

No. 297

RECEIVED
1989 APR 28 PM 4:09
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1989



ENROLLED

SENATE BILL NO. 297

(By Senator Chafin)



PASSED April 8, 1989

In Effect from Passage

ENROLLED
Senate Bill No. 297

(BY SENATOR CHAFIN)

[Passed April 8, 1989; in effect from passage.]

AN ACT to amend and reenact section fourteen, article three, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to professional discipline of physicians and podiatrists; reporting of information to board pertaining to professional malpractice 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; and probable cause determinations.

Be it enacted by the Legislature of West Virginia:

That section fourteen, article three, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, 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 professional malpractice 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 disciplin-
2 ary proceedings as well as initiate disciplinary
3 proceedings based on information received from
4 medical peer review committees, physicians,
5 podiatrists, hospital administrators, professional
6 societies and others.

7 The board may initiate investigations as to profes-
8 sional incompetence or other reasons for which a
9 licensed physician or podiatrist may be adjudged
10 unqualified if the board receives notice that, within
11 the most recent five-year period, five or more
12 judgments or settlements in excess of fifty thousand
13 dollars each arising from medical professional liability
14 have been rendered or made against such physician or
15 podiatrist.

16 (b) Upon request of the board, any medical peer
17 review committee in this state shall report any
18 information that may relate to the practice or perfor-
19 mance of any physician or podiatrist known to that
20 medical peer review committee. Copies of such
21 requests for information from a medical peer review
22 committee may be provided to the subject physician or
23 podiatrist if, in the discretion of the board, the
24 provision of such copies will not jeopardize the board's
25 investigation. In the event that copies are so provided,
26 the subject physician or podiatrist is allowed fifteen
27 days to comment on the requested information and
28 such comments must be considered by the board.

29 After the completion of the hospital's formal disci-
30 plinary procedure and after any resulting legal action,
31 the chief executive officer of such hospital shall report
32 in writing to the board within sixty days the name of
33 any member of the medical staff or any other physi-

34 cian or podiatrist practicing in the hospital whose
35 hospital privileges have been revoked, restricted,
36 reduced or terminated for any cause, including resig-
37 nation, together with all pertinent information
38 relating to such action. The chief executive officer
39 shall also report any other formal disciplinary action
40 taken against any physician or podiatrist by the
41 hospital upon the recommendation of its medical staff
42 relating to professional ethics, medical incompetence,
43 medical malpractice, moral turpitude or drug or
44 alcohol abuse. Temporary suspension for failure to
45 maintain records on a timely basis or failure to attend
46 staff or section meetings need not be reported.

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

56 Every person, partnership, corporation, association,
57 insurance company, professional society or other
58 organization providing professional liability insurance
59 to a physician or podiatrist in this state shall submit to
60 the board the following information within thirty days
61 from any judgment, dismissal or settlement of a civil
62 action or of any claim involving the insured: The date
63 of any judgment, dismissal or settlement; whether any
64 appeal has been taken on the judgment, and, if so, by
65 which party; the amount of any settlement or judg-
66 ment against the insured; and such other information
67 as the board may require.

68 Within thirty days after a person known to be a
69 physician or podiatrist licensed or otherwise lawfully
70 practicing medicine and surgery or podiatry in this
71 state or applying to be so licensed is convicted of a
72 felony under the laws of this state, or of any crime
73 under the laws of this state involving alcohol or drugs
74 in any way, including any controlled substance under

75 state or federal law, the clerk of the court of record in
76 which the conviction was entered shall forward to the
77 board a certified true and correct abstract of record of
78 the convicting court. The abstract shall include the
79 name and address of such physician or podiatrist or
80 applicant, the nature of the offense committed and the
81 final judgment and sentence of the court.

82 Upon a determination of the board that there is
83 probable cause to believe that any person, partnership,
84 corporation, association, insurance company, profes-
85 sional society or other organization has failed or
86 refused to make a report required by this subsection,
87 the board shall provide written notice to the alleged
88 violator stating the nature of the alleged violation and
89 the time and place at which the alleged violator shall
90 appear to show good cause why a civil penalty should
91 not be imposed. The hearing shall be conducted in
92 accordance with the provisions of article five, chapter
93 twenty-nine-a of this code. After reviewing the record
94 of such hearing, if the board determines that a
95 violation of this subsection has occurred, the board
96 shall assess a civil penalty of not less than one
97 thousand dollars nor more than ten thousand dollars
98 against such violator. Anyone so assessed shall be
99 notified of the assessment in writing and the notice
100 shall specify the reasons for the assessment. If the
101 violator fails to pay the amount of the assessment to
102 the board within thirty days, the attorney general may
103 institute a civil action in the circuit court of Kanawha
104 County to recover the amount of the assessment. In
105 any such civil action, the court's review of the board's
106 action shall be conducted in accordance with the
107 provisions of section four, article five, chapter twenty-
108 nine-a of this code.

109 Any person may report to the board relevant facts
110 about the conduct of any physician or podiatrist in this
111 state which in the opinion of such person amounts to
112 professional malpractice or professional incompetence.

113 The board shall provide forms for filing reports
114 pursuant to this section. Reports submitted in other
115 forms shall be accepted by the board.

116 The filing of a report with the board pursuant to any
117 provision of this article, any investigation by the board
118 or any disposition of a case by the board does not
119 preclude any action by a hospital, other health care
120 facility or professional society comprised primarily of
121 physicians or podiatrists to suspend, restrict or revoke
122 the privileges or membership of such physician or
123 podiatrist.

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

131 (1) Attempting to obtain, obtaining, renewing or
132 attempting to renew a license to practice medicine and
133 surgery or podiatry by bribery, fraudulent misrepresen-
134 tation or through known error of the board.

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

140 (3) False or deceptive advertising.

141 (4) Aiding, assisting, procuring or advising any
142 unauthorized person to practice medicine and surgery
143 or podiatry contrary to law.

144 (5) Making or filing a report that the person knows
145 to be false; intentionally or negligently failing to file a
146 report or record required by state or federal law;
147 willfully impeding or obstructing the filing of a report
148 or record required by state or federal law; or inducing
149 another person to do any of the foregoing. Such
150 reports and records as are herein covered mean only
151 those that are signed in the capacity as a licensed
152 physician or podiatrist.

153 (6) Requesting, receiving or paying directly or
154 indirectly a payment, rebate, refund, commission,

155 credit or other form of profit or valuable consideration
156 for the referral of patients to any person or entity in
157 connection with providing medical or other health
158 care services or clinical laboratory services, supplies of
159 any kind, drugs, medication or any other medical
160 goods, services or devices used in connection with
161 medical or other health care services.

162 (7) Unprofessional conduct by any physician or
163 podiatrist in referring a patient to any clinical labora-
164 tory or pharmacy in which the physician or podiatrist
165 has a proprietary interest unless such physician or
166 podiatrist discloses in writing such interest to the
167 patient. Such written disclosure shall indicate that the
168 patient may choose any clinical laboratory for
169 purposes of having any laboratory work or assignment
170 performed or any pharmacy for purposes of
171 purchasing any prescribed drug or any other medical
172 goods or devices used in connection with medical or
173 other health care services.

174 As used herein, "proprietary interest" does not
175 include an ownership interest in a building in which
176 space is leased to a clinical laboratory or pharmacy at
177 the prevailing rate under a lease arrangement that is
178 not conditional upon the income or gross receipts of
179 the clinical laboratory or pharmacy.

180 (8) Exercising influence within a patient-physician
181 relationship for the purpose of engaging a patient in
182 sexual activity.

183 (9) Making a deceptive, untrue or fraudulent repre-
184 sentation in the practice of medicine and surgery or
185 podiatry.

186 (10) Soliciting patients, either personally or by an
187 agent, through the use of fraud, intimidation or undue
188 influence.

189 (11) Failing to keep written records justifying the
190 course of treatment of a patient, such records to
191 include, but not be limited to, patient histories,
192 examination and test results and treatment rendered,
193 if any.

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

199 (13) Prescribing, dispensing, administering, mixing
200 or otherwise preparing a prescription drug, including
201 any controlled substance under state or federal law,
202 other than in good faith and in a therapeutic manner
203 in accordance with accepted medical standards and in
204 the course of the physician's or podiatrist's profes-
205 sional practice.

206 (14) Performing any procedure or prescribing any
207 therapy that, by the accepted standards of medical
208 practice in the community, would constitute experi-
209 mentation on human subjects without first obtaining
210 full, informed and written consent.

211 (15) Practicing or offering to practice beyond the
212 scope permitted by law or accepting and performing
213 professional responsibilities that the person knows or
214 has reason to know he is not competent to perform.

215 (16) Delegating professional responsibilities to a
216 person when the physician or podiatrist delegating
217 such responsibilities knows or has reason to know that
218 such person is not qualified by training, experience or
219 licensure to perform them.

220 (17) Violating any provision of this article or a rule
221 or order of the board, or failing to comply with a
222 subpoena or subpoena duces tecum issued by the
223 board.

224 (18) Conspiring with any other person to commit an
225 act or committing an act that would tend to coerce,
226 intimidate or preclude another physician or podiatrist
227 from lawfully advertising his services.

228 (19) Gross negligence in the use and control of
229 prescription forms.

230 (20) Professional incompetence.

231 (21) The inability to practice medicine and surgery

232 or podiatry with reasonable skill and safety due to
233 physical or mental disability, including deterioration
234 through the aging process or loss of motor skill or
235 abuse of drugs or alcohol. A physician or podiatrist
236 adversely affected under this subdivision shall be
237 afforded an opportunity at reasonable intervals to
238 demonstrate that he can resume the competent prac-
239 tice of medicine and surgery or podiatry with reason-
240 able skill and safety to patients. In any proceeding
241 under this subdivision, neither the record of
242 proceedings nor any orders entered by the board shall
243 be used against the physician or podiatrist in any other
244 proceeding.

245 (d) The board shall deny any application for a
246 license or other authorization to practice medicine and
247 surgery or podiatry in this state to any applicant who,
248 and shall revoke the license of any physician or
249 podiatrist licensed or otherwise lawfully practicing
250 within this state who, is found guilty by any court of
251 competent jurisdiction of any felony involving
252 prescribing, selling, administering, dispensing, mixing
253 or otherwise preparing any prescription drug,
254 including any controlled substance under state or
255 federal law, for other than generally accepted
256 therapeutic purposes. Presentation to the board of a
257 certified copy of the guilty verdict or plea rendered in
258 the court is sufficient proof thereof for the purposes of
259 this article. A plea of nolo contendere has the same
260 effect as a verdict or plea of guilt.

261 (e) The board may refer any cases coming to its
262 attention to an appropriate committee of an appropri-
263 ate professional organization for investigation and
264 report. Any such report shall contain
265 recommendations for any necessary disciplinary
266 measures and shall be filed with the board within
267 ninety days of any such referral. The
268 recommendations shall be considered by the board and
269 the case may be further investigated by the board. The
270 board after full investigation shall take whatever
271 action it deems appropriate, as provided herein.

272 (f) The investigating body, as provided for in

273 subsection (e) of this section, may request and the
274 board under any circumstances may require a physi-
275 cian or podiatrist or person applying for licensure or
276 other authorization to practice medicine and surgery
277 or podiatry in this state to submit to a physical or
278 mental examination by a physician or physicians
279 approved by the board. A physician or podiatrist
280 submitting to any such examination has the right, at
281 his expense, to designate another physician to be
282 present at the examination and make an independent
283 report to the investigating body or the board. The
284 expense of the examination shall be paid by the board.
285 Any individual who applies for or accepts the privilege
286 of practicing medicine and surgery or podiatry in this
287 state is deemed to have given his consent to submit to
288 all such examinations when requested to do so in
289 writing by the board and to have waived all objections
290 to the admissibility of the testimony or examination
291 report of any examining physician on the ground that
292 the testimony or report is privileged communication.
293 If a person fails or refuses to submit to any such
294 examination under circumstances which the board
295 finds are not beyond his control, such failure or
296 refusal is prima facie evidence of his inability to
297 practice medicine and surgery or podiatry competently
298 and in compliance with the standards of acceptable
299 and prevailing medical practice.

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

304 (h) In every disciplinary or licensure denial action,
305 the board shall furnish the physician or podiatrist or
306 applicant with written notice setting out with particu-
307 larity the reasons for its action. Disciplinary and
308 licensure denial hearings shall be conducted in accor-
309 dance with the provisions of article five, chapter
310 twenty-nine-a of this code. However, hearings shall be
311 heard upon sworn testimony and the rules of evidence
312 for trial courts of record in this state shall apply to all
313 such hearings. A transcript of all hearings under this

314 section shall be made, and the respondent may obtain
315 a copy of the transcript at his expense. The physician
316 or podiatrist has the right to defend against any such
317 charge by the introduction of evidence, the right to be
318 represented by counsel, the right to present and cross-
319 examine witnesses and the right to have subpoenas
320 and subpoenas duces tecum issued on his behalf for
321 the attendance of witnesses and the production of
322 documents. The board shall make all its final actions
323 public. The order shall contain the terms of all action
324 taken by the board.

325 (i) Whenever it finds any person unqualified because
326 of any of the grounds set forth in subsection (c) of this
327 section, the board may enter an order imposing one or
328 more of the following:

329 (1) Deny his application for a license or other
330 authorization to practice medicine and surgery or
331 podiatry;

332 (2) Administer a public reprimand;

333 (3) Suspend, limit or restrict his license or other
334 authorization to practice medicine and surgery or
335 podiatry for not more than five years, including
336 limiting the practice of such person to, or by the
337 exclusion of, one or more areas of practice, including
338 limitations on practice privileges;

339 (4) Revoke his license or other authorization to
340 practice medicine and surgery or podiatry or to
341 prescribe or dispense controlled substances;

342 (5) Require him to submit to care, counseling or
343 treatment designated by the board as a condition for
344 initial or continued licensure or renewal of licensure
345 or other authorization to practice medicine and sur-
346 gery or podiatry;

347 (6) Require him to participate in a program of
348 education prescribed by the board;

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

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

354 (j) Notwithstanding the provisions of section eight,
355 article one, chapter thirty of this code, if the board
356 determines the evidence in its possession indicates that
357 a physician's or podiatrist's continuation in practice or
358 unrestricted practice constitutes an immediate danger
359 to the public, the board may take any of the actions
360 provided for in subsection (i) of this section on a
361 temporary basis and without a hearing, if institution of
362 proceedings for a hearing before the board are
363 initiated simultaneously with the temporary action
364 and begin within fifteen days of such action. The
365 board shall render its decision within five days of the
366 conclusion of a hearing under this subsection.

367 (k) Any person against whom disciplinary action is
368 taken pursuant to the provisions of this article has the
369 right to judicial review as provided in articles five and
370 six, chapter twenty-nine-a of this code. Except with
371 regard to an order of temporary suspension of a
372 license for six months or less, a person shall not
373 practice medicine and surgery or podiatry or deliver
374 health care services in violation of any disciplinary
375 order revoking or limiting his license while any such
376 review is pending. Within sixty days, the board shall
377 report its final action regarding restriction, limitation,
378 suspension or revocation of the license of a physician
379 or podiatrist, limitation on practice privileges or other
380 disciplinary action against any physician or podiatrist
381 to all appropriate state agencies, appropriate licensed
382 health facilities and hospitals, insurance companies or
383 associations writing medical malpractice insurance in
384 this state, the American Medical Association, the
385 American Podiatry Association, professional societies
386 of physicians or podiatrists in the state and any entity
387 responsible for the fiscal administration of medicare
388 and medicaid.

389 (l) Any person against whom disciplinary action has
390 been taken under the provisions of this article shall at
391 reasonable intervals be afforded an opportunity to
392 demonstrate that he can resume the practice of

393 medicine and surgery or podiatry on a general or
394 limited basis. At the conclusion of a suspension,
395 limitation or restriction period, the physician or
396 podiatrist has the right to resume practice pursuant to
397 the orders of the board: *Provided*, That for a revoca-
398 tion pursuant to subsection (d) of this section a
399 reapplication shall not be accepted for a period of at
400 least five years.

401 (m) Any entity, organization or person, including the
402 board, any member of the board, its agents or
403 employees and any entity or organization or its
404 members referred to in this article, any insurer, its
405 agents or employees, a medical peer review committee
406 and a hospital governing board, its members or any
407 committee appointed by it acting without malice and
408 without gross negligence in making any report or
409 other information available to the board or a medical
410 peer review committee pursuant to law and any
411 person acting without malice and without gross negli-
412 gence who assists in the organization, investigation or
413 preparation of any such report or information or
414 assists the board or a hospital governing body or any
415 such committee in carrying out any of its duties or
416 functions provided by law, is immune from civil or
417 criminal liability, except that the unlawful disclosure
418 of confidential information possessed by the board is a
419 misdemeanor as provided for in this article.

420 (n) A physician or podiatrist may request in writing
421 to the board a limitation on or the surrendering of his
422 license to practice medicine and surgery or podiatry or
423 other appropriate sanction as provided herein. The
424 board may grant such request and, if it considers it
425 appropriate, may waive the commencement or contin-
426 uation of other proceedings under this section. A
427 physician or podiatrist whose license is limited or
428 surrendered or against whom other action is taken
429 under this subsection has a right at reasonable
430 intervals to petition for removal of any restriction or
431 limitation on or for reinstatement of his license to
432 practice medicine and surgery or podiatry.

433 (o) In every case considered by the board under this

434 article regarding discipline or licensure, whether
435 initiated by the board or upon complaint or informa-
436 tion from any person or organization, the board shall
437 make a preliminary determination as to whether
438 probable cause exists to substantiate charges of dis-
439 qualification due to any reason set forth in subsection
440 (c) of this section. If such probable cause is found to
441 exist, all proceedings on such charges shall be open to
442 the public who shall be entitled to all reports, records,
443 and nondeliberative materials introduced at such
444 hearing, including the record of the final action taken:
445 *Provided*, That any medical records, which were
446 introduced at such hearing and which pertain to a
447 person who has not expressly waived his right to the
448 confidentiality of such records, shall not be open to the
449 public nor is the public entitled to such records.

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

Frederic L. Purden
.....
Chairman Senate Committee

J. L. Satter
.....
Chairman House Committee

Originated in the Senate.

In effect from passage.

Isid C. Stellas
.....
Clerk of the Senate

Donald G. Kopp
.....
Clerk of the House of Delegates

Sam D. Trueman
.....
President of the Senate

[Signature]
.....
Speaker House of Delegates

The within *is approved* this the *26th*
day of *April* 1989.

Yaston Caperton
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 4/24/89

Time 2:34