

THE SCRIVENER

Subpoenas Revisited

By Scott Moïse

Almost ten years ago, I wrote a column on drafting subpoenas, and since then, the rules have changed. Because subpoenas remain a significant discovery document, this column is updating this issue to bring it in line with current law.

Drafting subpoenas usually consists of merely filling in forms found on judicial websites. You might be saying to yourself, “That’s not hard. My cat could do that.” If your cat can read and follow Rule 45 and knows how to issue subpoenas in other states, then you would be right. If not, both you and Mr. Whiskers should read on.

1. When are subpoenas required?

Subpoenas are used in four situations: (1) to compel attendance at trial or hearings, (2) to compel attendance at depositions, (3) to compel production of documents, and (4) to compel an inspection of premises.

Subpoenas fall into two categories: A subpoena *ad testificandum* compels the attendance of a witness; a subpoena *duces tecum* compels production of documents and things. 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2451, at 15 (2d ed. 1994).

2. What are the basic rules for issuing subpoenas in South Carolina?

Rule 45 and court forms require the following for all subpoenas in federal and state courts:

- The title of the action, civil action number, and name of the court from which the subpoena is issued
- Commandment for the recipient to attend trial or deposition, or to produce documents for inspection or copying (additionally,

federal courts allow testing and sampling), or to allow inspection of premises

- The text of Rule 45(c) and (d) verbatim (**please note** that Rule 45 seems to change frequently, so do not just pull up an old subpoena form and enter new information without ensuring it has the latest version of the Rule)
- Name of witness (person or entity) to whom the subpoena is directed, and for federal court depositions, the witness’s address
- For production or inspection of documents or premises: time, date, and place for the event to take place
- For testifying at a deposition or at a hearing: time, date, place, and (for a subpoena duces tecum to produce documents, electronically stored information, or objects at the deposition) description of the documents, ESI, or objects to be brought, and in federal court only, the method of recording
- For a non-party corporation or other entity testifying at a 30(b)(6) deposition: (1) description, with reasonable particularity, of the matters for examination and (2) notice that the entity must designate witnesses to testify about information known or reasonably available to the entity, for each category, and may also set out the matters on which each person

may testify. (Read Rule 12(b)(6) for more information on the subpoena and other requirements.)

- Signature of the lawyer or clerk of court who issues the subpoena, and name, address, telephone number, and (for federal court only) e-mail address of the lawyer for the issuing party or the pro se litigant
- Date the subpoena is issued.

Additionally, state courts require:

- Set out the *name of the court* from which the subpoena is issued.

Subpoenas must be served as directed under Rule 4.

3. For South Carolina state court subpoenas, what is the difference between where the case is issued and where it is pending?

State court subpoenas have different blanks for where the subpoena is issued and where the case is pending. They are not always the same court, but many times, lawyers incorrectly fill in both blanks with where the case is pending.

(a) Where is the case pending?

This is the easy requirement. The case is “pending” in the court that currently has jurisdiction, typically where the case was filed (or the court in which the case was removed or transferred).

Figure 1

STATE OF SOUTH CAROLINA
ISSUED BY THE COURT OF COMMON PLEAS IN THE
COUNTY OF DORCHESTER

John C. Hawk IV and PollyBeth Hawk,
Plaintiffs
v.
Ryan A. Earhart,
Defendant,

SUBPOENA IN A CIVIL CASE
Case Number 07-CP-1S-5894

Pending in Dorchester County

For example, if *Hawk v. Earhart* is filed in **state court** in Dorchester County, the subpoena will simply state, in the appropriate place across from the caption, that it is pending in Dorchester County. (see **Figure 1**)

(b) From which state court should the subpoena be issued?

This is the tricky part, and without the correct designation of issuing court, the subpoena may not be enforceable. The issuing court depends on a number of factors.

If the subpoena commands attendance at trial or a hearing

A state court subpoena is issued from the county in which the hearing or trial is to be held. Usually, that will be the same county in which the case is pending. In the *Hawk* case above, if trial will be held in Dorchester County, a trial subpoena will issue from Dorchester County.

A federal subpoena will issue from the court of the district where trial will be held. In *Hawk*, the district will be the district of Charleston.

For hearings, however, the matter may be heard in a county other than where it is pending. For example, in state court, Judge Newman—a Richland County resident—may be the assigned judge in a complex case pending in Richland County. Since state court judges rotate circuits, he may be holding court in Charleston when lawyers in the complex case file an emergency motion, and the parties agree to go to Judge Newman in Charleston. In that case, the

subpoena for a witness to appear at the hearing will issue from the Charleston County Court of Common Pleas, although the case is pending in Richland. (see **Figure 2**)

If the subpoena commands attendance at a deposition

A subpoena must be issued out of the county or district where the deposition will be taken. In *Hallamore Corp. v. Capco Steel Corp.*, No. 08-cv-00075S, 2009 WL 1883044, at *2 (D. Del. June 30, 2009), the Delaware federal court found that a deposition subpoena was unenforceable when it was issued from Delaware and commanded a Delaware nonparty to attend a 30(b)(6) deposition that was to be taken in Pennsylvania. The plaintiff argued that the subpoena was valid under Rule 45(b)(2)(B) because it was issued within 100 miles of the deposition site. The court disagreed, ruling that the subpoena must be issued from the Pennsylvania district where the deposition was to take place, and Rule 45(b)(2)(B) merely allows service of the subpoena outside of the state.

Assume that the plaintiff in state court wants to depose a witness who lives in Ware Shoals, South Carolina, where the deposition will take place. The subpoena will issue from the *Greenwood County* Court of Common Pleas since Ware Shoals is located in that county.

However, if the witness, a resident of Ware Shoals, works in Greenville and prefers to have her deposition taken there, the subpoena will issue from the *Greenville County* Court of Common Pleas.

Also, if the deposition witness is not a party or an officer, director,

Figure 2 STATE OF SOUTH CAROLINA
ISSUED BY THE COURT OF COMMON PLEAS IN THE
COUNTY OF CHARLESTON

J. Sam Scoville and Viviana Scoville,
Plaintiffs
v.
Fuller Enterprises, Inc.,
Defendant.

SUBPOENA IN A CIVIL CASE
Case Number 07-CP-23-552
Pending in Richland County

or managing agent of a party, the state court subpoena must issue from one of three places: (1) where the witness resides, (2) where he is employed, or (3) where he regularly transacts business in person. See S.C. R. Civ. P. 45(a)(2).

If the subpoena commands production, inspection, and copying

of documents (and additionally for federal court: testing or sampling)

For state court, the subpoena is issued out of the county or district where the business is located or regularly transacts business. See S.C. R. Civ. P. 45, notes to 1993 amends. Therefore, if the case is pending in Charleston County, but

the subpoena seeks documents from a pharmacy located in Chapin, SC, the subpoena should be issued from the Lexington County Court of Common Pleas.

4. Who is allowed to sign and issue subpoenas?

As officers of the court, members of the bars in South Carolina

SOUTH CAROLINA STATE AND FEDERAL SUBPOENAS

<p>Attend trial or hearing</p>	<p>STATE: County in which the lawsuit is currently pending</p>	<p>STATE: county where the hearing or trial is to take place</p> <p>NOTE for state court: For a deposition, the subpoena may command a nonparty to attend only within 50 miles of where the witness resides, is employed, or regularly transacts business in person</p> <p>For trial, a witness can be compelled to attend trial anywhere within the state.</p> <p>FEDERAL: district where the case is pending</p> <p>NOTE for federal court: For a trial, hearing, or deposition, the subpoena may command a person to attend only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; OR (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense</p>	<p>STATE: The rules do not provide the number of days of notice, but try to give at least ten days' notice or keep the witness apprised of where the case stands on the roster. If the subpoena requires the witness to produce documents at the hearing, provide prior notice to all parties.</p> <p>Witnesses are entitled to \$25.00 fees and mileage allowed by law for official travel of State officers and employees from the witness's residence to the location commanded in the subpoena. Fees and mileage should be paid when the witness arrives at the trial or hearing. (S.C. Code Ann. § 8-11-197; S.C. R. Civ. P. 30(a)(2), 45(b)(1).)</p> <p>FEDERAL: Provide written notice to all parties and a "reasonable" time to comply (Fed. R. Civ. P. 30(b)(1); 45(a)(4); 45(d)(3)(A)(i).) If the subpoena requires the witness to produce documents at the hearing, provide prior notice to all parties. Fed. R. Civ. P. 45(a)(4).)</p> <p>Witnesses are entitled to a fee of \$40 per day and mileage or reimbursement of transportation costs as prescribed by statute. (28 U.S.C. § 1821.)</p>
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<p>Attend deposition</p>	<p>STATE: County in which the lawsuit is currently pending</p>	<p>STATE: county where the deposition will be taken EXCEPT if deponent is not a party or officer, director, or managing agent, the subpoena must issue from county where the witness (1) resides, (2) works, or (3) regularly transacts business in person (45(a)(2)).</p> <p>FEDERAL: district where the case is pending *SEE NOTE ABOVE FOR ATTENDING TRIAL OR A HEARING</p>	<p>STATE: Provide at least 10 days' prior notice to all parties. (S.C. R. Civ. P. 30(b)(1).)</p> <p>Witnesses are entitled to \$25.00 fees and mileage allowed by law for official travel of State officers and employees from the witness's residence to the location commanded in the subpoena. Fees and mileage should be paid when the witness arrives at the deposition. (S.C. R. Civ. P. 45(b)(1).)</p> <p>FEDERAL: Provide a "reasonable" time to comply and provide written notice to all parties <u>prior to service</u> if documents or ESI is requested through a subpoena duces tecum and (Fed. R. Civ. P. 30(b)(1); 45(a)(4); 45(d)(3)(A)(i).)</p> <p>Witnesses are entitled to a fee of \$40 per day and mileage or reimbursement of transportation costs as prescribed by statute. (28 U.S.C. § 1821.)</p>
<p>Produce documents (if separate from a subpoena commanding a person's attendance)</p>	<p>STATE: County in which the lawsuit is currently pending</p>	<p>STATE: county where the business is located or regularly transacts business – or person resides (works) or regularly does business</p> <p>FEDERAL: district where the production will be made NOTE: A non-party can produce documents in a "reasonably convenient" place. (45(c)(2))</p>	<p>STATE: Provide at least 10 days' prior notice to all parties. (S.C. R. Civ. P. 45(b)(1).)</p> <p>FEDERAL: Provide "reasonable notice to all parties prior to service (Fed. R. Civ. P. 45(a)(4); 45(d)(3)(A)(i).)</p>

state and federal courts may issue and sign subpoenas on behalf of a court in which they are authorized to practice. Fed. R. Civ. P. 45(a)(3); S.C. R. Civ. P. 45(a)(3). Alternatively, a blank subpoena may be signed by the clerk of court from the court where the case is pending. *Id.*

See the chart on pages 54-55 that sets out the overall requirements for subpoenas.

5. Are subpoenas allowed for seeking documents and testimony from both parties and nonparties?

“The leading treatises agree that although Rule 45 may apply to both parties and nonparties, resort to Rule 45 should not be allowed when it circumvents the requirements and protections of Rule 34 for the production of documents belonging to a party.” *Layman v. Junior Players Golf Acad., Inc.*, 314 F.R.D. 379, 385 (D.S.C. 2016). For example, in a case in which the court has entered a scheduling order, a party may not try to circumvent the 30-day response allowed for a Rule 34 request for production of

documents by issuing a subpoena with its shortened deadlines so that the party can obtain the documents within the discovery deadline in a scheduling order. *Id.* (finding that the subpoena to another party issued less than 30 days before the scheduling order deadline appeared to be an attempt to circumvent Rule 34 via Rule 45). This rule does not apply if the subpoena is directed to a nonparty and the nonparty’s documents could not have been obtained from a party to the proceedings. See *Sherrill v. Dio Transp., Inc.*, No. 2:15-CV-02838-DCN, 2016 WL 6823324, at *4 (D.S.C. Nov. 18, 2016).

“If documents are available from a party, it has been thought preferable to have them obtained pursuant to Rule 34 rather than subpoenaing them from a nonparty witness.” *Id.*

6. Must you provide other parties with copies of documents obtained in response to a subpoena?

State court rules require parties to provide other parties with copies of documents received in response to subpoenas only if the other parties make a written request for the documents. See S.C. R. Civ. P. 45(c)(2)(A). (This applies only when the documents are produced without a deposition.) The safest thing to do is to include a document request under Rule 34 that asks for copies of all subpoenaed documents. The requesting party must pay for the reasonable copying costs.

Federal court rules are silent on this issue, but most requests for production under Rule 34 will probably be broad enough to cover the subpoenaed documents. Again, to ensure they are produced, parties in federal court should include a specific request for those documents in the normal requests for production.

7. What are the grounds for objecting to subpoenas?

Rule 45(c) requires people who issue subpoenas to take reasonable steps “to avoid imposing undue burden or expense on a person subject to that subpoena.” Courts have the power to issue sanctions

for violating this rule, including but not limited to lost earnings and attorneys’ fees.

A person who is commanded to produce documents is not required to appear in person at the place of production, unless he is also commanded to appear at a deposition, trial, or hearing. Instead, the person may simply copy the documents and mail them to the requesting party (and under Rule 45, the requesting party is responsible for paying reasonable copying costs).

Another option available to the person receiving a subpoena is to object and attempt to have the request modified or quashed entirely. The party must serve objections within fourteen days after service of the subpoena or before the time for compliance called for in the subpoena. At that point, the burden shifts to the requesting party, who must obtain a court order to compel production.

Grounds for objection arise when the subpoena:

- (a) imposes undue burden and significant expense (for which a party may be requested to reimburse the witness or limit the request);
- (b) fails to allow reasonable time to comply;
- (c) requires a nonparty or person who is not an officer of a party (federal) or not an officer, director, managing agent, or general partner of a party (state) to travel—other than for trial—more than 50 miles (state) or 100 miles (federal) from the place where he resides, is employed, or regularly transacts business;
- (d) seeks privileged or other protected matter—such as trade secrets or other confidential research, development, or commercial information—and no exception or waiver applies; or
- (e) seeks an unretained expert’s opinion or information not describing specific events or occurrences in dispute and resulting from the expert’s study that was not made at any party’s request (state court only).

Fed. R. Civ. P. 45(d)(3)(A); S.C. R. Civ. P. 45(c)(3)(A), (B).

In general, a party does not have standing to bring a motion to quash a subpoena under Rule 45 “unless the party claims some personal right or privilege in the information sought by the subpoena.” *Layman*, 314 F.R.D. at 385. However, a party may challenge a subpoena by way of a motion for a protective order under Rule 26 standards regardless of whether the party has standing to quash under Rule 45. *Id.* (stating that “a party may move for a protective order to protect itself from ‘annoyance, embarrassment, oppression, or undue burden or expense,’ regardless of whether the moving party is seeking to prevent disclosure of information by a nonparty, as long as the moving party can tie the protected information to an interest listed in the rule”).

8. What are the duties in responding to subpoenas?

If people or entities receiving a subpoena do not object, they must

follow certain rules, which are set out in the subpoena. They must:

- produce the requested documents as they are kept in the usual course of business or organize and label them to correspond to the categories in the request; and
- if documents are withheld because of privilege or they constitute trial preparation materials, the objecting party must state that claim expressly and provide a description of the nature of the withheld documents or information, sufficient enough to enable the requesting party to contest the claim. Federal rules specifically state that if privileged documents are inadvertently produced in response to a subpoena, upon prompt notice, the receiving party must return, destroy, or sequester all the protected materials and copies. The receiving party, however, may submit the documents to the court under seal for a determination of the merit of the claim. If the receiving party disclosed the protected documents

or information prior to being notified of the inadvertent production, the receiving party must take reasonable steps to retrieve the documents or information. See Fed. R. Civ. P. 45(e); S.C. R. Civ. P. 45(d).

The federal rules have several additional requirements regarding production of electronically-stored information. Fed. R. Civ. P. 45(e)(1).

Conclusion

If you routinely ask your assistant to draft subpoenas without checking the document carefully before signing it, you are making a big mistake. The South Carolina Supreme Court has found this type of conduct to be a violation of the Rules of Professional Responsibility, and your subpoena may be invalid if you do not follow the rules. Also, remember to serve the subpoena on all parties. Next time you are thinking that drafting subpoenas is simple enough for your cat to do them, start filling out applications for your cat to attend law school, or you may be in trouble. ☛