

VIRGINIA ACTS OF ASSEMBLY -- 2005 SESSION

CHAPTER 649

An Act to amend and reenact §§ 8.01-399 and 8.01-581.1 of the Code of Virginia, to amend the Code of Virginia by adding sections numbered 8.01-20.1, 8.01-50.1, 8.01-52.1, by adding in Article 2 of Chapter 21.1 of Title 8.01 a section numbered 8.01-581.20:1, and by adding sections numbered 16.1-83.1, 38.2-2228.2, and 54.1-2912.3, relating to medical malpractice.

[H 2659]

Approved March 23, 2005

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-399 and 8.01-581.1 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding sections numbered 8.01-20.1, 8.01-50.1, 8.01-52.1, by adding in Article 2 of Chapter 21.1 of Title 8.01 a section numbered 8.01-581.20:1, and by adding sections numbered 16.1-83.1, 38.2-2228.2, and 54.1-2912.3 as follows:

§ 8.01-20.1. Certification of expert witness opinion at time of service of process.

Every motion for judgment, counter claim, or third party claim in a medical malpractice action, at the time the plaintiff requests service of process upon a defendant, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. This certification is not necessary if the plaintiff, in good faith, alleges a medical malpractice action that asserts a theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience.

The certifying expert shall not be required to be an expert witness expected to testify at trial nor shall any defendant be entitled to discover the identity of the certifying expert or the nature of the certifying expert's opinions. Should the certifying expert be identified as an expert expected to testify at trial, the opinions and bases therefor shall be discoverable pursuant to Rule 4:1 of the Rules of Supreme Court of Virginia with the exception of the expert's status as a certifying expert.

Upon written request of any defendant, the plaintiff shall, within 10 business days after receipt of such request, provide the defendant with a certification form that affirms that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested or affirms that the plaintiff did not need to obtain a certifying expert witness opinion. If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant as required under this section, the court shall impose sanctions according to the provisions of § 8.01-271.1 and may dismiss the case with prejudice.

§ 8.01-50.1. Certification of expert witness opinion at time of service of process.

Every motion for judgment, counter claim, or third party claim in any action pursuant to § 8.01-50 for wrongful death against a health care provider, at the time the plaintiff requests service of process upon a defendant, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. This certification is not necessary if the plaintiff, in good faith, alleges in his wrongful death action a medical malpractice theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience.

The certifying expert shall not be required to be an expert expected to testify at trial nor shall any defendant be entitled to discover the identity of the certifying expert or the nature of the certifying expert's opinions. Should the certifying expert be identified as an expert expected to testify at trial, the opinions and bases therefor shall be discoverable pursuant to Rule 4:1 of the Rules of Supreme Court of Virginia with the exception of the expert's status as a certifying expert.

Upon written request of any defendant, the plaintiff shall, within 10 business days after receipt of such request, provide the defendant with a certification form which affirms that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested or affirms that the plaintiff did not need to obtain a certifying expert opinion. If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant, the court shall impose sanctions according to the provisions of § 8.01-271.1 and may dismiss the case with prejudice.

§ 8.01-52.1. Admissibility of expressions of sympathy.

In any wrongful death action brought pursuant to § 8.01-50 against a health care provider, or in any arbitration or medical malpractice review panel proceeding related to such wrongful death action, the portion of statements, writings, affirmations, benevolent conduct or benevolent gestures expressing sympathy or general sense of benevolence, which are made by a health care provider or an agent of a health care provider to a relative of the patient, or a representative of the patient about the death of the patient as a result of the unanticipated outcome of health care, shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest. A statement of fault that is part of or in addition to any of the above shall not be made inadmissible by this section.

For purposes of this section, unless the context otherwise requires:

"Health care" has the same definition as provided in § 8.01-581.1.

"Health care provider" has the same definition as provided in § 8.01-581.1.

"Relative" means a decedent's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half-brother, half-sister, or spouse's parents. In addition, "relative" includes any person who had a family-type relationship with the decedent.

"Representative" means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a medical power of attorney, or any person recognized in law or custom as a patient's agent.

"Unanticipated outcome" means the outcome of the delivery of health care that differs from an expected result.

§ 8.01-399. Communications between physicians and patients.

A. Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be required to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.

B. If the physical or mental condition of the patient is at issue in a civil action, the ~~diagnosis~~ *diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan* of the practitioner, ~~obtained or formulated as contemporaneously documented in the patient's medical record,~~ during the ~~time course~~ of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. However, no order shall be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it shall be restricted to the medical records that relate to the physical or mental conditions at issue in the case. No disclosure of diagnosis or treatment plan facts communicated to, or otherwise learned by, such practitioner shall occur if the court determines, upon the request of the patient, that such facts are not relevant to the subject matter involved in the pending action or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial.

C. This section shall not (i) be construed to repeal or otherwise affect the provisions of § 65.2-607 relating to privileged communications between physicians and surgeons and employees under the Workers' Compensation Act; (ii) apply to information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug; or (iii) prohibit a duly licensed practitioner of the healing arts, or his agents, from disclosing information as required by state or federal law.

D. Neither a lawyer nor anyone acting on the lawyer's behalf shall obtain, in connection with pending or threatened litigation, information concerning a patient from a practitioner of any branch of the healing arts without the consent of the patient, except through discovery pursuant to the Rules of the Supreme Court as herein provided. However, the prohibition of this subsection shall not apply to:

1. Communication between a lawyer retained to represent a practitioner of the healing arts, or that lawyer's agent, and that practitioner's employers, partners, agents, servants, employees, co-employees or others for whom, at law, the practitioner is or may be liable or who, at law, are or may be liable for the practitioner's acts or omissions;

2. Information about a patient provided to a lawyer or his agent by a practitioner of the healing arts employed by that lawyer to examine or evaluate the patient in accordance with Rule 4:10 of the Rules of the Supreme Court; or

3. Contact between a lawyer or his agent and a nonphysician employee or agent of a practitioner of healing arts for any of the following purposes: (i) scheduling appearances, (ii) requesting a written recitation by the practitioner of handwritten records obtained by the lawyer or his agent from the practitioner, provided the request is made in writing and, if litigation is pending, a copy of the request and the practitioner's response is provided simultaneously to the patient or his attorney, (iii) obtaining information necessary to obtain service upon the practitioner in pending litigation, (iv) determining when

records summoned will be provided by the practitioner or his agent, (v) determining what patient records the practitioner possesses in order to summons records in pending litigation, (vi) explaining any summons that the lawyer or his agent caused to be issued and served on the practitioner, (vii) verifying dates the practitioner treated the patient, provided that if litigation is pending the information obtained by the lawyer or his agent is promptly given, in writing, to the patient or his attorney, (viii) determining charges by the practitioner for appearance at a deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place to which he is or will be summoned to give testimony.

E. A clinical psychologist duly licensed under the provisions of Chapter 36 (§ 54.1-3600 et seq.) of Title 54.1 shall be considered a practitioner of a branch of the healing arts within the meaning of this section.

F. Nothing herein shall prevent a duly licensed practitioner of the healing arts, or his agents, from disclosing any information that he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection with the care of the patient, the protection or enforcement of the a practitioner's legal rights including such rights with respect to medical malpractice actions, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law.

§ 8.01-581.1. Definitions.

As used in this chapter:

"Health care" means any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical diagnosis, care, treatment or confinement.

"Health care provider" means (i) a person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional services as a physician or hospital, dentist, pharmacist, registered nurse or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, physical therapy assistant, clinical psychologist, clinical social worker, professional counselor, licensed dental hygienist, health maintenance organization, or emergency medical care attendant or technician who provides services on a fee basis;; (ii) a professional corporation, all of whose shareholders or members are so licensed;; (iii) a partnership, all of whose partners are so licensed;; (iv) a nursing home as defined in § 54.1-3100 except those nursing institutions conducted by and for those who rely upon treatment by spiritual means alone through prayer in accordance with a recognized church or religious denomination;; (v) a professional limited liability company comprised of members as described in subdivision A 2 of § 13.1-1102;; (vi) a corporation, partnership, limited liability company or any other entity, except a state-operated facility, which employs or engages a licensed health care provider and which primarily renders health care services;; or (vii) a director, officer, employee, independent contractor, or agent of the persons or entities referenced herein, acting within the course and scope of his employment or engagement as related to health care or professional services.

"Health maintenance organization" means any person licensed pursuant to Chapter 43 (§ 38.2-4300 et seq.) of Title 38.2 who undertakes to provide or arrange for one or more health care plans.

"Hospital" means a public or private institution licensed pursuant to Chapter 5 (§ 32.1-123 et seq.) of Title 32.1 or Chapter 8 (§ 37.1-179 et seq.) of Title 37.1.

"Impartial attorney" means an attorney who has not represented (i) the claimant, his family, his partners, co-proprietors or his other business interests; or (ii) the health care provider, his family, his partners, co-proprietors or his other business interests.

"Impartial health care provider" means a health care provider who (i) has not examined, treated or been consulted regarding the claimant or his family; (ii) does not anticipate examining, treating, or being consulted regarding the claimant or his family; or (iii) has not been an employee, partner or co-proprietor of the health care provider against whom the claim is asserted.

"Malpractice" means any tort *action or breach of contract action for personal injuries or wrongful death*, based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient.

"Patient" means any natural person who receives or should have received health care from a licensed health care provider except those persons who are given health care in an emergency situation which exempts the health care provider from liability for his emergency services in accordance with § 8.01-225.

"Physician" means a person licensed to practice medicine or osteopathy in this Commonwealth pursuant to Chapter 29 (§ 54.1-2900 et seq.) of Title 54.1.

§ 8.01-581.20:1. Admissibility of expressions of sympathy.

In any civil action brought by an alleged victim of an unanticipated outcome of health care, or in any arbitration or medical malpractice review panel proceeding related to such civil action, the portion of statements, writings, affirmations, benevolent conduct, or benevolent gestures expressing sympathy, or general sense of benevolence, which are made by a health care provider or an agent of a health care provider to the patient, a relative of the patient, or a representative of the patient shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest. A statement of

fault that is part of or in addition to any of the above shall not be made inadmissible by this section.

For purposes of this section, unless the context otherwise requires:

"Health care" has the same definition as provided in § 8.01-581.1.

"Health care provider" has the same definition as provided in § 8.01-581.1.

"Relative" means a patient's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half-brother, half-sister, or spouse's parents. In addition, "relative" includes any person who has a family-type relationship with the patient.

"Representative" means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a medical power of attorney, or any person recognized in law or custom as a patient's agent.

"Unanticipated outcome" means the outcome of the delivery of health care that differs from an expected result.

§ 16.1-83.1. Certification of expert witness opinion at time of service of process.

Every warrant in debt, counter claim, or third party claim in a medical malpractice action, at the time the plaintiff requests service of process upon a defendant, shall be deemed a certification that the plaintiff has obtained from an expert whom the plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. This certification is not necessary if the plaintiff, in good faith, alleges a medical malpractice action that asserts a theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience.

The certifying expert shall not be required to be an expert witness expected to testify at trial nor shall any defendant be entitled to discover the identity of the certifying expert or the nature of the certifying expert opinions. Should the certifying expert be identified as an expert expected to testify at trial, the opinions and bases therefor shall be discoverable pursuant to Rule 4:1 of the Rules of Supreme Court of Virginia with the exception of the expert's status as a certifying expert.

Upon written request of any defendant, the plaintiff shall, within 10 business days after receipt of such request, provide the defendant with a certification form which affirms that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested or affirms that the plaintiff did not need to obtain a certifying expert opinion. If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant, the court shall impose sanctions according to the provisions of § 8.01-271.1 and may dismiss the case with prejudice.

§ 38.2-2228.2. Certain medical malpractice claims to be reported to the Commission.

All medical malpractice claims settled or adjudicated to final judgment against a person, corporation, firm, or entity providing health care, and any such claim closed without payment during each calendar year shall be reported annually to the Commission by the insurer of the health care provider. The reports shall not identify the parties. The report shall state the following data, to the extent applicable, in a format prescribed by the Commission:

- 1. The nature of the claim and damages asserted;*
- 2. The principal medical and legal issues;*
- 3. Attorneys' fees and expenses paid in connection with the claim or defense, to the extent these amounts are known;*
- 4. Attorneys' fees and expenses reserved in connection with the claim or defense;*
- 5. The amount of the settlement or judgment awarded to the claimant to the extent this amount is known;*
- 6. The specialty of each health care provider;*
- 7. The date the claim was reported to the company;*
- 8. The date the loss occurred;*
- 9. The date the claim was closed;*
- 10. The date and amount of the initial reserve;*
- 11. The amount of loss paid by the insurer if different from the amount of settlement or judgment awarded to the claimant; and*
- 12. Any other pertinent information the Commission may require as is consistent with the provisions of this section.*

The report shall include a statistical summary of the information collected in addition to an individual report on each claim. The report shall be submitted in an electronic format. Statistical summaries and individual closed claim reports shall be a matter of public record, except that data reported under item 10 shall, at the request of the reporting insurer, not be disclosed in the public record.

The report shall be filed electronically by July 1 of the year following the applicable calendar year; however, a report with data for calendar years 2002, 2003, and 2004 shall be filed by September 1, 2005.

§ 54.1-2912.3. Competency assessments of certain practitioners.

The Board shall require an assessment of the competency of any person licensed under this chapter on whose behalf three medical malpractice claims are paid in a 10-year period. The assessment shall be accomplished in 12 months or less by a program acceptable to the Board. The licensee shall bear all costs of the assessment. The results of the assessment shall be reviewed by the Board and the Board shall determine a plan of corrective action or appropriate resolution pursuant to the assessment. The assessment, related documents and the processes shall be governed by the confidentiality provisions of § 54.1-2400.2 and shall not be admissible into evidence in any medical malpractice action involving the licensee. The Board shall report annually to the General Assembly the number of competency assessments undertaken.