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HOUSE BILL 785  
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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~~

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

- 28           (1) Quash or modify the subpoena if it is unreasonable and oppressive and  
29           in such case may order the party in whose behalf the subpoena is  
30           issued to pay the person to whom the subpoena is directed part or all of  
31           his reasonable expenses including attorneys' fees or  
32           (2) Grant the motion unless the party in whose behalf the subpoena is  
33           issued advances the reasonable cost of producing the records, books,  
34           papers, documents, or tangible things.
- 35       (d) Subpoena for taking depositions.—
- 36           (1) Proof of service of a notice to take a deposition as provided in Rules  
37           30(a) and 31(a) constitutes a sufficient authorization for the issuance  
38           by the clerk of the superior court for the county in which the  
39           deposition is to be taken of subpoenas for the persons named or  
40           described therein. The subpoena may command the person to whom it  
41           is directed to produce designated records, books, papers, documents, or  
42           tangible things which constitute or contain evidence relating to any of  
43           the matters within the scope of the examination permitted by Rule

1           ~~26(b), but in that event the subpoena will be subject to the provisions~~  
2           ~~of section (c) of Rule 26 and section (c) of this rule.~~

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

14           ~~(2) Repealed by Session Laws 1975, c. 762, s. 3, effective January 1,~~  
15           ~~1976.~~

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

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

35           ~~(a) Form; Issuance. —~~

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

37           ~~a. The title of the action, the name of the court in which the action~~  
38           ~~is pending, the number of the civil action, and the name of the~~  
39           ~~party at whose instance the witness is summoned.~~

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

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

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

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

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

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

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

2 (1) Failure by any person without adequate excuse to obey a subpoena  
3 served upon the person may be deemed a contempt of court. Failure by  
4 any party without adequate cause to obey a subpoena served upon the  
5 party shall also subject the party to the sanctions provided in Rule  
6 37(d).

7 (2) The court may award costs and attorney's fees to the party who issued  
8 a subpoena if the court determines that a person objected to the  
9 subpoena or filed a motion to quash or modify the subpoena, and the  
10 objection or motion was unreasonable or was made for improper  
11 purposes such as unnecessary delay."

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

13 **"§ 15A-801. Subpoena for witness.**

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

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

19 **"§ 15A-802. Subpoena for the production of documentary evidence.**

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

25 **SECTION 4.** This act becomes effective October 1, 2003, and applies to  
26 actions pending or filed on or after that date.