Health Care Law

Michael C. Guanzon
Clement & Wheatley, Danville, Virginia.

Follow this and additional works at: https://scholarship.richmond.edu/lawreview
Part of the Health Law and Policy Commons, and the Legislation Commons
HEALTH CARE LAW

Michael C. Guanzon *

I. INTRODUCTION

Virginia health law continues to evolve, demonstrating its depth in, and interrelationship to, other various areas of the law, such as privacy, corporate governance, tax, and tort law. During the past year and a half, this continued evolution was evident in the legal developments arising from the three branches of Virginia's government.

From the legislative branch, the Virginia General Assembly enacted a wide range of health law enhancements, ranging from further harmonizing Virginia's health records privacy law1 with the Health Insurance Portability and Accountability Act of 19962 ("HIPAA"), to broadening the scope of practice for allied health professionals and the scope of professional regulation, to responding to issues related to professional liability. In fact, one such enactment3 was in direct response to a decision by the Supreme Court of Virginia not to provide immunity to a physician who did not obtain laboratory results ordered by another physician.4

From the judicial branch, the Supreme Court of Virginia made other significant decisions regarding a health practitioner's expo-

* Principal, Clement & Wheatley, Danville, Virginia. B.A., 1991, University of Virginia; J.D., 1995, University of Richmond School of Law. Mr. Guanzon serves at Secretary of the Virginia Bar Association Health Law Council and as a member of Bar Council of the Virginia State Bar. His practice focuses on health law, commercial transactions, and commercial real estate.

sure to liability by defining a physician’s duty of care in the context of a Rule 4:10 examination and by refusing to impose vicarious liability upon a hospital for the alleged negligence of an independently contracted physician.

Lastly, from the executive branch, the Board of Medicine recently issued significant regulations on the standards of professional conduct for all practitioners licensed by it and emergency regulations on a physician’s ability to mix, dilute, or reconstitute sterile manufactured drug products. This survey is intended to highlight the most significant recent developments in health law from the Virginia General Assembly, the Supreme Court of Virginia, and the Virginia Board of Medicine.

II. LEGISLATIVE DEVELOPMENTS

A. Health Records Privacy

Since the implementation of the Privacy Rule under HIPAA, many health practitioners have found themselves in the precarious position of determining how and to what extent the Privacy Rule preempts the Virginia Health Privacy Law. Under section 164.506 of the Privacy Rule, a “covered entity” may use or disclose “protected health information” for its own “health care operations.” Prior to the 2006 Session of the General Assembly, Virginia’s apparent analogue to the “health care operations” exception under HIPAA was the exception for disclosure in “the normal course of business in accordance with accepted standards of practice within the health services setting.” However, the phrase “in the normal course of business” was not specifically de-

5. VA. SUP. CT. R. 4:10.
13. Id.
fined or described in the Virginia Code. As such, the question arose as to whether any situations existed in which the scope of the HIPAA "health care operations" exception to confidentiality did not overlap with the scope of Virginia's "in the normal course of business" exception to confidentiality.

In lieu of specifically answering this question by creating a new definition for the existing "in the normal course of business" exception to confidentiality, the General Assembly enacted House Bill 853, which added "health care operations" as defined by HIPAA to the list of permitted disclosures (including the "in the normal course of business" disclosure) under the Virginia Health Privacy Law. This addition effectively allows: (1) those Virginia health providers who are not subject to HIPAA to continue to benefit from having the phrase "in the normal course of business" undefined and undisturbed; and (2) those Virginia health practitioners who are "covered entities" under HIPAA to have an available state law mechanism under which they may comply with HIPAA. House Bill 853 demonstrates an apparent, ongoing effort of the legislature to harmonize HIPAA and the Virginia Health Privacy Law.

B. Scope of Practice of Allied Health Professionals

In the 2006 Session, the Virginia General Assembly enacted several laws that broadened or clarified the scope of practice of allied health professionals.

1. Physician Assistants ("PAs")

Although the General Assembly granted to PAs a certain level of parity with nurse practitioners under certain circumstances, it apparently declined to do so in others.

20. In other words, the desired effect is that Virginia health practitioners, who are covered entities under HIPAA, can comply with HIPAA by merely complying with the Virginia Health Privacy Law.
a. State Employee Health Insurance Policy

The General Assembly clarified that the state employee health insurance policy shall cover an infant follow-up audiological hearing examination if recommended by a PA, in addition to one recommended by a physician, nurse practitioner, or audiologist.21

b. Child Immunizations

Although PAs now may share certain information pertaining to child immunizations with certain health providers without parental consent,22 the General Assembly did not add PAs to the existing list of health practitioners who could exempt a child from required immunizations.23

c. Tuberculosis Disease

PAs now may treat a patient for tuberculosis disease and make reports on the disease,24 but diagnosing tuberculosis disease remains reserved for only physicians and nurse practitioners.25

d. Required Prenatal Tests

PAs are granted parity with physicians and nurse practitioners in their authority and duty to examine and test pregnant women for venereal diseases;26 however, if a health practitioner is not licensed to attend to pregnant women, that practitioner may refer a patient for such testing to “a licensed physician, licensed nurse practitioner, or clinic,” but arguably not to PAs.27

27. See id.
e. Nursing Home and Assisted Living Facilities

With respect to rights of nursing home facility patients, the General Assembly granted PAs equal authority as physicians and nurse practitioners to inform residents of their medical condition and make reports affecting: (1) the receipt of medical information; (2) meetings with and participation in certain groups; (3) the retention and use of personal clothing and possessions; and (4) the ability to share a room with a spouse. Similar treatment of PAs may be found in the enumeration of rights of residents of assisted living facilities.

f. Medical Assistance Services Plan

With respect to a plan for medical assistance services that the Board of Medical Assistance Services may submit to the U.S. Secretary of Health and Human Services under Virginia Code section 32.1-325, a PA, in addition to a physician and nurse practitioner, now may execute a certificate of medical necessity for durable medical equipment. Such a plan shall cover an infant follow-up audiological hearing examination if recommended by a PA, in addition to one recommended by a physician, nurse practitioner, or audiologist.

g. Rescue Crew Examination

PAs are treated equally with physicians and nurse practitioners in their ability to examine rescue crew members and to receive certain medical data.

29. Id.
37. Id. § 46.2-208(B)(1) (Supp. 2006).
h. Examination of Incapacitated Drivers

PAs may now report to the Department of Motor Vehicles (the "DMV") their professional opinion that a patient is unfit to drive a motor vehicle and have their identity protected from disclosure to such patient, but if the DMV requires the patient to undergo a physical examination, the examination may be performed only by a physician or nurse practitioner.

i. Certificates by PAs

A PA now may sign certificates formerly signed only by a physician or nurse practitioner, including the report on the physical examination required of school bus driver applicants, the certificate that enables a buyer to cancel a health spa contract, and the certificate required for certain child day center employees.

j. Rabies Immunization Information

A PA, in addition to a physician and nurse practitioner, now may request and receive, from a veterinarian, rabies immunization information for an animal that has bitten or injured the PA’s patient.

2. Nurse Practitioners

In addition to the authority to prescribe Schedules III, IV, V, and VI controlled substances, nurse practitioners may prescribe Schedule II controlled substances. Although PAs may prescribe Schedules III, IV, V, and VI controlled substances, PAs remain unauthorized to prescribe Schedule II controlled substances.
3. Dialysis Patient Care Technicians

The General Assembly authorized, on a temporary basis, "a person who has completed a training program in dialysis patient care [to] engage in provisional practice to obtain practical experience in providing direct patient care under direct and immediate supervision" of a registered nurse. 46

4. Dental Hygienists

A dentist is permitted to authorize certain qualified dental hygienists, under the dentist's supervision, to administer Schedule VI nitrous oxide, oxygen inhalation analgesia, and, to adults, Schedule VI local anesthesia. 47

5. Child Day Care Center Workers

Certain laymen are authorized to administer drugs:

[T]o a child in a child day program as defined in [Virginia Code] § 63.2-100 and regulated by the State Board of Social Services or the Child Day Care Council, provided such person (i) has satisfactorily completed a training program for this purpose approved by the Board of Nursing and taught by a registered nurse, licensed practical nurse, doctor of medicine or osteopathic medicine, or pharmacist; (ii) has obtained written authorization from a parent or guardian; (iii) administers drugs only to the child identified on the prescription label in accordance with the prescriber's instructions pertaining to dosage, frequency, and manner of administration; and (iv) administers only those drugs that were dispensed from a pharmacy and maintained in the original, labeled container that would normally be administered by a parent or guardian to the child. 48

6. Certified Nurse Midwives

While not required to be supervised by a physician, certified nurse midwives are required by Virginia law to collaborate and

47. VA. CODE ANN. §§ 54.1-2722(D), -3408(J) (Supp. 2006).
48. Id. § 54.1-3408(N) (Supp. 2006).
consult with a physician when rendering midwifery services.\textsuperscript{49} Notwithstanding any such required collaboration or consultation, a certified nurse midwife shall remain liable for malpractice, and limited civil immunity for ordinary negligence is granted to:

\begin{quote}
[A]ny (i) doctor of medicine or osteopathy who did not collaborate or consult with the midwife regarding the patient and who has not previously treated the patient for this pregnancy, (ii) nurse, (iii) prehospital emergency medical personnel, or (iv) hospital as defined in [Virginia Code] § 32.1-123 or agents thereof, who provides screening and stabilization health care services to a patient as a result of a certified nurse midwife's negligent, grossly negligent, or willful and wanton acts or omissions.\textsuperscript{50}
\end{quote}

C. \textit{Powers of the Health Regulatory Boards; The Virginia Department of Health Professionals}

1. Health Regulatory Boards

a. Advisory Letter to Complainant

If a health regulatory board decides not to pursue disciplinary action against a licensee after a complaint or report has been filed against such licensee, that board may send to the licensee an advisory letter indicating that decision.\textsuperscript{51} Moreover, that board may send an advisory letter to the complainant:

\begin{quote}
That (i) an investigation has been conducted, (ii) the matter was concluded without a disciplinary proceeding, and (iii), if appropriate, an advisory letter from the board has been communicated to the [licensee]. In providing such information, the board shall inform the [complainant] that he is subject to the requirements of this section relating to confidentiality and discovery.\textsuperscript{52}
\end{quote}

b. Reinstatement Proceedings

The Virginia General Assembly enacted a thirty-day increase in the time in which a health regulatory board, in response to a filed reinstatement application, must hold a reinstatement hear-

\begin{footnotes}
\item 49. \textit{Id.} §§ 54.1-2901(A)(31), -2957(B) (Supp. 2006).
\item 50. \textit{Id.} § 54.1-2957.03 (Supp. 2006).
\item 51. \textit{Id.} § 54.1-2400.2(F) (Supp. 2006).
\item 52. \textit{Id.}
\end{footnotes}
ing after a mandatory suspension or revocation of a health practitioner’s license.\textsuperscript{53} The hearing must occur “not later than the next regular meeting of the board after the expiration of 60 days from the receipt of such [reinstatement] application.”\textsuperscript{54}

2. Board of Medicine—Restricted Volunteer License

The Board of Medicine is authorized to issue a restricted volunteer license under certain terms and conditions to a duly qualified practitioner of the healing arts who:

1. Held an unrestricted license issued by the Virginia Board of Medicine or by a board in another state as a licensee in good standing at the time the license expired or became inactive;

2. Is practicing within the limits of his license in accordance with provisions of [Virginia Code] § 54.1-106; and

3. Attests to knowledge of the laws and regulations governing his branch of the healing arts in Virginia.\textsuperscript{55}

Holders of a restricted volunteer license may practice in clinics organized for the delivery of health care services without charge.\textsuperscript{56} Clearly, this legislation, coupled with the existing grant of limited civil immunity to certain volunteer health professionals,\textsuperscript{57} is a continuing attempt of the legislature to promote participation in charitable works and healthcare delivery to the indigent patient population.

3. Board of Dentistry—Temporary Licenses

The Virginia General Assembly broadened the scope of circumstances in which the Board of Dentistry may issue temporary dentistry licenses.\textsuperscript{58} Now, the Board of Dentistry may issue a temporary license where the temporary licensee would be render-


\textsuperscript{54} VA. CODE ANN. § 54.1-2409(D) (Supp. 2006).

\textsuperscript{55} Id. § 54.1-2928.1(A)(1)-(3) (Supp. 2006).

\textsuperscript{56} See id. § 54.1-2928.1 (Supp. 2006).

\textsuperscript{57} See id. § 54.1-106 (Repl. Vol. 2005).

ing professional services in dental clinics operated by the Virginia Department of Corrections.59

4. Virginia Department of Health Professionals

In 2006, the General Assembly passed legislation to ensure that professional licensure fees collected by the Department of Health Professions stay in its hands for professional regulation purposes, instead of possibly being allocated to another agency for some other purpose.60 Virginia Code section 54.1-113(B) now states:

Nongeneral funds generated by fees collected on behalf of the health regulatory boards and accounted for and deposited into a special fund by the Director of the Department of Health Professions shall be held exclusively to cover the expenses of the health regulatory boards, the Health Practitioners' Intervention Program, and the Department and Board of Health Professions and shall not be transferred to any agency other than the Department of Health Professions, except as provided in [Virginia Code] §§ 54.1-3011.1 and 54.1-3011.2 [i.e., fees for the Nursing Scholarship and Loan Repayment Fund].61

D. Corporate Governance

Under Virginia Code section 13.1-671.1, shareholders of a corporation (including a professional corporation) may agree, as evidenced by written unanimous agreement of all persons who are shareholders at the time of the agreement, or in the corporation's articles of incorporation or bylaws if approved by all persons who are shareholders at the time of such adoption, to eliminate the board of directors or modify its make-up or manner of selection.62 Prior to the 2006 Session of the General Assembly, the Virginia statute on professional corporations63 was silent as to whether the professional licensure requirements of persons directing the provision of professional services would still apply in the event of such elimination or modification under Virginia Code section

59. VA. CODE ANN. § 54.1-2715(A) (Supp. 2006).
61. VA. CODE ANN. § 54.1-113(B) (Supp. 2006).
Accordingly, the General Assembly, in its 2006 Session, clarified that with respect to professional corporations organized to render health services, if such elimination or modification should occur, "only individuals or entities licensed or otherwise legally authorized to render the same professional services . . . provided by the professional corporation . . . shall supervise and direct the provision of professional services of that professional corporation."  

E. Tax

1. Tax Credit for Long-Term Care Insurance

Beginning with the 2006 taxable year, individuals purchasing long-term care insurance for themselves shall be entitled to a tax credit equal to fifteen percent of the amount paid during the taxable year; however, the total credits over the life of the policy may not exceed fifteen percent of the premiums paid for the first twelve months of coverage, and the amount of Virginia tax credit claimed is limited to the extent a federal income tax deduction for such premiums has been claimed. Unused tax credits, if any, may be carried over in the following five taxable years.

2. Retail Sales and Use Tax Exemptions

a. Veterinarians

"[M]edicines and drugs sold to a veterinarian provided they are used or consumed directly in the care, medication, and treatment of agricultural production animals or for resale to a farmer for direct use in producing an agricultural product for market" are exempt from the retail sales and use tax.

---

68. Id. § 58.1-339.11(B) (Cum. Supp. 2006).
b. Nursing Homes

"[M]edicines and drugs purchased for use or consumption by a . . . nursing home, clinic, or similar corporation not otherwise exempt" under Virginia Code section 58.1-609.10 are exempt from retail sales and use tax.\(^7\)

F. Tort, Immunity, and Privilege


a. Oraee v. Breeding

In June 2005, the Supreme Court of Virginia issued its decision in Auer v. Miller,\(^7\) granting civil immunity to a cardiologist who did not act in response to the results of a laboratory test ordered by another physician.\(^7\) In fact, the cardiologist did not review the test results that were posted to the patient's chart.\(^7\) The test results revealed an infection that remained untreated and progressed, and the patient subsequently died.\(^7\) Nonetheless, the court found that the cardiologist was entitled to civil immunity\(^7\) under Virginia Code section 8.01-581.18(B), which provided in part:

> Any physician shall be immune from civil liability for any failure to review, or to take any action in response to the receipt of, any report of the results of any laboratory test or other examination of the physical or mental condition of any person, which test or examination such physician neither requested nor authorized in writing, unless such report is provided directly to the physician by the person so examined or tested with a request for consultation . . . .\(^7\)

Less than five months after its decision in Auer, the Supreme Court of Virginia overruled Auer with three justices dissenting in

---

70. Id. § 58.1-609.10(9) (Cum. Supp. 2006).
72. See Auer, 270 Va. at 177-78, 613 S.E.2d at 424.
73. Id. at 176, 613 S.E.2d at 423.
74. Id.
75. Id. at 177, 613 S.E.2d at 424.
76. VA. CODE ANN. § 8.01-581.18(B) (Repl. Vol. 2000).
Oraee v. Breeding. The court found that the facts in Auer were not factually distinguishable from those in Oraee, and that its previous analysis of Virginia Code section 8.01-581.18(B) in Auer "was a mistake." Interpreting Virginia Code section 8.01-581.18 as a whole, the court opined that the immunity under Virginia Code section 8.01-581.18 "does not pertain to reports of laboratory tests or examinations requested or authorized by a physician," but to laboratory tests or examinations requested or authorized by an individual patient.

b. 2006 Legislative Response

In an apparent response to the November 2005 Oraee decision, the General Assembly enacted House Bill 1110, which deleted former Virginia Code section 8.01-581.18(B) and created a new section 8.01-581.18:1, which provides:

A. No physician shall be liable for the failure to review or act on the results of laboratory tests or examinations of the physical or mental condition of any patient, which tests or examinations the physician

---

78. Id. at 497, 621 S.E.2d at 52. In Oraee, the defendant neurologist requested a rheumatology consultation from another physician who ordered certain critical laboratory tests on a hospital inpatient. Id. at 492, 621 S.E.2d at 49. Prior to the test results being available, the neurologist discharged the patient with an order for a follow-up examination by the neurologist. Id. at 493, 621 S.E.2d at 49-50. At the follow-up examination, the neurologist treated the patient without obtaining the results of the tests ordered by the physician that were then available. Id., 621 S.E.2d at 50. Under the applicable standard of care, the test results would have prompted a different course of treatment. Id. The patient subsequently died. Id.
79. Id. at 499, 621 S.E.2d at 53.
80. Virginia Code section 8.01-581.18(A) provided in part:
Whenever a laboratory test or other examination of the physical or mental condition of any person is conducted by or under the supervision of a person other than a physician and not at the request or with the written authorization of a physician, any report of the results of such test or examination shall be provided by the person conducting such test or examination to the person who was the subject of such test or examination. Such report shall state in bold type that it is the responsibility of the recipient to arrange with his physician for consultation and interpretation of the results of such test or examination.
81. Oraee, 270 Va. at 499, 621 S.E.2d at 53.
82. Id.
neither requested nor authorized, unless (i) the report of such results is provided directly to the physician by the patient so examined or tested with a request for consultation; (ii) the physician assumes responsibility to review or act on the results; or (iii) the physician has reason to know that in order to manage the specific mental or physical condition of the patient, review of or action on the pending results is needed. However, no physician shall be immune under this section unless the physician establishes that (a) no physician-patient relationship existed when the results were received or accessed; or (b) the physician received or accessed the results without a request for consultation and without responsibility for management of the specific mental or physical condition of the patient relating to the results or (c) the physician consulted on a specific mental or physical condition, the results were not part of that physician's management of the patient and the physician had no reason to know that he was to inform the patient of the results or refer the patient to another physician; or (d) the physician received or accessed results, the interpretation of which would exceed the physician's scope of practice and the physician had no reason to know that he was to inform the patient of the results or refer the patient to another physician.

B. As used in this section, "physician" means a person licensed to practice medicine, chiropractic, or osteopathy in the Commonwealth.

Virginia Code section 8.01-581.18:1 appears to be an attempt to more equitably balance competing interests—accountability in the rendering of healthcare services and a fair allocation of risk among healthcare providers who provide these services to the same patient.

2. Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") Self-Assessments—Privilege

For healthcare entities that are required to produce self-assessment reports for accreditation by JCAHO, those reports "shall be privileged and confidential and shall not be subject to subpoena or admitted as evidence in a civil or administrative proceeding." However, this privilege shall not "affect the discoverability or admissibility of facts, information, or records [in the ordinary course of business] referenced in [Virginia Code section 8.01-581.17(C)]] as related to patient care from a source other

85. Id. § 8.01-581.17(I) (Cum. Supp. 2006).
than such accreditation body." These self-assessment reports are an addition to the existing privileged documents relating to quality assurance, peer review, credentialing, and patient safety as described in Virginia Code section 8.01-581.17(B).

3. Licensed Marriage and Family Therapists

The Virginia General Assembly clarified that marriage and family therapists must be licensed: (1) to qualify for limited civil immunity protection under Virginia Code section 8.01-581.13(A) for serving as a member or agent of certain interventional entities,88 and (2) to have their mental health and substance abuse services covered under a mandated insurance benefit.89 In addition, licensed marriage and family therapists and licensed professional counselors are now included in the definition of a "medical professional" as that term is used in the context of privacy protection of certain insurance information under Virginia Code sections 38.2-600 to -620.90

4. Certified Nurse Midwives

In 2006, the General Assembly enacted legislation regarding malpractice liability and civil immunity for certified nurse midwives.91

III. JUDICIAL DEVELOPMENTS

A. Immunity for Certain Tests and Examinations

In Oraee v. Breeding,92 the Supreme Court of Virginia declined to provide immunity to a physician who neglected to obtain laboratory results ordered by another physician.93

86. Id.
87. See id. § 8.01-581.17(B) (Cum. Supp. 2006).
89. See id. (codified as amended at VA. CODE ANN. § 38.2-3412.1 (Cum. Supp. 2006)).
91. For a discussion of these developments, see supra Part II.B.6.
93. See id. at 499, 621 S.E.2d at 53. For a discussion of Oraee and the resulting legis-
B. No Vicarious Liability for Negligence of Independently Contracted Emergency Room Physician

In *Sanchez v. Medicorp Health System*, a patient claimed to have received negligent care and treatment from an emergency room physician who was working for the defendant hospital as an independent contractor. The patient sought recovery from the hospital on the theory of apparent or ostensible agency, also known as agency by estoppel, which the Supreme Court of Virginia acknowledged as being defined as "'[a]n agency created by operation of law and established by a principal's actions that would reasonably lead a third person to conclude that an agency exists.'" Unwilling to apply this theory to the facts of the case, the supreme court held for the hospital.

Before stating its holding, the supreme court acknowledged the general rule that "'[i]n Virginia, the doctrine of *respondeat superior* imposes tort liability on an employer for the negligent acts of its employees, *i.e.*, its servants, but not for the negligent acts of an independent contractor.'" The court further acknowledged that although it had previously imposed vicarious liability for the acts of an independent contractor under the theory of apparent or ostensible agency, those cases involved contract claims, not negligence claims. The court, apparently not persuaded by the decisions or rationales of other state courts addressing this issue, indicated in its conclusion that the "theory of apparent or ostensible agency, or agency by estoppel, has never been used in Virginia to impose vicarious liability on an employer for the negligent acts of an independent contractor." The court then ruled in favor of the hospital without providing much more of an expla-
nation. While the supreme court did not expressly rule out the possible application of the theory of apparent or ostensible agency to all negligence claims, it appears that it was unwilling to extend the theory of apparent or ostensible agency to negligence claims under the facts of this case.

C. Cognizable Malpractice Claim Arising out of Rule 4:10 Examination

In January 2006, the Supreme Court of Virginia held in *Harris v. Kreutzer* that:

[A] cause of action for malpractice may lie for the negligent performance of a Rule 4:10 examination. However, a Rule 4:10 physician's duty is limited solely to the exercise of due care consistent with the applicable standard of care so as not to cause harm to the patient in actual conduct of the examination.

In finding such a duty on the part of the defendant psychologist, the court first acknowledged that in Virginia, "a physician's liability for malpractice is predicated upon an initial finding that a consensual agreement exists between physician and patient, establishing a relationship from which flows the physician's duty of care." The initial issue for the court was whether a consensual agreement can exist where the Rule 4:10 examination was ordered by the trial court. The court reasoned that by bringing a personal injury action, the plaintiff gave implied consent to the Rule 4:10 examination, and that by performing the Rule 4:10 examination, the defendant psychologist expressly consented to a relationship with the examinee.

---

105. *See id.*
106. *See id.* at 307-08, 618 S.E.2d at 335-36.
108. *Id.* at 202, 624 S.E.2d at 32. Rule 4:10 of the Rules of the Supreme Court of Virginia provides that:
   When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending, upon motion of an adverse party, may order the party to submit to a physical or mental examination by one or more health care providers.
111. *See id.* at 199, 624 S.E.2d at 30.
112. *See id.*
Finding that a consensual agreement existed, the court then determined that, in the context of the Rule 4:10 examination relationship, the psychologist had a cognizable duty to the examinee under Virginia Code sections 8.01-581.1 to 581.2011, because under the definition of "malpractice" in Virginia Code section 8.01-581.1, a Rule 4:10 examination constituted "health care rendered by a 'health care provider'... to a 'patient'."

Although the court found that the psychologist owed a duty to the Rule 4:10 examinee, it limited the scope of such duty to non-malfeasance. According to the court, "Because the Rule 4:10 examination functions only to ascertain information relative to the underlying litigation, the physician's duty in a Rule 4:10 setting is solely to examine the patient without harming her in the conduct of the examination." From a public policy standpoint, the court believed that if such a limitation did not exist, it "would lead to an endless stream of litigation wherein defeated litigants would seek to redeem loss of the main action by suing to recover damages from those witnesses whose adverse testimony might have brought about the adverse result." While Harris will unlikely open a floodgate of Rule 4:10 malpractice litigation, this case is instructive on the basis upon which the physician-patient relationship is formed and demonstrates that a physician-patient relationship may be found to exist outside of the traditional setting.

D. Sexual Assault Claim in a Nursing Home Facility Outside of Medical Malpractice Act

In Alcoy v. Valley Nursing Homes, Inc., the Supreme Court of Virginia considered "whether causes of action for negligence and sexual assault and battery, based on the failure of nursing home personnel to ensure the safety of one of their residents, are sub-

114. See id., 624 S.E.2d at 31 (quoting VA. CODE ANN. § 8.01-581.1 (Cum. Supp. 2006)).
115. Id. at 201, 624 S.E.2d at 31.
ject to the provisions of the Medical Malpractice Act'\textsuperscript{118} (the "Act"). Because such claims (1) were founded upon the nursing home's alleged failure to provide "adequate and proper personnel, visitor screening, and security systems" and (2) did "not involve the provision of health care or professional services" to any particular patient, the plaintiff's claims were deemed by the court to be outside of the definitions of "malpractice" and "healthcare," as those terms are used in the Act.\textsuperscript{119} Accordingly, the court, in reversing the trial court, found that the Act "appl[ied] only to omissions and actions related to medical treatment and care of an individual patient, rather than to any tort committed against a patient on the premises of a medical care facility."\textsuperscript{120}

E. Federal Court—Virginia's Partial Birth Abortion Statute Unconstitutional

In \textit{Richmond Medical Center for Women v. Hicks},\textsuperscript{121} the United States Court of Appeals for the Fourth Circuit, in June 2005, affirmed the invalidation of Virginia Code section 18.2-71.1 by the United States District Court for the Eastern District of Virginia.\textsuperscript{122} Under Virginia Code section 18.2-71.1(A), "Any person who knowingly performs partial birth infanticide and thereby kills a human infant is guilty of a Class 4 felony."\textsuperscript{123} The Fourth Circuit ruled that "[b]ecause the Virginia Act does not contain an exception for circumstances when the banned abortion procedures are necessary to preserve a woman's health," Virginia Code section 18.2-71.1 is unconstitutional on its face and the Commonwealth of Virginia is permanently enjoined from enforcing it.\textsuperscript{124}

In December 2005, the governmental defendants filed a petition for a writ of certiorari to the Supreme Court of the United States.\textsuperscript{125} Although the petition was distributed for conference in March 2006, the Supreme Court has not yet ruled on the petition.

\textsuperscript{118} Id. at 39-40, 630 S.E.2d at 302 (citing VA. CODE ANN. §§ 8.01-581.1 to -581.20:1 (Cum. Supp. 2006)).

\textsuperscript{119} Id. at 43, 630 S.E.2d at 304.

\textsuperscript{120} Id. at 44, 630 S.E.2d at 304.

\textsuperscript{121} 409 F.3d 619 (4th Cir. 2005).

\textsuperscript{122} See id. at 629.


\textsuperscript{124} See Hicks, 409 F.3d at 629.

\textsuperscript{125} Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619 (4th Cir. 2005), \textit{petition for}
IV. ADMINISTRATIVE DEVELOPMENTS

A. New Standards of Professional Conduct

In October 2005, the Virginia Board of Medicine promulgated regulations on standards of professional conduct,\(^1\)\(^2\)\(^6\) covering the following areas:

(1) treating and prescribing for self or family;\(^1\)\(^2\)\(^7\)

(2) general confidentiality, completion, maintenance (e.g., a minimum six-year maintenance period—except where the patient is a minor child, where records were from another practitioner, or where records were otherwise required by contract or law), and disposal of patient records;\(^1\)\(^2\)\(^8\)

(3) practitioner-patient communications as to the patient’s medical condition and practitioner’s skill, informed consent, and termination of the practitioner-patient relationship;\(^1\)\(^2\)\(^9\)

(4) general prohibited conduct (e.g., improper delegation of duties, disruptive behavior in a health care setting, and exploitation);\(^1\)\(^3\)\(^0\)

(5) advertising ethics (including, without limitation, the advertisement of fee discounts, the use of “board certified” designation, and accountability for advertising content);\(^1\)\(^3\)\(^1\)

(6) recommendation, direction, sale, and prescription of vitamins, minerals and food supplements;\(^1\)\(^3\)\(^2\)

(7) prohibition against the sale, prescription, or administration of anabolic steroids for other than accepted therapeutic purposes;\(^1\)\(^3\)\(^3\)

(8) solicitation or remuneration in exchange for referral;\(^1\)\(^3\)\(^4\)

(9) pharmacotherapy for weight loss;\(^1\)\(^3\)\(^5\)

(10) sexual contact with a patient, former patient, a “key third
\(^1\)\(^3\) See id. § 85-20-25 (2006).
\(^1\)\(^3\)\(^4\) See id. §§ 85-20-26, -27 (2006).
\(^1\)\(^3\)\(^5\) See id. § 85-20-28 (2006).
\(^1\)\(^3\)\(^6\) See id. § 85-20-29 (2006).
\(^1\)\(^3\)\(^7\) See id. § 85-20-30 (2006).
\(^1\)\(^3\)\(^8\) See id. § 85-20-40 (2006).
\(^1\)\(^3\)\(^9\) See id. § 85-20-50 (2006).
\(^1\)\(^4\) See id. § 85-20-80 (2006).
\(^1\)\(^5\) See id. § 85-20-90 (2006).
party,” and medical trainee;136 and
(11) refusal to provide information to the Board of Medicine pursuant to an investigation or enforcement of a statute or regulation.137

Virtually all of these areas have been addressed by professional organizations, such as the American Medical Association.138 While the Board of Medicine, under Virginia Code section 54.1-2915(A)(12), defines unprofessional conduct, in part, as acting “in a manner contrary to the standards of ethics of his branch of the healing arts,”139 to discipline a licensee under that section, the Board of Medicine must “establish three things: first, the applicable ‘standards of ethics of [the licensee’s] branch of the healing arts’ by which his conduct was to be adjudicated under the statute; second, the specific ethical standard [the licensee] was alleged to have violated; and, third, [the licensee’s] violation of that standard.”140 In fact, the case of Goad v. Virginia Board of Medicine142 demonstrated the legal challenges that the Board of Medicine must overcome to discipline a licensee under Virginia Code section 54.1-2915(A)(12) for “conducting his practice in a manner

136. See id. § 85-20-100 (2006).
138. See, e.g., AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS § 3.03 (2006) (allied health professionals); id. § 3.08 (sexual harassment and exploitation between medical supervisors and trainees); id. § 5.01 (advertising and managed care organizations); id. § 6.015 (direct-to-consumer advertisements of prescription drugs); id. § 5.02 (advertising and publicity); id. § 5.04 (standards of professional responsibility for communications media); id. § 5.05 (confidentiality); id. § 5.055 (confidential care for minors); id. § 6.02 (fee splitting); id. § 6.021 (financial incentives to patients for referrals); id. § 6.03 (fee splitting for referrals to health care facilities); id. § 6.04 (fee splitting for drug or device prescription rebates); id. § 7.03 (records of physicians upon retirement or departure from a group); id. § 7.04 (sale of a medical practice); id. § 7.05 (retention of medical records); id. § 8.054 (financial incentives and the practice of medicine); id. § 8.06 (informed consent); id. § 8.061 (surrogate decision-making); id. § 8.085 (waiver of informed consent for research in emergency situations); id. § 8.115 (termination of the physician-patient relationship); id. § 8.12 (patient information); id. § 8.14 (sexual misconduct in the practice of medicine); id. § 8.145 (sexual or romantic relations between physicians and key third parties); id. § 8.19 (self-treatment or treatment of immediate family members); id. § 9.045 (physicians with disruptive behavior); see also AMERICAN MEDICAL ASSOCIATION, HEALTH & ETHICS POLICIES OF THE AMA HOUSE OF DELEGATES § 140.926 (2006) (policy for physician entrepreneur activity); id. § 150.954 (dietary supplements and herbal remedies); id. § 150.969 (commercial weight-loss systems and programs); id. §§ 315.000–998 (medical records and patient privacy); id. § 405.983 (Yellow Page listings for the American Board of Medical Specialties); id. § 405.985 (truthful specialty information); id. § 405.987 (identification of board certified physicians); id. § 470.976 (abuse of anabolic steroids).
contrary to the standards of ethics of his branch of the healing arts." 142 By implementing these new regulations on the standards of professional conduct, the Board of Medicine created another means to discipline a licensee for unprofessional conduct. 143

B. Mixing, Diluting, or Reconstituting of Drugs for Administration

In December 2005, to comply with amendments to the Virginia Drug Control Act,144 the Virginia Board of Medicine issued emergency regulations, effective for one year, on the mixing, diluting, or reconstituting of drugs for administration and the transportation of those drugs.145 While these regulations are mostly technical in nature, a physician who engages in such mixing, diluting, or reconstituting is required to disclose such actions to the Board of Medicine and is subject to unannounced inspections by the Board of Medicine.146

V. CONCLUSION

As this survey demonstrates, health law in the Commonwealth of Virginia continues to evolve and expand its reach. Despite the various areas of law discussed in this survey, there are many other health law developments that were not covered, such as the General Assembly's revisions to certificate of public need law governing certain nursing facilities,147 establishment of small employer health group insurance cooperatives,148 revisions to laws governing hospital authorities,149 and revisions to criminal laws

---

146. See id. § 85-20-420(B) (2006).
147. See Act of Apr. 6, 2006, ch. 776, cl. 1, 2006 Va. Acts ___ (allowing the Commissioner of Health to amend conditions for a certificate of need issued for an increase in certain nursing facility beds).
and criminal procedure relating to mental illness. While the concept of "health law" still remains vague, it is clear that these developments resulted from the continuous dynamic interplay between the legislature, the judiciary, and the governmental regulatory agencies.
