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HOUSE BILL NO. 2292

Offered January 12, 2011

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A *BILL to amend and reenact §§ 8.01-413 and 32.1-127.1:03 of the Code of Virginia, relating to electronic access to health records.*

Patrons—Sickles, Ebbin and Janis

Referred to Committee on Health, Welfare and Institutions

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, his attorney and authorized insurer to copies of such records or papers; subpoena; damages, costs and attorney 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 as provided by law may comply with the subpoena by a timely mailing to the clerk issuing the subpoena or in whose court the action is pending properly authenticated copies, photographs or microphotographs in lieu of the originals. The court whose clerk issued the subpoena or, in the case of an attorney-issued subpoena, in which the action is pending, 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.

Except as provided in subsection G, the party requesting the subpoena duces tecum or on whose behalf an attorney-issued subpoena duces tecum was issued 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 \$0.50 for each page up to 50 pages and \$0.25 a page thereafter for copies from paper or other hard copy generated from computerized or other electronic storage, or other photographic, mechanical, electronic, imaging or chemical storage process and \$1 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 \$10.

Upon request, a patient's account balance or itemized listing of charges maintained by a health care provider shall be supplied at no cost up to three times every ~~twelve~~ 12 months to either the patient or the patient's attorney.

B. Copies of hospital, nursing facility, physician's, or other health care provider's records or papers *or electronic access to such records or papers* shall be furnished within 15 days of receipt of such request to the patient, his attorney, his executor or administrator, or an authorized insurer upon such patient's, attorney's, executor's, administrator's, or authorized insurer's written request, which request shall comply with the requirements of subsection E of § 32.1-127.1:03.

However, copies of a patient's records *or electronic access to a patient's records* shall not be furnished to such patient when the patient's treating physician or clinical psychologist, in the exercise of professional judgment, 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 reasonably likely to endanger the life or physical safety of the patient or another person, or that such health records make reference to a person, other than a health care provider, and the access requested would be reasonably likely to cause substantial harm to such referenced person. In any such case, if requested by the patient or his attorney or authorized insurer, such records *or electronic access to such records* shall be furnished within 15 days of the date of such request to the patient's attorney or authorized insurer, rather than to the patient.

If the records are not provided to the patient in accordance with this section, then, if requested by the

59 patient, the hospital, nursing facility, physician, or other health care provider denying the request shall
60 comply with the patient's request to either (i) provide a copy of *or electronic access to* the records to a
61 physician or clinical psychologist of the patient's choice whose licensure, training, and experience,
62 relative to the patient's condition, are at least equivalent to that of the treating physician or clinical
63 psychologist upon whose opinion the denial is based, who shall, at the patient's expense, make a
64 judgment as to whether to make the records available to the patient or (ii) designate a physician or
65 clinical psychologist, whose licensure, training, and experience, relative to the patient's condition, are at
66 least equivalent to that of the treating physician or clinical psychologist upon whose opinion the denial
67 is based and who did not participate in the original decision to deny the patient's request for his records,
68 who shall, at the expense of the provider denying access to the patient, review the records and make a
69 judgment as to whether to make the records available to the patient. In either such event, the hospital,
70 nursing facility, physician, or other health care provider denying the request shall comply with the
71 judgment of the reviewing physician or clinical psychologist.

72 Except as provided in subsection G, a reasonable charge may be made by the hospital, nursing
73 facility, physician or other health care provider maintaining the records for the cost of the services
74 relating to the maintenance, retrieval, review, and preparation of the copies of *or provision of electronic*
75 *access to* the records. Except for copies of X-ray photographs, however, such charges shall not exceed
76 \$0.50 per page for up to 50 pages and \$0.25 a page thereafter for copies from paper or other hard copy
77 generated from computerized or other electronic storage, or other photographic, mechanical, electronic,
78 imaging or chemical storage process and \$1 per page for copies from microfilm or other micrographic
79 process, a fee for search and handling, not to exceed \$10, and all postage and shipping costs. Any
80 hospital, nursing facility, physician, or other health care provider receiving such a request from a
81 patient's attorney or authorized insurer shall require a writing signed by the patient confirming the
82 attorney's or authorized insurer's authority to make the request and shall accept a photocopy, facsimile,
83 or other copy of the original signed by the patient as if it were an original.

84 Upon request, a patient's account balance or itemized listing of charges maintained by a health care
85 provider shall be supplied at no cost up to three times every ~~twelve~~ 12 months to either the patient or
86 the patient's attorney.

87 C. Upon the failure of any hospital, nursing facility, physician, or other health care provider to
88 comply with any written request made in accordance with subsection B within the period of time
89 specified in that subsection and within the manner specified in subsections E and F of § 32.1-127.1:03,
90 the patient, his attorney, his executor or administrator, or authorized insurer may cause a subpoena duces
91 tecum to be issued. The subpoena may be issued (i) upon filing a request therefor with the clerk of the
92 circuit court wherein any eventual suit would be required to be filed, and upon payment of the fees
93 required by subdivision A 18 of § 17.1-275, and fees for service or (ii) by the patient's attorney in a
94 pending civil case in accordance with § 8.01-407 without payment of the fees established in subdivision
95 A 23 of § 17.1-275. A sheriff shall not be required to serve an attorney-issued subpoena that is not
96 issued at least five business days prior to the date production of the record is desired. The subpoena
97 shall be returnable within 20 days of proper service, directing the hospital, nursing facility, physician, or
98 other health care provider to produce and furnish copies of the reports and papers to the clerk who shall
99 then make the same available to the patient, his attorney or authorized insurer. If the court finds that a
100 hospital, nursing facility, physician, or other health care provider willfully refused to comply with a
101 written request made in accordance with subsection B, either by willfully or arbitrarily refusing or by
102 imposing a charge in excess of the reasonable expense of making the copies and processing the request
103 for records, the court may award damages for all expenses incurred by the patient or authorized insurer
104 to obtain such copies, including court costs and reasonable ~~attorney's~~ attorney fees.

105 D. The provisions of subsections A, B, and C ~~hereof~~ shall apply to any health care provider whose
106 office is located within or without the Commonwealth if the records pertain to any patient who is a
107 party to a cause of action in any court in the Commonwealth of Virginia, and shall apply only to
108 requests made by the patient, his attorney, his executor or administrator, or any authorized insurer, in
109 anticipation of litigation or in the course of litigation.

110 E. Health care provider, as used in this section, shall have the same meaning as provided in
111 § 32.1-127.1:03 and shall also include an independent medical copy retrieval service contracted to
112 provide the service of retrieving, reviewing, and preparing such copies for distribution.

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

116 G. The provisions of this section governing fees that may be charged by a health care provider
117 whose records are subpoenaed or requested pursuant to this section shall not apply in the case of any
118 request by a patient for his own records, which shall be governed by subsection J of § 32.1-127.1:03.
119 This subsection shall not be construed to affect other provisions of state or federal statute, regulation or
120 any case decision relating to charges by health care providers for copies of records requested by any

person other than a patient when requesting his own records pursuant to subsection J of § 32.1-127.1:03.
§ 32.1-127.1:03. Health records privacy.

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

Pursuant to this subsection:

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

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

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

B. As used in this section:

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

"Certification" means a written representation that is delivered by hand, by first-class mail, by overnight delivery service, or by facsimile if the sender obtains a facsimile-machine-generated confirmation reflecting that all facsimile pages were successfully transmitted.

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

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

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

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

"Health plan" means an individual or group plan that provides, or pays the cost of, medical care. "Health plan" shall include any entity included in such definition as set out in 45 C.F.R. § 160.103.

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

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

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

182 entity.

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

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

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

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

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

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

197 3. The release of juvenile health records to a secure facility or a shelter care facility pursuant to
198 § 16.1-248.3.

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

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

208 2. In compliance with a subpoena issued in accord with subsection H, pursuant to a search warrant
209 or a grand jury subpoena, pursuant to court order upon good cause shown or in compliance with a
210 subpoena issued pursuant to subsection C of § 8.01-413. Regardless of the manner by which health
211 records relating to an individual are compelled to be disclosed pursuant to this subdivision, nothing in
212 this subdivision shall be construed to prohibit any staff or employee of a health care entity from
213 providing information about such individual to a law-enforcement officer in connection with such
214 subpoena, search warrant, or court order;

215 3. In accord with subsection F of § 8.01-399 including, but not limited to, situations where disclosure
216 is reasonably necessary to establish or collect a fee or to defend a health care entity or the health care
217 entity's employees or staff against any accusation of wrongful conduct; also as required in the course of
218 an investigation, audit, review or proceedings regarding a health care entity's conduct by a duly
219 authorized law-enforcement, licensure, accreditation, or professional review entity;

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

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

222 6. As required or authorized by law relating to public health activities, health oversight activities,
223 serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease,
224 public safety, and suspected child or adult abuse reporting requirements, including, but not limited to,
225 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,
226 32.1-283.1, 37.2-710, 37.2-839, 53.1-40.10, 54.1-2400.6, 54.1-2400.7, 54.1-2403.3, 54.1-2506,
227 54.1-2966, 54.1-2966.1, 54.1-2967, 54.1-2968, 54.1-3408.2, 63.2-1509, and 63.2-1606;

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

229 8. In connection with the health care entity's own health care operations or the health care operations
230 of another health care entity, as specified in 45 C.F.R. § 164.501, or in the normal course of business in
231 accordance with accepted standards of practice within the health services setting; however, the
232 maintenance, storage, and disclosure of the mass of prescription dispensing records maintained in a
233 pharmacy registered or permitted in Virginia shall only be accomplished in compliance with
234 §§ 54.1-3410, 54.1-3411, and 54.1-3412;

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

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

238 11. To the guardian ad litem and any attorney representing the respondent in the course of a
239 guardianship proceeding of an adult patient who is the respondent in a proceeding under Chapter 10
240 (§ 37.2-1000 et seq.) of Title 37.2;

241 12. To the guardian ad litem and any attorney appointed by the court to represent an individual who
242 is or has been a patient who is the subject of a commitment proceeding under § 19.2-169.6, Article 5
243 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title

16.1, or a judicial authorization for treatment proceeding pursuant to Chapter 11 (§ 37.2-1100 et seq.) of Title 37.2;

13. To a magistrate, the court, the evaluator or examiner required under Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title 16.1 or § 37.2-815, a community services board or behavioral health authority or a designee of a community services board or behavioral health authority, or a law-enforcement officer participating in any proceeding under Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title 16.1, § 19.2-169.6, or Chapter 8 (§ 37.2-800 et seq.) of Title 37.2 regarding the subject of the proceeding, and to any health care provider evaluating or providing services to the person who is the subject of the proceeding or monitoring the person's adherence to a treatment plan ordered under those provisions. Health records disclosed to a law-enforcement officer shall be limited to information necessary to protect the officer, the person, or the public from physical injury or to address the health care needs of the person. Information disclosed to a law-enforcement officer shall not be used for any other purpose, disclosed to others, or retained;

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

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

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

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

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

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

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

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

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

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

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

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

26. To the Office of the Inspector General for Behavioral Health and Developmental Services pursuant to Article 3 (§ 37.2-423 et seq.) of Chapter 4 of Title 37.2;

27. 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, pursuant to subdivision 1;

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

29. To law-enforcement officials, in response to their request, for the purpose of identifying or locating a suspect, fugitive, person required to register pursuant to § 9.1-901 of the Sex Offender and

305 Crimes Against Minors Registry Act, material witness, or missing person, provided that only the
306 following information may be disclosed: (i) name and address of the person, (ii) date and place of birth
307 of the person, (iii) social security number of the person, (iv) blood type of the person, (v) date and time
308 of treatment received by the person, (vi) date and time of death of the person, where applicable, (vii)
309 description of distinguishing physical characteristics of the person, and (viii) type of injury sustained by
310 the person;

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

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

316 32. To the State Health Commissioner pursuant to § 32.1-48.015 when such records are those of a
317 person or persons who are subject to an order of quarantine or an order of isolation pursuant to Article
318 3.02 (§ 32.1-48.05 et seq.) of Chapter 2;

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

323 34. To notify a family member or personal representative of an individual who is the subject of a
324 proceeding pursuant to Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title 16.1 or Chapter 8
325 (§ 37.2-800 et seq.) of Title 37.2 of information that is directly relevant to such person's involvement
326 with the individual's health care, which may include the individual's location and general condition,
327 when the individual has the capacity to make health care decisions and (i) the individual has agreed to
328 the notification, (ii) the individual has been provided an opportunity to object to the notification and
329 does not express an objection, or (iii) the health care provider can, on the basis of his professional
330 judgment, reasonably infer from the circumstances that the individual does not object to the notification.
331 If the opportunity to agree or object to the notification cannot practicably be provided because of the
332 individual's incapacity or an emergency circumstance, the health care provider may notify a family
333 member or personal representative of the individual of information that is directly relevant to such
334 person's involvement with the individual's health care, which may include the individual's location and
335 general condition if the health care provider, in the exercise of his professional judgment, determines
336 that the notification is in the best interests of the individual. Such notification shall not be made if the
337 provider has actual knowledge the family member or personal representative is currently prohibited by
338 court order from contacting the individual; and

339 35. To a threat assessment team established by a public institution of higher education pursuant to
340 § 23-9.2:10 when such records concern a student at the public institution of higher education, including
341 a student who is a minor.

342 Notwithstanding the provisions of subdivisions 1 through 35, a health care entity shall obtain an
343 individual's written authorization for any disclosure of psychotherapy notes, except when disclosure by
344 the health care entity is (i) for its own training programs in which students, trainees, or practitioners in
345 mental health are being taught under supervision to practice or to improve their skills in group, joint,
346 family, or individual counseling; (ii) to defend itself or its employees or staff against any accusation of
347 wrongful conduct; (iii) in the discharge of the duty, in accordance with subsection B of § 54.1-2400.1,
348 to take precautions to protect third parties from violent behavior or other serious harm; (iv) required in
349 the course of an investigation, audit, review, or proceeding regarding a health care entity's conduct by a
350 duly authorized law-enforcement, licensure, accreditation, or professional review entity; or (v) otherwise
351 required by law.

352 E. *Health care records required to be disclosed pursuant this section shall be made available as*
353 *paper copies, electronic copies, or electronically via secured Internet connection, upon request.*
354 *However, no health care entity shall be required to provide records in an electronic format if such*
355 *format is not used by the health care entity in the regular course of business.* Requests for copies of or
356 *electronic access to health records shall (i) be in writing, dated and signed by the requester; (ii) identify*
357 *the nature of the information requested; and (iii) include evidence of the authority of the requester to*
358 *receive such copies or access such records, and identification of the person to whom the information is*
359 *to be disclosed. The health care entity shall accept a photocopy, facsimile, or other copy of the original*
360 *signed by the requestor as if it were an original. Within 15 days of receipt of a request for copies of or*
361 *electronic access to health records, the health care entity shall do one of the following: (i)(a) furnish*
362 *such copies of or allow electronic access to the requested health records to any requester authorized to*
363 *receive them; (ii)(b) inform the requester if the information does not exist or cannot be found; (iii)(c) if*
364 *the health care entity does not maintain a record of the information, so inform the requester and provide*
365 *the name and address, if known, of the health care entity who maintains the record; or (iv)(d) deny the*
366 *request (a)(1) under subsection F, (b)(2) on the grounds that the requester has not established his*

authority to receive such health records or proof of his identity, or ~~(e)~~(3) as otherwise provided by law. Procedures set forth in this section shall apply only to requests for health records not specifically governed by other provisions of state law.

F. Except as provided in subsection B of § 8.01-413, copies of *or electronic access to* an individual's health records shall not be furnished to such individual or anyone authorized to act on the individual's behalf when the individual's treating physician or the individual's treating clinical psychologist has made a part of the individual's record a written statement that, in the exercise of his professional judgment, the furnishing to or review by the individual of such health records would be reasonably likely to endanger the life or physical safety of the individual or another person, or that such health record makes reference to a person other than a health care provider and the access requested would be reasonably likely to cause substantial harm to such referenced person. If any health care entity denies a request for copies of *or electronic access to* health records based on such statement, the 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 individual's condition are at least equivalent to that of the physician or clinical psychologist upon whose opinion the denial is based. The designated reviewing physician or clinical psychologist shall make a judgment as to whether to make the health record available to the 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 any such designated physician or clinical psychologist shall be accompanied by a statement from the custodian of the health record that the individual's treating physician or clinical psychologist determined that the individual's review of his health record would be 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.

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

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

AUTHORIZATION TO RELEASE CONFIDENTIAL HEALTH RECORDS

Individual's Name

Health Care Entity's Name

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

Information or Health Records to be disclosed

Purpose of Disclosure or at the Request of the Individual

As the person signing this authorization, I understand that I am giving my permission to the above-named health care entity for disclosure of confidential health records. I understand that the health care entity may not condition treatment or payment on my willingness to sign this authorization unless the specific circumstances under which such conditioning is permitted by law are applicable and are set forth in this authorization. I also understand that I have the right to revoke this authorization at any time, but that my revocation is not effective until delivered in writing to the person who is in possession of my health records and is not effective as to health records already disclosed under this authorization. A copy of this authorization and a notation concerning the persons or agencies to whom disclosure was made shall be included with my original health records. I understand that health information disclosed under this authorization might be redisclosed by a recipient and may, as a result of such disclosure,

no longer be protected to the same extent as such health information was protected by law while solely in the possession of the health care entity.

This authorization expires on (date) or (event)

Signature of Individual or Individual's Legal Representative if

Individual is Unable to Sign

Relationship or Authority of Legal Representative

Date of Signature

H. Pursuant to this subsection:

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

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

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

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

NOTICE TO INDIVIDUAL

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

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

NOTICE TO HEALTH CARE ENTITIES

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

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

NO MOTION TO QUASH WAS FILED; OR

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

IF YOU RECEIVE NOTICE THAT THE INDIVIDUAL WHOSE HEALTH RECORDS ARE BEING REQUESTED HAS FILED A MOTION TO QUASH THIS SUBPOENA, OR IF YOU FILE A 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 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 health records, health care 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 health records in a sealed envelope as set forth, health care entities shall not respond to a subpoena duces tecum for such health records until they have received a certification as set forth in subdivision 5 or 8 from the party on whose behalf the subpoena duces tecum was issued.

If the health care entity has actual receipt of notice that a motion to quash the subpoena has been filed or if the health care entity files a motion to quash the subpoena for health records, then the health care 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 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 health care entity. The health records returned to the 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 entity that the time for filing a motion to quash has elapsed and that no motion to quash was filed. Any health care entity receiving such certification shall have the duty to comply with the subpoena duces tecum by returning the specified health records by either the return date on the subpoena or five 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 individual's health records over the 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 health records have been submitted by a health care entity to the court or administrative agency in a sealed envelope, the court or administrative agency shall: (i) upon determining that no submitted health records should be disclosed, return all submitted health records to the health care entity in a sealed envelope; (ii) upon determining that all submitted health records should be disclosed, provide all the submitted health records to the party on whose behalf the subpoena was issued; or (iii) upon determining that only a portion of the submitted health records should be disclosed, provide such portion to the party on whose behalf the subpoena was issued and return the remaining health records to the 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 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

548 disclosures sought in the subpoena duces tecum are consistent with such resolution; and, therefore, the
549 health records previously delivered in a sealed envelope to the clerk of the court or administrative
550 agency will not be returned to the health care entity;

551 b. All filed motions to quash have been resolved by the court or administrative agency and the
552 disclosures sought in the subpoena duces tecum are consistent with such resolution and that, since no
553 health records have previously been delivered to the court or administrative agency by the health care
554 entity, the health care entity shall comply with the subpoena duces tecum by returning the health records
555 designated in the subpoena by the return date on the subpoena or five days after receipt of certification,
556 whichever is later;

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

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

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

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

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

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

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

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

587 I. Health care entities may testify about the health records of an individual in compliance with
588 §§ 8.01-399 and 8.01-400.2.

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