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HOUSE BILL NO. 2044

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on February 1, 2019)

(Patron Prior to Substitute—Delegate McGuire)

A BILL to amend and reenact § 8.01-413 of the Code of Virginia, relating to medical records; subpoena duces tecum; additional time to comply.

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 attorney fees.

A. In any case where the 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, imaging, or chemical storage process thereof shall be admissible as evidence in any court of the 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 or papers.

Any 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 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 health care provider for the service of maintaining, retrieving, reviewing, preparing, copying, and mailing the items produced pursuant to subsections B2, B3, B4, and B6, as applicable.

B. Copies of a health care provider's records or papers shall be furnished within 30 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. If a health care provider is unable to provide such records or papers within 30 days of receipt of such request, such provider shall notify the requester of such records or papers in writing of the reason for the delay and shall have no more than 30 days after the date of such written notice to comply with such request.

However, copies of a patient's records or papers 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 or papers a written statement that in his opinion the furnishing to or review by the patient of such records or papers would be reasonably likely to endanger the life or physical safety of the patient or another person, or that such records or papers 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 papers shall be furnished within 30 days of the date of such request to the patient's attorney or authorized insurer, rather than to the patient.

If the records or papers are not provided to the patient in accordance with this section, then, if requested by the patient, the health care provider denying the request shall comply with the patient's request to either (i) provide a copy of the records or papers to a physician or clinical psychologist of the patient's choice whose licensure, training, and experience, relative to the patient's condition, are at least equivalent to that of the treating physician or clinical psychologist upon whose opinion the denial is based, who shall, at the patient's expense, make a judgment as to whether to make the records or papers available to the patient or (ii) designate a physician or clinical psychologist, whose licensure, training, and experience, relative to the patient's condition, are at least equivalent to that of the treating physician or clinical psychologist upon whose opinion the denial is based and who did not participate in the original decision to deny the patient's request for his records or papers, who shall, at the expense of the provider denying access to the patient, review the records or papers and make a judgment as to whether to make the records or papers available to the patient. In either such event, the health care provider

60 denying the request shall comply with the judgment of the reviewing physician or clinical psychologist.

61 Except as provided in subsection G, a reasonable charge may be made by the health care provider
62 maintaining the records or papers for the cost of the services relating to the maintenance, retrieval,
63 review, and preparation of the copies of the records or papers, pursuant to subsections B2, B3, B4, and
64 B6, as applicable. Any health care provider receiving such a request from a patient's attorney or
65 authorized insurer shall require a writing signed by the patient confirming the attorney's or authorized
66 insurer's authority to make the request, which shall comply with the requirements of subsection G of
67 § 32.1-127.1:03, and shall accept a photocopy, facsimile, or other copy of the original signed by the
68 patient as if it were an original.

69 B1. A health care provider shall produce the records or papers in either paper, hard copy, or
70 electronic format, as requested by the requester. If the health care provider does not maintain the items
71 being requested in an electronic format and does not have the capability to produce such items in an
72 electronic format, such items shall be produced in paper or other hard copy format.

73 B2. When the records or papers requested pursuant to subsection B1 are produced in paper or hard
74 copy format from records maintained in (i) paper or other hard copy format or (ii) electronic storage, a
75 health care provider may charge the requester a reasonable fee not to exceed \$0.50 per page for up to
76 50 pages and \$0.25 per page thereafter for such copies, \$1 per page for hard copies from microfilm or
77 other micrographic process, and a fee for search and handling not to exceed \$20, plus all postage and
78 shipping costs.

79 B3. When the records or papers requested pursuant to subsection B1 are produced in electronic
80 format from records or papers maintained in electronic storage, a health care provider may charge the
81 requester a reasonable fee not to exceed \$0.37 per page for up to 50 pages and \$0.18 per page thereafter
82 for such copies and a fee for search and handling not to exceed \$20, plus all postage and shipping costs.
83 Except as provided in subsection B4, the total amount charged to the requester for records or papers
84 produced in electronic format pursuant to this subsection, including any postage and shipping costs and
85 any search and handling fee, shall not exceed \$150 for any request made on and after July 1, 2017, but
86 prior to July 1, 2021, or \$160 for any request made on or after July 1, 2021.

87 B4. When any portion of records or papers requested to be produced in electronic format is stored in
88 paper or other hard copy format at the time of the request and not otherwise maintained in electronic
89 storage, a health care provider may charge a fee pursuant to subsection B2 for the production of such
90 portion, and such production of such portion is not subject to any limitations set forth in subsection B3,
91 whether such portion is produced in paper or other hard copy format or converted to electronic format
92 as requested by the requester. Any other portion otherwise maintained in electronic storage shall be
93 produced electronically. The total search and handling fee shall not exceed \$20 for any production made
94 pursuant to this subsection where the production contains both records or papers in electronic format and
95 records or papers in paper or other hard copy format.

96 B5. Upon request, a patient's account balance or itemized listing of charges maintained by a health
97 care provider shall be supplied at no cost up to three times every 12 months to either the patient or the
98 patient's attorney.

99 B6. When the record requested is an X-ray series or study or other imaging study and is requested to
100 be produced electronically, a health care provider may charge the requester a reasonable fee, which shall
101 not exceed \$25 per X-ray series or study or other imaging study, and a fee for search and handling,
102 which shall not exceed \$10, plus all postage and shipping costs. When an X-ray series or study or other
103 imaging study is requested to be produced in hard copy format, or when a health care provider does not
104 maintain such X-ray series or study or other imaging study being requested in an electronic format or
105 does not have the capability to produce such X-ray series or study or other imaging study in an
106 electronic format, a health care provider may charge the requester a reasonable fee, which may include a
107 fee for search and handling not to exceed \$10 and the actual cost of supplies for and labor of copying
108 the requested X-ray series or study or other imaging study, plus all postage and shipping costs.

109 B7. Upon request by the patient, or his attorney, of records or papers as to the cost to produce such
110 records or papers, a health care provider shall inform the patient, or his attorney, of the most
111 cost-effective method to produce such a request pursuant to subsection B2, B3, B4, or B6, as applicable.

112 B8. Production of records or papers to the patient, or his attorney, requested pursuant to this section
113 shall not be withheld or delayed solely on the grounds of nonpayment for such records or papers.

114 C. Upon the failure of any health care provider to comply with any written request made in
115 accordance with subsection B within the period of time specified in that subsection and within the
116 manner specified in subsections E and F of § 32.1-127.1:03, the patient, his attorney, his executor or
117 administrator, or authorized insurer may cause a subpoena duces tecum to be issued. The subpoena may
118 be issued (i) upon filing a request therefor with the clerk of the circuit court wherein any eventual suit
119 would be required to be filed, and upon payment of the fees required by subdivision A 18 of
120 § 17.1-275, and fees for service or (ii) by the patient's attorney in a pending civil case in accordance
121 with § 8.01-407 without payment of the fees established in subdivision A 23 of § 17.1-275.

122 A sheriff shall not be required to serve an attorney-issued subpoena that is not issued at least five
123 business days prior to the date production of the record is desired.

124 No subpoena duces tecum for records or papers shall set a return date by which the health care
125 provider must comply with such subpoena earlier than 15 days from the date of the subpoena, except by
126 order of a court or administrative agency for good cause shown. When a court or administrative agency
127 orders that records or papers be disclosed pursuant to a subpoena duces tecum earlier than 15 days from
128 the date of the subpoena, a copy of such order shall accompany such subpoena.

129 As to a subpoena duces tecum issued with at least a 15-day return date, if no motion to quash is
130 filed within 15 days of the issuance of the subpoena, the party requesting the subpoena duces tecum or
131 the party on whose behalf the subpoena was issued shall certify to the subpoenaed health care provider
132 that (a) the time for filing a motion to quash has elapsed and (b) no such motion was filed. Upon
133 receipt of such certification, the subpoenaed health care provider shall comply with the subpoena duces
134 tecum by returning the specified records or papers by either (1) the return date on the subpoena or (2)
135 five days after receipt of such certification, whichever is later.

136 The subpoena shall direct the health care provider to produce and furnish copies of the records or
137 papers to the requester or clerk, who shall then make the same available to the patient, his attorney, or
138 his authorized insurer.

139 If the court finds that a health care provider willfully refused to comply with a written request made
140 in accordance with subsection B, either (A) by failing over the previous six-month period to respond to
141 a second or subsequent written request, properly submitted to the health care provider in writing with
142 complete required information, without good cause or (B) by imposing a charge in excess of the
143 reasonable expense of making the copies and processing the request for records or papers, the court may
144 award damages for all expenses incurred by the patient or authorized insurer to obtain such copies,
145 including a refund of fees if payment has been made for such copies, court costs, and reasonable
146 attorney fees.

147 If the court further finds that such subpoenaed records or papers, subpoenaed pursuant to this
148 subsection, or requested records or papers, requested pursuant to subsection B, are not produced for a
149 reason other than compliance with § 32.1-127.1:03 or an inability to retrieve or access such records or
150 papers, as communicated in writing to the subpoenaing party or requester within the time period
151 required by subsection B, such subpoenaing party or requester shall be entitled to a rebuttable
152 presumption that expenses and attorney fees related to the failure to produce such records or papers shall
153 be awarded by the court.

154 *C1. A health care provider may make written request to the party requesting the subpoena duces*
155 *tecum or the party on whose behalf the subpoena was issued for such party's consent to an additional*
156 *seven days within which to comply with such subpoena, which consent shall not be unreasonably*
157 *withheld, provided such subpoena was served within 15 days of the return date and provided such*
158 *additional time does not adversely affect a party's ability to timely prepare for trial, depositions, or such*
159 *other proceeding. This subsection shall not apply to an independent medical copy retrieval service*
160 *contracted to provide the service of retrieving, reviewing, and preparing such copies for distribution.*

161 D. The provisions of this section shall apply to any health care provider whose office is located
162 within or outside the Commonwealth if the records pertain to any patient who is a party to a cause of
163 action in any court in the Commonwealth, and shall apply only to requests made by the patient, his
164 attorney, his executor or administrator, or any authorized insurer, in anticipation of litigation or in the
165 course of litigation.

166 E. As used in this section, "health care provider" has the same meaning as provided in
167 § 32.1-127.1:03 and includes an independent medical copy retrieval service contracted to provide the
168 service of retrieving, reviewing, and preparing such copies for distribution.

169 F. Notwithstanding the authorization to admit as evidence patient records in the form of
170 microphotographs, prescription dispensing records maintained in or on behalf of any pharmacy registered
171 or permitted in the Commonwealth shall only be stored in compliance with §§ 54.1-3410, 54.1-3411 and
172 54.1-3412.

173 G. The provisions of this section governing fees that may be charged by a health care provider
174 whose records are subpoenaed or requested pursuant to this section shall not apply in the case of any
175 request by a patient for a copy of his own records, which shall be governed by subsection J of
176 § 32.1-127.1:03. This subsection shall not be construed to affect other provisions of state or federal
177 statute, regulation or any case decision relating to charges by health care providers for copies of records
178 requested by any person other than a patient when requesting his own records pursuant to subsection J
179 of § 32.1-127.1:03.