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SENATE BILL NO. 831

Offered January 12, 2005

Prefiled January 10, 2005

A BILL to amend and reenact § 2.2-1839 of the Code of Virginia, as it is effective and as it shall become effective, and §§ 54.1-3900.01 and 54.1-3936 of the Code of Virginia, relating to receivers for attorneys.

Patrons—Mims; Delegates: Black and Marshall, R.G.

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-1839 of the Code of Virginia, as it is effective and as it shall become effective, and §§ 54.1-3900.01 and 54.1-3936 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-1839. (For expiration date /- See Editor's note) Risk management plans administered by the Department of the Treasury's Risk Management Division for political subdivisions, constitutional officers and others.

A. The Division shall establish one or more risk management plans specifying the terms and conditions for coverage, subject to the approval of the Governor, and which plans may be purchased insurance, self-insurance or a combination of self-insurance and purchased insurance to provide protection against liability imposed by law for damages and against incidental medical payments resulting from any claim made against any county, city or town; authority, board, or commission; sanitation, soil and water, planning or other district; public service corporation owned, operated or controlled by a locality or local government authority; constitutional officer; state court-appointed attorney; any attorney for any claim arising out of the provision of pro bono legal services for custody and visitation to an eligible indigent person under a program approved by the Supreme Court of Virginia or the Virginia State Bar; *any receiver for an attorney's practice appointed under § 54.1-3900.01 or 54.1-3936*; affiliate or foundation of a state department, agency or institution; any clinic that is organized in whole or primarily for the delivery of health care services without charge; any individual serving as a guardian or limited guardian as defined in § 37.1-134.6 for any consumer of a community services board or behavioral health authority or any patient or resident of a state facility operated by the Department of Mental Health, Mental Retardation and Substance Abuse Services; or the officers, agents or employees of any of the foregoing for acts or omissions of any nature while in an authorized governmental or proprietary capacity and in the course and scope of employment or authorization.

For the purposes of this section, "delivery of health care services without charge" shall be deemed to include the delivery of dental, medical or other health services when a reasonable minimum fee is charged to cover administrative costs.

B. Participation in the risk management plan shall be voluntary and shall be approved by the participant's respective governing body or by the State Compensation Board in the case of constitutional officers, by the office of the Executive Secretary of the Virginia Supreme Court in the case of state court-appointed attorneys, *including attorneys appointed to serve as receivers under § 54.1-3900.01 or 54.1-3936*, or attorneys under Virginia Supreme Court or Virginia State Bar approved programs, by the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services for any individual serving as a guardian or limited guardian for any patient or resident of a state facility operated by such Department or by the executive director of a community services board or behavioral health authority for any individual serving as a guardian or limited guardian for a consumer of such board or authority, and by the Division. Upon such approval, the Division shall assume sole responsibility for plan management, compliance, or removal. The Virginia Supreme Court shall pay the cost for coverage of eligible persons performing services in approved programs of the Virginia Supreme Court or the Virginia State Bar. The Department of Mental Health, Mental Retardation and Substance Abuse Services shall be responsible for paying the cost of coverage for eligible persons performing services as a guardian or limited guardian for any patient or resident of a state facility operated by the Department. The applicable community services board or behavioral health authority shall be responsible for paying the cost of coverage for eligible persons performing services as a guardian or limited guardian for consumers of such board or authority.

C. The Division shall provide for the legal defense of participating entities and shall reserve the right to settle or defend claims presented under the plan. All prejudgment settlements shall be approved in advance by the Division.

D. The risk management plan established pursuant to this section shall provide for the establishment

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59 of a trust fund for the payment of claims covered under such plan. The funds shall be invested in the
60 manner provided in § 2.2-1806 and interest shall be added to the fund as earned.

61 The trust fund shall also provide for payment of legal defense costs, actuarial costs, administrative
62 costs, contractual costs and all other expenses related to the administration of such plan.

63 E. The Division shall, in its sole discretion, set the premium and administrative cost to be paid to it
64 for providing a risk management plan established pursuant to this section. The premiums and
65 administrative costs set by the Division shall be payable in the amounts at the time and in the manner
66 that the Division in its sole discretion shall require. The premiums and administrative costs need not be
67 uniform among participants, but shall be set so as to best ensure the financial stability of the plan.

68 § 2.2-1839. (For effective date /- See Editor's note) Risk management plans administered by the
69 Department of the Treasury's Risk Management Division for political subdivisions, constitutional
70 officers, etc.

71 A. The Division shall establish one or more risk management plans specifying the terms and
72 conditions for coverage, subject to the approval of the Governor, and which plans may be purchased
73 insurance, self-insurance or a combination of self-insurance and purchased insurance to provide
74 protection against liability imposed by law for damages and against incidental medical payments
75 resulting from any claim made against any county, city or town; authority, board, or commission;
76 sanitation, soil and water, planning or other district; public service corporation owned, operated or
77 controlled by a locality or local government authority; constitutional officer; state court-appointed
78 attorney; any attorney for any claim arising out of the provision of pro bono legal services for custody
79 and visitation to an eligible indigent person under a program approved by the Supreme Court of Virginia
80 or the Virginia State Bar; *any receiver for an attorney's practice appointed under § 54.1-3900.01 or*
81 *54.1-3936*; affiliate or foundation of a state department, agency or institution; any clinic that is
82 organized in whole or primarily for the delivery of health care services without charge; any individual
83 serving as a guardian or limited guardian as defined in § 37.1-134.6 for any consumer of a community
84 services board or behavioral health authority or any patient or resident of a state facility operated by the
85 Department of Mental Health, Mental Retardation and Substance Abuse Services; any participant who
86 satisfies the requirements of § 2.2-1839.1; or the officers, agents or employees of any of the foregoing
87 for acts or omissions of any nature while in an authorized governmental or proprietary capacity and in
88 the course and scope of employment or authorization.

89 For the purposes of this section, "delivery of health care services without charge" shall be deemed to
90 include the delivery of dental, medical or other health services when a reasonable minimum fee is
91 charged to cover administrative costs.

92 B. Participation in the risk management plans shall be voluntary and shall be approved by both the
93 participant's respective governing body or by the State Compensation Board in the case of constitutional
94 officers, by the office of the Executive Secretary of the Virginia Supreme Court in the case of state
95 court-appointed attorneys, *including attorneys appointed to serve as receivers under § 54.1-3900.01 or*
96 *54.1-3936*, or attorneys under Virginia Supreme Court or Virginia State Bar approved programs, by the
97 Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services
98 for any individual serving as a guardian or limited guardian for any patient or resident of a state facility
99 operated by such Department or by the executive director of a community services board or behavioral
100 health authority for any individual serving as a guardian or limited guardian for a consumer of such
101 board or authority, and by the Division. Those participants under § 2.2-1839.1 shall not be required to
102 obtain approval from any entity other than the Division. Upon such approval, the Division shall assume
103 sole responsibility for plan management, compliance, or removal. The Virginia Supreme Court shall pay
104 the cost for coverage of eligible persons performing services in approved programs of the Virginia
105 Supreme Court or the Virginia State Bar. The Department of Mental Health, Mental Retardation and
106 Substance Abuse Services shall be responsible for paying the cost of coverage for eligible persons
107 performing services as a guardian or limited guardian for any patient or resident of a state facility
108 operated by the Department. The applicable community services board or behavioral health authority
109 shall be responsible for paying the cost of coverage for eligible persons performing services as a
110 guardian or limited guardian for consumers of such board or authority.

111 C. The Division shall provide for the legal defense of participants and shall reserve the right to settle
112 or defend claims presented under the plan. All prejudgment settlements shall be approved in advance by
113 the Division.

114 D. The risk management plans established pursuant to this section shall provide for the establishment
115 of trust funds for the payment of claims covered under such plans. The funds shall be invested in the
116 manner provided in § 2.2-1806 and interest shall be added to the fund as earned.

117 Trust funds shall also provide for payment of legal defense costs, actuarial costs, administrative costs,
118 contractual costs and all other expenses related to the administration of such plans.

119 E. The Division shall, in its sole discretion, set the premium, deductible, and administrative cost to
120 be paid to it for providing risk management plans established pursuant to this section. The premiums

and administrative costs set by the Division shall be payable in the amounts at the time and in the manner that the Division in its sole discretion shall require. The premiums, deductibles, and administrative costs need not be uniform among participants, but shall be set so as to best ensure the financial stability of the plans.

§ 54.1-3900.01. Protection of client interests; appointment of receiver for practice of a disabled, impaired, absent, deceased, suspended or disbarred attorney.

A. Upon a showing that an attorney is unable to properly discharge properly responsibilities to his clients by reason of the attorney's disability, impairment, absence or death or that an a suspended or disbarred attorney has been disbarred or suspended and has not complied with Part Six, Section IV, Paragraph 13 (K) (L)M of the Rules of the Virginia Supreme Court, and that no responsible party capable of conducting the affairs of the attorney properly discharging the attorney's responsibilities to clients is known to exist, the circuit court of any city or county wherein such the attorney resides, or in the case of a deceased attorney resided, or maintained an office, upon the ex parte petition of Bar Counsel or the chairman of a district committee of the Virginia State Bar, may issue an order appointing an attorney or one or more attorneys who shall have to serve as receiver with the powers and duties specified in this section. The court, in its discretion, may require a receiver appointed pursuant to this section to post bond, with or without surety. The court may issue such order if the petition, supported by affidavit of the petitioner and such other evidence as the court may require, shows reasonable cause to believe that by reason of the subject attorney's disability, impairment, absence, or death, the subject attorney is unable to properly discharge his responsibilities to clients; or that the subject attorney's law license has been suspended or revoked and the subject attorney has not complied with Part Six, Section IV, Paragraph 13 M of the Rules of Supreme Court; and that no responsible party capable of properly discharging the subject attorney's responsibilities to clients is known to exist. The Virginia State Bar shall use its best efforts to provide a copy of the petition, affidavits, and notice of the time and place of any hearing to the subject attorney and any known duly appointed personal representative of the subject attorney or the subject attorney's estate.

B. Any attorney receiver so appointed shall be bound by the attorney-client privilege and confidentiality under the Virginia Rules of Professional Conduct with respect to the records of individual clients client matters and shall not disclose any privileged or confidential client information contained in the files so inventoried without the client consent of the client to whom the file relates, except or as required to carry out an order of the court by court order, or to respond to a Virginia State Bar disciplinary investigation or an investigation by the Virginia State Bar Clients' Protection Fund involving the subject attorney.

C. Any attorney receiver so appointed shall, unless otherwise ordered by the court, (i) prepare and file with the Virginia State Bar an inventory of all case files under the subject attorney's control of the subject attorney; (ii) notify in writing all of the subject's subject attorney's clients of the appointment and take whatever action seems indicated the receiver deems appropriate to protect the interests of the clients until such time as the clients have had an opportunity to obtain substitute successor counsel, and in the case of a deceased attorney, notify in writing the personal representative, if any, of the deceased attorney's estate and the commissioner of accounts of the circuit court in which the deceased attorney's estate is being administered that the receiver may have a claim against the deceased attorney's estate for fees and costs of the receivership; (iii) identify and take control of all bank accounts, including without limitation trust or otherwise and operating accounts, over which the subject attorney had signatory authority and take control of the trust and operating accounts in connection with his law practice; (iv) prepare and submit an accounting of receipts and disbursements and account balances of all funds under the receiver's control for submission to the court within four months of the appointment and annually thereafter until the receivership is terminated by the court; (v) attempt to collect any accounts receivable related to the subject's subject attorney's law practice; (vi) identify and attempt to recover any assets wrongfully diverted from the subject attorney's law practice, or assets acquired with funds wrongfully diverted from the subject attorney's law practice; (vii) terminate the subject's subject attorney's law practice; (viii) reduce to cash all of the assets of the subject's subject attorney's law practice, and in the case of a deceased attorney notify in writing the personal representative, if any, of the deceased attorney's estate, and the commissioner of accounts of the circuit court in which the deceased attorney's estate is being administered of any proposed liquidations of assets; (ix) determine the nature and amount of all claims of creditors, including clients, of the subject's subject attorney's law practice; and (x) prepare and file with the court a report of such assets and claims proposing a distribution to such creditors and, in the case of a deceased attorney, notify in writing the personal representative, if any, of the deceased attorney's estate and the commissioner of accounts of the circuit court in which the deceased attorney's estate is being administered of the proposed distribution of the receivership funds. Upon the court's approval of the receiver's report of the receiver, at a hearing after such notice as the court may require to creditors, the personal representative of the subject

attorney's estate and the commissioner of accounts of the circuit court in which the deceased attorney's estate is being administered, the receiver shall distribute the assets funds in the receiver's control, including funds produced by the liquidation of the subject's subject attorney's law practice, first to clients whose funds were or ought to have been held in trust by the subject attorney, then to the receiver in respect of the fees and for fees, costs and expenses awarded pursuant to subsection D E below, and thereafter to the general creditors of the subject's subject attorney's law practice, including clients whose funds were not required to have been held in trust by the subject. The appointed attorney shall also prepare a statement of receipts and disbursements and account balances of all funds under his control for submission to the court. The statement shall be submitted within two months of the appointment and annually thereafter until the receivership is terminated by the court. The court, in its discretion, may require any attorney appointed pursuant to this section to post bond, with or without surety attorney, and then to the subject attorney or the subject attorney's personal representative.

D. The court may determine whether any assets under the receiver's control should be returned to the subject attorney or the subject attorney's personal representative during the receivership.

D.E. Any attorney receiver so appointed shall be entitled, upon proper application to the court in which the appointment was made, to recover an award of reasonable fees for services rendered and to a recovery of necessary costs incurred, costs and expenses. If there are not sufficient nontrust funds to pay the award, then the shortfall shall be paid by the Virginia State Bar, to the extent that the Virginia State Bar has funds available and the . The Virginia State Bar shall have a claim against the subject attorney or his the attorney's estate for the amount paid.

F. This statute is declared to be remedial. Its purpose is to protect the interests of clients adversely affected by attorneys who have either engaged in misconduct or because of disability, impairment, absence, or death are unable to provide legal services for their clients. It is to be liberally administered in order to protect those interests and thereby the public's interest in the quality of legal services provided by Virginia attorneys.

§ 54.1-3936. Protection of client interests in proceedings pending disciplinary action.

A. If Bar Counsel or the chairman of a district committee of the Virginia State Bar has reasonable cause to believe that an attorney is engaging in any activity which is unlawful or in violation of violates the Virginia Code of Professional Responsibility Rules of Professional Conduct and which will result in loss of property of one or more of the attorney's clients or any other person, he Bar Counsel may make submit an ex parte application petition to the circuit court of the city or county wherein the attorney who is the subject of the complaint petition resides or is doing business for the issuance of an order authorizing the immediate inspection by and production to representatives of the applicant petitioner of any records, documents, and physical or other evidence belonging to the subject attorney or any professional partnership, professional limited liability company, or professional corporation with which he the subject attorney is associated. The court may issue such order without notice to the attorney if the application, on verified petition, supported by affidavit of the applicant petitioner and such other evidence as the court may require, shows reasonable cause to believe that such action is required to prevent immediate loss of property of one or more of the subject attorney's clients or any other person. The papers filed with the court pursuant to this subsection shall be placed under seal.

B. If Bar Counsel or the chairman of a district committee of the Virginia State Bar has reasonable cause to believe that an attorney is engaging in any activity which is unlawful or in violation of the Virginia Code of Professional Responsibility Rules of Professional Conduct and which will result in loss of property of one or more of the attorney's clients or any other person, he Bar Counsel may file a complaint petition with the circuit court of the county or city wherein the attorney who is the subject of the complaint subject attorney resides or is doing business. The complaint petition may seek the following relief: (i) an injunction prohibiting the withdrawal of any bank deposits or the disposition of any other assets belonging to or subject to the control of the attorney who is the subject of the complaint the subject attorney or any professional partnership, professional limited liability company, or professional corporation with which he the subject attorney is associated; and (ii) the appointment of a receiver for all or part of the funds or property belonging to or of the subject to the control of the attorney who is the subject of the complaint attorney's law practice or of any professional partnership, professional limited liability company, or professional corporation with which he the subject attorney is associated. The attorney who is the subject of the complaint subject attorney shall be given notice of the time and place of the hearing on the complaint petition and an opportunity to offer evidence. The court, in its discretion, may require a receiver appointed pursuant to this section to post bond, with or without surety. The papers filed with the court under this subsection shall be placed under seal until such time as the court grants an injunction or appoints a receiver. The court may issue an injunction, appoint a receiver or provide such other relief as the court may consider proper if, after a hearing, the court finds that such relief is necessary or appropriate to prevent loss of property of one or more of the subject attorney's clients or any other person.

C. In any proceeding under subsection B of this section, any professional partnership, professional

limited liability company, or professional corporation with which the *subject* attorney who is the subject of the complaint is associated and any other person or entity known to Bar Counsel to be indebted to or having in his possession property, real or personal, belonging to or subject to the control of such attorney the subject attorney's law practice and which property is sought to be protected, Bar Counsel reasonably believes may become part of the receivership assets, shall be served with a copy of the complaint petition and notice of the time and place of the hearing and shall be afforded an opportunity to respond and offer evidence.

D. The court, on motion filed by any party, may transfer a proceeding under this section to any court in which a proceeding is pending pursuant to § 54.1-3935 or § 54.1-3937 for the revocation of the license of the attorney who is the subject of an order issued pursuant to this section.

E.D. Any attorney so appointed shall *The receiver shall*, unless otherwise ordered by the court, (i) prepare and file with the Virginia State Bar an inventory of all case files under the subject attorney's control of the subject attorney; (ii) notify in writing all of the subject's subject attorney's clients of the appointment and take whatever action seems indicated the receiver deems appropriate to protect the interests of the clients until such time as the clients have had an opportunity to obtain substitute successor counsel, and in the case of a deceased attorney, notify in writing the personal representative, if any, of the deceased attorney's estate and the commissioner of accounts of the circuit court in which the deceased attorney's estate is being administered that the receiver may have a claim against the deceased attorney's estate for fees and costs of the receivership; (iii) identify and take control of all bank accounts, including without limitation trust or otherwise and operating accounts, over which the subject attorney had signatory authority and take control of the trust and operating accounts in connection with his law practice; (iv) prepare and submit an accounting of receipts and disbursements and account balances of all funds under the receiver's control for submission to the court within four months of the appointment and annually thereafter until the receivership is terminated by the court; (v) attempt to collect any accounts receivable related to the subject's subject attorney's law practice; (vi) identify and attempt to recover any assets wrongfully diverted from the subject attorney's law practice, or assets acquired with funds wrongfully diverted from the subject attorney's law practice; (vii) terminate the subject's subject attorney's law practice; (viii) reduce to cash all of the assets of the subject's subject attorney's law practice; (ix) , and in the case of a deceased attorney notify in writing the personal representative, if any, of the deceased attorney's estate, and the commissioner of accounts of the circuit court in which the deceased attorney's estate is being administered of any proposed liquidations of assets; (x) determine the nature and amount of all claims of creditors, including clients, of the subject's subject attorney's law practice; and (xi) (x) prepare and file with the court a report of such assets and claims proposing a distribution to such creditors and, in the case of a deceased attorney, notify in writing the personal representative, if any, of the deceased attorney's estate and the commissioner of accounts of the circuit court in which the deceased attorney's estate is being administered of the proposed distribution of the receivership funds. Upon the court's approval of the receiver's report of the receiver, at a hearing after such notice as the court may require to creditors, the personal representative of the subject attorney's estate and the commissioner of accounts of the circuit court in which the deceased attorney's estate is being administered, the receiver shall distribute the assets of the subject's subject attorney's law practice first to clients whose funds were or ought to have been held in trust by the subject attorney, then to the receiver in respect of the for fees and , costs, and expenses awarded pursuant to subsection F below E, and thereafter to the general creditors of the subject's subject attorney's law practice, including clients whose funds were not required to have been held in trust by the subject. The appointed attorney shall also prepare a statement of receipts and disbursements and account balances of all funds under his control for submission to the court. The statement shall be submitted within two months of the appointment and annually thereafter until the receivership is terminated by the court. The court, in its discretion, may require any attorney appointed pursuant to this section to post bond, with or without surety attorney, and then to the subject attorney or the subject attorney's personal representative.

F.E. A receiver appointed pursuant to this section shall be entitled, upon proper application to the court in which the appointment was made, to recover an award of reasonable fees for services rendered and to a recovery of necessary , costs incurred, and expenses. If there are not sufficient nontrust funds to pay the award, then the shortfall shall be paid by the Virginia State Bar, to the extent that the Virginia State Bar has funds available and the . The Virginia State Bar shall have a claim against the subject attorney or his the subject attorney's estate for the amount paid.

G.F. The court may determine whether any assets under the receiver's control of the receiver should be turned over returned to the subject attorney or the subject attorney's personal representative during the receivership.

G. This statute is declared to be remedial. Its purpose is to protect the interests of clients adversely affected by attorneys who have engaged in misconduct. It is to be liberally administered in order to

305 *protect those interests and thereby the public's interest in the quality of legal services provided by*
306 *Virginia attorneys.*