

**PROPOSED REVISIONS TO THE RULES OF CIVIL PROCEDURE
FOR THE DISTRICT, MAGISTRATE, AND METROPOLITAN COURTS
PROPOSAL 2020-010**

March 3, 2020

The Rules of Civil Procedure for State Courts Committee has recommended amendments to Rules 1-045, 2-502, and 3-502 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 2, 2020, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

1-045. Subpoena.

A. Form; issuance.

(1) Every subpoena shall:

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

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

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

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) All subpoenas shall issue from the court for the district in which the matter is pending.

(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 authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court.

B. Service; place of examination.

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

(2) A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or as provided in Rule 1-004(E)(3) NMRA, and, if that person's attendance is commanded:

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

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

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

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

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

(6) A subpoena may be issued within this state in an action pending outside the state pursuant to Rule 1-045.1 NMRA upon the filing of a miscellaneous proceeding in the judicial district in which the subpoena is to be served. Upon the docketing of the miscellaneous proceeding, the subpoena may be issued and shall be served as provided by this rule.

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

C. Protection of persons subject to subpoenas.

(1) *In general.* A party or an 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 that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

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

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

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

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

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

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

(b) Subject to ~~[Subparagraph (2) of Paragraph D]~~ Subparagraph (D)(2) of this rule:

(i) a person commanded to produce and permit inspection, copying, testing, or sampling or a person who has a legal interest in or the legal right to possession of the designated material or premises may ~~[file]~~ serve a written objection on all parties to the lawsuit or file a motion to quash the subpoena with the court;

(ii) any party ~~[may]~~ who objects to the subpoena shall, within fourteen (14) days after service of the subpoena, serve upon the person served with the subpoena and all parties written objection to or a motion to quash inspection, copying, testing, or sampling of any or all of the designated materials or inspection of the premises.

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

(3)

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

(i) fails to allow reasonable time for ~~[compliance,]~~ compliance;

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

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

(iv) subjects a person to undue burden.

(b) If a ~~[subpoena:]~~ subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial ~~[information,]~~ information;

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

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

D. Duties in responding to subpoena.

(1)

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

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

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

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

(2)

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

(b) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. By motion, a receiving party may promptly present the information to the court for in camera review and a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

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

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

[As amended, effective January 1, 1987; August 1, 1989; January 1, 1998; November 1, 2002, as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as amended by Supreme Court Order No. 09-8300-018, effective August 7, 2009; as amended by Supreme Court Order No. _____, effective in all cases pending or filed on or after _____.]

Committee commentary for 2002 amendment. —

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

In 1991, the federal rule was amended to allow pretrial subpoenas of documents or tangible items without the necessity of noticing and scheduling a simultaneous deposition. In 1997, the New Mexico Supreme Court similarly amended Rule 1-045 NMRA.

As amended in 1991, the federal rule required that “[p]rior notice” of any commanded production shall be served on each party, ~~[F.R.] Fed. R.~~ Civ. P. ~~[45(b)-(4)] 45(b)(1)~~. “The purpose of the notice provision is to afford other parties an opportunity to object to the production. . . .” Fed. R. Civ. P. ~~[Rule] 45~~ Committee Comment.

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

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

The federal rule, requiring “[p]rior notice” is ambiguous, though it has been construed to require “reasonable notice” prior to service of the subpoena. *Biocore Medical Technologies, Inc. v. Khosrowshahi*, 181 F.R.D. 660, 667 (D. Kan. 1998). The committee considered but rejected this construction, preferring to set a specific time that will assure prior notice, while also recognizing the possibility that a court might reduce the time under appropriate circumstances.

1997 Amendment of Rule 1-045

1. Introduction

The New Mexico District Court Rules were based upon the Federal Rules of Civil Procedure. Although the New Mexico rules diverge from the Federal Rules when appropriate, the committee regularly reviews New Mexico’s District Court Rules of Civil Procedure when the Federal Rules are modified. Federal Rule 45 - Subpoenas - underwent significant change as a result

of amendments that went into effect in [~~December,~~] December 1991 and was further modified by amendments effective in [~~December,~~] December 1995. The Rules Committee's reevaluation of Rule 1-045 NMRA in light of the changes in the federal rule prompted amendments to Rule 1-045 NMRA and the adoption of Rule 1-045 NMRA in its current form.

2. Overview

Rule 1-045 NMRA formerly contained different provisions for subpoenas for attendance at trial or hearing and for attendance at a deposition. The existing rule follows the model of the current federal rule which generally eliminates that distinction. Rule 1-045 NMRA formerly had the effect of barring parties from obtaining items such as documents or inspecting premises except in conjunction with a subpoena setting a deposition of a witness. The existing rule follows the current federal rule which allows subpoenas for production of items or inspection of premises from non-parties without the necessity of scheduling and conducting a deposition at the same time. The rule provides procedural protections to assure advance notice to parties that a party has issued a subpoena for production or inspection.

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

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

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

3. Who may issue subpoenas

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

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

4. Form and content of subpoenas

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

Following the model of the current federal rule, subpoenas no longer need to contain the seal of the court. They must, however, now contain the civil action number of the case for which

the subpoena is issued. Rule 1-045(A)(1)(d) NMRA now provides that subpoenas shall be substantially in the form approved by the Supreme Court and the Court has approved forms consistent with the requirements of Rule 1-045 NMRA. See Civil Form 4-505 NMRA.

5. Service of subpoenas

Rule 1-045 NMRA now explicitly authorizes service of process anywhere in the state. When a person is beyond the subpoena power of the New Mexico District Court, Rule 1-045 NMRA provides that the party to the New Mexico proceeding who seeks to subpoena items, conduct inspection, or conduct a deposition in another state shall do so in the manner provided by law or rule of the other state. See, e.g., Mass. Gen. Laws Ann. 123A Sec. 11 (West 1985) (“Discovery Within Commonwealth for Proceedings Outside Commonwealth”).

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

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

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

6. Notice of service of subpoena

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

Because Rule 1-045 NMRA formerly required that subpoenas for pre-trial production or inspection could only be issued in conjunction with the taking of a deposition, the notice requirement of Rule 1-030(B)(1) NMRA effectively assured that all parties would receive notice of every pre-trial attempt by a party to compel production and inspection against a non-party. Rule 1-045 NMRA now authorizes issuance of a subpoena for pre-trial production without the necessity of a simultaneous deposition, Rule 1-045(A)(1)(d) NMRA, with the result that the notice requirement in Rule 1-030(B)(1) NMRA no longer assures that all parties will receive notice of pre-trial production and subpoenas. To fill this notice gap, Rule 1-045(B)(2) NMRA now requires that prior to or simultaneously with the service of pre-trial inspection or production subpoenas the party on whose behalf the subpoena is served must give notice to all parties in the lawsuit in the

manner required by Rule 1-005 NMRA. This provision follows the model of the current federal rule.

7. Place of attendance or production

Service of a subpoena may be made anywhere in the state. Rule 1-045(B)(1) NMRA. As was the case under former Rule 1-045 NMRA, if the subpoena commands attendance at a trial or a hearing, the person served with the subpoena must appear as commanded anywhere in the state. Rule 1-045(B)(4) NMRA.

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

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

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

8. Proof of service of subpoena

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

9. Duty to avoid misuse of subpoena authority

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

10. Subpoenas for production or inspection

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

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

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

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

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

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

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

If timely objections are served, the subpoenaed person need not comply with the subpoena unless and until the person seeking the subpoenaed items obtains a court order compelling the production. Rule 1-045(C)(2)(b) NMRA. Alternatively, the person who opposes compliance with the subpoena and serves timely notice of objections may file a timely motion seeking to quash or modify the subpoena. Rule 1-045(C)(3)(a) NMRA.

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

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

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

Committee commentary for 2007 amendment. —

See the 2007 committee commentary to Rule 1-026 NMRA for additional information. [As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as amended by Supreme Court Order No. 09-8300-018, effective August 7, 2009.]

Committee commentary for 2009 amendment. —

See the 2009 committee commentary to Rule 1-026 NMRA for additional information. [As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as amended by Supreme Court Order No. _____, effective _____.]

2-502. Subpoenas.

A. Form; issuance.

- (1) Every subpoena shall:
 - (a) state the name of the court from which it is issued;
 - (b) state the title of the action and the action number;
 - (c) command each person to whom it is directed to attend a trial or hearing and give testimony or to produce for trial or hearing designated books, documents, or tangible things in the possession, custody, or control of that person, or to permit inspection of premises of a party, at a time and place therein specified;
 - (d) state the time and date of the hearing or trial, the name of the judge before whom the witness is to appear or produce documents; and
 - (e) be substantially in the form approved by the Supreme Court.
- (2) All subpoenas shall issue from the court in which the matter is pending.
- (3) The judge or clerk shall issue a subpoena, other than a subpoena duces tecum, signed but otherwise in blank, to a party requesting it, who shall fill it in before service. The judge or clerk may issue a subpoena duces tecum to a party only if the subpoena duces tecum is completed by the party prior to issuance by the judge or clerk. An attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court in which the case is pending.
- (4) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

B. Service.

(1) A subpoena may be served by any person who is not a party and is not less than eighteen (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 that person's attendance is commanded, by tendering to that person the full fee for one day's expenses provided by ~~[Subsection A of Section 10-8-4]~~ Section 10-8-4(A) NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by ~~[Subsection D of Section 10-8-4]~~ Section 10-8-4(D) NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one (1) day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises of a party before trial, notice shall be served on each party in the manner prescribed by Rule 2-203 NMRA.

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

C. Protection of persons subject to subpoenas.

(1) A party or an 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 that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)

- (a) Unless specifically commanded to appear in person, a person commanded to produce and permit inspection and copying of designated books, papers, documents

or tangible things, or inspection of premises of a party need not appear in person at the hearing or trial.

(b) Subject to Subparagraph ~~[(2) of Paragraph D]~~ (D)(2) of this rule, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve ~~[upon all parties written objection to inspection or copying of any or all of the designated materials or inspection of the premises of a party]~~ a written objection on all parties to the lawsuit or file a motion to quash the subpoena with the court. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(c) Absent a court order, a person commanded to produce and permit inspection and copying shall not respond to the subpoena before the expiration of fourteen (14) days after the date of service of the subpoena.

(3)

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

- (i) fails to allow reasonable time for compliance,
- (ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
- (iii) subjects a person to undue burden.

(b) The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena if a subpoena:

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information,
- (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
- (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial.

If the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

D. Duties in responding to subpoena.

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

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly

and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

E. **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. [As amended, effective January 1, 1994; May 1, 1994; May 1, 2002; as amended by Supreme Court Order No. _____, effective _____.]

3-502. Subpoenas.

A. Form; issuance.

- (1) Every subpoena shall:
 - (a) state the name of the court from which it is issued;
 - (b) state the title of the action and its civil action number;
 - (c) command each person to whom it is directed to attend a trial or hearing and give testimony or to produce for trial or hearing designated books, documents or tangible things in the possession, custody or control of that person;
 - (d) state the time and date of the hearing or trial, the name of the judge before whom the witness is to appear or produce documents; and
 - (e) be substantially in the form approved by the Supreme Court.
- (2) All subpoenas shall issue from the court for the court in which the matter is pending.
- (3) The judge or clerk shall issue a subpoena, other than a subpoena duces tecum, signed but otherwise in blank, to a party requesting it, who shall fill it in before service. The judge or clerk may issue a subpoena duces tecum to a party only if the subpoena duces tecum is completed by the party prior to issuance by the judge or clerk. An attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court in which the case is pending.
- (4) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

B. Service.

- (1) A subpoena may be served by any person who is not a party and is not less than eighteen (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 that person's attendance is commanded, by tendering to that person the full fee for one day's expenses provided by [~~Subsection A of Section 10-8-4~~] Section 10-8-4(A) NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by [~~Subsection D of Section 10-8-4~~] Section 10-8-4(D) NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one (1) day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises before trial, notice shall be served on each party in the manner prescribed by Rule 3-203 NMRA.
- (2) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

C. Protection of persons subject to subpoenas.

(1) A party or an 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 that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)

(a) Unless specifically commanded to appear in person, a person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things need not appear in person at the hearing or trial.

(b) Subject to Subparagraph ~~[(2) of Paragraph D]~~ (D)(2) of this rule, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve ~~[upon all parties written objection to inspection or copying of any or all of the designated materials or inspection of the premises]~~ a written objection on all parties to the lawsuit or file a motion to quash the subpoena with the court. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(c) Absent a court order, a person commanded to produce and permit inspection and copying shall not respond to the subpoena before the expiration of fourteen (14) days after the date of service of the subpoena.

(3)

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

(i) fails to allow reasonable time for compliance,
(ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
(iii) subjects a person to undue burden.

(b) The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena if a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development or commercial information,
(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial.

If the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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

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

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

E. **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. [As amended, effective January 1, 1994; May 1, 1994; May 1, 2002; as amended by Supreme Court Order No. _____, effective _____.]



Rule Proposal Comment Form

1 message

mailservices@sks.com <mailservices@sks.com>

Mon, Mar 30, 2020 at 3:36 PM

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov

Your Name

David W. Frizzell

Phone Number

5052284974

Email

david.w.frizzell@gmail.com

Proposal Number

2020-010

Comment

Regarding proposal 2020-010:

The proposal to amend Rule 1-045 is not sufficiently clear to allow a person served to evaluate whether the per diem fee is required with the service of the subpoena. Specifically, how will a witness determine, under subsection B(2)(a), if he or she is "to be paid from funds appropriated . . . for payment of state witnesses?" And what exactly does "by processing for payment to such witness the fee" mean? For example, will a subpoena, issued by a District Attorney for a witness in a criminal case, state on its face that the witness will receive a check for fees and mileage upon that witness's appearance at trial? Will the subpoena state on its face that the witness will be given such a check at trial or will the witness be required to submit some application for his or her fees and mileage? How will an attorney, counseling a person under subpoena, know whether the witness may rely on subsection B(2)(b) to avoid the obligation to appear?

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