

IN THE COURT OF CLAIMS OF OHIO

FILED  
COURT OF CLAIMS  
OF OHIO

2016 JAN 22 PM 3: 24

DAVID BENTKOWSKI,

Plaintiff,

vs.

OHIO LOTTERY COMMISSION

Defendant.

Case No. 2014-00651

JUDGE PATRICK MCGRATH

THE OHIO LOTTERY  
COMMISSION'S NOTICE  
OF INVALID SUBPOENA  
AND MOTION TO QUASH  
THE SUBPOENA OF  
LAWRENCE MILTNER

**ORIGINAL**

1. Plaintiff's attempted service of the subpoena was improper under Civ.R. 45(B); therefore, the subpoena is invalid.

Mr. Bentkowski's process server left a subpoena for Lawrence Miltner with Traci Konesky, a Lottery employee who happened to be in the first floor reception area of the Lottery's downtown Cleveland office building. *See* Affidavit of Traci Konesky. The subpoena indicates that it was served at Mr. Miltner's residence, but that is not true. *Id.* And leaving a subpoena with a co-worker or secretary at a person's place of employment is not an authorized means of serving a subpoena under the civil rules. Civ.R. 45(B) permits service of a subpoena in one of four ways: (1) delivery in person, (2) reading it to the person, (3) leaving it at a person's place of residence, or (4) sending it certified mail return receipt requested. Plaintiff attempted to leave it at Mr. Miltner's place of employment. This is not one of the four authorized methods. His place of employment is not his place of residence. *Stammen v Woodruff*, 2nd Dist. Drake No. 1039, 1981 WL 2552 \*3 (Sept 28, 1981).

The trial court is permitted to refuse to honor a subpoena left with a co-worker at a person's place of business. *City of Columbus v Timson*, 10th Dist. Franklin No. 87AP-939, 1988 WL 70463, \*5 (June 30, 1988). It makes sense that leaving a subpoena with a secretary or receptionist who is not involved in the litigation is improper considering one cannot leave a subpoena with a witness's own trial attorney. *Carosella v Conwell*, 183 Ohio App.3d 688, 742 N.E.2d 188 (2000). A witness cannot

be compelled to testify when a subpoena is served improperly. *Landoll v Dowell*, 10th Dist. Franklin Nos. 94APF05-617, 94APF05-623, 94APF05-618, 94APF05-622, 1995 WL 100560, \* 7 (1995). Before certified mail was a permitted method of service, the 10th District held that a witness could not be compelled to testify when the subpoena was served via certified mail. *Id.* Even though she showed up to the deposition, she did not have to testify. *Id.*

The civil rule was recently amended to permit an additional method of service, that is, by certified mail. Civ.R. 45, staff notes July 1, 2008 Amendments. Had the legislature intended to permit service by leaving it at a person's place of employment, it could have added that option to the language of the rule. However, it did not. Furthermore, Civ.R. 5, which deals with the service of pleadings, permits service by leaving the document at the person's place of employment. This option was intentionally omitted from Civ.R. 45. There are only four options for service and Plaintiff failed to comply with any of them.

Furthermore, the address on the subpoena is not the address where the subpoena was left. It is not the address for Mr. Miltner's place of employment. Finally, the process server who delivered the subpoena *had not even been appointed to do so*. Mr. Bentkowski's motion for his appointment was filed on January 20, 2016, but that motion had not been granted at the time he appeared in the Lottery's reception area. For these reasons, the subpoena is invalid and Mr. Miltner should not be compelled to testify at trial.

- 2. The Court should quash the subpoena issued to Mr. Miltner because he is Chief Legal Counsel for the Defendant. His testimony is protected by the attorney-client privilege.**

Civ.R. 45(C)(3)(b) provides that the Court *shall* quash or modify the subpoena if the subpoena requires disclosure of privileged matters. Any communication with Mr. Miltner, as in-house counsel for Defendant, would be protected by the attorney-client privilege. Courts have held that the common law attorney-client privilege, which provides greater protection than the statutory

privilege, includes government agencies consulting with in-house counsel for legal advice or assistance. *State ex rel. Leslie v Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, ¶ 30. The purpose of the attorney-client privilege “\* \* \* is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves the public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.” *Upjohn Co. v United States*, 449 U.S. 383, 389, 101 S.Ct. 677 (1981). If Mr. Miltner was compelled to testify, the purpose of the privilege would be repudiated.

The information he would provide would be that which he learned from Ms. Popadiuk, who will testify at the trial and who is the object of Mr. Bentkowski's sole remaining claim in this case, that she terminated him not for the reasons she has identified—his condescension, poor performance and inability to follow her instructions, among other things—but instead retaliated against him for criticizing her as having treated other employees in a discriminatory manner. The only remaining issue, then, is why Ms. Popadiuk terminated Mr. Bentkowski. Mr. Bentkowski admitted that he never told Mr. Miltner that he had concerns about her behavior. Consequently, Mr. Miltner could not have been part of the alleged retaliatory decision if he did not know about Mr. Bentkowski's underlying opposition.

Mr. Miltner should not be compelled to give testimony unless Mr. Bentkowski can show that (1) his testimony is necessary to obtain relevant information that cannot be obtained from any other source, and (2) his testimony would not significantly interfere with his ability to perform his governmental duties. *Bentkowski v Ohio Lottery Commission*, Entry Granting Motion to Quash, Ct of Cl. 2014-00651 (Aug. 28, 2015), citing *New York v Oneida Indian Nation of N.Y.*, N.D.N.Y. No. 95-CV-0554, 2001 U.S. Dist. LEXIS 21616, \*8-9 (Nov. 9, 2001). The essential considerations, then, are whether the information is available through alternative sources and if Mr. Miltner has unique personal knowledge that cannot be obtained elsewhere. *Id.*

Requiring Mr. Miltner to be absent from his office and travel to Columbus for a day is unduly burdensome especially considering he will not provide any unique information about Ms. Popadiuk's decision to terminate.

Any communication that Mr. Miltner had with any Lottery Commission employee is protected by the attorney-client privilege. Plaintiff has not demonstrated that Mr. Miltner did anything but provide legal advice. Mr. Miltner did not have any independent involvement or evidence regarding Mr. Bentkowski's termination. Any information he would have about the termination, if any, would be what was communicated to him; and that information is protected by the privilege. Plaintiff has not demonstrated that the privilege has been waived or that he has a need for information that can overcome the privilege.

Pursuant to Civ.R. 45(C)(3)(b), the Court should quash the subpoena issued to Mr. Miltner.

Respectfully Submitted,

MICHAEL DEWINE  
Ohio Attorney General



RANDALL W. KNUTTI (0022388)  
Assistant Attorney General  
Principal Attorney  
Court of Claims Defense  
150 E. Gay Street, 18<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-7447  
[Randall.Knutti@OhioAttorneyGeneral.gov](mailto:Randall.Knutti@OhioAttorneyGeneral.gov)  
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that I sent this document by regular United State mail, postage prepaid, on January 22, 2016 to:

Brent L. English  
The 820 Building  
820 West Superior Avenue, 9<sup>th</sup> Floor  
Cleveland, Ohio 44113

  
\_\_\_\_\_  
RANDALL W. KNUTTI (0022388)





# COURT OF CLAIMS OF OHIO

The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614. 387.9800 or 1.800.824.8263  
www.cco.state.oh.us

## Subpoena

David A. Bentkowski

Plaintiff

v.

Case Number: 2014-00651

Ohio Lottery Commission

Defendant

Judge: Patrick M. McGrath

To: Dennis Berg  
36004 Haverford Place  
Avon, Ohio 44011

### YOU ARE HEREBY COMMANDED TO:

- Attend and give testimony at a (trial) (hearing) (deposition) on the date, time and at the place specified below.
- Attend to testify and produce documents and/or tangible things at a (trial) (hearing) (deposition) on the date, time and at the place specified below.
- Produce and permit inspection and copying, on the date and at the time and place specified below, of any designated documents that are in your possession custody or control.
- Produce and permit inspection and copying, testing or sampling, on the date and at the time and place specified below, of any tangible things that are in your possession, custody or control.
- Permit entry upon the following described land or other property, for the purposes described in civil 34(a)(3)), on the date and at the time and place specified below.

*Description of land or other premises:*

DATE: 01/26/16 TIME: 10:00 a.m. PLACE: Court of Claims of Ohio, The Ohio  
Judicial Center, 65 South Front Street,  
Third Floor, Columbus, Ohio 43215

DESCRIPTION OF ITEMS TO BE PRODUCED:

THE STATE OF OHIO

County, ss

To the Sheriff of \_\_\_\_\_ County, Ohio, Greetings:

**YOU ARE HEREBY COMMANDED TO SUBPOENA THE ABOVE NAMED PERSON.**

WITNESS MY HAND AND SEAL OF SAID COURT THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 20\_\_\_\_,  
CLERK OF THE COURT OF CLAIMS OF OHIO.

BY: \_\_\_\_\_  
Assistant Clerk

**REQUESTING PARTY INFORMATION:**

NAME: Brent L. English, Esq.

(ATTORNEY FOR:) David A. Bentkowski

TELEPHONE NUMBER 216-781-9917

**NOTE: READ ALL INFORMATION ON THIS SUBPOENA.**

**Civil Rule 45 (C) Protection of persons subject to subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

(2) (a) A person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing or trial.

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii),(iii),(iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production. If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production. An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded.

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

(a) Fails to allow reasonable time to comply;

(b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;

(c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;

(d) Subjects a person to undue burden.

(4) Before filing a motion pursuant to division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.

(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.

**Civil Rule 45 (D) Duties in responding to subpoena.**

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labelled to correspond with the categories in the subpoena. A person producing documents pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials under Civ. R.26(B)(3) or (4), 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 demanding party to contest the claim.

**Civil Rule 45 (E) Sanctions.**

Failure 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. A subpoenaed person or that person's attorney who frivolously resists discovery under this rule may be required by the court to pay the reasonable expenses, including reasonable attorney's fees, of the party seeking the discovery. The court from which a subpoena was issued may impose upon a party or attorney in breach of the duty imposed by division (C)(1) of this rule an appropriate sanction, which may include, but is not limited to, lost earnings and reasonable attorney's fees.

**RETURN OF SERVICE**

I RECEIVED THIS SUBPOENA ON \_\_\_\_\_, AND SERVED THE PARTY  
NAMED ON THE REVERSE

HEREOF BY \_\_\_\_\_ ON \_\_\_\_\_

I WAS UNABLE TO COMPLETE SERVICE FOR THE FOLLOWING REASON:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Sheriff's Fees**

Service \_\_\_\_\_

Mileage \_\_\_\_\_

Copy \_\_\_\_\_

Total \_\_\_\_\_

\_\_\_\_\_  
Signature of serving party

Circle one:

Deputy Sheriff

Attorney

Process Server

Deputy Clerk

Other \_\_\_\_\_



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David A. Bentkowski

Plaintiff

v.

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Ohio Lottery Commission

Defendant

Judge: Patrick M. McGrath

To: Lawrence J. Miltner, Esq.

26984 Brahms Drive

Westlake, Ohio 44145

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