

Civil Subpoenas in Federal Court Part I: Successful Preparation and Service of Subpoenas

By Erin E. Rhinehart

Discovery is typically a large part of litigation associates' respective workloads. A majority of case strategy is evaluating what discovery should be conducted and when. For example, seeking out third-party discovery early in a case may be strategically beneficial because information may be obtained that can be used later against opposing parties. Therefore, early evaluation of which third parties may provide useful information, as well as how that information will best be conveyed (e.g., documents, testimony, or both), usually will prove fruitful for the case and demonstrate initiative and critical thinking to a supervising attorney.

Obtaining discovery from non-parties is often achieved by issuing a subpoena. This article—the first of two addressing third-party subpoenas—provides guidance for the preparation and execution of subpoenas served within the United States for civil cases pending in federal court. The second article discusses responding and objecting to federal civil subpoenas.

Applicable Rules Governing Federal Subpoenas

Federal Rule of Civil Procedure 45 governs subpoenas. Rule 45 contains a significant amount of information and requires careful attention to the details. Depending on the jurisdiction from which a subpoena is issued, local rules also may provide necessary information. For example, the court from which the subpoena is issued may provide, either via its clerk's office or on its website, a civil subpoena form that summarizes all necessary information required by that court. Local rules may also provide specifics relating to timing, meet-and-confer obligations, and related issues. *See, e.g.*, S.D. Fla. Local Rule 26.1(F)(2) ("Written discovery requests and subpoenas seeking the production of documents must be served in sufficient time that the response is due on or before the discovery cutoff date."); N.D. Ohio Local Rule 16.1(b)(6) ("Counsel must initiate discovery requests and notice or subpoena depositions sufficiently in advance of the discovery cut-off date so as to comply with this rule, and discovery requests that seek responses or schedule depositions after the discovery cut-off are not enforceable except by order of the Court for good cause shown."); N.D. Ca. Local Rule 30-1 ("A party noticing a deposition of a witness who is not a party or affiliated with a party must also meet and confer about scheduling, but may do so after serving the nonparty witness with a subpoena."). Further, although Rule 45 governs subpoenas, other federal rules relating to discovery also may apply, including Rules 26, 30 and 34.

Determine the Appropriate District Court from Which the Subpoena Must Issue

Rule 45 directs a key, fundamental issue: From which district court must a subpoena issue? The determinative factor is what is being commanded of the witness (e.g., production of documents or things, attendance, or both). If the subpoena commands attendance at a deposition, then Rule 45(a)(2)(B) controls and the subpoena must issue "from the court for the district where the deposition is to be taken." If the subpoena commands production or inspection—and is "separate from a subpoena commanding a person's attendance"—then Rule 45(a)(2)(C) controls, and the subpoena must issue "from the court for the district where the production or inspection is to be made." Therefore, if the subpoena commands both attendance and production of documents, then the jurisdiction of the deposition controls. *See also* FED. R. CIV. P. 45(a)(1)(C) (permitting subpoenas commanding attendance to be combined with subpoenas commanding production or inspection).

Identify the Proper Method of Service

Improper service is an easy way for a witness to object and delay the process; therefore, careful attention to effectuating proper service is important. Rule 45(b)(1) provides that "[a]ny 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." Although a majority of courts require personal service under Rule 45, some courts permit service by certified mail. *See Franklin v. State Farm Fire and Cas. Co.*, No. 09-10947, 2009 U.S. Dist. LEXIS 90687, at *3-4 (E.D. Mich. Sept. 30, 2009) ("The majority of courts hold that Rule 45 requires personal service. . . . The growing number of cases that have determined that Rule 45 does not require personal service have permitted service by certified mail and other means if the method of service is made in a manner designed to reasonably insure actual receipt of the subpoena.") (internal citations omitted); *Halawani v. Wolfenbarger*, No. 07-15483, 2008 U.S. Dist. LEXIS 100482, at *9-10 (E.D. Mich. Dec. 10, 2008) (certified mail acceptable method of service); *Windsor v. Martindale*, 175 F.R.D. 665, 670 (D. Colo. 1997) (finding that service via regular mail is improper and a basis on which to quash the subpoena). Employing a method of service other than personal, however, should "reasonably insure actual receipt of [the] subpoena by the witness." *Franklin*, 2009 U.S. Dist. LEXIS 90687, at *4. As discussed below, preliminary communications with the witness may be helpful, because the witness may agree to accept service by mail. Any agreement relating to alternative service should be documented.

Personal service requires the retention of an appropriate process server. If the witness is local, then finding a process server

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will likely not be difficult. If, on the other hand, service must be effectuated in an unfamiliar jurisdiction, research of potential process-service companies may be necessary. The Internet is a good source for locating process-service companies and obtaining contact information. Contact potential process servers and inquire as to applicable fees, practice, procedure, familiarity with the area in which the witness resides, timing of service, proof of service, and notification when service is effectuated.

Rule 45(b)(4) provides that, “when necessary,” proof of service “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.” Although proof of service may never need to be filed with the court, it is important to retain written proof of service, including the certification statement by the process server (or the return receipt if served via certified mail), should an objection ever be raised regarding service.

Consider Communicating with the Witness Prior to Issuing the Subpoena

It may be beneficial to contact the witness prior to issuing the subpoena. Third parties generally have no real stake in the outcome of the underlying litigation; therefore, making their lives easier, and compliance with the subpoena less cumbersome, may make the process less adversarial. For example, several potential issues may be negotiated prior to issuance of the subpoena. First, it may be beneficial to allow the recipient of the subpoena to suggest a reasonable compliance deadline or dates on which to schedule a deposition. Second, consider whether to offer to pay for or negotiate the costs of copying the requested documents. Third, determine whether the recipient is willing

to accept an alternative method of service (e.g., certified mail or regular mail). Finally, be willing to negotiate the scope of the requested material or stipulate to a protective order, particularly if the information sought will implicate proprietary or trade-secret material. Not only may the recipient appreciate your flexibility and accommodations, but also potential objections to the subpoena may be avoided.

Individuals are also usually thankful to have someone explain to them that a process server will be delivering documents to them personally, an experience that may be unsettling or make the witness feel as though he or she has done something wrong. In addition, the specific timing and location of service can be agreed upon. It is important, however, to explain to the witness that you do not represent him or her.

Preparing a Subpoena Duces Tecum

A subpoena commanding the production of documents is often referred to as a subpoena duces tecum. Although preparation of a subpoena duces tecum is similar to preparing a request for the production of documents to an opposing party, be careful to tailor the requests appropriately. Often, attorneys are fearful of missing something, meaning requests for documents are drafted more broadly than necessary. Courts generally weigh a recipient’s third-party status in favor of upholding objections based on over-breadth or undue burden. *Englar v. 41B Dist. Ct.*, No. 04-CV-73977, 2009 U.S. Dist. LEXIS 100949, at *16 (E.D. Mich. Oct. 29, 2009) (non-party status weighs in favor of a finding of undue burden). Anticipate such objections and draft the requests appropriately to avoid, or reduce the likelihood of success on, such objections.

Like document requests served on a party, subpoenas duces tecum directed to third parties should include appropriate definitions and instructions. Beyond the general definitions and instructions typically included—such as Rule 34’s definition of “writing,” party names, relevant abbreviations, relevant time period(s), and instructions relating to necessary privilege logs—it is also important to include definitions and instructions relating to electronically stored information (ESI). In particular, Rule 45(a)(1)(C) provides that a subpoena may specify “the form or forms in which electronically stored information is to be produced.” If the subpoena does not specify the form, then Rule 45(d)(1)(B) provides that the individual or entity responding may produce all ESI in the manner “in which it is ordinarily maintained.” See also FED. R. CIV. P. 34(a), (b).

Finally, do not forget to attach as exhibits all applicable protective orders active in the underlying litigation, as well as a copy of the operative complaint. These documents will further educate recipients on the underlying litigation, as well as guide them in preparing their response.

Preparing a Subpoena Commanding Testimony

Subpoenas commanding a witness to give testimony may not require as much written preparation as a subpoena duces tecum; however, additional procedural requirements must be followed to effectuate successful service of the subpoena. First, Rule 45(a)(1)(B) requires that a subpoena commanding deposition testimony specify the method of transcription (e.g., written or

Third-party discovery provides ample opportunities to further build a case; however, sufficient preparation and attention to detail is necessary to successfully subpoena a witness or documents. The following checklist will serve as a good reminder:

1. Identify third-party witnesses and objectives of discovery (e.g., documents, testimony, or both).
2. Review applicable rules (e.g., Rule 45, local rules).
3. Identify appropriate jurisdiction from which the subpoena must issue.
4. Consider communicating with the witness prior to service of the subpoena.
5. Identify method of service (e.g., personal or certified mail).
6. Identify applicable fees.
7. Prepare requests for documents.
8. Prepare notice to parties.
9. Effectuate service of notice and subpoena.
10. File the notice of service, or proof of service, if required by local rules.

videotape). As explained in the Advisory Committee notes to Rule 45 (Amendment 2005), the purpose of providing notice to the deponent is to close the gap between Rule 45 and Rule 30(b)(2), and to allow the deponent an adequate opportunity to object to the method of transcription.

Second, Rule 45(b)(1) provides that “if the subpoena requires that person’s attendance, tendering the fees for 1 day’s attendance and the mileage allowed by law” is required at the time of service. In other words, witness and mileage fees must be prepaid to the witness upon service of the subpoena; otherwise, proper service has not been effectuated. *In re Stratosphere Corp. Sec. Litig.*, 183 F.R.D. 684, 687 (D. Nev. 1999) (denying motion to compel deposition testimony, in part, because “failure to pay witness and mileage fees required by FED. R. CIV. P. 45(b)(1) renders service incomplete”); *see also* 28 U.S.C. §§ 1821–1825 (providing further guidance on applicable fees).

Finally, if the subpoena compelling testimony is issued to a corporation, then the subpoena must also comply with the requirements of Rule 30(b)(6).

Provide Notice to All Parties

All parties to the underlying litigation must be provided notice of the subpoena prior to service. Rule 45(b)(1) provides that “[i]f 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.” *See also* FED. R. CIV. P. 45, 2007 Advisory Committee notes (stressing that notice must be given to the parties before service of the subpoena to provide an opportunity for objection). Further, Rule 30(b)

(1) requires that “reasonable written notice” of a deposition be provided to all parties. The notice is a separate document from the subpoena and is provided to the parties only—not to the recipient of the subpoena. Among other items, the notice should identify the recipient of the subpoena, time and location for production or deposition, and include a copy of any requests for production.

Options if the Witness Fails to Comply with the Subpoena

Rule 45 provides two options if a witness fails to comply with a subpoena. First, Rule 45(c)(2)(B)(i) provides that the issuing party may move for an order compelling production. Second, Rule 45(e) provides that the issuing court may hold in contempt a witness for noncompliance. Rule 45(e) may also be used as the basis for a motion for sanctions or costs. *See Halawani*, 2008 U.S. Dist. LEXIS 100482, at *15.

Prior to filing a motion with the court, extrajudicial attempts to resolve any discovery dispute should be exhausted. FED. R. CIV. P. 45(c)(2)(B)(i) (providing that a motion to compel production or inspection may be filed “[a]t any time, *on notice to the commanded person*. . .”). Applicable local rules may provide guidance as to extrajudicial resolution of discovery disputes. S.D. Ohio Local Rules 37.1, 37.2 (requiring parties to exhaust all extrajudicial means for the resolution of the discovery dispute among parties). Although certain local rules may apply only to discovery disputes among parties, attempting such extrajudicial resolution (and noting such efforts in a motion to compel) undoubtedly will be appreciated by the court and will further support an order compelling production.

Civil Subpoenas in Federal Court Part II: Complying with Third-Party Subpoenas

By Erin E. Rhinehart

As discussed in “Successful Preparation and Service of Subpoenas,” discovery is a large part of a litigation associate’s workload. While there is strategy associated with the selection and service of third-party discovery, successfully responding and objecting to third-party subpoenas provides many opportunities for an associate to shine. In particular, successfully responding to subpoenas may limit a client’s exposure to unnecessary litigation, as well as offer associates a unique opportunity to gain client contact, develop client relationships, and provide a favorable outcome for the client in a relatively short time. This article provides guidance relating to compliance with third-party subpoenas served within the United States for civil cases pending in federal court.

Evaluate Whether Your Client Has Standing to Object

Generally, your client will have been the recipient of the subpoena, and standing to respond and object will not be an issue. However, if your client is a party to the underlying litigation and you received notice of the third-party subpoena on your client’s behalf, then there may be an issue as to whether your client has standing to object (and, if so, to what specifically your client may object).

The general rule is that a party lacks standing to quash a subpoena served on a third party, except as to claims of (1) privilege relating to the documents being sought, (2) an applicable privacy interest, (3) an applicable personal interest, or (4) an applicable proprietary interest. *See, e.g., Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Co. 1997); *Halawani v. Wolfenbarger*, No. 07-15483, 2008 U.S. Dist. LEXIS 100482, at *3 (E.D. Mich. Dec. 10, 2008). A party also has standing to enforce the court’s orders and rules when subpoenas issued to non-parties violate the court’s order or rule (*e.g.*, scheduling orders, protective orders). *The Hartz Mountain Corp. v. Channelle Pharma. Veterinary Prods. Mft. Ltd.*, 235 F.R.D. 535, 536 (D. Me. 2006) (finding plaintiffs had standing to enforce court’s scheduling order).

Know the Compliance Deadline

Federal Rule of Civil Procedure 45(c) governs a third party’s responses and objections to a subpoena. After a client receives a subpoena, the first item to review is the compliance date set forth in the subpoena. Close attention to deadlines is necessary because serving objections late—even by one day—may result in a waiver. *Halawani*, 2008 U.S. Dist. LEXIS 100482, at *12.

Rule 45(c)(3)(A)(i) requires only that the issuing party provide for a “reasonable time to comply” with a subpoena.

What is “reasonable” depends on the circumstances of each case. *Parrot, Inc. v. Nicestuff Distrib. Int’l, Inc.*, No. 06-61231, 2009 U.S. Dist. LEXIS 8528, at *10–11 (S.D. Fla. Jan. 26, 2009) (“[C]ourts make the determination of reasonableness on a case-by-case basis, considering factors at work in the given case.”); *Fox v. Traverse City Area Pub. Schs. Bd. of Educ.*, No. 1:07-cv-956, 2009 U.S. Dist. LEXIS 18095, at *3–4 (W.D. Mich. Mar. 10, 2009) (citing various authority on what constitutes a “reasonable” time for subpoena compliance). Generally, third parties are provided 30 days within which to comply. Less time, however, may be specified, and it may be necessary to contact the issuing party to request an extension. If the issuing party is not receptive to negotiating an extension, then an objection and motion to quash the subpoena may be necessary. *Fox*, 2009 U.S. Dist. LEXIS 18095, at *2 (“Rule 45(c)(3)(A)(i) requires a court to quash or modify a subpoena that fails to allow a reasonable time to comply.”).

Preparation of Responses and Objections to a Subpoena Duces Tecum

Third parties have several options when responding to a subpoena duces tecum (*i.e.*, a subpoena commanding the production of documents). Rule 45(c)(2)(B) provides that objections “must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served.” In other words, a third party must serve objections within 14 days of service of the subpoena; or, if less than 14 days is provided within which to comply, then prior to the time specified for compliance. Absent unusual circumstances and good cause shown, “[t]he failure to serve written objections to a subpoena within the time specified by Rule 45 typically constitutes a waiver of such objections.” *Halawani*, 2008 U.S. Dist. LEXIS 100482, at *11.

There are three common types of objections: 1) general objections applicable to each request, 2) procedural objections, and 3) substantive objections. Although general objections may overlap with more specific objections, it is important to include a list of general objections that may be repeated, as applicable, in a concise manner throughout the response to ensure that all potential objections are preserved. This practice also makes for a more efficient and thorough response.

An initial review of the subpoena should focus on whether there are any procedural defects. Although most defects in service must be cured for the subpoena to be enforceable, such defects almost always can be cured with comparative ease. Accordingly, it is worth considering negotiating a waiver of service defects to obtain additional time to comply with the subpoena.

Once you are confident that the subpoena was properly served and there are no procedural defects to cure, review the subpoena for substantive objections. Commonly cited objections

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include (1) privileged or confidential; (2) irrelevant; (3) vague, ambiguous, or overbroad; and (4) undue burden.

Privilege and confidentiality must be claimed for any documents or testimony commanded to prevent waiver of any potential privilege or confidentiality claim. Review any applicable protective orders provided with the subpoena. If none was provided, contact the attorney responsible for service of the subpoena and discuss whether there are any operative protective orders. If no applicable protective order is in effect, then evaluate whether a stipulated protective order may be needed or whether a motion for a protective order is necessary. FED. R. CIV. P. 26(c)(1) (“any person from whom discovery is sought may move for a protective order . . . to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense”). If it is necessary to claim privilege over any documents or testimony, then preparation and service of a privilege log is required. *Minnesota Sch. Bds. Ass’n. Ins. Trust v. Employers Ins. Co.*, 183 F.R.D. 627, 630 (N.D. Ill. 1999) (“Courts interpreting Rule 45(d)(2) have held that a party claiming privilege may provide a privilege log within a ‘reasonable time’ as long as objections are asserted within the fourteen-day time frame.”).

Apart from privilege and confidentiality, all requests should be reviewed to ensure compliance with the relevancy rules set forth in Rule 26(b). “A request for discovery . . . should ordinarily be allowed unless it is clear that the information sought can have no possible bearing on the subject matter of the action.” *Halawani*, 2008 U.S. Dist. LEXIS 100482, at *13–14. Although understandably broad, all discovery—including third-party discovery—has its limits.

Along with these possible objections, evaluate whether any requests are vague, ambiguous, or overbroad. Courts that have upheld objections based on over-breadth have sometimes predicated the ruling based on language such as “and all documents relating thereto.” *Parrot*, 2009 U.S. Dist. LEXIS 8528, at *18–19. Requests that create any undue burden on the recipient also are objectionable. Courts may evaluate

several factors when considering whether the subpoena creates an undue burden on the recipient, including non-party status, whether the discovery is “unreasonably cumulative or duplicative,” whether the discovery sought is “obtain[able] from some other source that is more convenient, less burdensome, or less expensive,” and whether the cost of the discovery outweighs its benefit. See, e.g., FED. R. CIV. P. 26(b)(2)(C); *Englar v. 41B Dist. Ct.*, No. 04-CV-73977, 2009 U.S. Dist. LEXIS 100949, at *16 (E.D. Mich. Oct. 29, 2009) (non-party status weighs in favor of a finding of undue burden); *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007) (“The Rule 45 ‘undue burden’ standard requires district courts supervising discovery to be generally sensitive to the costs imposed on third parties”); *Whitlow v. Martin*, No. 04-CV-3211, 2009 U.S. Dist. LEXIS 96011, at *10 (C.D. Ill. Oct. 15, 2009) (refusing to sustain third party’s objection that documents sought may be obtained from more convenient alternative sources because no alternative source was identified).

Finally, requests for electronically stored information (ESI) have become the subject of much negotiation and litigation. If the subpoena commands the production of ESI, then review with your client, and their appropriate information technology personnel, the scope of any potentially responsive and relevant electronic information, as well as the procedure, time, and cost for retrieving and producing such ESI. FED. R. CIV. P. 45(d)(1)(D); *Whitlow*, 2009 U.S. Dist. LEXIS 96011, at *14–15 (“[A] person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. However, the Court may order discovery from such sources if the requesting party shows a good cause, considering the limitations of Rule 26(b)(2)(C).”) (internal quotations and citations omitted). Production of ESI can be time-consuming and costly. Paying close attention to what is being requested and negotiating with the requesting party over the payment of costs is essential to maintaining control over the production.

Preparation of Responses and Objections to Testimonial Subpoenas

Responding to a subpoena commanding the attendance of a witness to give deposition testimony may be less cumbersome than responding to a subpoena duces tecum. Often, responding to a testimonial subpoena will require only the resolution of any scheduling conflicts among the parties and the deponent. Nevertheless, a review of the subpoena for any procedural deficiencies, including payment of all applicable fees, should be conducted to ensure that service was proper and your client is subject to the subpoena. Otherwise, any objections will be waived. Also, Rule 45’s privilege and undue-burden standards, as discussed above, apply to both document and testimonial subpoenas alike and, therefore, should such objections be necessary, the same general rules apply. *Watts*, 482 F.3d at 508 (citation omitted)

If a testimonial subpoena is served on a corporation, then Rule 30(b)(6) also applies. A review of the areas of examination identified will probably require more substantial responses and

Proper response to a third-party subpoena requires an efficient yet detailed analysis of the subpoena served. Therefore, the following checklist serves as a good reminder:

1. Review the deadline for compliance.
2. Review the subpoena and evaluate what it is requesting (e.g., documents, testimony or both).
3. Prepare responses and objections.
4. Evaluate whether a protective order may be needed.
5. If there is a need for a protective order, or to limit the subpoena, then discuss with opposing counsel.
6. If the meet-and-confer is unsuccessful, then evaluate whether to prepare a motion for protective order, motion to modify, or motion to quash.

objections, as well as assistance to the company in selecting the appropriate deponent to testify on the company's behalf.

Evaluate the Need for a Motion to Modify or Quash the Subpoena

If the issuing party is unwilling to negotiate a more limited request for information or accommodate the needs of your client, or objections alone are insufficient to protect the recipient of the subpoena, then a motion to modify or quash the subpoena may be necessary. Extrajudicial efforts to resolve the dispute, however, should be exhausted prior to filing a motion to modify or quash. Rules 45(c)(3)(A) and (B), which govern motions to modify and quash, provide both mandatory and discretionary rules relating to when orders granting such motions are appropriate.

Regardless which subsection of Rule 45(c)(3) is used to file a motion, such motions may be required to be filed before the time set to comply with the subpoena, absent excusable delay. It is better practice to file the motion before the date set for compliance.

Therefore, both a careful attention to detail, as well as a quick analysis, is necessary to respond successfully to subpoenas.

Finally, motions to quash or modify should be brought in the issuing court if different from the forum in which the underlying litigation is pending. *Hartz Mountain Corp.*, 235 F.R.D. at 536 (holding that, even if the "14-days-after-service deadline imposed by FED. R. CIV. P. 45(c)(2)(B)" applied to motions to quash, failure to meet deadline was excusable because such failure resulted from attempts to reach an extrajudicial agreement). As noted in *Hartz Mountain Corp.*, it is within the discretion of the issuing court "to transfer motions involving the subpoena to the district court in which the action is pending;" or, to stay the motion pending a related resolution necessary by the other court. Usually, issuing courts are more receptive to motions to transfer or stay if the litigation surrounding the subpoena is between the two parties to the underlying litigation. If the non-party brought the motion to quash or modify, however, then the issuing court may be less likely to transfer or stay the motion.