

Subpoenas (CR 45)

Subpoenas Generally

A Subpoena is a command from a court or officer that directs a person to give testimony or produce and permit inspections 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. CR 45 (a)(1)(C).

A subpoena to attend and testify or to produce documents and material may be joined in a single form or issued separately. CR 45 (a)(3).

“Any person may be compelled to attend as a witness before any court, judge, commissioner, or referee, in any civil action or proceeding in this state.” RCW 5.56.010. Fees for travel, meals, and lodging shall be paid for compelled attendance. *Id.*

Subpoena Duces Tecum - Compelling Production of Documents or other Tangible Things

A party can be compelled to produce documents or other tangible evidence by a Request for Production under CR 34. CR 30(b)(5). “**A party** may be compelled to produce evidence at a deposition or permit inspection only in accordance with rule 34.” CR 45 (a)(3). A party may want to use a subpoena duces tecum against a party as opposed to a Request for Production which allows the producing party 30 days to respond. CR 34(a)(3)(A). The rule is generally interpreted to allow an opposing party the full 30 days to respond to a subpoena duces tecum or a request for production, so this tactic is not truly available.

Conversely, CR 34 notes that “[t]his rule [on requests for production] does not preclude an independent action or a subpoena issued pursuant to rule 45 against a person not a party for production of documents and things and permission to enter upon land.” CR 34 (c).

The rule on subpoenas is not specific as to the minimum amount of time required to provide a subpoenaed witness to respond. Presumably, “a reasonable amount of time” would be required, a deposition by oral examination requires at least 5 days notice but CR 45(c)(2)(B) indicates that a subpoenaed witness may note an objection to the subpoena within 14 days of service of the subpoena.

Further, a subpoena duces tecum must also be served on all parties, at least 5 days prior to the date the non-party witness is served with the subpoena duces tecum.

Therefore, it is probably cleanest to serve a subpoena duces tecum on all parties at least 19 days before the deadline for production established by the subpoena and then served on the witness from whom production is sought 5 days after that with at least 14 days allowed for production.

Service on a party

A subpoena of a represented party shall be served on counsel for that party, as required by the Civil Rules, “[w]henver under the rules service is required or permitted to be made upon a party

represented by an attorney the **service shall be made upon the attorney** unless service directly upon a party represented by an attorney is ordered by the court.” CR 5(b)(1).

If the deponent ignores the subpoena

To disregard or ignore a subpoena subjects the party/deponent to sanctions under CR 37 or a finding of contempt under RCW 7.21. This chapter explicitly identifies that “[r]efusal of a witness to appear, be sworn, or, without lawful authority to answer a question” constitutes contempt of court. RCW 7.21.010. Further, “[i]f any person duly served with a subpoena and obliged to attend as a witness, shall fail to do so, without any reasonable, he or she shall be liable to the aggrieved party for all damages occasioned by such failure, to be recovered in a civil action” RCW 5.56.060

Any potential ambiguity about disobedience of a subpoena is clarified by the Civil Rule on subpoenas which states, “[f]ailure 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.” CR 45(g).

Such disobedience of a subpoena exposes that deponent (and potentially their attorney) to sanctions.

The Court has broad authority in the form of the sanction that can be imposed. Willful and deliberate failure to appear for a deposition constitutes a basis for sanctions, potentially including dismissal. *Peterson v. Cuff*, 72 Wn. App. 596 (1994).

If a party fails to appear at their deposition, or “if a party or an officer, director, managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to appear before the officer who is to take his or her deposition, after being served with a proper notice” “the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, **the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.**” CR 37(d)(3).

Further, if a deponent believes that there is a basis for objection to a subpoena or grounds to quash a subpoena, it is that deponent’s burden to assert that basis and seek a protective order.

“**The failure to act** described in this subsection **may not be excused** on the ground that the discovery sought is objectionable **unless the party failing to act has applied for a protective order** as provided by rule 26(c).” CR 37(d)(3).

Supposedly defective service provides a basis for an objection that must be asserted. Unilateral non-compliance is not permitted under the rules, but rather, a protective order may be sought. CR 26(c). “**In order to avoid the deposition, [the deponent] needed to seek a protective order under CR 26(g)**. She failed to do so, and consequently, was subject to sanctions.” *Ivy v. Brown*, 139 Wn. App. 1017 (2007).