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Chapter 25: Upon Review, the California Legislature Establishes a Uniform Definition of “Licentiate”

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Code Section Affected

Business and Professions Code § 809 (amended).

AB 1922 (Hernandez); 2008 STAT. Ch. 25.

I. INTRODUCTION

One commentator has observed “that the United States suffers from a general medical malpractice crisis.”¹ Yet, despite the prevalence of malpractice incidents, medical practitioners expect and deserve a fair procedure for reviewing such complaints. Chapter 25 seeks to ensure that such procedures are in place for *all* medical practitioners.

Business and Professions Code section 805 *et seq.* (section 805) specifies the steps for disciplining certain types of medical practitioners, referred to by section 805 as “licentiates.”² Since 1999, section 805 defined the term “licentiate” to include clinical social workers and marriage and family therapists.³ However, social workers and marriage and family therapists were not defined as “licentiates” within section 809.⁴ Licentiates, as defined by section 809, are entitled to appeal actions by peer review boards.⁵ Thus, peer review boards could have subjected social workers and marriage and family therapists to disciplinary action without giving the affected party the opportunity to have the action reviewed.⁶ Chapter 25 updates the definition of “licentiate” under section 809 to include social workers and marriage and family therapists, thereby ensuring that these professions are afforded a final hearing in the event they are subjected to an adverse peer-review action.⁷

1. Noam Sher, *New Differences Between Negligence and Strict Liability and Their Implications on Medical Malpractice Reform*, 16 S. CAL. INTERDISC. L.J. 335, 336 (2007); *see also* Agency for Healthcare Research and Quality, Medical Errors: The Scope of the Problem, <http://www.ahrq.gov/qual/errback.htm> (last visited Jan. 12, 2009) (on file with the *McGeorge Law Review*) (reporting that a survey conducted by the American Society of Health-System Pharmacists found that 56% of respondents reported that they are “very concerned” about “[c]omplications from a medical procedure”).

2. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1922, at 3-4 (May 13, 2008).

3. SENATE COMMITTEE ON BUSINESS, PROFESSIONS, AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 1922, at 3, 5 (May 12, 2008).

4. *See id.* at 3 (“[Existing law] defines a ‘licentiate’ for purposes of [those entitled to due process rights] as a physician and surgeon, doctor of podiatric medicine, clinical psychologist, or dentist.”).

5. *See* CAL. BUS. & PROF. CODE § 809.2 (West 2003) (providing guidelines for the appeals process).

6. SENATE COMMITTEE ON BUSINESS, PROFESSIONS, AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 1922, at 4 (May 12, 2008).

7. *Id.* at 3.

II. LEGAL BACKGROUND

In 1986, the U.S. Congress enacted the Health Care Quality Improvement Act (HCQIA) to reform the medical practice.⁸ Three years later, the California Legislature opted out of the federal program's peer review provisions by enacting Business and Professions Code section 809 *et seq.*,⁹ whereby California established its own rules regarding medical peer review.¹⁰ These measures require private hospitals "to establish high professional and ethical standards," which must be maintained through the use of "fairly conducted peer review."¹¹ Because peer review boards have the power to restrict or revoke a physician's license, the "peer review procedure plays a significant role in protecting the public against incompetent, impaired, or negligent physicians."¹²

A. General Mechanics of the Medical Peer Review Process

In the event that a peer review board denies, revokes, or restricts a licentiate's staff privileges, membership, or employment, a report of the action taken must be filed with the relevant state agency.¹³ A licentiate targeted for disciplinary action by a peer review board can request a hearing to review the action.¹⁴ This hearing panel may have either mutually-agreed upon arbitrators or "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."¹⁵ Thus, hospitals retain the ability to unilaterally appoint "unbiased" board members.¹⁶ These "unbiased" board members do not need to specialize in the same field as the doctor being reviewed if it would not be "feasible."¹⁷

8. See *id.* at 1 ("[The HCQIA] created standards for hospital peer review committees, provided immunity for those involved in peer review, and established the National Practitioner Data Bank, a system for reporting physicians whose competency has been questioned or when the physician has been sanctioned."). The states had the option to "opt-out" of certain provisions of the HCQIA. CAL. BUS. & PROF. CODE § 809(a)(1) (amended by Chapter 25).

9. *Unnamed Physician v. Bd. of Trs. of Saint Agnes Med. Ctr.*, 93 Cal. App. 4th 607, 616, 113 Cal. Rptr. 2d 309, 315 (5th Dist. 2001).

10. *Id.* California's peer review system is meant to avoid the HCQIA's deficiencies, as well as preempt possible adverse judicial interpretations of the federal law. CAL. BUS. & PROF. CODE § 809.

11. *Unnamed Physician*, 93 Cal. App. at 617, 113 Cal. Rptr. 2d at 316.

12. *Kibler v. N. Inyo County Local Hosp. Dist.*, 39 Cal. 4th 192, 200, 138 P.3d 193, 197 (2006).

13. CAL. BUS. & PROF. CODE § 805(b) (West Supp. 2008). These reports are referred to as "805 reports." *Id.* § 805(a)(7).

14. *Id.* § 809.2 (West 2003).

15. *Id.* § 809.2(a).

16. *Id.*

17. *Id.*

A licentiate can challenge a peer review board's decisions in court by seeking a writ of mandamus.¹⁸ A peer review board must employ adjudicatory procedures that comply with the pertinent statutes.¹⁹ Although courts often defer to peer review boards' statutory interpretation, ultimately it is the courts that decide how a statute is to be interpreted.²⁰ Thus, whether a peer review board correctly interpreted a statute is treated as a question of law and reviewed de novo by the courts.²¹ In contrast, courts review adjudicatory determinations made by a peer review board under an "abuse of discretion" standard.²²

B. The "Fair Procedure" Requirement

Section 809 "recognizes not only the balance between the rights of the physician to practice his or her profession and the duty of the hospital to ensure quality care, but also the importance of a *fair procedure, free of arbitrary and discriminatory acts.*"²³ Yet, licentiates are not afforded due process rights during hearings;²⁴ instead, hearings must only employ "fair procedure,"²⁵ meaning that a licentiate's hearing must conform to section 809 *et seq.*²⁶

"Fair procedure" is distinguishable from due process because it is defined statutorily, not constitutionally.²⁷ *Kaiser Foundation Hospitals v. Sacramento County Superior Court* demonstrates the distinction. In that case, a physician demanded a hearing after Kaiser Foundation Hospital-Sacramento/Roseville

18. See *Mileikowsky v. Tenet Healthsystem*, 128 Cal. App. 4th 531, 555-56, 27 Cal. Rptr. 3d 171, 188-89 (2d Dist. 2005) (stating that either traditional mandamus or administrative mandamus could be appropriate remedies, depending on the nature of the peer review board's actions).

"Statutes provide for two types of review by mandate: ordinary mandate and administrative mandate. . . . The nature of the administrative action or decision to be reviewed determines the applicable type of mandate. . . . In general, quasi-legislative acts are reviewed by ordinary mandate and quasi-judicial acts are reviewed by administrative mandate."

Id. at 554 n.15, 27 Cal. Rptr. 3d at 187 n.15 (quoting *Bunnett v. Regents of Univ. of Cal.*, 35 Cal. App. 4th 843, 848, 41 Cal. Rptr. 2d 567, 568 (1995)).

19. See *id.* at 554, 27 Cal. Rptr. 3d at 187 ("The first [question is] whether Dr. Mileikowsky was afforded the hearing required by the Business and Professions Code . . .").

20. *Id.* at 555, 27 Cal. Rptr. 3d at 188.

21. *Id.*

22. *Id.* at 556, 27 Cal. Rptr. 3d at 189. "Abuse of discretion is established if the [peer review board] has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence." *Id.* (quoting *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 123-24, 514 P.2d 111, 120 (1973)).

23. *Unnamed Physician v. Bd. of Trs. of Saint Agnes Med. Ctr.*, 93 Cal. App. 4th 607, 616-17, 113 Cal. Rptr. 2d 309, 316 (5th Dist. 2001) (emphasis added).

24. *Kaiser Found. Hosp. v. Sacramento County Superior Court*, 128 Cal. App. 4th 85, 101-02, 26 Cal. Rptr. 3d 744, 755 (3d Dist. 2005).

25. *Id.* at 102, 26 Cal. Rptr. 3d at 755.

26. *Id.*

27. See *id.* ("Since Kaiser and TPMG are private institutions, whatever fair procedure rights Dr. Dennis has arise from section 809 *et seq.* and not from the due process clauses of the state and federal Constitutions.").

terminated her.²⁸ The plaintiff complained that the hospital's ability to unilaterally select the hearing panel members violated her due process rights.²⁹ The court reasoned that because the plaintiff was only entitled to participate in a fair procedure, the plaintiff's due process complaints were inapposite.³⁰ So long as the hearing panel consisted of disinterested members, a medical facility could unilaterally select the panel participants.³¹ Therefore, the plaintiff did not have the right to participate in the selection of the hearing panelists.³²

III. CHAPTER 25

Chapter 25 modifies California's medical peer review system³³ by expanding the meaning of the term "licentiate" to include marriage and family therapists and clinical social workers.³⁴

IV. ANALYSIS OF CHAPTER 25

Chapter 25 seeks to resolve a discontinuity in the law.³⁵ Chapter 25's author intended that the legislation grant clinical social workers and marriage and family therapists the same procedural rights to which other professionals defined as "licentiates" are entitled.³⁶ The only change to California law is the addition of "marriage and family therapists and clinical social workers to the definition of . . . licentiate for purposes of the peer review process."³⁷ Therefore, Chapter 25 gives all professionals defined as "licentiates" equal procedural rights.

Chapter 25 does not contain any language that would affect the mechanics of the peer review process, so it does nothing to address concerns that the peer review process allows for bad-faith actions against practitioners.³⁸

28. *Id.* at 91-92, 26 Cal. Rptr. 3d at 747-48.

29. *Id.* at 94, 26 Cal. Rptr. 3d at 749-50.

30. *Id.* at 102, 26 Cal. Rptr. 3d at 755.

31. CAL. BUS. & PROF. CODE § 809.2(a) (West 2003).

32. *Kaiser Found. Hosp.*, 128 Cal. App. 4th at 101-02, 26 Cal. Rptr. 3d at 755.

33. *See* CAL. BUS. & PROF. CODE § 809.

34. *Id.* (amended by Chapter 25). In addition to the two types of practitioners added by Chapter 25, the term "licentiate" also includes: physicians, surgeons, podiatrists, clinical psychologists, and dentists. *Id.*

35. *See* E-mail from Annabel Smith, Staff Member for Assembly Member Edward Hernandez, to author (July 25, 2008, 12:25:00 PST) (on file with the *McGeorge Law Review*) ("The bill was a necessary technical cleanup to existing law.").

36. *See id.* ("Since [marriage and family therapists] can have their membership, employment, or privileges adversely affected by a Section 805 report, they should have the same due process protection [as other licentiates] provided by Section 809. AB 1922 updated the law to provide those protections."); SENATE COMMITTEE ON BUSINESS, PROFESSIONS, AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 1922, at 3 (May 12, 2008) (stating that according to Chapter 25's sponsor, the California Association of Marriage and Family Therapists, Chapter 25 "updates existing law to ensure due process protections are afforded to marriage and family therapists who are the subject of a peer review process").

37. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1922, at 1 (May 13, 2008).

38. *See* Lawrence R. Huntoon, Editorial, *Sham Peer Review: The Unjust "Objective Test,"* J. AM.

A. The Danger of “Bad-Faith” Peer Review

According to the California Association of Marriage and Family Therapists, “[p]eer review protects the consumer by preserving high standards.”³⁹ Effective peer review disciplines the small number of physicians that generate a disproportionately high number of malpractice suits.⁴⁰ However, there is a fear that peer review boards engage in bad-faith reviews.⁴¹ Dr. Larry Huntoon, who is a prominent member of the Association of American Physicians and Surgeons, stated, “[t]o bury their own mistakes, hospitals label doctors as ‘disruptive’ and file trumped-up charges of wrongdoing. Then they count on the ‘where there’s smoke, there’s fire’ perception to make the doctor the scapegoat.”⁴² For example, in 2000, a doctor served as an expert witness in opposition to the hospital that employed him.⁴³ The hospital subsequently fired the doctor.⁴⁴ When the doctor attempted to appeal his termination, the hospital denied him due process by effectively quashing the proceedings.⁴⁵

Additionally, unlike other types of alternative dispute resolution, section 809 *et seq.* allows for hospitals to unilaterally choose hearing panel members.⁴⁶ For example, in the context of arbitration, the default rule is that arbitration hearings are to be held by a “neutral arbitrator,”⁴⁷ defined as a person “selected jointly by the parties or by the arbitrators selected by the parties.”⁴⁸ However, Chapter 25 leaves the previous law—allowing for review by either arbitrators who are

PHYSICIANS & SURGEONS, Dec. 22, 2007, at 100 (“According to case law, bad-faith motives of a hospital and peer reviewers, including retaliatory, hostile, malicious, discriminatory, anticompetitive motives, intended to harm another physician, are considered irrelevant!”); Yann H. H. van Geertruyden, Comment, *The Fox Guarding the Henhouse: How the Health Care Quality Improvement Act of 1986 and State Peer Review Protection Statutes Have Helped Protect Bad Faith Peer Review in the Medical Community*, 18 J. CONTEMP. HEALTH L. & POL’Y 239, 252 (2001) (“Although it is inaccurate to assume that all peer review committees are predisposed to targeting a certain type of physician, it is nonetheless accurate to suggest that the peer review process, as currently structured, offers peer review participants the ability to practice arbitrary peer review with little fear of repercussion.” (emphasis in original)).

39. ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF AB 1922, at 2 (Apr. 1, 2008).

40. See Richard Greene, *Quackus Tyrannus*, FORBES, Oct. 5, 1987, at 67 (reporting that one study of Chicago-area physicians found that 2% of the practicing physicians “were . . . subject [to] 36% of all malpractice suits filed”).

41. See Huntoon, *supra* note 38, at 100 (“All a hospital has to do is utter the magic words ‘peer review’ and ‘objective test’ in court, and the hospital and bad-faith peer reviewers receive complete immunity.”).

42. *Doctors & Lawyers Form ‘Dream Team’ to Ask Supreme Court to Protect Medical Whistleblowers*, U.S. NEWswire, Dec. 20, 2005, National Desk.

43. *Id.*

44. *Id.*

45. *Id.*

46. Compare CAL. BUS. & PROF. CODE § 809.2(a) (West 2003) (allowing for a hospital to select “unbiased individuals” to serve as the triers of fact), with CAL. CIV. PROC. CODE § 1282(a) (West 2007) (providing that arbitration shall be held before a “neutral arbitrator”).

47. CAL. CIV. PROC. CODE § 1282(a).

48. *Id.* § 1280(d). The court may also appoint a neutral arbitrator “when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them.” *Id.*

mutually agreed upon, or by “unbiased individuals” unilaterally selected by the hospital unchanged.⁴⁹ While the default rule in arbitration is that the parties must mutually select the arbitrator,⁵⁰ mutual selection of arbitrators is simply one permissible process of adjudication in the context of medical peer review.⁵¹

Recently, courts in other states have been receptive to doctors’ claims against peer review boards.⁵² Furthermore, the California Medical Board has been examining the issue of bad-faith peer review.⁵³ Unfortunately, although Chapter 25 expands the procedural rights of certain professionals,⁵⁴ it does not take any steps to ensure that licentiates are not subject to bad-faith peer reviews.

B. Creation of an Independent Review Board May Cure Bad-Faith Review

A major flaw in the medical peer review process is that practitioners who are subject to adverse peer review decisions have few opportunities to appeal.⁵⁵ Bad-faith peer reviews could be minimized by creating an independent state agency to oversee peer review boards’ actions.⁵⁶

Indeed, such state agencies already exist in other contexts. For example, the Public Employee Relations Board (PERB) is an independent review board that has the responsibility of promoting uniform and stable relations between the State of California and its employees.⁵⁷ Similarly, the creation of an independent state agency with the responsibility of examining peer review decisions would

49. See CAL. BUS. & PROF. CODE § 809.2(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” (emphasis added)); *Kaiser Found. Hosp. v. Sacramento County Superior Court*, 128 Cal. App. 4th 85, 101-02, 26 Cal. Rptr. 3d 744, 755 (3d Dist. 2005) (stating that practitioners are not entitled to due process rights, but only “whatever fair procedure rights” are provided by the governing statutes).

50. CAL. CIV. PROC. CODE § 1282(a).

51. CAL. BUS. & PROF. CODE § 809.2(a).

52. See Valerie Jablow, *Expert Witnesses Win Their Day in Court Against Medical Groups*, TRIAL, Sept. 1, 2006, at 20 (reporting that the North Carolina and Florida appellate courts recently found in favor of doctors in their suits against peer review boards).

53. Steve Twedt, *Medical Groups Look into ‘Bad Faith’ Peer Reviews*, PITTSBURGH POST-GAZETTE, Oct. 24, 2004, <http://www.post-gazette.com/pg/04298/400170-114.stm> (on file with the *McGeorge Law Review*).

54. CAL. BUS. & PROF. CODE § 809 (amended by Chapter 25).

55. van Geertruyden, *supra* note 38, at 254.

56. *Id.* at 267; see also Twedt, *supra* note 53 (reporting that the Association of American Physicians and Surgeons has instituted a program that sends a peer review board’s decision, upon the request of an affected physician, to be examined by an independent review board).

57. Public Employment Relations Board, PERB Function, <http://www.perb.ca.gov/about/func.asp> (last visited Jan. 14, 2009) (on file with the *McGeorge Law Review*). PERB promotes good relations between civil servants and State employers by having exclusive initial jurisdiction over claims that a party has committed an unfair labor practice. *San Diego Teachers Ass’n v. Superior Court*, 24 Cal. 3d 1, 12-13, 593 P.2 838, 846 (1979). An “unfair labor practice” is defined as “[a]ny conduct prohibited by state or federal law governing the relations among employers, employees, and labor organizations.” BLACK’S LAW DICTIONARY 1564 (8th ed. 2004).

promote more uniform health care practices throughout California.⁵⁸ In addition, an independent state agency “would likely neutralize much of the pressure facing both peer reviewers in addition to those being peer reviewed.”⁵⁹ Finally, considering that state medical boards are responsible for licensing physicians, it makes sense that the state would have a role in determining whether physicians can continue to practice medicine.⁶⁰

V. CONCLUSION

Chapter 25 aligns the definition of “licentiate” under section 809 with the definition of “licentiate” under section 805.⁶¹ Although Chapter 25 does not address every problem that exists within the medical peer review process, it does ensure that social workers and marriage and family therapists are given the opportunity to contest adverse peer review actions.⁶² There may indeed be a medical malpractice problem in this country, but *all* medical professionals must have an equal opportunity to respond to disciplinary measures taken against them.

58. See van Geertruyden, *supra* note 38, at 267 (“Physicians who perform the initial peer review of their colleague’s work would surely welcome an independent analysis to ensure consistent application of generally accepted medical standards.”).

59. *Id.*

60. See *id.* (“As the importance of acquiring such privileges in a hospital has become so critical to practicing medicine within the state, it follows that states should play a role in overseeing which physicians are afforded privileges.”).

61. SENATE COMMITTEE ON BUSINESS, PROFESSIONS, AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 1922, at 3 (May 12, 2008).

62. *Id.*