

## Practice Pointer



“Practice Pointer,” a regular feature in *The Journal*, offers brief tips from your colleagues to improve your practice. The areas of expertise will vary as will the approaches.

## Medical malpractice legislation update

The 2005 General Assembly session enacted the most significant procedural and evidentiary changes to medical malpractice litigation in several years. These changes were the culmination of a massive two-year lobbying effort by the Medical Society of Virginia (MSV) directed toward securing new and restrictive caps on pain and suffering, attorney’s fees and other limitations on the right to trial by jury.

The pinnacle of this lobbying effort was “White Coat Day,” when 2,000+ doctors marched on the State Capitol in their white coats on February 4, 2004. The Virginia Trial Lawyers Association (VTLA) responded by presenting the facts about medical malpractice in Virginia, facts that made it clear that claims made, cases settled and tried, and dollars paid on claims, were not causing the huge increases in med/mal insurance premiums, and that real people, people victimized by medical negligence, would be further damaged if the MSV’s proposals were adopted.

Ultimately, with extraordinary pressure from the General Assembly, a compromise was agreed to by the VTLA and the MSV, resulting in procedural and evidentiary changes to litigating medical malpractice cases that ultimately protect the substantive rights of victims of medical malpractice, requires insurance companies to provide details of medical malpractice claims to the State Corporation Commission, and greater oversight of negligent doctors by the Board of Medicine. Most importantly, there are no new caps on recoveries, attorney’s fees, or restrictions on the collateral source rule.

This practice pointer contains a summary of the changes. Of course, it is no substitute for reading the statutes.

### *Certificates of Merit,* *Va. Code Ann. §§8.01.20.1, 8.01-52.1*

For the plaintiff’s attorney, the most significant statutory change requires the plaintiff to obtain a written opinion from a qualified expert witness that the defendant being served breached the standard of care and the breach was a proximate cause of the claimed injury prior to *servicing* a motion for judgment arising out of medical malpractice. The certificate is not discoverable nor is there discovery of the identity of the expert. The certifying expert is not required to testify at trial.

The certificate of merit is not required in the case where the plaintiff’s attorney reasonably believes that expert testimony is not necessary. Those are the rare cases where the breach is within the common knowledge of the jurors.

### *Admissibility of Expressions of Sympathy,* *Va. Code Ann. § 8.01-52.1*

Newly enacted Va. Code Ann. § 8.01-52.1 provides a limited exclusion for use at trial of expressions of “sympathy or general sense of benevolence.” Admissions of fault remain admissible.

### *Communications between physicians and patients,* *Amendment of §8.01-399*

Va. Code Ann. §8.01-399, the statutory basis for the patient-physician privilege, has been broadened to permit a physician to disclose in a civil action the “diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner’s treatment . . . .” Unlike the above statutory changes, this provision is not limited to medical malpractice actions.

### *Breach of contract actions are subject to the* *Medical Malpractice Act*

The definition of malpractice in Va. Code Ann. §8.01-581.1 has been broadened to include breaches of contract for personal injury or death based on services of a health care provider.

### *Medical malpractice carriers will be required* *to submit closed claims to the* *State Corporation Commission*

Pursuant to Va. Code Ann. §38.2-2228.2, medical malpractice carriers will be required to submit detailed reports to the S.C.C. of the nature of all claims settled, adjudicated to a final judgment, or closed without payment. The intent of this legislation is to provide the S.C.C. with objective information regarding the nature and volume of medical malpractice claims in Virginia, the amount spent on defending cases, and how cases are being resolved. The report is not to identify the parties. The report shall be a matter of public record.

### *Competency of health care providers*

The Board of Medicine will be required to assess the competency of any physician who has had three paid claims in the prior ten years. The assessment and related documents are subject to the confidentiality provisions of Va. Code Ann. §54.1-2400.2 and are not admissible in evidence.