

PRINCIPLES OF COOPERATION FOR

PHYSICIANS AND ATTORNEYS

IN

THE COMMONWEALTH OF VIRGINIA

(Fourth Edition)

As Promulgated By

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1. PRIVACY/ COMMUNICATIONS

There are a number of important state and federal laws which address access to a patient's medical records and communications with his or her physician, and it would not be feasible in these Principles of Cooperation fully and fairly to outline all of those laws. Further, many of the laws interact, or even conflict, with one another in certain respects and may be subject to varying interpretations. Nonetheless, physicians and attorneys are expected to comply with the various state and federal laws relative to patient privacy, and legal advice or court intervention should be sought where questions arise.

As a general principle, no attorney should request that a physician provide any information concerning the history, physical condition, diagnosis, or prognosis of a patient except at the request of or with the written authorization of the patient. Likewise, no physician should furnish such information to a third party without such permission from the patient.

The federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") is among the most important of the federal laws affecting patient privacy rights. Under privacy regulations published by the U.S. Department of Health and Human Services under HIPAA ("HIPAA Privacy Regulations"), protected health information generally may not be used or disclosed by covered physicians unless the patient authorizes the disclosure or use or an exception applies. HIPAA may preempt conflicting state laws which limit a patient's access to his or her own medical records or which purport to afford third parties greater access to those records than would otherwise be permitted by HIPAA. Further, before a physician provides a patient's medical records to an attorney who is assisting the physician, HIPAA may require that the physician enter into a business associate agreement with the attorney to ensure that the attorney will not improperly use or disclose the information. A 2004 model attorney-provider business associate agreement prepared by a committee of the Virginia Bar Association is available for your consideration on the VBA's website at www.vba.org. Other federal laws and regulations restrict the disclosure or use of substance abuse treatment records.

By statute, Virginia recognizes the patient's right of privacy in the content of his or her medical records. The Virginia Patient Health Records Privacy Act (Va. Code § 32.1-127.1:03) is the most comprehensive of these statutes. It sets out specific protocols for the disclosure of patient records, includes standards for patient authorizations for the release of health care information and for subpoenas of medical records, specifies situations where medical records may be released without patient authorization, and cross-references a variety of other relevant state and federal laws.

Another important Virginia statute addresses communications among or between physicians, patients and attorneys concerning a patient's health information and records.

Va. Code § 8.01-399 provides that when the physical or mental condition of the patient is at issue in a civil action, the diagnosis or treatment plan of the physician as documented in the patient's medical record and the facts communicated to or learned by the physician in connection with his or her examination or treatment of the patient shall be disclosed, but only in discovery pursuant to the Rules of the Court or through testimony at trial. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice.

Virginia law also provides that sensitive patient information should not be disclosed if a court determines, upon the request of the patient, that it is not relevant to the subject matter of the pending action or that it does not appear to be reasonably calculated to lead to the discovery of admissible evidence. This statute also provides that only diagnoses offered to a reasonable degree of medical probability shall be admissible at trial.

Finally, the Virginia statute precludes an attorney from obtaining, in connection with pending or threatened litigation, information concerning a patient from a patient's physician without the consent of the patient except through discovery pursuant to the Rules of the Court or unless another exception applies. This Virginia limitation is not intended to prohibit a variety of listed communications which are administrative in nature such as communications necessary for scheduling appearances, arranging service of process, scheduling the provision of subpoenaed records, verifying treatment dates (where litigation is pending the information obtained under this provision must be provided promptly to the patient or his or her attorney), or determining the physician's charges for appearance at a deposition or trial. However, it is possible that the HIPAA Privacy Regulations may limit certain of those disclosures.

The Virginia Bar Association will continue to work with relevant health care professional associations, including The Medical Society of Virginia, and health care agencies on an on-going basis to propose appropriate legislative changes to the Virginia General Assembly to bring our state laws into compliance with HIPAA.

Special rules may also apply under Virginia statutes and HIPAA where the physician believes disclosure could harm the patient. In such event, the physician should note his or her opinion in the patient's record and should notify the patient's attorney so that the appropriate action can be taken to prevent the harm. The patient's attorney may still obtain the record upon proper written authorization or court order. If a dispute arises regarding disclosure of such records, it may also be appropriate for the physician to prepare an affidavit for the trial judge stating his or her position concerning the adverse effects of such disclosure. 2004 amendments to several of the Virginia medical records statutes make clear that if the physician determines not to disclose the record to the patient because of the likelihood of harm, the patient may "appeal" that determination either by designating (at the patient's expense) a like qualified practitioner to reconsider

the determination or by requiring the physician (at the physician's expense) to designate a qualified practitioner to reconsider the determination.

Absent a subpoena or statutory exception, requests for medical records should be accompanied by a written patient authorization signed by the patient which is compliant with the requirements of HIPAA and Virginia law. An example of such an authorization is included in Va. Code § 32.1-127.1:03(G). A subpoena must comply with Va. Code § 32.1-127.1:03(H) which was revised in 2003 and 2004 to make it HIPAA compliant.

Again, in view of the complexity of the interplay among the various state and federal laws that regulate the use and disclosure of patient records and health information, physicians and attorneys are expected to act in good faith to understand and comply with these laws and should seek legal advice or court intervention where appropriate.

2. PHYSICIAN'S AVAILABILITY

The relationship between an attorney and a physician should be based upon mutual courtesy and understanding, and those principles should be followed in connection with efforts to schedule a physician's testimony.

3. PRESENTATION OF MEDICAL QUESTIONS

It is the duty of each professional to present fairly and adequately the medical and legal questions involved in controversies. To that end, the practice of frank pre-trial discussions between physician and attorney of the medical and legal questions involved should be encouraged for the purpose of obtaining a complete understanding on the part of each as to the issues. An exchange of facts and opinions in advance of testimony minimizes confusion and the time required, encourages settlements, and enhances the understanding of the roles of the two professions.

Similarly, open, frank and regular dialogue between members of local medical societies and local bar associations concerning problem areas and opportunities to develop reasonable and mutually acceptable solutions should be encouraged.

4. REASONABLE FEES

A physician is entitled to a reasonable fee for time expended for preparing or reviewing detailed medical reports, attending attorney/physician conferences and providing expert testimony in litigation involving medical issues.

A reasonable fee means those charges which reflect the physician's compensation for a similar measure of time in his or her practice and as are usual and customary in the community. Such fees should in no way be dependent upon the outcome of the litigation, be excessive or unreasonable, or be designed to discourage patients or attorneys from utilizing the services of a physician where necessary. The fee should be based solely on the time involved. Attorneys and physicians should discuss and agree on the rate of compensation in advance of a conference, deposition, or trial appearance. The physician is encouraged to maintain a uniform fee schedule. A physician's fees for expert services, depositions and trial testimony should be set impartially, without regard to whether such services are requested by the patient's attorney or the attorney for another party.

The attorney requesting time and activity on the part of the physician should make adequate financial arrangements with his or her client for the services he or she specifically requests of the physician, such as court or deposition testimony, requests for medical records, and pre-trial conferences. Ethically, an attorney may advance or guarantee the expenses of litigation, including the expenses of medical examinations, the cost of obtaining and presenting evidence, and the reasonable fee for the professional services of the physician as an expert witness, provided the client remains ultimately liable for such expenses. If the attorney is to guarantee the expenses, he or she should confirm that agreement to the physician in writing. In disbursing any recovery, an attorney has a good faith obligation to see that the charges of treating physicians are paid by the client.

5. PHYSICIAN'S RECORDS

The original of all records of the physician made in connection with the treatment and evaluation of the patient and maintained by the physician are the property of the physician. Similarly, original hospital medical records are the property of the hospital.

Virginia law provides, pursuant to Va. Code § 8.01-413, that upon the written request of the patient or his or her attorney, copies of medical records shall be furnished to the patient or his or her attorney within 15 days of the request. Copies shall be furnished to the patient's attorney only pursuant to written patient authorization. If a physician or clinical psychologist has included in the patient's records a written statement that in his or her opinion the review by the patient of such records would be injurious to the patient's health or well being, the physician may refuse to disclose the record absent court order or completion of the "appeal" process outlined in Section 1 above. Attorneys who receive a client's medical records under such circumstances are admonished to give serious consideration to the physician's concerns lest the client be needlessly harmed.

The original medical records should not be released except upon court order or pursuant to a subpoena. Generally, copies of existing records may be provided instead of the original in response to a proper request.

If medical records are subpoenaed, copies may be mailed to the clerk of the court issuing the subpoena or to the person specified in the subpoena. The subpoena must also comply with Va. Code § 32.1-127.1:03(H) which is designed to satisfy the HIPAA Privacy Regulations. Reasonable charges should be billed to the person who requested the subpoena pursuant to Va. Code § 8.01-413 (see Section 8 below).

Other requests for medical information should be accompanied by a written patient authorization which is compliant with the requirements of HIPAA. An example of such an authorization is included in Va. Code § 32.1-127.1:03(G). Generally, copies of existing records may be provided instead of the original in response to a proper request.

6. MEDICAL EXAMINATIONS BY CONSENT OR RULE 4:10

Upon the order of the court where the action is pending, or by agreement between the attorneys, the party whose medical condition is at issue may be required to submit to examination by one or more physicians chosen by the other party's attorney, agreed upon between counsel, or ordered by the court. For the medical examination of a litigant ordered pursuant to Rule 4:10 of the Rules of the Supreme Court of Virginia, the examining physician shall make a written report of the examination and send the report to the clerk of the court with copies to the counsel for each party. The report shall be detailed, setting out the findings of the physician including the results of all tests performed, diagnoses, and conclusions, together with reports of all earlier examinations of the same condition. Under Rule 4:10, the party requesting the examination is responsible for the costs of the examination.

7. REQUESTED MEDICAL REPORTS

Physicians should promptly furnish medical reports to attorneys requesting them on behalf of clients. In the absence of unusual circumstances, and with the written authorization of the patient, a physician should respond to a request for a medical report within 15 days of receipt. If there is any question about what is needed or what should be included, the physician should write or telephone the requesting attorney.

When a report is requested by an attorney, he or she should make clear in a written request for the report the specific condition about which he or she seeks

information and should likewise indicate whether he or she is asking for a prognosis, a diagnosis or a report on the extent of any disability. The request for the report should also indicate to the physician whether the attorney or the client should be billed for the report, and should indicate the arrangements which have been made for payment of the report. Physicians may request payment prior to providing the report to the attorney.

8. CHARGES FOR COPYING

Physicians and other health care providers are entitled to reasonable charges for duplicating and mailing records, whether the copies are furnished pursuant to a subpoena or pursuant to a request from a patient or an attorney. Currently, Virginia law allows for a reasonable charge, not to exceed fifty cents for each page up to 50 pages and 25 cents for each page thereafter when the request is pursuant to a subpoena or by an attorney. Va. Code § 8.01-413. That Section also permits the provider to charge a search and handling fee not to exceed \$10. However, when the request for the record is made directly by the patient, the provider may only charge a “reasonable cost-based fee” which shall include only the cost of supplies and labor for copying, postage and the cost of preparing an explanation or summary if requested. The \$10 charge for search and handling would not be permissible if the request is made directly by patient (or someone who can make health care decisions for the patient) rather than by the patient’s attorney. Va. Code § 32.1- 127.1:03 (J).

9. DEPOSITION TESTIMONY

Deposition testimony of physicians is sometimes necessary and is preferably arranged at a scheduled time in the physician’s office. Depositions are necessary for a number of reasons including, for discovery, to perpetuate testimony, or to be used in lieu of the physician’s appearance at trial. A physician’s appearance in court is usually the most effective way to present his or her testimony; however, physicians cannot always be present or their live testimony may be of secondary value. Therefore, both professions are encouraged to consider the alternative use of depositions. Physicians should agree to videotaped depositions when requested. Physicians should make themselves available for depositions during reasonable business hours.

10. CONTINGENCY FEE

No member of the legal profession should suggest, and no member of the medical profession should agree to accept, a fee wholly or partially contingent upon the outcome of the matter in which testimony is offered. A fee shall not be deemed contingent simply because the patient’s financial condition may render collection difficult in the event the patient does not prevail in a legal action. Even if the attorney is aware that the patient’s

financial condition may render collection difficult in the event the patient does not prevail, the attorney still must withhold that information from the physician unless the patient authorizes the disclosure.

11. FEE ADJUSTMENT

If the attorney, on behalf of the client-patient, wishes to propose a reduction of the medical bill in connection with a proposed settlement or actual recovery, the attorney should present the physician with a statement of the proposal. The proposal should include the proposed or actual gross funds to be received and the proposed plan of settlement, including the normal or contractual attorney fee and the actual amount the attorney proposes to charge. The attorney should not propose a reduction in the medical bill if such a reduction would cause the physician to be in violation of applicable law, and the attorney should inform the physician that the physician is not required to reduce his or her fees.

12. CANCELLED TESTIMONY

If scheduled testimony is cancelled without sufficient time for the physician to rearrange his or her scheduled time productively (e.g., seeing patients, operating, consulting, etc.), the physician may charge a reasonable fee for his or her unproductive time. Attorneys are expected to inform physicians promptly of cancellations, delays, or continuances. Physicians should not set arbitrary or unreasonable deadlines for communication of this information, and it is recommended that the physician's protocols be communicated to the attorney at the onset to reduce the opportunity for a misunderstanding. The physician has an affirmative duty to minimize the amount of unproductive time and should make a reasonable effort to reschedule his or her time in order to minimize expenses to be charged to the responsible party.

13. SCHEDULING

The physician should attempt to be available at reasonable times for consultation with the attorney and for purposes of providing testimony. The attorney should attempt to give as much notice as possible to the physician about when the physician will be needed.

The attorney should notify the physician of the trial date promptly after it is set and that his or her attendance on that date will be required. Attorneys should make arrangements for the physician to appear at a prescribed time for his or her testimony. If this prescribed time is different from the time stated on the subpoena, the physician may assume that the prescribed time is acceptable to the court.

Where the physician determines that he or she cannot be present on the date indicated for trial or depositions, after making all reasonable efforts to make the adjustment in his or her schedule to permit his or her attendance, the physician shall promptly notify the attorney who has requested the physician's appearance and cooperate with the attorney to arrange a convenient alternative date. The attorney should promptly notify the physician in the event of settlements or continuances.

It is recognized that, although every reasonable effort should be made to minimize the inconvenience to the physician witness, the dispatch of the duties of the courts cannot be governed by the convenience of litigants, attorneys or witnesses, whomever they may be.

14. IMPROVED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT

Many times an attorney's interaction with a physician arises from the attorney's role in representing the patient in a dispute with the physician. Improved communications between the physician and patient can often avoid the dispute, and the resulting acrimony, altogether. There are seemingly insurmountable barriers to informal conversations between a physician and patient when something is wrong. What is frequently needed by the patient or the patient's family is simply an opportunity to ask questions of the physician and hear from the physician what happened, why it happened, and what to expect. This could be an important part of the healing process for the patient. It could also be an opportunity for the physician to express concern for the patient, deal with the physician's own anxiety and help re-establish the break in the important trust relationship between physician and patient. Attorneys and physicians should encourage the expression of benevolence or sympathies in cases involving personal injuries as permitted in Va. Code § 8.01-581.20.1 and in cases of wrongful death as permitted in Va. Code § 8.01-52.1. Physicians and attorneys should work together to create this opportunity within the context of an appropriate dispute resolution process and consistent with their respective ethical responsibilities to their patients and clients.

15. DISPUTE RESOLUTION

Physicians and attorneys should act reasonably and in good faith in an effort to resolve disagreements or disputes arising within or outside of these guidelines. If those efforts prove unsuccessful, a recommended protocol for resolving the disagreement or dispute would be to communicate with the Virginia State Bar and The Medical Society of Virginia (or the local bar association and local medical society in the relevant jurisdiction) to designate a qualified attorney and physician to attempt to mediate the dispute either in person or by telephone. If the attorney and physician designated to mediate the disagreement or dispute are unable to mediate a solution with which all parties agree, the designated attorney and physician should be asked if they could make a unanimous recommendation to the parties for an appropriate resolution of the disagreement or dispute. While not binding upon the parties, such a unanimous recommendation hopefully will help the parties resolve the disagreement or dispute. Recourse to the court should be viewed as a last resort.

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