

Rule 45. Subpoena.

- (a) Form; Issuance. –
 - (1) Every subpoena shall state all of the following:
 - a. The title of the action, the name of the court in which the action is pending, the number of the civil action, and the name of the party at whose instance the witness is summoned.
 - b. A command to each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated records, books, papers, documents, or tangible things in the possession, custody, or control of that person therein specified.
 - c. The protections of persons subject to subpoenas under subsection (c) of this rule.
 - d. The requirements for responses to subpoenas under subsection (d) of this rule.
 - (2) A command to produce evidence may be joined with a command to appear at trial or hearing or at a deposition, or any subpoena may be issued separately.
 - (3) A subpoena shall issue from the court in which the action is pending.
 - (4) The clerk of court in which the action is pending shall issue a subpoena, signed but otherwise blank, to a party requesting it, who shall complete it before service. Any judge of the superior court, judge of the district court, magistrate, or attorney, as officer of the court, may also issue and sign a subpoena.
- (b) Service. –
 - (1) Manner. – Any subpoena may be served by the sheriff, by the sheriff's deputy, by a coroner, or by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to that person or by registered or certified mail, return receipt requested. Service of a subpoena for the attendance of a witness only may also be made by telephone communication with the person named therein only by a sheriff, the sheriff's designee who is not less than 18 years of age and is not a party, or a coroner.
 - (2) Service of copy. – A copy of the subpoena served under subdivision (1) of this subsection shall also be served upon each party in the manner prescribed by Rule 5(b). This subdivision does not apply to subpoenas issued under G.S. 15A-801 or G.S. 15A-802.
- (c) Protection of Persons Subject to Subpoena. –
 - (1) Avoid undue burden or expense. – A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an

appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

- (2) For production of public records or hospital medical records. – Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.
- (3) Written objection to subpoenas. – Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:
 - a. The subpoena fails to allow reasonable time for compliance.
 - b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
 - c. The subpoena subjects a person to an undue burden.
 - d. The subpoena is otherwise unreasonable or oppressive.
 - e. The subpoena is procedurally defective.

- (4) Order of court required to override objection. – If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.
 - (5) Motion to quash or modify subpoena. – A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.
 - (6) Order to compel; expenses to comply with subpoena. – When a court enters an order compelling a deposition or the production of records, books, papers, documents, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, or tangible things specified in the subpoena.
 - (7) Trade secrets; confidential information. – When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.
 - (8) Order to quash; expenses. – When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.
- (d) Duties in Responding to Subpoenas. –

- (1) Form of response. – A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label the documents to correspond with the categories in the request.
- (2) Specificity of objection. – When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, or other tangible things not produced, sufficient for the requesting party to contest the objection.

(d1) Opportunity for Inspection of Subpoenaed Material. – A party or attorney responsible for the issuance and service of a subpoena shall, within five business days after the receipt of material produced in compliance with the subpoena, serve all other parties with notice of receipt of the material produced in compliance with the subpoena and, upon request, shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party.

(e) Contempt; Expenses to Force Compliance With Subpoena. –

- (1) Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of court. Failure by any party without adequate cause to obey a subpoena served upon the party shall also subject the party to the sanctions provided in Rule 37(d).
- (2) The court may award costs and attorney's fees to the party who issued a subpoena if the court determines that a person objected to the subpoena or filed a motion to quash or modify the subpoena, and the objection or motion was unreasonable or was made for improper purposes such as unnecessary delay. (1967, c. 954, s. 1; 1969, c. 886, s. 1; 1971, c. 159; 1975, c. 762, s. 3; 1983, c. 665, s. 1; c. 722; 1989, c. 262, s. 1; 2003-276, s. 1; 2007-514, s. 1.)

STATE OF NORTH CAROLINA

File No.

In The General Court Of Justice

☐ District ☐ Superior Court Division

County

Additional File Numbers

VERSUS**SUBPOENA**

G.S. 1A-1, Rule 45

Party Requesting Subpoena

☐ State/Plaintiff☐ Defendant**NOTE TO PARTIES NOT REPRESENTED BY COUNSEL:** Subpoenas may be produced at your request, but must be signed and issued by the office of the Clerk of Superior Court, or by a magistrate or judge.**TO**

Name And Address Of Person Subpoenaed

Alternate Address

Telephone No.

Telephone No.

YOU ARE COMMANDED TO: (check all that apply):

- ☐ appear and testify, in the above entitled action, before the court at the place, date and time indicated below.
- ☐ appear and testify, in the above entitled action, at a deposition at the place, date and time indicated below.
- ☐ produce and permit inspection and copying of the following items, at the place, date and time indicated below.
- ☐ See attached list. (List here if space sufficient)

Name And Location Of Court/Place Of Deposition/Place To Produce

Date To Appear/Produce

Time To Appear/Produce

☐ AM ☐ PM

Name And Address Of Applicant Or Applicant's Attorney

Date

Signature

Telephone No.

☐ Deputy CSC☐ Assistant CSC☐ Clerk Of Superior Court☐ Superior Court Judge☐ Magistrate☐ Attorney/DA☐ District Court Judge**RETURN OF SERVICE**

I certify this subpoena was received and served on the person subpoenaed as follows:

- By ☐ personal delivery.
- ☐ registered or certified mail, receipt requested and attached.
- ☐ telephone communication (For use only by the sheriff's office for witness subpoenaed to appear and testify.)
- ☐ I was unable to serve this subpoena.

Service Fee

☐ Paid

Date Served

Signature of Authorized Server

Title

\$

☐ Due**NOTE TO PERSON REQUESTING SUBPOENA:** A copy of this subpoena must be delivered, mailed or faxed to the attorney for each party in this case. If a party is not represented by an attorney, the copy must be mailed or delivered to the party. This does not apply in criminal cases.

NOTE: Rule 45, North Carolina Rules of Civil Procedure, Parts (c) and (d).

(c) Protection Of Persons Subject To Subpoena

(1) Avoid undue burden or expense. - A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

(2) For production of public records or hospital medical records. - Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

(3) Written objection to subpoena. - Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:

- a. The subpoena fails to allow reasonable time for compliance.
- b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
- c. The subpoena subjects a person to an undue burden.
- d. The subpoena is otherwise unreasonable or oppressive.
- e. The subpoena is procedurally defective.

(4) Order of court required to override objection. - If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which

an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.

(5) Motion to quash or modify subpoena. - A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.

(6) Order to compel: expenses to comply with subpoena. - When a court enters an order compelling a deposition or the production of records, books, papers, documents, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, or tangible things specified in the subpoena.

(7) Trade secrets, confidential information. - When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the time on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash; expenses. - When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties In Responding To Subpoena

(1) Form of response. - A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label the documents to correspond with the categories in the request.

(2) Specificity of objection. - When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, or other tangible things not produced, sufficient for the requesting party to contest the objection.

INFORMATION FOR WITNESS

NOTE: If you have any questions about being subpoenaed as a witness, you should contact the person named on the other side of this Subpoena in the box labeled "Name And Address Of Applicant Or Applicant's Attorney."

DUTIES OF A WITNESS

- I Unless otherwise directed by the presiding judge, you must answer all questions asked when you are on the stand giving testimony.
- I In answering questions, speak clearly and loudly enough to be heard.
- I Your answers to questions must be truthful.
- I If you are commanded to produce any items, you must bring them with you to court or to the deposition.
- I You must continue to attend court until released by the court. You must continue to attend a deposition until the deposition is completed.

BRIBING OR THREATENING A WITNESS

It is a violation of State law for anyone to attempt to bribe, threaten, harass, or intimidate a witness. If anyone attempts to do any of these things concerning your involvement as a witness in a case, you should promptly report that to the district attorney or the presiding judge.

WITNESS FEE

A witness under subpoena and that appears in court to testify, is entitled to a small daily fee, and to travel expense reimbursement, if it is necessary to travel outside the county in order to testify. (The fee for an "expert witness" will be set by the presiding judge.) After you have been discharged as a witness, if you desire to collect the statutory fee, you should immediately contact the Clerk's office and certify to your attendance as a witness so that you will be paid any amount due you.

State Bar Ethics Issues: 2008 Formal Ethics Opinion 4 and RPC 236¹

2008 Formal Ethics Opinion 4

Approved by State Bar Council on July 18, 2008

Use of Subpoena Power to Obtain Records

Editor's note: To the extent the opinions are in conflict, this opinion overrules RPC 236.

Proposed opinion rules that a lawyer may issue a subpoena in compliance with Rule 45 of the Rules of Civil Procedure which authorizes a subpoena for the production of documents to the lawyer's office without the need to schedule a hearing, deposition or trial.

Inquiry:

Lawyer A represents Lender in pursuing a collection matter pertaining to a certain check. Lawyer A sent a subpoena to the drawee bank, which is not a party to the law suit, requesting a copy of the front and back of the check. Lawyer A provided notice of the subpoena to the other parties in the action. There is no hearing or deposition scheduled. Lawyer B, who represents the bank, believes that Lawyer A may not send a subpoena for documents to a third party unless the subpoena commands the production of the documents at a pending hearing, deposition, or trial.

May Lawyer A issue a subpoena to the bank without scheduling a hearing, deposition, or trial?

Opinion:

Yes. Opinion #3 of RPC 236 states:

It is deceptive and a violation of the [Rules of Professional Conduct] for a lawyer to use the subpoena process (except in compliance with the Rules of Civil Procedure of the court where the action is pending) to mislead the custodian of documentary evidence as to the lawyer's authority to require the production of such documents. However, a subpoena issued in compliance with the applicable Rules of Civil Procedure may be used by the lawyer.

See Rule 3.1 and Rule 8.4(c). Prior to 2003, North Carolina Rule of Civil Procedure 45 did not permit the issuance of a subpoena separately from a trial, hearing, or deposition. The current rule provides in pertinent part:

Rule 45. Subpoena.

(a) Form; Issuance. -

¹ Both 2008 Formal Ethics Opinion 4 and RPC 236 are the property of the North Carolina State Bar.

(1) Every subpoena shall state all of the following:

....

B. A command to each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated records, books, papers, documents, or tangible things in the possession, custody, or control of that person therein specified.

....

(2) A command to produce evidence may be joined with a command to appear at trial or hearing or at a deposition, or any subpoena may be issued separately.

Lawyers have an obligation to interpret the Rules of Civil Procedure in good faith and to apply sound legal reasoning to a rule's interpretation and application. The current version of Rule 45 permits the issuance of a subpoena to produce evidence together with a command to appear at a trial, hearing, or deposition or "[a] command to produce evidence . . . may be issued separately".

Lawyer A may, therefore, subpoena a third party to produce records at Lawyer A's office so long as Lawyer A follows all of the requirements set out in Rule 45, including service of the subpoena to each party which affords other parties the opportunity to file objections.

To the extent that this opinion conflicts with RPC 236, that opinion is overruled.

RPC 236

January 24, 1997

Editor's Note: This opinion was originally published as RPC 236 (Revised).

Misuse of Subpoena Process

Opinion rules that a lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

Inquiry #1:

Attorney A represents John Doe who was injured in an automobile accident. Witnesses are listed on the accident report. Attorney A issues subpoenas to the witnesses directing them to appear at his office at a designated time "to give testimony." The subpoenas are served on the witnesses who later appear at Attorney A's office at the appointed times. The only persons in attendance are Attorney A, a secretary/notary, and the witnesses. No notice was given to any adverse parties. Is Attorney A's conduct ethical?

Opinion #1:

No. Rule 45(a) of the Rules of Civil Procedure permits the issuance of a subpoena "for the purpose of attaining the testimony of a witness in a pending cause." Where no action is pending, it is false and deceptive, in violation of Rule 1.2(c) and Rule 7.2(a)(4), to issue a subpoena to a prospective witness that misleads the prospective witness as to the existence of a filed lawsuit and as to the prospective witness's legal obligation to appear.

Inquiry #2:

After the commencement of a child custody and support action, Mother's attorney issues and signs a subpoena to Father's employer directing the employer to appear in district court at a designated time and to produce Father's employment records. The case is not scheduled for trial or hearing. Mother's attorney attaches a letter to the subpoena that informs the employer that a court appearance may be avoided by sending copies of the employment records directly to the attorney. No notice is given to Father's attorney. Are the actions of Mother's attorney ethical?

Opinion #2:

No. Stating in the subpoena and in the letter to the employer that there is a scheduled court hearing at which the employment records must be produced is a misrepresentation of fact in violation of Rule 1.2(c) and Rule 7.2(a).

Inquiry #3:

Attorney A filed a caveat on behalf of two sons of Testator. Attorney A issues and serves a subpoena on Dr. John Smith, Testator's physician, directing Dr. Smith to appear at Attorney A's office at a designated time to produce all of the medical records pertaining to Testator. Attorney A also issues and serves a subpoena on the custodian of the records of ABC Bank directing the custodian to appear at Attorney A's office at a designated time to produce all of Testator's and Testator's executor's bank records for the preceding five years. No trial, hearing, or deposition is scheduled in the pending action. Attorney A writes letters to the witnesses advising them that they may avoid appearing at his office by providing him with copies of the documents he has subpoenaed. Attorney A did not give notice to any other party interested in the caveat proceeding. Is Attorney A's conduct ethical?

Opinion #3:

No. It is deceptive and a violation of Rule 1.2(c) and Rule 7.2(a)(4) for a lawyer to use the subpoena process (except in compliance with the Rules of Civil Procedure of the court where the action is pending) to mislead the custodian of documentary evidence as to the lawyer's authority to require the production of such documents. However, a subpoena issued in compliance with the applicable Rules of Civil Procedure may be used by the lawyer.

Inquiry #4:

Is notice to opposing counsel required when a lawyer issues a subpoena pursuant to Rule 45(c) of the Rules of Civil Procedure commanding a person to appear and produce records?

Opinion #4:

This is a question of civil procedure which is outside the purview of the Ethics Committee.

THE NORTH CAROLINA STATE BAR

208 Fayetteville Street • PO Box 25908 • Raleigh, NC 27611-5908 • 919.828.4620

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