

## **SUBPOENA IN AN ADVERSARY PROCEEDING**

### **Purpose of the Form**

This subpoena is for use in an adversary proceeding. It may be used to compel a witness to testify in a trial before the bankruptcy court or at a deposition. The subpoena also may be used to command the production of books, documents, electronically stored information, or tangible things for inspection and copying and to compel the inspection of premises.

Variations of this form are used in Fed. R. Bankr. P. 2004 examinations and in bankruptcy cases. Form 254 is a subpoena compelling a witness to appear and testify and to produce documents at a Rule 2004 examination. Form 256 is a subpoena compelling a witness to appear and testify at a trial or hearing in a bankruptcy case or at a deposition in the case. It also can be used to compel the production of books, documents, electronically stored information, or tangible things or the inspection of premises.

Rule 45 of the Federal Rules of Civil Procedure, which is incorporated by Fed. R. Bankr. P. 9016, governs the use of subpoenas. Rule 45 was amended in 2006 “to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information.” Advisory Committee Note to 2006 Amendments. The bankruptcy subpoena forms were revised to conform to the Rule 45 amendments.

### **Applicable Law and Rules**

1. Fed. R. Bankr. P. 9016 incorporates Fed. R. Civ. P. 45.
2. Rule 45 provides for the issuance of a subpoena at the request of a party to compel testimony at a trial, hearing, or deposition; command production of documents, electronically stored information, or other objects; or permit the inspection of premises. Rule 45(a).
3. A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is being taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made. Rule 45(a)(2).
4. At the request of a party, the clerk shall issue a subpoena, signed but otherwise in blank. The party must complete the subpoena before it is served. Rule 45(a)(3).

5. As an officer of the court, an attorney may issue and sign a subpoena on behalf of a court in which the attorney is authorized to practice. An attorney also can issue a subpoena on behalf of a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice. Rule 45(a)(3).
6. Fed. R. Civ. P. 30 and 31, which are incorporated by reference by Fed. R. Bankr. P. 7030 and 7031, govern depositions. The rules require reasonable notice of a deposition in writing to every party to the action. The notice is served prior to the issuance of the subpoena. Permission from the court is required to take a deposition under certain circumstances set out in Rules 30(a)(2) and 31(a)(2). If discovery materials are filed in the court, copies of the notice, proof of service for the notice, subpoena, and proof of service for the subpoena should be filed in the court in which the subpoena was issued. *See*, Rule 45(b)(4).
7. A party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Rule 45(c)(1). The court on behalf of which the subpoena was issued shall enforce this duty and impose an appropriate sanction upon a party or attorney in breach of the duty.
8. In addition to compelling testimony, a subpoena can require the person to whom it is directed “to produce documents, electronically stored information, or tangible things or to permit the inspection of premises . . .” Rule 45(a)(1)(C).
9. A subpoena for production of evidence or to permit inspection may be joined with a subpoena to appear at a trial, hearing, or deposition, or a subpoena for production or to permit inspection of premises may be issued separately. Rule 45(a)(1)(C). If issued separately, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made. Rule 45(a)(2).
10. A person commanded to produce books, documents, electronically stored information, or tangible things or to permit inspection need not appear in person at the time of production or inspection unless commanded to appear for a deposition, hearing, or trial. Rule 45(c)(2)(A).
11. A subpoena may require a person who is not a party or an officer of a party to travel to a trial, hearing, or deposition up to 100 miles from the place where that person resides, is employed, or regularly transacts business in person, or, subject to certain restrictions, to travel to trial from anyplace within the state in which the trial is held. Rule 45(c)(3).
12. A subpoena may be served by any person who is not a party and is not less than 18 years

of age. Rule 45(b)(1).

13. Service of a subpoena upon a person named in the subpoena is made by delivering a copy of the subpoena to the person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Rule 45(b)(1).
14. Computation of the fees and allowances to be paid a witness for attending a trial, hearing, or deposition is governed by 28 U.S.C. § 1821.
15. As of December 1, 2008, the witness fee was \$40 per day, 28 U.S.C. § 1821(b), and the mileage allowance for an automobile was 58.5 cents per mile, 41 C.F.R. § 301-10.303.<sup>1</sup> Computation of mileage is set by a uniform table of mileage maintained by the General Services Administration. 28 U.S.C. § 1821(c)(2).
16. Subject to the restrictions in Rule 45(c)(3)(A)(ii), a subpoena may be served at any place within the district of the court by which it is issued, at any place within 100 miles of the place of examination or production (whether or not within the district), or at any place within the state where a state statute or court rule permits service of a subpoena issued by a state court of general jurisdiction sitting at the place of the examination. In addition, when provided by a federal statute, the court may, for cause, authorize the service of a subpoena at any other place. Rule 45(b)(2).
17. Subpoenas are an exception to the nationwide service of process in bankruptcy cases. Fed. R. Bankr. P. 7004(d).
18. "Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server." Rule 45(b)(4).
19. The duties of a person responding to a subpoena to produce documents or electronically stored information are set out in Rule 45(d). The subdivision includes restrictions on the production of information subject to a claim that it is privileged or subject to protection as trial-preparation material, Rule 45(d)(2), and on the production of electronically stored information from sources that are not reasonably accessible, Rule 45(d)(1)(D).
20. Documents shall be produced as they are kept in the usual course of business or the records may be organized and labeled to correspond with the categories set out in the

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<sup>1</sup> Current information on the mileage rate is available on the Code Of federal Regulations website at <http://www.gpoaccess.gov/cfr/index.html> by searching for 41 C.F.R. § 301-10.303.

subpoena. Rule 45(d)(1)(A). If the subpoena does not specify the form for producing electronically stored information, the information shall be produced in the form in which the person responding to the subpoena ordinarily maintains it or in a form that is reasonably usable. Rule 45(d)(1)(B).

21. Rule 45(e) provides that failing to obey a subpoena without adequate excuse may be deemed contempt of court.

### **Instructions for Subpoena**

#### **Caption**

1. Identify the judicial district in which the bankruptcy case was filed. Example: "Eastern District of California."
2. "In re": Insert the name of the debtor as it appears in the bankruptcy petition.
3. "Plaintiff": Insert the name of the plaintiff as it appears in the caption of the complaint.
4. "Case No.": Insert the bankruptcy case number assigned by the court when the case was filed.
5. "Chapter": Insert the chapter of the Bankruptcy Code under which the case is pending.
6. "Defendant": Insert the name of the defendant as it appears in the caption of the complaint.
7. "Adv. Proc. No.": Insert the adversary proceeding number assigned by the court when the complaint was filed.

#### **To**

Insert in this box the complete name and address of the person to whom the subpoena is directed. (The clerk may issue a subpoena, signed but otherwise in blank, but the form must be filled in, including the name and address, before the subpoena is served.)

#### **Check boxes followed by "YOU ARE COMMANDED"**

Check the appropriate box or boxes.

**Place of Testimony (below first checkbox)**

Insert the complete address of the place where the witness is to appear and testify. The address should include the name of the building, street number and name, city, state, and zip code. If this is not a subpoena for trial testimony, indicate that this box is not applicable.

**Courtroom**

Insert the number or name of the courtroom in which the witness is to testify. If this is not a subpoena for trial testimony, indicate that this box is not applicable.

**Date and Time**

Insert the date and time of the trial. If this is not a subpoena for trial testimony, indicate that this box is not applicable.

**Place of Deposition (below second checkbox)**

Insert the complete address of the place where the witness is to be deposed. The address should include the name of the building, room number, street number and name, city, state, and zip code. If this is not a subpoena for deposition testimony, indicate that this box is not applicable.

**Date and Time**

Insert the date and time of the deposition. If this is not a subpoena for deposition testimony, indicate that this box is not applicable.

**You Are Commanded to Produce (third checkbox)**

Insert the exact description of any and all books, documents, electronically stored information, or tangible things the witness is required to produce. If no evidence is to be produced, enter "NONE."

**Place**

Insert the complete address of the place where the witness is to produce the books, documents, electronically stored information, or tangible things. The address should include the name of the building, the room number, street number and name, city, state, and zip code. If no evidence is to be produced, enter "Not Applicable."

**Date and Time**

Insert the date and time at which the witness is to produce the books, documents, electronically stored information, or tangible things. If no evidence is to be produced, enter “Not Applicable.”

**Premises (below fourth checkbox)**

Insert the complete description of the premises to be inspected. The address should include the name of the building and the room number (if applicable), street number and name, city, state, and zip code or other information sufficient to identify the premises with particularity. If this is not a subpoena for inspection of premises, enter “Not Applicable.”

**Date and Time**

Insert the date and time at which the premises are to be inspected. If this is not a subpoena for inspection of premises, enter “Not Applicable.”

**Issuing Officer’s Signature and Title (bottom of front of form)**

The person who issues the subpoena signs here, states his or her title (for example, “deputy clerk” or “attorney”), and dates the signature.

**Date**

Insert the date the subpoena was issued.

**Issuing Officer's Name, Address, and Phone Number**

If an attorney issues the subpoena, insert the attorney's name, street address, city, state, zip code, and telephone number, including area code. If the subpoena is issued by the clerk, insert the information for the clerk's office.

**Instructions for Proof of Service**

The proof of service and declaration on the reverse of the form are to be completed, under penalty of perjury, by the person who serves the subpoena.

**Served**

Insert the date and place the subpoena was served. Specify the street address, city, state, and zip code of the place service of the subpoena was made.

**Served On**

Insert the full (printed or typed) name of the person who received the subpoena.

**Manner of Service**

Describe the manner of service.

**Served By**

Insert the full (printed or typed) name of the person who served the subpoena and specify the person's title.

**Declaration of Server**

The declaration is to be completed as follows

“Date”: Insert the month, day and year the certificate is signed.

“Signature of Server”: This must be the ORIGINAL signature of the person who served the subpoena.

“Address of Server”: Print or type the address of the person who signs the declaration

**Protection of Persons Subject to Subpoenas**

In order to protect persons subject to subpoenas, Rule 45(a)(1)(A)(iv) requires that every subpoena set forth the text of subdivisions (c) and (d) of the rule. Subdivision (e) is set out on the subpoena form to inform the person served that failing to obey a subpoena without adequate excuse may be deemed contempt of court. Furthermore, Rule 45(c)(1) provides that a party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena and that the court on behalf of which the subpoena was issued shall enforce this duty.

**General Information for the Clerk**

Form 255 is for use in an adversary proceeding. It may be used to command a witness to testify in a trial before the bankruptcy court or at a deposition. The subpoena also may be used to compel the production of books, documents, electronically stored information, or tangible things for inspection and copying and to command the inspection of premises.

Fed. R. Civ. P. 45, which is incorporated by reference by Fed. R. Bankr. P. 9016, authorizes both the clerk and attorneys to issue subpoenas. In many cases the clerk will issue subpoenas, signed but otherwise in blank. The name of the party to be served need not be filled in when the clerk issues a subpoena, but the subpoena must be completed before it is served.

Fed. R. Civ. P. 30(b) and 31(a), which are incorporated by reference by Fed. R. Bankr. P. 7030 and 7031, require reasonable notice of a deposition to every party to the action. The notice is served prior to the issuance of the subpoena.

If a deposition is to be conducted outside the district in which the adversary proceeding is pending, Rule 45(a)(2)(B) provides that the subpoena shall be issued by the court for the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, Rule 45(a)(2)(C) provides that a subpoena for production or inspection shall be issued by the court in the district in which the production or inspection is to be made. When a clerk issues a subpoena for an adversary proceeding which is pending in another district, the clerk should create a special file for noting the issuance of the subpoena and filing the related papers.

If discovery materials are filed in the court, copies of the notice, proof of service of the notice, subpoena, and proof of service of the subpoena should be filed in the court in the district in which the deposition is to be taken. *See*, Rule 45(b)(4).