

§ 6-334(A). Discovery from a nonparty without a deposition.

(a) Procedure.

(1) Scope. Any party may, by subpoena without a deposition:

(A) require the production for inspection, copying, testing, or sampling of designated books, papers, documents, tangible things, or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, and other data compilations from which information can be obtained) translated if necessary by the owner or custodian into reasonably usable form, that are in the possession, custody, or control of a person who is not a party and within the scope of Rule 26(b); or

(B) obtain entry upon designated land or other property within the scope of Rule 26(b) that is in the possession or control of a person who is not a party for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

(2) Notice. A party intending to serve a subpoena pursuant to this rule shall give notice in writing to every other party to the action at least 10 days before the subpoena will be issued. The notice shall state the name and address of the person who will be subpoenaed, the time and place for production or entry, and that the subpoena will be issued on or after a stated date. A designation of the materials sought to be produced shall be attached to or included in the notice.

Such notice may be given by a party other than a plaintiff at any time. Such notice may not be given by a plaintiff until the time at which Rule 30(a) would permit a plaintiff to take a deposition.

(3) Issuance. A subpoena may be issued pursuant to this rule, either by a request to the clerk of the court or by an attorney authorized to do so by statute, at any time after all parties have been given the notice required by subsection (2). The subpoena shall identify all parties who were given notice that it would be issued and the date upon which each of them was given notice. A subpoena pursuant to this rule shall include or be accompanied by a copy of this rule.

(4) Time, manner, and return of service. A subpoena pursuant to this rule shall be served either personally by any person not interested in the action or by registered or certified mail not less than 10 days before the time specified for compliance. The person making personal service shall make a return showing the manner of service to the party for whom the subpoena was issued.

(b) Protection of Other Parties.

(1) Objection Before Issued. Before the subpoena is requested or issued any party may serve a written objection on the party who gave notice that it would be issued. The objection shall specifically identify any intended production or entry that is protected by an applicable privilege, that is not within the scope of

discovery, or that would be unreasonably intrusive or oppressive to the party. No subpoena shall demand production of any material or entry upon any premises identified in the objection. If the objection specifically objects that the person served with the subpoena should not have the option to deliver or mail copies of documents or things directly to a party, the subpoena shall not be issued unless all parties to the lawsuit mutually agree on the method for delivery of the copies.

(2) Order. The party who gave notice that a subpoena would be issued may apply to the court in which the action is pending for an order with respect to any discovery for which another party has served a written objection. Upon hearing after notice to all parties the court may order that the subpoena be issued or not issued or that discovery proceed in a different manner, may enter any protective order authorized by Rule 26(c), and may award expenses as authorized by Rule 37(a)(4).

(3) Protective Order. After a subpoena has been issued any party may move for a protective order under Rule 26(c).

(c) Protection of the Person Served with a Subpoena.

(1) Avoiding Burden and Expense. A party or an attorney who obtains discovery pursuant to this rule shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court by which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings of the person subject to the subpoena and reasonable attorney fees.

(2) Responding to the Subpoena.

(A) A person served with a subpoena pursuant to this rule shall permit inspection, copying, testing, or sampling either where the documents or tangible things are regularly kept or at some other reasonable place designated by that person. If the subpoena states that the person served has an option to deliver or mail legible copies of documents or things instead of inspection, that person may condition the preparation of the copies on the advance payment of the reasonable cost of copying.

(B) A person served with a subpoena pursuant to this rule may, within 10 days after service of the subpoena, serve upon the party for whom the subpoena was issued a written objection to production of any or all of the designated materials or entry upon the premises. If objection is made, the party for whom the subpoena was issued shall not be entitled to production of the materials or entry upon premises except pursuant to an order of the court. If an objection has been made, the party for whom the subpoena was issued may, upon notice to all other parties and the person served with the subpoena, move at any time in the district court in the county in which the subpoena is served for an order to compel compliance with the subpoena. Such an order to compel production or to permit entry shall protect any person who is not a party or an officer of a party from significant expense resulting from complying with the command.

(3) Protections. On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(A) fails to allow reasonable time for compliance,

(B) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(C) subjects a person to undue burden.

(d) Duties in Responding to Subpoena.

(1) Production. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) Objection. When information subject to a subpoena is withheld on an objection that it is privileged, not within the scope of discovery, or otherwise protected from discovery, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the party who requested the subpoena to contest the objection.

(e) Coordination.

(1) Copies. If the party for whom the subpoena was issued creates or obtains copies of documents or things, that party shall make available a duplicate of such copies at the request of any other party upon advance payment of the reasonable cost of making the copies.

(2) Inspection. If a notice of intent to serve a subpoena designates that the subpoena will require entry upon land or other property for the purposes permitted by subsection (a)(1)(B), any other party shall, upon request to the party who gave the notice, be named in the subpoena as also attending at the same time and place.

COMMENT TO RULE 34A

Authority to issue a subpoena pursuant to this rule is governed by Neb. Rev. Stat. § 25-1273. The procedure is similar to the practice for nonparty nondeposition discovery under Fed. R. Civ. P. 45, with certain topics such as the time of prior notice and coordination of the disclosure more specifically defined. This procedure is optional, so a party may elect to use a deposition or any other available discovery procedure instead.

Rule 34A and Comment adopted December 12, 2001; Rule 34A(c)(2)(B) amended May 19, 2004; Rule 34A(a)(1)(A), 34A(a)(2), 34A(b)(1), 34A(c)(2)(A-B) amended June 4, 2008, effective June 18, 2008. Renumbered and codified as § 6-334(A), effective July 18, 2008.