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## CIVIL PRACTICE

### *Subpoenas: Allow Issuance of Subpoenas for Depositions by Attorneys*

|                 |  |
|-----------------|--|
| CODE SECTION:   | O.C.G.A § 9-11-45 (amended)  |
| BILL NUMBER:    | HB 321   |
| ACT NUMBER:     | 54   |
| GEORGIA LAWS:   | 1997 Ga. Laws 457  |
| SUMMARY:        | The Act concerns issuing subpoenas for taking depositions and for producing documents and tangible things at deposition. The Act provides that, upon agreement of the parties, an attorney may compel the presence of a witness at a deposition or command the production of documents and tangible things at the examination by issuing a subpoena under the attorney's own signature. However, an attorney may personally issue a subpoena for deposition or production only on behalf of a court in which the attorney is authorized to practice or a court for a venue where the deposition is to be taken and the deposition pertains to an action pending in a court in which the attorney is authorized to practice. An attorney can still obtain a subpoena from the clerk of the court if he or she so desires. |
| EFFECTIVE DATE: | July 1, 1997   |

#### *History*

Prior to the 1997 Session, the State Bar of Georgia (SBG) asked Representative Scott Tolbert of the 25th District to introduce legislation to amend Georgia law regarding the issuance of subpoenas.<sup>1</sup> The SBG wanted to make it easier for Georgia attorneys to compel the presence of witnesses at depositions by conforming Georgia law to the Federal Rules of Civil Procedure.<sup>2</sup> Under former Georgia law, if an attorney wanted to compel the presence of a person at a deposition, the attorney was required to obtain a subpoena from the "clerk of the superior court of the county in which the action [was] pending or the clerk of any court of record in the county where the deposition [was] to be taken."<sup>3</sup>

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1. See Telephone Interview with Rep. Scott Tolbert, House District No. 25 (Apr. 23, 1997) [hereinafter Tolbert Interview].

2. See *id.*

3. 1972 Ga. Laws 510, § 11 (formerly found at O.C.G.A. § 9-11-45(a)(1) (1993)).

In comparison, the Federal Rules of Civil Procedure state that an attorney as an officer of the court may

issue and sign a subpoena on behalf of (A) a court in which the attorney is authorized to practice; or (B) a court for a district in which a deposition or production is compelled by subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.<sup>4</sup>

In drafting HB 321, Representative Tolbert's intent was to have Georgia law concerning the issuance of subpoenas mirror federal law.<sup>5</sup>

### HB 321

#### *Introduction*

The original version of HB 321 adopted the language of the Federal Rules of Civil Procedure and allowed an attorney to compel the presence of a person at a deposition by permitting the attorney to issue a subpoena under his or her own signature.<sup>6</sup> However, Representative Tom Murphy, Speaker of the House, opposed the original version of HB 321 because he did not want Georgia law to imitate federal law.<sup>7</sup> Speaker Murphy introduced a substitute to HB 321 on the House floor.<sup>8</sup> The substitute, which was the final version of the bill, states that an attorney can issue a subpoena under his or her own signature only if he or she obtains the agreement of all parties.<sup>9</sup>

The Act makes it easier for an attorney to obtain and issue subpoenas for depositions.<sup>10</sup> Formerly, an attorney was required to obtain subpoenas for depositions from the clerk of the court in the county in which the action was pending or where the deposition was to be taken.<sup>11</sup> The Act provides that an attorney may bypass the clerk of the court and issue a subpoena for deposition under his or her own

4. FED. R. CIV. P. 45(a)(3).

5. See Tolbert Interview, *supra* note 1.

6. Compare HB 321, as introduced, 1997 Ga. Gen. Assem., with FED. R. CIV. P. 45(a)(3).

7. See Tolbert Interview, *supra* note 1.

8. See Final Composite Status Sheet, Mar. 28, 1997; see also Tolbert Interview, *supra* note 1.

9. See Final Composite Status Sheet, Mar. 28, 1997. Compare HB 321, as introduced, 1997 Ga. Gen. Assem. with O.C.G.A. § 9-11-45 (Supp. 1997) (inserting clause in subparagraph (B) of paragraph (1) of subsection (a) that reads "[u]pon agreement of the parties," which requires an attorney to obtain the consent of the opposing party before issuing a subpoena under his or her own signature).

10. O.C.G.A. § 9-11-45 (Supp. 1997); see Tolbert Interview, *supra* note 1.

11. See 1972 Ga. Laws 510, § 11 (formerly found at O.C.G.A. § 9-11-45(a)(1) (1993)).

signature as long as he or she obtains the consent of the opposing party.<sup>12</sup> An attorney can also obtain a subpoena from the clerk of the court if he or she so desires.<sup>13</sup>

### *Changes to Former Law*

The Act amends former law concerning the issuance of subpoenas by dividing paragraph (1) of subsection (a) of former Code section 9-11-45 into three subparagraphs and by adding new subparagraph (B).<sup>14</sup> New subparagraph (B) states as follows:

Upon agreement of the parties, an attorney, as an officer of the court, may issue and sign a subpoena for the person sought to be deposed on behalf of a court in which the attorney is authorized to practice or a court for a venue in which a deposition is compelled by the subpoena if the deposition pertains to an action pending in a court in which the attorney is authorized to practice.<sup>15</sup>

This new subparagraph, which allows an attorney, upon agreement of the parties, to issue subpoenas for deposition under his or her own signature, contains the substantive changes to former law. The Act also adds language to what is now new subparagraph (C) to conform with new subparagraph (B).<sup>16</sup> New subparagraph (C) concerns the issuance of subpoenas for the production of documents at depositions, and the Act also allows an attorney to subpoena documents at a deposition under his or her own signature.<sup>17</sup>

### *Various Versions of HB 321*

The original version of HB 321 closely paralleled Rule 45(a)(3) of the Federal Rules of Civil Procedure.<sup>18</sup> However, HB 321 went through a few changes before it was finally passed into law.<sup>19</sup> The original version of the bill contained no clause requiring an attorney to obtain the agreement of all parties before issuing a subpoena for deposition.<sup>20</sup>

12. O.C.G.A. § 9-11-45 (Supp. 1997).

13. *See id.* § 9-11-45(a).

14. *Compare* 1972 Ga. Laws 510, § 11 (formerly found at O.C.G.A. § 9-11-45(a)(1) (1993)), *with* O.C.G.A. § 9-11-45(a)(1)(B) (Supp. 1997).

15. O.C.G.A. § 9-11-45(a)(1)(B) (Supp. 1997).

16. *Compare* 1972 Ga. Laws 510, § 11 (formerly found at O.C.G.A. § 9-11-45(a)(1) (1993)), *with* O.C.G.A. § 9-11-45(a)(1)(B) (Supp. 1997); *see also* Tolbert Interview, *supra* note 1.

17. O.C.G.A. § 9-11-45(a)(1)(C) (Supp. 1997).

18. *See* Tolbert Interview, *supra* note 1.

19. *Compare* HB 321, as introduced, 1997 Ga. Gen. Assem., *with* HB 321 (HCS), 1997 Ga. Gen. Assem., *and* O.C.G.A. § 9-11-45 (Supp. 1997).

20. *Compare* HB 321, as introduced, 1997 Ga. Gen. Assem., *with* O.C.G.A. § 9-11-

It also excluded some of the conforming language that was later added to subparagraph (C).<sup>21</sup>

After its initial reading in the House of Representatives, HB 321 went to the House Judiciary Committee for review.<sup>22</sup> The Committee added a clause to what is now new subparagraph (C).<sup>23</sup> As introduced, new subparagraph (C) of HB 321 stated that when subpoenas were issued pursuant to this bill, the subpoena had to "be issued and served in accordance with law governing issuance of subpoenas for attendance at court."<sup>24</sup> It then stated that the subpoena could command the deponent to produce documents and tangible things at his or her deposition.<sup>25</sup> The Committee was worried that attorneys might interpret the bill, as it was originally drafted, as stating that attorneys would have to obtain a subpoena from the clerk of the court when they wanted to command the production of documents at a deposition.<sup>26</sup> To avoid this confusion, the Committee added a clause to new subparagraph (C) to conform it to new subparagraph (B).<sup>27</sup> According to this conforming language, which reads "except as to issuance by an attorney," an attorney does not have to obtain a subpoena from the court clerk for deposition and production if the attorney wishes to issue the subpoena under his or her own signature.<sup>28</sup>

When the Committee substitute went before the House for a vote, Speaker Murphy proposed a floor substitute to HB 321.<sup>29</sup> He proposed that a clause be added to new subparagraph (B) of the bill.<sup>30</sup> This clause requires an attorney to obtain the agreement of all parties to the action before the attorney can issue a subpoena under his or her own signature.<sup>31</sup> Speaker Murphy's substitute passed and was included in the final version of the bill signed by the Governor.<sup>32</sup> Thus, under the Act, an attorney may now compel the presence of any witness at a

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45 (Supp. 1997).

21. Compare HB 321, as introduced, 1997 Ga. Gen. Assem., with HB 321 (HCS), 1997 Ga. Gen. Assem.

22. See Final Composite Status Sheet, Mar. 28, 1997

23. See HB 321 (HCS), 1997 Ga. Gen. Assem. (inserting clause that reads "except as to issuance by an attorney").

24. HB 321, as introduced, 1997 Ga. Gen. Assem.

25. See *id.*

26. See Tolbert Interview, *supra* note 1.

27. See *id.*; HB 321 (HCS), 1997 Ga. Gen. Assem. (adding clause that reads "except as to issuance by an attorney").

28. See HB 321 (HCS), 1997 Ga. Gen. Assem.

29. See O.C.G.A. § 9-11-45 (Supp. 1997).

30. Compare O.C.G.A. § 9-11-45(a)(1)(B) (Supp. 1997), with HB 321, as introduced, 1997 Ga. Gen. Assem.

31. O.C.G.A. § 9-11-45(a)(1)(B) (Supp. 1997) (adding clause that reads "[u]pon agreement of the parties. . .").

32. See Final Composite Status Sheet, Mar. 28, 1997.

deposition by issuing a subpoena under his or her own signature. The only limitation is that the attorney must obtain the consent of the other parties in order to do so.<sup>33</sup>

*Effect of the Act on Issuing Subpoenas: Parties to the Action*

The Act has little effect on taking depositions of parties to the action, as opposed to taking depositions of non-party witnesses.<sup>34</sup> Under former law, if an attorney wanted to depose a non-party witness, the attorney had to obtain a subpoena from the clerk of the court in order to compel the non-party witness' presence at the deposition.<sup>35</sup> However, if an attorney wanted to depose a party to the action, no subpoena was required.<sup>36</sup> Rather, the common practice of attorneys was to contact opposing counsel to schedule a mutually convenient time and place for taking the opposing party's deposition.<sup>37</sup> If both parties reached an agreement as to when and where the deposition was to occur, the deposing attorney filed a notice of deposition with the court clerk pursuant to Code section 9-11-30 and served it on the opposing party.<sup>38</sup> Similarly, if an attorney wanted a party to produce documents at his or her deposition, the attorney did not have to obtain a subpoena; rather, he or she attached a request to produce documents, pursuant to Code section 9-11-34, along with the notice of deposition.<sup>39</sup> In fact, issuing a subpoena to an opposing party was considered bad form, and the attorney issuing such a subpoena was viewed as being overly litigious.<sup>40</sup> Subpoenas were not necessary because if a party failed to appear or produce documents at a deposition, the notice of deposition or the request to produce documents could be enforced with a motion to compel, pursuant to Code section 9-11-37.<sup>41</sup>

33. See O.C.G.A. § 9-11-45 (Supp. 1997); see also Tolbert Interview, *supra* note 1.

34. See Tolbert Interview, *supra* note 1; Telephone Interview with Rep. Ben Allen, House District No. 117 (Apr. 22, 1997) [hereinafter Allen Interview].

35. See 1972 Ga. Laws 510, § 11 (formerly found at O.C.G.A. § 9-11-45(a)(1) (1993)); see also Warehouse Home Furnishings Distrib. v. Davenport, 261 Ga. 853, 853-54, 413 S.E.2d 195 (1992).

36. See Tolbert Interview, *supra* note 1; Allen Interview, *supra* note 34; *infra* notes 37-41 and accompanying text; see also Davenport, 261 Ga. at 853-54, 413 S.E.2d at 196.

37. See Tolbert Interview, *supra* note 1; Allen Interview, *supra* note 34.

38. See Tolbert Interview, *supra* note 1; Allen Interview, *supra* note 34; 1993 Ga. Laws 1315, § 4 (codified at O.C.G.A. § 9-11-30(b) (1996)).

39. See Tolbert Interview, *supra* note 1; 1993 Ga. Laws 1315, § 4 (codified at O.C.G.A. § 9-11-30(b)(5) (1996)); 1988 Ga. Laws 375, § 1 (codified at O.C.G.A. § 9-11-34 (1993)).

40. See Tolbert Interview, *supra* note 1, Allen Interview, *supra* note 34.

41. See Tolbert Interview, *supra* note 1; 1992 Ga. Laws 6, § 9 (codified at O.C.G.A. § 9-11-37(d) (1993)).

*Effect of the Act on Issuing Subpoenas: Non-Party Witnesses*

The substantive effect of the Act concerns the issuance of subpoenas to disinterested non-party witnesses.<sup>42</sup> Prior to the Act, if an attorney wanted to depose a witness who was not a party to the action, the non-party witness inevitably would demand that a subpoena be served before he or she would appear at the deposition.<sup>43</sup> Thus, as previously stated, the deposing attorney had to obtain a subpoena from the clerk of the court.<sup>44</sup> An attorney could not force a non-party witness to appear at a deposition simply by serving a notice of deposition and a subsequent motion to compel.<sup>45</sup> After the passage of the Act, however, when a non-party witness demands that he or she be served with a subpoena prior to attending a deposition, an attorney no longer has to obtain a subpoena from the clerk of the court.<sup>46</sup> The attorney can compel the presence of a non-party witness at a deposition by issuing a subpoena under his or her own signature.<sup>47</sup>

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42. See Tolbert Interview, *supra* note 1.

43. See Telephone Interview with Joe Young, Legislative Counsel (Apr. 23, 1997) [hereinafter Young Interview].

44. See 1972 Ga. Laws 510, § 11 (formerly found at O.C.G.A. § 9-11-45(a)(1) (1993)); Young Interview, *supra* note 43.

45. See Tolbert Interview, *supra* note 1; Young Interview, *supra* note 43.

46. O.C.G.A. § 9-11-45 (Supp. 1997).

47. See *id.*