

Be Careful What You Ask For: Costs of Issuing Broad Subpoena May Significantly Outweigh Benefits

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Rule 45 of the North Carolina Rules of Civil Procedure allows parties to litigation to subpoena documents and electronically stored information from nonparties. In a recent opinion, *Kelley v. Agnoli*, COA09-179 (July 6, 2010), the North Carolina Court of Appeals made clear that parties issuing subpoenas to nonparties may be required to pay significant sums for the time and effort nonparties undertake to comply with overly broad subpoenas.

Underlying Facts

In *Kelley*, the plaintiff Thomas Michael Kelley and defendant Francesca Agnoli, who were engaged to be married, had entered into an “engagement agreement” which obligated Mr. Kelley to support Ms. Agnoli for the rest of her life irrespective of whether they ever married. Eventually, however, Mr. Kelley came to suspect that Ms. Agnoli never intended to marry him, but had instead merely manipulated him for personal gain. He filed suit against her, asserting fraud-related claims. He served a subpoena on the law firm Davis & Harwell, P.A., who had represented Ms. Agnoli in preparing the engagement agreement and was representing her in the litigation commenced by Mr. Kelley. Among other things, the subpoena sought all documents related to agreements or draft agreements between Mr. Kelley and any third party, “including but not limited to all notes, correspondence, memoranda, emails, drafts or final agreements, and documents concerning conversations with anyone regarding these matters.”

Davis & Harwell objected to the subpoena on the grounds of relevance, attorney-client privilege, work product, and undue burden and expense. Although Mr. Kelley’s attorneys met with Davis & Harwell to discuss its objections, they refused to narrow the scope of the subpoena or the burden it placed on Davis & Harwell. Mr. Kelley then moved to compel production of all requested documents. At the hearing, Davis & Harwell argued that compliance with the subpoena would impose an undue burden and expense because it would require the firm to physically search every case file opened by the firm since 1980. The trial court granted Mr. Kelley’s motion to compel, and ordered Davis & Harwell to produce, within 30 days, a privilege log numbering and describing each responsive document it considered privileged and to submit the log and related documents for *in camera* review. The court also concluded that the language in the subpoenas was overly broad. Davis & Harwell partially complied with the order by submitting a 44-page privilege log and 2,394 pages of documents for *in camera* review.

Following its review, the trial court entered an order stating that the documents on the log were, with very few exceptions, privileged and protected from discovery. It announced that it would hold a later hearing to consider compensation for Davis & Harwell in complying with the subpoena. Davis & Harwell then filed documentation related

to its time and expense in complying with the subpoena, ultimately seeking \$53,704.06 for 232.2 hours of labor by various firm personnel. Following a hearing on the matter, the trial court concluded that Mr. Kelley owed Davis & Harwell \$40,000 in compensation for lost earnings incurred as a result of the issuance of the subpoena because Mr. Kelley and his counsel failed to take reasonable steps to avoid imposing an undue burden or expense on Davis & Harwell.

Court of Appeals Opinion

In a unanimous opinion written by Judge Martha Geer, the Court of Appeals affirmed the trial court's decision to enter a monetary award to compensate Davis & Harwell for complying with Mr. Kelley's subpoena. The court first examined Rule 45(c)(1), which requires a party and/or attorney issuing a subpoena to "take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena." A party or attorney in violation of this requirement "shall" be sanctioned, and such sanction "may include compensating the person unduly burdened for lost earnings and for reasonable attorneys fees." The court next examined Rule 45(c)(6), which provides that when a court enters an order compelling production under Rule 45, the order "shall" protect any person who is not a party "from significant expense resulting from complying with the subpoena." The court found the use of the word "shall" in both subsections to indicate that awarding compensation and/or costs for a nonparty's compliance with an overly broad subpoena is mandatory:

"[W]e hold that if a trial court finds a violation of Rule 45(c)(1), it must impose an appropriate sanction. . . . On the other hand, the trial court, in granting a motion to compel under Rule 45(c)(6), is required to protect the party producing documents from 'significant expense.'"

The court noted that Mr. Kelley was on notice throughout the production process that Davis & Harwell believed the subpoena to be overbroad and intended to seek reimbursement for its compliance. During that time, Mr. Kelley could have modified or limited his demands to limit his exposure to potential reimbursement costs – but consciously chose not to. For that reason, the Court of Appeals concluded that the trial court was authorized to award compensation for Davis & Harwell's lost earnings and expenses incurred in complying with the subpoena.

The court also noted that it was the responsibility of Mr. Kelley and his attorney to assess, before issuing the subpoena, whether it was unduly burdensome. Even though the court did enter an order compelling Davis & Harwell to comply with the subpoena, that ruling did not relieve Mr. Kelley or his attorney of responsibility for issuing an overbroad subpoena: "It was up to Mr. Kelley to determine whether the documents were important enough to warrant having to pay the expenses of gathering them."

Kelley's Lessons

Kelley teaches several important lessons for both parties and nonparties involved in litigation in North Carolina. First

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and foremost, parties and their counsel who seek documents and electronically stored information from nonparties must exercise caution in how they draft their subpoenas. Henceforth, trial courts are sure to apply *Kelley* to inquire whether a party issuing a subpoena has taken appropriate steps to ensure that the subpoena will not impose an undue burden or expense on the nonparty recipient. The party issuing the subpoena must therefore, to the extent possible, place itself in the shoes of the nonparty and anticipate the burdens, difficulty, and expense the subpoena will impose. Furthermore, if a nonparty objects to the breadth of the subpoena, the party issuing the subpoena must seriously consider the concerns the nonparty presents and work with the nonparty to minimize its burden, difficulty, and expense. A party that fails to do so, as *Kelley* teaches, does so at its own peril.

For those businesses and individuals who find themselves on the receiving end of an overly broad North Carolina subpoena, *Kelley* should serve as a very effective tool empowering the nonparty to object and, if necessary, seek appropriate sanctions and/or compensation. First, nonparties should take advantage of the power of an objection, embedded in Rule 45(b). One of the bases for an objection is that compliance with the subpoena subjects the nonparty to an “undue burden.” Such an objection places the proverbial ball back into the court of the party issuing the subpoena, because absent an order compelling production, the objection forestalls any production the subpoena otherwise requires. Because of *Kelley*’s command, nonparties objecting to overly broad subpoenas should find increased levels of cooperation and compromise by parties issuing subpoenas. Parties issuing subpoenas will likely be much more willing to narrow their requests under the perceived threat of sanctions and/or compensation awards than they might have been before *Kelley*.

Kelley also teaches nonparties to appropriately document their time and expense incurred in complying with a subpoena. A nonparty’s counsel should also clearly communicate to both the party issuing the subpoena, and to the court, that the nonparty will be seeking compensation for its time, expense, and attorneys fees incurred in complying with the subpoena. In the face of such communications, and the holding in *Kelley*, the groundwork will be well laid to recover for such time, expense, and attorneys fees should the party issuing the subpoena fail to heed *Kelley*’s command.

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