

Proposed Amendments to Rule 45

Rule 45 is amended as follows:

Rule 45. Subpoena

~~(a) Form; Issuance.~~

~~(1) Every subpoena shall~~

(a) In General.

(1) Form and Contents.

(A) **Requirements--In General. Every subpoena must:**

(i) state the ~~name of the~~ court;

(Bii) state the title of the action and its ~~civil-~~action number;

and

(Giii) command each person to whom it is directed to **do the following at a specified time and place:** attend and give testimony or to **testify;** produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in ~~the~~ **that person's** possession, custody, or control ~~of that person,;~~ or to permit **the** inspection of premises, ~~at a time and place therein specified;~~ and

(Div) set forth ~~out~~ the text of subdivisions **Rule 45**(c) and (d) of this rule. ~~A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.~~

(B) Command to Attend a Deposition--Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) Command to Produce; Included Obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) **Issued from the Court.** A subpoena must issue as follows:

(A) for attendance at a ~~trial or hearing~~ **or trial**, from the court;

(B) for attendance at a deposition, from the court, ~~stating the method for recording the testimony;~~ and

(C) for production, **or** inspection, ~~copying, testing, or sampling,~~ if separate from a subpoena commanding a person's attendance, from the court.

(3) **Issued by Whom.** The clerk shall **must** issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall **requests it. That party must** complete it before service. An attorney admitted to practice before the Court of International Trade as an officer of the court may also issue and sign a subpoena on behalf of the court.

(b) **Service.**

(1) ~~A subpoena may be served by any~~ **(1) By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.** Any person who is **at least 18 years old and** not a party and is not less than 18 years of age. ~~Service of a subpoena upon~~ **may serve a person-subpoena. Serving a subpoena requires delivering a copy to the** named therein shall be made by delivering a copy thereof to such person and, if the **subpoena requires that** person's attendance is commanded, by, tendering to that person the fees for one **1** day's attendance and the mileage allowed by law. ~~When~~ **Fees and mileage need not be tendered when** the subpoena is issued **issues** on behalf of the United States or an officer **any of its officers** or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded **agencies. If the subpoena commands the** production of documents and, **electronically stored information, or tangible** things or **the** inspection of premises before trial shall, **then before it is served, a notice must** be served on each party in the manner prescribed by.

(2) Service in the United States. Subject to Rule 5(b). ~~(2) Subject to the provisions of clause 45(c)(3)(A)(ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place:~~

(A) within 100 miles of the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena. ~~When;~~ **or**

(B) that the court authorizes on motion and for good cause, if a federal statute of the ~~United States~~ **so** provides therefor, or when the interest of justice may require, ~~the court upon proper application and cause shown may authorize the service of a subpoena at any other place.~~ A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

~~(3)~~ **(3) Service in a Foreign Country. 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.**

(4) Proof of Service. Proving service, when necessary ~~shall be made by,~~ **requires** filing with the clerk of the court a statement of **showing** the date and manner of service and ~~of the names of the persons served,~~ **The statement must be** certified by the person who made the service. **server.**

(c) ~~Protection of Persons~~ **Protecting a Person** Subject to Subpoenas **Subpoena.**

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or an attorney responsible for the issuance **issuing** and service of a **serving a** subpoena shall **must** take reasonable steps to avoid imposing undue burden or expense on a person subject to ~~that~~ **the** subpoena. The court shall **must** 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 and a reasonable attorney's fee **attorney's fees — on a party or attorney who fails to comply.**

(2) **Command to Produce Materials or Permit Inspection.**

(A) **Appearance Not Required.** A person commanded to produce and **documents, electronically stored information, or tangible things, or to** permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or **the** inspection of premises, need not appear in person at the place of production or inspection unless **also** commanded to appear for **a** deposition, hearing, or trial.

(B) ~~Subject to paragraph (d)(2) of this rule, a~~ **Objections.** **A** person commanded to produce and **documents or tangible things or to** permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena **a** written objection to producing **inspecting, copying, testing or sampling** any or all of the designated materials or inspection of **to inspecting** the premises — or to producing electronically stored information in the form or forms requested. ~~If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order~~

~~of the court. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.~~ **The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:**

(i) At any time, on notice to the commanded person, the serving party may move the court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the court shall **must** quash or modify ~~the~~ **a** subpoena if ~~it~~ **that**:

(i) fails to allow **a reasonable time for compliance; **to comply**;**

(ii) requires a person who is ~~not~~ **neither a party ~~or an~~ **nor a party's** officer of a party to travel to a place more than 100 miles from ~~the~~ place where that person resides, is employed, or regularly**

transacts business in person; — except that, subject to the provisions of clause **Rule 45(c)(3)(B)(iii)** of this rule, such a **)**, the person may in order **be commanded** to attend **a** trial ~~be~~ ~~commanded to travel~~ **by traveling** from any such place;

(iii) requires disclosure of privileged or other protected matter ~~and~~, **if** no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) ~~if~~ **When Permitted**. **To protect a person subject to or affected by** a subpoena ~~(i)~~, **the court may, on motion, quash or modify the subpoena if it** requires disclosure of:

(i) disclosing a trade secret or other confidential research, development, or commercial information; ~~or~~

~~(ii) requires disclosure of~~ **(ii) disclosing** an unretained expert's **expert's** opinion or information ~~not describing~~ **that does not describe** specific events or occurrences in dispute and resulting **results** from the expert's **expert's** study ~~made~~ **that was** not at the request of any **requested by a** party; or

(iii) requires a person who is ~~not~~ **neither** a party ~~or~~ ~~an~~ **nor a party's** officer of a party to incur substantial expense to travel more than 100 miles to attend trial, ~~the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued.~~

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and assures

(ii) ensures that ~~the~~ **the subpoenaed** person to whom the subpoena is addressed will be reasonably compensated, ~~the court may order appearance or production only upon specified conditions.~~

(d) Duties in Responding to a Subpoena.

(1) **Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:**

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

~~(B) If a subpoena does not specify the form or forms for~~ **(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for** producing electronically stored information, ~~a~~ **the** person responding to a subpoena ~~must produce the information~~ **it** in a form or forms in which the person ~~it is~~ **it is** ordinarily

~~maintains it~~ **maintained** or in a ~~form or forms that are reasonably usable~~ **form or forms**.

(C) A **Electronically Stored Information Produced in Only One Form**. **The** person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A **Inaccessible Electronically Stored Information**. **The** person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, ~~the person from whom discovery is sought~~ **for a protective order, the person responding** must show that the information ~~sought~~ is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C)(4). The court may specify conditions for the discovery.

(2) **Claiming Privilege or Protection**.

(A) ~~When~~ **Information Withheld**. **A person withholding subpoenaed** information subject to a subpoena is withheld on **under** a claim that it is privileged or subject to protection as trial-preparation materials, **material must:**

(i) expressly make 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.~~

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) **Information Produced**. If information ~~is~~ produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has ~~and may~~; **must** not use or disclose the information until the claim is resolved. ~~A receiving party~~ **must take reasonable steps to retrieve the information if the party disclosed it before being notified; and** may promptly present the information to the court under seal for a determination of the claim. ~~If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it.~~ The person who produced the information must preserve the information until the claim is resolved.

(e) **Contempt**. ~~Failure by any~~ **The court may hold in contempt a person who, having been served, fails** without adequate excuse to obey ~~a~~ **the** subpoena served upon that person ~~may~~. **A nonparty's failure to obey must** be deemed a contempt of the court. ~~An adequate cause for failure to obey exists when a~~ **excused if the**

subpoena purports to require ~~at~~**the** non-party to attend or produce at a place ~~not~~
within **outside** the limits provided by clause ~~of Rule 45(c)(3)(A)(ii)~~ of subparagraph
~~(C)(3)(A)~~**.**

(As amended June 19, 1985, eff. Oct. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; Oct. 3, 1990, eff. Jan. 1, 1991; Sept. 25, 1992, eff. Jan. 1, 1993; Nov. 27, 2007, eff. Jan. 1, 2008; **_____, 2009, eff. _____, 2010.**)

Advisory Committee Note

The language of Rule 45 has been amended as part of the general restyling of these rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.