

# VIRGINIA ACTS OF ASSEMBLY -- 2004 SESSION

## CHAPTER 335

*An Act to amend and reenact §§ 8.01-407, 8.01-413, 16.1-89 and 16.1-265 of the Code of Virginia, relating to attorney-issued summons.*

[S 495]

Approved April 8, 2004

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 8.01-407, 8.01-413, 16.1-89 and 16.1-265 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~~ Workers' 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 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~~ Workers' 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. 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 Article 3 (§ 8.01-654 et seq.) of Chapter 25 of this title, (ii) delinquency or abuse and neglect proceedings under Article 3 (§ 16.1-241 et seq.) of Chapter 11 of Title 16.1, (iii) issuance of a protective order pursuant to Article 4 (§ 16.1-246 et seq.) or Article 9 (§ 16.1-278 et seq.) of Chapter 11 of Title 16.1, or Chapter 9.1 (§ 19.2-152.8 et seq.) of Title 19.2, (iv) civil forfeiture proceedings, (v)

habitual offender proceedings under Article 9 (§ 46.2-351 et seq.) of Chapter 3 of Title 46.2, (vi) administrative license suspension pursuant to § 46.2-391.2 and (vii) petition for writs of mandamus or prohibition in connection with criminal proceedings. ~~A subpoena issued by an attorney shall not be issued less than~~ *A sheriff shall not be required to serve an attorney-issued subpoena that is not issued at least five business days prior to the date that attendance is desired.*

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

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

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

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

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

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

Any hospital, nursing facility, physician, or other health care provider whose records or papers relating to any such patient are subpoenaed for production as provided by law may comply with the subpoena by a timely mailing to the clerk issuing the subpoena or in whose court the action is pending properly authenticated copies, photographs or microphotographs in lieu of the originals. The court whose clerk issued the subpoena or, in the case of an attorney-issued subpoena, in which the action is pending, may, after notice to such hospital, nursing facility, physician, or other health care provider, enter an order requiring production of the originals, if available, of any stored records or papers whose copies, photographs or microphotographs are not sufficiently legible. The party requesting the subpoena duces tecum or on whose behalf an attorney-issued subpoena duces tecum was issued shall be liable for the reasonable charges of the hospital, nursing facility, physician, or other health care provider for the service of maintaining, retrieving, reviewing, preparing, copying and mailing the items produced. Except for copies of X-ray photographs, however, such charges shall not exceed ~~fifty cents~~ \$0.50 for each page up to ~~fifty~~ 50 pages and ~~twenty-five cents~~ \$0.25 a page thereafter for copies from paper or other hard copy generated from computerized or other electronic storage, or other photographic, mechanical, electronic, imaging or chemical storage process and ~~one dollar~~ \$1 per page for copies from microfilm or other micrographic process, plus all postage and shipping costs and a search and handling fee not to exceed ~~ten dollars~~ \$10.

B. Copies of hospital, nursing facility, physician's, or other health care provider's records or papers shall be furnished within ~~fifteen~~ 15 days of such request to the patient, his attorney or an authorized insurer upon such patient's, attorney's or authorized insurer's written request, which request shall comply with the requirements of subsection E of § 32.1-127.1:03. However, copies of a patient's records shall not be furnished to such patient where the patient's treating physician has made a part of the patient's records a written statement that in his opinion the furnishing to or review by the patient of such records would be injurious to the patient's health or well-being, but in any such case such records shall be furnished to the patient's attorney or authorized insurer within ~~fifteen~~ 15 days of the date of such request. A reasonable charge may be made for the service of maintaining, retrieving, reviewing and preparing such copies. Except for copies of X-ray photographs, however, such charges shall not exceed ~~fifty cents~~ \$0.50 per page for up to ~~fifty~~ 50 pages and ~~twenty-five cents~~ \$0.25 a page thereafter for copies from paper or other hard copy generated from computerized or other electronic storage, or other photographic, mechanical, electronic, imaging or chemical storage process and ~~one dollar~~ \$1 per page for copies from microfilm or other micrographic process, plus all postage and shipping costs and a search and handling fee not to exceed ~~ten dollars~~ \$10. Any hospital, nursing facility, physician, or other health care provider receiving such a request from a patient's attorney or authorized insurer shall require a writing signed by the patient confirming the attorney's or authorized insurer'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, his attorney or authorized insurer 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 without payment of the fees established in subdivision A 23 of § 17.1-275. *A sheriff shall not be required to serve an attorney-issued subpoena that is not issued at least five business days prior to the date production of the record is desired.* The subpoena shall be returnable within ~~twenty~~ 20 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, his attorney or authorized insurer. 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 or authorized insurer 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, his client or any authorized insurer, 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.

§ 16.1-89. Subpoena duces tecum; attorney-issued subpoena duces tecum.

A judge or clerk of a district court may issue a subpoena duces tecum pursuant to the terms of Rule 4:9 of the Rules of the Supreme Court of Virginia except that such subpoena may be directed to a party to the case as well as to a person who is not a party.

Subpoenas duces tecum for medical records issued by an attorney shall be subject to the provisions of §§ 8.01-413 and 32.1-127.1:03 except that no separate fee for issuance shall be imposed.

A subpoena duces tecum may also 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. Any such subpoena duces tecum shall be on a form approved by the Committee on District Courts, signed by the attorney as if a pleading and shall include the attorney's address. A copy, together with the attorney's certificate of service pursuant to Rule 1:12, shall be mailed or delivered to the clerk's office of the court in which the case is pending on the day of issuance by the attorney. The law governing subpoenas duces tecum issued by a clerk shall apply mutatis mutandis, except that attorneys may not issue subpoenas duces tecum in those cases in which they may not issue a summons as provided in § 8.01-407 ~~and may not issue a subpoena duces tecum less than~~ *A sheriff shall not be required to serve an attorney-issued subpoena that is not issued at least five business days prior to the date that production of evidence is desired.* When an attorney-at-law transmits one or more subpoenas duces tecum to a sheriff to be served in his jurisdiction, the provisions in § 8.01-407 regarding such transmittals shall apply.

If the time for compliance with a subpoena duces tecum issued by an attorney is less than ~~fourteen~~ 14 days after service of the subpoena, the person to whom it is directed may serve upon the party issuing the subpoena a written objection setting forth any grounds upon which such production, inspection or testing should not be had. If objection is made, the party on whose behalf the subpoena was issued and served shall not be entitled to the requested production, inspection or testing, except pursuant to an order of the court, but may, upon notice to the person to whom the subpoena was directed, move for an order to compel production, inspection or testing. Upon such timely motion, the court may quash, modify or sustain the subpoena.

§ 16.1-265. Subpoena; attorney-issued subpoena.

Upon application of a party and pursuant to the rules of the Supreme Court of Virginia for the issuance of subpoenas, the clerk of the court shall issue, and the court on its own motion may issue, subpoenas requiring attendance and testimony of witnesses and production of records, documents or other tangible objects at any hearing.

Subpoenas duces tecum for medical records shall be subject to the provisions of §§ 8.01-413 and

32.1-127.1:03 except that no separate fee shall be imposed. A subpoena may also be issued in a civil proceeding 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. Any such subpoena shall be on a form approved by the Committee on District Courts, signed by the attorney as if a pleading and shall include the attorney's address. A copy, together with the attorney's certificate of service pursuant to Rule 1:12, shall be mailed or delivered to the clerk's office of the court in which the case is pending on the day of issuance by the attorney. The law governing subpoenas issued by a clerk shall apply mutatis mutandis, except that attorneys may not issue subpoenas in those cases in which they may not issue a summons as provided in § 8.01-407 ~~and may not issue a subpoena duces tecum less than five business days prior to the date that production of evidence is required.~~ When an attorney-at-law transmits one or more subpoenas or subpoenas duces tecum to a sheriff to be served in his jurisdiction, the provisions in § 8.01-407 regarding such transmittals shall apply. *A sheriff shall not be required to serve an attorney-issued subpoena that is not issued at least five business days prior to the date production of evidence is required.*

If the time for compliance with a subpoena issued by an attorney is less than ~~fourteen~~ 14 days after service of the subpoena, the person to whom it is directed may serve upon the party issuing the subpoena a written objection setting forth any grounds therefor. If objection is made, the party on whose behalf the subpoena was issued and served shall not be entitled to compliance, except pursuant to an order of the court, but may, upon notice to the person to whom the subpoena was directed, move for an order to compel compliance. Upon such timely motion, the court may quash, modify or sustain the subpoena.