UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

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CLERK'S
ANNOUNCEMENT
93-110

UPDATED TO REFLECT MILEAGE ADJUSTMENT AS OF 1/1/03.

TO: Court Users

FROM: Thomas J. Hart, Clerk

DATE: May 13, 1993

RE: **Subpoenas in Bankruptcy Court**

Attached are the following items:

1. An article titled Civil Subpoenas in Federal Court as appeared in the November, 1992 Court Administration Bulletin.

2. Bankruptcy subpoena forms:

   a. B254 - Subpoena for Rule 2004 Examination

   b. B255 - Subpoena in an Adversary Proceeding

   c. B256 - Subpoena in a Case Under the Bankruptcy Code.

The forms have no copyright. Duplicate them as needed. Extras are available from this Court.

COURT ADMINISTRATION BULLETIN

A monthly journal of the Court Administration Division

Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20544 *November 1992*

CIVIL SUBPOENAS IN FEDERAL COURT

See the following pages for an article by
Robert H. Shumwell
Clerk & Magistrate Judge*
U.S. District Court
Western District of Louisiana

The *Court Administration Bulletin* is a non-copyrighted, in-house, not-for-profit, monthly government newsletter. It is produced by the Court Administration Division (CAD) of the Administrative Office (AO) of the United States Courts. Circulation includes the justices and various departments of the Supreme Court; all Article III, bankruptcy, and magistrate judges; all court executives and clerks of court; Congressional members of the various House and Senate committees concerned with the Federal Judiciary; and the Brookings Institute, National Center for State Courts, Center for Public Resources (ADR), and other court organizations, political science departments, and law schools** upon request (and if they supply self-addressed, post-paid envelopes).

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* There are a few of these combination District Court Clerk–Magistrate Judge positions around the country — very few, and decreasing.

** The same free copy policy applies to law offices. The Bulletin weighs about 2 ounces. Currently, that's $.52 postage.

generated. The 50 cents per notice fee continues to apply to all new and pending cases for all other chapters; *i.e.*, chapters 9, 11, and 12, to the extent there is an estate. The approval of the new miscellaneous administrative fee does not preclude trustees from seeking reimbursement for noticing they perform. In addition, the miscellaneous administrative fee is due at the time of filing and cannot be paid in installments; *i.e.*, it is not subject to Bankruptcy Rule 1006(b), which applies only to filing fees.

The new miscellaneous administrative fee of $30 in chapter 7 and chapter 13 cases, as well as the 50 cents per notice fee in all other chapters and in pending chapter 7 and chapter 13 cases, should be credited to Fund 092037.

The new miscellaneous administrative fee becomes effective December 1, 1992. The AO will keep courts advised as to future changes to the fee structure as a result of the Bankruptcy Committee's study noted above regarding an alternative fee arrangement for chapter 11 and chapter 7 asset cases.

Sources: *Memoranda*, Director Mecham, Nov. 4 & Nov. 20, 1992.

CIVIL SUBPOENAS IN FEDERAL COURT

Robert H. Shemwell

Traditionally, the clerk of court has issued all civil subpoenas in the United States District Court. On Dec. 1, 1991, this changed. Under FRCP 45(a)(3) attorneys now have the power to issue subpoenas in civil actions. This was only one of the changes in the area of civil subpoenas resulting from the Dec. 1, 1991 amendments to the Federal Rules of Civil Procedure. FRCP 45 was essentially rewritten with significant impact in the area of subpoenas.

The newly created power of an attorney to issue civil subpoenas carries with it potential perils since FRCP 45(c)(1) provides sanctions for abuse of the subpoena power "which may include, but is not limited to, lost earnings and a reasonable attorney fee." Therefore it is important that attorneys be aware of the rules governing issuance of civil subpoenas.

Court Issuing a Subpoena

In issuing a subpoena, the first issue to decide is the proper court from which the subpoena should issue. The general rule is that a court may only issue subpoenas for proceedings which will take place within the boundaries of its district. This means the district where a witness is to appear for a trial subpoena or the district where a witness is to testify in response to a deposition subpoena. It could also mean the district where production or inspection is to be made in the case of a subpoena to produce or inspect documents or things under FRCP 34.

Form of a Subpoena

FRCP 45(a)(1) sets forth the form requirements for a civil subpoena. Forms are available at the office of the clerk of court. In the Western District of Louisiana, the clerk of court will also make forms available to attorneys on a computer disk in WordPerfect 5.1 if the attorney provides the disk. Attorneys may design their own form so long as the requirements of FRCP 45(a) are met.

Service of a Subpoena

The rules for service of a subpoena did not change with the recent amendments. Service of a subpoena may still be made "by any person who is not a party and is not less than 18 years of age." FRCP 45(b)(1). Service is accomplished "by delivering a copy thereof to such person" and "tendering to that person the fees for one day's attendance and the mileage allowed by law." FRCP 45(b)(1). The United States is exempted from the requirement that fees must be tendered at the time of service. FRCP 45(b)(1). While it has not been judicially determined, "mileage" to be tendered is generally understood to be roundtrip mileage "from such witness's residence by the shortest practical route in going to and returning from the place of attendance." 28 USCA § 1821(c)(1).

Witness Fees and Mileage

Witness fees and mileage are determined in accordance with 28 USC § 1821. Currently, a

witness is entitled to "$40 per day for each day's attendance" and 25 cents per mile. 28 USC § 1821(b) & (c)(2). The mileage allowance is the mileage allowed to government employees under 5 USC § 5704 and is subject to change from time to time.* In addition to mileage and the witness fee, a witness is entitled to a subsistence allowance if required to remain overnight. 28 USC § 1821(d). The rate of the subsistence allowance is the same rate paid to government employees at the specific location under 5 USC § 5702(a).

Geographic Scope of a Subpoena

The distinction that existed between the scope of a trial subpoena and a deposition subpoena was eliminated in the recent amendment to FRCP 45. In Louisiana, a civil subpoena may be served at any place within the state. FRCP 45(b)(2); LSA-RS 13:3661; La. C.C.P. 1351 & 1356. A subpoena may also be issued to an out-of-state witness as long as the witness is located within 100 miles from a place of "deposition, hearing, trial, production or inspection" which is within the judicial district where the civil subpoena is issued. FRCP 45(b)(2).

Out-of-District Subpoenas

Attorneys often have a need to subpoena a witness for a deposition, for production of a document or inspection of premises in a district other than the district where the civil action is pending. Under the earlier version of FRCP 45 an attorney had to take the following steps:

- file a notice of deposition in the district where the action was pending;
- file proof of service of such notice of deposition in the district where the deposition was to be taken, which entailed a $20 fee; and
- request the clerk of that district court to issue a subpoena.

While this method of service of an out-of-district subpoena is still available when authorized by local rule, a greatly simplified alternative is now available. Under the current version of FRCP 45, an attorney may directly issue a subpoena for a deposition to be taken in another district merely by drawing up the subpoena in the name of the district court where the deposition is to be taken, without any fee or involvement of the clerk of either court. This simple procedure also applies to subpoenas for the production of documents or inspection of premises in other districts.

Proof of Service of a Subpoena

Proof of service of a subpoena normally does not have to be filed with the court. FRCP 45(b)(3) provides for filing of proof of service of a subpoena "when necessary." While Rule 45 does not say what "necessary" means, filing a proof of service of a subpoena may be "necessary" when court action is sought; *e.g.*, when making an application for an issuance of a bench warrant or seeking costs for failure of a witness to appear at a deposition.

Subpoena for the Production of Documents

Prior to Dec. 1, 1991, FRCP 34 requiring production of documents only applied to parties. Therefore, production of documents from a nonparty required scheduling of a deposition, issuance of a subpoena *duces tecum* and cancellation of the deposition after compliance with the subpoena *duces tecum*. FRCP 34 was amended to also apply to nonparties, thereby eliminating the necessity of setting a deposition. Under the current law, an attorney can directly issue a subpoena to a party or a nonparty "to produce documents and things or to submit to an inspection as provided in Rule 45." FRCP 34 (c). The witness does not have to appear in person as long as the documents are produced. FRCP 45(c)(2)(A). At least 14 days should be given to a person subpoenaed under FRCP 34 since there exists a right to serve an objection to production within 14 days. FRCP 45(c)(2)(B). If an objection is served on the attorney or party issuing the subpoena *duces tecum*, there is no obligation to produce unless compelled to do so by order of court. FRCP 45(c)(2)(B).

Protection of the Witness

While the amendment to FRCP 45 broadened the scope of a civil subpoena and gave attorneys the power to issue such subpoenas, the rights of the witness were not ignored. FRCP 45(c) was added to set forth protections for witnesses under

* Effective 1/1/03 mileage allowance is now 36 cents per mile.

subpoena. Attorneys are charged with the duty of taking "reasonable steps to avoid imposing undue burden or expense on a person" subject to a subpoena, which duty is enforced by an "appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee." FRCP 45(c)(1). Other protections are set forth including the right of a person subpoenaed under FRCP 34 to object and, in appropriate situations, to have a subpoena quashed or modified. FRCP 45(c). The text of subdivisions (c) and (d) of Rule 45, dealing with protection of witnesses and duties in responding, must appear on each subpoena.

Quashing or Modification of Subpoenas

If a subpoena "fails to allow reasonable time for compliance" or "subjects a person to undue burden," the court that issued a subpoena shall quash or modify the subpoena upon a timely motion. FRCP 45(c)(3)(A)(i) & (iv) provides for the quashing or modification of a subpoena if a nonparty is required to travel more than 100 miles. FRCP 45(c)(3)(A)(ii). However, if the nonparty was subpoenaed for a trial and there is a showing of "substantial need for the testimony or material that cannot be otherwise met without undue burden," the court may order the nonparty witness to appear under conditions set forth by the court. FRCP 45(c)(3)(B)(iii). A subpoena may also be quashed or modified under the following circumstances:

- "requires disclosure of privileged or otherwise protected material," FRCP 45(c)(3)(A)(iii);
- "requires disclosure of a trade secret or other confidential research, development or commercial information," FRCP 45(c)(3)(B)(i); or
- "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," FRCP 45(c)(3)(B)(ii).

Production of Documents Pursuant to a Subpoena

When a person is subpoenaed under FRCP 34 to produce documents, the person can choose how to produce the documents. The documents can either be produced "as they are kept in the usual course of business" or the person "shall organize and label them to correspond with the categories in the demand." FRCP 45(d)(1).

Withholding Subpoenaed Information Pursuant to a Privilege

The amended rules give the witness the right to have a subpoena quashed if it "requires disclosure of privileged or otherwise protected matter and no exception or waiver applies." FRCP 45(c)(3)(A)(iii). However, this protection has a cost. When a privilege is claimed, the witness has the obligation to expressly state the privilege and support it with:

> 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.

FRCP 45(d)(2).

Failure to Comply With a Subpoena

The rule that failure to comply with a subpoena "without adequate excuse" may be deemed a contempt of court has not been changed. FRCP 45(e). A second sentence was added to FRCP 45(e) setting forth at least one adequate cause for failure to comply with a subpoena; namely when a non-party is required to attend or produce at a place more than 100 miles away without a court order. This provision seems to suggest that although a valid subpoena may be issued to a nonparty statewide, the nonparty is not in contempt of court if the subpoena requires the nonparty to travel more than 100 miles, unless that nonparty is required by the court to appear at trial pursuant to FRCP 45(c)(3)(B)(iii).

The changes in the rules governing subpoenas give attorneys a great deal of flexibility which did not previously exist. All attorneys should familiarize themselves with these new procedures to take full advantage of the changes, while avoiding any potential pitfalls.

.....

Robert Shemwell has served as magistrate judge for the U.S. District Court for the Western District of Louisiana since 1984 and clerk of court for the U.S. District Court since 1975.

■

United States Bankruptcy Court

_____ DISTRICT OF _____

In re ,

Debtor

SUBPOENA FOR RULE 2004 EXAMINATION

Case No. _____

To:

Chapter _____

☐ YOU ARE COMMANDED to appear and testify at an examination under Rule 2004, Fed.R.Bankr.P., at the place, date, and time specified below. A copy of the court order authorizing the examination is attached.

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE	DATE

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____

Rule 45, Fed.R.Civ.P., Parts (c) & (d) made applicable in cases under the Bankruptcy Code by Rule 9016, Fed.R.Bankr.P.

(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) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the 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 the 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.

(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 a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, 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

(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

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

(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 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 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.

United States Bankruptcy Court

_____ DISTRICT OF _____

In re

Debtor

Plaintiff

V.

Defendant

To:

SUBPOENA IN AN ADVERSARY PROCEEDING

Case No. _____

Chapter _____

Adv. Proc. No. _____

☐ YOU ARE COMMANDED to appear in the United States Bankruptcy Court at the place, date, and time specified below to testify in the above adversary proceeding.

PLACE	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above adversary proceeding.

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any subpoenaed organization not a party to this adversary proceeding shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify, Fed.R.Civ.P. 30(b)(6) made applicable in adversary proceedings by Rule 7030, Fed.R.Bankr.P.

ISSUING OFFICER SIGNATURE AND TITLE	DATE

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

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SIGNATURE OF SERVER

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ADDRESS OF SERVER

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Rule 45, Fed.R.Civ.P., Parts (c) & (d) made applicable in cases under the Bankruptcy Code by Rule 9016, Fed.R.Bankr.P.

(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) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the 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 the 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.

(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 a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, 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

(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

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

(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 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 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.

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United States Bankruptcy Court

_____ DISTRICT OF _____

In re ,

Debtor

SUBPOENA IN A CASE UNDER THE BANKRUPTCY CODE

Case No. _____

To:

Chapter _____

☐ YOU ARE COMMANDED to appear in the United States Bankruptcy Court at the place, date, and time specified below to testify in the above case.

PLACE	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any subpoenaed organization not a party to this proceeding shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify, Fed.R.Civ.P. 30(b)(6) made applicable to this proceeding by Rule 7030, Fed.R.Bankr.P. See Rules 1018 and 9014, Fed.R.Bankr.P.

ISSUING OFFICER SIGNATURE AND TITLE	DATE

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

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SIGNATURE OF SERVER

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ADDRESS OF SERVER

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(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the 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 the 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.

(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 a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, 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

(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

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

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(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 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.

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(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.

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