From: Robert Butcher
To: Rule13comments
Subject: Rule 13(a)(2)
Date: Friday, December 15, 2017 10:19:06 AM

Personal or Confidential Information needs to be defined. The definition will vary widely depending on what side of the isle you sit – is a subpoena for all incident reports from law enforcement considered personal or confidential? I can see a solicitor arguing that, when it is in fact public information.

Most personal or confidential information is protected under state and federal privacy statutes such as HIPAA and FERPA, DJJ, and SCDSS confidentiality statutes. I strongly believe that this only creates a chance for solicitors to attempt to limit discovery by creating judge made rules and you will have different definitions of "Personal or Confidential Information" from one circuit to another.

Robert J. Butcher

221 Glenwood Drive
Manning, South Carolina 29102

Post Office Box 486
Manning, South Carolina 29102

Phone: (803) 432-7599
Facsimile: (803) 432-7466
E-mail: rbutcher@camdensc-law.com
Website: www.camdensc-law.com

From: Robert Childs
To: Rule13comments
Subject: Rule 13(a) Amendment.
Date: Monday, December 18, 2017 5:23:57 PM

The authority of the attorney to issue subpoenas in General Sessions Court is an important and vital amendment to the Rules. Additionally, sub-section 2 provides an important safeguard for the disclosure of confidential information concerning the victim and properly advises defense attorneys as to the procedure to follow. Therefore, I support both amendments.

However, the Court should also look at clarifying several issues that continue to create problems with unwary counsel. One, the Court should clarify that the other party should be copied with the subpoena upon its issuance. Two, the Court should clarify that either party may subpoena duces tecum records prior to the trial upon notice to the other party with an opportunity to quash or modify the subpoena, and. Three, the Court should add that this rule applies to Magistrate and Municipal Court.

At present some prosecutors and defense attorneys believe they do not have to directly copy the other party with subpoenas since its issued by the Clerk. Both the State and Defense need an opportunity to duces tecum records in advance of the trial. Duce Tecums are frequently used by the State while on the other hand it is sometimes alleged that the Defense may only Duces Tecum to the actual trial. Lastly, making the rule apply to Magistrate and Municipal Courts lends guidance to the City Judges and Magistrates and unburdens them from issuing subpoenas which rarely if ever are copied to either party but issued solely on the officer's warrant information.

Thank you for your consideration.

Truly,

Robbie Childs

Robert C. Childs, III
Childs Law Firm L.L.C.
2100 Poinsett Hwy., Suite D.
Greenville SC 29609
864-242-9997
Fax: 864-242-9914

KEVIN S. BRACKETT
SOLICITOR

December 20, 2017

Chief Justice Donald W. Beatty
S.C. Supreme Court
1231 Gervais Street
Columbia, SC 29201

Dear Chief Justice Beatty and Justices of the Supreme Court,

I am writing to comment on the proposed Rule 13 allowing the issuance of subpoena's by attorneys for cases pending in General Sessions. I have no issue with granting that authority to attorneys however I would propose that the language be modified slightly to make it clear that the subpoenas cannot be used by either the state or the defense to demand production of documents or testimony outside of a court hearing for which both parties are noticed.

In the past I have seen subpoenas issued which purport to direct the individual or corporation served to produce the documents sought at the office of the attorney requesting the subpoena. While section (2) of the proposed rule would protect victim's records from being subject to such a subpoena there is nothing that would protect anyone else from having their privacy invaded by an aggressive attorney foraging for information that could be useful to their case.

I do not believe that this is the intention of the proposed rule and a simple clarification could remove any room for argument:

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 a subpoena 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 *in court*, or otherwise produce documentary evidence *at a future court hearing* with the time and place therein specified. The subpoena shall also

MOSS JUSTICE CENTER
1675-1A YORK HIGHWAY • YORK, SOUTH CAROLINA 29745-7422
(803) 628-3020 • FAX: (803) 628-3025

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.

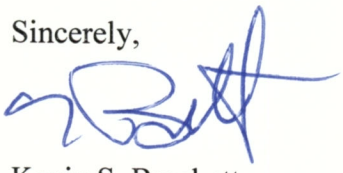
The notes could clarify this further by saying:

The 2018 amendment provides that an attorney is also authorized to issue and sign a subpoena on behalf of a court in which that attorney is licensed to practice. *It makes clear that subpoenas shall only be issued for the purpose of summoning witnesses to court to be called to the stand to give testimony or present documentary evidence. It is not to be used as a discovery tool.* The rule allowing an attorney to issue and sign a subpoena does not apply to any request for a subpoena for a witness located in another state, which is governed by the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. See S.C. Code. Ann. §§ 19-9-10 et seq. (2014). New paragraph (a)(2) adopts a version of the federal rule intended to provide a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. The amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party.

By requiring the production of documents under these circumstances the judiciary will continue to enjoy the authority to regulate carefully intrusions into the privacy of our state's citizens. South Carolina has always taken an exceptional interest in protecting the privacy of it's citizens as made clear by the addition of specific language to that effect in the 4th Amendment of the South Carolina Constitution. I believe the language I propose would make it crystal clear to the bar that the power to issue subpoenas will not be allowed to place this important right in jeopardy.

Thank you for your consideration and I will be happy to discuss this further at your convenience should you wish me to appear in person.

Sincerely,



Kevin S. Brackett
Solicitor, 16th Judicial Circuit

From: Andrew J. Savage
To: Rule13comments
Subject: Comment on Proposed Rule 13
Date: Wednesday, December 20, 2017 5:12:52 PM

I am glad to see that the Criminal Bar is now allowed to issue its own subpoena. The current rule is extremely burdensome for the Criminal Defense Bar in every case but particularly when a member is representing a client in a jurisdiction at a distance from the attorney's office.

The new rule while an improvement leaves open for interpretation what is personal or confidential. Phone records? Social media accounts? Academic grades or prior discipline? Military records?

Why not require notice to a victim 14 days prior to the issuance of a subpoena and eliminate the need for universal court approval? The parties can exchange reasons for the need or the denial therby identifying the issues before the Court gets involved. Also the insertion of time limits to respond or object for any subpoena is prudent. The parties can extend the deadline if they wish without court intervention. In essence I propose language that will limit the need for court hearings as they uniformly delay the proceedings. I also wonder why only a victim's personal information is protected and not all parties who may be subjected to an intrusive subpoena.

The government should be required to notice the defendant in every instance that they subpoena documents or an individual's presence. This would help prevent the constant battle for Brady material.

Thank you for allowing this input. This is a great start to what I hope with be the establishment of a comprehensive criminal procedure. It is long overdue. It has been tried before but rejected without comment

by the then Chief Justice.

Merry Christmas to all.

Best,

Andy Savage
Bar # 4946

AMIE L. CLIFFORD
Attorney at Law
Post Office Box 5010
Columbia, South Carolina 29250-5010

January 5, 2018

VIA EMAIL ONLY (rule13comments@sccourts.org)

Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

Re: Comments on Proposed Amendments to Rule 13, SCRCrimP

Dear Mr. Shearouse,

As a 35-year member of the South Carolina Bar, who has spent most of my career practicing or focusing on criminal law (primarily from the prosecution perspective), I am responding to the Court's December 2017 call for comments on the proposed amendment to Rule 13, SCRCrimP.

I am in favor of the Court's proposal to protect the privacy of crime victims by requiring a judicial order before a subpoena *duces tecum* may be issued to obtain personal or confidential information about a victim from a third party. However, the proposed new (a)(2), may be read as not allowing either the third party or the prosecution to object, and it does not provide guidance to the trial courts if challenges are made. I submit the following suggested changes to the proposed amendment for the Court's consideration (suggestions are in bold font).

> (2) (a) Issuance of Subpoena for Personal or Confidential Information About a Victim. A subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order.
>
> **(i)** Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim **and prosecution** so that ~~**the victim can move**~~ **a motion** to quash or modify the subpoena or ~~**otherwise object**~~ **other objection may be made.**
>
> **(ii) A third party commanded to produce personal and confidential information about a victim may, prior to or at the judicial proceeding for which the subpoena commands appearance and production, object.**
>
> **If the defendant's subpoena is challenged, the defendant must establish (1) a reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis; (2) that**

the materials are not protected from disclosure by state, federal or other law; (3) that the materials possess evidentiary value and are relevant and admissible; and (4) that the application is not intended to intimidate, harass or abuse the victim.

Under Article I, Section 24, of the South Carolina Constitution, a victim has the right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process. Amending (a)(2) as suggested above would clarify that a victim need not either, personally or through counsel, appear in court to challenge a subpoena, but that such objections can be made by the prosecution[1] and the third party. In addition, the inclusion of language setting forth the standard once a subpoena is challenged would provide guidance to the Bench and Bar and strike a balance between a defendant's right to exculpatory evidence with the competing right and interests of a victim to protect personal or confidential information.

In addition, I ask that the Court consider addressing, in some manner, the use and dissemination of personal and confidential materials about a victim obtained by the defense so that the privacy of crime victims may be protected as fully as possible.

Thank you for the opportunity to submit these comments to the Court. Please contact me if you or the Court have any questions or need further information.

Sincerely,

Amie L. Clifford

[1] Research has disclosed that some courts have interpreted their subpoena rules to confer standing upon the prosecution to challenge defense subpoenas to third parties requesting personal or confidential information about a crime victim. See, *e.g.*, *People v. Spykstra,* 234 P.3d 662, 666 (Colo. 2010) ("...we find that the District Attorney has an independent interest in ensuring the propriety of the subpoenas. As the prosecuting party, the District Attorney has an interest in the case's management, particularly in the prevention of witness harassment through improper discovery requests."); *Commonwealth v. Lam,* 444 Mass. 224, 827 N.E.2d 209, 213–14 (2005) (prosecution has standing to challenge a defendant's motion for summonses).

January 5, 2018

Via Email: rule13comments@sccourts.org

Honorable Daniel E. Shearhouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RE: Comments on Proposed Amendments to Rule 13, SC Rule of Criminal Procedure

Dear Mr. Shearhouse:

On behalf of the South Carolina Coalition Against Domestic Violence and Sexual Assault, ("SCCADVASA"), I respectfully submit this letter expressing our support of the proposed addition of Rule 13(a)(2) to the SC Rules of Criminal Procedure. In addition, SCCADVASA encourages the Court to consider the adoption of additional protective language in Rule 13(a)(2) to prohibit the use or disclosure of any victim information beyond the proceedings for which they are requested. In the event that proposed Rule 13(a)(2) is not adopted, SCCADVASA opposes the proposed amendment to Rule 13(a)(1) out of concern that subpoenas issued without court oversight will result in the violation of the constitutional and statutory rights of domestic violence and sexual assault victims to privacy and to "be treated with fairness, respect and dignity and to be free from intimidation, harassment or abuse throughout the criminal and juvenile justice process".[1]

About SCCADVASA

SCCADVASA is the statewide coalition of organizations providing intervention services to victims and survivors of domestic violence and sexual assault and Primary Prevention programs to students and communities across the state. We work towards ending domestic and sexual violence in South Carolina and beyond through engaging individuals and communities in advocacy, collaboration and education. We advocate for the transformative social change that will result in a society free of violence, push for policy changes that support survivors, and provide education and technical assistance to build the capacity of our members, allied organizations and communities to provide trauma-informed and survivor-centered services.

[1] SC Constit. Art I § 24(1), Victim's Bill of Rights; *see also* SC Const. Art. I, § 24(a)(6) (granting victims the right to "be reasonably protected from the accused or persons acting on his behalf").

sccadvasa
South Carolina Coalition Against
Domestic Violence and Sexual Assault

Request for the Inclusion of Protective Language in the Proposed Rule 13(a)(2)

SCCADVASA commends the Court for the additional protections of crime victims set forth in the proposed Rule 13(a)(2). However, we would ask the Court to further consider including the protective language proposed by the SC Commission on Prosecution Coordination on Page 5 of its November 21, 2017 comments. More specifically, SCCADVASA requests that the new Rule 13(a)(2) by amended as follows:

> (a)**(2) Issuance of Subpoena for Personal or Confidential Information About a Victim.** A subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object. **Any court order issued allowing the use of a subpoena duces tecum must prohibit the parties from using or disclosing the documents and any information contained therein for any purpose other than the litigation or proceeding for which such documents were requested; prohibit the provision of a copy of such documents to the defendant; and require the documents to be returned to the person from whom the documents were obtained or destruction of the documents (including all copies made) at the end of the litigation or proceedings.**

We believe that these additional protections on the use and dissemination of the victims' personal and confidential information are necessary for the protection of victims' rights, and are consistent with the legislative intent set forth in SC Code § 16-3-1505, which states that the rights of victims should be "honored and protected by … judges in a manner no less vigorous than the protections afforded criminal defendants."

Concerns Regarding the Proposed Amendment to Allow Attorney Issuance of Subpoenas if Rule 13(a)(2) is not Adopted

SCCADVASA does not oppose the proposed amendment to Rule 13(a)(1) allowing attorney issuance of subpoenas as long as the proposed Rule 13(a)(2) is adopted. However, we are concerned that if proposed Rule 13(a)(2) is not adopted, the reduction of court oversight will increase the frequency of improper attempts to obtain the personal and confidential information of domestic violence and sexual assault victims.

Although there is no constitutional pre-trial right to discovery of information in the possession of third parties in a criminal proceeding, SCCADVASA's member organizations report an increasing trend in subpoenas seeking the personal and confidential information of

the victims they serve. These subpoenas are often overbroad and irrelevant and when left unchallenged, result in the violation of the victim's constitutional and statutory rights. In the majority of cases, victims receive little to no notice of the subpoena and are unable to locate or afford legal counsel to file any objections. Generally, the victim's only defense is the hope that the third party will notify them and/or raise all available and legally required objections available to the agency.

If the proposed Rule 13(a)(2) is not approved, the elimination of prior court oversight will increase the possibility of improperly issued subpoenas seeking the personal and confidential information of crime victims. This will only serve as a chilling effect on victims' decision to report crime; participate in the criminal justice process; and seek medical, therapeutic or other supportive services.

Thank you the opportunity to be heard on this important issue. We are deeply grateful to the Court for its inclusion of the proposed Rule 13(a)(2), and believe that this represents an important step forward in the protection of victims of domestic violence and sexual assault in South Carolina. Please feel free to contact me if the Court has questions or need for further clarification.

Sincerely,

Patricia S. Ravenhorst (SC Bar # 68624)
General Counsel
South Carolina Coalition Against Domestic Violence and Sexual Assault
pravenhorst@sccadvasa.org
803-256-2900

Sixteenth Circuit Public Defender Office
Moss Justice Center
1675-1E York Highway
P.O. Box 691
York, S.C. 29745

Harry A. Dest
Sixteenth Circuit Defender

Bryson J. Barrowclough
Deputy Public

Stacey D. Coleman
Juvenile Division

Melissa A.Inzerillo
Philip L. Smith
Sr. Assistant Public Defenders

Assistant Public Defenders
Monier Abusaft
Mindy Lipinski
Mark McKinnon
Devon Nielson
Jessica M. Russo
Charles Rudnick
Raia J. Hirsch
Jeffrey Zuschke

Magistrate Court Division
Sherril Alford
Toni Johnson
Harris Kaufman

Union County Public Defender
Erik D. Delaney
Jenny Williams

January 5, 2018

RE: Proposed Amendment to Rule 13 of SC Rules of Criminal Procedure

To Whom it May Concern:

I am writing to express concern regarding proposed changes to Rule 13. While on the whole, the modifications to the rule are beneficial to and necessary for criminal defense attorneys throughout our state, the proposal of Section 2 as it is written now raises some major concerns.

As a former member of the private bar with a victim-impact heavy caseload, and as a current Assistant Public Defender specializing in crimes against children and women, primarily, the lack of specificity in both substantive and procedural definitions and mechanisms is problematic. If there is a plan to draft a "definitions" portion to this rule specifically, then it is possible these potential issues may resolve themselves. Particularly troubling is the vagueness of some of the terms and requirements outlined in the amendment.

First, as to "confidential" information regarding an alleged victim, clarification is needed. While HIPPA governs medical records, and in some cases school records are within the purview of FERPA, there are other categories of information regarding an alleged victim that are not as clear cut or defined by statute as confidential and/or privileged. For example, a private school or day care that is not subject to FERPA ***may*** disclose documents to defense counsel upon presentment of a subpoena, without notice to the alleged victim or the need for an alleged victim's consent. Defending CSC's, I often look to alleged victims' conduct or disciplinary records from academic institutions for use in my cross-examination of "experts," both blind and treating. This has been a fruitful area in this ever-shifting landscape of expert testimony in CSC's, and to lose access to it would have a major impact on attorneys' abilities to negotiate, mitigate, and litigate.

Sixteenth Circuit Public Defender Office

Moss Justice Center
1675-1E York Highway
P.O. Box 691
York, S.C. 29745

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Union County Public Defender
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Jenny Williams

Next, the above concern could be addressed by providing a mechanism for continuing to get this kind of information, but it would still only address the issue in part. First, attorneys could lose the constitutional right to effectively impeach or cross-examine a State's witness. This could result in the loss of the ability to impeach or challenge a forensic interviewer, a behavioral scientist or a treating physician. Once an alleged victim is put "on notice" that certain items are being requested, the potential for destruction or modification is alarming. This could be addressed with some sort of mechanism that would allow for the preservation of requested materials-possibly with an ex-parte motion for the production "forthwith" that mirrors the Federal rule-but as written, the proposed amendment does not address this concern.

Additionally, there is no outlined protocol and enforcement mechanism for this notice requirement. For example, it is unclear to whom defense attorneys are required to serve notice regarding acquisition of an alleged victim's protected information. Is the State going to be responsible for accepting this service? Are they then obliged to notify the alleged victim of this service, and is that obligation an affirmative duty on their part? And if the alleged victim doesn't appear to receive this notice, are they in some sort of default that allows defense attorneys to receive a court order anyway? Finally, it is important to clarify or define what material is when we are requesting specific evidence. Is it a *Brady* standard or is it "any and all relevant" information. To word our requests properly and to argue them effectively, an articulated standard is needed. That standard could simply refer to existing precedent established in the likes of *Blackwell* or *Brady*, or it may lay out its own definition without reference to any others.

Sincerely,

Raia Jane Hirsch
Assistant Public Defender

1. Subpoena form should explain at least that issuing attorney does not represent the witness and is not permitted to give the witness legal advice except in accordance with Rule 4.3, namely, "a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." Already have too big a problem with victim's advocates accosting and answering the legal questions of alleged victims who don't want prosecution of domestic violence charges, which tends to also result in violations of Rule 4.4(a). Subpoena form should be standardized across the state.
2. "Victim" should be changed to "alleged victim." Is testimony about an alleged victim included in "requiring the production of personal information"? Does this subsection cover a subpoena for testimony on an alleged victim him/herself? Need a workable definition of "alleged victim"—e.g., is a bystanding customer in a robbery of convenience store clerk an alleged victim?
3. If an alleged victim is not a party to a case, not sure how he/she could move to quash or modify or object. Definition of "personal information" is unclear in light of policy behind the rule. Maybe better to require upon motion of party, written memos or hearing and order w/ specific finding that issuance of subpoena complies w/ all applicable law, e.g., Rule 4.4(a) (lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person); rape shield statute.

Benjamin John Tripp
Assistant Public Defender for Beaufort County
1905 Duke Street, 2nd Floor Room 210
PO Box 525
Beaufort, SC 29901
Voicemail (843) 255-5819 | Text (843) 592-5417 | btripp@bcgov.net

"Undoubtedly, before defense counsel can have a meaningful discussion about the advantages and disadvantages of a plea agreement, counsel must do a considerable amount of work. . . . To be effective, defense counsel must do far more than just conduct a good client interview. . . . Once defense counsel has completed the investigation and carefully evaluated the case, counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome. . . . **Surely the 'meet 'em and plead 'em' attitude that marks the plea bargaining efforts of too many indigent defenders cannot be seriously described as effective.**" Joy, Peter A. and Rodney J. Uphoff, *Systemic Barriers to Effective Assistance of Counsel in Plea Bargaining*, 99 Iowa Law Review 2103, 2108-12 (2014).

"[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. **The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.**" *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985).

"**A prosecutor has the responsibility of a minister of justice and not simply that of an advocate**. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Rule 3.8 n.1, RPC, Rule 407, SCACR.