

## [Courts are Required to Award Attorney Fees to a Substantially Prevailing Party in Peer Review Lawsuits](#)

Posted on September 10, 2010 by [David J. McMahon](#)

In [Smith v. Selma Community Hospital](#), 2010 DJDAR 13933 (2010), the [California Court of Appeal, Fifth District](#), held that under [Business and Professions Code Section 809.9](#), a substantially prevailing party in a peer review lawsuit is entitled to an attorney fee award if the other party's conduct in bringing, defending or litigating the case was frivolous, unreasonable, without foundation or in bad faith.

The litigation commenced after the governing board of Selma Community Hospital ("SCH") terminated the hospital privileges of Brenton Smith, M.D. Smith pursued a petition for writ of mandate seeking an order to have his privileges reinstated. Smith prevailed in the writ proceeding and was also successful in defeating the appeal brought by SCH.

Smith then filed a motion for attorney fees under Business and Professional Code Section 809.9. He sought a fee award in the sum of \$117,837.50. The trial court denied the motion for fees in its entirety. The court reached that conclusion, reasoning that SCH's position was not frivolous, unreasonable, without foundation, or in bad faith.

In 2009, Smith filed a timely notice of appeal from the order denying his motion for attorney fees. The appeal centered on the proper interpretation of Business and Professions Code Section 809.9, the interpretation of [Mir v. Charter Suburban Hospital](#), 27 Cal. App. 4th 1471 (1994), and the evidence relevant to the determination of the "bad faith" standard.

The appellate court reversed and remanded.

The court noted that under Section 809.9, a court must award attorney fees to a substantially prevailing party in a peer review lawsuit where the other party's conduct in bringing, defending or litigating the lawsuit was frivolous, unreasonable, without foundation, or in bad faith.

The court noted that the terms "frivolous," "unreasonable," and "without foundation" are objective standards. The court stated, however, that the determination of whether a party has acted in "bad faith" is a subjective standard. It involved findings regarding the defendant's motive for defending or litigating an action.

After an extensive analysis of the evidence in the record, the court of appeal concluded that the trial court did not anticipate, or utilize the correct legal standard for determining whether SCH acted in bad faith. Thus, this court remanded the case such that the trial court could apply that standard to the evidence in the record.