Subpoenas: Using Subpoenas to Obtain Evidence

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This Practice Note analyzes the key issues that parties should consider when they use 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 must be included in a subpoena, who may issue a subpoena, how to serve a subpoena, how to calculate the fee to be paid to the subpoenaed witness, how to provide notice of the subpoena to the other parties, how to enforce the subpoena, and how to appeal a court order granting or denying the discovery sought in a subpoena.

Subpoenas are commonly used in civil litigation to obtain evidence 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 use subpoenas to obtain evidence in federal civil litigation under *FRCP 45* (FRCP), which was amended on December 1, 2013. Counsel should carefully review the amended rule before serving a subpoena in a federal lawsuit, as both the rule's substance and subdivision lettering has changed. For a chart comparing the key differences between former FRCP 45 and the amended rule, see *Amended Federal Rule of Civil Procedure 45 Simplifies Subpoena Practice (http://us.practicallaw.com/1-549-4345)*.

WHEN TO USE A SUBPOENA

Depending on the situation, a subpoena may or may not be the preferable method for obtaining evidence from another person or entity. This section discusses when parties should use subpoenas in federal civil litigation and when they should look to the other devices permitted by the FRCP for obtaining discovery.

PARTIES AND NON-PARTIES

Subpoenas are typically used by parties in a lawsuit to obtain evidence from non-party witnesses. 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, courts have held that a party's use of a subpoena to obtain evidence from another party is not necessarily prohibited (see *Mortgage Information Servs. v. Kitchens, 210 F.R.D. 562, 563-66 (W.D.N.C. 2002)*; 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 already produced by a party in discovery is available at trial. In addition, because the FRCP does not require a party to appear at trial, a subpoena may be necessary to ensure his attendance (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, there is occasionally a question about which types of employees are subject to discovery under *FRCP 26* through *FRCP 37* and which employees must be subpoenaed under *FRCP 45*. In general, a corporate party's officers, directors and managing agents do not need to be subpoenaed, but can be commanded to appear for a deposition through a notice issued under *FRCP 30* (see *Stone v. Morton Int'l, Inc., 170 F.R.D. 498, 503-04 (D. Utah 1997)*). Lower-level corporate employees, however, often must be subpoenaed (see *O'Connor v. Trans Union Corp., No. 97-cv-4633, 1998 WL 372667, at *2-3 (E.D. Pa. May 11, 1998)*).

INDIRECT NON-PARTY DISCOVERY

In certain circumstances, non-party discovery may be obtained indirectly through the parties. 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 *Gen. Envt'l Sci. Corp. v. Horsfall, 136 F.R.D. 130, 133-34 (N.D. Ohio 1991)*; see also *Dietrich v. Bauer, No. 95-cv-7051, 2000 WL 1171132, at *2-5 (S.D.N.Y. Aug. 16, 2000)*; *Addamax Corp. v. Open Software Found., Inc., 148 F.R.D. 462, 468 (D. Mass. 1993)*; *GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc., No. 11-cv-1299, 2012 WL 1414070, at *10 (S.D.N.Y. Apr. 20, 2012)*).

For further analysis of the issues that courts consider in determining whether a corporation practically controls documents held by an affiliate, see *Article, Protecting Foreign Corporations from US Discovery (http://us.practicallaw.com/6-502-5304)*.

THE COOPERATIVE WITNESS

Before subpoenaing a witness, counsel for the requesting party should investigate whether the witness will voluntarily provide the sought-after evidence. The requesting party may be able to save a significant amount of time and money if the witness is willing to voluntarily comply with an informal request for evidence. However, even if the witness agrees to voluntarily provide the requested evidence, a party may still want to use a subpoena (backed by the threat of contempt sanctions for disobedience) to ensure the witness' 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 subpoena that seeks documents from a witness may be combined with a subpoena seeking that person's testimony as well (*FRCP 45(a)(1)(C)*). Alternatively, the requesting party may serve separate document subpoenas and testimonial subpoenas directed to the same person (*FRCP 45(a)(1)(C)*).

REQUIRED CONTENTS OF THE SUBPOENA

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

- The name of the court that issued the subpoena, because only the court where the underlying action is pending (the issuing court) may issue a subpoena (see *FRCP 45(a)(2)* and *From Which Court Must the Subpoena Issue?*).
- A proper citation of the title of the action and the civil action 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' 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).
- The categories of documents sought (if the subpoena commands the production or inspection of documents).
- The method for recording testimony (if the subpoena seeks testimony).

(*FRCP 45(a)(1)(A)-(B)*.)

In addition:

- The subpoena, which may be issued by the clerk or an attorney authorized to practice in the issuing court (see *Who May Issue the Subpoena?*), must bear the issuer's signature (*FRCP 45(a)(3)*).
- If ESI is sought, the subpoena may specify the form(s) in which the ESI is to be produced (*FRCP 45(a)(1)(C)*).
- If the subpoena requires a 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 for download 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 088.
- Appear for a deposition is the AO 088A.
- Produce documents, information, or objects or to permit inspection of premises is the AO 088B.

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 a company representative to testify about many issues, the issuing party may include this additional information as an attachment (also known as a "rider") to the subpoena.

ISSUING THE SUBPOENA

FRCP 45(a) speaks of "issuing" a subpoena. The term "issuing" has two distinct meanings in this context:

- Which court's name must appear on the face of the subpoena.
- Who can physically sign the subpoena.

As explained below, a subpoena must be properly "issued" on both levels to be valid and enforceable.

FROM WHICH COURT MUST THE SUBPOENA ISSUE?

FRCP 45 requires subpoenas to be "issued" out of a court. The physical act of issuing a subpoena from a court is simple: the issuing party's attorney need only place the issuing court's name at the top of the subpoena. However, the legal effect of issuing a subpoena from a court is significant: the subpoena becomes a judicial command emanating from that court, the disobedience of which may be punishable as a contempt of court (*FRCP 45(g)*).

Under the amended rule, all subpoenas, whether for documents, depositions, hearing or trial, must now be issued from the court where the case is pending (*FRCP 45(a)(2)*).

WHO MAY ISSUE THE SUBPOENA?

Under *FRCP 45*, two types of individuals may "issue," or sign, a subpoena:

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

(*FRCP 45(a)(3)*.)

Although counsel need only be admitted in the issuing court to sign a subpoena, subpoena-related motion practice may require separate admission in another court (or the use of local counsel) if compliance with the subpoena is required outside the issuing court's jurisdiction (see *Enforcing the Subpoena*). In certain districts, counsel may need to be separately admitted to depose a witness within that district (if different from the issuing court). (See, for example, *E.D. Mich. L. Civ. R. 83.20(i)(1)(E)(ii)* (non-member attorney may conduct a deposition in the Eastern District of Michigan only under certain circumstances); see also *Winterrowd v. Am. Gen. Annuity Ins. Co., 556 F.3d 815, 820 (9th Cir. 2000)* ("Admissions rules and procedure for federal court are independent of those that govern admission to practice in state courts").) If the court's local rules are unclear on these points, check with a local attorney to see what the common practice is in that district.

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. As explained below, the rules governing service of a subpoena are fairly strict. Non-compliance 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, for example, if the issuing party desires 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 person named therein (*FRCP 45(b)(1)*; *Omikoshi Japanese Restaurant v. Scottsdale Ins. Co., No 08-cv-3657, 2008 WL 4829583, at *1 (E.D. La. Nov. 5, 2008)*). If the subpoena is directed to a corporation (or other entity), it must be personally served on a corporate officer or other agent authorized under *FRCP 4* to accept service of process (see *In re Motorsports Merchandise Antitrust Litig., 186 F.R.D. 344, 348 (W.D. Va. 1999)*).

The rigid rules governing the method of subpoena service 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 challenge directed to the propriety of service, 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 within which compliance with a subpoena may be commanded. When a subpoena is issued during 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 Systems, Inc., No. 08-cv-60570, 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, however, provide a minimum time period for compliance (see, for example, *E.D. Va. L. Civ. R. 45(E)* (requiring trial subpoena to be served no later than 14 days before the return date); *E.D. Va. L. Civ. R. 45(F)* (requiring deposition subpoenas to be served no later than 11 days before the date of the deposition)).

Generally, a subpoena may not be served before the parties conduct their *FRCP 26(f)* pre-trial discovery conference, also known as a meet and confer (*FRCP 26(d)(1)*). In addition, counsel should ensure that the subpoena is served (and that the return date is designated) before any related discovery deadlines (see *Ponson v. BellSouth Telecomm., Inc., No. 09-cv-0149, 2010 WL 1552802, at *3 (E.D. La. Apr. 16, 2010)*; *Surbella v. Foley, No. 05-cv-0758, 2006 WL 3007429, at *1 (S.D. Ohio Oct. 20, 2006)*).

PLACE OF SERVICE

A subpoena issued under *FRCP 45* can now be served anywhere in the United States (see *FRCP 45(b)(2)*).

PLACE OF COMPLIANCE

Although a subpoena may now be served anywhere in the US, *FRCP 45* places strict limits on where a subpoena may command compliance. This section outlines FRCP 45's geographic limits, and briefly explains the potential consequences of a subpoena that purports to command compliance beyond those limits.

Subpoenas Seeking Testimony

A non-party generally may only be commanded 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 (*FRCP 45(c)(1)(A)*). The 100-mile limit may, however, be expanded for trial subpoenas to encompass the entire state where the non-party lives, works, or regularly transacts business in person, but only if the witness would not incur substantial expense to attend the trial (*FRCP 45(c)(1)(B)(ii)*).

A subpoena is not required 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 deposition subpoena was served (see *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 (see 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

For subpoenas seeking documents, ESI, or tangible things, the place of production must be within 100 miles of where the witness lives, works, or regularly transacts business in person (*FRCP 45(c)(2)(A)*). However, nothing in the amended rule prevents parties from agreeing to produce items electronically, as is common practice with large document productions and ESI (see 2013 Advisory Committee Notes to FRCP 45).

For subpoenas seeking inspection of premises, the specified location must be 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 *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 the above geographic limits, a court generally must quash or modify the subpoena on motion (see *FRCP 45(d)(3)(A)(ii)* and *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 party's payment (see 2013 Advisory Committee Notes to FRCP 45(c)).

PROOF OF SERVICE

Following service of a subpoena, the process server must prepare a certified proof of service (*FRCP 45(b)(4)*). This may be in the form of an affidavit or declaration (the latter does not require notarization). Alternatively, the server may use the "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, and include the date, manner of service and the 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 for testimony commanded by the subpoena (see *Witness Fees*).

The issuing party should retain the server's original proof of service. The proof of service does not need to be served on any of the other parties and should not be filed with the court unless there is a reason to do so, for example, if the issuing party wishes to attach the proof of service as an exhibit to a motion (*FRCP 45(b)(4)*).

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. The fee is, instead, set by *28 U.S.C. § 1821*. 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 other specialized witness that may have an established hourly rate.

MILEAGE FEE

The mileage fee provided by the issuing party must be tendered irrespective of the distance that the witness travels to attend the deposition, hearing or trial, although it only needs to be a reasonable estimate of the distance traveled (see *In re Dennis, 330 F.3d 696, 705 (5th Cir. 2003)*).

The mileage fee is calculated by multiplying the rate per mile (presently set at $0.565 for travel by automobile) by the number of miles traveled to and from the place of attendance. 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 MapQuest or 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 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 per mile allowed by law 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 General Services Administration (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 the rate per mile for reimbursing federal employees traveling by privately owned vehicle is to be established by regulations prescribed by the GSA pursuant to *5 U.S.C. § 5707*.

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 merely states that the reimbursement rates are published on the GSA's website.

The GSA's website lists the 2013 reimbursement mileage rates as follows:

- Privately owned automobile: $0.565.
- Privately owned motorcycle: $0.535.
- Privately owned airplane: $1.33.

(See *Privately Owned Vehicle (POV) Mileage Reimbursement Rates*.)

In addition, the IRS's 2013 optional standard mileage rates for use by taxpayers in computing the deductible costs of operating their automobiles is:

- $0.565 per mile for business miles driven.
- $0.24 per mile driven for medical or moving purposes.
- $0.14 per mile driven in service of charitable organizations.

(See *IRS Standard Mileage Rates for 2013*.)

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 for purposes of computing 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 regulation promulgated by the GSA 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 wish to subscribe to the ALK uniformed table of distances, a reasonable alternative may be to use an online mapping service such as MapQuest or Google Maps.

When measuring the distance to and from the place of attendance, the starting point will typically be 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, it may be prudent to measure 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 also 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 attendance and mileage fees may be paid in cash, by check, by money order or by any other generally accepted method of payment. Where the issuing party tenders payment in some 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 attendance and mileage fees must be tendered at the time the subpoena is served (see *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 may also 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

No attendance or mileage fee is required for subpoenas commanding the production and/or the inspection of documents (see *Benek v. Kan. City Life Ins. Co., No. 07-cv-5142, 2008 WL 356661, at *1 (W.D. Wash. Feb. 6, 2008)*). This is because the recipient is not required to attend the production, unless the subpoena also commands the recipient to appear for a deposition, hearing or trial (*FRCP 45(d)(2)(A)*).

NO FEES FOR SUBPOENA ISSUED BY US

The US government is not required to tender witness fees when the subpoena issues on behalf of the US government or any of its officers or agencies (*FRCP 45(b)(1)*).

NOTICE OF SUBPOENA

Under the FRCP, an attorney who seeks to obtain evidence from a non-party must notify the other parties of the subpoena's issuance. This section covers the key points for counsel to consider when providing the requisite notice to the other parties.

TIMING OF THE NOTICE

If a subpoena commands the production of documents, ESI, tangible things or the inspection of premises before trial, the issuing party must serve a notice and a copy of the subpoena on each party to the lawsuit before the subpoena is served (*FRCP 45(a)(4)*). 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. However, the notice requirement is now contained in a separate provision earlier in the rule to emphasize that counsel should comply with the rule as stated. The amended rule also requires counsel to serve a copy of the subpoena, along with the notice, before serving the witness (see *FRCP 45(a)(4); see also 2013 Advisory Committee Notes to FRCP 45(a)*).

If a subpoena commands a witness to appear for a deposition, the issuing party must give written notice to the other parties in the lawsuit under *FRCP 30*. However, this notice does not need to be given before the subpoena is served if the timing of the notice is reasonable (*FRCP 30(b)(1)*).

Although *FRCP 45* does not expressly require prior notice of a trial subpoena, courts have required prior notice where the issuing party uses a trial subpoena to obtain discovery (see *Kenney, Becker LLP v. Kenney, No. 06-cv-2975, 2008 WL 681452, at *3 & n.3 (S.D.N.Y. Mar. 10, 2008)*).

DRAFTING THE NOTICE

The notice of subpoena should identify the person to whom the subpoena is directed and state the date, time and place of the production, inspection or testimony so that the other parties may review the documents produced or attend the deposition. If the subpoena is for production of documents, ESI, tangible things, or the inspection of premises before trial, the issuing party must also attach a copy of the subpoena to the notice so that the other parties know exactly what evidence is being sought from the witness. Counsel should include a copy of any testimonial subpoenas with a notice of a non-party deposition.

SERVING THE NOTICE

The notice and a copy of the subpoena must be served on all of the other parties to the lawsuit (*FRCP 45(a)(4)*). The issuing party should check the court's Case Management/Electronic Case Filing (CM/ECF) rules to determine whether discovery-related documents, such as a notice of subpoena, may be electronically served and filed. If the court's rules do not allow for the electronic service and filing of subpoena notices, the issuing party may serve the notice by mail or another acceptable method of service under *FRCP 5(b)*.

PROVING SERVICE

Counsel may need to draft an affidavit of service after the notice of subpoena is served. Even if the court's rules do not require the notice to be filed, counsel should keep the original affidavit of service in his files in case service is later challenged.

POST-SERVICE NOTICE

FRCP 45(a)(4) does not expressly state whether the issuing attorney must give notice to the other parties once the sought-after documents are delivered to their commanded destination. Nor does it state whether the issuing attorney must inform other parties of any post-service changes or modifications to the subpoena that may have been negotiated by the issuing party and the witness(es). 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 they are produced (see *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/attorneys, which may include lost earnings and reasonable attorneys' 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, No. 01-mc-0026, 2001 WL 1661473, at *3 (W.D. Mich. Apr. 9, 2001)*).

ENFORCING THE SUBPOENA

Witnesses do not always comply with subpoenas. As a result, the issuing party may need to enlist the court to force compliance. This section of the Note outlines the main issues for counsel to consider when seeking the court's assistance in forcing a reluctant witness to provide the sought-after evidence.

ATTORNEY ADMISSIONS

Before filing a motion to enforce a subpoena, whether labeled a motion to compel or a motion for contempt sanctions, the movant's attorney must first confirm that he is admitted to practice in the court where the motion is to be made -- or figure out how to proceed if he is not so admitted.

Admission Required

Attorney admission requirements are typically set out in the district court's local rules. Generally, an attorney may only appear on behalf of a client in a particular court if he is admitted to practice there (see, for example, *S.D.N.Y. and E.D.N.Y. L. Civ. R. 1.3(c)*). Signing and arguing a motion constitutes a court appearance.

An attorney's admission status should not present much of a problem if he files a motion to enforce a subpoena in the issuing court (again, meaning the court where the underlying action is pending). Presumably, the movant's attorney is already admitted to practice in that court.

However, if compliance is sought in a court other than the issuing court, counsel may need to be admitted in the compliance court before filing a motion to enforce the subpoena or taking other steps in furtherance of the subpoena.

Types of Admission

If the movant's attorney is not admitted in the district court where the motion is to be made, he may apply for membership in the court's bar if he otherwise meets the qualifications for membership. Typically, full bar membership in a federal district court is limited to attorneys who are admitted to the state bar of the state where the court is located. Out-of-state attorneys, on the other hand, are usually allowed to become admitted on a pro hac vice basis. Directions on how to become admitted to a court or on a pro hac vicebasis may be found on the court's website and/or in its local rules.

Local Counsel

Many courts require out-of-state attorneys admitted pro hac vice to associate with local counsel for the duration of the action (see, for example, *C.D. Cal. L. Civ. 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 (see, for example, *D.N.J. L. Civ. R. 101.1(c)(4)*).

Plan Ahead

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

REVIEW THE COURT'S AND JUDGE'S RULES

Federal motion practice is governed in large part by the court's local rules, CM/ECF rules and the judge's individual practice rules (if the judge has any). These rules are normally posted on the court's website and cover issues such as:

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

It is critical for counsel to understand these rules before filing a motion (or any other document for that matter) in federal court.

MAKING A MOTION TO COMPEL COMPLIANCE UNDER FRCP 37

One way to enforce a subpoena against a non-party witness is to move to compel compliance under *FRCP 37(a)*. This section of the Note covers the main points to consider when moving under FRCP 37(a).

When Used

Motions under *Rule 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)*; see also *Westmoreland v. CBS, Inc., 770 F.2d 1168, 1175 (D.C. Cir. 1985)*; *Fremont Energy Corp. v. Seattle Post Intelligencer, 688 F.2d 1285, 1287 (9th Cir. 1982)*; *Fisher v. Marubeni Cotton Corp., 526 F.2d 1338, 1341 (8th Cir. 1975)*.)

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 provide the discovery in an effort to resolve the situation without court action (*FRCP 37(a)(1)*).

Where to Make the Motion

A motion under *FRCP 37* to compel a non-party's compliance with a subpoena must be made 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 *From Which Court Must the Subpoena Issue?*). However, compliance generally may only be commanded within 100 miles of where the non-party witness lives, works or regularly transacts business in person (see *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 to compel the witness to testify at the deposition. However, a motion to compel may later be transferred to the issuing court (see *Transfer of a Subpoena-related Motion*).

Burden of Proof

Generally, the party seeking to compel compliance bears the initial burden of demonstrating:

- Which discovery requests are the subject of its motion to compel.
- The relevance of the sought-after evidence.
- The circumstances of the witness' non-compliance.
- Why the witness' objections are not justified.

(See *Peralta v. Martel, No. 09-cv-3228, 2011 WL 5547153, at *1 (E.D. Cal. Nov. 14, 2011)*; *Wilson v. Hill, No. 08-cv-0552, 2010 WL 5014486, at *2 (S.D. Ohio Dec. 3, 2010)*; *Bayview Loan Servicing, LLC v. Boland, 259 F.R.D. 516, 518 (D. Colo. 2009)*.)

The burden then shifts to the witness to demonstrate why the sought-after evidence is not discoverable, such as where the request is overly broad, seeks privileged information or is unduly burdensome (see*Snedeker v. Snedeker, No. 10-cv-0189, 2011 WL 3555650, at *1-*2 (S.D. Ind. Aug. 11, 2011)*; *Belaire at Boca, LLC v. Ass'ns Ins. Agency, Inc., No. 06-cv-80887, 2007 WL 2177212, at *1 (S.D. Fla. July 26, 2007)*).

Relief Available

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

Are Fees and Costs Recoverable?

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)*). Note that 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)*).

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 compliance under *FRCP 45*. This section covers the main points to consider when moving under FRCP 45.

When Used

FRCP 45 is used as the 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, the moving party may or may not need to meet and confer with the witness (or her attorney if she is represented) before making a motion to compel or for contempt under *FRCP 45* (compare *Travelers Indem. Co. v. Metro. Life Ins. Co., 228 F.R.D. 111, 115 (D. Conn. 2005)* (meet and confer not required for Rule 45 motions) with *C.D. Cal. L. Civ. R. 45-1* (meet and confer required for Rule 45 motions)). As a practical matter, however, it is usually advisable to first reach out to the witness (or her counsel, which is required if the witness is known to be represented by counsel) in an attempt to resolve the dispute without engaging in potentially expensive motion practice.

Where to Make the Motion

Subpoena-related motions and applications must initially be filed in the compliance court (see 2013 Advisory Committee Notes to FRCP 45(f)). This includes motions for contempt (see *FRCP 45(g)*). The compliance court may or may not be the same as the court where the underlying action is pending, and that issued the subpoena (see *From Which Court Must the Subpoena Issue?*).

Transfer of a Subpoena-related Motion

A subpoena-related motion filed in the compliance court may be transferred to the issuing court if either:

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

(*FRCP 45(f)*; see also 2013 Advisory Committee Notes to *FRCP 45(f)*.)

Transfer of subpoena-related motions should be "truly rare." For example, 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 a 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 attorney for the subpoenaed witness is authorized to practice in the compliance court, the attorney may, after transfer, file papers and appear on the motion in the issuing court (FRCP 45(f)). No separate pro hac vice admission to the issuing court is required in these circumstances for the attorney of the subpoenaed witness.

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 carries the burden of proof on a motion to compel or a motion for contempt sanctions under *FRCP 45* (see *Thomas v. Blue Cross & Blue Shield Ass'n, 594 F.3d 814, 821 (11th Cir. 2010)*; *Echostar Comm. Corp. v. News Corp. Ltd., 180 F.R.D. 391, 394 (D. Co. 1998)*). However, the recipient of the subpoena bears the burden of proof where compliance is resisted on the ground that the subpoena seeks ESI that is not reasonably accessible because of undue burden or cost (*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 (see *FRCP 45(g)*; see also 2013 Advisory Committee Notes on FRCP 45(g)). Prior to the December 1, 2013 amendments to FRCP 45, some courts held that a party could immediately move for contempt sanctions under FRCP 45(g) where a subpoenaed witness fails to either:

- Appear and testify at a deposition or trial (without also serving a motion to quash and obtaining a stay of the deposition or other testimony).
- Produce documents (without also serving written objections under *FRCP 45(d)(2)(B)*).

(See *Francois v. Blandford, No-10-cv-1330, 2012 WL 777273, at *3 (E.D. La. Mar. 7, 2012)*; *Diamond v. Simon, No. 89-cv-7061, 1994 WL 10622, at *1 (S.D.N.Y. Jan. 10, 1994)*.) Although amended FRCP 45clarifies that contempt sanctions may be applied to a person who disobeys a subpoena-related order, or one who fails entirely to obey a subpoena, the 2013 Advisory Committee Notes to FRCP 45(g) state that it is "rare" for a court to use contempt sanctions without first ordering compliance with a subpoena.

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., No. 06-cv-2151, 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, No. 91-cv-4528, 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 civil contemnor 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 non-party witness is found in contempt, the sanction should be directed to the non-compliant witness, not against the adverse party, unless that party took steps to secure the witness' non-compliance (see *Francois, 2012 WL 777273, at *3*; see also *GenOn Mid-Atlantic, No. 11-cv-1299, 2012 WL 1414070, at *8-15* (noting that parties can be sanctioned for non-party's alleged spoliation of evidence, but finding party's conduct in that case not to be sanctionable)).

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)*); *Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492, 494 & n. 5 (9th Cir. 1983)*).
- 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' motion to quash also constitutes an order compelling the sought-after discovery, the party seeking discovery will typically make a cross-motion to compel in response to the witness' motion to quash.

Are Fees and Costs Recoverable?

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, No. 08-mc-0001, 2008 WL 687195, at *4 & n. 11 (M.D. La. Mar. 10, 2008)*; *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-cv-2164, 2007 WL 852521, at *7 (D. Kan. Mar. 16, 2007)*; *Davis v. Speechworks Int'l, Inc., No. 03-cv-0533, 2005 WL 1206894, at *4-*5 (W.D.N.Y. May 20, 2005)*; *SEC v. Kimmes, No. 18-mc-0304, 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, No. 05-bk-50986, 07-ad-1470, 2008 WL 1790410, at *5-*8 (Bankr. D.N.J. Apr. 18, 2008)*; *Int'l Bhd. of Elec. Workers, No. 06-cv-2151, 2007 WL 622504, at *1, *5*; *Tranchant v. Envt'l Monitoring Svc., Inc., No. 00-cv-2196, 2001 WL 1160864, at *1-*2 (E.D. La. Oct. 2, 2001)*; *Bulkmatic Transport Co., Inc. v. Pappas, No. 99-cv-12070, 2001 WL 504839, at *3 (S.D.N.Y. May 11, 2001)*; *Kohler, No. 90-cv-3188, 1993 WL 307775, at *2*).

PROCEDURE FOR MAKING THE MOTION

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

Motion Made in Court Where Underlying Action is Pending

If a motion to compel compliance or for contempt sanctions is made in the issuing court, 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 the court's CM/ECF system. 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.

Keep in mind that special service rules may apply for contempt motions (see, for example, *S.D.N.Y. and E.D.N.Y. L. Civ. R. 83.6(a)* (if alleged contemnor is not represented by counsel, service must be made personally, together with a copy of Local Civil Rule 83.6, in the manner prescribed by *FRCP 4*)). In addition, 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*; *Fisher, 526 F.2d at 1342-1343*). Even more stringent procedures apply if the court decides to level criminal contempt sanctions against the witness (see *Bagwell, 512 U.S. at 826-27*).

Motion Not Made in Court Where Underlying Action is Pending

Often, evidence crucial to a lawsuit is held by a non-party witness who has no connection to the judicial district where the underlying action is pending. In these situations, 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 (see *From Which Court Must the Subpoena Issue?*). To enforce such a subpoena, 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 (see *Visto Corp. v. Smartner Info. Sys., Nos. 06-80339 MISC, 06-80352 MISC, 2007 WL 218771, at *1 (N.D. Cal. Jan. 29, 2007)*).

Miscellaneous actions are typically commenced the same way as civil lawsuits. However, each court has its own internal procedures governing the commencement of these types of actions. Procedural 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's clerk in charge of miscellaneous filings for further guidance. Website links for all of the US federal district courts (which include the various clerks' office phone numbers) may be accessed through Practical Law's *Court Rules* page.

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 (see, for example, *S.D.N.Y. Elec. Case Filing Rules & Instructions (ECF Rules), § 18.9 (Aug. 2013)*). Other courts require miscellaneous actions to be commenced through the court's CM/ECF system (see, for example, *D. Mass. CM/ECF Admin. Proc., § F(1) (July 2011)*).
- **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. In addition, some courts may require the moving party to file a notice of appearance and a civil cover sheet.
- **Filing fees.** Federal district courts charge a $46 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 recipient of the subpoena and the other parties to the underlying action, and files proof of service in the issuing court (*FRCP 5(a)(1)(D)*; *FRCP 5(d)(1)* and *FRCP 37(a)(1)*). Typically, paper copies of the initiating documents must be served on the parties (see, for example, *S.D.N.Y. ECF Rules, § 18.9 (Aug. 2013)*). Depending on the court, post-initiation documents (such as opposition and reply briefs) may be served and filed in paper format or electronically (see, for example, *S.D.N.Y. ECF Rules, § 18.9 (Aug. 2013)* (post-initiation documents in miscellaneous cases must be served and filed electronically)).
- **Attorney admissions.** Before commencing a miscellaneous action, counsel for the moving party should check the relevant court's local rules to determine whether he must be admitted to practice in that court and whether he must retain local counsel. If counsel for the moving party is allowed to file papers himself, and the court allows e-filing in miscellaneous cases, he should also obtain a CM/ECF login and password from the issuing 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 and standing orders and the judge's individual practice rules to ensure that all of the required documents are filed and all local procedures are followed.

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

- 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, the issuing party may need to submit additional documents, such as an affidavit detailing the alleged misconduct, the alleged damages caused by the misconduct and evidence regarding the sum of costs incurred by the moving party (see, for example,*S.D.N.Y. and E.D.N.Y. L. Civ. R. 83.6(a)*).

- The moving party may have to file additional documents if the motion is made by way of a miscellaneous proceeding (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 be prepared to 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 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' non-compliance.
- The relevance of the evidence sought by the subpoena, 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 made in the subpoena.
- Any potential burden imposed on the witness, such as the time frame covered by the subpoena's requests.
- To the extent required, the moving party's attempt to meet and confer with the witness or his 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 be left with no other choice but 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 45might arguably 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 ordered by the court and the particular court that issues the order. As a general matter, appeals of orders made during discovery are reviewed 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 commanded by a subpoena served on a non-party is not immediately appealable if that order is entered by the court where the underlying action is pending (see *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 commanded by a subpoena served on a non-party in an ancillary proceeding is immediately appealable if the ancillary proceeding is pending in a district court located in a different circuit from where the underlying lawsuit is pending (see *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 from a non-party where the ancillary proceeding and the underlying lawsuit are in separate district courts within the same circuit:

- Several circuits hold that an appeal in this situation must wait until entry of a final judgment in the underlying action (see *Periodical Publishers Service 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 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 an 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*).