

Changes to Federal Rules of Civil Procedure 45 and 37

Rule 45

Rule 45 governs the issuance of subpoenas in federal court. Significant changes to Rule 45 went in to effect on December 1, 2013. This handout provides an overview of these changes, and gives the practical implications of such changes.

1. 45(a)(2): A subpoena must issue from the court where the action is pending.
 - a. The prior version of Rule 45 had different rules as to which court was the proper court to issue a subpoena. A subpoena for attendance at a hearing or a trial was issued from the district court where the hearing or trial was to be held, a deposition subpoena was issued from the district court in the district where the deposition was to take place, and a document subpoena was issued from the district where the documents were to be produced or inspected.
 - b. To streamline the process and prevent confusion, the new version of Rule 45 provides that all subpoenas are to be issued from the district court where the action is pending.
2. 45(a)(3): The clerk must issue a subpoena, signed but otherwise 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.
 - a. This change is again designed to streamline the process for issuing a subpoena. The prior version of Rule 45 allowed an attorney to issue and sign a subpoena as either an officer of a court in which the attorney was authorized to practice or a court for a district where a deposition was to be taken or production was to be made. Now, so long as the attorney is authorized to practice in the court where the action is pending, the attorney may issue and sign a subpoena for any purpose authorized under Rule 45.
3. Rule 45(a)(4): 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.
 - a. This requirement is not entirely new; however, the provision has been moved to a more prominent location in the rule. The requirement that the notice include a copy of the actual subpoena is new.
 - b. This change is designed to enable other parties to object to the subpoena, or to serve a subpoena for additional materials. By requiring a copy of the subpoena, the rule now ensures that all parties will know exactly what the subpoenaed person is being asked to produce prior to the actual service of the subpoena.

4. Rule 45(b)(2): A subpoena may be served at any place within the United States.
 - a. This change removes the geographical limits on where a subpoena may be served.
 - b. Again, this reflects the new rule's intent of streamlining the subpoena process.
 - c. Although the process of serving a subpoena has been substantially simplified, the rule still protects subpoena recipients by imposing geographical limits on the place for compliance with the subpoena.

5. Rule 45(c): Place of Compliance
 - a. As in the old rule, a non-party can only be commanded to attend a trial, hearing, or deposition within 100 miles of where the person resides, is employed, or regularly transacts business in person.
 - b. A subpoena may command a person to attend a trial, hearing, or deposition within the state where the person resides, is employed, or regularly transacts business in person, but only if the person is a party or a party's officer.
 - i. This overrules cases decided under the previous version of Rule 45, in which courts held that a district court may compel a party or party's officers to travel more than 100 miles, or to another state, to testify at trial.
 - ii. Note that a party may still pursue the depositions of parties, officers, directors, and managing agents of parties simply by issuing a notice of deposition under Rule 30.
 - c. In addition, a non-party may be commanded to attend a trial if the non-party would not incur substantial expense.
 - d. A subpoena may command the production of documents, ESI, or tangible things at a location within 100 miles of where the person resides, is employed, or regularly transacts business in person.
 - e. A subpoena may command the inspection of premises at the premises to be inspected, regardless of location.

6. Rule 45(d)(2)(B)(i): At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
 - a. Motions to compel production or inspection from a person subject to a subpoena must be brought in the court for the district where compliance is required.
 - b. Under the prior version of Rule 45, these motions were brought in the issuing court.

7. Rule 45(d)(3): Quashing or Modifying a Subpoena
 - a. Motions to quash or modify a subpoena must be filed, at least initially, in the court for the district where compliance is required.
 - b. Under the prior version of the rule, these motions were brought in the issuing court.

8. Rule 45(e)(2)(B): 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 the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.
 - a. Motions to determine privilege must be made in the court for the district where compliance is required.
 - b. Under the old version of the rule, these motions were brought in the issuing court.

9. General notes regarding Motions to Quash, Motions to Compel, and Motions to Determine a Claim of Privilege
 - a. Under the prior version of Rule 45, these were all brought in the issuing court. Now, they are all properly brought in the court for the district where compliance with the subpoena is required.
 - b. Now, the issuing court will always be the court where the action is pending.
 - c. This new version of the rule is intended to preserve the practice of having a court for the district where the subpoenaed person resides, or one within 100 miles of that person's residence or place of employment, hear such motions.
 - d. This provision, combined with the geographical limitations of Rule 45(c), is designed to protect local non-parties. Disputes about subpoenas are resolved in the non-party's local district court.
 - e. REMEMBER: If you want to file a motion allowed under Rule 45, it must be brought, at least initially, in the court for the district in which compliance is required.

10. Rule 45(f): When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.
 - a. This is a new provision, and it provides for the transfer of a motion allowed under Rule 45 from the court where compliance is required to the court that issued the subpoena.
 - i. One of two conditions must be met: (1) the person subject to the subpoena consents to the transfer; or (2) the court finds exceptional circumstances.
 - b. The proponent of the transfer bears the burden of showing exceptional circumstances.
 - i. Circumstances which may allow transfer:

1. Burdens on a local non-party are avoided;
 2. Transfer is necessary to avoid disrupting the issuing court's management of the underlying litigation;
 3. The issuing court has already ruled on various issues presented by the motion;
 4. The same issues are likely to arise in discovery in multiple districts.
- c. Any person with an interest in the Rule 45 Motion may seek a transfer.
11. Rule 45(g): The court for the district where compliance is required—and also, after a motion is transferred, the issuing 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. A subpoenaed person may be held in contempt for either failing to obey the subpoena or violating an order related to the subpoena.
 - b. The court in the district where compliance is required may hold the person in contempt.
 - c. If a motion is transferred pursuant to Rule 45(f), then the issuing court may hold the person in contempt.

Rule 37

Rule 37 addresses failure to cooperate in discovery and the appropriate sanctions for such a failure. Subsection (b)(1) was added to Rule 37 to conform with Rule 45(f), which is discussed in-depth above. The subsection provides:

1. If the court in the district where discovery is taken orders a deponent to be sworn, or to answer a question, and the deponent fails to obey, the failure may be treated as contempt of court.
2. If a deposition related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or where the action is pending.

The addition of Rule 37(b)(1) allows a party seeking to enforce the deponent's compliance some flexibility in choosing which court to apply to for sanctions for a deponent's failure to comply with a court order. For example, if a party seeking compliance transfers a subpoena-related motion to the issuing court (i.e., the court where the action is pending), that court orders the deponent to comply, and the deponent fails to comply, the party seeking compliance has a choice. They may apply for sanctions in either the court where the matter is pending, or the court where the deposition is to be taken.