Subpoenas: Responding to a Subpoena (Federal)

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A Practice Note outlining the key issues to consider when responding to a subpoena in federal civil litigation under Federal Rule of Civil Procedure (FRCP 45). Specifically, this Note covers how to comply with a subpoena, the various ways one can object to (or move to quash) a subpoena, and how to appeal a decision compelling or denying the discovery sought by a subpoena. It also explains the consequences of failing to timely object to (or comply with) an otherwise valid subpoena.

Contents

Parties commonly use subpoenas in civil litigation to obtain evidence from individuals, corporations, and other entities who are not parties to a lawsuit. This Note outlines the key issues to consider when responding to a subpoena under Federal Rule of Civil Procedure (FRCP) 45.

First Steps in Responding to a Subpoena

A subpoena recipient should take several preliminary steps immediately to ensure proper and timely compliance with the subpoena.

Alert All Need-to-Know Employees

A corporate recipient must first alert those individuals who need to know that the company received a subpoena. These may include:

- The general counsel.
- Other in-house lawyers.
- Certain corporate officers.
- In certain circumstances, outside lawyers.

Calendar Deadlines

The recipient should identify and calendar when it must respond to the subpoena (known as the return date or compliance date). If necessary, the recipient's lawyer may need to quickly contact the issuing party to negotiate an extension. Any extensions should be in writing.

Special Considerations for Document Subpoenas

Issue a Litigation Hold and Begin Document Collection and Review

After proper service of a subpoena for documents or other tangible items (known as a document subpoena or subpoena *duces tecum*), a non-party subpoena recipient has a duty to identify and preserve responsive documents. An organization that receives a subpoena may need to issue and implement a litigation hold to ensure that it identifies, collects, and preserves all responsive documents to comply with the subpoena. For more information on issuing and implementing litigation holds, see Practice Note, Implementing a Litigation Hold and Litigation Hold Checklist.

Preserve Documents Held Outside the Issuing Court's Jurisdiction

Generally, a subpoena recipient must produce all responsive documents within its possession, custody, or control, regardless of the location of the documents (*Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 412-13 (3d Cir. 2004); *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 494-95 (E.D. Pa. 2005) (compelling production of documents held overseas)). The recipient must therefore ensure that it preserves any potentially responsive documents in any location.

Ensure That Affiliates Preserve Responsive Documents

A company served with a document subpoena must produce all responsive documents within its control. This may include documents in the physical possession of another, affiliated company (see *In re Umarex, USA, Inc.*, 2016 WL 2941046, at *3 (M.D. La. May 19, 2016); *St. Jude Med. S.C., Inc. v. Janssen-Counotte*, 305 F.R.D. 630, 639 (D. Or.), reconsideration denied, 104 F. Supp. 3d 1150 (D. Or. 2015)). If a company therefore reasonably believes that one or more of its corporate affiliates has responsive information, it should alert those affiliates about the subpoena to ensure they also take the proper steps to identify and preserve all relevant documents in their possession.

Preserve Documents Regardless of Objections or Challenges to the Subpoena

A subpoena recipient must preserve responsive documents and information regardless of whether it believes that the subpoena is objectionable. If the recipient fails to take reasonable steps to preserve relevant evidence, and a court overrules objections or challenges to the subpoena, it may hold the recipient in contempt of court (FRCP 45(g)). A subpoena recipient also may become liable for third-party spoliation or negligence claims in some jurisdictions (see, for example, *Benson v. Penske Truck Leasing Corp.*, 2006 WL 840419, at *3 (W.D. Tenn. Mar. 30, 2006) (discussing cases)).

Special Considerations for Deposition or Trial Subpoenas

If a subpoena commands one or more company representatives to appear at a deposition, hearing, or trial, the issuing party must identify and notify the proper witness(es). If the subpoena commands an appearance to provide testimony in an area that the subpoena does not sufficiently specify, identifying the appropriate witness(es) may require the subpoena recipient to confer with issuing counsel and conduct interviews of corporate employees.

If the proper witness is unavailable to testify on the date specified in the subpoena, the company must indicate this fact as part of a written response to the subpoena. Alternatively, the recipient may contact the issuing party directly (or through counsel) and negotiate a different mutually convenient appearance date.

Determine Potential Response Options

A subpoena recipient may respond in several ways. Depending on the circumstances of the case, the recipient may:

- Comply with the subpoena and provide the requested testimony or documents, or both (see Complying with the Subpoena).
- Serve specific written objections to a document subpoena (see Written Objections).
- Move to quash (or modify) the subpoena (see Motion to Quash or Modify: Procedural Issues, Mandatory Grounds for Quashing or Modifying, Permissive Grounds for Quashing or Modifying, and Other Grounds for Quashing or Modifying).
- Move for a protective order (see Motion for a Protective Order).
- Contact the party who served the subpoena in an attempt to informally resolve the issue (see Informally Contact the Issuing Party).
- Contact an adverse party (that is, a party to the litigation whose interests are adverse to those of the party that issued the subpoena) in an attempt to have the adverse party exercise its rights against the party who issued the subpoena (see Informally Contact the Adverse Party).

Decide Whether to Comply With or Resist the Subpoena

Several considerations impact the decision of whether to comply with (or resist) a subpoena, including:

- The time, effort, and cost of compliance or resistance.
- Whether or not sound legal and practical arguments to support non-compliance are available under the circumstances.
- The likelihood that arguments in support of non-compliance may be successful.

Decide Whether to Engage Counsel

A subpoena recipient must quickly decide whether to enlist counsel in formulating and initiating its response. A company may want to engage outside counsel if, for example:

- The subpoena requests the production of sensitive or proprietary information.
- The subpoena seeks the production of large volumes of documents.
- The subpoena requires an appearance in a jurisdiction where in-house counsel is not admitted.

However, companies may wish to handle the response internally if:

- The subpoena calls for only a few documents.
- The stakes involved are relatively low.
- In-house counsel is admitted in the relevant jurisdiction in the event a court appearance is necessary.

Complying with the Subpoena

Document Subpoenas

Produce Documents Within Possession, Custody, or Control

A subpoena recipient who chooses to comply with a document subpoena must produce all materials in its possession, custody, or control, regardless of their location (FRCP 45(a)(1)(A)(iii)). For example, a California corporation served with a subpoena that a California federal court issued commanding the production of documents at a specified place in California must produce all responsive documents, even if those documents are located in its New York office (assuming the subpoena is not otherwise objectionable).

No matter the location, a recipient corporation also must ensure that it produces responsive documents and electronically stored information (ESI) that are physically in the possession of:

- Subsidiaries.
- Affiliates.
- Divested entities.
- Other third parties under the subpoenaed entity's control.

Review for Privilege and Responsiveness

Once the recipient of a document subpoena identifies all of the places where potentially responsive materials are located, the recipient must review those documents and other materials to determine whether they are actually responsive to the subpoena's requests.

The recipient should also review all potentially responsive documents to determine whether to withhold them from production based on the attorney-client privilege, work-product doctrine or another recognized privilege or protection. Depending on the scope of the production, corporate recipients may want to have either in-house counsel or outside litigation counsel conduct the pre-production document review.

Only those non-privileged documents that fall within the scope of the subpoena should be produced. Under most circumstances, materials withheld on privilege grounds will require the creation of a privilege log, absent agreement or court order. For more on privileged documents and creating a privilege log, see Practice Note: Asserting the Attorney-Client Privilege and Work-Product Protection and Standard Document, Privilege Log.

Method and Form of Production

The most efficient and cost-effective form of production in response to a subpoena varies depending on the subpoena recipient's resources and the volume of documents involved. The most common methods of production are:

- For minimal documents:
  - Mailing or hand-delivering a hard copy (typically, a subpoena recipient does not need to produce original documents); or
  - scanning the hard copies into PDF format and producing to the requesting attorney via email (upon agreement by the requesting attorney).

- For large-scale document productions:
  - scanning the requested hard copy documents onto a DVD and mailing or hand-delivering only the DVD (containing scanned images of the documents) to the requesting attorney; or
  - providing access to uploaded documents through online hosting systems, such as Dropbox (see, for example, *Boxer F2, L.P. v. Flamingo W., Ltd.*, 2015 WL 2106101, at *1 (D. Colo. May 4, 2015)). A hosted production permits the subpoena recipient to use a secure website to provide uploaded documents to the requesting attorney. After the subpoena recipient has uploaded the requested information to the website, the requesting attorney can access that data using a web browser and a login and password.

To keep track of the production, the recipient should place Bates numbers or control numbers on each document or image produced. The recipient should also place a label on each DVD, file, or box (if producing paper copies) containing the range of Bates or control numbers on the documents in each DVD, file, or box.

The recipient only needs to deliver the documents to the location stated in the subpoena (typically, the office of the attorney who issued the subpoena). It does not need to serve the documents on every party to the underlying action. Although FRCP 45 does not identify the acceptable methods of production, the responding individual or entity may arrange for service of responsive documents by any of the service methods set out in FRCP 5 other than service through the court's Case Management/Electronic Case Filing (CM/ECF) system. Service through CM/ECF results in a court filing and these types of discovery documents are not normally filed with the court (FRCP 5(d)(1); see also 2000 Advisory Committee Notes to FRCP 5(d)).

Organizing the Production

The subpoena recipient may produce documents as they are kept in the ordinary course of business, or can organize and label them to correspond with the categories in the demand contained in the subpoena (FRCP 45(e)(1)(A)). The recipient may choose the manner in which to produce the documents and can even produce them in some hybrid form. For example, the recipient may produce documents responsive to certain requests by category of document request and to other requests as they are maintained in the ordinary course of business.

Inspection as Alternative to Production

Under certain circumstances, the recipient may offer inspection as an alternative to actually producing documents, ESI, and other materials. Moreover, where the recipient chooses to comply with a subpoena by producing copies of documents, the issuing party may also seek to inspect, copy, test, or sample the original documents or materials, unless the recipient formally objects (FRCP 45(a)(1)(D)).

Producing Electronically Stored Information

Document subpoenas often request the production of emails and other ESI. If a subpoena does not specify a form for producing ESI, the recipient must produce responsive materials in the form(s) in which they are ordinarily maintained or in a reasonably usable form(s) (FRCP 45(e)(1)(B)). The recipient does not, however, need to produce the same ESI in more than one form (FRCP 45(e)(1)(C)). For example, if the recipient is instructed to produce the documents in native format, there is no additional obligation to also produce them in TIFF format or hard copy. Further, the subpoenaed party may object to producing ESI in a specified format.

The recipient does not need to provide ESI from sources that are not reasonably accessible because of undue burden or cost, such as electronic data stored on backup tapes (FRCP 45(e)(1)(D)). The burden of making this showing (whether in a response to a motion to compel or in a motion for a protective order) is on the party claiming that the information is not reasonably accessible because of undue burden or cost (FRCP 45(e)(1)(D)). The court may still order discovery from these sources if the requesting party shows good cause (FRCP 45(e)(1)(D)). The court may also specify conditions for the discovery (FRCP 45(e)(1)(D)).

Timing of Production

The subpoena's recipient should ensure that the requested documents arrive at the location stated in the subpoena on or before the return date. For example, the recipient should not wait until the return date to mail the documents to the requesting party, as this may technically violate the terms of the subpoena (subpoenas typically require documents production at a specified date, time, and place).

Preparing the Proof of Service

After delivering the documents to the required destination, the person who physically served the documents should prepare a certificate of service or an affidavit (or declaration) of service setting out:

- The server's identity.
- A general description of the documents delivered (along with the Bates ranges or control numbers for those documents).
- The identity of the person receiving the documents.
- The method, time, date, and place of delivery.
- Any other relevant details.

The party responding to the subpoena should retain this proof of service in its files and present it to the court if the issuing party claims that the recipient did not comply with the subpoena's demands.

For help with preparing an affidavit of service, see Standard Document, Affidavit of Service (FRCP 5).

Producing Documents Under an Existing Confidentiality Agreement

In some instances, a subpoena may seek documents containing sensitive business information or other private information (such as trade secrets, private health information, and social security numbers) that a recipient cannot safely produce without an applicable confidentiality agreement. A confidentiality agreement may, for example:

- Provide that parties may only use the documents produced for the purpose of the litigation.
- Place an "attorneys' eyes only" limit on who can view the documents.
- Require the:
  - parties to file the documents under seal if used in connection with a court proceeding; and
  - prompt return or destruction of the documents at the conclusion of the lawsuit.

If the court where the lawsuit is pending has already approved a confidentiality agreement in the case, counsel should check to see whether the confidentiality agreement contains a provision that automatically controls the treatment of any documents that non-parties produce in response to a subpoena. Alternatively, if the terms of an existing confidentiality agreement that does not address non-party productions are otherwise acceptable to the subpoena recipient, it may be possible to simply enter a stipulation expanding the scope of the existing agreement to cover any documents produced in response to the subpoena.

What if There is No Confidentiality Agreement?

If no confidentiality agreement exists (or none that is acceptable to the recipient), the recipient should seek to enter into an agreement with the issuing party after asserting timely written objections to producing the sensitive information. If the negotiations reach an impasse, the recipient can move for a protective order in the issuing court (FRCP 26(c)(1)). However, the moving party has the burden of persuasion for entry of a protective order (see *Jones v. Hirschfeld*, 219 F.R.D. 71, 74-75 (S.D.N.Y. 2003)).

Informing the Other Side if the Recipient Has No Responsive Documents

If the recipient determines that it does not have any responsive documents, it must let the issuing party know in writing. The recipient must serve the response no later than the return date, although it is generally prudent to serve the response no later than the date on which written objections must be served (see Written Objections). The subpoena recipient and the issuing party may informally modify this timeline through negotiation, but the subpoena recipient must ensure that it formally conveys that it does not have responsive materials in its possession, custody, or control.

Subpoenas Seeking Testimony

The steps taken to properly comply with a subpoena seeking testimony are different from those required to comply with a document subpoena. Counsel should consider the following issues when preparing a witness to testify in response to a subpoena.

Timely Compliance Required

If a subpoena recipient decides to comply with a subpoena seeking testimony, the witness must timely arrive at the place for the deposition, hearing, or trial on the return date as stated in the subpoena. Otherwise, the court may hold the witness in contempt (see *Francois v. Blandford*, 2012 WL 777273, at *3 (E.D. La. Mar. 7, 2012)).

Witness Preparation: FRCP 30(b)(6) Depositions

Under FRCP 30(b)(6), a party may seek to depose a corporation (or other organization) by naming it as the deponent in the subpoena. If a corporation chooses to comply with this type of subpoena, it must produce a company witness who is knowledgeable about the topics stated in the subpoena. In other words, an affirmative duty exists to educate the 30(b)(6) witness(es) regarding the noticed topics. For more on preparing an FRCP 30(b)(6) witness, see Practice Note, How to Prepare for and Successfully Defend a Rule 30(b)(6) Deposition.

Arrange for Legal Representation and Reimbursement of Travel Expenses

The company should arrange for a lawyer to represent a FRCP 30(b)(6) witness or other high-ranking corporate officer at the deposition, hearing, or trial. The company may also wish to hire a lawyer for lower-level employees if their testimony has the potential to affect the rights or interests of the company. In addition, the company should arrange for the requesting party to reimburse the witness for all travel expenses authorized by law (see Subpoenas: Drafting, Issuing, and Serving Subpoenas (Federal): Witness Fees).

Corporate Liability for Witness's Non-Compliance

Where a subpoena seeks the testimony of a corporate officer, director, or managing agent, the corporation must ensure that the appropriate witness appears to testify. Courts treat the failure of a corporate officer, director, or managing agent to attend a deposition as the corporation's failure. In contrast, a court generally cannot sanction a corporation when its low-level employees fail to appear for their depositions, at least where the corporation did not take any steps to prevent the appearance or aid in the employee's non-compliance. (See *Int'l. B'hood of Elec. Workers, Local 474*, 2007 WL 622504, at *4 (W.D. Tenn. Feb. 22, 2007.)

Witness Preparation: General Issues

Before producing a company witness to testify, counsel should prepare the witness on the issues that may come up during the deposition, hearing, or trial. Generally, where possible, experienced outside litigation counsel should direct the company's witness preparation efforts, as they may do so more thoroughly and efficiently. In addition, outside counsel's involvement may further support any assertions of privilege that the company wishes to make regarding communications and other information related to the witness preparation process. For more information on the attorney-client privilege, see Attorney-Client Privilege and Work Product Doctrine Toolkit.

Written Objections to a Document Subpoena

A subpoena recipient may serve written objections to a document subpoena on the issuing party (FRCP 45(d)(2)(B)).

Form of Written Objections

FRCP 45 does not set out any required form for written objections served in response to a document subpoena. Unless the relevant court has a specific rule on this issue, the recipient may draft its objections like written formal responses to document requests under FRCP 34, with a caption and other information that the FRCP and the issuing court's local rules require. Alternatively, the issuing court's practice may allow a non-party to assert its objections in a letter to opposing counsel.

The recipient should avoid boilerplate objections (see *Am. Federation of Musicians of the US and Canada v. Skodam Films, LLC*, 2015 WL 7771078, at *7 (N.D. Tex. Dec. 3, 2015) (extending FRCP 34's specificity requirements for objections to a party's request for documents to a non-party's objections to a document subpoena)). A recipient's objections to a document subpoena should:

- Clearly and separately state objections for each objectionable request contained within the subpoena.
- Include the specific legal and factual grounds for each objection.
- Contain the recipient's attorney's signature (FRCP 26(g)(1)).

Contrast with Motion to Quash

Because timely serving written objections suspends a non-party's obligation to comply with a document subpoena pending a court order, the recipient of a document subpoena does not need to formally move to quash the subpoena. A document subpoena recipient can rest on its written objections until the issuing party serves a motion to compel compliance with the subpoena (see *Am. Federation of Musicians of the US and Canada*, 2015 WL 7771078, at *4).

In contrast, the recipient may not simply serve written objections in response to a subpoena seeking testimony. If the recipient does not want to comply with a testimonial subpoena, it must make a formal motion to quash or modify under FRCP 45(d)(3), or, in some cases, a motion for a protective order under FRCP 26(c) (see Motion to Quash or Modify: Procedural Issues; and see *Kingsberry v. United States*, 2012 WL 1296903, at *2 (S.D. Ill. Apr. 16, 2012); *Aetna Cas. and Sur. Co. v. Rodco Autobody*, 130 F.R.D. 2, 3 (D. Mass. 1990)).

Method of Service

The recipient may serve written objections on the requesting party under any of the acceptable methods of service set out in FRCP 5(b), except that it should not serve the objections through CM/ECF. Serving through CM/ECF results in a court filing, and courts typically do not permit the filing of these types of discovery-related documents except as part of a related motion or other filing (FRCP 5(d)(1); see also 2000 Advisory Committee Notes to FRCP 5(d)).

The recipient does not need to serve every party in the underlying action with its objections. Instead, it may choose to serve only the issuing party (FRCP 45(d)(2)(B)). The recipient should retain its original objections and only serve a copy in case the recipient needs to produce the original to the court.

Proof of Service

The person who physically serves the written objections should draft a certificate of service or an affidavit (or declaration) of service that:

- Identifies:
  - the server; and
  - the person served.
- Provides:
  - the title of the document(s) served;
  - the time, date, place and manner of service; and
  - any other relevant information.

The recipient should retain the original proof of service in case the requesting party claims that it did not receive the written objections. The proof of service does not need to be served on the other parties or filed with the court unless it is being used in connection with a court filing, such as an opposition to a motion to compel.

Timing of Service

The party who issues a subpoena generally sets the return date. Although FRCP 45 does not contain any specific requirements on setting the subpoena's return date, counsel for a subpoena recipient should consider that:

- A district court's local or judge's rules may require issuing counsel to set a return date that provides a subpoena recipient with a certain minimum amount of time to comply after service of the subpoena.
- Even if the applicable local or judge's rules do not contain specific timing requirements for a subpoena's return date, depending on the circumstances, a subpoena recipient may be able to object to a subpoena on the grounds that it does not provide a reasonable amount of time to respond (see Grounds for Objecting and Failure to Allow Reasonable Time to Comply).

Counsel for a subpoena recipient must pay careful attention to the return date in a subpoena and to applicable rules to determine the deadline for serving any written objections, or for filing an appropriate motion, to avoid the consequences of failing to comply with a subpoena.

Time to Object Under FRCP 45(d)(2)(B)

Absent an agreement or court order stating otherwise, a subpoena recipient must serve any written objections on the party or attorney designated in the subpoena before the earlier of:

- The subpoena's return date (which issuing counsel sets).
- 14 days after the subpoena is served.

(FRCP 45(d)(2)(B).)

This is significant because it is different than serving written objections to requests for documents served under FRCP 34, which are generally due 30 days from service (FRCP 34(b)(2)(A)).

The chart below provides examples of how the specified return date may impact the date for serving objections:

Return Date	Objections Due
10 days after service of the subpoena	10 days
14 days after service of the subpoena	14 days
30 days after service of the subpoena	14 days

The recipient's objections only need to be served (not necessarily received by the issuing party) on or before the earlier of 14 days after service or the return date. When the recipient sends its objections by mail, for example, those objections are deemed served as soon as they are placed in the mailbox, even if the issuing party does not receive them until several days later (FRCP 5(b)(2)(C); see also *Aetna Cas. & Sur. Co.*, 130 F.R.D. at *3).

Time to Assert Privilege Objections

A recipient who objects to a document subpoena on attorney-client privilege or work product grounds generally must serve a privilege log on the issuing party (see Claiming Privilege or Protection). Depending on the scope of the subpoena, however, it may be impossible for the recipient to conduct a proper privilege review within the time frame that the recipient must serve objections under FRCP 45(d)(2)(B).

In this situation, most courts conclude that the responding party may assert **general** privilege or work product objections within the time that FRCP 45(d)(2)(B) requires and provide a detailed privilege log within a "reasonable time" afterwards (see *In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d Cir. 1998); *Tuite v. Henry*, 98 F.3d 1411, 1416 (D.C. Cir. 1996); *Williams v. Bridgeport Music, Inc.*, 300 F.R.D. 120, 124 (S.D.N.Y. 2014)). However, some courts take issue with the "reasonable time" standard for privilege logs (see, for example, *Alabama Educ. Ass'n v. Bentley*, 2013 WL 246417, at *4-5 (N.D. Ala. Jan. 22, 2013)).

Consequences for Not Timely Objecting

The failure to timely comply with a subpoena without adequate excuse may constitute contempt of court (FRCP 45(g)). A court also may deem all objections waived if the recipient fails to serve its objections in a timely fashion (see *Moore v. Chase, Inc.*, 2015 WL 4393031, at *5 (E.D. Cal. July 17, 2015); *Application of Sumar*, 123 F.R.D. 467, 472 (S.D.N.Y. 1988)).

Court May Excuse Untimely Objections

A court may excuse untimely objections in certain circumstances. For example, the court may forgive the recipient's failure to timely serve written objections where the recipient and the issuing party attempted to negotiate an extension of time for compliance or where the subpoena:

- Is overbroad on its face.
- Imposes a significant burden on a non-party witness.
- Sets a return date that does not allow for sufficient time for compliance.

(See *Premier Election Sols., Inc. v. Systest Labs Inc.*, 2009 WL 3075597, at *4-6 (D. Colo. Sept. 22, 2009.)

Grounds for Objecting

Many grounds for objecting to a document subpoena exist, and they are essentially the same as those that a subpoena recipient can make in a motion to quash or modify a subpoena (see Mandatory Grounds for Quashing or Modifying, Permissive Grounds for Quashing or Modifying and Other Grounds for Quashing or Modifying). Common objections include that the subpoena:

- Does not allow sufficient time to comply (see Failure to Allow Reasonable Time to Comply).
- Seeks irrelevant evidence.
- Requires disclosure of privileged or other protected information (see Disclosure of Privileged Information).
- Subjects the recipient to undue burden or expense (see Undue Burden).
- Requires disclosure of a trade secret or other confidential business information (see Disclosure of Confidential Information).
- Requires disclosure of an unretained expert's opinion or information (see Unretained Expert's Opinion).
- Contains requests that are so vague and ambiguous that it is unreasonable or even impossible for the recipient to comply.
- Was issued out of the wrong court (only the court where the action is pending may properly issue a subpoena) (FRCP 45(a)(2)).

Effect of Serving Written Objections

By serving written objections, the recipient suspends its obligation to comply with the document subpoena until (and unless) the court later orders compliance on a motion or the recipient and the issuing party reach an agreement. If the recipient and the issuing party cannot reach an agreement, the issuing party may attempt to force compliance by making a motion to compel (FRCP 45(d)(2)(B)(i)).

The recipient is still under a duty to preserve responsive documents and other information both before and after it serves its objections. The duty to preserve does not evaporate until (and unless) the court quashes the subpoena or the parties agree otherwise, assuming no independent duty to preserve exists.

Cost-Shifting Allowed

If the court determines that compliance with a document subpoena may impose an undue expense on the recipient, the court can shift the cost of compliance to the issuing party (FRCP 45(d)(2)(B)(ii)). The court also may order that the costs be fixed before production or assessed after the subpoena recipient produces the documents (*United States v. CBS, Inc.*, 666 F.2d 364 (9th Cir. 1982)).

In deciding whether to shift the cost of compliance, courts consider:

- The non-party's interest in the outcome of the case.
- The non-party's ability to bear the costs, as compared to the requesting party's.

- Whether the litigation is of public importance.

(See *Miller v. Allstate Fire & Cas. Ins. Co.*, 2009 WL 700142, at *5 (W.D. Pa. Mar. 17, 2009); and see, for example, *Siltronic Corp. v. Employers Ins. Co. of Wausau*, 2014 WL 991822, at *1-3 (D. Or. Mar. 13, 2014).)

Benefits of Serving Written Objections

Serving written objections may not necessarily prevent the disclosure of the requested documents, because the requesting party may ultimately succeed on a motion to compel. However, written objections may still provide the recipient with several advantages. For example, by serving timely, written objections, the subpoena recipient can:

- Effectively shift the burden of proof to the party that issued the subpoena by requiring the issuing party to file a motion to compel (however, the recipient continues to bear the burden of proof for objections based on the claimed inaccessibility of ESI (FRCP 45(e)(1)(D)). In contrast, a subpoena recipient has the burden of proof when moving to quash the subpoena.
- Avoid expending the time and resources needed to commence a miscellaneous action, if enforcement of the subpoena must occur in a court other than the issuing court. Instead, serving written objections can effectively shift that burden to the requesting party, who must start a new action to file a motion to compel to enforce the subpoena.
- Help prevent waiver while securing additional time for the subpoena recipient to comply with the subpoena, in the event the court ultimately overrules the objections.

Motion to Quash or Modify: Procedural Issues

If the recipient does not wish to comply with a subpoena seeking documents or testimony, it may move to quash or modify the subpoena (FRCP 45(d)(3)).

Review the Relevant Rules

Before making any motion, including a motion to quash, counsel for the moving party should review the relevant rules and comply with all of the required procedures. For motions to quash or modify, counsel should review:

- FRCP 45.
- The court's local rules on formatting, timing, motion practice, service, and filing issues.
- The court's CM/ECF rules.
- Relevant standing orders.
- The judge's individual practice rules, if any.
- Any other standing orders of the issuing court or individual judge.

Failure to follow the procedures in these rules may result in a court rejecting the filing of the motion.

Pre-Motion to Quash or Modify Meet and Confer

Depending on the court and judge, applicable rules may require the subpoena recipient's attorney to meet and confer with the issuing party's attorney before moving to quash under FRCP 45 and to file a certificate of conference or affidavit about the meet and confer. However, even if not required, counsel should consider attempting to meet and confer with the issuing party's attorney, as it may lead to a cost-effective resolution of the dispute.

Burden of Proof

A subpoena recipient has the burden of persuasion on a motion to quash (*ATS Products, Inc v. Champion Fiberglass, Inc.*, 309 F.R.D. 527, 531 (N.D. Cal. 2015)).

Immediate Effect of Motion to Quash or Modify

The immediate effect a motion to quash has on the recipient's obligation to respond to a subpoena may depend on the type of subpoena at issue. For example:

- Some courts have held that the recipient may refuse to comply with a **document subpoena** until the court has decided its motion to quash or modify (see *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 494 (9th Cir. 1983)). The recipient must still continue to preserve all responsive evidence that the subpoena seeks, at least until the court grants the motion to quash or the parties reach an agreement (*TCYK, LLC v. Does 1-20*, 2013 WL 6475040, at *3 (N.D. Tex. Dec. 10, 2013)).
- Other courts have held that filing a motion to quash in response to a **testimonial subpoena** does not relieve the recipient of its duty to appear. In this situation, the recipient should also move to stay the deposition pending the outcome of its motion to quash (see *Stephen L. LaFrance Hold., Inc., v. Sorensen*, 278 F.R.D. 429, 436 & n. 40 (E.D. Ark. 2011)).

In addition, some courts may have local rules providing for the automatic stay of discovery once a subpoena recipient files a motion to quash (for example, D. Kan. Rule 26.2(b)).

If the court's rules (and controlling precedent) are not clear on whether the **mere filing** of a motion to quash temporarily excuses compliance with a subpoena pending the court's ruling, the recipient should consider also seeking a temporary stay of discovery.

Where to Make the Motion

A subpoena recipient must file any motion to quash or modify a subpoena with the compliance court (FRCP 45(d)(3)(A)). If the subpoena recipient is located in the jurisdiction of the issuing court, the compliance court is the same as the issuing court. However, a subpoena recipient located outside the issuing court's jurisdiction must file a motion to quash or modify in the court for the district where the subpoena recipient is located.

Procedure for Moving to Quash

The procedure for moving to quash can vary significantly depending on whether the issuing court or a different court has jurisdiction to enforce compliance with the subpoena.

Motion Made in Court Where Underlying Action is Pending

The procedure for moving to quash is relatively straightforward if the compliance court is the same as the issuing court. In this situation, the recipient serves and files its motion in that court according to the rules applicable to other filings in the case.

The recipient's attorney typically must be admitted to practice in the court, or at least admitted in the case on a pro hac vice basis, before he can sign papers or otherwise appear in the court. If the recipient's attorney is not already admitted in the issuing court, he will need to file a *pro hac vice* motion (see *Pro Hac Vice* Admission in Federal District Court Checklist). Depending on the court's local rules, the recipient's attorney may need to retain local counsel to file the *pro hac vice* motion. Moreover, in many courts, attorneys admitted *pro hac vice* must use local counsel for the duration of the case. Because attorney admissions rules (including rules on *pro hac vice* admission) vary from court-to-court, counsel should consult the issuing court's local rules on this issue.

Counsel likely must file the motion to quash electronically through CM/ECF. To e-file using CM/ECF, attorneys must obtain a login and password from the court. Courts typically give CM/ECF logins and passwords to attorneys who are admitted to, and remain in good standing with, the courts' bar. Many (but not all) courts also give CM/ECF logins and passwords to non-member attorneys admitted *pro hac vice*. If the recipient's lawyer is not a member of the issuing court's bar and the court does not allow *pro hac vice* attorneys to e-file, the recipient's lawyer must retain local counsel to e-file on his behalf. Each district court's website typically contains information on how to obtain a CM/ECF login and password.

Motion Not Made in Court Where Underlying Action is Pending

When a court other than the issuing court has jurisdiction to enforce compliance with a subpoena, a subpoena recipient who wishes to move to quash or modify a subpoena must commence a miscellaneous action in the compliance court and serve and file its motion papers in that action.

For example, if the plaintiff in a lawsuit pending in the Southern District of New York issues a subpoena directed to a non-party witness located in the Northern District of California, the non-party witness must commence a miscellaneous action in the Northern District of California if it wants to move to quash the subpoena.

In addition to resolving the attorney admissions and CM/ECF issues outlined above, the recipient's lawyer must also determine how to properly commence a miscellaneous action in the compliance court. The procedure for commencing a miscellaneous action in connection with a motion to quash is essentially the same procedure that the issuing party must follow when commencing a miscellaneous action in connection with a motion to compel compliance. For more on this issue, see Subpoenas: Enforcing a Subpoena (Federal): Motion Not Made in Court Where Underlying Action is Pending.

Transferring the Motion

Where the issuing court and compliance courts differ, the compliance court may transfer a filed motion to quash to the issuing court if either:

- The person subject to the subpoena consents to the transfer.
- The compliance court finds exceptional circumstances, which the party seeking transfer must establish.

(FRCP 45(f); see also 2013 Advisory Committee Notes to FRCP 45(f).)

Although a compliance court should rarely order transfer of a motion under this rule, transfer may be appropriate to avoid disrupting the issuing court's management of the underlying litigation, such as when either:

The issuing court has already ruled on a previous discovery motion that raised the same issues as a motion filed in the compliance court.

The same issues are likely to arise as a result of subpoenas issued in many districts within a single lawsuit.

(See 2013 Advisory Committee Notes to FRCP 45(f).)

If a subpoena recipient's attorney is authorized to practice in the compliance court, the attorney may (after transfer to the issuing court) file papers and appear on the motion in the issuing court (FRCP 45(f)). Under the rule, the attorney need not obtain separate *pro hac vice* admission in this circumstance.

If the issuing court orders further discovery as a result of the motion, the issuing court may then re-transfer the matter to the compliance court to enforce the order (see 2013 Advisory Committee Notes to FRCP 45(f)).

Time to Make the Motion

Generally, counsel must move to quash or modify a subpoena before the subpoena's return date (see *Bouchard Transp. Co. v. Associated Elec. & Gas Ins. Servs. Ltd.*, 2015 WL 6741852, at *1 (S.D.N.Y. Nov. 4, 2015); *HT S.R.L. v. Velasco*, 2015 WL 5120980, at *12 (D.D.C. Aug. 28, 2015)).

Courts may excuse delay for the same reasons that justify delay in serving written objections, including where the parties engaged in communications that may have otherwise avoided the need for a motion to quash or modify (see Court May Excuse Untimely Objections)).

Courts also may excuse delay where the time between the subpoena's service and return date is very short, which then prevents the moving party from reasonably being able to file its motion before the return date (see *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 238 F. Supp. 2d 270, 278 & n. 6 (D.D.C. 2002)).

Required Documents

Depending on the court, the recipient will likely have to serve and file the following documents in connection with its motion to quash:

- A notice of motion.
- A memorandum of law.

- Supporting affidavits (or declarations).
- A proposed order.
- Proof of service.

For help with preparing and filing motions generally in federal court, see Practice Note, Motion Practice in Federal Court: Overview.

The recipient's attorney may also need to serve and file:

- A corporate disclosure statement, if the client is a corporation or other organization (FRCP 7.1).
- A notice of appearance, if counsel is already admitted to practice in the court.
- A *pro hac vice* motion, if counsel is not admitted to practice in the court (see *Pro Hac Vice* Admission in Federal District Court Checklist). This requirement is equally applicable to in-house and outside counsel.
- A civil cover sheet and other documents that the court's local rules require, if counsel is filing the motion to quash in a miscellaneous action (see Subpoenas: Enforcing a Subpoena (Federal): Motion Not Made in Court Where Underlying Action is Pending).

Mandatory Grounds for Quashing or Modifying

On a timely motion, the compliance court must quash or modify a subpoena that:

- Fails to allow a reasonable time to comply (FRCP 45(d)(3)(A)(i); see Failure to Allow Reasonable Time to Comply).
- Requires a person to appear for a trial, hearing, or deposition beyond FRCP 45(c)(1)'s geographic limits (FRCP 45(d)(3)(A)(ii); see Travel in Excess of 100 Miles).
- Requires the production of documents, ESI, or tangible things at a place beyond 100 miles of where the subpoena recipient lives, works, or regularly transacts business in person (FRCP 45(c)(2)(A); FRCP 45(d)(3)(A)(ii); see 100-Mile Limit Applies to Document Subpoenas).
- Requires inspection of premises other than at the premises to be inspected (FRCP 45(c)(2)(B); FRCP 45(d)(3)(A)(ii)).
- Requires disclosure of privileged or other protected matter, if no exception or waiver applies (FRCP 45(d)(3)(A)(iii); see Disclosure of Privileged Information).
- Subjects the recipient to undue burden (FRCP 45(d)(3)(A)(iv); see Undue Burden).

Failure to Allow Reasonable Time to Comply

FRCP 45 does not expressly require an issuing party to provide a subpoena recipient with a certain minimum amount of time to comply, although local or judge's rules may (see Timing of Service). In these jurisdictions, the minimum time for compliance that the local or judge's rules set is typically dispositive of the issue of whether the subpoena recipient has a reasonable amount of time to comply between service of the subpoena and the subpoena's return date.

Absent local or judge's rules that require issuing counsel to provide a subpoena recipient with a certain minimum amount of time to comply, a motion to quash based on insufficient notice usually depends on the facts of the specific case (see *HT S.R.L.*, 2015 WL 5120980, at *12).

Travel in Excess of 100 Miles

Under FRCP 45, a court generally must grant a motion to quash or modify if a subpoena requires a person to travel to a deposition, hearing, or trial beyond 100 miles from where that person lives, works, or regularly transacts business in person, regardless of whether the person is a party or non-party (FRCP 45(c)(1) and FRCP 45(d)(3)(A)). However, certain exceptions exist to the rule's prohibition against requiring witnesses to travel outside the 100-mile limit described in FRCP 45(c).

Trial Subpoenas: Non-Parties

One exception to FRCP 45's 100-mile limit exists for **trial** subpoenas, which may command compliance anywhere in the entire state where a **non-party** witness lives, works, or regularly transacts business in person, so long as the non-party will not incur substantial travel expense to attend the trial (FRCP 45(c)(1)(B)(ii)). Even if travel to trial would cause the non-party to incur substantial expense, the issuing party may generally avoid having a subpoena quashed on these grounds by agreeing to pay for the recipient's travel expenses.

Testimonial Subpoenas: Parties and Party Officers

Another exception to FRCP 45's 100-mile limit exists for **trial**, **hearing**, and **deposition** subpoenas, which may command compliance anywhere in the entire state where the **party** or **party officer** lives, works, or regularly transacts business in person (FRCP 45(c)(1)(B)(i)). This rule differs from the rule applicable to non-parties in that the state-wide expansion for non-parties is limited to trial subpoenas, and only if the non-party would not incur substantial expense.

Under the pre-2013 version of FRCP 45, courts were split on whether a court could compel a party or party officer to travel across the country to attend trial. The 2013 amendments to FRCP 45(c) clarified that a court cannot compel parties and their officers to attend trial outside the 100-mile or state-wide limits of FRCP 45(c)(1) (2013 Advisory Committee Notes to FRCP 45(c)).

Measuring the 100 Miles

In deciding whether to grant a motion to quash, courts generally measure the 100 miles as a straight line between the place from which the witness travels and the place of attendance, not by the surface route taken or total mileage traveled (see *Universitas Educ., LLC v. Nova Grp., Inc.*, 2013 WL 57892, at *2 (S.D.N.Y. Jan. 4, 2013)).

Relevant Business Transactions

If the issuing party relies on the witness's business transactions to support the subpoena's validity, the issuing party must present evidence of **substantial in-person** trips to the jurisdiction of the issuing court. Sporadic visits or

business transactions done over the phone do not qualify. (See *In re Application Pursuant to 28 U.S.C. Sec. 1782*, 2014 WL 4181618, at *3 (S.D. Ohio Aug. 21, 2014).)

100-Mile Limit Applies to Document Subpoenas

A subpoena for documents may not command production at a place more than 100 miles from where the subpoena recipient lives, works, or regularly transacts business in person (FRCP 45(c)(2)(A)). A subpoena that commands production beyond this limit must be quashed (FRCP 45(d)(3)(A)(ii) (requiring that a subpoena be quashed or modified if a subpoena violates any of the geographic restrictions in FRCP 45(c))).

However, FRCP 45 does not require a subpoena recipient to travel or to appear to produce documents, and nothing prevents the parties from agreeing to produce documents using the service methods set out in FRCP 5, including by mail or electronically (FRCP 45(d)(2)(A) and 2013 Advisory Committee Notes to FRCP 45(c)).

Disclosure of Privileged Information

The court must quash a subpoena that seeks privileged or other protected information, such as an attorney's work product. Federal or state law may govern whether or not a subpoena recipient may withhold information on attorney-client privilege grounds, depending on whether the underlying cause of action arises from alleged violations of federal or state law. On the other hand, federal law determine work-product privilege claims. (See Claiming Privilege or Protection.)

Undue Burden

"Undue burden" is a broad, catch-all provision that allows the court to quash or modify a subpoena that imposes extreme hardship on the recipient because of the time, effort, or expense required to comply. Challenges based on undue burden or expense typically arise where a subpoena seeks the production of documents, not where it seeks testimony.

What is an Undue Burden?

Determining whether the claimed burden is "undue" requires the court to weigh the issuing party's needs against the recipient's burden. In balancing these competing interests, courts usually look at:

- The relevance of the sought-after evidence.
- The issuing party's need for the evidence.
- The breadth of the request.
- The time period covered by the request.
- The adequacy of the description of the evidence sought.
- The burden imposed.

(See *Usov v. Lazar*, 2014 WL 4354691, at *16 (S.D.N.Y. Sept. 2, 2014).)

However, courts also may consider other factors, such as whether compliance with the subpoena implicates privacy interests and whether the sought-after evidence is more readily available from another source (see *In re Consellior SAS, Kerfraval, Ass'n De Documentation Pour L'industrie Nationale*, 2013 WL 5517925, at *3 (D. Conn. Oct. 2, 2013)).

Sanctions for Imposing Undue Burden on Recipient

The issuing party and its attorney could face sanctions if the court determines that compliance with the subpoena would impose an undue burden or expense on the witness who is subject to the subpoena. These sanctions can include paying the recipient's lost earnings and reasonable attorneys' fees (FRCP 45(d)(1)).

Permissive Grounds for Quashing or Modifying

In addition to the grounds under which a court **must** quash or modify a subpoena, FRCP 45 also sets out grounds under which a court **may** quash or modify a subpoena. Specifically, a court may quash or modify a subpoena that requires the recipient to disclose:

- A trade secret or other confidential research, development, or commercial information (see Disclosure of Confidential Information).
- An unretained expert's opinion or information that does not describe specific occurrences in dispute and results from an expert's study that a party did not request (see Unretained Expert's Opinion).

(FRCP 45(d)(3)(B)(i)-(ii).)

Disclosure of Confidential Information

Courts generally may quash or modify a subpoena that seeks trade secret or other confidential commercial information only where the recipient shows that the disclosure of this information would cause substantial economic harm to its competitive position (see *Albany Molecular Research, Inc. v. Schloemer*, 274 F.R.D. 22, 25 (D.D.C. 2011)).

Counsel often can resolve objections to a subpoena requiring the disclosure of trade secret or other confidential information through a confidentiality agreement, either by applying an existing one in the case or entering into a new one that the subpoena recipient and the issuing party negotiate (see Producing Documents Under an Existing Confidentiality Agreement).

Unretained Expert's Opinion

FRCP 45 prohibits a party from attempting to extract expert testimony from a non-party witness who has not been retained by a party in the litigation (FRCP 45(d)(3)(B)(ii)). Otherwise, a party could seek to force an expert to provide

testimony without compensating the expert for his opinion (1991 Advisory Committee Note to former FRCP 45(c)(3)(B)(ii)).

However, a court may order an unretained expert to comply with a subpoena if the issuing party demonstrates substantial need for the testimony and ensures that the subpoenaed person will be reasonably compensated (1991 Advisory Committee Notes to former FRCP 45(c)(3)(B)(ii)). In determining the issuing party's need for an expert's testimony, courts may consider various factors, including the:

- Degree to which the expert is being called because of the expert's knowledge of facts relevant to the case rather than to give opinion testimony.
- Difference between testifying to a previously formed or expressed opinion and forming a new one.
- Possibility that the witness is a unique expert.
- Extent to which the issuing party can show the unlikelihood that any comparable witness will willingly testify.
- Degree to which the witness can show that he has been oppressed by having to testify continually.

(1991 Advisory Committee Notes to former FRCP 45(c)(3)(B)(ii), citing *Kaufman v. Edelstein*, 539 F.2d 811, 822 (2d Cir. 1976).)

Of course, an expert witness who has already been retained by a party to testify at trial may be deposed by any other party to the litigation (FRCP 26(b)(4)(A)). An unretained expert may also be subpoenaed as a **fact witness** for the purpose of eliciting testimony regarding specific events or facts in dispute (see *United States Willis v. SouthernCare, Inc.*, 2015 WL 5604367, at *6-8 (S.D. Ga. Sept. 23, 2015)).

Court May Shift Cost of Compliance to Issuing Party

In circumstances where the court may quash or modify a subpoena, the court may also shift the cost of compliance to the issuing party instead (FRCP 45(d)(3)(C)). In deciding whether to shift the cost of compliance to the party seeking discovery, courts typically consider:

- The non-party's interest in the outcome of the case.
- The non-party's ability to bear the costs (as compared to the requesting party's).
- Whether the litigation is of public importance.

(See *Miller*, 2009 WL 700142, at *5.)

Other Grounds for Quashing or Modifying

The grounds for quashing or modifying a subpoena are not limited to those set out in FRCP 45(d). The recipient may have many other valid grounds for objecting to a subpoena, including:

- The subpoena was improperly served (see Subpoenas: Drafting, Issuing and Serving Subpoenas (Federal): Method of Service).
- No witness fees were tendered at the time of service (see Subpoenas: Drafting, Issuing, and Serving Subpoenas (Federal): Witness Fees).
- Lack of subject matter jurisdiction over the lawsuit (see *US Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988)).

- Technical defects on the face of the subpoena, such as the failure to include the text that FRCP 45 requires (see *Anderson v. Virgin Islands*, 180 F.R.D. 284, 289-90 (D.V.I. 1998)).

Relief Available on Motion to Quash or Modify

Court May Quash or Modify Subpoena

If a subpoena recipient prevails on a motion to quash or modify, the court can either quash the subpoena in its entirety or modify the objectionable portions (see *Ghandi v. Police Dept. of City of Detroit*, 74 F.R.D. 115, 117 (E.D. Mich. 1977)). Assuming the subpoena is not one that must be quashed under FRCP 45(d)(3)(A), a district court has discretion to decide whether to quash or modify a subpoena (see *Gambino v. Payne*, 2015 WL 866811, at *2 (W.D.N.Y. Mar. 2, 2015); *Arista Records LLC v. Does 1-27*, 584 F. Supp. 2d 240, 253 (D. Me. 2008)).

If the court quashes the subpoena, the issuing party generally may serve another subpoena on the recipient that cures the original subpoena's defects, unless the court orders otherwise (for example, because the discovery deadline has passed).

Court May Order Compliance on Specified Conditions

In situations where the issuing court **may** (as opposed to must) quash or modify a subpoena, the court has the discretion instead to order an appearance or production under specified conditions if the requesting party:

- Shows a substantial need for the testimony or material.
- Shows that it cannot otherwise fulfill that need without undue hardship.
- Ensures that the subpoenaed person will be reasonably compensated.

(FRCP 45(d)(3)(C).)

For example, the court may condition a document production on entry of a protective order or require the issuing party to compensate a subpoenaed witness before ordering the witness to appear for a deposition.

Denial of Motion to Quash May Not Necessarily Require Compliance

A question sometimes arises about what effect the denial of a motion to quash has on the recipient's obligations, such as where a court order denying the motion to quash does not direct compliance within a specified time period. Although the denial of a motion to quash can also be interpreted as an order compelling compliance, at least one court has suggested otherwise (see *Pennwalt Corp.*, 708 F.2d at 494). To avoid this uncertainty, issuing parties sometimes cross-move to compel compliance in response to a motion to quash a subpoena.

Motion for a Protective Order

In response to a discovery subpoena, the recipient may make a motion for a protective order under FRCP 26(c) instead of (or in combination with) a motion to quash or modify under FRCP 45.

Meet and Confer Required Before Filing a Motion for Protective Order

A motion for a protective order under FRCP 26(c) must include a certification that the moving party has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action (FRCP 26(c)(1)). Counsel should also check whether the court and the presiding judge have specific rules on this issue. These rules may, for instance, indicate how and when to conduct the pre-motion conference.

Available Relief

The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, undue burden, or expense by doing one or more of the following:

- Forbidding the disclosure or discovery.
- Specifying terms, including time and place, for the disclosure or discovery.
- Prescribing a discovery method other than the one that the party seeking discovery selected.
- Forbidding inquiry into certain matters or limiting the scope of disclosure or discovery to certain matters.
- Designating the persons who may be present while the discovery is conducted.
- Requiring that a deposition be sealed and opened only on court order.
- Requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.
- Requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(FRCP 26(c)(1)(A)-(H).)

Although the relief ordered under FRCP 26(c) and as a result of a motion to quash or modify under FRCP 45 may be duplicative, in some situations, the subpoena's recipient should move only under FRCP 26(c). For example, if a subpoena recipient objects to videotaping a deposition, he cannot move to quash the deposition on that ground alone. However, the recipient may be able to obtain a protective order under FRCP 26(c) limiting the use of that recording or seeking a change in the recording format (see 2005 Advisory Committee Notes to former FRCP 45).

Burden of Proof

As with a motion to quash, the recipient of the subpoena bears the burden of proof in seeking a protective order under FRCP 26(c) (see *Parrot, Inc.*, 2009 WL 197979, at *3).

Standard for Obtaining a Protective Order

As noted above, a court may only grant a protective order for good cause. To demonstrate good cause, the party seeking a protective order must show that the sought-after disclosure will cause a clearly defined and serious injury (see *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995)).

Courts may consider several non-exclusive factors in determining whether "good cause" exists for a protective order, including whether:

- Disclosure will violate any privacy interests.
- The issuing party seeks the information for a legitimate purpose or for an improper purpose.
- Disclosure of the information will cause a party embarrassment.
- Information for which a subpoena recipient or party requests confidentiality is important to public health and safety.
- The sharing of information among litigants will promote fairness and efficiency.
- A party benefitting from the confidentiality order is a public entity or official.
- The case involves issues important to the public.

(See *Glenmede Trust Co.*, 56 F.3d at 483.)

Immediate Effect of Motion for a Protective Order

Courts have held that the mere filing of a motion for a protective order under FRCP 26(c) does not automatically stay the recipient's discovery obligations pending resolution of the motion (see *Versage v. Marriott Int'l., Inc.*, 2006 WL 3614921, at *7 (M.D. Fla. Dec. 11, 2006)). However, some local rules provide for an automatic stay of discovery after the filing of a motion for a protective order (for example, D. Kan. Rule 26.2(a)).

In the absence of a controlling local rule, the moving party should consider also asking the court to enter a temporary stay of the contested discovery pending resolution of its motion for a protective order.

Where to Make the Motion

For document subpoenas, the recipient may move for a protective order in the issuing court. For matters relating to a deposition, a subpoena recipient may also seek a protective order in the court for the district where the issuing party will take the deposition, if different from the issuing court (FRCP 26(c)(1); see also *Lefkoe v. Joseph A. Bank Clothiers, Inc.*, 577 F.3d 240, 246 (4th Cir. 2009)).

Procedure for Moving for a Protective Order

As with a motion to quash or modify a subpoena, the procedure for moving for a protective order may differ depending on whether the subpoena recipient must file the motion in the issuing court or in the court for the district where the issuing party will take the deposition. Depending on the court, counsel may need to gain court admission to obtain a CM/ECF login and password to file a motion for a protective order. (For more on these issues, see Procedure for Moving to Quash).

Time to Make the Motion

A motion for a protective order is timely if counsel files the motion before the subpoena's return date (see *SEC v. Goldstone*, 301 F.R.D. 593, 645 (D.N.M. 2014)). However, counsel may also need to obtain an order staying discovery pending resolution of the motion for a protective order to avoid the consequences of non-compliance (see Immediate Effect of Motion for a Protective Order). Therefore, counsel should consider filing the motion as early as possible to provide the court with enough time before the return date to rule on the request for a stay and to minimize the risk of the court finding that the subpoena recipient failed to comply with the subpoena.

Required Documents

Counsel generally must file the same type of documents on a motion for a protective order as on a motion to quash or modify a subpoena (see Required Documents). For a sample motion for protective order and links to sample accompanying documents, see Standard Document, Motion for a Protective Order: Motion or Notice of Motion.

Claiming Privilege or Protection

Procedure for Asserting the Privilege or Protection

If a subpoena recipient withholds responsive materials on the basis that the attorney-client privilege, work product doctrine, or another recognized protection applies to these materials, the recipient must both:

- Expressly make the privilege or protection claim.
- Describe the nature of the withheld materials in a manner that enables the parties to assess the assertion without revealing the privileged or protected information.

(FRCP 45(e)(2)(A).)

Generally, the recipient does this by serving a privilege log on the issuing party's attorney. The recipient risks waiving its privilege claims and being held in contempt if it fails to provide the required detail in a privilege log (1991 Advisory Committee Notes to former FRCP 45(d)(2)). For a sample privilege log, see Standard Document, Privilege Log.

Ideally, a subpoena recipient serves its privilege log along with any production of non-privileged documents, written objections, motion to quash, or motion for a protective order. However, courts may allow the recipient to serve the log within a reasonable time after serving its objections or motion (see *Tuite*, 98 F.3d at 1416-17; see also Time to Assert Privilege Objections).

For more information on how to assert the attorney-client privilege and work product protection, see Practice Note, Asserting the Attorney-Client Privilege and Work Product Protection.

What if the Recipient Inadvertently Produced Privileged or Protected Information?

Unless an agreement or protective order otherwise provides, a litigant who inadvertently produces privileged or work product-protected material in response to a subpoena may notify the parties of this fact, triggering the receiving party's duty to:

- Promptly return, sequester, or destroy the documents and any copies it has.
- Not use or disclose the information until the claim is resolved.
- Take reasonable steps to retrieve the information if the party disclosed it before being notified.

(FRCP 45(e)(2)(B).)

The party that received the purportedly privileged or protected information may promptly present the information to the court under seal for a determination of the claim. The person who produced copies of the privileged information must preserve the information at least until the claim is resolved. (FRCP 45(e)(2)(B).)

For more detailed information on privilege issues, see Practice Notes, Asserting the Attorney-Client Privilege and Work-Product Protection and Litigating the Attorney-Client Privilege and Work-Product Doctrine.

Alternative Ways to Respond to a Subpoena

Informally Contact the Issuing Party

Before preparing any motion or objections, counsel for the subpoena recipient should always consider informally contacting the issuing party's counsel as a first step, which may:

- Efficiently clarify or narrow the scope of a subpoena.
- Lead to an agreement that gives the subpoena recipient more time to respond.

Informally Contact the Adverse Party

Depending on the circumstances, counsel for the subpoena recipient should also consider informally contacting the issuing party's adversary in the underlying lawsuit. The adverse party may independently move to quash or modify the subpoena if it has a personal right or privilege that the subpoena or the information responsive to it may affect (see *Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir. 1979), *Jacobs v. Conn. Comm. Tech. Colleges*, 258 F.R.D. 192, 194-95 (D. Conn. 2009); *Sterling Merch., Inc. v. Nestle, S.A.*, 470 F. Supp. 2d 77, 81 (D.P.R. 2006)). If the recipient's interests and the adverse party's interests are identical, the recipient may, for example, save time and money by joining in on a motion to quash that the adverse party drafts.

Consequences for Failing to Comply with a Subpoena

A recipient who fails to comply with an otherwise valid subpoena or subpoena-related order without adequate excuse can be held in contempt and subjected to fines or even imprisonment (FRCP 45(g)). However, some courts will first order the recipient to comply with the subpoena before holding the recipient in contempt (see Subpoenas: Enforcing a Subpoena (Federal): Relief Available: Contempt Sanctions).

FRCP 45(g) does not state what constitutes an "adequate excuse" for non-compliance, as the inquiry is fact-specific. However, in certain situations, a court is more likely to find the existence of an adequate excuse for non-compliance. For example, a recipient's absolute inability to comply with a subpoena constitutes an adequate excuse for disobedience so long as the recipient has not taken deliberate steps to make compliance impossible (see *Kowalczyk v. US*, 936 F. Supp. 1127, 1149-50 (E.D.N.Y. 1996)).

However, given the fact-intensive inquiry and a court's discretion to determine what constitutes an adequate excuse, the prudent course for a subpoena recipient is to comply with the subpoena, serve written objections, or move to quash or seek a protective order, rather than disregard the subpoena and hope that the court will find an adequate excuse for non-compliance.

Appeals

Because discovery orders are interlocutory, non-final orders, federal appellate courts typically only have jurisdiction to review discovery orders in connection with an appeal from a final judgment. However, these orders may sometimes be immediately appealable, depending on the relief that the lower court ordered and the particular court that issued the order.

Order Granting Discovery

A non-party may not immediately appeal an order requiring compliance with a discovery subpoena, regardless of whether the court issued the order in the underlying action or in an ancillary proceeding. However, the subpoenaed party may obtain appellate review of this type of order if the subpoenaed party:

- Defies the court order.
- Is found in contempt.
- Appeals the contempt citation.

(See *In re Flat Glass Antitrust Litig.*, 288 F.3d 83, 89-90 (3d Cir. 2002) (underlying action), *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 119-122 (4th Cir. 1994) (ancillary proceeding); *In re Subpoena Served on the Cal. Pub. Utils. Comm'n*, 813 F.2d 1473, 1476 (9th Cir. 1987) (non-party must appeal contempt citation).)

Standard of Review

Generally, federal appellate courts review discovery orders under an abuse of discretion standard (see *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, 755 F.3d 55, 59 (1st Cir. 2014)). However, the standard of review for appeals of orders regarding the attorney-client privilege varies depending on the circumstances and the jurisdiction (see

Practice Note, Litigating the Attorney-Client Privilege and Work Product Doctrine: Appellate Review of Decisions Concerning the Privileges).

