

# **WEST VIRGINIA LEGISLATURE**

## **2018 REGULAR SESSION**

**Introduced**

### **House Bill 4609**

BY DELEGATE ANDERSON AND DEEM

[INTRODUCED FEBRUARY 13, 2018; REFERRED

TO THE COMMITTEE ON HEALTH AND HUMAN RESOURCES

THEN THE JUDICIARY.]

1 A BILL to amend and reenact §30-3-14 of the Code of West Virginia, 1931, as amended, relating  
2 to advertising by physicians and podiatrists; providing that the use of patient testimonials  
3 in advertising is not per se false or deceptive advertising.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

94 in other forms shall be accepted by the board.

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

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

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

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

110           (3) False or deceptive advertising: Provided, That the use of patient testimonials by a  
111 physician or a podiatrist in advertising his or her practice, is not per se false or deceptive  
112 advertising;

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

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

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

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

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

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

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

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

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

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

146 the promotion or sale of services, goods, appliances or drugs;

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

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

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

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

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

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

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

170 (20) Professional incompetence;

171 (21) The inability to practice medicine and surgery or podiatry with reasonable skill and



172 safety due to physical or mental impairment, including deterioration through the aging process,  
173 loss of motor skill or abuse of drugs or alcohol. A physician or podiatrist adversely affected under  
174 this subdivision shall be afforded an opportunity at reasonable intervals to demonstrate that he or  
175 she may resume the competent practice of medicine and surgery or podiatry with reasonable skill  
176 and safety to patients. In any proceeding under this subdivision, neither the record of proceedings  
177 nor any orders entered by the board shall be used against the physician or podiatrist in any other  
178 proceeding; or

179 (22) Knowingly failing to report to the board any act of gross misconduct committed by  
180 another licensee of the board.

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

196 (e) The board may refer any cases coming to its attention to an appropriate committee of  
197 an appropriate professional organization for investigation and report. Except for complaints

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

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

224 examination under circumstances which the board finds are not beyond his or her control, failure  
225 or refusal is prima facie evidence of his or her inability to practice medicine and surgery or podiatry  
226 competently and in compliance with the standards of acceptable and prevailing medical practice.

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

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

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

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

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

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

266 (2) Administer a public reprimand;

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

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

274 (5) Require him or her to submit to care, counseling or treatment designated by the board  
275 as a condition for initial or continued licensure or renewal of licensure or other authorization to

276 practice medicine and surgery or podiatry;

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

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

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

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

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

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

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

297 A person may not practice medicine and surgery or podiatry or deliver health care services  
298 in violation of any disciplinary order revoking, suspending or limiting his or her license while any  
299 appeal is pending. Within 60 days, the board shall report its final action regarding restriction,  
300 limitation, suspension or revocation of the license of a physician or podiatrist, limitation on practice  
301 privileges or other disciplinary action against any physician or podiatrist to all appropriate state

302 agencies, appropriate licensed health facilities and hospitals, insurance companies or  
303 associations writing medical malpractice insurance in this state, the American Medical  
304 Association, the American Podiatry Association, professional societies of physicians or podiatrists  
305 in the state and any entity responsible for the fiscal administration of Medicare and Medicaid.

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

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

322 (o) A physician or podiatrist may request in writing to the board a limitation on or the  
323 surrendering of his or her license to practice medicine and surgery or podiatry or other appropriate  
324 sanction as provided in this section. The board may grant the request and, if it considers it  
325 appropriate, may waive the commencement or continuation of other proceedings under this  
326 section. A physician or podiatrist whose license is limited or surrendered or against whom other  
327 action is taken under this subsection may, at reasonable intervals, petition for removal of any

328 restriction or limitation on or for reinstatement of his or her license to practice medicine and  
329 surgery or podiatry.

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

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

346 (r) Notwithstanding any other provisions of this article, the board may, at any time, on its  
347 own motion, or upon motion by the complainant, or upon motion by the physician or podiatrist, or  
348 by stipulation of the parties, refer the matter to mediation. The board shall obtain a list from the  
349 West Virginia State Bar's mediator referral service of certified mediators with expertise in  
350 professional disciplinary matters. The board and the physician or podiatrist may choose a  
351 mediator from that list. If the board and the physician or podiatrist are unable to agree on a  
352 mediator, the board shall designate a mediator from the list by neutral rotation. The mediation  
353 shall not be considered a proceeding open to the public and any reports and records introduced

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

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

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

NOTE: The purpose of this bill is to provide that the use of patient testimonials in advertising by physicians and podiatrists is not per se false or deceptive advertising.

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