Massachusetts General Laws Annotated
Massachusetts Rules of Civil Procedure
VI. Trials (Refs & Annos)

Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), Rule 45

Rule 45. Subpoena

Currentness

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk of court, by a notary public, or by a justice of the peace, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to do the following at a specified time and place: to attend and give testimony; to produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or to permit inspection of premises. The clerk, notary public, or justice of the peace shall issue a subpoena signed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) 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. 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 upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the documents, electronically stored information, or tangible things. 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. A person commanded to produce documents, electronically stored information, or tangible things, or to permit 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.

(c) Service. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person, or by exhibiting it and reading it to him, or by leaving a copy at his place of abode; and, if the person's attendance is required, by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or the Commonwealth or a political subdivision thereof, or an officer, or agency of either, fees and mileage need not be tendered.

(d) Subpoenas for Taking Deposition and for Command to Produce; Place of Examination.

(1) No subpoena for the taking of a deposition shall be issued prior to the service of a notice to take the deposition. If a subpoena commands only 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 copy of the subpoena shall be served on each party. The party serving a subpoena requiring production or inspection before trial shall also serve on each party a copy of any objection to the commanded production or inspection and a notice of any production made or, alternatively, provide a copy of the production to each party.

The subpoena commanding the person to whom it is directed to produce documents, electronically stored information, or tangible things, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by these rules, is subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

A subpoena upon a party which commands the production of documents, electronically stored information, or things must give the party at least 30 days for compliance after service thereof. Such subpoena shall not require compliance of a defendant within 45 days after service of the summons and complaint on that defendant. The court may allow a shorter or longer time.

A person commanded to produce documents or tangible things or to permit inspection may within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the party or attorney designated in the subpoena written objection to inspecting, copying, testing, or sampling any of the materials; to inspecting the premises; or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection is made, move at any time upon notice to the commanded person for an order compelling production or inspection. Such an order to compel production or inspection shall protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

(2) Unless the court orders otherwise, other than for a hearing or trial, a resident of this Commonwealth shall not be required to attend an examination or produce documents, electronically stored information, or tangible things at a place more than 50 airline miles distant from either his residence, place of employment, or place of business, whichever is nearest to the place to which he is subpoenaed. Other than for a hearing or trial, a nonresident of the Commonwealth when served with a subpoena within the Commonwealth may be required to attend or produce documents, electronically stored information, or tangible things only in that county wherein he is served, or within 50 airline miles of the place of service, or at such other convenient place as is fixed by an order of court.

(e) Subpoena for a Hearing or Trial. At the request of any party subpoenas for attendance or to produce documents, electronically stored information, or tangible things at a hearing or trial shall be issued by any of the persons directed in subdivision (a) of this rule. A subpoena requiring the attendance of a witness or production of documents, electronically stored information, or tangible things at a hearing or trial may be served at any place within the Commonwealth.

(f) 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 that requires production of documents shall produce them as they are kept in the ordinary course of business or shall organize and label them to correspond to the categories in the demand. Other than for a deposition, hearing, or trial, unless the production of original documents is requested, the producing party may produce copies of the documents, including by electronic means, provided that, if requested, the producing party affords all parties a fair opportunity to verify the copies by comparison with the originals.

(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 shall 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 may object to the discovery of inaccessible electronically stored information, and any such objection shall specify the reason that such discovery is inaccessible. On motion to compel or for a protective order, the person claiming inaccessibility bears the burden of showing inaccessibility. 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(f)(4)(C) and (D). 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 shall make the claim expressly and provide information that will enable the parties to assess the claim. A privilege log need not be prepared, except by agreement or order of the court.

(B) *Information mistakenly 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. The provisions of Rule 26(b)(5)(B) and (C) are applicable.

(3) *Further Protection*. Any person subject to a subpoena under this rule may move the court:

(A) for a protective order under rule 26(c) or

(B) to be deemed entitled to any protection set forth in any discovery or procedural order previously entered in the case.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court in which the action is pending.

Credits

Amended August 3, 1982, effective January 1, 1983; November 17, 1986, effective January 1, 1987; September 24, 2013, effective January 1, 2014; January 29, 2015, effective April 1, 2015.

Editors' Notes

REPORTER'S NOTES--1973

Rule 45 closely follows Federal Rule 45 with changes to coincide with prior Massachusetts practice. In these Rules, the word "subpoena" is the equivalent of "witness summons" in prior Massachusetts practice. The word "summons" in these Rules always means "summons of complaint." The first sentence of Rule 45(a) embodies the provisions of G.L. c. 233, § 1:

> A clerk of a court of record, or notary public or a justice of the peace may issue summonses for witnesses in all cases pending before courts. . . .

Rule 45(b) incorporates the familiar Massachusetts practice of issuing subpoenas duces tecum. The rule specifically allows the subpoena to be used to command the production of books, papers, documents or tangible things. The section incorporates a protective device on behalf of the person to whom the subpoena is addressed. By motion made promptly, the producent can have the court modify or quash the subpoena if it is unreasonable and oppressive, or require the party seeking the production to pay the costs thereof. Quashing or modifying a subpoena which is unreasonable is well established in Massachusetts practice. See Finance Commission of the City of Boston v. McGrath, 343 Mass. 754, 765, 180 N.E.2d 808, 815-816 (1962); Bull v. Loveland, 27 Mass. 9 (1830). Observe the relation between Rule 45(b) and Rule 26(c), which gives the person served with a notice for the taking of a deposition the right to move the court for appropriate relief, including an order that the deposition may not be taken or that it may be taken only at some designated place, or that the scope of inquiry be limited. Rule 45(b)(1) gives a non-party under a subpoena duces tecum the right to seek a protective order. Without the language of Rule 45(b)(1), a non-party subpoenaed merely to force the production of documents (as, for example, the custodian of records of a hospital) would not be explicitly empowered to seek appropriate court relief; indeed, the silence of the rules on the point might be interpreted to mean that he has no such right. The language of Rule 45(b)(1) is designed to eliminate all such confusion.

Rule 45(c) allows service of a subpoena to be made by any non-party who is over 18 years of age. This accords with G.L. c. 233, § 2 which allows service of a summons to be made "by an officer qualified to serve civil process or by a disinterested person." Both statute and rule thus permit service by a party's attorney. Although permissible, this practice may be unwise *cf.* ABA, Canons of Professional Ethics, Canon 19; ABA Code of Professional Responsibility DR 5-102; EC 5-9, 5-10.

Rule 45(c) permits service to be made in accordance with pre-rule Massachusetts practice. See G.L. c. 233, § 2. The requirement that the fees be tendered to the witness accords with G.L. c. 233, § 3:

> No person shall be required to attend as a witness in a civil case . . . unless the legal fees for one day's attendance and for travel to and from the place where he is required to attend are paid or tendered to him.

Rule 45(d) provides the mechanism for using a subpoena to compel the attendance of a witness at a deposition. It also permits the subpoena to be used to compel the deponent to produce at the deposition designated papers, documents, books or tangible things. Such use of a subpoena is not intended to circumvent whatever good-cause-for-production requirements may remain in the discovery rules, at least as to parties. Rule 45(d)(1) indeed gives a non-party deponent substantially all the objection-rights of a party. A subpoena for the attendance of a witness at a deposition may not be issued without a showing that service of notice to take a deposition as provided for in the discovery rules has been made.

Rule 45(d)(1) regulates the place-of-taking-of in Massachusetts depositions only. It does not attempt to regulate the problem of enforcement of subpoenas out-of-state. Whether the state will honor a Massachusetts subpoena is a question that depends on reciprocal arrangements between Massachusetts and the state in question, and must be resolved ad hoc. Presumably, the state enforcing the Massachusetts subpoena will in its order of enforcement make explicit the place where the deposition is to be taken. An in-state deponent may not be summoned to a deposition more than 50 miles from where he lives or works. The mileage is specified in airline (i.e., straight-line) terms in order to obviate disputes over road distances.

Rule 45(e) provides that a subpoena shall issue as a matter of course upon the request of any party. This section is applicable to hearings as well as trials and follows pre-rule Massachusetts practice. See G.L. c. 233, §§ 1, 7, 8.

Rule 45(f) likewise works no change in Massachusetts practice; it preserves the existing law as to penalties for failure to comply with the requirements of a subpoena. Failure of a party to submit to discovery is also punishable by an appropriate order under Rule 37.

REPORTER'S NOTES--1983

This amendment makes clear that one cannot circumvent the time periods in Rule 30(b)(5) and Rule 34(b) by serving a deposition subpoena duces tecum on another party.

A subpoena is unnecessary to compel a party to appear or to produce documents at a party's deposition. See Rules 37(d) and 30(b)(5).

REPORTER'S NOTES--1986

This amendment makes clear that a deposition subpoena can require, in addition to production, permission to inspect and copy designated books, papers, documents, or tangible things. The amendment brings the Massachusetts Rule closer to the wording of Fed.R.Civ.P. 45(d).

REPORTER'S NOTES--2008

In 2008, Rule 26(b)(5) was amended to require the production of a privilege log by a party who makes a claim of privilege or protection in response to a discovery request. The requirement of a privilege log applies to a claim of privilege or right to protection asserted by a *party* only. Rule 26(b)(5) imposes no obligation to produce a privilege log on the part of a non-party who withholds information after service of a subpoena for the production of documentary evidence under Rule 45(b), although a court would appear to have authority to order preparation of a log.

REPORTER'S NOTES--2014

The 2014 amendments to Rule 45 were part of a series of amendments concerning discovery of electronically stored information. For background, see the 2014 Reporter's Notes to Rule 26.

The 2014 amendments relating to electronically stored information have resulted in a number of changes to Rule 45.

Language has been added to Rule 45(b) recognizing a duty on the party issuing a subpoena to “take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” This language makes the Massachusetts rule similar to its federal counterpart. It is a recognition of the burden involving time and expense that a subpoena imposes upon a third person, often with no stake in the outcome and often without counsel. Although this provision has been added in connection with amendments that relate to electronic discovery, the requirement of taking steps to avoid undue burden and expense is not limited to subpoenas involving electronically stored information.

References to “electronically stored information” have been added to Rule 45(b) and (d).

Existing Rule 45(f) (contempt) has been redesignated as Rule 45(g).

Rule 45(f), taken from Rule 45(d) of the Federal Rules of Civil Procedure, has been added. Rule 45(f) sets forth procedures applicable to producing documents, including electronically stored information.

Rule 45(f)(2) is modeled after Rule 45(d)(2)(A) of the Federal Rules of Civil Procedure, but with the added proviso that a person subpoenaed need not prepare a privilege log, a recognition of the burden that otherwise would be imposed on a non-party claiming a privilege.

Rule 45(f)(2)(B), dealing with information mistakenly produced that is subject to a claim of privilege or protection, incorporates the "clawback" provisions and procedures set forth in Rule 26(b)(5)(B) and (C).

REPORTER'S NOTES-2015

Background to 2015 Amendments

In 2013, the Standing Advisory Committee on the Rules of Civil Procedure of the Supreme Judicial Court (Standing Advisory Committee) undertook a review of Rule 45 governing subpoenas. Two matters that prompted the Committee to undertake this review were changes to Rule 45 of the Federal Rules of Civil Procedure effective December 1, 2013 and changes to Rule 45 of the Massachusetts Rules of Civil Procedure resulting from a series of rules amendments that dealt with discovery of electronically stored information effective January 1, 2014.

The most significant change in Rule 45 as result of this review was the adoption for Massachusetts practice of a "documents only" subpoena directed to a non-party, a practice that has existed under the Federal Rules of Civil Procedure since 1991.

Without the formal rules-based ability to subpoena documents from a non-party, Massachusetts lawyers have accomplished a result similar to that allowed under the Federal Rules by resorting to a practice of noticing the deposition of a keeper of records together with a deposition subpoena that required the production of documents at the deposition. See Rules 30(b)(1) and 45(d) (prior to the instant amendment). As long as there was no need to depose the keeper of records and only a desire to obtain the requested documents, the party seeking the discovery would agree to "waive" the appearance at the deposition if the documents themselves were produced. With the adoption of a documents only subpoena in 2015, there is no longer a need in Massachusetts to use deposition practice in regard to a non-party for the sole purpose of document production.

Other changes were made to Rule 45 to bring the rule up-to-date and to make the rule consistent with current subpoena practice.

The 2015 Amendments

A number of changes have been made to Rule 45 to deal with the dual nature of the subpoena-- to command the appearance of a non-party witness and to command production of documents, etc. from the non-party witness. The following is a section-by-section analysis describing the significant changes.

Rule 45(a).

As amended, Rule 45(a) states that a subpoena may command a person, in addition to giving testimony, "to produce designated documents, electronically stored information, or tangible things in that person's possession, custody or control; or to permit inspection of premises" and to do so "at a specified time and place." The addition of the quoted language formally adopts the concept of a documents only subpoena for Massachusetts civil practice.

A specific reference to electronically stored information has been added, consistent with other changes made to the discovery rules in 2014 regarding discovery of electronically stored information.

The language added to Rule 45(a) has been adapted from Rule 45(a)(1)(A)(iii) of the Federal Rules of Civil Procedure.

Rule 45(b).

As revised, this rule implements the documents only provisions of the new rule. The new title to Rule 45(b) and language that a command to produce documents, etc. may be included in a subpoena to attend a deposition or in a separate subpoena are taken from Rule 45(a)(1)(C) of the Federal Rules of Civil Procedure.

The last sentence of the revised rule makes clear that a command to produce documents, etc. does not require the person upon whom it is served to "appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial." See Rule 45(d)(2)(A) of the Federal Rules of Civil Procedure.

Rule 45(c).

Rule 45(c), dealing with service of the subpoena, makes clear that the requirement of tendering of fees to the person served with the subpoena applies only if the person's attendance is commanded and does not apply if the subpoena commands production only.

Rule 45(d).

A provision has been added to Rule 45(d)(1) that prior to service of a documents only subpoena before trial, a copy of the subpoena must be served on each party. This language differs from Rule 45(a)(4) of the Federal Rules of Civil Procedure, which requires that both a notice and a copy of the subpoena to be served on each party. The Massachusetts version reflects the belief that the requirement of a notice in addition to a copy of the subpoena is not needed. Service of a copy of the subpoena will provide sufficient notice to allow other parties to monitor discovery and to raise any objection to the subpoena.

The party serving the subpoena must also serve on all parties to the case a copy of any objection received to the subpoena as well as a notice of any production made or alternatively, a copy of the production. Similar requirements do not appear in the Federal Rules. The Massachusetts addition was provided so that parties to the case, other than the party who served the subpoena, are aware of the scope of production and are aware of any objection to production made by the non-party who has been served with the subpoena. The language also gives the option to the party who receives the documents to provide copies of the documents to the other parties, as often was the prior practice.

The last paragraph of Rule 45(d)(1) states that if there is an objection to production by the person served with the subpoena, the party seeking production may move to compel production. "Such an order to compel production or inspection shall protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance." This quoted language in the Massachusetts rule differs from the cognate provision in Rule 45(d)(2)(B)(ii) of the Federal Rules of Civil Procedure. The federal rule provides that an order of production must protect the person "from significant expense resulting from compliance."

This is an intentional variation from the federal rules. The Massachusetts version adopts the same language that was added to Rule 45(b) in connection with the 2014 amendments regarding electronically stored information. A party issuing a subpoena is required to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Rule 45(b), as amended effective January 1, 2014. The 2014 Reporter's Notes to the Massachusetts amendments described the philosophy behind the language "undue burden or expense" as follows:

> It is a recognition of the burden involving time and expense that a subpoena imposes upon a third person, often with no stake in the outcome and often without counsel. Although this provision has been added in connection with amendments that relate to electronic discovery, the requirement of taking steps to avoid undue burden and expense is not limited to subpoenas involving electronically stored information.

The Massachusetts language is intended to provide judges with broad discretion on a case-by-case basis to deal with the burden on a non-party to a case, and the possible expense, involved in responding to a subpoena. Its language is sufficiently broad to allow a court to require cost-sharing in its discretion as part of an order to produce.

The title of Rule 45(d) has also been revised to reflect the new procedure for a documents only subpoena.

Rule 45(e).

The pre-2015 version of Rule 45(e) dealt with a subpoena requiring attendance at a hearing or trial. The 2015 amendments added language making this provision applicable as well to a subpoena requiring production of documents, etc.

Rule 45(f).

A sentence has been added to Rule 45(f)(1)(A) to address the question whether copies of documents or originals of documents must be produced in response to a subpoena. The sentence states that in the case of a documents only subpoena, the producing person may produce copies of the documents, unless originals were requested in the command. However, if requested, the producing party must provide "all parties a fair opportunity to verify the copies by comparison with the originals."

This sentence is not in the federal rules. It is intended to recognize the general practice in Massachusetts of producing copies of documents, and not the originals, other than at a deposition, hearing, or trial. This is consistent with the procedure applicable where documents are produced in connection with a deposition and the producing party desires to retain the originals. Rule 30(f)(1), second paragraph, provides that under such circumstances, the producing party

> may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition.

The sentence provides that copies may be produced "by electronic means." This language recognizes the benefits of producing copies by such methods as electronic transfer of files by e-mail, CD-ROM, or Internet connection.

The last sentence of Rule 45(f)(1)(2)(A) has been amended to provide that even though a privilege log is not required in the case of a subpoena to a third person where there is an objection on the basis of privilege, the parties may agree to the preparation of a privilege log or the court may so order.

Rule 45(g).

There are no changes to Rule 45(g) dealing with contempt for failure to obey a subpoena.

Notes of Decisions (13)

Rules Civ. Proc., Rule 45, MA ST RCP Rule 45
Massachusetts annotated rules are current with amendments received through July 1, 2015. Forms are current through January 15, 2015.

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