WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1989

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.

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

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

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

After the completion of the hospital's formal disciplinary procedure and after any resulting legal action, the chief executive officer of such hospital shall report in writing to the board within sixty days the name of any member of the medical staff or any other physi-
cian or podiatrist practicing in the hospital whose hospital privileges have been revoked, restricted, reduced or terminated for any cause, including resignation, together with all pertinent information relating to such action. The chief executive officer shall also report any other formal disciplinary action taken against any physician or podiatrist by the hospital upon the recommendation of its medical staff relating to professional ethics, medical incompetence, medical malpractice, moral turpitude or drug or alcohol abuse. Temporary suspension for failure to maintain records on a timely basis or failure to attend staff or section meetings need not be reported.

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

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

Within thirty days after a person known to be a physician or podiatrist licensed or otherwise lawfully practicing medicine and surgery or podiatry in this state or applying to be so licensed is convicted of a felony under the laws of this state, or of any crime under the laws of this state involving alcohol or drugs 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,
corporation, association, insurance company, profes-
sional society or other organization has failed or
refused to make a report required by this subsection,
the board shall provide written notice to the alleged
violator stating the nature of the alleged violation and
the time and place at which the alleged violator shall
appear to show good cause why a civil penalty should
not be imposed. The hearing shall be conducted in
accordance with the provisions of article five, chapter
twenty-nine-a of this code. After reviewing the record
of such hearing, if the board determines that a
violation of this subsection has occurred, the board
shall assess a civil penalty of not less than one
thousand dollars nor more than ten thousand dollars
against such violator. Anyone so assessed shall be
notified of the assessment in writing and the notice
shall specify the reasons for the assessment. If the
violator fails to pay the amount of the assessment to
the board within thirty days, the attorney general may
institute a civil action in the circuit court of Kanawha
County to recover the amount of the assessment. In
any such civil action, the court’s review of the board’s
action shall be conducted in accordance with the
provisions of section four, article five, chapter twenty-
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
pursuant to this section. Reports submitted in other
forms shall be accepted by the board.
The filing of a report with the board pursuant to any provision of this article, any investigation by the board or any disposition of a case by the board does not preclude any action by a hospital, other health care facility or professional society comprised primarily of physicians or podiatrists to suspend, restrict or revoke the privileges or membership of such physician or podiatrist.

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

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

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

(3) False or deceptive advertising.

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

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

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

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

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

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

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

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

(11) Failing to keep written records justifying the course of treatment of a patient, such records to include, but not be limited to, patient histories, examination and test results and treatment rendered, if any.
(12) Exercising influence on a patient in such a way as to exploit the patient for financial gain of the physician or podiatrist or of a third party. Any such influence includes, but is not limited to, the promotion or sale of services, goods, appliances or drugs.

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

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

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

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

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

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

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

(20) Professional incompetence.

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

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

e) The board may refer any cases coming to its attention to an appropriate committee of an appropriate professional organization for investigation and report. Any such report shall contain recommendations for any necessary disciplinary measures and shall be filed with the board within ninety days of any such referral. The recommendations shall be considered by the board and the case may be further investigated by the board. The board after full investigation shall take whatever action it deems appropriate, as provided herein.

f) The investigating body, as provided for in
subsection (e) of this section, may request and the
board under any circumstances may require a physi-
cian or podiatrist or person applying for licensure or
other authorization to practice medicine and surgery
or podiatry in this state to submit to a physical or
mental examination by a physician or physicians
approved by the board. A physician or podiatrist
submitting to any such examination has the right, at
his expense, to designate another physician to be
present at the examination and make an independent
report to the investigating body or the board. The
expense of the examination shall be paid by the board.
Any individual who applies for or accepts the privilege
of practicing medicine and surgery or podiatry in this
state is deemed to have given his consent to submit to
all such examinations when requested to do so in
writing by the board and to have waived all objections
to the admissibility of the testimony or examination
report of any examining physician on the ground that
the testimony or report is privileged communication.
If a person fails or refuses to submit to any such
examination under circumstances which the board
finds are not beyond his control, such failure or
refusal is prima facie evidence of his inability to
practice medicine and surgery or podiatry competently
and in compliance with the standards of acceptable
and prevailing medical practice.

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

(h) In every disciplinary or licensure denial action,
the board shall furnish the physician or podiatrist or
applicant with written notice setting out with particu-
larity the reasons for its action. Disciplinary and
licensure denial hearings shall be conducted in accor-
dance with the provisions of article five, chapter
twenty-nine-a of this code. However, hearings shall be
heard upon sworn testimony and the rules of evidence
for trial courts of record in this state shall apply to all
such hearings. A transcript of all hearings under this
section shall be made, and the respondent may obtain a copy of the transcript at his expense. The physician or podiatrist has the right to defend against any such charge by the introduction of evidence, the right to be represented by counsel, the right to present and cross-examine witnesses and the right to have subpoenas and subpoenas duces tecum issued on his behalf for the attendance of witnesses and the production of documents. The board shall make all its final actions public. The order shall contain the terms of all action taken by the board.

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

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

(2) Administer a public reprimand;

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

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

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

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

(7) Require him to practice under the direction of a physician or podiatrist designated by the board for a specified period of time; and
(8) Assess a civil fine of not less than one thousand dollars nor more than ten thousand dollars.

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

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

(l) Any person against whom disciplinary action has been taken under the provisions of this article shall at reasonable intervals be afforded an opportunity to demonstrate that he can resume the practice of
medicine and surgery or podiatry on a general or
limited basis. At the conclusion of a suspension,
limitation or restriction period, the physician or
podiatrist has the right to resume practice pursuant to
the orders of the board: Provided, That for a revoca-
tion pursuant to subsection (d) of this section a
reapplication shall not be accepted for a period of at
least five years.

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

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

(o) In every case considered by the board under this
article regarding discipline or licensure, whether initiated by the board or upon complaint or information from any person or organization, the board shall make a preliminary determination as to whether probable cause exists to substantiate charges of disqualification due to any reason set forth in subsection (c) of this section. If such probable cause is found to exist, all proceedings on such charges shall be open to the public who shall be entitled to all reports, records, and nondeliberative materials introduced at such hearing, including the record of the final action taken: Provided, That any medical records, which were introduced at such hearing and which pertain to a person who has not expressly waived his right to the confidentiality of such records, shall not be open to the public nor is the public entitled to such records.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Frederick L. Purcell
Chairman Senate Committee

J. L. Steed
Chairman House Committee

Originated in the Senate.

In effect from passage.

J. E. Hills
Clerk of the Senate

Donald S. Kemp
Clerk of the House of Delegates

Sampson T. Funderburk
President of the Senate

P. B. Walker
Speaker House of Delegates

The within bill is approved this the 21st day of April, 1989.

Gaston Caperton
Governor