

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

House Bill 4037

BY DELEGATE PORTERFIELD

[Introduced January 08, 2020; Referred to the
Committee on Health and Human Resources then the
Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §16-2P-1, §16-2P-2, §16-2P-3, §16-2P-4, §16-2P-5, §16-2P-6, §16-2P-7,
 3 §16-2P-8, §16-2P-9, §16-2P-10, and §16-2P-11; to amend and reenact §16-5-22 of said
 4 code; to amend and reenact §30-3-14 of said code; and to amend and reenact §30-14-11
 5 of said code, all relating to examination procedures to detect fetal heartbeat prior to an
 6 abortion; declaring legislative findings; defining terms; requiring an examination to detect
 7 fetal heartbeat prior to performing an abortion; requiring documentation of procedure and
 8 results; requiring proposal of legislative rule; prohibiting performance of abortion without
 9 conducting heartbeat examination; prohibiting performance of abortion to terminate life of
 10 unborn human individual when heartbeat has been detected; providing certain exceptions;
 11 requiring documentation when abortion is performed; maintaining legal availability of
 12 contraceptive drugs and devices; mandating certain actions if provisions of this act are
 13 suspended, or invalidated, or if state action is authorized through judicial proceedings;
 14 declaring severability of provisions; providing criminal penalties; requiring certain reports
 15 to be filed with State Registrar for Vital Statistics; and establishing grounds for disciplinary
 16 action against medical doctors and doctors of osteopathy who violate provisions of this
 17 act.

Be it enacted by the Legislature of West Virginia:

CHAPTER 16. PUBLIC HEALTH.

ARTICLE 2P. FETAL HEARTBEAT ACT.

§16-2P-1. Declaration of legislative findings.

1 The Legislature makes the following findings, based upon contemporary medical
 2 research:

3 (1) As many as 30 percent of natural pregnancies end in spontaneous miscarriage;

4 (2) Less than five percent of all natural pregnancies end in spontaneous miscarriage after
 5 detection of fetal cardiac activity;

6 (3) Over 90 percent of intrauterine pregnancies survive the first trimester if cardiac activity
7 is detected in the gestational sac;

8 (4) Nearly 90 percent of in vitro pregnancies do not survive the first trimester where cardiac
9 activity is not detected in the gestational sac;

10 (5) Fetal heartbeat, therefore, has become a key medical predictor that an unborn human
11 individual will reach live birth;

12 (6) Cardiac activity begins at a biologically identifiable moment in time, normally when the
13 fetal heart is formed in the gestational sac;

14 (7) The State of West Virginia has legitimate interests from the outset of a pregnancy in
15 protecting the health of the woman and the life of an unborn human individual who may be born;
16 and

17 (8) In order to make an informed choice about whether to continue her pregnancy, the
18 pregnant woman has a legitimate interest in knowing the likelihood of the fetus surviving to
19 full-term birth based upon the presence of cardiac activity.

§16-2P-2. Definitions.

1 As used in this article:

2 “Conception” means fertilization of a human ovum;

3 “Contraceptive” means a drug, device, or chemical that prevents conception;

4 “Fetal heartbeat” means cardiac activity or the steady and repetitive rhythmic contraction
5 of the fetal heart within the gestational sac;

6 “Fetus” means the human offspring developing during pregnancy from the moment of
7 conception and includes the embryonic stage of development;

8 “Gestational age” means the age of an unborn human individual as calculated from the
9 first day of the last menstrual period of a pregnant woman;

10 “Gestational sac” means the structure that comprises the extraembryonic membranes that
11 envelop the fetus and that is typically visible by ultrasound after the fourth week of pregnancy;

12 “Intrauterine pregnancy” means a pregnancy in which the fetus is attached to the placenta
13 within the uterus of the pregnant woman;

14 “Medical emergency” has the same meaning as in §16-2I-1(c) of this code;

15 “Physician” means any medical or osteopathic doctor licensed to practice medicine in this
16 state;

17 “Pregnancy” means the human female reproductive condition when the woman is carrying
18 developing human offspring, that begins with fertilization of a human ovum, and that is calculated
19 from the first day of the last menstrual period of the woman;

20 “Serious risk of the substantial and irreversible impairment of a major bodily function”
21 means any medically diagnosed condition that so complicates the pregnancy of the woman as to
22 directly or indirectly cause the substantial and irreversible impairment of a major bodily function;

23 “Spontaneous miscarriage” means the natural or accidental termination of a pregnancy
24 and the expulsion of the fetus, typically caused by genetic defects in the fetus or physical
25 abnormalities in the pregnant woman;

26 “Standard medical practice” means the degree of skill, care, and diligence that a physician
27 of the same medical specialty would employ in like circumstances. As applied to the method used
28 to determine the presence of a fetal heartbeat for purposes of §16-2P-3 of this code, “standard
29 medical practice” includes employing the appropriate means of detection depending on the
30 estimated gestational age of the fetus and the condition of the woman and her pregnancy; and

31 “Unborn child” and “unborn human individual” means an individual organism of the species
32 homo sapiens from fertilization until live birth.

§16-2P-3. Detection of cardiac activity prior to performing or inducing abortion.

1 (a)(1) A person who intends to perform or induce an abortion on a woman with an
2 intrauterine pregnancy shall determine whether there is a detectable fetal heartbeat of the unborn
3 human individual the pregnant woman is carrying. The method of determining the presence of a
4 fetal heartbeat shall be consistent with the person’s good faith understanding of standard medical

5 practice.

6 (2) The person who determines the presence or absence of a fetal heartbeat shall record
7 in the pregnant woman's medical record the estimated gestational age of the unborn human
8 individual, the method used to test for a fetal heartbeat, the date and time of the test, and the
9 results of the test.

10 (3) The person who performs the examination for the presence of a fetal heartbeat shall
11 give the pregnant woman the option to view or hear the fetal heartbeat.

12 (b) The Secretary of the Department of Health and Human Resources shall propose a rule
13 for legislative approval in accordance with the provisions of §29A-3-1 et seq. of this code
14 specifying the appropriate methods of performing an examination to determine the presence of a
15 fetal heartbeat of an unborn human individual based on standard medical practice: *Provided*, That
16 the rule shall only specify a method or methods of examination to be performed externally.

17 (c) A person is not in violation of subsection (a) of this section if:

18 (1) The person has performed an examination for the purpose of determining the presence
19 of a fetal heartbeat of an unborn human individual utilizing standard medical practice;

20 (2) The examination does not reveal a fetal heartbeat or the person has been informed by
21 a physician who has performed the examination for a fetal heartbeat that the examination did not
22 reveal a fetal heartbeat; and

23 (3) The person notes in the pregnant woman's medical records the procedure utilized to
24 detect the presence of a fetal heartbeat.

§16-2P-4. Abortion without fetal heartbeat examination; exceptions.

1 (a) Except as provided in subsections (b) and (e) of this section, no person shall
2 intentionally perform or induce an abortion on a pregnant woman before determining in
3 accordance with §16-2P-3(a) of this code whether the unborn human individual the pregnant
4 woman is carrying has a detectable fetal heartbeat.

5 (b) The prohibition in subsection (a) of this section shall not apply to a physician who
6 performs or induces the abortion if the physician believes that a medical emergency exists that
7 prevents compliance with subsection (a) of this section. A physician who performs or induces an
8 abortion on a pregnant woman based on this exception shall make written notations in the
9 pregnant woman's medical records of both of the following:

10 (1) The physician's belief that a medical emergency necessitating the abortion existed;

11 and

12 (2) The medical condition of the pregnant woman that prevented compliance with
13 subsection (a) of this section.

14 The physician shall maintain a copy of the notations in the physician's own records for at
15 least seven years from the date the notations were made.

16 (c) A person is not in violation of this section if the person acts in accordance with
17 §16-2P-3(a) of this code and the method used to determine the presence of a fetal heartbeat does
18 not reveal a fetal heartbeat.

19 (d) A pregnant woman on whom an abortion is intentionally performed or induced in
20 violation of subsection (a) of this section is not guilty of violating this section or of attempting to
21 commit, conspiring to commit, or complicity in committing a violation of this section. In addition,
22 the pregnant woman is not subject to a civil penalty based on the abortion being performed or
23 induced in violation of this section.

24 (e) This section only applies to intrauterine pregnancies.

§16-2P-5. Abortion after detection of fetal heartbeat; exceptions.

1 (a) Except as provided in subsections (b) and (e) of this section, no person shall
2 intentionally perform or induce an abortion on a pregnant woman with the specific intent of causing
3 or abetting the termination of the life of the unborn human individual the pregnant woman is
4 carrying and whose fetal heartbeat has been detected in accordance with §16-2P-3(a) of this
5 code.

6 (b) (1) This section shall not apply to a physician who performs a medical procedure that,
7 in the physician's reasonable medical judgment, is designed or intended to prevent the death of
8 the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of
9 a major bodily function of the pregnant woman.

10 (2) A physician who performs a medical procedure as described in this subsection shall,
11 in writing:

12 (A) Declare that the medical procedure is necessary, to the best of the physician's
13 reasonable medical judgment, to prevent the death of the pregnant woman or to prevent a serious
14 risk of the substantial and irreversible impairment of a major bodily function of the pregnant
15 woman; and

16 (B) Specify the pregnant woman's medical condition that the medical procedure is
17 asserted to address and the medical rationale for the physician's conclusion that the medical
18 procedure is necessary to prevent the death of the pregnant woman or to prevent a serious risk
19 of the substantial and irreversible impairment of a major bodily function of the pregnant woman.

20 (c) The physician shall place the written document required by subsection (b) of this
21 section in the pregnant woman's medical records. The physician shall maintain a copy of the
22 document in the physician's own records for at least seven years from the date the document is
23 created.

24 (d) A person is not in violation of subsection (a) of this section if the person acts in
25 accordance with §16-2P-3(a) of this code and the method used to determine the presence of a
26 fetal heartbeat does not reveal a fetal heartbeat.

27 (e) A pregnant woman on whom an abortion is intentionally performed or induced in
28 violation of subsection (a) of this section is not guilty of violating this section or of attempting to
29 commit, conspiring to commit, or complicity in committing a violation of subsection (a) of this
30 section. In addition, the pregnant woman is not subject to a civil penalty based on the abortion
31 being performed or induced in violation of subsection (a) of this section.

32 (f) This section only applies to intrauterine pregnancies.

33 (g) This section shall not repeal or limit any other provision of this code that restricts or
34 regulates the performance or inducement of an abortion by a particular method or during a
35 particular stage of a pregnancy.

§16-2P-6. Documentation when abortion performed; retention period.

1 (a) In addition to, and independent of, any other provision of this code, a person who
2 performs or induces an abortion on a pregnant woman shall:

3 (1) If the reason for the abortion purported is to preserve the health of the pregnant woman,
4 specify in a written document the medical condition that the abortion is asserted to address and
5 the medical rationale for the person’s conclusion that the abortion is necessary to address that
6 condition; or

7 (2) If the reason for the abortion is other than to preserve the health of the pregnant
8 woman, specify in a written document that maternal health is not the purpose of the abortion.

9 (b) The person who specifies the information in the document described in this section
10 shall place the document in the pregnant woman’s medical records. The person who specifies
11 the information shall maintain a copy of the document in the person’s own records for at least
12 seven years from the date the document is created.

§16-2P-7. Contraceptive drugs and devices.

1 Nothing in this article shall be construed to prohibit the sale, use, prescription, or
2 administration of a drug, device, or chemical that is designed for contraceptive purposes.

§16-2P-8. Civil right of action.

1 (a) A woman on whom an abortion was performed or induced in violation of §16-2P-4(a)
2 or §16-2P-5(a) of this code may file a civil action for the wrongful death of her unborn child.

3 (b) A woman who prevails in an action filed pursuant to this section shall receive from the
4 person who performed or induced the abortion:

5 (1) Damages in an amount equal to \$10,000 or an amount determined by the trier of fact

6 after consideration of the evidence at the mother's election at any time prior to final judgment
7 subject to the same defenses and requirements of proof, except any requirement of live birth, as
8 would apply to a suit for the wrongful death of a child who had been born alive; and

9 (2) Court costs and reasonable attorney's fees.

10 (c) A determination that §16-2P-4(a) or §16-2P-5(a) of this code is unconstitutional shall
11 be a defense to an action filed under subsection (a) of this section alleging that the defendant
12 violated the subsection that was determined to be unconstitutional.

13 (d) If the defendant in an action filed under this section prevails and: (1) The court finds
14 that the commencement of the action constitutes frivolous conduct; (2) the court's finding is not
15 based on that court or another court determining that §16-2P-4(a) or §16-2P-5(a) of this code is
16 unconstitutional; and (3) the court finds that the defendant was adversely affected by the frivolous
17 conduct; then the court shall award reasonable attorney's fees to the defendant.

§16-2P-9. Facility inspections to include review of documentation.

1 When the Department of Health and Human Resources conducts an inspection, for the
2 purpose of licensure, certification, periodic review of operations, oversight of health procedures,
3 or investigation of a complaint, of any facility that performs abortions, the department shall inspect
4 the facility's medical records to ensure that the physicians or other persons who perform abortions
5 at that facility are in compliance with the reporting requirements under §16-5-22 of this code. The
6 facility shall make the medical records available for inspection to the Department of Health and
7 Human Resources, but shall not release any individual's health information in the medical records
8 that is protected from disclosure by state or federal law.

§16-2P-10. Effects of court review; validity and severability.

1 (a) It is the intent of the Legislature that a court judgment or order suspending enforcement
2 of any provision of this article is not to be regarded as an effective repeal of that provision.

3 (b) (1) After the issuance of a decision by the Supreme Court of the United States
4 overruling the decision in the case of Roe v. Wade, 410 U.S. 113 (1973), the issuance of any

5 other court order or judgment restoring, expanding, or clarifying the authority of states to prohibit
 6 or regulate abortion entirely or in part, or the effective date of an amendment to the Constitution
 7 of the United States restoring, expanding, or clarifying the authority of states to prohibit or regulate
 8 abortion entirely or in part, the Attorney General may apply to an appropriate state or federal court
 9 for either or both of the following:

10 (A) A declaration that any one or more sections of this article are constitutional; or

11 (B) A judgment or order lifting an injunction against the enforcement of any provisions of
 12 this article.

13 (2) If the Attorney General fails to apply for the relief described in this subsection within 30
 14 days of an event described in subdivision (1) of this subsection, the prosecuting attorney or the
 15 county attorney of any county in this state may apply to the appropriate state or federal court for
 16 such relief.

17 (c) If any provision of this article is held invalid, or if the application of such provision to
 18 any person or circumstance is held invalid, the invalidity of that provision does not affect any other
 19 provisions or applications of this article that can be given effect without the invalid provision or
 20 application and, to this end, the provisions of this article are severable as provided in §2-2-10(cc)
 21 of this code. It is the express intent of the Legislature that:

22 (1) Any invalidity or potential invalidity of a provision of this article is not to impair the
 23 immediate and continuing enforceability of the remaining provisions; and

24 (2) The provisions of this article are not to have the effect of repealing or limiting any other
 25 laws of this state, except as may be expressly stated in this article.

§16-2P-11. Criminal penalties.

1 Any person who violates §16-2P-4(a) or §16-2P-5(a) of this code is guilty of a felony and,
 2 upon conviction, shall be punished by confinement in a correctional facility for not less than one
 3 nor more than five years and fined up to \$5,000.

ARTICLE 5. VITAL STATISTICS.

§16-5-22. Reports of induced termination of pregnancy.

1 (a) Each induced termination of pregnancy which occurs in this state, regardless of the
2 length of gestation, shall be reported to the section of vital statistics no later than the 10th day of
3 the month following the month the procedure was performed by the person in charge of the
4 institution in which the induced termination of pregnancy was performed. If the induced
5 termination of pregnancy was performed outside an institution, it shall be reported by the attending
6 physician. The State Registrar shall prepare a form or provide a suitable electronic process for
7 the transmission of the reports from the institution or physician to the section of vital statistics.

8 Information to be collected shall include:

9 (1) The gestational age of the fetus;

10 (2) The state and county of residence of the woman;

11 (3) The age of the woman;

12 (4) The type of medical or surgical procedure performed;

13 (5) The method of payment for the procedure;

14 (6) Whether birth defects were known, and if so, what birth defects; ~~and~~

15 (7) All information the physician is required to certify or provide in writing under §16-2P-3,
16 §16-2P-4, §16-2P-5, and §16-2P-6 of this code;

17 ~~(7)~~ (8) Related information as required by the commissioner, other applicable sections of
18 this code, or by the legislative rule: *Provided*, That:

19 (A) No personal identifiers, including, but not limited to, name, street address, city, zip
20 code, or social security number, will be collected; and

21 (B) Individual records may only be released for research purposes as approved by the
22 state Registrar and may be released in a format designed to further protect the confidentiality of
23 the woman as the state Registrar deems necessary.

24 (b) An analysis of the compiled information relating to induced terminations of pregnancy
25 shall be included in the annual report of vital statistics.

CHAPTER 30. PROFESSIONS AND OCCUPATIONS.

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 podiatrist; investigations; physical and mental examinations; hearings; sanctions; summary sanctions; reporting by the board; reapplication; civil and criminal immunity; voluntary limitation of license; probable cause determination; referral to law-enforcement authorities.

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

5 The board may initiate investigations as to professional incompetence or other reasons
6 for which a licensed physician or podiatrist may be adjudged unqualified based upon criminal
7 convictions; complaints by citizens, pharmacists, physicians, podiatrists, peer review committees,
8 hospital administrators, professional societies, or others; or unfavorable outcomes arising out of
9 medical professional liability. The board shall initiate an investigation if it receives notice that
10 three or more judgments, or any combination of judgments and settlements resulting in five or
11 more unfavorable outcomes arising from medical professional liability, have been rendered or
12 made against the physician or podiatrist within a five-year period. The board may not consider
13 any judgments or settlements as conclusive evidence of professional incompetence or conclusive
14 lack of qualification to practice.

15 (b) Upon request of the board, any medical peer review committee in this state shall report
16 any information that may relate to the practice or performance of any physician or podiatrist known

17 to that medical peer review committee. Copies of the requests for information from a medical peer
18 review committee may be provided to the subject physician or podiatrist if, in the discretion of the
19 board, the provision of such copies will not jeopardize the board's investigation. In the event that
20 copies are provided, the subject physician or podiatrist is allowed 15 days to comment on the
21 requested information and such comments must be considered by the board.

22 The chief executive officer of every hospital shall, within 60 days after the completion of
23 the hospital's formal disciplinary procedure and also within 60 days after the commencement of
24 and again after the conclusion of any resulting legal action, report in writing to the board the name
25 of any member of the medical staff or any other physician or podiatrist practicing in the hospital
26 whose hospital privileges have been revoked, restricted, reduced, or terminated for any cause,
27 including resignation, together with all pertinent information relating to such action. The chief
28 executive officer shall also report any other formal disciplinary action taken against any physician
29 or podiatrist by the hospital upon the recommendation of its medical staff relating to professional
30 ethics, medical incompetence, medical professional liability, moral turpitude or drug or alcohol
31 abuse. Temporary suspension for failure to maintain records on a timely basis or failure to attend
32 staff or section meetings need not be reported. Voluntary cessation of hospital privileges for
33 reasons unrelated to professional competence or ethics need not be reported.

34 Any managed care organization operating in this state which provides a formal peer review
35 process shall report in writing to the board, within 60 days after the completion of any formal peer
36 review process and also within 60 days after the commencement of and again after the conclusion
37 of any resulting legal action, the name of any physician or podiatrist whose credentialing has been
38 revoked or not renewed by the managed care organization. The managed care organization shall
39 also report in writing to the board any other disciplinary action taken against a physician or
40 podiatrist relating to professional ethics, professional liability, moral turpitude, or drug or alcohol
41 abuse within 60 days after completion of a formal peer review process which results in the action
42 taken by the managed care organization. For purposes of this subsection, "managed care

43 organization” means a plan that establishes, operates, or maintains a network of health care
44 providers who have entered into agreements with and been credentialed by the plan to provide
45 health care services to enrollees or insureds to whom the plan has the ultimate obligation to
46 arrange for the provision of or payment for health care services through organizational
47 arrangements for ongoing quality assurance, utilization review programs, or dispute resolutions.

48 Any professional society in this state comprised primarily of physicians or podiatrists which
49 takes formal disciplinary action against a member relating to professional ethics, professional
50 incompetence, medical professional liability, moral turpitude, or drug or alcohol abuse shall report
51 in writing to the board within 60 days of a final decision the name of the member, together with all
52 pertinent information relating to the action.

53 Every person, partnership, corporation, association, insurance company, professional
54 society, or other organization providing professional liability insurance to a physician or podiatrist
55 in this state, including the state Board of Risk and Insurance Management, shall submit to the
56 board the following information within 30 days from any judgment or settlement of a civil or medical
57 professional liability action excepting product liability actions: The name of the insured; the date
58 of any judgment or settlement; whether any appeal has been taken on the judgment and, if so, by
59 which party; the amount of any settlement or judgment against the insured; and other information
60 required by the board.

61 Within 30 days from the entry of an order by a court in a medical professional liability
62 action or other civil action in which a physician or podiatrist licensed by the board is determined
63 to have rendered health care services below the applicable standard of care, the clerk of the court
64 in which the order was entered shall forward a certified copy of the order to the board.

65 Within 30 days after a person known to be a physician or podiatrist licensed or otherwise
66 lawfully practicing medicine and surgery or podiatry in this state or applying to be licensed is
67 convicted of a felony under the laws of this state or of any crime under the laws of this state
68 involving alcohol or drugs in any way, including any controlled substance under state or federal

69 law, the clerk of the court of record in which the conviction was entered shall forward to the board
70 a certified true and correct abstract of record of the convicting court. The abstract shall include
71 the name and address of the physician or podiatrist 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 cause to believe that any person,
74 partnership, corporation, association, insurance company, professional society, or other
75 organization has failed or refused to make a report required by this subsection, the board shall
76 provide written notice to the alleged violator stating the nature of the alleged violation and the time
77 and place at which the alleged violator shall appear to show good cause why a civil penalty should
78 not be imposed. The hearing shall be conducted in accordance with §29A-5-1 *et seq.* of this code.
79 After reviewing the record of the hearing, if the board determines that a violation of this subsection
80 has occurred, the board shall assess a civil penalty of not less than \$1,000 nor more than \$10,000
81 against the violator. The board shall notify any person so assessed of the assessment in writing
82 and the notice shall specify the reasons for the assessment. If the violator fails to pay the amount
83 of the assessment to the board within 30 days, the Attorney General may institute a civil action in
84 the Circuit Court of Kanawha County to recover the amount of the assessment. In any civil action,
85 the court's review of the board's action shall be conducted in accordance with §29A-5-4 of this
86 code. Notwithstanding any other provision of this article to the contrary, when there are conflicting
87 views by recognized experts as to whether any alleged conduct breaches an applicable standard
88 of care, the evidence must be clear and convincing before the board may find that the physician
89 or podiatrist has demonstrated a lack of professional competence to practice with a reasonable
90 degree of skill and safety for patients.

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

94 The board shall provide forms for filing reports pursuant to this section. Reports submitted

95 in other forms shall be accepted by the board.

96 The filing of a report with the board pursuant to any provision of this article, any
97 investigation by the board, or any disposition of a case by the board does not preclude any action
98 by a hospital, other health care facility, or professional society comprised primarily of physicians
99 or podiatrists to suspend, restrict, or revoke the privileges or membership of the physician or
100 podiatrist.

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

105 (1) Attempting to obtain, obtaining, renewing, or attempting to renew a license to practice
106 medicine and surgery or podiatry by bribery, fraudulent misrepresentation, or through known error
107 of the board;

108 (2) Being found guilty of a crime in any jurisdiction, which offense is a felony, involves
109 moral turpitude, or directly relates to the practice of medicine. Any plea of nolo contendere is a
110 conviction for the purposes of this subdivision;

111 (3) False or deceptive advertising;

112 (4) Aiding, assisting, procuring, or advising any unauthorized person to practice medicine
113 and surgery or podiatry contrary to law;

114 (5) Making or filing a report that the person knows to be false; intentionally or negligently
115 failing to file a report or record required by state or federal law; willfully impeding or obstructing
116 the filing of a report or record required by state or federal law; or inducing another person to do
117 any of the foregoing. The reports and records covered in this subdivision mean only those that
118 are signed in the capacity as a licensed physician or podiatrist;

119 (6) Requesting, receiving, or paying directly or indirectly a payment, rebate, refund,
120 commission, credit, or other form of profit or valuable consideration for the referral of patients to

121 any person or entity in connection with providing medical or other health care services or clinical
122 laboratory services, supplies of any kind, drugs, medication, or any other medical goods, services,
123 or devices used in connection with medical or other health care services;

124 (7) Unprofessional conduct by any physician or podiatrist in referring a patient to any
125 clinical laboratory or pharmacy in which the physician or podiatrist has a proprietary interest
126 unless the physician or podiatrist discloses in writing such interest to the patient. The written
127 disclosure shall indicate that the patient may choose any clinical laboratory for purposes of having
128 any laboratory work or assignment performed or any pharmacy for purposes of purchasing any
129 prescribed drug or any other medical goods or devices used in connection with medical or other
130 health care services;

131 As used in this subdivision, "proprietary interest" does not include an ownership interest
132 in a building in which space is leased to a clinical laboratory or pharmacy at the prevailing rate
133 under a lease arrangement that is not conditional upon the income or gross receipts of the clinical
134 laboratory or pharmacy;

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

137 (9) Making a deceptive, untrue, or fraudulent representation in the practice of medicine
138 and surgery or podiatry;

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

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

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

146 (13) Prescribing, dispensing, administering, mixing, or otherwise preparing a prescription

147 drug, including any controlled substance under state or federal law, other than in good faith and
148 in a therapeutic manner in accordance with accepted medical standards and in the course of the
149 physician's or podiatrist's professional practice. A physician who discharges his or her
150 professional obligation to relieve the pain and suffering and promote the dignity and autonomy of
151 dying patients in his or her care and, in so doing, exceeds the average dosage of a pain relieving
152 controlled substance, as defined in Schedules II and III of the Uniform Controlled Substance Act,
153 does not violate this article;

154 (14) Performing any procedure or prescribing any therapy that, by the accepted standards
155 of medical practice in the community, would constitute experimentation on human subjects
156 without first obtaining full, informed, and written consent;

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

160 (16) Delegating professional responsibilities to a person when the physician or podiatrist
161 delegating the responsibilities knows or has reason to know that the person is not qualified by
162 training, experience, or licensure to perform them;

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

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

168 (19) Gross negligence in the use and control of prescription forms;

169 (20) Professional incompetence;

170 (21) The inability to practice medicine and surgery or podiatry with reasonable skill and
171 safety due to physical or mental impairment, including deterioration through the aging process,
172 loss of motor skill, or abuse of drugs or alcohol. A physician or podiatrist adversely affected under

173 this subdivision shall be afforded an opportunity at reasonable intervals to demonstrate that he or
174 she may resume the competent practice of medicine and surgery or podiatry with reasonable skill
175 and safety to patients. In any proceeding under this subdivision, neither the record of proceedings
176 nor any orders entered by the board shall be used against the physician or podiatrist in any other
177 proceeding; or

178 (22) Failure to comply with the requirements of §16-2P-3, §16-2P-4, or §16-2P-5 of this
179 code or failure to comply with any of the requirements regarding making or maintaining medical
180 records or documents described in §16-2P-6 of this code; or

181 ~~(22)~~ (23) Knowingly failing to report to the board any act of gross misconduct committed
182 by another licensee of the board.

183 (d) The board shall deny any application for a license or other authorization to practice
184 medicine and surgery or podiatry in this state to any applicant, and shall revoke the license of any
185 physician or podiatrist licensed or otherwise lawfully practicing within this state who, is found guilty
186 by any court of competent jurisdiction of any felony involving prescribing, selling, administering,
187 dispensing, mixing, or otherwise preparing any prescription drug, including any controlled
188 substance under state or federal law, for other than generally accepted therapeutic purposes.
189 Presentation to the board of a certified copy of the guilty verdict or plea rendered in the court is
190 sufficient proof thereof for the purposes of this article. A plea of nolo contendere has the same
191 effect as a verdict or plea of guilt. Upon application of a physician that has had his or her license
192 revoked because of a drug related felony conviction, upon completion of any sentence of
193 confinement, parole, probation, or other court-ordered supervision and full satisfaction of any
194 fines, judgments, or other fees imposed by the sentencing court, the board may issue the
195 applicant a new license upon a finding that the physician is, except for the underlying conviction,
196 otherwise qualified to practice medicine: *Provided*, That the board may place whatever terms,
197 conditions, or limitations it deems appropriate upon a physician licensed pursuant to this
198 subsection.

199 (e) The board may refer any cases coming to its attention to an appropriate committee of
200 an appropriate professional organization for investigation and report. Except for complaints
201 related to obtaining initial licensure to practice medicine and surgery or podiatry in this state by
202 bribery or fraudulent misrepresentation, any complaint filed more than two years after the
203 complainant knew, or in the exercise of reasonable diligence should have known, of the existence
204 of grounds for the complaint shall be dismissed: *Provided*, That in cases of conduct alleged to be
205 part of a pattern of similar misconduct or professional incapacity that, if continued, would pose
206 risks of a serious or substantial nature to the physician's or podiatrist's current patients, the
207 investigating body may conduct a limited investigation related to the physician's or podiatrist's
208 current capacity and qualification to practice and may recommend conditions, restrictions, or
209 limitations on the physician's or podiatrist's license to practice that it considers necessary for the
210 protection of the public. Any report shall contain recommendations for any necessary disciplinary
211 measures and shall be filed with the board within 90 days of any referral. The recommendations
212 shall be considered by the board and the case may be further investigated by the board. The
213 board after full investigation shall take whatever action it considers appropriate, as provided in
214 this section.

215 (f) The investigating body, as provided in §30-3-14(e) of this code, may request and the
216 board under any circumstances may require a physician or podiatrist or person applying for
217 licensure or other authorization to practice medicine and surgery or podiatry in this state to submit
218 to a physical or mental examination by a physician or physicians approved by the board. A
219 physician or podiatrist submitting to an examination has the right, at his or her expense, to
220 designate another physician to be present at the examination and make an independent report to
221 the investigating body or the board. The expense of the examination shall be paid by the board.
222 Any individual who applies for or accepts the privilege of practicing medicine and surgery or
223 podiatry in this state is considered to have given his or her consent to submit to all examinations
224 when requested to do so in writing by the board and to have waived all objections to the

225 admissibility of the testimony or examination report of any examining physician on the ground that
226 the testimony or report is privileged communication. If a person fails or refuses to submit to an
227 examination under circumstances which the board finds are not beyond his or her control, failure
228 or refusal is prima facie evidence of his or her inability to practice medicine and surgery or podiatry
229 competently and in compliance with the standards of acceptable and prevailing medical practice.

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

232 (h) In every disciplinary or licensure denial action, the board shall furnish the physician or
233 podiatrist or applicant with written notice setting out with particularity the reasons for its action.
234 Disciplinary and licensure denial hearings shall be conducted in accordance with §29A-5-1 *et seq.*
235 of this code. However, hearings shall be heard upon sworn testimony and the rules of evidence
236 for trial courts of record in this state shall apply to all hearings. A transcript of all hearings under
237 this section shall be made, and the respondent may obtain a copy of the transcript at his or her
238 expense. The physician or podiatrist has the right to defend against any charge by the introduction
239 of evidence, the right to be represented by counsel, the right to present and cross examine
240 witnesses and the right to have subpoenas and subpoenas duces tecum issued on his or her
241 behalf for the attendance of witnesses and the production of documents. The board shall make
242 all its final actions public. The order shall contain the terms of all action taken by the board.

243 (i) In disciplinary actions in which probable cause has been found by the board, the board
244 shall, within 20 days of the date of service of the written notice of charges or 60 days prior to the
245 date of the scheduled hearing, whichever is sooner, provide the respondent with the complete
246 identity, address, and telephone number of any person known to the board with knowledge about
247 the facts of any of the charges; provide a copy of any statements in the possession of or under
248 the control of the board; provide a list of proposed witnesses with addresses and telephone
249 numbers, with a brief summary of his or her anticipated testimony; provide disclosure of any trial
250 expert pursuant to the requirements of Rule 26(b)(4) of the West Virginia Rules of Civil Procedure;

251 provide inspection and copying of the results of any reports of physical and mental examinations
252 or scientific tests or experiments; and provide a list and copy of any proposed exhibit to be used
253 at the hearing: Provided, That the board shall not be required to furnish or produce any materials
254 which contain opinion work product information or would be a violation of the attorney-client
255 privilege. Within 20 days of the date of service of the written notice of charges, the board shall
256 disclose any exculpatory evidence with a continuing duty to do so throughout the disciplinary
257 process. Within 30 days of receipt of the board's mandatory discovery, the respondent shall
258 provide the board with the complete identity, address, and telephone number of any person known
259 to the respondent with knowledge about the facts of any of the charges; provide a list of proposed
260 witnesses with addresses and telephone numbers, to be called at hearing, with a brief summary
261 of his or her anticipated testimony; provide disclosure of any trial expert pursuant to the
262 requirements of Rule 26(b)(4) of the West Virginia Rules of Civil Procedure; provide inspection
263 and copying of the results of any reports of physical and mental examinations or scientific tests
264 or experiments; and provide a list and copy of any proposed exhibit to be used at the hearing.

265 (j) Whenever it finds any person unqualified because of any of the grounds set forth in
266 §30-3-14(c) of this code, the board may enter an order imposing one or more of the following:

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

269 (2) Administer a public reprimand;

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

273 (4) Revoke his or her license or other authorization to practice medicine and surgery or
274 podiatry or to prescribe or dispense controlled substances for any period of time, including for the
275 life of the licensee, that the board may find to be reasonable and necessary according to evidence
276 presented in a hearing before the board or its designee;

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

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

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

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

284 (k) Notwithstanding the provisions of §30-1-8 of this code, if the board determines the
285 evidence in its possession indicates that a physician's or podiatrist's continuation in practice or
286 unrestricted practice constitutes an immediate danger to the public, the board may take any of
287 the actions provided in §30-3-4(j) of this code on a temporary basis and without a hearing if
288 institution of proceedings for a hearing before the board are initiated simultaneously with the
289 temporary action and begin within 15 days of the action. The board shall render its decision within
290 five days of the conclusion of a hearing under this subsection.

291 (l) Any person against whom disciplinary action is taken pursuant to this article has the
292 right to judicial review as provided in §29A-5-1 *et seq.* and §29A-6-1 *et seq.* of this code: *Provided,*
293 That a circuit judge may also remand the matter to the board if it appears from competent
294 evidence presented to it in support of a motion for remand that there is newly discovered evidence
295 of such a character as ought to produce an opposite result at a second hearing on the merits
296 before the board and:

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

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

300 A person may not practice medicine and surgery or podiatry or deliver health care services
301 in violation of any disciplinary order revoking, suspending, or limiting his or her license while any
302 appeal is pending. Within 60 days, the board shall report its final action regarding restriction,

303 limitation, suspension, or revocation of the license of a physician or podiatrist, limitation on
304 practice privileges, or other disciplinary action against any physician or podiatrist to all appropriate
305 state agencies, appropriate licensed health facilities and hospitals, insurance companies or
306 associations writing medical malpractice insurance in this state, the American Medical
307 Association, the American Podiatry Association, professional societies of physicians or podiatrists
308 in the state, and any entity responsible for the fiscal administration of Medicare and Medicaid.

309 (m) Any person against whom disciplinary action has been taken under this article shall,
310 at reasonable intervals, be afforded an opportunity to demonstrate that he or she can resume the
311 practice of medicine and surgery or podiatry on a general or limited basis. At the conclusion of a
312 suspension, limitation, or restriction period the physician or podiatrist may resume practice if the
313 board has so ordered.

314 (n) Any entity, organization or person, including the board, any member of the board, its
315 agents or employees and any entity or organization or its members referred to in this article, any
316 insurer, its agents or employees, a medical peer review committee and a hospital governing
317 board, its members or any committee appointed by it acting without malice and without gross
318 negligence in making any report or other information available to the board or a medical peer
319 review committee pursuant to law and any person acting without malice and without gross
320 negligence who assists in the organization, investigation, or preparation of any such report or
321 information or assists the board or a hospital governing body or any committee in carrying out any
322 of its duties or functions provided by law is immune from civil or criminal liability, except that the
323 unlawful disclosure of confidential information possessed by the board is a misdemeanor as
324 provided in this article.

325 (o) A physician or podiatrist may request in writing to the board a limitation on or the
326 surrendering of his or her license to practice medicine and surgery or podiatry or other appropriate
327 sanction as provided in this section. The board may grant the request and, if it considers it
328 appropriate, may waive the commencement or continuation of other proceedings under this

329 section. A physician or podiatrist whose license is limited or surrendered or against whom other
330 action is taken under this subsection may, at reasonable intervals, petition for removal of any
331 restriction or limitation on or for reinstatement of his or her license to practice medicine and
332 surgery or podiatry.

333 (p) In every case considered by the board under this article regarding discipline or
334 licensure, whether initiated by the board or upon complaint or information from any person or
335 organization, the board shall make a preliminary determination as to whether probable cause
336 exists to substantiate charges of disqualification due to any reason set forth in §30-3-14(c) of this
337 code. If probable cause is found to exist, all proceedings on the charges shall be open to the
338 public who are entitled to all reports, records, and nondeliberative materials introduced at the
339 hearing, including the record of the final action taken: *Provided*, That any medical records, which
340 were introduced at the hearing and which pertain to a person who has not expressly waived his
341 or her right to the confidentiality of the records, may not be open to the public nor is the public
342 entitled to the records.

343 (q) If the board receives notice that a physician or podiatrist has been subjected to
344 disciplinary action or has had his or her credentials suspended or revoked by the board, a hospital
345 or a professional society, as defined in §30-3-14(b) of this code, for three or more incidents during
346 a five-year period, the board shall require the physician or podiatrist to practice under the direction
347 of a physician or podiatrist designated by the board for a specified period of time to be established
348 by the board.

349 (r) Notwithstanding any other provisions of this article, the board may, at any time, on its
350 own motion, or upon motion by the complainant, or upon motion by the physician or podiatrist, or
351 by stipulation of the parties, refer the matter to mediation. The board shall obtain a list from the
352 West Virginia State Bar's mediator referral service of certified mediators with expertise in
353 professional disciplinary matters. The board and the physician or podiatrist may choose a
354 mediator from that list. If the board and the physician or podiatrist are unable to agree on a

355 mediator, the board shall designate a mediator from the list by neutral rotation. The mediation
356 shall not be considered a proceeding open to the public, and any reports and records introduced
357 at the mediation shall not become part of the public record. The mediator and all participants in
358 the mediation shall maintain and preserve the confidentiality of all mediation proceedings and
359 records. The mediator may not be subpoenaed or called to testify or otherwise be subject to
360 process requiring disclosure of confidential information in any proceeding relating to or arising out
361 of the disciplinary or licensure matter mediated: *Provided*, That any confidentiality agreement and
362 any written agreement made and signed by the parties as a result of mediation may be used in
363 any proceedings subsequently instituted to enforce the written agreement. The agreements may
364 be used in other proceedings if the parties agree in writing.

365 (s) A physician licensed under this article may not be disciplined for providing expedited
366 partner therapy in accordance with §16-4F-1 *et seq.* of this code.

367 (t) Whenever the board receives credible information that a licensee of the board is
368 engaging or has engaged in criminal activity or the commitment of a crime under state or federal
369 law, the board shall report the information, to the extent that sensitive or confidential information
370 may be publicly disclosed under law, to the appropriate state or federal law-enforcement authority
371 and/or prosecuting authority. This duty exists in addition to and is distinct from the reporting
372 required under federal law for reporting actions relating to health care providers to the United0
373 States Department of Health and Human Services.

ARTICLE 14. OSTEOPATHIC PHYSICIANS AND SURGEONS.

§30-14-11. Refusal, suspension or revocation of license; suspension or revocation of certificate of authorization.

1 (a) The board may refuse to issue a license, suspend or revoke a license, fine a licensee,
2 order restitution or rehabilitative action by a licensee, or order a combination thereof for any one
3 or more of the following causes:

4 (1) Conviction of a felony, as shown by a certified copy of the record of the trial court:
5 *Provided*, That if the conviction is for an offense that involves the transfer, delivery or illicit
6 possession of a prescription drug, then the board shall revoke or refuse to issue the license of the
7 convicted physician or physician's assistant for a period of time until the physician or physician's
8 assistant demonstrates a record of rehabilitation and that he or she has the integrity, moral
9 character and professional competence to practice in this state;

10 (2) Conviction of a misdemeanor involving moral turpitude;

11 (3) Violation of any provision of this article regulating the practice of osteopathic physicians
12 and surgeons;

13 (4) Fraud, misrepresentation or deceit in procuring or attempting to procure admission to
14 practice;

15 (5) Gross malpractice;

16 (6) Advertising by means of knowingly false or deceptive statements;

17 (7) Advertising, practicing or attempting to practice under a name other than one's own;

18 (8) Habitual drunkenness, or habitual addiction to the use of morphine, cocaine or other
19 habit-forming drugs; or

20 (9) Failure to comply with the requirements of §16-2P-3, §16-2P-4, or §16-2P-5 of this
21 code or failure to comply with any of the requirements regarding making or maintaining medical
22 records or documents described in §16-2P-6 of this code; or

23 ~~(9)~~ (10) Knowingly failing to report to the board any act of gross misconduct committed by
24 another licensee of the board.

25 (b) The board shall also have the power to suspend or revoke for cause any certificate of
26 authorization issued by it. It shall have the power to reinstate any certificate of authorization
27 suspended or revoked by it.

28 (c) An osteopathic physician licensed under this article may not be disciplined for providing
29 expedited partner therapy in accordance with §16-4-1 *et seq.* of this code.

NOTE: The purpose of this bill is to require an examination to be conducted to detect presence of a fetal heartbeat to performing or inducing an abortion on a pregnant woman and to prohibit the abortion if a heartbeat is detected or if the examination is not conducted first.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.