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HOUSE BILL NO. 810

AMENDMENT IN THE NATURE OF A SUBSTITUTE
 (Proposed by the Senate Committee on Education and Health
 on March 2, 2000)

(Patron Prior to Substitute—Delegate Joannou)

A BILL to amend and reenact §§ 8.01-413 and 32.1-127.1:03 of the Code of Virginia, relating to copies of medical records; release.

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-413 and 32.1-127.1:03 of the Code of Virginia are amended and reenacted 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, photostatted 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 shall require a writing signed by the patient confirming the attorney's authority to make the request *and shall accept a photocopy, facsimile, or other copy of the original signed by the patient as if it were an original.*

C. Upon the failure of any hospital, nursing facility, physician, or other health care provider to comply with any written request made in accordance with subsection B within the period of time specified in that subsection and within the manner specified in § 32.1-127.1:03, the patient or his attorney may by affidavit filed with the clerk of the circuit court wherein any eventual suit, if any, would be required to be filed, upon payment of the fees required by subdivision A 18 of § 17.1-275, and fees for service, request that the clerk subpoena such records or papers. The clerk shall thereupon issue a subpoena, returnable within twenty days of proper service, directing the hospital, nursing facility, physician, or other health care provider to produce and furnish copies of the reports and papers to him, whereupon, the clerk shall make the same available to the patient or his attorney. If the court finds that a hospital, nursing facility, physician, or other health care provider willfully refused to comply with a

60 written request made in accordance with subsection B, either by willfully or arbitrarily refusing or by
61 imposing a charge in excess of the reasonable expense of making the copies and processing the request
62 for records, the court may award damages for all expenses incurred by the patient to obtain such copies,
63 including court costs and reasonable attorney's fees.

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

68 E. Health care provider, as used in this section, shall have the same meaning as provided in
69 § 32.1-127.1:03 and shall also include an independent medical copy retrieval service contracted to
70 provide the service of retrieving, reviewing, and preparing such copies for distribution.

71 F. Notwithstanding the authorization to admit as evidence patient records in the form of
72 microphotographs, prescription dispensing records maintained in or on behalf of any pharmacy registered
73 or permitted in Virginia shall only be stored in compliance with §§ 54.1-3410, 54.1-3411 and 54.1-3412.

74 § 32.1-127.1:03. Patient health records privacy.

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

79 Patient records shall not be removed from the premises where they are maintained without the
80 approval of the provider, except in accordance with a court order or subpoena consistent with § 8.01-413
81 C or with this section or in accordance with the regulations relating to change of ownership of patient
82 records promulgated by a health regulatory board established in Title 54.1.

83 No person to whom disclosure of patient records was made by a patient or a provider shall redisclose
84 or otherwise reveal the records of a patient, beyond the purpose for which such disclosure was made,
85 without first obtaining the patient's specific consent to such redisclosure. This redisclosure prohibition
86 shall not, however, prevent (i) any provider who receives records from another provider from making
87 subsequent disclosures as permitted under this section or (ii) any provider from furnishing records and
88 aggregate or other data, from which patient-identifying prescription information has been removed,
89 encoded or encrypted, to qualified researchers, including, but not limited to, pharmaceutical
90 manufacturers and their agents or contractors, for purposes of clinical, pharmaco-epidemiological,
91 pharmaco-economic, or other health services research.

92 B. As used in this section:

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

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

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

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

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

100 "Patient-identifying prescription information" means all prescriptions, drug orders or any other
101 prescription information that specifically identifies an individual patient.

102 "Provider" shall have the same meaning as set forth in the definition of "health care provider" in
103 § 8.01-581.1, except that state-operated facilities shall also be considered providers for the purposes of
104 this section. Provider shall also include all persons who are licensed, certified, registered or permitted by
105 any of the health regulatory boards within the Department of Health Professions, except persons
106 regulated by the Board of Funeral Directors and Embalmers or the Board of Veterinary Medicine.

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

109 "Record" also includes the substance of any communication made by a patient to a provider in
110 confidence during or in connection with the provision of health services to a patient or information
111 otherwise acquired by the provider about a patient in confidence and in connection with the provision of
112 health services to the patient.

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

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

116 2. Except where specifically provided herein, the records of minor patients.

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

118 1. As set forth in subsection E of this section, pursuant to the written consent of the patient or in the
119 case of a minor patient, his custodial parent, guardian or other person authorized to consent to treatment
120 of minors pursuant to § 54.1-2969; also, in emergency cases or situations where it is impractical to
121 obtain the patient's written consent, pursuant to the patient's oral consent for a provider to discuss the

patient's records with a third party specified by the patient;

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 required in the course of an investigation, audit, review or proceedings regarding 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 and 8.01-400.2;

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, 32.1-36.1, 32.1-40, 32.1-41, 32.1-276.5, 32.1-283, 32.1-283.1, 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, 63.1-55.3 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; 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 patient has waived his right to the privacy of the medical records;

10. When examination and evaluation of a patient are 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 §§ 37.1-128.1, 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 for purposes of reimbursement;

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; or upon a change of ownership or closing of a pharmacy pursuant to regulations of the Board of Pharmacy;

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

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

21. 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;

22. 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;

23. If the records are those of a deceased or mentally incapacitated patient to the personal representative or executor of the deceased patient or the legal guardian or committee of the incompetent or incapacitated patient 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 patient in order of blood relationship; and

24. 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 provider's designated

183 organ procurement organization certified by the United States Health Care Financing Administration and
184 (ii) to any eye bank or tissue bank in Virginia certified by the Eye Bank Association of America or the
185 American Association of Tissue Banks.

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

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

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

215 **CONSENT TO RELEASE OF CONFIDENTIAL HEALTH CARE**
216 **INFORMATION**

217 Patient Name

218 Provider Name

219 Person, agency or provider to whom disclosure is to be made

220 Information or Records to be disclosed

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

229 This consent expires on (date)

230 Signature of Patient Date

231 H. 1. No party to an action shall request the issuance of a subpoena duces tecum for an opposing
232 party's medical records unless a copy of the request for the subpoena is provided to opposing counsel or
233 the opposing party if they are pro se, simultaneously with filing the request. No party to an action shall
234 request the issuance of a subpoena duces tecum for the medical records of a nonparty witness unless a
235 copy of the request for the subpoena is provided to the nonparty witness simultaneously with filing the
236 request.

237 In instances where medical records being subpoenaed are those of a pro se party or nonparty witness,
238 the party requesting the issuance of the subpoena shall deliver to the pro se party or nonparty witness
239 together with the copy of the request for subpoena, a statement informing them of their rights and
240 remedies. The statement shall include the following language and the heading shall be in boldface
241 capital letters:

242 **NOTICE TO PATIENT**

243 The attached Request for Subpoena means that (insert name of party requesting subpoena) has asked
244 the court to issue a subpoena to your doctor or other health care providers (names of health care

providers inserted here) requiring them to produce your medical records. Your doctor or other health care provider is required to respond by providing a copy of your medical records. If you believe your records should not be disclosed and object to their disclosure, you have the right to file a motion with the clerk of the court to quash the subpoena. You may contact the clerk's office 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, it must be filed as soon as possible before the provider sends out the records in response to the subpoena. If you elect to file a motion to quash, you must notify your doctor or other health care provider(s) that you are filing the motion so that the provider knows to send the records to the clerk of court in a sealed envelope or package for safekeeping while your motion is decided.

2. Any party filing a request for a subpoena duces tecum for a patient's medical records shall include a Notice to Providers in the same part of the request where the provider is directed where and when to return the records. Such notice shall be in boldface capital letters and shall include the following language:

NOTICE TO PROVIDERS

IF YOU RECEIVE NOTICE THAT YOUR PATIENT HAS FILED A MOTION TO QUASH (OBJECTING TO) THIS SUBPOENA, OR IF YOU FILE A MOTION TO QUASH THIS SUBPOENA, SEND THE RECORDS ONLY TO THE CLERK OF THE COURT WHICH ISSUED THE SUBPOENA USING THE FOLLOWING PROCEDURE: PLACE THE RECORDS IN A SEALED ENVELOPE AND ATTACH TO THE SEALED ENVELOPE A COVER LETTER TO THE CLERK OF COURT WHICH STATES THAT CONFIDENTIAL HEALTH CARE RECORDS ARE ENCLOSED AND ARE TO BE HELD UNDER SEAL PENDING THE COURT'S RULING ON THE MOTION TO QUASH THE SUBPOENA. THE SEALED ENVELOPE AND THE COVER LETTER SHALL BE PLACED IN AN OUTER ENVELOPE OR PACKAGE FOR TRANSMITTAL TO THE COURT.

3. Health care providers shall provide a copy of all records as required by a subpoena duces tecum or court order for such medical records. If the health care provider has, however, actual receipt of notice that a motion to quash the subpoena has been filed or if the health care provider files a motion to quash the subpoena for medical records, then the health care provider shall produce the records to the clerk of the court issuing the subpoena, where the court shall place the records under seal until a determination is made regarding the motion to quash. The securely sealed envelope shall only be opened on order of the judge. In the event the court grants the motion to quash, the records shall be returned to the health care provider in the same sealed envelope in which they were delivered to the court. In the event that a judge orders the sealed envelope to be opened to review the records in camera, a copy of the judge's order shall accompany any records returned to the provider. The records returned to the provider shall be in a securely sealed envelope.

4. It is the duty of any party requesting a subpoena duces tecum for medical records to determine whether the patient whose records are sought is pro se or a nonparty. Any request for a subpoena duces tecum for the medical records of a nonparty or of a pro se party shall direct the provider (in boldface type) not to produce the records until ten days after the date on which the provider is served with the subpoena duces tecum and shall be produced no later than twenty days after the date of such service.

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, or issued by a duly authorized administrative agency conducting an investigation, audit, review or proceedings regarding a provider's conduct. The provisions of this subsection apply to the medical records of both minors and adults.

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

Providers may testify about the medical records of a patient in compliance with §§ 8.01-399 and 8.01-400.2.