



COMMONWEALTH OF VIRGINIA

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July 27, 2009

The Honorable Linda T. Puller
Member, Senate of Virginia
P.O. Box 73
Mount Vernon, Virginia 22121-0073

Dear Senator Puller:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You seek guidance regarding the standard of care that must be applied by medical malpractice review panels or finders of fact to determine whether health care providers¹ have delivered quality medical care. Specifically, your concern is about the standard of care to be applied to serious emergency health problems such as strokes and heart problems. Further, you ask what organization's standards of care must be recognized as the official standards by the Commonwealth.

Response

It is my opinion that a medical malpractice review panel or a finder of fact must apply the standard of care for health care providers based on that degree of skill and diligence practiced by comparable health care providers throughout the Commonwealth, as well as the testimony of expert witnesses regarding such standard of care. However, Virginia law permits proof of local customs to determine the appropriate standard. Further, the General Assembly has not adopted either a national standard or a particular organization's standard of care.

Applicable Law and Discussion

The General Assembly has established the standard of care to be applied to health care providers in proceedings before medical malpractice review panels or finders of fact in § 8.01-581.20(A), which provides that:

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,

¹See VA. CODE ANN. § 8.01-581.1 (Supp. 2009) (defining "health care provider" for purposes of Chapter 21.1 of Title 8.01, §§ 8.01-581.1 to 8.01-581.20:1 (Medical Malpractice)). For purposes of this opinion, any reference to health care provider or health care providers means the entities and practitioners defined in § 8.01-581.1.

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.

Section 8.01-581.20(A) establishes a standard of care according to a statewide standard.² The standard of care for physicians is that degree of skill practiced by physicians in the entire state. However, § 8.01-581.20(A) permits proof of local customs to determine the appropriate standard.³ The General Assembly has not adopted a national standard or a particular organization's standard of care.⁴ In Virginia, a plaintiff asserting medical malpractice must establish that the act or omission of the accused physician fell below the community standard of care.⁵ Typically, this is accomplished through expert testimony.

To establish a prima facie case of medical malpractice, a plaintiff must produce evidence: (1) to establish the applicable standard of care; (2) to demonstrate a deviation from the standard; and (3) that develops a causal relationship between the deviation and the injury sustained.⁶ In a typical medical malpractice case, the plaintiff presents expert testimony that the physician departed from the customary standard of care and that such departure is the factual and proximate cause of the plaintiff's injuries.⁷ For example, in one case a plaintiff alleged that her physician negligently performed a gynecological laparoscopic cystectomy in which her colon was perforated.⁸ The plaintiff's expert witness, who was not licensed in the Commonwealth, testified he was aware of the standard of care applicable to basic laparoscopic and abdominal surgical procedures in Virginia through discussion with physicians licensed in the Commonwealth.⁹ The witness stated there were no great differences between one state and another

²See *Black v. Bladergroen*, 258 Va. 438, 443, 521 S.E.2d 168, 170 (1999); Michelle Huckaby Lewis, John K. Gohagan & Daniel J. Merenstein, *The Locality Rule and the Physician's Dilemma: Local Medical Practices vs the National Standard of Care*, 297 JAMA 2633, 2634 (June 20, 2007).

³See *id.* ("In many states, there is also a geographic, or locality, component to the determination of the standard of care. Although 29 states and the District of Columbia have adopted a national standard, 21 states maintain a version of the locality rule, in which the standard of care by which a physician is judged is the standard of care in a particular locality.").

⁴See *Christian v. Surgical Specialists of Richmond, Ltd.*, 268 Va. 60, 65, 596 S.E.2d 522, 525 (2004); see also REPORT OF THE JOINT SUBCOMMITTEE STUDYING VIRGINIA'S MEDICAL MALPRACTICE LAWS, H. DOC. NO. 12, at 6 (1986) (discussing standard of medical care in Virginia; declining to recommend change to standard of care or adopt national standard).

⁵See Kathleen M. McCauley & Dana A Dews, *Medical Malpractice Law*, 41 U. RICH. L. REV. 231, 238 (2006) (noting essential component of medical malpractice case is to provide expert witness testimony that defendant breached standard of care).

⁶See *Raines v. Lutz*, 231 Va. 110, 113, 341 S.E.2d 194, 196 (1986).

⁷See Tim Cramm, Arthur J. Hartz & Michael D. Green, *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 WAKE FOREST L. REV. 699, 701 (2002).

⁸See *Christian*, 268 Va. at 62, 596 S.E.2d at 523.

⁹*Id.* at 63, 596 S.E.2d at 523.

concerning the standard of care for these particular procedures.¹⁰ The Supreme Court of Virginia reversed the trial court's decision denying the doctor's qualification as an expert witness stating that "[t]he clear implication of his testimony as a whole was that he was familiar with the Virginia standard of care applicable to the surgical procedure performed by [the defendant], which coincidentally was the national standard of care."¹¹ Further, "[no] provision of law prohibits Virginia physicians from practicing according to a national standard of care if one exists for a particular specialty, even though neither the General Assembly nor this Court has adopted such a standard."¹²

Medical malpractice law dictates that physicians "possess and exercise that reasonable degree of skill" and diligence "possessed and exercised by members of their profession under similar circumstances."¹³ The law does not demand "the utmost degree of care and skill attainable or known to the profession."¹⁴ Section 8.01-581.20(B) provides that "[i]n 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." Thus, the question for the fact finder becomes not whether a defendant-physician was reasonable in his provision of medical care, but whether he adhered to the customs employed by other physicians in treating similar patients.¹⁵ This reliance on custom to determine the standard of care for physicians is based on the fact that the specialized and complex nature of medical care makes it difficult for a fact finder to have the knowledge or experience to determine what is objectively reasonable.¹⁶

Section 8.01-581.20(A) provides, in part, that:

Any physician ... who is licensed in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified.... A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had active

¹⁰ *Id.*

¹¹ *Id.* at 66, 596 S.E.2d at 525.

¹² *Id.* at 65-66, 596 S.E.2d at 525 (quoting *Black*, 258 Va. at 443, 521 S.E.2d at 170). "Expert testimony is not necessary for proof of negligence in nontechnical matters or those of which an ordinary person may be expected to have knowledge, or where the lack of skill or want of care is so obvious as to render expert testimony unnecessary." 61 AM. JUR. 2D *Physicians, Surgeons, and other Healers*, § 323, at 438 (2002). For example, a doctor's clear cut deviation from a drug manufacturer's recommendations to the medical profession of the conditions under which its drugs should be prescribed. *Id.* Further, in instances where a plaintiff can prove what is or is not proper practice based on a recognized standard or authoritative medical text or treatise. *Id.* Finally, an expert may not be employed in the rare instance where the medical malpractice is so egregious that lay persons, relying on common knowledge and experience, can recognize or infer negligence. See *Raines*, 231 Va. at 113 n.2, 341 S.E.2d at 196 n.2; 61 AM. JUR. 2D, *supra*, § 323, at 437.

¹³ *Cramm et al.*, *supra* note 7, at 702 (citing 61 AM. JUR. 2D *Physicians, Surgeons, and other Healers* 206 (1999)).

¹⁴ *Id.*

¹⁵ *Id.* at 702-03.

¹⁶ *Id.*

clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

The Virginia Supreme Court in clarifying the expert witness requirement has held that to qualify as an expert witness the expert must meet both a "knowledge requirement" and an "active clinical practice requirement."¹⁷ The active clinical practice requirement must be defined in terms of "the relevant medical procedure at issue" and "in the context of the actions by which the defendants [are] alleged to have deviated from the standard of care."¹⁸ To qualify as an expert witness on the standard of care, the witness must have expert knowledge of such standard in the defendant's specialty plus an active clinical practice in either that specialty or a related field of medicine within one year of the alleged malpractice.¹⁹ Thus, the standard of care applied in an emergency department of a hospital necessarily would be evaluated based on the procedure at issue.²⁰ Unless the emergency room setting requires that the procedure be performed in a different manner, any physician proffered as an expert witness could meet the "related field of medicine" test for purposes of § 8.01-581.20(A) if he performs the procedure and the standard of care for performing the procedure is the same.²¹ An expert's lack of knowledge regarding certain emergency medicine procedures might disqualify him from rendering expert testimony on those procedures, but would not preclude his testimony on procedures that are common to emergency medicine and his field of expertise assuming the procedures are performed according to the same standard of care.²²

Conclusion

Accordingly, it is my opinion that a medical malpractice review panel or a finder of fact must apply the standard of care for health care providers based on that degree of skill and diligence practiced by comparable health care providers throughout the Commonwealth, as well as the testimony of expert witnesses regarding such standard of care. However, Virginia law permits proof of local customs to determine the appropriate standard. Further, the General Assembly has not adopted either a national standard or a particular organization's standard of care.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read "W. C. Mims", with a stylized flourish at the end.

William C. Mims

6:1354; 1:941/09-032

¹⁷Hinkley v. Koehler, 269 Va. 82, 88, 606 S.E.2d 803, 806 (2005); *see also* McCauley & Dews, *supra* note 5, at 238 (discussing *Hinkley* case).

¹⁸McCauley & Dews, *supra* note 5, at 238 (alteration in original) (citations omitted).

¹⁹*See* Jackson v. Qureshi, 277 Va. 114, 122, 671 S.E.2d 163, 167 (2009).

²⁰Sami v. Varn, 260 Va. 280, 285, 535 S.E.2d 172, 174 (2000).

²¹*Id.* at 285, 535 S.E.2d at 174-75.

²²*Id.* at 284, 535 S.E.2d at 174.