

MASSACHUSETTS RULES OF CIVIL PROCEDURE

RULE 45. SUBPOENA

Reporter's Notes--2015

Background to 2015 Amendments

In 2013, the Standing Advisory Committee on the Rules of Civil Procedure of the Supreme Judicial Court (Standing Advisory Committee) undertook a review of Rule 45 governing subpoenas. Two matters that prompted the Committee to undertake this review were changes to Rule 45 of the Federal Rules of Civil Procedure effective December 1, 2013 and changes to Rule 45 of the Massachusetts Rules of Civil Procedure resulting from a series of rules amendments that dealt with discovery of electronically stored information effective January 1, 2014.

The most significant change in Rule 45 as result of this review was the adoption for Massachusetts practice of a “documents only” subpoena directed to a non-party, a practice that has existed under the Federal Rules of Civil Procedure since 1991.

Without the formal rules-based ability to subpoena documents from a non-party, Massachusetts lawyers have accomplished a result similar to that allowed under the Federal Rules by resorting to a practice of noticing the deposition of a keeper of records together with a deposition subpoena that required the production of documents at the deposition. See Rules 30(b)(1) and 45(d) (prior to the instant amendment). As long as there was no need to depose the keeper of records and only a desire to obtain the requested documents, the party seeking the discovery would agree to “waive” the appearance at the deposition if the documents themselves were produced. With the adoption of a documents only subpoena in 2015, there is no longer a need in Massachusetts to use deposition practice in regard to a non-party for the sole purpose of document production.

Other changes were made to Rule 45 to bring the rule up-to-date and to make the rule consistent with current subpoena practice.

The 2015 Amendments

A number of changes have been made to Rule 45 to deal with the dual nature of the subpoena-- to command the appearance of a non-party witness and to command production of documents, etc. from the non-party witness. The following is a section-by-section analysis describing the significant changes.

Rule 45(a).

As amended, Rule 45(a) states that a subpoena may command a person, in addition to giving 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” and to do so “at a specified time and place.” The addition of the quoted language formally adopts the concept of a documents only subpoena for Massachusetts civil practice.

A specific reference to electronically stored information has been added, consistent with other changes made to the discovery rules in 2014 regarding discovery of electronically stored information.

The language added to Rule 45(a) has been adapted from Rule 45(a)(1)(A)(iii) of the Federal Rules of Civil Procedure.

Rule 45(b).

As revised, this rule implements the documents only provisions of the new rule. The new title to Rule 45(b) and language that a command to produce documents, etc. may be included in a subpoena to attend a deposition or in a separate subpoena are taken from Rule 45(a)(1)(C) of the Federal Rules of Civil Procedure.

The last sentence of the revised rule makes clear that a command to produce documents, etc. does not require the person upon whom it is served to “appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.” See Rule 45(d)(2)(A) of the Federal Rules of Civil Procedure.

Rule 45(c).

Rule 45(c), dealing with service of the subpoena, makes clear that the requirement of tendering of fees to the person served with the subpoena applies only if the person’s attendance is commanded and does not apply if the subpoena commands production only.

Rule 45(d).

A provision has been added to Rule 45(d)(1) that prior to service of a documents only subpoena before trial, a copy of the subpoena must be served on each party. This language differs from Rule 45(a)(4) of the Federal Rules of Civil Procedure, which requires that both a notice and a copy of the subpoena to be served on each party. The Massachusetts version reflects the belief that the requirement of a notice in addition to a copy of the subpoena is not needed. Service of a copy of the subpoena will provide sufficient notice to allow other parties to monitor discovery and to raise any objection to the subpoena.

The party serving the subpoena must also serve on all parties to the case a copy of any objection received to the subpoena as well as a notice of any production made or alternatively, a copy of the production. Similar requirements do not appear in the Federal Rules. The

Massachusetts addition was provided so that parties to the case, other than the party who served the subpoena, are aware of the scope of production and are aware of any objection to production made by the non-party who has been served with the subpoena. The language also gives the option to the party who receives the documents to provide copies of the documents to the other parties, as often was the prior practice.

The last paragraph of Rule 45(d)(1) states that if there is an objection to production by the person served with the subpoena, the party seeking production may move to compel production. “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.” This quoted language in the Massachusetts rule differs from the cognate provision in Rule 45(d)(2)(B)(ii) of the Federal Rules of Civil Procedure. The federal rule provides that an order of production must protect the person “from significant expense resulting from compliance.”

This is an intentional variation from the federal rules. The Massachusetts version adopts the same language that was added to Rule 45(b) in connection with the 2014 amendments regarding electronically stored information. A party issuing a subpoena is required to “take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” Rule 45(b), as amended effective January 1, 2014. The 2014 Reporter’s Notes to the Massachusetts amendments described the philosophy behind the language “undue burden or expense” as follows:

It is a recognition of the burden involving time and expense that a subpoena imposes upon a third person, often with no stake in the outcome and often without counsel. Although this provision has been added in connection with amendments that relate to electronic discovery, the requirement of taking steps to avoid undue burden and expense is not limited to subpoenas involving electronically stored information.

The Massachusetts language is intended to provide judges with broad discretion on a case-by-case basis to deal with the burden on a non-party to a case, and the possible expense, involved in responding to a subpoena. Its language is sufficiently broad to allow a court to require cost-sharing in its discretion as part of an order to produce.

The title of Rule 45(d) has also been revised to reflect the new procedure for a documents only subpoena.

Rule 45(e).

The pre-2015 version of Rule 45(e) dealt with a subpoena requiring attendance at a hearing or trial. The 2015 amendments added language making this provision applicable as well to a subpoena requiring production of documents, etc.

Rule 45(f).

A sentence has been added to Rule 45(f)(1)(A) to address the question whether copies of documents or originals of documents must be produced in response to a subpoena. The sentence states that in the case of a documents only subpoena, the producing person may produce copies of the documents, unless originals were requested in the command. However, if requested, the producing party must provide “all parties a fair opportunity to verify the copies by comparison with the originals.”

This sentence is not in the federal rules. It is intended to recognize the general practice in Massachusetts of producing copies of documents, and not the originals, other than at a deposition, hearing, or trial. This is consistent with the procedure applicable where documents are produced in connection with a deposition and the producing party desires to retain the originals. Rule 30(f)(1), second paragraph, provides that under such circumstances, the producing party

may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition.

The sentence provides that copies may be produced “by electronic means.” This language recognizes the benefits of producing copies by such methods as electronic transfer of files by e-mail, CD-ROM, or Internet connection.

The last sentence of Rule 45(f)(1)(2)(A) has been amended to provide that even though a privilege log is not required in the case of a subpoena to a third person where there is an objection on the basis of privilege, the parties may agree to the preparation of a privilege log or the court may so order.

Rule 45(g).

There are no changes to Rule 45(g) dealing with contempt for failure to obey a subpoena.