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SENATE BILL NO. 541

Offered January 9, 2002

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A *BILL to amend and reenact §§ 8.01-407 and 8.01-413 of the Code of Virginia, relating to attorney-issued subpoenas.*

Patrons—Mims; Delegate: Howell

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-407 and 8.01-413 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-407. How summons for witness issued, and to whom directed; prior permission of court to summon certain officials and judges; attendance before commissioner of other state; attorney-issued summons.

A. A summons may be issued, directed as prescribed in § 8.01-292, commanding the officer to summon any person to attend on the day and at the place that such attendance is desired, to give evidence before a court, grand jury, arbitrators, magistrate, notary, or any commissioner or other person appointed by a court or acting under its process or authority in a judicial or quasi-judicial capacity. The summons may be issued by the clerk of the court if the attendance is desired at a court or in a proceeding pending in a court. The clerk shall not impose any time restrictions limiting the right to properly request a summons up to and including the date of the proceeding:

If attendance is desired before a commissioner in chancery or other commissioner of a court, the summons may be issued by the clerk of the court in which the matter is pending, or by such commissioner in chancery or other commissioner;

If attendance is desired before a notary or other officer taking a deposition, the summons may be issued by such notary or other officer at the instance of the attorney desiring the attendance of the person sought;

If attendance is sought before a grand jury, the summons may be issued by the attorney for the Commonwealth, or the clerk of the court, at the instance of the attorney for the Commonwealth.

Except as otherwise provided in this subsection, if attendance is desired in a civil proceeding pending in a court or at a deposition in connection with such proceeding, *including medical malpractice review panels, and a claim before the Worker's Compensation Commission*, a summons may be issued by an attorney-at-law who is an active member of the Virginia State Bar at the time of issuance, as an officer of the court. An attorney-issued summons shall be on a form approved by the Supreme Court, signed by the attorney and shall include the attorney's address. The summons *and any transmittal sheet* shall be deemed to be a pleading to which the provisions of § 8.01-271.1 shall apply. A copy of the summons, ~~together with payment of all clerk's fees, if applicable, and, if served by a sheriff, all service of process fees, shall be mailed or delivered to the clerk's office of the court in which the case is pending or the Worker's Compensation Commission, as applicable,~~ on the day of issuance by the attorney. The law governing summonses issued by a clerk shall apply mutatis mutandis. When an attorney-at-law transmits one or more attorney-issued subpoenas to a sheriff to be served in his jurisdiction, such subpoenas shall be accompanied by a transmittal sheet. The transmittal sheet, which may be in the form of a letter, shall contain for each subpoena: (i) the person to be served, (ii) the name of the city or county in which the subpoena is to be served, in parentheses, (iii) the style of the case in which the subpoena was issued, (iv) the court in which the case is pending, and (v) the amount of fees tendered or paid to each clerk in whose court the case is pending together with a photocopy of the payment instrument or clerk's receipt. If copies of the same transmittal sheet are used to send subpoenas to more than one sheriff for service of process, then subpoenas shall be grouped by the jurisdiction in which they are to be served. ~~Such transmittal sheet shall be signed by the transmitting attorney under penalty of perjury.~~ For each person to be served, an original subpoena and copy thereof shall be included. If the attorney desires a return copy of the transmittal sheet as proof of receipt, he shall also enclose an additional copy of the transmittal sheet together with an envelope addressed to the attorney with sufficient first class postage affixed. Upon receipt of such transmittal, the transmittal sheet shall be date-stamped and, if the extra copy and above-described envelope are provided, the copy shall also be date-stamped and returned to the attorney-at-law in the above-described envelope.

However, when such transmittal does not comply with the provisions of this section, the sheriff may promptly return such transmittal if accompanied by a short description of such noncompliance. An attorney may not issue a summons in any of the following civil proceedings: (i) habeas corpus under

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59 Article 3 (§ 8.01-654 et seq.) of Chapter 25 of this title, (ii) delinquency or abuse and neglect
60 proceedings under Article 3 (§ 16.1-241 et seq.) of Chapter 11 of Title 16.1, (iii) issuance of a
61 protective order pursuant to Article 4 (§ 16.1-246 et seq.) or Article 9 (§ 16.1-278 et seq.) of Chapter 11
62 of Title 16.1, or Chapter 9.1 (§ 19.2-152.8 et seq.) of Title 19.2, (iv) civil forfeiture proceedings, (v)
63 habitual offender proceedings under Article 9 (§ 46.2-351 et seq.) of Chapter 3 of Title 46.2, (vi)
64 administrative license suspension pursuant to § 46.2-391.2 and (vii) petition for writs of mandamus or
65 prohibition in connection with criminal proceedings. A subpoena issued by an attorney shall not be
66 issued less than five business days prior to the date that attendance is desired.

67 In other cases, if attendance is desired, the summons may be issued by the clerk of the circuit court
68 of the county or city in which the attendance is desired.

69 A summons shall express on whose behalf, and in what case or about what matter, the witness is to
70 attend. Failure to respond to any such summons shall be punishable by the court in which the
71 proceeding is pending as for contempt. When any subpoena is served less than five calendar days before
72 appearance is required, the court may, after considering all of the circumstances, refuse to enforce the
73 subpoena for lack of adequate notice.

74 B. No subpoena shall, without permission of the court first obtained, issue for the attendance of the
75 Governor, Lieutenant Governor, or Attorney General of this Commonwealth, or a judge of any court
76 thereof; the President or Vice President of the United States; any member of the President's Cabinet; any
77 ambassador or consul; or any military officer on active duty holding the rank of admiral or general.

78 C. This section shall be deemed to authorize a summons to compel attendance of a citizen of the
79 Commonwealth before commissioners or other persons appointed by authority of another state when the
80 summons requires the attendance of such witness at a place not out of his county or city.

81 § 8.01-413. Certain copies of health care provider's records or papers of patient admissible; right of
82 patient or his attorney to copies of such records or papers; subpoena; damages, costs and attorney's fees.

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

91 Any hospital, nursing facility, physician, or other health care provider whose records or papers
92 relating to any such patient are subpoenaed for production as provided by law may comply with the
93 subpoena by a timely mailing to the clerk issuing the subpoena or in whose court the action is pending
94 properly authenticated copies, photographs or microphotographs in lieu of the originals. The court whose
95 clerk issued the subpoena or, in the case of an attorney-issued subpoena, in which the action is pending,
96 may, after notice to such hospital, nursing facility, physician, or other health care provider, enter an
97 order requiring production of the originals, if available, of any stored records or papers whose copies,
98 photographs or microphotographs are not sufficiently legible. The party requesting the subpoena duces
99 tecum or on whose behalf an attorney-issued subpoena duces tecum was issued shall be liable for the
100 reasonable charges of the hospital, nursing facility, physician, or other health care provider for the
101 service of maintaining, retrieving, reviewing, preparing, copying and mailing the items produced. Except
102 for copies of X-ray photographs, however, such charges shall not exceed fifty cents for each page up to
103 fifty pages and twenty-five cents a page thereafter for copies from paper or other hard copy generated
104 from computerized or other electronic storage, or other photographic, mechanical, electronic, imaging or
105 chemical storage process and one dollar per page for copies from microfilm or other micrographic
106 process, plus all postage and shipping costs and a search and handling fee not to exceed ten dollars.

107 B. Copies of hospital, nursing facility, physician's, or other health care provider's records or papers
108 shall be furnished within fifteen days of such request to the patient or his attorney upon such patient's or
109 attorney's written request, which request shall comply with the requirements of subsection E of
110 § 32.1-127.1:03. However, copies of a patient's records shall not be furnished to such patient where the
111 patient's treating physician has made a part of the patient's records a written statement that in his
112 opinion the furnishing to or review by the patient of such records would be injurious to the patient's
113 health or well-being, but in any such case such records shall be furnished to the patient's attorney within
114 fifteen days of the date of such request. A reasonable charge may be made for the service of
115 maintaining, retrieving, reviewing and preparing such copies. Except for copies of X-ray photographs,
116 however, such charges shall not exceed fifty cents per page for up to fifty pages and twenty-five cents a
117 page thereafter for copies from paper or other hard copy generated from computerized or other
118 electronic storage, or other photographic, mechanical, electronic, imaging or chemical storage process
119 and one dollar per page for copies from microfilm or other micrographic process, plus all postage and
120 shipping costs and a search and handling fee not to exceed ten dollars. Any hospital, nursing facility,

physician, or other health care provider receiving such a request from a patient's attorney shall require a writing signed by the patient confirming the attorney'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 or his attorney 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 if issued by such attorney at least five business days prior to the date that production of the record is desired ~~upon~~ *without* payment of the fees ~~required by established in~~ subdivision A. 23. of § 17.1-275 ~~at the time of filing of a copy of the subpoena duces tecum with the clerk.~~ The subpoena shall be returnable within twenty 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 or his attorney. 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 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 an attorney, or his client, in anticipation of litigation or in the course of litigation.

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.