CONFIDENTIALITY AND PRIVILEGE IN COLORADO

I. CONFIDENTIALITY AND PRIVILEGE ARE SEPARATE CONCEPTS

Confidential: Entrusted with the confidence of another or with her secret affairs; intended to be held in confidence or kept secret; treated as private or not for publication. *Black's Law Dictionary, Sixth Edition.*

Privilege: Information made by certain persons within a protected relationship which the law protects from forced disclosure. *Black's Law Dictionary, Sixth Edition*.

The distinctions between confidential and privileged information is important, particularly as it relates to discoverability and production of information within the context of litigation.

II. THE RIGHT TO PRIVACY AND CONFIDENTIALITY

- An interested person may oppose discovery on grounds that it would violate his/her right to privacy or confidentiality.
- This right to personal privacy is grounded in the Bill of Rights and the 14th Amendment. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003).
- The right to privacy "includes the power to control what we shall reveal about our intimate selves, to whom, and for what purpose." *Martinelli v. District Court*, 612 P.2d 1083, 1091 (Colo. 1980) (personnel files); *Stone v. State Farm Mutual Auto Ins. Co.*, 185 P.3d 150 (Colo. 2008) (tax returns); *People In Interest of E.G.*, 2015 COA 18, 2015 WL 795121, ¶ 15 (Colo.App. 2015) (defense access to crime scene).
- "When the right to privacy is at issue, the trial court must give the discovery request special consideration and balance an individual's right to keep personal information private with the general policy in favor of broad disclosure." *In re District Court***,** 256 P.3d 687, 690-691 (Colo. 2011).

Applying the Balancing Test—Procedural Steps regarding access to confidential information

- First, the requesting party must prove that the information sought is relevant to the subject of the action;
- Second, the party opposing discovery must show that he/she has a legitimate expectation of privacy with respect to the information;
- Third, if the party opposing discovery meets this threshold burden, the requesting party must prove either (a) disclosure is required to serve a compelling state interest or (b) there is a compelling need for the information; and,
- Fourth, if the requesting party satisfies the third step, it must also show either (a) the information is not available for other sources or (b) it is using the least intrusive means to obtain the information.

*In re District Court***,** 256 P.3d 687, 690 (Colo. 2011).

III. PARTICULAR CONFIDENTIATLITY STATUTES

Child Abuse and Neglect Records

Confidentiality: Generally, records and reports of child abuse or neglect are confidential. C.R.S. 19-1-307(1)(a). Child abuse and neglect records may include materials that are privileged under section 13-90-107, C.R.S.

Statutory Exceptions: There are numerous statutory exceptions to confidentiality. For example, access is allowed to the district attorney, law enforcement agency, and social services department conducting an investigation of child abuse or neglect (see, C.R.S. 19-3-308(5.5) and -307(3)); the child, through a guardian ad litem; and a parent, guardian, legal custodian, or other person or agency responsible for the health or welfare of the child. C.R.S. 19-1-307(2)(a), (c), (d), and (e).

Judicially Determined Exceptions: Discovery of child abuse and neglect records is governed by C.R.S. 13-90-107, not Crim.P. 16. *People v. Jowell*, 199 P.3d 38, 42 (Colo. App. 2008). A court may allow access to other persons "for good cause," C.R.S. 19-1-307(2)(i), or "upon its finding that access to such records may be necessary for determination of an issue before such court, but such access shall be limited to in camera inspection unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue then pending before it," C.R.S. 19-1-307(2)(f).

Discovery at Defendant's Request: To justify *in camera* review, a defendant must identify the type of information sought and explain why disclosure of that information "is necessary," i.e., relevant and material. *Jowell* at 42.

Discovery at Prosecutor's Request: "[I]f the prosecutor believes that a social services record contains material exculpatory information, he or she must ask the court to review the record in camera and to find that public disclosure 'is necessary for the resolution of an issue,' under subsection (2)(f)." *Id.*

In Camera Review: A court should permit discovery of information that is materially favorable (*i.e.*, exculpatory or impeaching) to the defendant and inculpatory information that would materially assist in preparing a defense.

Id. at 43. If the records contain information that would otherwise be subject to automatic disclosure, that fact weighs in favor of disclosure. *Id*.

Protection of Reporting Parties: A reporting party is immune from liability applies unless a court determines that his/her report was willful, wanton, and malicious. C.R.S. 19-3-309.

Educational Records

Discoverability: The discoverability of school records depends on the combined effect of C.R.S. § 22-1-123(3) and 20 U.S.C. 1232g(b)(2)(B), the Family Education Rights and Privacy Act ("FERPA"). Neither statute creates an absolute privilege against disclosure.

Discovery Protocol: Two appellate cases, *People v. Bachofer*, 192 P.3d 454, 460 (Colo.App. 2008), and *People v. Wittrein*, 221 P.3d 1076, 1085 (Colo. 2009), prescribe conditions precedent for discovery of school records:

- The trial judge must determine whether the defendant articulated a good faith, specific need for information contained in school records.
- If the defendant meets this threshold showing of need, a trial judge must issue an order or authorize issuance of a subpoena requiring notice to the student or his/her parents and a hearing at which the student or his/her parents will have an opportunity to respond to the defendant's request for disclosure of school records.
- At hearing a trial judge must balance the defendant's need for the information against the privacy interests of the student and his/her parents.
- If the trial court, after considering all relevant case-specific factors, determines that the defendant's need outweighs any privacy interests, then it should review the records *in camera*.
- After conducting an *in camera* review the trial court may order disclosure of records that contain information materially favorable to the defendant and inculpatory information that will be of material assistance in preparing a defense.

Applying the Balancing Test—Relevant Factors: "[T]he court should consider (1) the nature of the information sought, (2) the relationship between this information and the issue in dispute, and (3) the harm that may result from disclosure." *People v. Bachofer*, 192 P.3d 454, 460-461 (Colo.App. 2008).

Victims' Compensation Records

Materials of a crime victim compensation board or a district attorney received, made, or kept to process a claim on behalf of a crime victim are confidential. Such records may not be provided through discovery except upon court order after a showing that such records exist and that releasing the documents "will not pose any threat to the safety or welfare of the victim or any other person whose identity may appear in board's records, or violate any other privilege or confidentiality right." The court may conduct an in camera review, without either party present, to determine these issues. C.R.S. 24-4.1-107.5(2) (as amended by HB 15-1035).

IV. STATUTORY PRIVILEGES

Statutory Privileges—General Concepts

"[S]tatutory privileges must be strictly construed and the claimant of a privilege bears the burden of establishing the applicability of the privilege." *People v. District Court*, 743 P.2d 432, 435 (Colo. 1987).

Statutory privileges share four characteristics:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Beth Israel Hospital v. District Court, 683 P.2d 343, 345 (Colo. 1984).

Asserting a Statutory Privilege

Burden of Proof: The claimant of a privilege bears the burden of establishing its applicability.

Privilege Log: The claimant must provide a privilege log in response to a discovery request. The privilege log must (a) explain the privilege being claimed as to each communication and (b) identify the documents withheld with sufficient particularity to permit the requesting party and the court to evaluate the claim.

Traverse: If the discovery dispute cannot be resolved by the parties, the requesting party may ask the trial court to resolve the dispute and perform an *in camera* inspection, if necessary.

In camera review will be limited to disputed documents.
Alcon v. Spicer, 113 P.3d 735, 740-742 (Colo. 2005).

Statutory Privileges Recognized in Colorado

Marital/Spousal – C.R.S. § 13-90-107(1)(a)(I)
Civil Union Partnership – C.R.S. § 13-90-107(a.5)(I)
Attorney/Client – C.R.S. § 13-90-107(b)
Clergy member/Minister/Priest/Rabbi – C.R.S. § 13-90-107(c)
Physician/Patient – C.R.S. § 13-90-107(d)
Public Officer – C.R.S. § 13-90-107(e)
Certified Public Accountant – C.R.S. § 13-90-107(f)(I)
Licensed Psychotherapist/Patient – C.R.S. § 13-90-107(g)
Qualified Testifying Interpreter – C.R.S. § 13-90-107(h)
Confidential Intermediary – C.R.S. § 13-90-107(i)
Voluntary Self-Evaluation – C.R.S. § 13-90-107(j)(I)(A)
Victim Advocate – C.R.S. § 13-90-107(k)(I)
Parent/Child – C.R.S. § 13-90-107(I)(I)
Law Enforcement or Firefighter Peer Support Member – C.R.S. § 13-90-107(m)(I)
Emergency Medical Service Provider – C.R.S. § 13-90-107(m)(1.5)
Newsperson – C.R.S. § 13-90-119
Statements of Juvenile in Course of Court-Ordered Treatment – 19-3-207(2.5)

V. SELECTED STATUTORY PRIVILEGES

Parent/Child Derivative Privilege, C.R.S. 13-90-107(1)(l):

A parent may not be examined as to any communication made in confidence by the parent's minor child to the parent when the minor child and the parent were in the presence of an attorney representing the minor child, or in the presence of a physician who has a confidential relationship with the minor child pursuant to paragraph (d) of this subsection (1), or in the presence of a mental health professional who has a confidential relationship with the minor child pursuant to paragraph (g) of this subsection (1), or in the presence of a clergy member, minister, priest, or rabbi who has a confidential relationship with the minor child pursuant to paragraph (c) of this subsection (1).

Exceptions: This privilege does not apply to a civil action by one parent against the other; a civil action in which parent and child are adverse parties; mental health commitment proceedings brought against either a parent or the child; a guardianship or conservatorship action brought because of a mental or physical condition of either a parent or the child; an action for termination or relinquishment of the parent-child legal relationship; a dependency or neglect action; support proceedings against a parent; and a criminal action brought against a parent, a parent's spouse, a parent's partner in a civil union, a sibling, or a step-sibling in which the child is alleged to be a victim. C.R.S. 13-90-107(1)(l)(II).

Waiver: "[This privilege] may be waived by express consent to disclosure by the minor child who made the communication or by failure of the minor child to object when the contents of the communication are demanded." C.R.S. 13-90-107(1)(l)(I).

Inadmissibility of Certain Evidence, C.R.S. 19-3-207:

(1) Upon the request of the county attorney, special county attorney, or the city attorney of a city and county, the court shall set a hearing to determine the admissibility in a subsequent criminal proceeding arising from the same episode of information derived directly from testimony obtained pursuant to compulsory process in a proceeding under this article. . . . The court shall not enter such an order if the district attorney presents prima facie evidence that the inadmissibility of such information would substantially impair his or her ability to prosecute the criminal case.

(2.5) Notwithstanding any other provision of law to the contrary, a juvenile's statements to a professional made in the course of treatment ordered by the court pursuant to this article shall not, without the juvenile's consent, be admitted into evidence in any criminal or juvenile delinquency case brought against the juvenile; except that the privilege shall not apply to statements regarding future misconduct.

C.R.S. 19-3-207(1), (2.5).

Scope of Subsection (1): Subsection (1) must be initiated by the petitioner in a dependency or neglect action. Subsection (1) is limited to evidence derived directly from testimony obtained through compulsory process in such a proceeding.

Caveat: Because subsection (1) does not provide for notice to the defense it may be vulnerable to a constitutional challenge based on the due process clause or the equal protection clause.

Scope of Subsection (2.5): Subsection (2.5) is limited to a juvenile's statements to a professional in the course of court-ordered treatment. Without consent, such statements are inadmissible in a criminal or juvenile delinquency case brought against the juvenile.

Exception: Statements regarding future misconduct.

Crimes Against At-Risk Adults and At-Risk Juveniles, C.R.S. 18-6.5-104:

The statutory privileges provided in section 13-90-107(1), C.R.S., shall not be available for excluding or refusing testimony in any prosecution for a crime committed against an at-risk adult or an at-risk juvenile pursuant to this article.

Scope: Crimes against at-risk adult or an at-risk juvenile, as defined by C.R.S. 18-6.5-102(9) and listed in C.R.S. 18-6.5-103, include assault in the first, second, and third degree; robbery; theft in the presence of a victim; caretaker neglect; sexual assault; unlawful sexual contact; sexual assault on a child; sexual assault on a client by a psychotherapist; criminal exploitation; and attempt, solicitation, and conspiracy to commit those offenses.

Caveat: This exception may be subject to constitutional limitations (*e.g.*, effective assistance of counsel, due process of law, fair trial, privilege against self-incrimination).

VI. OVERCOMING A STATUTORY PRIVILEGE

Waiver/Consent: If a statutory privilege applies, the only basis for allowing **any disclosure of privileged information** is waiver by or consent of the privilege holder. *People v. Tauer*, 847 P.2d 259, 261 (Colo.App. 1993); *People v. District Court***,** 719 P.2d 722, 727 (Colo. 1986).

A GAL's Discretion: In some cases it may be in the child's best interests to permit disclosure of privileged information. A GAL's client is the best interests of the child. CJD 04-06(V)(B) (Revised 3/15/13). "[A]n attorney's obligation not to reveal confidential information provided by the child does not apply if the information must be revealed to ensure the child's best interests." *Id*. A GAL or Child's Representative must consult with the child in a developmentally appropriate manner, consider the child's position regarding disposition of a matter, and explain to the child the limitations on confidentiality. *Id.*

Burden of Proof: "[T]he burden of establishing a waiver is on the party seeking to overcome the claim of privilege. A waiver must be supported by evidence showing that the privilege holder, by words or conduct, has expressly or impliedly forsaken his claim of confidentiality with respect to the information in question." *Clark v. District Court*, 668 P.2d 3, 7 (Colo. 1981) (citations omitted); see also, *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002), *L.A.N. v. L.M.B.*, 292 P.3d 942, ¶ 30 (Colo. 2013). A waiver may occur when a witness testifies to the substance of any treatment sessions or otherwise places his/her post-assault mental health in issue. *People v. Sisneros*, 55 P.3d 797, 801 (Colo. 2002).

Limited Scope Waivers: The *L.A.N.* opinion allows "limited-scope waivers of the psychotherapist-patient privilege." *Garcia v. Patton*, 2014 W.L. 5358449 (Colo. 2005). In the event of a dispute, a court must determine the scope of a waiver. *L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. 2013).

When Waiver Does Not Occur: A victim in a criminal case does not waive the psychologist-patient privilege by filling out a victim's impact statement, *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004); testifying at a preliminary hearing, *People v. Sisneros*, 55 P.3d 797 (Colo. 2002); or by testifying at trial to the emotional effects of an alleged assault, *People v. Silva*, 782 P.2d 846 (Colo. App. 1989). Unauthorized disclosure of privileged information to a police officer does not result in waiver. *People v. Tauer*, 847 P.2d 259 (Colo. App. 1993) (treating psychologist disclosed privileged information to police officer); *People v. Pressley*, 804 P.2d 226 (Colo.App. 1990) (police officer observed two treatment sessions through one-way mirror). An express waiver of the physician-patient privilege with respect to hospital records does not result in an implied waiver of the psychologist-patient privilege with respect to other, subsequent treatment records. *People v. Pressley*, 804 P.2d 226 (Colo.App. 1990); *People v. Wittrein*, 221 P.3d 1076, 1082-1084 (Colo. 2009).

No Balancing Test: A privilege defined by section 13-90-107 ***is not subject to judicial balancing of competing interests***. *Clark v. District Court*, 668 P.2d 3 (Colo. 1981); *People v. Sisneros*, 55 P.3d 797 (Colo. 2002); *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009).

6th Amendment Concerns: A defendant's constitutional right to confront witnesses does not supersede a victim's right to rely upon an evidentiary privilege. *People v. District Court*, 719 P.2d 722 (Colo. 1986); *People v. Tauer*, 847 P.2d 259 (Colo. App. 1993); *People v. Turner*, 109 P.3d 639 (Colo. 2005).

In Camera Inspection: Generally, a court should not review privileged documents *in camera*. *People v. Sisneros*, 55 P.3d 797 (Colo. 2002); *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009); *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004). However, *in camera* review may be required by due process of law—*e.g.*, to determine if an exception applies or a privilege was waived. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60-61 (1987); *People v. Madera*, 112 P.3d 688, 691 (Colo. 2005) (attorney-client privilege); *People v Trujillo*, 144 P.3d 539 (Colo. 2006); *Spykstra* at 670; *Alcon v. Spicer*, 113 P.3d 735, 740-742 (Colo. 2005).

VII. COLORADO RULE OF CRIMINAL PROCEDURE 17 – SUPBOENA

Rule 17: In every criminal case, the prosecuting attorneys and the defendant have the right to compel the attendance of witnesses and the production of tangible evidence by service upon them of a subpoena to appear for examination as a witness upon the trial or other hearing.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. The subpoenaing party shall forthwith provide a copy of the subpoena to opposing counsel (or directly to the defendant if unrepresented) upon issuance. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service on a Minor. Service of a subpoena upon a parent or legal guardian who has physical care of an unemancipated minor that contains wording commanding said parent or legal guardian to produce the unemancipated minor for the purpose of testifying before the court shall be valid service compelling the attendance of both said parent or legal guardian and the unemancipated minor for examination as witnesses. In addition, service of a subpoena as described in this subsection shall compel said parent or legal guardian either to make all necessary arrangements to ensure that the unemancipated minor is available before the court to testify or to appear in court and show good cause for the unemancipated minor's failure to appear.

The Rule's Purpose: Crim. P. 17(c) is the means by which the prosecution and defendant may compel third parties to produce evidence for use at trial. *People v. Spykstra*, 234 P.3d 662, 668 (Colo. 2010); *People v. Baltazar*, 241 P.3d 941, 943 (Colo. 2010). It additionally permits pretrial inspection of that evidence under the supervision of the court in order to facilitate and expedite trials involving voluminous documents, not to grant additional discovery. *Spykstra*, 234 P.3d at 668.

Procedure: Crim. P. 17's procedure for compliance thus requires a witness to produce the evidence at trial or other hearing in connection with examination. *People v. Spykstra*, 234 P.3d 662, 668 (Colo. 2010). With respect to subpoenas duces tecum returnable before trial, as were issued in this case, Crim. P. 17(c) requires in-court production. *Id.* This controlled method of disclosure protects the third party from unreasonable search and seizure. *Id.* As the rule and the cases make clear, the party issuing the subpoena cannot search and retrieve evidence in a third-party witness's possession. *Id.* Rather, it is the witness who must comply with the subpoena by producing the evidence in court. *Id.* When the witness appears in response to a subpoena and in good faith asserts full compliance to the extent the evidence exists, the subpoena process is at an end. *Id.* Crim. P. 17 does not, however, provide for expanded discovery. *People v. Baltazar*, 241 P.3d 941, 943 (Colo. 2010).

Court's Duty: Crim. P. 17(c) requires a court to block the enforcement of an unreasonable or oppressive subpoena by modifying or quashing the subpoena. *People v. Spykstra*, 234 P.3d 662, 668 (Colo. 2010). Although the rule itself does not further define what is unreasonable or oppressive, the nature of the court's inquiry necessarily turns on the facts and circumstances of the case. Id.

Spykstra Test: When a criminal pretrial third-party subpoena is challenged, a defendant must demonstrate:

(1) A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis;

(2) That the materials are evidentiary and relevant;

(3) That the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence;

(4) That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and

(5) That the application is made in good faith and is not intended as a general fishing expedition.

People v. Spykstra, 234 P.3d 662, 669 (Colo. 2010)

Additional Balancing Test: In addition to this basic test, subpoenas issued for materials which may be protected by a privilege or a right to confidentiality also require a balancing of interests. In such circumstances, the defendant must make a greater showing of need and, in fact, might not gain access to otherwise material information depending on the nature of the interest against disclosure. *People v. Spykstra*, 234 P.3d 662, 670 (Colo. 2010). The heightened sensitivity of protected information requires a proportionately greater showing of need before disclosure may be justified. *Id.* Thus, for example, generally inconsistent statements are less likely to be sufficiently probative than specific evidence of recantation. *Id.*

VIII. Colorado Rules of Civil Procedure Rule 45(c) – Protecting a Person Subject to a Subpoena

In Re Marriage of Wiggins, 279 P.3d 1 (Colo. 2012), involved a divorce action in which the father issued a subpoena for mother's employment file, without her consent or notice. The employer provided the file directly to father's counsel. Mother sought a protection order, which the trial court denied. The Supreme Court issued *certiorari* and reversed, clarifying that production of documents was to be used "only in connection with a subpoena for a witness's attendance at a deposition, hearing or trial." Id. at 7. Further, citing CBA Ethics Committee Revised Formal Opinion 86, the Court emphasized the importance of providing actual and advance notice to counsel and the party for whom the subpoena applies.

The analysis used in *Wiggins* was reiterated, in part, by the Supreme Court in *Spykstra* and *Baltazar*, namely the requirement for in-court production of records at a trial or other hearing in connection with examination of the witness.

The 2013 revisions to C.R.C.P. 45 sought to address problems associated with:

1. Subpoenas seeking medical records of nonparties;
2. Failure to advise privilege holders of subpoena;
3. Failure to notify opposing party of subpoena;
4. Direct delivery of subpoenaed documentation without consideration of privileged or confidential nature of the information;
5. Requests for information previously determined to be irrelevant and non-discoverable under established case law.

New C.R.C.P. 45 Impacts Medical Records Subpoenas and Tracks Federal Rule. 42- Jan. Colo.Law. 23.

Colorado Rules of Civil Procedure Rule 45(c) and (d):

(c) Protecting a Person Subject to a Subpoena.

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena ***must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena***. The issuing court must enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney's fees, on a party or attorney who fails to comply.

(2) **Command to Produce Records or Tangible Things.**

(A) *Attendance Not Required.* A person commanded to produce records or tangible things need not attend in person at the place of production unless also commanded to attend for a deposition, hearing, or trial.

(B) *For Production of Privileged Records.*

(i) If a subpoena commands production of records from a person who provides services subject to one of the privileges established by C.R.S. § 13-90-107, or from the records custodian for that person, which records pertain to services performed by or at the direction of that person ("privileged records"), such a subpoena must be accompanied by an authorization signed by the privilege holder or holders or by a court order authorizing production of such records.

(ii) Prior to the entry of an order for a subpoena to obtain the privileged records, the court shall consider the rights of the privilege holder or holders in such privileged records, including an appropriate means of notice to the privilege holder or holders or whether any objection to production may be resolved by redaction.

(iii) If a subpoena for privileged records does not include a signed authorization or court order permitting the privileged records to be produced by means of subpoena, the subpoenaed person shall not appear to testify and shall not disclose any of the privileged records to the party who issued the subpoena.

(C) *Objections.* Any party or the person subpoenaed to produce records or tangible things may submit to the party issuing the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials. The objection must be submitted before the earlier of the time specified for compliance or 14 days after the subpoena is served. If objection is made, the party issuing the subpoena shall promptly serve a copy of the objection on all other parties. If an objection is made, the party issuing the subpoena is not entitled to inspect, copy, test or sample the materials except pursuant to an order of the court from which the subpoena was issued. If an objection is made, at any time on notice to the subpoenaed person and the other parties, the party issuing the subpoena may move the issuing court for an order compelling production.

(3) **Quashing or Modifying a Subpoena.**

(A) *When Required.* On motion made promptly and in any event at or before the time specified in the subpoena for compliance, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to attend a deposition in any county other than where the person resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court;

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

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion made promptly and in any event at or before the time specified in the subpoena for compliance, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific matters in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order attendance or production under specified conditions if the issuing party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to Subpoena.

(1) **Producing Records or Tangible Things.**

(A) Unless agreed in writing by all parties, the privilege holder or holders and the person subpoenaed, production shall not be made until at least 14 days after service of the subpoena, except that, in the case of an expedited hearing pursuant to these rules or any statute, in the absence of such agreement, production shall be made only at the place, date and time for compliance set forth in the subpoena; and

(B) If not objected to, a person responding to a subpoena to produce records or tangible things must produce them as they are kept in the ordinary course of business or must organize and label them to

correspond to the categories in the demand and must permit inspection, copying, testing, or sampling of the materials.

(2) **Claiming Privilege or Protection.**

(A) *Information Withheld.* Unless the subpoena is subject to subsection (c)(2)(B) of this Rule relating to production of privileged records, a person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) make the claim expressly; and

(ii) describe the nature of the withheld records or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena 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; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.