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### Topics for Discussion

1. Defining Subpoenas & Service of Subpoenas
2. Protections & Compliance
3. Response to Subpoenas & Motions
4. Forcing Compliance & Protections
5. Production to Other Parties
6. Issuing/Responding to Out of State Subpoenas
7. Additional Circumstances

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### N.C. R. Civ. P. 45—What is a subpoena?

- (a)(2) A command to produce records, books, papers, electronically stored information, or tangible things may be joined with a command to appear at trial or hearing or at a deposition, or any subpoena may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

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### Fed. R. Civ. P. 45—What is a subpoena?

- (a)(1)(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises;
- "duces tecum" – you shall bring with you; produce documents

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### Service of Subpoena

- N.C. R. Civ. P. 45(b)
- (1) (personal service) may be served on a party by sheriff, coroner, or by any person not a party to the lawsuit over the age of 18;
- Certified mail; registered mail;
- Service of a subpoena for the attendance of a witness only may also be made by telephone communication with the person named therein only by a sheriff, the sheriff's designee who is not less than 18 years of age and is not a party, or a coroner.
- This subsection does not apply to subpoenas in criminal matters.
- File affidavit of service once service obtained.

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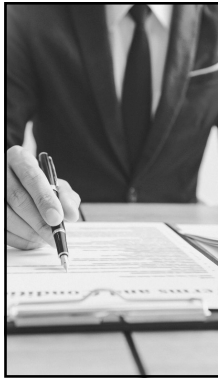
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### Service of Subpoena

- Fed. R. Civ. P 45(b)
- (1) any person at least 18 years old and not a party may serve;
- If attendance is required, tendering fee for 1 day and mileage allowance
- Can be served nationwide.
- Fed. R. Civ. P 45(b)(4) – proof of service—must file with issuing court a statement certified by server demonstrating service
- Fed. R. Civ. P 5(a)(1)(C)-discovery paper
- 5(b)—serve an attorney, personal service, leave at person's office or dwelling, certified or registered mail,

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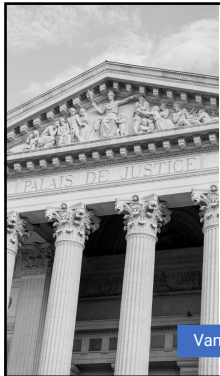
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**N.C. R. Civ. P. 45(c)—Protection, avoid undue burden**

- (1) Party or attorney **SHALL** take reasonable steps to avoid imposing undue burden or expense on person subject to a subpoena.
- When violated, a court **SHALL** enforce this section and may impose sanctions on the violating party or attorney (lost earnings, attorneys' fees).
- Cost shifting
- (2) production of certified public records or medical records and affidavit

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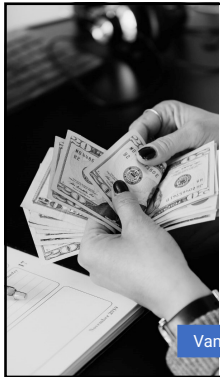
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**Fed. R. Civ. P. 45(d)—Protection, avoid undue burden**

- (1) Party or attorney **must** take reasonable steps to avoid imposing undue burden or expense on person subject to a subpoena.
- When violated, a court **must** enforce this section and may impose sanctions on the violating party or attorney (lost earnings, attorneys' fees).

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**Place of compliance N.C.**

- N.C. R. Civ. P. 30(b)(1)—oral deposition of resident witness in the county where the person resides or is employed
- Nonresident witness—county where witness resides or within 50 miles of the place of service
- Judge can order the deposition to take place in the county where the case is pending.
- Deposition by remote means (Zoom)

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**Place of compliance Fed. R. Civ. P. 45(C)**

- (1) For a hearing, trial, or deposition:
  - (A) within 100 miles of the person's residence, place of work, or regularly conducts business;
  - (B) within the state in which the person resides, works, or conducts business **if** the person is:
    - (i) a party or party's officer; or
    - (ii) is commanded to attend trial and would not incur substantial expense.
- Some disagreement amongst courts re virtual depositions.

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**Response to Subpoena— N.C. R. Civ. P. 45(c)**

- (3) within 10 days (of service) or before the time specified for compliance;
- written; served on issuing party
  - (a) fails to allow reasonable time to comply;
  - (b) requires disclosure of privileged information or protected material;
  - (c) subjects person to undue burden or expense;
  - (d) is otherwise unreasonable or oppressive; or
  - (e) is procedurally defective.
- (4) – requires Court order to override objection  
 Issuing party may file a motion to compel compliance.  
 Order to Quash expenses 45(c)(6) – court may order issuing party to pay responding party's reasonable expenses to comply with subpoena

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**Response to Subpoena— Fed. R. Civ. P. 45(d)**

- (2)(B)—Objections
- within 14 days (of service) or before time for compliance written; served on issuing party
  - (i) fails to allow sufficient time to comply;
  - (ii) requires compliance beyond geographical limits of 45(c);
  - (iii) requires disclosure of privileged information or protected material; or
  - (iv) subjects person to undue burden.
- The issuing party may file a motion to compel compliance.

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**If claiming privilege, be specific!**

- N.C. R. Civ. P. 45(d)(5)—make privilege or work product objection with specificity
- Support with privilege log
- Fed. R. Civ. P. 45(e)(2)(A)—expressly make the claim of privilege
- Support with privilege log
- Fed. R. Civ. P. 45(e)(2)(B)—Claw Back provision
  - Check any protective or confidentiality order in case

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**Motion to Quash or Modify Subpoena**

- N.C. R. Civ. P. 45(c)(5)
- Motion by responding party
- Within 10 days (of service) or before the time specified for compliance
- Filed in the court in the county in which compliance is to occur
- Court will quash or modify subpoena if the responding party demonstrates existence of any of the 45(c)(3) reasons
- Order to Quash expenses 45(c)(8) – court may order issuing party to pay responding party's costs and attorneys' fees

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**Motion to Quash or Modify Subpoena**

- Fed. R. Civ. P. 45(d)(3)
- Motion by responding party
- Court may issue order to protect responding party from:
  - (B)(i) disclosing a trade secret or other confidential research, development, or commercial information; or
  - (B)(ii) disclosing an unretained expert's opinion or information unrelated to dispute.
- Court may require compliance if requesting party shows:
  - (C)(i) substantial need for testimony or materials; or
  - (C)(ii) ensures compensation for responding party.

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### Forcing Compliance

- N.C. R. Civ. P. 45(e)(1) & (2)
- Failure to comply with a subpoena without justification may be deemed a contempt of court.
- Party failing to comply subject to sanctions under N.C. R. Civ. P. 37(d).
- Court may award attorneys' fees and costs to the issuing party of the responding party's objections or motion in response were made for improper purpose (like delay).
- Fed. R. Civ. P. 45(g)—a party who fails to obey the subpoena without adequate excuse may be subject to Court's contempt power.

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### Protection of Confidential or Trade Secret Information

- N.C. R. Civ. P. 45(c)(8) – when subpoena requires production of trade secret or confidential materials, a court may protect the responding party by quashing or modifying the subpoena
- When issuing party shows substantial need for the information, the court may order the testimony or production under certain circumstances

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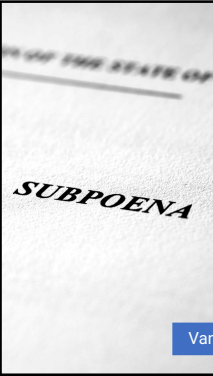
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**N.C. R. Civ. P. 45(d1)—  
Production to other parties**

- The party issuing the subpoena must serve notice on all other parties in the case and give them an opportunity to review and inspect materials produced in response to the subpoena
- within 5 business days or receipt of response to subpoena

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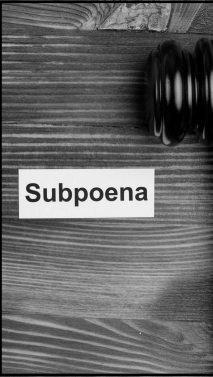
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**Duties in Responding to  
Subpoena**

- N.C. R. Civ. P. 45(d)(1)—shall produce documents as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.
- N.C. R. Civ. P. 45(d)(2)—if not specified, ESI must be produced as kept or in a reasonably usable form
- Fed. R. Civ. P. 45(e)(1)(A)—must produce documents as they are kept in the ordinary course of business or must organize and label them to correspond to the categories of the demand.
- Fed. R. Civ. P. 45(e)(1)(B)—if not specified, ESI must be produced as kept or in a reasonably usable form

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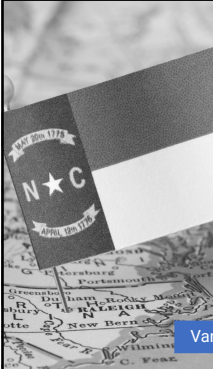
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### Issuing Out of State Subpoena in NC

- Hypo: Case pending in IL; witness in Wake County, NC
- N.C. Uniform Interstate Depositions and Discovery Act ("UIDDA")
  - N.C. Gen. Stat. § 1F.
- Issue subpoena from IL state court where matter is pending;
- 1F-3(a): submit IL subpoena to Wake County Superior Court Clerk;
- 1F-3(b): pay filing fee (N.C. G. S. § 7A-305(a)(2))
- 1F-3(b): the Clerk will open a court file, assign a file number
- 1F-3(b): Clerk issues subpoena from Wake County Court to party in Wake County;
- Proper service under N.C. R. Civ. P. 45(b)

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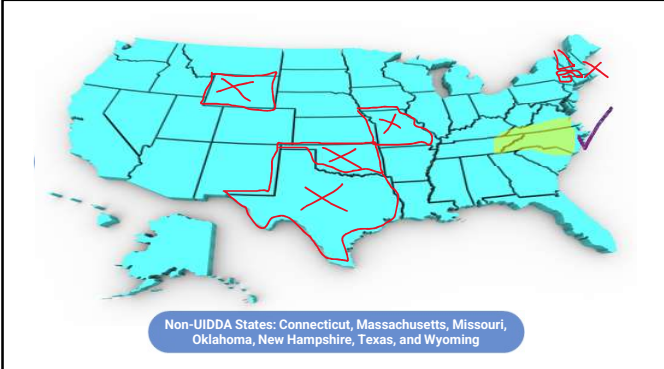
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Non-UIDDA States: Connecticut, Massachusetts, Missouri, Oklahoma, New Hampshire, Texas, and Wyoming

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### Responding to Out of State Subpoenas

- Wake County party served with out-of-state subpoena (technically issued by Wake County Clerk)
- 1F-6: File motions for relief with the County Clerk that issued subpoena
- Directed to and to be heard in a Court in the issuing County

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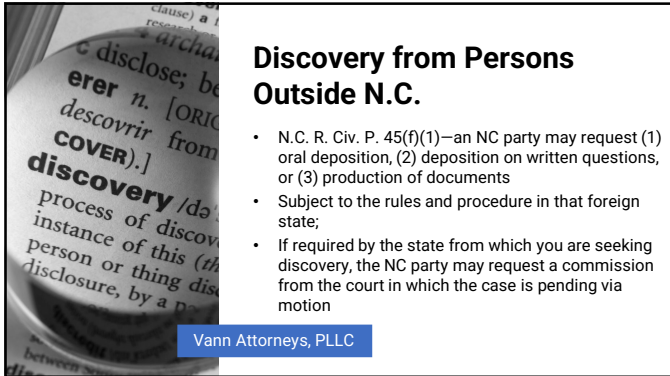
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**Discovery from Persons Outside N.C.**

- N.C. R. Civ. P. 45(f)(1)—an NC party may request (1) oral deposition, (2) deposition on written questions, or (3) production of documents
- Subject to the rules and procedure in that foreign state;
- If required by the state from which you are seeking discovery, the NC party may request a commission from the court in which the case is pending via motion

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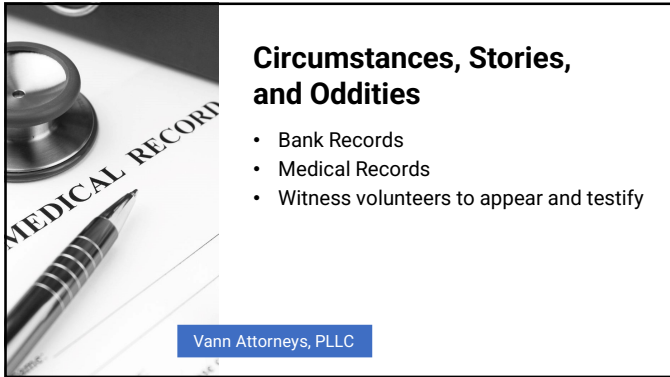
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**Circumstances, Stories, and Oddities**

- Bank Records
- Medical Records
- Witness volunteers to appear and testify

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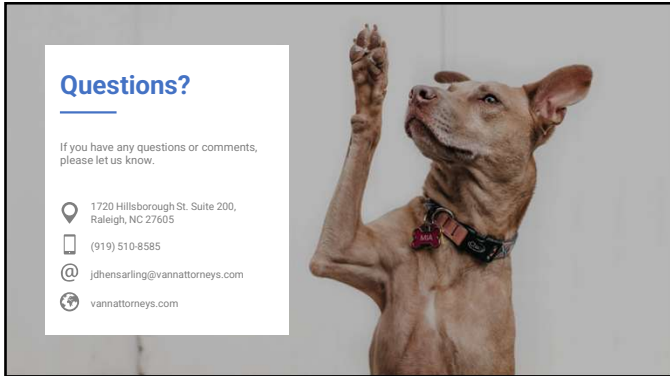
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**Questions?**

If you have any questions or comments, please let us know.

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## J.D. Hensarling, Vann Attorneys

J.D. represents clients in complex business disputes, contract and construction disputes, and disputes involving unfair and deceptive trade practices, personal injury, negligence, and fraud. His practice also involves advising clients regarding e-discovery issues. He is admitted to practice before the United States Supreme Court, the U.S. Court of Appeals for the Fourth, Fifth, and D.C. circuits, as well as the District of Columbia Circuit Court, the U.S. District courts for the Eastern, Western and Middle districts of North Carolina, and the U.S. District courts for the Southern, Northern, Eastern and Western districts of Texas.

J.D. has represented clients in the real estate development, energy, petroleum, insurance, healthcare, education, telecommunications, railroad, medical, construction, and brewing industries. Prior to moving to Raleigh, he practiced at a large Washington, D.C. firm, where he worked in the trial section dedicated to litigation involving securities fraud and commercial contracts. He also worked in the trial section of one of Houston's largest firms and as in-house counsel at SBC Texas, now AT&T.

JD has been certified as a Superior Court Mediator by the North Carolina Dispute Resolution Commission since 2014. JD enjoys serving as a mediator and assisting parties in working toward resolving their disputes.

J.D. is a member of the North Carolina Bar Association and the 10th Judicial District Bar. J.D. has taught Pretrial Litigation since 2010 at Campbell Law School.