

**JOINT SUBCOMMITTEE STUDYING RISK  
MANAGEMENT PLANS FOR PHYSICIANS  
AND HOSPITALS**

**SJR 394/HJR 704 (2005)**

August 30, 2005  
Richmond, Virginia

This was the first meeting of the second year of study of the Joint Subcommittee Studying Risk Management Plans for Physicians and Hospitals.

Senator Newman, chairman, reviewed the identical bills passed by the General Assembly as a result of the first year of the Subcommittee's work (HB 2659-Kilgore and SB 1173-Newman).

The legislation, which went into effect July 1:

- Requires an expert witness to certify, before service of process is made, that the health care practitioner deviated from the standard of care.
- Provides that an expression of sympathy or general sense of benevolence to a patient or a patient's relative is not admissible at trial as an admission of liability or as an admission against interest.
- Provides that the impressions, observations, evaluations, and histories obtained or formulated during the course of the practitioner's treatment may be disclosed.
- Revises the definition of malpractice to limit it to an action for tort or breach of contract for personal injuries or wrongful death.
- Requires medical malpractice liability insurers to submit annual reports to the State Corporation Commission stating information regarding claims made against health care practitioners.
- Directs the Board of Medicine to require an assessment of the competency of a health care practitioner who has had three medical malpractice claim payments in 10 years.

The Medical Society of Virginia (MSV) made a presentation on what health courts are and whether they are feasible in Virginia. Dr. Daniel Carey, on behalf of the Medical Society of Virginia, stated that the MSV wants to preserve a quality health care system for all Virginians and is concerned about the huge spikes in malpractice premiums and access to care, particularly in high-risk specialties and is looking at health courts in an effort to think of innovative ways of addressing these issues. The MSV is not proposing "health courts which mimic drug courts and family courts," but instead is seeking authorization for regional pilots to test procedural improvements for the trial of medical malpractice cases using federal demonstration grant funds.

The MSV is seeking greater reliance on independent experts and its goals are:

- More reliable application of consistent standards of care;
- Reasonable compensation for more injured patients; and
- Reduced incentives for secrecy.

The key elements of the proposal are:

- Expertise: regional judges with health care training;
- Neutral experts: reliance on neutral experts, compensated by the court;
- Consistent decisions: decisions about standard of care made as a matter of law by regional health court judge; and
- Consistent compensation: similar injuries receive similar compensation across the state.

The MSV stated such a system would (i) enhance procedural rules to achieve consistency, (ii) perhaps have an initial review board for clear, uncontestable cases, with referral to a health court if not a clear case of malpractice and (iii) retain current rights of appeal.

The MSV's proposed timeline to advance this proposal is:

- Coordinate medical education for judges 2005-2006;
- Evaluate the practicality of having neutral experts involving judicial resource 2006-2007;
- Develop guidelines to achieve similar compensation for similar injuries 2006-2007;
- Enhance procedural tools available to judges in medical malpractice cases 2006-2007; and
- Revise Virginia model jury instructions to reflect changes above 2006-2007.

Potential Benefits according to the MSV:

- Promotes consistent expert rulings which restores trust in reliable justice;
- Reduces the need for doctors to practice defensive medicine which will decrease health care costs;
- Facilitates quality improvement and enhances safety by promoting a culture of openness and transparency;
- Reduces litigation costs; and
- Gets patients back to their lives and lets good doctors concentrate on providing excellent medical care.

Jody Wagner, Treasurer of Virginia, discussed SB 601 from the 2004 Session, which provides that the Department of Treasury is to establish on July 1, 2006, a risk management plan allowing certain qualifying physicians and sole community hospitals to purchase medical malpractice insurance and allowing sole community hospitals to purchase general liability coverage. Ms. Wagner stated that at this time there is no physician malpractice insurer domiciled in Virginia. She reviewed the criteria for participation by a physician and noted that prior acts coverage would be included. She reminded the subcommittee that in its first year of study it considered a recommendation to limit the plan to true crisis situations, such as bankruptcy of a carrier or a carrier leaving the market and stated that the Division of Risk Management could readily modify the program to operate as a true safety net. (Note: The subcommittee declined to endorse this recommendation and decided to keep the issue on the table for its second year of study.) She summarized a study done last year on similar programs administered by other states and said that most were performing adequately and are generally stable but some are struggling. Success is based on adequate initial funding, ability to control

legal costs and integrity of the fund. An estimated \$2 million initial funding is needed to sustain the program while sufficient premium revenue accumulates. Reinsurance would be purchased. Defense costs could best be controlled by hiring an in-house lawyer to manage cases. After receiving funding the program could be established in 60 to 90 days. Issues that it would be helpful to address through further legislation are: whether the plan would pay agent commissions, whether the plan expires or could be dissolved after a certain period of time or under certain conditions, and whether it could be reorganized into a mutual plan or assignment to private market. Although implementation of this plan would assure that there is medical malpractice insurance available, it is not anticipated that the plan would dramatically reduce premiums.

In response to questions about the \$2 million start up costs, it was pointed out that a claim could be filed the first day for an act that occurred in the past. The subcommittee asked for additional information on the experience of other states that have implemented similar programs, especially West Virginia which converted its program into a mutual insurance company and sold it. Antidotal evidence indicates that a state plan improves the market and increases competition. Although Virginia's plan would probably not deny coverage to a physician with a poor disciplinary record, it is probable that the premium would be quite expensive for high risk physicians. Subcommittee members stated that they do not want the state administered plan to be a last resort for Virginia physicians who cannot obtain insurance elsewhere. Rather, they would prefer for it to be a true competitor for medical malpractice insurance and expressed a desire to see a mutual company whose experience is based exclusively on Virginia experience.

A representative of the Bureau of Insurance with the State Corporation Commission gave an update on the progress that is being made to comply with the requests made to the Commission in SJR394/HJR 704, which are to:

- Report on medical malpractice insurance rates and the implications of possible changes in the system of regulation on insurance premiums and related issues;
- Determine the average medical malpractice rates for neurosurgery, obstetrics and gynecology, orthopedics, emergency medicine, and anesthesiology in Virginia under the current regulatory structure;
- Compare such rates to the Commission's estimates for medical malpractice insurance rates for these specialties based upon prior approval and data that excludes loss experience and other data from other states; and
- Assess the probable effects of the availability and affordability of medical malpractice insurance for these specialties if Virginia requires prior approval of the rates rather than continuing to regulate these rates under existing file and use provisions.

The Bureau's consulting actuaries are updating the December 2003 report titled "Analysis of Medical Professional Liability Rates for Physicians and Surgeons." Detailed supporting data underlying the rates filed by licensed insurers has been collected. In order to comply with the requests made in the resolution, additional data was collected beyond that required to update the report. The actuaries are in the process of analyzing the information and the Bureau anticipates that the report will be completed in November.

The November 2003 report titled “A Report on the Level of Competition in Virginia Relating to Medical Malpractice Insurance” is being updated with the assistance of the Bureau’s consulting economists. An updated market practices survey was sent out in January requesting information from malpractice writers regarding market conditions and whether the insurers are seeking to write new policies. Detailed financial information has been obtained from each insurer writing medical malpractice insurance in Virginia and will be used to provide comparative measures of the past profitability of the malpractice insurance market in Virginia.

Members of the subcommittee expressed a desire to have the results of the Bureau's research provided to them as soon as possible and also asked for the number of carriers currently writing medical malpractice insurance in the Commonwealth.

A representative of the Virginia Trial Lawyers Association (VTLA) observed that last year, at the subcommittee's request, VTLA worked with the MSV to make compromises but that this would not be possible over the issue of health courts. Concerns about the right to a trial by jury and due process were cited. Juries are capable of determining whether there has been a breach of the standard of care. He noted that the subcommittee's bill has been in effect for only two months and suggested allowing time to pass in order to determine the effect of those changes. He pointed out that health courts would cost the state a lot of money. Research has shown that doctors leave practices for a number of reasons, not just because of high insurance rates. It has not been shown that there is a correlation between medical malpractice cases and insurance rates. A discussion of the disciplinary system for doctors versus lawyers ensued.

The subcommittee's next meeting will be Tuesday, September 20 at 2 p.m. in Senate Room A of the General Assembly Building.