

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 647

(By Senators Jenkins, Foster, Barnes, Stollings and Green)

[Originating in the Committee on Government Organization;
reported February 24, 2012.]

A BILL to amend and reenact §30-3-14 of the Code of West Virginia, 1931, as amended; to amend and reenact §30-4-21 of said code; and to amend and reenact §30-14-12a of said code, all relating to the Board of Medicine, Board of Dental Examiners and the Board of Osteopathy; and permitting the boards to independently initiate disciplinary proceedings in certain circumstances.

Be it enacted by the Legislature of West Virginia:

That §30-3-14 of the Code of West Virginia, 1931, as amended, be amended and reenacted; that §30-4-21 of said code be amended and reenacted; and that §30-14-12a of said code be amended and reenacted, all to read as follows:

ARTICLE 3. WEST VIRGINIA MEDICAL PRACTICE ACT.

§30-3-14. Professional discipline of physicians and podiatrists; reporting of information to board pertaining to medical professional liability and professional incompetence required; penalties; grounds for license denial and discipline of physicians and podiatrists; investigations; physical and mental examinations; hearings; sanctions; summary sanctions; reporting by the board; reapplication; civil and criminal immunity; voluntary limitation of license; probable cause determinations.

1 (a) The board may independently initiate disciplinary
2 proceedings as well as initiate disciplinary proceedings
3 based on information received from medical peer review
4 committees, physicians, podiatrists, hospital administrators,
5 professional societies and others.

6 The board may initiate investigations as to professional
7 incompetence or other reasons for which a licensed physician
8 or podiatrist may be adjudged unqualified based upon
9 criminal convictions; complaints by citizens, pharmacists,
10 physicians, podiatrists, peer review committees, hospital
11 administrators, professional societies or others; or unfavor-

12 able outcomes arising out of medical professional liability.
13 The board shall initiate an investigation if it receives notice
14 that three or more judgments, or any combination of judg-
15 ments and settlements resulting in five or more unfavorable
16 outcomes arising from medical professional liability have
17 been rendered or made against the physician or podiatrist
18 within a five-year period. The board may not consider any
19 judgments or settlements as conclusive evidence of profes-
20 sional incompetence or conclusive lack of qualification to
21 practice.

22 (b) Upon request of the board, any medical peer review
23 committee in this state shall report any information that may
24 relate to the practice or performance of any physician or
25 podiatrist known to that medical peer review committee.
26 Copies of the requests for information from a medical peer
27 review committee may be provided to the subject physician
28 or podiatrist if, in the discretion of the board, the provision
29 of such copies will not jeopardize the board's investigation.
30 In the event that copies are provided, the subject physician
31 or podiatrist is allowed fifteen days to comment on the
32 requested information and such comments must be consid-
33 ered by the board.

34 The chief executive officer of every hospital shall, within
35 sixty days after the completion of the hospital's formal
36 disciplinary procedure and also within sixty days after the
37 commencement of and again after the conclusion of any
38 resulting legal action, report in writing to the board the
39 name of any member of the medical staff or any other
40 physician or podiatrist practicing in the hospital whose
41 hospital privileges have been revoked, restricted, reduced or
42 terminated for any cause, including resignation, together
43 with all pertinent information relating to such action. The
44 chief executive officer shall also report any other formal
45 disciplinary action taken against any physician or podiatrist
46 by the hospital upon the recommendation of its medical staff
47 relating to professional ethics, medical incompetence,
48 medical professional liability, moral turpitude or drug or
49 alcohol abuse. Temporary suspension for failure to maintain
50 records on a timely basis or failure to attend staff or section
51 meetings need not be reported. Voluntary cessation of
52 hospital privileges for reasons unrelated to professional
53 competence or ethics need not be reported.

54 Any managed care organization operating in this state
55 which provides a formal peer review process shall report in

56 writing to the board, within sixty days after the completion
57 of any formal peer review process and also within sixty days
58 after the commencement of and again after the conclusion of
59 any resulting legal action, the name of any physician or
60 podiatrist whose credentialing has been revoked or not
61 renewed by the managed care organization. The managed
62 care organization shall also report in writing to the board
63 any other disciplinary action taken against a physician or
64 podiatrist relating to professional ethics, professional
65 liability, moral turpitude or drug or alcohol abuse within
66 sixty days after completion of a formal peer review process
67 which results in the action taken by the managed care
68 organization. For purposes of this subsection, “managed care
69 organization” means a plan that establishes, operates or
70 maintains a network of health care providers who have
71 entered into agreements with and been credentialed by the
72 plan to provide health care services to enrollees or insureds
73 to whom the plan has the ultimate obligation to arrange for
74 the provision of or payment for health care services through
75 organizational arrangements for ongoing quality assurance,
76 utilization review programs or dispute resolutions.

77 Any professional society in this state comprised primar-
78 ily of physicians or podiatrists which takes formal disciplin-
79 ary action against a member relating to professional ethics,
80 professional incompetence, medical professional liability,
81 moral turpitude or drug or alcohol abuse shall report in
82 writing to the board within sixty days of a final decision the
83 name of the member, together with all pertinent information
84 relating to the action.

85 Every person, partnership, corporation, association,
86 insurance company, professional society or other organiza-
87 tion providing professional liability insurance to a physician
88 or podiatrist in this state, including the State Board of Risk
89 and Insurance Management, shall submit to the board the
90 following information within thirty days from any judgment
91 or settlement of a civil or medical professional liability
92 action excepting product liability actions: The name of the
93 insured; the date of any judgment or settlement; whether any
94 appeal has been taken on the judgment and, if so, by which
95 party; the amount of any settlement or judgment against the
96 insured; and other information required by the board.

97 Within thirty days from the entry of an order by a court
98 in a medical professional liability action or other civil action

99 in which a physician or podiatrist licensed by the board is
100 determined to have rendered health care services below the
101 applicable standard of care, the clerk of the court in which
102 the order was entered shall forward a certified copy of the
103 order to the board.

104 Within thirty days after a person known to be a physi-
105 cian or podiatrist licensed or otherwise lawfully practicing
106 medicine and surgery or podiatry in this state or applying to
107 be licensed is convicted of a felony under the laws of this
108 state or of any crime under the laws of this state involving
109 alcohol or drugs in any way, including any controlled
110 substance under state or federal law, the clerk of the court of
111 record in which the conviction was entered shall forward to
112 the board a certified true and correct abstract of record of
113 the convicting court. The abstract shall include the name and
114 address of the physician or podiatrist or applicant, the
115 nature of the offense committed and the final judgment and
116 sentence of the court.

117 Upon a determination of the board that there is probable
118 cause to believe that any person, partnership, corporation,
119 association, insurance company, professional society or other
120 organization has failed or refused to make a report required

121 by this subsection, the board shall provide written notice to
122 the alleged violator stating the nature of the alleged violation
123 and the time and place at which the alleged violator shall
124 appear to show good cause why a civil penalty should not be
125 imposed. The hearing shall be conducted in accordance with
126 the provisions of article five, chapter twenty-nine-a of this
127 code. After reviewing the record of the hearing, if the board
128 determines that a violation of this subsection has occurred,
129 the board shall assess a civil penalty of not less than \$1,000
130 nor more than \$10,000 against the violator. The board shall
131 notify any person so assessed of the assessment in writing
132 and the notice shall specify the reasons for the assessment.
133 If the violator fails to pay the amount of the assessment to
134 the board within thirty days, the Attorney General may
135 institute a civil action in the circuit court of Kanawha
136 County to recover the amount of the assessment. In any civil
137 action, the court's review of the board's action shall be
138 conducted in accordance with the provisions of section four,
139 article five, chapter twenty-nine-a of this code. Notwith-
140 standing any other provision of this article to the contrary,
141 when there are conflicting views by recognized experts as to
142 whether any alleged conduct breaches an applicable stan-

143 dard of care, the evidence must be clear and convincing
144 before the board may find that the physician or podiatrist
145 has demonstrated a lack of professional competence to
146 practice with a reasonable degree of skill and safety for
147 patients.

148 Any person may report to the board relevant facts about
149 the conduct of any physician or podiatrist in this state which
150 in the opinion of that person amounts to medical professional
151 liability or professional incompetence.

152 The board shall provide forms for filing reports pursuant
153 to this section. Reports submitted in other forms shall be
154 accepted by the board.

155 The filing of a report with the board pursuant to any
156 provision of this article, any investigation by the board or
157 any disposition of a case by the board does not preclude any
158 action by a hospital, other health care facility or professional
159 society comprised primarily of physicians or podiatrists to
160 suspend, restrict or revoke the privileges or membership of
161 the physician or podiatrist: Provided, That notwithstanding
162 any provision to the contrary, the board may independently
163 initiate disciplinary proceedings based on a report or
164 information from an agent or investigator of the Board of

165 Pharmacy, related to data from the controlled substance
166 monitoring program.

167 (c) The board may deny an application for license or
168 other authorization to practice medicine and surgery or
169 podiatry in this state and may discipline a physician or
170 podiatrist licensed or otherwise lawfully practicing in this
171 state who, after a hearing, has been adjudged by the board as
172 unqualified due to any of the following reasons:

173 (1) Attempting to obtain, obtaining, renewing or attempt-
174 ing to renew a license to practice medicine and surgery or
175 podiatry by bribery, fraudulent misrepresentation or through
176 known error of the board;

177 (2) Being found guilty of a crime in any jurisdiction,
178 which offense is a felony, involves moral turpitude or
179 directly relates to the practice of medicine. Any plea of nolo
180 contendere is a conviction for the purposes of this subdivi-
181 sion;

182 (3) False or deceptive advertising;

183 (4) Aiding, assisting, procuring or advising any unautho-
184 rized person to practice medicine and surgery or podiatry
185 contrary to law;

186 (5) Making or filing a report that the person knows to be
187 false; intentionally or negligently failing to file a report or
188 record required by state or federal law; willfully impeding or
189 obstructing the filing of a report or record required by state
190 or federal law; or inducing another person to do any of the
191 foregoing. The reports and records covered in this subdivi-
192 sion mean only those that are signed in the capacity as a
193 licensed physician or podiatrist;

194 (6) Requesting, receiving or paying directly or indirectly
195 a payment, rebate, refund, commission, credit or other form
196 of profit or valuable consideration for the referral of patients
197 to any person or entity in connection with providing medical
198 or other health care services or clinical laboratory services,
199 supplies of any kind, drugs, medication or any other medical
200 goods, services or devices used in connection with medical or
201 other health care services;

202 (7) Unprofessional conduct by any physician or podiatrist
203 in referring a patient to any clinical laboratory or pharmacy
204 in which the physician or podiatrist has a proprietary
205 interest unless the physician or podiatrist discloses in
206 writing such interest to the patient. The written disclosure
207 shall indicate that the patient may choose any clinical

208 laboratory for purposes of having any laboratory work or
209 assignment performed or any pharmacy for purposes of
210 purchasing any prescribed drug or any other medical goods
211 or devices used in connection with medical or other health
212 care services;

213 As used in this subdivision, "proprietary interest" does
214 not include an ownership interest in a building in which
215 space is leased to a clinical laboratory or pharmacy at the
216 prevailing rate under a lease arrangement that is not condi-
217 tional upon the income or gross receipts of the clinical
218 laboratory or pharmacy;

219 (8) Exercising influence within a patient-physician
220 relationship for the purpose of engaging a patient in sexual
221 activity;

222 (9) Making a deceptive, untrue or fraudulent representa-
223 tion in the practice of medicine and surgery or podiatry;

224 (10) Soliciting patients, either personally or by an agent,
225 through the use of fraud, intimidation or undue influence;

226 (11) Failing to keep written records justifying the course
227 of treatment of a patient, including, but not limited to,
228 patient histories, examination and test results and treatment
229 rendered, if any;

230 (12) Exercising influence on a patient in such a way as to
231 exploit the patient for financial gain of the physician or
232 podiatrist or of a third party. Any influence includes, but is
233 not limited to, the promotion or sale of services, goods,
234 appliances or drugs;

235 (13) Prescribing, dispensing, administering, mixing or
236 otherwise preparing a prescription drug, including any
237 controlled substance under state or federal law, other than
238 in good faith and in a therapeutic manner in accordance with
239 accepted medical standards and in the course of the physi-
240 cian's or podiatrist's professional practice: *Provided*, That a
241 physician who discharges his or her professional obligation
242 to relieve the pain and suffering and promote the dignity and
243 autonomy of dying patients in his or her care and, in so
244 doing, exceeds the average dosage of a pain relieving
245 controlled substance, as defined in Schedules II and III of the
246 Uniform Controlled Substance Act, does not violate this
247 article;

248 (14) Performing any procedure or prescribing any
249 therapy that, by the accepted standards of medical practice
250 in the community, would constitute experimentation on

251 human subjects without first obtaining full, informed and
252 written consent;

253 (15) Practicing or offering to practice beyond the scope
254 permitted by law or accepting and performing professional
255 responsibilities that the person knows or has reason to know
256 he or she is not competent to perform;

257 (16) Delegating professional responsibilities to a person
258 when the physician or podiatrist delegating the responsibili-
259 ties knows or has reason to know that the person is not
260 qualified by training, experience or licensure to perform
261 them;

262 (17) Violating any provision of this article or a rule or
263 order of the board or failing to comply with a subpoena or
264 subpoena duces tecum issued by the board;

265 (18) Conspiring with any other person to commit an act
266 or committing an act that would tend to coerce, intimidate or
267 preclude another physician or podiatrist from lawfully
268 advertising his or her services;

269 (19) Gross negligence in the use and control of prescrip-
270 tion forms;

271 (20) Professional incompetence; or

272 (21) The inability to practice medicine and surgery or
273 podiatry with reasonable skill and safety due to physical or
274 mental impairment, including deterioration through the
275 aging process, loss of motor skill or abuse of drugs or alcohol.
276 A physician or podiatrist adversely affected under this
277 subdivision shall be afforded an opportunity at reasonable
278 intervals to demonstrate that he or she may resume the
279 competent practice of medicine and surgery or podiatry with
280 reasonable skill and safety to patients. In any proceeding
281 under this subdivision, neither the record of proceedings nor
282 any orders entered by the board shall be used against the
283 physician or podiatrist in any other proceeding.

284 (d) The board shall deny any application for a license or
285 other authorization to practice medicine and surgery or
286 podiatry in this state to any applicant who, and shall revoke
287 the license of any physician or podiatrist licensed or other-
288 wise lawfully practicing within this state who, is found
289 guilty by any court of competent jurisdiction of any felony
290 involving prescribing, selling, administering, dispensing,
291 mixing or otherwise preparing any prescription drug,
292 including any controlled substance under state or federal
293 law, for other than generally accepted therapeutic purposes.

294 Presentation to the board of a certified copy of the guilty
295 verdict or plea rendered in the court is sufficient proof
296 thereof for the purposes of this article. A plea of nolo
297 contendere has the same effect as a verdict or plea of guilt.
298 Upon application of a physician that has had his or her
299 license revoked because of a drug related felony conviction,
300 upon completion of any sentence of confinement, parole,
301 probation or other court-ordered supervision and full
302 satisfaction of any fines, judgments or other fees imposed by
303 the sentencing court, the board may issue the applicant a
304 new license upon a finding that the physician is, except for
305 the underlying conviction, otherwise qualified to practice
306 medicine: *Provided*, That the board may place whatever
307 terms, conditions or limitations it deems appropriate upon a
308 physician licensed pursuant to this subsection.

309 (e) The board may refer any cases coming to its attention
310 to an appropriate committee of an appropriate professional
311 organization for investigation and report. Except for com-
312 plaints related to obtaining initial licensure to practice
313 medicine and surgery or podiatry in this state by bribery or
314 fraudulent misrepresentation, any complaint filed more than
315 two years after the complainant knew, or in the exercise of

316 reasonable diligence should have known, of the existence of
317 grounds for the complaint shall be dismissed: *Provided*, That
318 in cases of conduct alleged to be part of a pattern of similar
319 misconduct or professional incapacity that, if continued,
320 would pose risks of a serious or substantial nature to the
321 physician's or podiatrist's current patients, the investigating
322 body may conduct a limited investigation related to the
323 physician's or podiatrist's current capacity and qualification
324 to practice and may recommend conditions, restrictions or
325 limitations on the physician's or podiatrist's license to
326 practice that it considers necessary for the protection of the
327 public. Any report shall contain recommendations for any
328 necessary disciplinary measures and shall be filed with the
329 board within ninety days of any referral. The recommenda-
330 tions shall be considered by the board and the case may be
331 further investigated by the board. The board after full
332 investigation shall take whatever action it considers appro-
333 priate, as provided in this section.

334 (f) The investigating body, as provided in subsection (e)
335 of this section, may request and the board under any circum-
336 stances may require a physician or podiatrist or person
337 applying for licensure or other authorization to practice

338 medicine and surgery or podiatry in this state to submit to a
339 physical or mental examination by a physician or physicians
340 approved by the board. A physician or podiatrist submitting
341 to an examination has the right, at his or her expense, to
342 designate another physician to be present at the examination
343 and make an independent report to the investigating body or
344 the board. The expense of the examination shall be paid by
345 the board. Any individual who applies for or accepts the
346 privilege of practicing medicine and surgery or podiatry in
347 this state is considered to have given his or her consent to
348 submit to all examinations when requested to do so in
349 writing by the board and to have waived all objections to the
350 admissibility of the testimony or examination report of any
351 examining physician on the ground that the testimony or
352 report is privileged communication. If a person fails or
353 refuses to submit to an examination under circumstances
354 which the board finds are not beyond his or her control,
355 failure or refusal is prima facie evidence of his or her
356 inability to practice medicine and surgery or podiatry
357 competently and in compliance with the standards of
358 acceptable and prevailing medical practice.

359 (g) In addition to any other investigators it employs, the
360 board may appoint one or more licensed physicians to act for
361 it in investigating the conduct or competence of a physician.

362 (h) In every disciplinary or licensure denial action, the
363 board shall furnish the physician or podiatrist or applicant
364 with written notice setting out with particularity the reasons
365 for its action. Disciplinary and licensure denial hearings
366 shall be conducted in accordance with the provisions of
367 article five, chapter twenty-nine-a of this code. However,
368 hearings shall be heard upon sworn testimony and the rules
369 of evidence for trial courts of record in this state shall apply
370 to all hearings. A transcript of all hearings under this section
371 shall be made, and the respondent may obtain a copy of the
372 transcript at his or her expense. The physician or podiatrist
373 has the right to defend against any charge by the introduc-
374 tion of evidence, the right to be represented by counsel, the
375 right to present and cross-examine witnesses and the right
376 to have subpoenas and subpoenas duces tecum issued on his
377 or her behalf for the attendance of witnesses and the produc-
378 tion of documents. The board shall make all its final actions
379 public. The order shall contain the terms of all action taken
380 by the board.

381 (i) In disciplinary actions in which probable cause has
382 been found by the board, the board shall, within twenty days
383 of the date of service of the written notice of charges or sixty
384 days prior to the date of the scheduled hearing, whichever is
385 sooner, provide the respondent with the complete identity,
386 address and telephone number of any person known to the
387 board with knowledge about the facts of any of the charges;
388 provide a copy of any statements in the possession of or
389 under the control of the board; provide a list of proposed
390 witnesses with addresses and telephone numbers, with a
391 brief summary of his or her anticipated testimony; provide
392 disclosure of any trial expert pursuant to the requirements
393 of Rule 26(b)(4) of the West Virginia Rules of Civil Proce-
394 dure; provide inspection and copying of the results of any
395 reports of physical and mental examinations or scientific
396 tests or experiments; and provide a list and copy of any
397 proposed exhibit to be used at the hearing: *Provided*, That
398 the board shall not be required to furnish or produce any
399 materials which contain opinion work product information
400 or would be a violation of the attorney-client privilege.
401 Within twenty days of the date of service of the written
402 notice of charges, the board shall disclose any exculpatory

403 evidence with a continuing duty to do so throughout the
404 disciplinary process. Within thirty days of receipt of the
405 board's mandatory discovery, the respondent shall provide
406 the board with the complete identity, address and telephone
407 number of any person known to the respondent with knowl-
408 edge about the facts of any of the charges; provide a list of
409 proposed witnesses with addresses and telephone numbers,
410 to be called at hearing, with a brief summary of his or her
411 anticipated testimony; provide disclosure of any trial expert
412 pursuant to the requirements of Rule 26(b)(4) of the West
413 Virginia Rules of Civil Procedure; provide inspection and
414 copying of the results of any reports of physical and mental
415 examinations or scientific tests or experiments; and provide
416 a list and copy of any proposed exhibit to be used at the
417 hearing.

418 (j) Whenever it finds any person unqualified because of
419 any of the grounds set forth in subsection (c) of this section,
420 the board may enter an order imposing one or more of the
421 following:

422 (1) Deny his or her application for a license or other
423 authorization to practice medicine and surgery or podiatry;

424 (2) Administer a public reprimand;

425 (3) Suspend, limit or restrict his or her license or other
426 authorization to practice medicine and surgery or podiatry
427 for not more than five years, including limiting the practice
428 of that person to, or by the exclusion of, one or more areas of
429 practice, including limitations on practice privileges;

430 (4) Revoke his or her license or other authorization to
431 practice medicine and surgery or podiatry or to prescribe or
432 dispense controlled substances for a period not to exceed ten
433 years;

434 (5) Require him or her to submit to care, counseling or
435 treatment designated by the board as a condition for initial
436 or continued licensure or renewal of licensure or other
437 authorization to practice medicine and surgery or podiatry;

438 (6) Require him or her to participate in a program of
439 education prescribed by the board;

440 (7) Require him or her to practice under the direction of
441 a physician or podiatrist designated by the board for a
442 specified period of time; and

443 (8) Assess a civil fine of not less than \$1,000 nor more
444 than \$10,000.

445 (k) Notwithstanding the provisions of section eight,
446 article one, chapter thirty of this code, if the board deter-

447 mines the evidence in its possession indicates that a physi-
448 cian's or podiatrist's continuation in practice or unrestricted
449 practice constitutes an immediate danger to the public, the
450 board may take any of the actions provided in subsection (j)
451 of this section on a temporary basis and without a hearing if
452 institution of proceedings for a hearing before the board are
453 initiated simultaneously with the temporary action and
454 begin within fifteen days of the action. The board shall
455 render its decision within five days of the conclusion of a
456 hearing under this subsection.

457 (l) Any person against whom disciplinary action is taken
458 pursuant to the provisions of this article has the right to
459 judicial review as provided in articles five and six, chapter
460 twenty-nine-a of this code: *Provided*, That a circuit judge
461 may also remand the matter to the board if it appears from
462 competent evidence presented to it in support of a motion for
463 remand that there is newly discovered evidence of such a
464 character as ought to produce an opposite result at a second
465 hearing on the merits before the board and:

466 (1) The evidence appears to have been discovered since
467 the board hearing; and

468 (2) The physician or podiatrist exercised due diligence in
469 asserting his or her evidence and that due diligence would
470 not have secured the newly discovered evidence prior to the
471 appeal.

472 A person may not practice medicine and surgery or
473 podiatry or deliver health care services in violation of any
474 disciplinary order revoking, suspending or limiting his or her
475 license while any appeal is pending. Within sixty days, the
476 board shall report its final action regarding restriction,
477 limitation, suspension or revocation of the license of a
478 physician or podiatrist, limitation on practice privileges or
479 other disciplinary action against any physician or podiatrist
480 to all appropriate state agencies, appropriate licensed health
481 facilities and hospitals, insurance companies or associations
482 writing medical malpractice insurance in this state, the
483 American Medical Association, the American Podiatry
484 Association, professional societies of physicians or podia-
485 trists in the state and any entity responsible for the fiscal
486 administration of Medicare and Medicaid.

487 (m) Any person against whom disciplinary action has
488 been taken under the provisions of this article shall, at
489 reasonable intervals, be afforded an opportunity to demon-

490 strate that he or she can resume the practice of medicine and
491 surgery or podiatry on a general or limited basis. At the
492 conclusion of a suspension, limitation or restriction period
493 the physician or podiatrist may resume practice if the board
494 has so ordered.

495 (n) Any entity, organization or person, including the
496 board, any member of the board, its agents or employees and
497 any entity or organization or its members referred to in this
498 article, any insurer, its agents or employees, a medical peer
499 review committee and a hospital governing board, its
500 members or any committee appointed by it acting without
501 malice and without gross negligence in making any report or
502 other information available to the board or a medical peer
503 review committee pursuant to law and any person acting
504 without malice and without gross negligence who assists in
505 the organization, investigation or preparation of any such
506 report or information or assists the board or a hospital
507 governing body or any committee in carrying out any of its
508 duties or functions provided by law is immune from civil or
509 criminal liability, except that the unlawful disclosure of
510 confidential information possessed by the board is a misde-
511 meanor as provided in this article.

512 (o) A physician or podiatrist may request in writing to
513 the board a limitation on or the surrendering of his or her
514 license to practice medicine and surgery or podiatry or other
515 appropriate sanction as provided in this section. The board
516 may grant the request and, if it considers it appropriate, may
517 waive the commencement or continuation of other proceed-
518 ings under this section. A physician or podiatrist whose
519 license is limited or surrendered or against whom other
520 action is taken under this subsection may, at reasonable
521 intervals, petition for removal of any restriction or limitation
522 on or for reinstatement of his or her license to practice
523 medicine and surgery or podiatry.

524 (p) In every case considered by the board under this
525 article regarding discipline or licensure, whether initiated by
526 the board or upon complaint or information from any person
527 or organization, the board shall make a preliminary determi-
528 nation as to whether probable cause exists to substantiate
529 charges of disqualification due to any reason set forth in
530 subsection (c) of this section. If probable cause is found to
531 exist, all proceedings on the charges shall be open to the
532 public who are entitled to all reports, records and
533 nondeliberative materials introduced at the hearing, includ-

534 ing the record of the final action taken: *Provided*, That any
535 medical records, which were introduced at the hearing and
536 which pertain to a person who has not expressly waived his
537 or her right to the confidentiality of the records, may not be
538 open to the public nor is the public entitled to the records.

539 (q) If the board receives notice that a physician or
540 podiatrist has been subjected to disciplinary action or has
541 had his or her credentials suspended or revoked by the
542 board, a hospital or a professional society, as defined in
543 subsection (b) of this section, for three or more incidents
544 during a five-year period, the board shall require the
545 physician or podiatrist to practice under the direction of a
546 physician or podiatrist designated by the board for a speci-
547 fied period of time to be established by the board.

548 (r) Notwithstanding any other provisions of this article,
549 the board may, at any time, on its own motion, or upon
550 motion by the complainant, or upon motion by the physician
551 or podiatrist, or by stipulation of the parties, refer the matter
552 to mediation. The board shall obtain a list from the West
553 Virginia State Bar's mediator referral service of certified
554 mediators with expertise in professional disciplinary
555 matters. The Board and the physician or podiatrist may

556 choose a mediator from that list. If the board and the
557 physician or podiatrist are unable to agree on a mediator, the
558 board shall designate a mediator from the list by neutral
559 rotation. The mediation shall not be considered a proceeding
560 open to the public and any reports and records introduced at
561 the mediation shall not become part of the public record. The
562 mediator and all participants in the mediation shall maintain
563 and preserve the confidentiality of all mediation proceedings
564 and records. The mediator may not be subpoenaed or called
565 to testify or otherwise be subject to process requiring
566 disclosure of confidential information in any proceeding
567 relating to or arising out of the disciplinary or licensure
568 matter mediated: *Provided*, That any confidentiality agree-
569 ment and any written agreement made and signed by the
570 parties as a result of mediation may be used in any proceed-
571 ings subsequently instituted to enforce the written agree-
572 ment. The agreements may be used in other proceedings if
573 the parties agree in writing.

ARTICLE 4. WEST VIRGINIA DENTAL PRACTICE ACT.

§30-4-21. Complaints; investigations.

- 1 (a) Upon receipt of a written complaint filed against any
- 2 dentist or dental hygienist, the board shall provide a copy of

3 the complaint to the dentist or dental hygienist as specified
4 by legislative rule promulgated by the board.

5 (b) The board may investigate the complaint. If the board
6 finds upon investigation that probable cause exists that the
7 dentist or dental hygienist has violated any provision of this
8 article or the rules, the board shall serve the dentist or dental
9 hygienist with a written statement of charges and a notice
10 specifying the date, time and place of hearing. The hearing
11 shall be held in accordance with section twenty-two of this
12 article.

13 (c) Notwithstanding any provision to the contrary, the
14 board may independently initiate disciplinary proceedings
15 based on a report or information from an agent or investiga-
16 tor of the Board of Pharmacy, related to data from the
17 controlled substance monitoring program.

ARTICLE 14. OSTEOPATHIC PHYSICIANS AND SURGEONS.

**§30-14-12a. Initiation of suspension or revocation proceedings
allowed and required; reporting of information to
board pertaining to professional malpractice and
professional incompetence required; penalties;
probable cause determinations.**

1 (a) The board may independently initiate suspension or

2 revocation proceedings as well as initiate suspension or
3 revocation proceedings based on information received from
4 any person.

5 The board shall initiate investigations as to professional
6 incompetence or other reasons for which a licensed osteo-
7 pathic physician and surgeon may be adjudged unqualified
8 if the board receives notice that three or more judgments or
9 any combination of judgments and settlements resulting in
10 five or more unfavorable outcomes arising from medical
11 professional liability have been rendered or made against
12 such osteopathic physician within a five-year period.

13 (b) Upon request of the board, any medical peer review
14 committee in this state shall report any information that may
15 relate to the practice or performance of any osteopathic
16 physician known to that medical peer review committee.
17 Copies of such requests for information from a medical peer
18 review committee may be provided to the subject osteopathic
19 physician if, in the discretion of the board, the provision of
20 such copies will not jeopardize the board's investigation. In
21 the event that copies are provided, the subject osteopathic
22 physician has fifteen days to comment on the requested

23 information and such comments must be considered by the
24 board.

25 After the completion of a hospital's formal disciplinary
26 procedure and after any resulting legal action, the chief
27 executive officer of such hospital shall report in writing to
28 the board within sixty days the name of any member of the
29 medical staff or any other osteopathic physician practicing
30 in the hospital whose hospital privileges have been revoked,
31 restricted, reduced or terminated for any cause, including
32 resignation, together with all pertinent information relating
33 to such action. The chief executive officer shall also report
34 any other formal disciplinary action taken against any
35 osteopathic physician by the hospital upon the recommenda-
36 tion of its medical staff relating to professional ethics,
37 medical incompetence, medical malpractice, moral turpitude
38 or drug or alcohol abuse. Temporary suspension for failure
39 to maintain records on a timely basis or failure to attend
40 staff or section meetings need not be reported.

41 Any professional society in this state comprised primar-
42 ily of osteopathic physicians or physicians and surgeons of
43 other schools of medicine which takes formal disciplinary
44 action against a member relating to professional ethics,

45 professional incompetence, professional malpractice, moral
46 turpitude or drug or alcohol abuse, shall report in writing to
47 the board within sixty days of a final decision the name of
48 such member, together with all pertinent information
49 relating to such action.

50 Every person, partnership, corporation, association,
51 insurance company, professional society or other organiza-
52 tion providing professional liability insurance to an osteo-
53 pathic physician in this state shall submit to the board the
54 following information within thirty days from any judgment,
55 dismissal or settlement of a civil action or of any claim
56 involving the insured: The date of any judgment, dismissal or
57 settlement; whether any appeal has been taken on the
58 judgment, and, if so, by which party; the amount of any
59 settlement or judgment against the insured; and such other
60 information required by the board.

61 Within thirty days after a person known to be an osteo-
62 pathic physician licensed or otherwise lawfully practicing
63 medicine and surgery in this state or applying to be licensed
64 is convicted of a felony under the laws of this state, or of any
65 crime under the laws of this state involving alcohol or drugs
66 in any way, including any controlled substance under state

67 or federal law, the clerk of the court of record in which the
68 conviction was entered shall forward to the board a certified
69 true and correct abstract of record of the convicting court.
70 The abstract shall include the name and address of such
71 osteopathic physician or applicant, the nature of the offense
72 committed and the final judgment and sentence of the court.

73 Upon a determination of the board that there is probable
74 cause to believe that any person, partnership, corporation,
75 association, insurance company, professional society or other
76 organization has failed or refused to make a report required
77 by this subsection, the board shall provide written notice to
78 the alleged violator stating the nature of the alleged violation
79 and the time and place at which the alleged violator shall
80 appear to show good cause why a civil penalty should not be
81 imposed. The hearing shall be conducted in accordance with
82 the provisions of article five, chapter twenty-nine-a of this
83 code. After reviewing the record of such hearing, if the board
84 determines that a violation of this subsection has occurred,
85 the board shall assess a civil penalty of not less than \$1,000
86 nor more than \$10,000 against such violator. The board shall
87 notify anyone assessed of the assessment in writing and the
88 notice shall specify the reasons for the assessment. If the

89 violator fails to pay the amount of the assessment to the
90 board within thirty days, the Attorney General may institute
91 a civil action in the circuit court of Kanawha County to
92 recover the amount of the assessment. In any such civil
93 action, the court's review of the board's action shall be
94 conducted in accordance with the provisions of section four,
95 article five, chapter twenty-nine-a of this code.

96 Any person may report to the board relevant facts about
97 the conduct of any osteopathic physician in this state which
98 in the opinion of such person amounts to professional
99 malpractice or professional incompetence.

100 The board shall provide forms for filing reports pursuant
101 to this section. Reports submitted in other forms shall be
102 accepted by the board.

103 The filing of a report with the board pursuant to any
104 provision of this article, any investigation by the board or
105 any disposition of a case by the board does not preclude any
106 action by a hospital, other health care facility or professional
107 society comprised primarily of osteopathic physicians or
108 physicians and surgeons of other schools of medicine to
109 suspend, restrict or revoke the privileges or membership of
110 such osteopathic physician: Provided, That notwithstanding

111 any provision to the contrary, the board may independently
112 initiate disciplinary proceedings based on a report or
113 information from an agent or investigator of the Board of
114 Pharmacy, related to data from the controlled substance
115 monitoring program.

116 (c) In every case considered by the board under this
117 article regarding suspension, revocation or issuance of a
118 license whether initiated by the board or upon complaint or
119 information from any person or organization, the board shall
120 make a preliminary determination as to whether probable
121 cause exists to substantiate charges of cause to suspend,
122 revoke or refuse to issue a license as set forth in subsection
123 (a), section eleven of this article. If such probable cause is
124 found to exist, all proceedings on such charges shall be open
125 to the public who are entitled to all reports, records, and
126 nondeliberative materials introduced at such hearing,
127 including the record of the final action taken: *Provided*, That
128 any medical records, which were introduced at such hearing
129 and which pertain to a person who has not expressly waived
130 his or her right to the confidentiality of such records, shall
131 not be open to the public nor is the public entitled to such
132 records. If a finding is made that probable cause does not

133 exist, the public has a right of access to the complaint or
134 other document setting forth the charges, the findings of fact
135 and conclusions supporting such finding that probable cause
136 does not exist, if the subject osteopathic physician consents
137 to such access.

138 (d) If the board receives notice that an osteopathic
139 physician has been subjected to disciplinary action or has
140 had his or her credentials suspended or revoked by the
141 board, a medical peer review committee, a hospital or
142 professional society, as defined in subsection (b) of this
143 section, for three or more incidents in a five-year period, the
144 board shall require the osteopathic physician to practice
145 under the direction of another osteopathic physician for a
146 specified period to be established by the board.