

# Analysis of Amendments to Federal Rules of Civil Procedure 45 and 37

The Supreme Court of the United States has made significant amendments to Federal Rule of Civil Procedure 45, which became effective on December 1, 2013. Rule 45 governs the form, issuance, service, enforcement of, compliance with, and protection from, subpoenas in federal court. Due to the amendments to Rule 45, the Supreme Court has also made less extensive amendments to Rule 37, which addresses parties' failure to cooperate in discovery and sanctions for such failures.

There are significant changes to Rule 45, a number of which are designed to streamline the process of issuing and serving subpoenas. However, the amendments also, among other changes, modify the procedures for bringing motions related to subpoenas and resolve conflicting case law with respect to the subpoena power of the federal courts over parties and their officers for testimony at trial.

Foley prepared the following chart to assist those who find themselves involved with the subpoena process in civil cases in federal court — whether as a party or a subpoenaed person or entity — to navigate the changes by not only identifying the most significant provisions and changes, but also explaining the practical and strategic implications of these changes.



# Analysis of Amendments to Federal Rules of Civil Procedure 45 and 37

Rule	Difference	Practical Implications
<p><b>“Form and Contents”</b></p> <p><b>Rule 45(a)(1)(A)(ii)</b></p> <p><a href="#">[Click to See Text of Rule]</a></p>	<p>Removes the requirement that every subpoena must state the court in which it is pending.</p>	<p>Update form subpoenas and/or use updated form subpoenas from the district courts that take into account this change when issuing subpoenas on or after December 1, 2013.</p>
<p><b>“Issuing Court”</b></p> <p><b>Rule 45(a)(2)</b></p> <p><a href="#">[Click to See Text of Rule]</a></p>	<p>A subpoena must issue from the court where the action is pending.</p> <p>Previously, the court from which a subpoena was issued varied depending upon the purpose for which the subpoena was issued (i.e., attendance at hearing or trial, attendance at deposition, or production of documents) and the location of the witness or the place at which documents were to be produced.</p>	<p>This change streamlines the procedure for issuing a subpoena. Every subpoena now must be issued from the court where the action is pending. This change should increase efficiency and decrease costs connected with the issuance of subpoenas, as a party and its attorneys will no longer have to expend time investigating which court is the proper court to issue the subpoena.</p>
<p><b>“Issued by Whom”</b></p> <p><b>Rule 45(a)(3)</b></p> <p><a href="#">[Click to See text of Rule]</a></p>	<p>An attorney may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.</p> <p>Previously, an attorney could issue and sign a subpoena as either an officer of a court in which the attorney is authorized to practice or 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.</p>	<p>This change further simplifies the procedure for issuing a subpoena. So long as the attorney is authorized to practice in the court in which the action is pending, the attorney may issue and sign a subpoena for any purpose authorized under Rule 45.</p>



Rule	Difference	Practical Implications
<p><b>“Notice to Other Parties Before Service”</b></p> <p><b>Rule 45(a)(4)</b></p> <p><a href="#">[Click to See Text of Rule]</a></p>	<p>The provision requiring a party serving a subpoena for documents or inspection of premises to provide notice to all parties prior to serving the subpoena is moved to a more prominent location in Rule 45. Furthermore, the provision adds a requirement that the notice to parties include a copy of the subpoena.</p>	<p>This change is aimed at achieving the purpose of enabling the other parties to object to the subpoena or to serve a subpoena for additional materials from the person to whom the subpoena is directed.</p> <p>The new requirement that a copy of the subpoena be served with the notice ensures that the other parties to the lawsuit will know exactly what the subpoenaed person is being requested to produce prior to the subpoena being served on that person. As a result, a party to the action can, assuming it has standing to do so, object to and seek relief from the Court with respect to a subpoena that the party believes is improper at the earliest possible opportunity – potentially prior to service of the subpoena on the person to whom it is directed and almost certainly before such person is required to produce documents in response to the subpoena.</p> <p>Further, if the rule works as intended, all parties to the action will serve document subpoenas on a given third party at or around the same time. Thus, a third party to which a subpoena is directed would need to respond to multiple subpoenas concurrently. On the other hand, the idea is that the third party would comply with its document production obligations in the case at once, as opposed to having to respond to a series of subpoenas from various parties over an extended period of time. Having said that, there is no requirement that a party receiving notice of a document subpoena serve its own subpoena to that third party in any particular time frame.</p>



Rule	Difference	Practical Implications
<p><b>“Service in the United States”</b></p> <p><b>Rule 45(b)(2)</b></p> <p><a href="#">[Click to See Text of Rule]</a></p>	<p>Rule 45 now provides for nationwide service of subpoenas.</p> <p>Previously, there were geographical limits on where a subpoena could be served, depending on such factors as the location of the issuing court, the place specified for a deposition, trial, or the production of documents, and the law of the state in which the issuing court is located.</p>	<p>This change greatly simplifies the service of subpoenas. A person to whom a subpoena is directed can now be served anywhere in the United States. This helps parties avoid technical problems in obtaining service, particularly if a witness resides or conducts business outside of the district of the court in which the action is pending. At the same time, persons to whom subpoenas are directed – particularly third-parties – are afforded certain protections through geographic limitations on where such persons may be compelled to comply with a subpoena. See, “<i>Place of Compliance</i>,” below.</p> <p>For example, say that a case is pending in the United States District Court for the Eastern District of Michigan and a party to that case wants to subpoena a third-party witness who resides and works in Chicago, Illinois. Assuming that the party wanted to specify Chicago as the location for the deposition, under the old Rule, the subpoena could likely only be served in Illinois or within 100 miles of Chicago. If the witness was, say, on an extended vacation in California and there was a pressing time constraint in taking the deposition, the party could be out of luck. Under the amended rule, however, the subpoena could be served on the third-party witness in California. However, the subpoena can only command that the third-party attend a deposition within 100 miles of Chicago.</p>



Rule	Difference	Practical Implications
<p><b>“Place of Compliance”</b></p> <p><b>Rule 45(c)</b></p> <p><a href="#">[Click to See Text of Rule]</a></p>	<p>The amended Rule adds a provision collecting and simplifying the various provisions where compliance with a subpoena can be required.</p> <p>Just as in the old Rule, the amended Rule provides that a non-party can only be commanded to attend a hearing or deposition within 100 miles of where the person resides, is employed, or regularly transacts business in person. A non-party can be commanded to attend a trial within that same geographic framework, as well as within the state where the person resides, is employed, or regularly transacts business in person so long as the person would not incur substantial expense.</p> <p>The amended Rule provides that a party or the party’s officers may only be commanded to attend trial within 100 miles of where the person resides, is employed, or regularly conducts business, or within the state where the person resides, is employed, or regularly transacts business in person. The amended Rule thus resolves an interpretive split with respect to subpoenaing a party or its officers for trial. The amended Rule does not allow a subpoena to command that a party or its officers travel more than 100 miles for trial unless the party or its officers reside, are employed in, or regularly transacts business in person in the state in which the trial takes place.</p>	<p>If a party desires to present at trial the testimony of an adversary party, or its officers, and the party or its officers reside outside the subpoena power under Rule 45, it is critical that the party desiring the testimony depose the adverse party or its officers so that it can utilize the provisions of Rule 32(a)(3) (“An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party’s officer, director, managing agent or designee under Rule 30(b)(6) or 31(a)(4)”) and Rule 32(a)(4) (“A party may use for any purpose the deposition of a witness, whether or not a party if the court finds...that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness’s absence was procured by the party offering the deposition.”).</p> <p>Conversely, a party who does not wish to testify, or to have its officers testify, at trial is under no obligation to do so if the party and/or its officers are outside the subpoena power of Rule 45. For example, say a case is pending in the United States District Court for the District of Minnesota, and the trial will be held in Minneapolis. If an officer of a party defendant resides and is employed in Chicago, and does not regularly transact business in person at any place within 100 miles of Minneapolis, the plaintiff cannot compel her to testify at trial. However, the party should of course consult with counsel and carefully weigh the risks of not testifying at trial, especially if the opposing party will be presenting deposition testimony of the party or its officers at trial.</p>



Rule	Difference	Practical Implications
<p><b>“Place of Compliance”</b></p> <p>Rule 45(c) Cont.</p>	<p>Production of documents, electronically stored information, or tangible things may be commanded at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person.</p> <p>Inspection of premises may be commanded at the premises to be inspected, regardless of location.</p>	
<p><b>“Protecting a Person Subject to a Subpoena; Enforcement”; “Duties in Responding to a Subpoena”</b></p> <p>Rules 45(d) &amp; (e)</p> <p><a href="#">[Click to See Text of Rule]</a></p>	<p>Motions to quash a subpoena (Rule 45(d)(3)), to compel production of inspection from a person subject to a subpoena (Rule 45(d)(2)(B)(i)), and to determine a claim of privilege as to information produced in response to a subpoena (Rule 45(e)(2)(B)) (together, “Subpoena-Related Motions”) must be brought, at least initially, in the court for the district where compliance is required. Previously, such motions were brought in the issuing court. However, given that the issuing court will now always be the court where the action is pending, this change in terminology preserves the previous practice of having a court for the district where the subpoenaed person resides, or one within 100 miles of the person’s residence or place employment, hear such motions (at least initially, see “<i>Transferring a Subpoena-Related Motion</i>,” below).</p>	<p>In situations where the subpoenaed person lives and works outside the district in which the action is pending and outside a 100-mile radius surrounding such district, Subpoena-Related Motions must initially be brought in a district court which is different than the court in which the action is pending – and that is most likely geographically closer to the home and work of the subpoenaed person. In fact, the committee comments make clear that the geographical limitations imposed by Rule 45(c), together with the provisions of Rules 45(d) and (e) are designed to protect local nonparties by assuring local resolution of disputes about subpoenas. Thus, a party that has issued a subpoena is deciding how hard of a line to take with a non-party’s compliance with a subpoena, that party should consider that, at least initially, it will be arguing any disputes regarding the subpoena before a judge who is not familiar with the case, will likely not be involved in the resolution of the merits of the substantive claims, and is sitting in the home district (or near-home district) of a non-party who has been dragged into court. Having said that, certain disputes regarding the subpoena may be transferred to the court where the action is pending for determination. See, “<i>Transferring a Subpoena-Related Motion</i>,” below.</p>



Rule	Difference	Practical Implications
<p><b>“Transferring a Subpoena-Related Motion”</b></p> <p><b>Rule 45(f)</b></p> <p><a href="#">[Click to See Text of Rule]</a></p>	<p>This new provision provides for the transfer of a Subpoena-Related Motion from the court where compliance is required to the issuing court (assuming the two are not the same) where either: (1) the person subject to the subpoena consents to the transfer; or (2) the court finds exceptional circumstances.</p> <p>Per the Committee notes, the proponent of the transfer bears the burden of showing exceptional circumstances and such circumstances may be found where burdens on a local non-party are avoided and transfer is necessary to avoid disrupting the issuing court’s management of the underlying litigation, such as when that court has already ruled on various issues presented by the motion or the same issues are likely to arise in discovery in multiple districts.</p> <p>Where the attorney of a person subject to a subpoena is authorized to practice in the court where the motion is made, that attorney may appear and file papers as an officer of the issuing court after transfer even if the attorney has not been admitted to that district.</p> <p>To the extent the issuing court, after having a Subpoena-Related Motion transferred to it, issues an order requiring further compliance with the subpoena, it may transfer the order to the court where the motion was made for purposes of enforcing the order.</p>	<p>All persons with an interest in a Subpoena-Related Motion – including the party issuing a subpoena, a non-party subject to a subpoena, and other parties to the case – may consider whether they would prefer that the court for the district where compliance is required or the issuing court decide the Motion. It may be that all parties agree that the Subpoena-Related Motion should be transferred to the issuing court, in which case it will be. If the person subject to the subpoena does not consent, it may be an uphill battle to obtain a transfer, but may still be worth the effort depending on the importance of the discovery and the extent to which the issuing court has already addressed issues similar to those raised in the Subpoena-Related Motion.</p> <p>A person subject to a subpoena may have to fight out a Subpoena-Related Motion in a venue not of its choosing should the court where the motion is brought grant a transfer; however, such person will not have to worry about finding additional local counsel to appear before the court to which the matter is transferred if it so chooses. This is perhaps a small point, but one which can save a person subject to a subpoena time, effort and costs in retaining additional counsel and provides some continuity to the proceedings.</p>



Rule	Difference	Practical Implications
<p><b>“Contempt”</b></p> <p><b>Rule 45(g)</b></p> <p><a href="#">[Click to See Text of Rule]</a></p>	<p>The amended Rule 45(g) clarifies that it is the court for the district where compliance is required – and the issuing court after a transfer of a Subpoena-Related Motion – that may hold a subpoenaed person in contempt for failing to obey a subpoena without adequate excuse.</p> <p>The amended version also adds a clause that a subpoenaed person may be held in contempt for violating an order related to the subpoena, as opposed to just the subpoena itself. The Committee comments note that it would be rare in civil litigation for a court to issue a contempt sanction without first ordering compliance with a subpoena, and that such order might not require all of the compliance sought by the subpoena. Procedurally, then, contempt proceedings are often initiated by an order to show cause with respect to a person’s failure to obey the compliance order. Disobedience of such an order may also be treated as contempt under Rule 45(g).</p>	<p>The practical considerations are similar to those identified with respect to Rules 45(d) &amp; (e) and Rule 45(f) above.</p>
<p><b>“Failure to Comply with a Court Order—Sanctions Sought in the District Where the Deposition Is Taken”</b></p> <p><b>Rule 37(b)(1)</b></p> <p><a href="#">[Click to See Text of Rule]</a></p>	<p>This subsection of Rule 37, which addresses, inter alia, the failure to cooperate in discovery and sanctions for such failure, adds a sentence to conform with the provision in Rule 45(f) for transferring a Subpoena-Related Motion to the court where the action is pending. It provides that, should the court to which the motion was transferred order a deponent to be sworn or to answer a question and the deponent fails to obey, that failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.</p>	<p>In situations where a Subpoena-Related Motion with respect to deposition testimony is transferred to the issuing court, and that court orders a deponent to comply, the party seeking to enforce the deponent’s compliance has flexibility as to which court – the court where the deposition is taken or the court issuing the subpoena – to apply for sanctions for the deponent’s failure to comply with such order.</p>



# Amended Federal Rules of Civil Prodecure 37 and 45

## Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

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(b) **FAILURE TO COMPLY WITH A COURT ORDER.**

(1) **Sanctions Sought in the District Where the Deposition Is Taken.** If the court where the 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. 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 the court where the action is pending.

(2) **Sanctions Sought in the District Where the Action Is Pending.**

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## 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;

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(ii) state the title of the action 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 to permit inspection, copying, testing, or sampling of the materials.
- (2) **Issuing Court.** A subpoena must issue from the court where the action is pending.
- [\[Click to Return to Table\]](#)
- (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.
- [\[Click to Return to Table\]](#)
- (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.
- [\[Click to Return to Table\]](#)
- (b) **SERVICE.**
- (1) **By Whom and How; Tendering Fees.** 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.
  - (2) **Service in the United States.** A subpoena may be served at any place within the United States.
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- (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.

(c) **PLACE OF COMPLIANCE.**

(1) **For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) **For Other Discovery.** A subpoena may command:

(A) 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; and

(B) inspection of premises at the premises to be inspected.

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(d) **PROTECTING A PERSON SUBJECT TO A 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 for the district where compliance is required 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 court for the district where compliance is required 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 for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (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 for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

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

**(C) Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(d) (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.



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(e) **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 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.

(f) **TRANSFERRING A SUBPOENA-RELATED MOTION.**

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.

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(g) **CONTEMPT.**

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.

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