

RULE 45. SUBPOENA

(a) Form; Issuance.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things, or permit inspection of premises, in the possession, custody or control of that person at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) A subpoena for the Superior Court may issue from the court in any county, and for the District Court from the court in any district.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to the Maine Bar may also issue and sign a subpoena as officer of the court.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age, including the attorney of a party. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. Prior notice of any commanded production of documents and things or inspection of premises or the appearance of a witness in discovery or pretrial proceedings shall be served on each party in the manner prescribed by Rule 5(b) at least 14 days

prior to the response date set forth in the subpoena. A party shall have 7 days to object to a discovery or pretrial subpoena and to arrange for the determination of the objection by the court. Subpoenas commanding the appearance of a witness or the production of documents or things at trial or hearing shall be served on each party in the manner prescribed by Rule 5(b).

(2) A subpoena may be served at any place within the state.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court for which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings, a reasonable attorney fee, and other reasonable expenses incurred in seeking the sanction.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises, need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena a written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of any justice or judge of the court for which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court for which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow a reasonable time for compliance;

(ii) requires a resident of this state who is not a party or an officer of a party to travel to attend a deposition outside the county wherein that person resides or is employed or transacts business in person or a distance of more than 100 miles one way, whichever is greater, unless the court otherwise orders; requires a nonresident of the state who is not a party or an officer of a party to attend outside the county wherein that person is served with a subpoena, or farther than 100 miles from the place of service, unless some other convenient place is fixed by an order of court;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles one way to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to a Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(e) **Motions and Objections.** Motions or objections concerning subpoenas issued in discovery or pretrial proceedings shall be made under Rule 26(g). Motions or objections concerning subpoenas issued to command appearance or production of documents or tangible things at trial or hearing shall promptly be directed first to the judge or justice presiding at such trial or hearing.

(f) **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court in which the action is pending or in the county in which the deposition is taken. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A). Punishment for contempt under this subdivision (f) shall be in accordance with Rule 66 and 16 M.R.S.A. § 102.

**Advisory Committee Note
December 11, 2007**

Subdivision (b) is amended to require that discovery subpoenas be served sufficiently in advance to enable an opposing party to object to the subpoena and to arrange to present the objection to the court under subdivision (e), which incorporates the procedure under Rule 26 (g). The amendment is intended to eliminate the sharp practice of timing the service of subpoenas during discovery so that opposing parties have no practical opportunity to object and obtain a ruling before the response to the subpoena is required. Since a party under this procedure may simply object, rather than move to quash (the remedy for nonparties), a conforming amendment is made to subdivision (e). The amendment also confirms that trial subpoenas should be served under Rule 5. Obviously, when time is short prior to trial, the best practice is for the serving party to alert the other parties by means more expedient than Rule 5 or risk having to explain to the court why a

telephone call, fax or email could not have been sent to avoid a hurried hearing on motions or objections to the subpoena. Objections should be promptly directed to the court under subdivision (3).

Advisory Committee's Notes
May 1, 1999

A new subdivision (e) has been added, re-designating the former subdivision (e) as (f). Under the new subdivision (e), motions concerning subpoenas issued in discovery or pretrial proceedings must be made under Rule 26(g). The purpose of the amendment is to simplify and expedite the resolution of discovery disputes by prohibiting written motions. If the subpoena requires a witness appearance or the production of documents and tangible things at trial or hearing, a written motion should be filed, directed first to the judge or justice presiding at the trial or hearing.

Advisory Committee's Notes
March 1, 1998

Rule 45 (c) is amended to extend the reach of subpoenas to 100 miles rather than 50 miles. This amendment brings Rule 45 into line with M.R. Civ. P. 32(a)(3) and federal practice.

Advisory Committee's Notes
February 15, 1996

Rule 45(a)(1)(D) is added to make clear the original intention of the 1993 amendments of Rule 45 that the text of Rules 45(c) and (d) were to be appended to the subpoena. Forms 11.10 and 11.20, as simultaneously amended in 1993, call for inclusion of the rule language, and the requirement is made explicit in footnotes to those forms. The present amendment conforms the Maine rule to Federal Rule 45(a)(1)(D) and eliminates any doubt or question about the source of the requirement.

Advisory Committee's Notes
1993

Rule 45 is amended to adopt a 1991 amendment of Federal Rule 45. Former Rule 45 is abrogated, but the amendment retains distinctive features of the former rule and practice under it that are appropriate for the Maine courts. *See* 1 Field,

McKusick and Wroth, *Maine Civil Practice* § 45.7 (2d ed. 1970). By simultaneous amendments conforming changes have been made in Forms 11.10 and 11.20 and a new Form 11.30 has been added.

The purposes of the amendment are to clarify the organization of the rule and to facilitate access to documentary evidence or other material, and inspection of premises, in the possession of nonparties. The amended rule provides expanded protection for the interests of witnesses and other nonparties.

Rule 45(a)(1), in the words of the federal Advisory Committee Note, authorizes the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of evidentiary material required to be produced. A party seeking additional production from a person subject to such a subpoena may serve an additional subpoena requiring additional production at the same time and place.

* * * * * [The provision also] authorizes the issuance of a subpoena to compel the inspection of premises in the possession of a non-party. Rule 34 has authorized such inspections of premises in the possession of a party as discovery compelled under Rule 37, but prior practice required an independent proceeding to secure such relief ancillary to the federal proceeding when the premises were not in the possession of a party * * * * *.

The simultaneous addition of a new Rule 34(c) makes clear that the purpose of these amendments is to extend the production and inspection provisions of Rule 34 to nonparties. No change in the scope of production and inspection from that under Rule 34 is intended. When the purpose is discovery, the scope is that delineated in Rule 26(b).

Rules 45(a)(2), (3), depart from the federal rule to carry forward present Maine practice permitting issuance of the subpoena in blank to a party by the clerk or issuance by a member of the Maine bar. As under the prior rule, the subpoena may issue in any county or district. The requirement that the subpoena bear the seal of the court, which under former Rule 45(a) applied only to subpoenas issued by the clerk, has been eliminated for all subpoenas. Only the signature of the issuing clerk or attorney is required. *Cf.* F.R.Civ.P. 45(a) advisory committee's note to 1991 amendment.

Rule 45(b) substantially retains the provisions for service presently found in subdivisions (c) and (e). The amended rule makes clear that a party's attorney may

make service. Because the procedure replaces the former practice of taking a deposition with a subpoena *duces tecum*, paragraph (1) contains a requirement of notice of production or inspection to other parties in order to preserve their opportunity to object to or supplement the discovery.

Rule 45(c) is intended to protect the rights of witnesses by stating, in paragraph (1), a general prohibition against abuse of a subpoena and giving the court to which a subpoena is returnable broad powers to issue protective orders and impose sanctions to assure that nonparties are protected against significant expense and other burdens. The protective provisions are intended to track those of Rule 26(c) but are here phrased in terms reflecting the perspective of the witness. *See* F.R.Civ.P. 45(c) advisory committee's note to 1991 amendment. Consistent with present M.R. Civ. P. 45(d)(2), the limits on travel by a deponent or trial witness are set at 50 miles, rather than 100 miles as in the federal rule.

Rule 45(d)(1) extends to nonparties the requirements of orderly production imposed on parties by the last paragraph of Rule 34(b). Paragraph (2) is intended to provide a party against whom a claim of privilege has been lodged sufficient information to resist an unjustified claim. *See* F.R.Civ.P. 45(d)(2) advisory committee's note to 1991 amendment.

Consistent with the purpose of Federal Rule 45(a)(1)(D) (not adopted in Maine), Forms 11.10 and 11.20 have been amended to require the full text of Rules 45(c) and (d) to be appended to a subpoena, and a similar provision has been made in new Form 11.30. *See* Advisory Committee's Notes to those forms.

Rule 45(e) retains the provision for contempt presently found in Rule 45(f), with the addition of language expressly recognizing that disobedience of a subpoena calling for attendance or production outside the geographical limits of new Rule 45(c)(3)(A)(ii) is not a contempt.

Advisory Committee's Note October 1, 1970

By a procedure that is analogous to that provided in amended Rule 34, Rule 45(d)(1) is amended to make clear that a subpoena *duces tecum* issued for taking a deposition may command the person to whom it is directed, not only to produce, but also to permit inspection and copying of designated books, papers, etc. The person to whom the subpoena is directed has ten days within which to object. In

the event of such objection, the party serving the subpoena is required to go forward in seeking a court order that he be permitted to inspect the copies.

**Advisory Committee's Note
December 31, 1967**

As the terms of trial justices expire, their functions, civil as well as criminal, are taken over by the District Court (1961 Laws, c. 386, § 1; 4 M.R.S.A. § 152) and any continuing purpose for the issuance of subpoenas by trial justices in civil cases is eliminated.

**Explanation of Amendment
November 1, 1966**

This amendment was adopted to conform to the language of Maine Criminal Rule 17(f) (2), by specifying that the limitation on a deponent's travel is fifty miles "one way." Conformity eliminates the possibility that a different meaning might be implied in the Civil Rule.

**Reporter's Notes
December 1, 1959**

This rule adopts Federal Rule 45 with minor variations. It makes the following changes in Maine practice:

1. Equity Rule 26 and R.S.1954, Chap. 113, Sec. 23 (repealed in 1959), are changed by permitting the issuance of a subpoena duces tecum without an order of court. Rule 45(b) does, however, give the party served with such a subpoena the opportunity to obtain the protection of the court.

2. Rule 45(c) in permitting service of a subpoena by any person seems to change the law in the statute books, but it is in keeping with existing Maine practice, as evidenced by 1 Sullivan, *Maine Civil Officer* 427, where there appears a form of affidavit when service is made by a person other than an officer.

3. Rule 45(d) (2) broadens existing law with respect to the distance a witness may be required to travel to give his deposition. R.S.1954, Chap. 117, Sec. 11 (repealed in 1959), limits this distance to 30 miles. The rule uses as a limit the county lines or a distance not exceeding 50 miles if outside the county, unless the court otherwise orders. It seems more reasonable to require one witness to travel a

considerable distance than to force the lawyers, the notary, and the court reporter to do so.