



Virginia's 2010 Mental Health Law Changes

CLIENT ADVISORY

The mental health laws in Virginia experienced substantial change in 2008 and 2009. There were far fewer changes in the mental health laws as a result of this year's General Assembly session, but still several that should be noted. Following is a summary of those changes, all of which take effect July 1, 2010.

I. Mandatory Outpatient Treatment

The Virginia statutes addressing mandatory outpatient treatment following involuntary admission were revised, with the new law encouraging the use of mandatory outpatient treatment once a patient has been admitted to a facility.¹ In the order for involuntary admission, the judge or special justice may authorize the treating physician to discharge the person to mandatory outpatient treatment not to exceed the length of the order under a discharge plan, if the following four elements are met:

- i) *the person has a history of lack of compliance with treatment for mental illness that at least twice within the past 36 months has resulted in the person being subject to an order for involuntary admission pursuant to subsection C;*
- ii) *in view of the person's treatment history and current behavior, the person is in need of mandatory outpatient treatment following inpatient treatment in order to prevent a relapse or deterioration that would be likely to result in the person meeting the criteria for*

- involuntary inpatient treatment;*
- iii) *as a result of mental illness, the person is unlikely to voluntarily participate in outpatient treatment unless the court enters an order authorizing discharge to mandatory outpatient treatment following inpatient treatment; and*
- iv) *the person is likely to benefit from mandatory outpatient treatment.*²

An amendment was added to the House bill which prohibits the use of outpatient treatment if a patient continues to meet the same involuntary commitment standard as he would have exhibited when he arrived at the facility. Following are the requirements for authorization of outpatient treatment.

Prior to discharging the person to mandatory outpatient treatment under a discharge plan . . . the treating physician shall determine, based upon his professional judgment, that

- (1) *the person*

- (a) *in view of the person's treatment history and current behavior, no longer needs inpatient hospitalization,*
- (b) *requires mandatory outpatient treatment at the time of discharge to prevent relapse or deterioration of his condition that would likely result in his meeting the criteria for involuntary inpatient treatment,*
- (c) *has sufficient capacity to understand the stipulations of his treatment,*
- (d) *has expressed an interest in living in the community and has agreed to abide by his discharge plan,*

¹ House Bill 729 and Senate Bill 360.

² Revision to Va. Code §37.2-817, Involuntary Admission and Mandatory Outpatient Treatment Orders.



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(e) is deemed to have the capacity to comply with the discharge plan and understand and adhere to conditions and requirements of the treatment and services, and
(f) the ordered treatment can be delivered on an outpatient basis by the community services board or designated provider; and
(2) at the time of discharge, services are actually available in the community and providers of services have actually agreed to deliver the services. **In no event shall the treating physician discharge a person to mandatory outpatient treatment under a discharge plan . . . if the person meets the criteria for involuntary commitment. . . .** The discharge plan developed by the treating physician and facility staff in conjunction with the community services board and the person shall serve as and shall contain all the components of the comprehensive mandatory outpatient treatment plan. . . , and no initial mandatory outpatient treatment plan. . . shall be required. The discharge plan shall be submitted to the court for approval and, upon approval by the court, shall be filed and incorporated into the order entered. . . . The discharge plan shall be provided to the person by the community services board at the time of the person's discharge from the inpatient facility. The community services board where the person resides upon discharge shall monitor the person's compliance with the discharge plan and report any material noncompliance to the court. . . (emphasis added)³

II. Psychiatric Treatment of Minors Act

The Psychiatric Treatment of Minors Act (prior to this Bill, it was known as the Psychiatric *Inpatient* Treatment of Minors Act) was substantially revised.⁴ A "qualified evaluator" is an individual designated by the community

services board serving the area where the facility of admission is located, who is not and will not be treating the minor and who has no significant financial interest in the minor's hospitalization. The evaluator prepares a report of his/her findings. The definition of "qualified evaluator" was revised this year to include other healthcare providers (if a psychiatrist or psychologist is not available). They are:

- i) any mental health professional licensed in Virginia through the Department of Health Professions as a clinical social worker, professional counselor, marriage and family therapist, psychiatric nurse practitioner, or clinical nurse specialist, or
- ii) any mental health professional employed by a community services board.⁵

The "Inpatient Treatment of Minors; general applicability; disclosure of records" statute⁶ added a provision allowing health care providers to notify the minor's parents of relevant information. It states:

Any health care provider providing services to a minor who is the subject of proceedings under this article may notify the minor's parent of information which is directly relevant to such individual's involvement with the minor's health care, which may include the minor's location and general condition, in accordance with subdivision D 34 of § 32.1-127.1:03, unless the provider has actual knowledge that the parent is currently prohibited by court order from contacting the minor.

The Emergency Custody Order (ECO) and Temporary Detention Order (TDO) provisions for minors were also revised to more closely mirror the adult ECO and TDO provisions.

³ Revision to Va. Code §37.2-817, Involuntary Admission and Mandatory Outpatient Treatment Orders.

⁴ Senate Bill 65.

⁵ Va. Code §16.1-336, Definitions.

⁶ Va. Code §16.1-337(B).



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III. Surrogate Decision-makers

Virginia now has a new category of surrogate decision-makers in the event a patient does not have an advance medical directive.⁷ Specifically, the new provision, added to Va. Code §54.1-2986, "Procedure in absence of an advance directive; procedure for advance directive without agent; no presumption; persons who may authorize health care for patients incapable of informed decisions" adds a category allowing a friend to make healthcare decisions when there is no family, guardian, or other appropriately designated individual. The provision states:

Except in cases in which the proposed treatment recommendation involves the withholding or withdrawing of a life-prolonging procedure, any adult, except any director, employee, or agent of a health care provider currently involved in the care of the patient, who (i) has exhibited special care and concern for the patient and (ii) is familiar with the patient's religious beliefs and basic values and any preferences previously expressed by the patient regarding health care, to the extent that they are known. A quorum of a patient care consulting committee as defined in § 54.1-2982 of the facility where the patient is receiving health care or, if such patient care consulting committee does not exist or if a quorum of such patient care consulting committee is not reasonably available, two physicians who (a) are not currently involved in the care of the patient, (b) are not employed by the facility where the patient is receiving health care, and (c) do not practice medicine in the same professional business entity as the attending physician shall determine whether a person

*meets these criteria and shall document the information relied upon in making such determination.*⁸

This provision will likely be extremely helpful to hospitals, which have historically sought a guardianship for patients who did not have an advance directive, or any family members, and for whom consent was needed for medical decisions. This added provision allows a friend or acquaintance "who has exhibited special care and concern for the patient" to make healthcare decisions for that patient. End of life decisions (i.e. withdrawing or withholding life-prolonging procedures) are excluded from the "friend's" decision-making capabilities.

IV. Advance Directives Do Not Have to be Notarized Before Submitting to the Registry

Lastly, Va. Code §§54.1-2983 and 54.1-2995 were revised to delete the provision requiring an advance directive to be notarized before it is submitted to the Department of Health for filing in the Advance Health Care Directive Registry.⁹ In 2009, the Advance Directive form was revised such that the person making the advance directive can provide his/her decision maker with the authority to admit him/her to a healthcare facility for the treatment of mental illness for up to 10 days.

If you would like more information on Virginia's mental health law changes, please contact W. Scott Johnson or Molly A. Huffman at (804)967-9604 or by email (sjohnson@hdjn.com or mhuffman@hdjn.com). Additional information about the firm Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at www.hdjn.com.

⁷ Senate Bill 275.

⁸ Va. Code §54.1-2986(7).

⁹ House Bill 267.



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