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## SENATE BILL NO. 1389

Offered January 14, 2009

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A *BILL to amend and reenact §§ 8.01-581.15 and 54.1-2400 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 21.1 of Title 8.01 an article numbered 3, consisting of sections numbered 8.01-581.20:2 through 8.01-581.20:11, relating to medical malpractice.*

Patron—Stolle

Referred to Committee on Education and Health

**Be it enacted by the General Assembly of Virginia:**

**1. That the §§ 8.01-581.15 and 54.1-2400 of Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 21.1 of Title 8.01 an article numbered 3, consisting of sections numbered 8.01-581.20:2 through 8.01-581.20:11, as follows:**

§ 8.01-581.15. Limitation on recovery in certain medical malpractice actions.

In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after August 1, 1999, which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed \$1.5 million. The maximum recovery limit of \$1.5 million shall increase on July 1, 2000, and each July 1 thereafter by \$50,000 per year; however, the annual increase on July 1, 2007, and the annual increase on July 1, 2008, shall be \$75,000 per year. Each annual increase shall apply to the act or acts of malpractice occurring on or after the effective date of the increase. The July 1, 2008, increase shall be the final annual increase. *On and after July 1, 2009, a health care provider's personal liability is limited to \$2 million for any injury to, or death of, a patient, and any amount due from a judgment or verdict in excess of \$2 million shall be paid from the Patients' Compensation Fund established in Article 3 (§ 8.01-581.20:2 et seq.) of this chapter.*

Where the act or acts of malpractice occurred prior to August 1, 1999, the total amount recoverable for any injury to, or death of, a patient shall not exceed the limitation on recovery set forth in this statute as it was in effect when the act or acts of malpractice occurred.

In interpreting this section, the definitions found in § 8.01-581.1 shall be applicable.

*Article 3.**Patients' Compensation Fund Act.*

§ 8.01-581.20:2. *Short title; definitions.*

A. *The provisions of this article shall be known and may be cited as the Virginia Patients' Compensation Fund Act.*

B. *As used in this article:*

"Board" shall mean the board of directors appointed pursuant to § 8.01-581.20:5 of the Patients' Compensation Program established in § 8.01-581.20:3.

"Fund" shall mean the Patients' Compensation Fund established in § 8.01-581.20:4.

"Program" shall mean the Patients' Compensation Program established in § 8.01-581.20:3.

§ 8.01-581.20:3. *Patients' Compensation Program established.*

*There is hereby established the Patients' Compensation Program.*

§ 8.01-581.20:4. *Patients' Compensation Fund established.*

A. *There is hereby established a special, permanent, nonrevolving fund to be known as the Patients' Compensation Fund to finance the Patients' Compensation Program established in subsection B. The assets of the fund shall be used solely to pay that portion of the amount due from a malpractice judgment, settlement, or verdict in excess of \$2 million and to administer the Program. The Fund is liable only for payment of claims against health care providers who have paid fees prescribed pursuant to § 8.01-581.20:3 and includes reasonable and necessary expenses incurred in payment of claims and the Fund's administrative expense.*

B. *The Board shall prescribe fees, which shall be payable by health care providers, that are sufficient to cover all expenses for the administration and operation of the Program. Upon prescription of the fees, the Board shall notify the health regulatory boards of the amount of such fees, which shall be levied and collected by the health regulatory boards and remitted to the Board pursuant to subdivision 16 of § 54.1-2400.*

C. *The Commonwealth shall not be responsible for any costs, expenses, liabilities, judgments, or other obligations of the Fund.*

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59 *D. An independent certified public accountant selected by the Board shall annually audit the*  
60 *accounts of the Fund, and the cost of such audit services shall be borne by the Program and be paid*  
61 *from moneys designated for such purposes in the Fund. The audit shall be performed at least each fiscal*  
62 *year, in accordance with generally accepted auditing standards and, accordingly, include such tests of*  
63 *the accounting records and such auditing procedures as are considered necessary under the*  
64 *circumstances. The Board shall furnish copies of the audit to the same persons who are entitled to*  
65 *receive copies of the Board's report on investment of the Fund's assets. All audits of the Fund are open*  
66 *for reasonable inspection to the general public.*

67 *§ 8.01-581.20:5. Board of directors.*

68 *A. The board of directors shall manage and operate the Patients' Compensation Fund, and any*  
69 *income from it, according to its plan of operation developed pursuant to § 8.01-581.20:6. The Board*  
70 *shall be composed of three physicians to be appointed by the Governor after consultation with the*  
71 *Medical Society of Virginia; two dentists to be appointed by the Governor after consultation with the*  
72 *Virginia Dental Association; two hospital representatives to be appointed by the Governor after*  
73 *consultation with the Virginia Hospital and Healthcare Association; two insurance representatives to be*  
74 *appointed by the Governor after consultation with the insurance industry; two attorneys to be appointed*  
75 *by the Governor after consultation with the Virginia State Bar; and two representatives of the general*  
76 *public appointed by the Governor who are unaffiliated with insurance or health care industries or the*  
77 *medical or legal professions.*

78 *The members shall serve for terms of six years. The Board shall elect a chairman and other*  
79 *necessary officers for two-year terms.*

80 *The Board shall meet at the call of the chairman or a majority of the members, but in any event, it*  
81 *shall meet at least once a year.*

82 *A majority of the Board members shall constitute a quorum for the transaction of any business of the*  
83 *Board. Actions of the Board shall receive the affirmative vote of a majority of the quorum to be*  
84 *effective.*

85 *B. The Board shall be a public body for purposes of the Virginia Freedom of Information Act*  
86 *(§ 2.2-3700 et seq.).*

87 *§ 8.01-581.20:6. Plan of operation.*

88 *The Board shall develop a plan of operation for the efficient administration of the Fund consistent*  
89 *with the provisions of this article. The plan of operation and any amendments to the plan are subject to*  
90 *the approval of the Commissioner of Insurance or his designee. If the Board fails to develop a plan of*  
91 *operation within the time frame established by the Governor or his designee, the Commissioner of*  
92 *Insurance or his designee shall develop the plan of operation for the Fund.*

93 *§ 8.01-581.20:7. Action for damages.*

94 *A. In an action for malpractice against a health care provider, the health care provider shall, within*  
95 *five days of receipt of the complaint, excluding Saturdays, Sundays, and legal holidays, give notice to*  
96 *the Board of the action. If after reviewing the facts upon which the action is based, it appears that the*  
97 *claim will exceed \$2 million, the Board may appear and actively defend the Fund pursuant to*  
98 *§ 8.01-581.20:8.*

99 *B. A person who has recovered a final judgment or verdict, or a settlement approved by the Board,*  
100 *against a health care provider may file a claim with the Board to recover that portion of the judgment,*  
101 *settlement, or verdict in excess of \$2 million. If the Fund incurs liability exceeding \$2 million to any*  
102 *person, the Fund shall not pay more than \$2 million per year until the claim has been paid in full.*

103 *Claims filed against the Fund shall be paid in the order received within 90 days after filing unless*  
104 *the judgment underlying a claim is appealed. If the Fund does not have enough money to pay all of the*  
105 *claims, claims received after the moneys in the Fund are exhausted are immediately payable the*  
106 *following year in the order in which they were received.*

107 *Moneys may be withdrawn from the Fund only upon the signature of the chairman of the Board or*  
108 *his designee.*

109 *§ 8.01-581.20:8. Legal representation.*

110 *The Office of the Attorney General shall provide requested legal services to the Program as provided*  
111 *in this section. The Program shall compensate the Office of the Attorney General for its provision of*  
112 *such legal services based on a reasonable hourly rate as shall be agreed upon periodically by the board*  
113 *of directors and the Attorney General. If the Office of the Attorney General is unable to provide such*  
114 *legal services as the result of a conflict of interest or other disqualifying circumstances, the Board may*  
115 *employ such other counsel as it deems necessary.*

116 *§ 8.01-581.20:09. Records.*

117 *All books and records of the Program are open for reasonable inspection to the general public.*  
118 *However, the following records of the Program shall be confidential: (i) records subject to the*  
119 *attorney-client privilege; (ii) records concerning deliberations of the Board in connection with specific*  
120 *claims; and (iii) all records required to be kept confidential by federal law. Except as herein authorized,*

an officer, agent or employee of the Program, and any person who has held any such position, shall not disclose, directly or indirectly, any such confidential record or information.

§ 8.01-581.20:10. Rules and regulations.

The Board may adopt any rules and regulations necessary to carry out the provisions of this article. The procedure for adoption of rules and regulations by the Board shall be consistent with the provisions of Article 2 (§ 2.2-4006 et seq.) of the Administrative Process Act.

§ 8.01-581.20:11. Judicial review.

Any person aggrieved by a final order or decision under this article shall be entitled to judicial review thereof in accordance with the Administrative Process Act (§ 2.2-4000 et seq.).

§ 54.1-2400. General powers and duties of health regulatory boards.

The general powers and duties of health regulatory boards shall be:

1. To establish the qualifications for registration, certification, licensure or the issuance of a multistate licensure privilege in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.

2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.

3. To register, certify, license or issue a multistate licensure privilege to qualified applicants as practitioners of the particular profession or professions regulated by such board.

4. To establish schedules for renewals of registration, certification, licensure, and the issuance of a multistate licensure privilege.

5. To levy and collect fees for application processing, examination, registration, certification or licensure or the issuance of a multistate licensure privilege and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.

6. To promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ 54.1-100 et seq.) and Chapter 25 (§ 54.1-2500 et seq.) of this title.

7. To revoke, suspend, restrict, or refuse to issue or renew a registration, certificate, license or multistate licensure privilege which such board has authority to issue for causes enumerated in applicable law and regulations.

8. To appoint designees from their membership or immediate staff to coordinate with the Intervention Program Committee and to implement, as is necessary, the provisions of Chapter 25.1 (§ 54.1-2515 et seq.) of this title. Each health regulatory board shall appoint one such designee.

9. To take appropriate disciplinary action for violations of applicable law and regulations.

10. To appoint a special conference committee, composed of not less than two members of a health regulatory board or, when required for special conference committees of the Board of Medicine, not less than two members of the Board and one member of the relevant advisory board, to act in accordance with § 2.2-4019 upon receipt of information that a practitioner of the appropriate board may be subject to disciplinary action. The special conference committee may (i) exonerate the practitioner; (ii) reinstate the practitioner; (iii) place the practitioner on probation with such terms as it may deem appropriate; (iv) reprimand the practitioner; (v) modify a previous order; and (vi) impose a monetary penalty pursuant to § 54.1-2401. The order of the special conference committee shall become final 30 days after service of the order unless a written request to the board for a hearing is received within such time. If service of the decision to a party is accomplished by mail, three days shall be added to the 30-day period. Upon receiving a timely written request for a hearing, the board or a panel of the board shall then proceed with a hearing as provided in § 2.2-4020, and the action of the committee shall be vacated. This subdivision shall not be construed to limit the authority of a board to delegate to an appropriately qualified agency subordinate, as defined in § 2.2-4001, the authority to conduct informal fact-finding proceedings in accordance with § 2.2-4019, upon receipt of information that a practitioner may be subject to a disciplinary action. Criteria for the appointment of an agency subordinate shall be set forth in regulations adopted by the board.

11. To convene, at their discretion, a panel consisting of at least five board members or, if a quorum of the board is less than five members, consisting of a quorum of the members to conduct formal proceedings pursuant to § 2.2-4020, decide the case, and issue a final agency case decision. Any decision rendered by majority vote of such panel shall have the same effect as if made by the full board and shall be subject to court review in accordance with the Administrative Process Act. No member who participates in an informal proceeding conducted in accordance with § 2.2-4019 shall serve on a panel conducting formal proceedings pursuant to § 2.2-4020 to consider the same matter.

12. To issue inactive licenses or certificates and promulgate regulations to carry out such purpose.

182 Such regulations shall include, but not be limited to, the qualifications, renewal fees, and conditions for  
183 reactivation of licenses or certificates.

184 13. To meet by telephone conference call to consider settlement proposals in matters pending before  
185 special conference committees convened pursuant to this section, or matters referred for formal  
186 proceedings pursuant to § 2.2-4020 to a health regulatory board or a panel of the board or to consider  
187 modifications of previously issued board orders when such considerations have been requested by either  
188 of the parties.

189 14. To request and accept from a certified, registered or licensed practitioner or person holding a  
190 multistate licensure privilege to practice nursing, in lieu of disciplinary action, a confidential consent  
191 agreement. A confidential consent agreement shall be subject to the confidentiality provisions of  
192 § 54.1-2400.2 and shall not be disclosed by a practitioner. A confidential consent agreement shall  
193 include findings of fact and may include an admission or a finding of a violation. A confidential consent  
194 agreement shall not be considered either a notice or order of any health regulatory board, but it may be  
195 considered by a board in future disciplinary proceedings. A confidential consent agreement shall be  
196 entered into only in cases involving minor misconduct where there is little or no injury to a patient or  
197 the public and little likelihood of repetition by the practitioner. A board shall not enter into a  
198 confidential consent agreement if there is probable cause to believe the practitioner has (i) demonstrated  
199 gross negligence or intentional misconduct in the care of patients or (ii) conducted his practice in such a  
200 manner as to be a danger to the health and welfare of his patients or the public. A certified, registered  
201 or licensed practitioner who has entered into two confidential consent agreements involving a standard  
202 of care violation, within the 10-year period immediately preceding a board's receipt of the most recent  
203 report or complaint being considered, shall receive public discipline for any subsequent violation within  
204 the 10-year period unless the board finds there are sufficient facts and circumstances to rebut the  
205 presumption that the disciplinary action be made public.

206 15. When a board has probable cause to believe a practitioner is unable to practice with reasonable  
207 skill and safety to patients because of excessive use of alcohol or drugs or physical or mental illness, the  
208 board, after preliminary investigation by an informal fact-finding proceeding, may direct that the  
209 practitioner submit to a mental or physical examination. Failure to submit to the examination shall  
210 constitute grounds for disciplinary action. Any practitioner affected by this subsection shall be afforded  
211 reasonable opportunity to demonstrate that he is competent to practice with reasonable skill and safety to  
212 patients. For the purposes of this subdivision, "practitioner" shall include any person holding a multistate  
213 licensure privilege to practice nursing.

214 16. *To levy upon and collect from health care providers, described in clause (i) of the definition of*  
215 *"health care provider" in § 8.01-581.1, fees that are sufficient to cover all expenses for the*  
216 *administration and operation of the Patients' Compensation Program established under Article 3*  
217 *(§ 8.01-581.20:2 et seq.) of Chapter 21.1 of Title 8.01. The health regulatory boards shall remit all*  
218 *moneys collected pursuant to this subdivision to the board of directors of the Patients' Compensation*  
219 *Program.*