



COMMONWEALTH of VIRGINIA

Office of the Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

February 25, 2009

The Honorable George E. Schaefer
Clerk of Norfolk Circuit Court
100 Saint Paul's Boulevard
Norfolk, Virginia 23510

Dear Mr. Schaefer:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether a competency evaluation report ordered by and submitted to a court pursuant to § 19.2-169.1, which is not sealed by court order, is open to inspection under § 17.1-208 or protected by § 32.1-127.1:03.

Response

It is my opinion that a competency evaluation report that was ordered by and submitted to a court as part of the court's record is open to inspection under § 17.1-208, provided such report is not sealed by court order.

Applicable Law and Discussion

When a court finds probable cause to believe that a criminal defendant "lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense," the court must order a competency evaluation.¹ The evaluator must submit a written report to the court and attorneys of record addressing, among other things, the defendant's capacity to understand the proceedings and his ability to assist his attorney.² You ask whether the public may access the evaluation report.

There is a presumption in the common law that judicial records are open to public inspection.³ Section 17.1-208, which codifies this presumption,⁴ provides, in relevant part, that:

¹VA. CODE ANN. § 19.2-169.1(A) (2008).

²Section 19.2-169.1(D).

³*See, e.g., In re Worrell Enters., Inc.*, 14 Va. App. 671, 680, 419 S.E.2d 271, 277 (1992).

⁴*Shenandoah Publ'g House, Inc. v. Fanning*, 235 Va. 253, 258-59, 368 S.E.2d 253, 255-56 (1988) (construing legislative history of § 17-43, predecessor to § 17.1-208).

Except as otherwise provided by law, any records and papers of every circuit court that are maintained by the clerk of the circuit court shall be open to inspection by any person and the clerk shall, when requested, furnish copies thereof, except in cases in which it is otherwise specially provided.

Section 32.1-127.1:03 establishes an individual's privacy right to his health records and prohibits health care entities from disclosing health records except when permitted or required by state law. Further, § 32.1-127.1:03(A)(3) prevents a person to whom health records have been disclosed from further disclosing the records without first obtaining the authorization of the individual who is the subject of the records. Section 32.1-127.1:03(B) defines a "health record" as "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." A health record further includes "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."⁵ A "health care entity" encompasses any health care provider, including all persons who are licensed by any health regulatory board within the Department of Health Professions.⁶ "Health services," include, but are not limited to, examination, diagnosis, and evaluation.⁷ Based on these definitions, a competency evaluation report prepared by a psychiatrist or clinical psychologist that addresses the defendant's capacity and treatment is a "health record." However, § 19.2-169.1(D) requires the evaluator to submit the report to the court and to the attorneys of record, which places the report under the authority of the court subject to the provisions of § 17.1-208.

With respect to competency evaluation reports, it is clear that both §§ 17.1-208 and 32.1-127.1:03 apply. Section 32.1-127.1:03 applies generally to all health records and their use and disclosure. However, § 17.1-208 applies to all records and papers maintained by the clerk of the court, which would include competency evaluation reports filed as part of a court record. When there is an apparent conflict between different statutes, the more specific statute prevails.⁸ Because § 17.1-208 specifically governs the records and papers maintained by the circuit court clerks, § 32.1-127.1:03 must yield to § 17.1-208.⁹

Applying these principles, the Court of Appeals of Virginia has considered whether the media and the public¹⁰ may have access to a criminal competency hearing as well as the documents admitted into

⁵VA. CODE ANN. § 32.1-127.1:03(B) (Supp. 2008) (defining "health record").

⁶*See id.* (defining "health care entity" and "health care provider").

⁷*Id.* (defining "health services").

⁸*See, e.g.,* Op. Va. Att'y Gen. No. 08-104, available at <http://www.vaag.com/OPINIONS/2009opns/08-104-Bulova-Sickles.pdf>, and cases cited therein.

⁹*See* Perreault v. Free Lance-Star, 276 Va. 375, 391, 666 S.E.2d 352, 360 (2008) (noting statutory presumption of public access to judicial records); *see also* 2000 Op. Va. Att'y Gen. 94, 95 (concluding general provisions of § 32.1-271(A), which prohibits inspection and disclosure of vital records, must give way to specific provisions of § 17.1-208).

¹⁰The press and public generally enjoy the same right of access. *See Worrell Enterprises*, 14 Va. App. at 676, 419 S.E.2d at 274.

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evidence during such hearing.¹¹ The Court relied upon the federal and state constitutions¹² to grant such access, noting that courts in other jurisdictions favored a qualified right of access to competency hearings¹³ and that public access to such hearings can play a significant positive role in criminal competency hearings.¹⁴ A decision to seal a report rests within the sound discretion of the court.¹⁵

Conclusion

Accordingly, it is my opinion that a competency evaluation report that was ordered by and submitted to a court as part of the court's record is open to inspection under § 17.1-208, provided such report is not sealed by court order.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. C. Mims', with a stylized flourish at the end.

William C. Mims
Acting Attorney General

6:765; 1:941/08-099

¹¹*In re Times-World Corp.*, 25 Va. App. 405, 488 S.E.2d 677 (1997).

¹²*Id.* at 419, 488 S.E.2d at 684. Access to a criminal competency hearing can only be denied by showing a compelling governmental interest and the denial must be narrowly tailored to serve that interest. *Id.* at 415-16, 488 S.E.2d at 682.

¹³*Id.* at 414, 488 S.E.2d at 681 (citing cases from other jurisdictions).

¹⁴*Id.* at 415, 488 S.E.2d at 682.

¹⁵*See Perreault*, 276 Va. at 389, 666 S.E.2d at 359-60.