

PROPOSED

**STATE OF VERMONT
VERMONT SUPREME COURT
TERM, 2017**

Order Promulgating Amendments to Rule 45 of the Vermont Rules of Civil Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rules 45(a), (b), and (f) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 45. SUBPOENA

(a) Form; Issuance.

- (1) Every subpoena shall
 - (A) state the name of the court from which it is issued; and
 - (B) state the title of the action, the name of the court in which it is pending, and its civil action number; and
 - (C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and
 - (D) set forth the text of subdivisions (c) and (d) of this rule; and
 - (E) comply with applicable format provisions of the Vermont Rules for Electronic Filing.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

- (2) A subpoena may issue from the court in any county.
- (3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney, ~~a notary public~~, or a magistrate may also issue and sign a subpoena.
- (4) ~~If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served~~

~~on the persons to whom it is directed, a notice and a copy of the subpoena must be served on each party A copy of every subpoena must be served on all parties to the case before or at the same time that it is served on the person to whom it is directed, with the exception of subpoenas for appearance in court for a trial or other hearing.~~

(b) Service.

(1) A subpoena may be served by any person who is not a party and is ~~not less than at least~~ 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person with the subpoena the fees for one day's attendance and the mileage allowed by law.

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

(3) Proof of service when necessary shall be made by filing with the clerk of the court for which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

* * * * *

(f) Interstate Depositions and Discovery.

(1) *Purpose.* This rule governs depositions and discovery conducted in Vermont in connection with a civil action brought in another state.

(2) *Definitions.* In this rule:

(A) "Foreign jurisdiction" means a state other than Vermont.

(B) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(C) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(D) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(E) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(i) attend and give testimony at a deposition;

(ii) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(iii) permit inspection of premises under the control of the person.

(3) *Issuance of Subpoena for Interstate Depositions and Discovery.*

(A) To request issuance of a subpoena under this rule, a party or lawyer must submit a foreign subpoena or a court order from the foreign jurisdiction to the clerk of court in the county in which discovery is sought to be conducted, along with (i) a Vermont subpoena for signature by the clerk, (ii) a list of all counsel (or unrepresented parties) in the foreign action and their addresses and phone numbers, and (iii) the required filing fee. The subpoena cannot require either the appearance of a witness, or the production of documents, outside the State of Vermont. A request for the issuance of a subpoena under this rule may be filed by a lawyer not admitted to practice in Vermont and does not constitute an appearance in the courts of this state. An unrepresented party may request issuance of a subpoena pursuant to this rule, but may only sign the foreign subpoena if such signing is authorized by the rules of the foreign jurisdiction.

(B) Challenges to the Subpoena. A motion for a protective order or to enforce, quash, or modify a subpoena issued under this paragraph (3) must comply with Rule 45(c) and be submitted to the court in the county in which discovery is to be conducted. Any attorney filing a motion or a response to such a motion, or appearing at a hearing on the motion, must be admitted to practice in Vermont.

(C) When a party submits a foreign subpoena to a clerk of court, the clerk shall promptly issue a subpoena for service upon the person to whom the foreign subpoena is directed provide it to the judge for review without delay. If the judge approves the request the clerk shall promptly sign the Vermont subpoena and return it to the requesting party for service.

(D) A subpoena under subparagraph (C) must:

(i) conform to the requirements of Rule 45 and other applicable provisions of these rules, but may otherwise incorporate the terms used in the foreign subpoena so long as they conform to these rules;

(ii) advise the person to whom the subpoena is directed that such a person has a right to move in the Vermont court under Rule 45(c) for an order to quash or modify the subpoena; and

(iii) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(4) *Service of Subpoena.* A subpoena issued under paragraph (3) will be returned to the party requesting it, who is responsible for arranging for service and payment of the witness fee. It must be served in compliance with Rule 45(b), except that the officer or individual responsible for service shall not return a certificate of service or affidavit to the court that issued the subpoena. Instead the officer or individual responsible for service shall deliver a certificate of service or affidavit to the party who requested the subpoena.

(5) *Deposition, Production, and Inspection.* Rules 45(a), 45(b), 45(d) apply to subpoenas issued under paragraph (3).

(6) ~~An application to the court for a protective order or to enforce, quash, or modify a subpoena issued under paragraph (3) must comply with Rule 45(e) and be submitted to the court in the county in which discovery is to be conducted.~~

Reporter's Notes—2017 Amendment

Rule 45 is amended at the request of the Civil Division Oversight Committee to conform the rule to current practice and to assure uniformity among the clerks' offices.

Rule 45(a)(3) is amended by the deletion of "notary public" from the list of those empowered to issue a subpoena. Notaries do not have express power to issue subpoenas. See 24 V.S.A. § 445. The term was carried over into the original rule from a statute that was repealed at the time of promulgation. See Reporter's Notes to original Rule 45(a). Notary practice is not governed by rules and training.

The amendment to Rule 45(a)(4) simplifies language and provides for prior or simultaneous service on the parties to avoid warning the witness before the parties can act. Rule 45(b)(1) is amended by addition of the requirement that witness fees be tendered with the subpoena to avoid issues of enforcement that might arise in the event of later nonpayment. For statutory witness fees, see 32 V.S.A. § 1551.

Rule 45(f)(3)(A) is amended to clarify the application of the interstate deposition and discovery provisions of the rule to lawyers not admitted in Vermont and unrepresented litigants. To accommodate varying state practices, a request for a Vermont subpoena may be based on a foreign court order as well as a foreign subpoena. For uniformity of practice, the amendment requires that a blank subpoena, specific information about counsel or parties, and the filing fee accompany the request. The amendment also makes clear that the reach of a subpoena issued under it is limited to Vermont and specifies that a nonresident lawyer may file a request without making an appearance. An unrepresented litigant may make a request under the rule on the basis of a foreign subpoena if the foreign state permits the litigant to sign such a subpoena. Otherwise, the litigant must proceed with a foreign court order.

Rule 45(f)(3)(B) incorporates the provisions of former Rule 45(f)(6), substituting "motion" for "application" for consistency with the general provisions of the Rules and adding the requirement that the practice on such motions is limited to Vermont-admitted lawyers

because they are adversary proceedings.

Rule 45(f)(3)(C) (formerly (B)) is amended to require judicial approval before the clerk signs it. This provision and the amendment to paragraph Rule 45(f)(4) spell out that the clerk is to deliver the signed subpoena to the requesting party, who is responsible for service and payment of the witness fee. Former subparagraph (C) is redesignated (D).

Former Rule 45(f)(6) is deleted because it is now incorporated in Rule 45(f)(3)(B).

2. That these rules, as amended, are prescribed and promulgated effective _____, 2017. The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this _____ day of _____, 2017.

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice