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HOUSE BILL 785  
Committee Substitute Favorable 4/28/03  
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Short Title: Rules of Civil Proc/Rewrite Rule 45.

(Public)

Sponsors:

Referred to:

March 27, 2003

A BILL TO BE ENTITLED

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

The General Assembly of North Carolina enacts:

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

**"Rule 45. Subpoena.**

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

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

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

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

27 (1) Quash or modify the subpoena if it is unreasonable and oppressive and  
28 in such case may order the party in whose behalf the subpoena is  
29 issued to pay the person to whom the subpoena is directed part or all of  
30 his reasonable expenses including attorneys' fees or

31 (2) Grant the motion unless the party in whose behalf the subpoena is  
32 issued advances the reasonable cost of producing the records, books,  
33 papers, documents, or tangible things.

34 (d) Subpoena for taking depositions.—

35 (1) Proof of service of a notice to take a deposition as provided in Rules  
36 30(a) and 31(a) constitutes a sufficient authorization for the issuance  
37 by the clerk of the superior court for the county in which the  
38 deposition is to be taken of subpoenas for the persons named or  
39 described therein. The subpoena may command the person to whom it  
40 is directed to produce designated records, books, papers, documents, or  
41 tangible things which constitute or contain evidence relating to any of  
42 the matters within the scope of the examination permitted by Rule  
43 26(b), but in that event the subpoena will be subject to the provisions  
44 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 becomes effective October 1, 2003, and applies to  
17 actions pending or filed on or after that date.