


SUBPOENAS

**THE BASICS THAT EVERY
ATTORNEY NEEDS TO KNOW**

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Subpoena

- Sub=under
- Poena = penalty
- Subpoena duces tecum: writ instructing witness to bring/produce documents or electronically stored information
- Subpoena ad testificandum: writ instructing a witness to testify orally



Mike gets his very first subpoena

Ohio Rules of Civil Procedure

- Court has broad discretion in matters of discovery
- Civ.R. 26: General Provisions Governing Discovery
 - Scope of discovery: Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending action.
 - It is not ground for objection that the information sought will be inadmissible at trial if the information appears reasonably calculated to lead to discovery of admissible evidence.

Local Rules

- Local Rule 2.05: if an answer is filed, status or IPC will be set with notice of mandatory exchange of discovery
- Local Rule 10.01: Discovery shall be pursuant to orders issued
- Local Rule 10.02: Sanctions: Failure to comply with discovery may result in sanctions
- Local Rule 20.01: Discovery: The exchange of information between parties is required.
- Local Rule 20.03: Completion of discovery: All discovery shall be completed prior to the date specified in the Court's Order with a list of documents to be exchanged
- Local Rule 20.05: Motions to Compel/Sanctions/extend: no later than 7 days before status conference/IPC/ or subsequent hearing.

Absence of Malice, 1981



Rule 45: Ohio Rules of Civil Procedure

- (A) Form
- (B) Service
- (C) Protection of persons subject to subpoenas
- (D) Duties in responding to subpoena
- (E) Sanctions
- (F) Privileges

Civ.R. 45(A): Form

- Name of issuing court
- Title of action
- Case number
- Command each person, with a time and place, 1-6
- Protections and Duties text of Civ.R. 45 (C) and (D)

- Not for party
- Serve all other parties with notice and copy of subpoena

Summit County Clerk - Domestic

Summit County Clerk - Domestic


Summit County Clerk - Domestic

6 types...

- Attend and give testimony at trial or hearing
- Attend and give testimony at deposition in county where deponent resides or is employed or transacts business in person
- Produce documents, electronically stored information, or tangible thing at trial, hearing or deposition
- Produce and permit inspection and copying of documents
- Produce and permit inspection and copying, testing of tangible things
- Permit entry upon land/property

Civ.R. 45(B): Who May Service

- Sheriff
- Bailiff
- Coroner
- Clerk of court
- Constable
- Attorney at law
- Any other person designated by order of court who is not a party and is not less than 18 (process server)



Civ.R. 45(B): How to Serve

- Delivering a copy of subpoena to the person
- Reading it to him/her in person
- Leaving it at person's usual place of residence
- Placing a sealed envelope containing the subpoena in U.S. mail as certified or express mail, return receipt
- "Where a subpoena is left at the business location or place of employment of a witness and where that witness has actual knowledge of the subpoena, a valid service of summons has been completed." *Denovcheck v. Bd. of Trumbull Cty. Commrs.* (1988), 36 Ohio St.3d 14, 5020 N.E.2d 1362

AND

OAC: 4761-11-13

- By tendering to the person subject to subpoena for attendance,
 - the fee for one day's attendance
 - Mileage allowed by law
 - In county, upon demand,
 - Out of county in which court is located, without demand
- OAC: 4761-11-13 (A) & (B)
 - \$12 for full day's attendance (required or requested to be present at a proceeding before and after twelve o'clock noon, regardless of whether called to testify.
 - \$6 for half day's attendant at hearing of deposition (required to be present either before or after twelve o'clock noon, but not both).
 - \$0.505 (fifty and one-half cents) per mile to/from residence to place for testimony

Return of Subpoena

- Return to the Clerk of Courts
 - When served by mail delivery, the return shall attach the signed receipt to the return.
 - Return may be forwarded through the postal service
 - Or returned otherwise

RETURN OF SUBPOENA (CIVIL) - SECTION 2309.01 OF THE OHIO RULES OF CIVIL PROCEDURE

DATE OF RETURN: _____

RETURNED TO: _____

RETURNED BY: _____

REASON FOR RETURN: _____

REMARKS: _____

Civ.R. 45 (C): Protections of Subject Person(s)

- (1) avoid imposing undue burden or expense on person
- (2) (a) If producing, only appear in person if commanded to attend and give testimony
- (2)(b) if producing, serve written objections to production
 - Within 14 days after service or
 - Before compliance date if less than 14 days
- If objection is made, party serving subpoena is not entitled to production except with court order.
 - Motion for order to compel production
 - Must protect a non-party from significant expense

Civ.R. 45 (C)(3) Quash or Modify

- Court shall quash or modify or order specific conditions if subpoena:
 - Fails to allow reasonable time
 - Requires disclosure of privileged or protected matter and no exception or waiver applies
 - Requires disclosure of a known fact
 - Requires disclosure of opinion held by an expert not retained or employed Civ.R. 26(B)(5)
 - if fact does not describe specific events or occurrences in dispute and
 - results from study not made at party request
 - Undue burden

Privilege

- Attorney-client privilege R.C. 2317.02(A)
 - Except if litigation for fees or malpractice
- Physician-patient privilege R.C. 2317.02(B)
- Psychologist-client privilege R.C. 4732.19: on same basis as R.C. 2317.02
- Husband –Wife: second marriage
- Counselor-client privilege R.C. 2317.02(G)(1)
 - School counselor, LPCC, social worker, marriage therapist, social worker
 - Special considerations for minors
 - *Rulong v. Rulong*, 2004-Ohio-6919 (8th Dist., 2004): Only the minor can waive the privilege for testimony of mental health provider.

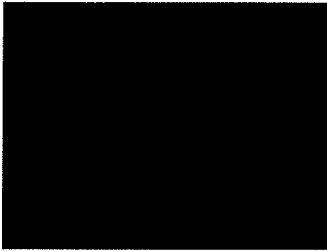
Undue Burden

- Before filing Motion to quash for undue burden, the person resisting shall attempt to resolve through discussions with the issuing attorney.
- Motion must be supported by an affidavit of subpoenaed person or certificate of attorney of efforts made to resolve
- Court shall quash or modify unless the party shows
 - a substantial need for the testimony/material that cannot be met otherwise without undue hardship AND
 - Assures the subpoenaed person will be reasonably compensated.
- *McDade v. Morris*, (Ninth District, November 12, 2015) 2015-Ohio-4670, C.A. 27454

Who can Quash

- The specific language of the subpoena matters.
- “Given the specific language of the subpoenas, i.e. “within your possession and/or control”, we find that only those commanded to appear and produce the documents could file motions to quash the subpoenas.” *Abels v. Ruf*, (Ninth District, Summit County, July 26, 2006) 2006-Ohio-3813, ¶19
- Other protections are still available.
- If a non-party is subpoenaed only to attend and give testimony pursuant to Civ.R. 45(A)(1)(b)(i), his remedy to avoid attending the deposition is to file a motion to quash the subpoena under Civ.R. 45(C). *Ray v. Jacquemain*, (9th, 2002) 2002-Ohio-3192, C.A. 20851, ¶23

Hoffa, 1992



Civ.R. 45(D): Duties in Responding

- Produce documents: person shall produce, at the person's option,
 - as they are kept in the usual course of business or
 - organized and labeled with categories in the subpoena
- Permit inspection and copying: by all parties present at the time and place set for inspecting and copying.
- If form not specified for electronic info, responding person may produce in any useable form.

Civ.R. 45(D)(2): July 1, 2012 Amendment

- Under the 2012 amendment a deponent no longer may be compelled by subpoena to appear for a deposition anywhere in the state, but only in the county where the deponent resides or is employed or transacts business in person, or at such other convenient place as is fixed by an order of court. A person may still be compelled to appear for trial or hearing at any place within the state.

Civ.R. 26(B)(4): Factors

- Party need not provide discovery of electronically stored information when the production imposes undue burden.
- On Motion to Compel or for protective order, party from whom discovery sought must show information is not reasonably accessible because of undue burden or expense.
- Court may still order production if requesting party shows good cause
- Factors Court considers:
 - Unreasonably cumulative or duplicative
 - Can obtain from other source that is less burdensome or less expensive
 - Party has had ample opportunity to obtain the information sought
 - Burden or expense outweighs the likely benefit, taking into account
 - Relative importance in the case of the issues on which discovery is sought
 - Amount in controversy
 - Parties' resources
 - Importance of the proposed discovery in resolving the issues

Civ.R. 26 (C): Protective orders

- Any party or person from whom discovery is sought
- With good cause shown
- After attempts to resolve evidenced by statement
- Order that justice requires protection for the person from
 - Annoyance
 - Embarrassment
 - Oppression
 - Undue burden or expense
- Order terms:
 - Terminate discovery
 - Limit terms or conditions, including time or place
 - Limit method
 - Limit scope
 - Limit participants
 - Under seal

Expert Opinion or Undue Burden

Civ. R. 45(C)(3) quash

- Motion to Quash filed
- Shifts burden
- the court shall quash or modify the subpoena unless the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship

Civ. R. 26(C) protection order

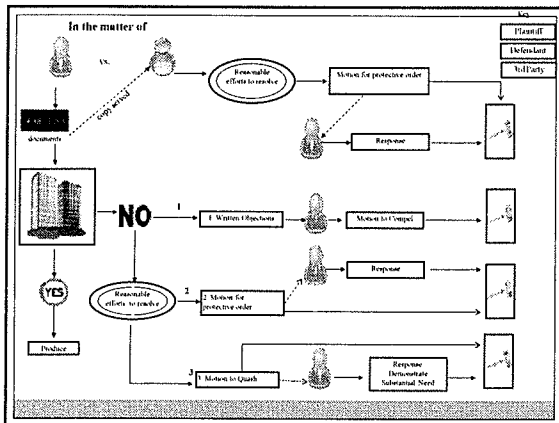
- Motion for Protective Order filed
- No requirement to show "substantial need" for the material sought
- *Montrose Ford, Inc. v. Starn*, (9th Dist.2002) 147 Ohio App.3d 256 ¶21

26(B)(5) Experts Retained by other Party

- A party may discover facts known or opinions held by retained expert of specially employed only if able to show unable to obtain facts and opinions by other means without undue hardship
- Upon showing of other exceptional circumstances such that denial of discovery would cause manifest injustice
- Alternative: interrogatories to identify expert and subject matter. Party may discover opinion and facts relevant to the stated subject matter


Civ.R. 45 (D): Sanctions

- Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.
- A subpoenaed person or that person's attorney who frivolously resists discovery may be required to pay the reasonable expenses, including reasonable attorney's fees, of the party seeking the discovery.
- Issuing party/attorney: Court may impose for breach of the duty imposed by division (C)(1) (reasonable steps to avoid under burden), sanctions, including lost earnings and reasonable attorney's fees.



Special Considerations

- Preserve the record:
notice of service
- Serve copy of subpoena on all parties.
- Timing is everything.
- Special notes: get contact information for every witness
- Don't forget to notify if hearing is canceled or continued or witness is not needed



QUESTIONS
