

Subpoenas: Enforcing a Subpoena (Federal)

by Practical Law Litigation with [David J. Lender](#), [Jared R. Friedmann](#), [Weil, Gotshal & Manges LLP](#)

Maintained • USA (National/Federal)

This Practice Note analyzes the key issues that parties should consider when they seek to enforce subpoenas to obtain evidence in federal civil litigation under [Rule 45 of the Federal Rules of Civil Procedure](#) (FRCP). Specifically, this Note addresses how to enforce a subpoena and how to appeal a court order granting or denying the discovery sought in a subpoena.

Contents

[Enforcing the Subpoena](#)

[Attorney Admissions](#)

[Review the Court's and Judge's Rules](#)

[Moving to Compel Compliance Under FRCP 37](#)

[Moving for Contempt Sanctions and/or to Compel Compliance Under FRCP 45](#)

[Procedure for Making the Motion](#)

[Required Documents](#)

[Substance of the Motion](#)

[Independent Action to Obtain Discovery](#)

[Appeals](#)

[Order Denying Discovery Entered in Underlying Action](#)

[Order Denying Discovery Entered in Ancillary Action](#)

[Order Compelling Compliance With Subpoena](#)

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 seek to enforce subpoenas to obtain evidence in federal civil litigation under [FRCP 45](#).

For information on drafting, issuing, and serving a subpoena, see [Practice Note: Drafting, Issuing, and Serving Subpoenas \(Federal\)](#).

Enforcing the Subpoena

Where a witness fails to comply with or objects to a subpoena, the issuing party may need to ask the court to intervene. Depending on where the subpoena recipient is located, counsel may need to seek enforcement in the issuing court or in another court with jurisdiction over the recipient. ([FRCP 45\(d\)\(2\)\(B\)](#), [\(f\)](#), [\(g\)](#).)

Before seeking to enforce compliance with a subpoena, counsel should:

- Consider the appropriate court in which to seek compliance with the subpoena and whether counsel needs to obtain admission there before seeking to enforce the subpoena (see [Attorney Admissions](#)).
- Review the applicable jurisdiction's and judge's rules (see [Review the Court's and Judge's Rules](#)).
- Determine the appropriate motion, such as:
 - a motion to compel under [FRCP 37](#) (see [Moving to Compel Compliance Under FRCP 37](#)); and/or
 - a motion for contempt sanctions and/or to compel compliance under [FRCP 45](#) (see [Moving for Contempt Sanctions and/or to Compel Compliance Under FRCP 45](#)).
- Determine the requirements for the substance of and filing the motion (see [Procedure for Making the Motion, Required Documents](#), and [Substance of the Motion](#)).

Attorney Admissions

Admission Required

Generally, an attorney may only sign and argue a motion on behalf of a client in a particular court if the attorney is admitted to practice there (for example, [S.D.N.Y. and E.D.N.Y. L. Civ. R. 1.3\(c\)](#)). A federal court's local rules typically contain attorney admission requirements.

If the compliance court is the court where the underlying action is pending, counsel likely is already admitted to that court. However, if counsel must seek compliance in a different court because the subpoena recipient is located elsewhere, counsel may need to become admitted in the compliance court or retain local counsel before seeking to enforce the subpoena.

Counsel should note that, where the compliance and issuing courts differ, the compliance court may transfer a subpoena-related motion to the issuing court in certain circumstances (see [Transfer of a Subpoena-Related Motion](#)). In these circumstances, counsel for the subpoenaed witness admitted in the compliance court need not obtain separate admission to the issuing court, and may, after transfer, file papers and appear on the motion in the issuing court ([FRCP 45\(f\)](#)).

Types of Admission

If not already admitted in the federal court where counsel seeks to enforce the subpoena, counsel may need to obtain either:

- Full bar membership. Most federal courts limit full bar membership to attorneys who are admitted to practice in the state in which the federal court sits.

- [Pro hac vice](#) admission. Most federal courts allow out-of-state attorneys to become admitted on this basis, assuming counsel meets other requirements. For more on *pro hac vice* admission, see [Pro Hac Vice Admission in Federal District Court Checklist](#).

Local Counsel

Many courts require out-of-state attorneys admitted *pro hac vice* to associate with local counsel for the duration of the action (for example, [C.D. Cal. L.R. 83-2.1.3.4](#)). Depending on the court's rules, local counsel may have to sign and file all documents on behalf of the out-of-state attorney.

Plan Ahead

Becoming a member of the court's bar or getting admitted on a *pro hac vice* basis takes time. Securing a local lawyer acceptable to the client may take some time as well. Once it becomes apparent that counsel must file a motion to enforce a subpoena, counsel should immediately start the process of becoming admitted to the federal court where the motion will be made (if not already admitted) and, if necessary, seeking out local counsel.

Review the Court's and Judge's Rules

A court's local rules, [Case Management/Electronic Case Filing](#) (CM/ECF) rules, and the judge's individual practice rules and standing orders (if the judge has any) largely govern federal motion practice. These rules, normally posted on the court's website, cover issues such as:

- Whether a district or magistrate judge hears discovery-related motions.
- Whether the court requires a pre-motion conference.
- Time-frames and deadlines related to filing opposition and reply briefs.
- The proper method for filing documents (for example, in paper or electronic format).

Counsel should review and understand these rules before filing a subpoena-related motion in federal court.

Moving to Compel Compliance Under FRCP 37

When Used

Motions under [FRCP 37\(a\)](#) to compel a **non-party's** compliance are limited to situations where a:

- Witness refuses to answer oral questions at her deposition.
- Witness refuses to answer written questions posed under [FRCP 31](#).
- Corporation fails to designate a representative to testify under either [FRCP 30\(b\)\(6\)](#) or [FRCP 31\(a\)\(4\)](#).

([FRCP 37\(a\)\(3\)\(B\)\(i\)-\(ii\)](#).)

Pre-Motion Meet and Confer

A motion to compel compliance under [FRCP 37\(a\)](#) must include a certification that the movant has, in good faith, conferred (or attempted to confer) with the person who failed to comply with the subpoena in an effort to resolve the situation without court action ([FRCP 37\(a\)\(1\)](#)).

Where to Make the Motion

Counsel must make a motion under [FRCP 37](#) to compel a non-party's compliance with a subpoena in the compliance court (the court for the district where the discovery is or will be taken) ([FRCP 37\(a\)\(2\)](#)). The compliance court may or may not be the same as the issuing court. Only the court where the underlying action is pending may issue a subpoena (see [Practice Note: Subpoenas: Drafting, Issuing, and Serving Subpoenas \(Federal\): From Which Court Must the Subpoena Issue?](#)).

However, a subpoena generally may only command compliance within 100 miles of where the non-party witness lives, works, or regularly transacts business in person (see [Practice Note: Subpoenas: Drafting, Issuing, and Serving Subpoenas \(Federal\): Place of Compliance](#)). For example, if a non-compliant deposition witness lives, works, and regularly transacts business only in the Northern District of California, but the underlying action is pending in (and therefore the subpoena issued out of) the Southern District of New York, counsel would have to initiate motion practice in the Northern District of California (the compliance court) to compel the witness to testify at the deposition. However, the compliance court may later transfer the motion to compel to the issuing court (see [Transfer of a Subpoena-Related Motion](#)).

Burden of Proof

Generally, the party seeking to compel compliance with discovery requests, including a subpoena, bears the initial burden of demonstrating the relevance of the sought-after evidence. Counsel must also include in the motion to compel:

- The specific requests at issue.
- The circumstances of the witness's non-compliance.
- Why the witness's objections lack justification.

The burden then shifts to the witness to demonstrate why the sought-after evidence is not discoverable, such as because the request is overly broad, seeks privileged information, or is unduly burdensome (see, for example, [Sierra Club v. Union Elec. Co.](#), 2015 WL 9583394, at *2 (E.D. Mo. Dec. 31, 2015); [West v. Shultz](#), 2015 WL 8781276, at *1 (M.D. Pa. Dec. 15, 2015); [Pearson v. Varano](#), 2015 WL 7273265, at *1 (M.D. Pa. Nov. 18, 2015); [Grigsby v. Munguia](#), 2015 WL 3442344, at *5 (E.D. Cal. May 28, 2015)).

Relief Available

The primary relief available under [FRCP 37\(a\)](#) relating to subpoenas is an order compelling compliance with the subpoena ([FRCP 37\(a\)\(1\)](#)). A party may not seek contempt sanctions against a witness until (and unless) the court orders compliance and the witness fails to comply with the court's order ([FRCP 37\(b\)](#)).

Are Motion Fees and Costs Recoverable Under FRCP 37?

If a court grants a motion to compel, the party seeking compliance with a subpoena under [FRCP 37](#) may recover from the witness its reasonable expenses incurred in making the motion, including attorney's fees ([FRCP 37\(a\)\(5\)\(A\)](#)).

However, if the court denies the motion to compel, the witness may be able to recover from the movant its reasonable expenses incurred in opposing the motion, including attorney's fees ([FRCP 37\(a\)\(5\)\(B\)](#)).

If the motion is granted in part and denied in part, the court may apportion reasonable expenses for the motion ([FRCP 37\(a\)\(5\)\(C\)](#)).

Moving for Contempt Sanctions and/or to Compel Compliance Under FRCP 45

Another way to enforce a subpoena against a non-party witness is to move for contempt sanctions and/or to compel compliance under [FRCP 45](#).

When Used

[FRCP 45](#) may serve as a basis to enforce a subpoena where the non-party witness:

- Fails to appear to testify at a deposition.
- Fails to appear to testify at trial.
- Fails to produce documents in response to a document subpoena.
- Serves written objections in response to a document subpoena.
- Serves a motion to quash in response to either a deposition or document subpoena.

Pre-Motion Meet and Confer

Depending on the court and its local rules, counsel may or may not need to meet and confer with the witness (or her attorney if she is represented) before moving to compel or for contempt under [FRCP 45](#). As a practical matter, however, counsel should first reach out to the witness (or the witness's counsel, as required if the witness is known to have counsel) in an attempt to resolve the dispute without engaging in potentially expensive motion practice.

Where to Make the Motion

Counsel must initially file subpoena-related motions and applications in the compliance court (see 2013 Advisory Committee Notes to [FRCP 45\(f\)](#)). This includes motions for contempt ([FRCP 45\(g\)](#)). The compliance court may or

may not be the court where the underlying action is pending (see [Practice Note: Subpoenas: Drafting, Issuing, and Serving Subpoenas \(Federal\): From Which Court Must the Subpoena Issue?](#)).

Transfer of a Subpoena-Related Motion

After counsel files the motion in the compliance court, the compliance court may subsequently transfer the motion to the issuing court if either:

- The person subject to the subpoena consents to the transfer.
- The court finds exceptional circumstances, which the party seeking transfer must establish.

([FRCP 45\(f\)](#)); see also 2013 Advisory Committee Notes to FRCP 45(f).)

Transfer may be appropriate to avoid disrupting the issuing court's management of the underlying litigation, such as when the issuing court has already ruled on a previous discovery motion made before it that raised the same issues as the motion filed in the compliance court, or the same issues are likely to arise as a result of subpoenas issued in many districts within a single lawsuit (see 2013 Advisory Committee Notes to FRCP 45(f)).

If the issuing court orders further discovery as a result of the motion, the issuing court may then re-transfer the matter to the compliance court to enforce the order (see 2013 Advisory Committee Notes to FRCP 45(f)).

Burden of Proof

The moving party generally has the burden of proof on a motion to compel compliance with a subpoena or a motion for contempt sanctions under [FRCP 45](#). However, if the subpoena recipient refuses to comply based on an argument that the subpoena seeks ESI that is not reasonably accessible due to undue burden or cost, the subpoena recipient has the burden of proof on that ground ([FRCP 45\(e\)\(1\)\(D\)](#)).

Relief Available: Contempt Sanctions

Under [FRCP 45](#), a person who disobeys a subpoena, or a subpoena-related order, may be subject to contempt sanctions ([FRCP 45\(g\)](#)); see also 2013 Advisory Committee Notes on FRCP 45(g)). However, a court rarely imposes sanctions without first ordering compliance with the subpoena (see 2013 Advisory Committee Notes to FRCP 45(g)).

Civil contempt sanctions generally include fines, and in some extreme cases, imprisonment (see [In re Grand Jury Proceedings](#), 280 F.3d 1103, 1107 (7th Cir. 2002) (fine and imprisonment ordered for failure to obey grand jury subpoena) cert denied, 536 U.S. 925 (2002); [Int'l Bhd. of Elec. Workers, Local 474 v. Eagle Elec. Co.](#), 2007 WL 622504, at *1 (W.D. Tenn. Feb. 22, 2007) (imprisonment); [Painewebber, Inc. v. Acstar Ins. Co.](#), 211 F.R.D. 247, 249 (S.D.N.Y. 2002) (fine imposed for failure to comply with deposition and document subpoenas); [Forum Ins. Co. v. Keller](#), 1992 WL 297580, at *3 (S.D.N.Y. Oct. 8, 1992) (fine imposed for failure to comply with document subpoena)). Civil contempt sanctions are designed primarily to coerce the contemnor into complying with the court's demands (see [Int'l Union, United Mine Workers of Am. v. Bagwell](#), 512 U.S. 821, 827-30 (1994); [In re Grand Jury Proceedings](#), 280 F.3d at 1107). A person held in civil contempt may purge the contempt by complying with the court's mandate (see [Bagwell](#), 512 U.S. at 828; [In re Grand Jury Proceedings](#), 280 F.3d at 1107-08).

If a court holds a non-party witness in contempt, the court should impose the sanction against the non-compliant witness, rather than the adverse party, unless that party took steps to secure the witness' non-compliance (see [Francois v. Blandford](#), 2012 WL 777273, at *3 (E.D. La. Mar. 7, 2012); see also [GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc.](#), 282 F.R.D. 346, 353-59 (S.D.N.Y. 2012) (noting that the court may sanction parties for a non-party's alleged [spoliation](#) of evidence, but finding no sanctionable conduct)).

Relief Available: Order Compelling Compliance with Subpoena

Generally, a party should move under [FRCP 45](#) to compel compliance with a subpoena where any of the following occur:

- Prior case law indicates that the court will not order contempt sanctions absent violation of an order compelling compliance.
- The witness timely served written objections in response to a document subpoena ([FRCP 45\(d\)\(2\)\(b\)\(i\)-\(ii\)](#)).
- The witness timely served a motion to quash and to stay discovery in response to a deposition subpoena. To eliminate any doubt as to whether a court order denying the witness's motion to quash also constitutes an order compelling the sought-after discovery, the party seeking discovery typically makes a cross-motion to compel in response to the witness's motion to quash.

Are Motion Fees and Costs Recoverable Under FRCP 45?

Whether or not a party may recover its motion-related costs and fees from the witness under [FRCP 45](#) depends on the relief sought.

As a general rule, the movant may not recover its motion-related costs and fees under [FRCP 45](#) when it moves to compel compliance with the subpoena (see [Peacock v. Merrill](#), 2008 WL 687195, at *4 & n. 11 (M.D. La. Mar. 10, 2008); [Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.](#), 2007 WL 852521, at *7 (D. Kan. Mar. 16, 2007); [Davis v. Speechworks Int'l, Inc.](#), 2005 WL 1206894, at *4-5 (W.D.N.Y. May 20, 2005); [SEC v. Kimmes](#), 1996 WL 734892, at *5-*11 (S.D.N.Y. Dec. 24, 1996); [Application of Sumar](#), 123 F.R.D. 467, 473-74 (S.D.N.Y. 1988)).

However, courts may award costs and fees to a party who prevails on a motion for contempt sanctions (see [Francois](#), 2012 WL 777273, at *3; [In re Faiella](#), 2008 WL 1790410, at *5-8 (Bankr. D.N.J. Apr. 18, 2008); [Int'l Bhd. of Elec. Workers](#), 2007 WL 622504, at *1, *5; [Tranchant v. Env'tl Monitoring Svc., Inc.](#), 2001 WL 1160864, at *1-2 (E.D. La. Oct. 2, 2001); [Bulkmatic Transport Co., Inc. v. Pappas](#), 2001 WL 504839, at *3 (S.D.N.Y. May 11, 2001)).

Procedure for Making the Motion

As explained below, the procedure for either moving to compel or for contempt sanctions may differ significantly depending on where the motion is filed.

Motion Made in Court Where Underlying Action is Pending

If counsel seeks to file a motion to compel compliance or for contempt sanctions in the issuing court (because the witness is located there), the moving party normally may serve and file its motion according to the same filing guidelines applicable to other documents in the case. Generally, this means serving and filing the motion electronically through CM/ECF. In addition, the moving party may have to serve a paper copy of the motion on the non-party witness (or his attorney) by mail or another acceptable service method under [FRCP 5](#), unless the witness (or his attorney) receives CM/ECF service in the case (see [Practice Note, Serving Federal Court Documents Under FRCP 5](#)).

Special service rules may apply for contempt motions (for example, [S.D.N.Y. and E.D.N.Y. L. Civ. R. 83.6\(a\)](#) (if alleged contemnor does not have counsel, service must be made personally, together with a copy of Local Civil Rule 83.6, under [FRCP 4](#))). The court may decide to hold a formal hearing if the movant seeks civil contempt sanctions against the witness under [FRCP 45\(g\)](#). An alleged contemnor has the right to notice and an opportunity to be heard before being held in contempt of court (see [Bagwell, 512 U.S. at 827](#)). Even more stringent procedures apply if the court decides to impose criminal contempt sanctions against the witness (see [id. at 826-27](#)).

Motion Not Made in Court Where Underlying Action is Pending

Often, a non-party witness who has no connection to the judicial district where the underlying action is pending has crucial evidence. In this situation, a litigant may have no choice but to seek compliance in a district court located where the witness lives or works, even though that court is not the court where the underlying lawsuit is pending ([Practice Note: Subpoenas: Drafting, Issuing, and Serving Subpoenas \(Federal\): From Which Court Must the Subpoena Issue?](#)). To enforce the subpoena outside of the issuing court, the moving party must first commence a new action in the compliance court and file its motion papers in that new action. These are commonly referred to as miscellaneous (or ancillary) actions.

Counsel typically may commence a miscellaneous action the same way as a civil lawsuit. However, each court has its own internal procedures for these types of actions. The protocol may vary considerably from court to court. If the court's local rules are unclear on how to commence a miscellaneous action, contact the relevant court clerk in charge of miscellaneous filings for further guidance.

Some common issues that arise when the moving party commences a miscellaneous action are:

- **Method of commencement.** Some courts require the moving party to commence miscellaneous actions by filing paper copies of the initiating documents at the courthouse. Other courts require counsel to file miscellaneous actions through CM/ECF.
- **Required documents.** The moving party must file its motion papers to commence the miscellaneous action. If the moving party is a corporation or other organization, it must also file a Rule 7.1 corporate disclosure statement (see [Standard Document, Rule 7.1 Disclosure Statement](#)). In addition, some courts require the moving party to file a notice of appearance and a civil cover sheet.
- **Filing fees.** Federal district courts charge a filing fee to open a new miscellaneous action (see [United States District Court Fee Chart](#)).
- **Post-commencement service and filing.** After the action is commenced, the moving party serves the initiating documents (and any post-initiation documents) on the subpoena recipient and the other parties to the underlying action and files proof of service ([FRCP 5\(a\)\(1\)\(D\)](#); [FRCP 5\(d\)\(1\)](#) and [FRCP 37\(a\)\(2\)](#)). Often, counsel must serve paper copies of the initiating documents on the parties, although counsel should check

the applicable local rules and CM/ECF guidelines. Depending on the court, counsel may serve and file post-initiation documents (such as opposition and reply briefs) in paper format or electronically.

- **Attorney admissions.** Before commencing a miscellaneous action, counsel for the moving party should check the relevant court's local rules to determine any admission issues (see [Attorney Admissions](#)). Counsel should also determine whether to obtain a CM/ECF login and password for that court.

Required Documents

As with any other motion, a motion to compel compliance with a subpoena (or a motion for contempt sanctions) generally requires the moving party to serve and file:

- A notice of motion.
- A memorandum of law.
- Supporting declarations and affidavits as necessary.
- Proof of service.
- If appropriate, a proposed order.

Before filing the motion, counsel should always check the court's local rules, standing orders, and the judge's individual practice rules to ensure that counsel files all of the required documents and follows all local procedures. For more on preparing and filing motions in federal court generally, see [Practice Note, Motion Practice in Federal Court: Overview](#).

When preparing a motion to compel or a motion for contempt, counsel should consider that:

- The court may (or may not) require a certification stating that the parties have met and conferred in an attempt to resolve their differences without resorting to motion practice (see [Pre-Motion Meet and Confer](#)).
- When moving for contempt, counsel may need to submit additional documents, such as an affidavit detailing the:
 - alleged misconduct;
 - alleged damages that the misconduct caused; and
 - evidence regarding the sum of costs that the moving party incurred.
- If counsel must commence a miscellaneous proceeding, additional documents may be required (see [Motion Not Made in Court Where Underlying Action is Pending](#)).

Substance of the Motion

As with most discovery motions, a motion to enforce a subpoena is inherently fact-specific. Where appropriate, counsel should address the following issues in its motion:

- The legal basis for the motion (for example, whether the party is moving under [FRCP 37](#) or [FRCP 45](#)).
- The relief sought (for example, compliance with the subpoena, contempt sanctions, and any related costs and attorneys' fees).
- The factual background and [subject matter jurisdiction](#) of the underlying action (if the motion is not made in the court where the underlying action is pending).
- The circumstances surrounding the issuance and service of the subpoena.
- The circumstances surrounding the witness's non-compliance.

- The relevance of the evidence the subpoena seeks, including a description of why it is necessary to obtain the evidence from this particular witness, as opposed to some other source.
- A description of the reasonableness and clarity of the demands that the subpoena makes.
- Any potential burden imposed on the witness, such as the time frame that the subpoena's requests cover.
- To the extent required, the moving party's attempt to meet and confer with the witness or her attorney to resolve the dispute without judicial intervention.

Independent Action to Obtain Discovery

If the issuing party cannot successfully subpoena a non-party witness under [FRCP 45](#), that party may need to commence an independent action to obtain discovery (see [Lubrin v. Hess Oil V.I. Corp.](#), 109 F.R.D. 403, 405 (D.V.I. 1986); [Darbeau v. Lib. of Cong.](#), 453 F. Supp. 2d 168, 170-71 (D.D.C. 2006) (independent action seeking discovery permissible where statutory bases for obtaining discovery are inadequate); see also 1991 Advisory Committee Notes to FRCP 34(c) (noting that independent actions to obtain discovery from non-parties are not precluded under the FRCP, but they may be unnecessary in light of [FRCP 45](#))). These are sometimes referred to as actions for an equitable bill of discovery. A situation where a non-party witness cannot be successfully subpoenaed under [FRCP 45](#) may arise if that witness purposely stays in a federal district that is more than 100 miles away from where he lives, works, and regularly transacts business in person to avoid being deposed in a particular lawsuit ([FRCP 45\(c\)\(1\)\(A\)](#)).

Appeals

Generally, federal appeals courts may hear appeals only following final judgments from lower courts. Discovery orders, such as orders quashing (or compelling compliance with) subpoenas, are typically deemed interlocutory and are therefore reviewable only in connection with an appeal from a final judgment (see [In re Subpoena Served on the Cal. Pub. Utils. Comm'n](#), 813 F.2d 1473, 1476 (9th Cir. 1987)). However, these orders may sometimes be immediately appealable. As explained below, whether an immediate appeal lies from an order quashing (or compelling compliance with) a subpoena generally depends on the relief that the court orders and the particular court that issues the order. As a general matter, appellate courts review discovery orders under an abuse of discretion standard (see [Wantanabe Realty Corp. v. City of New York](#), 159 Fed. App'x 235, 240 (2d Cir. 2005)).

Order Denying Discovery Entered in Underlying Action

An order denying discovery sought by a subpoena to a non-party is not immediately appealable if the court where the underlying action is pending enters the order (see [P.H. Glatfelter co. v. Windward Prospects Ltd.](#), 847 F.3d 452, 455-58 (7th Cir. 2017); [Caswell v. Manhattan Fire & Marine Ins. Co.](#), 399 F.2d 417, 422 (5th Cir. 1968)).

Order Denying Discovery Entered in Ancillary Action

An order denying discovery sought by a subpoena to a non-party in a miscellaneous or ancillary proceeding is immediately appealable if that proceeding is pending in a district court located in a different circuit from where the underlying lawsuit is pending (see [Nevada v. J-M Mfg. Co.](#), 555 F. App'x 782, 783 n.1 (10th Cir. 2014); [Nicholas v.](#)

[Wyndham Int'l, Inc., 373 F.3d 537, 541-42 \(4th Cir. 2004\)](#); [Cusumano v. Microsoft Corp., 162 F.3d 708, 712 \(1st Cir. 1998\)](#)).

In contrast, circuit courts are split over whether an immediate appeal may lie from an order denying discovery sought from a non-party where the proceeding and the underlying lawsuit are in separate district courts within the same circuit. Specifically:

- Several circuits hold that an appeal in this situation must wait until entry of a final judgment in the underlying action (see [Periodical Publishers Serv. Bureau, Inc. v. Keys, 981 F.2d 215, 217-18 \(5th Cir. 1993\)](#); [Hooker v. Cont'l Life Ins. Co., 965 F.2d 903, 905 \(10th Cir. 1992\)](#); [Barrick Group, Inc. v. Mosse, 849 F.2d 70, 73 \(2d Cir. 1988\)](#); [In re Subpoena Served on the Cal. Pub. Utils. Comm'n, 813 F.2d at 1476-80](#)).
- Other circuits take a more liberal approach and allow the aggrieved party to immediately appeal (see [Heat & Control, Inc. v. Hester Indus., Inc., 785 F.2d 1017, 1021-22 \(Fed. Cir. 1986\)](#); [Ariel v. Jones, 693 F.2d 1058, 1059 \(11th Cir. 1982\)](#)).

If the aggrieved party is forced to file two separate appeals after entry of final judgment in the underlying action (that is, an appeal from the miscellaneous or ancillary proceeding and an appeal from a final judgment in the underlying action), he must file two separate notices of appeal in the district courts (and pay the required filing fees for both) and then move in the appellate court to consolidate the two appeals under [Rule 3\(b\) of the Federal Rules of Appellate Procedure](#) (see [Hooker, 965 F.2d at 905](#)).

Order Compelling Compliance With Subpoena

Non-parties may not take an immediate appeal from court-ordered discovery based on a subpoena regardless of whether the order is made in the underlying action or in a miscellaneous or ancillary proceeding. To obtain immediate appellate review, the subpoenaed party must defy the court order, be found in contempt, and appeal the contempt citation (see [In re Flat Glass Antitrust Litig., 288 F.3d 83, 89-90 \(3d Cir. 2002\)](#) (underlying action); [MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116, 119-122 \(4th Cir. 1994\)](#) (ancillary proceeding); [Hooker, 965 F.2d at 904 & n.1](#) (ancillary proceeding); [In re Subpoena Served on the Cal. Pub. Utils. Comm'n, 813 F.2d at 1476](#) (non-party must appeal contempt citation); but see [Caswell, 399 F.2d at 422](#)).