

# **WEST VIRGINIA LEGISLATURE**

**2019 REGULAR SESSION**

**Introduced**

## **Senate Bill 119**

BY SENATORS TRUMP AND BOSO

[Introduced January 9, 2019; Referred  
to the Committee on the Judiciary]



1 A BILL to amend and reenact §30-3C-1 and §30-3C-3 of the Code of West Virginia, 1931, as  
2 amended; and to amend said code by adding thereto a new section, designated §30-3C-  
3 5, all relating to discovery in certain proceedings; specifying certain health care peer  
4 review documents are confidential and not subject to discovery; providing that a person  
5 who testifies before a review organization or is a member of a review organization shall  
6 not be required to testify or asked about his or her testimony; providing that peer review  
7 proceedings, communications, and documents of a review organization are confidential  
8 and privileged and shall not be subject to discovery; providing that an individual may be  
9 given access to documents used as basis for an adverse professional review action,  
10 subject to a protective order as may be appropriate; providing that privilege is not deemed  
11 to be waived unless the review organization executes a written waiver; defining terms; and  
12 addressing original source materials.

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

**ARTICLE 3C. HEALTH CARE PEER REVIEW ORGANIZATION PROTECTION.**

**§30-3C-1. Definitions.**

1 As used in this article:  
2 “Document” means any information, data, reports, or records prepared by or on behalf of  
3 a health care provider and includes mental impressions, analyses, and/or work product.  
4 “Health care facility” means any clinic, hospital, pharmacy, nursing home, assisted living  
5 facility, residential care community, end-stage renal disease facility, home health agency, child  
6 welfare agency, group residential facility, behavioral health care facility or comprehensive  
7 community mental health center, intellectual/developmental disability center or program, or other  
8 ambulatory health care facility in and licensed, regulated, or certified by the State of West Virginia  
9 under state or federal law and any state-operated institution or clinic providing health care and  
10 any related entity to the health care facility as that term is defined in §55-7B-1 et seq. of this code.

11 ~~“Health care professionals” means individuals who are licensed to practice in any health~~  
12 ~~care field and individuals, who, because of their education, experience or training participate as~~  
13 ~~members of or consultants to a review organization~~

14 “Health care provider” means a person, partnership, corporation, professional limited  
15 liability company, health care facility, entity or institution licensed by, or certified in, this state or  
16 another state, to provide health care or professional health care services, including a physician,  
17 osteopathic physician, physician’s assistant, advanced practice registered nurse, health care  
18 facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor,  
19 physical therapist, speech-language pathologist, audiologist, occupational therapist, psychologist,  
20 pharmacist, technician, certified nursing assistant, emergency medical services personnel,  
21 emergency medical services authority or agency, any person supervised by or acting under the  
22 direction of a licensed professional, any person taking actions or providing service or treatment  
23 pursuant to or in furtherance of a physician’s plan of care, a health care facility’s plan of care,  
24 medical diagnosis, or treatment; or an officer, employee, or agent of a health care provider acting  
25 in the course and scope of the officer’s, employee’s, or agent’s employment.

26 “Peer review” means the procedure for evaluation by health care ~~professionals~~ providers  
27 of the quality, delivery, and efficiency of services ordered or performed by other health care  
28 professionals, including practice analysis, inpatient hospital and extended care facility utilization  
29 review, medical audit, ambulatory care review, claims review and patient safety review,  
30 preparation for or simulation of audits or surveys of any kind, and all forms of quality  
31 assurance/performance improvement whether or not required by any statute, rule, or regulation  
32 applicable to a health care facility or health care provider.

33 ~~“Professional society” includes medical, psychological, nursing, dental, optometric,~~  
34 ~~pharmaceutical, chiropractic and podiatric organizations having as members at least a majority of~~  
35 ~~the eligible licentiates in the area or health care facility or agency served by the particular~~  
36 ~~organization~~

37           “Review organization” means any committee, organization, individual, or group of  
38 individuals engaging in peer review, including, without limitation, a hospital medical executive  
39 committee and/or subcommittee thereof, a hospital utilization review committee, a hospital tissue  
40 committee, a medical audit committee, a health insurance review committee, a health  
41 maintenance organization review committee, hospital, medical, dental, and health service  
42 corporation review committee, a hospital plan corporation review committee, a professional health  
43 service plan review committee or organization, a dental review committee, a physicians’ advisory  
44 committee, a podiatry advisory committee, a nursing advisory committee, any committee or  
45 organization established pursuant to a medical assistance program, the Joint Commission on  
46 Accreditation of Health Care Organizations or similar accrediting body or any entity established  
47 by such accrediting body or to fulfill the requirements of such accrediting body, any entity  
48 established pursuant to state or federal law for peer review purposes, and any committee  
49 established by one or more state or local professional societies or institutes, to gather and review  
50 information relating to the care and treatment of patients for the purposes of: (i) Evaluating and  
51 improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii)  
52 establishing and enforcing guidelines designed to keep within reasonable bounds the cost of  
53 health care. It shall also mean any hospital board committee or organization reviewing the  
54 professional qualifications or activities of its medical staff or applicants for admission thereto, and  
55 any professional standards review organizations established or required under state or federal  
56 statutes or regulations.

**§30-3C-3. Confidentiality of records.**

1           ~~The proceedings and records of a review organization shall be confidential and privileged~~  
2 ~~and shall not be subject to subpoena or discovery proceedings or be admitted as evidence in any~~  
3 ~~civil action arising out of the matters which are subject to evaluation and review by such~~  
4 ~~organization and no person who was in attendance at a meeting of such organization shall be~~  
5 ~~permitted or required to testify in any such civil action as to any evidence or other matters~~

6 ~~produced or presented during the proceedings of such organization or as to any findings,~~  
7 ~~recommendations, evaluations, opinions or other actions of such organization or any members~~  
8 ~~thereof: *Provided*, That information, documents or records otherwise available from original~~  
9 ~~sources are not to be construed as immune from discovery or use in any civil action merely~~  
10 ~~because they were presented during proceedings of such organization, nor should any person~~  
11 ~~who testifies before such organization or who is a member of such organization be prevented~~  
12 ~~from testifying as to matters within his knowledge, but the witness shall not be asked about his~~  
13 ~~testimony before such an organization or opinions formed by him as a result of said organization~~  
14 ~~hearings: *Provided, however*, That an individual may execute a valid waiver authorizing the~~  
15 ~~release of the contents of his file pertaining to his own acts or omissions, and such waiver shall~~  
16 ~~remove the confidentiality and privilege of said contents otherwise provided by this section:~~  
17 ~~Provided further, That upon further review by any other review organization, upon judicial review~~  
18 ~~of any finding or determination of a review organization or in any civil action filed by an individual~~  
19 ~~whose activities have been reviewed, any testimony, documents, proceedings, records and other~~  
20 ~~evidence adduced before any such review organization shall be available to such further review~~  
21 ~~organization, the court and the individual whose activities have been reviewed. The court shall~~  
22 ~~enter such protective orders as may be appropriate to provide for the confidentiality of the records~~  
23 ~~provided the court by a review organization and all papers and records relating to the proceedings~~  
24 ~~had before the reviewing court~~

25 (a) Any document prepared by or on behalf of a health care provider for the purpose of  
26 improving the quality, delivery, or efficiency of health care or for the purpose of credentialing or  
27 reviewing health care providers is confidential and privileged and shall not be subject to discovery  
28 in a civil action or administrative proceeding. Such documents include, without limitation:

29 (1) Nursing home, as referred to in §55-7B-6(e) of this code, incident or event reports,  
30 except reports pertaining to the plaintiff of that civil action, or reports of same or similar incidents

31 within a reasonable time frame of the events at issue in the civil action, containing only factual  
32 information, but excluding personal identification information;

33 (2) Documents related to review organization proceedings for hiring, disciplining,  
34 terminating, credentialing, issuing staff privileges, renewing staff privileges, or alleged misconduct  
35 of a health care provider;

36 (3) Review organization documents;

37 (4) Quality control and performance improvement documents;

38 (5) Documents satisfying regulatory obligations related to quality assurance and  
39 performance improvement; and

40 (6) Reviews, audits, and recommendations of consultants or other persons or entities  
41 engaged in the performance of peer review.

42 (b) A person who testifies before a review organization, or who is a member of a review  
43 organization, shall not be required to testify regarding, or be asked about, his or her testimony  
44 before such review organization, deliberations of the review organization, or opinions formed as  
45 a result of the review organization's proceedings. A person who testifies before a review  
46 organization, or who is a member of a review organization, shall not be prevented from testifying  
47 in court or an administrative hearing as to matters within his or her personal knowledge.

48 (c) All peer review proceedings, communications, and documents of a review organization  
49 and all records developed or obtained during an investigation conducted pursuant to §30-3-1 et  
50 seq., §30-3E-1 et seq., and/or §30-14-1 et seq. of this code shall be confidential and privileged  
51 and shall not be subject to discovery in any civil action or administrative proceeding: *Provided,*  
52 That an individual may be given access to any document that was used as the basis for an  
53 adverse professional review action against him or her, subject to such protective order as may be  
54 appropriate to maintain the confidentiality of the information contained therein. Privilege is not  
55 deemed to be waived unless the review organization executes a written waiver authorizing the  
56 release of such peer review proceedings, communications, or documents.

57 (d) Nothing in this section limits the disclosure of peer review proceedings,  
58 communications, and documents by a review organization or a health care facility to a medical  
59 licensing board pursuant to the provisions of §30-3-1 et seq. and §30-14-1 et seq. of this code.

**§30-3C-5. Original source; waivers; further proceedings.**

1 Information available from original sources are not to be construed as immune from  
2 discovery or use in any civil action merely because they were included in any report or analysis  
3 related to improving the quality, delivery, or efficiency of health care or for the purpose of  
4 credentialing or reviewing health care providers. Documents contained in peer review files are  
5 not discoverable on the basis that they were not created as part of the peer review process; rather,  
6 the document must be produced from the original source: *Provided*, That if the party seeking  
7 production can show that obtaining source documents will be unduly burdensome, the court may,  
8 in its discretion, order production of the nonprivileged documents contained in the peer review  
9 file.

NOTE: The purpose of this bill is to specify documents that are not subject to discovery in certain proceedings. The bill provides that documents prepared by or on behalf of a health care provider for the purpose of improving the quality, delivery, or efficiency of health care or for the purpose of credentialing or reviewing health care providers is confidential and privileged and is not subject to discovery in a civil action or administrative proceeding. The bill defines terms. The bill specifies certain documents that are confidential and not subject to discovery. The bill provides that a person who testifies before a review organization or is a member of a review organization shall not be required to testify or be asked about his or her testimony. The bill provides that peer review proceedings, communications, and documents of a review organization are confidential and privileged and shall not be subject to discovery. The bill provides that an individual may be given access to documents used as basis for an adverse professional review action, subject to a protective order as may be appropriate. The bill provides that privilege is not deemed to be waived unless the review organization executes a written waiver. The bill addresses original source materials.

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