



FRCP 45 notice requirement

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Dear Committee,

Please consider clarification of the timing of the prior-notice requirement for non-party subpoenas for documents or ESI, which is being moved from Rule 45(b)(1) to 45(a)(4). The requirement that notice be given to other parties "before" the subpoena is served is vague, because it could be read to mean one day before (or less?). As service is complete upon mailing, the rule is complied with by mailing a copy to the other parties, then delivering the subpoena to the non-party later the same day, or the following day.

If the purpose of the notice is to simply let the other parties know about the subpoena, then it would be sufficient simply to require service of a copy of the subpoena upon the other parties contemporaneous with service of the subpoena, and remove the word "before." But if the purpose is to give other parties an opportunity to object to the subpoena, then a specific period of time should be built in, plus the opportunity for the other parties to waive that period. I confess that I have not read the cases that triggered the 2007 amendment from "prior" to "before," but I can tell you that this vagueness is already causing problems in practice.

Indiana attorneys are familiar with this concept, as the Indiana Trial Rules have long required a 15-day notice period before service of a non-party subpoena. The period is waivable, so common practice in most cases is to send a copy of the subpoena to other counsel and ask that the 15-day waiting period be waived, and it usually is. (The Indiana rule also requires the requesting party to produce to the other parties copies of all documents received via the subpoena, which also has its benefits, but may not be appropriate for the federal rule.)

Thank you.

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