

1 COMMITTEE SUBSTITUTE

2 FOR

3 **Senate Bill No. 647**

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

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

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9
10 A BILL to amend and reenact §30-3-14 of the Code of West Virginia,
11 1931, as amended; to amend and reenact §30-4-21 of said code;
12 and to amend and reenact §30-14-12a of said code, all relating
13 to the Board of Medicine, Board of Dental Examiners and the
14 Board of Osteopathy; and permitting the boards to
15 independently initiate disciplinary proceedings in certain
16 circumstances.

17 *Be it enacted by the Legislature of West Virginia:*

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

22 **ARTICLE 3. WEST VIRGINIA MEDICAL PRACTICE ACT.**

23 **§30-3-14. Professional discipline of physicians and podiatrists;**
24 **reporting of information to board pertaining to**
25 **medical professional liability and professional**

1 **incompetence required; penalties; grounds for license**
2 **denial and discipline of physicians and podiatrists;**
3 **investigations; physical and mental examinations;**
4 **hearings; sanctions; summary sanctions; reporting by**
5 **the board; reapplication; civil and criminal**
6 **immunity; voluntary limitation of license; probable**
7 **cause determinations.**

8 (a) The board may independently initiate disciplinary
9 proceedings as well as initiate disciplinary proceedings based on
10 information received from medical peer review committees,
11 physicians, podiatrists, hospital administrators, professional
12 societies and others.

13 The board may initiate investigations as to professional
14 incompetence or other reasons for which a licensed physician or
15 podiatrist may be adjudged unqualified based upon criminal
16 convictions; complaints by citizens, pharmacists, physicians,
17 podiatrists, peer review committees, hospital administrators,
18 professional societies or others; or unfavorable outcomes arising
19 out of medical professional liability. The board shall initiate an
20 investigation if it receives notice that three or more judgments,
21 or any combination of judgments and settlements resulting in five
22 or more unfavorable outcomes arising from medical professional
23 liability have been rendered or made against the physician or
24 podiatrist within a five-year period. The board may not consider
25 any judgments or settlements as conclusive evidence of professional

1 incompetence or conclusive lack of qualification to practice.

2 (b) Upon request of the board, any medical peer review
3 committee in this state shall report any information that may
4 relate to the practice or performance of any physician or
5 podiatrist known to that medical peer review committee. Copies of
6 the requests for information from a medical peer review committee
7 may be provided to the subject physician or podiatrist if, in the
8 discretion of the board, the provision of such copies will not
9 jeopardize the board's investigation. In the event that copies are
10 provided, the subject physician or podiatrist is allowed fifteen
11 days to comment on the requested information and such comments must
12 be considered by the board.

13 The chief executive officer of every hospital shall, within
14 sixty days after the completion of the hospital's formal
15 disciplinary procedure and also within sixty days after the
16 commencement of and again after the conclusion of any resulting
17 legal action, report in writing to the board the name of any member
18 of the medical staff or any other physician or podiatrist
19 practicing in the hospital whose hospital privileges have been
20 revoked, restricted, reduced or terminated for any cause, including
21 resignation, together with all pertinent information relating to
22 such action. The chief executive officer shall also report any
23 other formal disciplinary action taken against any physician or
24 podiatrist by the hospital upon the recommendation of its medical
25 staff relating to professional ethics, medical incompetence,
26 medical professional liability, moral turpitude or drug or alcohol

1 abuse. Temporary suspension for failure to maintain records on a
2 timely basis or failure to attend staff or section meetings need
3 not be reported. Voluntary cessation of hospital privileges for
4 reasons unrelated to professional competence or ethics need not be
5 reported.

6 Any managed care organization operating in this state which
7 provides a formal peer review process shall report in writing to
8 the board, within sixty days after the completion of any formal
9 peer review process and also within sixty days after the
10 commencement of and again after the conclusion of any resulting
11 legal action, the name of any physician or podiatrist whose
12 credentialing has been revoked or not renewed by the managed care
13 organization. The managed care organization shall also report in
14 writing to the board any other disciplinary action taken against a
15 physician or podiatrist relating to professional ethics,
16 professional liability, moral turpitude or drug or alcohol abuse
17 within sixty days after completion of a formal peer review process
18 which results in the action taken by the managed care organization.
19 For purposes of this subsection, "managed care organization" means
20 a plan that establishes, operates or maintains a network of health
21 care providers who have entered into agreements with and been
22 credentialed by the plan to provide health care services to
23 enrollees or insureds to whom the plan has the ultimate obligation
24 to arrange for the provision of or payment for health care services
25 through organizational arrangements for ongoing quality assurance,
26 utilization review programs or dispute resolutions.

1 Any professional society in this state comprised primarily of
2 physicians or podiatrists which takes formal disciplinary action
3 against a member relating to professional ethics, professional
4 incompetence, medical professional liability, moral turpitude or
5 drug or alcohol abuse shall report in writing to the board within
6 sixty days of a final decision the name of the member, together
7 with all pertinent information relating to the action.

8 Every person, partnership, corporation, association, insurance
9 company, professional society or other organization providing
10 professional liability insurance to a physician or podiatrist in
11 this state, including the State Board of Risk and Insurance
12 Management, shall submit to the board the following information
13 within thirty days from any judgment or settlement of a civil or
14 medical professional liability action excepting product liability
15 actions: The name of the insured; the date of any judgment or
16 settlement; whether any appeal has been taken on the judgment and,
17 if so, by which party; the amount of any settlement or judgment
18 against the insured; and other information required by the board.

19 Within thirty days from the entry of an order by a court in a
20 medical professional liability action or other civil action in
21 which a physician or podiatrist licensed by the board is determined
22 to have rendered health care services below the applicable standard
23 of care, the clerk of the court in which the order was entered
24 shall forward a certified copy of the order to the board.

25 Within thirty days after a person known to be a physician or
26 podiatrist licensed or otherwise lawfully practicing medicine and

1 surgery or podiatry in this state or applying to be licensed is
2 convicted of a felony under the laws of this state or of any crime
3 under the laws of this state involving alcohol or drugs in any way,
4 including any controlled substance under state or federal law, the
5 clerk of the court of record in which the conviction was entered
6 shall forward to the board a certified true and correct abstract of
7 record of the convicting court. The abstract shall include the
8 name and address of the physician or podiatrist or applicant, the
9 nature of the offense committed and the final judgment and sentence
10 of the court.

11 Upon a determination of the board that there is probable cause
12 to believe that any person, partnership, corporation, association,
13 insurance company, professional society or other organization has
14 failed or refused to make a report required by this subsection, the
15 board shall provide written notice to the alleged violator stating
16 the nature of the alleged violation and the time and place at which
17 the alleged violator shall appear to show good cause why a civil
18 penalty should not be imposed. The hearing shall be conducted in
19 accordance with the provisions of article five, chapter
20 twenty-nine-a of this code. After reviewing the record of the
21 hearing, if the board determines that a violation of this
22 subsection has occurred, the board shall assess a civil penalty of
23 not less than \$1,000 nor more than \$10,000 against the violator.
24 The board shall notify any person so assessed of the assessment in
25 writing and the notice shall specify the reasons for the
26 assessment. If the violator fails to pay the amount of the

1 assessment to the board within thirty days, the Attorney General
2 may institute a civil action in the circuit court of Kanawha County
3 to recover the amount of the assessment. In any civil action, the
4 court's review of the board's action shall be conducted in
5 accordance with the provisions of section four, article five,
6 chapter twenty-nine-a of this code. Notwithstanding any other
7 provision of this article to the contrary, when there are
8 conflicting views by recognized experts as to whether any alleged
9 conduct breaches an applicable standard of care, the evidence must
10 be clear and convincing before the board may find that the
11 physician or podiatrist has demonstrated a lack of professional
12 competence to practice with a reasonable degree of skill and safety
13 for patients.

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

18 The board shall provide forms for filing reports pursuant to
19 this section. Reports submitted in other forms shall be accepted
20 by the board.

21 The filing of a report with the board pursuant to any
22 provision of this article, any investigation by the board or any
23 disposition of a case by the board does not preclude any action by
24 a hospital, other health care facility or professional society
25 comprised primarily of physicians or podiatrists to suspend,
26 restrict or revoke the privileges or membership of the physician or

1 podiatrist: Provided, That notwithstanding any provision to the
2 contrary, the board may independently initiate disciplinary
3 proceedings based on a report or information from an agent or
4 investigator of the Board of Pharmacy, related to data from the
5 controlled substance monitoring program.

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

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

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

20 (3) False or deceptive advertising;

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

24 (5) Making or filing a report that the person knows to be
25 false; intentionally or negligently failing to file a report or
26 record required by state or federal law; willfully impeding or

1 obstructing the filing of a report or record required by state or
2 federal law; or inducing another person to do any of the foregoing.
3 The reports and records covered in this subdivision mean only those
4 that are signed in the capacity as a licensed physician or
5 podiatrist;

6 (6) Requesting, receiving or paying directly or indirectly a
7 payment, rebate, refund, commission, credit or other form of profit
8 or valuable consideration for the referral of patients to any
9 person or entity in connection with providing medical or other
10 health care services or clinical laboratory services, supplies of
11 any kind, drugs, medication or any other medical goods, services or
12 devices used in connection with medical or other health care
13 services;

14 (7) Unprofessional conduct by any physician or podiatrist in
15 referring a patient to any clinical laboratory or pharmacy in which
16 the physician or podiatrist has a proprietary interest unless the
17 physician or podiatrist discloses in writing such interest to the
18 patient. The written disclosure shall indicate that the patient
19 may choose any clinical laboratory for purposes of having any
20 laboratory work or assignment performed or any pharmacy for
21 purposes of purchasing any prescribed drug or any other medical
22 goods or devices used in connection with medical or other health
23 care services;

24 As used in this subdivision, "proprietary interest" does not
25 include an ownership interest in a building in which space is
26 leased to a clinical laboratory or pharmacy at the prevailing rate

1 under a lease arrangement that is not conditional upon the income
2 or gross receipts of the clinical laboratory or pharmacy;

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

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

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

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

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

19 (13) Prescribing, dispensing, administering, mixing or
20 otherwise preparing a prescription drug, including any controlled
21 substance under state or federal law, other than in good faith and
22 in a therapeutic manner in accordance with accepted medical
23 standards and in the course of the physician's or podiatrist's
24 professional practice: *Provided*, That a physician who discharges
25 his or her professional obligation to relieve the pain and
26 suffering and promote the dignity and autonomy of dying patients in

1 his or her care and, in so doing, exceeds the average dosage of a
2 pain relieving controlled substance, as defined in Schedules II and
3 III of the Uniform Controlled Substance Act, does not violate this
4 article;

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

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

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

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

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

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

26 (20) Professional incompetence; or

1 (21) The inability to practice medicine and surgery or
2 podiatry with reasonable skill and safety due to physical or mental
3 impairment, including deterioration through the aging process, loss
4 of motor skill or abuse of drugs or alcohol. A physician or
5 podiatrist adversely affected under this subdivision shall be
6 afforded an opportunity at reasonable intervals to demonstrate that
7 he or she may resume the competent practice of medicine and surgery
8 or podiatry with reasonable skill and safety to patients. In any
9 proceeding under this subdivision, neither the record of
10 proceedings nor any orders entered by the board shall be used
11 against the physician or podiatrist in any other proceeding.

12 (d) The board shall deny any application for a license or
13 other authorization to practice medicine and surgery or podiatry in
14 this state to any applicant who, and shall revoke the license of
15 any physician or podiatrist licensed or otherwise lawfully
16 practicing within this state who, is found guilty by any court of
17 competent jurisdiction of any felony involving prescribing,
18 selling, administering, dispensing, mixing or otherwise preparing
19 any prescription drug, including any controlled substance under
20 state or federal law, for other than generally accepted therapeutic
21 purposes. Presentation to the board of a certified copy of the
22 guilty verdict or plea rendered in the court is sufficient proof
23 thereof for the purposes of this article. A plea of nolo
24 contendere has the same effect as a verdict or plea of guilt. Upon
25 application of a physician that has had his or her license revoked
26 because of a drug related felony conviction, upon completion of any

1 sentence of confinement, parole, probation or other court-ordered
2 supervision and full satisfaction of any fines, judgments or other
3 fees imposed by the sentencing court, the board may issue the
4 applicant a new license upon a finding that the physician is,
5 except for the underlying conviction, otherwise qualified to
6 practice medicine: *Provided*, That the board may place whatever
7 terms, conditions or limitations it deems appropriate upon a
8 physician licensed pursuant to this subsection.

9 (e) The board may refer any cases coming to its attention to
10 an appropriate committee of an appropriate professional
11 organization for investigation and report. Except for complaints
12 related to obtaining initial licensure to practice medicine and
13 surgery or podiatry in this state by bribery or fraudulent
14 misrepresentation, any complaint filed more than two years after
15 the complainant knew, or in the exercise of reasonable diligence
16 should have known, of the existence of grounds for the complaint
17 shall be dismissed: *Provided*, That in cases of conduct alleged to
18 be part of a pattern of similar misconduct or professional
19 incapacity that, if continued, would pose risks of a serious or
20 substantial nature to the physician's or podiatrist's current
21 patients, the investigating body may conduct a limited
22 investigation related to the physician's or podiatrist's current
23 capacity and qualification to practice and may recommend
24 conditions, restrictions or limitations on the physician's or
25 podiatrist's license to practice that it considers necessary for
26 the protection of the public. Any report shall contain

1 recommendations for any necessary disciplinary measures and shall
2 be filed with the board within ninety days of any referral. The
3 recommendations shall be considered by the board and the case may
4 be further investigated by the board. The board after full
5 investigation shall take whatever action it considers appropriate,
6 as provided in this section.

7 (f) The investigating body, as provided in subsection (e) of
8 this section, may request and the board under any circumstances may
9 require a physician or podiatrist or person applying for licensure
10 or other authorization to practice medicine and surgery or podiatry
11 in this state to submit to a physical or mental examination by a
12 physician or physicians approved by the board. A physician or
13 podiatrist submitting to an examination has the right, at his or
14 her expense, to designate another physician to be present at the
15 examination and make an independent report to the investigating
16 body or the board. The expense of the examination shall be paid by
17 the board. Any individual who applies for or accepts the privilege
18 of practicing medicine and surgery or podiatry in this state is
19 considered to have given his or her consent to submit to all
20 examinations when requested to do so in writing by the board and to
21 have waived all objections to the admissibility of the testimony or
22 examination report of any examining physician on the ground that
23 the testimony or report is privileged communication. If a person
24 fails or refuses to submit to an examination under circumstances
25 which the board finds are not beyond his or her control, failure or
26 refusal is prima facie evidence of his or her inability to practice

1 medicine and surgery or podiatry competently and in compliance with
2 the standards of acceptable and prevailing medical practice.

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

6 (h) In every disciplinary or licensure denial action, the
7 board shall furnish the physician or podiatrist or applicant with
8 written notice setting out with particularity the reasons for its
9 action. Disciplinary and licensure denial hearings shall be
10 conducted in accordance with the provisions of article five,
11 chapter twenty-nine-a of this code. However, hearings shall be
12 heard upon sworn testimony and the rules of evidence for trial
13 courts of record in this state shall apply to all hearings. A
14 transcript of all hearings under this section shall be made, and
15 the respondent may obtain a copy of the transcript at his or her
16 expense. The physician or podiatrist has the right to defend
17 against any charge by the introduction of evidence, the right to be
18 represented by counsel, the right to present and cross-examine
19 witnesses and the right to have subpoenas and subpoenas duces tecum
20 issued on his or her behalf for the attendance of witnesses and the
21 production of documents. The board shall make all its final
22 actions public. The order shall contain the terms of all action
23 taken by the board.

24 (i) In disciplinary actions in which probable cause has been
25 found by the board, the board shall, within twenty days of the date
26 of service of the written notice of charges or sixty days prior to

1 the date of the scheduled hearing, whichever is sooner, provide the
2 respondent with the complete identity, address and telephone number
3 of any person known to the board with knowledge about the facts of
4 any of the charges; provide a copy of any statements in the
5 possession of or under the control of the board; provide a list of
6 proposed witnesses with addresses and telephone numbers, with a
7 brief summary of his or her anticipated testimony; provide
8 disclosure of any trial expert pursuant to the requirements of Rule
9 26(b) (4) of the West Virginia Rules of Civil Procedure; provide
10 inspection and copying of the results of any reports of physical
11 and mental examinations or scientific tests or experiments; and
12 provide a list and copy of any proposed exhibit to be used at the
13 hearing: *Provided*, That the board shall not be required to furnish
14 or produce any materials which contain opinion work product
15 information or would be a violation of the attorney-client
16 privilege. Within twenty days of the date of service of the
17 written notice of charges, the board shall disclose any exculpatory
18 evidence with a continuing duty to do so throughout the
19 disciplinary process. Within thirty days of receipt of the board's
20 mandatory discovery, the respondent shall provide the board with
21 the complete identity, address and telephone number of any person
22 known to the respondent with knowledge about the facts of any of
23 the charges; provide a list of proposed witnesses with addresses
24 and telephone numbers, to be called at hearing, with a brief
25 summary of his or her anticipated testimony; provide disclosure of
26 any trial expert pursuant to the requirements of Rule 26(b) (4) of

1 the West Virginia Rules of Civil Procedure; provide inspection and
2 copying of the results of any reports of physical and mental
3 examinations or scientific tests or experiments; and provide a list
4 and copy of any proposed exhibit to be used at the hearing.

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

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

10 (2) Administer a public reprimand;

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

16 (4) Revoke his or her license or other authorization to
17 practice medicine and surgery or podiatry or to prescribe or
18 dispense controlled substances for a period not to exceed ten
19 years;

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

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

26 (7) Require him or her to practice under the direction of a

1 physician or podiatrist designated by the board for a specified
2 period of time; and

3 (8) Assess a civil fine of not less than \$1,000 nor more than
4 \$10,000.

5 (k) Notwithstanding the provisions of section eight, article
6 one, chapter thirty of this code, if the board determines the
7 evidence in its possession indicates that a physician's or
8 podiatrist's continuation in practice or unrestricted practice
9 constitutes an immediate danger to the public, the board may take
10 any of the actions provided in subsection (j) of this section on a
11 temporary basis and without a hearing if institution of proceedings
12 for a hearing before the board are initiated simultaneously with
13 the temporary action and begin within fifteen days of the action.
14 The board shall render its decision within five days of the
15 conclusion of a hearing under this subsection.

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

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

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

4 A person may not practice medicine and surgery or podiatry or
5 deliver health care services in violation of any disciplinary order
6 revoking, suspending or limiting his or her license while any
7 appeal is pending. Within sixty days, the board shall report its
8 final action regarding restriction, limitation, suspension or
9 revocation of the license of a physician or podiatrist, limitation
10 on practice privileges or other disciplinary action against any
11 physician or podiatrist to all appropriate state agencies,
12 appropriate licensed health facilities and hospitals, insurance
13 companies or associations writing medical malpractice insurance in
14 this state, the American Medical Association, the American Podiatry
15 Association, professional societies of physicians or podiatrists in
16 the state and any entity responsible for the fiscal administration
17 of Medicare and Medicaid.

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

25 (n) Any entity, organization or person, including the board,
26 any member of the board, its agents or employees and any entity or

1 organization or its members referred to in this article, any
2 insurer, its agents or employees, a medical peer review committee
3 and a hospital governing board, its members or any committee
4 appointed by it acting without malice and without gross negligence
5 in making any report or other information available to the board or
6 a medical peer review committee pursuant to law and any person
7 acting without malice and without gross negligence who assists in
8 the organization, investigation or preparation of any such report
9 or information or assists the board or a hospital governing body or
10 any committee in carrying out any of its duties or functions
11 provided by law is immune from civil or criminal liability, except
12 that the unlawful disclosure of confidential information possessed
13 by the board is a misdemeanor as provided in this article.

14 (o) A physician or podiatrist may request in writing to the
15 board a limitation on or the surrendering of his or her license to
16 practice medicine and surgery or podiatry or other appropriate
17 sanction as provided in this section. The board may grant the
18 request and, if it considers it appropriate, may waive the
19 commencement or continuation of other proceedings under this
20 section. A physician or podiatrist whose license is limited or
21 surrendered or against whom other action is taken under this
22 subsection may, at reasonable intervals, petition for removal of
23 any restriction or limitation on or for reinstatement of his or her
24 license to practice medicine and surgery or podiatry.

25 (p) In every case considered by the board under this article
26 regarding discipline or licensure, whether initiated by the board

1 or upon complaint or information from any person or organization,
2 the board shall make a preliminary determination as to whether
3 probable cause exists to substantiate charges of disqualification
4 due to any reason set forth in subsection (c) of this section. If
5 probable cause is found to exist, all proceedings on the charges
6 shall be open to the public who are entitled to all reports,
7 records and nondeliberative materials introduced at the hearing,
8 including the record of the final action taken: *Provided*, That any
9 medical records, which were introduced at the hearing and which
10 pertain to a person who has not expressly waived his or her right
11 to the confidentiality of the records, may not be open to the
12 public nor is the public entitled to the records.

13 (q) If the board receives notice that a physician or
14 podiatrist has been subjected to disciplinary action or has had his
15 or her credentials suspended or revoked by the board, a hospital or
16 a professional society, as defined in subsection (b) of this
17 section, for three or more incidents during a five-year period, the
18 board shall require the physician or podiatrist to practice under
19 the direction of a physician or podiatrist designated by the board
20 for a specified period of time to be established by the board.

21 (r) Notwithstanding any other provisions of this article, the
22 board may, at any time, on its own motion, or upon motion by the
23 complainant, or upon motion by the physician or podiatrist, or by
24 stipulation of the parties, refer the matter to mediation. The
25 board shall obtain a list from the West Virginia State Bar's
26 mediator referral service of certified mediators with expertise in

1 professional disciplinary matters. The Board and the physician or
2 podiatrist may choose a mediator from that list. If the board and
3 the physician or podiatrist are unable to agree on a mediator, the
4 board shall designate a mediator from the list by neutral rotation.
5 The mediation shall not be considered a proceeding open to the
6 public and any reports and records introduced at the mediation
7 shall not become part of the public record. The mediator and all
8 participants in the mediation shall maintain and preserve the
9 confidentiality of all mediation proceedings and records. The
10 mediator may not be subpoenaed or called to testify or otherwise be
11 subject to process requiring disclosure of confidential information
12 in any proceeding relating to or arising out of the disciplinary or
13 licensure matter mediated: *Provided*, That any confidentiality
14 agreement and any written agreement made and signed by the parties
15 as a result of mediation may be used in any proceedings
16 subsequently instituted to enforce the written agreement. The
17 agreements may be used in other proceedings if the parties agree in
18 writing.

19 **ARTICLE 4. WEST VIRGINIA DENTAL PRACTICE ACT.**

20 **§30-4-21. Complaints; investigations.**

21 (a) Upon receipt of a written complaint filed against any
22 dentist or dental hygienist, the board shall provide a copy of the
23 complaint to the dentist or dental hygienist as specified by
24 legislative rule promulgated by the board.

25 (b) The board may investigate the complaint. If the board
26 finds upon investigation that probable cause exists that the

1 dentist or dental hygienist has violated any provision of this
2 article or the rules, the board shall serve the dentist or dental
3 hygienist with a written statement of charges and a notice
4 specifying the date, time and place of hearing. The hearing shall
5 be held in accordance with section twenty-two of this article.

6 (c) Notwithstanding any provision to the contrary, the board
7 may independently initiate disciplinary proceedings based on a
8 report or information from an agent or investigator of the Board of
9 Pharmacy, related to data from the controlled substance monitoring
10 program.

11 **ARTICLE 14. OSTEOPATHIC PHYSICIANS AND SURGEONS.**

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

17 (a) The board may independently initiate suspension or
18 revocation proceedings as well as initiate suspension or revocation
19 proceedings based on information received from any person.

20 The board shall initiate investigations as to professional
21 incompetence or other reasons for which a licensed osteopathic
22 physician and surgeon may be adjudged unqualified if the board
23 receives notice that three or more judgments or any combination of
24 judgments and settlements resulting in five or more unfavorable
25 outcomes arising from medical professional liability have been

1 rendered or made against such osteopathic physician within a
2 five-year period.

3 (b) Upon request of the board, any medical peer review
4 committee in this state shall report any information that may
5 relate to the practice or performance of any osteopathic physician
6 known to that medical peer review committee. Copies of such
7 requests for information from a medical peer review committee may
8 be provided to the subject osteopathic physician if, in the
9 discretion of the board, the provision of such copies will not
10 jeopardize the board's investigation. In the event that copies are
11 provided, the subject osteopathic physician has fifteen days to
12 comment on the requested information and such comments must be
13 considered by the board.

14 After the completion of a hospital's formal disciplinary
15 procedure and after any resulting legal action, the chief executive
16 officer of such hospital shall report in writing to the board
17 within sixty days the name of any member of the medical staff or
18 any other osteopathic physician practicing in the hospital whose
19 hospital privileges have been revoked, restricted, reduced or
20 terminated for any cause, including resignation, together with all
21 pertinent information relating to such action. The chief executive
22 officer shall also report any other formal disciplinary action
23 taken against any osteopathic physician by the hospital upon the
24 recommendation of its medical staff relating to professional
25 ethics, medical incompetence, medical malpractice, moral turpitude
26 or drug or alcohol abuse. Temporary suspension for failure to

1 maintain records on a timely basis or failure to attend staff or
2 section meetings need not be reported.

3 Any professional society in this state comprised primarily of
4 osteopathic physicians or physicians and surgeons of other schools
5 of medicine which takes formal disciplinary action against a member
6 relating to professional ethics, professional incompetence,
7 professional malpractice, moral turpitude or drug or alcohol abuse,
8 shall report in writing to the board within sixty days of a final
9 decision the name of such member, together with all pertinent
10 information relating to such action.

11 Every person, partnership, corporation, association, insurance
12 company, professional society or other organization providing
13 professional liability insurance to an osteopathic physician in
14 this state shall submit to the board the following information
15 within thirty days from any judgment, dismissal or settlement of a
16 civil action or of any claim involving the insured: The date of
17 any judgment, dismissal or settlement; whether any appeal has been
18 taken on the judgment, and, if so, by which party; the amount of
19 any settlement or judgment against the insured; and such other
20 information required by the board.

21 Within thirty days after a person known to be an osteopathic
22 physician licensed or otherwise lawfully practicing medicine and
23 surgery in this state or applying to be licensed is convicted of a
24 felony under the laws of this state, or of any crime under the laws
25 of this state involving alcohol or drugs in any way, including any
26 controlled substance under state or federal law, the clerk of the

1 court of record in which the conviction was entered shall forward
2 to the board a certified true and correct abstract of record of the
3 convicting court. The abstract shall include the name and address
4 of such osteopathic physician or applicant, the nature of the
5 offense committed and the final judgment and sentence of the court.

6 Upon a determination of the board that there is probable cause
7 to believe that any person, partnership, corporation, association,
8 insurance company, professional society or other organization has
9 failed or refused to make a report required by this subsection, the
10 board shall provide written notice to the alleged violator stating
11 the nature of the alleged violation and the time and place at which
12 the alleged violator shall appear to show good cause why a civil
13 penalty should not be imposed. The hearing shall be conducted in
14 accordance with the provisions of article five, chapter
15 twenty-nine-a of this code. After reviewing the record of such
16 hearing, if the board determines that a violation of this
17 subsection has occurred, the board shall assess a civil penalty of
18 not less than \$1,000 nor more than \$10,000 against such violator.
19 The board shall notify anyone assessed of the assessment in writing
20 and the notice shall specify the reasons for the assessment. If
21 the violator fails to pay the amount of the assessment to the board
22 within thirty days, the Attorney General may institute a civil
23 action in the circuit court of Kanawha County to recover the amount
24 of the assessment. In any such civil action, the court's review of
25 the board's action shall be conducted in accordance with the
26 provisions of section four, article five, chapter twenty-nine-a of

1 this code.

2 Any person may report to the board relevant facts about the
3 conduct of any osteopathic physician in this state which in the
4 opinion of such person amounts to professional malpractice or
5 professional incompetence.

6 The board shall provide forms for filing reports pursuant to
7 this section. Reports submitted in other forms shall be accepted
8 by the board.

9 The filing of a report with the board pursuant to any
10 provision of this article, any investigation by the board or any
11 disposition of a case by the board does not preclude any action by
12 a hospital, other health care facility or professional society
13 comprised primarily of osteopathic physicians or physicians and
14 surgeons of other schools of medicine to suspend, restrict or
15 revoke the privileges or membership of such osteopathic physician:
16 Provided, That notwithstanding any provision to the contrary, the
17 board may independently initiate disciplinary proceedings based on
18 a report or information from an agent or investigator of the Board
19 of Pharmacy, related to data from the controlled substance
20 monitoring program.

21 (c) In every case considered by the board under this article
22 regarding suspension, revocation or issuance of a license whether
23 initiated by the board or upon complaint or information from any
24 person or organization, the board shall make a preliminary
25 determination as to whether probable cause exists to substantiate
26 charges of cause to suspend, revoke or refuse to issue a license as

1 set forth in subsection (a), section eleven of this article. If
2 such probable cause is found to exist, all proceedings on such
3 charges shall be open to the public who are entitled to all
4 reports, records, and nondeliberative materials introduced at such
5 hearing, including the record of the final action taken: *Provided,*
6 That any medical records, which were introduced at such hearing and
7 which pertain to a person who has not expressly waived his or her
8 right to the confidentiality of such records, shall not be open to
9 the public nor is the public entitled to such records. If a
10 finding is made that probable cause does not exist, the public has
11 a right of access to the complaint or other document setting forth
12 the charges, the findings of fact and conclusions supporting such
13 finding that probable cause does not exist, if the subject
14 osteopathic physician consents to such access.

15 (d) If the board receives notice that an osteopathic physician
16 has been subjected to disciplinary action or has had his or her
17 credentials suspended or revoked by the board, a medical peer
18 review committee, a hospital or professional society, as defined in
19 subsection (b) of this section, for three or more incidents in a
20 five-year period, the board shall require the osteopathic physician
21 to practice under the direction of another osteopathic physician
22 for a specified period to be established by the board.