JOINT SUBCOMMITTEE STUDYING RISK MANAGEMENT PLANS FOR PHYSICIANS AND HOSPITALS
SB 601 (2004)

Recommendations to be considered

Monday, December 6, 2004

1. Require an expert witness to certify prior to service of process on a defendant, that the standard of care was breached by the defendant which proximately caused damages.

2. Provide that damages are not recoverable in a personal injury or wrongful death suit against a health care provider if the plaintiff left the medical facility against medical advice.

3. Allow evidence of collateral benefits at trial.

4. Prohibit evidence of a physician saying "I am sorry" or apologizing to a patient from being admitted into evidence in any subsequent litigation as an admission of liability or admission against interest.

5. Limit the professional liability insurance plan to be established and administered by the Division of Risk Management pursuant to SB 601 to true crisis situations (bankruptcy of carrier or carrier leaves market).

6. Require all medical malpractice claims settled or adjudicated to final judgment and any such claim closed without payment, during each calendar year to be reported annually to the State Corporation Commission by the insurer of the health care provider.

7. Require the Board of Medicine to evaluate the competency of a practitioner who has had five malpractice settlements or judgments in the most recent ten year period and require the Virginia State Bar to evaluate the competency of an attorney who has had five incidents of discipline, settlements or judgments in the most recent ten year period.

8. Mandate that all malpractice cases be heard by a malpractice review panel and provide consequences for a plaintiff who institutes a suit when the panel has found in favor of the defense.

9. Establish a $250,000 cap on non-economic damages.

10. Establish a limit on attorneys' fees.

11. Eliminate the rule that prohibits treating physicians from testifying in medical malpractice cases involving their patients. (See attached document which discusses amending §§ 8.01-399 and 32.1-127.1:03).

12. Allow defense attorneys to interview or speak with other health care providers of the patient/plaintiff. (See attached document which discusses accomplishing this by amending subsection D of § 8.01-399).

13. Revise the definition of "malpractice" in § 8.01-581.1 to include any "action or claim of any description or kind whatsoever." (See attached document which discusses this.)

14. Allow malpractice cases to be filed only in the venue jurisdiction where the medical care was delivered to plaintiff and provide that the statute of limitations is not tolled if the suit is filed in the wrong jurisdiction, except where excusable error was made. (See attached document which discusses this.)

15. Repeal subsection C of § 8.01-581.20 which limits each party to two expert witnesses. (See attached document which discusses this.)

16. Allow depositions to serve as the basis for granting a motion for summary judgment or striking evidence in a medical malpractice case. (See attached document which discusses amending § 8.01-420.)

17. Require the plaintiff, prior to filing suit, to secure admissible medical expert opinion that there has been a breach of the applicable standard of care. (See attached document which discusses this.)

18. Revise Section 8.01-401.1 for medical malpractice cases only to permit the text of medical literature to be submitted to the jury as an exhibit, to allow qualification of medical literature as "authoritative" by the experts for the party proposing the exhibit literature, and shortening the time for disclosure of such literature to 10 days before trial.

19. Require the Executive Secretary of the Supreme Court to develop a case summary form to be completed by the plaintiff and filed with the initial pleading in each civil case in the circuit court. The form should include the name and address of the plaintiff and defendant, the type of case, the final disposition and if the action is a medical malpractice action, the profession and specialty of the health care professional. The Executive Secretary will produce reports from the information in the automated system.

20. In practice areas where medical malpractice insurance rates are particularly egregious, require the State Corporation Commission to review rates based on loss experience in Virginia and not from other states. Medical malpractice insurance for the practice areas will be removed from "file and use" category and be made subject to rate regulation (as workers' compensation insurance, for example). Rates will then be set based on the loss experience from Virginia.

21. Prohibit any entity from mandating that physicians carry limits equal to or greater than the current malpractice cap.

22. Draft a study resolution to continue the Joint Subcommittee Studying Risk Management Plans for Physicians and Hospitals for another year.

Attached Documents

Recommendation No. 11

Changes to Virginia Code §8.01-399

Virginia Code §8.01-399 has been routinely interpreted by Circuit Courts throughout Virginia in medical malpractice cases to exclude the testimony, opinions, and even the original medical records of plaintiff's treating health care providers [primarily physicians]. The VADA will happily supply copies of the orders and opinions to verify this.

The effect of these rulings has been to exclude from consideration by the jury of information from the actual health care providers who treated the patient and who were often part of the treatment team along with the defendant health care providers. As a result, jurors hear the opinions of hired experts, rather than those far more accurate views of the same health care provider/experts who were actually involved in the treatment.

The VADA feels that this is a perverse and unintended result of §8.01-399 as it applies to medical malpractice cases. The medical treatment which may require some privacy protection in some other cases is the crux of the factual and legal issues in dispute in medical malpractice cases.

This code section creates a unique rule that prohibits defendants from interviewing treating physician witnesses, but allows unlimited access to the same witnesses by counsel for the patient/plaintiff. No other civil litigation situation has a statutory limitation on access to witnesses in this unilateral fashion.

Problem: Treating physicians cannot testify in medical malpractice cases involving their patients.

Solutions:

A. Make §8.01-399 inapplicable to medical malpractice cases. This can be most effectively achieved by adding a subsection "G." Following is proposed text to make it clear this section no longer limits such testimony:

"G. Nothing in this section shall in any way limit the testimony of any treating health care provider, as defined in Virginia Code §8.01-581.1, including both fact and opinion testimony, in any action by the patient of such treating health care provider against any health care provider under the Virginia Medical Malpractice Act, §8.01-581.1, et seq."

B. A similar amendment with identical language should be made to the Virginia Health Records Privacy Act, Virginia Code §32.1-127.1:03, in order to foreclose any effort to create a similar barrier under that act. The amendment should be added to subsection "I."

Recommendation No. 12

Problem: Defendants' attorneys are not allowed to interview or speak with other health care providers of the patient/plaintiff, while the patient/plaintiff's counsel has unfettered access to all of these witnesses. Depositions taken to find out what they know or did, are then put in a form [depositions] which can generally be read into evidence at trial by the plaintiff's attorney. Defendants are thus unable to find out what these witnesses know

Solutions:

A. The simplest solution is to add the following language to the beginning of subsection "D." of §8.01-399:

"Except in an action pending or threatened under the Virginia Medical Malpractice Act, §8.01-581.1. et seq…"

and also add corresponding language to subsection "C." of §8.01-399:

C. … ~~or~~ (iii) prohibit a duly licensed practitioner of the healing arts, or his agents, from disclosing information as required by state or federal law; *or, (iv) in any action pending or threatened under the Virginia Medical Malpractice Act, §8.01-581.1. et seq., prohibit any health care provider from any communications with any other health care provider, his lawyer, or his agent, who is involved in any way in the treatment of any patient making or threatening such action.*

B. The next simplest solution is to make the prohibition against contact apply to attorneys for both the patient/plaintiff and defendant health care providers. This can be achieved by adding the following text as item "4." to subsection D.:

"*In any action pending or threatened under the Virginia Medical Malpractice Act, §8.01-581.1. et seq., the requirements of this subsection D. shall apply to each and every lawyer or person acting on any lawyer's behalf for all parties, including the lawyer for the patient or patient's estate, and shall apply notwithstanding any consent given by the patient, patient's administrator or patient's executor authorizing communication between such health care provider and lawyer."*

Recommendation No. 13

<u>*Problem:*</u> Actions relating to medical treatment against health care providers are proceeding outside of the Virginia Medical Malpractice Act. These are a new phenomenon, and are cases couched as "breach of contract" or "battery." The purpose of styling these claims in this way is to avoid the requirements for expert witnesses and the cap contained in the Virginia Medical Malpractice Act. [§8.01-581.20 and §8.01-581.15.] Medical malpractice cases are the only professional liability claims which are "torts" in Virginia, and that is based on the theory that the "touching" allowed of a physician during treatment is a form of "battery." We feel juries are unable to be meaningfully instructed in this legal minutia, and therefore all medical malpractice

cases should proceed only under the Virginia Medical Malpractice Act. We believe this was the intention of the General Assembly all along.

Solution: Revise the definition of "*malpractice*" in Virginia Code §8.01-581.1 to read as follows:

"Malpractice" means any ~~tort~~ *action or claim of any description or kind whatsoever* based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient."

Recommendation No. 14

Problem: Medical malpractice cases are generally subject to a two (2) year statute of limitations. Counsel for the plaintiff will often file a case in a jurisdiction other than where the medical treatment was provided. Sometimes this is done on the pretext that one of the corporate defendants not really the target of the suit [such as the hospital] has a satellite clinic in another venue. Sometimes the actions are "parked" in these stranger venues to avoid accidental detection in the Clerk's office by the defendants and in order to extend the statute of limitations by not serving the suits for a year. With a nonsuit, these cases can often last as long as 4 years before the defendant health care providers know they have been sued.

Solution: Require that all cases under the Virginia Medical Malpractice Act be filed ONLY in the venue jurisdiction where the medical care as defined in §8.01-581.1 was delivered to the patient/plaintiff. Also provide that the statute of limitations is not tolled if the suit is filed in the wrong jurisdiction, except where excusable error was made and the suit was filed by mistake in an adjacent jurisdiction [i.e., Richmond City rather than Henrico County; Norfolk City rather than Portsmouth; Roanoke City rather than Roanoke County, etc.] This can be most easily accomplished by adding a section to the Virginia Medical Malpractice Act, and it should be coordinated with the VADA proposal that all medical malpractice suits also be accompanied when filed by an affidavit from a qualified expert witness, as covered in another memorandum.

Recommendation No. 15

Problem: The 2003 General Assembly added a limitation of two (2) expert witnesses for each party. This provision does not have the effect of making the defendant physicians "play fair." Rather, it prevents the defendant physicians from proving that the speculative or minority standard of care theories of the plaintiff are NOT held by the majority of the profession or specialty. This can be proven to a jury only by the number of experts who are willing to come to testify. Therefore, we propose that subsection "C.," added by Acts of 2003, c. 251, be repealed in its entirety.

§ 8.01-581.20. Standard of care in proceeding before medical malpractice review panel; expert testimony; determination of standard in action for damages.
A. In any proceeding before a medical malpractice review panel or in any action against a physician, clinical psychologist, podiatrist, dentist, nurse, hospital or other health care provider to recover damages alleged to have been caused by medical malpractice where the acts or omissions so complained of are alleged to have occurred

in this Commonwealth, the standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth and the testimony of an expert witness, otherwise qualified, as to such standard of care, shall be admitted; provided, however, that the standard of care in the locality or in similar localities in which the alleged act or omission occurred shall be applied if any party shall prove by a preponderance of the evidence that the health care services and health care facilities available in the locality and the customary practices in such locality or similar localities give rise to a standard of care which is more appropriate than a statewide standard. Any physician who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified. This presumption shall also apply to any physician who is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia. An expert witness who is familiar with the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this Commonwealth. A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

B. In any action for damages resulting from medical malpractice, any issue as to the standard of care to be applied shall be determined by the jury, or the court trying the case without a jury.

C. In any action described in this section, each party may designate, identify or call to testify at trial no more than two expert witnesses per medical discipline on any issue presented. The court may permit a party, for good cause shown, to designate, identify, or call to testify at trial additional expert witnesses. The number of treating health care providers who may serve as expert witnesses pursuant to § 8.01-399 shall not be limited pursuant to this subsection, except for good cause shown. If the court permits a party to designate, identify, or call additional experts, the court may order that party to pay all costs incurred in the discovery of such additional experts. For good cause shown, pursuant to the Rules of Supreme Court of Virginia, the court may limit the number of expert witnesses other than those identified in this subsection whom a party may designate, identify, or call to testify at trial.

(1979, c. 325; 1980, c. 164; 1989, cc. 146, 729; 1992, c. 240; 2003, c. 251.)

Recommendation No. 16

Changes to Virginia Code §8.01-420

As discussed in the hearing on October 25, 2004, use of depositions in motions for summary judgment is consistent with allowing courts to dismiss factually and legally unsupportable claims prior to trial. This is not now allowed under the general provisions prohibiting use of depositions for summary judgment in Virginia Code §8.01-420. This technique has proven extremely effective and efficient in Virginia's federal courts, where such procedures are available, if not common.

We would propose a simple change to §8.01-420 as follows [*in italics*]:

§8.01-420. Depositions as basis for motion for summary judgment or to strike evidence

No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used. *The provisions of this section shall not apply to suits or actions subject to Virginia Code §8.01-581.1, et seq.*

Recommendation No. 17

Certification of expert witness at time of filing of medical malpractice case

As discussed in the hearing on October 25, 2004, one of the greatest abuses is the filing of medical malpractice actions by a plaintiff without having secured any admissible medical expert opinion that there has been a breach of the applicable standard of care. Although the Virginia Medical Malpractice Act requires an expert witness who will testify at trial that the defendant health care provider breached the applicable standard of care, few courts will require a plaintiff to identify specifically the details of the plaintiff's claim or the medical reasons why the action was filed until long into the discovery process. Even fewer courts require identification of a plaintiff's fundamental expert basis for the action until long after depositions of the health care providers are completed, often as late as 90 days before trial. This game of "Go Fish" consumes a large part of the time and resources used to defend medical malpractice cases and prevents the defendant health care provider from knowing what "theory" the plaintiff is pursuing until very late in the legal process.

This problem was identified and fixed in North Carolina in 1996. North Carolina Rules of Civil Procedure, Rule 9(j) ["Pleading Special Matters; Medical Malpractice."] A copy of the North Carolina procedure is attached. We feel the North Carolina procedure is simple, fair, and would impose virtually no additional burden on a responsible plaintiff's attorney. It has worked very well in that state.

Set out below is an adaptation of that North Carolina procedure to current Virginia procedure. We recommend this be adopted as new section in the Virginia Medical Malpractice Act, Virginia Code §8.01-581.1, *et seq*.

"Any action or suit filed pursuant to §8.01-581.1, et seq., shall be dismissed unless:

(1) The initial pleading specifically asserts that the health care provided to the patient by the health care provider has been reviewed by a person who is reasonably expected to qualify as an expert witness pursuant to §8.01-581.20 and who is willing to testify that such medical care failed to comply with the applicable standard of care; or,

(2) The initial pleading specifically asserts that the health care provided to the patient by the health care is of a nature that does not require proof by an expert witness pursuant to §8.01-581.20. This subparagraph is not intended to expand or diminish the scope of the exception to §8.01-581.20.

Upon motion by the patient made prior to the expiration of the applicable statute of limitations in the Circuit Court where any action or suit pursuant to §8.01-581.1 must be filed, the judge may allow the filing of a pleading not in compliance with this section, in which event the judge shall establish a period of time, not to exceed 120 days, within which the patient must comply with the provisions of this section.

The plaintiff shall provide, at the request of any one of the health care provider defendants named in the initial pleading, proof of compliance with this section through up to ten (10) interrogatories, the answers to which shall be verified by expert identified in the initial pleadings, under oath.

If no expert is identified pursuant to subparagraph (2) of this section, at the request of any one of the health care provider defendants named in the initial pleading, the lawyer for the plaintiff and the plaintiff shall provide a statement under oath setting forth all facts which support the plaintiff's contention that the claimed breach of the applicable standard of care does not require proof pursuant to §8.01-581.20. Thereafter, any defendant may file an affidavit signed under oath by the health care provider and his lawyer in opposition thereto. Whereupon, any defendant may file a motion in the pending proceeding upon such sworn information to determine whether an expert shall be required pursuant to §8.01-581.20. If the judge determines that an expert witness is required, the judge shall dismiss the action or suit. In the event of such dismissal, the statute of limitations shall not be tolled for the time during which the action or suit was pending and the dismissal shall count as a voluntary non-suit pursuant to §8.01-380.

Interrogatories propounded by the health care provider pursuant to this section shall not be counted in any limitations imposed upon the number of interrogatories established by statute, rule of court, or order of the trial court.