

The Sedona Conference Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition (January 2020 Public Comment Version)

Developments since the 2008 edition of *The Sedona Conference Commentary on Non-Party Production and Rule 45 Subpoenas* have led to significant revisions and additions now included in this *Second Edition*. Federal Rule of Civil Procedure 45 (Rule 45) was revised substantially in 2013. The 2015 amendments to the Federal Rules of Civil Procedure also impact Rule 45. The rise of cloud computing has put appreciable amounts of party data into the hands of non-parties, leading to increased use of Rule 45 subpoenas, in turn resulting in a significant growth of the case law under Rule 45.

Section II of this *Commentary* briefly explains the major revisions to Rule 45 made by the 2013 Rules amendments, as well as the effect of the 2015 Rules amendments.

Section III of this *Commentary* proposes an approach for determining whether a party has possession, custody, or control of information that may make a non-party subpoena inappropriate. In other words, if the non-party has possession or custody of electronically stored information (ESI) but a party retains control, the information should be obtained from the party under Rule 34, not from the non-party under Rule 45.

Section IV of this *Commentary* deals with preservation. A letter or similar request for the preservation of evidence generally does not create a non-party preservation obligation. In most cases, receipt of a properly served subpoena only obligates a non-party to take reasonable steps to produce the requested materials and does not obligate the non-party to initiate a formal legal hold process. Rather, the non-party's obligation is to ensure the requested information is not destroyed during the compliance period. However, once a non-party has complied with a subpoena by producing responsive documents and ESI, the non-party has no duty to preserve them. Because Rule 45(d)(2)(B)(ii) places no time limit for a party to move to compel production of information sought by a subpoena, this *Commentary* accordingly encourages a non-party to provide a specific date after which it will no longer retain the documents or ESI that it objects to producing. Such a step thereby places the requesting party on notice of the date by which the requesting party needs to determine the completeness of the production and make a motion to compel.



The longest section of this *Commentary*, Section V, deals with the related concepts of sanctions under Rule 45(d)(1), cost shifting under Rule 45(d)(2)(B)(ii), and quashing or limiting the scope of a subpoena under Rule 45(d)(3). Section V analyzes the now extensive case law under each of these approaches. This *Commentary* focuses on case law discussing the importance of properly objecting within the required 14 days in order to benefit from the rule’s mandatory cost-shifting component. There is also detailed discussion on what constitutes undue burden under the various subsections of Rule 45, including when and how courts have relieved non-parties of their obligations under a subpoena due to undue burden under these subsections.

Finally, Section VI sets forth “Practice Pointers” for both parties and non-parties dealing with a Rule 45 subpoena.

The full text of *The Sedona Conference Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition* is available free for individual download from The Sedona Conference website at https://thesedonaconference.org/publication/Commentary_on_Non-Party_Production_and_Rule_45_Subpoenas.

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