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HOUSE BILL NO. 490

Offered January 8, 2014

Prefiled January 6, 2014

A *BILL to amend and reenact § 8.01-413 of the Code of Virginia, relating to health care provider records and electronic metadata.*

Patron—Albo

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:**1. That § 8.01-413 of the Code of Virginia is 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 attorneys' 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 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 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 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 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 patient, the hospital, nursing facility, physician, or other health care provider denying the request shall

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

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

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

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

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

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

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

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

121 Upon request of the patient or patient's attorney, a health care provider shall provide the patient
122 with the metadata of the patient's electronic medical record. For purposes of this section, metadata shall
123 include data about data that is automatically generated as part of the computer record, including but
124 not limited to (i) audit trails of user accesses, activities, and times; (ii) order and results detail sheets
125 showing further details on individual audit trail line items; and (iii) other data that certifies how, when,
126 where, and by whom electronic documents and other computer-based information have been authored,
127 viewed, manipulated, changed, edited, or otherwise accessed in the patient's electronic medical record.