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HOUSE BILL NO. 750

Offered January 22, 1996

A BILL to amend and reenact §§ 8.01-413 and 54.1-2403.3 of the Code of Virginia, to amend the Code of Virginia by adding a section numbered 32.1-127.1:03, and to repeal § 32.1-127.1:02 of the Code of Virginia, relating to health care provider records.

Patron—DeBoer

Referred to Committee on Health, Welfare and Institutions

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-413 and 54.1-2403.3 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 32.1-127.1:03 as follows:

§ 8.01-413. Certain copies of health care provider's records or papers of patient admissible; right of patient or his attorney to copies of such records or papers; subpoena; damages, costs and attorney's fees.

A. In any case where the hospital, nursing facility, physician's, or other health care provider's original records or papers of any patient in a hospital or institution for the treatment of physical or mental illness are admissible or would be admissible as evidence, any typewritten copy, photograph, photostatic copy, or microphotograph or printout or other hard copy generated from computerized or other electronic storage, microfilm, or other photographic, mechanical, electronic or chemical storage process thereof shall be admissible as evidence in any court of this Commonwealth in like manner as the original, if the printout or hard copy or microphotograph or photograph is properly authenticated by the employees having authority to release or produce the original records.

Any hospital, nursing facility, physician, or other health care provider whose records or papers relating to any such patient are subpoenaed for production under this section or the Rules of the Supreme Court of Virginia may comply with the subpoena by a timely mailing to the clerk issuing the subpoena properly authenticated copies, photographs or microphotographs in lieu of the originals. The court whose clerk issued the subpoena may, after notice to such hospital, nursing facility, physician, or other health care provider, enter an order requiring production of the originals, if available, of any stored records or papers whose copies, photographs or microphotographs are not sufficiently legible. The party requesting the subpoena shall be liable for the reasonable charges of the hospital, nursing facility, physician, or other health care provider for the service of maintaining, retrieving, reviewing, preparing, copying and mailing the items produced. Except for copies of X-ray photographs, however, such charges shall not exceed fifty cents for each page up to fifty pages and twenty-five cents a page thereafter for copies from paper and one dollar per page for copies from microfilm or other micrographic process, plus all postage and shipping costs and a search and handling fee not to exceed ten dollars.

B. Copies of hospital, nursing facility, physician's, or other health care provider's records or papers shall be furnished within fifteen days of such request to the patient or his attorney upon such patient's or attorney's written request, *which request shall comply with the requirements of § 32.1-127.1:03*. However, copies of a patient's records shall not be furnished to such patient where the patient's treating physician has made a part of the patient's records a written statement that in his opinion the furnishing to or review by the patient of such records would be injurious to the patient's health or well-being, but in any such case such records shall be furnished to the patient's attorney within fifteen days of the date of such request. A reasonable charge may be made for the service of maintaining, retrieving, reviewing and preparing such copies. Except for copies of X-ray photographs, however, such charges shall not exceed fifty cents per page for up to fifty pages and twenty-five cents a page thereafter for copies from paper and one dollar per page for copies from microfilm or other micrographic process, plus all postage and shipping costs and a search and handling fee not to exceed ten dollars. Any hospital, nursing facility, physician, or other health care provider receiving such a request from a patient's attorney may *shall* require a writing signed by the patient confirming the attorney's authority to make the request. Records or papers relating to a deceased patient, or a patient whose treating physician determines to be mentally incompetent to consent, or physically incapable of consenting, shall be provided to any of the following persons, in order of priority stated, upon the written request of such person, unless the hospital, nursing facility, physician, or other health care provider is aware of any available person in a higher class: (i) the personal representative of a deceased patient; (ii) the legal guardian or committee of an incompetent or incapacitated patient; (iii) the spouse; (iv) an adult son or daughter; (v) either parent; (vi) an adult brother or sister; or (vii) any of the other relatives of the patient in the descending order of blood relationship.

C. Upon the failure of any hospital, nursing facility, physician, or other health care provider to

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60 comply with any written request made in accordance with subsection B within the period of time
61 specified in that subsection *and within the manner specified in § 32.1-127.1:03*, the patient or his
62 attorney may by affidavit filed with the clerk of the circuit court wherein any eventual suit, if any,
63 would be required to be filed, upon payment of the fees required by subdivision (23) of § 14.1-112, and
64 fees for service, request that the clerk subpoena such records or papers. The clerk shall thereupon issue
65 a subpoena, returnable within twenty days of proper service, directing the hospital, nursing facility,
66 physician, or other health care provider to produce and furnish copies of the reports and papers to him,
67 whereupon, the clerk shall make the same available to the patient or his attorney. If the court finds that
68 a hospital, nursing facility, physician, or other health care provider willfully refused to comply with a
69 written request made in accordance with subsection B, either by willfully or arbitrarily refusing or by
70 imposing a charge in excess of the reasonable expense of making the copies and processing the request
71 for records, the court may award damages for all expenses incurred by the patient to obtain such copies,
72 including court costs and reasonable attorney's fees.

73 D. The provisions of subsections A, B, and C hereof shall apply to any health care provider whose
74 office is located within or without the Commonwealth if the records pertain to any patient who is a
75 party to a cause of action in any court in the Commonwealth of Virginia, and shall apply only to
76 requests made by an attorney, or his client, in anticipation of litigation or in the course of litigation.

77 E. Health care provider, as used in this section, shall have the same meaning as provided in
78 ~~§ 8.01-581.1~~ § 32.1-127.1:03 and shall also include an independent medical copy retrieval service
79 contracted to provide the service of retrieving, reviewing, and preparing such copies for distribution.

80 § 32.1-127.1:03. *Health care confidentiality.*

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

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

84 "Health services" includes but is not limited to examination, diagnosis, evaluation, treatment,
85 pharmaceuticals, aftercare, habilitation or rehabilitation and mental health therapy of any kind.

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

87 "Patient" means a person who is receiving or has received health services from a provider.

88 "Provider" shall have the same meaning as set forth in the definition of "Health care provider" in
89 § 8.01-581.1, except that state-operated facilities shall also be considered providers for the purposes of
90 this section. Provider shall also include all individuals who are licensed or certified by any of the health
91 regulatory boards within the Department of Health Professions, except individuals regulated by the
92 Board of Funeral Directors and Embalmers or the Board of Veterinary Medicine.

93 "Record" means any written, printed or electronically recorded material maintained by a provider in
94 the course of providing health services to a patient concerning the patient and the services provided.

95 "Record" also includes the substance of any communication made by a patient to a provider in
96 confidence during or in connection with the provision of health services to a patient or information
97 otherwise acquired by the provider about a patient in confidence and in connection with the provision of
98 health services to the patient.

99 B. There is hereby recognized a patient's right of privacy in the content of a patient's medical
100 record. Patient records are the property of the provider maintaining them and, except when permitted by
101 this section, or when permitted by another provision of state or federal law, no provider, or other
102 person working in a health care setting, may disclose the records of a patient.

103 Patient records shall not be removed from the premises where they are maintained without the
104 approval of the owner, except in accordance with court order or subpoena consistent with § 8.01-413 or
105 with this section.

106 No third party to whom disclosure of patient records is made by a provider may redisclose or
107 otherwise reveal the records of a patient, beyond the purpose for which such disclosure was made,
108 without first obtaining the patient's specific consent to such redisclosure. However, this redisclosure
109 prohibition does not apply so as to prohibit any provider who receives records from another provider
110 from making a subsequent disclosure permitted under this section.

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

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

114 2. The disclosure by a mental health provider to the caretaker of a mental health patient, (including
115 any family member who acts as a caretaker), of only such limited information as is necessary to enable
116 the caretaker to provide support and care to the patient and as is consistent with the standards and
117 ethics of the provider's mental health profession; or

118 3. Except where specifically provided herein, the records of minor patients.

119 D. Providers may disclose the records of a patient:

120 1. As set forth in subsection E of this section, pursuant to the written consent of the patient or in the
121 case of a minor patient, his custodial parent, guardian or other person authorized to consent to

treatment of minors pursuant to § 54.1-2969;

2. In compliance with a subpoena issued in accord with subsection H of this section 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 provider or the provider's employees or staff against any accusation of wrongful conduct; also as is necessary in the course of an investigation, audit or review of a provider's conduct by a duly-authorized law enforcement, licensure, accreditation, or professional review entity;

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

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

6. As required or authorized by any other provision of law including contagious disease, public safety, and suspected child or adult abuse reporting requirements, including but not limited to those contained in §§ 32.1-36.1, 37.1-98.2, 53.1-40.10, 54.1-2403.3, 54.1-2906, 54.1-2907, 54.1-2966, 54.1-2966.1, 54.1-2967, 54.1-2968, and 63.1-248.11;

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

8. In the normal course of business in accordance with accepted standards of practice within the health services setting;

9. When the patient has waived his right to the privacy of the medical records;

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

11. To the guardian ad litem in the course of a guardianship proceeding of an adult patient authorized under §§ 37.1-128.01, 37.1-128.2 and 37.1-132;

12. To the attorney appointed by the court to represent a patient in a civil commitment proceeding under § 37.1-67.3;

13. To the attorney and/or guardian ad litem of a minor patient who represents such minor in any judicial or administrative proceeding, provided that 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 provider of such order;

14. With regard to the Court Appointed Special Advocate (CASA) program, a minor's records in accord with § 9-173.12;

15. To an agent appointed under a patient's power of attorney or to an agent or decision maker designated in a patient's advance directive for health care or to any other person consistent with the provisions of the Health Care Decisions Act (§ 54.1-2981 et seq.);

16. To third-party payors and their agents pursuant to the deemed consent provisions of §§ 37.1-226 and 37.1-227 when the patient has requested the provider to submit bills to the third-party payor for payment under a contract or insurance policy;

17. 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;

18. Upon the sale of a medical practice as provided in § 54.1-2405;

19. When the patient orally consents to a provider's discussing with a third party specified by the patient information contained in the patient's records or confidential information obtained by the provider in the course of examining or treating the patient;

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

21. To the patient, except as provided in subsection E of this section and subsection B of § 8.01-413;

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. Records of a deceased patient to the personal representative of a deceased patient; and

25. Pursuant to the medical temporary detention order set out in subsection M of § 37.1-134.5.

E. Requests for copies of medical 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. Within fifteen days of receipt of a request for copies of medical records, the provider 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 provider does not maintain a record of the information, so inform the requester and provide the name and address, if known, of the

183 provider who maintains the record; or (iv) deny the request (a) under subsection F, (b) on the grounds
184 that the requester has not established his authority to receive such records or proof of his identity, or
185 (c) as otherwise provided by law. Procedures set forth in this section shall apply only to requests for
186 records not specifically governed by other provisions of this Code or of federal law.

187 F. Except as provided in subsection B of § 8.01-413, copies of a patient's records shall not be
188 furnished to such patient or anyone authorized to act on the patient's behalf where the patient's
189 attending physician or the patient's clinical psychologist has made a part of the patient's record a
190 written statement that, in his opinion, the furnishing to or review by the patient of such records would
191 be injurious to the patient's health or well-being. If any custodian of medical records denies a request
192 for copies of records based on such statement, the custodian shall permit examination and copying of
193 the medical record by another such physician or clinical psychologist selected by the patient, whose
194 licensure, training and experience relative to the patient's condition is at least equivalent to that of the
195 physician or clinical psychologist upon whose opinion the denial is based. The person or entity denying
196 the request shall inform the patient of the patient's right to select another reviewing physician or
197 clinical psychologist under this subsection who shall make a judgment as to whether to make the record
198 available to the patient. Any record copied for review by the physician or clinical psychologist selected
199 by the patient shall be accompanied by a statement from the custodian of the record that the patient's
200 attending physician or clinical psychologist determined that the patient's review of his record would be
201 injurious to the patient's health or well-being.

202 G. A written consent to allow release of patient records may, but need not, be in the following form:

203 CONSENT TO RELEASE OF CONFIDENTIAL HEALTH CARE INFORMATION

204
205 Patient Name.....
206 Provider Name.....
207 Person, agency or provider to whom
208 disclosure is to be made.....
209 Information or Records to be disclosed.....
210

211 As the person signing this consent, I understand that I am giving my permission to the above-named
212 provider or other named third party for disclosure of confidential health care records. I also understand
213 that I have the right to revoke this consent, but that my revocation is not effective until delivered in
214 writing to the person who is in possession of my records. A copy of this consent and a notation
215 concerning the persons or agencies to whom disclosure was made shall be included with my original
216 records. The person who receives the records to which this consent pertains may not redisclose them to
217 anyone else without my separate written consent unless such recipient is a provider who makes a
218 disclosure permitted by law.

219 This consent expires on (date).....
220 Signature of Patient..... Date

221
222 H. Except in the case of a subpoena requested pursuant to subsection C of § 8.01-413, no subpoena
223 shall be issued to a provider for a patient's medical records unless the attorney makes the following
224 certifications at the time he files the request for the subpoena: (i) that he has sent to the patient whose
225 records are being sought, by first class mail, a copy of the request for subpoena on the same day as the
226 request was filed with the clerk of the court, (such copy of the request for subpoena shall clearly note
227 the date on which the request was filed with the clerk of the court), and (ii) that he has sent to the
228 patient, together with the copy of the request for subpoena, notice of the patient's right to object to the
229 subpoena in conformity with this subsection.

230 Furthermore, except in the case of a subpoena requested pursuant to § 8.01-413, no subpoena shall
231 be issued to a provider for medical records unless the request for subpoena specifies the required
232 production dates in accordance with the requirements set forth in this subsection. Without these
233 certifications, the clerk of the court shall not issue the requested subpoena. Such certifications are in
234 addition to the requesting counsel's obligation to notify the patient's attorney, if any.

235 The attorney or the party filing a request for subpoena for medical records shall serve upon the
236 patient whose records are being sought, by first class mail, a copy of the request for the subpoena,
237 together with a notice which advises the patient that he has the right to file a motion to quash the
238 subpoena with the clerk of the court within twenty days from the date that the request for subpoena was
239 filed with the clerk of the court.

240 The request for subpoena shall stipulate that the provider shall not return the subpoenaed records
241 earlier than twenty days from the date the subpoena was served upon the provider. However, the
242 attorney filing the request for subpoena may apply for a court order, upon good cause shown,
243 compelling production of the records by an earlier date. At the time of application for an expedited

return date, the requesting attorney shall certify that he has notified the patient, and the patient's attorney, if any, of application for such order, with notice to the patient of his right to be heard in opposition. The request for subpoena shall also specify the latest date by which the provider must provide return of the subpoenaed records.

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

The provisions of this subsection have no application to subpoenas for medical records requested under § 8.01-413.

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

No provider under subpoena to appear as a witness, although required to appear as directed by subpoena, is compelled to testify as to patient records without the consent of the patient, unless ordered to testify by a court in accordance with subsections A and B of § 8.01-399.

§ 54.1-2403.3. Medical records; ownership; provision of copies.

Medical records maintained by any health care provider as defined in ~~§ 8.01-581.1~~ § 32.1-127.1:03 shall be the property of such health care provider. Such health care provider shall release copies of any such medical records in compliance with ~~§ 32.1-127.1:02~~ § 32.1-127.1:03 or § 8.01-413, if the request is made for purposes of litigation, or as otherwise provided by state or federal law.

2. That § 32.1-127.1:02 of the Code of Virginia is repealed.