

## **Rule 45. Subpoena**

### **(a) IN GENERAL.**

#### **(1) *Form and Contents.***

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

(i) state the name of the court;

(ii) state the title of the action, its case number, the calendar designation when known, and if assigned to a specific judge or magistrate judge, the name of that judge or magistrate judge;

(iii) command each person to whom it is directed to do the following at a specified time and place within the District of Columbia, unless the parties and person subpoenaed otherwise agree or the court, upon application, fixes another convenient location: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(c) and (d).

**(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 person to permit inspection, copying, testing, or sampling of the materials.

#### **(2) [Deleted].**

**(3) *Issued by Whom.*** An attorney authorized to practice in the District of Columbia may issue and sign a subpoena. A party not represented by an attorney may obtain from the clerk and complete a blank subpoena, and submit it to the clerk to be signed. The clerk may sign the subpoena if it relates to a case in which action is pending, otherwise the clerk shall refer the subpoena to a judge or magistrate judge for consideration.

**(4) *Notice to Other Parties Before Service.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

### **(b) SERVICE.**

**(1) *By Whom and How; Tendering Fees.*** Any person who is at least 18 years of age and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for one day's attendance and the mileage allowed by law, except that:

(A) witnesses will be subpoenaed without prepayment of witness fees if the court grants a request to proceed without prepayment of costs, fees, or security under Rule 54-II; and

(B) fees and mileage need not be tendered when the subpoena issues on behalf of the United States or the District of Columbia or any officers or agencies of either.

(2) *Service in the District of Columbia.* Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the District of Columbia;

(B) outside the District of Columbia but within 25 miles of the place specified for the deposition, hearing, trial, production, or inspection; or

(C) that the court authorizes on motion and for good cause, if an applicable statute so provides.

(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, requires filing with the clerk of the court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) PROTECTING A PERSON SUBJECT TO SUBPOENA; ENFORCEMENT.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable 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 documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for deposition, hearing or trial.

(B) *Objections.* A person commanded to produce documents, electronically stored information, or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If objection is made, 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 must quash or modify a subpoena that:

(i) fails to allow reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 25 miles from where that person resides, is employed, or regularly transacts business in

person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place to the place of trial;

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

(iv) subjects a person to undue burden.

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

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

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 25 miles to attend trial.

(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

(ii) ensures that the subpoenaed person will be reasonably compensated.

(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 must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

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

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

(D) *Inaccessible Electronically Stored Information*. The person responding 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 for a protective order, the person responding must show that the information 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). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection*.

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

(i) expressly make the claim; and

(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 produced in response to a subpoena 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; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) TRANSFERRING A SUBPOENA-RELATED MOTION. A subpoena-related motion may be transferred to the court where the action is pending if the person subject to the subpoena consents or if the court finds exceptional circumstances. To enforce its order, the court where the action is pending may transfer the order to the court where the motion was made

(f) CONTEMPT. The court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

#### COMMENT TO 2018 AMENDMENTS

This rule conforms to the corresponding civil rule. The rule now provides for discovery of electronically stored information.

#### COMMENT

Pursuant to subparagraph (b)(1) of this Rule, a person serving a subpoena commanding attendance in court must also give the person subpoenaed the fees for one day's attendance and the mileage allowed by law. Those fees and travel allowances can be found in Title 28 U.S.C. § 1821 et seq. See D.C. Code § 15-714. For waiver of prepayment of costs and witness fees, see SCR-Dom. Rel. 54(f). For purposes of this Rule, an attorney is not a party and may serve a subpoena. See *In re Kirk*, 413 A.2d 928 (D.C. App. 1980). However, in the event of a factual dispute over service, there is a risk that the attorney's ability to continue as counsel in the case will be affected.