

# Subpoenas: Drafting, Issuing, and Serving Subpoenas (Federal)

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*This Practice Note analyzes the key issues that parties should consider when they draft, issue, and serve subpoenas to obtain evidence in federal civil litigation under [Rule 45 of the Federal Rules of Civil Procedure \(FRCP\)](#). Specifically, this Note addresses the situations in which a party should use a subpoena, what information a party must include in a subpoena, who may issue a subpoena, how to serve a subpoena, how to calculate the fee to pay to the subpoenaed witness, and how to provide notice of the subpoena to the other parties.*

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Parties commonly use [subpoenas](#) in civil litigation to obtain evidence during [discovery](#) from individuals, corporations, and other entities who are not parties to a lawsuit. This Note analyzes the key issues that parties should consider when they draft, issue, and serve subpoenas to obtain evidence in federal civil litigation under [FRCP 45](#).

For information on enforcing subpoenas and appealing a court order granting or denying the discovery sought in a subpoena, see [Practice Note: Subpoenas: Enforcing a Subpoena \(Federal\)](#).

## When to Use a Subpoena

### Parties and Non-Parties

Parties in a lawsuit typically use subpoenas to obtain evidence from non-party witnesses. When properly issued, a subpoena becomes a judicial command emanating from the court. As a result, the court may punish a recipient's disobedience of a subpoena as a contempt of court ([FRCP 45\(g\)](#)).

A party does not need to use a subpoena to obtain evidence from another party. It can instead use any of the discovery devices contained in [FRCP 26](#) through [FRCP 37](#). However, many courts have held that a party's use of a subpoena to obtain evidence from another party is not necessarily prohibited, so long as a party does not use a subpoena to circumvent [FRCP 34](#) (see [US v. 2121 Celeste Road SW, Albuquerque, N.M., 307 F.R.D. 572, 587-591 \(D.N.M. 2015\)](#) (collecting and discussing cases); but see [Hasbro, Inc. v. Serafino, 168 F.R.D. 99, 100 \(D. Mass. 1996\)](#)). For example, a party may wish to use a subpoena to ensure that the original version of a document that a party already produced in discovery is available at trial. In addition, a party may need a subpoena to ensure a party's attendance at trial (see [McGill v. Duckworth, 944 F.2d 344, 353 \(7th Cir. 1991\)](#), overruled on other grounds by, [Farmer v. Brennan, 511 U.S. 825 \(1994\)](#)).

## Corporate Officers and Employees

In the corporate context, an issue may arise about the types of employees subject to discovery under [FRCP 26](#) through [FRCP 37](#), versus those who a party must subpoena under [FRCP 45](#). A party generally does not need a subpoena to command a corporate party's officers, directors, and managing agents to appear for a [deposition](#). Instead, a party may command their appearance at a deposition through a notice issued under [FRCP 30](#). In contrast, a party often must subpoena lower-level corporate employees to depose them (see [E.E.O.C. v. Honda of Am. Mfg., Inc., 2007 WL 682088, at \\*1 \(S.D. Ohio Feb. 28, 2007\)](#); [Stone v. Morton Int'l, Inc., 170 F.R.D. 498, 503-04 \(D. Utah 1997\)](#)).

## Indirect Non-Party Discovery Through FRCP 34

In certain circumstances, a party may obtain non-party discovery indirectly through other parties in a case. For example, if a corporation is a party to a lawsuit and is served with a document request under [FRCP 34](#), it must produce all responsive documents within its control even if those documents are in the physical possession of affiliated companies or other third parties that are not parties to the underlying action (see [GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc., 282 F.R.D. 346, 356 \(S.D.N.Y. 2012\)](#); [Bank of Am. Corp. v. Lemgruber, 385 F. Supp. 2d 200, 237 \(S.D.N.Y. 2005\)](#); [Gen. Envt'l Sci. Corp. v. Horsfall, 136 F.R.D. 130, 133-34 \(N.D. Ohio 1991\)](#)).

## The Cooperative Witness

Before subpoenaing a witness, counsel should investigate whether the witness might voluntarily provide the sought-after evidence. A witness who is willing to voluntarily comply with an informal request for evidence may save the requesting party a significant amount of time and money. However, even if the witness agrees to voluntarily provide the requested evidence, a party still may want to use a subpoena to ensure continued cooperation.

## Types of Subpoenas

A subpoena may command a witness to:

- Testify at a deposition, hearing, or trial (testimonial subpoena).
- Produce (or make available for inspection) documents, [electronically stored information](#) (ESI), or other tangible items (document subpoena).

A party may combine a subpoena that seeks documents from a witness with a subpoena seeking that person's testimony as well. Alternatively, the requesting party may serve separate document subpoenas and testimonial subpoenas directed to the same person. ([FRCP 45\(a\)\(1\)\(C\)](#).)

## Issuing the Subpoena

[FRCP 45\(a\)](#) uses the term "issuing" a subpoena. Issuing in this context means both:

- Which court's name must appear on the face of the subpoena.

- Who can physically sign the subpoena.

A subpoena must be properly issued on both levels to be valid and enforceable.

### **From Which Court Must the Subpoena Issue?**

[FRCP 45](#) requires that all subpoenas be issued out of the court where the case is pending ([FRCP 45\(a\)\(2\)](#)). The issuing party's attorney therefore must place the issuing court's name at the top of the subpoena.

### **Who May Issue the Subpoena?**

Under [FRCP 45](#), two types of individuals may issue, or sign, a subpoena:

- The clerk of the issuing court.
- An attorney authorized to practice in the court where the action is pending.

([FRCP 45\(a\)\(3\)](#).)

Subpoena-related motion practice may require separate admission in another court (or the use of local counsel) if the subpoena requires compliance outside the issuing court's jurisdiction (see [Practice Note: Enforcing a Subpoena \(Federal\): Enforcing the Subpoena](#)).

In certain districts, counsel also may need to be separately admitted to depose a witness within that district (if different from the issuing court). Counsel should check the applicable district court's local rules to determine whether they require separate admission. If the court's local rules are unclear on these points, check with a local attorney to determine the common practice in that district.

### **Required Contents of the Subpoena**

A subpoena issued in the context of federal civil litigation must contain:

- The name of the court that issued the subpoena ([FRCP 45\(a\)\(2\)](#)); see also [From Which Court Must the Subpoena Issue?](#)
- A proper citation of the title of the action and the case number.
- The identity of the person to whom the subpoena is directed.
- The text of [FRCP 45\(d\) and \(e\)](#), which together set out the witness's rights and duties in responding, objecting, or moving to quash the subpoena.
- The time and place for either the production or inspection of documents, or for attendance at a hearing, trial, or deposition (known as the return date or compliance date).
- If the subpoena commands the production or inspection of documents, the categories of documents sought.
- If the subpoena seeks testimony, the method for recording testimony.

([FRCP 45\(a\)\(1\)\(A\)-\(B\)](#).)

In addition:

- The subpoena must bear the issuer's signature ([FRCP 45\(a\)\(3\)](#)); see also [Who May Issue the Subpoena?](#)). If an attorney issues the subpoena, the subpoena should include the attorney's:
  - name;
  - address;
  - email address;
  - telephone number; and
  - client's name.
- If the subpoena seeks ESI, the subpoena may specify the form(s) in which the responding party must produce the ESI ([FRCP 45\(a\)\(1\)\(C\)](#)).
- If the subpoena requires a non-party corporation (or other organization) to designate a representative to testify about certain matters, the subpoena must advise the non-party organization of its duty to make this designation ([FRCP 30\(b\)\(6\)](#)).

Many attorneys use the official subpoena forms available on the Administrative Office of the US Courts' [Court Forms by Category](#) webpage. The official form for a subpoena commanding a witness to:

- Attend a hearing or trial is the [AO o88](#).
- Appear for a deposition is the [AO o88A](#).
- Produce documents, information, or objects, or to permit inspection of premises, is the [AO o88B](#).

If the chosen form does not provide enough space for all of the required information, as is often the case when a subpoena calls for the production of many types of documents or requests that a company representative testify about many issues, the issuing party may include this additional information as an attachment (sometimes called an addendum, rider, or exhibit) to the subpoena.

## Serving the Subpoena

A subpoena is a form of judicial [process](#) (similar to a summons) by which the issuing court obtains jurisdiction over a non-party. To obtain jurisdiction over a non-party, the issuing party must properly serve the subpoena, and the rules on serving a subpoena are fairly strict. Counsel's failure to comply with these rules may invalidate the subpoena.

### Who May Serve?

Any person who is not a party to the underlying action and is at least 18 years of age may serve the subpoena ([FRCP 45\(b\)\(1\)](#)).

### What Should be Served?

The person serving the subpoena should serve a copy of the subpoena on the witness ([FRCP 45\(b\)\(1\)](#)). The issuing party should retain the original subpoena and not file it with the court unless there is a valid basis for doing so, such as to submit the subpoena as an exhibit to a motion (2000 Advisory Committee Notes to FRCP 5(d)).

## Method of Service

Most courts hold, and the plain text of [FRCP 45](#) seems to require, that a subpoena must be **hand-delivered** to the subpoenaed person ([FRCP 45\(b\)\(1\)](#); [Bergeron v. Great W. Cas. Co.](#), 2015 WL 5307685, at \*1-3 (E.D. La. Sept. 10, 2015)). If the subpoena is directed to a corporation (or other entity), it generally must be personally served on a corporate officer or other agent authorized under [FRCP 4](#) to accept service of process (see [Catlin v. Global](#), 2014 WL 3955220, at \*3 (W.D.N.Y. Aug. 13, 2014)).

The rigid rules governing service of a subpoena are quite different from the more liberal rules governing service of a summons (compare [FRCP 4\(e\)-\(k\)](#) with [FRCP 45\(b\)\(1\)](#)). The issuing party risks having the subpoena quashed if the party serves it by mail, overnight carrier, or delivers it to the witness' attorney. However, some courts have held that a subpoena may be served by methods other than hand-delivery (see, for example, [Hall v. Sullivan](#), 229 F.R.D. 501, 505 (D. Md. 2005)).

To avoid a service-related challenge, counsel should take the conservative approach and arrange for hand-delivery by an appropriate process server directly to the witness or corporate representative.

## Timing of Service

[FRCP 45](#) does not provide a minimum time period for compliance with a subpoena. In discovery, typically the issuing party may allow up to 30 days after service to comply with a subpoena, but may demand compliance within a shorter time period if reasonable under the circumstances (see [Subair Sys., LLC v. Precisionaire Sys., Inc.](#), 2008 WL 1914876, at \*2 & n. 4 (S.D. Fla. Apr. 26, 2008) (ten days-notice reasonable under [FRCP 45](#))).

The issuing court's local rules may provide a minimum time period for compliance (for example, [E.D. Va. L. Civ. R. 45\(E\)](#) (requiring trial subpoena to be served at least 14 days before the return date); [E.D. Va. L. Civ. R. 45\(F\)](#) (requiring deposition subpoenas to be served at least 11 days before the date of the deposition)). The court's local rules may also require that the return date on the subpoena occurs before the discovery cutoff date (for example, [S.D. Fla. L. Civ. R. 26.1\(d\)](#)).

Generally, parties must conduct their [FRCP 26\(f\)](#) pre-trial discovery conference, also known as a **meet and confer**, before subpoenas can be served ([FRCP 26\(d\)\(1\)](#)). Following a meet and confer, subpoenas may be served at any time before any applicable discovery deadlines. Counsel should ensure that the return date on the subpoena occurs before any applicable discovery deadlines. (See [Ponson v. BellSouth Telecomm., Inc.](#), 2010 WL 1552802, at \*3 (E.D. La. Apr. 16, 2010); [Surbella v. Foley](#), 2006 WL 3007429, at \*1 (S.D. Ohio Oct. 20, 2006).)

## Place of Service

Counsel may serve a subpoena issued under [FRCP 45](#) anywhere in the US ([FRCP 45\(b\)\(2\)](#)).

## Place of Compliance

Although counsel may serve a subpoena anywhere in the US, [FRCP 45](#) places strict geographical limits on where a subpoena may command compliance. These limits depend on the type of subpoena at issue.

### Subpoenas Seeking Testimony

A subpoena generally may only command a non-party to testify at a deposition, hearing, or trial if the place of testimony is:

- Within **100 miles** of where the witness:
  - lives;
  - works; or
  - regularly transacts business in person.
- Within **the state** where the non-party witness lives, works, or regularly transacts business in person, but **only if the non-party witness would not incur substantial expense to attend the trial.**

([FRCP 45\(c\)\(1\)\(A\)](#); [FRCP 45\(c\)\(1\)\(B\)\(ii\)](#).)

A party does not need to use a subpoena to compel a party (or its officers, directors, and managing agents) **to attend a deposition**. Parties and their officers, directors, and managing agents must appear for a deposition that is properly noticed under [FRCP 30](#), or face sanctions, regardless of whether a party serves a deposition subpoena ([FRCP 37\(d\)\(1\)\(A\)\(i\)](#); see also 2013 Advisory Committee Notes to FRCP 45(c)). Although no subpoena is required to depose a party, if one is served, it must comply with the geographical limits of [FRCP 45](#) to be enforceable (2013 Advisory Committee Notes to FRCP 45(c)).

However, a subpoena is required to compel a party or a party's officer **to appear at a hearing or trial**. A hearing or trial subpoena directed to a party or a party's officer may not require the witness to travel more than 100 miles to attend the hearing or trial unless the party or officer lives, works, or regularly transacts business in person in the state where the hearing or trial is to be held ([FRCP 45\(c\)\(1\)\(A\)](#); [FRCP 45\(c\)\(1\)\(B\)\(i\)](#); see also 2013 Advisory Committee Note to FRCP 45(c)). When an order under [FRCP 43\(a\)](#) authorizes testimony from a remote location, the witness can be commanded to testify from any place within [FRCP 45\(c\)](#)'s limits (2013 Advisory Committee Notes to FRCP 45(c)).

### Subpoenas Seeking Production or Inspection

A subpoena seeking documents, ESI, or tangible things must designate a place of production within 100 miles of where the witness lives, works, or regularly transacts business in person ([FRCP 45\(c\)\(2\)\(A\)](#)). However, nothing in [FRCP 45](#) prevents parties from agreeing to produce items electronically (2013 Advisory Committee Notes to FRCP 45).

A subpoena seeking inspection of premises must specify the location of the premises to be inspected ([FRCP 45\(c\)\(2\)\(B\)](#)).

### Measuring the 100-Mile Limit

Courts generally measure the 100-mile limit in [FRCP 45](#) as a straight line between the place from which the witness travels and the place of attendance, not by the surface route taken (see [Goldenson v. Steffens, 2014 WL 3105367, at \\*3 \(D. Me. July 7, 2014\)](#); [Palazzo ex rel. Delmage v. Corio, 204 F.R.D. 639 \(E.D.N.Y. 1998\)](#)).

### **Failure to Comply with Geographic Limitations**

If a subpoena purports to require compliance outside of [FRCP 45](#)'s geographic limits, a court generally must quash or modify the subpoena on motion ([FRCP 45\(d\)\(3\)\(A\)\(ii\)](#); see also [Practice Note, Subpoenas: Responding to a Subpoena](#)). Some exceptions apply. For example, if travel outside the geographic limits would result in substantial expense to a non-party witness, the party who issued the subpoena may cover the expense. The court can then condition the subpoena's enforcement on the issuing party's payment (see 2013 Advisory Committee Notes to [FRCP 45\(c\)](#)).

### **Proof of Service**

After serving a subpoena, the process server must prepare a certified proof of service ([FRCP 45\(b\)\(4\)](#)). Proof of service may be in the form of either:

- An affidavit or [declaration](#) (which does not require notarization).
- A completed "Proof of Service" section of the standard subpoena form found on the Administrative Office of the US Courts' [Court Forms by Category](#) webpage.

The proof of service must:

- Identify the server by name.
- Include the:
  - date;
  - manner of service; and
  - name(s) of the person(s) served.

([FRCP 45\(b\)\(4\)](#).)

In addition, for subpoenas commanding attendance at a deposition or trial, the server should state the amount of the witness fee that was tendered as compensation (see [Witness Fees](#)).

Counsel issuing the subpoena:

- Should retain the server's original proof of service.
- Need not serve the proof of service on any of the other parties.
- Should not file the proof of service with the court unless there is a reason to do so, for example, if the issuing party wishes to attach it as an exhibit to a motion.

## Witness Fees

For subpoenas requiring a person's attendance, the issuing party must advance the witness compensation for:

- One day's attendance.
- The round-trip mileage fee for travel to and from the place of attendance.

([FRCP 45\(b\)\(1\)](#).)

This section outlines the key issues for counsel to consider when tendering the requisite attendance and mileage fees to a subpoenaed witness.

## Daily Attendance Fee

[FRCP 45\(b\)\(1\)](#) does not actually set the daily attendance fee for appearance at a deposition, hearing, or trial. Instead, [28 U.S.C. § 1821](#) sets the fee. Under [28 U.S.C. § 1821\(b\)](#), the typical daily attendance fee for witnesses in federal proceedings is \$40. This amount may vary depending on whether attendance is required by an expert or another specialized witness that may have an established hourly rate.

## Mileage Fee

The issuing party must tender the mileage fee no matter how small the distance the witness travels to attend the deposition, hearing, or trial, although the fee only needs to be a reasonable estimate of the distance traveled (see [In re Dennis](#), 330 F.3d 696, 705 (5th Cir. 2003)).

Counsel calculate the mileage fee by multiplying the rate per mile by the number of miles traveled to and from the place of attendance. The current rates for travel are available on the General Services Administration's (GSA's) [website](#). Although the basic calculation is simple and straightforward, it rests on a complex and interlocking web of federal statutes and regulations. A good rule of thumb to avoid such complexities is to simply use an online mapping service such as Google Maps to determine the driving distance from the witness' place of origin (whether home or office) to the location of the deposition, and then multiply that distance by \$0.75 (an easy-to-use number that exceeds the current mileage reimbursement rates for automobiles) to ensure that you are advancing a sufficient fee (for example, 40 miles x \$0.75 = \$30). For those wishing for a more precise calculation, the statutory and regulatory authority for calculating the mileage fee is analyzed in detail below.

## How to Determine Rate Per Mile

[FRCP 45\(b\)\(1\)](#) is silent on how to calculate the rate per mile that a traveling witness is entitled to receive. It merely states that the witness must receive the mileage fee "allowed by law."

The starting point for determining the rate the law allows is [28 U.S.C. § 1821\(c\)\(2\)](#). However, [Section 1821\(c\)\(2\)](#) does not actually set the rate per mile that a traveling witness is entitled to receive. Instead, it states that the travel allowance must be equal to the allowance which the GSA has prescribed, pursuant to [5 U.S.C. § 5704](#), for federal employees traveling on official business by privately owned vehicle.

[Section 5704](#), in turn, states that GSA regulations prescribed under [5 U.S.C. § 5707](#) establish the rate per mile for reimbursing federal employees traveling by privately owned vehicle.

[Section 5707\(b\)\(2\)\(A\)](#) requires the GSA to issue regulations prescribing:

- A mileage reimbursement rate which reflects the current costs of operating privately owned automobiles. This rate must not exceed the IRS's single standard mileage rate for optional use by taxpayers in computing the deductible costs of operating their automobiles.
- Mileage reimbursement rates which reflect the current costs of operating privately owned airplanes and motorcycles.

The GSA's regulation setting out the mileage reimbursement rate for operating a privately owned automobile, motorcycle, or airplane is [41 C.F.R. § 301-10.303](#). [Section 301-10.303](#) states that the reimbursement rates are published on the GSA's website.

The GSA's website lists the current reimbursement mileage rates (see [Privately Owned Vehicle \(POV\) Mileage Reimbursement Rates](#)).

The GSA mileage rates should not be confused with the optional standard mileage rates set by the IRS for taxpayers to compute the deductible costs of operating their automobiles, which may also differ from year to year (see [IRS Standard Mileage Rates for 2018](#)).

### **How to Determine Distance Traveled**

As with determining the rate per mile, [FRCP 45\(b\)\(1\)](#) is silent on how to measure the distance traveled to compute the mileage fee. The starting point for determining how to measure the distance to and from the place of attendance is [28 U.S.C. § 1821](#).

[Section 1821\(c\)\(2\)](#) states only that mileage shall be computed on the basis of a "uniformed table of distances" adopted by the GSA. The GSA's uniformed table of distances is a proprietary database developed by ALK Technologies and available to users for a subscription fee. However, a GSA regulation promulgated to help federal employees calculate distance measurements when seeking reimbursement for travel by privately owned automobiles (and motorcycles) states that distance calculations may be based on "paper or electronic standard highway mileage guides, or the actual miles driven as determined from odometer readings" ([41 C.F.R. § 301-10.302](#)). Therefore, if the issuing party does not subscribe to the ALK uniformed table of distances, an online mapping service such as Google Maps is a reasonable alternative.

When measuring the distance to and from the place of attendance, the starting point typically is either the witness' home or place of business. If there is more than one possible starting point, such as when the witness lives and works in the district where the subpoena is returnable, counsel should consider measuring the distance from the furthest point to the place of attendance.

### **Calculating the Mileage Fee**

Although [FRCP 45\(b\)\(1\)](#) does not provide guidance on how to compute the mileage fee, the answer may lie in a GSA regulation designed to help federal employees compute mileage reimbursements for travel by privately owned automobiles and motorcycles ([41 C.F.R. § 301-10.301](#)). Under this regulation, the mileage fee is calculated by multiplying the distance traveled (as determined by [41 C.F.R. § 301-10.302](#)) by the applicable mileage rate (as determined by [41 C.F.R. § 301-10.303](#)). Case law is consistent with this approach (see, for example, [Green Const. Co. v. Kan. Power & Light Co.](#), 153 F.R.D. 670, 681 (D. Kan. 1994)).

### **Form of Payment**

The issuing party may pay attendance and mileage fees in cash, by check, by money order, or by any other generally accepted method of payment. Where the issuing party tenders payment in a form other than cash (for example, by check), the issuing party should ensure that the recipient can access the funds before the subpoena's return date.

### **Time of Payment**

The issuing party must tender attendance and mileage fees when serving the subpoena ([FRCP 45\(b\)\(1\)](#); see also [CF & I Steel Corp. v. Mitsui & Co. \(U.S.A.\)](#), 713 F.2d 494, 496 (9th Cir. 1983)). Failure to tender the requisite fees at the time of service may invalidate the subpoena (see [In re Dennis](#), 330 F.3d at 704-05).

### **Reimbursement for Reasonable Costs**

The party issuing the subpoena also may have to reimburse the witness for costs incurred during travel to and from the designated place of attendance, such as airfare, tolls, and lodging ([28 U.S.C. § 1821\(c\)-\(d\)](#)). The issuing party typically pays for these costs after the witness has attended the deposition, hearing, or trial, unless otherwise ordered by the court.

### **No Fees for Document Subpoenas**

Subpoenas commanding the production and/or the inspection of documents do not require payment of attendance or mileage fees (see [Benek v. Kan. City Life Ins. Co.](#), 2008 WL 356661, at \*1 (W.D. Wash. Feb. 6, 2008)). This is because subpoenas that seek only documents do not require the subpoena recipient to attend the production ([FRCP 45\(d\)\(2\)\(A\)](#)).

### **No Fees for Subpoena Issued by US**

[FRCP 45](#) does not require the US government to tender witness fees when it or any of its officers or agencies issues a subpoena ([FRCP 45\(b\)\(1\)](#)).

## Notice of Subpoena

An attorney who seeks to obtain evidence or a deposition from a non-party must notify the other parties of the subpoena's issuance under the FRCP. Before serving a subpoena, counsel should consider:

- The timing of the notice to the other parties (see [Timing of the Notice](#)).
- The contents of the notice (see [Drafting the Notice](#)).
- How to properly serve the notice (see [Serving the Notice](#)).

## Timing of the Notice

### Notice of Document Subpoena

For document subpoenas that do not also command testimony, the issuing party must serve a separate notice and a copy of the subpoena on each party to the lawsuit **before** the subpoena is served on the witness ([FRCP 45\(a\)\(4\)](#); [Henry v. Morgan's Hotel Group, Inc.](#), 2016 WL 303114, at \*1-2 (S.D.N.Y. Jan. 25, 2016); [Usov v. Lazar](#), 2014 WL 4354691, at \*15 (S.D.N.Y. Sept. 2, 2014); see also 2013 Advisory Committee Notes to FRCP 45(a)). The purpose of this requirement is to give other parties a chance to object to the production or inspection, or to serve a subpoena for additional materials (2013 Advisory Committee Notes to FRCP 45(a)).

In practice, attorneys often fail to obey the pre-service notice rule by notifying parties contemporaneously with service on the witness. Sometimes, notification occurs after service of the subpoena on the witness. Depending on the circumstances, a court may or may not find that failure to comply with the pre-service notice requirement invalidates the subpoena (see, for example, [Ello v. Brinton](#), 2017 WL 56316, at \*5 (N.D. Ind. Jan. 5, 2017) (discussing cases and declining to quash subpoena); [Kremsky v. Kremsky](#), 2017 WL 30003, at \*3 (E.D. Pa. Jan. 3, 2017) (quashing 14 subpoenas without prejudice for failure to comply with the notice requirement)).

### Notice of Deposition Subpoena

If a subpoena commands a witness to appear for a deposition, regardless of whether the subpoena also seeks documents, the issuing party must give reasonable written notice to every other party in the case ([FRCP 30\(b\)\(1\)](#)). Counsel generally must provide separate notice, as courts have found that merely serving a copy of the subpoena on the other parties in the case is insufficient (see, for example, [Cole v. City of New York](#), 2012 WL 1138570, at \*4 (S.D.N.Y. Apr. 5, 2012)). Although [FRCP 30](#) only requires that notice be reasonable and does not explicitly require notice to other parties **before** service of the subpoena on the non-party witness, some courts have read this requirement into the statute (see, for example, [Cole](#), 2012 WL 1138570, at \*3-5 (S.D.N.Y. Apr. 5, 2012); [In re Dixie Farms Market](#), 28 Fed. Appx. 673, 675 (9th Cir. 2002)).

However, depending on the circumstances, a court may find it reasonable for counsel to serve notice on the parties **after** service of a deposition subpoena on a non-party witness if counsel serves the notice on every other party immediately or as soon as possible after subpoenaing the non-party witness. For example, counsel may intentionally serve notice on the other parties after subpoenaing the witness to prevent other parties from speaking or tampering with the witness before the witness is subpoenaed. Counsel should always check the case law and local rules in the

applicable jurisdiction and weigh the risk of a court quashing the deposition subpoena against the need to preserve the element of surprise with a particular witness.

### **Notice of Trial or Hearing Subpoena**

[FRCP 45](#) does not expressly require prior notice of a trial or hearing subpoena. However, courts have required prior notice where the issuing party attempts to use a trial subpoena to obtain discovery (see [Kenney, Becker LLP v. Kenney, 2008 WL 681452, at \\*3 & n.3 \(S.D.N.Y. Mar. 10, 2008\)](#)).

### **Drafting the Notice**

A notice of subpoena for documents and/or deposition should:

- Be formatted like other documents in federal court, including by having the case caption and a proper signature block (see [Practice Note, General Formatting Rules in Federal District Court](#)).
- Identify the name of the party who issued the subpoena.
- Identify the person to whom the subpoena is directed.
- State:
  - the date of the production, inspection, or testimony;
  - the time of the production, inspection, or testimony; and
  - the place of the production, inspection, or testimony.
- Attach a copy of the subpoena as an exhibit.

### **Serving the Notice**

Counsel must ensure proper service of the notice and a copy of the subpoena on all other parties to satisfy the notice requirement. Counsel should check the local and [Case Management/Electronic Case Filing \(CM/ECF\)](#) rules of the relevant jurisdiction to determine whether the court permits electronic service and filing of a notice of subpoena, as some district courts consider notices of subpoena to be discovery documents that counsel should not serve and file through CM/ECF. If the court's rules do not allow for the electronic service and filing of notices of subpoena, the issuing party may serve the notice and copy of the subpoena by mail or another acceptable method of service under [FRCP 5\(b\)](#).

### **Proof of Service of the Notice**

Counsel should create and maintain proper proof of service of the notice and the copy of the subpoena. For more information on proof of service in federal court, see [Practice Note, Serving Federal Court Documents Under FRCP 5: Proving Service to the Court](#).

### **Post-Service Notice for Production**

For document subpoenas, [FRCP 45\(a\)\(4\)](#) does not expressly state whether the issuing party must give notice to the other parties once the subpoena recipient produces the requested documents at the designated location. The rule also does not state whether the issuing attorney must inform other parties of any post-service changes or modifications to the subpoena that the issuing party and the subpoena recipient may have negotiated. Nevertheless, notifying the other parties of these developments is within the spirit of [FRCP 45\(a\)\(4\)](#). Additionally, parties may request in their scheduling order that the court require this notice, as well as access to materials once produced (2013 Advisory Committee Notes to FRCP 45(a)).

### **Duty to Avoid Undue Burden or Expense**

When using a subpoena to obtain evidence, the issuing party must avoid imposing undue burden or expense on a witness subject to the subpoena ([FRCP 45\(d\)\(1\)](#)). The compliance court may enforce this requirement through discretionary sanctions on offending parties and counsel, which may include lost earnings and reasonable attorney's fees ([FRCP 45\(d\)\(1\)](#)).

Courts have held that a party's attempt to enforce an invalid subpoena is a per se violation of this rule and therefore sanctionable in certain circumstances (see [Matthias Jans & Assocs., v. Dropic, 2001 WL 1661473, at \\*3 \(W.D. Mich. Apr. 9, 2001\)](#)).