

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 92

An Act to amend and reenact §§ 8.01-407 and 16.1-265 of the Code of Virginia, relating to attorney-issued subpoenas; release of witness.

[H 1756]

Approved March 21, 2023

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-407 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; how witness released from attorney-issued subpoena; prior permission of court to summon certain officials and judges.

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 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 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 who is an active member of the Virginia State Bar 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 either (a) the payment instrument and a photocopy of the letter sent to the clerk's office that accompanied such payment instrument or (b) the 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: ~~(a)~~ (1) habeas corpus under Article 3 (§ 8.01-654 et seq.) of Chapter 25 of this title, ~~(b)~~ (2) delinquency or abuse and neglect proceedings under Article 3 (§ 16.1-241 et seq.) of Chapter 11 of Title 16.1, ~~(c)~~ (3) civil forfeiture proceedings, ~~(d)~~ (4) administrative license suspension pursuant to § 46.2-391.2, and ~~(e)~~ (5) petition for writs of mandamus or prohibition in connection with criminal proceedings. 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. If any subpoena is served less than five calendar days before appearance is required upon any judicial officer generally incompetent to testify pursuant to § 19.2-271, such subpoena shall be without legal force or effect unless the subpoena has been issued by a judge.

Following the issuance of an attorney-issued subpoena, the person to whom such subpoena is directed may be released from compliance with such subpoena by any attorney for the party on whose behalf the subpoena was issued, or a person acting on behalf of such attorney, provided that, in civil cases only, notwithstanding § 19.2-267, such release be in writing and served concurrently on all other parties, or, if any such party is represented by counsel, on the attorney of record, by electronic mail, notwithstanding the requirements of Rule 1:12 of the Rules of Supreme Court of Virginia. A copy of such written release shall also be sent to the clerk of the court via fax or, if available, through the clerk's electronic filing system. For purposes of this paragraph, (A) a release transmitted by electronic mail to the person to whom such subpoena was directed qualifies as a written release from such subpoena and (B) a copy of such written release shall be served contemporaneously on all other parties by electronic mail.

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, 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.

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

Upon application of a party and pursuant to the ~~rules~~ 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. 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 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. *The release of a person to whom an attorney-issued subpoena is directed shall be governed by the provisions of § 8.01-407.*