REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

Virginia's Medical Malpractice Laws

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

House Document No. 12

COMMONWEALTH OF VIRGINIA
RICHMOND
1986

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Report of the Joint Subcommittee
Studying Virginia's Medical Malpractice Laws
To
The Governor and the General Assembly of Virginia
Richmond, Virginia
January, 1986

To: Honorable Gerald L. Baliles, Governor of Virginia,
and
The General Assembly of Virginia

INTRODUCTION AND BACKGROUND

House Joint Resolution No. 20 (Appendix A) was passed by the 1984 Session of the General Assembly. The Resolution called for creation of a joint subcommittee to study Virginia's medical malpractice laws. The joint subcommittee was requested to evaluate the effect and need for continuation of various changes made in 1976 in response to the "medical malpractice crisis." House Joint Resolution No. 20 specifically requested the joint subcommittee to evaluate the need for (i) continuation of the malpractice review panels, (ii) continuation of the limitation on the amount of recovery ("the cap") in malpractice actions, and (iii) reinstitution of a malpractice closed-claim reporting procedure. The joint subcommittee's study was not limited to these issues, however. Issues to be studied in addition to those specifically mentioned in House Joint Resolution No. 20 were agreed to at the initial meeting in 1984. These issues included evaluation of the current malpractice insurance rate-making structure, the procedures applicable in panel proceedings and the sometimes unique procedural and substantive provisions of the law applicable to medical malpractice trials.

The membership of the joint subcommittee was appointed in accordance with House Joint Resolution No. 20. The Speaker of the House of Delegates appointed Delegates Clifton A. Woodrum and John G. Dicks, III, from the House Committee for Courts of Justice; John Ward Bane, Esquire, of Hampton, as a citizen member representing the Virginia State Bar; and George M. Nipe, M.D., of Harrisonburg, as a citizen member representing the Virginia Medical Society. The Senate Committee on Privileges and Elections appointed Senator Wiley F. Mitchell, Jr., from the Senate Committee for Courts of Justice; R. Carter Scott, III, Esquire, of Richmond, as a citizen representative of the Virginia Bar Association; and John N. Simpson of Richmond Memorial Hospital as a citizen representative of the Virginia Hospital Association.

Delegate Woodrum was elected chairman of the joint subcommittee and Senator Mitchell was elected vice-chairman. The joint subcommittee submitted an interim report to the 1985 General Assembly (House Document No. 21, 1985). The report summarized the work of the joint subcommittee during 1984.

At the request of the joint subcommittee, Delegate Woodrum introduced House Joint Resolution No. 209 (Appendix B) during the 1985 legislative session. The resolution requested a continuation of the study for one year. Although substantial progress had been made, the joint subcommittee believed another year was necessary to complete a thorough review of the complex issues under consideration. The resolution was passed by the General Assembly. The membership of the joint subcommittee remained the same.

Additionally, Delegate Dicks introduced the joint subcommittee recommendation to reinstate the mandatory, closed-claim reporting requirement for medical malpractice claims (House Bill No. 1434, 1985). The bill was also passed by the General Assembly. The remaining 1985 legislative recommendations of the joint subcommittee dealing with the need for impartiality and a clarification of the role of members of the malpractice review panels (House Bill No. 1167, 1985) and a clarification of the application of the cap on recovery to certain hospitals (House Bill No. 1137, 1985) were held by the patron, Delegate Woodrum, for consideration by the General Assembly in 1986 along with the final recommendations of the joint subcommittee.

The joint subcommittee held four public hearings and two work sessions in 1985, in addition to the seven meetings held in 1984. All meetings were well attended by interested members of the public, including representatives of the insurance industry, the Medical Society of Virginia,

the Virginia Trial Lawyers Association, and the Virginia Association of Defense Attorneys.

The joint subcommittee expresses particular gratitude to Thomas W. Williamson, Jr., Esquire, of the Virginia Trial Lawyers Association and Philip Stone, Esquire, of the Virginia Association of Defense Attorneys for their hard work and assistance in helping the joint subcommittee finalize their recommendations.

EXECUTIVE SUMMARY

Following a thorough review of Virginia's medical malpractice laws, the joint subcommittee makes the following recommendations:

1. That the provisions of law applicable to the limitation on recovery against charitable hospitals under § 8.01-38 be clarified to avoid a possible construction of § 8.01-581.15 to apply the higher limitation, generally applicable to health care providers, to charitable hospitals (Appendix C);

2. That an exception to the general provisions governing accrual of a cause of action for personal injuries be provided for medical malpractice actions involving foreign objects left in the body or fraudulent concealment of, or intentional misrepresentation with respect to, the injury, subject to a maximum extension of the applicable statute of limitations of ten years from the date of the injury in order to alleviate the harshness of the general rule in these cases involving injuries which are not readily apparent (Appendix C); and

3. That, in order to improve the credibility, guarantee the impartiality and increase the efficiency of the medical malpractice review panels, the provisions governing the review panels be modified in the following ways: that the panel members be required to take a specific oath of impartiality, that the panel members be specifically authorized and instructed to apply their particular expertise to the facts, that the rules for assembly of and access to the record of the panel proceedings be codified, that the size of the panel be reduced to five, that evidentiary submissions be limited to relevant portions of documents, that the procedure used in selecting the panel members be clarified, that the chairman be authorized to set dates for the completion of discovery and a hearing, if requested, that the procedures to be followed when an amendment to the notice of claim is requested be codified, and that it be made clear that a constitutional objection to the review panel proceeding is not waived by participation in such a proceeding (Appendix D).

CONSIDERATIONS AND FINDINGS

The joint subcommittee requested a continuation of its 1984 study in order to complete its evaluation and finalize recommendations with respect to (i) use of the contingent fee in malpractice actions, (ii) abrogation of the collateral source rule, (iii) need for retention of or an increase in "the cap," (iv) weight to be given a panel decision in subsequent litigation, (v) need for clarification of the evidentiary standard in proceedings before the panel, (vi) desirability of modifying the statute of limitations to provide for a date of discovery accrual time in cases involving injuries which are not readily apparent and a shortened tolling period for minors, (vii) need to clarify the law pertaining to the qualification of expert witnesses, and (viii) need to clarify a standard of care.

These issues affecting trial procedures were broken down into categories for purposes of discussion. The categories were attorneys fees, damages, standard of care and qualification of expert witnesses and the statute of limitations. The review panel issues were discussed generally. After review of substantial statistical data on the panels in 1984, the joint subcommittee concluded that they serve an important function in a significant number of malpractice cases. (See House Document No. 21, 1985, Appendix D). However, in 1985, particular attention was given to methods of improving the credibility and efficiency of the process. A summary of the joint subcommittee's deliberations and recommendations follows.

TRIAL PROCEDURES

ATTORNEYS' FEES

The contingent fee is sometimes referred to as the "poor man's key to the court house door." The joint subcommittee recognizes that the contingent fee serves a legitimate purpose. However, a number of health care providers expressed concern that the contingent fee gives the attorney too much of a financial interest in the action, may result in payment of a fee which is disproportionate to the effort expended, and encourages the filing of frivolous claims which result in serious non-economic injury to the defendant. A majority of the subcommittee agreed to review alternative proposals for regulation of attorneys' fees in medical malpractice actions. Two proposals were drafted for the subcommittee (Appendix E).

The first draft would have required judicial approval of the amount of compensation paid to an attorney as the result of his representation of an injured party in any medical malpractice review panel proceeding or in any action (Appendix E1). A similar provision is currently in effect in ten states. This draft was modeled on current law requiring such approval in any case involving an infant plaintiff. The second draft was modeled on recently adopted New York law and would have set statutory maximums for fees at 30% of the first $250,000 recovered, 25% of the next $250,000, 20% of the next $500,000, 15% of the next $250,000 and 10% of any amount paid over $1,250,000 (Appendix E2).

While discussing these proposals, it became apparent that the joint subcommittee was reluctant to adopt either medical malpractice-specific proposal in the absence of a demonstrated need for such regulation. The joint subcommittee received no evidence that the goal of reducing the number of frivolous claims would be affected by either judicial approval or statutory regulation of attorneys' fees. The joint subcommittee notes that judicial approval of attorneys' fees is currently required under Virginia law in those cases most vulnerable to abuse, i.e., infant settlements and wrongful death cases. To the extent that fee regulation is necessary, it is best accomplished within the attorney-client relationship.

DAMAGES

Again in 1985 the joint subcommittee considered the desirability of abrogating the collateral source rule to allow evidence of payments made to the claimant from third-party sources to be admitted and considered in determining the amount of any award (Appendix F). The theory behind the rule barring such evidence is that the negligent defendant ought not be the beneficiary of the injured party's contract with a third party. A number of health care providers and attorneys testified that the collateral source rule results in a windfall to the claimant. They argued that the defendant is paying for a part of the claimant's injury which was not actually incurred.

The joint subcommittee members recognized the relevance of this argument. However, a majority was not convinced that a medical malpractice-specific abrogation of the rule was justified at this time. The joint subcommittee believes that the collateral source rule mitigates the potential harshness of the limitation on recovery and, therefore, should be retained.

The joint subcommittee remains unconvinced that abolition of the limitation on recovery is desirable at this time. The testimony heard last year strongly advocated retention of the limitation as a stabilizing factor for the insurance climate in Virginia. Additionally, the joint subcommittee notes that the use of structured settlements tends to alleviate the harshness of the limitation.

A proposal mandating the use of structured settlements in medical malpractice actions for future damages in excess of $250,000 was considered (Appendix G). The proposal was modeled on the recently enacted New York statute. After discussion of this proposal, the joint subcommittee again failed to see a demonstrated need for a malpractice-specific statute. It was agreed that acceptance of a structured settlement was a decision best left to an injured claimant.

The joint subcommittee also discussed whether application of the limitation on total recovery needed to be clarified. For example, the question was raised whether the statutory limitation was intended to apply to punitive damages. Noting that this issue is the subject of pending litigation, a majority of the joint subcommittee agreed that legislative clarification would be

inappropriate at this time.

The joint subcommittee believes that clarification of the application of the $500,000 limitation on recovery against certain hospitals is desirable for the reasons discussed last year. (See House Document No. 21, supra, pp. 12 and 13.) The necessary legislation is included in this report as Appendix C.

STANDARD OF CARE/QUALIFICATION OF EXPERT WITNESSES

The issues involved in determining the appropriate standard of care to be applied in medical malpractice cases were perhaps the most complex and perplexing issues addressed. A substantial portion of the joint subcommittee's time was focused on these issues. (See also, House Document No. 21, supra, p. 11.) Phil Stone and Tom Williamson provided the joint subcommittee with invaluable assistance, applying their expertise as defense and plaintiffs' lawyers, respectively, to these issues. Unfortunately, they were not able to reach agreement on appropriate statutory language.

The joint subcommittee heard testimony throughout the course of its study to the effect that the quality of medical care in Virginia is very high. Mr. Williamson and others suggested that medical care given should be judged upon what a similar health care provider would do under the same circumstances. It was suggested that use of a "circumstances" test would abrogate a statewide or local standard of care but would be broad enough to allow evaluation of the defendant's conduct based upon the availability of and access to various data and medical services and facilities, as well as the reasonableness of variances in local practices. It was further suggested that the current standard of care artificially restricts the pool of expert witnesses available.

Mr. Stone and others countered that adoption of a pure circumstances test would constitute adoption of a national standard of care. Mr. Stone argued that the conduct of health care providers in Virginia should be judged upon the practice of their peers in Virginia. He believes some nexus with Virginia medical practice is essential to a reasonable standard of care. Mr. Stone and others also suggested that adoption of a circumstances test would facilitate the use of the "hired gun" expert witness. He does not believe this is a desirable result.

A number of proposals modifying the standard of care were considered by the joint subcommittee (Appendix H). The drafts identified as Appendix H1, H2, and H6, generated the most interest and discussion. Some members of the joint subcommittee believed that the standard of care should be modified to more accurately reflect current medical practices. They noted that medical education, professional literature and continuing education programs are not geared to the practice in any particular state. However, opponents of a national standard of care were concerned that a change would tip the balance on the burden of proof by allowing the plaintiff to use expert witnesses without their demonstrating sufficient knowledge of and familiarity with the practice of the health care provider involved in the claim.

Unfortunately, the joint subcommittee was not able to reach a consensus on the appropriate language to address the concerns raised. A majority of the joint subcommittee agrees that the concept of a Virginia standard of care is a fiction. Medical practices in urban areas, with ready access to the more technologically advanced facilities of teaching hospitals, are significantly different from the practices in more rural or isolated areas of the state. The common practice in some areas in the southern or western parts of the state may be more similar to the practice in North Carolina than the practice in Richmond. However, the joint subcommittee is concerned that any change in the standard of care would be confusing and would not adequately address the necessary variances in local practices. The joint subcommittee recommends that no changes be made in the standard of care provisions at this time.

STATUTE OF LIMITATIONS

The joint subcommittee also spent a considerable amount of time in continued discussion of whether a date of discovery limitation in certain cases involving injuries which are not readily apparent was desirable and the impact, if any, on the insurance climate. The joint subcommittee also considered whether a special limitations period for minors was necessary due to the particular impact such claims had on the insurance industry. (See House Document No. 21,

supra, pp. 9-11.) In order to minimize the impact of these modified limitations provisions, the joint subcommittee focused on discovery proposals which included a maximum number of years from the date of the incident. Actuarial data on the effect of these changes was received from Tillinghast, Nelson and Warren, Inc., of Atlanta (see Appendix I). The Tillinghast analysis concluded that modifications in the statute of limitations would only slightly effect the claims costs.

The joint subcommittee therefore recommends that the statute of limitations be extended to allow the claimant a reasonable time within which to discover the injury, but not more than ten years from the date of the injury, in cases involving foreign objects or fraudulent concealment of, or intentional misrepresentation with respect to, the injury (see Appendix C). These are the cases in which strict application of the two-year limitations period is most prejudicial to the claimant.

In discussing the tolling provisions applicable to malpractice actions by minors, the joint subcommittee noted the evidentiary problems and insurance reserving problems created by the passage of time. (See Appendix J for draft bill considered.) The joint subcommittee received testimony from Edward Peck, Ph.D., on the effect of a reduction in the statute of limitations for minors. Dr. Peck is one of only two neuropsychologists in Virginia. He testified that primary brain development occurs after birth. He noted that because many functions of the brain do not sufficiently mature until puberty or even later, cognitive disorders related to birth injuries would not be apparent. He suggested that reducing the statute of limitations for minors would prejudice those minors who suffered such injuries.

The joint subcommittee also grappled with the problem of the effect of cutting off a minor's cause of action for his injuries because his legal guardian failed to discover the injury within the shortened tolling period. Minors and other persons under a disability are uniquely dependent upon another to diligently discover the injury and prosecute the claim. The general rule applicable in negligence cases is that the negligence of a parent will not be inputed to the minor to bar the minor's claim. Shelton v. Mullins, 207 Va. 17(1966.) The joint subcommittee concluded that it would be unfair, and possibly a denial of equal protection, to limit the time for bringing an action to a period within which the person was legally incapable of bringing an action on his own behalf.

The joint subcommittee briefly discussed the possibility of eliminating any tolling provision for minors where the injury is readily apparent at the time of its occurrence. However, the same concerns discussed above were raised with regard to a situation where the parent negligently or intentionally failed to bring an action on behalf of the minor within the two-year limitations period. The joint subcommittee recognizes the problems claims for injuries to minors pose for health care providers and their insurers. Nonetheless, they believe that the "cure" may be worse than the disease in these cases.

The joint subcommittee recommends that no action be taken to modify the tolling provisions applicable to minors in actions for medical malpractice.

REVIEW PANELS

The joint subcommittee continued its evaluation of the medical malpractice review panels. The joint subcommittee concluded that the panels effectively evaluate complex claims in a relatively short period of time at a reduced cost to the parties and are generally viewed favorably by claimants and health care providers. This year the joint subcommittee focused on means to improve the credibility and efficiency of the review panel process. The joint subcommittee heard testimony from a number of lawyers who practice before review panels and a number of health care providers. Many of the problems identified with the review panel process are procedural in nature.

The joint subcommittee recognizes that the perceptions of health care providers and potential claimants as to the panel process may be improved. Testimony was heard from a number of people who would like to have the opinion of the panel carry greater weight in a subsequent trial. However, the joint subcommittee noted that the panel process is informal. The general rules of evidence do not apply. This informality is desirable at the panel stage of the

proceedings to facilitate an initial screening of the complex issues. In light of this informality and the screening function which the panel serves, the joint subcommittee believes it would be inappropriate to give greater evidentiary weight to the panel opinion.

The joint subcommittee believes the credibility of the panel process will be improved by statutorily stressing the need for impartial and professional members of the review panels. Therefore, it is recommended that (i) the statutory definition of impartiality as it applies to panel members be expanded to exclude from participation any health care provider who has been consulted by a party, (ii) the panel members be reminded of their obligation to be impartial by requiring the notice of appointment to the panel to include the applicable statutory definition of impartiality and the oath to be taken by the panel members and (iii) the panel members be reminded and encouraged to apply their individual expertise to the facts presented (see Appendix D). These recommendations are the same as those made last year but held over for consideration with the complete package of recommendations.

The joint subcommittee did not find a lack of impartiality to be a significant problem. Nonetheless, the members believe these statutory changes will preserve and strengthen the view that the panel members are impartial investigators, evaluators and experts. The joint subcommittee also recommends that every effort continue to be made to appoint health care members of the panel from the same field of practice or speciality as the defendant. These recommended changes will instill necessary confidence in the panel process.

A number of persons suggested to the joint subcommittee that the efficiency of the panel process could be improved. In this regard the joint subcommittee discussed the size and composition of the panel and problems involved in scheduling the panel proceedings.

In order to facilitate review by a panel, the joint subcommittee recommends that the size of the panel be decreased from seven to five. The joint subcommittee heard testimony that because of conflicts in the schedules of the professional panel members, it is often difficult to schedule hearings promptly. Additionally it was noted that if the panel is not named until discovery is completed, there will often be a long delay before these conflicts in schedules become apparent. The joint subcommittee recommends a number of statutory changes to improve the efficiency of the panel process (see Appendix D).

The joint subcommittee recommends that at the time the Chief Justice receives a request for a panel and designates the chairman, he also advise the chairman of the names of the other four panel members. The chairman may then contact the panel members and work out a schedule. Conflicts, if any, can be resolved promptly. The fact that a panel member has an interest in the proceeding or knowledge of anything that would prevent him from being impartial might also be discovered.

Additionally, the joint subcommittee recommends that the chairman be authorized to set dates for the completion of discovery and for a hearing if one is requested. The date for completion of discovery is to be no more than ninety days from the date the chairman is designated. All persons who testified indicated that this would give the parties ample time to complete discovery. The joint subcommittee suggests that the chairman schedule the hearing, if any, as soon as practical after the completion of discovery. However, the proposed legislation prohibits scheduling of the hearing sooner than ten days after the date set for completion of discovery. This will allow the parties sufficient time to prepare without unduly delaying the process. Once discovery is complete, the Chief Justice notifies the parties of the names of the four professional panel members. Should the parties wish to proceed with the panel process after completion of discovery, they may begin submitting documentary evidence to the panel.

In order to facilitate review of the claim by the panel, the joint subcommittee also recommends that only the relevant portions of the documentary evidence be submitted. Amplification of these documents may be requested by the panel if necessary to its review. This provision will eliminate the burden sometimes placed on panel members by requiring review of voluminous documents submitted.

The joint subcommittee heard testimony that the efficiency of the panel process could be improved if the panel were authorized to relate its decision verbally in the presence of the parties upon completion of its deliberations. It was noted that § 8.01-581.7(c) currently requires

mailing of the panel opinion. The joint subcommittee believes this is an unnecessary requirement and recommends that the panel be authorized to verbally advise the parties of its opinion, if known, at the time of the hearing. Subsequent mailing of the formal written opinion is required.

In addition to discussing the above methods of improving the credibilty and efficiency of the panel, the joint subcommittee focused on some of the procedural problems encountered by those involved in the panel process. Testimony was heard that there were some discrepancies in the way in which amendments to the notice of claim were handled. Clarification of the process used for compiling and storing, as well as providing access to, the record of the panel proceedings was also requested. Finally, some of the attorneys who testified suggested that the need to raise an objection to the constitutionality of the panel process be abrogated by statute.

The joint subcommittee recommends that the procedures governing amendments to the notice of claim be clarified and codified. The new procedures are designed to avoid any perceived need for multiple review panel or trial court proceedings involving the same claim. The chairman or trial judge is authorized to stay any on-going proceedings or procedural limitations periods in order to facilitate consolidation of related claims.

Additionally, the joint subcommittee recommends that the procedures for compiling and storing and providing access to the record of review panel proceedings be codified and clarified. The joint subcommittee also agrees that the law should be amended to eliminate the need perceived by some attorneys to raise a constitutional objection in order to preserve it.

The joint subcommittee also discussed a possible modification of the procedure governing rescission of a request for a review panel (Appendix K). It was suggested that rescission should be allowed only where both parties agree. The party who originally failed to request a panel, in reliance on the other party's request or by choice, would be given the opportunity to veto a request for rescission. The joint subcommittee considered and discussed this proposal but upon deliberation rejected it. They reasoned that the current provisions are adequate. Current practice allows rescission on request only if it appears that the other party would not have requested a panel.

ALTERNATIVE PROCEDURE IN CERTAIN MALPRACTICE CLAIMS

In addition to the matters discussed above, the joint subcommittee reviewed a far-reaching proposal to modify the law governing medical malpractice claims (See Appendix L). The proposal would allow the claimant to elect to proceed under an alternate procedure. If the claimant made the election, the limitation on recovery would be waived. The specific proposal reviewed would have reduced the limitation on recovery in other cases to $500,000. The joint subcommittee did not appear to favor this reduction. In return for the waiver of the limitation, the claimant would agree to (i) accept payment of any award for future damages in periodic installments, (ii) a $100,000 limitation on the amount of non-economic damages, (iii) a reduction of any award by an amount equal to amounts received from collateral sources, subject to any necessary reduction in the amount of collateral source payments to avoid impairment of the claimant's rights and (iv) a scheduled limitation on the amount of attorneys' fees.

Unfortunately, this proposal was raised at one of the last meetings of the joint subcommittee. While some interest was noted, it was agreed that additional study of its implications was necessary. Upon further consideration, this proposal or a similar proposal may be viewed as striking a proper balance between providing an efficient and fair system of adjudicating medical malpractice claims and providing a favorable climate in Virginia necessary to ensure the continued availability of affordable insurance for health care providers.

CONCLUSION

The joint subcommittee has completed a thorough review of Virginia's medical malpractice laws and the effect of these laws on the costs and availability of medical malpractice insurance, on health care providers and persons injured by malpractice and on the public in general. At this time, the joint subcommittee believes that Virginia medical malpractice law strikes a proper balance between the often competing interests. It is apparent that the problems experienced by

health care providers and medical malpractice insurers are not unique. We may be on the verge of a crisis affecting all lines of property and casualty insurance.

The joint subcommittee believes that the closed claim reporting mechanism re-instituted in 1985 on the committee's recommendation will facilitate future evaluations of this balance. The recommendations proposed this year will ensure that Virginia remains a favorable environment for insurers to do business and will increase the fairness, credibility and efficiency of the reparations system.

Respectfully submitted,

Clifton A. Woodrum, Chairman
Wiley F. Mitchell, Jr., Vice-Chairman
John G. Dicks, III
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R. Carter Scott, III
John N. Simpson

INDEX TO APPENDICES

APPENDIX A

LD4072598

HOUSE JOINT RESOLUTION NO. 20

Offered January 16, 1984

Requesting the House Committee for Courts of Justice and the Senate Committee on Courts of Justice to establish a joint subcommittee to study the medical malpractice laws of the Commonwealth.

Patrons–Woodrum, Glasscock, Moss, Marks, Cranwell, Dickinson, Cohen, Robinson, W. P., Axselle, and Miller, C.

Referred to the Committee on Rules

WHEREAS, the last major revision of the Commonwealth's statutory laws relating to medical malpractice occurred in 1976; and

WHEREAS, sufficient time has passed to evaluate the 1976 revision and to consider whether further changes in the Commonwealth's medical malpractice laws may be appropriate; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, that a joint subcommittee be established to study the medical malpractice laws in the Commonwealth. The joint subcommittee shall consist of seven members to be appointed as follows: three members of the House Committee for Courts of Justice to be appointed by the Chairman and two members of the Senate Committee for Courts of Justice to be appointed by the Senate Committee on Privileges and Elections; one citizen member of the Virginia Trial Lawyers Association to be appointed by the Chairman of the House Committee for Courts of Justice and one citizen member of the Virginia Medical Society to be appointed by the Senate Committee on Privileges and Elections. The subcommittee shall complete its work in time to make recommendations to the 1985 Session of the General Assembly.

The direct and indirect costs of this study are estimated to be $18,500.

APPENDIX B

LD9016598

HOUSE JOINT RESOLUTION NO. 209

Offered January 10, 1985

Continuing the joint subcommittee studying Virginia's medical malpractice laws.

Patrons–Woodrum, Dicks, and DeBoer; Senator: Mitchell

Referred to the Committee on Rules

WHEREAS, House Joint Resolution No. 20, passed during the 1984 Session of the General Assembly, created a joint subcommittee to study and evaluate the laws of the Commonwealth as they pertain to medical malpractice; and

WHEREAS, the joint subcommittee identified several areas of the law on which to focus the study, including a review of the insurance rate-making process, the need for reinstitution of a closed-claim data reporting requirement, the effect of the use of malpractice review panels and the need for their continuation, the desirability of modifying certain practices and procedures before the panel and at trial, the effect of the law governing the standard of care to be applied in malpractice actions and the qualification of expert witnesses, an evaluation of the effect of the limitation on recovery and application of the collateral source rule and the desirability of modifying the law pertaining to the statute of limitations in malpractice actions; and

WHEREAS, the joint subcommittee met on several occasions to hear testimony from interested persons including representatives of the insurance industry, actuaries, attorneys, physicians, nurses and other health care providers and from consumers of health care services; and

WHEREAS, the joint subcommittee was able to formulate recommendations regarding certain of these issues for consideration by the 1985 Session of the General Assembly; and

WHEREAS, because of the complexity of the issues and interests involved and the vast amount of relevant information available, the joint subcommittee was not able to formulate recommendations on all of the issues; and

WHEREAS, substantial progress was made by the joint subcommittee toward making these recommendations and solidifying the necessary working relationship among the affected interest groups; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the joint study of Virginia's medical malpractice laws is continued. The membership of the joint subcommittee shall remain the same, with any vacancy being filled in the same manner as the original appointment. The joint subcommittee shall complete its study in time to submit its recommendations to the 1986 Session of the General Assembly.

The direct and indirect costs of this study are estimated to be $12,035.

APPENDIX C

LD0243598

D 11/21/85 Devine T 11/21/85 smw

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact §§ 8.01-38 and 8.01-243 of the Code of Virginia, relating to limitations on the tort liability of hospitals and the statute of limitations in certain medical malpractice cases involving foreign objects or fraud.

Be it enacted by the General Assembly of Virginia:

1. That §§ and 8.01-38 and 8.01-243 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-38. Tort liability of hospitals.–Hospital as referred to in this section shall include any institution within the definition of hospital in § 32.1-123 of the Code of Virginia.

No hospital, as defined in this section, shall be immune from liability for negligence or any other tort on the ground that it is a charitable institution unless *(i)* such hospital renders exclusively charitable medical services for which service no bill for service is rendered to, nor any charge is ever made to the patient, or ~~unless~~ *(ii)* the party alleging such negligence or other tort was accepted as a patient by such institution under an express written agreement executed by the hospital and delivered at the time of admission to the patient or the person admitting such patient providing that all medical services furnished such patient are to be supplied on a charitable basis without financial liability to the patient ; ~~provided,~~ . However, ~~that~~ *notwithstanding the provisions of § 8.01-581.15* a hospital which is exempt from taxation pursuant to § 501 (c) (3) of Title 26 of the United States Code (Internal Revenue Code of 1954) and which is insured against liability for negligence or other tort in an amount not less than $500,000 for each occurrence shall not be liable for damage in excess of the *lesser of the* limits of such insurance or *one million dollars* .

§ 8.01-243. Personal action for injury to person or property generally.–A. Unless otherwise provided *in this section or* by *other* statute, every action for personal injuries, whatever the theory of recovery, ~~except as provided in B hereof,~~ shall be brought within two years ~~next~~ after the cause of action ~~shall have accrued~~ *accrues* .

B. Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years ~~next~~ after the cause of action ~~shall have accrued~~ *accrues* .

C. The two-year limitations period specified in subsection A shall be extended in actions for malpractice against a health care provider as follows:

1. In cases arising out of a foreign object having no therapeutic or diagnostic effect being left in a patient's body, for a period of one year from the date the object is discovered or, by the exercise of due diligence, reasonably should have been discovered; and

2. In cases in which fraud, concealment or intentional misrepresentation of fact prevented discovery of the injury within the two-year period, for one year from the date the injury is discovered or, by the exerise of due diligence, reasonably should have been discovered.

However, the provisions of this subsection shall not apply to extend the limitations period beyond ten years from the date the cause of action accrues.

APPENDIX D

LD0242598

D 11/21/85 Devine C 11/21/85 jds

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact §§ 8.01-581.1, 8.01-581.2, 8.01-581.3, 8.01-581.4, 8.01-581.6 and 8.01-581.7 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 8.01-581.2:1, 8.01-581.3:1, 8.-1-581.4:1, 8.01-581.4:2 and 8.01-581.11:1, relating to medical malpractice review panels; number of members; amendments to notice of claim; impartiality of members; oath; conduct of proceedings; evidentiary submissions; record of proceedings; constitutional objections.

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-581.1, 8.01-581.2, 8.01-581.3, 8.01-581.4, 8.01-581.6 and 8.01-581.7 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 8.01-581.2:1, 8.01-581.3:1, 8.01-581.4:1, 8.01-581.4:2 and 8.01-581.11:1 as follows:

§ 8.01-581.1. Definitions.—As used in this chapter:

~~1.~~ "Health care provider" means 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 or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, physical therapy assistant, clinical psychologist or a nursing home as defined in § 54-900 of the Code of Virginia 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, or an officer, employee or agent thereof acting in the course and scope of his employment.

~~2.~~ "Physician" means a person licensed to practice medicine or osteopathy in this Commonwealth pursuant to Chapter 12 (§ 54-273 et seq.) of Title 54.

~~3.~~ "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 § ~~54-276.9~~ *8.01-225* of the Code of Virginia.

~~4.~~ "Hospital" means a public or private institution licensed pursuant to Chapter ~~16~~ *5* (§ ~~32-207~~ *32.1-123* et seq.) of Title ~~32~~ *32.1* or Chapter 8 (§ 37.1-179 et seq.) of Title 37.1 ~~or subject to the provisions of Chapter 10 (§ 32-147 et seq.) of Title 32~~ .

~~5.~~ "Malpractice" means any tort based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient.

~~6.~~ "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.

~~7.~~ "Impartial attorney" means an attorney who has not represented : ~~a.~~ *(i)* the claimant, his family, his partners, co-proprietors or his other business interests; or ~~b.~~ *(ii)* The health care provider, his family, his partners, co-proprietors or his other business interests.

~~8.~~ "Impartial health care provider" means a health care provider who *(i)* has not : ~~a.~~ examined ~~or~~ , treated *or been consulted regarding* ~~or anticipates examining or treating~~ the claimant or his family; *(ii) does not anticipate examining, treating, or being consulted regarding the claimant or his family;* or ~~b.~~ *(iii) has not* been an employee, partner or co-proprietor of the

health care provider against whom the claim is asserted.

§ 8.01-581.2. Notice of claim for medical malpractice required; request for review by medical malpractice review panel; rescission of request; determination on request.–A. No action may be brought for malpractice against a health care provider unless the claimant notifies ~~such~~ *the* health care provider in writing by registered or certified mail prior to commencing the action. The written notification shall include the time of the alleged malpractice and a reasonable description of the act or acts of malpractice. The claimant or health care provider may within sixty days of such notification file a written request for a review by a medical malpractice review panel established as provided in § 8.01-581.3. The request for review shall be mailed to the Chief Justice of the Supreme Court of Virginia. Upon receipt of such request, the Chief Justice shall designate one sitting or one retired circuit court judge to act as chairman of the panel *and shall select the other panel members as provided in § 8.01-581.3:1* . No actions based on alleged malpractice shall be brought within ninety days of the notification by the claimant to the health care provider and if a panel is requested within the period of review by the medical review panel.

B. Whenever the requesting party rescinds a request for review by a medical malpractice review panel, notice of such rescission shall be given to counsel for the opposing party at the time notice is given to the Chief Justice of the Supreme Court.

C. Notice of the determination of the Chief Justice on a request for review shall be given to counsel for both parties.

§ 8.01-581.2:1. Amendment of notice of claim.–After the notice of claim has been delivered or mailed to a health care provider, the chairman or, if a request for a review panel has not been filed, the court in which a motion for judgment based on the claim has been or would be filed may grant leave to amend the notice to add additional parties or theories of recovery in furtherance of the ends of justice except where (i) the request for leave to amend is made less than ten days before the date set for the review panel to convene or for the hearing or (ii) the chairman or judge finds that the request for leave to amend is without merit. If leave to amend is granted, the chairman or judge may, upon motion of a health care provider originally noticed, stay the review panel proceedings or continue the trial, extend the time for completion of discovery, filing of pleadings and other procedural limitations periods, or enter such other orders as are appropriate to avoid prejudice to the parties and to avoid unnecessary delay and duplication in the proceedings.

Leave to amend the notice pursuant to this section shall not be granted if the chairman or judge finds that the applicable statute of limitations has expired with respect to the new or additional parties or theories.

§ 8.01-581.3. Composition, selection, etc., of panel.– ~~Upon certification by the parties that discovery has been completed, the Chief Justice of the Supreme Court shall appoint a medical review panel. Such certification shall not of itself preclude the taking of additional discovery in the event an action is subsequently filed.~~ The medical review panel shall consist of (i) ~~three~~ *two* impartial attorneys and ~~three~~ *two* impartial health care providers, licensed and actively practicing their professions in the Commonwealth and (ii) one sitting or one retired judge of a circuit court who shall serve as chairman of the panel. The chairman shall have no vote except in the case of a tie vote. The medical review panel shall be selected by the Chief Justice from a list of health care providers submitted to him by the State Board of Medicine and a list of attorneys submitted by the Virginia State Bar. In the selection of the health care provider members, the Chief Justice shall give due regard to the nature of the claim and the nature of the practice of the health care provider. ~~The members of the medical review panel shall be sworn by the chairman to render an opinion faithfully and fairly.~~

§ 8.01-581.3:1. Completion of discovery; hearing date; notification to parties and panel members; oath of panel members.–At the time that the panel chairman is designated, the Chief Justice shall advise the chairman of the names of the panel members. Within ten days of receipt of his designation the chairman shall advise the parties of the date set for the completion of discovery. Nothing in this section shall preclude the taking of additional discovery if an action is subsequently filed.

Except for good cause shown, the date for completion of discovery shall not be set beyond ninety days from the date on which the chairman was designated. Within the period set for the taking of discovery and upon consultation with the panel members, the chairman shall notify the parties of the date set for a hearing by the review panel, if any, or the date on which the panel will convene. Such date shall not be set sooner than ten days after the date for completion of discovery. Upon completion of discovery, the Chief Justice shall notify the parties of the name, address and professional practice of each panel member and shall also notify the panel members, in writing, of their appointment.

The written notification to the panel members of selection by the Chief Justice shall include the definitions of "impartial attorney" and "impartial health care provider" as contained in § 8.01-581.1 and a copy of the oath to which the panel members will be required to subscribe when the panel convenes. The oath shall be as follows:

"I do solemnly swear (or affirm) that I have no past or present relationship with the parties nor am I aware of anything that would prevent me from being impartial in my deliberations. I further swear (or affirm) that I will render an opinion faithfully and fairly on the basis of the evidence presented, applying any professional expertise I may have, giving due regard to the nature of the claim and the nature of the practice of the health care provider." A panel member who, for any reason, could not take the oath of impartiality shall promptly notify the Chief Justice, in writing, of such inability. The Chief Justice shall then select and notify another panel member in place of and practicing the same profession as the disqualified member.

§ 8.01-581.4. Submission of evidence to panel; depositions and discovery; duties of chairman; access to material.–The evidence to be considered by the medical review panel shall be promptly submitted by the respective parties, upon appointment of the panel, to each member of the panel in written form. Either party, upon request, shall be granted a hearing before the panel. The evidence may consist of medical charts, X-rays, laboratory tests, excerpts of treatises, and depositions of witnesses, including parties, and, when a hearing is held, oral testimony before the panel. *The parties shall submit to the panel members only those portions of deposition transcripts, medical records, treatises and other documents which are relevant to the claim. However, upon request of the chairman, a party shall produce all or part of any such document submitted.* At the discretion of the chairman, additional depositions of parties and witnesses may be taken, or other additional discovery may be had, at any time prior to hearing by any party. Part Four of the Rules of the Supreme Court shall govern the taking of depositions; provided, the chairman shall rule on the admissibility of all or any part of a deposition offered as evidence at the hearing. Either party may have discovery pursuant to procedures set out in Part Four of the Rules of the Supreme Court of Virginia prior to appointment of the panel or thereafter in the discretion of the chairman. In the event that any party ~~shall object~~ *objects* to all or any part of the discovery proceedings prior to the appointment of the panel or ~~object~~ *objects* to all or part of any additional discovery allowed after the panel is appointed, the dispute shall be presented to and resolved by the chairman pursuant to Part Four of the Rules of the Supreme Court.

Within ten days after his appointment, the chairman shall designate the office of a clerk of a circuit court within the circuit wherein the chairman resides to which office process shall be returnable. The chairman shall also designate the style of the case under which process shall issue. Process for discovery shall issue upon application to the clerk. Any such discovery and any depositions taken for purposes of discovery or otherwise, under this section, may be used in any subsequent civil proceeding based upon the same claim for any purpose otherwise proper under Part Four of the Rules of Court. The chairman of the panel shall advise the panel relative to any legal question involved in the review proceeding and shall prepare the opinion of the panel as provided in § 8.01-581.7. ~~A copy of the evidence shall be sent to each member upon appointment to the panel.~~ All parties shall have full access to any material submitted to the panel.

§ 8.01-581.4:1. Assembly of record; transfer to trial court.–Upon conclusion of deliberations and rendering of an opinion by the panel, all documentary evidence submitted to the panel, a transcript of the ore tenus hearing, if any, and a copy of the written opinion of the panel shall be filed in the office of the clerk designated pursuant to § 8.01-581.4. The record shall be maintained for 120 days from the date the statute of limitations on the claim would run or sixty days following the issuance of the panel opinion, whichever is later. However, upon notice and

request from the clerk of court in which an action is filed within that time period, the record shall be transferred to the office of the clerk in which the action is pending. Upon completion of the action, the clerk of the trial court shall transfer a copy of the panel record to the Executive Secretary of the Supreme Court. If no such request for transfer is made within the time period specified, the record shall be transferred to and filed with the Executive Secretary of the Supreme Court. The record shall be maintained by the Executive Secretary in accordance with Rule 6 (d) of the Medical Malpractice Rules of Practice.

The party filing an action based upon the claim submitted to the review panel, shall advise the clerk of the trial court at the time the motion for judgment is filed in which clerk's office the panel record is being held.

§ 8.01-581.4:2. Removal of record for inspection and copying; notice.—Any party may, upon notice to all other parties or their counsel, remove any book, record or document which has been filed with the clerk or has become a part of the permanent record filed with the Executive Secretary for purposes of inspection and copying. The party removing the documents shall give an appropriate receipt to the clerk or Executive Secretary and shall be responsible for the return of the materials within ten days.

§ 8.01-581.6. Conduct of proceedings.—In the conduct of its proceedings:

1. The testimony of the witnesses shall be given under oath. Members of the medical review panel, once sworn, shall have the power to administer oaths.

2. In the event a hearing is held, the parties are entitled to be heard, to present relevant evidence, and to cross-examine witnesses to the extent necessary to enable the panel to render an opinion as specified in § 8.01-581.7. The rules of evidence need not be observed. The medical review panel may proceed with the hearing and *shall* render an opinion upon the evidence produced, notwithstanding the failure of a party duly notified to appear.

3. The medical review panel may issue or cause to be issued, on its own motion or on application of any party, subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence. Subpoenas so issued shall be served and, upon application by a party or the panel to a court of proper venue having jurisdiction over a motion for judgment based on such claim, enforced in the manner provided for the service and enforcement of subpoenas in a civil action. All provisions of law compelling a person under subpoena to testify are applicable.

4. [Repealed.]

5. The hearing shall be conducted by all members of the medical review panel unless the parties otherwise agree. A majority of the members present may determine any question and may render an opinion.

6. The medical review panel members may apply their expertise in evaluating the evidence giving due regard to the nature of the claim and the nature of the practice of the health care provider, whether expert medical opinions are presented by the parties or not.

§ 8.01-581.7. Opinion of panel.—A. Within thirty days, after receiving all the evidence, the panel shall have the duty, after joint deliberation, to render one or more of the following opinions:

1. The evidence does not support a conclusion that the health care provider failed to comply with the appropriate standard of care;

2. The evidence supports a conclusion that the health care provider failed to comply with the appropriate standard of care and that such failure is a proximate cause in the alleged damages;

3. The evidence supports a conclusion that the health care provider failed to comply with the appropriate standard of care and that such failure is not a proximate cause in the alleged damages; or

4. The evidence indicates that there is a material issue of fact, not requiring an expert opinion, bearing on liability for consideration by a court or jury.

B. If the review panel's finding is that set forth in ~~subdivision~~ *paragraph* 2 of subsection A of this section, the panel may determine whether the claimant suffered any disability or impairment and the degree and extent thereof.

C. The opinion shall be in writing and shall be signed by all panelists who agree therewith. Any member of the panel may note his dissent. All such opinions shall be mailed to the claimant and the health care provider within five days of the date of their rendering. *However, this subsection shall not be construed to preclude the panel from announcing the opinion in the presence of the parties or their counsel, provided a signed written opinion is subsequently mailed as provided in this subsection.*

§ 8.01-581.11:1. Objections not waived by participation.—Participation in any medical malpractice review panel proceeding pursuant to this article shall not constitute a waiver by a party to the proceedings of any objections to the constitutionality of the review panel procedure.

APPENDIX E1, NOT RECOMMENDED

LD0109598

D 09/30/85 Devine C 10/03/85 smw

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend the Code of Virginia by adding in Article 2 of Chapter 21.1 of Title 8.01 a section numbered 8.01-581.21, relating to court approval of attorneys' fees in medical malpractice actions.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Article 2 of Chapter 20.1 of Title 8.01 a section numbered 8.01-581.21 as follows:

§ 8.01-581.21. Approval of attorney's fee required.–In any proceeding before a medical malpractice review panel or any action against a health care provider recover damages alleged to have been caused by medical malpractice, the court having jurisdiction over the claim or in which the action is pending shall have the power to approve and confirm the amount of compensation to be allowed the attorney for the plaintiff or claimant. The order approving and confirming the fee shall be binding except that it may be set aside for fraud.

APPENDIX E2, NOT RECOMMENDED

LD0110598

D 9/30/85 Devine C 10/1/85 jrt

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend the Code of Virginia by adding in Chapter 21 of Title 8.01 a section numbered 8.01-581.21, relating to attorneys' fees in medical malpractice cases; schedule; exceptions.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 21 of Title 8.01 a section numbered 8.01-581.21 as follows:

§ 8.01-581.21. Schedule for attorneys' fees; application for exception; court order required.—A. In any action or proceeding against a health care provider for medical malpractice, a contingent fee charged by an attorney for a party shall not exceed the amount of compensation provided for in the following schedule:

30 percent of the first $250,000 of the sum recovered;

25 percent of the next $250,000 of the sum recovered;

20 percent of the next $500,000 of the sum recovered;

15 percent of the next 250,000 of the sum recovered;

10 percent of any amount over $1,250,000 of the sum recovered.

Such percentages shall be computed on the net sum recovered, after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. No deduction shall be made, in computing such percentages, for liens, assignments or claims (i) in favor of hospitals, for medical care, dental care and treatment by doctors and nurses, (ii) of self-insurers or insurance carriers or (iii) on items similar to those specified in (i) and (ii).

B. In the event that claimant's or plaintiff's attorney believes in good faith that, due to extraordinary circumstances, the fee schedule set forth in subsection A will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the claimant or plaintiff and other persons holding liens or assignments on the recovery. The application shall be made to the court having jurisdiction over the action. Upon application, the judge may, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, fix an amount greater than that specified in the schedule set forth in subsection A as reasonable compensation for services rendered. However, any such greater amount awarded by the court shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the claimant or plaintiff and the attorney. If the application is granted, the judge shall make a written order accordingly, briefly stating the reasons for granting the greater compensation. A copy of such order shall be served on all persons entitled to receive notice of the application.

APPENDIX F, NOT RECOMMENDED

LD0112598

D 9/30/85 DEVINE C 10/2/85 jds

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend the Code of Virginia by adding in Article 2 of Chapter 21.1 of Title 8.01 a section numbered 8.01-581.21, relating to payments from collateral sources in medical malpractice actions; reduction of award. -

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Article 2 of Chapter 21.1 of Title 8.01 a section numbered 8.01-581.21 as follows:

§ 8.01-581.21. Payments from collateral source; reduction of award.–In any action against a health care provider for damages alleged to have been caused by medical malpractice occurring in this Commonwealth, where the plaintiff seeks to recover for the cost of medical, dental or custodial care, rehabilitative services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source. If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plantiff of maintaining such benefits.

In order to find than any future cost or expense will, with reasonable certainty, be replaced or indemnified by a collateral source the court must find that the plantiff is legally entitled to the continued receipt of the collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by the agreement.

As used in this section, "collateral source" includes (i) insurance benefits, except life insurance, (ii) social security benefits, except those benefits provided under Title XVIII of the Social Security Act and (iii) workers' compensation or employee benefit programs, except such sources entitled by law to a lien against any recovery by the plaintiff.

APPENDIX G, NOT RECOMMENDED

LD0111598

D10/1/85DEVINE C10/7/85BAM

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend the Code of Virginia by adding in Chapter 21.1 of Title 8.01 an article numbered 3, consisting of sections numbered 8.01-581.21 through 8.01-581.30, relating to verdicts and judgments in medical malpractice actions; periodic payments.

Be it enacted by the General Assembly of Virginia:

1. 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 8.01-581.21 through 8.01-581.30 as follows:

Article 3.

Verdicts and Judgment.

§ 8.01-581.21. Itemized verdict in medical malpractice actions.—In a medical malpractice action the court shall instruct the jury that if the jury finds a verdict awarding damages it shall, in its verdict, specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element, including, but not limited to, medical expenses, dental expenses, loss of earnings, impairment of earning ability, and pain and suffering. In a medical malpractice action, each element shall be further itemized into amounts intended to compensate for damages which have been incurred prior to the verdict and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future damages, the finder of fact shall set forth the period of years over which such amounts are intended to provide compensation. In computing the damages, the finder of fact shall award the full amount of future damages, as calculated, without reduction to present value.

§ 8.01-581.22. Basis for determining judgment to be entered.—A. In order to determine the judgment to be entered on a verdict in an action against a health care provider to recover damages for medical malpractice the court shall proceed as provided in this section. The court shall apply to the findings of past and future damages any applicable rules of law, including set-offs, credits, additurs, and remittiturs, in calculating the respective amounts of past and future damages claimants are entitled to recover and defendants are obligated to pay.

B. The court shall enter judgment in lump sum for (i) past damages, (ii) future damages not in excess of $250,000, and (iii) any damages, fees or costs payable in lump sum or otherwise under subsections C and D of the section. For purposes of this section, any lump sum payment of a portion of future damages shall be deemed to include the elements of future damages in the same proportion as such elements comprise the total award for future damages as determined by the trier of fact.

C. Payment of litigation expenses and that portion of the attorney's fees related to past damages shall be payable in a lump sum. Payment of that portion of the attorney's fees related to future damages for which the claimant is entitled to a lump sum payment, as provided in this article, shall also be payable in a lump sum. Payment of that portion of the attorney's fees related to the future periodically paid damages shall also be payable in the lump sum, based on the present value of the annuity contract purchased to provide payment of such future periodically paid damages pursuant to subsection E of this section.

D. Upon election of a subrogee or a lien holder, including an employer or insurer who

provides workers' compensation, any part of future damages allocable to reimbursement of payments previously made by the subrogee or the lien holder shall be paid in lump sum to the subrogee or the lien holder in such amount as is calculable and determinable under the law in effect at the time of the payment. The election shall be made in writing and filed with the court within ten days of the entry of the judgment.

E. With respect to awards of future damages in excess of $250,000, the court shall enter judgment as follows:

1. After making any adjustments prescribed by subsections B, C and D of this section, the court shall enter a judgment for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments. The present value of such a contract shall be determined in accordance with generally accepted actuarial practices by applying the discount rate in effect at the time of the award to the full amount of the remaining future damages, as calculated pursuant to this subsection. The period of time over which such periodic payments shall be made and the period of time used to calculate the present value of the annuity contract shall be the period of years determined by the trier of fact in arriving at the itemized verdict as provided in § 8.01-581.21. However, the period of time over which such periodic payments shall be made and the period of time used to calculate the present value for damages attributable to pain and suffering shall be ten years or the period of time determined by the trier of fact, whichever is less.

2. The court, as part of its judgment, shall direct that the defendants and their insurance carriers be required to offer and to guarantee the purchase and payment of such an annuity contract. The annuity contract shall provide for the payment of the annual payments of such remaining future damages over the period of time determined pursuant to this subsection.

3. The annual payment for the first year shall be calculated by dividing the remaining amount of future damages by the number of years over which such payments shall be made and the payment due in each succeeding year shall be computed by adding four percent to the previous year's payment. Where payment of a portion of the future damages terminates in accordance with the provisions of this article, the four percent added payment shall be based only upon that portion of the damages that remains subject to continued payment. Unless otherwise agreed, the annual sum so arrived at shall be paid in equal monthly installments and in advance.

F. With the consent of the claimant and any party liable for the judgment, in whole or in part, the court shall enter judgment for the amount found for future damages attributable to said party as such are determinable without regard to the provisions of this article.

§ 8.01-581.23. Form of security.—Security authorized or required for payment of a judgment for periodic installments entered in accordance with this article must be (i) in the form of an annuity contract, (ii) executed by a qualified insurer and approved by the Commissioner of Insurance pursuant to § 8.01-581.30 of this article, and (iii) approved by the court.

§ 8.01-581.24. Posting and maintaining security.—A. If the court enters a judgment for periodic installments, each party liable for all or a portion of the judgment shall separately or jointly with one or more others post security in an amount necessary to secure payment for the amount of the judgment for future periodic installments within thirty days after the date the judgment is entered. A liability insurer having a contractual obligation and any other person adjudged to have an obligation to pay all or part of a judgment for periodic installments on behalf of a judgment debtor is obligated to post security to the extent of its contractual or adjudged obligation if the judgment debtor has not done so.

B. A judgment creditor or successor in interest and any party having rights may move the court to find that security has not been posted and maintained with regard to a judgment obligation owing to the moving party. Upon so finding, the court shall order that security complying with this article be posted within thirty days. If security is not posted within that time, the court shall enter a judgment for the lump sum as such sum is determinable under the law without regard to this article. However, if a judgment debtor who is the only person liable for a portion of a judgment for periodic installments fails to post and maintain security, the right to lump sum payment applies only against that judgment debtor and the portion of the

judgment so owed.

C. If more than one party is liable for all or a portion of a judgment requiring security under this article and the required security is posted by one or more but fewer than all of the parties liable, the security requirements are satisfied and those posting security may proceed under subsection B to enforce rights for security or lump sum payment to satisfy or protect rights of reimbursement from a party not posting security.

§ 8.01-581.25. Failure to make payment.–If at any time following entry of judgment, a judgment debtor fails for any reason to make a payment in a timely fashion according to the terms of this article, the judgment creditor may petition the court which rendered the original judgment for an order requiring payment by the judgment debtor of the outstanding payments in a lump sum. In calculating the amount of the lump sum judgment, the court shall total the remaining periodic payments due and owing to the judgment creditor, as calculated pursuant to subsection B of § 8.01-581.22, and shall not convert these amounts to their present value. The court may also require the payment of interest on the outstanding judgment.

§ 8.01-581.26. Effect of death of judgment creditor.–Unless otherwise agreed between the parties at the time security is posted, in all cases covered by this article in which future damages are payable in periodic installments, the liability for payment of any installments for medical, dental or other costs of health care or noneconomic loss not yet due at the death of the judgment creditor terminates upon the death of the judgment creditor.

The portion of any periodic payment allocable to loss of future earnings shall not be reduced or terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support immediately prior to his death to the extent that such duty of support exists under applicable law at the time of the death of the judgment creditor. Payments to such persons shall continue for the remainder of the period as originally found by the finder of fact under § 8.01-581.21 or until such duty of support ceases to exist, whichever occurs first. In such cases, the court which rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the future payments of unpaid future damages in accordance with this subsection. The apportioned amounts shall be payable in the future as provided for in this article.

If the judgment creditor does not owe a duty of support to any person at the time of his death or if such duty ceases to exist, the remaining payments shall be considered part of the estate of the judgment creditor. In such cases, the court which rendered the original judgment may, upon petition of any party in interest, convert those portions of the periodic payments allocable to the loss of future earnings to a lump sum by calculating the present value of such payments in order to assist in the settlement of the estate of the judgment creditor.

§ 8.01-581.27. Adjustment of payments.–A. If, at any time after entry of the judgment, a judgment creditor or successor in interest can establish that the continued payment of the judgment in periodic installments will impose a hardship, the court may, in its discretion, order that the remaining payments or a portion thereof shall be made to the judgment creditor in a lump sum. The court shall, before entering such an order, find that: (i) unanticipated and substantial medical, dental or other needs have arisen that warrant the payment of the remaining payments, or a portion thereof, in a lump sum; (ii) ordering such a lump sum payment would not impose an unreasonable financial burden on the judgment debtor or debtors; (iii) ordering such a lump sum payment will accommodate the future medical and other needs of the judgment creditor; and (iv) ordering such a lump sum payment would further the interests of justice.

B. If a lump sum payment is ordered by the court, the lump sum shall be calculated on the basis of the present value of remaining periodic payments, or portions thereof, that are converted into a lump sum payment. Any remaining future periodic payments shall be reduced accordingly.

§ 8.01-581.28. Settlements.–Nothing in this article shall be construed to limit the rights of any plaintiff, defendant or insurer to settle medical malpractice claims as they, in their discretion, consider appropriate.

§ 8.01-581.29. Assignment of periodic installments.–An assignment of or an agreement to assign any right to periodic installments for future damages contained in a judgment entered under this article is enforceable only as to amounts: (i) for payment of alimony, maintenance, or child support; (ii) for the cost of products, services, or accommodations provided or to be provided by the assignee for medical, dental or other health care; or (iii) for attorney's fees and other expenses of litigation incurred in securing the judgment.

§ 8.01-581.30. Duties of Commissioner of Insurance.–The Commissioner of Insurance shall establish rules and regulations for determining which insurers, self-insurers, plans or arrangements are financially qualified to provide the security required under this article and to be designated as qualified insurers.

APPENDIX H1, NOT RECOMMENDED

LD0106598

D 9/27/85 DEVINE C 10/22/85 jds

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact § 8.01-581.20 of the Code of Virginia, relating to standard of care in medical malpractice actions and proceedings before the review panel.

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-581.20 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-581.20. Standard of care in proceeding before medical malpractice review panel; in actions for malpractice; 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, 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 *same* field of practice or specialty ~~in this Commonwealth and the~~ *as the defendant, who (i) has access to the same information regarding the patient's medical history and his illness, disease or condition at the time of the occurrence of the act or omission alleged to be negligent, and (ii) is acting under circumstances which are the same as or substantially similar to those prevailing at the time of the occurrence.*

The testimony of an expert witness, otherwise qualified, as to ~~such~~ *the* 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~~ . 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.

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.

APPENDIX H2, NOT RECOMMENDED

LD0240598

D 11/21/85 DEVINE C 11/22/85 jds

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact § 8.01-581.20 of the Code of Virginia, relating to standard of care in medical malpractice actions and proceedings before the review panel.

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-581.20 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-581.20. Standard of care in proceeding before medical malpractice review panel; in actions for malpractice; 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, 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 *same* field of practice or specialty ~~in this Commonwealth and the~~ *as the defendant, who (i) has access to the same information regarding the patient's medical history and his illness, disease or condition at the time of the occurrence of the act or omission alleged to be negligent, and (ii) is acting under circumstances which are the same as or substantially similar to those prevailing at the time of the occurrence.*

The testimony of an expert witness, otherwise qualified, as to ~~such~~ *the* 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~~ *proves* 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~~ . 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.

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.

APPENDIX H3, NOT RECOMMENDED

LD0239598

D 11/21/85 DEVINE C 11/22/85 jds

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact § 8.01-581.20 of the Code of Virginia, relating to standard of care in medical malpractice actions and proceedings before the review panel.

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-581.20 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-581.20. Standard of care in proceeding before medical malpractice review panel; in actions for malpractice; 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, 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 *same* field of practice or specialty ~~in this Commonwealth and the~~ *as the defendant, who (i) has access to the same information regarding the patient's medical history and his illness, disease or condition at the time of the occurrence of the act or omission alleged to be negligent, and (ii) is acting under circumstances which are the same as or substantially similar to those prevailing in the locality at the time of the occurrence.*

The testimony of an expert witness, otherwise qualified, as to ~~such~~ *the* 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~~ . 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.

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.

APPENDIX H4, NOT RECOMMENDED

LD0238598

D 11/21/85 DEVINE C 11/22/85 jds

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact § 8.01-581.20 of the Code of Virginia, relating to standard of care in medical malpractice actions and proceedings before the review panel.

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-581.20 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-581.20. Standard of care in proceeding before medical malpractice review panel; in actions for malpractice; 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, 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 *same* field of practice or specialty ~~in this Commonwealth and the~~ *as the defendant, who (i) has access to the same information regarding the patient's medical history and his illness, disease or condition at the time of the occurrence of the act or omission alleged to be negligent, and (ii) is acting under circumstances, including but not limited to the availability of health care services and facilities, which are the same as or substantially similar to those prevailing at the time of the occurrence.*

The testimony of an expert witness, otherwise qualified, as to ~~such~~ *the* 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~~ . 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.

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.

APPENDIX H5, NOT RECOMMENDED

LD0237598

D 11/21/85 DEVINE T 11/21/85 smw

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact § 8.01-581.20 of the Code of Virginia, relating to standard of care in medical malpractice actions and proceedings before the review panel.

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-581.20 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-581.20. Standard of care in proceeding before medical malpractice review panel; in actions for malpractice; 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, 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 *in this Commonwealth* by a reasonably prudent practitioner in the *same* field of practice or specialty ~~in this Commonwealth and the~~ *as the defendant, who (i) has access to the same information regarding the patient's medical history and his illness, disease or condition at the time of the occurrence of the act or omission alleged to be negligent, and (ii) is acting under circumstances which are the same as or substantially similar to those prevailing at the time of the occurrence.*

The testimony of an expert witness, otherwise qualified, as to ~~such~~ *the* standard of care, shall *not* 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. 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.

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.

APPENDIX H6. NOT RECOMMENDED

LD0291598

D 11/25/85 DEVINE T 11/26/85 jds

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact § 8.01-581.20 of the Code of Virginia, relating to standard of care in medical malpractice actions and proceedings before the review panel.

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-581.20 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-581.20. Standard of care in proceeding before medical malpractice review panel; in actions for malpractice; 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, 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. 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.~~

~~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.~~ *shall be determined by the panel or by the finder of fact based upon evidence of what a reasonably prudent practitioner in the same field of practice or specialty as the defendant would have done acting under the same or substantially similar circumstances as the defendant. As used in this section the term "circumstances" shall mean the totality of circumstances under which the defendant was operating at the time of the occurrence of the alleged negligence, including, but not limited to, information available to the defendant regarding the patient's medical history and his illness, disease or condition and access to health care services and facilities.*

The testimony of expert witnesses shall be admissible for purposes of determining the standard of care. An expert witness who is familiar with the degree of skill and diligence practiced by a reasonably prudent practitioner in the same field of practice or specialty as the defendant, under the circumstances prevailing at the time of the occurrence of the alleged negligence, shall not have his testimony excluded on the ground that he does not practice in this Commonwealth.

APPENDIX H7, NOT RECOMMENDED

LD0319598

D 11/25/85 DEVINE T 11/26/85 jds

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact § 8.01-581.20 of the Code of Virginia, relating to standard of care in medical malpractice actions and proceedings before the review panel.

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-581.20 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-581.20. Standard of care in proceeding before medical malpractice review panel; in actions for malpractice; 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, 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 *in the same or a similar community* by a reasonably prudent practitioner ~~in the field of practice or specialty in this Commonwealth and the~~ *acting under circumstances which are the same as or substantially similar to those prevailing at the time of the occurrence. However, if the health care provider whose negligence is alleged to have given rise to the cause of action (i) is certified by the appropriate American Board as a specialist, (ii) is trained and experienced in a medical specialty or (iii) holds himself out as a specialist, the standard of care shall be determined based upon the degree of skill and diligence practiced by a reasonably prudent practitioner who is a member in good standing of and trained and experienced in the same specialty as the defendant and who is acting under circumstances which are the same as or substantially similar to those prevailing at the time of the occurrence.*

For purposes of determining the appropriate standard of care, 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~~ *if he demonstrates to the satisfaction of the court, that he is familiar with the circumstances prevailing at the time of the occurrence of the alleged negligence and he possesses sufficient knowledge, training and experience similar to the defendant as to the acceptable standard of care under the circumstances* . 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.

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.

Tillinghast

TILLINGHAST, NELSON & WARREN, INC.
Consultants • Actuaries

UNITED STATES • UNITED KINGDOM • CANADA • BERMUDA • AUSTRALIA

3340 Peachtree Road
Atlanta, Georgia 30026
(404) 261-5420
Telex 804429

June 19, 1985

Mr. Richard Immel
The Medical Society of Virginia
4205 Dover Road
Richmond, Virginia 23221

Dear Mr. Immel:

The Medical Society of Virginia requested that Tillinghast, Nelson, and Warren, Inc. evaluate the rate level impact of four proposed changes in the statute of limitations with respect to medical professional liability suits. It is our understanding that the current statute of limitations runs for two years from the incident giving rise to the suit, except that the statute is tolled for minors until age 18.

The four possible revisions to the statute of limitations are as follows:

1. One year from the date the patient discovered, or reasonably should have discovered the incident, with an outside limit of five years from the date of incident.

2. Same as Option 1, except the outside limit is 10 years.

3. Two years from when the patient discovered or reasonably should have discovered the incident, with an outside limit of five years from the date of incident.

4. The same as Option 3 with an outside limit of 10 years.

It is our understanding that these limitations would apply to minors as well as adults, and that there would be no change in the present two year statute of limitations with respect to wrongful deaths. We have further assumed that the discovery provision relates to the discovery of injury.

Analysis

We are not aware of any "standard" approach to evaluating statute changes of this type. Historical data from other states at the time of statute of limitation changes is of questionable value, since the changes made are somewhat different from those proposed here, and since they generally were adopted in conjunction with other changes.

One Approach

One school of thought says that adding a discovery provision to the statute causes more claims to enter the system since claims which could not have been discovered within the original statutory time from the incident date are added to the system. In conjunction with a discovery provision, shortening the statute of limitations, either by shortening the general statute from two years to one year, or by reducing the number of years on infant statutes simply causes claims to be reported sooner.

We have seen some evidence which might support this reasoning. States with one year, two year, or three year statutes of limitation typically show a significant portion of their claims reported in the last six months before the statute of limitations is exhausted. Several states adopted 8 to 12 year limits on claims by minors, but to date their experience (on a claims made basis) on claims reported four or more years after the alleged malpractice occurrence does not appear to be significantly better than that of states with longer statutes for minors.

If this school of thought is correct, all of the proposed options will raise the expected claim costs, since the discovery provision will add claims which cannot be discovered within the present two year statute of limitations, while the reductions in the length of the statutes will do little more than move claims around.

Another Approach

To test whether states with discovery provisions and longer statutes of limitations have higher claims costs than other states, we selected eight states with levels of urbanization similar to Virginia, and compared their statutes of limitations to their expected claim costs (Exhibit 1). There appeared to be only a weak correspondence between statutes of limitation and claim costs. This would seem to suggest that factors other than statutes of limitation, such as differences in litigiousness and liberality in court awards, are more responsible for differences amoung states in claim costs.

As a method of quantifying the correspondence between the varying statutes and predicted per physician cost of claims and claim expenses, we estimated the average length of time between incident

and report for each of the eight states. We fitted a regression line to the pairs of numbers defined by the average time to report and the predicted average per physician cost claim and claim expenses for each of the eight states (Exhibit 2). This analysis showed that states with slower reporting patterns, either because of discovery provisions or because of longer statutes of limitation, tend to have higher costs. A one year increase in the average time to report was found to correspond to a 16% increase in claim and claim expense costs.

This approach suggests that the options above may not have a major impact on claim costs due to changes in the general statute or the addition of a discovery provision. The option of reducing the general statute of limitations from two years to one year can be expected to reduce the average time to report by less than one half year. Adding a discovery provision will increase the time in which to discover and report claims. It is not possible to determine the value of this increase precisely. Based on reporting pattern data in other states, we think this value would be equivalent to an increase of up to a half year. Ignoring the effects of the overall limitations from incident date as they apply to infant claims, this suggests that options three and four could increase costs by up to 8%. Options one and two would include the offsetting effect of reducing the statute from two years to one. The cost changes anticipated under those options (again ignoring the overall incident date limits) would not be significant.

With respect to the effect of the overall limitation from date of incident, we analyzed St. Paul Insurance Company data with respect to Virginia claims reported more than five years after the malpractice incident. Based upon their data, 2% to 3% of claim costs are associated with claims reported more than 10 years after the alleged malpractice incident, and another 2% to 3% are associated with claims reported between 5 and 10 years after the incident. Given the current statute, the vast majority of these late reported claim relate to infant cases. It is our opinion that many of these claims will be reported earlier with a shorter statute of limitations, and we estimate that a 10 year statute of limitations will reduce overall costs by 1% relative to what they would be otherwise, and a 5 year statute will reduce costs by 2%.

We stated earlier that we have conducted our analysis in the context of the discovery feature meaning discovery of injury. If discovery is to be interpreted as discovery of negligence, this will expand,

perhaps considerably, the effective statute under the proposed alternatives. The amount of increase in claims costs associated with such an interpretation would be difficult if not impossible to measure given currently available data. It could be significant, however, since such an interpretation would allow for claims triggered by circumstances beyond those directly attributable to a medical incident or subsequent discovered injury.

As mentioned earlier, all of the estimates indicated above are subject a high degree of uncertainty. The selection of any proposed changes in statutes as well as the estimate of their impact on costs involves several crictical judgments of both an actuarial and legal nature, and requires prudence so as not to exacerbate unduly what is already a very expensive claim cost area.

Summary

If Virginia is to adopt a discovery malpractice statute, we would suggest option 1 or 2, which is one year from discovery with an outside limit of 5 or 10 years. In this approach, a reduction by a year in the statute of limitation is made, which somewhat compensates the cost for adding the discovery provision. The outside limit would be 5 or 10 years, since the cost advantage of any shorter statute appears to be modest.

One reason for recommending option 1 or 2 over option 3 or 4 is that Virginia's costs for malpractice coverage have continued to increase steadily in recent years. We are concerned that over-liberalization of the statute could abruptly set the stage for further significant cost increases. We are also concerned that the publicity associated with changing the statute in any fashion may act to cause an unanticipated increase in claims and their consequent cost.

We believe that an outside limit from date of incident such as the 5 or 10 year limit in options 1 or 2 is appropriate and desirable. The expected value of this may appear small, but it will most likely be concentrated in a few classes, such as obstetricians. It is very difficult to determine the precise facts of a case more than 5 or 10 years old, which puts physicians at a higher risk of nonmeritous suits. The use of a 5 or 10 year limit does not appear to be unreasonably burdensome, since the vast majority of valid claims should be discovered within this time period.

As stated earlier, the ultimate cost of the discovery provision cannot be determined based on available data with any degree of precision. The determination as to when a particular claim was discoverable is subject to a wide difference of opinion. We think it is necessary and prudent to apply a measure of conservatism when selecting the appropriate statute, and thus would select a reduction in the general limitation to one year if a discovery provision is added.

We hope the foregoing comments are of assistance in determining which of the options (if any) should be implemented. We remain available to amplify any of the areas discussed above.

Sincerely,

Gail E. Tverberg, FCAS, MAAA

GET/kmk

cc: Dr. Ron Davis
Allan Goolsby

VIRGINIA MEDICAL SOCIETY

COMPARISON OF AVERAGE COSTS AND STATUTES OF LIMITATION

MEDIUM URBANIZATION STATES	ESTIMATED AVERAGE PER PHYSICIAN CLAIM COSTS (a)	STATUTE OF LIMITATION IN YEARS (b)				
		FROM INCIDENT	FROM DISCOVERY	MAXIMUM FROM INCIDENT	MAXIMUM FOR INFANT	WRONGFUL DEATH
TENNESSEE	$6,069	1	1	3	19	1
VIRGINIA	$6,544	2	N/A	N/A	20	2
GEORGIA	$8,874	2	N/A	N/A	20	2
WISCONSIN	$9,880	3	1	5	10 (c)	3
INDIANA	$11,480	2	N/A	N/A	8	2
LOUISIANA	$13,445	1	1	3	3	1
MISSOURI	$15,949	2	N/A	N/A	12	3
OREGON	$17,153	2	2	5	20	3
AVERAGE	$11,174					

NOTE:

(a) St. Paul 1983 $100,000 limit fitted pure premiums, increased to a 1985 Class 4 $1,000,000 limit level.

(b) Based upon statutory provisions as compiled in "Medical Malpractice" by Louisell and Williams. Discovery as shown above refers to a discovery statute similar to that proposed in Virginia, not a foreign object exception.

(c) Exludes persons with a developmental disability, such as brain damage.

Pure Premium vs. Ave. Years to Report

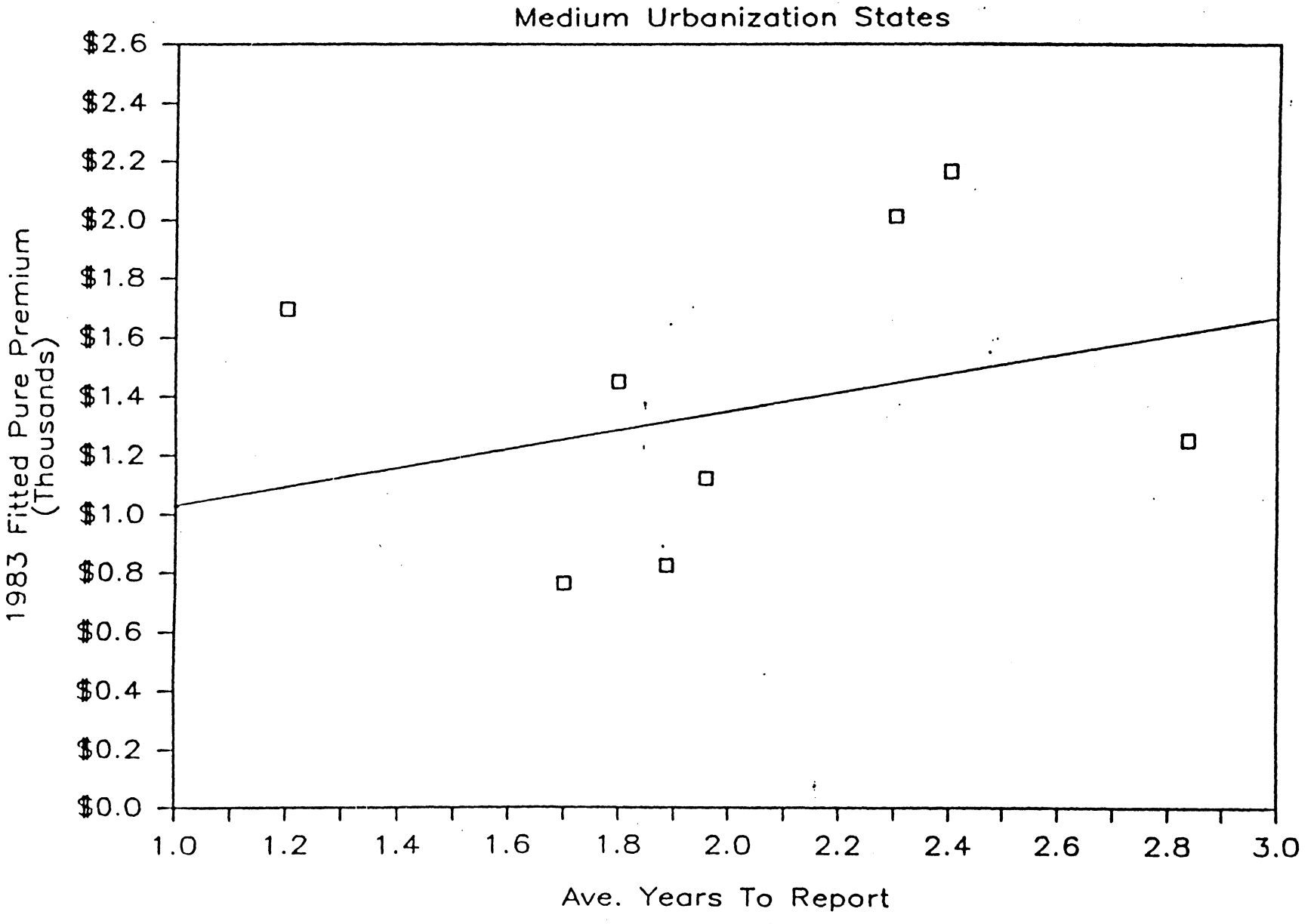

Exhibit 2
Appendix I

APPENDIX J, NOT RECOMMENDED

LD0241598

D 11/22/85 Devine T 11/25/85 jrt

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact §§ 8.01-229 and 8.01-230 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 8.01-243.1, relating to tolling of the statute of limitations in actions by minors for medical malpractice; date of discovery.

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-229 and 8.01-230 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 8.01-243.1 as follows:

§ 8.01-229. Suspension or tolling of statute of limitations; effect of disabilities; death; injunction; prevention of service by defendant; dismissal, nonsuit or abatement; devise for payment of debts; new promises; debts proved in creditors' suits.—A. Disabilities which toll the statute of limitations. - Except as otherwise specifically provided in §§ 8.01-237, 8.01-241, 8.01-242 , *8.01-243.1* and other provisions of this Code,

1. If a person entitled to bring any action is at the time the cause of action accrues an infant or of unsound mind, such person may bring it within the prescribed limitation period after such disability is removed; or

2. After a cause of action accrues,

a. If an infant becomes entitled to bring such action, the time during which he is within the age of minority shall not be counted as any part of the period within which the action must be brought; or

b. If a person entitled to bring such action becomes of unsound mind, the time during which he is of unsound mind shall not be computed as any part of the period within which the action must be brought, except where a guardian or committee is appointed for such person in which case an action may be commenced by such committee or guardian before the expiration of the applicable period of limitation or within one year after his qualification as such, whichever occurs later.

For the purposes of items 1 and 2 of this subsection, a person shall be deemed of unsound mind if he is adjudged insane by a court of competent jurisdiction to be mentally incapable of rationally conducting his own affairs, or if it ~~shall~~ otherwise ~~appear~~ *appears* to the court or jury determining the issue that such person is or was so mentally incapable of rationally conducting his own affairs within the prescribed limitation period.

3. If a convict is or becomes entitled to bring an action against his committee, the time during which he is incarcerated shall not be counted as any part of the period within which the action must be brought.

B. Effect of death of a party. - The death of a person entitled to bring an action or of a person against whom an action may be brought shall toll the statute of limitations as follows:

1. Death of person entitled to bring a personal action. - If a person entitled to bring a personal action dies with no such action pending before the expiration of the limitation period for commencement thereof, then an action may be commenced by the decedent's personal representative before the expiration of the limitation period or within one year after his qualification as personal representative, whichever occurs later.

2. Death of person against whom personal action may be brought. - If a person against whom a personal action may be brought dies before the commencement of such action and before the expiration of the limitation period for commencement thereof then a claim may be filed against the decedent's estate or an action may be commenced against the decedent's personal representative before the expiration of the applicable limitation period or within one year after the qualification of such personal representative, whichever occurs later.

3. Effect of death on actions for recovery of realty, or a proceeding for enforcement of certain liens relating to realty. - Upon the death of any person in whose favor or against whom an action for recovery of realty, or a proceeding for enforcement of certain liens relating to realty, may be brought, such right of action shall accrue to or against his successors in interest as provided in §§ 8.01-236 through 8.01-242 of Article 2 (§ 8.01-236 et seq.) of this chapter.

4. Accrual of a personal cause of action against the estate of any person subsequent to such person's death. - If a personal cause of action has not accrued against a decedent before his death, an action may be brought against the decedent's personal representative or a claim thereon may be filed against the estate of such decedent before the expiration of the applicable limitation period or within two years after the qualification of the decedent's personal representative, whichever occurs later.

5. Accrual of a personal cause of action in favor of decedent. - If a person dies before a personal cause of action which survives would have accrued to him, if he had continued to live, then an action may be commenced by such decedent's personal representative before the expiration of the applicable limitation period or within one year after the qualification of such personal representative, whichever occurs later.

6. Delayed qualification of personal representative. - If there is an interval of more than one year between the death of any person in whose favor or against whom a cause of action has accrued or shall subsequently accrue and the qualification of such person's personal representative, such personal representative shall, for the purposes of this chapter, be deemed to have qualified on the last day of such period of one year.

C. Suspension during injunctions. - When the commencement of any action is stayed by injunction, the time of the continuance of the injunction shall not be computed as any part of the period within which the action must be brought.

D. Prevention of service by defendant. - *The time during which service of process upon a defendant is prevented shall not be counted as any part of the period within which the action must be brought* when an action has been commenced and service of process ~~upon a defendant~~ is prevented by such defendant's:

1. Departing from the Commonwealth; or

2. Absconding or concealing himself; or

3. Filing a petition in bankruptcy or filing a petition for an extension or arrangement under the United States Bankruptcy Act; or

4. Using any other direct or indirect means to obstruct the prosecution of such cause of action ; ~~then the time that such prevention has continued shall not be counted as any part of the period within which the action must be brought~~ .

E. Dismissal, abatement, or nonsuit.

1. Except as provided in paragraph 3 of this subsection, if any action is commenced within the prescribed limitation period and for any cause abates or is dismissed without determining the merits, the time such action is pending shall not be computed as part of the period within which such action may be brought, and another action may be brought within the remaining period.

2. If a judgment or decree is rendered for the plaintiff in any action commenced within the prescribed limitation period and such judgment or decree is arrested or reversed upon a ground

which does not preclude a new action for the same cause, or if there is occasion to bring a new action by reason of the loss or destruction of any of the papers or records in a former action which was commenced within the prescribed limitation period, then a new action may be brought within one year after such arrest or reversal or such loss or destruction, but not after.

3. If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date he suffers such nonsuit, or within the original period of limitation, whichever period is longer. This tolling provision shall apply irrespective of whether the action is originally filed in a federal or a state court and recommenced in any other court.

F. Effect of devise for payment of debts. - No provision in the will of any testator devising his real estate, or any part thereof, subject to the payment of his debts or charging the same therewith, or containing any other provision for the payment of debts, shall prevent this chapter from operating against such debts, unless it plainly appears to be the testator's intent that it shall not so operate.

G. Effect of new promise in writing.

1. If any person against whom a right of action has accrued on any contract, other than a judgment or recognizance, promises, by writing signed by him or his agent, payment of money on such contract, the person to whom the right has accrued may maintain an action for the money so promised, within such number of years after such promise as it might be maintained if such promise were the original cause of action. An acknowledgment in writing, from which a promise of payment may be implied, shall be deemed to be such promise within the meaning of this subsection.

2. The plaintiff may sue on the new promise described in paragraph 1 of this subsection or on the original cause of action, except that when the new promise is of such a nature as to merge the original cause of action then the action shall be only on the new promise.

H. Suspension of limitations in creditors' suits. - When an action is commenced as a general creditors' action, or as a general lien creditors' action, or as an action to enforce a mechanics' lien, the running of the statute of limitations shall be suspended as to debts provable in such action from the commencement of the action, provided they are brought in before the commissioner in chancery under the first reference for an account of debts; but as to claims not so brought in the statute shall continue to run, without interruption by reason either of the commencement of the action or of the order for an account, until a later order for an account, under which they do come in, or they are asserted by petition or independent action.

In actions not instituted originally either as general creditors' actions, or as general lien creditors' actions, but which become such by subsequent proceedings, the statute of limitations shall be suspended by an order of reference for an account of debts or of liens only as to those creditors who come in and prove their claims under the order. As to creditors who come in afterwards by petition or under an order of recommittal, or a later order of reference for an account, the statute shall continue to run without interruption by reason of previous orders until filing of the petition, or until the date of the reference under which they prove their claims, as the case may be.

I. When an action is commenced within a period of thirty days prior to the expiration of the limitation period for commencement thereof and the defending party or parties desire to institute an action as third-party plaintiff against one or more persons not party to the original action, the running of the period of limitation against such action shall be suspended as to such new party for a period of sixty days from the expiration of the applicable limitation period.

§ 8.01-230. Accrual of cause of action.–In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person, when the breach of contract or duty occurs in the case of damage to property and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under §§ 8.01-233, *8.01-243.1*, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250

or other statute.

§ 8.02-243.1. Actions for medical malpractice; infants.–Every action on behalf of a minor for medical malpractice shall be commenced within two years of the occurrence of the last act or omission of the defendant giving rise to the cause of action. However, where the injury resulting from the defendant's act or omission is not readily apparent at the time of its origin and is discovered two or more years after the occurrence of the last act of the defendant, the action shall be commenced within one year of the date such injury is discovered or reasonably should have been discovered; provided that in no event may an action on behalf of a minor be commenced more than two years after the minor's eighteenth birthday nor more than ten years from the date of the last act or omission of the defendant giving rise to the cause of action.

APPENDIX K, NOT RECOMMENDED

LD0137598

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SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact §§ 8.01-581.2 and 8.01-581.9 of the Code of Virginia, relating to rescission of requests for a medical malpractice review panel.

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-581.2 and 8.01-581.9 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-581.2. Notice of claim for medical malpractice required; request for review by medical malpractice review panel; rescission of request; determination on request.—A. No action may be brought for malpractice against a health care provider unless the claimant notifies such health care provider in writing by registered or certified mail prior to commencing the action. The written notification shall include the time of the alleged malpractice and a reasonable description of the act or acts of malpractice. The claimant or health care provider may within sixty days of such notification file a written request for a review by a medical malpractice review panel established as provided in § 8.01-581.3. The request for review shall be mailed to the Chief Justice of the Supreme Court of Virginia. Upon receipt of such request, the Chief Justice shall designate one sitting or one retired circuit court judge to act as chairman of the panel. No actions based on alleged malpractice shall be brought within ninety days of the notification by the claimant to the health care provider and if a panel is requested within the period of review by the medical review panel.

B. Whenever the requesting party ~~rescinds~~ *files a request to rescind* a request for review by a medical malpractice review panel, notice of such *request for* rescission shall be given to counsel for the opposing party at the time notice is given to the Chief Justice of the Supreme Court. *The opposing party has ten days from receipt of the request for rescission to file an objection to the rescission with the Chief Justice and the requesting party. If an objection is filed, rescission shall not be allowed and the parties will proceed with the panel procedure as if the request for rescission was not filed. All applicable time limitations shall be tolled for the period commencing with receipt by the opposing party of the request for rescission and ending with receipt by the requesting party of the objection to rescission.*

If no objection is filed within the ten-day period, the Chief Justice shall give notice to all parties or their counsel that the request for a review panel has been rescinded.

C. Notice of the determination of the Chief Justice on a request for review shall be given to counsel for both parties.

§ 8.01-581.9. Notice of claim to toll statute of limitations; when notice of claim or request for review deemed given.—The giving of notice of a claim pursuant to § 8.01-581.2 shall toll the applicable statute of limitations for and including a period of 120 days from the date such statute of limitations would otherwise run, or ~~60~~ *sixty* days following issuance of any opinion by the medical review panel, whichever is later. ~~A notice of~~ Rescission of a request for a medical malpractice review panel or notice of a determination by the Chief Justice of the Supreme Court granting or denying a request *for a review panel* shall toll the applicable statute of limitations for and including a period of sixty days following the giving of such notice.

The notice of a claim pursuant to § 8.01-581.2 or the request for review of such claim by a medical review panel shall be deemed to be given when delivered or mailed by registered or certified mail to the appropriate claimant or health care provider at his office, residence or last known address.

The provisions of this section shall apply to all causes of action arising without regard to the date the cause of action arose, except to the extent that any such cause of action was barred by the applicable statute of limitations prior to July 1, 1982.

I. Amendment to § 8.01-581.15:

§ 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 July 1, 1986, 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 five hundred thousand dollars. This limitation of recovery shall not apply if the claimant exercises a written election in his complaint pursuant to § 8.01-581.21, and thereby consents to be bound by the special provisions set forth in § 8.01-581.22.

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

II. New Statutes:

§ 8.01-581.21. Pleading requirements for alternative proceedings in certain medical malpractice actions. -- In any action for malpractice where the act or acts of malpractice occurred on or after July 1, 1986, a claimant may avoid the limitation of total recovery set forth in § 8.01-581.15 by exercising a written election in his complaint to have the proceeding governed by the provisions of § 8.01-581.22.

Any complaint which sets forth such a written election shall contain the following:

A. A statement that the claimant consents to be bound by the provisions of § 8.01-581.22;

B. A statement of the facts constituting the cause of action in ordinary and concise language;

C. A listing of all benefits of any kind paid or payable to the claimant from any source other than the claimant's own assets or assets of the claimant's immediate family as a result of the incident or occurrence forming the basis of the malpractice claim;

D. A demand for judgment for the relief to which the claimant claims he is entitled, except that the dollar amount of the relief sought shall not be stated.

§ 8.01-581.22. Special provisions governing alternative proceedings in certain medical malpractice actions. -- If a claimant makes the written election provided for in § 8.01-581.21, the following provisions shall control the action for malpractice:

A. Damages shall be awarded in accordance with principles of the common law. The jury, or if the action is tried without a jury, the court shall render any award for damages by category of loss. The court shall enter a judgment that future damages, if any, shall be paid in whole by periodic payments rather than by a lump-sum payment; the judgment shall include, if necessary, other provisions to assure that funds are available as periodic payments become due. Any part of the award, if any, which is paid on a periodic basis shall be

adjusted annually according to changes in the consumer price index in the community where the claimant resides. In this subsection, future damages includes damages for future medical treatment, rehabilitation, and care and loss of future earnings;

B. If a claimant who is receiving installment payments of a judgment shall die before the expiration of a 5-year period from the date of the award, and prior to the receipt by the claimant of all such installment payments, the court shall deduct from the total of the installment payments then remaining unpaid the amount thereof representing compensation for expenses of future medical treatment, rehabilitation and care made necessary by the injury involved, shall cause the balance of all such installments after such deduction to be paid to the estate of the claimant so dying and shall cause such judgment to be marked satisfied. If the claimant receiving installment payments shall die after the expiration of a 5-year period from the date of the award, then any payments shall terminate automatically as of the date of the claimant's death;

C. The damages awarded may include compensation for pain and suffering or other non-economic loss. However, compensation for non-economic losses shall not exceed the sum of $100,000;

D. Except when the collateral source is a federal program which by law must seek subrogation and except death benefits paid under life insurance, a claimant may only recover

damages from the health care provider which exceed amounts received by the claimant as compensation for the injuries from collateral sources, whether private, group or governmental, and whether contributory or noncontributory. Evidence of collateral sources, other than a federal program which must by law seek subrogation and the death benefit paid under life insurance, is admissible after the jury, or if the action is tried without a jury, the court has rendered an award. The court may take into account the value of claimant's rights to coverage exhausted or depleted by payment of these collateral benefits by adding back a reasonable estimate of their probable value, or by earmarking and holding for possible periodic payment under Subsection A that amount of the award that would otherwise have been deducted, to see if the impairment of claimant's rights actually takes place in the future;

E. When a claimant is represented by an attorney in the prosecution of his malpractice claim, the claimant's attorney fees from any award made from the first $100,000 may not exceed 35%, from the second $100,000 attorney fees may not exceed 25%, and attorney fees may not exceed 20% on the balance of any award;

F. In the event that a plaintiff's attorney believes in good faith that the fee schedules set forth in Subsection E, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the claimant and other persons

holding liens or assignments on the recovery. Upon such application, the court, in its discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the schedules set forth in Subsection E. If the application is granted, the Court shall issue a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.