

Proposed Revisions to Rule 45-Final

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk of court, by a notary public, or by a justice of the peace, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to do the following at a specified time and place: to attend and give testimony; to produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or to permit inspection of premises. The clerk, notary public, or justice of the peace shall issue a subpoena signed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) 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. 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 upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the documents, electronically stored information, or tangible things. 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. A person commanded to produce documents, electronically stored information, or tangible things, or to permit 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.

(c) Service. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person, or by exhibiting it and reading it to him, or by leaving a copy at his place of abode; and, if the person's attendance is required, by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or the Commonwealth or a political subdivision thereof, or an officer, or agency of either, fees and mileage need not be tendered.

(d) Subpoenas for Taking Deposition and for Command to Produce; Place of Examination.

(1) No subpoena for the taking of a deposition shall be issued prior to the service of a notice to take the deposition. If a subpoena commands only the production of documents, electronically stored information, or tangible things or the inspection of premises, other than for a hearing or trial, then before it is served on the person to whom it is directed, a copy of the subpoena shall be served on each party. The party serving the subpoena, other than for hearing or trial, shall also serve on each party a copy of any objection to the commanded production and a notice of any production made or, alternatively, provide a copy of the production to each party.

The subpoena commanding the person to whom it is directed to produce documents, electronically stored information, or tangible things, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by these rules, is subject to the provisions of **Rule 26(c)** and subdivision (b) of this rule.

A deposition subpoena upon a party which commands the production of documents, electronically stored information, or things must give the party deponent at least 30 days for compliance after service thereof. Such subpoena shall not require compliance of a defendant within 45 days after service of the summons and complaint on that defendant. The court may allow a shorter or longer time.

A person commanded to produce documents or tangible things or to permit inspection may within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the party or attorney designated in the subpoena written objection to inspecting, copying, testing, or sampling any of the materials; 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 from which the subpoena was issued. The party serving the subpoena may, if objection is made, move at any time upon notice to the commanded person for an order compelling production or inspection. Such an order to compel production or inspection shall protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

(2) Unless the court orders otherwise, other than for a hearing or trial, a resident of this Commonwealth shall not be required to attend an examination or produce documents, electronically stored information, or tangible things at a place more than 50 airline miles distant from either his residence, place of employment, or place of business, whichever is nearest to the place to which he is subpoenaed. Other than for a hearing or trial, a non-resident of the Commonwealth when served with a subpoena within the Commonwealth may be required to attend or produce documents, electronically stored information, or tangible things only in that county wherein he is served, or within 50 airline miles of the place of service, or at such other convenient place as is fixed by an order of court.

(e) Subpoena for a Hearing or Trial. At the request of any party subpoenas for attendance or to produce documents, electronically stored information, or tangible things at a hearing or trial shall be issued by any of the persons directed in subdivision (a) of this rule. A subpoena requiring the attendance of a witness or production of documents, electronically stored information, or tangible things at a hearing or trial may be served at any place within the Commonwealth.

(f) 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 that requires production of documents shall produce them as they are kept in the ordinary course of business

or shall organize and label them to correspond to the categories in the demand. Other than for a deposition, hearing, or trial, unless the production of original documents is requested, the producing party may produce copies of the documents, including by electronic means, provided that, if requested, the producing party affords all parties a fair opportunity to verify the copies by comparison with the originals.

(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 shall 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 may object to the discovery of inaccessible electronically stored information, and any such objection shall specify the reason that such discovery is inaccessible. On motion to compel or for a protective order, the person claiming inaccessibility bears the burden of showing inaccessibility. 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(f)(4)(C) and (D)**. 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 shall make the claim expressly and provide information that will enable the parties to assess the claim. A privilege log need not be prepared, except by agreement or order of the court.

(B) Information mistakenly 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. The provisions of **Rule 26(b)(5)(B) and (C)** are applicable.

(3) Further Protection. Any person subject to a subpoena under this rule may move the court:

(A) for a protective order under **Rule 26(c)** or

(B) to be deemed entitled to any protection set forth in any discovery or procedural order previously entered in the case.

(g) Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court in which the action is pending.

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