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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 2005

ENROLLED

Committee Substitute for

House Bill No. 2764

(By Delegates Kominar, Amores, Stalnaker,
Long, Hartman, R. Thompson and Stemple)

Passed March 28, 2005

In Effect from Passage

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COMMITTEE SUBSTITUTE

FOR

H. B. 2764

(BY DELEGATES KOMINAR, AMORES, STALNAKER,
LONG, HARTMAN, R. THOMPSON AND STEMPLER)

[Passed March 28, 2005; in effect from passage.]

AN ACT to amend and reenact §30-3-14 of the Code of West Virginia, 1931, as amended, relating to allowing the Board of Medicine to issue a license to a physician convicted of certain drug related offenses.

Be it enacted by the Legislature of West Virginia:

That §30-3-14 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 3. WEST VIRGINIA MEDICAL PRACTICE ACT.

§30-3-14. Professional discipline of physicians and podiatrists; reporting of information to Board pertaining to medical professional liability and professional incompetence required; penalties; grounds for

license denial and discipline of physicians and podiatrists; investigations; physical and mental examinations; hearings; sanctions; summary sanctions; reporting by the Board; reapplication; civil and criminal immunity; voluntary limitation of license; probable cause determinations.

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

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

21 (b) Upon request of the Board, any medical peer review
22 committee in this state shall report any information that may
23 relate to the practice or performance of any physician or
24 podiatrist known to that medical peer review committee. Copies
25 of the requests for information from a medical peer review
26 committee may be provided to the subject physician or podia-
27 trist if, in the discretion of the Board, the provision of such

28 copies will not jeopardize the Board's investigation. In the
29 event that copies are provided, the subject physician or podia-
30 trist is allowed fifteen days to comment on the requested
31 information and such comments must be considered by the
32 Board.

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

52 Any managed care organization operating in this state
53 which provides a formal peer review process shall report in
54 writing to the Board, within sixty days after the completion of
55 any formal peer review process and also within sixty days after
56 the commencement of and again after the conclusion of any
57 resulting legal action, the name of any physician or podiatrist
58 whose credentialing has been revoked or not renewed by the
59 managed care organization. The managed care organization
60 shall also report in writing to the Board any other disciplinary
61 action taken against a physician or podiatrist relating to

62 professional ethics, professional liability, moral turpitude or
63 drug or alcohol abuse within sixty days after completion of a
64 formal peer review process which results in the action taken by
65 the managed care organization. For purposes of this subsection,
66 “managed care organization” means a plan that establishes,
67 operates or maintains a network of health care providers who
68 have entered into agreements with and been credentialed by the
69 plan to provide health care services to enrollees or insureds to
70 whom the plan has the ultimate obligation to arrange for the
71 provision of or payment for health care services through
72 organizational arrangements for ongoing quality assurance,
73 utilization review programs or dispute resolutions.

74 Any professional society in this state comprised primarily
75 of physicians or podiatrists which takes formal disciplinary
76 action against a member relating to professional ethics, profes-
77 sional incompetence, medical professional liability, moral
78 turpitude or drug or alcohol abuse shall report in writing to the
79 Board within sixty days of a final decision the name of the
80 member, together with all pertinent information relating to the
81 action.

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

94 Within thirty days from the entry of an order by a court in
95 a medical professional liability action or other civil action in
96 which a physician or podiatrist licensed by the Board is
97 determined to have rendered health care services below the
98 applicable standard of care, the clerk of the court in which the
99 order was entered shall forward a certified copy of the order to
100 the Board.

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

113 Upon a determination of the Board that there is probable
114 cause to believe that any person, partnership, corporation,
115 association, insurance company, professional society or other
116 organization has failed or refused to make a report required by
117 this subsection, the Board shall provide written notice to the
118 alleged violator stating the nature of the alleged violation and
119 the time and place at which the alleged violator shall appear to
120 show good cause why a civil penalty should not be imposed.
121 The hearing shall be conducted in accordance with the provi-
122 sions of article five, chapter twenty-nine-a of this code. After
123 reviewing the record of the hearing, if the Board determines
124 that a violation of this subsection has occurred, the Board shall
125 assess a civil penalty of not less than one thousand dollars nor
126 more than ten thousand dollars against the violator. The Board
127 shall notify any person so assessed of the assessment in writing

128 and the notice shall specify the reasons for the assessment. If
129 the violator fails to pay the amount of the assessment to the
130 Board within thirty days, the Attorney General may institute a
131 civil action in the circuit court of Kanawha County to recover
132 the amount of the assessment. In any civil action, the court's
133 review of the Board's action shall be conducted in accordance
134 with the provisions of section four, article five, chapter twenty-
135 nine-a of this code. Notwithstanding any other provision of this
136 article to the contrary, when there are conflicting views by
137 recognized experts as to whether any alleged conduct breaches
138 an applicable standard of care, the evidence must be clear and
139 convincing before the Board may find that the physician or
140 podiatrist has demonstrated a lack of professional competence
141 to practice with a reasonable degree of skill and safety for
142 patients.

143 Any person may report to the Board relevant facts about the
144 conduct of any physician or podiatrist in this state which in the
145 opinion of that person amounts to medical professional liability
146 or professional incompetence.

147 The Board shall provide forms for filing reports pursuant to
148 this section. Reports submitted in other forms shall be accepted
149 by the Board.

150 The filing of a report with the Board pursuant to any
151 provision of this article, any investigation by the Board or any
152 disposition of a case by the Board does not preclude any action
153 by a hospital, other health care facility or professional society
154 comprised primarily of physicians or podiatrists to suspend,
155 restrict or revoke the privileges or membership of the physician
156 or podiatrist.

157 (c) The Board may deny an application for license or other
158 authorization to practice medicine and surgery or podiatry in
159 this state and may discipline a physician or podiatrist licensed

160 or otherwise lawfully practicing in this state who, after a
161 hearing, has been adjudged by the Board as unqualified due to
162 any of the following reasons:

163 (1) Attempting to obtain, obtaining, renewing or attempting
164 to renew a license to practice medicine and surgery or podiatry
165 by bribery, fraudulent misrepresentation or through known error
166 of the Board;

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

171 (3) False or deceptive advertising;

172 (4) Aiding, assisting, procuring or advising any unautho-
173 rized person to practice medicine and surgery or podiatry
174 contrary to law;

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

183 (6) Requesting, receiving or paying directly or indirectly a
184 payment, rebate, refund, commission, credit or other form of
185 profit or valuable consideration for the referral of patients to
186 any person or entity in connection with providing medical or
187 other health care services or clinical laboratory services,
188 supplies of any kind, drugs, medication or any other medical
189 goods, services or devices used in connection with medical or
190 other health care services;

191 (7) Unprofessional conduct by any physician or podiatrist
192 in referring a patient to any clinical laboratory or pharmacy in
193 which the physician or podiatrist has a proprietary interest
194 unless the physician or podiatrist discloses in writing such
195 interest to the patient. The written disclosure shall indicate that
196 the patient may choose any clinical laboratory for purposes of
197 having any laboratory work or assignment performed or any
198 pharmacy for purposes of purchasing any prescribed drug or
199 any other medical goods or devices used in connection with
200 medical or other health care services;

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

206 (8) Exercising influence within a patient-physician relation-
207 ship for the purpose of engaging a patient in sexual activity;

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

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

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

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

221 (13) Prescribing, dispensing, administering, mixing or
222 otherwise preparing a prescription drug, including any con-
223 trolled substance under state or federal law, other than in good
224 faith and in a therapeutic manner in accordance with accepted
225 medical standards and in the course of the physician's or
226 podiatrist's professional practice: *Provided*, That a physician
227 who discharges his or her professional obligation to relieve the
228 pain and suffering and promote the dignity and autonomy of
229 dying patients in his or her care and, in so doing, exceeds the
230 average dosage of a pain relieving controlled substance, as
231 defined in Schedules II and III of the Uniform Controlled
232 Substance Act, does not violate this article;

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

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

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

246 (17) Violating any provision of this article or a rule or order
247 of the Board or failing to comply with a subpoena or subpoena
248 duces tecum issued by the Board;

249 (18) Conspiring with any other person to commit an act or
250 committing an act that would tend to coerce, intimidate or

251 preclude another physician or podiatrist from lawfully advertis-
252 ing his or her services;

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

255 (20) Professional incompetence; or

256 (21) The inability to practice medicine and surgery or
257 podiatry with reasonable skill and safety due to physical or
258 mental impairment, including deterioration through the aging
259 process, loss of motor skill or abuse of drugs or alcohol. A
260 physician or podiatrist adversely affected under this subdivision
261 shall be afforded an opportunity at reasonable intervals to
262 demonstrate that he or she may resume the competent practice
263 of medicine and surgery or podiatry with reasonable skill and
264 safety to patients. In any proceeding under this subdivision,
265 neither the record of proceedings nor any orders entered by the
266 Board shall be used against the physician or podiatrist in any
267 other proceeding.

268 (d) The Board shall deny any application for a license or
269 other authorization to practice medicine and surgery or podiatry
270 in this state to any applicant who, and shall revoke the license
271 of any physician or podiatrist licensed or otherwise lawfully
272 practicing within this state who, is found guilty by any court of
273 competent jurisdiction of any felony involving prescribing,
274 selling, administering, dispensing, mixing or otherwise prepar-
275 ing any prescription drug, including any controlled substance
276 under state or federal law, for other than generally accepted
277 therapeutic purposes. Presentation to the Board of a certified
278 copy of the guilty verdict or plea rendered in the court is
279 sufficient proof thereof for the purposes of this article. A plea
280 of nolo contendere has the same effect as a verdict or plea of
281 guilt. Upon application of a physician that has had his or her
282 license revoked because of a drug related felony conviction,

283 upon completion of any sentence of confinement, parole,
284 probation or other court-ordered supervision and full satisfac-
285 tion of any fines, judgments or other fees imposed by the
286 sentencing court, the Board may issue the applicant a new
287 license upon a finding that the physician is, except for the
288 underlying conviction, otherwise qualified to practice medicine:
289 *Provided,* That the Board may place whatever terms, conditions
290 or limitations it deems appropriate upon a physician licensed
291 pursuant to this subsection.

292 (e) The Board may refer any cases coming to its attention
293 to an appropriate committee of an appropriate professional
294 organization for investigation and report. Except for complaints
295 related to obtaining initial licensure to practice medicine and
296 surgery or podiatry in this state by bribery or fraudulent
297 misrepresentation, any complaint filed more than two years
298 after the complainant knew, or in the exercise of reasonable
299 diligence should have known, of the existence of grounds for
300 the complaint shall be dismissed: *Provided,* That in cases of
301 conduct alleged to be part of a pattern of similar misconduct or
302 professional incapacity that, if continued, would pose risks of
303 a serious or substantial nature to the physician's or podiatrist's
304 current patients, the investigating body may conduct a limited
305 investigation related to the physician's or podiatrist's current
306 capacity and qualification to practice and may recommend
307 conditions, restrictions or limitations on the physician's or
308 podiatrist's license to practice that it considers necessary for the
309 protection of the public. Any report shall contain recommenda-
310 tions for any necessary disciplinary measures and shall be filed
311 with the Board within ninety days of any referral. The recom-
312 mendations shall be considered by the Board and the case may
313 be further investigated by the Board. The Board after full
314 investigation shall take whatever action it considers appropri-
315 ate, as provided in this section.

316 (f) The investigating body, as provided for in subsection (e)
317 of this section, may request and the Board under any circum-
318 stances may require a physician or podiatrist or person applying
319 for licensure or other authorization to practice medicine and
320 surgery or podiatry in this state to submit to a physical or
321 mental examination by a physician or physicians approved by
322 the Board. A physician or podiatrist submitting to an examina-
323 tion has the right, at his or her expense, to designate another
324 physician to be present at the examination and make an
325 independent report to the investigating body or the Board. The
326 expense of the examination shall be paid by the Board. Any
327 individual who applies for or accepts the privilege of practicing
328 medicine and surgery or podiatry in this state is considered to
329 have given his or her consent to submit to all examinations
330 when requested to do so in writing by the Board and to have
331 waived all objections to the admissibility of the testimony or
332 examination report of any examining physician on the ground
333 that the testimony or report is privileged communication. If a
334 person fails or refuses to submit to an examination under
335 circumstances which the Board finds are not beyond his or her
336 control, failure or refusal is prima facie evidence of his or her
337 inability to practice medicine and surgery or podiatry compe-
338 tently and in compliance with the standards of acceptable and
339 prevailing medical practice.

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

343 (h) In every disciplinary or licensure denial action, the
344 Board shall furnish the physician or podiatrist or applicant with
345 written notice setting out with particularity the reasons for its
346 action. Disciplinary and licensure denial hearings shall be
347 conducted in accordance with the provisions of article five,
348 chapter twenty-nine-a of this code. However, hearings shall be
349 heard upon sworn testimony and the rules of evidence for trial

350 courts of record in this state shall apply to all hearings. A
351 transcript of all hearings under this section shall be made, and
352 the respondent may obtain a copy of the transcript at his or her
353 expense. The physician or podiatrist has the right to defend
354 against any charge by the introduction of evidence, the right to
355 be represented by counsel, the right to present and cross-
356 examine witnesses and the right to have subpoenas and subpoe-
357 nas duces tecum issued on his or her behalf for the attendance
358 of witnesses and the production of documents. The Board shall
359 make all its final actions public. The order shall contain the
360 terms of all action taken by the Board.

361 (i) In disciplinary actions in which probable cause has been
362 found by the Board, the Board shall, within twenty days of the
363 date of service of the written notice of charges or sixty days
364 prior to the date of the scheduled hearing, whichever is sooner,
365 provide the respondent with the complete identity, address and
366 telephone number of any person known to the Board with
367 knowledge about the facts of any of the charges; provide a copy
368 of any statements in the possession of or under the control of
369 the Board; provide a list of proposed witnesses with addresses
370 and telephone numbers, with a brief summary of his or her
371 anticipated testimony; provide disclosure of any trial expert
372 pursuant to the requirements of Rule 26(b)(4) of the West
373 Virginia Rules of Civil Procedure; provide inspection and
374 copying of the results of any reports of physical and mental
375 examinations or scientific tests or experiments; and provide a
376 list and copy of any proposed exhibit to be used at the hearing:
377 *Provided*, That the Board shall not be required to furnish or
378 produce any materials which contain opinion work product
379 information or would be a violation of the attorney-client
380 privilege. Within twenty days of the date of service of the
381 written notice of charges, the Board shall disclose any exculpa-
382 tory evidence with a continuing duty to do so throughout the
383 disciplinary process. Within thirty days of receipt of the
384 Board's mandatory discovery, the respondent shall provide the

385 Board with the complete identity, address and telephone
386 number of any person known to the respondent with knowledge
387 about the facts of any of the charges; provide a list of proposed
388 witnesses with addresses and telephone numbers, to be called
389 at hearing, with a brief summary of his or her anticipated
390 testimony; provide disclosure of any trial expert pursuant to the
391 requirements of Rule 26(b)(4) of the West Virginia Rules of
392 Civil Procedure; provide inspection and copying of the results
393 of any reports of physical and mental examinations or scientific
394 tests or experiments; and provide a list and copy of any
395 proposed exhibit to be used at the hearing.

396 (j) Whenever it finds any person unqualified because of any
397 of the grounds set forth in subsection (c) of this section, the
398 Board may enter an order imposing one or more of the follow-
399 ing:

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

402 (2) Administer a public reprimand;

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

408 (4) Revoke his or her license or other authorization to
409 practice medicine and surgery or podiatry or to prescribe or
410 dispense controlled substances for a period not to exceed ten
411 years;

412 (5) Require him or her to submit to care, counseling or
413 treatment designated by the Board as a condition for initial or
414 continued licensure or renewal of licensure or other authoriza-
415 tion to practice medicine and surgery or podiatry;

416 (6) Require him or her to participate in a program of
417 education prescribed by the Board;

418 (7) Require him or her to practice under the direction of a
419 physician or podiatrist designated by the Board for a specified
420 period of time; and

421 (8) Assess a civil fine of not less than one thousand dollars
422 nor more than ten thousand dollars.

423 (k) Notwithstanding the provisions of section eight, article
424 one, chapter thirty of this code, if the Board determines the
425 evidence in its possession indicates that a physician's or
426 podiatrist's continuation in practice or unrestricted practice
427 constitutes an immediate danger to the public, the Board may
428 take any of the actions provided for in subsection (j) of this
429 section on a temporary basis and without a hearing if institution
430 of proceedings for a hearing before the Board are initiated
431 simultaneously with the temporary action and begin within
432 fifteen days of the action. The Board shall render its decision
433 within five days of the conclusion of a hearing under this
434 subsection.

435 (l) Any person against whom disciplinary action is taken
436 pursuant to the provisions of this article has the right to judicial
437 review as provided in articles five and six, chapter twenty-nine-
438 a of this code: *Provided*, That a circuit judge may also remand
439 the matter to the Board if it appears from competent evidence
440 presented to it in support of a motion for remand that there is
441 newly discovered evidence of such a character as ought to
442 produce an opposite result at a second hearing on the merits
443 before the Board and:

444 (1) The evidence appears to have been discovered since the
445 Board hearing; and

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

449 A person may not practice medicine and surgery or podiatry
450 or deliver health care services in violation of any disciplinary
451 order revoking, suspending or limiting his or her license while
452 any appeal is pending. Within sixty days, the Board shall report
453 its final action regarding restriction, limitation, suspension or
454 revocation of the license of a physician or podiatrist, limitation
455 on practice privileges or other disciplinary action against any
456 physician or podiatrist to all appropriate state agencies, appro-
457 priate licensed health facilities and hospitals, insurance compa-
458 nies or associations writing medical malpractice insurance in
459 this state, the American Medical Association, the American
460 Podiatry Association, professional societies of physicians or
461 podiatrists in the state and any entity responsible for the fiscal
462 administration of medicare and medicaid.

463 (m) Any person against whom disciplinary action has been
464 taken under the provisions of this article shall, at reasonable
465 intervals, be afforded an opportunity to demonstrate that he or
466 she can resume the practice of medicine and surgery or podiatry
467 on a general or limited basis. At the conclusion of a suspension,
468 limitation or restriction period the physician or podiatrist may
469 resume practice if the Board has so ordered.

470 (n) Any entity, organization or person, including the Board,
471 any member of the Board, its agents or employees and any
472 entity or organization or its members referred to in this article,
473 any insurer, its agents or employees, a medical peer review
474 committee and a hospital governing board, its members or any
475 committee appointed by it acting without malice and without
476 gross negligence in making any report or other information
477 available to the Board or a medical peer review committee
478 pursuant to law and any person acting without malice and

479 without gross negligence who assists in the organization,
480 investigation or preparation of any such report or information
481 or assists the Board or a hospital governing body or any
482 committee in carrying out any of its duties or functions pro-
483 vided by law is immune from civil or criminal liability, except
484 that the unlawful disclosure of confidential information
485 possessed by the Board is a misdemeanor as provided for in this
486 article.

487 (o) A physician or podiatrist may request in writing to the
488 Board a limitation on or the surrendering of his or her license
489 to practice medicine and surgery or podiatry or other appropri-
490 ate sanction as provided in this section. The Board may grant
491 the request and, if it considers it appropriate, may waive the
492 commencement or continuation of other proceedings under this
493 section. A physician or podiatrist whose license is limited or
494 surrendered or against whom other action is taken under this
495 subsection may, at reasonable intervals, petition for removal of
496 any restriction or limitation on or for reinstatement of his or her
497 license to practice medicine and surgery or podiatry.

498 (p) In every case considered by the Board under this article
499 regarding discipline or licensure, whether initiated by the Board
500 or upon complaint or information from any person or organiza-
501 tion, the Board shall make a preliminary determination as to
502 whether probable cause exists to substantiate charges of
503 disqualification due to any reason set forth in subsection (c) of
504 this section. If probable cause is found to exist, all proceedings
505 on the charges shall be open to the public who are entitled to all
506 reports, records and nondeliberative materials introduced at the
507 hearing, including the record of the final action taken: *Pro-*
508 *vided,* That any medical records, which were introduced at the
509 hearing and which pertain to a person who has not expressly
510 waived his or her right to the confidentiality of the records, may
511 not be open to the public nor is the public entitled to the
512 records.

513 (q) If the Board receives notice that a physician or podia-
514 trist has been subjected to disciplinary action or has had his or
515 her credentials suspended or revoked by the Board, a hospital
516 or a professional society, as defined in subsection (b) of this
517 section, for three or more incidents during a five-year period,
518 the Board shall require the physician or podiatrist to practice
519 under the direction of a physician or podiatrist designated by
520 the Board for a specified period of time to be established by the
521 Board.

522 (r) Notwithstanding any other provisions of this article, the
523 Board may, at any time, on its own motion, or upon motion by
524 the complainant, or upon motion by the physician or podiatrist,
525 or by stipulation of the parties, refer the matter to mediation.
526 The Board shall obtain a list from the West Virginia State Bar's
527 mediator referral service of certified mediators with expertise
528 in professional disciplinary matters. The Board and the physi-
529 cian or podiatrist may choose a mediator from that list. If the
530 Board and the physician or podiatrist are unable to agree on a
531 mediator, the Board shall designate a mediator from the list by
532 neutral rotation. The mediation shall not be considered a
533 proceeding open to the public and any reports and records
534 introduced at the mediation shall not become part of the public
535 record. The mediator and all participants in the mediation shall
536 maintain and preserve the confidentiality of all mediation
537 proceedings and records. The mediator may not be subpoenaed
538 or called to testify or otherwise be subject to process requiring
539 disclosure of confidential information in any proceeding
540 relating to or arising out of the disciplinary or licensure matter
541 mediated: *Provided*, That any confidentiality agreement and
542 any written agreement made and signed by the parties as a
543 result of mediation may be used in any proceedings subse-
544 quently instituted to enforce the written agreement. The
545 agreements may be used in other proceedings if the parties
546 agree in writing

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Randy White
Chairman Senate Committee

H. Robert Bracy
Chairman House Committee

Originating in the House.

In effect from passage.

Daniel E. Holmes
Clerk of the Senate

Gregory W. B...
Clerk of the House of Delegates

Carl Ray Tomblin
President of the Senate

[Signature]
Speaker of the House of Delegates

The within is approved this the 6th
day of April, 2004.

[Signature]
Governor

PRESENTED TO THE
GOVERNOR

Date 3/31/05

Time 9:15 AM