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HOUSE BILL NO. 878

Offered January 14, 2004

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A BILL to amend and reenact §§ 16.1-266, 16.1-343, 32.1-127.1:03, 37.1-67.3, 37.1-134.9, 37.1-134.12, and 37.1-134.21 of the Code of Virginia, relating to access to health records and information for guardians ad litem and attorneys representing minors and certain adults in certain court proceedings.

 Patron—O'Bannon

Referred to Committee on Health, Welfare and Institutions

Be it enacted by the General Assembly of Virginia:

1. That §§ 16.1-266, 16.1-343, 32.1-127.1:03, 37.1-67.3, 37.1-134.9, 37.1-134.12, and 37.1-134.21 of the Code of Virginia are amended and reenacted as follows:

§ 16.1-266. Appointment of counsel and guardian ad litem.

A. Prior to the hearing by the court of any case involving a child who is alleged to be abused or neglected or who is the subject of an entrustment agreement or a petition seeking termination of residual parental rights or who is otherwise before the court pursuant to subdivision A 4 of § 16.1-241 or § 63.2-1230, the court shall appoint a discreet and competent attorney-at-law as guardian ad litem to represent the child pursuant to § 16.1-266.1.

B. Prior to the detention review hearing or the adjudicatory or transfer hearing by the court of any case involving a child who is alleged to be in need of services, in need of supervision or delinquent, such child and his parent, guardian, legal custodian or other person standing in loco parentis shall be informed by a judge, clerk or probation officer of the child's right to counsel and of the liability of the parent, guardian, legal custodian or other person standing in loco parentis for the costs of such legal services pursuant to § 16.1-267 and be given an opportunity to:

1. Obtain and employ counsel of the child's own choice; or

2. If the court determines that the child is indigent within the contemplation of the law pursuant to the guidelines set forth in § 19.2-159 and his parent, guardian, legal custodian or other person standing in loco parentis does not retain an attorney for the child, a statement of indigence substantially in the form provided by § 19.2-159 and a financial statement shall be executed by such child, and the court shall appoint an attorney-at-law to represent him; or

3. Waive the right to representation by an attorney, if the court finds the child and the parent, guardian, legal custodian or other person standing in loco parentis of the child consent, in writing, to such waiver and that the interests of the child and the parent, guardian, legal custodian or other person standing in loco parentis in the proceeding are not adverse. Such written waiver shall be in accordance with law and shall be filed with the court records of the case.

C. A judge, clerk or probation officer shall inform the parent or guardian of his right to counsel prior to the adjudicatory hearing of a petition in which a child is alleged to be abused or neglected or at risk of abuse or neglect as provided in subdivision A 2a of § 16.1-241 and prior to a hearing at which a parent could be subjected to the loss of residual parental rights. In addition, prior to the hearing by the court of any case involving any other adult charged with abuse or neglect of a child, this adult shall be informed of his right to counsel. This adult and the parent or guardian shall be given an opportunity to:

1. Obtain and employ counsel of the parent's, guardian's or other adult's own choice; or

2. If the court determines that the parent, guardian or other adult is indigent within the contemplation of the law pursuant to the guidelines set forth in § 19.2-159, a statement substantially in the form provided by § 19.2-159 and a financial statement shall be executed by such parent, guardian or other adult and the court shall appoint an attorney-at-law to represent him; or

3. Waive the right to representation by an attorney in accordance with the provisions of § 19.2-160.

If the identity or location of a parent or guardian is not reasonably ascertainable or a parent or guardian fails to appear, the court shall consider appointing an attorney-at-law to represent the interests of the absent parent or guardian, and the hearing may be held.

Prior to a hearing at which a child is the subject of an initial foster care plan filed pursuant to § 16.1-281, a foster care review hearing pursuant to § 16.1-282 and a permanency planning hearing pursuant to § 16.1-282.1, the court shall consider appointing counsel to represent the child's parent or guardian.

D. In those cases described in subsections A, B and C which in the discretion of the court require counsel or a guardian ad litem to represent the child or children or the parent or guardian or other adult

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59 party in addition to the representation provided in those subsections, a discreet and competent
60 attorney-at-law may be appointed by the court as counsel or a guardian ad litem.

61 E. In all other cases which in the discretion of the court require counsel or a guardian ad litem, or
62 both, to represent the child or children or the parent or guardian, discreet and competent attorneys-at-law
63 may be appointed by the court. However, in cases where the custody of a child or children is the subject
64 of controversy or requires determination and each of the parents or other persons claiming a right to
65 custody is represented by counsel, the court shall not appoint counsel or a guardian ad litem to represent
66 the interests of the child or children unless the court finds, at any stage in the proceedings in a specific
67 case, that the interests of the child or children are not otherwise adequately represented.

68 F. Any state or local agency, department, authority or institution and any school, hospital, physician
69 or other health or mental health care provider shall permit a guardian ad litem *or counsel for the child*
70 appointed pursuant to this section to inspect and copy, without the consent of the child or his parents,
71 any records relating to the child whom the guardian *or counsel* represents upon presentation by him of a
72 copy of the court order appointing him or a court order specifically allowing him such access. Upon
73 request therefor by the guardian ad litem *or counsel for the child* made at least 72 hours in advance, a
74 mental health care provider shall make himself available to conduct a review and interpretation of the
75 child's treatment records which are specifically related to the investigation. Such a request may be made
76 in lieu of or in addition to inspection and copying of the records.

77 § 16.1-343. Involuntary commitment; duties of attorney for the minor.

78 As far as possible in advance of a hearing conducted under § 16.1-344, or an appeal from such a
79 hearing, the minor's attorney shall interview the minor; the minor's parent, if available; the petitioner;
80 and the qualified evaluator. He shall interview all other material witnesses, and examine all relevant
81 diagnostic and other reports.

82 *Any state or local agency, department, authority or institution and any school, hospital, physician or*
83 *other health or mental health care provider shall permit the attorney appointed pursuant to this article*
84 *to inspect and copy, without the consent of the minor or his parents, any records relating to the minor*
85 *whom the attorney represents.*

86 The obligation of the minor's attorney during the hearing or appeal is to interview witnesses, obtain
87 independent experts when possible, cross-examine adverse witnesses, present witnesses on behalf of the
88 minor, articulate the wishes of the minor, and otherwise fully represent the minor in the proceeding.
89 Counsel appointed by the court shall be compensated in an amount not to exceed \$100.

90 § 32.1-127.1:03. Health records privacy.

91 A. There is hereby recognized a ~~patient's~~ *an individual's* right of privacy in the content of a ~~patient's~~
92 ~~medical record~~ *his health records*. ~~Patient~~ Health records are the property of the ~~provider health care~~
93 ~~entity~~ maintaining them, and, except when permitted by this section or by another provision of state or
94 federal law, no ~~provider health care entity~~, or other person working in a health care setting, may
95 disclose ~~the an individual's health records of a patient~~.

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

101 No person to whom ~~disclosure of patient health records was made by a patient or a provider are~~
102 ~~disclosed~~ shall redisclose or otherwise reveal the ~~health records of a patient~~ *an individual*, beyond the
103 purpose for which such disclosure was made, without first obtaining the ~~patient's individual's~~ specific
104 ~~consent~~ *authorization* to such redisclosure. This redisclosure prohibition shall not, however, prevent (i)
105 any ~~provider health care entity~~ who receives ~~health records~~ from another ~~provider health care entity~~
106 from making subsequent disclosures as permitted under this section and the federal Department of
107 Health and Human Services regulations relating to the electronic transmission of data and ~~patient privacy~~
108 ~~protected health information~~ *promulgated by the United States Department of Health and Human*
109 *Services* as required by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42
110 U.S.C. § 1320d et seq.) or (ii) any ~~provider health care entity~~ from furnishing ~~health records~~ and
111 aggregate or other data, from which ~~patient-~~ *individually* identifying prescription information has been
112 removed, encoded or encrypted, to qualified researchers, including, but not limited to, pharmaceutical
113 manufacturers and their agents or contractors, for purposes of clinical, pharmaco-epidemiological,
114 pharmaco-economic, or other health services research.

115 B. As used in this section:

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

119 "Certification" means a written representation that is delivered by hand, by first-class mail, by
120 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 services" includes, but is not limited to, examination, diagnosis, evaluation, treatment, pharmaceuticals, aftercare, habilitation or rehabilitation and mental health therapy of any kind. "Parent" means a biological, adoptive or foster parent.

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

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

"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.

"~~Provider~~Health care provider" shall have the same meaning as set forth 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. ~~Provider~~ Health care provider shall also include all persons who are licensed, certified, registered or permitted 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.

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

C. Except as specifically provided herein, 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 ~~minor patients~~ 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. ~~Providers~~ Health care entities may disclose the health records of a ~~patient~~:

1. As set forth in subsection E of this section, pursuant to the written ~~consent~~ authorization of the ~~patient~~ individual or in the case of a minor ~~patient~~, his custodial parent, guardian or other person authorized to consent to treatment of minors pursuant to § 54.1-2969; also, in emergency cases or situations where it is impractical to obtain the ~~patient's~~ an individual's written ~~consent~~ authorization, pursuant to the ~~patient's~~ individual's oral ~~consent~~ authorization for a health care provider or health plan to discuss the ~~patient's~~ individual's health records with a third party specified by the ~~patient~~ individual;

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~~ health care entity or the ~~provider's~~ 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 ~~provider's~~ health

182 *care entity's* conduct by a duly authorized law-enforcement, licensure, accreditation, or professional
183 review entity;

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

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

186 6. As required or authorized by law relating to public health activities, health oversight activities,
187 serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease,
188 public safety, and suspected child or adult abuse reporting requirements, including, but not limited to,
189 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,
190 32.1-283.1, 37.1-98.2, 53.1-40.10, 54.1-2403.3, 54.1-2506, 54.1-2906, 54.1-2907, 54.1-2966,
191 54.1-2966.1, 54.1-2967, 54.1-2968, 63.2-1606 and 63.2-1509;

192 7. Where necessary in connection with the care of the ~~patient~~ *individual*, including in the
193 implementation of a hospital routine contact process *for organ donation pursuant to subdivision B. 4. of*
194 *§ 32.1-127*;

195 8. In the normal course of business in accordance with accepted standards of practice within the
196 health services setting; however, the maintenance, storage, and disclosure of the mass of prescription
197 dispensing records maintained in a pharmacy registered or permitted in Virginia shall only be
198 accomplished in compliance with §§ 54.1-3410, 54.1-3411 and 54.1-3412;

199 9. When the ~~patient~~ *individual* has waived his right to the privacy of the ~~medical~~ *health* records;

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

202 11. To the guardian ad litem *and any attorney representing the respondent* in the course of a
203 guardianship proceeding of an adult patient *authorized who is the respondent in a proceeding* under
204 Article 1.1 (§ 37.1-134.6 et seq.) of Chapter 4 of Title 37.1;

205 12. To the attorney appointed by the court to represent a ~~patient~~ *in an individual who is or has been*
206 *a patient who was the subject of* a civil commitment proceeding under § 37.1-67.3 *or a judicial*
207 *authorization for treatment proceeding pursuant to § 37.1-134.21*;

208 13. To the attorney and/or guardian ad litem of a minor ~~patient~~ who represents such minor in any
209 judicial or administrative proceeding, ~~provided that if~~ the court or administrative hearing officer has
210 entered an order granting the attorney or guardian ad litem this right and such attorney or guardian ad
211 litem presents evidence to the ~~provider~~ *health care entity* of such order;

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

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

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

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

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

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

227 20. To the ~~patient~~ *individual who is the subject of the health record*, except as provided in
228 subsections E and F of this section and subsection B of § 8.01-413;

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

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

234 23. If the *health* records are those of a deceased or mentally incapacitated ~~patient~~ *individual* to the
235 personal representative or executor of the deceased ~~patient~~ *individual* or the legal guardian or committee
236 of the incompetent or incapacitated ~~patient~~ *individual* or if there is no personal representative, executor,
237 legal guardian or committee appointed, to the following persons in the following order of priority: a
238 spouse, an adult son or daughter, either parent, an adult brother or sister, or any other relative of the
239 deceased ~~patient~~ *individual* in order of blood relationship;

240 24. For the purpose of conducting record reviews of inpatient hospital deaths to promote
241 identification of all potential organ, eye, and tissue donors in conformance with the requirements of
242 applicable federal law and regulations, including 42 C.F.R. § 482.45, (i) to the *health care* provider's
243 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;

25. To the Office of the Inspector General for Mental Health, Mental Retardation and Substance Abuse Services pursuant to Chapter 16 (§ 37.1-255 et seq.) of Title 37.1;

26. (Expires July 1, 2006) 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 Title 32.1, pursuant to subdivision D 1 of this section; and

27. To law-enforcement officials by each licensed emergency medical services agency, (i) when the patient individual is the victim of a crime or (ii) when the patient 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.

E. Requests for copies of medical 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 provider 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 medical health records, the provider 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 provider 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 provider 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 this Code, federal law or state or federal regulation.

F. Except as provided in subsection B of § 8.01-413, copies of a patient's an individual's health records shall not be furnished to such patient individual or anyone authorized to act on the patient's individual's behalf where when the patient's attending individual's treating physician or the patient's individual's treating clinical psychologist has made a part of the patient's individual's record a written statement that, in his opinion the exercise of his professional judgment, the furnishing to or review by the patient individual of such health records would be injurious reasonably likely to endanger the patient's health or well-being life or physical safety of the individual or another person, or that such health record makes reference to a person who is not a health care provider and the access requested would be reasonably likely to cause substantial harm to such referenced person. If any custodian of medical records health care entity denies a request for copies of health records based on such statement, the custodian shall permit examination and copying of the medical record by another such physician or clinical psychologist selected by the patient health care entity shall inform the individual of the individual's right to designate, in writing, at his own expense, another reviewing physician or clinical psychologist, whose licensure, training and experience relative to the patient's individual's condition are at least equivalent to that of the physician or clinical psychologist upon whose opinion the denial is based. The person or entity denying the request shall inform the patient of the patient's right to select another reviewing physician or clinical psychologist under this subsection who designated reviewing physician or clinical psychologist shall make a judgment as to whether to make the health record available to the patient individual.

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

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

G. A written consent authorization to allow release of patient an individual's health records may, but

305 ~~need not, be in~~ shall substantially include the following ~~form~~ information:

306 ~~CONSENT AUTHORIZATION TO RELEASE OF CONFIDENTIAL HEALTH CARE~~
 307 ~~INFORMATION RECORDS~~

308 ~~Patient Individual's Name~~-
 309

310 ~~Provider Health Care Entity's Name~~-
 311

312 ~~Person, agency or provider Health Care Entity to whom disclosure is to be made-~~
 313

314 ~~Person, agency or provider to whom disclosure is to be made~~.....

315 Information or Health Records to be disclosed-
 316

317
 318 Purpose of Disclosure or At the Request of the Individual
 319

320
 321

322 As the person signing this ~~consent~~ authorization, I understand that I am giving my permission to the
 323 above-named ~~provider or other named third party~~ health care entity for disclosure of confidential health
 324 care records. *I understand that the health care entity may not condition treatment or payment on my*
 325 *willingness to sign this authorization unless the specific circumstances under which such conditioning is*
 326 *permitted by law are applicable and are set forth in this authorization.* I also understand that I have the
 327 right to revoke this ~~consent~~ authorization at any time, but that my revocation is not effective until
 328 delivered in writing to the person who is in possession of my health records and that such revocation
 329 will be prospective and is not effective as to health records that were already disclosed under the
 330 authorization prior to delivery of my revocation. A copy of this ~~consent~~ authorization and a notation
 331 concerning the persons or agencies to whom disclosure was made shall be included with my original
 332 health records. ~~The person who receives the records to which this consent pertains may not redisclose~~
 333 ~~them to anyone else without my separate written consent unless such I understand that health~~
 334 ~~information disclosed under this authorization might be redisclosed by a recipient is a provider who~~
 335 ~~makes a disclosure permitted by law and may, as a result of such disclosure, no longer be protected to~~
 336 ~~the same extent as such health information was protected by law while solely in the possession of the~~
 337 ~~health care entity.~~

338 This ~~consent~~ authorization expires on (date) or (event).....,

339 Signature of ~~Patient Individual or Individual's Legal Representative if Individual is Unable to Sign~~
 340

341 Relationship or Authority of Legal Representative
 342

343 Date of Signature
 344 H. Pursuant to this subsection:

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

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

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

362 In instances where ~~medical~~ health records being subpoenaed are those of a pro se party or nonparty
 363 witness, the party requesting or issuing the subpoena shall deliver to the pro se party or nonparty
 364 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 PATIENT/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 ~~or~~, 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 ~~medical~~ health records. Your doctor ~~or~~, other health care provider *or other health care entity* is required to respond by providing a copy of your ~~medical~~ 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 ~~or~~, 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 a ~~patient's medical~~ *an individual's health* records shall include a Notice to ~~Providers~~ in the same part of the request in which the ~~provider~~ *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 PROVIDERS

A COPY OF THIS SUBPOENA DUCES TECUM HAS BEEN PROVIDED TO ~~YOUR PATIENT~~ *OR YOUR PATIENT'S THE INDIVIDUAL WHOSE HEALTH RECORDS ARE BEING REQUESTED* *OR HIS COUNSEL. YOU OR YOUR PATIENT HAVE 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 ~~YOUR PATIENT~~ *THE INDIVIDUAL WHOSE HEALTH RECORDS ARE BEING REQUESTED* HAS FILED A MOTION TO QUASH THIS SUBPOENA, OR IF YOU FILE A MOTION TO QUASH THIS SUBPOENA, YOU MUST SEND THE HEALTH RECORDS ONLY TO THE CLERK OF THE COURT OR ADMINISTRATIVE AGENCY THAT ISSUED THE SUBPOENA OR IN WHICH THE ACTION IS PENDING AS SHOWN ON THE SUBPOENA USING THE FOLLOWING PROCEDURE:

PLACE THE *HEALTH* RECORDS IN A SEALED ENVELOPE AND ATTACH TO THE SEALED ENVELOPE A COVER LETTER TO THE CLERK OF COURT OR ADMINISTRATIVE AGENCY WHICH STATES THAT CONFIDENTIAL HEALTH ~~CARE~~ RECORDS ARE ENCLOSED AND ARE TO BE HELD UNDER SEAL PENDING A 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 OR ADMINISTRATIVE AGENCY.

3. Upon receiving a valid subpoena duces tecum for ~~medical~~ health records, health care ~~providers~~ *entities* shall have the duty to respond to the subpoena in accordance with the provisions of subdivisions 4, 5, 6, 7, and 8.

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

If the health care ~~provider~~ *entity* has actual receipt of notice that a motion to quash the subpoena has been filed or if the health care ~~provider~~ *entity* files a motion to quash the subpoena for ~~medical~~ health

records, then the health care ~~provider entity~~ shall produce the *health* records, in a securely sealed envelope, to the clerk of the court or administrative agency issuing the subpoena or in whose court or administrative agency the action is pending. The court or administrative agency shall place the *health* 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 or administrative agency. In the event the court or administrative agency grants the motion to quash, the *health* records shall be returned to the health care ~~provider entity~~ in the same sealed envelope in which they were delivered to the court or administrative agency. In the event that a judge or administrative agency orders the sealed envelope to be opened to review the *health* records in camera, a copy of the order shall accompany any *health* records returned to the ~~provider health care entity~~. The *health* records returned to the ~~provider health care entity~~ shall be in a securely sealed envelope.

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

6. In the event that the individual whose *health* records are being sought files a motion to quash the subpoena, the court or administrative agency shall decide whether good cause has been shown by the discovering party to compel disclosure of the ~~patient's private individual's health~~ records over the ~~patient's individual's~~ objections. In determining whether good cause has been shown, the court or administrative agency 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.

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

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

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

b. All filed motions to quash have been resolved by the court or administrative agency and the disclosures sought in the subpoena duces tecum are consistent with such resolution and that, since no ~~medical health~~ records have previously been delivered to the court or administrative agency by the ~~provider health care entity~~, the ~~provider health care entity~~ shall comply with the subpoena duces tecum by returning the ~~medical 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 ~~medical health~~ records shall be disclosed and all ~~medical health~~ records previously delivered in a sealed envelope to the clerk of the court or administrative agency will be returned to the ~~provider 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 ~~medical health~~ records that were previously delivered to the court or administrative agency for which disclosure has been authorized will not be returned to the ~~provider health care entity~~; however, all ~~medical health~~ records for which disclosure has not been authorized will be returned to the ~~provider 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 medical health records have previously been delivered to the court or administrative agency by the provider health care entity, the provider 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 medical health 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 health care entity's conduct.

The provisions of this subsection shall apply to subpoenas for the medical health records of both minors and adults and to subpoenas for the health records of individuals in connection with hearings pursuant to Title 65.2 or any action at law brought to recover damages against any employer that is subject to Title 65.2.

Nothing in this subsection shall have any effect on the existing authority of a court or administrative agency to issue a protective order regarding medical health records, including, but not limited to, ordering the return of medical health records to a health care provider 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. Providers Health care entities may testify about the medical health records of a patient an individual in compliance with §§ 8.01-399 and 8.01-400.2.

§ 37.1-67.3. Same; involuntary admission and treatment.

A. The commitment hearing shall be held within forty-eight hours of the execution of the temporary detention order as provided for in § 37.1-67.1; however, if the forty-eight-hour period herein specified terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, such person may be detained, as herein provided, until the next day that is not a Saturday, Sunday, legal holiday or day on which the court is lawfully closed.

B. The judge, in commencing the commitment hearing, shall inform the person whose involuntary admission is being sought of his right to apply for voluntary admission and treatment as provided for in § 37.1-65 and shall afford such person an opportunity for voluntary admission. The judge shall ascertain if such person is then willing and capable of seeking voluntary admission and treatment. If the person is capable and willingly accepts voluntary admission and treatment, the judge shall require him to accept voluntary admission for a minimum period of treatment and after such minimum period, not to exceed seventy-two hours, to give the hospital forty-eight hours' notice prior to leaving the hospital, during which notice period he shall not be discharged, unless sooner discharged pursuant to § 37.1-98 or § 37.1-99. Such person shall be subject to the transportation provisions as provided in § 37.1-71 and the requirement for prescreening by a community services board or community mental health clinic as provided in § 37.1-65.

C. If a person is incapable of accepting or unwilling to accept voluntary admission and treatment, the judge shall inform such person of his right to a commitment hearing and right to counsel. The judge shall ascertain if a person whose admission is sought is represented by counsel, and if he is not represented by counsel, the judge shall appoint an attorney-at-law to represent him. However, if such person requests an opportunity to employ counsel, the court shall give him a reasonable opportunity to employ counsel at his own expense.

D. A written explanation of the involuntary commitment process and the statutory protections associated with the process shall be given to the person and its contents explained by an attorney prior to the commitment hearing. The written explanation shall include, at a minimum, an explanation of the person's right to retain private counsel or be represented by a court-appointed attorney, to present any defenses including independent evaluation and expert testimony or the testimony of other witnesses, to be present during the hearing and testify, to appeal any certification for involuntary admission to the circuit court, and to have a jury trial on appeal. The judge shall ascertain whether the person whose admission is sought has been given the written explanation required herein.

E. To the extent possible, during or before the commitment hearing, the attorney for the person whose admission is sought shall interview his client, the petitioner, the examiner described below, the community services board staff, and any other material witnesses. He shall also examine all relevant diagnostic and other reports, present evidence and witnesses, if any, on his client's behalf, and otherwise actively represent his client in the proceedings. A health care provider shall disclose or make available all such reports, treatment information and records concerning his client to the attorney, upon request. The role of the attorney shall be to represent the wishes of his client, to the extent possible.

F. The petitioner shall be given adequate notice of the place, date, and time of the commitment

549 hearing. The petitioner shall be entitled to retain counsel at his own expense, to be present during the
550 hearing, and to testify and present evidence. The petitioner shall be encouraged but shall not be required
551 to testify at the hearing and the person whose admission is sought shall not be released solely on the
552 basis of the petitioner's failure to attend or testify during the hearing.

553 G. Notwithstanding the above, the judge shall require an examination of such person by a
554 psychiatrist or a psychologist who is licensed in Virginia by either the Board of Medicine or the Board
555 of Psychology who is qualified in the diagnosis of mental illness or, if such a psychiatrist or
556 psychologist is not available, any mental health professional who is (i) licensed in Virginia through the
557 Department of Health Professions and (ii) qualified in the diagnosis of mental illness. The examiner
558 chosen shall be able to provide an independent examination of the person. The examiner shall not be
559 related by blood or marriage to the person, shall not be responsible for treating the person, shall have no
560 financial interest in the admission or treatment of the person, shall have no investment interest in the
561 hospital detaining or admitting the person under this article, and, except for employees of state hospitals
562 and of the U.S. Department of Veterans Affairs, shall not be employed by such hospital. For purposes of
563 this section, investment interest means the ownership or holding of an equity or debt security, including,
564 but not limited to, shares of stock in a corporation, interests or units of a partnership, bonds, debentures,
565 notes, or other equity or debt instruments.

566 All such examinations shall be conducted in private. The judge shall summons the examiner who
567 shall certify that he has personally examined the individual and has probable cause to believe that the
568 individual (i) is or is not so seriously mentally ill as to be substantially unable to care for himself, or
569 (ii) does or does not present an imminent danger to himself or others as a result of mental illness, and
570 (iii) requires or does not require involuntary hospitalization or treatment. Alternatively, the judge, in his
571 discretion, may accept written certification of the examiner's findings if the examination has been
572 personally made within the preceding five days and if there is no objection sustained to the acceptance
573 of such written certification by the person or his attorney. The judge shall not render any decision on
574 the petition until such examiner has presented his report either orally or in writing.

575 H. Except as otherwise provided in this section, prior to making any adjudication that such person is
576 mentally ill and shall be confined to an institution pursuant to this section, the judge shall require from
577 the community services board which serves the political subdivision where the person resides a
578 prescreening report, and the board or clinic shall provide such a report within forty-eight hours or if the
579 forty-eight-hour period terminates on a Saturday, Sunday, legal holiday or day on which the court is
580 lawfully closed, the next day that is not a Saturday, Sunday, legal holiday or day on which the court is
581 lawfully closed. If it is impossible or impractical to obtain a prescreening report from the community
582 services board which serves the political subdivision where the person resides, the judge may obtain
583 such report from the community services board of the political subdivision where the person is located.
584 The report shall be admissible as evidence of the facts stated therein and shall state whether the person
585 is deemed to be so seriously mentally ill that he is substantially unable to care for himself, an imminent
586 danger to himself or others as a result of mental illness and in need of involuntary hospitalization or
587 treatment, whether there is no less restrictive alternative to institutional confinement and what the
588 recommendations are for that person's care and treatment. In the case of a person sentenced and
589 committed to the Department of Corrections and who has been examined by a psychiatrist or clinical
590 psychologist, the judge may proceed to adjudicate whether the person is mentally ill and should be
591 confined pursuant to this section without requesting a prescreening report from the community services
592 board.

593 I. After observing the person and obtaining the necessary positive certification and any other relevant
594 evidence which may have been offered, if the judge finds specifically (i) that the person presents an
595 imminent danger to himself or others as a result of mental illness or has been proven to be so seriously
596 mentally ill as to be substantially unable to care for himself, and (ii) that alternatives to involuntary
597 confinement and treatment have been investigated and deemed unsuitable and there is no less restrictive
598 alternative to institutional confinement and treatment, the judge shall by written order and specific
599 findings so certify and order that the person be placed in a hospital or other facility for a period of
600 treatment not to exceed 180 days from the date of the court order. Such placement shall be in a hospital
601 or other facility designated by the community services board which serves the political subdivision in
602 which the person was examined as provided in this section. If the community services board does not
603 provide a placement recommendation at the commitment hearing, the person shall be placed in a
604 hospital or other facility designated by the Commissioner.

605 J. After observing the person and obtaining the necessary positive certification and any other relevant
606 evidence which may have been offered, if the judge finds specifically (i) that the person presents an
607 imminent danger to himself or others as a result of mental illness or has been proven to be so seriously
608 mentally ill as to be substantially unable to care for himself, and (ii) that less restrictive alternatives to
609 institutional confinement and treatment have been investigated and are deemed suitable, and if,
610 moreover, the judge finds specifically that (i) the patient has the degree of competency necessary to

understand the stipulations of his treatment, (ii) the patient expresses an interest in living in the community and agrees to abide by his treatment plan, (iii) the patient is deemed to have the capacity to comply with the treatment plan, (iv) the ordered treatment can be delivered on an outpatient basis, and (v) the ordered treatment can be monitored by the community services board or designated providers, the judge shall order outpatient treatment, day treatment in a hospital, night treatment in a hospital, outpatient involuntary treatment with anti-psychotic medication pursuant to § 37.1-134.21, or such other appropriate course of treatment as may be necessary to meet the needs of the individual. Upon failure of the patient to adhere to the terms of the outpatient treatment, the judge may revoke the same and, upon notice to the patient and after a commitment hearing, order involuntary commitment for treatment at a hospital. The community services board which serves the political subdivision in which the person resides shall recommend a specific course of treatment and programs for provision of such treatment. The community services board shall monitor the person's compliance with such treatment as may be ordered by the court under this section, and the person's failure to comply with involuntary outpatient treatment as ordered by the court may be admitted into evidence in subsequent hearings held pursuant to the provisions of this section.

K. The judge shall make or cause to be made a tape or other audio recording of the hearing and shall submit such recording to the appropriate district court clerk to be retained in a confidential file. Such recordings shall only be used to document and to answer questions concerning the judge's conduct of the hearing. These recordings shall be retained for at least three years from the date of the relevant commitment hearing. The judge shall also order that copies of the relevant medical records of such person be released to the facility or program in which he is placed upon request of the treating physician or director of the facility or program. Except as provided in this section, the court shall keep its copies of relevant medical records, reports, and court documents pertaining to the hearings provided for in this section confidential if so requested by such person, or his counsel, with access provided only upon court order for good cause shown. Such records, reports, and documents shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). Such person shall be released at the expiration of 180 days unless involuntarily committed by further petition and order of a court as provided herein or such person makes application for treatment on a voluntary basis as provided for in § 37.1-65.

L. The procedures required by this section shall be followed at such commitment hearing. The judge shall render a decision on such petition after the appointed examiner has presented his report, either orally or in writing, and after the community services board that serves the political subdivision where the person resides has presented a prescreening report, either orally or in writing, with recommendations for that person's placement, care and treatment. These reports, if not contested, may constitute sufficient evidence upon which the court may base its decision.

M. The clerk shall certify and forward forthwith to the Central Criminal Records Exchange, on a form provided by the Exchange, a copy of any order for involuntary commitment to a hospital. The copy of the form and the order shall be kept confidential in a separate file and used only to determine a person's eligibility to possess, purchase or transfer a firearm.

§ 37.1-134.9. Appointment of guardian ad litem.

A. On the filing of every petition for guardianship or conservatorship, the court shall appoint a guardian ad litem to represent the interests of the respondent. The guardian ad litem shall be paid such fee as is fixed by the court to be paid by the petitioner or taxed as costs, as the court directs.

B. Duties of the guardian ad litem include: (i) personally visiting the respondent; (ii) advising the respondent of rights pursuant to §§ 37.1-134.12 and 37.1-134.13, and certifying to the court that the respondent has been so advised; (iii) recommending that legal counsel should be appointed for the respondent, pursuant to § 37.1-134.12, if the guardian ad litem believes that counsel for the respondent is necessary; (iv) investigating the petition and evidence, requesting additional evaluation if necessary, and filing a report pursuant to subsection C; and (v) personally appearing at all court proceedings and conferences.

C. In the report required by subsection B (iv), the guardian ad litem shall address the following major areas of concern: (i) whether the court has jurisdiction; (ii) whether or not a guardian or conservator is needed; (iii) the extent of the duties and powers of the guardian or conservator, e.g., personal supervision, financial management, medical consent only; (iv) the propriety and suitability of the person selected as guardian or conservator, after consideration of geographic location, familial or other relationship with the respondent, ability to carry out the powers and duties of the office, commitment to promoting the respondent's welfare, any potential conflicts of interests, wishes of the respondent, and recommendations of relatives; (v) a recommendation as to the amount of surety on the conservator's bond; if any; and (vi) consideration of proper residential placement of the respondent.

D. A health care provider shall disclose or make available to the guardian ad litem, upon request, any information, records, and reports concerning the respondent that he determines necessary to

672 *perform his duties under this section.*

673 § 37.1-134.12. Counsel for respondent.

674 The respondent has the right to be represented by counsel of the respondent's choice. If the
675 respondent is not represented by counsel, the court may appoint legal counsel, upon the filing of the
676 petition or at any time prior to the entry of the order upon request of the respondent or the guardian ad
677 litem if the court determines that counsel is needed to protect the respondent's interest. Counsel
678 appointed by the court shall be paid such fee as is fixed by the court to be taxed as part of the costs of
679 the proceeding.

680 *A health care provider shall disclose or make available to the attorney upon request any*
681 *information, records, and reports concerning the respondent that he determines necessary to perform his*
682 *duties under this section, including a copy of the evaluation report required under § 37.1-134.11.*

683 § 37.1-134.21. Judicial authorization of treatment and detention of certain persons.

684 A. An appropriate circuit court, or judge as defined in § 37.1-1, may authorize on behalf of an adult
685 person, in accordance with this section, the provision, withholding or withdrawal of a specific treatment
686 or course of treatment for a mental or physical disorder, if it finds upon clear and convincing evidence
687 that (i) the person is either incapable of making an informed decision on his own behalf or is incapable
688 of communicating such a decision due to a physical or mental disorder and (ii) the proposed action is in
689 the best interest of the person.

690 B. For purposes of this section:

691 "Disorder" includes any physical or mental disorder or impairment, whether caused by injury,
692 disease, genetics, or other cause.

693 "Incapable of making an informed decision" means unable to understand the nature, extent or
694 probable consequences of a proposed treatment, or unable to make a rational evaluation of the risks and
695 benefits of the proposed treatment as compared with the risks and benefits of alternatives to that
696 treatment. Persons with dysphasia or other communication disorders who are mentally competent and
697 able to communicate shall not be considered incapable of giving informed consent.

698 C. Any person may request authorization of the provision, withholding or withdrawal of a specific
699 treatment, or course of treatment, for an adult person by filing a petition in the circuit court, or with a
700 judge as defined in § 37.1-1, of the county or city in which the allegedly incapable person resides or is
701 located, or in the county or city in which the proposed place of treatment is located. Upon filing such a
702 petition, the petitioner or the court shall deliver or send a certified copy of the petition to the person
703 who is the subject of such petition and, if the identity and whereabouts of the person's next of kin are
704 known, to the next of kin.

705 D. As soon as reasonably possible after the filing of the petition, the court shall appoint an attorney
706 to represent the interests of the allegedly incapable person at the hearing. However, such appointment
707 shall not be required in the event that the person, or another interested person on behalf of the person,
708 elects to retain private counsel at his own expense to represent the interests of the person at the hearing.
709 If the allegedly incapable person is indigent, his counsel shall be paid by the Commonwealth as
710 provided in § 37.1-89 from funds appropriated to reimburse expenses incurred in the involuntary mental
711 commitment process. However, this provision shall not be construed to prohibit the direct payment of an
712 attorney's fee either by the patient or by an interested person on his behalf, which fee shall be subject to
713 the review and approval of the court.

714 E. Following the appointment of an attorney pursuant to subsection D above, the court shall schedule
715 an expedited hearing of the matter. The court shall notify the person who is the subject of the petition,
716 his next of kin, if known, the petitioner, and their respective counsel of the date and time for the
717 hearing. In scheduling such a hearing, the court shall take into account the type and severity of the
718 alleged physical or mental disorder, as well as the need to provide the person's attorney with sufficient
719 time to adequately prepare his client's case.

720 F. Notwithstanding the provisions of subsections C and E above regarding delivery or service of the
721 petition and notice of the hearing to the next of kin of any person who is the subject of such petition, if
722 such person is a patient in any hospital at the time the petition is filed, the court, in its discretion, may
723 dispense with the requirement of any notice to the next of kin. This subsection shall not, however, be
724 construed to interfere with any decision made pursuant to the Health Care Decisions Act (§ 54.1-2981 et
725 seq.).

726 G. Evidence presented at the hearing may be submitted by affidavit in the absence of objection by
727 the person who is the subject of the petition, the petitioner, either of their respective counsel, or by any
728 other interested party. Prior to the hearing, the attorney shall investigate the risks and benefits of the
729 treatment decision for which authorization is sought and of alternatives to the proposed decision. The
730 attorney shall make a reasonable effort to inform the person of this information and to ascertain the
731 person's religious beliefs and basic values and the views and preferences of the person's next of kin. A
732 *health care provider shall disclose or make available to the attorney, upon request, any information,*
733 *records, and reports concerning the person that the attorney determines necessary to perform his duties*

under this section.

H. Prior to authorizing the provision, withholding or withdrawal of treatment pursuant to this section, the court shall find:

1. That there is no legally authorized person available to give consent;

2. That the person who is the subject of the petition is incapable either of making an informed decision regarding a specific treatment or course of treatment or is physically or mentally incapable of communicating such a decision;

3. That the person who is the subject of the petition is unlikely to become capable of making an informed decision or of communicating an informed decision within the time required for decision; and

4. That the proposed course of treatment is in the best interest of the patient. However, the court shall not authorize a proposed course of treatment which is proven by a preponderance of the evidence to be contrary to the person's religious beliefs or basic values unless such treatment is necessary to prevent death or a serious irreversible condition. The court shall take into consideration the right of the person to rely on nonmedical, remedial treatment in the practice of religion in lieu of medical treatment.

1. The court may not authorize the following under this section:

1. Nontherapeutic sterilization, abortion, or psychosurgery.

2. Admission to a mental retardation facility or a psychiatric hospital, as defined in § 37.1-1. However, the court may issue an order under this section authorizing the provision, withholding or withdrawal of a specific treatment or course of treatment of a person whose admission to such facility has been or is simultaneously being authorized under §§ 37.1-65, 37.1-65.1, 37.1-65.2, 37.1-65.3, or § 37.1-67.1, or of a person who is subject to an order of involuntary commitment previously or simultaneously issued under § 37.1-67.3 or Article 1.1 (§ 37.1-70.1 et seq.) of Chapter 2 of this title.

3. Administration of antipsychotic medication for a period to exceed 180 days or electroconvulsive therapy for a period to exceed 60 days pursuant to any petition filed under this section. The court may authorize electroconvulsive therapy only if it is demonstrated by clear and convincing evidence, which shall include the testimony of a licensed psychiatrist, that all other reasonable forms of treatment have been considered and that electroconvulsive therapy is the most effective treatment for the person. Even if the court has authorized administration of antipsychotic medication or electroconvulsive therapy hereunder, these treatments may be administered over the person's objection only if he is subject to an order of involuntary commitment, including outpatient involuntary commitment, previously or simultaneously issued under § 37.1-67.3 or Article 1.1 (§ 37.1-70.1 et seq.) of Chapter 2 of this title, or the provisions of Chapter 11 (§ 19.2-167 et seq.) or Chapter 11.1 (§ 19.2-182.2 et seq.) of Title 19.2.

4. Restraint or transportation of the person, unless it finds upon clear and convincing evidence that restraint or transportation is necessary to the provision of an authorized treatment for a physical disorder.

J. Any order authorizing the provision, withholding or withdrawal of treatment pursuant to subsection A shall describe any treatment or course of treatment authorized and may authorize generally such related examinations, tests, or services as the court may determine to be reasonably related to the treatment authorized. The order shall require the treating physician to review and document the appropriateness of the continued administration of antipsychotic medications not less frequently than every 30 days. Such order shall require the treating physician or other service provider to report to the court and the person's attorney any change in the person's condition resulting in probable restoration or development of the person's capacity to make and to communicate an informed decision prior to completion of any authorized course of treatment and related services. The order may further require the treating physician or other service provider to report to the court and the person's attorney any change in circumstances regarding any authorized course of treatment or related services or the withholding or withdrawal of treatment or services which may indicate that such authorization is no longer in the person's best interests. Upon receipt of such report, or upon the petition of any interested party, the court may enter such order withdrawing or modifying its prior authorization as it deems appropriate. Any petition or order under this section may be orally presented or entered, provided a written order shall be subsequently executed.

K. Any order hereunder of a judge, or of a judge or magistrate under subsection M, may be appealed de novo within 10 days to the circuit court for the jurisdiction where the order was entered, and any such order of a circuit court hereunder, either originally or on appeal, may be appealed within 10 days to the Court of Appeals.

L. Any licensed health professional or licensed hospital providing, withholding or withdrawing treatment, testing or detention pursuant to the court's or magistrate's authorization as provided in this section shall have no liability arising out of a claim to the extent such claim is based on lack of consent to such course of treatment, testing or detention or the withholding or withdrawal of such treatment, testing or detention. Any such professional or hospital providing, withholding or withdrawing treatment with the consent of the person receiving or being offered treatment shall have no liability arising out of a claim to the extent it is based on lack of capacity to consent if a court or a magistrate has denied a

petition hereunder to authorize such treatment, and such denial was based on an affirmative finding that the person was capable of making and communicating an informed decision regarding the proposed provision, withholding or withdrawal of treatment.

M. Based upon the opinion of a licensed physician that an adult person is incapable of making an informed decision as a result of a physical injury or illness and that the medical standard of care indicates that testing, observation and treatment are necessary to prevent imminent and irreversible harm, a magistrate may issue, for good cause shown, an emergency custody order for such adult person to be taken into custody and transported to a hospital emergency room for such testing, observation or treatment.

Prior to issuance of an emergency custody order pursuant to this subsection, the magistrate shall ascertain that there is no legally authorized person available to give consent to necessary treatment for the adult person and that the adult person (i) is incapable of making an informed decision regarding obtaining necessary treatment, (ii) has refused transport to obtain such necessary treatment, (iii) has indicated an intention to resist such transport, and (iv) is unlikely to become capable of making an informed decision regarding obtaining necessary treatment within the time required for such decision.

An opinion by the licensed physician that an adult person is incapable of making an informed decision as a result of physical injury or illness shall only be rendered after such licensed physician has communicated electronically or personally with the emergency medical services personnel on the scene and has attempted to communicate electronically or personally with the adult person to obtain information and medical data concerning the cause of the adult person's incapacity, has attempted to obtain consent from the adult person and has failed to obtain such consent.

If there is a change in the person's condition, the emergency medical services personnel shall contact the licensed physician. If at any time the licensed physician determines that a person subject to an order under this subsection has become capable of making and communicating an informed decision, such physician shall rely on the person's decision on whether to consent to further observation, testing or treatment.

Upon reaching the emergency room, the person shall be evaluated by a licensed physician. If the physician determines that the person meets the requirements of subsection N, the physician may apply for a temporary detention order pursuant to that subsection. If the physician determines that the person does not meet the requirements of subsection N, the person shall be released from custody immediately. The person shall remain in custody until this evaluation is performed, but in no event shall the period of custody under this subsection exceed four hours.

The law-enforcement officer may lawfully go to or be sent beyond the territorial limits of the county, city or town in which he serves to any point in the Commonwealth for the purpose of executing an order for emergency custody pursuant to this subsection. Nothing herein shall preclude a law-enforcement officer from obtaining emergency medical treatment or further medical evaluation at any time for a person in his custody as provided in this subsection.

If an order of emergency custody is not executed within four hours of its issuance, the order shall be void and shall be returned unexecuted to the office of the clerk of the issuing court or, if such office is not open, to any judge or magistrate thereof.

N. Upon the advice of a licensed physician who has attempted to obtain consent and upon a finding of probable cause to believe that an adult person within the court's or a magistrate's jurisdiction is incapable of making an informed decision regarding treatment of a physical or mental disorder, or is incapable of communicating such a decision due to a physical or mental disorder, and that the medical standard of care calls for testing, observation or treatment of the disorder within the next 24 hours to prevent death, disability, or a serious irreversible condition, the court or, if the court is unavailable, a magistrate may issue an order authorizing temporary detention of the person by a hospital emergency room or other appropriate facility and authorizing such testing, observation or treatment. The detention may not be for a period exceeding 24 hours unless extended by the court as part of an order authorizing treatment under subsection A. If before completion of authorized testing, observation or treatment, the physician determines that a person subject to an order under this subsection has become capable of making and communicating an informed decision, the physician shall rely on the person's decision on whether to consent to further observation, testing or treatment. If before issuance of an order under this subsection or during its period of effectiveness, the physician learns of an objection by a member of the person's immediate family to the testing, observation or treatment, he shall so notify the court or magistrate, who shall consider the objection in determining whether to issue, modify or terminate the order.

O. The provisions of § 37.1-89 relating to payment by the Commonwealth shall not apply to the cost of detention, testing or treatment under this section.

P. Nothing in this section shall be deemed to affect the right to use, and the authority conferred by, any other applicable statutory or regulatory procedure relating to consent, or to diminish any common law authority of a physician or other treatment provider to provide, withhold or withdraw services to a

857 person unable to give or to communicate informed consent to those actions, with or without the consent
858 of the person's relative, including but not limited to common law or other authority to provide treatment
859 in an emergency situation; nor shall anything in this section be construed to affect the law defining the
860 conditions under which consent shall be obtained for medical treatment, or the nature of the consent
861 required.

862 Q. Judicial authorization pursuant to this section for providing, withholding or withdrawing treatment
863 need not be obtained for a person for whom consent or authorization has been granted or issued or may
864 be obtained in accordance with the provisions of Article 8 (§ 54.1-2981 et seq.) of Chapter 29 of Title
865 54.1 or other applicable statutes or common law of this Commonwealth.