

## 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 to produce documents for inspection and copying. A subpoena is not necessary to compel the debtor to attend a Rule 2004 examination. **Service of the order for the examination is sufficient.**

Variations of this form are used in adversary proceedings and bankruptcy cases. Form 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 books, documents, electronically stored information, or tangible things for inspection and copying or to permit the inspection of premises. Form 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.** 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. 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 chapter 11 cases, chapter 12 cases, and chapter 13 cases, 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 documents . . . may be compelled in the manner provided in Rule 9016 for the attendance of a witnesses at a hearing or trial.”
3. Fed. R. Bankr. P. 9016, which incorporates Fed. R. Civ. P. 45, governs the use of a subpoena to produce evidence, to permit inspection of premises, or to command attendance at a trial, hearing, or deposition. Rule 45(a).

4. A subpoena is not necessary to compel the debtor to attend an examination under Rule 2004. 1983 Advisory Committee Note. Service of a copy of the order for the examination is sufficient to compel the debtor's attendance. There are no territorial limits on the service of an order for a Rule 2004 examination on the debtor. Rule 2004(d).
5. Because Rule 2004(d) applies only to the debtor, a subpoena must be used to compel a nondebtor to attend.
6. Although the order for the Rule 2004 examination is issued by the court in which the bankruptcy case is pending, the subpoena commanding attendance at the examination is issued by the court for the district in which the examination is to be held. *See*, Rule 45(a)(2).
7. 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).
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 the court for the district in which a Rule 2004 examination is to be held if the attorney is admitted to practice in that district or if the examination was ordered in a bankruptcy case in a court in which the attorney is authorized to practice. Rule 2004(c).
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 documents, electronically stored information, or tangible things or to permit the inspection of premises . . ." Rule 45(a)(1)(C).
11. 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 2004(c), Rule 45(c)(3). The debtor may be ordered to attend an examination at any time and place designated by the court. Rule 2004(d).
12. If a person resides beyond the geographic limits of a subpoena from the court where the bankruptcy case is pending, the order for the Rule 2004 examination

may be entered and certified by the court where the case is pending, 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).

13. 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).
14. 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).
15. 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 debtor is to be examined, 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).
16. 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.
17. 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 the mileage allowance is set by a uniform table maintained by the General Services Administration. 28 U.S.C. § 1821(c)(2).
18. Subject to the restrictions in Rule 45(c)(3)(A)(ii), a subpoena may be served at any place within the district where 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).
19. Subpoenas are an exception to the nationwide service of process in bankruptcy cases. Fed. R. Bankr. P. 7004(d).

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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.

20. “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).
21. 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).
22. 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. 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).
23. 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. “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 followed by “YOU ARE COMMANDED”**

Check the appropriate box or boxes.

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

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 Comanded to Produce (second checkbox)**

Insert in this box 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 in this box 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 in this box 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.”

**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.

**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, 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)(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**

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 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, 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.

If the examination is to be conducted outside of the district where the bankruptcy case is pending, the subpoena for the Rule 2004 examination may be issued in the name of the bankruptcy court where the examination is to take place. Rules 2004(c) and 45(a)(2). When a clerk issues a subpoena for an examination in a case which is pending in another district, the issuing clerk 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.