

98-114

HEALTH: REGULATION OF MEDICAL CARE FACILITIES.

RULES OF SUPREME COURT OF VIRGINIA: CRIMINAL PRACTICE AND PROCEDURE (SUBPOENA).

CIVIL REMEDIES AND PROCEDURE: EVIDENCE - MEDICAL EVIDENCE.

COURTS NOT OF RECORD: JURISDICTION AND PROCEDURE, CRIMINAL MATTERS — JUVENILE AND DOMESTIC RELATIONS COURTS.

CONSTITUTION OF VIRGINIA: JUDICIARY.

Patient medical records may not be disclosed in response to subpoena duces tecum except in compliance with statutory Notice to Provider/Patient provisions.

The Honorable John M. White-Hurst
Commonwealth's Attorney for Mecklenburg County
September 23, 1999

You ask whether, in connection with a criminal proceeding, a health care provider is to release a patient's medical records in response to a subpoena duces tecum issued in accordance with the Rules of Supreme Court of Virginia¹ or whether the party requesting the subpoena also must comply with the notice provisions of § 32.1-127.1:03 of the *Code of Virginia*.

Part 3A of the Rules of Supreme Court of Virginia governs criminal proceedings in circuit courts and juvenile and domestic relations district courts, in addition to proceedings before certain magistrates.² Rule 3A:12(b) provides:

Upon notice to the adverse party and on affidavit by the party applying for the subpoena that the requested writings or objects are material to the proceedings and are in the possession of a person not a party to the action, the judge or the clerk may issue a subpoena duces tecum for the production of writings or objects described in the subpoena.

Section 32.1-127.1:03 recognizes a patient's right of privacy in the content of his medical records and governs the disclosure of the records.³ Subsection A of § 32.1-127.1:03 states:

[E]xcept when permitted by this section or by another provision of state or federal law, no provider, or other person working in a health care setting, may disclose the records of a patient.

Subsection D of § 32.1-127.1:03 sets out twenty-four instances in which a provider may disclose a patient's records. The only instance applicable to disclosure pursuant to a subpoena duces tecum is contained in subdivision 2, which permits disclosure "[i]n compliance with a subpoena issued in accord with subsection H of this section, pursuant to court order upon good cause shown or in compliance with a subpoena issued pursuant to subsection C of § 8.01-413." Subsection H of § 32.1-127.1:03 imposes conditions on the issuance of a subpoena duces tecum for the medical records of a party or of a nonparty witness. These conditions include: (i) providing a copy of the request to opposing counsel or the opposing party if the party is pro se, or to the nonparty witness; (ii) delivering to a pro se party or a nonparty witness a Notice to Patient,

informing the patient of his right to file a motion to quash with the clerk of court; and (iii) delivering to the provider a Notice to Providers, informing the provider that if he receives notice of a motion to quash or if the provider himself files a motion to quash, the provider is to send the records to the clerk of court in a sealed envelope.⁴

While the broad and comprehensive language of § 32.1-127.1:03 indicates a clear legislative intent to encompass all disclosures of a patient's medical records, the statute expressly does not override other provisions of state law that would permit the release of medical records. Thus, the records may be disclosed if permitted by § 32.1-127.1:03 or if permitted by "another provision of state ... law."⁵

An argument can be made that Rule 3A:12(b) constitutes "another provision of state ... law"⁶ that permits disclosure and that, therefore, § 32.1-127.1:03 has no application to a subpoena duces tecum for medical records issued under the rule. I do not accept this argument for several reasons. First, such a position would violate the accepted principle of statutory construction that, when statutes provide different procedures on the same subject matter and it is not clear which of the two statutes applies, the more specific statute prevails over the more general.⁷ Section 32.1-127.1:03 deals specifically with the release of medical records, and § 32.1-127.1:03(D)(2) deals specifically with the release of medical records pursuant to subpoenas.

Secondly, § 32.1-127.1:03 expressly recognizes the patient's right to privacy in the content of his medical records and protects this right by granting the patient access to the court prior to the involuntary disclosure of his medical records to a third party. Although Rule 3A:12(b) conditions issuance of a subpoena on notice to the adverse party and an affidavit stating that the records are "material to the proceedings," the rule does not require that the court consider the effect of disclosure on the patient's right to privacy.

In light of the specificity of § 32.1-127.1:03 and the purpose underlying enactment of the statute, I cannot conclude that the General Assembly intended to except from operation of the statute subpoenas issued for medical records under Rule 3A:12(b). Accordingly, it is my opinion that, unless the records are issued "pursuant to court order upon good cause shown or in compliance with a subpoena issued pursuant to subsection C of § 8.01-413,"⁸ a subpoena duces tecum for medical records in a criminal proceeding must comply with the notice provisions of § 32.1-127.1:03(H).

A subpoena issued in a criminal proceeding under Rule 3A:12(b) does not constitute "a subpoena issued pursuant to subsection C of § 8.01-413."⁹ Section 8.01-413(B) requires that, with certain exceptions, a health care provider must release copies of a patient's medical records to the patient or his attorney upon written request. If the provider does not respond to the request within the fifteen days specified in § 8.01-413(B), § 8.01-413(C) authorizes the patient or his attorney to obtain a subpoena for release of the records.¹⁰ Section 8.01-413(C) applies only in instances in which the patient requests copies of his own medical records.¹¹

Since § 8.01-413(C) does not apply to subpoenas by persons other than the patient or his attorney,¹² a subpoena for medical records issued in a criminal proceeding must comply with § 32.1-127.1:03(H), unless the subpoena constitutes a "court order upon good cause shown."¹³ I do not view a subpoena issued under Rule 3A:12(b) as constituting a "court order upon good cause shown" for purposes of § 32.1-127.1:03(D)(2), although the judge or clerk may issue the subpoena only upon receipt of an affidavit stating that the records are "material to the proceedings." It is clear that the General Assembly intended to permit the court to issue an order requiring the disclosure of medical records without complying with the notice requirements of § 32.1-127.1:03(H). It is unlikely, however, that the General Assembly intended a subpoena issued upon an affidavit stating that the records are "material to the proceedings" to constitute a court order for "good cause shown."¹⁴

In conclusion, it is my opinion that, because no language in § 32.1-127.1:03 clearly excludes subpoenas duces tecum for medical records in a criminal proceeding, the disclosure of such records is subject to the conditions imposed by the statute. Thus, absent the issuance of a "court order upon good cause shown,"¹⁵ the records may be disclosed only in compliance with a subpoena issued in accord with § 32.1-127.1:03(H). As required by Rule 3A:12(b), the records also must be "material to the proceedings."¹⁶

¹See Va. Const. art. VI, § 5 (1971) (authorizing Supreme Court to make rules governing practice and procedures used in courts of Commonwealth; rules are not to conflict with general law established by General Assembly); see also § 8.01-3 (Supreme Court may prepare system of rules of practice to be used in all courts of Commonwealth).

²See Va. Sup. Ct. R. 3A:1. Sections 16.1-131 and 16.1-265 provide that the Rules of the Supreme Court apply to the issuance of subpoenas duces tecum in criminal proceedings in courts not of record and in juvenile and domestic relations district courts.

³Section 32.1-127.1:03 was enacted at the 1997 Session of the General Assembly. See 1997 Va. Acts ch. 682, at 1626, 1628-32.

⁴Section 32.1-127.1:03(H)(1)-(2). Section 32.1-127.1:03(H)(4) provides that if the request is for the records of a pro se party or a nonparty witness, the request is to direct the provider not to provide the records for 10 days.

⁵Section 32.1-127.1:03(A).

⁶*Id.*

⁷See *Davis v. Davis*, 206 Va. 381, 386 143 S.E.2d 835, 839 (1965); 17 M.J. *Statutes* § 101, at 498-99 (1994); 1997 Op. Va. Att'y Gen. 20, 21.

⁸Section 32.1-127.1:03(D)(2).

⁹*Id.*

¹⁰Section 8.01-413(D) limits the scope of subsections B and C. The medical records need be disclosed under § 8.01-413 only if the patient is "a party to a cause of action" and if the request is made by a patient or his attorney "in anticipation of litigation or in the course of litigation." Section 8.01-413(D).

¹¹Subsections B and C of § 8.01-413 require that the request for the records and the request for the subpoena "comply with" or be in "the manner specified in § 32.1-127.1:03." A reasonable reading of this language is that the requests are to contain the information specified in § 32.1-127.1:03(E) and, if to be released to the patient's attorney, the consent form set out in § 32.1-127.1:03(G). Since the patient himself or his attorney is requesting the record, it would be illogical to require that such requests contain the Notice to Patient form set out in § 32.1-127.1:03(H)(1).

¹²In a 1995 opinion, the Attorney General concludes that § 8.01-413 authorizes a medical facility to charge a Commonwealth's attorney for copying and retrieving items specified in § 8.01-413 in response to a subpoena for medical records. See 1995 Op. Va. Att'y Gen. 22, 23. The opinion deals with the payment of a provider's costs for copying medical records in response to a subpoena issued in a criminal case. While the opinion concludes that § 8.01-413 requires the payment of the provider's costs in all cases, including criminal cases, the opinion should not be

read as concluding that § 8.01-413(C) requires a health care provider generally to disclose a patient's medical records to a prosecutor in a criminal proceeding.

¹³Section 32.1-127.1:03(D)(2).

¹⁴Another possible exclusion from the notice requirements of § 32.1-127.1:03(H) is the statement in subsection E that "[p]rocedures set forth in this section shall apply only to requests for records not specifically governed by other provisions of this Code, federal law or federal or state regulation." Section 32.1-127.1:03(E) details the information that a request for copies of medical records is to include and the actions that the provider must take in response to the request. While it would appear that the exclusion contained in subsection E would apply only to the "[p]rocedures set forth" in subsection E, the language refers to "[p]rocedures set forth *in this section*." (Emphasis added.) Regardless of whether the General Assembly intended the exclusion in subsection E to apply to all of § 32.1-127.1:03, including the notice requirements of subsection H, it is my opinion that no other provision of the Code *specifically* governs requests for medical records in a criminal proceeding pursuant to a subpoena duces tecum and that, accordingly, the exclusion in subsection E does not apply.

¹⁵Section 32.1-127.1:03(D)(2).

¹⁶This conclusion is consistent with the accepted principle that statutes dealing with the same subject matter are to be construed together to produce a result that gives effect to all acts of the legislature. See *Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); *Commonwealth v. Sanderson*, 170 Va. 33, 195 S.E. 516 (1938); *Op. Va. Att'y Gen.*: 1990 at 108, 108; 1989 at 189, 190-91.