

## NONPARTY DISCOVERY

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 Task 34 Produce and Inspect Nonparty Documents

**TASK 31**  
**Subpoena Records from**  
**Nonparties**

**I. WHAT AND WHY**

- A. To prepare for trial, you may need to:
1. Obtain documents in a nonparty's custody or control
  2. Depose a nonparty
  3. Inspect a nonparty's premises
- B. Nonparties may voluntarily comply with your discovery requests. However, to compel compliance, serve a subpoena. FRCP 45(a)(1)(C); *In re Air Crash at Dallas/Ft. Worth Airport*, 117 F.R.D. 392 (N.D. Tex. 1987).
1. You cannot send a nonparty a FRCP 34 request to produce. See Task 37. That procedure is limited to parties. *Smith v. Parmley*, 558 F.Supp. 161 (E.D. Tenn. 1982).
  2. Subpoena records only, a deposition only, or records in conjunction with a deposition.
  3. With a trial subpoena, you may demand records without convening a deposition or requesting live testimony at trial. FRCP. 45(a)(1)(c).
- C. Typical nonparty documents include:
1. Medical records
  2. Government, police and regulatory records
  3. Employment files
  4. Eyewitness reports and statements
  5. Education transcripts
  6. Construction drawings, plans and reports
  7. Financial records
  8. Property records
  9. Video and audio tapes, and computer databases
- D. Subpoena records that are relevant, not privileged, and admissible or reasonably calculated to lead to the discovery of

admissible evidence. FRCP 26(b)(1); *In re Penn Central Comm. Paper Litig.*, 61 F.R.D. 453, 458 (S.D.N.Y. 1973).

- E. A subpoena is not necessary to compel the deposition of a corporate party's officers, directors or managing agents. See FRCP 30(b)(6).
- F. Subpoenas are not self-enforcing and require contempt procedures if the nonparty does not respond. See Task 33.
- G. The court must have personal jurisdiction over a non-party witness for it to enforce a subpoena requiring the witness' testimony. *FDIC v. Abrams*, 893 F. Supp. 4 (D. Mass. 1995).
- H. A non-party employee's personnel files may be immune to subpoena where the information contained is not directly related to plaintiff's claims. *Knoll v. American Telephone & Telegraph Co.*, 176 F.3d 359, 365 (6<sup>th</sup> Cir. 1999).

**II. WHEN**

- A. Obtain discovery from nonparties as soon as you attend the FRCP 26(f) initial meeting (see Task 20) and become aware of evidence you need. The sooner you serve a subpoena, the better:
1. Once you serve a subpoena, obtaining records can take a long time, especially if the records are old or in the custody of the government or a company with an unsophisticated filing system.
  2. Nonparties often respond slowly and fail to take a subpoena seriously.
  3. Serving a subpoena early will allow you to obtain evidence that may lead to other important evidence, thus requiring more time to complete your discovery.
  4. You will have time to respond to objections or motions for protective orders, and file motions to compel. See FRCP 30(b)(5).
- B. Give the nonparty a reasonable time to respond to the subpoena. FRCP 45(c)(3)(A). The appropriate length of time varies with the particular circumstances. For example,

give more time when you request a large volume of old archived documents.

- C. Parties may stipulate in writing to modify the nonparty’s response deadline, provided the extension does not interfere with any time set for completing discovery, a hearing or trial. FRCP 29.
- D. Rule 45 subpoenas cannot be used after the discovery deadlines imposed by the court have expired. *Grant v. Otis Elevator*, 199 FRD 673-675 (N.D. Ok. 2001).

**III. HOW**

- A. Determine whether you need evidence in a nonparty’s custody or control to help you understand or prove your case.
  - 1. Review your proof outline (see Task 4) for the evidence you need to prove the elements of the claims and defenses.
  - 2. Contact your client and discuss the evidence you need. Clients often know whether a nonparty has certain records or information.
  - 3. If you are not sure whether a nonparty has certain evidence, identify and contact the nonparty’s records custodian through its legal department or counsel. However, you cannot be certain whether evidence exists until you actually receive it.
- B. Decide whether to depose the nonparty, request records or both.
  - 1. If you request records without a deposition, you save your client deposition costs.
  - 2. Deposing a nonparty may lay a foundation to qualify business records under FRE 803(6) and admit them into evidence without further authentication or hearsay objections.
    - a. If the documents you request are business records and the nonparty is a business entity, make sure the person you depose is the records custodian. In the subpoena, designate the records custodian as the person you seek to depose. See FRCP 30(b)(1).
    - b. Depose the records custodian to:
      - i. Lay a foundation for the admissibility of the documents under the business records exception to the hearsay rule. See 28 U.S.C. §1732; Task 89.
      - ii. Learn whether other relevant documents are at remote loca-

tions that are not readily available but still are within the party’s custody and control.

- iii. Discover new witnesses, custodians or information.
- 3. If the nonparty resides more than 100 miles from the place of trial or hearing, you cannot subpoena the nonparty for trial, except under limited circumstances. FRCP 45(b)(2). Therefore, depose the nonparty and use the deposition in lieu of testimony to authenticate the records at trial. See FRCP 32(a)(3); *Starr v. J. Hacker Co.*, 688 F.2d 78 (8th Cir. 1982).
- 4. If you have time, review the records and then decide whether to depose the nonparty. Save your client the deposition cost while leaving open the opportunity to take the deposition.
- 5. Consider requesting the records and arranging the deposition, but advising the nonparty that you will cancel the deposition if the nonparty produces records by a certain date. The nonparty will likely comply to avoid the deposition.
- C. Advise the nonparty or counsel that you intend to subpoena records, depose the nonparty or inspect premises. Find out:
  - 1. Where to serve the subpoena and to whom you should direct it. If you seek records from an entity, direct the subpoena to the entity, not to the person the entity designates to testify. See FRCP 30(b)(6).
  - 2. The name and address of the records custodian or other person who will testify on the nonparty’s behalf. An entity must designate a knowledgeable person to testify on its behalf. FRCP 30(b)(6).
  - 3. What records the nonparty will produce. If possible, ask the person who will testify at the deposition.
  - 4. What you can do to facilitate the production.
- D. Prepare the subpoena.
  - 1. A court or attorney can issue a subpoena. FRCP 45(a)(3). Obtain Form AO 88, “Deposition Subpoena,” from the court clerk. See Form 31:A.
  - 2. Indicate whether you want the nonparty to produce records, appear for deposition or both. FRCP 45(a)(1)(C).

3. Include the name of the “issuing” court. FRCP 45(a)(1)(A).
  - a. The issuing court has jurisdiction over the witness and records (FRCP 45(a)(2)) and hears motions to compel or for protective orders. FRCP 26(c), 37(a)(1).
  - b. If the deposition or production will take place in the district or within 100 miles of the court where the action is pending, that court is the issuing court. See FRCP 45(b).
  - c. Otherwise, locate the court in the district where the witness or records are located and send the papers to that court to issue the subpoena. FRCP 45(a)(2).
  - d. You also may request that the nonparty stipulate under FRCP 29 that a records custodian in another district will appear to produce documents without a subpoena.
4. Include the case title and number, and the court where the case is pending. FRCP 45(a)(1)(B).
5. Request that the nonparty testify, produce records, or both at the specified time and place. FRCP 45(a)(1)(C). You cannot compel a nonparty to travel more than 100 miles from where he or she works or resides. FRCP 45(c)(3)(A).
6. Insert the full text of FRCP 45(c) and (d), regarding the subpoenaed party’s rights. FRCP 45(a)(1)(D). The cautionary language in Rule 45(c) must be reprinted on every subpoena issued. The cautionary language in Rule 45(c) must be reprinted on every subpoena issued.
7. Specify that the nonparty must produce documents within his or her “possession, custody, and control” even if they are not conveniently at hand.
  - a. Explain whether this includes documents in the possession of agents, attorneys, accountants, etc.
  - b. Designate the documents as specifically as possible so the nonparty will understand your requests. FRCP 45(a)(1)(C).
  - c. Include a catch-all request to cover other relevant documents the nonparty may have. Request “all other documents and items related to” a particular person, transaction, claim or defense.
    - d. Subpoena computer database data by requiring that discoverable information on a hard drive be copied onto a disk or CD-ROM. See *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382 (7th Cir. 1993).
- E. Serve a copy of the subpoena on all parties. FRCP 45(b)(1). To depose the nonparty, also serve a deposition notice (see Task 40) on all parties. Subpoenas must be served on the other parties prior to the service on the respondent. If the subpoena requires a production of documents or inspection of premises, notice must be served on all parties so that they have time to participate and/or request the same or additional documents. *Biocore Med. Techs., Inc. v. Khosrowshahi*, 181 F.R.D. 660, 667 (D. Kan. 1998). Subpoenas must be served on the other parties prior to the service on the respondent. If the subpoena requires a production of documents or inspection of premises, notice must be served on all parties so that they have time to participate and/or request the same or additional documents. *Biocore Med. Techs., Inc. v. Khosrowshahi*, 181 F.R.D. 660, 667 (D. Kan. 1998).
- F. Serve the subpoena on the nonparty by personal service. FRCP 45(b)(1).
  1. Consider hiring a professional process server in the issuing court’s district to avoid any question as to whether the nonparty was properly served.
  2. Serve a subpoena on an entity by serving an officer or agent. *Ghandi v. Police Dep’t. of Detroit*, 74 F.R.D. 115, 121 (E.D. Mich. 1977).
  3. The proof of service must include the date and manner of service, and the name of the person served. The person who made the service must sign it. FRCP 45(b)(3).
  4. Keep the original proof of service. You may need to file it to enforce the subpoena. See Task 33.
- G. If the nonparty must travel for the deposition or to produce records, also serve a check payable to the nonparty for one day’s attendance (\$40) and 25¢ per mile. FRCP 45(b)(1); 28 U.S.C. § 1821. Serve the fee with the subpoena or the court may quash the subpoena. *CF & I Steel Corp. v. Mitsui & Co.*, 713 F.2d 494 (9th Cir. 1983).
- H. If the nonparty is a U.S. national or U.S. resident in another country, or if records are in a U.S. entity’s possession in another

country, review 28 U.S.C. § 1783 for the subpoena procedure.

- I. The party opposing the production of records pursuant to a non-party subpoena has the burden of showing that the subpoena should be quashed because it is unreasonable or unduly oppressive. *Linder v. Colereo-Port Carrero*, 180 F.R.D. 168, 172-73 (D.D.C. 1998).
- J. Some of the grounds to quash a subpoena served on a non-party include:
  - 1. Unreasonable time. *Kupritz v. Savannah College of Art & Design*, 155 F.R.D. 84 (E.D. Pa. 1994).
  - 2. Unreasonable travel. *Jackson v. Brinker*, 147 F.R.D. 189 (S.D. Ind. 1993).
  - 3. Privilege. *Re-Max Int'l, Inc. v. Century 21 Real Estate Corp.* 846 F. Supp. 910 (D. Co. 1994).
  - 4. Undue burden. *American Standard v. Pfizer, Inc.*, 828 F. 2d 734. (Fed. Cir. 1987).
  - 5. Trade secret or intellectual property. *Ark Wright Mut. Ins. Co. v. Nation Union Fire Ins. Co.*, 148 F.R.D. 552 (S.D. W. Va. 1993).

**IV. PRACTICE NOTE**

- A. Serve a subpoena on all nonparties you seek to depose, even those who agree to appear voluntarily. If an unsubpoenaed nonparty fails to appear for deposition, a court may order the party noticing the deposition to pay the other parties' expenses and attorneys' fees for appearing at the deposition. FRCP 30(g).
- B. An agreement to serve an attorney instead of a witness is not enforceable, and the witness may choose not to comply with the subpoena. The safer practice is to schedule a convenient time to serve the witness.
- C. Entities such as hospitals, schools, large companies and government agencies receive many subpoenas and have regular procedures for responding. Contact the nonparty's counsel or legal department to find out its procedures, and direct the subpoena to the appropriate place and person.
- D. Consider hiring an attorney service to serve subpoenas and copy nonparties' records when the records are routine and the inspection will likely be unopposed.
- E. When obtaining documents by subpoena, recognize that even though the non-party

may be under an obligation to produce the documents and certify that they are true and accurate copies, such certification does not establish their admissibility. Without a deposition, you may not have adequate foundation for the admissibility of the documents unless they qualify under a hearsay exception. Thus, it is often wise to serve a Notice of Deposition in conjunction with the non-party subpoena.

**TASK 32**  
**Challenge Subpoenas**

**I. WHAT AND WHY**

- A. To challenge a subpoena ordering a non-party to produce documents and/or appear for deposition:
  - 1. A nonparty may:
    - a. Serve written objections on the party or attorney serving the subpoena. FRCP 45(c)(2)(B). *Wang v. Hsu*, 919 F.2d 130 (10th Cir. 1990).
    - b. Seek a protective order under FRCP 26(c) if complying with the subpoena will cause annoyance, embarrassment, oppression, or undue burden or expense. *Frideres v. Schiltz*, 150 F.R.D. 153, 155 (S.D. Iowa 1993).
  - 2. A party may have standing to object. The most common objection is privilege. See Task 39. Even if a party does not have standing to object, the party may have a special interest in protecting certain types of information, such as:
    - a. The identity of government informants. See, e.g., *United States v. One 1986 Chevrolet Van*, 927 F.2d 39 (1st Cir. 1991).
    - b. Military secrets. See *United States v. Reynolds*, 345 U.S. 1 (1953).
    - c. State secrets. See *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197 (1958); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474 (9th Cir.), cert. denied, *China Everbright Trading Co. v. Timber Falling Consultants, Inc.*, 113 S.Ct. 454 (1992).
- B. Pursuant to FRCP 45(c)(3)(A), 45(c)(3)(B) and, implicitly, FRCP 26(c), parties and nonparties may move to quash or modify