

HB 2082

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STATE OF WEST VIRGINIA

WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 1999



ENROLLED

House Bill No. 2082

(By Mr. Speaker, Mr. Kiss)



Passed March 12, 1999

In Effect Ninety Days from Passage

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OFFICE OF THE CLERK
SENATE OF WEST VIRGINIA

ENROLLED
H. B. 2082

(BY MR. SPEAKER, MR. KISS)

[Passed March 12, 1999; in effect ninety days from passage.]

AN ACT to amend and reenact sections two, ten, thirteen, fourteen and fifteen, article three, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said article three by adding thereto a new section, designated section eighteen, all relating to the West Virginia medical practice act; expanding the purposes of the article creating the board of medicine; authorizing the board to enter into reciprocity agreements with other jurisdictions; providing an exemption for eligible graduates of certain foreign medical schools from meeting additional requirements for licensure; defining the term "telemedicine"; requiring licensure for persons engaged in the practice of telemedicine, and providing exceptions; expanding the basis for board investigations; eliminating certain mandatory reporting; providing additional due process protections for physicians subject to disciplinary proceedings; stating the evidentiary standard for board action; permitting assessment of cost against complainant in certain cases; providing for remand in cases of after-discovered evidence; mediation; authorizing the formation of medical corporations with licensed osteopathic physicians; and continuing the board pursuant to the West Virginia sunset law.

Be it enacted by the Legislature of West Virginia:

That sections two, ten, thirteen, fourteen and fifteen, article three, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that said article be further amended by adding thereto a new section, designated section eighteen, all to read as follows:

ARTICLE 3. WEST VIRGINIA MEDICAL PRACTICE ACT.

§30-3-2. Purpose.

1 The purpose of this article is to provide for the licensure
2 and professional discipline of physicians and podiatrists and for
3 the certification and discipline of physician assistants and to
4 provide a professional environment that encourages the delivery
5 of quality medical services within this state.

§30-3-10. Licenses to practice medicine and surgery or podiatry.

1 (a) The board shall issue a license to practice medicine and
2 surgery or to practice podiatry to any individual who is quali-
3 fied to do so in accordance with the provisions of this article.

4 (b) For an individual to be licensed to practice medicine
5 and surgery in this state, he or she must meet the following
6 requirements:

7 (1) He or she shall submit an application to the board on a
8 form provided by the board and remit to the board a reasonable
9 examination fee, the amount of the reasonable fee to be set by
10 the board. The application must, as a minimum, require a sworn
11 and notarized statement that the applicant is of good moral
12 character and that he or she is physically and mentally capable
13 of engaging in the practice of medicine and surgery;

14 (2) He or she must provide evidence of graduation and
15 receipt of the degree of doctor of medicine or its equivalent
16 from a school of medicine, which is approved by the liaison
17 committee on medical education or by the board;

18 (3) He or she must submit evidence to the board of having
19 successfully completed a minimum of one year of graduate
20 clinical training in a program approved by the accreditation
21 council for graduate medical education; and

22 (4) He or she must pass an examination approved by the
23 board, which examination can be related to a national standard.
24 The examination shall be in the English language and be
25 designed to ascertain an applicant's fitness to practice medicine
26 and surgery. The board shall before the date of examination
27 determine what will constitute a passing score: *Provided*, That
28 the board, or a majority of them, may accept in lieu of an
29 examination of applicants, the certificate of the national board
30 of medical examiners: *Provided, however*, That the board is
31 authorized to enter into reciprocity agreements with medical
32 licensing authorities in other states, the District of Columbia,
33 Canada or the Commonwealth of Puerto Rico, and, for an
34 applicant who: (i) Is currently fully licensed, excluding any
35 temporary, conditional or restricted license or permit, under the
36 laws of another state or jurisdiction having reciprocity;(ii) has
37 been engaged on a full-time professional basis in the practice of
38 medicine within that state or jurisdiction for a period of at least
39 five years; and (iii) is not the subject of any pending disciplin-
40 ary action by a medical licensing board and has not been the
41 subject of professional discipline by a medical licensing board
42 in any jurisdiction, the board may permit licensure in this state
43 by reciprocity. If an applicant fails to pass the examination on
44 two occasions, he or she shall successfully complete a course of
45 study or training, as approved by the board, designed to
46 improve his or her ability to engage in the practice of medicine
47 and surgery, before being eligible for reexamination.

48 (c) In addition to the requirements of subsection (b) hereof,
49 any individual who has received the degree of doctor of
50 medicine or its equivalent from a school of medicine located
51 outside of the United States, the Commonwealth of Puerto Rico
52 and Canada, to be licensed to practice medicine in this state,
53 must also meet the following additional requirements and
54 limitations:

55 (1) He or she must be able to demonstrate to the satisfaction
56 of the board his or her ability to communicate in the English
57 language;

58 (2) Before taking a licensure examination, he or she must
59 have fulfilled the requirements of the educational commission

60 for foreign medical graduates for certification, or he or she must
61 provide evidence of receipt of a passing score on the examina-
62 tion of the educational commission for foreign medical gradu-
63 ates: *Provided*, That an applicant who: (i) Is currently fully
64 licensed, excluding any temporary, conditional or restricted
65 license or permit, under the laws of another state, the District of
66 Columbia, Canada or the Commonwealth of Puerto Rico; (ii)
67 has been engaged on a full-time professional basis in the
68 practice of medicine within the state or jurisdiction where the
69 applicant is fully licensed for a period of at least five years; and
70 (iii) is not the subject of any pending disciplinary action by a
71 medical licensing board and has not been the subject of
72 professional discipline by a medical licensing board in any
73 jurisdiction, is not required to have a certificate from the
74 educational commission for foreign medical graduates;

75 (3) He or she must submit evidence to the board of either:
76 (i) Having successfully completed a minimum of two years of
77 graduate clinical training in a program approved by the accredi-
78 tation council for graduate medical education; or (ii) current
79 certification by a member board of the American Board of
80 Medical Specialties.

81 (d) For an individual to be licensed to practice podiatry in
82 this state, he or she must meet the following requirements:

83 (1) He or she shall submit an application to the board on a
84 form provided by the board and remit to the board a reasonable
85 examination fee, the amount of the reasonable fee to be set by
86 the board. The application must, as a minimum, require a sworn
87 and notarized statement that the applicant is of good moral
88 character and that he or she is physically and mentally capable
89 of engaging in the practice of podiatric medicine;

90 (2) He or she must provide evidence of graduation and
91 receipt of the degree of doctor of podiatric medicine and its
92 equivalent from a school of podiatric medicine which is
93 approved by the council of podiatry education or by the board;

94 (3) He or she must pass an examination approved by the
95 board, which examination can be related to a national standard.

96 The examination shall be in the English language and be
97 designed to ascertain an applicant's fitness to practice podiatric
98 medicine. The board shall before the date of examination
99 determine what will constitute a passing score. If an applicant
100 fails to pass the examination on two occasions, he or she shall
101 successfully complete a course of study or training, as approved
102 by the board, designed to improve his or her ability to engage
103 in the practice of podiatric medicine, before being eligible for
104 reexamination; and

105 (4) He or she must submit evidence to the board of having
106 successfully completed a minimum of one year of graduate
107 clinical training in a program approved by the council on
108 podiatric medical education, or the colleges of podiatric
109 medicine. The board may consider a minimum of two years of
110 graduate podiatric clinical training in the U. S. armed forces or
111 three years private podiatric clinical experience in lieu of this
112 requirement.

113 (e) All licenses to practice medicine and surgery granted
114 prior to the first day of July, one thousand nine hundred
115 ninety-one, and valid on that date, shall continue in full effect
116 for the term and under the conditions provided by law at the
117 time of the granting of the license: *Provided*, That the provi-
118 sions of subsection (d) of this section shall not apply to any
119 person legally entitled to practice chiropody or podiatry in this
120 state prior to the eleventh day of June, one thousand nine
121 hundred sixty-five: *Provided, however*, That all persons
122 licensed to practice chiropody prior to the eleventh day of June,
123 one thousand nine hundred sixty-five, shall be permitted to use
124 the term "chiropody-podiatry" and shall have the rights,
125 privileges and responsibilities of a podiatrist set out in this
126 article.

**§30-3-13. Unauthorized practice of medicine and surgery or
podiatry; criminal penalties; limitations.**

1 (a) A person shall not engage in the practice of medicine
2 and surgery or podiatry, hold himself or herself out as qualified
3 to practice medicine and surgery or podiatry or use any title,
4 word or abbreviation to indicate to or induce others to believe

5 that he or she is licensed to practice medicine and surgery or
6 podiatry in this state unless he or she is actually licensed under
7 the provisions of this article. A person engaged in the practice
8 of telemedicine is considered to be engaged in the practice of
9 medicine within this state and is subject to the licensure
10 requirements of this article. As used in this section, the
11 “practice of telemedicine” means the use of electronic informa-
12 tion and communication technologies to provide health care
13 when distance separates participants and includes one or both
14 of the following: (1) The diagnosis of a patient within this state
15 by a physician located outside this state as a result of the
16 transmission of individual patient data, specimens or other
17 material by electronic or other means from within this state to
18 the physician or his or her agent; or (2) the rendering of
19 treatment to a patient within this state by a physician located
20 outside this state as a result of transmission of individual patient
21 data, specimens or other material by electronic or other means
22 from within this state to the physician or his or her agent. No
23 person may practice as a physician’s assistant, hold himself or
24 herself out as qualified to practice as a physician’s assistant, or
25 use any title, word or abbreviation to indicate to or induce
26 others to believe that he or she is licensed to practice as a
27 physician’s assistant in this state unless he or she is actually
28 licensed under the provisions of this article. Any person who
29 violates the provisions of this subsection is guilty of a misde-
30 meanor and, upon conviction thereof, shall be fined not more
31 than ten thousand dollars, or imprisoned in the county jail not
32 more than twelve months, or both fined and imprisoned.

33 (b) The provisions of this section do not apply to:

34 (1) Persons who are duly licensed health care providers
35 under other pertinent provisions of this code and are acting
36 within the scope of their license;

37 (2) Physicians or podiatrists licensed in other states or
38 foreign countries who are acting in a consulting capacity with
39 physicians or podiatrists duly licensed in this state, for a period
40 of not more than three months: *Provided*, That this exemption
41 is applicable on a one-time only basis.

42 (3) An individual physician or podiatrist, or physician or
43 podiatrist, or physician or podiatrist groups, or physicians or
44 podiatrists at a tertiary care or university hospital outside this
45 state and engaged in the practice of telemedicine who consult
46 or render second opinions concerning diagnosis or treatment of
47 patients within this state: (i) In an emergency or without
48 compensation or expectation of compensation; or (ii) on an
49 irregular or infrequent basis which occurs less than once a
50 month or less than twelve times in a calendar year.

51 (4) Persons holding licenses granted by another state or
52 foreign country who are commissioned medical officers of, a
53 member of or employed by the armed forces of the United
54 States, the United States public health service, the veterans'
55 administration of the United States, any federal institution or
56 any other federal agency while engaged in the performance of
57 their official duties;

58 (5) Any person providing first-aid care in emergency
59 situations;

60 (6) The practice of the religious tenets of any recognized
61 church in the administration of assistance to the sick or suffer-
62 ing by mental or spiritual means;

63 (7) Visiting medical faculty engaged in teaching or research
64 duties at a medical school or institution recognized by the board
65 and who are in this state for periods of not more than six
66 months: *Provided*, That the individuals do not otherwise engage
67 in the practice of medicine or podiatry outside of the auspices
68 of their sponsoring institutions;

69 (8) Persons enrolled in a school of medicine approved by
70 the liaison committee on medical education or by the board, or
71 persons enrolled in a school of podiatric medicine approved by
72 the council of podiatry education or by the board, or persons
73 enrolled in an undergraduate or graduate physician assistant
74 program approved by the committee on allied health education
75 and accreditation or its successor on behalf of the American
76 Medical Association or by the board, or persons engaged in
77 graduate medical training in a program approved by the liaison

78 committee on graduate medical education or the board, or
79 engaged in graduate podiatric training in a program approved
80 by the council on podiatric medical education or by the board,
81 who are performing functions in the course of training includ-
82 ing with respect to functions performed by medical residents or
83 medical students under the supervision of a licensed physician,
84 ordering and obtaining laboratory tests, medications and other
85 patient orders by computer or other electronic means and no
86 other provision of this code to the contrary may be construed to
87 prohibit or limit medical residents' or medical students' use of
88 computers or other electronic devices in this manner;

89 (9) The fitting, recommending or sale of corrective shoes,
90 arch supports or similar mechanical appliances in commercial
91 establishments; and

92 (10) The fitting or sale of a prosthetic or orthotic device not
93 involving any surgical procedure, in accord with a prescription
94 of a physician, osteopathic physician, or where chiropractors or
95 podiatrists are authorized by law to prescribe such a prosthetic
96 or orthotic device, in accord with a prescription of a chiroprac-
97 tor or podiatrist, by a practitioner or registered technician
98 certified by the American Board for Certification of Orthotics
99 and Prosthetics in either prosthetics or orthotics: *Provided*, That
100 the sale of any prosthetic or orthotic device by a partnership,
101 proprietorship or corporation which employs such a practitioner
102 or registered technician who fitted the prosthetic or orthotic
103 device shall not constitute the unauthorized practice of medi-
104 cine: *Provided, however*, That the practitioner or registered
105 technician may, without a prescription, make recommendation
106 solely to a physician or osteopathic physician or to a chiroprac-
107 tor or podiatrist otherwise authorized by law to prescribe a
108 particular prosthetic or orthotic device, regarding any prosthetic
109 or orthotic device to be used for a patient upon a request for
110 such recommendation.

111 (c) This section shall not be construed as being in any way
112 a limitation upon the services of a physician's assistant per-
113 formed in accordance with the provisions of this article.

114 (d) Persons covered under this article may be permitted to
115 utilize electronic signature or unique electronic identification to
116 effectively sign materials, transmitted by computer or other
117 electronic means, upon which signature is required for the
118 purpose of authorized medical practice. Such signatures are
119 deemed legal and valid for purposes related to the provision of
120 medical services. This subsection does not confer any new
121 practice privilege or right on any persons covered under this
122 article.

§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 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 if there are five judgments
12 or settlements within the most recent five-year period in excess
13 of fifty thousand dollars each. The board may not consider any
14 judgments or settlements as conclusive evidence of professional
15 incompetence or conclusive lack of qualification to practice.

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

19 podiatrist known to that medical peer review committee. Copies
20 of the requests for information from a medical peer review
21 committee may be provided to the subject physician or podia-
22 trist if, in the discretion of the board, the provision of such
23 copies will not jeopardize the board's investigation. In the event
24 that copies are so provided, the subject physician or podiatrist
25 is allowed fifteen days to comment on the requested informa-
26 tion and such comments must be considered by the board.

27 After the completion of the hospital's formal disciplinary
28 procedure and after any resulting legal action, the chief execu-
29 tive officer of the hospital shall report in writing to the board
30 within sixty days the name of any member of the medical staff
31 or any other physician or podiatrist practicing in the hospital
32 whose hospital privileges have been revoked, restricted,
33 reduced or terminated for any cause, including resignation,
34 together with all pertinent information relating to such action.
35 The chief executive officer shall also report any other formal
36 disciplinary action taken against any physician or podiatrist by
37 the hospital upon the recommendation of its medical staff
38 relating to professional ethics, medical incompetence, medical
39 malpractice, moral turpitude or drug or alcohol abuse. Tempo-
40 rary suspension for failure to maintain records on a timely basis
41 or failure to attend staff or section meetings need not be
42 reported. Voluntary cessation of hospital privileges for reasons
43 unrelated to professional competence or ethics need not be
44 reported.

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

52 Every person, partnership, corporation, association, insur-
53 ance company, professional society or other organization
54 providing professional liability insurance to a physician or
55 podiatrist in this state shall submit to the board the following

56 information within thirty days from any judgment, or settlement
57 of a civil or medical malpractice action excepting product
58 liability actions: The date of any judgment or settlement;
59 whether any appeal has been taken on the judgment, and, if so,
60 by which party; the amount of any settlement or judgment
61 against the insured; and other information as the board may
62 require.

63 Within thirty days after a person known to be a physician
64 or podiatrist licensed or otherwise lawfully practicing medicine
65 and surgery or podiatry in this state or applying to be so
66 licensed is convicted of a felony under the laws of this state, or
67 of any crime under the laws of this state involving alcohol or
68 drugs in any way, including any controlled substance under
69 state or federal law, the clerk of the court of record in which the
70 conviction was entered shall forward to the board a certified
71 true and correct abstract of record of the convicting court. The
72 abstract shall include the name and address of the physician or
73 podiatrist or applicant, the nature of the offense committed and
74 the final judgment and sentence of the court.

75 Upon a determination of the board that there is probable
76 cause to believe that any person, partnership, corporation,
77 association, insurance company, professional society or other
78 organization has failed or refused to make a report required by
79 this subsection, the board shall provide written notice to the
80 alleged violator stating the nature of the alleged violation and
81 the time and place at which the alleged violator shall appear to
82 show good cause why a civil penalty should not be imposed.
83 The hearing shall be conducted in accordance with the provi-
84 sions of article five, chapter twenty-nine-a of this code. After
85 reviewing the record of the hearing, if the board determines that
86 a violation of this subsection has occurred, the board shall
87 assess a civil penalty of not less than one thousand dollars nor
88 more than ten thousand dollars against the violator. Anyone so
89 assessed shall be notified of the assessment in writing and the
90 notice shall specify the reasons for the assessment. If the
91 violator fails to pay the amount of the assessment to the board
92 within thirty days, the attorney general may institute a civil
93 action in the circuit court of Kanawha County to recover the

94 amount of the assessment. In any such civil action, the court's
95 review of the board's action shall be conducted in accordance
96 with the provisions of section four, article five, chapter twenty-
97 nine-a of this code. Notwithstanding any other provision of this
98 article to the contrary, when there are conflicting views by
99 recognized experts as to whether any alleged conduct breaches
100 an applicable standard of care, the evidence must be clear and
101 convincing before the board may find that the physician has
102 demonstrated a lack of professional competence to practice with
103 a reasonable degree of skill and safety for patients.

104 Any person may report to the board relevant facts about the
105 conduct of any physician or podiatrist in this state which in the
106 opinion of that person amounts to professional malpractice or
107 professional incompetence.

108 The board shall provide forms for filing reports pursuant to
109 this section. Reports submitted in other forms shall be accepted
110 by the board.

111 The filing of a report with the board pursuant to any
112 provision of this article, any investigation by the board or any
113 disposition of a case by the board does not preclude any action
114 by a hospital, other health care facility or professional society
115 comprised primarily of physicians or podiatrists to suspend,
116 restrict or revoke the privileges or membership of the physician
117 or podiatrist.

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

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

128 (2) Being found guilty of a crime in any jurisdiction, which
129 offense is a felony, involves moral turpitude or directly relates

130 to the practice of medicine. Any plea of nolo contendere is a
131 conviction for the purposes of this subdivision;

132 (3) False or deceptive advertising;

133 (4) Aiding, assisting, procuring or advising any unautho-
134 rized person to practice medicine and surgery or podiatry
135 contrary to law;

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

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

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

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

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

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

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

173 (11) Failing to keep written records justifying the course of
174 treatment of a patient, the records to include, but not be limited
175 to, patient histories, examination and test results and treatment
176 rendered, if any;

177 (12) Exercising influence on a patient in such a way as to
178 exploit the patient for financial gain of the physician or
179 podiatrist or of a third party. Any influence includes, but is not
180 limited to, the promotion or sale of services, goods, appliances
181 or drugs;

182 (13) Prescribing, dispensing, administering, mixing or
183 otherwise preparing a prescription drug, including any con-
184 trolled substance under state or federal law, other than in good
185 faith and in a therapeutic manner in accordance with accepted
186 medical standards and in the course of the physician's or
187 podiatrist's professional practice: *Provided*, That a physician
188 who discharges his or her professional obligation to relieve the
189 pain and suffering and promote the dignity and autonomy of
190 dying patients in his or her care, and in so doing, exceeds the
191 average dosage of a pain relieving controlled substance, in
192 Schedule II and III of the Uniform Control Substance Act, does
193 not violate this article;

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

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

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

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

210 (18) Conspiring with any other person to commit an act or
211 committing an act that would tend to coerce, intimidate or
212 preclude another physician or podiatrist from lawfully advertis-
213 ing his or her services;

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

216 (20) Professional incompetence;

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

229 (d) The board shall deny any application for a license or
230 other authorization to practice medicine and surgery or podiatry
231 in this state to any applicant who, and shall revoke the license
232 of any physician or podiatrist licensed or otherwise lawfully
233 practicing within this state who, is found guilty by any court of
234 competent jurisdiction of any felony involving prescribing,
235 selling, administering, dispensing, mixing or otherwise prepar-
236 ing any prescription drug, including any controlled substance
237 under state or federal law, for other than generally accepted
238 therapeutic purposes. Presentation to the board of a certified

239 copy of the guilty verdict or plea rendered in the court is
240 sufficient proof thereof for the purposes of this article. A plea
241 of nolo contendere has the same effect as a verdict or plea of
242 guilt.

243 (e) The board may refer any cases coming to its attention to
244 an appropriate committee of an appropriate professional
245 organization for investigation and report. Except for complaints
246 related to obtaining initial licensure to practice medicine and
247 surgery or podiatry in this state by bribery or fraudulent
248 misrepresentation, any complaint filed more than two years
249 after the complainant knew, or in the exercise of reasonable
250 diligence should have known, of the existence of grounds for
251 the complaint, shall be dismissed: *Provided*, That in cases of
252 conduct alleged to be part of a pattern of similar misconduct or
253 professional incapacity that, if continued, would pose risks of
254 a serious or substantial nature to the physician or podiatrist's
255 current patients, the investigating body may conduct a limited
256 investigation related to the physician or podiatrist's current
257 capacity and qualification to practice, and may recommend
258 conditions, restrictions or limitations on the physician or
259 podiatrist's license to practice that it considers necessary for the
260 protection of the public. Any report shall contain recommenda-
261 tions for any necessary disciplinary measures and shall be filed
262 with the board within ninety days of any referral. The recom-
263 mendations shall be considered by the board and the case may
264 be further investigated by the board. The board after full
265 investigation shall take whatever action it deems appropriate, as
266 provided herein.

267 (f) The investigating body, as provided for in subsection (e)
268 of this section, may request and the board under any circum-
269 stances may require a physician or podiatrist or person applying
270 for licensure or other authorization to practice medicine and
271 surgery or podiatry in this state to submit to a physical or
272 mental examination by a physician or physicians approved by
273 the board. A physician or podiatrist submitting to any such
274 examination has the right, at his or her expense, to designate
275 another physician to be present at the examination and make an
276 independent report to the investigating body or the board. The

277 expense of the examination shall be paid by the board. Any
278 individual who applies for or accepts the privilege of practicing
279 medicine and surgery or podiatry in this state is deemed to have
280 given his or her consent to submit to all examinations when
281 requested to do so in writing by the board and to have waived
282 all objections to the admissibility of the testimony or examina-
283 tion report of any examining physician on the ground that the
284 testimony or report is privileged communication. If a person
285 fails or refuses to submit to any such examination under
286 circumstances which the board finds are not beyond his or her
287 control, failure or refusal is prima facie evidence of his or her
288 inability to practice medicine and surgery or podiatry compe-
289 tently and in compliance with the standards of acceptable and
290 prevailing medical practice.

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

294 (h) In every disciplinary or licensure denial action, the
295 board shall furnish the physician or podiatrist or applicant with
296 written notice setting out with particularity the reasons for its
297 action. Disciplinary and licensure denial hearings shall be
298 conducted in accordance with the provisions of article five,
299 chapter twenty-nine-a of this code. However, hearings shall be
300 heard upon sworn testimony and the rules of evidence for trial
301 courts of record in this state shall apply to all hearings. A
302 transcript of all hearings under this section shall be made, and
303 the respondent may obtain a copy of the transcript at his or her
304 expense. The physician or podiatrist has the right to defend
305 against any charge by the introduction of evidence, the right to
306 be represented by counsel, the right to present and cross-
307 examine witnesses and the right to have subpoenas and subpoe-
308 nas duces tecum issued on his or her behalf for the attendance
309 of witnesses and the production of documents. The board shall
310 make all its final actions public. The order shall contain the
311 terms of all action taken by the board.

312 (i) In disciplinary actions in which probable cause has been
313 found by the board, the board shall, within twenty days of the

314 date of service of the written notice of charges or sixty days
315 prior to the date of the scheduled hearing, whichever is sooner,
316 provide the respondent with the complete identity, address, and
317 telephone number of any person known to the board with
318 knowledge about the facts of any of the charges; provide a copy
319 of any statements in the possession of or under the control of
320 the board; provide a list of proposed witnesses with addresses
321 and telephone numbers, with a brief summary of his or her
322 anticipated testimony; provide disclosure of any trial expert
323 pursuant to the requirements of Rule 26(b)(4) of the West
324 Virginia Rules of Civil Procedure; provide inspection and
325 copying of the results of any reports of physical and mental
326 examinations or scientific tests or experiments; and provide a
327 list and copy of any proposed exhibit to be used at the hearing.
328 *Provided*, That the board shall not be required to furnish or
329 produce any materials which contain opinion work product
330 information or would be violative of the attorney-client
331 privilege. Within twenty days of the date of service of the
332 written notice of charges, the board shall be required to disclose
333 any exculpatory evidence with a continuing duty to do so
334 throughout the disciplinary process. Within thirty days of
335 receipt of the board's mandatory discovery, the respondent shall
336 provide the board with the complete identity, address, and
337 telephone number of any person known to the respondent with
338 knowledge about the facts of any of the charges; provide a list
339 of proposed witnesses with addresses and telephone numbers,
340 to be called at hearing, with a brief summary of his or her
341 anticipated testimony; provide disclosure of any trial expert
342 pursuant to the requirements of Rule 26(b)(4) of the West
343 Virginia Rules of Civil Procedure; provide inspection and
344 copying of the results of any reports of physical and mental
345 examinations or scientific tests or experiments; and provide a
346 list and copy of any proposed exhibit to be used at the hearing.

347 (j) Whenever it finds any person unqualified because of any
348 of the grounds set forth in subsection (c) of this section, the
349 board may enter an order imposing one or more of the follow-
350 ing:

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

- 353 (2) Administer a public reprimand;
- 354 (3) Suspend, limit or restrict his or her license or other
355 authorization to practice medicine and surgery or podiatry for
356 not more than five years, including limiting the practice of that
357 person to, or by the exclusion of, one or more areas of practice,
358 including limitations on practice privileges;
- 359 (4) Revoke his or her license or other authorization to
360 practice medicine and surgery or podiatry or to prescribe or
361 dispense controlled substances;
- 362 (5) Require him or her to submit to care, counseling or
363 treatment designated by the board as a condition for initial or
364 continued licensure or renewal of licensure or other authoriza-
365 tion to practice medicine and surgery or podiatry;
- 366 (6) Require him or her to participate in a program of
367 education prescribed by the board;
- 368 (7) Require him or her to practice under the direction of a
369 physician or podiatrist designated by the board for a specified
370 period of time; and
- 371 (8) Assess a civil fine of not less than one thousand dollars
372 nor more than ten thousand dollars.
- 373 (k) Notwithstanding the provisions of section eight, article
374 one, chapter thirty of this code, if the board determines the
375 evidence in its possession indicates that a physician's or
376 podiatrist's continuation in practice or unrestricted practice
377 constitutes an immediate danger to the public, the board may
378 take any of the actions provided for in subsection (i) of this
379 section on a temporary basis and without a hearing, if institu-
380 tion of proceedings for a hearing before the board are initiated
381 simultaneously with the temporary action and begin within
382 fifteen days of the action. The board shall render its decision
383 within five days of the conclusion of a hearing under this
384 subsection.
- 385 (l) Any person against whom disciplinary action is taken
386 pursuant to the provisions of this article has the right to judicial
387 review as provided in articles five and six, chapter twenty-nine-

388 a of this code: *Provided*, That a circuit judge may also remand
389 the matter to the board if it appears from competent evidence
390 presented to it in support of a motion for remand that there is
391 newly discovered evidence of such a character as ought to
392 produce an opposite result at a second hearing on the merits
393 before the board and:

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

396 (2) The physician or podiatrist exercised due diligence in
397 asserting his or her evidence and that due diligence would not
398 have secured the newly discovered evidence prior to the appeal.
399 Except with regard to an order of temporary suspension of a
400 license for six months or less, a person may not practice
401 medicine and surgery or podiatry or deliver health care services
402 in violation of any disciplinary order revoking or limiting his or
403 her license while any such review is pending. Within sixty days,
404 the board shall report its final action regarding restriction,
405 limitation, suspension or revocation of the license of a physi-
406 cian or podiatrist, limitation on practice privileges or other
407 disciplinary action against any physician or podiatrist to all
408 appropriate state agencies, appropriate licensed health facilities
409 and hospitals, insurance companies or associations writing
410 medical malpractice insurance in this state, the American
411 Medical Association, the American Podiatry Association,
412 professional societies of physicians or podiatrists in the state
413 and any entity responsible for the fiscal administration of
414 medicare and medicaid.

415 (m) Any person against whom disciplinary action has been
416 taken under the provisions of this article shall at reasonable
417 intervals be afforded an opportunity to demonstrate that he or
418 she can resume the practice of medicine and surgery or podiatry
419 on a general or limited basis. At the conclusion of a suspension,
420 limitation or restriction period, the physician or podiatrist has
421 the right to resume practice pursuant to the orders of the board:
422 *Provided*, That for a revocation pursuant to subsection (d) of
423 this section a reapplication may not be accepted for a period of
424 at least five years.

425 (n) Any entity, organization or person, including the board,
426 any member of the board, its agents or employees and any
427 entity or organization or its members referred to in this article,
428 any insurer, its agents or employees, a medical peer review
429 committee and a hospital governing board, its members or any
430 committee appointed by it acting without malice and without
431 gross negligence in making any report or other information
432 available to the board or a medical peer review committee
433 pursuant to law and any person acting without malice and
434 without gross negligence who assists in the organization,
435 investigation or preparation of any such report or information
436 or assists the board or a hospital governing body or any
437 committee in carrying out any of its duties or functions pro-
438 vided by law, is immune from civil or criminal liability, except
439 that the unlawful disclosure of confidential information
440 possessed by the board is a misdemeanor as provided for in this
441 article.

442 (o) A physician or podiatrist may request in writing to the
443 board a limitation on or the surrendering of his or her license to
444 practice medicine and surgery or podiatry or other appropriate
445 sanction as provided herein. The board may grant the request
446 and, if it considers it appropriate, may waive the commence-
447 ment or continuation of other proceedings under this section. A
448 physician or podiatrist whose license is limited or surrendered
449 or against whom other action is taken under this subsection has
450 a right at reasonable intervals to petition for removal of any
451 restriction or limitation on or for reinstatement of his or her
452 license to practice medicine and surgery or podiatry.

453 (p) In every case considered by the board under this article
454 regarding discipline or licensure, whether initiated by the board
455 or upon complaint or information from any person or organiza-
456 tion, the board shall make a preliminary determination as to
457 whether probable cause exists to substantiate charges of
458 disqualification due to any reason set forth in subsection (c) of
459 this section. If probable cause is found to exist, all proceedings
460 on the charges shall be open to the public who shall be entitled
461 to all reports, records, and nondeliberative materials introduced
462 at the hearing, including the record of the final action taken:

463 *Provided*, That any medical records, which were introduced at
464 the hearing and which pertain to a person who has not expressly
465 waived his or her right to the confidentiality of the records, may
466 not be open to the public nor is the public entitled to the
467 records.

468 (q) Notwithstanding any other provisions of this article, the
469 board may at any time, on its own motion, or upon motion by
470 the complainant, or upon motion by the physician or podiatrist,
471 or by stipulation of the parties, refer the matter to mediation.
472 The board shall obtain a list from the West Virginia state bar's
473 mediator referral service of certified mediators with expertise
474 in professional disciplinary matters. The board and the physi-
475 cian or podiatrist may choose a mediator from this list. If the
476 board and the physician or podiatrist are unable to agree on a
477 mediator, the board shall designate a mediator from this listing
478 by neutral rotation. The mediation shall not be considered a
479 proceeding open to the public and any reports and records
480 introduced at the mediation shall not become part of the public
481 record. The mediator and all participants in the mediation shall
482 maintain and preserve the confidentiality of all mediation
483 proceedings and records. The mediator may not be subpoenaed
484 or called to testify or otherwise be subject to process requiring
485 disclosure of confidential information in any proceeding
486 relating to or arising out of the disciplinary or licensure matter
487 mediated. *Provided*, That any confidentiality agreement and
488 any written agreement made and signed by the parties as a
489 result of mediation may be used in any proceedings subse-
490 quently instituted to enforce the written agreement. The
491 agreements may be used in other proceedings if the parties
492 agree in writing to do this.

**§30-3-15. Medical corporations; podiatry corporations; applica-
tion for registration; fees; notice to secretary of
state of issuance of certificate; action by secretary
of state; rights and limitations generally; biennial
registration; when practice to cease; admissibility
and effect of certificate signed by secretary of
board; criminal penalty; severability.**

1 (a) When one or more physicians duly licensed to practice
2 medicine and surgery in this state under this article, or one or
3 more physicians duly licensed under this article and one or
4 more physicians duly licensed under article fourteen of this
5 chapter, or one or more podiatrists duly licensed to practice
6 podiatry in this state wish to form a medical or podiatry
7 corporation, respectively, such physician or physicians or
8 podiatrist or podiatrists shall file a written application therefor
9 with the board on a form prescribed by it and shall furnish proof
10 satisfactory to the board that each applicant is a duly licensed
11 physician or podiatrist. A fee, not to exceed five hundred
12 dollars, the amount of such fee to be set by the board, shall
13 accompany each application. Upon its determination that each
14 applicant is duly licensed, the board shall notify the secretary of
15 state that a certificate of authorization has been issued to the
16 person or persons making the application. When the secretary
17 of state receives such notification from the board, he or she
18 shall attach such authorization to the corporation application
19 and, upon compliance by the corporation with the pertinent
20 provisions of chapter thirty-one of this code, shall notify the
21 incorporators that such corporation, through duly licensed
22 physicians or through duly licensed podiatrists, may engage in
23 the practice of medicine and surgery or the practice of podiatry.

24 (b) A medical corporation may practice medicine and
25 surgery only through individual physicians duly licensed to
26 practice medicine and surgery in this state and a podiatrist may
27 practice podiatry only through individual podiatrists duly
28 licensed to practice podiatry in this state, but such physicians or
29 podiatrists may be employees rather than shareholders of such
30 corporation, and nothing herein contained shall be construed to
31 require a license for or other legal authorization of any individ-
32 ual employed by such corporation to perform services for which
33 no license or other legal authorization is otherwise required.
34 Nothing contained in this article is meant or intended to change
35 in any way the rights, duties, privileges, responsibilities and
36 liabilities incident to the physician-patient or podiatrist-patient
37 relationship nor is it meant or intended to change in any way the
38 personal character of the physician-patient or podiatrist-patient

39 relationship. A corporation holding such certificate of authori-
40 zation shall register biennially, on or before the thirtieth day of
41 June, on a form prescribed by the board, and shall pay an
42 annual registration fee not to exceed three hundred dollars, the
43 amount of such fee to be set by the board.

44 (c) A medical or podiatry corporation holding a certificate
45 of authorization shall cease to engage in the practice of medi-
46 cine and surgery or the practice of podiatry upon being notified
47 by the board that any of its shareholders is no longer a duly
48 licensed physician or podiatrist, or when any shares of such
49 corporation have been sold or disposed of to a person who is
50 not a duly licensed physician or podiatrist: *Provided*, That the
51 personal representative of a deceased shareholder shall have a
52 period, not to exceed twelve months from the date of such
53 shareholder's death, to dispose of such shares; but nothing
54 contained herein shall be construed as affecting the existence of
55 such corporation or its right to continue to operate for all lawful
56 purposes other than the practice of medicine and surgery or the
57 practice of podiatry.

58 (d) No corporation shall practice medicine and surgery or
59 any of its branches, or hold itself out as being capable of
60 practicing medicine and surgery, or practice podiatry or hold
61 itself out as being capable of practicing podiatry, without a
62 certificate from the board; nor shall any corporation practice
63 medicine and surgery or any of its branches or hold itself out as
64 being capable of practicing medicine and surgery, or practice
65 podiatry or hold itself out as being capable of practicing
66 podiatry, after its certificate has been revoked, or if suspended,
67 during the term of such suspension. A certificate signed by the
68 secretary of the board to which is affixed the official seal of the
69 board to the effect that it appears from the records of the board
70 that no such certificate to practice medicine and surgery or any
71 of its branches, or to practice podiatry, in the state has been
72 issued to any such corporation specified therein or that such
73 certificate has been revoked or suspended shall be admissible
74 in evidence in all courts of this state and shall be prima facie
75 evidence of the facts stated therein.

76 (e) Any officer, shareholder or employee of such corpora-
77 tion who participates in a violation of any provision of this
78 section shall be guilty of a misdemeanor and, upon conviction
79 thereof, shall be fined not exceeding one thousand dollars.

§30-3-18. Continuation of board.

1 The board of medicine shall continue to exist until the first
2 day of July, two thousand, pursuant to the provisions of article
3 ten, chapter four of this code, to allow for the completion of a
4 preliminary performance review by the joint committee on
5 government operations.

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



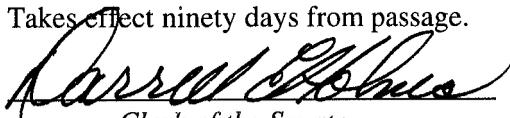
Chairman Senate Committee



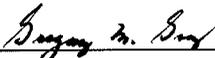
Chairman House Committee

Originating in the House.

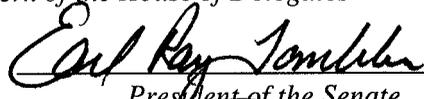
Takes effect ninety days from passage.



Clerk of the Senate



Clerk of the House of Delegates

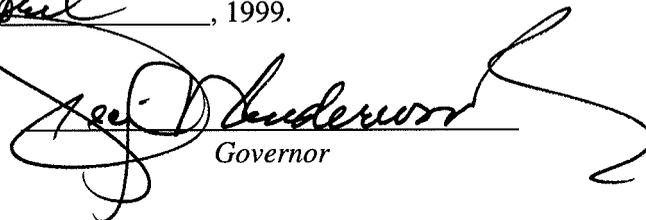


President of the Senate



Speaker of the House of Delegates

The within approved this the 7th
day of April, 1999.



Governor

PRESENTED TO THE

GOVERNOR

Date

3/26/99

Time

2:28pm