

of North Carolina Rule of Civil Procedure 45(d1) and ask the court to compel Plaintiffs to provide all Defendants a complete copy of materials received pursuant to a third party subpoena, as required by the rule.

FACTUAL BACKGROUND

Legislative Defendants previously hired Dr. Thomas Hofeller to assist in drawing state legislative redistricting plans in 2011 and 2017. Plaintiffs contend in this case that the legislative redistricting plans violate the North Carolina Constitution because of their alleged partisan motive and effect. Plaintiffs posit that Dr. Hofeller aided the North Carolina legislature in violating their civil rights, and their complaint references Dr. Hofeller repeatedly and characterizes him as an antagonist in their narrative.

Dr. Hofeller passed away in August of 2018. Plaintiffs in this case issued a third-party subpoena to Dr. Hofeller's daughter, Stephanie Lizon, seeking documents regarding North Carolina redistricting. Instead of limiting her response to materials involving North Carolina redistricting, Ms. Lizon produced a large quantity of electronic files to Plaintiffs, including information that is apparently sensitive personal information or otherwise nonresponsive to the subpoena. (*see generally* *Pla. Motion for Clarification*).

Nearly a week after receiving the materials from Ms. Lizon, Plaintiffs' counsel notified the other parties of their receipt of the materials pursuant to the subpoena. Counsel for Legislative Defendants thereafter requested a copy of all materials produced by Ms. Lizon, as required under Rule 45(d1). Rather than provide Legislative Defendants an opportunity to inspect and copy the files received by Plaintiffs, they proposed that their vendor search for and supposedly filter out personal information based on searches of keywords and then provide Defendants with a copy of the remainder of the documents at a total cost of \$3,500-\$4,000. Legislative Defendants' objected

to this process on the ground that all parties are entitled to an opportunity to inspect and copy materials received by another party through a subpoena and counsel for the parties are capable of protecting the confidentiality of any information that might be personal or sensitive.

Plaintiffs filed their Motion for Clarification on April 4, 2019, seeking the court's determination of whether Rule 45(d1), N.C. R. Civ. P., requires Plaintiffs to provide all parties with an opportunity to inspect and copy the materials produced pursuant to the subpoena to Ms. Lizon. On April 9, 2019, after filing the motion, Plaintiffs provided Defendants and Intervenors with an index of the materials produced by Ms. Lizon. The index consists of a list of electronic files over 7,000 pages long.

ARGUMENT

A. North Carolina Rule of Civil Procedure 45(d1) Requires Plaintiffs to Allow Other Parties an Opportunity to Inspect and Copy All Documents Received Pursuant to a Subpoena.

The plain language of North Carolina Rule of Civil Procedure 45(d1) states that the party responsible for serving a subpoena upon a third party “shall” serve notice of receipt of the materials within five business days of receiving it. The rule further states that the party “upon request, shall provide all other parties a reasonable opportunity to copy and inspect such material...” With respect to the materials received from Ms. Lizon, Plaintiffs have failed to comply with the plain language of Rule 45(d1).

No part of Rule 45(d1) permits a party to filter information before providing it to the requesting party. In fact, allowing filtering prior to the opportunity to copy and inspect would undermine the purpose of the rule itself. Permitting a party to filter out material received in response to a subpoena it deemed “private” or “irrelevant” would simply encourage all of the parties in the litigation to subpoena the same non-party in order to ensure that the party was receiving all information within that third party's possession and that was possessed by the party

issuing the subpoena. Under the plain meaning of the rule, all requesting parties, which here includes the Legislative Defendants, are entitled to inspect and copy all materials produced in response to the subpoena issued to Ms. Lizon.

The need for equal access to these materials is especially acute in this case. No one need doubt the good intentions of Plaintiffs' counsel to appreciate that they are legally obligated to represent the interests of their clients, and those clients are directly adverse to Dr. Hofeller. Plaintiffs subpoenaed Dr. Hofeller to prove his role as a bad actor in the 2011 and 2017 redistricting processes. Their position at this stage that they should set aside their adversity to Dr. Hofeller, and review his documents with his best interests in mind, and provide the other parties to this case only the materials they deem relevant creates a conflict of interest and is at odds with the adversarial nature of this proceeding. No other parties have any way to verify the integrity of this process, the criteria for weeding out documents, and how those criteria are applied in practice. Placing Plaintiffs' counsel in the position of protecting Dr. Hofeller's interests and the other litigants in the position of trusting them with no check on their discretion is untenable. Indeed, if anyone can claim to represent Dr. Hofeller's interests in this case, it is counsel to the Legislative Defendants, who have represented Dr. Hofeller in various capacities over the past four decades. In all events, the rules do not contemplate the one-sided review Plaintiffs propose, and that is, as shown, for good reason.

Plaintiffs cite no authority to the contrary. In support of their claim that Plaintiffs may filter out information before providing Defendants an opportunity to copy and inspect, Plaintiffs cite *Beam ex rel. Mauney v. Beam Rest Home, Inc.*, No. 13 cvs 4710, 2014 WL 4748600 (N.C. Super. Sept. 25, 2014). However, *Beam* involved a minority shareholder's right to inspect corporate records, not the right of litigants under Rule 45 to inspect and copy materials received pursuant to

a subpoena. The relevance of this case is hard to discern. Aside from being about a different legal authority, *Beam* addressed a minority shareholder's right to inspect *original* corporate records rather than to receive *copies*. *Id.* In fact, the court specifically stated that "Defendant had provided copies of all records..." and that "Plaintiff acknowledges that he has received copies of all the documents he has sought to inspect and copy in this action..." *Id.* at *2-3. In the instant case, however, Plaintiffs' are instead denying Legislative Defendants the opportunity to inspect and copy and *Beam* is therefore inapplicable here.

B. Legislative Defendants Offer More Acceptable Alternatives to Resolve This Matter Without Court Intervention.

Plaintiffs' counsel are not wrong to be concerned for Dr. Hofeller's privacy; this is a concern all litigants here share. But there are far better ways to proceed that are consistent with the rules of procedure, the adversarial nature of this proceeding, Plaintiffs' duties to their own clients (who, again, are adverse to Dr. Hofeller), and Dr. Hofeller's interest than Plaintiffs have proposed. Legislative Defendants outline several alternatives below.

I. Return the Documents to Ms. Lizon.

Legislative Defendants believe that Dr. Hofeller's daughter is in the best position to know what personal or sensitive information is on the hard drives and flash drives sent to Plaintiffs. Legislative Defendants propose that the court direct Plaintiffs to return all of the files to Ms. Lizon, request that she produce only files that are responsive to the subpoena, and provide instructions on how best to proceed. Ms. Lizon could then remove any personal, sensitive, information from the files. At this point, Plaintiffs do not even offer to return the data to Ms. Lizon—they simply give her the option to request that they do so. *See Pla. Motion for Clarification* at 6.

II. The Parties Receive All Materials and Engage in Negotiation Regarding Search Terms

Alternatively, the court should direct the Plaintiffs to provide all parties with a copy of the

files received and then direct the parties to confer and agree upon an out-of-court process whereby the parties identify non-responsive data and return the non-responsive data to Ms. Lizon or destroy it. The process could include, for instance, agreeing to a common set of search terms and allowing each parties' vendors to conduct the searches. This would allow the parties to confirm that the review sets all exclude the same files, ensure no documents were inadvertently excluded, allow a quality control check on the vendors performing the searches, and permit each party to bear themselves the cost of the search by their vendor.

III. Plaintiffs Identify Documents They Wish To Exclude on the Index Provided to the Parties.

On April 9, 2019, after filing a Motion for Clarification, Plaintiffs provided Legislative Defendants and Intervenors an index of documents produced by Ms. Lizon, which had been requested by Legislative Defendants. As another alternative, the court could direct Plaintiffs to identify on the index those files they believe are responsive to the subpoena. The other parties would then have an opportunity to decide whether they agree with Plaintiffs' list and could meet and confer to develop a common set of files on the index that would be extracted. The remaining files could be returned to Ms. Lizon or destroyed.

CONCLUSION

The court should require Plaintiffs to immediately provide the parties in this case with an opportunity to copy and inspect the material produced by Ms. Lizon. Alternatively, the court should direct the parties to confer and cooperate in a joint effort to exclude nonresponsive information in a way that allows all parties the ability to participate in the process of excluding the files.

This the 11th day of April, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing in the above titled action upon all other parties to this cause by:

- Hand delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via facsimile transmittal;
- By email transmittal;
- Depositing a copy here of, first class postage pre-paid in the United States mail, properly addressed to:

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This the 11th day of April, 2019.

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