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# Rule 45 Third-Party Subpoenas and Upcoming Amendments

Using or Objecting to Subpoenas to Obtain Testimony and Evidence

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THURSDAY, JULY 11, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Jonathan E. Goldberg, Partner, SNR Denton, New York

Darren A. Craig, Member, Frost Brown Todd, Indianapolis

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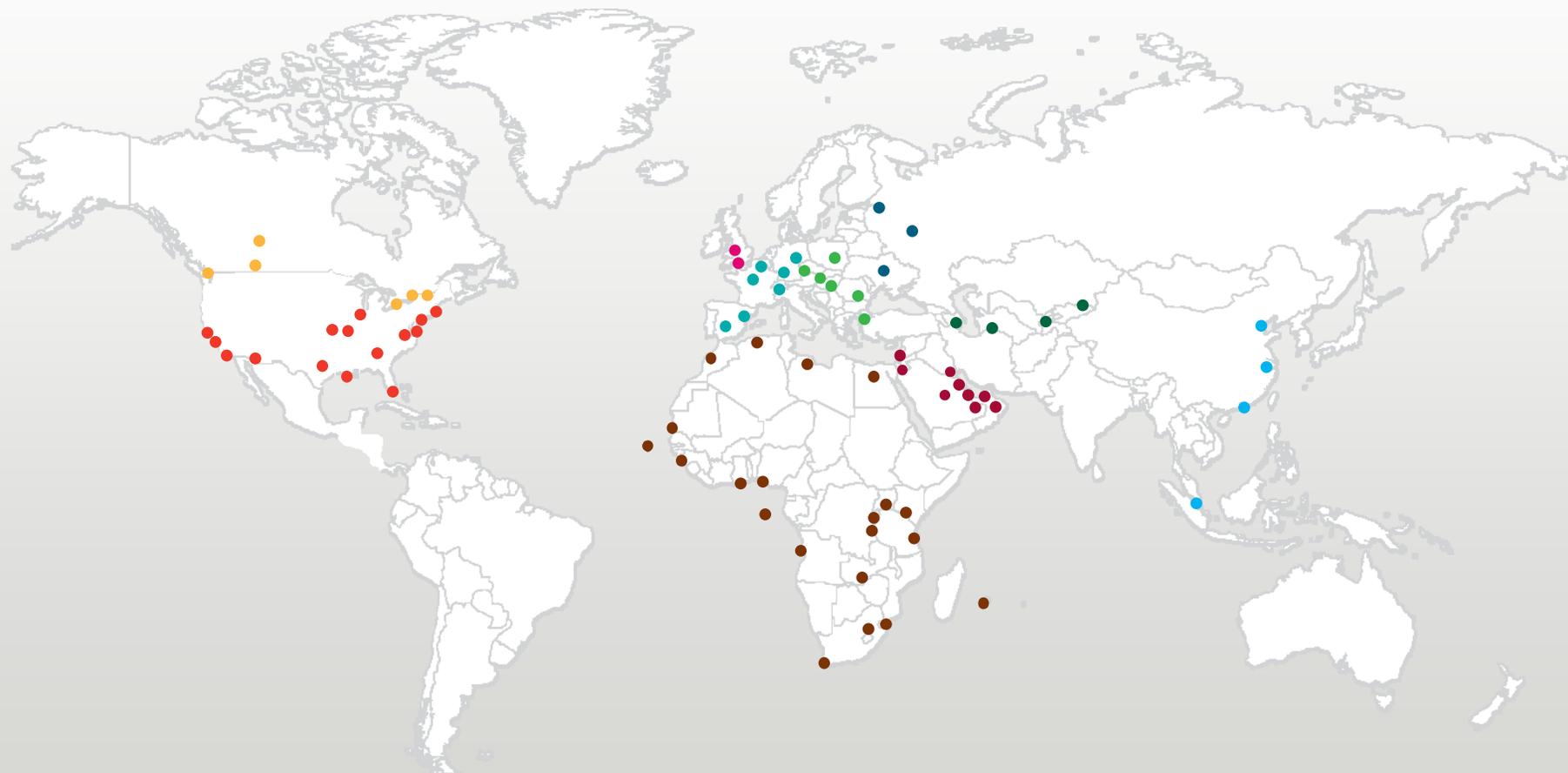
# Rule 45 Third-Party Subpoenas and Upcoming Amendments

## Using or Objecting to Subpoenas to Obtain Testimony and Evidence

July 10, 2013

Jonathan Evan Goldberg  
Dentons US LLP

# Locations





# Jonathan Evan Goldberg

Jonathan Evan Goldberg is a member of Dentons' Litigation and Arbitration practice, where he focuses on all aspects of complex commercial litigation, employment law and litigation, and ERISA litigation.

Jonathan, an experienced litigator, trial lawyer, and public speaker, has successfully represented numerous clients in federal and state courts throughout the United States in matters involving claims of retaliation, discrimination, wrongful termination, fraud, breach of fiduciary duty and breach of contract. Jonathan also routinely represents corporations and individuals in trade secrets and restrictive covenant litigation, assists clients in understanding and addressing the various legal issues raised in connection with the failure of Bernard L. Madoff Securities, Inc., and has defended corporate and individual clients in connection with investigations by the US Department of Labor (DOL) and the US Department of Justice (DOJ), Antitrust Division.

Jonathan also concentrates on and advises US and multinational companies and executives in all aspects of employment law, including drafting and negotiating employment and separation agreements, corporate restructurings and reductions in force, employment advice related to corporate transactions, internal corporate investigations, handbooks and policy manuals, sexual harassment and other sensitivity training, protecting against employee raiding and theft of confidential information, and compliance with all federal, state, and local discrimination laws.

Prior to joining SNR Denton, Jonathan gained significant litigation and trial experience working at several major law firms and served as a federal law clerk for the Honorable Harvey E. Schlesinger, US District Court for the Middle District of Florida, Jacksonville, Florida.

Jonathan is also a trained and skilled mediator.



# Preparing and serving third-party subpoenas

- Required contents
- Issuing the subpoena
- Serving the subpoena
- Witness fees
- Notice of subpoena
- Rule 45 amendments

# Required Contents of Subpoena

Pursuant to Rule 45(a)(1)(A), every subpoena must:

- (i) state the court from which it issued;
- (ii) state the title of the action, the court in which it is pending, and its civil-action number;
- (iii) command each person to whom it is directed to do the following at a specified time and place:
  - 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).

# Text of Rule 45(c)

## (c) Protecting a Person Subject to a Subpoena.

(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 issuing 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 a deposition, hearing, or trial.

(B) **Objections.** A person commanded to produce documents 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 an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing 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 issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party’s officer to travel more than 100 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 within the state where the trial is held;

(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 issuing 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 100 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.

# Text of Rule 45(d)

(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 to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

# Additional Requirements for Subpoena Contents

- In addition, pursuant to Rule 45(a)(1)(B), “[a] subpoena commanding attendance at a deposition must state the method for recording the testimony.”
- In other words, the Subpoena must state whether the deposition will be recorded simply by stenographic means (i.e., by a court reporter) and/or by video.
- *Practice Tip:* Include the possibility of both (“will be recorded by court reporter and/or by video”).

# Permissible Form/Contents

- Document “command” can be combined with a subpoena seeking testimony (*subpoena ad testificandum*) or set forth in a stand-alone subpoena (*subpoena duces tecum*).
- Text of Rule 45(a)(1)(C): “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.”
- Note that “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.” Rule 45(a)(1)(D).

## Issuing the Subpoena – Rule 45(a)(2)

- *Issued from Which Court.* A subpoena must issue as follows:
  - (A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;
  - (B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and
  - (C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.
- (3) *Issued by Whom.* The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:
  - (A) a court in which the attorney is authorized to practice; or
  - (B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

# Service/Fees/Notice – Rule 45(b)

- (1) *By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.* Any person who is at least 18 years old 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 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. 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, a notice must be served on each party.
- (2) *Service in the United States.* Subject to [Rule 45\(c\)\(3\)\(A\)\(ii\)](#), a subpoena may be served at any place:
  - (A) within the district of the issuing court;
  - (B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;
  - (C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or
  - (D) that the court authorizes on motion and for good cause, if a federal 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 issuing 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.

# Form Subpoena

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action

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UNITED STATES DISTRICT COURT  
for the  
\_\_\_\_\_ District of \_\_\_\_\_

\_\_\_\_\_  
*Plaintiff*  
v.  
\_\_\_\_\_  
*Defendant*

)  
)  
) Civil Action No.  
)  
) (If the action is pending in another district, state where:  
) \_\_\_\_\_ District of \_\_\_\_\_ )

**SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION**

To:

*Testimony*: **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
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The deposition will be recorded by this method: \_\_\_\_\_

*Production*: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

\_\_\_\_\_

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: \_\_\_\_\_ *CLERK OF COURT* OR \_\_\_\_\_  
*Signature of Clerk or Deputy Clerk* *Attorney's signature*

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* \_\_\_\_\_, who issues or requests this subpoena, are:  
\_\_\_\_\_  
\_\_\_\_\_

Page 2 of form is proof of service.  
Page 3 of form is copy of Rules 45(c) and (d)

# Summary of Amendments

- Under the new Rule 45(a)(2), “a subpoena [for testimony or documents only] must issue from the court where the action is pending.” (Currently, Rule 45 requires that a deposition subpoena issue “from the court for the district where the deposition is to be taken,” or that a “documents only” subpoena issue “from the court for the district where the production or inspection is to be made.”)
- A new subsection (a)(4) emphasizes that “documents only” subpoenas must be served on each party “before the subpoena is served on the person to whom it is directed.” The amendment not only highlights the notice requirement, but it also requires service of the subpoena itself, giving parties a preview of its substance before service on the deponent.
- Service of process (Rule 45(b)(2)) is now nationwide.
- Rule 45(c)(1) clarifies that a trial subpoena, deposition subpoena, and documents-only subpoena are returnable only within the state or within 100 miles of where the witness lives, works, or regularly does business, even if the witness is a party or a party’s officer, or, in the case of a trial subpoena, elsewhere if such witness would not incur “substantial expense.”
- The “court where compliance is required” may transfer the motion to the issuing court pursuant to Rule 45(f) if the witness consents or if the court finds “exceptional circumstances.”

# Redline of Rule 45 Amendments

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- "Dirty" Version of Rule 45
- Rule 45. Subpoena  
(a) In General.  
(1) Form and Contents.  
(A) Requirements - In General. Every subpoena must:  
(i) state the court from which it issued;  
(ii) state the title of the action, ~~the court in which it is pending,~~ and its civil-action number;  
(iii) command each person to whom it is directed to do the following at a specified time and place: 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(d) and (e).  
(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 party to permit inspection, copying, testing, or sampling of the materials.  
(2) ~~Issued from which Court.~~ A subpoena must issue from the court where the action is pending, ~~as follows:~~  
(A) ~~for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;~~  
(B) ~~for attendance at a deposition, from the court for the district where the deposition is to be taken; and~~  
(C) ~~for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.~~  
(3) Issued by Whom. The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena ~~if the attorney is authorized to practice in the issuing court, as an officer of:~~  
(A) ~~a court in which the attorney is authorized to practice; or~~  
(B) ~~a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.~~  
(4) Notice to Other Parties Before Service. If the subpoena commands the production before trial of documents, electronically stored information, or tangible things or the pretrial inspection of premises, 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 before the subpoena is served on the person to whom it is directed.~~
- (b) Service.  
(1) By Whom and How; Tendering Fees; Serving a Copy of Certain Subpoenas. Any person who is at least 18 years old 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 1 day's attendance and the mileage allowed by law. Fees and mileage need

# Redline continued

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66 not be tendered when the subpoena issues on behalf of the United  
67 States or any of its officers or agencies. ~~if the subpoena~~  
68 ~~commands the production of documents, electronically stored~~  
69 ~~information, or tangible things or the inspection of premises~~  
70 ~~before trial, then before it is served, a notice must be served on~~  
71 ~~each party.~~  
72 (2) ~~Service in the United States. A subpoena may be served at any~~  
73 ~~place within the United States. Subject to Rule 45(c)(3)(A)(iii),~~  
74 ~~a subpoena may be served at:~~  
75 (A) ~~within the district of the issuing court;~~  
76 (B) ~~outside that district but within 100 miles of the place~~  
77 ~~specified for the deposition, hearing, trial, production, or~~  
78 ~~inspection;~~  
79 (C) ~~within the state of the issuing court if a state statute or~~  
80 ~~court rule allows service at that place of a subpoena issued~~  
81 ~~by a state court of general jurisdiction sitting in the~~  
82 ~~place specified for the deposition, hearing, trial,~~  
83 ~~production, or inspection; or~~  
84 (D) ~~that the court authorizes on motion and for good cause, if a~~  
85 ~~federal statute so provides.~~  
86 (3) ~~Service in a Foreign Country. 28 U.S.C. § 1783 governs issuing~~  
87 ~~and serving a subpoena directed to a United States national or~~  
88 ~~resident who is in a foreign country.~~  
89 (4) ~~Proof of Service. Proving service, when necessary, requires~~  
90 ~~filing with the issuing court a statement showing the date and~~  
91 ~~manner of service and the names of the persons served. The~~  
92 ~~statement must be certified by the server.~~  
93 (c) ~~Place~~  
94 ~~of compliance.~~  
95 (1) ~~For a Trial, Hearing, or Deposition. A subpoena may command a~~  
96 ~~person to attend a trial, hearing, or deposition only as follows:~~  
97 (A) ~~within 100 miles of where the person resides, is employed,~~  
98 ~~or regularly transacts business in person; or~~  
99 (B) ~~within the state where the person resides, is employed, or~~  
100 ~~regularly transacts business in person, if the person~~  
101 ~~(i) the person is a party or a party's officer; or~~  
102 ~~(ii) the person is commanded to attend a trial and would~~  
103 ~~not incur substantial expense.~~  
104 (2) ~~For other Discovery. A subpoena may command:~~  
105 (A) ~~production of documents, tangible things, or electronically~~  
106 ~~stored information, or tangible things at a place within 100~~  
107 ~~miles of where the person resides, is employed, or regularly~~  
108 ~~transacts business in person, reasonably convenient for the~~  
109 ~~person who is commanded to produce; and~~  
110 (B) ~~inspection of premises at the premises to be inspected.~~  
111 (d) ~~(e)~~  
112 (1) ~~Protecting a Person Subject to a Subpoena; Enforcement.~~  
113 ~~Avoiding Undue Burden or Expense; Sanctions. A party or attorney~~  
114 ~~responsible for issuing and serving a subpoena must take~~  
115 ~~reasonable steps to avoid imposing undue burden or expense on a~~  
116 ~~person subject to the subpoena. The issuing court for the~~  
117 ~~district where compliance is required under Rule 45(c) must~~  
118 ~~enforce this duty and impose an appropriate sanction - which may~~  
119 ~~include lost earnings and reasonable attorney's fees - on a party~~  
120 ~~or attorney who fails to comply.~~  
121 (2) ~~Command to Produce Materials or Permit Inspection.~~  
122 (A) ~~Appearance Not Required. A person commanded to produce~~  
123 ~~documents, electronically stored information, or tangible~~  
124 ~~things, or to permit the inspection of premises, need not~~  
125 ~~appear in person at the place of production or inspection~~  
126 ~~unless also commanded to appear for a deposition, hearing,~~  
127 ~~or trial.~~  
128 (B) ~~Objections. A person commanded to produce documents or~~  
129 ~~tangible things or to permit inspection may serve on the~~  
130 ~~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~~

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131 to producing electronically stored information in the form  
132 or forms requested. The objection must be served before the  
133 earlier of the time specified for compliance or 14 days  
134 after the subpoena is served. If an objection is made, the  
135 following rules apply:  
136 (1) At any time, on notice to the commanded person, the  
137 serving party may move the ~~issuing court for the~~  
138 ~~district where compliance is required under Rule 45(c)~~  
139 ~~for an order compelling production or inspection.~~  
140 (11) These acts may be required only as directed in the  
141 order, and the order must protect a person who is  
142 neither a party nor a party's officer from significant  
143 expense resulting from compliance.  
144 (3) **Quashing or Modifying a Subpoena.**  
145 (A) **When Required.** On timely motion, the ~~issuing court for the~~  
146 ~~district where compliance is required under Rule 45(c)~~ must  
147 quash or modify a subpoena that:  
148 (i) fails to allow a reasonable time to comply;  
149 (ii) requires a person to comply beyond the geographical  
150 limits specified in Rule 45(c), who is neither a party  
151 nor a party's officer to travel more than 100 miles  
152 from where that person resides, is employed, or  
153 regularly transacts business in person — except that,  
154 subject to Rule 45(c)(3)(B)(iii), the person may be  
155 commanded to attend a trial by traveling from any such  
156 place within the state where the trial is held;  
157 (iii) requires disclosure of privileged or other protected  
158 matter, if no exception or waiver applies; or  
159 (iv) subjects a person to undue burden.  
160 (B) When Permitted. To protect a person subject to or affected  
161 by a subpoena, the ~~issuing court for the district where~~  
162 ~~compliance is required under Rule 45(c)~~ may, on motion,  
163 quash or modify the subpoena if it requires:  
164 (i) disclosing a trade secret or other confidential  
165 research, development, or commercial information; ~~or~~  
166 (ii) disclosing an unretained expert's opinion or  
167 information that does not describe specific  
168 occurrences in dispute and results from the expert's  
169 study that was not requested by a party; ~~or~~  
170 ~~(iii) a person who is neither a party nor a party's officer~~  
171 ~~to incur substantial expense to travel more than 100~~  
172 ~~miles to attend trial.~~  
173 (C) **Specifying Conditions as an Alternative.** In the  
174 circumstances described in Rule 45(~~dc~~) (3) (B), the court may,  
175 instead of quashing or modifying a subpoena, order  
176 appearance or production under specified conditions if the  
177 serving party:  
178 (i) shows a substantial need for the testimony or material  
179 that cannot be otherwise met without undue hardship;  
180 and  
181 (ii) ensures that the subpoenaed person will be reasonably  
182 compensated.  
183 (d) **Duties in Responding to a Subpoena.**  
184 (1) **Producing Documents or Electronically Stored Information.** These  
185 procedures apply to producing documents or electronically stored  
186 information:  
187 (A) **Documents.** A person responding to a subpoena to produce  
188 documents must produce them as they are kept in the ordinary  
189 course of business or must organize and label them to  
190 correspond to the categories in the demand.  
191 (B) **Form for Producing Electronically Stored Information Not**  
192 **Specified.** If a subpoena does not specify a form for  
193 producing electronically stored information, the person  
194 responding must produce it in a form or forms in which it is

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195 ordinarily maintained or in a reasonably usable form or  
196 forms.  
197 (C) Electronically Stored Information Produced in Only One Form.  
198 The person responding need not produce the same  
199 electronically stored information in more than one form.  
200 (D) Inaccessible Electronically Stored Information. The person  
201 responding need not provide discovery of electronically  
202 stored information from sources that the person identifies  
203 as not reasonably accessible because of undue burden or  
204 cost. On motion to compel discovery or for a protective  
205 order, the person responding must show that the information  
206 is not reasonably accessible because of undue burden or  
207 cost. If that showing is made, the court may nonetheless  
208 order discovery from such sources if the requesting party  
209 shows good cause, considering the limitations of Rule  
210 26(b)(2)(C). The court may specify conditions for the  
211 discovery.  
212 (2) Claiming Privilege or Protection.  
213 (A) Information Withheld. A person withholding subpoenaed  
214 information under a claim that it is privileged or subject  
215 to protection as trial-preparation material must:  
216 (i) expressly make the claim; and  
217 (ii) describe the nature of the withheld documents,  
218 communications, or tangible things in a manner that,  
219 without revealing information itself privileged or  
220 protected, will enable the parties to assess the  
221 claim.  
222 (B) Information Produced. If information produced in response  
223 to a subpoena is subject to a claim of privilege or of  
224 protection as trial-preparation material, the person making  
225 the claim may notify any party that received the information  
226 of the claim and the basis for it. After being notified, a  
227 party must promptly return, sequester, or destroy the  
228 specified information and any copies it has; must not use or  
229 disclose the information until the claim is resolved; must  
230 take reasonable steps to retrieve the information if the  
231 party disclosed it before being notified; and may promptly  
232 present the information under seal to the court for the  
233 ~~district where compliance is required under Rule 45(c)~~ under  
234 ~~seal~~ for a determination of the claim. The person who  
235 produced the information must preserve the information until  
236 the claim is resolved.  
237 (f) ~~Transferring a Subpoena-Related Motion. When the court where compliance~~  
238 ~~is required did not issue the subpoena, it may transfer a motion under~~  
239 ~~this rule to the issuing court if the parties and the person subject to~~  
240 ~~the subpoena consents or if the court finds exceptional circumstances.~~  
241 ~~Then, if the attorney for a person subject to a subpoena is authorized~~  
242 ~~to practice in the court where the motion was made, the attorney may~~  
243 ~~file papers and appear on the motion as an officer of the issuing court.~~  
244 ~~To enforce its order, the issuing court may transfer the order to the~~  
245 ~~court where the motion was made.~~  
246 (g\*) ~~Contempt. The court for the district where compliance is required under~~  
247 ~~Rule 45(c) - and also, after a motion is transferred, the issuing court~~  
248 ~~- may hold in contempt a person who, having been served, fails without~~  
249 ~~adequate excuse to obey the subpoena or an order related to it. A~~  
250 ~~nonparty's failure to obey must be excused if the subpoena purports to~~  
251 ~~require the nonparty to attend or produce at a place outside the limits~~  
252 ~~of Rule 45(c)(1)(A)(ii).~~

#### Committee Note

1  
2 Rule 45 was extensively amended in 1991. The goal of the present  
3 amendments is to clarify and simplify the rule. The amendments recognize the  
4 court where the action is pending as the issuing court, permit nationwide  
5 service of a subpoena, and collect in a new subdivision (c) the previously

# Objecting to or limiting the scope of subpoenas: ESI preservation and production

- What are best practices for non-party recipients of a subpoena for documents to preserve the data and make effective objections to the scope of the subpoena?
  - Timing/Deadlines
  - Burden/Expense
  - Who? When? Where? What?
  - Discussions with Issuing Party
  - Discussions with Non-Issuing Party
  - Cases/Strategies

# Thank you



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## **Rule 45 Third-Party Subpoenas and Upcoming Amendments**

Darren A. Craig, Frost Brown Todd LLC  
July 11, 2013

## Enforcing the subpoena

- Burden of proof
- Basis for motion
- Relief sought
- Where to make the motion
- Rule 45 amendments
- Substance and required documents

## Rule 45 amendment's impact on trial subpoenas for parties and party officers

## Burden of proof

Party moving to compel must make facial showing that:

- Discovery responses are deficient. *Bayview Loan Servicing, LLC v. Boland*, 259 F.R.D. 516, 518 (D. Colo. 2009).
- Objections are unjustified. *Peralta v. Martel*, No. CIV S-09-3228, 2011 WL 5547153, at \*1 (E.D. Cal. Nov. 14, 2011).
- Discovery is relevant. *Wilson v. Hill*, No. 2:08-CV-552, 2010 WL 5014486, at \*2 (S.D. Ohio Dec. 3, 2010.)

## Burden of proof

- Not a heavy burden.
- Relevance evaluated under Rule 26 standard. *Williams v. City of Dallas*, 178 F.R.D. 103, 110 (S.D. Tex. 1998).
- Court assumes allegations in complaint are true to determine relevance. *Id.* at 106 n.3.

## Burden of proof

- Burden then shifts to non-party to show why materials sought are not discoverable.  
*Snedeker v. Snedeker*, No. 2:10-cv-189, 2011 WL 3555650, at \*1 (S.D. Ind. Aug. 11, 2011).

## Burden of proof

Quashing or modifying subpoena (mandatory):

- Subpoena fails to allow a reasonable time to comply. Fed. R. Civ. P. 45(c)(3)(A)(i).
- Subpoena requires person to travel more than 100 miles or to a different state for trial. Fed. R. Civ. P. 45(c)(3)(A)(ii).
- Subpoena requires disclosure of privileged material. Fed. R. Civ. P. 45(c)(3)(A)(iii).

## Burden of proof

Quashing or modifying subpoena (discretionary)

- Subpoena requires disclosure of trade secrets or other confidential information. Fed. R. Civ. P. 45(c)(3)(B)(i).
- Subpoena requires disclosure of unretained expert's opinion or information about occurrences not in dispute. Fed. R. Civ. P. 45(c)(3)(B)(ii).
- Subpoena requires non-party to incur substantial expense to travel more than 100 miles to attend trial. Fed. R. Civ. P. 45(c)(3)(B)(iii).

## Burden of proof

### Protective Orders – Fed. R. Civ. P. 26(c)(1)

- Materials sought are irrelevant. *Mannington Mills, Inc. v. Armstrong World Indus., Inc.*, 206 F.R.D. 525, 529 (D. Del. 2002).
- Discovery sought subjects non-party to an unreasonable burden. *Belaire at Boca, LLC v. Associations Ins. Agency, Inc.*, No. 06-80887-CIV, 2007 WL 2177212, at \*1 (S.D. Fla. July 26, 2007).
- Must establish burden through declarations or other evidence. *Id.*

## Burden of proof

Factors relevant to burden analysis – *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 49 (S.D.N.Y. 1996).

- Party's need for documents.
- Breadth of document requests.
- Time period covered by requests.
- Particularity with which documents are described.

## Burden of proof

- Courts prefer to modify subpoenas, rather than to quash them entirely. *Williams v. City of Dallas*, 178 F.R.D. 103, 110 (N.D. Tex. 1998).
- Confidentiality of trade secrets and other proprietary information can be guarded by protective order. Fed. R. Civ. P. 26(c)(1)(G).
- Court may condition compliance on requesting party's compensating non-party. Fed. R. Civ. P. 45(c)(3)(C)(ii).

## Basis for Motion – Testimonial Subpoenas

- Witness fails to appear to testify at a deposition.
- Corporation fails to designate a representative to testify under Rule 30(b)(6) or Rule 31(a)(4).
- Witness refuses to answer questions at a deposition.
- Witness refuses to answer questions posed in deposition by written questions.
- Witness fails to appear to testify at trial.

## Basis for Motion – Document Subpoenas

- Non-party fails to produce documents in response to a document subpoena.
- Non-party serves objections in response to a document subpoena.
- Non-party files a motion to quash or motion for protective order in response to a document or testimonial subpoena.

## Relief Sought

- Compliance with the subpoena
- Civil contempt sanctions (usually a fine).
  - In some courts, not available unless a party disobeys an order compelling discovery.
- Attorneys' fees incurred in bringing motion for contempt.
- Attorneys' fees incurred in bringing a motion to compel are not recoverable. *In re Application of Sumar*, 123 F.R.D. 467, 473-74 (S.D.N.Y. 1988).

## Where to Make the Motion – Current Practice

- File motion to compel or for sanctions in the court that issues the subpoena. Fed. R. Civ. P. 45(c)(2)(B)(i) & 45(e).
- File as a motion if the issuing court is the court where the action is pending.
- File a miscellaneous action if the issuing court is not where the underlying action is pending.
  - Filing fee is \$46.00.
  - Check local rules for procedures.

## Rule 45 Amendments

- Motion to compel must be filed in “the court for the district where compliance is required.” Fed. R. Civ. P. 45(d)(2)(B)(i) (effective December 1, 2013).
- “Place of compliance” defined in Rule 45(c).
- Generally, within 100 miles of where the non-party resides, is employed, or regularly transacts business in person.

## Rule 45 Amendments

### Testimonial subpoena

- May command a non-party to attend a trial, hearing, or deposition “within 100 miles of where the person resides, is employed, or regularly transacts business in person.” Fed. R. Civ. P. 45(c)(1)(A).
- A party or a party’s officers, directors, or managing agents may be required to attend a deposition by notice. The geographic restrictions of Rule 45 do not apply.

## Rule 45 Amendments

### Testimonial subpoena (continued)

- May command a party or party's officer to attend trial anywhere "within the state where the person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(1)(B).
- May command a non-party to attend a trial anywhere in the state where the person resides, is employed, or regularly transacts business only if the non-party "would not incur substantial expense." Fed. R. Civ. P. 45(c)(1)(B)(ii).

## Rule 45 Amendments

### Testimonial subpoena (continued)

- Where court enters an order for remote testimony under Rule 43(a), it may issue a subpoena compelling a witness to testify at a place within 100 miles of where the witness resides, works, or regularly transacts business.

## Rule 45 Amendments

### Document subpoena

- Subpoena may command “production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person.” Fed. R. Civ. P. 45(c)(2)(A).
- Subpoena may command inspection of premises “at the premises to be inspected.” Fed. R. Civ. P. 45(c)(2)(B).

## Rule 45 Amendments

### Transferring a Subpoena-Related Motion

- New Rule 45(f) authorizes the compliance court to transfer a motion to compel or a motion to quash to the issuing court in two circumstances:
  - “[T]he person subject to the subpoena consents”;  
or
  - “the court finds exceptional circumstances.”
- Party consent is not required.

## Rule 45 Amendments

### Transferring a Subpoena-Related Motion (continued)

- “Exceptional circumstances” are not defined.
- Burden on proponent of transfer to show exceptional circumstances exist.
- Transfer may be appropriate where:
  - Necessary to avoid disrupting issuing court’s management of litigation;
  - Issuing court has already ruled on issues presented by the motion; or
  - Same issues are likely to arise in multiple districts.

## Rule 45 Amendments

### Transferring a Subpoena-Related Motion (continued)

- Committee Notes encourage communication between issuing court and compliance court.
- Committee Notes encourage judges to permit teleconferences to minimize inconvenience after transfer.
- Rule authorizes attorneys licensed in compliance court to file documents in issuing court after transfer.

## Rule 45 Amendments

### Transferring a Subpoena-Related Motion (continued)

- Motion may be retransferred to compliance court to enforce discovery order.
- Disobedience of issuing court's order entered after transfer constitutes contempt of both issuing court and compliance court.  
Fed. R. Civ. P. 45(g).

## Substance and Required Documents

### Substance of motion

- Factual background of underlying litigation.
- Relevance of requested discovery.
- Details concerning the issuance and service of the subpoena.
- Details concerning non-party's objections or non-compliance.
- Legal basis for motion.
- Relief sought.
- Efforts to resolve dispute.

# Substance and Required Documents

## Required documents

- Notice of appearance
- Motion
- Supporting brief/memorandum
- Subpoena and proof of service
- Supporting declarations or other evidence
- Certificate of efforts to resolve dispute (if required)
- Request for hearing
- Proposed order

## Rule 45 amendment's impact on trial subpoenas for parties and party officers

- Amendments make clear that neither a party nor its officers may be compelled to attend trial outside the state where the party or the party officer resides, is employed, or regularly transacts business unless the subpoena requires no more than 100 miles of travel. Fed. R. Civ. P. 45(c)(1)(B)(i).
- Resolves split of authority – *Vioxx* issue

## Rule 45 amendment's impact on trial subpoenas for parties and party officers

- *In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664 (E.D. La. 2006) (compelling a party officer from New Jersey to testify at a trial in New Orleans).
- *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that out-of-state plaintiffs cannot be compelled to attend a trial in New Orleans where they would have to travel more than 100 miles).

Questions?

Thank you!

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