

1 **1-045. Subpoena.**

2 A. **Form; issuance.**

3 (1) Every subpoena shall:

4 (a) state the name of the court from which it is issued;

5 (b) state the title of the action and its civil action number;

6 (c) command each person to whom it is directed to attend and give

7 testimony or to produce and permit inspection, copying, testing or sampling of designated

8 documents, electronically stored information or tangible things in the possession, custody

9 or control of that person, or to permit inspection of premises, at a time and place therein

10 specified; and

11 (d) be substantially in the form approved by the Supreme Court.

12 A command to produce evidence or to permit inspection, copying, testing or

13 sampling may be joined with a command to appear at trial or hearing or at deposition, or may

14 be issued separately. A subpoena may specify the form or forms in which electronically

15 stored information is to be produced.

16 (2) All subpoenas shall issue from the court for the district in which the

17 matter is pending.

18 (3) The clerk shall issue a subpoena, signed but otherwise in blank, to a

19 party requesting it, who shall complete it before service. An attorney authorized to practice

20 law in New Mexico and who represents a party, as an officer of the court, may also issue and

21 sign a subpoena on behalf of the court.

1 **B. Service; place of examination.**

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

3 (2) A subpoena may be served by any person who is not a party and is not
4 less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall
5 be made by delivering a copy thereof to such person and, if that person's attendance is
6 commanded:

7 (a) if the witness is to be paid from funds appropriated by the
8 legislature to the administrative office of the courts for payment of state witnesses or for the
9 payment of witnesses in indigency cases, by processing for payment to such witness the fee
10 and mileage prescribed by regulation of the administrative office of the courts;

11 (b) for all persons not described in Subparagraph (2)(a) of this
12 paragraph, by tendering to that person the full fee for one day's expenses provided by
13 Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers
14 attending a board or committee meeting and the mileage provided by Subsection D of
15 Section 10-8-4 NMSA 1978. The fee for per diem expenses shall not be prorated. If
16 attendance is required for more than one day, a full day's expenses shall be paid prior to
17 commencement of each day attendance is required. When the subpoena is issued on behalf
18 of the state or an officer or agency thereof, fees and mileage need not be tendered. Prior to
19 or at the same time as service of any subpoena commanding production of documents and
20 things or inspection of premises before trial, notice shall be served on each party in the
21 manner prescribed by Rule 1-005 NMRA.

1 (3) A person may be required to attend a deposition within one hundred
2 (100) miles of where that person resides, is employed or transacts business in person, or at
3 such other place as is fixed by an order of the court.

4 (4) A person may be required to attend a hearing or trial at any place
5 within the state.

6 (5) Proof of service when necessary shall be made by filing with the clerk
7 of the court a return substantially in the form approved by the Supreme Court.

8 (6) A subpoena may be issued [~~for taking of a deposition~~] within this state
9 in an action pending outside the state pursuant to [~~Section 38-8-1 NMSA 1978~~] Rule 1-045.1
10 NMRA upon the filing of a miscellaneous proceeding in the judicial district in which the
11 subpoena is to be served. Upon the docketing of the miscellaneous proceeding, the subpoena
12 may be issued and shall be served as provided by this rule.

13 (7) A subpoena may be served in an action pending in this state on a
14 person in another state or country in the manner provided by law or rule of the other state
15 or country.

16 C. **Protection of persons subject to subpoenas.**

17 (1) **In general.** A party or an attorney responsible for the issuance and
18 service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense
19 on a person subject to that subpoena. The court on behalf of which the subpoena was issued
20 shall enforce this duty and impose upon the party or attorney in breach of this duty an
21 appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable

1 attorney's fee.

2 (2) **Subpoena of materials or inspection of premises.**

3 (a) A person commanded to produce and permit inspection,
4 copying, testing or sampling of designated electronically stored information, documents or
5 tangible things, or inspection of premises:

6 (i) need not appear in person at the place of production,
7 inspection, copying, testing or sampling unless commanded to appear for deposition, hearing
8 or trial;

9 (ii) absent a court order, shall not respond to the subpoena
10 prior to the expiration of fourteen (14) days after the date of service of the subpoena;

11 (iii) if a written objection is served or a motion to quash the
12 subpoena is filed, shall not respond to the subpoena until ordered by the court;

13 (iv) may condition the preparation of any copies upon
14 payment in advance of the reasonable cost of inspection and copying.

15 (b) Subject to Subparagraph (2) of Paragraph D of this rule:

16 (i) a person commanded to produce and permit inspection,
17 copying, testing or sampling or a person who has a legal interest in or the legal right to
18 possession of the designated material or premises may file a written objection or a motion
19 to quash the subpoena;

20 (ii) any party may, within fourteen (14) days after service
21 of the subpoena serve upon all parties written objection to or a motion to quash inspection,

1 copying, testing or sampling of any or all of the designated materials or inspection of the
2 premises.

3 (iii) If objection is served on the party serving the subpoena
4 or a motion to quash is filed with the court and served on the parties, the party serving the
5 subpoena shall not be entitled to inspect, copy, test or sample the materials or inspect the
6 premises except pursuant to an order of the court by which the subpoena was issued. The
7 court may award costs and attorney fees against a party or person for serving written
8 objections or filing a motion to quash which lacks substantial merit.

9 (3)

10 (a) On timely motion, the court by which a subpoena was issued
11 shall quash or modify the subpoena if it:

12 (i) fails to allow reasonable time for compliance,

13 (ii) requires a person who is not a party or an officer of a
14 party to travel to a place more than one hundred (100) miles from the place where that
15 person resides, is employed or regularly transacts business in person, except that, subject to
16 the provisions of Subparagraph (3)(b)(iii) of this paragraph, such a person may in order to
17 attend trial be commanded to travel from any such place within the state in which the trial
18 is held, or

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

21 (iv) subjects a person to undue burden.

1 (b) If a subpoena:
2 (i) requires disclosure of a trade secret or other
3 confidential research, development or commercial information,
4 (ii) requires disclosure of an unretained expert's opinion
5 or information not describing specific events or occurrences in dispute and resulting from
6 the expert's study made not at the request of any party; or
7 (iii) requires a person who is not a party or an officer of a
8 party to incur substantial expense to travel more than one hundred (100) miles to attend trial,
9 the court may, to protect a person subject to or affected by the subpoena, quash or modify
10 the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need
11 for the testimony or material that cannot be otherwise met without undue hardship and
12 assures that the person to whom the subpoena is addressed will be reasonably compensated,
13 the court may order appearance or production only upon specified conditions.

14 **D. Duties in responding to subpoena.**

15 (1)
16 (a) A person responding to a subpoena to produce documents shall
17 produce them as they are kept in the usual course of business or shall organize and label
18 them to correspond with the categories in the demand.

19 (b) If a subpoena does not specify the form or forms for producing
20 electronically stored information, a person responding to a subpoena must produce the
21 information in a form or forms in which the person ordinarily maintains it or in a form or

1 forms that are reasonably usable.

2 (c) A person responding to a subpoena need not produce the same
3 electronically stored information in more than one form.

4 (d) A person responding to a subpoena need not provide discovery
5 of electronically stored information from sources that the person identifies as not reasonably
6 accessible because of undue burden or cost. On motion to compel discovery or to quash, the
7 person from whom discovery is sought must show that the information sought is not
8 reasonably accessible because of undue burden or cost. If that showing is made, the court
9 may order discovery from such sources if the requesting party shows good cause,
10 considering the limitations of Subparagraph (3) of Paragraph B of Rule 1-026 NMRA. The
11 court may specify the conditions for the discovery.

12 (2)

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

18 (b) If information is produced in response to a subpoena that is
19 subject to a claim of privilege or of protection as trial-preparation material, the person
20 making the claim may notify any party that received the information of the claim and the
21 basis for it. After being notified, a party must promptly return, sequester or destroy the

1 specified information and any copies it has and may not use or disclose the information until
2 the claim is resolved. By motion, a receiving party may promptly present the information
3 to the court for in camera review and a determination of the claim. If the receiving party
4 disclosed the information before being notified, it must take reasonable steps to retrieve it.
5 The person who produced the information must preserve the information until the claim is
6 resolved.

7 E. **Contempt.** Failure by any person without adequate excuse to obey a
8 subpoena served upon that person may be deemed a contempt of the court from which the
9 subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to
10 require a non-party to attend or produce at a place not within the limits provided in
11 Subparagraph (3)(a)(ii) of Paragraph C of this rule.

12 F. **Duties to make copies available.** A party receiving documents under
13 subpoena shall make them available for copying by other parties.

14

15 As amended, effective January 1, 1987; August 1, 1989; January 1, 1998; November 1, 2002,
16 as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as amended
17 by Supreme Court Order No. 09-8300-018, effective August 7, 2009.]

18 **Committee Commentary.**

19 **2002 Amendment to Rule 1-045**

20 Formerly, pre-trial production of documents or tangible items in the possession or
21 control of a nonparty could only be obtained by a subpoena issued in conjunction with a

1 notice of deposition of the person in possession of the documents.

2 In 1991, the federal rule was amended to allow pretrial subpoenas of documents or
3 tangible items without the necessity of noticing and scheduling a simultaneous deposition.

4 In 1997, the New Mexico Supreme Court similarly amended Rule 1-045 NMRA.

5 As amended in 1991, the federal rule required that "[p]rior notice" of any
6 commanded production shall be served on each party, F.R. Civ. P. 45(b) (1). "The purpose
7 of the notice provision is to afford other parties an opportunity to object to the production.
8 . . ." Fed. R. Civ. P. Rule 45 Committee Comment.

9 The 1997 amendment of Rule 1-045 NMRA provided for notice to all parties "[p]rior
10 to or at the same time" as service of the subpoena. Rule 1-045(B)(2)(b) NMRA. As
11 demonstrated in *Wallis v. Smith*, 2001-NMCA-017, 130 N.M. 214, 22 P.2d 682, *cert. denied*
12 23 P.3d 929, the New Mexico rule could be construed to permit a party to hand deliver a
13 subpoena for documents and simultaneously mail notice to other parties with the possible
14 result that the nonparty might comply with the subpoena before other parties received notice
15 of its contents and had an opportunity to object to its contents pursuant to Rule
16 1-045(C)(2)(b) NMRA.

17 The 2002 amendment to Rule 1-045(C)(2) NMRA solves this problem by providing
18 a fourteen (14) day period before responding to assure that "a person who has a legal interest
19 in or the legal right to possession of the designated material or premises" or any party will
20 have an opportunity to object to the subpoena before the witness responds.

21 The federal rule, requiring "[p]rior notice" is ambiguous, though it has been

1 construed to require "reasonable notice" prior to service of the subpoena. *Biocore Medical*
2 *Technologies, Inc. v. Khosrowshahi*, 181 F.R.D. 660, 667 (D. Kan. 1998). The committee
3 considered but rejected this construction, preferring to set a specific time that will assure
4 prior notice, while also recognizing the possibility that a court might reduce the time under
5 appropriate circumstances.

6

7 **1997 Amendment of Rule 1-045**

8 **1. Introduction**

9 The New Mexico District Court Rules were based upon the Federal Rules of Civil
10 Procedure. Although the New Mexico rules diverge from the Federal Rules when
11 appropriate, the committee regularly reviews New Mexico's District Court Rules of Civil
12 Procedure when the Federal Rules are modified. Federal Rule 45 - Subpoenas - underwent
13 significant change as a result of amendments that went into effect in December, 1991 and
14 was further modified by amendments effective in December, 1995. The Rules Committee's
15 reevaluation of Rule 1-045 in light of the changes in the federal rule prompted amendments
16 to Rule 1-045 and the adoption of Rule 1-045 in its current form.

17 **2. Overview**

18 Rule 1-045 formerly contained different provisions for subpoenas for attendance at
19 trial or hearing and for attendance at a deposition. The existing rule follows the model of the
20 current federal rule which generally eliminates that distinction.

21 Rule 1-045 formerly had the effect of barring parties from obtaining items such as

1 documents or inspecting premises except in conjunction with a subpoena setting a deposition
2 of a witness. The existing rule follows the current federal rule which allows subpoenas for
3 production of items or inspection of premises from non-parties without the necessity of
4 scheduling and conducting a deposition at the same time. The rule provides procedural
5 protections to assure advance notice to parties that a party has issued a subpoena for
6 production or inspection.

7 The rule provides for statewide service of both trial and hearing subpoenas and
8 deposition and production subpoenas. Rule 1-045(B)(1).

9 Formerly, Rule 1-045 placed significant geographic limitations upon the place that
10 depositions might be conducted in the absence of a court order. Some of those limitations
11 depended upon the place of service of the subpoena. The rule eliminates the significance of
12 the place of service of the subpoena as a factor in setting the place of deposition and
13 modifies but does not eliminate other limitations in the former rule.

14 Rule 1-045 formerly authorized only the district court clerk to issue subpoenas. The
15 existing rule follows the current federal rule which allows a party's attorney to issue
16 subpoenas in the name of the court.

17 **3. Who may issue subpoenas**

18 Formerly, Rule 1-045 required that the clerk issue and sign all subpoenas. Following
19 the model of the current federal rule, Rule 1-045 now authorizes an attorney for a party to
20 issue and sign subpoenas in the attorney's capacity as an officer of the court. Any attorney
21 authorized to practice law in New Mexico who is serving as attorney to a party may issue

1 trial and hearing subpoenas as well as deposition and production and inspection subpoenas.

2 The clerk continues to have power to issue subpoenas. A clerk's subpoena will be of
3 particular use to a party who is not represented by counsel. The clerk of the court for the
4 district in which the matter is pending is the appropriate person to issue subpoenas for
5 service anywhere in the state.

6 **4. Form and content of subpoenas**

7 A subpoena may: 1) command a person to attend at trial or attend a hearing; 2)
8 command a person to appear for a deposition; 3) command a person to permit inspection of
9 premises; 4) command a person to produce items at trial or a hearing; or 5) command a
10 person to produce items for discovery or inspection prior to trial. A subpoena to produce
11 items or permit inspection may, but need not, also command the person to attend a trial,
12 hearing or deposition. Thus, Rule 1-045 now permits a party to subpoena items or obtain
13 inspection without simultaneously scheduling a deposition.

14 Following the model of the current federal rule, subpoenas no longer need to contain
15 the seal of the court. They must, however, now contain the civil action number of the case
16 for which the subpoena is issued. Rule 1-045(A)(1)(d) now provides that subpoenas shall be
17 substantially in the form approved by the Supreme Court and the Court has approved forms
18 consistent with the requirements of Rule 1-045. *See* Civil Form 4-505 NMRA.

19 **5. Service of subpoenas**

20 Rule 1-045 now explicitly authorizes service of process anywhere in the state. When
21 a person is beyond the subpoena power of the New Mexico District Court, Rule 1-045

1 provides that the party to the New Mexico proceeding who seeks to subpoena items, conduct
2 inspection, or conduct a deposition in another state shall do so in the manner provided by
3 law or rule of the other state. *See, e.g.*, Mass. Gen. Laws Ann. 123A Sec. 11 (West 1985)
4 ("Discovery Within Commonwealth for Proceedings Outside Commonwealth").

5 As in former Rule 1-045, service of the subpoena normally must be accompanied by
6 the tender of designated per diem expenses and mileage except in situations provided for in
7 Rule 1-045(B)(2)(a) and when subpoenas are issued in behalf of the state, a state officer or
8 a state agency. The rule now specifically requires that the full per diem be tendered even if
9 the party believes that the required attendance will not take an entire day. Where attendance
10 is required for more than one day, the full per diem for each additional day must be paid
11 prior to the commencement of proceedings each day.

12 Rule 1-045(B)(2) formerly provided that the failure to tender required per diem
13 expense and mileage fees did not invalidate the subpoena but merely justified the imposition
14 of appropriate sanctions. That provision has been omitted from Rule 1-045. The committee
15 intends that henceforth the failure to tender required expense and mileage fees shall
16 invalidate the subpoena and justify non-compliance with the subpoena's command. The
17 burden of compliance rests upon the person on whose behalf the subpoena is served.

18 Because Rule 1-045 already provided for service by any person not a party who is
19 at least eighteen years old, specific references to the authority of sheriffs and deputies to
20 serve subpoenas was superfluous and has been omitted in this rule. This modification
21 follows the model of the current federal rule.

1 **6. Notice of service of subpoena**

2 Whenever a party schedules a deposition (whether or not a subpoena is issued
3 compelling attendance at the deposition), Rule 1-030(B)(1) requires that notice of the
4 deposition be sent to each party. When a subpoena for production or inspection is served in
5 conjunction with the notice of deposition, the party seeking production at the deposition
6 must also send notice of the issuance of the subpoena to each party along with the notice of
7 the deposition. *Id.*

8 Because Rule 1-045 formerly required that subpoenas for pre-trial production or
9 inspection could only be issued in conjunction with the taking of a deposition, the notice
10 requirement of Rule 1-030(B)(1) effectively assured that all parties would receive notice of
11 every pre-trial attempt by a party to compel production and inspection against a non-party.
12 Rule 1-045 now authorizes issuance of a subpoena for pre-trial production without the
13 necessity of a simultaneous deposition, Rule 1-045(A)(1)(d), with the result that the notice
14 requirement in Rule 1-030(B)(1) no longer assures that all parties will receive notice of
15 pre-trial production and subpoenas. To fill this notice gap, Rule 1-045(B)(2) now requires
16 that prior to or simultaneously with the service of pre-trial inspection or production
17 subpoenas the party on whose behalf the subpoena is served must give notice to all parties
18 in the lawsuit in the manner required by Rule 1-005. This provision follows the model of the
19 current federal rule.

20 **7. Place of attendance or production**

21 Service of a subpoena may be made anywhere in the state. Rule 1-045(B)(1). As was

1 the case under former Rule 1-045, if the subpoena commands attendance at a trial or a
2 hearing, the person served with the subpoena must appear as commanded anywhere in the
3 state. Rule 1-045(B)(4).

4 Rule 1-045 modifies the former rule concerning the place in which a deposition of
5 a subpoenaed witness may be scheduled. The rule formerly contained separate provisions
6 for the place of depositions, depending upon whether the person subpoenaed was a resident
7 of the judicial district in which the deposition was to be taken. In the case of nonresidents
8 of the judicial district, the former rule focused on the place of service, and required that the
9 deposition be held within forty miles of the place of service of the subpoena unless the court
10 ordered otherwise.

11 Rule 1-045 eliminates the distinction between residents and nonresidents of the
12 judicial district and does not take into account the place of service in setting the proper place
13 for the deposition. Instead, Rule 1-045 provides that all persons may be required to attend
14 a deposition only within 100 miles of the place of their residence, their place of employment
15 or where they transact business unless another place is fixed by order of the court. Rule
16 1-045(B)(3).

17 If a person declines to honor a subpoena that is inconsistent with the geographical
18 limitations of this rule, the person cannot be held in contempt for failure to attend the
19 deposition unless the court entered an order compelling attendance at that place. Rule
20 1-045(E).

21 **8. Proof of service of subpoena**

1 The Supreme Court has approved a form for proof of service of a subpoena. *See* civil
2 Form 4-505 NMRA. When proof of service of the subpoena must be filed pursuant to Rule
3 1-005(D) NMRA, Rule 1-045(B)(5) requires that the form of the proof of service be in
4 substantial compliance with the approved form.

5 **9. Duty to avoid misuse of subpoena authority**

6 For the first time, Rule 1-045 imposes an explicit duty on parties and attorneys
7 responsible for subpoenas to take reasonable steps to avoid undue burden or expense on
8 persons subject to the subpoenas. Rule 1-045(C)(1). The court may sanction parties or
9 attorneys who violate this rule with appropriate sanctions including imposition of an order
10 to pay the witness lost earnings and attorney's fees. *Id.*

11 **10. Subpoenas for production or inspection**

12 Subpoenas for production of tangible items or inspection of premises now may issue
13 without the necessity for setting a deposition at the same time. Rule 1-045(A)(1)(d). When
14 such a subpoena is issued, the party responsible for the issuance of the subpoena must
15 provide timely notice to all parties of the issuance of the subpoena. Rule 1-045(B)(2).

16 The rule formerly provided only that the subpoenaed person "produce" the items. The
17 rule now requires that the person "produce and permit inspection and copying" of the books,
18 documents or tangible items. Rule 1-045(A)(1)(d).

19 The rule formerly provided that the subpoena must identify the items subject to the
20 subpoena with reasonable particularity. The committee has eliminated this explicit
21 requirement in deference to its preference to model Rule 1-045 after the federal rule, but

1 believes that the requirement that the items be "designated", Rule 1-045(A)(1)(c),
2 incorporates the former requirement of reasonable particularity in the description of the
3 items sought. The former rule also explicitly limited the scope of subpoenaed items to those
4 within the scope of discovery permitted by Rule 1-026(B). The committee has eliminated
5 this explicit limitation also in deference to its preference to model Rule 1-045 after the
6 federal rule, but assumes that specific references to protection for trade secrets, expert
7 opinions and the like, now found in Rule 1-045(C)(3)(b), which are rooted in Rule 1-026,
8 suffice to indicate that the subpoena of items continues to be subject to the limitations of
9 discovery in Rule 1-026.

10 The person who receives a subpoena to produce items or permit inspection of
11 premises need not appear in person at the designated time and place unless that person is also
12 commanded in the subpoena to appear for a deposition, trial or hearing. Rule 1-045(C)(2).

13 The person who receives a subpoena to produce items or permit inspection of
14 premises must do so unless the person serves timely (*See* Rule 1-045(C)(2)(b)) objections
15 on all parties. This modifies the federal rule by requiring service on all parties.

16 If no objections are served, the person responding shall produce the documents either
17 as they are kept in the ordinary course of business or labeled and organized to correspond
18 with the categories of the demand. Rule 1-045(D)(1).

19 If timely objections are served, the subpoenaed person need not comply with the
20 subpoena unless and until the person seeking the subpoenaed items obtains a court order
21 compelling the production. Rule 1-045(C)(2)(b). Alternatively, the person who opposes

1 compliance with the subpoena and serves timely notice of objections may file a timely
2 motion seeking to quash or modify the subpoena. Rule 1-045(C)(3)(a).

3 Rule 1-045 now lists grounds for seeking an order of protection from a subpoena,
4 Rule 1-045(C)(3), and provides guidelines for the court to use in ruling on such motions. *Id.*
5 These new provisions follow the current federal rule.

6 **11. Taking a deposition in New Mexico for an action pending outside New Mexico**

7 A New Mexico statute authorizes New Mexico courts to order the deposition of
8 persons found in this state for use in conjunction with legal proceedings outside New
9 Mexico. Sections 38-8-1 to 38-8-3 NMSA 1978. Rule 1-045(B)(6) makes reference to [~~the~~
10 ~~statute as a guide to practitioners~~] new Rule 1-045.1 NMRA, which authorizes the issuance
11 of subpoenas for depositions and other discovery in New Mexico for an action pending
12 outside of New Mexico.

13

14 **Committee Commentary for 2007 Amendments.**

15 *See* the 2007 Committee Commentary to Rule 1-026 NMRA for additional information.

16

17 [As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as
18 amended by Supreme Court Order No. 09-8300-018, effective August 7, 2009.]

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