

Agenda
Advisory Committee
on Rules of Civil Procedure

January 24, 2006
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Approval of minutes.	Fran Wikstrom
Request from Supreme Court: Research the effects of the discovery amendments.	Fran Wikstrom
Rule 45. Subpoena.	Tim Shea
Style amendments to FRCP	Jonathan Hafen

Meeting Schedule

February 28, 2007
March 28, 2007
April 25, 2007
May 23, 2007
September 26, 2007
October 24, 2007
November 28, 2007

Committee Web Page: <http://www.utcourts.gov/committees/civproc/>

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, November 29, 2006
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, James T. Blanch, Todd M. Shaughnessy, Terrie T. McIntosh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Janet H. Smith, Thomas R. Lee, Judge R. Scott Waterfall, Cullen Battle, Barbara Townsend, Leslie W. Slauch, Honorable Anthony W. Schofield

EXCUSED: Honorable Anthony B. Quinn, Francis J. Carney, Jonathan Hafen, Debora Threedy, David W. Scofield, Steven Marsden, Lori Woffinden

STAFF: Tim Shea, Matty Branch, Trystan B. Smith

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:04 p.m. Mr. Slauch moved to approve the October 25, 2006 minutes as submitted. The committee unanimously approved the minutes.

II. COMMENTS TO RULES. Rules 5, 17, 74, 75.

Mr. Shea brought the comments to Rules 5, 17, 74, and 75 back to the committee. Mr. Shea indicated there were few substantive comments with the exception of whether Rule 74 should be further amended to require leave of court to withdraw if the preparation of an order is pending. Mr. Wikstrom indicated that he read Rule 74 to currently address this issue.

Ms. Smith moved to approve the rules as drafted. The committee unanimously approved the changes to the subject rules.

III. E-DISCOVERY. RULES 16, 26, 33, 34, 37, 45.

Judge Nuffer brought the e-discovery rules back to the committee and provided us with an overview and history of the federal e-discovery rules. He also elicited comments from the other members of the e-discovery subcommittee.

Judge Nuffer initially discussed the planning stages of e-discovery under Rules 16 and 26. The e-discovery subcommittee suggested parroting the federal amendments to Rules 16 and 26 with the exception of adding "preservation" to Rule 16(b)(6) and Rule 26(f)(2) (C) and (D). The subcommittee also suggested adding "electronically stored information" to the categories of items to be produced in a party's initial disclosures under Rule 26(a)(1)(B).

Mr. Battle discussed the scope and safe harbor rules of e-discovery under Rules 26(b)(2)(B) and Rule 37(f). Mr. Battle discussed the advisability of defining the phrase “electronically stored information.” The subcommittee indicated it was unnecessary.

Mr. Battle further discussed the addition of Rule 26(b)(2) which is a deviation from the federal rules. Rule 26(b)(2) would add a requirement for specificity in a claim of inaccessibility.

In the federal rule, the only requirement is that a party identify that the source is not reasonably accessible. The subcommittee’s proposal is that the party “shall expressly make the claim that the source is not reasonably accessible, describing the source, the reasons it is not reasonably accessible and the nature of the information not provided in a manner that will enable other parties to assess the claim.”

Mr. Lee suggested a revision to the proposed language stating: The parties shall expressly make “any” claim that the source is not reasonably accessible the reasons it is not reasonably accessible and the nature of the information not provided “and other information necessary” that will enable other parties to assess the claim.

The committee discussed whether it was necessary to deviate from the federal rule and if it is necessary for a party to specify a claim of inaccessibility. Mr. Lee moved to adopt his proposed amendment. The committee approved Mr. Lee’s proposed amendment to Rule 26(b)(2).

Mr. Battle discussed Rule 37(g) with the committee. Mr. Battle expressed his concern regarding the last sentence of Rule 37(g) which states, “Absent exceptional circumstances, a court may not impose sanctions . . . for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”

Mr. Lee questioned whether this provision was necessary. Mr. Shaughnessy suggested the provision is designed to protect companies who routinely tape over or destroy electronically stored information. Ms. McIntosh indicated it was a huge cost for companies to maintain and keep back-up tapes with electronically stored information. The committee discussed the mechanics of how tapes with electronically stored information are created and maintained. The subcommittee suggested it was preferable to adopt the changes in the federal rules to follow the case law adopted by federal courts.

Mr. Shaughnessy discussed Rules 33 and 34 with the committee. The subcommittee suggested the committee adopt the federal amendments to Rules 33 and 34. The committee did not suggest any revision to the proposed changes.

Judge Nuffer discussed claims of privilege under Rule 26(b)(5)(A) and (B). The subcommittee suggested the committee adopt the federal language proposed in Rule 26(b)(5) (B). The federal rule change did not anticipate inadvertent disclosures. Under subsection (B), a party produces material without reviewing the production for privilege.

Ms. Townsend discussed e-discovery under Rule 45. The federal rule changes incorporated “electronically stored information”³ where applicable, and addressed e-discovery

where applicable. Ms. Townsend suggested the committee adopt the federal language revising Rule 45. Mr. Shea recommended the committee incorporate the e-discovery changes to Rule 45 and republish Rule 45 for public comment. The committee agreed.

Judge Nuffer moved the committee adopt the proposed e-discovery rules with the changes suggested above. The committee unanimously approved the motion.

IV. RULE 78. REQUIREMENT TO INFORM COURT OF ADDRESS.

Mr. Shea drafted the proposed Rule 78 at the suggestion of Second District Judge Rodney Page who indicated his concern regarding a trial court's ability to dismiss a suit because of a party's failure to maintain current contact information. Mr. Shea suggested language requiring a party or a party's lawyer to provide to the court clerk the party's address, e-mail address, and phone number. The rule would further require a party to inform the court clerk of a change in that party's contact information.

Mr. Slaugh questioned the need for Rule 78. Mr. Slaugh suggested the Court had the inherent authority to dismiss a suit if a party failed to maintain contact information or failed to attend a hearing. Judge Nuffer recommended the committee consider an amendment to Rule 10 to require a change of address to be updated. Mr. Wikstrom suggested a separate rule for pro se parties which would require the parties to provide and update their contact information.

Judge Schofield volunteered to contact Judge Page to discuss his concerns and report back to the committee.

V. ADJOURNMENT.

The meeting adjourned at 5:36 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, January 24, 2007, at the Administrative Office of the Courts.

1 Rule 45. Subpoena.

2 (a) Form; issuance.

3 (a)(1) Every subpoena shall:

4 (a)(1)(A) issue from the court in which the action is pending;

5 (a)(1)(B) state the title and case number of the action, the name of the court from
6 which it is issued, and the name and address of the party or attorney servicing
7 responsible for issuing the subpoena, ~~and its civil action number~~;

8 (a)(1)(C) command each person to whom it is directed

9 (a)(1)(C)(i) to appear ~~to and~~ give testimony at a trial, ~~or at~~ hearing, or ~~at~~ deposition,

10 or

11 (a)(1)(C)(ii) to appear and produce ~~or to permit for~~ inspection, ~~and~~ copying ~~of testing~~
12 or sampling documents, electronically stored information or tangible things in the
13 possession, custody or control of that person, or

14 (a)(1)(C)(iii) to copy documents or electronically stored information in the
15 possession, custody or control of that person and mail or deliver the copies to the party
16 or attorney responsible for issuing the subpoena before a date certain, or

17 (a)(1)(C)(iv) to appear and to permit inspection of premises, ~~at a time and place~~
18 ~~therein specified~~;

19 (a)(1)(D) if an appearance is required, specify the date, time and place for the
20 appearance; and

21 ~~(a)(1)(D) set forth the text of (a)(1)(E) include a N~~ notice to ~~P~~ persons ~~S~~ served with a
22 ~~S~~ subpoena, in a form substantially similar ~~form~~ to the subpoena form appended to
23 these rules. A subpoena may specify the form or forms in which electronically stored
24 information is to be produced.

25 ~~(a)(2) A command to produce or to permit inspection and copying of documents or~~
26 ~~tangible things, or to permit inspection of premises, may be joined with a command to~~
27 ~~appear at trial, or at hearing, or at deposition, or may be issued separately.~~

28 ~~(a)(3)~~ (a)(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a
29 party requesting it, who shall complete it before service. An attorney admitted to
30 practice in ~~the court in which the action is pending~~ Utah may ~~also~~ issue and sign a
31 subpoena as an officer of the court.

32 (b) Service; ~~scope fees; prior notice.~~

33 (b)(1) ~~Generally.~~

34 ~~(b)(1)(A)~~ A subpoena may be served by any person who is at least 18 years of age
35 and not a party and is not less than 18 years of age to the case. Service of a subpoena
36 upon ~~a the~~ person named therein to whom it is directed shall be made as provided in
37 Rule 4(d) ~~for the service of process and, if the,~~

38 (b)(2) If the subpoena commands a person's appearance, is commanded, by
39 tendering to that person the party or attorney responsible for issuing the subpoena shall
40 tender with the subpoena the fees for one day's attendance and the mileage allowed by
41 law. When the subpoena is issued on behalf of the United States, or this state, or any
42 officer or agency of either, fees and mileage need not be tendered.

43 ~~(b)(3) Prior notice of any commanded production or inspection of documents or~~
44 ~~tangible things or inspection of premises before trial shall be served on each party in the~~
45 ~~manner prescribed by Rule 5(b).~~ If the subpoena commands a person to copy and mail
46 or deliver documents or electronically stored information, to produce documents,
47 electronically stored information or tangible things for inspection, copying, testing or
48 sampling or to permit inspection of premises, the party or attorney responsible for
49 issuing the subpoena shall serve each party with notice of the subpoena by delivery or
50 other method of actual notice prior to service of the subpoena.

51 ~~(b)(1)(B) Proof of service when necessary shall be made by filing with the clerk of~~
52 ~~the court from which the subpoena is issued a statement of the date and manner of~~
53 ~~service and of the names of the persons served, certified by the person who made the~~
54 ~~service.~~

55 ~~(b)(1)(C) Service of a subpoena outside of this state, for the taking of a deposition or~~
56 ~~production or inspection of documents or tangible things or inspection of premises~~
57 ~~outside this state, shall be made in accordance with the requirements of the jurisdiction~~
58 ~~in which such service is made.~~

59 ~~(b)(2) Subpoena for appearance at trial or hearing. A subpoena commanding a~~
60 ~~witness to appear at a trial or at a hearing pending in this state may be served at any~~
61 ~~place within the state.~~

62 ~~(b)(3) Subpoena for taking deposition. (c) Appearance; resident; non-resident.~~

63 ~~(b)(3)(A)~~ (c)(1) A person who resides in this state may be required to appear:
64 (c)(1)(A) at a trial or hearing in the county in which the case is pending; and
65 (c)(1)(B) at a deposition, or to produce documents, electronically stored information
66 or tangible things, or to permit inspection of premises only in the county ~~where-in~~ in which
67 the person resides, ~~or~~ is employed, or transacts business in person, or at such other
68 place as the court may order.

69 (c)(2) A person who does not reside in this state but who is served within this state
70 may be required to appear:

71 (c)(2)(A) at a trial or hearing in the county in which the case is pending; and
72 (c)(2)(B) at a deposition, or to produce documents, electronically stored information
73 or tangible things, or to permit inspection of premises only in the county ~~in this state~~
74 ~~where-in~~ in which the person is served ~~with a subpoena~~, or at such other place as the
75 court may order.

76 ~~(b)(3)(B) A subpoena commanding the appearance of a witness at a deposition may~~
77 ~~also command the person to whom it is directed to produce or to permit inspection and~~
78 ~~copying of documents or tangible things relating to any of the matters within the scope~~
79 ~~of the examination permitted by Rule 26(b), but in that event the subpoena will be~~
80 ~~subject to the provisions of Rule 30(b) and paragraph (c) of this rule.~~

81 ~~(b)(4) Subpoena for production or inspection of documents or tangible things or~~
82 ~~inspection of premises. A subpoena to command a person who is not a party to produce~~
83 ~~or to permit inspection and copying of documents or tangible things or to permit~~
84 ~~inspection of premises may be served at any time after commencement of the action.~~
85 ~~The scope and procedure shall comply with Rule 34, except that the person must be~~
86 ~~allowed at least 14 days to comply as stated in subparagraph (c)(2)(A) of this rule.~~ (d)
87 Payment of production or copying costs. The party ~~servicing~~ or attorney responsible for
88 issuing the subpoena shall pay the reasonable cost of producing or copying ~~the~~
89 documents, electronically stored information or tangible things. Upon the request of any
90 other party and the payment of reasonable costs, the party ~~servicing~~ or attorney
91 responsible for issuing the subpoena shall provide to the requesting party copies of all
92 documents, electronically stored information or tangible things obtained in response to
93 the subpoena or shall make the tangible things available for inspection.

94 ~~(e)~~(e) Protection of persons subject to subpoenas; objection.

95 ~~(e)(1) A~~(e)(1) The party or ~~an~~ attorney responsible for ~~the issuance and service of~~
96 issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or
97 expense on ~~a~~the person subject to ~~that~~the subpoena. The court ~~from which the~~
98 subpoena was issued shall enforce this duty and impose upon the party or attorney in
99 breach of this duty an appropriate sanction, which may include, but is not limited to, lost
100 earnings and a reasonable attorney's attorney fee.

101 ~~(e)(2)(A)~~(e)(2) A subpoena ~~served upon a person who is not a party to copy and~~
102 mail or deliver documents or electronically stored information, to produce ~~or to permit~~
103 inspection and copying of documents, electronically stored information or tangible
104 things, or to permit inspection of premises, ~~whether or not joined with a command to~~
105 appear at trial, or at hearing, or at deposition, must allow the person at least 14 days
106 ~~after service to comply, unless a shorter time has been ordered by the court for good~~
107 cause shown shall comply with Rule 34(a) and (b)(1), except that the person subject to
108 the subpoena must be allowed at least 14 days after service to comply.

109 ~~(e)(2)(B) A person commanded to produce or to permit inspection and copying of~~
110 documents or tangible things or to permit inspection of premises need not appear in
111 person at the place of production or inspection unless also commanded to appear at
112 trial, at hearing, or at deposition.

113 ~~(e)(2)(C) A person commanded to produce or to permit inspection and copying of~~
114 documents or tangible things or inspection of premises may, before the time specified
115 for compliance with the subpoena, serve upon the party or attorney designated in the
116 subpoena written objection to inspection or copying of any or all of the documents or
117 tangible things or inspection of the premises. ~~(e)(3) The person subject to the subpoena~~
118 may object if the subpoena:

119 (e)(3)(A) fails to allow reasonable time for compliance;

120 (e)(3)(B) requires a resident of this state to appear at other than a trial or hearing in
121 a county in which the person does not reside, is not employed, or does not transact
122 business in person;

123 (e)(3)(C) requires a non-resident of this state to appear at other than a trial or
124 hearing in a county other than the county in which the person was served;

125 (e)(3)(D) requires the person to disclose privileged or other protected matter and no
126 exception or waiver applies;

127 (e)(3)(E) requires the person to disclose a trade secret or other confidential
128 research, development, or commercial information;

129 (e)(3)(F) subjects the person to an undue burden or cost;

130 (e)(3)(G) requires the person to produce electronically stored information in a form or
131 forms to which the person objects;

132 (e)(3)(H) requires the person to provide electronically stored information from
133 sources that the person identifies as not reasonably accessible because of undue
134 burden or cost; or

135 (e)(3)(I) requires the person to disclose an unretained expert's opinion or information
136 not describing specific events or occurrences in dispute and resulting from the expert's
137 study that was not made at the request of a party.

138 (e)(4)(A) If the person subject to the subpoena objects, the objection must be made
139 before the date for compliance.

140 (e)(4)(B) The person subject to the subpoena shall state the objection in a concise,
141 non-conclusory manner.

142 (e)(4)(C) If the objection is that the information commanded by the subpoena is
143 privileged or protected and no exception or waiver applies, or requires the person to
144 disclose a trade secret or other confidential research, development, or commercial
145 information, the objection shall sufficiently describe the nature of the documents,
146 communications, or things not produced to enable the party or attorney responsible for
147 issuing the subpoena to contest the objection.

148 (e)(4)(D) If the objection is that the electronically stored information is from sources
149 that are not reasonably accessible because of undue burden or cost, the person from
150 whom discovery is sought must show that the information sought is not reasonably
151 accessible because of undue burden or cost.

152 (e)(4)(E) The person shall serve the objection on the party or attorney responsible
153 for issuing the subpoena. The party or attorney responsible for issuing the subpoena
154 shall serve a copy of the objection on the other parties.

155 ~~(e)(5) If objection is made, the party serving or attorney responsible for issuing the~~
156 ~~subpoena shall is not be entitled to inspect and copy the materials or inspect the~~
157 ~~premises except pursuant to an order of the court. If objection has been made, the party~~
158 ~~serving the subpoena may, upon notice to the person commanded to produce,~~
159 ~~compliance but may move at any time for an order to compel the production~~
160 ~~compliance. The motion shall be served on the other parties and on the person subject~~
161 ~~to the subpoena. Such an An order to compel production compliance shall protect any~~
162 ~~the person who is not a party or an officer of a party subject to the subpoena from~~
163 ~~significant expense resulting from the inspection and copying commanded or harm. The~~
164 ~~court may quash or modify the subpoena. If the party or attorney responsible for issuing~~
165 ~~the subpoena shows a substantial need for the information that cannot be met without~~
166 ~~undue hardship, the court may order compliance upon specified conditions.~~

167 ~~(c)(3)(A) On timely motion, the court from which a subpoena was issued shall quash~~
168 ~~or modify the subpoena if it:~~

169 ~~(c)(3)(A)(i) fails to allow reasonable time for compliance;~~

170 ~~(c)(3)(A)(ii) requires a resident of this state who is not a party to appear at deposition~~
171 ~~in a county in which the resident does not reside, or is not employed, or does not~~
172 ~~transact business in person; or requires a non-resident of this state to appear at~~
173 ~~deposition in a county other than the county in which the person was served;~~

174 ~~(c)(3)(A)(iii) requires disclosure of privileged or other protected matter and no~~
175 ~~exception or waiver applies;~~

176 ~~(c)(3)(A)(iv) subjects a person to undue burden.~~

177 ~~(c)(3)(B) If a subpoena:~~

178 ~~(c)(3)(B)(i) requires disclosure of a trade secret or other confidential research,~~
179 ~~development, or commercial information;~~

180 ~~(c)(3)(B)(ii) requires disclosure of an unretained expert's opinion or information not~~
181 ~~describing specific events or occurrences in dispute and resulting from the expert's~~
182 ~~study made not at the request of any party;~~

183 ~~(c)(3)(B)(iii) requires a resident of this state who is not a party to appear at~~
184 ~~deposition in a county in which the resident does not reside, or is not employed, or does~~
185 ~~not transact business in person; or~~

186 ~~(c)(3)(B)(iv) requires a non-resident of this state who is not a party to appear at~~
187 ~~deposition in a county other than the county in which the person was served;~~
188 ~~the court may, to protect a person subject to or affected by the subpoena, quash or~~
189 ~~modify the subpoena or, if the party serving the subpoena shows a substantial need for~~
190 ~~the testimony or material that cannot otherwise be met without undue hardship and~~
191 ~~assures that the person to whom the subpoena is addressed will be reasonably~~
192 ~~compensated, the court may order appearance or production only upon specified~~
193 ~~conditions.~~

194 ~~(d)(f)~~ Duties in responding to subpoena.

195 (f)(1) A person commanded to copy and mail or deliver documents or electronically
196 stored information or to produce documents, electronically stored information or tangible
197 things shall serve on the party or attorney responsible for issuing the subpoena a
198 declaration under penalty of law stating in substance:

199 (f)(1)(A) that the declarant has knowledge of the facts contained in the declaration;

200 (f)(1)(B) that the documents, electronically stored information or tangible things
201 copied or produced are a full and complete response to the subpoena;

202 (f)(1)(C) that the documents, electronically stored information or tangible things are
203 the originals or that a copy is a true copy of the original; and

204 (f)(1)(D) the reasonable cost of copying or producing the documents, electronically
205 stored information or tangible things.

206 ~~(d)(1)-(f)(2)~~ A person responding to a subpoena commanded to copy and mail or
207 deliver documents or electronically stored information or to produce documents,
208 electronically stored information or tangible things shall copy or produce them as they
209 are kept in the usual course of business or shall organize and label them to correspond
210 with the categories in the ~~demand~~ subpoena.

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

216 (f)(3) If a subpoena does not specify the form or forms for producing electronically
217 stored information, a person responding to a subpoena must produce the information in
218 the form or forms in which the person ordinarily maintains it or in a form or forms that
219 are reasonably usable.

220 (f)(4) If the information produced in response to a subpoena is subject to a claim of
221 privilege or of protection as trial-preparation material, the person making the claim may
222 notify any party who received the information of the claim and the basis for it. After
223 being notified, the party must promptly return, sequester, or destroy the specified
224 information and any copies of it and may not use or disclose the information until the
225 claim is resolved. A receiving party may promptly present the information to the court
226 under seal for a determination of the claim. If the receiving party disclosed the
227 information before being notified, it must take reasonable steps to retrieve the
228 information. The person who produced the information must preserve the information
229 until the claim is resolved.

230 ~~(e)-(g)~~ Contempt. Failure by any person without adequate excuse to obey a
231 subpoena served upon that person ~~may be deemed a~~ is punishable as contempt of ~~the~~
232 ~~court from which the subpoena issued. An adequate cause for failure to obey exists~~
233 ~~when a subpoena purports to require a nonparty to appear or produce at a place not~~
234 ~~within the limits provided by subparagraph (c)(3)(A)(ii).~~

235 ~~(f)-(h)~~ Procedure ~~where when~~ witness ~~conceals himself evades service~~ or fails to
236 attend. If a witness evades service of a subpoena, or fails to attend after service of a
237 subpoena, the court may issue a warrant to the sheriff of the county to arrest the
238 witness and bring the witness before the court.

239 ~~(g)-(i)~~ Procedure when witness is confined in jail. If the witness is a prisoner ~~confined~~
240 ~~in a jail or prison within the state,~~ a party may move for an order ~~for examination to~~
241 examine the witness in the jail or prison ~~upon deposition or, in the discretion of the~~
242 court, for temporary removal and production or to produce the witness before the court
243 or officer for the purpose of being orally examined, ~~may be made upon motion, with or~~
244 ~~without notice, by a justice of the Supreme Court, or by the district court of the county in~~
245 ~~which the action is pending.~~

246 ~~(h)-(j)~~ Subpoena unnecessary; ~~when~~. A person present in court, or before a judicial
247 officer, may be required to testify in the same manner as if the person were in
248 attendance upon a subpoena.

249 ~~Advisory Committee Notes~~

250 ~~Purposes of Amendment.~~ ~~The 1994 amendments represent a substantial change~~
251 ~~from prior practice. Patterned on the 1991 amendments to Fed. R. Civ. P. 45, these~~
252 ~~amendments expedite and facilitate procedures for serving subpoenas, modify~~
253 ~~procedures relating to persons who are not parties to correspond to procedures relating~~
254 ~~to parties under Utah R. Civ. P. 34, and specify the rights and obligations of persons~~
255 ~~served with a subpoena.~~

256 ~~Paragraph (a).~~ ~~This paragraph amends former Rule 45 in the following important~~
257 ~~respects:~~

258 ~~First, subparagraph (a)(6)(3) authorizes an attorney to issue and sign a subpoena as~~
259 ~~an officer of the court. The subparagraph eliminates the requirement that an attorney~~
260 ~~obtain a subpoena from the clerk of the court, and the requirement that a subpoena be~~
261 ~~issued under seal of the court. An attorney who is not a member of the Utah State Bar~~
262 ~~but who has been admitted to practice pro hac vice in the court in which the action is~~
263 ~~pending is authorized to issue a subpoena. Consistent with the authority of an attorney~~
264 ~~to issue a subpoena, subparagraph (a)(1)(B) requires every subpoena to identify the~~
265 ~~attorney serving it. Subparagraph (a)(1)(A) requires every subpoena to issue from the~~
266 ~~court in which the action is pending, amending former Rule 45(d)(1), which authorized a~~
267 ~~deposition to be issued from the court where the deposition is to take place, as well as~~
268 ~~the court where the action is pending.~~

269 ~~Second, subparagraph (a)(2) authorizes a party to serve upon a person who is not a~~
270 ~~party a subpoena to produce or to permit inspection and copying of documents or~~
271 ~~tangible things, or to permit inspection of premises. A party no longer must serve a~~
272 ~~subpoena duces tecum to discover documents or tangible things from a person who is~~
273 ~~not a party, although the amended rule preserves that option, and no longer must bring~~
274 ~~an independent action for entry onto land. Subparagraph (a)(2) also requires a person~~
275 ~~who is not a party to produce materials within that person's control, which subjects that~~

276 ~~person to the same scope of discovery as if that person were a party served with a~~
277 ~~discovery request under Rule 34.~~

278 ~~Third, subparagraph (a)(1)(D) requires every subpoena to state the rights and duties~~
279 ~~of a person served in a form substantially similar to the form in the Appendix to these~~
280 ~~rules.~~

281 ~~Paragraph (b) also amends former Rule 45 in several important respects.~~
282 ~~Subparagraph (b)(1)(A) requires prior notice of each commanded production or~~
283 ~~inspection of documents or tangible things, or inspection of premises, to be served as~~
284 ~~prescribed by Rule 5(b). This subparagraph ensures that other parties will have notice~~
285 ~~enabling them to object to or participate in discovery, or to serve a demand for~~
286 ~~additional materials. No similar provision is included for depositions, because~~
287 ~~depositions are governed by Rule 30 or 31. Subparagraph (b)(1)(A) specifies that the~~
288 ~~subpoena may be served as required by Rule 4(e), amending paragraph (c) of the~~
289 ~~former rule.~~

290 ~~Subparagraph (b)(4) authorizes a subpoena for production or inspection of~~
291 ~~documents or tangible things or inspection of premises to be served upon a person who~~
292 ~~is not a party at any time after commencement of the action. A subpoena served upon a~~
293 ~~person who is not a party has the same scope specified in Rule 34(a) for a request~~
294 ~~served upon a party, and is subject to the same procedures specified in Rule 34(b). A~~
295 ~~person who is not a party is not required to file a written response to the subpoena,~~
296 ~~unless the party objects to the subpoena pursuant to subparagraph (c)(2)(D).~~

297 ~~Subparagraph (b)(4) also requires each party serving a subpoena for the production~~
298 ~~of documents to provide to other parties copies of documents obtained in response to~~
299 ~~the subpoena. No comparable provision appears in the federal rule, but the Committee~~
300 ~~determined that such a provision would alleviate some of the burden imposed upon~~
301 ~~persons who are not parties and shift it to parties.~~

302 ~~Other subparagraphs make minor amendments to the former Rule 45.~~
303 ~~Subparagraph (b)(1)(C) amends former paragraph (d)(3) to include a subpoena for~~
304 ~~document production or inspection, as well as a deposition subpoena. Subparagraph~~
305 ~~(b)(2) is the former paragraph (e) with minor modifications. Subparagraph (b)(3)(A)~~
306 ~~requires a nonresident to attend deposition only in the county where the nonresident is~~

307 ~~served, amending former paragraph (d)(2) to eliminate the requirement that a~~
308 ~~nonresident attend a deposition within forty miles of the place of service.~~

309 ~~Paragraph (c). Paragraph (c) states the rights of witnesses or other persons served~~
310 ~~with subpoenas. The paragraph does not diminish rights conferred by any other rule or~~
311 ~~any other authority. Subparagraph (c)(1) states the duty of an attorney to minimize the~~
312 ~~burden on a witness who is not a party, and specifies that such a witness may recover~~
313 ~~lost earnings that result from the misuse of a subpoena. Subparagraph (c)(1) expands~~
314 ~~the responsibility of an attorney stated in Rule 26(g); this responsibility is correlative to~~
315 ~~the expanded power of an attorney to issue a subpoena.~~

316 ~~Subparagraph (c)(2)(A) specifies that a person who is not a party served with a~~
317 ~~subpoena for the production or inspection of documents or tangible things or inspection~~
318 ~~of premises must have at least 14 days to respond. A subpoena to appear at trial, at~~
319 ~~hearing, or at deposition must be served within a reasonable time, unless it also~~
320 ~~requires the production of documents.~~

321 ~~Subparagraph (c)(2)(C) states that a person who is not a party has no obligation to~~
322 ~~make copies or to advance costs, and has no counterpart in either the federal rule or~~
323 ~~the former state rule. The Committee included this statement in the rule so that it would~~
324 ~~become part of the notice provided to each person served with a subpoena.~~

325 ~~Subparagraph (c)(2)(D) specifies that a person served with a subpoena for the~~
326 ~~production or inspection of documents or tangible things or inspection of premises may~~
327 ~~serve written objection upon the party serving the subpoena. The party serving the~~
328 ~~subpoena bears the burden to obtain an order to compel production, and must provide~~
329 ~~prior notice to the person served of the motion to compel. A person served with a~~
330 ~~subpoena to appear at trial, at hearing, or at deposition, must appear unless the person~~
331 ~~obtains a court order to quash or modify the subpoena; a written objection to the serving~~
332 ~~party is insufficient. A person served with a subpoena duces tecum may object to~~
333 ~~providing documents by notifying the party serving the subpoena, but still must appear~~
334 ~~to testify at trial, at hearing, or at deposition, unless the person obtains an order to~~
335 ~~quash or modify the subpoena.~~

336 ~~Subparagraph (c)(3) identifies the circumstances in which a subpoena may be~~
337 ~~modified or quashed. It follows paragraph (c)(3) of the 1991 amendments to Fed. R.~~

338 ~~Civ. P. 45, but is modified to specify the locations where residents or nonresidents of~~
339 ~~the State may be compelled to attend deposition.~~

340 ~~Paragraph (d). This paragraph follows the 1991 amendments to Fed R. Civ. P. 45.~~
341 ~~Subparagraph (d)(2)(D) applies to privileged attorney-client communications, and to all~~
342 ~~attorney work product protected under the doctrine of Hickman v. Taylor, 329 U.S. 495,~~
343 ~~67 S. Ct. 385, 91 L. Ed. 451 (1947), and progeny.~~

344 ~~Paragraph (e). This paragraph specifies that an adequate cause for failure to obey~~
345 ~~exists when a subpoena purports to require a party to respond at a place beyond the~~
346 ~~geographic boundaries imposed by the rule, amending former paragraph (f).~~

347 ~~Paragraph (f). This is the former paragraph (g), amended to eliminate references to~~
348 ~~the masculine pronoun.~~

349 ~~Paragraph (g). This is the former paragraph (h).~~

350 ~~Paragraph (h). This is the former paragraph (i), amended to eliminate references to~~
351 ~~the masculine pronoun.~~

352