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SENATE BILL NO. 97

Offered January 9, 2008

Prefiled January 2, 2008

A BILL to amend and reenact §§ 16.1-337, 19.2-169.6 and 32.1-127.1:03 of the Code of Virginia and to amend the Code of Virginia by adding in Article 1 of Chapter 8 of Title 37.2 a section numbered 37.2-804.2, relating to disclosure of mental health records.

 Patron—Lucas

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 16.1-337, 19.2-169.6 and 32.1-127.1:03 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 1 of Chapter 8 of Title 37.2 a section numbered 37.2-804.2 as follows:

§ 16.1-337. Inpatient treatment of minors; general applicability.

A. A minor may be admitted to a mental health facility for inpatient treatment only pursuant to §§ 16.1-338, 16.1-339, or § 16.1-340 or in accordance with an order of involuntary commitment entered pursuant to §§ 16.1-341 through 16.1-345. The provisions of Article 12 (§ 16.1-299 et seq.) of Chapter 11 of this title relating to the confidentiality of files, papers, and records shall apply to proceedings under §§ 16.1-339 through 16.1-345.

B. Any health care provider, as defined in § 32.1-127.1:03, shall, upon request, disclose to a magistrate, court, juvenile intake officer, evaluator required under § 16.1-342, community services board, or behavioral health authority performing evaluation, preadmission screening, or monitoring duties under this article, or any law-enforcement officer, all health records of the minor necessary to enable each of them to perform their duties under this article, as authorized by subsection D of § 32.1-127.1:03. These health care entities shall also disclose to one another such records as necessary to provide treatment to the minor and to monitor such treatment.

§ 19.2-169.6. Emergency treatment prior to trial.

A. Any defendant who is not subject to the provisions of § 19.2-169.2 may be hospitalized for psychiatric treatment prior to trial if:

1. The court with jurisdiction over the defendant's case finds clear and convincing evidence that the defendant (i) is being properly detained in jail prior to trial; (ii) has mental illness and is imminently dangerous to himself or others in the opinion of a qualified mental health professional; and (iii) requires treatment in a hospital rather than the jail in the opinion of a qualified mental health professional; or

2. The person having custody over a defendant who is awaiting trial has reasonable cause to believe that (i) the defendant has mental illness and is imminently dangerous to himself or others and (ii) requires treatment in a hospital rather than jail and the person having such custody arranges for an evaluation of the defendant by a person skilled in the diagnosis and treatment of mental illness provided a district court judge or a special justice, as defined in § 37.2-100 or, if a judge or special justice is not available, a magistrate, upon the advice of a person skilled in the diagnosis and treatment of mental illness, subsequently issues a temporary detention order for treatment in accordance with the procedures specified in §§ 37.2-809 through 37.2-813. In no event shall the defendant have the right to make application for voluntary admission and treatment as may be otherwise provided in § 37.2-805 or 37.2-814.

If the defendant is committed pursuant to subdivision 1 of this subsection, the attorney for the defendant shall be notified that the court is considering hospitalizing the defendant for psychiatric treatment and shall have the opportunity to challenge the findings of the qualified mental health professional. If the defendant is detained pursuant to subdivision 2 of this subsection, the court having jurisdiction over the defendant's case and the attorney for the defendant shall be given notice prior to the detention pursuant to a temporary detention order or as soon thereafter as is reasonable. Upon detention pursuant to subdivision 2 of this subsection, a hearing shall be held, upon notice to the attorney for the defendant, either (i) before the court having jurisdiction over the defendant's case or (ii) before a district court judge or a special justice, as defined in § 37.2-100, in accordance with the provisions of § 37.2-820, in which case the defendant shall be represented by counsel as specified in § 37.2-814; the hearing shall be held within 48 hours of execution of the temporary order to allow the court that hears the case to make the findings, based upon clear and convincing evidence, that are specified in subdivision 1 of this subsection. If the 48-hour period herein specified terminates on a Saturday, Sunday, or legal holiday, the person may be detained for the same period allowed for detention pursuant to a

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59 temporary detention order issued pursuant to §§ 37.2-809 through 37.2-813.

60 In any case in which the defendant is hospitalized pursuant to this section, the court having
61 jurisdiction over the defendant's case may provide by order that the admitting hospital evaluate the
62 defendant's competency to stand trial and his mental state at the time of the offense pursuant to
63 §§ 19.2-169.1 and 19.2-169.5.

64 B. A defendant subject to this section shall be treated at a hospital designated by the Commissioner
65 as appropriate for treatment and evaluation of persons under criminal charge. The director of the hospital
66 shall, within 30 days of the defendant's admission, send a report to the court with jurisdiction over the
67 defendant addressing the defendant's continued need for treatment for a mental illness and being
68 imminently dangerous to himself or others and, if so ordered by the court, the defendant's competency to
69 stand trial, pursuant to subsection D of § 19.2-169.1, and his mental state at the time of the offense,
70 pursuant to subsection D of § 19.2-169.5. Based on this report, the court shall (i) find the defendant
71 incompetent to stand trial pursuant to subsection E of § 19.2-169.1 and proceed accordingly, (ii) order
72 that the defendant be discharged from custody pending trial, (iii) order that the defendant be returned to
73 jail pending trial, or (iv) make other appropriate disposition, including dismissal of charges and release
74 of the defendant.

75 C. A defendant may not be hospitalized longer than 30 days under this section unless the court
76 which has criminal jurisdiction over him or a district court judge or a special justice, as defined in
77 § 37.2-100, holds a hearing at which the defendant shall be represented by an attorney and finds clear
78 and convincing evidence that the defendant continues to (i) have a mental illness, (ii) be imminently
79 dangerous to himself or others, and (iii) be in need of psychiatric treatment in a hospital. Hospitalization
80 may be extended in this manner for periods of 60 days, but in no event may such hospitalization be
81 continued beyond trial, nor shall such hospitalization act to delay trial, so long as the defendant remains
82 competent to stand trial.

83 *D. Any health care provider, as defined in § 32.1-127.1:03, rendering services to a defendant who is*
84 *the subject of a proceeding under this section, shall, upon request, disclose to a magistrate, court,*
85 *qualified mental health professional, employee or designee of a community services board or behavioral*
86 *health authority, the defendant's attorney, or law-enforcement officer involved in the emergency custody,*
87 *temporary detention, or involuntary commitment process of an individual all health records of the*
88 *individual necessary to enable each of them to perform their duties under this chapter, as authorized by*
89 *subsection D of § 32.1-127.1:03. These health care providers shall also disclose to one another such*
90 *records as necessary to provide treatment to the individual and to monitor such treatment.*

91 § 32.1-127.1:03. Health records privacy.

92 A. There is hereby recognized an individual's right of privacy in the content of his health records.
93 Health records are the property of the health care entity maintaining them, and, except when permitted
94 or required by this section or by other provisions of state law, no health care entity, or other person
95 working in a health care setting, may disclose an individual's health records.

96 Pursuant to this subsection:

97 1. Health care entities shall disclose health records to the individual who is the subject of the health
98 record, except as provided in subsections E and F of this section and subsection B of § 8.01-413.

99 2. Health records shall not be removed from the premises where they are maintained without the
100 approval of the health care entity that maintains such health records, except in accordance with a court
101 order or subpoena consistent with subsection C of § 8.01-413 or with this section or in accordance with
102 the regulations relating to change of ownership of health records promulgated by a health regulatory
103 board established in Title 54.1.

104 3. No person to whom health records are disclosed shall redisclose or otherwise reveal the health
105 records of an individual, beyond the purpose for which such disclosure was made, without first
106 obtaining the individual's specific authorization to such redisclosure. This redisclosure prohibition shall
107 not, however, prevent (i) any health care entity that receives health records from another health care
108 entity from making subsequent disclosures as permitted under this section and the federal Department of
109 Health and Human Services regulations relating to privacy of the electronic transmission of data and
110 protected health information promulgated by the United States Department of Health and Human
111 Services as required by the Health Insurance Portability and Accountability Act (HIPAA) (42 U.S.C.
112 § 1320d et seq.) or (ii) any health care entity from furnishing health records and aggregate or other data,
113 from which individually identifying prescription information has been removed, encoded or encrypted, to
114 qualified researchers, including, but not limited to, pharmaceutical manufacturers and their agents or
115 contractors, for purposes of clinical, pharmaco-epidemiological, pharmaco-economic, or other health
116 services research.

117 B. As used in this section:

118 "Agent" means a person who has been appointed as an individual's agent under a power of attorney
119 for health care or an advance directive under the Health Care Decisions Act (§ 54.1-2981 et seq.).

120 "Certification" means a written representation that is delivered by hand, by first-class mail, by

overnight delivery service, or by facsimile if the sender obtains a facsimile-machine-generated confirmation reflecting that all facsimile pages were successfully transmitted.

"Guardian" means a court-appointed guardian of the person.

"Health care clearinghouse" means, consistent with the definition set out in 45 C.F.R. § 160.103, a public or private entity, such as a billing service, repricing company, community health management information system or community health information system, and "value-added" networks and switches, that performs either of the following functions: (i) processes or facilitates the processing of health information received from another entity in a nonstandard format or containing nonstandard data content into standard data elements or a standard transaction; or (ii) receives a standard transaction from another entity and processes or facilitates the processing of health information into nonstandard format or nonstandard data content for the receiving entity.

"Health care entity" means any health care provider, health plan or health care clearinghouse.

"Health care provider" means those entities listed in the definition of "health care provider" in § 8.01-581.1, except that state-operated facilities shall also be considered health care providers for the purposes of this section. Health care provider shall also include all persons who are licensed, certified, registered or permitted or who hold a multistate licensure privilege issued by any of the health regulatory boards within the Department of Health Professions, except persons regulated by the Board of Funeral Directors and Embalmers or the Board of Veterinary Medicine.

"Health plan" means an individual or group plan that provides, or pays the cost of, medical care.

"Health plan" shall include any entity included in such definition as set out in 45 C.F.R. § 160.103.

"Health record" means any written, printed or electronically recorded material maintained by a health care entity in the course of providing health services to an individual concerning the individual and the services provided. "Health record" also includes the substance of any communication made by an individual to a health care entity in confidence during or in connection with the provision of health services or information otherwise acquired by the health care entity about an individual in confidence and in connection with the provision of health services to the individual.

"Health services" means, but shall not be limited to, examination, diagnosis, evaluation, treatment, pharmaceuticals, aftercare, habilitation or rehabilitation and mental health therapy of any kind, as well as payment or reimbursement for any such services.

"Individual" means a patient who is receiving or has received health services from a health care entity.

"Individually identifying prescription information" means all prescriptions, drug orders or any other prescription information that specifically identifies an individual.

"Parent" means a biological, adoptive or foster parent.

"Psychotherapy notes" means comments, recorded in any medium by a health care provider who is a mental health professional, documenting or analyzing the contents of conversation during a private counseling session with an individual or a group, joint, or family counseling session that are separated from the rest of the individual's health record. "Psychotherapy notes" shall not include annotations relating to medication and prescription monitoring, counseling session start and stop times, treatment modalities and frequencies, clinical test results, or any summary of any symptoms, diagnosis, prognosis, functional status, treatment plan, or the individual's progress to date.

C. The provisions of this section shall not apply to any of the following:

1. The status of and release of information governed by §§ 65.2-604 and 65.2-607 of the Virginia Workers' Compensation Act;

2. Except where specifically provided herein, the health records of minors; or

3. The release of juvenile health records to a secure facility or a shelter care facility pursuant to § 16.1-248.3.

D. Health care entities may, and, when required by other provisions of state law, shall, disclose health records:

1. As set forth in subsection E, pursuant to the written authorization of (i) the individual or (ii) in the case of a minor, (a) his custodial parent, guardian or other person authorized to consent to treatment of minors pursuant to § 54.1-2969 or (b) the minor himself, if he has consented to his own treatment pursuant to § 54.1-2969, or (iii) in emergency cases or situations where it is impractical to obtain an individual's written authorization, pursuant to the individual's oral authorization for a health care provider or health plan to discuss the individual's health records with a third party specified by the individual;

2. In compliance with a subpoena issued in accord with subsection H, pursuant to a search warrant or a grand jury subpoena, pursuant to court order upon good cause shown or in compliance with a subpoena issued pursuant to subsection C of § 8.01-413;

3. In accord with subsection F of § 8.01-399 including, but not limited to, situations where disclosure is reasonably necessary to establish or collect a fee or to defend a health care entity or the health care

entity's employees or staff against any accusation of wrongful conduct; also as required in the course of an investigation, audit, review or proceedings regarding a health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity;

4. In testimony in accordance with §§ 8.01-399 and 8.01-400.2;

5. In compliance with the provisions of § 8.01-413;

6. As required or authorized by law relating to public health activities, health oversight activities, serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease, public safety, and suspected child or adult abuse reporting requirements, including, but not limited to, those contained in §§ 32.1-36, 32.1-36.1, 32.1-40, 32.1-41, 32.1-127.1:04, 32.1-276.5, 32.1-283, 32.1-283.1, 37.2-710, 37.2-839, 53.1-40.10, 54.1-2400.6, 54.1-2400.7, 54.1-2403.3, 54.1-2506, 54.1-2966, 54.1-2966.1, 54.1-2967, 54.1-2968, 63.2-1509, and 63.2-1606;

7. Where necessary in connection with the care of the individual;

8. In connection with the health care entity's own health care operations or the health care operations of another health care entity, as specified in 45 C.F.R. § 164.501, or in the normal course of business in accordance with accepted standards of practice within the health services setting; however, the maintenance, storage, and disclosure of the mass of prescription dispensing records maintained in a pharmacy registered or permitted in Virginia shall only be accomplished in compliance with §§ 54.1-3410, 54.1-3411, and 54.1-3412;

9. When the individual has waived his right to the privacy of the health records;

10. When examination and evaluation of an individual are undertaken pursuant to judicial or administrative law order, but only to the extent as required by such order;

11. To the guardian ad litem and any attorney representing the respondent in the course of a guardianship proceeding of an adult patient who is the respondent in a proceeding under Chapter 10 (§ 37.2-1000 et seq.) of Title 37.2;

12. To the attorney appointed by the court to represent an individual who is or has been a patient who is the subject of a civil commitment proceeding under Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2 or a judicial authorization for treatment proceeding pursuant to Chapter 11 (§ 37.2-1100 et seq.) of Title 37.2;

13. *To any magistrate, court, mental health examiner required under § 16.1-342 or 37.2-815, community services board or behavioral health authority, or law-enforcement officer involved in an involuntary commitment proceeding under Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title 16.1; § 19.2-169.6, 19.2-176 or 19.2-177.1; or Chapter 8 (§ 37.2-800 et seq.) of Title 37.2 regarding the subject of such proceeding;*

14. To the attorney and/or guardian ad litem of a minor who represents such minor in any judicial or administrative proceeding, if the court or administrative hearing officer has entered an order granting the attorney or guardian ad litem this right and such attorney or guardian ad litem presents evidence to the health care entity of such order;

15. With regard to the Court-Appointed Special Advocate (CASA) program, a minor's health records in accord with § 9.1-156;

16. To an agent appointed under an individual's power of attorney or to an agent or decision maker designated in an individual's advance directive for health care or for decisions on anatomical gifts and organ, tissue or eye donation or to any other person consistent with the provisions of the Health Care Decisions Act (§ 54.1-2981 et seq.);

17. To third-party payors and their agents for purposes of reimbursement;

18. As is necessary to support an application for receipt of health care benefits from a governmental agency or as required by an authorized governmental agency reviewing such application or reviewing benefits already provided or as necessary to the coordination of prevention and control of disease, injury, or disability and delivery of such health care benefits pursuant to § 32.1-127.1:04;

19. Upon the sale of a medical practice as provided in § 54.1-2405; or upon a change of ownership or closing of a pharmacy pursuant to regulations of the Board of Pharmacy;

20. In accord with subsection B of § 54.1-2400.1, to communicate an individual's specific and immediate threat to cause serious bodily injury or death of an identified or readily identifiable person;

21. Where necessary in connection with the implementation of a hospital's routine contact process for organ donation pursuant to subdivision B 4 of § 32.1-127;

22. In the case of substance abuse records, when permitted by and in conformity with requirements of federal law found in 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2;

23. In connection with the work of any entity established as set forth in § 8.01-581.16 to evaluate the adequacy or quality of professional services or the competency and qualifications for professional staff privileges;

24. If the health records are those of a deceased or mentally incapacitated individual to the personal representative or executor of the deceased individual or the legal guardian or committee of the incompetent or incapacitated individual or if there is no personal representative, executor, legal guardian

or committee appointed, to the following persons in the following order of priority: a spouse, an adult son or daughter, either parent, an adult brother or sister, or any other relative of the deceased individual in order of blood relationship;

2425. For the purpose of conducting record reviews of inpatient hospital deaths to promote identification of all potential organ, eye, and tissue donors in conformance with the requirements of applicable federal law and regulations, including 42 C.F.R. § 482.45, (i) to the health care provider's designated organ procurement organization certified by the United States Health Care Financing Administration and (ii) to any eye bank or tissue bank in Virginia certified by the Eye Bank Association of America or the American Association of Tissue Banks;

2526. To the Office of the Inspector General for Mental Health, Mental Retardation and Substance Abuse Services pursuant to Article 3 (§ 37.2-423 et seq.) of Chapter 4 of Title 37.2;

2627. To an entity participating in the activities of a local health partnership authority established pursuant to Article 6.1 (§ 32.1-122.10:001 et seq.) of Chapter 4 of this title, pursuant to subdivision 1 of this subsection;

2728. To law-enforcement officials by each licensed emergency medical services agency, (i) when the individual is the victim of a crime or (ii) when the individual has been arrested and has received emergency medical services or has refused emergency medical services and the health records consist of the prehospital patient care report required by § 32.1-116.1;

2829. To law-enforcement officials, in response to their request, for the purpose of identifying or locating a suspect, fugitive, person required to register pursuant to § 9.1-901 of the Sex Offender and Crimes Against Minors Registry Act, material witness, or missing person, provided that only the following information may be disclosed: (i) name and address of the person, (ii) date and place of birth of the person, (iii) social security number of the person, (iv) blood type of the person, (v) date and time of treatment received by the person, (vi) date and time of death of the person, where applicable, (vii) description of distinguishing physical characteristics of the person, and (viii) type of injury sustained by the person.

2930. To law-enforcement officials regarding the death of an individual for the purpose of alerting law enforcement of the death if the health care entity has a suspicion that such death may have resulted from criminal conduct;

3031. To law-enforcement officials if the health care entity believes in good faith that the information disclosed constitutes evidence of a crime that occurred on its premises;

3132. To the State Health Commissioner pursuant to § 32.1-48.015 when such records are those of a person or persons who are subject to an order of quarantine or an order of isolation pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of this title; and

3233. To the Commissioner of the Department of Labor and Industry or his designee by each licensed emergency medical services agency when the records consist of the prehospital patient care report required by § 32.1-116.1 and the patient has suffered an injury or death on a work site while performing duties or tasks that are within the scope of his employment.

Notwithstanding the provisions of subdivisions 1 through 3233 of this subsection, a health care entity shall obtain an individual's written authorization for any disclosure of psychotherapy notes, except when disclosure by the health care entity is (i) for its own training programs in which students, trainees, or practitioners in mental health are being taught under supervision to practice or to improve their skills in group, joint, family, or individual counseling; (ii) to defend itself or its employees or staff against any accusation of wrongful conduct; (iii) in the discharge of the duty, in accordance with subsection B of § 54.1-2400.1, to take precautions to protect third parties from violent behavior or other serious harm; (iv) required in the course of an investigation, audit, review, or proceeding regarding a health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity; or (v) otherwise required by law.

E. Requests for copies of health records shall (i) be in writing, dated and signed by the requester; (ii) identify the nature of the information requested; and (iii) include evidence of the authority of the requester to receive such copies and identification of the person to whom the information is to be disclosed. The health care entity shall accept a photocopy, facsimile, or other copy of the original signed by the requestor as if it were an original. Within 15 days of receipt of a request for copies of health records, the health care entity shall do one of the following: (i) furnish such copies to any requester authorized to receive them; (ii) inform the requester if the information does not exist or cannot be found; (iii) if the health care entity does not maintain a record of the information, so inform the requester and provide the name and address, if known, of the health care entity who maintains the record; or (iv) deny the request (a) under subsection F, (b) on the grounds that the requester has not established his authority to receive such health records or proof of his identity, or (c) as otherwise provided by law. Procedures set forth in this section shall apply only to requests for health records not specifically governed by other provisions of state law.

305 F. Except as provided in subsection B of § 8.01-413, copies of an individual's health records shall
306 not be furnished to such individual or anyone authorized to act on the individual's behalf when the
307 individual's treating physician or the individual's treating clinical psychologist has made a part of the
308 individual's record a written statement that, in the exercise of his professional judgment, the furnishing
309 to or review by the individual of such health records would be reasonably likely to endanger the life or
310 physical safety of the individual or another person, or that such health record makes reference to a
311 person other than a health care provider and the access requested would be reasonably likely to cause
312 substantial harm to such referenced person. If any health care entity denies a request for copies of health
313 records based on such statement, the health care entity shall inform the individual of the individual's
314 right to designate, in writing, at his own expense, another reviewing physician or clinical psychologist,
315 whose licensure, training and experience relative to the individual's condition are at least equivalent to
316 that of the physician or clinical psychologist upon whose opinion the denial is based. The designated
317 reviewing physician or clinical psychologist shall make a judgment as to whether to make the health
318 record available to the individual.

319 The health care entity denying the request shall also inform the individual of the individual's right to
320 request in writing that such health care entity designate, at its own expense, a physician or clinical
321 psychologist, whose licensure, training, and experience relative to the individual's condition are at least
322 equivalent to that of the physician or clinical psychologist upon whose professional judgment the denial
323 is based and who did not participate in the original decision to deny the health records, who shall make
324 a judgment as to whether to make the health record available to the individual. The health care entity
325 shall comply with the judgment of the reviewing physician or clinical psychologist. The health care
326 entity shall permit copying and examination of the health record by such other physician or clinical
327 psychologist designated by either the individual at his own expense or by the health care entity at its
328 expense.

329 Any health record copied for review by any such designated physician or clinical psychologist shall
330 be accompanied by a statement from the custodian of the health record that the individual's treating
331 physician or clinical psychologist determined that the individual's review of his health record would be
332 reasonably likely to endanger the life or physical safety of the individual or would be reasonably likely
333 to cause substantial harm to a person referenced in the health record who is not a health care provider.

334 Further, nothing herein shall be construed as giving, or interpreted to bestow the right to receive
335 copies of, or otherwise obtain access to, psychotherapy notes to any individual or any person authorized
336 to act on his behalf.

337 G. A written authorization to allow release of an individual's health records shall substantially include
338 the following information:

339 AUTHORIZATION TO RELEASE CONFIDENTIAL HEALTH RECORDS

340 Individual's Name

341 Health Care Entity's Name

342 Person, Agency, or Health Care Entity to whom disclosure is to
343 be made

344 Information or Health Records to be disclosed

345 Purpose of Disclosure or at the Request of the Individual

346 As the person signing this authorization, I understand that I am giving my
347 permission to the above-named health care entity for disclosure of
348 confidential health records. I understand that the health care entity may not
349 condition treatment or payment on my willingness to sign this authorization
350 unless the specific circumstances under which such conditioning is permitted
351 by law are applicable and are set forth in this authorization. I also
352 understand that I have the right to revoke this authorization at any time, but
353 that my revocation is not effective until delivered in writing to the person
354 who is in possession of my health records and is not effective as to health
355 records already disclosed under this authorization. A copy of this
356 authorization and a notation concerning the persons or agencies to whom
357 disclosure was made shall be included with my original health records. I
358 understand that health information disclosed under this authorization might be
359 redisclosed by a recipient and may, as a result of such disclosure, no longer
360 be protected to the same extent as such health information was protected by
361 law while solely in the possession of the health care entity.

362 This authorization expires on (date) or (event)

363 Signature of Individual or Individual's Legal Representative if Individual is

Unable to Sign

Relationship or Authority of Legal Representative

Date of Signature

H. Pursuant to this subsection:

1. Unless excepted from these provisions in subdivision 9 of this subsection, no party to a civil, criminal or administrative action or proceeding shall request the issuance of a subpoena duces tecum for another party's health records or cause a subpoena duces tecum to be issued by an attorney unless a copy of the request for the subpoena or a copy of the attorney-issued subpoena is provided to the other party's counsel or to the other party if pro se, simultaneously with filing the request or issuance of the subpoena. No party to an action or proceeding shall request or cause the issuance of a subpoena duces tecum for the health records of a nonparty witness unless a copy of the request for the subpoena or a copy of the attorney-issued subpoena is provided to the nonparty witness simultaneously with filing the request or issuance of the attorney-issued subpoena.

No subpoena duces tecum for health records shall set a return date earlier than 15 days from the date of the subpoena except by order of a court or administrative agency for good cause shown. When a court or administrative agency directs that health records be disclosed pursuant to a subpoena duces tecum earlier than 15 days from the date of the subpoena, a copy of the order shall accompany the subpoena.

Any party requesting a subpoena duces tecum for health records or on whose behalf the subpoena duces tecum is being issued shall have the duty to determine whether the individual whose health records are being sought is pro se or a nonparty.

In instances where health records being subpoenaed are those of a pro se party or nonparty witness, the party requesting or issuing the subpoena shall deliver to the pro se party or nonparty witness together with the copy of the request for subpoena, or a copy of the subpoena in the case of an attorney-issued subpoena, a statement informing them of their rights and remedies. The statement shall include the following language and the heading shall be in boldface capital letters:

NOTICE TO INDIVIDUAL

The attached document means that (insert name of party requesting or causing issuance of the subpoena) has either asked the court or administrative agency to issue a subpoena or a subpoena has been issued by the other party's attorney to your doctor, other health care providers (names of health care providers inserted here) or other health care entity (name of health care entity to be inserted here) requiring them to produce your health records. Your doctor, other health care provider or other health care entity is required to respond by providing a copy of your health records. If you believe your health records should not be disclosed and object to their disclosure, you have the right to file a motion with the clerk of the court or the administrative agency to quash the subpoena. If you elect to file a motion to quash, such motion must be filed within 15 days of the date of the request or of the attorney-issued subpoena. You may contact the clerk's office or the administrative agency to determine the requirements that must be satisfied when filing a motion to quash and you may elect to contact an attorney to represent your interest. If you elect to file a motion to quash, you must notify your doctor, other health care provider(s), or other health care entity, that you are filing the motion so that the health care provider or health care entity knows to send the health records to the clerk of court or administrative agency in a sealed envelope or package for safekeeping while your motion is decided.

2. Any party filing a request for a subpoena duces tecum or causing such a subpoena to be issued for an individual's health records shall include a Notice in the same part of the request in which the recipient of the subpoena duces tecum is directed where and when to return the health records. Such notice shall be in boldface capital letters and shall include the following language:

NOTICE TO HEALTH CARE ENTITIES

A COPY OF THIS SUBPOENA DUCES TECUM HAS BEEN PROVIDED TO THE INDIVIDUAL WHOSE HEALTH RECORDS ARE BEING REQUESTED OR HIS COUNSEL. YOU OR THAT INDIVIDUAL HAS THE RIGHT TO FILE A MOTION TO QUASH (OBJECT TO) THE ATTACHED SUBPOENA. IF YOU ELECT TO FILE A MOTION TO QUASH, YOU MUST FILE THE MOTION WITHIN 15 DAYS OF THE DATE OF THIS SUBPOENA.

YOU MUST NOT RESPOND TO THIS SUBPOENA UNTIL YOU HAVE RECEIVED WRITTEN CERTIFICATION FROM THE PARTY ON WHOSE BEHALF THE SUBPOENA WAS ISSUED THAT THE TIME FOR FILING A MOTION TO QUASH HAS ELAPSED AND THAT:

NO MOTION TO QUASH WAS FILED; OR

ANY MOTION TO QUASH HAS BEEN RESOLVED BY THE COURT OR THE ADMINISTRATIVE AGENCY AND THE DISCLOSURES SOUGHT ARE CONSISTENT WITH SUCH RESOLUTION.

IF YOU RECEIVE NOTICE THAT THE INDIVIDUAL WHOSE HEALTH RECORDS ARE BEING REQUESTED HAS FILED A MOTION TO QUASH THIS SUBPOENA, OR IF YOU FILE A

425 MOTION TO QUASH THIS SUBPOENA, YOU MUST SEND THE HEALTH RECORDS ONLY TO
426 THE CLERK OF THE COURT OR ADMINISTRATIVE AGENCY THAT ISSUED THE SUBPOENA
427 OR IN WHICH THE ACTION IS PENDING AS SHOWN ON THE SUBPOENA USING THE
428 FOLLOWING PROCEDURE:

429 PLACE THE HEALTH RECORDS IN A SEALED ENVELOPE AND ATTACH TO THE SEALED
430 ENVELOPE A COVER LETTER TO THE CLERK OF COURT OR ADMINISTRATIVE AGENCY
431 WHICH STATES THAT CONFIDENTIAL HEALTH RECORDS ARE ENCLOSED AND ARE TO BE
432 HELD UNDER SEAL PENDING A RULING ON THE MOTION TO QUASH THE SUBPOENA.
433 THE SEALED ENVELOPE AND THE COVER LETTER SHALL BE PLACED IN AN OUTER
434 ENVELOPE OR PACKAGE FOR TRANSMITTAL TO THE COURT OR ADMINISTRATIVE
435 AGENCY.

436 3. Upon receiving a valid subpoena duces tecum for health records, health care entities shall have the
437 duty to respond to the subpoena in accordance with the provisions of subdivisions 4, 5, 6, 7, and 8 of
438 this subsection.

439 4. Except to deliver to a clerk of the court or administrative agency subpoenaed health records in a
440 sealed envelope as set forth, health care entities shall not respond to a subpoena duces tecum for such
441 health records until they have received a certification as set forth in subdivision 5 or 8 of this subsection
442 from the party on whose behalf the subpoena duces tecum was issued.

443 If the health care entity has actual receipt of notice that a motion to quash the subpoena has been
444 filed or if the health care entity files a motion to quash the subpoena for health records, then the health
445 care entity shall produce the health records, in a securely sealed envelope, to the clerk of the court or
446 administrative agency issuing the subpoena or in whose court or administrative agency the action is
447 pending. The court or administrative agency shall place the health records under seal until a
448 determination is made regarding the motion to quash. The securely sealed envelope shall only be opened
449 on order of the judge or administrative agency. In the event the court or administrative agency grants
450 the motion to quash, the health records shall be returned to the health care entity in the same sealed
451 envelope in which they were delivered to the court or administrative agency. In the event that a judge or
452 administrative agency orders the sealed envelope to be opened to review the health records in camera, a
453 copy of the order shall accompany any health records returned to the health care entity. The health
454 records returned to the health care entity shall be in a securely sealed envelope.

455 5. If no motion to quash is filed within 15 days of the date of the request or of the attorney-issued
456 subpoena, the party on whose behalf the subpoena was issued shall have the duty to certify to the
457 subpoenaed health care entity that the time for filing a motion to quash has elapsed and that no motion
458 to quash was filed. Any health care entity receiving such certification shall have the duty to comply
459 with the subpoena duces tecum by returning the specified health records by either the return date on the
460 subpoena or five days after receipt of the certification, whichever is later.

461 6. In the event that the individual whose health records are being sought files a motion to quash the
462 subpoena, the court or administrative agency shall decide whether good cause has been shown by the
463 discovering party to compel disclosure of the individual's health records over the individual's objections.
464 In determining whether good cause has been shown, the court or administrative agency shall consider (i)
465 the particular purpose for which the information was collected; (ii) the degree to which the disclosure of
466 the records would embarrass, injure, or invade the privacy of the individual; (iii) the effect of the
467 disclosure on the individual's future health care; (iv) the importance of the information to the lawsuit or
468 proceeding; and (v) any other relevant factor.

469 7. Concurrent with the court or administrative agency's resolution of a motion to quash, if
470 subpoenaed health records have been submitted by a health care entity to the court or administrative
471 agency in a sealed envelope, the court or administrative agency shall: (i) upon determining that no
472 submitted health records should be disclosed, return all submitted health records to the health care entity
473 in a sealed envelope; (ii) upon determining that all submitted health records should be disclosed, provide
474 all the submitted health records to the party on whose behalf the subpoena was issued; or (iii) upon
475 determining that only a portion of the submitted health records should be disclosed, provide such portion
476 to the party on whose behalf the subpoena was issued and return the remaining health records to the
477 health care entity in a sealed envelope.

478 8. Following the court or administrative agency's resolution of a motion to quash, the party on whose
479 behalf the subpoena duces tecum was issued shall have the duty to certify in writing to the subpoenaed
480 health care entity a statement of one of the following:

481 a. All filed motions to quash have been resolved by the court or administrative agency and the
482 disclosures sought in the subpoena duces tecum are consistent with such resolution; and, therefore, the
483 health records previously delivered in a sealed envelope to the clerk of the court or administrative
484 agency will not be returned to the health care entity;

485 b. All filed motions to quash have been resolved by the court or administrative agency and the
486 disclosures sought in the subpoena duces tecum are consistent with such resolution and that, since no

health records have previously been delivered to the court or administrative agency by the health care entity, the health care entity shall comply with the subpoena duces tecum by returning the health records designated in the subpoena by the return date on the subpoena or five days after receipt of certification, whichever is later;

c. All filed motions to quash have been resolved by the court or administrative agency and the disclosures sought in the subpoena duces tecum are not consistent with such resolution; therefore, no health records shall be disclosed and all health records previously delivered in a sealed envelope to the clerk of the court or administrative agency will be returned to the health care entity;

d. All filed motions to quash have been resolved by the court or administrative agency and the disclosures sought in the subpoena duces tecum are not consistent with such resolution and that only limited disclosure has been authorized. The certification shall state that only the portion of the health records as set forth in the certification, consistent with the court or administrative agency's ruling, shall be disclosed. The certification shall also state that health records that were previously delivered to the court or administrative agency for which disclosure has been authorized will not be returned to the health care entity; however, all health records for which disclosure has not been authorized will be returned to the health care entity; or

e. All filed motions to quash have been resolved by the court or administrative agency and the disclosures sought in the subpoena duces tecum are not consistent with such resolution and, since no health records have previously been delivered to the court or administrative agency by the health care entity, the health care entity shall return only those health records specified in the certification, consistent with the court or administrative agency's ruling, by the return date on the subpoena or five days after receipt of the certification, whichever is later.

A copy of the court or administrative agency's ruling shall accompany any certification made pursuant to this subdivision.

9. The provisions of this subsection have no application to subpoenas for health records requested under § 8.01-413, or issued by a duly authorized administrative agency conducting an investigation, audit, review or proceedings regarding a health care entity's conduct.

The provisions of this subsection shall apply to subpoenas for the health records of both minors and adults.

Nothing in this subsection shall have any effect on the existing authority of a court or administrative agency to issue a protective order regarding health records, including, but not limited to, ordering the return of health records to a health care entity, after the period for filing a motion to quash has passed.

A subpoena for substance abuse records must conform to the requirements of federal law found in 42 C.F.R. Part 2, Subpart E.

I. Health care entities may testify about the health records of an individual in compliance with §§ 8.01-399 and 8.01-400.2.

J. If an individual requests a copy of his health record from a health care entity, the health care entity may impose a reasonable cost-based fee, which shall include only the cost of supplies for and labor of copying the requested information, postage when the individual requests that such information be mailed, and preparation of an explanation or summary of such information as agreed to by the individual. For the purposes of this section, "individual" shall subsume a person with authority to act on behalf of the individual who is the subject of the health record in making decisions related to his health care.

§ 37.2-804.2. Emergency custody and involuntary admissions; access to health records.

Any health care provider, as defined in § 32.1-127.1:03, shall, upon request, disclose to a magistrate, court, mental health examiner required under § 37.2-815, employee or designee of a community services board or behavioral health authority, or law-enforcement officer involved in the emergency custody, temporary detention, or involuntary commitment process of an individual all health records of the individual necessary to enable each of them to perform their duties under this chapter, as authorized by subsection D of § 32.1-127.1:03. These health care entities shall also disclose to one another such records as necessary to provide treatment to the individual and to monitor such treatment.