



ALAN WILSON
ATTORNEY GENERAL

May 22, 2020

The Honorable David R. Wagner
Solicitor, Tenth Judicial Circuit
PO Box 8002
Anderson, SC 29622

Dear Solicitor Wagner:

You have requested an opinion from this Office regarding “the use of a subpoena duces tecum in criminal proceedings pursuant to Rule 13(a)(1) of the South Carolina Rules of Criminal Procedure, most notably in reference to the recent amendment and additional comment issued on May 1, 2019.”

In your opinion request letter, you state the following:

As I understand Rule 13, a subpoena duces tecum can only be issued for a “specified court proceeding.” Rule 13(a)(1), SCRCrimP. This language was added from previous Rule 13(a). My understanding is that this was to clarify that compelled production of documents from third parties, in criminal proceedings only, can only be conducted where there is a specified hearing and/or trial for which they are necessary. See Note to 2019 Amendment. Unlike Rule 45, SCRCP, which allows for the production of documents separate from a court proceeding, a third-party cannot be compelled via Rule 13 to produce documents at an earlier date and time than the court proceeding. Further, my understanding is that a party cannot move the court for a third-party to produce documents, and in essence manufacture, a “court proceeding” for the purposes of gathering documentation prior to a trial or hearing. Finally, it is my understanding that a party cannot issue a subpoena for a third-party during a term of General Sessions court in the absence of a specified hearing with notice. An example of this third scenario would be an appearance date for a determination on whether an individual charged will accept a plea offer or proceed forth to trial, but no other hearing has been

scheduled. It is my interpretation that these rules apply to all parties in the criminal litigation.

Could you please offer your opinion as to the addition of the language “specified court proceeding,” as that appears in the new Rule 13, SCRCrimP, as well as in the Note to the 2019 Amendment, particularly as it pertains to obtaining documents from third parties, and when and how such documents may be obtained.

LAW/ANALYSIS

Rule 13(a)(1) of the South Carolina Rules of Criminal Procedure currently provides:

(a)(1) *Issuance of Subpoenas.* Upon the request of any party, the clerk of court shall issue subpoenas or subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court. An attorney, as an officer of the court, may also issue and sign subpoenas or subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court. The subpoena shall state the name of the court, the title of the action, and shall command each person to whom it is directed to attend and give testimony, or otherwise produce documentary evidence at a specified court proceeding. The subpoena shall also set forth the name of the party requesting the appearance of such witness and the name of counsel for the party, if any. The clerk of court or attorney issuing the subpoena shall utilize a court-approved subpoena form.

Rule 13(a)(1), SCRCrimP (2019) (emphasis added).

The Note to the 2019 amendment explains that amended Rule 13(a)(1) “makes clear that subpoenas may only be issued to summon a witness to appear or present documentary evidence at a court proceeding.” *Id.*, Note to 2019 Amendment (emphasis added).

In order to interpret Rule 13(a)(1), we must consider the rules of statutory construction.¹ In a prior opinion, we stated the following:

¹ The rules of statutory construction apply to interpreting rules of criminal procedure. See Commonwealth v. Hightower, 438 Pa.Super. 400, 652 A.2d 873, 873 n. 1 (1995) (citing Pa.R.Crim.P. 2); Kazadi v. People, 2012 CO 73, 291 P.3d 16 (2012); State v. Simon, 229 Ariz. 60, 62, 270 P.3d 887, 889 (Ct. App. 2012).

[T]he cardinal rule of statutory interpretation is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). Further, it is a general rule of construction with any statute that the Legislature is presumed to have intended by its action to accomplish something and not to have done a futile thing. State ex rel McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

Op. S.C. Atty. Gen., 2012 WL 4459270 (September 19, 2012).

Pursuant to the language of Rule 13(a)(1) and its Note, subpoenas and subpoenas duces tecum may only be issued to summon a witness to appear or present documentary evidence at a specified court proceeding. The term “specified court proceeding” is not defined by the rule and this Office has been unable to find an appellate court case interpreting the term. We were able to find the definition of a “proceeding,” which is defined in reference to “Broadcasting, Televising, Recording or Photographing Court Proceedings,” as “any trial, hearing, motion, argument or other matter held in open court which the public is entitled to attend.”² Rule 605, SCACR.

The federal criminal rule regarding subpoenas, Rule 17, differs from our state criminal rule by expressly permitting, with court approval, a subpoena duces tecum to be issued for the production of documents prior to trial or before it is to be offered into evidence. However, it still provides guidance with interpreting Rule 13(a)(1). It states:

(a) Content. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena--signed and sealed--to the party requesting it, and that party must fill in the blanks before the subpoena is served

² According to Black's Law Dictionary, the term “open court” means:

[e]ither a court which has been formally convened and declared open for the transaction of its proper judicial business, or a court which is freely open to spectators.

(c) Producing Documents and Objects.

(1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them

Fed. R. Crim. P. 17 (emphasis added).

In United States v. Fletcher, 461 F. Supp. 2d 1101, 1102–03 (D. Ariz. 2006), the court generally discussed the issuance of subpoenas duces tecum under federal Rule 17:

Rule 17(c), Federal Rules of Criminal Procedure, governs the issuance of subpoenas for production of documents and other items in criminal cases. The rule may only be used to obtain materials which would be admissible as evidence in a criminal proceeding. Subpoenas issued pursuant to Rule 17(c) are not discovery devices . . . It is fundamental that there must be a proceeding pending before the Court to which the subpoenaed material relate before the subpoena may issue.

(cites omitted).

It was determined in United States v. Flynn, 103 F. Supp. 925 (S.D.N.Y. 1951), that subpoenas can only be issued if there is a scheduled hearing. In this case, the defendants served subpoenas on the United States Attorney-General, the Director of the Federal Bureau of Investigation, and the New York Special Agent in connection with a motion to suppress evidence of wire-tapping. The court found that no useful purpose would be served by hearing the motion and denied it. The court quashed the subpoenas, finding:

These subpoenas were served in connection with the defendants' motion to suppress evidence of wire-tapping, etc. Since this case is not on trial, the subpoenas pre-suppose a hearing on this question of illegal evidence. I have, however, denied the motion for a hearing.

Therefore, the subpoenas, having no independent standing, should be quashed.

United States v. Flynn, 103 F. Supp. 925, 931 (S.D.N.Y. 1951) (cites omitted).

Several courts have rejected the prosecution's use of subpoenas to compel witnesses to appear at pretrial interviews. The Sixth Circuit Court of Appeals held that "[t]he government's action of obtaining blank trial subpoenas from the court clerk and of using them to compel witnesses to attend an interview miles from the place of trial and at a proceeding other than an authorized one was highly improper." United States v. Keen, 509 F.2d 1273, 1274 (6th Cir. 1975). Citing Rule 17 of the Federal Rules of Criminal Procedure, the court stated:

This rule permits a subpoena ad testificandum or a subpoena duces tecum to be issued only for the purpose of compelling the attendance of witnesses or the production of evidence at a formal proceeding. Only in the case of a subpoena duces tecum may the court direct that the evidence subpoenaed be produced for inspection before trial or before it is to be offered in evidence. The government's action was clearly unauthorized and improper.

Id. at 1274 (cites omitted).

The Eighth Circuit Court of Appeals agreed with the decision in the Keen case:

The practice of using trial subpoenas to compel witnesses to attend pretrial conferences is improper under Rule 17 of the Federal Rules of Criminal Procedure. Several courts have interpreted Rule 17 to permit a subpoena to be issued only for the purpose of compelling the attendance of witnesses or the production of evidence at formal proceedings, such as grand jury proceedings, preliminary hearings, and trials. *See United States v. Keen*, 509 F.2d 1273, 1274–75 (6th Cir.1975); *United States v. Hedge*, 462 F.2d 220, 222–23 (5th Cir.1972); *United States v. Standard Oil Co.*, 316 F.2d 884, 897 (7th Cir.1963). The government may not use trial subpoenas to compel prospective trial witnesses to attend pretrial interviews with government attorneys. *Id.*

United States v. LaFuente, 991 F.2d 1406, 1411 (8th Cir. 1993) (emphasis added).

Citing LaFuente, the Tenth Circuit Court of Appeals stated: “[c]ourts have consistently interpreted Fed.R.Crim.P. 17(a) to permit the issuance of subpoenas only to compel attendance at formal proceedings such as hearings and trials.” United States v. Villa-Chaparro, 115 F.3d 797, 804 (10th Cir. 1997).

Under the federal criminal rule, subpoenas and subpoenas duces tecum are issued for the purpose of compelling the attendance of witnesses and the production of documents and other items at a scheduled formal proceeding, such as a hearing or trial. A subpoena duces tecum can only be used to obtain materials which are admissible as evidence and are related to the hearing or trial.

With court approval, subpoenas can be used to obtain documents prior to the trial or before they are to be offered into evidence.

South Carolina Criminal Rule 13(a)(1) does not provide for subpoenas duces tecum to be issued for the production of documents prior to trial or before they are to be offered into evidence. However, the South Carolina rule has other characteristics of the federal rule. Rule 13(a)(1) provides for subpoenas duces tecum to be issued for the production of “documentary evidence” at a specified court proceeding. The use of this term indicates that subpoenas duces tecum can only be used to compel the production of evidence in a court proceeding.

The Note to amended Rule 13(a)(1) explains that “subpoenas may only be issued to summon a witness to appear or present documentary evidence at a court proceeding.” Rule 13(a)(1), SCRCrimP, Note to 2019 Amendment (emphasis added). Because evidence is to be presented in court, it is our opinion that a “court proceeding” is a formal proceeding, such as a hearing or trial. This interpretation of a “court proceeding” is supported by the definition of a “proceeding” in the South Carolina Appellate Court Rules which was provided above.³

Since Rule 13(a)(1) also provides that subpoenas duces tecum are to be used for the production of documentary evidence at a “specified” court hearing, we will review the definition of the word “specified.” The word “specify” is defined as “to explain or describe something clearly and exactly.” See <https://dictionary.cambridge.org/us/dictionary/english/specify>. Black’s Law Dictionary defines “specify” as:

To mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize, or to distinguish by words one thing from another.

Black’s Law Dictionary (6th ed. 1990). The word “specifically” means “in a specific manner; explicitly, particularly, definitely.” Id.

Pursuant to Rule 13(a)(1) and its Note, subpoenas and subpoenas duces tecum are to be issued to summon a witness to appear or present documentary evidence at a clearly described, specific, and definite court proceeding. In our opinion, this anticipates a court proceeding which has already been scheduled.

³ See Rule 605, SCACR (a “proceeding” is “any trial, hearing, motion, argument or other matter held in open court which the public is entitled to attend”). See also Black’s Law Dictionary (6th ed. 1990) (“This term [open court] may mean either a court which has been formally convened and declared open for the transaction of its proper judicial business, or a court which is freely open to spectators”).

Although the language of South Carolina's civil rule regarding subpoenas, Rule 45, differs from the State's criminal rule, it also provides guidance with interpreting Rule 13(a)(1). It states:

(a) Form; Issuance.

(1) Every subpoena shall:

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced . . .

Rule 45, SCRCivP (emphasis added).

Rule 45 expressly permits a subpoena duces tecum to be issued separately from a trial, hearing, or deposition. It also allows a subpoena duces tecum to be used for either the production of evidence or the inspection of documents and other materials. Under the civil rule, a subpoena duces tecum can be issued for purposes of pre-trial investigation.

In contrast, the language of Rule 13(a)(1) and its Note only permits subpoenas and subpoenas duces tecum to be issued to summon a witness to appear or present documentary evidence at a specified court proceeding, which we believe to be a scheduled hearing or trial. The language does not provide for a subpoena duces tecum to be issued separately from a court proceeding or for the inspection of documents.

In a prior opinion, Op. S.C. Atty. Gen., 2005 WL 1024604 (April 5, 2005), this Office determined that in the absence of specific statutory authority or court rule, a magistrate was not authorized to issue a subpoena duces tecum. Based upon this opinion and the language of Rule 13(a)(1), it is our opinion that Rule 13(a)(1) does not grant the authority for a subpoena duces tecum to be issued for the inspection of documents prior to a hearing or trial.

The Honorable David R. Wagner
Page 8
May 22, 2020

In summary, Rule 13(a)(1) uses the terms “documentary evidence” and “specified court proceeding.” Giving these terms their plain and ordinary meaning, we believe that the intent was for parties to issue subpoenas duces tecum solely to compel the production of evidence in a scheduled formal proceeding, such as a hearing or trial. Because Rule 13(a)(1) lacks the express authority of Fed. R. Crim. P. 17 and Rule 45, SCRCivP, it is our opinion that the parties are not authorized to issue subpoenas duces tecum for the inspection of documents prior to a hearing or trial.

We will now address each of the statements in your opinion request letter, construing them as questions.

- 1) Was the addition of the term “specified court proceeding” to Rule 13(a)(1) to clarify that compelled production of documents from third parties, in criminal proceedings only, can only be conducted where there is a specified hearing and/or trial for which they are necessary?

Because Rule 13(a)(1) uses the terms “documentary evidence” and “specified court proceeding,” we believe that the intent was for the parties to only issue subpoenas duces tecum to compel third parties to produce evidence at a scheduled hearing or trial.

- 2) Is it correct that a third-party cannot be compelled via Rule 13 to produce documents at an earlier date and time than the court proceeding, unlike Rule 45, SCRCivP, which allows for the production of documents separate from a court proceeding?

Because Rule 13(a)(1) lacks the express authority of both Fed. R. Crim. P. 17 and Rule 45, SCRCivP, it is our opinion that the parties are not authorized to issue subpoenas duces tecum for the inspection of documents prior to a court proceeding in the manner described here.

- 3) Is it correct that a party cannot move the court for a third-party to produce documents, and in essence manufacture, a “court proceeding” for the purposes of gathering documentation prior to a trial or hearing?

As stated above, we believe that the intent in Rule 13(a)(1) was for the parties to only issue subpoenas duces tecum to compel third parties to produce evidence at a scheduled hearing or trial. Because of the lack of express authority, it is our opinion that the parties are not authorized to issue subpoenas duces tecum for the inspection of documents prior to a court proceeding.

A court may well find that an effort to “manufacture” a court proceeding in the manner that you describe here is improper under Rule 13(a)(1) under the facts of a particular case. However, any procedural questions of that kind are necessarily fact-specific, and unlike a court, we cannot adjudicate facts or make independent findings of fact in an opinion.

- 4) Is it correct that a party cannot issue a subpoena for a third-party during a term of General Sessions court in the absence of a specified hearing with notice? An example of this third scenario would be an appearance date for a determination on whether an individual charged will accept a plea offer or proceed forth to trial, but no other hearing has been scheduled.

Based upon the use of the terms “documentary evidence” and “specified court proceeding,” we have concluded that a party can only issue a subpoena duces tecum to compel the production of evidence in a scheduled formal proceeding, such as a hearing or trial. However, the Note to amended Rule 13(a)(1) clarifies that “subpoenas may only be issued to summon a witness to appear or present documentary evidence at a court proceeding.” Rule 13(a)(1), SCRCrimP, Note to 2019 Amendment (emphasis added). Accordingly, a court may well find that the appearance that you describe is not a “court proceeding” as contemplated by the rule. However, we must reiterate that any procedural questions of that kind are necessarily fact-specific, and unlike a court, we cannot adjudicate facts or make independent findings of fact in an opinion. This will be another matter to be decided by a court in the context of an individual case.

- 5) Do these rules apply to all parties in the criminal litigation?

Rule 13(a)(1) clearly states that “[u]pon the request of any party, the clerk of court shall issue subpoenas or subpoenas duces tecum” Rule 13(a)(1), SCRCrimP, supra (emphasis added). It also clearly provides that “[t]he subpoena shall also set forth the name of the party requesting the appearance of such witness and the name of counsel for the party, if any.” Id. (emphasis added). Based upon this language, we believe that Rule 13(a)(1) applies to all parties.

CONCLUSION

Rule 13(a)(1) of the South Carolina Rules of Criminal Procedure uses the terms “documentary evidence” and “specified court proceeding.” Giving these terms their plain and ordinary meaning, we believe that the intent was for parties to issue subpoenas duces tecum solely to compel the production of evidence in a scheduled formal proceeding, such as a hearing or trial. Because Rule 13(a)(1) lacks the express authority of Fed. R. Crim. P. 17 and Rule 45, SCRCivP, it is our opinion that the parties are not authorized to issue subpoenas duces tecum for the inspection of documents prior to a hearing or trial. However, the South Carolina Supreme Court may wish to provide clarification of this issue.

Furthermore, we emphasize that any procedural questions of the kind presented in your letter are necessarily fact-specific, and unlike a court, we cannot adjudicate facts or make independent findings of fact in an opinion. Many of the questions presented here are matters to be decided by a court in the context of an individual case. Our purpose in this opinion has been to offer what guidance we can to aid you in your work, and is not an attempt to comment on any particular

The Honorable David R. Wagner
Page 10
May 22, 2020

criminal proceeding. While we have offered what guidance we can, we ultimately must defer to the courts on application of this rule out of respect for the separation of powers set forth in the South Carolina Constitution. See Orr v. Clyburn, 277 S.C. 536, 290 S.E.2d 804 (1982); S.C. Const. art. I, § 8; S.C. Const. art.V.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General