

**REPORT OF THE
JOINT COMMISSION ON HEALTH CARE**

**Disclosure of Health Records
(HJR 134, 2004)**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 27

**COMMONWEALTH OF VIRGINIA
RICHMOND
2005**



COMMONWEALTH of VIRGINIA
Joint Commission on Health Care

Delegate Harvey B. Morgan
Chairman
Kim Snead
Executive Director

March 15, 2005

900 E. Main Street, Suite 3072E
P.O. Box 1322
Richmond, Virginia 23218
(804) 786-5445
Fax (804) 786-5538

TO: The Honorable Mark R. Warner, Governor of Virginia
and Members of the General Assembly

The 2004 General Assembly, in House Joint Resolution 134, directed the Joint Commission on Health Care (JCHC) to "study the use and disclosure of health records relative to Virginia law and the federal Health Insurance Portability and Accountability Act (HIPAA)" in order to "consider the need for amendments to Virginia laws and recommend ways to assist health care providers and other relevant parties to understand and comply with state and federal health record privacy laws." Representatives of the Health Law Section of the Virginia Bar Association (VBA) took the lead in developing study protocols and in overseeing completion of the study. Numerous, uncompensated hours were contributed by VBA members and other interested parties in completing the study.

An executive summary of the report was submitted prior to the 2005 General Assembly Session. The final report (a compilation of the reports of the Oversight Committee and the Focus Committees) is enclosed for your consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H. B. Morgan", written over a horizontal line.

Harvey B. Morgan
Chairman

JOINT COMMISSION ON HEALTH CARE: 2004

Chairman

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Vice-Chairman

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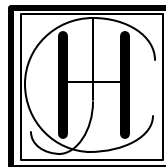
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The Honorable Jane H. Woods

Executive Director

Kim Snead



PREFACE

The Privacy Rule, promulgated under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), imposed new requirements for HIPAA-covered entities to ensure the privacy of health records including the use and disclosure of health records. As a general principle, HIPAA preempts state health privacy laws except where state laws provide (a) the individual with greater access to his own records than would HIPAA or (b) greater privacy protection for the individual. There are a number of instances in which it is unclear whether HIPAA privacy provisions or Virginia law take precedence.

House Joint Resolution 134, directed the Joint Commission on Health Care (JCHC) to “study the use and disclosure of health records relative to Virginia law and the federal Health Insurance Portability and Accountability Act (HIPAA)” in order to “consider the need for amendments to Virginia laws and recommend ways to assist health care providers and other relevant parties to understand and comply with state and federal health record privacy laws.” The JCHC study was completed in collaboration with representatives of the Health Law Section of the Virginia Bar Association, who took the lead in developing study protocols and in conducting the study. The Joint Commission introduced legislation in 2005 to make a number of changes to clarify Virginia statutes and to bring them into compliance with federal HIPAA Privacy Rule provisions.

On behalf of the Joint Commission on Health Care and its staff, I would like to thank the many lawyers, trade association representatives, agency representatives and practitioners who assisted with the study including: Theodore F. Adams, Steven D. Benjamin, David F. Boleyn, Gustav P. Chiarello, Tracey L. Cover, Patrick C. Devine, Jr., Brian O. Dolan, Harry N. Doyle, III, Robyn S. Ellis, Diane Engster, Helen Foster, Jeanne F. Franklin, Alan S. Goldberg, William H. Hall, Jr., Jane D. Hickey, Gail Jaspen, Reginald N. Jones, Robert Jones, Jonathan M. Joseph, Wade A. Kizer, Christopher LaGow, Kevin Logan, Joy Lombard, Jamie Martin, Kenneth D. McArthur, Jr., Stephen C. McCoy, Charles F. Midkiff, Jere Mundy, John Oliver, Claire R. Pettrone, Mark C. Pratt, William O. Quirey, Jr., Stephen D. Rosenthal, Shannon E. Sinclair, Chris Spanos, James E. Swiger, The Honorable Lawrence D. Tarr, Dana Traynham, Allyson K. Tysinger, Susan Ward, D. Calloway Whitehead, III and Victoria Willis.

Kim Snead
Executive Director

March 2005

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USE/DISCLOSURE OF HEALTH RECORDS UNDER VIRGINIA LAW AND HIPAA

EXECUTIVE SUMMARY

Authority for Study

HJR 134 directed JCHC to “study the use and disclosure of health records relative to Virginia law and the Health Insurance Portability and Accountability Act (HIPAA)” in order to “consider the need for amendments to Virginia laws and recommend ways to assist health care providers and other relevant parties to understand and comply with state and federal health record privacy laws.”

Background on the HIPAA Privacy Rule

The Privacy Rule, promulgated under the federal Health Insurance Portability and Accountability Act of 1996, imposed new requirements for HIPAA-covered entities to ensure the privacy of health records including the use and disclosure of health records. As a general principle, HIPAA preempts state health privacy laws except where state laws provide (a) the individual with greater access to his own records than would HIPAA or (b) greater privacy protection for the individual. There are a number of instances in which it is unclear whether HIPAA privacy provisions or Virginia law take precedence.

Issues Requiring No Change at this Time; Further Study May Be Appropriate

The following three issues require no change: Timeframe of Access; Consideration of “Disclosure” Versus “Use”; and Incorporation of HIPAA’s Broad “treatment, payment or operations” Exceptions into Virginia law. Each of the remaining issues that were reviewed are discussed separately and the Options that were approved by JCHC are shown in bold text.

REDISCLOSURE OF PROTECTED HEALTH INFORMATION

Code of Virginia § 32.1-127.1:03. A prohibits redisclosure of protected health information (PHI) “beyond the purpose for which such disclosure was made” without authorization, but goes on to list exceptions that may be made to this redisclosure restriction. The provision applies to all third parties that receive PHI via a permitted disclosure except the specified exceptions. But HIPAA only applies to “covered entities” (i.e. generally providers that bill electronically and health plans and does not directly affect third parties). The prohibition applying to third parties in Virginia’s statute is not preempted by HIPAA since HIPAA requirements do not apply to third parties that are not covered entities. Virginia’s redisclosure prohibition is a pro-consumer provision enacted to strengthen health privacy protections. Prior to July 1,

2004, Subsection G of the *Code* contained a suggested consent form that referred to the redisclosure prohibition. However, since Subsection G was amended to set out a HIPAA-compliant form for “authorization” that does not refer to Virginia’s redisclosure prohibition, third parties may violate Virginia law unknowingly by redisclosing information.

OPTIONS

Option I: Take no action.

Requires no action by health care providers, but it does not advance the privacy interests as adopted by the legislature.

Option II: Introduce legislation to amend the *Code of Virginia*, Title 32.1 Health Records Privacy statute to add language requiring health care entities to describe the redisclosure prohibition in some manner when disclosing PHI.

This would facilitate knowledge of the provision but could be seen as a “trap” creating liability if not followed, would be an added inconvenience, and could confuse business associates who are allowed to redisclose.

SAVINGS CLAUSE

Code of Virginia § 32.1-127.1:03 contains the phrase “except when permitted...by another provision of state or federal law.” The concern is whether the reference to “federal law” may be construed to replace Virginia’s more stringent disclosure limitations by saying that if HIPAA would permit disclosure, than Virginia’s more stringent laws do not apply. This could have enormous, unintended policy implications. Permission to disclose is given under HIPAA but only if all relevant provisions of the privacy rule are observed by the covered entity disclosing information. This is not broadly understood which would lead to violations. If on first analysis, the federal privacy rule is less restrictive than Virginia law, you must determine whether Virginia’s more stringent law preempts the federal privacy rule.

Existing language is ambiguous, and could be construed either to mean that if HIPAA does not prevent it, Virginia does not either OR to mean that you must comply with both Virginia law (if more stringent) and HIPAA. Also, if existing federal law supersedes contrary and more stringent Virginia law, we have a moving target as federal law keeps changing.

OPTIONS

Option I: Take no action.

Option II: Introduce legislation to amend the *Code of Virginia*, Title 32.1 Health Records Privacy statute to delete references to “another provision of...federal law” and to initiate public education to address confusion regarding federal supersede

and state preemption provisions. In addition, language in Subsection D.16 will be amended to clarify that third-party payors are allowed to disclose information as needed to its customary business partners.

ORGAN TRANSPLANT

Existing Virginia law ambiguously refers to a provider's "routine contact process" as a permitted disclosure, but is it intended to refer to the "routine contact process" used for organ procurement. It would be possible to argue that the provision is not limited to organ procurement and that any provider can disclose anything so long as it is a part of the provider's routine contact process. A careful reading of the provision makes clear that it was never intended to be a broad open-ended exception.

OPTIONS

Option I: Take no action.

Option II: Introduce legislation to amend the *Code of Virginia* § 32.1-127.1:03. D.7, which reads "including in the implementation of a health care provider's routine contact process pursuant to B.4 of *Code* § 32.1-127" into a separate subsection in § 32.1-127.1:03. D.20 to clarify the meaning.

PERMISSIVE VERSUS MANDATORY DISCLOSURE

Consideration of the completeness of the statutory list of permitted disclosures and the use of the word "may" as opposed to "shall" makes unclear whether disclosure of the 29 items listed in *Code of Virginia* § 32.1 -127.1:03.D are permissive or mandatory. In fact, other sections of the Virginia *Code* make clear which of the 29 items are mandatory, but if one looked only at the list in Subsection D, one may incorrectly conclude that all of them (e.g., "disclosure to the individual of his own records") are permissive.

OPTIONS

Option I: Take no action.

Option II: Introduce legislation to amend the *Code of Virginia* § 32.1 -127.1:03: (a) to move language from Subsection D.20 to Subsection A to read: "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" and (b) to add language to Subsection A to indicate that disclosure may be made when permitted "or required" by state law.

PSYCHOTHERAPY NOTES

Psychotherapy notes are the personal notes of a therapist intended to help him recall the therapy discussion. The notes are not intended to be seen or used by anyone other than the therapist. Virginia law currently treats psychotherapy notes as health records and as such, they are accorded no special protections other than those that apply to all health records. Conversely, HIPAA treats psychotherapy notes as a special category of health information to which distinct rules apply, but only if such notes have been removed from patient health records. In general, a HIPAA-covered entity may not disclose psychotherapy notes without patient authorization.

HIPAA preempts state privacy law unless the state law is more stringent which creates the following conflicts: with regard to access, Virginia law is considered more stringent because it provides greater access to the patient; but with regard to disclosure, HIPAA is considered more stringent because it would require patient authorization for disclosure for entities subject to HIPAA. Thus, a HIPAA-covered entity who keeps his psychotherapy notes separate from the health record would be allowed to disclose the note under Virginia law but would be precluded from disclosure without a court order or patient authorization under HIPAA. There is also confusion between existing Virginia law and HIPAA regarding when a patient is allowed “access” versus when a provider may “disclose” to a third party (e.g. a payor). Virginia law requires the patient to have broad access (and HIPAA would not preempt that access) but the provider would not be allowed to disclose the psychotherapy notes to a third party under HIPAA’s more stringent provisions.

OPTIONS

Option I: Take no action.

With regard to patient access:

Option II: Introduce legislation to amend the *Code of Virginia* § 32.1-127.1:03 to bring its provisions more in line with HIPAA. This would allow a provider to withhold the sensitive notes from the patient, when, for example, access may be detrimental.

With regard to disclosure to third parties:

Option III: Introduce legislation to amend the *Code of Virginia* § 32.1-127.1:03 to align its provisions with HIPAA so psychotherapy notes may not be disclosed to third parties without an authorization. (Thus one rule would apply regardless of whether or not the provider is a covered entity under HIPAA.)

OR

Option IV: Introduce legislation to amend the *Code of Virginia* § 32.1-127.1:03 to permit but not require providers to require an authorization before disclosing the psychotherapy notes to third parties (for a middle of the road approach).

COPYING CHARGES

HIPAA addresses the authority to charge for copies of health care records when requested by the “individual” and limits fees to a “reasonable cost-based fee.” Costs related to copying (including supplies and labor) and postage may be included in the fee but costs related to retrieving information, handling or processing the request may not be charged.

Code of Virginia § 8.01-413 sets out procedures for responding to requests for medical records made by patients or their attorneys, executors, or administrators; or authorized insurers related to litigation. A maximum permissible amount that may be charged is established; “except for copies of x-ray photographs...charges shall not exceed \$.50 for each page up to 50 pages and \$.25 a page thereafter for copies from paper or other hard copy...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.”

Other factors complicate the very contentious copying charge issue. First, under *Code of Virginia* § 8.01-413 the \$10.00 handling fee is probably not permissible under HIPAA if the individual asks for his records, but probably is permissible if the individual’s attorney or insurer makes the request. Second, a recent ruling by the Workers’ Compensation Commission suggested that only a “nominal” charge may be imposed in the non-litigation context. Third, draft Board of Medicine regulations may cite excessive charges for a patient’s records as a violation as “unprofessional conduct.” Fourth, additional *Code* Sections (§§ 16.1-89, 16.1-265, 32.1-127, 54.1-111, 54.1-2403.3 and 65.2-604) address copying charges. At this time, no recommendation is made to amend those Sections.

OPTIONS

Option I: Take no action.

Option II: Introduce legislation to amend the *Code of Virginia* § 32.1-127.1:03 to comply with the language in HIPAA rather than specify fee amounts for requests made by individuals for their own records (i.e. a “reasonable cost-based fee” that includes only the cost of copying and postage).

Option III: Introduce legislation to amend the *Code of Virginia* § 8.01-413 (related to litigation) to clarify that the fee provisions do not apply to requests made by individuals for their own records and cross reference *Code* § 32.1-127.1:03. (Retain the maximum permissive charge amounts.)

LAW ENFORCEMENT

In most instances involving release of health information to law enforcement, Virginia law is more restrictive than HIPAA and is therefore controlling. Virginia law

only contains express provisions for a health care provider to disclose PHI to law enforcement in specific instances, such as: *Code* § 54.1-2967 (reporting certain wounds), § 54.1-2400.2 (limited reporting by mental health providers of threats), and § 19.2-187.02 (regarding blood alcohol test results). Prior to HIPAA, law enforcement officers generally needed a subpoena or court order to access health information. Under HIPAA, a health care provider may disclose health information to a law enforcement officer in compliance with a grand jury subpoena or an administrative request (including a civil or authorized investigative demand or similar process authorized under law) as long as the information is relevant and material to a legitimate law enforcement inquiry.

Both Virginia law and HIPAA contain a version of the duty to warn announced in *Tarasoff v. Regents of the Univ. of California*. *Code* § 54.1-2400.1.B states: “A mental health provider has a duty to take precautions to protect third parties from violent behavior or other serious harm only when the client has orally, in writing, or via sign language, communicated to the provider a specific and immediate threat to cause serious bodily injury or death to an identified or readily identifiable person or persons, if the provider reasonably believes, or should believe according to the standards of his profession, that the client has the intent and ability to carry out that threat immediately or imminently....” HIPAA states: “[A] covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure: [i]s necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and [i]s to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat....” There are a number of ways in which Virginia law and HIPAA conflict including whether the disclosure is required or permitted, whether the threat relates to serious bodily injury or death or relates to health and safety, and whether the target must be a person or could be the public. (Reporting of a threat to blow up a bridge would be allowed under HIPAA but possibly restricted under Virginia law.)

OPTIONS

Option I: Take no action.

Health care providers would continue to be unable to disclose most health information to law enforcement absent a valid subpoena, court order, or patient authorization.

Option II: Introduce legislation to amend the *Code of Virginia* § 32.1-127.1:03 to more closely align with HIPAA.

Health care providers would be allowed to disclose certain health information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person.

Option III: Introduce legislation to amend the *Code of Virginia* in a more limited way in select areas.

Health care providers would be allowed to disclose information on the basis of a grand jury subpoena or search warrant or to disclose information based on an expanded set of circumstances.

Option IV: Continue to study the issue by including it on the 2005 Workplan for the Joint Commission on Health Care; perhaps as a joint study with the State Crime Commission.

MINORS' RECORDS IN CODE § 54.1-2969

Virginia law considers a minor to be an adult for purposes of consenting to treatment as specified in *Code* § 54.1-2969.E, but the minor is permitted only to authorize the disclosure of some types of the treatment that would be received (excluded treatment includes outpatient treatment for substance abuse, mental illness or emotional disturbance). It is unclear whether, under current Virginia law, a minor would be able to access records for the treatment he was allowed to consent to receive. HIPAA requires that a minor be allowed to disclose and access the health care records associated with treatment he consented to receive. It is unclear under HIPAA whether parents would have access to minor's records for treatment the minor consented to receive.

OPTIONS

Option I: Take no action.

Option II: Introduce legislation to amend the Code of Virginia § 54.1-2969 to allow parents' access to minor child's records unless such access would be restricted based on the professional judgment of the treating clinician.

Option III: Introduce legislation to amend the *Code of Virginia* § 54.1-2969 to allow parents' access except where such access would be restricted by *Code* § 20.1-124.6 which addresses access to ensure that parents, based on custody status, will not be denied access to their child's academic and health records.

Option IV: Introduce legislation to amend the *Code of Virginia* § 54.1-2969 to limit parents' access to treatment records where the minor's consent was sufficient to receive the treatment unless the minor consents to the disclosure, as required under the federal Substance Abuse Regulations.

MINORS' RECORDS IN CODE § 20-124.6

Code § 20.1-124.6 enacted to ensure parents based on custody status would not be denied access to their child's academic and health records, provides for open access to such records.

OPTIONS

Option I: Take no action.

Option II: Introduce legislation to amend the Code of Virginia § 20-124.6: (a) to define a health record in conformance with Code § 32.1-127.1:03.B; and (b) to define clearly the ability of the treating physician or clinical psychologist to deny disclosure of a minor's protected health information to the minor's parents as provided in Code § 32.1 -127.1:03.F (which limits disclosure based on considerations for the individual's life or physical safety).

MINORS' RECORDS IN CODE § 16.1-338

Code § 16.1-338 provides for admission of minors to inpatient psychiatric treatment. For minors 14 and older, who may be admitted upon joint application and consent of the minor and his parent, a copy of the treatment plan must be given to the minor. The Virginia statute and HIPAA are silent on whether the minor may access or authorize disclosure of his health records in this instance.

OPTIONS

Option I: Take no action.

Option II: Introduce legislation to amend the *Code of Virginia* § 16.1-338 to permit minors to access and disclose information without parental consent.

Option III: Introduce legislation to amend the *Code of Virginia* § 16.1-338 to permit minors to access their treatment information but not allow them to participate in the authorization for disclosure.

Option IV: Introduce legislation to amend the *Code of Virginia* § 16.1-338 to permit minors to access their treatment information and require concurrent minor/parental authorization for disclosure.

MINORS' RECORDS IN CODE § 2.2-3705.5

Code § 2.2-3705.5 (a section of the Virginia Freedom of Information Act) provides that where the person who is the subject of medical records is under the age of 18, his right of access may only be asserted by a parent or guardian. HIPAA provides the minor with a right of access when the minor consents to treatment or no other consent is required.

OPTIONS

Option I: Take no action.

Option II: Introduce legislation to amend the *Code of Virginia* § 2.2-3705.5 in order to: (a) comply with the provisions recommended for amending § 54.1-2969.E; (b) cross-reference § 20.124.6 if recommended for amending; and (c) comply with the provisions recommended for amending § 16.1-338.

HEALTH RECORDS RETENTION

The issue addressed was whether specific statutory timeframes for the retention of health records would be appropriate in light of HIPAA requirements.

OPTIONS

Option I: Take no action.

HIPAA's record-keeping requirements apply only to records for maintaining the patient's privacy (i.e. Protected Health Information), not the patient's health or medical record itself. Moreover, this matter may be best left to regulation or further study. While some advocate certainty, currently existing or proposed regulations differ among providers (e.g., 3 years for dentists, 5 years for hospitals, possible 6 years for physicians).

TITLE 37.1, CHAPTER 12

Should *Code of Virginia* Title 37.1, Chapter 12, which addresses disclosure of patient information to third-party payors by mental health, mental retardation and substance abuse professionals, be changed in any way (including repeal) in light of HIPAA, federal regulations on Confidentiality of Alcohol and Drug Abuse Patient Records, and other Virginia law (the Patient Health Records Privacy Act – § 32.1 - 127.1:03 in particular)? The provisions of Title 37.1, Chapter 12 were reviewed to determine: (a) conflict with or duplication of HIPAA Privacy Rule and the Virginia Health Records Privacy Act; (b) benefits or protections for patients or consumers that may be provided in the current statute; (c) additional requirements on health care providers or third-party payors than HIPAA; and (d) the adequacy of existing remedies in other statutes.

OPTIONS

Option I: Take no action.

This was the minority report recommendation, to retain Code of Virginia, Title 37.1, Chapter 12 considering the protections provided related to remedies and penalties which are not available under HIPAA or the Patient Health Records Privacy Act; and the belief that additional protection for mental health records is needed given the particular sensitivity of the information and the need for increased protection from wrongful disclosure.

Option II: Introduce legislation to amend *Code of Virginia* § 32.1 -127.1:03 to include the protections currently provided in Title 37.1, Chapter 12.

This was the minority report recommendation if Title 37.1, Chapter 12 is not retained.

Option III: Introduce legislation to repeal Code of Virginia, Title 37.1, Chapter 12.

This was the majority report recommendation, to repeal Code of Virginia, Title 37.1, Chapter 12 considering the burden it creates when compared with minimal additional benefits. Problems with Title 37.1, Chapter 12 noted in the majority report included :

(a) provision of minimal additional privacy protections while establishing a 2-step disclosure process and limiting redisclosure by third-party payors to “rate review, auditing or evaluation”; (b) creation of a private right of action for any person injured by violation as well as criminal penalties for violation (although Virginia already recognizes a private right of civil action for breach of privacy in the medical records context and HIPAA imposes certain criminal and administrative sanctions); (c) imposition of additional compliance burdens on providers and third-party payors that must comply with HIPAA Privacy Rule, federal Substance Abuse Regulations, and other Virginia law; and (d) requirement for a separate process for mental health records to the exclusion of other sensitive medical information which was seen as questionable given the protections provided in federal and state law.

WORKERS’ COMPENSATION

HIPAA provisions allow for health care providers to disclose health information as needed and allowed by workers’ compensation laws. The Virginia Workers Compensation Act (*Code of Virginia* § 65.2-604) states that a health care provider upon request of an employer, insurer, certified rehabilitation provider or their representative, shall furnish a copy of the “medical report.” The Virginia Workers’ Compensation Commission recently ruled in *Randall* that “medical reports” means the entire medical record regardless of whether it relates to the injury in nature or in time. Moreover, no notice to the patient of the release of his medical records is required. Questions have arisen as to what constitutes a medical report since the term is not defined in state statute. The committee sought to clarify the interplay between HIPAA and the Virginia Workers Compensation Act. Advocates for taking no action are concerned that notice, subpoena and other additional requirements may delay the investigation and thus the provision of benefits to workers. This appears to be a rather contentious topic; however, important privacy concerns are at issue.

OPTIONS

Option I: Take no action.

Option II: Introduce legislation to amend the Code of Virginia § 32.1 -127.1:03 to clarify whether subpoenas issued in workers’ compensation cases are covered under Subsection H.

Option III: Introduce legislation to amend the *Code of Virginia* to incorporate the *Randall* decision to provide clear guidance to health care providers regarding the

circumstances under which they are required to provide medical records and the extent to which they must do so.

The principal drawback was considered to be the risk that a Virginia law requiring disclosure of all medical records in a workers' compensation case, even those records which are unrelated to the claim at issue, may be preempted by HIPAA.

Option IV: Introduce legislation to amend the *Code of Virginia* to incorporate the concept that a medical report includes only those portions of the record that relate to the injury for which the claim has been filed.

The primary benefit was considered to be better protection of an injured worker's right to privacy in his medical record and against the chilling effect on legitimate workers' compensation claims that unfettered rights to medical records may have. However, in the absence of a bright line test, health care providers will apply different standards to determine whether a record is "related" to a worker's injury, resulting in uneven application of the law.

Option V: Introduce legislation to amend the *Code of Virginia* to incorporate employee notice of an employer's right to access medical records with no waiting period

The benefits include that this change would adopt certain HIPAA requirements that have been incorporated into Virginia law for the production of medical records in response to a subpoena duces tecum outside the context of workers' compensation and that a good faith effort would be made to notify the patient of action and no resulting motion to quash the subpoena was filed within 15 days of issuance.

Option VI: Introduce legislation to amend the *Code of Virginia* to incorporate employee notice of an employer's right to access medical records with an opportunity to contest access to all records.

The primary benefits would be the adoption of certain HIPAA requirements as noted above, plus an opportunity to contest disclosure before the Workers' Compensation Commission.

I. Authority for the Study/Organization of Report

House Joint Resolution 134 of the 2004 Session of the Virginia General Assembly directed the Joint Commission on Health Care (JCHC) to “study the use and disclosure of health records relative to Virginia law and the federal Health Insurance Portability and Accountability Act (HIPAA)” in order to “consider the need for amendments to Virginia laws and recommend ways to assist health care providers and other relevant parties to understand and comply with state and federal health record privacy laws.” The study resolution was developed in consultation with the Virginia Bar Association.

A copy of the HJR 134 is included in Appendix A.

COMPLETION OF THE STUDY

Representatives of the Health Law Section of the Virginia Bar Association (VBA) took the lead in developing study protocols and in overseeing completion of the study. The initial study protocol, as designed by the VBA representatives, is described in the paragraphs that follow.

Study Protocol for Completion of HIPAA Study

Introduction. Pursuant to HJR 134 which was patroned by Delegate John O’Bannon, the Joint Commission on Health Care (“Joint Commission”) has been asked to study (the “Study”) whether further changes to Virginia’s health records laws are warranted to address the requirements of the federal Health Insurance Portability and Accountability Act’s Privacy Regulations (“HIPAA”).

The Virginia Bar Association’s Health Law Section (“VBA”) has been asked by the patron and the Joint Commission’s Executive Director to assist in this effort by providing appropriate legal analysis and recommendations. In providing this assistance, the VBA has also been asked to work with the Joint Commission to develop protocols for the Study (“Study Protocols”) designed to foster timely input from all trade associations, governmental agencies and departments, consumer groups and other interested parties likely to be impacted by the Study.

Currently, the reports and recommendations of the Study are expected to be presented to the Joint Commission's Executive Director by September 15, 2004, so the Study can be presented during the Joint Commission's meeting on October 26, 2004. At its November 15, 2004 meeting, the Joint Commission will vote on the options which it wishes to support with legislation during the 2005 Session of the General Assembly.

Study Protocols. The initial Study Protocols are set out below. These Study Protocols are intended to be flexible and should change as needed to maximize appropriate public input. The Study Protocols also include contact information in the hope that parties interested in a particular aspect of the Study will volunteer to participate and provide meaningful input.

The Study Protocols developed by the VBA and the Joint Commission's Executive Director involve the establishment of an Oversight Committee and a number of Focus Committees as described below.

It is expected that the Oversight Committee and each Focus Committee will meet by telephone conference call at least twice per month, and efforts will be made to publish on the Joint Commission's website the meeting dates. Interested parties should communicate with the Committee's Chairperson or the Joint Commission's Executive Director for the call-in number if they wish to participate.

A. Oversight Committee. The Oversight Committee will perform several administrative functions and several study functions.

The administrative functions of the Oversight Committee include:

- i. helping to coordinate the activities of the several Focus Committees to ensure that they meet necessary deadlines, that their participants are appropriately diverse, that any disagreements are resolved and that the issues addressed by each Focus Committee are properly coordinated with those addressed by the other Focus Committees to minimize duplication of effort and to streamline the process; and
- ii. considering and refining the recommendations of the Focus Committees in order to present them to the Executive Director of the Joint Commission for consideration by September 15, 2004.

The study functions of the Oversight Committee are set out below.

B. Focus Committees. The several Focus Committees will each be asked to study and make recommendations concerning a discrete issue relevant to the Study. The members of a Focus Committee may make multiple recommendations.

Currently, there are nine Focus Committees; however; the number may grow if additional issues are identified.

An effort has been made to ensure that the membership of each of the Focus Committees is sufficiently diverse so that all perspectives of the issue being studied will be appropriately represented. If other individuals wish to participate, they should communicate with the Chairperson of the relevant Focus Committee, the Executive Director of the Joint Commission or the Chairperson of the Oversight Committee. Likewise, each Focus Committee is also directed to consider and, where appropriate, expand its membership to foster input from all interested parties.

Study Completion. The issues being study by the Oversight Committee and each focus committee are discussed in the following paragraphs.

A. Oversight Committee's Study. The Oversight Committee retained responsibility for the review of several issues.

The Savings Clause. The Oversight Committee will study and attempt to clarify the so-called "savings clause" contained in the Virginia Patient Records Privacy Act (Va. Code §32.1-127.1:03). This clause is located in the second sentence of subsection (A) and in the last sentence of subsection (E) of the Virginia Patient Records Privacy Act, and it is viewed by many as somewhat ambiguous. In light of HIPAA, some practitioners believe the words "except when permitted by ... federal law" contained in the Act could be read to eliminate all of Virginia's health records laws which restrict the use or disclosure beyond that which is otherwise permitted by HIPAA.

Miscellaneous Provisions. The Oversight Committee will also study a variety of less complex issues which have been identified in the Virginia's health records laws in an effort to "clean up" these laws and to make them internally consistent and consistent with HIPAA. The issues currently identified include:

(a) the interplay between Virginia’s redisclosure prohibitions (Va. Code § 32.1-127.1:03(A)) and HIPAA business associate agreement requirements,

(b) the statutory list of permitted disclosures and the use of the word “may” as opposed to “shall” for some or all of those items (Va. Code § 32.1-127.1:03(B)),

(c) the relationship between the release of health records and privilege waiver,

(d) the timeframe within which an individual should be provided with access to health records,

(e) the timeframe within which health records should be produced, and

(f) the language in the Virginia Patient Records Privacy Act relating to organ transplant records.

Where appropriate, certain of those issues may be directed to a new or existing Focus Committee.

iii. Oversight Committee Membership. Membership of the Oversight Committee includes:

- Patrick C. Devine, Jr., Esquire, Chair
- Jeanne F. Franklin, Esquire
- Alan A. Goldberg, Esquire
- Gail Jaspen, Esquire
- Jonathan M. Joseph, Esquire
- Stephen D. Rosenthal, Esquire
- Allison Tysinger, Esquire
- Kim Snead, Ex Officio

B. Focus Committees. The issues to be studied within each of the focus committees are briefly described in the pages which follow. Each Committee will present its recommendations (as draft legislative language where appropriate) to the Oversight Committee before September 15, 2004.

If there is not unanimity among the members of a Focus Committee on a particular issue, the members in disagreement with the majority are encouraged to submit alternative recommendations for consideration by the Oversight Committee and the Joint Commission's Executive Director. Likewise, if the members believe there are several appropriate actions which could be taken, they are free to suggest those alternatives.

The Joint Commission's Executive Director will then decide which options to submit to the Joint Commission, and typically several options (including taking no action) are submitted on each issue which is presented to the Joint Commission.

i. Workers' Compensation Focus Committee.

This Focus Committee will study the interplay between HIPAA and Virginia's Workers' Compensation laws. The focus will include, among other things, the extent to which HIPAA applies in the workers compensation context, the subpoena provisions and the definition of "medical report".

ii. Law Enforcement Focus Committee.

This Committee will study the interplay between HIPAA and Virginia's health records laws relating to the access to health records which would be afforded to law enforcement officials.

iii. Minor Records Focus Committee.

This Committee will study the relationship between HIPAA and the Virginia health records laws which relate to access to the health records of minors.

iv. Health Record Copying Costs Focus Committee.

This Committee will study the relationship between HIPAA and the several Virginia statutory provisions, including Va. Code § 8.01-413, which permit providers and others to impose costs, related to the reproduction and storage of requested health records.

v. Psychotherapy and Mental Health Records Focus Committee.

This Committee will study the interplay between HIPAA and the several Virginia laws which govern access to psychotherapy and other mental health records.

vi. Title 37.1 Focus Committee.

This Committee will study the possible repeal of the provisions of Title 37.1 related to the delivery of certain protected health information to, and use of this information by, certain third party payors. The remedies section contained in that provision will also be considered.

vii. Record Retention Focus Committee.

This Committee will study the rules governing the retention of health records by providers and payors to consider whether specific statutory timeframes for retention would be appropriate.

ORGANIZATION OF THE REPORT

This report includes four major sections. This section discussed the authority for the study and the study protocols that were developed. Section II presents the report of the Oversight Committee with regard to the issues selected for study and options and any recommendations developed for JCHC consideration. Section III presents the combined report of the Focus Groups including options and any recommendations developed for JCHC consideration.

II. Report of the Oversight Committee

REPORT ON REDISCLOSURE OF PERSONAL HEALTH INFORMATION

MEMO

TO: HJR 134 Study Oversight Committee

FROM: Jeanne Franklin and Jon Joseph

RE: Redisclosure of PHI

Background:

Virginia Code Section 32.1-127.1:03 (A) contains a redisclosure provision that reads: “...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. Sec 1320d et seq.) or (ii) any health care entity from furnishing health care 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.”

The intended effect of Virginia’s provision is to limit downstream, inadvertent, or casual dissemination of PHI beyond the scope of its initial authorized disclosure. It applies to all third parties that receive PHI by way of a permitted disclosure from a covered entity except in those cases specifically stated.

Policy:

Virginia’s redisclosure prohibition applying to third parties that receive PHI from a CE is not pre-empted by the HIPAA Privacy Rule. HIPAA does not have jurisdiction over third parties that are not covered entities except for third parties that serve as a Business

Associate of a HIPAA Covered Entity. In the latter case, a feature of the HIPAA-required Business Associate agreement is that the Business Associate may only use and disclose PHI consistent with the policies of the CE from which it received the PHI regarding authorized uses and disclosures. Such policies must include observation of minimum necessary uses and disclosures for payment and healthcare operations and employment of reasonable safeguards to avert unintended uses and disclosures.

The committee recognizes that Virginia's redisclosure prohibition is a pro-consumer provision that was adopted by the General Assembly in the spirit of strengthening health privacy protections, and sees no reason to recommend its repeal.

Issue:

How to facilitate compliance with this prohibition which remains "buried" in subsection A, in part as a result of other changes that have been made to 32.1-127.1:03?

32.1-127.1:03 (G) contained a suggested Consent form prior to July 1, 2004. That form contained a reference to the redisclosure prohibition. Effective July 1, 2004, 32.1-127.1:03 (G) was amended to set out the elements of an Authorization form that would also comply with the basic required elements of a HIPAA compliant Authorization form. The listed elements do not include reference to the redisclosure prohibition, and in fact necessarily include a HIPAA compliant statement warning the authorizing patient (individual) that his/her PHI might be subject to redisclosure.

The 2004 amendment to subsection G was not intended to obviate Virginia's redisclosure prohibition.

Recommendation: Amend Virginia Code Section 32.1-127.1:03 to insert new language in subsection A, following the statement of the redisclosure prohibition.

Health care entities disclosing any health record in written, printed or electronic form, pursuant to a provision in subsection D, shall include a description of the redisclosure prohibition in subsection A either through use of a transmittal letter, affixing such a description in a prominent location to any such disclosed health record, or through other means reasonably likely to inform the recipient of the records of such redisclosure prohibition. Such description may, but need not, state:

"Under Virginia law, you may not redisclose this protected health information without the specific authorization of the patient who is the subject of these records, except for the use or purpose for which its disclosure to you was authorized. This does not prevent healthcare providers from disclosing this information when permitted or required by law."

PROS:

Facilitates knowledge of the provision and thereby increases chance of compliance with it

The original reference to this provision in the earlier Consent form may have been misplaced anyhow and thus may have been ineffective

CONS:

Would Providers view this as a “trap” creating liability if they did not affix the statement?

Would affixing the statement be an additional inconvenience to health care providers?

Would it confuse Business Associates that receive PHI under a BA agreement to see that statement?

Is the removal of the previous suggested Consent Form notice of the redisclosure prohibition good reason to create this new notice provision, or is it an issue that doesn't need fixing?

FIXES:

Using a form stamp on all outgoing records would not likely present an undue burden and should not be a difficult requirement for licensed healthcare entities to learn of and comply with

Does not require a particular format or description of the prohibition on redisclosure

Alternative Recommendation: Do nothing and leave Virginia law as it stands

PROS:

Doing nothing is easier and does not require any learning or action by healthcare providers

CONS:

Not in service of privacy interests already adopted by the legislature

REPORT ON SAVINGS CLAUSE

1. Does except when “permitted by another provision of...federal law,” in the Virginia Health records privacy statute (32.1-127.1:03, referred to herein as the Virginia statute) confuse rather than help?

If the other provision of federal law seemingly permitting disclosure is HIPAA AdSi's privacy rule and disclosure is made in a manner not specifically permitted by Virginia law, the implicit reference to the federal privacy rule includes both the permissive provision and the other provisions that, by way of example, for covered health care providers, includes a Notice of Privacy Practices requirement, policies and procedures, and all the rest. In other words, permission is only given under the federal privacy rule if all of the relevant provisions of the rule are observed by the covered entity discloser. Apparently some are not taking the second step and instead, simply are concluding that “permitted by another provision of...federal law” means only the permissive provision without all the rest; that likely is subject to challenge.

RECOMMENDATION: Amend the Virginia statute to delete references to “another provision of...federal law” and the apparently confusing concept of the same, and engage in public education effort to clarify any confusion regarding federal “supercede” and state “preemption” areas, including federal preemption of the federal privacy rule by other federal law.

2. If the HIPAA AdSi privacy rule permits production and disclosure of documents and Virginia law has a contrary to the federal privacy rule provision and a more stringent requirement relative to the same production and disclosure, does the except of when “permitted by another provision of...federal law,” in the Virginia Health records privacy statute, cause the federal privacy rule to supersede Virginia's more stringent requirement?

If the federal privacy rule is less restrictive at a first level analysis and contrary to the Virginia law, one must continue on and do a supercession analysis; that is, HIPAA AdSi requires an analysis of the question whether any of Virginia's more stringent law preempts the federal privacy rule, which in some instances of production of documents, might well be so.

RECOMMENDATION: Amend the Virginia statute to delete references to “another provision of...federal law” and the apparently confusing concept of the same, and engage in public education effort to clarify any confusion regarding federal supersede and state preemption areas.

3. Does the reference to “disclose” without any reference to “use,” in the Virginia Health records privacy statute, mean that use is not prohibited at all under that statute without an authorization or as otherwise might specifically be permitted or required by law? Perhaps the word use should be added to a new phrase “may use or disclose” in the Virginia

Health records privacy statute. Query whether disclose appears elsewhere in Virginia statutes or judicial decisions, or use so appears, and whether that clarifies this ambiguity.

RECOMMENDATION: Inquire of providers, associations, governmental authorities, and legal counsel regarding any confusion or difficulties in the understanding and application of the concept of disclose vs. use, and provide any additional recommendations within six months.

4. Do the Virginia Health records privacy statute provisions regarding treatment, payment and health care operations analogs have to be supplemented by the HIPAA AdSi privacy rule definitions as part of an “including but not limited to...” or perhaps the HIPAA AdSi statutory provisions only, or should the Virginia provisions be superseded by the federal language; and if so, does that imply (or should that specifically require) incorporation by reference of the entirety of HIPAA AdSi's rules including, inter alia and when applicable, federal privacy rule notices, policies and procedures, and all the rest?

In Virginia, as in most states, it seems, there is a two tier privacy protection entitlement: one tier exists, with respect to covered health care providers and their patients, under federal HIPAA AdSi rules, and another exists for those providers, however few, who are outside of the reach of HIPAA AdSi. Oddly, perhaps, it's a question of who the provider is rather than who the patient is, although the information that is protected is patient information. Should HIPAA AdSi become the Virginia rule universally? Issues arising include, cost, complexity, need, confusion, changes in federal law, retrospective vs. prospective, and insurance.

RECOMMENDATION: Inquire of providers, associations, governmental authorities, patients, and legal counsel regarding any confusion or difficulties in operating under a two tier system with respect to health care privacy, and provide any additional recommendations within six months.

5. Is the provision for an authorization in the Virginia statute enough to address non-covered health care provider privacy protection needs, both from the provider and from the patient perspectives, or should the Virginia statute be amended to permit providers either: a. to seek and obtain an authorization (in order to avoid any confusion regarding whether other provisions of the Virginia statute do, indeed, in particular facts and circumstances, permit disclosure (and perhaps use as well); or b. to elect to be "covered" by the federal HIPAA AdSi privacy rule as if the provider was classified as a covered health care provider under that rule, regardless whether the electronic communications threshold has been met for covered classification (whereupon the Notice, and the policies and procedures, and all the rest, would be mandated unless -- or perhaps regardless whether -- an authorization is obtained or unless the provider is willing to rely on the other provisions of the Virginia statute or other Virginia law, at the provider's peril).

RECOMMENDATION: Inquire of providers, associations, governmental authorities, patients, and legal counsel regarding any confusion or difficulties in the understanding

and application of the Virginia statute and particularly in getting an authorization or not, and provide any additional recommendations within six months.

6. The Virginia statute does not address issues relating to the security of electronic health information, and those in Virginia who are not covered by the federal HIPAA AdSi security rule, when enforceable, seemingly are not regulated regarding electronic health information security (except by 32.1-127.1:01).

RECOMMENDATION: Inquire of providers, associations, governmental authorities, and legal counsel regarding any risks and areas of concern because the Virginia statute does not regulate electronic health information security generally, and provide any additional recommendations within six months.

7. Study will soon be given by those interested in mental health privacy issues under Virginia law, which could affect health care privacy generally.

RECOMMENDATION: Coordinate with study group, and provide any additional recommendations within six months.

§ 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 by this section or by another provision of state ~~or federal~~ law, no health care entity, or other person working in a health care setting, may disclose an individual's health records. 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. 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 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. 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 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. Health care entities may disclose health records:

1. As set forth in subsection E of this section, pursuant to the written authorization of the individual or in the case of a minor, 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 an individual's written authorization, pursuant to the individual's oral authorization for a health care provider or health plan to discuss the individual's health records with a third party specified by the 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 health care entity or the 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 health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity;

4. In testimony in accordance with §§ 8.01-399 and 8.01-400.2;
5. In compliance with the provisions of § 8.01-413;
6. As required or authorized by law relating to public health activities, health oversight activities, serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease, public safety, and suspected child or adult abuse reporting requirements, including, but not limited to, those contained in §§ 32.1-36, 32.1-36.1, 32.1-40, 32.1-41, 32.1-127.1:04, 32.1-276.5, 32.1-283, 32.1-283.1, 37.1-98.2, 53.1-40.10, 54.1-2400.6, 54.1-2400.7, 54.1-2403.3, 54.1-2506, 54.1-2966, 54.1-2966.1, 54.1-2967, 54.1-2968, 63.2-1606 and 63.2-1509;
7. Where necessary in connection with the care of the individual, including in the implementation of a health care provider's routine contact process pursuant to subdivision B 4 of § 32.1-127;
8. In the normal course of business in accordance with accepted standards of practice within the health services setting; however, the maintenance, storage, and disclosure of the mass of prescription dispensing records maintained in a pharmacy registered or permitted in Virginia shall only be accomplished in compliance with §§ 54.1-3410, 54.1-3411 and 54.1-3412;
9. When the individual has waived his right to the privacy of the health records;
10. When examination and evaluation of an individual are undertaken pursuant to judicial or administrative law order, but only to the extent as required by such order;
11. To the guardian ad litem and any attorney representing the respondent in the course of a guardianship proceeding of an adult patient who is the respondent in a proceeding under Article 1.1 (§ 37.1-134.6 et seq.) of Chapter 4 of Title 37.1;
12. To the attorney appointed by the court to represent an individual who is or has been a patient who is the subject of a civil commitment proceeding under § 37.1-67.3 or a judicial authorization for treatment proceeding pursuant to § 37.1-134.21;
13. 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;
14. With regard to the Court-Appointed Special Advocate (CASA) program, a minor's health records in accord with § 9.1-156;
15. 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.);
16. To third-party payors and their agents for purposes of reimbursement;
17. As is necessary to support an application for receipt of health care benefits from a governmental agency or as required by an authorized governmental agency reviewing such application or reviewing benefits already provided 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;
18. Upon the sale of a medical practice as provided in § 54.1-2405; or upon a change of ownership or closing of a pharmacy pursuant to regulations of the Board of Pharmacy;
19. In accord with 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;
20. 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 §/n 8.01-413;
21. In the case of substance abuse records, when permitted by and in conformity with requirements of federal law found in 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2;
22. In connection with the work of any entity established as set forth in §/n 8.01-581.16 to evaluate the adequacy or quality of professional services or the competency and qualifications for professional staff privileges;

23. If the 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;

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

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 (§/n 32.1-122.10:001 et seq.) of Chapter 4 of this title, pursuant to subdivision D 1 of this section;

27. 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;

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

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

E. Requests for copies of 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 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 health records, the 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 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 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 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 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.

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 subdivisions 5 or 8 of this subsection 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 disclosures sought in the subpoena duces tecum are consistent with such resolution; and, therefore, the health records previously delivered in a sealed envelope to the clerk of the court or administrative agency will not be returned to the 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 health records have previously been delivered to the court or administrative agency by the health care entity, the health care entity shall comply with the subpoena duces tecum by returning the 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 health records shall be disclosed and all health records previously delivered in a sealed envelope to the clerk of the court or administrative agency will be returned to the 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 health records that were previously delivered to the court or administrative agency for which disclosure has been authorized will not be returned to the health care entity; however, all health records for which disclosure has not been authorized will be returned to the 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 health records have previously been delivered to the court or administrative agency by the health care entity, the 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 health records requested under § 8.01-413, or issued by a duly authorized administrative agency conducting an investigation, audit, review or proceedings regarding a health care entity's conduct. The provisions of this subsection shall apply to subpoenas for the health records of both minors and adults. Nothing in this subsection shall have any effect on the existing authority of a court or

administrative agency to issue a protective order regarding health records, including, but not limited to, ordering the return of health records to a health care 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. Health care entities may testify about the health records of an individual in compliance with §§ 8.01-399 and 8.01-400.2.

(1997, c. 682; 1998, c. 470; 1999, cc. 812, 956, 1010; 2000, cc. 810, 813, 923, 927; 2001, c. 671; 2002, cc. 568, 658, 835, 860; 2003, cc. 471, 907, 983; 2004, cc. 49, 64, 65, 66, 67, 163, 773, 1014, 1021.)

REPORT ON ORGAN TRANSPLANT

§ 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 another provision of state or federal law, no health care entity, or other person working in a health care setting, may disclose an individual's health records.

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;

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*.

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 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. 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 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. Health care entities may, and when required shall, disclose health records:

1. As set forth in subsection E of this section, pursuant to the written authorization of the individual or in the case of a minor, 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 an individual's written authorization, pursuant to the individual's oral authorization for a health care provider or health plan to discuss the individual's health records with a third party specified by the 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 health care entity or the 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 health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity;

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

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

6. As required or authorized by law relating to public health activities, health oversight activities, serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease, public safety, and suspected child or adult abuse reporting requirements, including, but not limited to, those contained in §§ 32.1-36, 32.1-36.1, 32.1-40, 32.1-41, 32.1-127.1:04, 32.1-276.5, 32.1-283, 32.1-283.1, 37.1-98.2, 53.1-40.10, 54.1-2400.6, 54.1-2400.7, 54.1-2403.3, 54.1-2506, 54.1-2966, 54.1-2966.1, 54.1-2967, 54.1-2968, 63.2-1606 and 63.2-1509;

7. Where necessary in connection with the care of the individual including in the implementation of a health care provider's routine contact process pursuant to B-4 of § 32.1-127;

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

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

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

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

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

13. 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;

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

15. 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.);

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

17. As is necessary to support an application for receipt of health care benefits from a governmental agency or as required by an authorized governmental agency reviewing such application or reviewing benefits already provided 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;

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

19. In accord with 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;

20. Where necessary in connection with the implementation of a health care provider's routine contact process pursuant to subdivision B 4 of § 32.1-127;

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

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

23. If the 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;

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

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 this title, pursuant to subdivision D 1 of this section;

27. 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*;

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

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

E. Requests for copies of 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 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 health records, the 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 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 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 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 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.

REPORT ON PERMISSIVE VERSUS MANDATORY DISCLOSURE

The completeness of the statutory list of permitted disclosures and the use of the word “may” as opposed to “shall” for some or all of those items (Va. Code § 32.1-127.1:03(D)) should be considered. It was noted that the word “may” makes unclear whether disclosure of the 29 items listed in (D) are permissive or mandatory. Further, it was noted that most of the items in (D) are cross-referenced or are referred to in other sections where the mandatory nature of the disclosure is made clear; however, it was not clear whether that was the case with disclosure to the patient under (D)(20) because (i) §8.01-413 only applies in the litigation context and (ii) an aggressive reading of the savings clause in (E)(iv)(c) could suggest that the (D)(20) permissive language means a provider need not disclose to the patient under (E).

The issue was considered and several suggested changes were recommended including: Subsection D which will make clear that disclosure to the patient is mandatory absent a statutory exception (e.g. risk of harm, etc.). A proposal was made to move the language from Subsection D (20) to be a new second paragraph of subsection (A). A copy of the proposed change was circulated. The addition of language adding the words “or required” to line 2 of (A) was suggested. There was consensus that all of those changes should be adopted as well as a proposal for clarifying language to the first sentence of (D) to confirm that the “may” and “or as required must” disclose was adopted.

Separately, it was noted that some of the items listed in (D)(7), (8), (16), (17) and (18) use different terminology than the HIPAA provisions which permit disclosure for “treatment, payment and operations” (“TPO”); however, it was determined that no statutory changes should be recommended at this time.

Draft of Combined Changes for Oversight Committee Recommendations
(Incorporating redisclosure, savings clause, organ transplant, permissive versus mandatory disclosures, and psychotherapy notes)

§ 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 another provisions of state **or federal** law, no health care entity, or other person working in a health care setting, may disclose an individual's health records.

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. (i) 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. Health care entities disclosing any health record in written, printed or electronic form, pursuant to a provision in subsection D, shall include a description of the redisclosure prohibition in subsection A either through use of a transmittal letter, affixing such a description in a prominent location to any such disclosed health record, or through other means reasonably likely to inform the recipient of the records of such redisclosure prohibition. Such descriptions may, but need to state:

“Under Virginia law, you may not redisclose this protected health information without the specific authorization of the patient who is the subject of these records, except for the use or purpose for which its disclosure to you was authorized. This does not prevent healthcare providers from disclosing this information when permitted or required by law.”

(ii) 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 facsimilemachine-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 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.

"Psychotherapy Notes" means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or a family counseling session and that are separated from the rest of the individual's medical record.

Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary or the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis and progress to date.

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

1. As set forth in subsection E of this section, pursuant to the written authorization of the individual or in the case of a minor, 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 an individual's written authorization, pursuant to the individual's oral authorization for a health care provider or health plan to discuss the individual's health records with a third party specified by the 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 health care entity or the 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 health care entity's conduct by a duly authorized lawenforcement, licensure, accreditation, or professional review entity;
4. In testimony in accordance with §§ 8.01-399 and 8.01-400.2;
5. In compliance with the provisions of § 8.01-413;
6. As required or authorized by law relating to public health activities, health oversight activities, serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease, public safety, and suspected child or adult abuse reporting requirements, including, but not limited to, those contained in §§ 32.1-36, 32.1-36.1, 32.1-40, 32.1-41, 32.1-127.1:04, 32.1-276.5, 32.1-283, 32.1-283.1, 37.1-98.2, 53.1-40.10, 54.1-2400.6, 54.1-2400.7, 54.1-2403.3, 54.1-2506, 54.1-2966, 54.1-2966.1, 54.1-2967, 54.1-2968, 63.2-1606 and 63.2-1509;
7. Where necessary in connection with the care of the individual, [including in the implementation of a health care provider's routine contact process pursuant to subdivision B 4 of § 32.1-127](#);
8. In the normal course of business in accordance with accepted standards of practice within the health services setting; however, the maintenance, storage, and disclosure of the mass of prescription dispensing records maintained in a pharmacy registered or permitted in Virginia shall only be accomplished in compliance with §§ 54.1-3410, 54.1-3411 and 54.1-3412;
9. When the individual has waived his right to the privacy of the health records;
10. When examination and evaluation of an individual are undertaken pursuant to judicial or administrative law order, but only to the extent as required by such order;
11. To the guardian ad litem and any attorney representing the respondent in the course of a guardianship proceeding of an adult patient who is the respondent in a proceeding under Article 1.1 (§ 37.1-134.6 et seq.) of Chapter 4 of *Title 37.1*;
12. To the attorney appointed by the court to represent an individual who is or has been a patient who is the subject of a civil commitment proceeding under § 37.1-67.3 or a judicial authorization for treatment proceeding pursuant to § 37.1-134.21;
13. 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;

14. With regard to the Court-Appointed Special Advocate (CASA) program, a minor's health records in accord with § 9.1-156;
15. 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.);
16. To third-party payors and their agents for purposes of reimbursement;
17. As is necessary to support an application for receipt of health care benefits from a governmental agency or as required by an authorized governmental agency reviewing such application or reviewing benefits already provided 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;
18. Upon the sale of a medical practice as provided in § 54.1-2405; or upon a change of ownership or closing of a pharmacy pursuant to regulations of the Board of Pharmacy;
19. In accord with 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;
20. 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; Where necessary in connection with the implementation of a health care provider's routine contact process pursuant to subdivision B 4 of § 32.1-127;
21. In the case of substance abuse records, when permitted by and in conformity with requirements of federal law found in 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2;
22. In connection with the work of any entity established as set forth in § 8.01- 581.16 to evaluate the adequacy or quality of professional services or the competency and qualifications for professional staff privileges;
23. If the 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;
24. For the purpose of conducting record reviews of inpatient hospital deaths to promote identification of all potential organ, eye, and tissue donors in conformance with the

requirements of applicable federal law and regulations, including 42 C.F.R. § 482.45, (i) to the 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;

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 this title, pursuant to subdivision D 1 of this section;

27. 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;

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

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

D1. Notwithstanding any provision of subsection D., a health care entity must obtain an individual's written authorization for any use or disclosure of Psychotherapy Notes, except:

(i) Use by the originator of the Psychotherapy Notes in connection with the care of the individual;

(ii) Use by a health care entity to defend itself or its employees or staff against any accusation of wrongful conduct; or

(iii) As required in the course of an investigation, audit, review or proceedings regarding a health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity.

E. Requests for copies of 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 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 health records, the 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 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 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, federalstate law or state or federal regulation**.

F. Except as provided in subsection B of § 8.01-413, copies of 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 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.

Nothing in this section is intended to give an individual or third-parties a right to receive copies of, or otherwise have access to, Psychotherapy Notes.

III. Report of the Focus Committees

REPORT OF THE MEDICAL RECORDS COPYING CHARGES FOCUS COMMITTEE

The Health Records Copying Costs Focus Committee met on August 11 and August 31. The following individuals have participated in the committee's deliberations:

Susan Ward, Chair
Mark Pratt (AHIOS)
Reggie Jones (AHIOS)
Jan McDavid (AHIOS)
David Boleyn
Jamie Martin
Tray Adams
Jere Mundy (VHIMA)
Chuck Midkiff
Angela Fleming (for Chuck Midkiff)
David Anderson (VTLA)
Kevin Logan (Virginia Farm Bureau)
Chris Lagow

The committee's charge is to evaluate the relationship between HIPAA and several Virginia statutory provisions, including §8.01-413, that permit providers and others to impose costs related to the reproduction and delivery of requested health records.

Summary of Relevant HIPAA Regulations and State Law

HIPAA

HIPAA privacy rules address only authority to charge for provision of copies of health records when requested by the "individual." "Personal representative," defined as a person who under applicable law has authority to act on behalf of an individual in making health care-related decisions, is treated as an "individual" in this context. HIPAA limits fees to a "reasonable, cost-based fee" that includes only the cost of copying, including the cost of supplies and labor for copying and postage when the individual requests that the copy be mailed. Covered entities are prohibited from charging individuals any fees for retrieving or handling the information or processing the request. Fees for copying and postage specified in state law are presumed reasonable, unless they include retrieval or handling costs. HIPAA does not affect fees that may be charged for permissible provision of records to anyone other than the individual or his personal representative.

State Statutes

§8.01-413 sets out procedures for responding to requests for medical records made by patients; their attorneys, executors or administrators; or authorized insurers, but the section applies only to requests made in anticipation of or in the course of litigation. The statute establishes a maximum permissible amount that health care providers may charge for responding to requests for records in this context. These fee limits have been and continue to be applied more broadly than the litigation context.

§32.1-127.1:03, governing patient health records privacy, comprehensively governs health records privacy, but it does not address fees for provision of copies of records.

Other statutes reviewed include §§16.1-89 and 16.1-265 (apply provisions of §§8.01-413 and 32.1-127.1:03 to subpoenas duces tecum for medical records issued by an attorney); §54.1-111 (clarifies authority of owners of patient records to charge for providing copies); §54.1-2403.3 (incorporate by reference §§8.01-413 and 32.1-127.1:03 in health professions statutes); and §65.2-604 (governs furnishing of medical reports in Workers' Compensation cases).

Recommendations

1. State statutes should address charges for provision of requested records outside the litigation context. These fee provisions should be added to §32.1-127.1:03, which govern patient health records privacy.
2. Rather than specifying fee amounts, new provisions should simply authorize charging a fee for provision of records in response to an individual's request, tracking HIPAA language referring to reasonable costs and permissible charges.
3. Changes to §8.01-413 should be limited to amendments needed to clarify that its fee provisions do not apply to requests by individuals; the section should cross-reference §32.1-127.1:03 for provisions governing those requests. The committee agreed not to change fee amounts specified in §8.01-413. The committee also discussed but rejected substitution of the section's references to specific dollar amounts with references to "reasonable fees."
4. Worker's Compensation provisions should not be changed at this time. The Worker's Compensation Commission is now considering the question of fees and the applicability of §8.01-413 to copying fees in Workers' Compensation cases; fee policies should be addressed in that context. To address concerns of several committee members, proposed Subsection D1 clarifies that the exception in §8.01-413 (Subsection D1) for records requested by the individual is not intended to affect any other existing provisions found elsewhere in statute or case decisions governing charges for records requested by persons other than the patient.

5. The committee considered whether amendments were needed to §§16.1-89 and 16.1-265, which apply the provisions of §§8.01-413 and 32.1-127.1:03 to subpoenas duces tecum for medical records issued by an attorney. Section 16.1-89 specifies that “no separate fee for issuance shall be imposed” while §16.1-265 does not include the words “for issuance.” The committee considered whether the words “for issuance” should be included in the latter section and whether to clarify what fees are being referred to in these sections (assumed to be a reference to the fees authorized by §17.1-275.) We agreed, however, that such changes exceeded the scope of our charge and that they may have unintended consequences.

6. The committee considered need for clarification of reference in §54.1-2403.3, that states that release of medical records shall be in compliance with §§32.1-127.1:03 and 8.01-413 “or as otherwise provided by state or federal law.” While we believe that the underscored language may raise some questions in the context of HIPAA preemption provisions, we agreed that changes were not necessary or advisable at this time.

POSSIBLE AMENDMENTS TO VIRGINIA LAW

§ 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's fees.

A. In any case where the hospital, nursing facility, physician's, or other health care provider's original records or papers of any patient in a hospital or institution for the treatment of physical or mental illness are admissible or would be admissible as evidence, any typewritten copy, photograph, photostatted copy, or microphotograph or printout or other hard copy generated from computerized or other electronic storage, microfilm, or other photographic, mechanical, electronic or chemical storage process thereof shall be admissible as evidence in any court of this Commonwealth in like manner as the original, if the printout or hard copy or microphotograph or photograph is properly authenticated by the employees having authority to release or produce the original records.

Any hospital, nursing facility, physician, or other health care provider whose records or papers relating to any such patient are subpoenaed for production 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. ~~The~~ **Except as provided in Subsection D1 of this section, 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 \$.50 for each page up to 50 pages and \$.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.

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~~ subsections E and J 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 comply with the patient's request to either (i) provide a copy of the records 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 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, who shall, at the expense of the provider denying access to the patient, review the records and make a judgment as to whether to make the records available to the patient. In either such event, the hospital, nursing facility, physician, or other health care provider denying the request shall comply with the judgment of the reviewing physician or clinical psychologist.

A Except as provided in Subsection D1 of this section, a reasonable charge may be made by the hospital, nursing facility, physician or other health care provider maintaining the records for the cost of the services relating to the maintenance, retrieval, review, and preparation of the copies of the records. Except for copies of X-ray photographs, however, such charges shall not exceed \$.50 per page for up to 50 pages and \$.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, a fee for search and handling, not to exceed \$10, and all postage and shipping costs. Any hospital, nursing facility, physician, or other health care provider receiving such a request from a patient's attorney or authorized insurer shall require a writing signed by the patient confirming the attorney's or authorized insurer's authority to make the request and shall accept a photocopy, facsimile, or other copy of the original signed by the patient as if it were an original.

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

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

D1. Provisions of this section governing fees that may be charged by a health care provider whose records are subpoenaed or requested pursuant to this section shall not

apply in the case of any request by a patient for his own records, which shall be governed instead by Subsection J of §32.1-127.1:03. This subsection shall not be construed to affect other provisions of state or federal statute, regulation or case decisions governing charges by health care providers for provision of records requested by any person other than a patient requesting his own records as set forth in Subsection J of §32.1-127.1:03.

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

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

(Code 1950, § 8-277.1; 1954, c. 329; 1976, c. 50; 1977, cc. 208, 617; 1981, c. 457; 1982, c. 378; 1990, cc. 99, 320; 1992, c. 696; 1994, cc. 390, 572; 1995, c. 586; 1997, c. 682; 1998, c. 470; 2000, cc. 813, 923; 2001, c. 567; 2002, cc. 463, 654; 2004, cc. 65, 335, 742, 1014.)

§ 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 by this section or by another provision of state or federal law, no health care entity, or other person working in a health care setting, may disclose an individual's health records.

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.

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 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. 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 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. Health care entities may disclose health records:

1. As set forth in subsection E of this section, pursuant to the written authorization of the individual or in the case of a minor, 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 an individual's written authorization, pursuant to the individual's oral authorization for a health care provider or health plan to discuss the individual's health records with a third party specified by the 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 health care entity or the 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 health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity;

4. In testimony in accordance with §§ [8.01-399](#) and [8.01-400.2](#);

5. In compliance with the provisions of § [8.01-413](#);

6. As required or authorized by law relating to public health activities, health oversight activities, serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease, public safety, and suspected child or adult abuse reporting requirements, including, but not limited to, those contained in §§ [32.1-36](#), [32.1-36.1](#), [32.1-40](#), [32.1-41](#), [32.1-127.1:04](#), [32.1-276.5](#), [32.1-283](#), [32.1-283.1](#), [37.1-98.2](#), [53.1-40.10](#), [54.1-2400.6](#), [54.1-2400.7](#), [54.1-2403.3](#), [54.1-2506](#), [54.1-2966](#), [54.1-2966.1](#), [54.1-2967](#), [54.1-2968](#), [63.2-1606](#) and [63.2-1509](#);

7. Where necessary in connection with the care of the individual, including in the implementation of a health care provider's routine contact process pursuant to subdivision B 4 of § [32.1-127](#);

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

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

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

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

12. To the attorney appointed by the court to represent an individual who is or has been a patient who is the subject of a civil commitment proceeding under § [37.1-67.3](#) or a judicial authorization for treatment proceeding pursuant to § [37.1-134.21](#);

13. 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;

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

15. 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.);
16. To third-party payors and their agents for purposes of reimbursement;
17. As is necessary to support an application for receipt of health care benefits from a governmental agency or as required by an authorized governmental agency reviewing such application or reviewing benefits already provided 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](#);
18. Upon the sale of a medical practice as provided in § [54.1-2405](#); or upon a change of ownership or closing of a pharmacy pursuant to regulations of the Board of Pharmacy;
19. In accord with 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;
20. 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](#);
21. In the case of substance abuse records, when permitted by and in conformity with requirements of federal law found in 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2;
22. In connection with the work of any entity established as set forth in § [8.01-581.16](#) to evaluate the adequacy or quality of professional services or the competency and qualifications for professional staff privileges;
23. If the 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;
24. For the purpose of conducting record reviews of inpatient hospital deaths to promote identification of all potential organ, eye, and tissue donors in conformance with the requirements of applicable federal law and regulations, including 42 C.F.R. § 482.45, (i) to the 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;

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 this title, pursuant to subdivision D 1 of this section;
27. 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](#);
28. To the State Health Commissioner pursuant to § [32.1-48.015](#) when such records are those of a person or persons who are subject to an order of quarantine or an order of isolation pursuant to Article 3.02 (§ [32.1-48.05](#) et seq.) of Chapter 2 of this title.
29. To the Commissioner of the Department of Labor and Industry or his designee by each licensed emergency medical services agency when the records consist of the prehospital patient care report required by § [32.1-116.1](#) and the patient has suffered an injury or death on a work site while performing duties or tasks that are within the scope of his employment; and

E. Requests for copies of 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 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 health records, the 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 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 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 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 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.

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 subdivisions 5 or 8 of this subsection 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 disclosures sought in the subpoena duces tecum are consistent with such resolution; and, therefore, the health records previously delivered in a sealed envelope to the clerk of the court or administrative agency will not be returned to the 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 health records have previously been delivered to the court or administrative agency by the health care entity, the health care entity shall comply with the subpoena duces tecum by returning the 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 health records shall be disclosed and all health records previously delivered in a sealed envelope to the clerk of the court or administrative agency will be returned to the 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 health records that were previously delivered to the court or administrative agency for which disclosure has been authorized will not be returned to the health care entity; however, all health records for which disclosure has not been authorized will be returned to the 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 health records have previously been delivered to the court or administrative agency by the health care entity, the 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 health records requested under § [8.01-413](#), or issued by a duly authorized administrative agency conducting an investigation, audit, review or proceedings regarding a health care entity's conduct.

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

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

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

(1997, c. 682; 1998, c. 470; 1999, cc. 812, 956, 1010; 2000, cc. 810, 813, 923, 927; 2001, c. 671; 2002, cc. 568, 658, 835, 860; 2003, cc. 471, 907, 983; 2004, cc. 49, 64, 65, 66, 67, 163, 773, 1014, 1021.)

§ 54.1-111. Unlawful acts; prosecution; proceedings in equity; civil penalty.

A. It shall be unlawful for any person, partnership, corporation or other entity to engage in any of the following acts:

1. Practicing a profession or occupation without holding a valid license as required by statute or regulation.
2. Making use of any designation provided by statute or regulation to denote a standard of professional or occupational competence without being duly certified or licensed.
3. Making use of any titles, words, letters or abbreviations which may reasonably be confused with a designation provided by statute or regulation to denote a standard of professional or occupational competence without being duly certified or licensed.
4. Performing any act or function which is restricted by statute or regulation to persons holding a professional or occupational license or certification, without being duly certified or licensed.
5. Failing to register as a practitioner of a profession or occupation as required by statute or regulation.
6. Materially misrepresenting facts in an application for licensure, certification or registration.

7. Willfully refusing to furnish a regulatory board information or records required or requested pursuant to statute or regulation.
8. Violating any statute or regulation governing the practice of any profession or occupation regulated pursuant to this title.
9. Refusing to process a request, tendered in accordance with the regulations of the relevant health regulatory board or applicable statutory law, for patient records or prescription dispensing records after the closing of a business or professional practice or the transfer of ownership of a business or professional practice.

Any person who willfully engages in any unlawful act enumerated in this section shall be guilty of a Class 1 misdemeanor. The third or any subsequent conviction for violating this section during a 36-month period shall constitute a Class 6 felony.

B. In addition to the criminal penalties provided for in subsection A, the Department of Professional and Occupational Regulation or the Department of Health Professions, without compliance with the Administrative Process Act (§ [2.2-4000](#) et seq.), shall have the authority to enforce the provisions of subsection A and may institute proceedings in equity to enjoin any person, partnership, corporation or any other entity from engaging in any unlawful act enumerated in this section and to recover a civil penalty of at least \$200 but not more than \$5,000 per violation, with each unlawful act constituting a separate violation; but in no event shall the civil penalties against any one person, partnership, corporation or other entity exceed \$25,000 per year. Such proceedings shall be brought in the name of the Commonwealth by the appropriate Department in the circuit court or general district court of the city or county in which the unlawful act occurred or in which the defendant resides.

C. This section shall not be construed to prohibit or prevent the owner of patient records from (i) retaining copies of his patient records or prescription dispensing records after the closing of a business or professional practice or the transfer of ownership of a business or professional practice or (ii) charging a reasonable fee, ~~not in excess of the amounts authorized~~ ***as established in the applicable provisions of § [8.01-413](#) or Subsection J of §32.1-127.1:03***, for copies of patient records.

D. This section shall apply, mutatis mutandis, to all persons holding a multistate licensure privilege to practice nursing in the Commonwealth of Virginia.

(1979, c. 408, § 54-1.20; 1988, c. 765; 1993, cc. 129, 499; 1998, c. 470; 2001, c. 544; 2003, cc. 753, 762; 2004, c. 49.)

REPORT OF THE LAW ENFORCEMENT FOCUS COMMITTEE

The Law Enforcement Focus Committee met by telephone conference on July 8, 2004, at 1:00 p.m. to formulate an action plan based upon analysis of the interplay between HIPAA and Virginia's health records laws relating to the access to health records by law enforcement officials, as assigned during the initial June 10, 2004 HIPAA Study Committee meeting. The following Law Enforcement Focus Committee members attended the meeting: Brian O. Dolan, Esq., Wade A. Kizer, Esq., William O. Quirey, Jr., Esq., Gustav P. Chiarello, Esq., Steven D. Benjamin, Esq., and Allyson K. Tysinger, Esq. Mr. Dolan chaired the meeting and called the meeting to order. The consensus of the Focus Committee was that health care providers generally wish to cooperate with law enforcement if it is permitted, but have concerns about improperly violating patient confidentiality. The Focus Committee members also believed that in most instances involving release of health information to law enforcement, Virginia law is more restrictive than HIPAA. The ability of a criminal defendant to have access to health information was also discussed. The Focus Committee considered the assigned task and developed the following action plan:

- There was discussion whether to include release of blood samples in DWI/DUI investigations in the Focus Committee's review and it was agreed to not include that within the scope of our review.
- Allyson Tysinger offered to provide the Focus Committee members via e-mail with a prior HIPAA preemption analysis compiled by the Attorney General's Office.
- The Committee agreed to convene by telephone again once reviewing the materials from Ms. Tysinger.

The Focus Committee convened via telephone a second time at 3:00 p.m. on July 20, 2004. Brian Dolan called the meeting to order. Other members in attendance were: Allyson Tysinger, Esq., Wade A. Kizer, Esq., and Gustav P. Chiarello, Esq. All attending members had received and reviewed the materials from Ms. Tysinger. Mr. Kizer began the discussion by suggesting that Virginia law be expanded or clarified to allow law enforcement officials to gain access to health information through a grand jury subpoena or a court ordered warrant. Also discussed were those situations where law enforcement officials notify hospitals to be on the look out for person with a certain type of injury, essentially a hot pursuit situation, and the ability of a hospital to cooperate by so notifying law enforcement. The Focus Committee also examined the differences between the Virginia and HIPAA versions of the duty to warn, commonly referred to as the Tarasoff rule. The Focus Committee developed the following action plan to complete by August 17, 2004:

- Wade Kizer would propose draft language making clear that law enforcement officials can obtain health information through a grand jury subpoena or a

court-ordered warrant, provide arguments for and against such authority, and provide the information to Brian Dolan.

- Allyson Tysinger would compare HIPAA § 164.512(f) to Virginia Code § 32.1-171.1:03 and provide the analysis to Brian Dolan.
- Brian Dolan would outline the differences between the Virginia and HIPAA versions of the Tarasoff rule, and include options for keeping or modifying Virginia's rule. Mr. Dolan will provide his analysis to all Focus Committee members, simultaneously forwarding the information from Mr. Kizer and Ms. Tysinger.
- Brian Dolan will coordinate scheduling the next telephone conference.

Subsequent to the July 20, 2004 telephone conference, the above information was shared with all Focus Committee members. In addition, Rosemary Bourne of the Commonwealth Attorney's Office requested inclusion in the next conference to address concerns about HIPAA requirements limiting the ability of prosecutors to timely obtain records of victims and the necessity of providing notice to an accused.

The final telephone conference occurred at 11:00 a.m. on September 2, 2004. Mr. Dolan called the meeting to order. Also participating were Allyson Tysinger, Wade Kizer, Gustav Chiarello, and Rosemary Bourne. Wade Kizer agreed that Ms. Tysinger's proposed revisions encompassed his suggested revisions. These changes are outlined below. Accordingly, the participants evaluated and debated the statutory revisions discussed in Ms. Tysinger's report and unanimously agreed that the Virginia Code § 32.1-127.1:03 should be amended as indicated below. In addition, there was unanimous agreement that Virginia's version of the Tarasoff rule is more restrictive than HIPAA, and should be expanded to include a broader category of reportable threats and potential victims. Whether this should be accomplished through amending § 32.1-127.1:03(D)(19) only, which applies to all health care entities, or by also amending 54.1-2400.1(B), which only applies to mental health care providers, should be decided after consultation with the appropriate mental health profession societies, as only the latter section actually imposes a duty to report.

Also discussed was whether under HIPAA and/or Virginia law, a court-ordered warrant would include a magistrate issued warrant. The participants believed that a magistrate's warrant should be considered court-ordered, but neither HIPAA nor the Virginia Code provide clear guidance. Amending the Virginia Code to clarify this point would be relatively simple. As there may be unrelated reasons under Virginia law, however, that a magistrate's order typically is not considered a court order, we recommend the Oversight Committee consider this issue before proposing a statutory amendment.

Last, Ms. Bourne questioned the wisdom and necessity for the Commonwealth Attorney's Office to provide notice to an accused of an intent to obtain medical records in

some cases where the accused is either the spouse or custodial parent of the victim. The participants agreed that even if Virginia law provided an exception to the notice requirement, HIPAA would be more restrictive and not afford the Commonwealth Attorney's Office any relief from complying with the notice requirements. Thus, no change to Virginia law was recommended.

Following the telephone conference, Brian Dolan provided a brief status report to all Committee members and solicited additional input. No Committee member provided any additional comments.

Law Enforcement Focus Committee Analysis

With the exceptions of Virginia Code § 54.1-2967 (reporting certain wounds), § 54.1-2400.2 (limited reporting of threats by mental health providers), and § 19.2-187.02 (governing blood alcohol test results), current Virginia law does not contain any express provisions that permit a health care provider to disclose protected health information to a law enforcement officer. Thus, prior to the HIPAA Privacy Rule, health care providers could not disclose protected health information to law enforcement officers absent patient authorization, a valid subpoena, some other legal process, or a federal or state law that permitted the disclosure. Since there are few federal and state laws that permit disclosure to law enforcement, law enforcement officers generally need a subpoena or a court order to access health information under Virginia law.

The HIPAA Privacy Rule, however, contains a provision regarding disclosures of health information to law enforcement. See 45 C.F.R. § 164.512(f). Under the Privacy Rule, a provider may disclose health information to a law enforcement officer in compliance with a grand jury subpoena or an administrative request, including a civil or authorized investigative demand or similar process authorized under law, as long as the information sought is relevant and material to a legitimate law enforcement inquiry. 45 C.F.R. § 164.512(f)(1)(ii)(C). Providers may also disclose limited information such as name, address, birth date, dates of treatment, blood type, social security number, and distinguishing physical characteristics if a law enforcement officer requests such information for the purpose of identifying or locating a suspect, fugitive, material witness or missing person. 45 CFR 164.512(f)(2). In addition, the Privacy Rule has provisions for disclosures to law enforcement regarding crime committed on the premises of a health care provider and decedents whose deaths are suspected to have been the result of crime. 45 CFR 164.512(f)(3), (4).

Virginia law, which does not expressly permit disclosures to law enforcement, and the HIPAA Privacy Rule, which does permit certain disclosures to law enforcement are contrary. When a preemption analysis is conducted, Virginia law is found to be the more stringent because it provides greater privacy protection to the individual who is the subject of the information by not permitting most disclosures to law enforcement. Thus, in circumstances other than reporting certain wounds pursuant to § 54.1-2967 or blood alcohol test results pursuant to § 19.2-187.02, a change in Virginia law would be

necessary to allow health care providers to make disclosures of health information to law enforcement officers that the Privacy Rule permits.

Both the Code of Virginia and HIPAA contain a version of the duty to warn announced in Tarasoff v. Regents of the Univ. of California, 17 Cal. 3d 425 (1976). Specifically, Virginia Code § 54.1-2400.1(B) states, in relevant part:

A mental health service provider has a duty to take precautions to protect third parties from violent behavior or other serious harm only when the client has orally, in writing, or via sign language, communicated to the provider a specific and immediate threat to cause serious bodily injury or death to an identified or readily identifiable person or persons, if the provider reasonably believes, or should believe according to the standards of his profession, that the client has the intent and ability to carry out that threat immediately or imminently. If the third party is a child, in addition to taking precautions to protect the child from the behaviors in the above types of threats, the provider also has a duty to take precautions to protect the child if the client threatens to engage in behaviors that would constitute physical abuse or sexual abuse as defined in § [18.2-67.10](#).

In comparison, § 164.512(j)(1) of HIPAA states:

[a] covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure: [i]s necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and [i]s to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat. . . .

The first difference between the above statutes is that Virginia's reporting requirement is mandatory. Under HIPAA, reporting is permitted but not required. These statutory provisions differ in two other ways that are potentially contradictory.¹ First, Virginia law requires that the threat relate to serious bodily injury or death. HIPAA is more general, and only requires that the threat relate to health or safety. Second, Virginia requires that the target of the threat be an identified or readily identified person or persons. Virginia law does not provide guidance on what makes an individual a "readily identifiable person or persons." HIPAA allows reporting about a threat made against the public at large. In both instances, Virginia law arguably is more restrictive. A health care provider in Virginia, therefore, should follow Virginia law rather than HIPAA. This leads to the possibility, therefore, that a threat to blow up the Woodrow Wilson Bridge

¹ Virginia's statute also contains provisions for reporting threats of physical or sexual abuse of a child. Such disclosures would be permitted under other provisions of HIPAA, in particular §164.512(b) and (c).

could be reported to law enforcement pursuant to HIPAA, but possibly restricted from disclosure under Virginia law.

OPTIONS

1. Take no action. This would maintain the current state of the law. Health care providers would generally not be able to disclose health information to law enforcement officers absent a valid subpoena, a court order, or patient authorization.
2. Change Virginia law to more closely align it with the HIPAA Privacy Rule's provisions on disclosures to law enforcement. Such a change would permit health care providers to disclose health information to law enforcement officers in compliance with a grand jury subpoena and a search warrant. It would also permit health care providers to disclose certain health information to law enforcement officers for the purpose of identifying or locating a suspect, fugitive, material witness or missing person. Suggested changes to Virginia's Patient Health Records Privacy Act have been made below to align Virginia law with the Privacy Rule.
3. Make some changes, but not all. Such an approach would amend Virginia law to more closely align it with the HIPAA Privacy Rule but only in certain select areas. For instance, it could be decided to only amend Virginia law to allow health care providers to make disclosures to law enforcement officers in response to grand jury subpoenas and search warrants. Or it could be decided to only amend Virginia law to allow disclosures for location of a suspect, or expand the circumstances under which providers can warn about threats

Recommendation

The Law Enforcement Focus Committee recommends making the changes highlighted below.

Respectfully Submitted,

Brian O. Dolan, Esq.

POSSIBLE AMENDMENTS TO VIRGINIA LAW

Virginia's Patient Health Records Privacy Act – 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 by this section or by another provision of state or federal law, no

health care entity, or other person working in a health care setting, may disclose an individual's health records.

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.

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 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. 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 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. Health care entities may disclose health records:

1. As set forth in subsection E of this section, pursuant to the written authorization of the individual or in the case of a minor, 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 an individual's written authorization, pursuant to the individual's oral authorization for a health care provider or health plan to discuss the individual's health records with a third party specified by the individual;
2. In compliance with a subpoena issued in accord with subsection H of this section, [pursuant to a search warrant or a grand jury subpoena](#), 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 health care entity or the 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 health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity;
4. In testimony in accordance with §§ [8.01-399](#) and [8.01-400.2](#);
5. In compliance with the provisions of § [8.01-413](#);
6. As required or authorized by law relating to public health activities, health oversight activities, serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease, public safety, and suspected child or adult abuse reporting requirements, including, but not limited to, those contained in §§ [32.1-36](#), [32.1-36.1](#), [32.1-40](#), [32.1-41](#), [32.1-127.1:04](#), [32.1-276.5](#), [32.1-283](#), [32.1-283.1](#), [37.1-98.2](#), [53.1-40.10](#), [54.1-2400.6](#), [54.1-2400.7](#), [54.1-2403.3](#), [54.1-2506](#), [54.1-2966](#), [54.1-2966.1](#), [54.1-2967](#), [54.1-2968](#), [63.2-1606](#) and [63.2-1509](#);
7. Where necessary in connection with the care of the individual, including in the implementation of a health care provider's routine contact process pursuant to subdivision B 4 of § [32.1-127](#);
8. In the normal course of business in accordance with accepted standards of practice within the health services setting; however, the maintenance, storage, and disclosure of the mass of prescription dispensing records maintained in a pharmacy registered or permitted in Virginia shall only be accomplished in compliance with §§ [54.1-3410](#), [54.1-3411](#) and [54.1-3412](#);
9. When the individual has waived his right to the privacy of the health records;
10. When examination and evaluation of an individual are undertaken pursuant to judicial or administrative law order, but only to the extent as required by such order;

11. To the guardian ad litem and any attorney representing the respondent in the course of a guardianship proceeding of an adult patient who is the respondent in a proceeding under Article 1.1 (§ [37.1-134.6](#) et seq.) of Chapter 4 of Title 37.1;
12. To the attorney appointed by the court to represent an individual who is or has been a patient who is the subject of a civil commitment proceeding under § [37.1-67.3](#) or a judicial authorization for treatment proceeding pursuant to § [37.1-134.21](#);
13. 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;
14. With regard to the Court-Appointed Special Advocate (CASA) program, a minor's health records in accord with § [9.1-156](#);
15. 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.);
16. To third-party payors and their agents for purposes of reimbursement;
17. As is necessary to support an application for receipt of health care benefits from a governmental agency or as required by an authorized governmental agency reviewing such application or reviewing benefits already provided 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](#);
18. Upon the sale of a medical practice as provided in § [54.1-2405](#); or upon a change of ownership or closing of a pharmacy pursuant to regulations of the Board of Pharmacy;
19. Consistent with applicable law and standards of ethical conduct, if in good faith, it is believed use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat or law-enforcement officials; or 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;
20. 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](#);
21. In the case of substance abuse records, when permitted by and in conformity with requirements of federal law found in 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2;

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

23. If the 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;

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

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 this title, pursuant to subdivision D 1 of this section;

27. 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](#);

28. In response to a request of a law-enforcement official for the purpose of identifying or locating a suspect, fugitive, material witness or missing person, provided that only the following information may be disclosed: name and address, date and place of birth, social security number, blood type, type of injury, date and time of treatment, date and time of death if applicable, and a description of distinguishing physical characteristics;

29. To law-enforcement officials regarding the death of an individual if the health care entity has a suspicion that such death may have resulted from criminal conduct;

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

~~28~~31. To the State Health Commissioner pursuant to § [32.1-48.015](#) when such records are those of a person or persons who are subject to an order of quarantine or an order of isolation pursuant to Article 3.02 (§ [32.1-48.05](#) et seq.) of Chapter 2 of this title.

~~29~~32. To the Commissioner of the Department of Labor and Industry or his designee by each licensed emergency medical services agency when the records consist of the prehospital patient care report required by § [32.1-116.1](#) and the patient has suffered an injury or death on a work site while performing duties or tasks that are within the scope of his employment; and

E. Requests for copies of 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 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 health records, the 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 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 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 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 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.

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 subdivisions 5 or 8 of this subsection 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 disclosures sought in the subpoena duces tecum are consistent with such resolution; and, therefore, the health records previously delivered in a sealed envelope to the clerk of the court or administrative agency will not be returned to the 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 health records have previously been delivered to the court or administrative agency by the health care entity, the health care entity shall comply with the subpoena duces tecum by returning the 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 health records shall be disclosed and all health records previously delivered in a sealed envelope to the clerk of the court or administrative agency will be returned to the 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 health records that were previously delivered to the court or administrative agency for which disclosure has been authorized will not be returned to the health care entity; however, all health records for which disclosure has not been authorized will be returned to the 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 health records have previously been delivered to the court or administrative agency by the health care entity, the 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 health records requested under § [8.01-413](#), [issued by a grand jury](#), or issued by a duly authorized administrative agency conducting an investigation, audit, review or proceedings regarding a health care entity's conduct.

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

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

REPORT OF THE MINOR'S RECORDS FOCUS COMMITTEE

The Focus Committee on Minor's Records was established to determine what changes, if any, were needed in several provisions of the Virginia Code that deal with minors' records and treatment. These Code provisions are as follows: § 54.1-2969 (Authority to consent to surgical/-medical treatment of certain minors); § 20-124.6 (Access to a child's records); § 16.1-338 (Inpatient treatment of minors); and § 2.2-3705.5 (Exclusions to the Virginia Freedom of Information Act, health and social services records). The members of the Focus Committee were Jonathan M. Joseph, Esquire; Jane D. Hickey, Esquire (Office of the Attorney General); and Stephen C. McCoy, Esquire. The comments provided below are based on a consensus reached by the members of the Committee.

VA Code § 54.1-2969 – Authority to Consent to Surgical and Medical Treatment of Certain Minors

Under current law, a minor is deemed an adult for purposes of consenting to the treatment specified in § 54.1-2969(E), but the minor is only permitted to authorize the disclosure of medical information related to treatment of venereal disease and other infectious diseases required by the State Board of Health to be reported and medical information involving birth control, pregnancy or family planning. The minor is not permitted to authorize disclosure of health records related to outpatient treatment for substance abuse or mental illness or emotional disturbance for which he may have provided consent for treatment. This existing limitation conflicts with HIPAA when the minor consents to the treatment, 45 CFR § 164.502(g)(3)(i)(A). It is also not clear under Virginia law whether a minor has the authority to access his health records when he has consented to the treatment, but HIPAA requires a minor to be given access in such a situation. In order to remove the conflict with HIPAA concerning a minor's ability to authorize disclosure of his health records, and to clarify that the minor also has access to the records as required by HIPAA, the Committee offers three different approaches to accomplish this in the attached proposed amendments to § 54.1-2969(E). Section 32.1-127.1:03 (D)(1) of the Health Records Privacy Act related to disclosure of a minor's health records upon authorization of the parent, guardian or other custodian must also be amended to recognize the authority of the minor to authorize disclosure when consenting to treatment under § 54.1-2969(E). A proposed amendment is also attached.

It is also not clear whether, given the minor's ability to consent to such treatments, a parent should be entitled to access such records. The Committee has offered three possible alternatives in this regard. One version proposed would allow the parent access to a minor's records, except when such access would be restricted based on the professional judgment of the treatment clinician. The second version would allow the parent access to the records except where such access was restricted by § 20-124.6. The third version would limit parental access to records, where the minor's consent was sufficient to receive the treatment as provided in this section, unless the minor consented to the disclosure, as required under the federal Substance Abuse Regulations. We are

providing these three options for consideration by the full Committee and/or the Legislature. The Committee does not make any recommendation as to one of these three options. Whichever option is selected, it must be consistent with the proposed amendments to § 20-124.6 discussed below.

VA Code § 20-124.6 – Parental Access to a Child’s Records

This provision was enacted to ensure that parents will not be denied access to their child’s academic and health records regardless of whether they have custody of the child unless otherwise ordered by a court for good cause shown. Because this provision provides for open ended access to such records, the Committee recommends that it be modified to make it more consistent with the other provisions in the Virginia Code and HIPAA governing access to an individual’s health records.

In VA Code § 32.1-127.1:03(F), a health care entity may deny access to an individual or anyone authorized to act on an individual’s behalf when review of the records by that individual, in this case the minor, would be reasonably likely to endanger the life or physical safety of the individual, or another individual if referenced in the records. HIPAA also permits the health care entity to deny access to an individual’s personal representative, in this case the minor’s parent, if access is reasonably likely to cause substantial harm to the individual or another person provided procedures for review of the denial are afforded. See 45 CFR § 164.524(a)(3)(iii). The ability of a health care entity to deny records to an individual’s personal representative is not provided for in Virginia law. The Committee believes that this concept is an important one to include in § 20-124.6. This could particularly be an issue in custody situations. Furthermore, because the Committee is also recommending changes in § 54.1-2969, reference should be made to the ability of a minor to limit disclosure under this section when the minor consents to his own treatment. As a result, we have added language to § 20-124.6 that does the following: (1) defines a health record as it appears in § 32.1-127.1:03(B), (2) makes clear that the minor’s treating physician or clinical psychologist may limit disclosure to a parent as provided in § 32.1-127.1:03(F), and (3) permits the minor to restrict disclosure as provided in § 54.1-2969(E). We have tried to change the language to make it clear that the minor’s authorization is only required if the minor was the one who consented to the treatment under § 54.1-2969(E).

The attached proposed amendments contain both options to permit a treating physician or clinical psychologist to deny access to a parent based upon dangerousness, and to limit a parent’s access to a minor’s health record when that minor has consented to the treatment under § 54.1-2969 discussed above. The General Assembly may select one without the other, but the option selected must be consistent with the option selected for § 54.1-2969 discussed above. The General Assembly may also decide to make no change to this section. If so, a lack of clarity may remain especially in situations where a treating physician or clinical psychologist would like to restrict access to a parent.

VA Code § 16.1-338 – Psychiatric Inpatient Commitment of Minors Act

Section 16.1-338 provides a road map for admission of minors younger than 14 years of age and non-objecting minors 14 years of age and older to inpatient psychiatric treatment. A minor fourteen years of age or older may be admitted to a mental health facility upon the joint application and consent of the minor and the minor's parent. Subsection (C) requires that a copy of the individualized plan of treatment be given to the minor, but is silent on whether the minor may access his other health records or authorize their disclosure. Because the minor cannot consent to treatment without the consent of the parent, HIPAA does not address whether the minor retains a right of access to his records or authority to authorize disclosure. See 45 CFR § 164.502(g)(3)(i). The reason this section was evaluated by the Committee was to provide clarity on the question of whether minors should have the right to access health information in their record as well as have the right to authorize the disclosure of such information if they consented to the admission process, and to ensure to the greatest extent possible that this Code section is consistent with the approach taken in other Code sections reviewed herein when minors consent to their own treatment. The Committee wrestled with four potential options with regard to the current law. One was to permit minors to access the information and allow minors to authorize disclosure without parental consent. The second option would be to permit minors to access their own health information, but not allow them to be a participant in the authorization for disclosure process. The third possibility was to permit minors to access information that required a concurrent authorization of the minor and the parent to disclose the information. And, the final option, the Committee could take no action. The Committee concluded that the third option made the most sense and has added language by means of a new subsection G.

VA Code § 2.2-3705.5. - Minor's Access to Health Records under FOIA

The Virginia Freedom of Information Act also provides that where the person who is the subject of medical records is under the age of 18, his right of access may be asserted only by his parent or guardian. As discussed above, HIPAA provides the minor with a right of access when the minor consents to the treatment and no other consent is required. 45 CFR § 164.502(g)(3)(i)(A). Section 2.2-3705.5 must therefore be amended to comply with HIPAA to provide the minor with a right of access when he has consented to his treatment under § 54.1-2969(E). The Committee has also included a cross reference to § 20-124.6 if the amendments discussed above are accepted. A provision is also included in the proposed amendment attached permitting a minor fourteen years of age and older who consents to inpatient psychiatric treatment to access his records if that option is selected as discussed above.

POSSIBLE AMENDMENTS TO VIRGINIA LAW

Adult and Child

§ 54.1-2969. Authority to consent to surgical and medical treatment of certain minors.

A. Whenever any minor who has been separated from the custody of his parent or guardian is in need of surgical or medical treatment, authority commensurate with that of a parent in like cases is conferred, for the purpose of giving consent to such surgical or medical treatment, as follows:

1. Upon judges with respect to minors whose custody is within the control of their respective courts.
2. Upon local directors of social services or their designees with respect to (i) minors who are committed to the care and custody of the local board by courts of competent jurisdiction, (ii) minors who are taken into custody pursuant to § [63.2-1517](#), and (iii) minors who are entrusted to the local board by the parent, parents or guardian, when the consent of the parent or guardian cannot be obtained immediately and, in the absence of such consent, a court order for such treatment cannot be obtained immediately.
3. Upon the Director of the Department of Corrections or the Director of the Department of Juvenile Justice or his designees with respect to any minor who is sentenced or committed to his custody.
4. Upon the principal executive officers of state institutions with respect to the wards of such institutions.
5. Upon the principal executive officer of any other institution or agency legally qualified to receive minors for care and maintenance separated from their parents or guardians, with respect to any minor whose custody is within the control of such institution or agency.
6. Upon any person standing in loco parentis, or upon a conservator or custodian for his ward or other charge under disability.

B. Whenever the consent of the parent or guardian of any minor who is in need of surgical or medical treatment is unobtainable because such parent or guardian is not a resident of this Commonwealth or his whereabouts is unknown or he cannot be consulted with promptness reasonable under the circumstances, authority commensurate with that of a parent in like cases is conferred, for the purpose of giving consent to such surgical or medical treatment, upon judges of juvenile and domestic relations district courts.

C. Whenever delay in providing medical or surgical treatment to a minor may adversely affect such minor's recovery and no person authorized in this section to consent to such

treatment for such minor is available within a reasonable time under the circumstances, no liability shall be imposed upon qualified emergency medical services personnel as defined in § [32.1-111.1](#) at the scene of an accident, fire or other emergency, a licensed health professional, or a licensed hospital by reason of lack of consent to such medical or surgical treatment. However, in the case of a minor fourteen years of age or older who is physically capable of giving consent, such consent shall be obtained first.

D. Whenever delay in providing transportation to a minor from the scene of an accident, fire or other emergency prior to hospital admission may adversely affect such minor's recovery and no person authorized in this section to consent to such transportation for such minor is available within a reasonable time under the circumstances, no liability shall be imposed upon emergency medical services personnel as defined in § [32.1-111.1](#), by reason of lack of consent to such transportation. However, in the case of a minor fourteen years of age or older who is physically capable of giving consent, such consent shall be obtained first.

E. A minor shall be deemed an adult for the purpose of consenting to:

1. Medical or health services needed to determine the presence of or to treat venereal disease or any infectious or contagious disease that the State Board of Health requires to be reported;

2. Medical or health services required in case of birth control, pregnancy or family planning except for the purposes of sexual sterilization;

3. Medical or health services needed in the case of outpatient care, treatment or rehabilitation for substance abuse as defined in § [37.1-203](#); or

4. Medical or health services needed in the case of outpatient care, treatment or rehabilitation for mental illness or emotional disturbance; ~~or~~.

~~5. The~~ In addition, a minor shall be deemed an adult for the purpose of accessing or consenting to the release authorizing the disclosure of medical records related to subdivisions 1 ~~and 2~~ through 4.

F. Except for the purposes of sexual sterilization, any minor who is or has been married shall be deemed an adult for the purpose of giving consent to surgical and medical treatment.

G. A pregnant minor shall be deemed an adult for the sole purpose of giving consent for herself and her child to surgical and medical treatment relating to the delivery of her child when such surgical or medical treatment is provided during the delivery of the child or the duration of the hospital admission for such delivery; thereafter, the minor mother of such child shall also be deemed an adult for the purpose of giving consent to surgical and medical treatment for her child.

H. Any minor seventeen years of age may, with the consent of a parent or legal guardian, consent to donate blood and may donate blood if such minor meets donor eligibility requirements. However, parental consent to donate blood by any minor seventeen years of age shall not be required if such minor receives no consideration for his blood donation and the procurer of the blood is a nonprofit, voluntary organization.

I. Any judge, local director of social services, Director of the Department of Corrections, Director of the Department of Juvenile Justice, or principal executive officer of any state or other institution or agency who consents to surgical or medical treatment of a minor in accordance with this section shall make a reasonable effort to notify the minor's parent or guardian of such action as soon as practicable.

J. Nothing in subsection G shall be construed to permit a minor to consent to an abortion without complying with § [16.1-241](#).

K. Nothing in ~~subdivision 3 of~~ subsection E shall ~~prevent~~

1. Prevent a parent, legal guardian or person standing in loco parentis from obtaining the results of a minor's nondiagnostic drug test when the minor is not receiving care, treatment or rehabilitation for substance abuse as defined in § ~~37.1-203-203~~; or

2. Otherwise prevent or restrict a licensed health care professional, licensed hospital or other health care provider from disclosing medical records to a parent, legal guardian or person standing in loco parentis, except as provided in § 20-146 [124.6](#).¹

¹ [Delete reference to § 20-146 if no change is made to that section.](#)

Access to Health Records Restricted to Minor

§ 54.1-2969. Authority to consent to surgical and medical treatment of certain minors.

A. Whenever any minor who has been separated from the custody of his parent or guardian is in need of surgical or medical treatment, authority commensurate with that of a parent in like cases is conferred, for the purpose of giving consent to such surgical or medical treatment, as follows:

1. Upon judges with respect to minors whose custody is within the control of their respective courts.
2. Upon local directors of social services or their designees with respect to (i) minors who are committed to the care and custody of the local board by courts of competent jurisdiction, (ii) minors who are taken into custody pursuant to § [63.2-1517](#), and (iii) minors who are entrusted to the local board by the parent, parents or guardian, when the consent of the parent or guardian cannot be obtained immediately and, in the absence of such consent, a court order for such treatment cannot be obtained immediately.
3. Upon the Director of the Department of Corrections or the Director of the Department of Juvenile Justice or his designees with respect to any minor who is sentenced or committed to his custody.
4. Upon the principal executive officers of state institutions with respect to the wards of such institutions.
5. Upon the principal executive officer of any other institution or agency legally qualified to receive minors for care and maintenance separated from their parents or guardians, with respect to any minor whose custody is within the control of such institution or agency.
6. Upon any person standing in loco parentis, or upon a conservator or custodian for his ward or other charge under disability.

B. Whenever the consent of the parent or guardian of any minor who is in need of surgical or medical treatment is unobtainable because such parent or guardian is not a resident of this Commonwealth or his whereabouts is unknown or he cannot be consulted with promptness reasonable under the circumstances, authority commensurate with that of a parent in like cases is conferred, for the purpose of giving consent to such surgical or medical treatment, upon judges of juvenile and domestic relations district courts.

C. Whenever delay in providing medical or surgical treatment to a minor may adversely affect such minor's recovery and no person authorized in this section to consent to such treatment for such minor is available within a reasonable time under the circumstances, no liability shall be imposed upon qualified emergency medical services personnel as

defined in § [32.1-111.1](#) at the scene of an accident, fire or other emergency, a licensed health professional, or a licensed hospital by reason of lack of consent to such medical or surgical treatment. However, in the case of a minor fourteen years of age or older who is physically capable of giving consent, such consent shall be obtained first.

D. Whenever delay in providing transportation to a minor from the scene of an accident, fire or other emergency prior to hospital admission may adversely affect such minor's recovery and no person authorized in this section to consent to such transportation for such minor is available within a reasonable time under the circumstances, no liability shall be imposed upon emergency medical services personnel as defined in § [32.1-111.1](#), by reason of lack of consent to such transportation. However, in the case of a minor fourteen years of age or older who is physically capable of giving consent, such consent shall be obtained first.

E. A minor shall be deemed an adult for the purpose of consenting to:

1. Medical or health services needed to determine the presence of or to treat venereal disease or any infectious or contagious disease that the State Board of Health requires to be reported;
2. Medical or health services required in case of birth control, pregnancy or family planning except for the purposes of sexual sterilization;
3. Medical or health services needed in the case of outpatient care, treatment or rehabilitation for substance abuse as defined in § [37.1-203](#); or
4. Medical or health services needed in the case of outpatient care, treatment or rehabilitation for mental illness or emotional disturbance; ~~or~~.

~~5. The~~ F. A minor consenting to services described in Subsection E shall be deemed an adult for the purpose of accessing or consenting to the release authorizing disclosure of medical records related to subdivisions 1 and 2. created in connection with or as a result of such services.

[REQUIRES CONFORMING CHANGE IN § 20-146] § 20-124.6

[REQUIRES CONFORMING CHANGE IN § 32.1-127.01:03.D (ATTACHED)]

FG. Except for the purposes of sexual sterilization, any minor who is or has been married shall be deemed an adult for the purpose of giving consent to surgical and medical treatment.

GH. A pregnant minor shall be deemed an adult for the sole purpose of giving consent for herself and her child to surgical and medical treatment relating to the delivery of her child when such surgical or medical treatment is provided during the delivery of the child or the duration of the hospital admission for such delivery; thereafter, the minor mother of

such child shall also be deemed an adult for the purpose of giving consent to surgical and medical treatment for her child.

H. Any minor seventeen years of age may, with the consent of a parent or legal guardian, consent to donate blood and may donate blood if such minor meets donor eligibility requirements. However, parental consent to donate blood by any minor seventeen years of age shall not be required if such minor receives no consideration for his blood donation and the procurer of the blood is a nonprofit, voluntary organization.

I. Any judge, local director of social services, Director of the Department of Corrections, Director of the Department of Juvenile Justice, or principal executive officer of any state or other institution or agency who consents to surgical or medical treatment of a minor in accordance with this section shall make a reasonable effort to notify the minor's parent or guardian of such action as soon as practicable.

J. Nothing in subsection G shall be construed to permit a minor to consent to an abortion without complying with § [16.1-241](#).

K. Nothing in subdivision 3 of subsection E shall prevent a parent, legal guardian or person standing in loco parentis from obtaining the results of a minor's nondiagnostic drug test when the minor is not receiving care, treatment or rehabilitation for substance abuse as defined in § [37.1-203](#).

§ 32.1-127.1:03. Health records privacy. **[EXCERPT]**

D. Health care entities may disclose health records:

1. As set forth in subsection E of this section, pursuant to the written authorization of the individual or in the case of a minor [\(other than a minor described in § 54.1-2969.F\)](#), his custodial parent, guardian or other person authorized to consent to treatment of minors pursuant to § [54.1-2969](#); **in cases where a minor has consented to his treatment pursuant to § 54.1-2969(E), health records may be disclosed only pursuant to the written authorization of the consenting minor;** also, in emergency cases or situations where it is impractical to obtain an individual's written authorization, pursuant to the individual's oral authorization for a health care provider or health plan to discuss the individual's health records with a third party specified by the individual;

Professional Judgment

§ 54.1-2969. Authority to consent to surgical and medical treatment of certain minors.

A. Whenever any minor who has been separated from the custody of his parent or guardian is in need of surgical or medical treatment, authority commensurate with that of a parent in like cases is conferred, for the purpose of giving consent to such surgical or medical treatment, as follows:

1. Upon judges with respect to minors whose custody is within the control of their respective courts.
2. Upon local directors of social services or their designees with respect to (i) minors who are committed to the care and custody of the local board by courts of competent jurisdiction, (ii) minors who are taken into custody pursuant to § [63.2-1517](#), and (iii) minors who are entrusted to the local board by the parent, parents or guardian, when the consent of the parent or guardian cannot be obtained immediately and, in the absence of such consent, a court order for such treatment cannot be obtained immediately.
3. Upon the Director of the Department of Corrections or the Director of the Department of Juvenile Justice or his designees with respect to any minor who is sentenced or committed to his custody.
4. Upon the principal executive officers of state institutions with respect to the wards of such institutions.
5. Upon the principal executive officer of any other institution or agency legally qualified to receive minors for care and maintenance separated from their parents or guardians, with respect to any minor whose custody is within the control of such institution or agency.
6. Upon any person standing in loco parentis, or upon a conservator or custodian for his ward or other charge under disability.

B. Whenever the consent of the parent or guardian of any minor who is in need of surgical or medical treatment is unobtainable because such parent or guardian is not a resident of this Commonwealth or his whereabouts is unknown or he cannot be consulted with promptness reasonable under the circumstances, authority commensurate with that of a parent in like cases is conferred, for the purpose of giving consent to such surgical or medical treatment, upon judges of juvenile and domestic relations district courts.

C. Whenever delay in providing medical or surgical treatment to a minor may adversely affect such minor's recovery and no person authorized in this section to consent to such treatment for such minor is available within a reasonable time under the circumstances, no liability shall be imposed upon qualified emergency medical services personnel as defined in § [32.1-111.1](#) at the scene of an accident, fire or other emergency, a licensed health professional, or a licensed hospital by reason of lack of consent to such medical or surgical treatment. However, in the case of a minor fourteen years of age or older who is physically capable of giving consent, such consent shall be obtained first.

D. Whenever delay in providing transportation to a minor from the scene of an accident, fire or other emergency prior to hospital admission may adversely affect such minor's recovery and no person authorized in this section to consent to such transportation for such minor is available within a reasonable time under the circumstances, no liability shall be imposed upon emergency medical services personnel as defined in § [32.1-111.1](#), by reason of lack of consent to such transportation. However, in the case of a minor fourteen years of age or older who is physically capable of giving consent, such consent shall be obtained first.

E. A minor shall be deemed an adult for the purpose of consenting to:

1. Medical or health services needed to determine the presence of or to treat venereal disease or any infectious or contagious disease that the State Board of Health requires to be reported;

2. Medical or health services required in case of birth control, pregnancy or family planning except for the purposes of sexual sterilization;

3. Medical or health services needed in the case of outpatient care, treatment or rehabilitation for substance abuse as defined in § [37.1-203](#);

4. Medical or health services needed in the case of outpatient care, treatment or rehabilitation for mental illness or emotional disturbance; or

5. The ~~release~~ **disclosure** of **and authority to access** medical records related to subdivisions 1 ~~and 2~~ **through 4**.

F. Except for the purposes of sexual sterilization, any minor who is or has been married shall be deemed an adult for the purpose of giving consent to surgical and medical treatment.

G. A pregnant minor shall be deemed an adult for the sole purpose of giving consent for herself and her child to surgical and medical treatment relating to the delivery of her child when such surgical or medical treatment is provided during the delivery of the child or the duration of the hospital admission for such delivery; thereafter, the minor mother of such child shall also be deemed an adult for the purpose of giving consent to surgical and medical treatment for her child.

H. Any minor seventeen years of age may, with the consent of a parent or legal guardian, consent to donate blood and may donate blood if such minor meets donor eligibility requirements. However, parental consent to donate blood by any minor seventeen years of age shall not be required if such minor receives no consideration for his blood donation and the procurer of the blood is a nonprofit, voluntary organization.

I. Any judge, local director of social services, Director of the Department of Corrections, Director of the Department of Juvenile Justice, or principal executive officer of any state

or other institution or agency who consents to surgical or medical treatment of a minor in accordance with this section shall make a reasonable effort to notify the minor's parent or guardian of such action as soon as practicable.

J. Nothing in subsection G shall be construed to permit a minor to consent to an abortion without complying with § [16.1-241](#).

K. Nothing in ~~subdivision 3 of~~ subsection E shall prevent a parent, legal guardian or person standing in loco parentis from obtaining [\(1\) the results of a minor's nondiagnostic drug test when the minor is not receiving care, treatment or rehabilitation for substance abuse as defined in § \[37.1-203-203\]\(#\), or \(2\) a minor's other medical records, except when a licensed health care professional has determined, in the exercise of his professional judgment, that the disclosure of medical records to a parent, legal guardian or person standing in loco parentis would be reasonably likely to cause substantial harm to the minor or another person pursuant to § \[20-124.6\]\(#\).](#)

§ 20-124.6. Access to child's records.

Notwithstanding any other provision of law, neither parent, regardless of whether such parent has custody, shall be denied access to the academic, ~~medical, hospital~~ or other health records, as a health "record" is defined in § 32.1-127.1:03(B), of that parent's minor child unless otherwise ordered by the court for good cause shown. In addition, in the case of health records, access may also be denied if (i) the minor's treating physician or the minor's treating clinical psychologist has made a part of the minor's record a written statement that, in the exercise of his professional judgment, the furnishing to or review by the requesting parent of such health records would be reasonably likely to cause substantial harm to the minor or another person; or (ii) the minor has consented to his own treatment as permitted by § 54.1-2969(E). If a minor has consented to his own treatment as permitted by § 54.1-2969(E), such minor's authorization shall be required to provide the minor's parent access to the minor's health records. If a health care entity, as defined in § 32.1-127.1:03(B), denies a parental request for access to, or copies of, a minor's health record on the basis of (i), the health care entity denying the request shall comply with the provisions of § 32.1-127.1:03(F), and either the minor or the parent shall have the right to have the denial reviewed as specified in § 32.1-127.1:03(F) to determine whether to make the health record available to the parent.

Inpatient Psychiatric Treatment of Minors Act:

Amend § 16.1-338 by adding a new subsection G to provide:

§ 16.1-338. Parental admission of minors younger than fourteen and nonobjecting minors fourteen years of age or older.

A. A minor younger than fourteen years of age may be admitted to a willing mental health facility for inpatient treatment upon application and with the consent of a parent. A minor fourteen years of age or older may be admitted to a willing mental health facility for inpatient treatment upon the joint application and consent of the minor and the minor's parent.

B. Admission of a minor under this section shall be approved by a qualified evaluator who has conducted a personal examination of the minor within forty-eight hours after admission and has made the following written findings:

1. The minor appears to have a mental illness serious enough to warrant inpatient treatment and is reasonably likely to benefit from the treatment; and
2. The minor has been provided with a clinically appropriate explanation of the nature and purpose of the treatment; and
3. If the minor is fourteen years of age or older, that he has been provided with an explanation of his rights under this Act as they would apply if he were to object to admission, and that he has consented to admission; and
4. All available modalities of treatment less restrictive than inpatient treatment have been considered and no less restrictive alternative is available that would offer comparable benefits to the minor.

If admission is sought to a state hospital, the community services board serving the area in which the minor resides shall provide the examination required by this section and shall ensure that the necessary written findings have been made before approving the admission. A copy of the written findings of the evaluation required by this section shall be provided to the consenting parent and the parent shall have the opportunity to discuss the findings with the evaluator.

C. Within ten days after the admission of a minor under this section, the director of the facility or the director's designee shall ensure that an individualized plan of treatment has been prepared by the provider responsible for the minor's treatment and has been explained to the parent consenting to the admission and to the minor. The minor shall be involved in the preparation of the plan to the maximum feasible extent consistent with his ability to understand and participate, and the minor's family shall be involved to the maximum extent consistent with the minor's treatment needs. The plan shall include a

preliminary plan for placement and aftercare upon completion of inpatient treatment and shall include specific behavioral and emotional goals against which the success of treatment may be measured. A copy of the plan shall be provided to the minor and to his parents.

D. If the parent who consented to a minor's admission under this section revokes his consent at any time, or if a minor fourteen or older objects at any time to further treatment, the minor shall be discharged within forty-eight hours to the custody of such consenting parent unless the minor's continued hospitalization is authorized pursuant to §§ [16.1-339](#), [16.1-340](#), or § [16.1-345](#).

E. Inpatient treatment of a minor hospitalized under this section may not exceed ninety consecutive days unless it has been authorized by appropriate hospital medical personnel, based upon their written findings that the criteria set forth in subsection B of this section continue to be met, after such persons have examined the minor and interviewed the consenting parent and reviewed reports submitted by members of the facility staff familiar with the minor's condition.

F. Any minor admitted under this section while younger than fourteen and his consenting parent shall be informed orally and in writing by the director of the facility for inpatient treatment within ten days of his fourteenth birthday that continued voluntary treatment under the authority of this section requires his consent.

G. A minor fourteen years of age or older who joins in an application and consents to admission shall, in addition to his parent, have the right to access his health information. The concurrent authorization of both the parent and the minor shall be required to disclose the information.

HIPAA: FOIA Amendment Relating to Minor's Access to Records

§ 2.2-3705.5. Exclusions to application of chapter; health and social services records.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Health records, except that such records may be personally reviewed by the individual who is the subject of such records, as provided in subsection F of § [32.1-127.1:03](#).

Where the person who is the subject of medical records is confined in a state or local correctional facility, the administrator or chief medical officer of such facility may assert such confined person's right of access to the medical records if the administrator or chief medical officer has reasonable cause to believe that such confined person has an infectious disease or other medical condition from which other persons so confined need to be protected. Medical records shall only be reviewed and shall not be copied by such administrator or chief medical officer. The information in the medical records of a person

so confined shall continue to be confidential and shall not be disclosed by the administrator or chief medical officer of the facility to any person except the subject or except as provided by law.

Where the person who is the subject of medical ~~and mental~~ records is under the age of 18, his right of access may be asserted only by his guardian or his parent, including a noncustodial parent, unless such parent's parental rights have been terminated, ~~or~~ a court of competent jurisdiction has restricted or denied such access, or a parent has been denied access in accordance with § 20-124.6. In instances where the person who is the subject thereof is an emancipated minor, ~~or~~ a student in a public institution of higher education, or is a minor who has consented to his own treatment as permitted by §§ 54.1-2969 and 16.1-338, the right of access may be asserted by the subject person.

For the purposes of this chapter, statistical summaries of incidents and statistical data concerning patient abuse as may be compiled by the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services shall be open to inspection and copying as provided in § 2.2-3704. No such summaries or data shall include any patient-identifying information.

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REPORT OF THE HEALTH RECORD RETENTION FOCUS COMMITTEE

The Focus Committee on Health Record Retention, in light of the Health Insurance Portability and Accountability Act Privacy Regulations (“HIPAA”), recommends that **no changes** be made to create, or change, specific statutory timeframes in Virginia law for the retention of health records by providers and payors.

DISCUSSION

The charge put to the Focus Committee on Health Record Retention (the Focus Committee) by the Oversight Committee for the Joint Commission on Health Care Health Records Study, was to study the rules governing the retention of health records by providers and payors so as to consider whether specific statutory timeframes for retention would be appropriate in light of HIPAA’s requirements. The Focus Committee met on August 5, 2004, and again on August 12, 2004. At the second meeting the Focus committee discerned several reasons for not recommending any changes. However, the only two reasons relevant to the Focus Committee’s charge were, and are, as follows:

1. HIPAA’s record keeping requirements apply only to records related to maintaining the patient’s privacy (i.e., Protected Health Information), not the patient’s health or medical record itself; and
2. In regard to protecting a patient’s privacy, Virginia’s existing statutes are more stringent than HIPAA’s and, as a consequence, preempt HIPAA in this area. In light of the preceding, the Focus Committee recommends that **no changes** be made to create, or change, specific statutory timeframes for the retention of health records by providers and payors.

REPORT OF THE TITLE 37.1 FOCUS COMMITTEE

The Title 37.1 Focus Committee was established to determine whether Chapter 12 of Title 37.1, § 37.1-225 *et seq.*, related to disclosure of patient information to third party payers by mental health, mental retardation and substance abuse professionals, should be repealed as a result of implementation of the federal HIPAA Privacy Rule, 45 CFR Parts 160 and 164, or if not, whether any of the individual statutes should be amended or repealed. In addition to the HIPAA Privacy Rule, the Committee also considered the impact of the federal regulations on Confidentiality of Alcohol and Drug Abuse Patient Records (Substance Abuse Regulations), 42 CFR Part 2, and other Virginia law, especially the Patient Health Records Privacy Act, Va. Code § 32.1-127.1:03, on these Title 37.1 provisions.

The initial members of the Focus Committee were Reginald N. Jones, esq., Jonathan M. Joseph, esq., Susan Ward, esq. (Virginia Hospital and Healthcare Association), Gustav P. Chiarello, esq., Joy Lombard (Virginia Association of Health Plans) and Jane D. Hickey, esq. (Office of the Attorney General). The Committee met by conference call on July 13, 2004 and August 10, 2004. At the first meeting, the Committee determined that the patient or consumer perspective was not represented. As a result, Dana Traynham, esq. (Virginia Office for Protection and Advocacy), and Diane Engster, esq., were invited to participate.

The Committee reviewed whether the Title 37.1 provisions 1) conflict with the HIPAA Privacy Rule or are duplicative of the HIPAA Privacy Rule, 2) provide additional benefits or protections for patients or consumers than HIPAA, or 3) impose additional requirements upon health care providers or third party payers than HIPAA.

Majority Report

The majority of the Committee recommends that Chapter 12 of Title 37.1 be repealed because it provides little additional privacy protections to individuals when compared to the additional burdens it places on health care providers and third party payers to comply. This Chapter was enacted in 1978. There have been no further amendments since 1980, except for amendments made during the 2004 General Assembly Session to comply with HIPAA.

Conflict with HIPAA

The Committee found only minor conflicts with the HIPAA Privacy Rule. Section 37.1-229 establishes the form of consent or authorization for mental health, mental retardation and substance abuse providers to disclose information to third party payers, but HIPAA requires more information in the authorization form than does this Code section.² However, this section was made HIPAA compliant by an amendment

² 45 CFR § 164.508(c).

during the 2004 General Assembly Session that requires authorizations to also meet the standards of § 32.1-127.1:03 (G). Section 32.1-127.1:03(G) incorporates HIPAA's requirements regarding authorizations. While not conflicting with HIPAA, § 37.1-229 is not complete in and of itself and therefore cannot be relied upon by providers or third party payers to meet their obligations. It is more confusing than helpful because it is incomplete. The statute is also not needed because the Authorization to Release Confidential Health Records contained in § 32.1-127.1:03 is HIPAA compliant.

Section 37.1-230 entitles a mental health, mental retardation or substance abuse patient to receive a statement as to the substance of the information contained in a third party payer's records. HIPAA, however, provides the patient with a right of access to inspect and obtain a copy of the entire record,³ not just a statement as to the substance of the information. This section was also amended during the last General Assembly Session along with other provisions of Virginia law that govern a patient's access to health information, §§ 8.01-413, 32.1-127.1:03, and 38.2-608, to align it more closely with HIPAA's requirements on denying a patient access to his own health information. However, it still continues to conflict with HIPAA regarding a patient's ability to access his entire record rather than a statement of the substance of the records. Because the other provisions of Virginia law referenced above govern any patient's ability to access health information in the possession of third party payers, not just mental health, mental retardation or substance abuse patients, this section is unnecessary and due to its conflict with HIPAA, should be repealed.

Most importantly, Va. Code § 37.1-232 provides: "If any provision of federal law is in conflict with the requirements of this chapter, the federal law shall govern." Because of the preemption analysis that HIPAA imposes,⁴ this so-called "savings clause" creates the same problem as a similar phrase in § 32.1-127.1:03 that is being studied by the Oversight Committee, and has resulted in attorneys interpreting HIPAA and Virginia law in a variety of different ways. The federal Substance Abuse Regulations apply yet a different preemption analysis for health records that identify a patient as a substance abuser.⁵ This section adds nothing to assist a third party payer in determining what law or regulation to apply, but can be instead a source of confusion and should be repealed.

Additional Benefit/Burden Analysis

Under § 37.1-226, a patient who requests a mental health, mental retardation or substance abuse provider to submit a bill to a third party payer is deemed to have consented to the disclosure of certain limited information to the third party payer. Section 37.1-227 then permits a physician or other authorized professional employed by the third party payer to request additional information without limit if needed to process the claim, as long as the physician or professional states the reason for the request. Under HIPAA, the health care provider may disclose to the third party payer whatever protected

³ 45 CFR § 164.524 (a).

⁴ 45 CFR § 160.203.

⁵ 42 CFR § 2.20.

health information is necessary to process the claim without authorization from the patient and without requiring a request from a professional.⁶

While the two-step process in §§ 37.1-226 and -227 affords the patient some additional confidentiality protection not provided under HIPAA, it establishes a separate process for mental health, mental retardation and substance abuse providers and third party payers when processing requests for payment. Sections 37.1-226 and -227 also conflict with the federal Substance Abuse Regulations that generally require the written consent of the patient before the records may be disclosed to a third party payer.⁷ The amount of information disclosed to the third party payer for substance abuse records is then governed by the release or authorization itself. The Virginia Association of Health Plans indicates that its members do not report experiencing any problems complying with these two sections. These two sections do, however, impose an additional two-step process upon health care providers and third party payers that are not required by HIPAA, the federal Substance Abuse Regulations, and other Virginia law, while affording minimal additional protections to patients. For this reason, the Committee recommends that these two sections be repealed.

Section 37.1-228 prohibits a third party payer from disclosing information without authorization from the patient except for the purposes of rate review, auditing or evaluation and authorizes disclosure of limited information as part of a coordination of benefit program. Although the Association of Health Plans states that its members do not report having any problems complying with these provisions, determining what disclosures fall within the definition of “rate review”, “auditing” or “evaluation” is not clear. For example, the access that a Managed Health Care Insurance Plan (MCHIP) seeking a Certificate of Quality provides to the Department of Health as required under § 32.1-137.4 may be considered an “audit” or “evaluation,” but that is not abundantly clear. HIPAA permits a third party payer to disclose information in certain other situations, including carrying out its own health care operations,⁸ when otherwise required by law, for public health and health oversight activities, and in response to court orders and subpoenas,⁹ but all subject to HIPAA and other legal restrictions. Further, the Substance Abuse Regulations prohibit a third party payer from disclosing health records that identify a patient as a substance abuser without authorization except for medical emergencies,¹⁰ research activities,¹¹ audit and evaluation activities,¹² and court orders.¹³ Third party payers must again comply with HIPAA, federal Substance Abuse Regulations and other Virginia law, in addition to this Code section, while affording the patient limited additional privacy protection. For this reason, the Committee recommends that § 37.1-228 be repealed.

⁶ 45 CFR § 164.506.

⁷ 42 CFR § 2.2(b).

⁸ 45 CFR § 164.506.

⁹ 45 CFR § 164.512.

¹⁰ 42 CFR § 2.51.

¹¹ 42 CFR § 2.52.

¹² 42 CFR § 2.53.

¹³ 42 CFR Subpart E.

Remedies and Penalties

Finally, § 37.1-231 provides that any person violating any provision of Chapter 12 of Title 37.1 shall be liable in damages to any person injured by such a violation. Punitive damages may also be awarded in the event of multiple or continuous violations. The person shall also be guilty of a Class 2 misdemeanor and is subject to injunctive relief. HIPAA, on the other hand, is enforced by the federal Department of Health and Human Services' Office of Civil Rights. A person violating HIPAA may be fined from \$100 per violation up to \$250,000 and/or 10 years in prison for multiple violations or violations committed with intent to sell, transfer or use protected health information for commercial advantage, personal gain or malicious harm.¹⁴

HIPAA also does not convey a private right of action upon individuals for a violation of the Privacy Rule, as does this statute. See *Gonzaga University v. Doe*, 536 U.S. 273 (2002). The Virginia Supreme Court has, however, recognized a common law tort for wrongful disclosure of health information. *Curtis v. Fairfax Hospital*, 254 Va. 437 (1997); *S.R. v. INOVA Healthcare Services*, 49 Va. Cir. 119 (1999); see also, *Pierce v. Caday*, 244 Va. 285, 422 S.E.2d 371 (1992). An individual would therefore have a common law remedy in Virginia for wrongful disclosure of protected health information and be entitled to compensatory damages for any injury sustained, even if § 37.1-231 were repealed. The violator would also be subject to criminal penalties under HIPAA.¹⁵

Recommendation

Chapter 12 of Title 37.1 creates an additional process when mental health records are disclosed to third party payers. The Chapter provides minimal additional privacy protections, i.e. it 1) establishes a two-step process when providers disclose information to third party payers and 2) limits a third party payer's authority to re-disclose mental health information to "rate review, auditing or evaluation" activities and limits information that may be provided to coordination of benefit programs. The Chapter also creates a private right of action for any person injured by a violation and establishes criminal penalties for a violation of its provisions.

The Chapter, however, is subject to interpretation and imposes additional compliance burdens upon providers and third party payers that must also comply with the HIPAA Privacy Rule, federal Substance Abuse Regulations, and other Virginia law. The provision stating that federal law controls is dependent upon the attorney, provider or third party payer interpreting federal law and is currently not applied consistently throughout Virginia. Under what circumstances a third party payer may disclose information without patient authorization is also not clear. Although mental health records may arguably be more sensitive than other medical records thus requiring additional safeguards, medical records related to HIV or reproductive health are also

¹⁴ 42 U.S.C. §§ 1320d-5 and 1320d-6.

¹⁵ The federal Substance Abuse Regulations also impose criminal penalties upon any person who violates these regulations of not more than \$500 for a first offense, and \$5,000 for each subsequent offense. 42 CFR § 2.4.

sensitive. Maintaining a separate process for mental health records to the exclusion of other sensitive medical information is questionable given the variety of statutory and regulatory schemes, all designed to protect patient privacy, which providers and third party payers must comply with. Providers and third party payers also risk imposition of civil liability and criminal penalties for an inadvertent noncompliance with this Chapter. Such a burden appears excessive when compared with the minimal additional benefits this Chapter provides patients.

Alternatives

Should Chapter 12 not be repealed, the Committee recommends that the two provisions providing additional protections for mental health records in §§ 37.1-226 and -227, and the remedies and penalties provision in § 37.1-231 be moved to § 32.1-127.1:03 so that as many provisions as possible related to privacy of medical records be located in one place. The risk of medical records staff overlooking Chapter 12 while also implementing other competing statutory and regulatory processes related to health records privacy is great, especially considering the civil and criminal penalties to which they may be exposed.

Minority Report

The Minority of the Committee, Advocates for individuals with mental illness, write separately to recommend that the protections afforded by §37.1-225 *et seq.* be retained. Specifically, §37.1-231 provides for remedies and penalties which are not available under either HIPAA or the Patient Health Records Privacy Act. As stated in the Majority Report, there appears to be an action at common law for the wrongful disclosure of health information. However, the case law is sparse and none of the decisions speak specifically to the wrongful disclosure of health information to third party payors. Furthermore, courts have not been consistent in determining what remedies are afforded to individuals whose health information has been inappropriately disclosed.

The diagnosis of mental illness still carries a stigma in our society. Therefore, health records pertaining to mental illness are particularly sensitive (as recognized by the Majority Report) and require increased protection from wrongful disclosure. Although, as the Majority Report states, medical records for other diagnoses, such as HIV, are perhaps just as sensitive, they are not protected with a private right of action for their wrongful disclosure as are mental health records. This inequality should be the basis for a recommendation to extend the protection to all health records rather than diminish the protection for mental health records (as noted in the Alternatives section of the Majority Report).

The Minority recommends that §37.1-225 *et seq.* be retained. In the alternative, we recommend that the protections afforded by §37.1-231 be moved to §32.1-127.1:03.

JDH\HIPAA\Title37.1Rp t

POSSIBLE AMENDMENTS TO VIRGINIA LAW

That Chapter 12 of Title 37.1 of the Code of Virginia be repealed.

~~§ 37.1-225. Definitions.~~

As used in this chapter:

- ~~1. "Professional" means any individual authorized by law to engage in the diagnosis or treatment of a mental health, mental retardation, substance abuse or emotional condition, including a psychiatrist, psychologist, psychiatric social worker, physician, nurse, or other professional person providing mental health, mental retardation or substance abuse services.~~
- ~~2. "Patient" means a person who applies for service, consults, is examined, interviewed, treated or otherwise served to some extent by either a professional or by a treatment facility, or by both, with regard to a primarily mental or emotional condition or a social deprivation or dysfunction or a developmental disability of a mental or emotional order.~~
- ~~3. "Patient identifying information" means name, address, social security number or other information by which the identity of a patient can be determined with reasonable accuracy either directly or by access to other publicly available information.~~
- ~~4. "Treatment facility" means all mental health, mental retardation and substance abuse facilities, including facilities licensed pursuant to Chapter 8 (§ [37.1-179](#) et seq.) of Title 37.1 and hospitals licensed pursuant to § [32.1-126](#), clinics and training centers operated by the Department of Mental Health, Mental Retardation and Substance Abuse Services.~~
- ~~5. "Third party payors" means all third parties who provide by contract or by policy of insurance for the payment of treatment facility services, professional services or for a combination of such services.~~

~~§ 37.1-226. Patient deemed to authorize disclosure of certain information.~~

~~A patient who has requested a professional or treatment facility to submit a bill to a third party payor for payment under a contract or policy of insurance covering such patient shall be deemed to have authorized the disclosure of the following information to such third party payor:~~

- ~~1. The patient's name, address, date of birth, and the contract or policy number;~~
- ~~2. The date the patient was admitted to a treatment facility or the date the patient began receiving mental health, mental retardation or substance abuse services;~~
- ~~3. The date of onset of the patient's illness;~~

4. The date the patient was discharged from the treatment facility or the date the services terminated, if known;
5. The diagnosis, with brief information substantiating the diagnosis;
6. A brief description of the services provided such patient, including type of therapy, medications ordered and administered, and number of hours spent in individual, group, or family treatment, recreational therapy, or rehabilitative activities;
7. Status of the patient, whether in-patient or out-patient; and
8. The patient's relationship to the contract subscriber or policyholder.

~~§ 37.1-227. Disclosure of additional information.~~

~~If the third party payor is unable to settle the claim on the basis of the information provided pursuant to § [37.1-226](#), a physician or other authorized professional employed by the third party payor may request additional information stating the reasons therefor. Either the professional or the treatment facility, or both, may submit to the physician or other authorized professional the requested additional information which shall be treated as confidential by the third party payor, its agents, consultants and employees.~~

~~§ 37.1-228. Disclosure of information by third party payor prohibited; exceptions.~~

~~A. No third party payor shall disclose any information received from either a professional or a treatment facility, or both, about a patient without the patient's consent or authorization, except as hereafter provided in this section.~~

~~B. Such information may be disclosed by the third party payor without the patient's consent or authorization for the purposes of rate review, auditing or evaluation to the extent that such information is necessary to accomplish such purposes. Where a disclosure made to any person pursuant to this subsection includes patient identifying information, the records containing such information may not be removed from the premises of the third party payor and the information may not be used in connection with any legal, administrative, supervisory or other action whatsoever with respect to the patient.~~

~~C. Any third party payor participating in a coordination of benefit program with other third party payors may release such information to another third party payor without the patient's consent or authorization. Information released under this subsection shall be limited to:~~

1. The name of the patient;
2. The name of the professional;

3. The name of the treatment facility;
4. The date of onset of the patient's illness and the period of treatment covered by the third party payor; and
5. The amount already paid.

D. No person receiving any information about a patient from a third party payor may disclose such information.

~~§ 37.1-229. Form of consent or authorization.~~

~~No consent or authorization required by § [37.1-228](#) of this chapter shall be valid unless such consent or authorization is in writing and states:~~

- ~~1. The person to whom disclosure is to be made;~~
- ~~2. The nature of the information to be disclosed;~~
- ~~3. The purpose for which disclosure is to be made; and~~
- ~~4. The inclusive dates of the records to be disclosed.~~

~~No consent or authorization shall be valid unless it is dated and signed by the person consenting or authorizing. Any consent or authorization may be revoked except to the extent that action has already been taken in reliance on the consent or authorization.~~

~~Any consent or authorization pursuant to this section shall also comply with the relevant requirements of subsection G of § [32.1-127.1:03](#).~~

~~§ 37.1-230. Disclosure to patient of information released.~~

~~Any patient who is the subject of information received by a third party payor pursuant to the provisions of this chapter may request and shall be entitled to receive from such third party payor a statement as to the substance of such information.~~

~~However, if either the professional treating the patient or the treatment facility, or both, have advised the third party payor that the patient's treating physician or treating clinical psychologist has determined that such information, if given to the patient, would be reasonably likely to endanger the life or physical safety of the patient or another person, or that such 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, the third party payor shall, if requested by the patient, (i) provide such information to an attorney designated by the patient rather than to the patient or (ii) to a physician or clinical psychologist designated by the patient, whose licensure, training, and experience, relative to the patient's condition, are at least equivalent to that of the~~

~~treating physician or treating clinical psychologist upon whose opinion the denial is based, who, at the patient's expense, shall make a judgment as to whether to make the information available to the patient.~~

~~Alternatively, upon the patient's request, the third party payor shall instead provide such information to a physician or clinical psychologist, selected by the third party payor, whose licensure, training, and experience relative to the patient's condition are at least equivalent to that of the physician or clinical psychologist who initially advised the third party payor to deny the patient access to his records and who did not participate in the original decision to make, at the third party payor's expense, a judgment as to whether to make the information available to the patient.~~

~~The third party payor shall comply with the judgment of the reviewing physician or clinical psychologist.~~

~~§ 37.1-231. Remedies and penalties.~~

~~A. Any person violating any provision of this chapter shall be liable in damages to any person injured by such violation. Punitive damages may be awarded in the event of multiple or continuous violations of this chapter.~~

~~B. Any person who willfully violates any provision of this chapter shall be guilty of a Class 2 misdemeanor.~~

~~C. Any violation of the provisions of this chapter may be enjoined at the suit of the person injured thereby.~~

~~§ 37.1-232. Federal law to govern in case of conflict.~~

~~If any provision of federal law is in conflict with the requirements of this chapter, the federal law shall govern.~~

~~§ 37.1-233. Inapplicability of chapter.~~

~~The provisions of this chapter shall not apply to the underwriting of any application for insurance.~~

JDH\HIPAA\Title37.1Repeal

REPORT OF THE PSYCHOTHERAPY NOTES FOCUS COMMITTEE

The Psychotherapy Notes Focus Committee was established to study the interplay between the federal HIPAA Privacy Rule, 45 C.F.R Parts 160 and 164, and Virginia law governing access to and disclosure of psychotherapy notes.

The members of the Focus Committee were Stephen D. Rosenthal, esq., William O. Quirey, Jr., esq., William H. Hall, esq., Jeanne Franklin, esq., Robyn S. Ellis, esq., D. Calloway Whitehead III (Psychiatric Society of Virginia), Chris Spanos (Virginia Society for Clinical Social Work), Helen Foster, MD, and Allyson K. Tysinger, esq. (Office of the Attorney General). The Committee met by conference call on July 6, 2004; August 25, 2004; and September 14, 2004.

What is a Psychotherapy Note?

Psychotherapy notes are the personal notes of a therapist intended to help him recall the therapy discussion. They are not intended to be seen by anyone other than the therapist and are solely for the use of the therapist who created them. They are kept separately from the patient's health record.

Psychotherapy notes may contain a verbatim account of a therapy session. They may also contain the thoughts and feelings of the therapist during the session. For instance, a therapist may note that "when the patient said x, y, and z, the hair stood up on the back of my neck." Another example is a note that indicates that the patient is "creepy." Such notes are intended for the therapist's own personal use.

Current State of the Law

Virginia law currently treats psychotherapy notes as health records. As such, they are accorded no special protections other than those that apply to all health records. Access to and disclosure of psychotherapy notes are governed by the same laws controlling access to and disclosure of health records, most notably the Patient Health Records Privacy Act, Virginia Code § 32.1-127.1:03.

Conversely, the HIPAA Privacy Rule treats psychotherapy notes as a special category of health information to which distinct rules apply. In general, a health care entity may not disclose psychotherapy notes without patient authorization. *See* 45 C.F.R. § 164.508(a)(2). In addition, the individual who is the subject of the psychotherapy notes does not have a right to access the notes. *See* 45 C.F.R § 164.524(a)(1)(i).

Clearly, Virginia law and the HIPAA Privacy Rule are contrary with respect to an individual's ability to access psychotherapy notes. Whereas Virginia law would currently allow such access, the HIPAA Privacy Rule would not. The HIPAA Privacy Rule preempts all state law unless the state law is more stringent. In the case of an individual's

access to his health records, the law that provides the individual greater access is viewed as the more stringent. Because Virginia law with respect to an individual's access to psychotherapy notes gives greater access to the individual, it is considered the more stringent and is the law that all health care entities in Virginia must currently follow regardless of whether they are subject to the requirements of the HIPAA Privacy Rule.

Similarly, Virginia law and the HIPAA Privacy Rule are contrary with respect to many disclosures of psychotherapy notes. Virginia law currently allows health care entities to disclose psychotherapy notes without patient authorization in a variety of circumstances (*see* § 32.1-127.1:03(D)), whereas the HIPAA Privacy Rule would require patient authorization for those same disclosures. As stated above, the HIPAA Privacy Rule preempts state law unless the state law is more stringent. In the case of disclosure of health records to third parties, the law that provides the individual with greater privacy protection is considered the more stringent. Because the HIPAA Privacy Rule provides an individual with more privacy protection by requiring the individual's authorization for disclosure of psychotherapy notes, it is considered the more stringent and is the law that health care entities who are subject to the HIPAA Privacy Rule must follow. For health care entities that are not subject to the HIPAA Privacy Rule, the provisions of § 32.1-127.1:03 are controlling. Thus, health care entities in Virginia are currently following different rules with respect to the disclosure of psychotherapy notes depending on whether or not they are subject to the requirements of the HIPAA Privacy Rule.¹⁶

Recommendation on Access to Psychotherapy Notes

Option 1: Amend Virginia Law to Align it with the HIPAA Privacy Rule

Because Virginia law and the HIPAA Privacy Rule are contrary with respect to an individual's right to access psychotherapy notes, the Focus Committee recommends that Virginia law be amended to align it with the HIPAA Privacy Rule. Such an amendment would mean that an individual would not have the right to access psychotherapy notes.

Due to the nature of these notes, unfettered access to them by patients can be detrimental. Currently, therapists who are faced with a patient's request to access his psychotherapy notes try to only provide access if they are there to explain the notes to the patient. By amending Virginia law to align it with the HIPAA Privacy Rule, a therapist could take this course of action within the bounds of the law. In Attachment 1, draft language for such an amendment has been added to subsection F of § 32.1-127.1:03, with a definition of "Psychotherapy Notes" added to subsection B.

Option 2: Make No Change

If no change to Virginia law is made, individuals will retain the right to access psychotherapy notes unless access can be denied under current exceptions that are applicable to all health records.

¹⁶ Entities subject to the HIPAA Privacy Rule include health plans, health care clearinghouses, and health care providers who transmit any health information in electronic form in connection with a standard transaction governed by the Rule (generally transactions related to billing). *See* 45 C.F.R. § 160.102.

Recommendation on Disclosure of Psychotherapy Notes

The Focus Committee agreed that three options with respect to the disclosure of psychotherapy notes should be considered. However, the Committee does not make a recommendation as to which option is the most favorable.

Option 1: Amend Virginia Law to Align it with the HIPAA Privacy Rule

Virginia law and the HIPAA Privacy Rule are contrary with respect to many disclosures of psychotherapy notes. Currently, those health care entities that are subject to the HIPAA Privacy Rule follow the Rule's more stringent standard and generally disclose psychotherapy notes only with patient authorization. Those health care entities that are not covered by the HIPAA Privacy Rule follow Virginia law and are able to disclose psychotherapy notes without patient authorization as allowed by § 32.1-127.1:03(D). Amending Virginia law to align it with the HIPAA Privacy Rule with respect to the disclosure of psychotherapy notes will mean that all health care entities in Virginia will follow the same law. An amendment to accomplish this purpose is contained in Attachment 1. A new subsection (D)(30) is proposed to be added to § 32.1-127.1:03, with a definition of "Psychotherapy Notes" added to subsection B.

Option 2: Amend Virginia Law to Bring it Closer to the HIPAA Privacy Rule

This option is the "middle of the road" approach. This amendment would allow health care entities to require patient authorization prior to making a disclosure of psychotherapy notes for purposes of treatment, payment or health care operations. However, it would not go so far as the HIPAA Privacy Rule and mandate patient authorization.

Health care entities that are subject to the HIPAA Privacy Rule would still have to comply with the Rule and therefore, patient authorization for disclosure of psychotherapy notes would be required. For health care entities not subject to the HIPAA Privacy Rule, this amendment would give them discretion to disclose psychotherapy notes for purposes of treatment, payment or health care operations with or without patient authorization. Currently, many providers feel pressure from insurance companies to disclose these notes and would like some protection. This amendment would empower those providers to require patient authorization and thereby reduce pressure from insurance companies. However, it would not go so far as to impose an additional requirement to obtain patient authorization on those health care entities not subject to the HIPAA Privacy Rule.

Were this option to be adopted, health care entities in Virginia would still follow two different sets of rules depending on whether or not they were subject to the HIPAA Privacy Rule. Some providers may not believe that this option provides psychotherapy notes enough protection. In addition, some insurance companies may oppose it although it is not clear that they would oppose this option any more than they would oppose Option 1.

Draft language for this amendment can be found in Attachment 2. Proposed language has been added to subsection (D)(1) of § 32.1-127.1:03, as well as to subsection E. This option can be accomplished by enacting either the language proposed in subsection (D) or that in subsection (E) or both can be enacted to strengthen the effect.

Option 3: Make no change

If no change is made, health care entities subject to the HIPAA Privacy Rule will follow the more stringent requirements of the Rule and obtain patient authorization for most disclosures of psychotherapy notes. Entities not subject to the HIPAA Privacy Rule will be able to disclose psychotherapy notes without patient authorization in accordance with § 32.1-127.1:03(D).

POSSIBLE AMENDMENTS TO VIRGINIA LAW

Attachment 1

§ 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 by this section or by another provision of state or federal law, no health care entity, or other person working in a health care setting, may disclose an individual's health records.

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.

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" **includes Psychotherapy Notes and** 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 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.

"Psychotherapy Notes" means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or a family counseling session and that are separated from the rest of the individual's health record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis and progress to date.

C. 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 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. Health care entities may disclose health records:

1. As set forth in subsection E of this section, pursuant to the written authorization of the individual or in the case of a minor, 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 an individual's written authorization, pursuant to the individual's oral authorization for a health care provider or health plan to discuss the individual's health records with a third party specified by the 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 health care entity or the 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 health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity;
4. In testimony in accordance with §§ [8.01-399](#) and [8.01-400.2](#);
5. In compliance with the provisions of § [8.01-413](#);
6. As required or authorized by law relating to public health activities, health oversight activities, serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease, public safety, and suspected child or adult abuse reporting requirements, including, but not limited to, those contained in §§ [32.1-36](#), [32.1-36.1](#), [32.1-40](#), [32.1-41](#), [32.1-127.1:04](#), [32.1-276.5](#), [32.1-283](#), [32.1-283.1](#), [37.1-98.2](#), [53.1-40.10](#), [54.1-2400.6](#), [54.1-2400.7](#), [54.1-2403.3](#), [54.1-2506](#), [54.1-2966](#), [54.1-2966.1](#), [54.1-2967](#), [54.1-2968](#), [63.2-1606](#) and [63.2-1509](#);
7. Where necessary in connection with the care of the individual, including in the implementation of a health care provider's routine contact process pursuant to subdivision B 4 of § [32.1-127](#);
8. In the normal course of business in accordance with accepted standards of practice within the health services setting; however, the maintenance, storage, and disclosure of the mass of prescription dispensing records maintained in a pharmacy registered or permitted in Virginia shall only be accomplished in compliance with §§ [54.1-3410](#), [54.1-3411](#) and [54.1-3412](#);
9. When the individual has waived his right to the privacy of the health records;
10. When examination and evaluation of an individual are undertaken pursuant to judicial or administrative law order, but only to the extent as required by such order;
11. To the guardian ad litem and any attorney representing the respondent in the course of a guardianship proceeding of an adult patient who is the respondent in a proceeding under Article 1.1 (§ [37.1-134.6](#) et seq.) of Chapter 4 of Title 37.1;
12. To the attorney appointed by the court to represent an individual who is or has been a patient who is the subject of a civil commitment proceeding under § [37.1-67.3](#) or a judicial authorization for treatment proceeding pursuant to § [37.1-134.21](#);

13. 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;
14. With regard to the Court-Appointed Special Advocate (CASA) program, a minor's health records in accord with § [9.1-156](#);
15. 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.);
16. To third-party payors and their agents for purposes of reimbursement;
17. As is necessary to support an application for receipt of health care benefits from a governmental agency or as required by an authorized governmental agency reviewing such application or reviewing benefits already provided 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](#);
18. Upon the sale of a medical practice as provided in § [54.1-2405](#); or upon a change of ownership or closing of a pharmacy pursuant to regulations of the Board of Pharmacy;
19. In accord with 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;
20. 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](#);
21. In the case of substance abuse records, when permitted by and in conformity with requirements of federal law found in 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2;
22. In connection with the work of any entity established as set forth in § [8.01-581.16](#) to evaluate the adequacy or quality of professional services or the competency and qualifications for professional staff privileges;
23. If the 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;

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

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 this title, pursuant to subdivision D 1 of this section;

27. 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](#);

28. To the State Health Commissioner pursuant to § [32.1-48.015](#) when such records are those of a person or persons who are subject to an order of quarantine or an order of isolation pursuant to Article 3.02 (§ [32.1-48.05](#) et seq.) of Chapter 2 of this title.

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

30. Notwithstanding any provision of this subsection, a health care entity must obtain an individual's written authorization for any disclosure of Psychotherapy Notes, except:

- A. Disclosure by the health care entity for its own training programs in which students, trainees, or practitioners in mental health learn under supervision to practice or improve their skills in group, joint, family or individual counseling;**
- B. Disclosure by the health care entity to defend itself or its employees or staff against any accusation of wrongful conduct;**
- C. 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;**

D. As required in the course of an investigation, audit, review or proceedings regarding a health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity; or

E. As otherwise required by law.

E. Requests for copies of 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 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 health records, the 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 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 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 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 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.

Nothing in this subsection shall give an individual or anyone authorized to act on his behalf a right to receive copies of, or otherwise have access to, Psychotherapy Notes.

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 subdivisions 5 or 8 of this subsection 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 disclosures sought in the subpoena duces tecum are consistent with such resolution; and, therefore, the health records previously delivered in a sealed envelope to the clerk of the court or administrative agency will not be returned to the 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 health records have previously been delivered to the court or administrative agency by the health care entity, the health care entity shall comply with the subpoena duces tecum by returning the 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 health records shall be disclosed and all health records previously delivered in a sealed envelope to the clerk of the court or administrative agency will be returned to the 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 health records that were previously delivered to the court or administrative agency for which disclosure has been authorized will not be returned to the health care entity; however, all health records for which disclosure has not been authorized will be returned to the 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 health records have previously been delivered to the court or administrative agency by the health care entity, the 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 health records requested under § [8.01-413](#), or issued by a duly authorized administrative agency conducting an investigation, audit, review or proceedings regarding a health care entity's conduct.

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

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

Attachment 2

§ 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 by this section or by another provision of state or federal law, no health care entity, or other person working in a health care setting, may disclose an individual's health records.

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.

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" **includes Psychotherapy Notes and** 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 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.

"Psychotherapy Notes" means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents

of conversation during a private counseling session or a group, joint, or a family counseling session and that are separated from the rest of the individual's health record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis and progress to date.

C. 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 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. Health care entities may disclose health records:

1. As set forth in subsection E of this section, pursuant to the written authorization of the individual or in the case of a minor, 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 an individual's written authorization, pursuant to the individual's oral authorization for a health care provider or health plan to discuss the individual's health records with a third party specified by the individual; **in the case of Psychotherapy Notes, including those of a minor, health care entities may require the written authorization of the individual, or in the case of a minor, as set forth above, before making disclosures under D 7, 8, and 16 below.**
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 health care entity or the 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 health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity;
4. In testimony in accordance with §§ [8.01-399](#) and [8.01-400.2](#);
5. In compliance with the provisions of § [8.01-413](#);

6. As required or authorized by law relating to public health activities, health oversight activities, serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease, public safety, and suspected child or adult abuse reporting requirements, including, but not limited to, those contained in §§ [32.1-36](#), [32.1-36.1](#), [32.1-40](#), [32.1-41](#), [32.1-127.1:04](#), [32.1-276.5](#), [32.1-283](#), [32.1-283.1](#), [37.1-98.2](#), [53.1-40.10](#), [54.1-2400.6](#), [54.1-2400.7](#), [54.1-2403.3](#), [54.1-2506](#), [54.1-2966](#), [54.1-2966.1](#), [54.1-2967](#), [54.1-2968](#), [63.2-1606](#) and [63.2-1509](#);
7. Where necessary in connection with the care of the individual, including in the implementation of a health care provider's routine contact process pursuant to subdivision B 4 of § 32.1-127;
8. In the normal course of business in accordance with accepted standards of practice within the health services setting; however, the maintenance, storage, and disclosure of the mass of prescription dispensing records maintained in a pharmacy registered or permitted in Virginia shall only be accomplished in compliance with §§ [54.1-3410](#), [54.1-3411](#) and [54.1-3412](#);
9. When the individual has waived his right to the privacy of the health records;
10. When examination and evaluation of an individual are undertaken pursuant to judicial or administrative law order, but only to the extent as required by such order;
11. To the guardian ad litem and any attorney representing the respondent in the course of a guardianship proceeding of an adult patient who is the respondent in a proceeding under Article 1.1 (§ [37.1-134.6](#) et seq.) of Chapter 4 of Title 37.1;
12. To the attorney appointed by the court to represent an individual who is or has been a patient who is the subject of a civil commitment proceeding under § [37.1-67.3](#) or a judicial authorization for treatment proceeding pursuant to § [37.1-134.21](#);
13. 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;
14. With regard to the Court-Appointed Special Advocate (CASA) program, a minor's health records in accord with § [9.1-156](#);
15. 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.);
16. To third-party payors and their agents for purposes of reimbursement;

17. As is necessary to support an application for receipt of health care benefits from a governmental agency or as required by an authorized governmental agency reviewing such application or reviewing benefits already provided 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](#);
18. Upon the sale of a medical practice as provided in § [54.1-2405](#); or upon a change of ownership or closing of a pharmacy pursuant to regulations of the Board of Pharmacy;
19. In accord with 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;
20. 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](#);
21. In the case of substance abuse records, when permitted by and in conformity with requirements of federal law found in 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2;
22. In connection with the work of any entity established as set forth in § [8.01-581.16](#) to evaluate the adequacy or quality of professional services or the competency and qualifications for professional staff privileges;
23. If the 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;
24. For the purpose of conducting record reviews of inpatient hospital deaths to promote identification of all potential organ, eye, and tissue donors in conformance with the requirements of applicable federal law and regulations, including 42 C.F.R. § 482.45, (i) to the 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;
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 this title, pursuant to subdivision D 1 of this section;

27. 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](#);

28. To the State Health Commissioner pursuant to § [32.1-48.015](#) when such records are those of a person or persons who are subject to an order of quarantine or an order of isolation pursuant to Article 3.02 (§ [32.1-48.05](#) et seq.) of Chapter 2 of this title.

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

E. Requests for copies of 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 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 health records, the 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 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 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) **in the case of Psychotherapy Notes, including those of a minor, requested for purposes set forth in subsection D 7, 8, or 16 above, without evidence of the written authorization of the individual to disclose such notes for such purposes, or (d)** 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 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 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.

Nothing in this subsection shall give an individual or anyone authorized to act on his behalf a right to receive copies of, or otherwise have access to, Psychotherapy Notes.

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 subdivisions 5 or 8 of this subsection 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 disclosures sought in the subpoena duces tecum are consistent with such resolution; and, therefore, the health records previously delivered in a sealed envelope to the clerk of the court or administrative agency will not be returned to the 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 health records have previously been delivered to the court or administrative agency by the health care entity, the health care entity shall comply with the subpoena duces tecum by returning the 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 health records shall be disclosed and all health records previously delivered in a sealed envelope to the clerk of the court or administrative agency will be returned to the 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 health records that were previously delivered to the court or administrative agency for which disclosure has been authorized will not be returned to the health care entity; however, all health records for which disclosure has not been authorized will be returned to the 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 health records have previously been delivered to the court or administrative agency by the health care entity, the 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 health records requested under § [8.01-413](#), or issued by a duly authorized administrative agency conducting an investigation, audit, review or proceedings regarding a health care entity's conduct.

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

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

REPORT OF THE WORKERS COMPENSATION FOCUS COMMITTEE

The Focus Committee on Workers Compensation was established to determine what changes, if any, are required in provisions of the Workers Compensation Act (the “Act”) and related provisions of the Virginia Code that deal with the disclosure of an injured employee’s medical records. The relevant Code provisions are as follows: §§ 65.2-604 and 607 of the Act (governing disclosure of employee medical records) and 32.1-127.1:03 (governing health records privacy generally). The members of the Focus Committee were William O. Quirey, Jr., Esquire; Angela Fleming, Esquire (attending on behalf of Charles F. Midkiff, Esquire); Gustav P. Chiarello, Esquire; the Honorable Lawrence D. Tarr (Commissioner, Virginia Workers Compensation Commission); James E. Swiger, Esquire; and Stephen C. McCoy, Esquire.

The comments provided below are derived from a meeting of the Committee held on August 16, 2004 and materials subsequently produced by Committee members. They have not been reviewed by the Committee and should be regarded as draft comments until such time as a final draft can be prepared and submitted.

Background

The use and disclosure of patient health information by health care providers is governed by federal privacy regulations promulgated under the Health Insurance Portability and Accountability Act of 1996 and published at 45 C.F.R. Parts 160 and 164, Subparts A and E (“HIPAA”). HIPAA generally restrict the disclosure of patient health information. However, there are several exceptions to the restrictions imposed by HIPAA, one of which appears at 45 C.F.R. 164.512(l). Pursuant to Section 164.512(l), the HIPAA does not restrict disclosures that are otherwise permitted or required by state workers’ compensation laws. Specifically, Section 164.512(l) provides that a health care provider:

may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers’ compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.

The Virginia Workers Compensation Act (the “Act”), at Section 65.2-604 of the Code of Virginia, provides that a health care provider attending an injured employee shall, upon request of an employer, insurer, certified rehabilitation provider or their representative, furnish a copy of the “medical report.” The term “medical report” is not defined by the Act. As a result, there has been some conflict in the legal community regarding the extent to which health care providers are “authorized by” Section 65.2-604 to release patient medical records. In its recent decision in Randall v. SHS International, VWC File No. 214-26-37, the Workers Compensation Commission (the “Commission”) determined that the “medical report,” as that term is used in §65.2-604, “encompasses all medical records and medical documents.” However, there remains some disagreement in the legal and medical communities regarding the extent to which the Commission’s decision supplies health care providers with the “authorization” necessary to release medical information in compliance with HIPAA.

In its effort to make clearer the interplay between HIPAA and the Act (particularly Section 65.2-604 of the Act), the Committee reviewed the Code and prepared four proposed amendments. A fifth option is to take no action. The four proposed amendments, which may be considered for enactment individually or in combination, are described in detail below.

1. Option 1: Incorporate the Randall decision into the Code.

The first, and simplest, option would be to incorporate the Randall decision into the Code. The chief benefit of doing so would be to provide clear guidance to health care providers regarding the circumstances under which they are required to produce medical records and the extent to which they must do so. The principal drawback appears to be the risk that a Virginia law requiring disclosure of all medical records in a workers compensation case, even those records which are unrelated to the claim at issue, would be pre-empted by HIPAA. Section 160.203 of HIPAA provides that HIPAA pre-empts any state law that is “contrary” to the HIPAA regulations. For purposes of HIPAA, a state law is contrary when it “stands as an obstacle to the accomplishment and execution of the full purposes of” HIPAA.¹⁷ It is plausible to imagine a state or federal court ruling that a Virginia law giving an employer access to the full medical record of an injured employee, without regard to the relation of those records to the claim at hand, is “contrary” to the full purposes of HIPAA.

¹⁷ 45 C.F.R. 202 (2004).

Changes recommended to incorporate the Randall decision into Virginia law are found at Attachment 1.

2. Option 2: Limit records disclosed under §65.2-604 to those arising out of treatment for the injury to which a claim relates.

A second option is to adopt the position expressed by certain members of the medical community prior to the Randall decision: that the term “medical report,” as used in Sections 65.2-604 and 607, includes only those portions of the medical record that relate to the injury for which a claim has been filed under the Act. This approach is recommended by the fact that it better protects an injured workers right to privacy in his medical record, portions of which often, if not inevitably, are unrelated to the injury for which compensation is claimed. In the year since HIPAA became effective, individual awareness of and concern regarding medical records privacy has grown tremendously. It is possible that the extension to employers and insurers of unfettered rights to an injured employee’s medical records will have a chilling effect on legitimate workers compensation claims.

In contrast, it is apparent from discussions among our committee members that both the Commission and the workers compensation bar have strong reservations about extending to health care providers the right to determine which portions of a medical record are related to the injury for which a claim has been filed. In the absence of a bright line test, it is inevitable that different health care providers will apply different standards to determine whether a record is “related” to an employee’s injury, resulting in uneven application of the law. Moreover, it was clear from comments made by representatives of both the workers compensation plaintiffs’ and defense bars that they share the belief that option 2 would prove unworkable due to lack of a bright line standard and delays that this option would produce in adjudicating workers compensation claims.

Changes recommended to incorporate this option into Virginia law are found at Attachment 2.

3. Option 3: Provide employee with notice of employer’s right to access medical records.

Option 4: Provide employee with notice of employer's right to access medical records and an opportunity to contest access to all records.

The final two options considered by the Committee adopt certain of the requirements set forth under HIPAA, and incorporated into Virginia law, for the production of medical records in response to a subpoena duces tecum outside of the context of workers compensation. HIPAA generally prohibits the release of records in response to a subpoena duces tecum unless the party requesting issuance of a subpoena (or issuing an attorney-issued subpoena) certifies that (i) he or she has made a good faith effort to notify the patient whose records are at issue of the request, and (ii) no motion to quash the subpoena has been filed within the fifteen days following its issuance. The Virginia medical records privacy statute, at Section 32.1-127.1:03 of the Code, incorporates the HIPAA requirements for subpoenas.

The Committee has proposed two options, each of which would ensure that Virginia workers compensation claimants are made aware that their employer and certain other parties have access to their medical records. The second option goes a bit further by restricting a health care provider's ability to release records until the employee has had a reasonable opportunity to contest disclosure before the Commission.

Changes required to incorporate these options into Virginia law are found at Attachments 3 and 4, respectively. Please note that the proposed amendments are modeled closely after subsection H of section 32.1-127.1:03 of the Code.

5. Note regarding Virginia medical records privacy law.

As noted above, the foregoing proposals may be considered for enactment individually or in some combination. At a minimum, however, the Committee recommends amendment of the medical records privacy law, §32.1-127.1:03, to clarify whether subpoenas issued in workers compensation cases are covered by subsection H of the privacy law. A sample amendment, which would exclude workers compensation subpoenas from the privacy law's ambit, is included in Attachment 1, below.

Attachment 1

Randall Amendments

§ 65.2-604. Furnishing copy of medical report.

A. Any health care provider attending an injured employee shall, upon request of the injured employee, employer, insurer, or a certified rehabilitation provider as provided in Article 2 (§ [54.1-3510](#) et seq.) of Chapter 35 of Title 54.1 providing services to the injured employee, or of any representative thereof, furnish a copy of any medical report to the injured employee, employer, insurer, or a certified rehabilitation provider as provided in Article 2 (§ [54.1-3510](#) et seq.) of Chapter 35 of Title 54.1 providing services to the injured employee, or to any representative thereof, or to each of them upon request for such medical report.

B. Whenever any health care provider attending an injured employee refers the employee or transfers responsibility for his care to another health care provider, the referring or transferring provider, upon receipt of a request therefor, shall promptly transfer or cause to be transferred to the new or succeeding provider, or to the employee or someone acting on behalf of the employee, copies of all diagnostic test results, x-ray photographs, and other medical records pertaining to the employee's injury for which further treatment is to be sought from the succeeding provider.

In the event of such referral or transfer, the succeeding provider, if given any such diagnostic test results, x-ray photographs and other medical records pertaining to the employee's injury which were performed or recorded within the preceding 60 days by a referring or transferring provider, shall not repeat any such diagnostic tests or procedures previously conducted without making a good faith attempt to use them unless there is a medical necessity to do so as certified by a qualified physician on behalf of the succeeding provider. If the succeeding health care provider violates the requirements of this paragraph, such succeeding provider shall not be entitled to compensation or reimbursement from the injured employee's employer or the employer's insurer for any repeated test or procedure not so certified to be medically necessary, nor may the succeeding provider require the employee to bear any cost associated with the repeated test or procedure which would have been the responsibility of the employer or his insurer but for the provisions of this subsection.

C. As used in this section, (i) the term "health care provider" shall have the same meaning as set forth in § 8.01-581.1, except that state-operated facilities shall also be considered health care providers for the purposes of this section; and (ii) the term "medical report" shall mean any and all medical records of or relating to an injured employee in the possession of a health care provider to whom a request is submitted under subsection A of this section.

§ 32.1-127.1:03. Health records privacy (partial)

9. The provisions of this subsection have no application to (i) subpoenas for health records requested under § 8.01-413, or issued by a duly authorized administrative agency conducting an investigation, audit, review or proceedings regarding a health care entity's conduct; or (ii) any subpoena requested or issued or request for medical records made under § 65.2-604.

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

Nothing in this subsection shall have any effect on the existing authority of a court or administrative agency to issue a protective order regarding health records, including, but not limited to, ordering the return of health records to a health care 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.

Attachment 2

Option 2: Limiting Disclosure to “Related” Records

65.2-604. Furnishing copy of medical report.

A. Any health care provider attending an injured employee for an injury shall, upon request of the injured employee, employer, insurer, or a certified rehabilitation provider as provided in Article 2 (§ [54.1-3510](#) et seq.) of Chapter 35 of Title 54.1 providing services to the injured employee, or of any representative thereof, furnish a copy of any medical ~~report~~ records pertaining to the employee's injury to the injured employee, employer, insurer, or a certified rehabilitation provider as provided in Article 2 (§ [54.1-3510](#) et seq.) of Chapter 35 of Title 54.1 providing services to the injured employee, or to any representative thereof, or to each of them upon request for such medical ~~report~~ records.

B. Whenever any health care provider attending an injured employee refers the employee or transfers responsibility for his care to another health care provider, the referring or transferring provider, upon receipt of a request therefor, shall promptly transfer or cause to be transferred to the new or succeeding provider, or to the employee or someone acting on behalf of the employee, copies of all diagnostic test results, x-ray photographs, and other medical records pertaining to the employee's injury for which further treatment is to be sought from the succeeding provider.

In the event of such referral or transfer, the succeeding provider, if given any such diagnostic test results, x-ray photographs and other medical records pertaining to the employee's injury which were performed or recorded within the preceding 60 days by a referring or transferring provider, shall not repeat any such diagnostic tests or procedures previously conducted without making a good faith attempt to use them unless there is a medical necessity to do so as certified by a qualified physician on behalf of the succeeding provider. If the succeeding health care provider violates the requirements of this paragraph, such succeeding provider shall not be entitled to compensation or reimbursement from the injured employee's employer or the employer's insurer for any repeated test or procedure not so certified to be medically necessary, nor may the succeeding provider require the employee to bear any cost associated with the repeated test or procedure which would have been the responsibility of the employer or his insurer but for the provisions of this subsection.

C. As used in this section, the term "health care provider" shall have the same meaning as set forth in § [8.01-581.1](#), except that state-operated facilities shall also be considered health care providers for the purposes of this section.

§ 65.2-607. Medical examination; physician-patient privilege inapplicable; autopsy.

A. After an injury and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Commission, shall submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Commission. However, no employer may obtain more than one examination per medical specialty without prior authorization from the Commission, based upon a showing of good cause or necessity. The employee shall have the right to have present at such examination any duly qualified physician or surgeon provided and paid by him. No fact communicated to, or otherwise learned by, any physician or surgeon who may have attended or examined the employee in connection with an injury, or who may have been present at any such examination, shall be privileged, either in hearings provided for by this title, or any action at law brought to recover damages against any employer subject to the provisions of this title.

B. If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this title shall be suspended until such refusal or objection ceases and no compensation shall at any time be payable for the period of suspension unless in the opinion of the Commission the circumstances justify the refusal or obstruction.

C. The employer or the Commission may in any case of death require an autopsy at the expense of the party requesting the same. Such autopsy shall be performed upon order of the Commission, and anyone obstructing or interfering with such autopsy shall be punished for contempt.

Attachment 3

Notice to Employee (No Waiting Period)

§ 65.2-604. Furnishing copy of medical report.

A. Any health care provider attending an injured employee shall, upon written request of the injured employee, employer, insurer, or a certified rehabilitation provider as provided in Article 2 (§ 54.1-3510 et seq.) of Chapter 35 of Title 54.1 providing services to the injured employee, or of any representative thereof, furnish a copy of any medical report to the injured employee, employer, insurer, or a certified rehabilitation provider as provided in Article 2 (§ 54.1-3510 et seq.) of Chapter 35 of Title 54.1 providing services to the injured employee, or to any representative thereof, or to each of them upon written request for such medical report.

B. Whenever any health care provider attending an injured employee refers the employee or transfers responsibility for his care to another health care provider, the referring or transferring provider, upon receipt of a request therefor, shall promptly transfer or cause to be transferred to the new or succeeding provider, or to the employee or someone acting on behalf of the employee, copies of all diagnostic test results, x-ray photographs, and other medical records pertaining to the employee's injury for which further treatment is to be sought from the succeeding provider.

In the event of such referral or transfer, the succeeding provider, if given any such diagnostic test results, x-ray photographs and other medical records pertaining to the employee's injury which were performed or recorded within the preceding 60 days by a referring or transferring provider, shall not repeat any such diagnostic tests or procedures previously conducted without making a good faith attempt to use them unless there is a medical necessity to do so as certified by a qualified physician on behalf of the succeeding provider. If the succeeding health care provider violates the requirements of this paragraph, such succeeding provider shall not be entitled to compensation or reimbursement from the injured employee's employer or the employer's insurer for any repeated test or procedure not so certified to be medically necessary, nor may the succeeding provider require the employee to bear any cost associated with the repeated test or procedure which would have been the responsibility of the employer or his insurer but for the provisions of this subsection.

C. As used in this section, the term "health care provider" shall have the same meaning as set forth in § [8.01-581.1](#), except that state-operated facilities shall also be considered health care providers for the purposes of this section.

D. No employer, insurer, or certified rehabilitation provider, or representative thereof shall request medical records under subsection A (whether by causing the issuance of a subpoena duces tecum or otherwise) unless a copy of the request or a copy of the subpoena is provided to the injured employee's counsel or to the injured employee if pro se, simultaneously with filing the request or issuance of the subpoena.

In instances where health records being requested or subpoenaed are those of a pro se employee, the person making the request or causing issuance of the subpoena shall deliver to the employee together with the copy of the request or 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 EMPLOYEE

The attached document means that (insert name of party requesting medical records or causing issuance of the subpoena) has either requested copies of your medical records from your doctor or other health care provider or a subpoena has been issued to your doctor or other health care providers (names of health care providers inserted here) requiring them to produce your health records. Your doctor or other health care provider 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 Virginia Workers' Compensation Commission to limit disclosure of your records or quash the subpoena. You may contact the Virginia Workers' Compensation Commission to determine the requirements that must be satisfied when filing a motion to quash or limit disclosure of your records and you may elect to contact an attorney to represent your interest.

Attachment 4

Notice with Waiting Period

§ 65.2-604. Furnishing copy of medical report.

A. Any health care provider attending an injured employee shall, upon written request of the injured employee, employer, insurer, or a certified rehabilitation provider as provided in Article 2 (§ 54.1-3510 et seq.) of Chapter 35 of Title 54.1 providing services to the injured employee, or of any representative thereof, furnish a copy of any medical report to the injured employee, employer, insurer, or a certified rehabilitation provider as provided in Article 2 (§ 54.1-3510 et seq.) of Chapter 35 of Title 54.1 providing services to the injured employee, or to any representative thereof, or to each of them upon written request for such medical report.

B. Whenever any health care provider attending an injured employee refers the employee or transfers responsibility for his care to another health care provider, the referring or transferring provider, upon receipt of a request therefor, shall promptly transfer or cause to be transferred to the new or succeeding provider, or to the employee or someone acting on behalf of the employee, copies of all diagnostic test results, x-ray photographs, and other medical records pertaining to the employee's injury for which further treatment is to be sought from the succeeding provider.

In the event of such referral or transfer, the succeeding provider, if given any such diagnostic test results, x-ray photographs and other medical records pertaining to the employee's injury which were performed or recorded within the preceding 60 days by a referring or transferring provider, shall not repeat any such diagnostic tests or procedures previously conducted without making a good faith attempt to use them unless there is a medical necessity to do so as certified by a qualified physician on behalf of the succeeding provider. If the succeeding health care provider violates the requirements of this paragraph, such succeeding provider shall not be entitled to compensation or reimbursement from the injured employee's employer or the employer's insurer for any repeated test or procedure not so certified to be medically necessary, nor may the succeeding provider require the employee to bear any cost associated with the repeated test or procedure which would have been the responsibility of the employer or his insurer but for the provisions of this subsection.

C. As used in this section, the term "health care provider" shall have the same meaning as set forth in § 8.01-581.1, except that state-operated facilities shall also be considered health care providers for the purposes of this section.

D. Pursuant to this subsection:

1. No employer, insurer, or certified rehabilitation provider, or representative thereof shall request medical records under subsection A (whether by causing the issuance of a subpoena duces tecum or otherwise) unless a copy of the request or a copy of the subpoena is provided to the injured employee's counsel or to the injured employee if pro se, simultaneously with filing the request or issuance of the subpoena.

No request or subpoena for medical records shall set a return date earlier than 10 days from the date of the request or subpoena except by order of the Commission for good cause shown. When the Commission directs that medical records be disclosed pursuant to a request or subpoena earlier than 10 days from the date of the request or subpoena, a copy of the order shall accompany the request or subpoena.

Any employer, insurer, or certified rehabilitation provider requesting medical records or on whose behalf subpoena for medical records is being issued shall have the duty to determine whether the injured employee whose medical records are being sought is pro se.

In instances where medical records being subpoenaed are those of a pro se employee, the person making the request or causing issuance of the subpoena shall deliver to the pro se employee together with the copy of the request or a copy of the 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 EMPLOYEE

The attached document means that (insert name of party requesting medical records or causing issuance of the subpoena) has either requested copies of your medical records from your doctor or other health care provider or a subpoena has been issued to your doctor or other health care providers (names of health care providers inserted here) requiring them to produce your health records. Your doctor or other health care provider 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 Virginia Workers' Compensation Commission to limit disclosure of your records or quash the subpoena. If you elect to file a motion to quash or limit disclosure, such motion must be filed within 10 days of the date of the request or subpoena. You may contact the Virginia Workers' Compensation Commission to determine the requirements that must be satisfied when filing a motion to quash or limit disclosure of your records and you may elect to contact an attorney to represent your interest. If you elect to file a motion to quash or limit disclosure, you must notify your doctor or other health care provider(s) that you are filing the motion so that the health care provider or health care entity knows to send the medical records to the Virginia Workers' Compensation Commission in a sealed envelope or package for safekeeping while your motion is decided.

2. Any employer, insurer, or certified rehabilitation provider making a request for medical records or causing a subpoena to be issued for an employee's medical records shall include a Notice in the same part of the request in which the health care provider is directed where and when to return the medical records. Such notice shall be in boldface capital letters and shall include the following language:

NOTICE TO HEALTH CARE PROVIDERS

A COPY OF THIS REQUEST OR SUBPOENA DUCES TECUM HAS BEEN PROVIDED TO THE EMPLOYEE WHOSE MEDICAL RECORDS ARE BEING REQUESTED OR HIS COUNSEL. YOU OR THAT INDIVIDUAL HAS THE RIGHT TO FILE A MOTION TO QUASH (OBJECT TO) THE ATTACHED REQUEST OR SUBPOENA. IF YOU ELECT TO FILE A MOTION TO QUASH, YOU MUST FILE THE MOTION WITHIN 10 DAYS OF THE DATE OF THIS REQUEST OR SUBPOENA.

YOU MUST NOT RESPOND TO THIS REQUEST OR SUBPOENA UNTIL YOU HAVE RECEIVED WRITTEN CERTIFICATION FROM THE EMPLOYER, INSURER OR CERTIFIED REHABILITATION PROVIDER ON WHOSE BEHALF THE REQUEST WAS MADE OR THE SUBPOENA 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 VIRGINIA WORKERS COMPENSATION COMMISSION AND THE DISCLOSURES SOUGHT ARE CONSISTENT WITH SUCH RESOLUTION.

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

4. Health care providers shall not respond to a request or subpoena for such medical records until they have received a certification as set forth in subdivisions 5 or 8 of this subsection from the party making the request or causing the subpoena to be issued.

5. If no motion to quash or limit disclosure is filed within 10 days of the date of the request or of the subpoena, the party making the request or causing the subpoena to be issued shall certify in writing to the applicable health care provider that the time for filing a motion to quash or limit disclosure has elapsed and that no motion to quash or limit disclosure was filed. Any health care provider receiving such certification shall have the duty to comply with the request or subpoena by returning the specified medical records by either the return date on the subpoena (if applicable) or five days after receipt of the certification, whichever is later.

6. In the event that the employee whose medical records are being sought files a motion to quash or limit disclosure, the Commission shall decide whether good cause has been shown by the discovering party to compel disclosure of the employee's medical records over the employee's objections. In determining whether good cause has been shown, the Commission 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 employee; (iii) the effect of the disclosure on the employee's future health care; (iv) the importance of the information to the proceeding; and (v) any other relevant factor.

7. Following the Commission's resolution of a motion to quash or limit disclosure, the party on whose behalf the request was made or the subpoena was issued shall certify in writing to the health care provider a statement of one of the following:

a. All filed motions to quash or limit disclosure have been resolved by the Commission and the disclosures sought in the request or subpoena are consistent with such resolution and that the health care provider shall comply with the request or subpoena by returning the medical records designated in the request or subpoena by the return date on the subpoena (if applicable) or five days after receipt of certification, whichever is later;

b. All filed motions to quash or limit disclosure have been resolved by the Commission and the disclosures sought in the request or subpoena are not consistent with such resolution; therefore, no medical records shall be disclosed by the health care provider; or

c. All filed motions to quash or limit disclosure have been resolved by the Commission and the disclosures sought in the request or subpoena are not consistent with such resolution and that only limited disclosure has been authorized. The certification shall state that only the portion of the medical records as set forth in the certification, consistent with the Commission's ruling, shall be disclosed

A copy of the Commission's ruling shall accompany any certification made pursuant to this subdivision.

APPENDIX A

2004 SESSION

HOUSE JOINT RESOLUTION NO. 134

Directing the Joint Commission on Health Care to study the use and disclosure of health records relative to Virginia law and the federal Health Insurance Portability and Accountability Act (HIPAA). Report.

Agreed to by the House of Delegates, February 17, 2004

Agreed to by the Senate, March 9, 2004

WHEREAS, the privacy of patient health records is a highly important and significant issue for the Commonwealth of Virginia and her citizens; and

WHEREAS, over time the Commonwealth has developed policy and a body of laws protecting the privacy of health records; and

WHEREAS, Congress has passed the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. § 1320(d), et seq.) (HIPAA) which, among other things, imposes a federal body of laws and regulations pertaining to the privacy of health records (federal privacy rule); and

WHEREAS, subsection A of § [32.1-127.1:03](#) of the Code of Virginia prohibits disclosure of health records, "except when permitted by this section or by another provision of state or federal law"; and

WHEREAS, the federal rule (i) permits the use or disclosure of protected health information under certain circumstances and (ii) preempts inconsistent state laws unless, among other things, the state law is more stringent than the federal privacy rule counterpart; and

WHEREAS, because of the significant interplay between subsection A of § [32.1-127.1:03](#) and the federal privacy rule, and because of the vagaries of the federal privacy rule and the lack of guidance from the federal Department of Health and Human Services on substantive aspects of the federal privacy rule and on preemption issues, it is inordinately difficult and often impossible for entities in Virginia that use or disclose protected health information to determine with certainty whether subsection A of § [32.1-127.1:03](#) or the federal privacy rule controls many factual situations; and

WHEREAS, although the General Assembly has enacted, and will continue to enact, necessary amendments to § [32.1-127.1:03](#) to address particular procedural or substantive privacy issues raised by the inconsistencies between Virginia law and the federal privacy rule there is no overall consensus on the proper analysis of the interplay between subsection A of § [32.1-127.1:03](#) and the federal privacy rule, resulting in inconsistent interpretations, confusion and uncertainty; and

WHEREAS, for the benefit of patients, health care providers and others subject to the federal privacy rule and Virginia Law, a review of subsection A of § [32.1-127.1:03](#) in light of the federal privacy rule is needed to determine how best to coordinate the two bodies of laws and regulations and the degree to which they should be made consistent; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Joint Commission on Health Care be directed to study the use and disclosure of health records relative to Virginia law and the federal Health Insurance Portability and Accountability Act (HIPAA).

In conducting its study, the Commission shall review and determine the impact of the federal privacy rule pursuant to HIPAA on subsection A of § [32.1-127.1:03](#) regarding the use and disclosure of health records. The Commission shall also consider the need for amendments to relevant Virginia laws and recommend appropriate ways to assist health care providers and other relevant parties subject to the federal privacy rule in understanding and complying with state and federal health record privacy laws and regulations.

Technical assistance shall be provided to the Commission by the State Health Department and the Department of Health Professions. All agencies of the Commonwealth shall provide assistance to the Commission for this study, upon request.

The Joint Commission on Health Care shall complete its meetings by November 30, 2004, and the Director of the Commission shall submit to the Division of Legislative Automated Systems an executive summary of its findings and recommendations no later than the first day of the 2005 Regular Session of the General Assembly. The executive summary shall state whether the Commission intends to submit to the General Assembly and the Governor a report of its findings and recommendations for publication as a document. The executive summary and report shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website.

JOINT COMMISSION ON HEALTH CARE

Executive Director

Kim Snead

Senior Health Policy Analyst

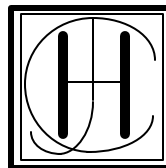
April R. Kees

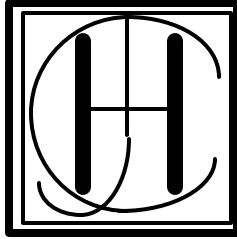
Health Policy Analyst

Catherine W. Harrison

Office Manager

Mamie V. White





Joint Commission on Health Care
900 East Main Street, Suite 3072E
P.O. Box 1322
Richmond, Virginia 23218
(804) 786-5445
(804) 786-5538 (FAX)

E-Mail: jchc@leg.state.va.us

Internet Address:

<http://legis.state.va.us/jchc/jchchome.htm>