

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

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HOUSE BILL 785
Committee Substitute Favorable 4/28/03

Short Title: Rules of Civil Proc/Rewrite Rule 45.

(Public)

Sponsors:

Referred to:

March 27, 2003

A BILL TO BE ENTITLED

1 AN ACT TO REWRITE RULE 45 OF THE NORTH CAROLINA RULES OF CIVIL
2 PROCEDURE.
3

4 The General Assembly of North Carolina enacts:

5 **SECTION 1.** G.S. 1A-1, Rule 45, reads as rewritten:

6 **"Rule 45. Subpoena.**

7 (a) ~~For attendance of witnesses; issuances; form.—A subpoena for the purpose of~~
8 ~~obtaining the testimony of a witness in a pending cause shall, except as hereinafter~~
9 ~~provided, be issued at the request of any party by the clerk of superior court for the~~
10 ~~county in which the hearing or trial is to be held. A subpoena shall be directed to the~~
11 ~~witness, shall state the name of the court and the title of the action, the name of the party~~
12 ~~at whose instance the witness is summoned, and shall command the person to whom it~~
13 ~~is directed to attend and give testimony at a time and place therein specified. The clerk~~
14 ~~shall issue a subpoena, or a subpoena for the production of documentary evidence,~~
15 ~~signed but otherwise in blank, to a party requesting it, who shall fill it in before service.~~
16 ~~A subpoena for a witness or witnesses need not be signed by the clerk, and is sufficient~~
17 ~~if signed by the party or his attorney. A subpoena for the production of documentary~~
18 ~~evidence need not be signed by the clerk, and is sufficient if signed by the attorney~~
19 ~~requesting the same.~~

20 (b) ~~Issuance by a judge.—Such subpoena may also be issued by any judge of the~~
21 ~~superior court, judge of the district court, or magistrate.~~

22 (c) ~~For production of documentary evidence.—A subpoena may also command~~
23 ~~the person to whom it is directed to produce the records, books, papers, documents, or~~
24 ~~tangible things designated therein. Where the subpoena commands any custodian of~~
25 ~~public records to appear for the sole purpose of producing certain records in his custody,~~
26 ~~the custodian subpoenaed may, in lieu of a personal appearance, tender to the court by~~
27 ~~registered mail certified copies of the records requested, together with an affidavit by~~
28 ~~the custodian as to the authentication of the record tendered or, if no such records are in~~
29 ~~his custody, an affidavit to that effect. Any original or certified copy or affidavit~~

1 delivered under the provisions of this rule, unless otherwise objectionable, shall be
2 admissible in any action or proceeding without further certification or authentication.
3 Where the subpoena commands any custodian of hospital medical records (as defined
4 in G.S. 8-44.1) to appear for the sole purpose of producing certain records in his
5 custody, the custodian subpoenaed may, in lieu of a personal appearance, tender to the
6 presiding judge or designee by registered mail or by personal delivery at no cost
7 certified copies of the records requested, on or before the time specified in the
8 subpoena, together with a copy of the subpoena and an affidavit by the custodian
9 testifying to the identity and authenticity of the records, that they are true and correct
10 copies, and as appropriate, that the records were made and kept in the regular course of
11 business at or near the time of the acts, conditions, or events recorded, and that they
12 were made by persons having knowledge of the information set forth; or if no such
13 records are in his custody, an affidavit to that effect. When the copies of medical
14 records are personally delivered, a receipt shall be obtained from the person receiving
15 the records. Any original or certified copy of medical records, or affidavit, delivered
16 according to the provisions of this rule shall not be held inadmissible in any action or
17 proceeding on the grounds that it lacks certification, identification, or authentication,
18 and it shall be received as evidence if otherwise admissible. The copies of the medical
19 records so tendered shall not be open to inspection or copy by any persons, except to the
20 parties to the case or proceeding and their attorneys in depositions, until ordered
21 published by the judge at the time of the hearing or trial. Nothing contained herein shall
22 be construed to waive the physician patient privilege or to require any privileged
23 communications under law to be disclosed. The judge, upon motion to quash or modify
24 made promptly and in any event at or before the time specified in the subpoena for
25 compliance therewith, may

- 26 (1) Quash or modify the subpoena if it is unreasonable and oppressive and
27 in such case may order the party in whose behalf the subpoena is
28 issued to pay the person to whom the subpoena is directed part or all of
29 his reasonable expenses including attorneys' fees or
30 (2) Grant the motion unless the party in whose behalf the subpoena is
31 issued advances the reasonable cost of producing the records, books,
32 papers, documents, or tangible things.

33 (d) Subpoena for taking depositions.—

- 34 (1) Proof of service of a notice to take a deposition as provided in Rules
35 30(a) and 31(a) constitutes a sufficient authorization for the issuance
36 by the clerk of the superior court for the county in which the
37 deposition is to be taken of subpoenas for the persons named or
38 described therein. The subpoena may command the person to whom it
39 is directed to produce designated records, books, papers, documents, or
40 tangible things which constitute or contain evidence relating to any of
41 the matters within the scope of the examination permitted by Rule
42 26(b), but in that event the subpoena will be subject to the provisions
43 of section (c) of Rule 26 and section (c) of this rule.

1 The person to whom the subpoena is directed may, within 10 days
2 after the service thereof or on or before the time specified in the
3 subpoena for compliance if such time is less than 10 days after service,
4 serve upon the attorney designated in the subpoena written objection to
5 inspection or copying of any or all of the designated materials. If
6 objection is made, the party serving the subpoena shall not be entitled
7 to inspect and copy the materials except pursuant to an order of the
8 court from which the subpoena was issued. The party serving the
9 subpoena may, if objection has been made, move upon notice to the
10 deponent for an order at any time before or during the taking of the
11 deposition.

12 (2) ~~Repealed by Session Laws 1975, c. 762, s. 3, effective January 1,~~
13 ~~1976.~~

14 (e) ~~Service.~~ All subpoenas may be served by the sheriff, by his deputy, by a
15 coroner or by any other person not less than 18 years of age, who is not a party. Service
16 of a subpoena for the production of documentary evidence may be made only by the
17 delivery of a copy to the person named therein or by registered or certified mail, return
18 receipt requested. Service of a subpoena for the attendance of a witness may be made by
19 telephone communication with the person named therein only by an authorized server
20 who shall be a sheriff, his designee who is not less than 18 years of age and not a party,
21 or coroner, or by delivery of a copy to the person named therein or by registered or
22 certified mail, return receipt requested, by any person authorized by this section to serve
23 subpoenas. Personal service shall be proved by return of a sheriff, his deputy, or a
24 coroner making service and by return under oath of any other person making service.
25 Service by telephone communication shall be proved by return of the authorized process
26 server, noting the method of service. Service by registered or certified mail shall be
27 proved by filing the return receipt with the return.

28 (f) ~~Punishment for failure to obey.~~ Failure by any person without adequate
29 cause to obey a subpoena served upon him may be deemed a contempt of the court from
30 which the subpoena issued. Failure by a party without adequate cause to obey a
31 subpoena served upon him shall also subject such party to the sanctions provided in
32 Rule 37(d).

33 (a) Form; Issuance. –

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

35 a. The title of the action, the name of the court in which the action
36 is pending, and the number of the civil action.

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

42 c. The protections of persons subject to subpoenas under
43 subsection (c) of this rule.

- 1 d. The requirements for responses to subpoenas under subsection
2 (d) of this rule.
- 3 (2) A command to produce evidence may be joined with a command to
4 appear at trial or hearing or at a deposition, or any subpoena may be
5 issued separately.
- 6 (3) A subpoena shall issue from the court in which the action is pending.
- 7 (4) The clerk of court in which the action is pending shall issue a
8 subpoena, signed but otherwise blank, to a party requesting it, who
9 shall complete it before service. Any judge of the superior court, judge
10 of the district court, magistrate, or attorney, as officer of the court, may
11 also issue and sign a subpoena.
- 12 (b) Service. –
- 13 (1) Manner. – Any subpoena may be served by the sheriff, by the sheriff's
14 deputy, by a coroner, or by any person who is not a party and is not
15 less than 18 years of age. Service of a subpoena upon a person named
16 therein shall be made by delivering a copy thereof to that person or by
17 registered or certified mail, return receipt requested. Service of a
18 subpoena for the attendance of a witness only may also be made by
19 telephone communication with the person named therein only by a
20 sheriff, the sheriff's designee who is not less than 18 years of age and
21 is not a party, or a coroner.
- 22 (2) Service of copy. – A copy of the subpoena served under subdivision
23 (1) of this subsection shall also be served upon each party in the
24 manner prescribed by Rule 5(b). This subdivision does not apply to
25 subpoenas issued under G.S. 15A-801 or G.S. 15A-802.
- 26 (c) Protection of Persons Subject to Subpoena. –
- 27 (1) Avoid undue burden or expense. – A party or an attorney responsible
28 for the issuance and service of a subpoena shall take reasonable steps
29 to avoid imposing an undue burden or expense on a person subject to
30 the subpoena. The court shall enforce this subdivision and impose
31 upon the party or attorney in violation of this requirement an
32 appropriate sanction that may include compensating the person unduly
33 burdened for lost earnings and for reasonable attorney's fees.
- 34 (2) For production of public records or hospital medical records. – Where
35 the subpoena commands any custodian of public records or any
36 custodian of hospital medical records, as defined in G.S. 8-44.1, to
37 appear for the sole purpose of producing certain records in the
38 custodian's custody, the custodian subpoenaed may, in lieu of personal
39 appearance, tender to the court in which the action is pending by
40 registered or certified mail or by personal delivery, on or before the
41 time specified in the subpoena, certified copies of the records
42 requested together with a copy of the subpoena and an affidavit by the
43 custodian testifying that the copies are true and correct copies and that
44 the records were made and kept in the regular course of business, or if

1 no such records are in the custodian's custody, an affidavit to that
2 effect. When the copies of records are personally delivered under this
3 subdivision, a receipt shall be obtained from the person receiving the
4 records. Any original or certified copy of records or an affidavit
5 delivered according to the provisions of this subdivision, unless
6 otherwise objectionable, shall be admissible in any action or
7 proceeding without further certification or authentication. Copies of
8 hospital medical records tendered under this subdivision shall not be
9 open to inspection or copied by any person, except to the parties to the
10 case or proceedings and their attorneys in depositions, until ordered
11 published by the judge at the time of the hearing or trial. Nothing
12 contained herein shall be construed to waive the physician-patient
13 privilege or to require any privileged communication under law to be
14 disclosed.

- 15 (3) Written objection to subpoenas. – Subject to subsection (d) of this rule,
16 a person commanded to appear at a deposition or to produce and
17 permit the inspection and copying of records may, within 10 days after
18 service of the subpoena or before the time specified for compliance if
19 the time is less than 10 days after service, serve upon the party or the
20 attorney designated in the subpoena written objection to the subpoena,
21 setting forth the specific grounds for the objection. The written
22 objection shall comply with the requirements of Rule 11. Each of the
23 following grounds is sufficient for objecting to a subpoena:
24 a. The subpoena fails to allow reasonable time for compliance.
25 b. The subpoena requires disclosure of privileged or other
26 protected matter and no exception or waiver applies to the
27 privilege or protection.
28 c. The subpoena subjects a person to an undue burden.
29 d. The subpoena is otherwise unreasonable or oppressive.
30 e. The subpoena is procedurally defective.

- 31 (4) Order of court required to override objection. – If objection is made
32 under subdivision (3) of this subsection, the party serving the subpoena
33 shall not be entitled to compel the subpoenaed person's appearance at a
34 deposition or to inspect and copy materials to which an objection has
35 been made except pursuant to an order of the court. If objection is
36 made, the party serving the subpoena may, upon notice to the
37 subpoenaed person, move at any time for an order to compel the
38 subpoenaed person's appearance at the deposition or the production of
39 the materials designated in the subpoena. The motion shall be filed in
40 the court in the county in which the deposition or production of
41 materials is to occur.

- 42 (5) Motion to quash or modify subpoena. – A person commanded to
43 appear at a trial, hearing, deposition, or to produce and permit the
44 inspection and copying of records, books, papers, documents, or other

- 1 tangible things, within 10 days after service of the subpoena or before
2 the time specified for compliance if the time is less than 10 days after
3 service, may file a motion to quash or modify the subpoena. The court
4 shall quash or modify the subpoena if the subpoenaed person
5 demonstrates the existence of any of the reasons set forth in
6 subdivision (3) of this subsection. The motion shall be filed in the
7 court in the county in which the trial, hearing, deposition, or
8 production of materials is to occur.
- 9 (6) Order to compel; expenses to comply with subpoena. – When a court
10 enters an order compelling a deposition or the production of records,
11 books, papers, documents, or other tangible things, the order shall
12 protect any person who is not a party or an agent of a party from
13 significant expense resulting from complying with the subpoena. The
14 court may order the party on whose behalf the subpoena is issued to
15 advance the reasonable cost of producing the records, books, papers,
16 documents, or tangible things specified in the subpoena.
- 17 (7) Trade secrets; confidential information. – When a subpoena requires
18 disclosure of a trade secret or other confidential research,
19 development, or commercial information, a court may, to protect a
20 person subject to or affected by the subpoena, quash or modify the
21 subpoena, or when the party on whose behalf the subpoena is issued
22 shows a substantial need for the testimony or material that cannot
23 otherwise be met without undue hardship, the court may order a person
24 to make an appearance or produce the materials only on specified
25 conditions stated in the order.
- 26 (8) Order to quash; expenses. – When a court enters an order quashing or
27 modifying the subpoena, the court may order the party on whose
28 behalf the subpoena is issued to pay all or part of the subpoenaed
29 person's reasonable expenses including attorney's fees.
- 30 (d) Duties in Responding to Subpoenas. –
- 31 (1) Form of response. – A person responding to a subpoena to produce
32 documents shall produce them as they are kept in the usual course of
33 business or shall organize and label the documents to correspond with
34 the categories in the request.
- 35 (2) Specificity of objection. –When information subject to a subpoena is
36 withheld on the objection that it is subject to protection as trial
37 preparation materials, or that it is otherwise privileged, the objection
38 shall be made with specificity and shall be supported by a description
39 of the nature of the communications, records, books, papers,
40 documents, or other tangible things not produced, sufficient for the
41 requesting party to contest the objection.
- 42 (e) Contempt. – Failure by any person without adequate excuse to obey a
43 subpoena served upon the person may be deemed a contempt of court. Failure by any

1 party without adequate cause to obey a subpoena served upon the party shall also
2 subject the party to the sanctions provided in Rule 37(d)."

3 **SECTION 2.** G.S.15A-801 reads as rewritten:

4 "**§ 15A-801. Subpoena for witness.**

5 The presence of a person as a witness in a criminal proceeding may be obtained by
6 subpoena, which must be issued and served in the manner provided in Rule 45 of the
7 Rules of Civil Procedure, ~~G.S. 1A-1~~G.S. 1A-1, except that subdivision (2) of subsection
8 (b) of the rule does not apply to subpoenas issued under this section."

9 **SECTION 3.** G.S. 15A-802 reads as rewritten:

10 "**§ 15A-802. Subpoena for the production of documentary evidence.**

11 The production of records, books, papers, documents, or tangible things in a criminal
12 proceeding may be obtained by subpoena which must be issued and served in the
13 manner provided in Rule 45 of the Rules of Civil Procedure, ~~G.S. 1A-1~~G.S. 1A-1,
14 except that subdivision (2) of subsection (b) of the rule does not apply to subpoenas
15 issued under this section."

16 **SECTION 4.** This act is effective when it becomes law and applies to actions
17 pending or filed on or after that date.