

RULE CHANGE 2012(16)

COLORADO RULES OF CIVIL PROCEDURE

Repeal and Readoption of C.R.C.P. 45 and JDF 80 Subpoena Forms

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;

(ii) state the title of the action, the court in which it is pending and its case number;

(iii) command each person to whom it is directed to do one or both of the following at a specified time and place: attend and testify at a deposition, hearing or trial; or produce designated books, papers and documents, whether in physical or electronic form (“records”), or tangible things, in that person's possession, custody, or control;

(iv) identify the party and the party's attorney, if any, who is serving the subpoena;

(v) identify the names, addresses and phone numbers and email addresses where known, of the attorneys for each of the parties and of each party who has appeared in the action without an attorney;

(vi) state the method for recording the testimony if the subpoena commands attendance at a deposition; and

(vii) if production of records or a tangible thing is sought, set out the text of sections (c) and (d) of this Rule verbatim on or as an attachment to the subpoena.

(B) *Combining or Separating a Command to Produce.* A command to produce records or tangible things may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be contained in a separate subpoena that does not require attendance.

(C) *Deposition Subpoena Must Comply With Discovery Rules.* A deposition subpoena may require the production of records or tangible things which are within the scope of discovery permitted by C.R.C.P. 26. A subpoena must not be used to avoid the limits on discovery imposed by C.R.C.P. 16.1, 16.2 or 26 or by the Case Management Order applicable to that case.

(D) *Subpoenas to Named Parties.* A subpoena issued under this Rule may not be utilized to obtain discovery from named parties to the action unless the court orders otherwise for good cause.

(2) Issued by Whom. The clerk of the court in which the case is docketed must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney who has entered an appearance in the case also may issue, complete and sign a subpoena as an officer of the court.

(b) Service.

(1) Time for Service. Unless otherwise ordered by the court for good cause:

(A) Subpoena for Trial or Hearing Testimony. Service of a subpoena only for testimony in a trial or hearing shall be made no later than 48 hours before the time for appearance set out in the subpoena.

(B) Subpoena for Deposition Testimony. Service of a subpoena only for testimony in a deposition shall be made not later than 7 days before compliance is required.

(C) Subpoena for Production of Documents. Service of any subpoena commanding a person to produce records or tangible things in that person's possession, custody, or control shall be made not later than 14 days before compliance is required. In the case of an expedited hearing pursuant to these rules or any statute, service shall be made as soon as possible before compliance is required.

(2) By Whom Served; How Served. 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 or service as otherwise ordered by the court consistent with due process. Service is also valid if the person named in the subpoena has signed a written acknowledgement or waiver of service. Service may be made anywhere within the state of Colorado.

(3) Tender of Payment for Mileage. If the subpoena requires a person's attendance, the payment for 1 day's mileage allowed by law must be tendered to the subpoenaed person at the time of service of the subpoena or within a reasonable time after service of the subpoena, but in any event prior to the appearance date. Payment for mileage need not be tendered when the subpoena issues on behalf of the state of Colorado or any of its officers or agencies.

(4) Proof of Service. Proof of service shall be made as provided in C.R.C.P. 4(h). Original subpoenas and returns of service of such subpoenas need not be filed with the court.

(5) Notice to Other Parties.

(A) Service on the Parties. Immediately following service of a subpoena, the party or attorney who issues the subpoena, shall serve a copy of the subpoena on all parties pursuant to C.R.C.P. 5; provided that such service is not required for a subpoena issued pursuant to C.R.C.P. 69.

(B) Notice of Changes. The party or attorney who issues the subpoena must give the other parties reasonable notice of any written modification of the subpoena or any new date and time for the deposition, or production of records and tangible things.

(C) *Availability of Produced Records or Tangible Things.* The party or attorney who issues the subpoena for production of records or tangible things must make available in a timely fashion for inspection and copying to all other parties the records or tangible things produced by the responding party.

(c) Protecting a Person Subject to a Subpoena.

(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 issuing court 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 Records or Tangible Things.*

(A) *Attendance Not Required.* A person commanded to produce records or tangible things need not attend in person at the place of production unless also commanded to attend for a deposition, hearing, or trial.

(B) *For Production of Privileged Records.*

(i) If a subpoena commands production of records from a person who provides services subject to one of the privileges established by C.R.S. § 13-90-107, or from the records custodian for that person, which records pertain to services performed by or at the direction of that person (“privileged records”), such a subpoena must be accompanied by an authorization signed by the privilege holder or holders or by a court order authorizing production of such records.

(ii) Prior to the entry of an order for a subpoena to obtain the privileged records, the court shall consider the rights of the privilege holder or holders in such privileged records, including an appropriate means of notice to the privilege holder or holders or whether any objection to production may be resolved by redaction.

(iii) If a subpoena for privileged records does not include a signed authorization or court order permitting the privileged records to be produced by means of subpoena, the subpoenaed person shall not appear to testify and shall not disclose any of the privileged records to the party who issued the subpoena.

(C) *Objections.* Any party or the person subpoenaed to produce records or tangible things may submit to the party issuing the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials. The objection must be submitted before the earlier of the time specified for compliance or 14 days after the subpoena is served. If objection is made, the party issuing the subpoena shall promptly serve a copy of the objection on all other parties. If an objection is made, the party issuing the subpoena is not entitled to inspect, copy, test or sample the materials except pursuant to an order of the court from which the subpoena was issued. If an objection is made, at any time on notice to the subpoenaed person and the other parties, the party issuing the subpoena may move the issuing court for an order compelling production.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On motion made promptly and in any event at or before the time specified in the subpoena for compliance, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to attend a deposition in any county other than where the person resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court;

(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 issuing court may, on motion made promptly and in any event at or before the time specified in the subpoena for compliance, 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 matters 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(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order attendance or production under specified conditions if the issuing 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.

(d) Duties in Responding to Subpoena.

(1) Producing Records or Tangible Things.

(A) Unless agreed in writing by all parties, the privilege holder or holders and the person subpoenaed, production shall not be made until at least 14 days after service of the subpoena, except that, in the case of an expedited hearing pursuant to these rules or any statute, in the absence of such agreement, production shall be made only at the place, date and time for compliance set forth in the subpoena; and

(B) If not objected to, a person responding to a subpoena to produce records or tangible things 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 and must permit inspection, copying, testing, or sampling of the materials.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* Unless the subpoena is subject to subsection (c)(2)(B) of this Rule relating to production of privileged records, a person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) make the claim expressly; and

(ii) describe the nature of the withheld records 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 to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Subpoena for Deposition; Place of Examination.

(1) *Residents of This State.* A resident of this state may be required by subpoena to attend an examination upon deposition only in the county wherein the witness resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court.

(2) *Nonresidents of This State.* A nonresident of this state may be required by subpoena to attend only within forty miles from the place of service of the subpoena in the state of Colorado or in the county wherein the nonresident resides or is employed or transacts business in person or at such other convenient place as is fixed by an order of court.

(f) **Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(e).

Committee Comments: If a subpoena to attend a deposition is sought pursuant to Rule 45(c)(2)(A) in order to produce and authenticate documents, the issuing party should consider establishing admissibility under C.R.E. 902(11) as a means of reducing undue burden and expense upon the subpoenaed person.

For scope of provision contained in Rule 45(c)(3)(B)(ii) relating to “unretained experts”, *see* Official Comments to Federal Rules of Civil Procedure, 1991 Amendment, Clause (c)(3)(B)(ii).

Repealed and Readopted by the Court, En Banc, October 18, 2012, effective January 1, 2013.

By the Court:

**Nancy E. Rice
Justice, Colorado Supreme Court**