

# In the United States Court of Federal Claims

## NOTICE OF PROPOSED AMENDMENTS TO RULES

Pursuant to 28 U.S.C. §§ 2071(b) and 2503(b), the United States Court of Federal Claims hereby provides notice that it proposes to amend RCFC 45 and invites public comment on the proposed amendments. The proposed changes are intended to reflect the corresponding changes to FRCP 45 (as amended December 1, 2013) to the extent permissible given the court's nationwide jurisdiction. The changes are shown by strikethrough and yellow highlighting.

Comments must be received by June 16, 2014, and addressed to:

Hazel Keahey  
Clerk of Court  
United States Court of Federal Claims  
717 Madison Place, NW  
Washington, DC 20439

Absent further notice, these amendments will take effect July 1, 2014.

  
Hazel C. Keahey  
Clerk of Court

Issued: May 14, 2014

# Proposed Amendments to RCFC 45

## RCFC 45. Subpoena

### (a) In General.

#### (1) *Form (See Appendix of Forms, Forms 6 and 7A) and Contents.*

##### (A) *Requirements—In General.*

Every subpoena must:

- (i) state ~~the name of the court~~ **from which it issued**;
- (ii) state the title of the action and its ~~docket~~ **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 **d o c u m e n t s**, 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 RCFC 45~~(c) and (d)~~ **(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 **party person** to permit inspection, copying, testing, or sampling of the materials.

(2) *Issued from Which Issuing Court.* ~~[Not used.]~~ A subpoena must issue **from the court where the action is pending.**

(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** authorized to sign filings under RCFC 83.1 also may issue and sign a subpoena as an officer of the court.

**(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.

**(b) Service.**

**(1) By Whom and How; Tendering Fees; Serving a Copy of Certain Subpoenas.** 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. ~~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, a notice must be served on each party.~~

**(2) Service in the United States.** Subject to RCFC 45(c)(3)(A)(ii), a subpoena may be served at any place within the United States.:

- ~~(A) [not used];~~
- ~~(B) within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;~~
- ~~(C) [not used];~~

~~(D) that the court authorizes on motion and for good cause.~~

**(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 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 a person resides, is employed, or regularly transacts business in person; or
- (B)** at any place within the United States 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.**

**(c)(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 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 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 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 comply beyond the limitations specified in RCFC 45(c) to travel more than 100 miles from where that person resides, is employed, or regularly**

~~transacts business in person except that, subject to RCFC 45(d)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place;~~

- (iii) requires disclosure of privileged or other protected matter, if no exception of 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 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; or

~~(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.~~

(C) *Specifying Conditions as an Alternative.* In the

circumstances described in RCFC 45(e)(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.

(d)(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 RCFC 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 ~~under seal~~ 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.** [Not used.]

**(e)(g) Contempt.** The 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.** ~~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 RCFC 45(c)(3)(A)(ii).~~

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, Nov. 3, 2008, \_\_\_\_\_.)

### **Rules Committee Notes**

#### **2002 Revision**

RCFC 45 conforms to FRCP 45 to the extent feasible given the court's nationwide jurisdiction.

#### **2007 Amendment**

RCFC 45 has been amended to reflect the corresponding changes to FRCP 45 that became effective December 1, 2006.

#### **2008 Amendment**

The language of RCFC 45 has been amended to conform to the general restyling of the FRCP.

#### **2014 Amendment**

**RCFC 45 has been amended to reflect the corresponding changes in wording and organizational structure to FRCP 45 that became effective December 1, 2013. The changes to RCFC 45 are not substantive; they do not alter the practice and procedure authorized under the court's rule.**