

SUBPOENA FOR RULE 2004 EXAMINATION

Purpose of the Form

This subpoena is for use in conjunction with an examination held pursuant to Fed. R. Bankr. P. 2004. It may be used to compel an entity to appear and testify and/or to produce documents or other objects for inspection and copying.

Variations of this form are used in adversary proceedings and bankruptcy cases. Form B 255 is used to compel a witness to appear and testify at a trial or deposition in an adversary proceeding. The form also can be used to command the production of documents or objects or the inspection of premises. Form B 256 is used for the same functions in a bankruptcy case.

Rule 45 of the Federal Rules of Civil Procedure, which is incorporated by Fed. R. Bankr. P. 9016, governs the use of subpoenas. The subpoena forms for use in bankruptcy cases and proceedings were revised when Rule 45 was amended extensively in 1991.

Applicable Law and Rules

1. Fed. R. Bankr. P. 2004 permits any party in a bankruptcy proceeding to obtain a court order for the examination of any entity. (A copy of the order should be attached to the subpoena.) Rule 2004(b) limits the scope of the examination to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 . . . the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or the formulation of a plan.
2. Rule 2004(c) provides that "the attendance of an entity for examination and the production of documentary evidence may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial."
3. Rule 2004(d) provides that "the court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending."
4. "Subdivision (d) [of Rule 2004] applies only to the debtor and a subpoena need not be issued. There are no territorial limits on the service of an order on the debtor." 1983 Advisory Committee Note.

5. Fed. R. Bankr. P. 9016 incorporates Fed. R. Civ. P. 45.
6. A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the trial or hearing 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).
7. At the request of a party, the clerk shall issue a subpoena for a trial, hearing, or deposition. Rule 45(a)(3).
8. 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).
9. 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.
10. In addition to compelling testimony, a subpoena can require the person to whom it is directed "to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person . . . at a time and place therein specified." Rule 45(a)(1)(C).
11. A subpoena for production of evidence may be joined with a subpoena to appear at trial or hearing, or may be issued separately. Rule 45(a). If issued separately, a subpoena for production shall issue from the court for the district in which the production is to be made. Rule 45(a)(2).
12. A person commanded to produce documents or objects need not appear in person at the time of production unless commanded to appear and testify. Rule 45(c)(2)(A).
13. A subpoena may require a person who is not a party or an officer of a party to travel to an examination 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 from anyplace within the state. Rule 45(c)(3)(A)(ii).

14. If a person who is not a party or an officer of a party resides beyond the geographic limits of the subpoena, the order for the Rule 2004 examination may be entered by the court where the case is pending, certified by that court, and then filed in the district where the person resides. Then the subpoena is issued in the name of the latter court and the examination is held in the district where the person resides. In re Texas International Co., 97 B.R. 582 (Bankr. C.D. Calif. 1989).
15. 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).
16. Service of a subpoena upon a person named therein 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).
17. An entity other than the debtor shall not be required to attend a Rule 2004 examination unless the mileage and one day's witness fee are tendered first. Rule 2004(e). If the witness to be examined is the debtor, no fees need be tendered, unless the deposition is to be taken more than 100 miles from the debtor's residence. If the debtor lives more than 100 miles away, the debtor shall be tendered mileage for the excess of 100 miles. Rule 2004(e).
18. Computation of the fees and allowances to be paid a witness for attending a Rule 2004 examination is governed by 28 U.S.C. § 1821.
19. As of July 1, 1999, the witness fee was \$40 per day, 28 U.S.C. § 1821(b), and the mileage allowance for an automobile was 31 cents per mile, 41 C.F.R. § 301-10.303. Computation of the mileage allowance is set by a uniform table maintained by the General Services Administration. 28 U.S.C. § 1821(c)(2).
20. 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 without the district that is within 100 miles of the place of examination, 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).
21. Subpoenas are an exception to the nationwide service of process in bankruptcy cases. Fed. R. Bankr. P. 7004(d).

22. "Proof of service when necessary shall be made by filing with the clerk of the court by 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." Rule 45(b)(3).
23. The duties of a person responding to a subpoena are set out in Rule 45(d). In particular, the rule provides that 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 subpoena.
24. Rule 45(e) provides that failure to obey a subpoena without adequate excuse may be deemed a 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. "Case No.": Insert the bankruptcy case number assigned by the court when the case was filed.
4. "Chapter": Insert the chapter of the Bankruptcy Code under which the case is pending.

To

Insert in this box the complete name and address of the witness to be examined. (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

Check the appropriate box or boxes.

Place

Insert in this box the complete address of the place where the witness is to appear and be examined. The address should include the name of the building, the room number, street number and name, city, state, and zip code.

Date and Time

Insert in this box the date and time of the Rule 2004 examination.

You Are Commanded to Produce

Insert in this box the exact description of any and all documents and objects the witness is required to produce. If no documents and objects are required, enter "NONE" in this box.

Place

Insert in this box the complete address of the place where the witness is to produce the documents and objects. The address should include the name of the building, the room number, street number and name, city, state, and zip code. If no documents and objects are required, enter "Not Applicable" in this box.

Date and Time

Insert in this box the date and time at which the witness is to produce the documents and objects. If no documents and objects are required, enter "Not Applicable" in this box.

Issuing Officer Signature and Title

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

Issuing Officer's Name and, 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, in this box. 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 on this line the month, day and year the certificate is signed.

Signature of Server: - The person who served the subpoena must sign. This must be an ORIGINAL signature.

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)(D) requires that every subpoena set forth the text of subdivisions (c) and (d) of the rule. Furthermore, the rule 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. Rule 45(c)(1).

General Information for the Clerk

Fed. R. Bankr. P. 2004 permits any party in a bankruptcy proceeding to obtain a court order for the examination of any entity, subject to certain limitations. Form B 254, Subpoena for Rule 2004 Examination, is used to compel an entity to appear and testify at an examination. The subpoena also can be used to require the entity to produce documents or other objects.

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 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.

If the person to be examined resides outside of the district where the bankruptcy case is pending or if the production is to take place in another district, the subpoena for the Rule 2004 examination may be issued in the name of the bankruptcy court where the examination or production is to take place. Rule 45(a)(2). When a clerk issues a subpoena for an examination or production in a case which is pending in another district, the clerk in the second district should create a special file for noting the issuance of the subpoena and filing the related papers, including a certified copy of the order for the Rule 2004 examination issued by the court where the case is pending.