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Swenson, Diane

From: M.McIntee [mcinteelaw@srt.com]
Sent: Thursday, August 21, 2008 11:45 AM
To: (SUP) Clerk of Court Office
Subject: Proposed Rule Changes

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

'AUG 21 2008**STATE OF NORTH DAKOTA**

Dear Ms. Miller:

I have several comments to present regarding the proposed changed to Rule 45 of the North Dakota Rules of Civil Procedure. [Subpoena] These comments are based upon issues that have arisen in my cases and generally pertain to family law issues.

My suggestions are:

1. Include a provision that a 'subpoena' under Rule 45 may be served upon an attorney for the person being asked to appear pursuant to the subpoena, if that attorney has noted his/her representation in the particular case. I have issued subpoenas in family law cases, to the other party and have served the attorney as required by Rule 5b. Older experienced lawyers recognize that once a case is started, all documents are served upon the opposing attorney, including a subpoena for a party. The new younger lawyers have objected to responding to the subpoena, claiming that since a subpoena is to be served upon a person, the actual service must be on the 'person' regardless if they are a represented party. Fortunately, our Courts have ruled otherwise, but if such fact were made clear in Rule 45, there were not be an argument for the trial court to have to consider at a hearing.

2. We recognize that when a non-party is served with a subpoena, the witness fee is to be paid. [not considering the issued of a government subpoena] I have had some younger attorneys object to a subpoena issued upon their client who is a party to the action because a witness fee was not provided. The trial court's have not upheld their argument, but perhaps the Rule should be modified to provide that witness fees are to be paid to non-party witnesses.

3. The third issue is also in regard to Rule 45. I have had several cases where a subpoena was issued to a custodial parent or a guardian of a minor or incompetent person, to bring the minor or incompetent person to the trial for purposes of testimony. This is quite often where the minor [who is of an age where he/she could testify] would be testifying against the interests of the then custodial parent. We have even gone so far as to issue a subpoena to the custodial parent, and issue checks to the minor. The custodial person will still object claiming that Rule 45 only permits the production of tangible documents and items, and not individuals.

I have faced this argument many times and generally the Court's have ordered the child to appear. I believe that there should be a provision in this Rule, that a subpoena may also be issued to a custodial person to produce the minor or person under their control.

I recognize that there may be cases, where a parent, who has been prevented from having contact with a child, may wish to issue a subpoena to the child, just for the purpose of having contact which may in fact be harmful or the child is too young to be able to testify and the purpose of the subpoena is just to harass the custodial parent. However, this is not the general case and there are provisions within the Rule to obtain orders to prevent such actions.

I ask that you present these comments and suggestions to the committee or the court as may be appropriate.

Michael S. McIntee
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8/21/2008