in its purpose to ensure the quality and safety of medical care in California.~~

~~(3) In light of these serious patient safety concerns, an overhaul of the peer review process applicable to physicians and surgeons is necessary.~~

~~(b) The Medical Board of California shall conduct a pilot program to redesign the peer review process, as it applies to~~

~~physicians and surgeons, based on the recommendations made in the report identified in subdivision (a).~~

~~(c) It is the intent of the Legislature to enact legislation that would establish guidelines for the Medical Board of California to follow in conducting the pilot program described in subdivision (b).~~

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