



## **I.R.C.P. 45. Subpoenas**

### **Idaho Rules of Civil Procedure Rule 45. Subpoenas.**

#### **(a) In General.**

##### *(1) Form and Contents.*

(A) Requirements – In General. Every subpoena must be substantially in the form found in Appendix B and must:

(i) state the name of the court from which it issued;

(ii) state the title of the action and the case number; and

(iii) command each person to whom it is directed to appear to give testimony at trial, or at a hearing or deposition at a specified time and place. A command to produce or to permit inspection and copying of documents, electronically stored information or tangible things, or to permit inspection of premises, may be joined with a command to appear at trial, or at hearing or deposition, or may be issued separately; and

(iv) state the method of recording the testimony if the subpoena is commanding attendance at a deposition.

(2) *Issuing Court.* A subpoena must issue from the court where the action is pending.

(3) *Issued by Whom.* At the request of a party, the clerk must issue a subpoena, signed and under the seal of the court, but otherwise blank, and the party must complete it before service. An attorney licensed in Idaho as officer of the court may also issue and sign a subpoena.

#### **(b) Service.**



(1) *By Whom and How.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law if requested. Fees and mileage need not be tendered when the subpoena is issued by the Attorney General or any prosecuting attorney or on behalf of the State or any of its officers or agencies.

(2) *Tendering Fees.*

(A) If the subpoena requires the person's attendance, the fees for 1 day's attendance and the mileage allowed by law must be tendered, if requested, at the time the subpoena is served.

(B) Service of a subpoena upon a party to a legal action or proceeding can be made by service on the attorney of record for that party in such legal action or proceeding as provided in Rule 5(b) for attendance at a hearing or trial with or without the production of documents or other objects. No prepayment tender of fees and mileage is necessary to that party, but the court may, upon a hearing held at any time after service on that party's attorney, determine the reasonable amount of such fees and mileage to be paid, if any, to that party.

(C) Fees and mileage need not be tendered when the subpoena is issued by the Attorney General or any prosecuting attorney or on behalf of the State or any of its officers or agencies.

(3) *Proof of Service.* When service is by an officer it must be returned with the officer's certificate of service, and when served by any other person, it must be returned with the person's affidavit stating the date and manner of service and the names of the persons served.

**(c) Subpoena for Production or Inspection of Premises.**

(1) *Subpoena to Attend a Deposition, Trial or Hearing.* A subpoena to attend a deposition, trial or hearing may command the person to whom it is directed to produce or permit inspection and copy of designated books, papers, documents, electronically stored information or tangible things. If the subpoena is for a party to attend a deposition, the scope and procedure must comply with Rule 34, and the party must be allowed at least 30 days to comply.

(2) *Subpoena to a Non Attending Party.* A subpoena to command a person who is not a party to produce or to permit inspection and copying of documents, electronically stored information, or tangible things, or to permit inspection of premises may be served at any time after all parties have either appeared or have been defaulted, unless otherwise ordered. The party serving the subpoena must:



(A) serve a copy of the subpoena on the opposing party at least 7 days prior to service on the third party, unless otherwise specified by the court;

(B) pay the reasonable cost of producing or copying the documents, electronically stored information or tangible things, and

(C) upon request of any other party and the payment of reasonable costs, provide copies of all documents obtained in response to the subpoena.

(3) *Appearance Not Required.* A person commanded to produce or permit inspection and copying of documents, electronically stored information or tangible things or to permit inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear at trial, at hearing or at deposition.

(4) *Organization of Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand.

**(d) Relief from Subpoena.** The court, upon timely motion, may:

(1) quash or modify the subpoena if it is unreasonable, oppressive, fails to allow time for compliance, requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden; or

(2) condition compliance with the subpoena upon the prepayment of the reasonable cost of producing the books, papers, documents, electronically stored information or tangible things.

**(e) Duties in Responding to a Subpoena.**

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.



(B) **Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) **Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

(D) **Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause. The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) **Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) **Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(f) Subpoena for Deposition.**

(1) **Issuance.** The clerk of the district court for the county in which an action is pending or the county in which a deposition is being taken to be used in an action pending in another state or country, may issue a subpoena upon



proof of service of a notice to take a deposition as provided by Rules 30 and 31 or by stipulation.

(2) *Place of Examination.* A resident of the state may be required to attend an examination only in the county where the resident resides or is employed or transacts business in person. A nonresident of the state may be required to attend in any county of the state where the nonresident is served with a subpoena.

**(g) Subpoena for Hearing or Trial.** At the request of any party, subpoenas for attendance at a hearing or trial must be issued as provided by Rule 45(a), and may be served at any place within the state.

**(h) Witness Fees.** Witness fees and expenses must be in the amounts provided for under Rule 54(d)(1).

**(i) Failure to Obey Subpoena.** Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of the court from which the subpoena issued, in addition to the penalties provided by law.

**(j) Interstate Depositions and Discovery.** This rule governs depositions and discovery conducted in Idaho in connection with a civil lawsuit brought in another state.

(1) *Statement of Purpose.* This rule constitutes Idaho's implementation of the Uniform Interstate Depositions and Discovery Act as modified herein.

(2) *Definitions.* In this rule:

(A) 'Foreign jurisdiction' means a state other than this state.

(B) 'Foreign subpoena' means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(C) 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(D) 'State' means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.



(E) 'Subpoena' means a document, however denominated, issued under authority of a court of record requiring a person to:

(i) attend and give testimony at a deposition;

(ii) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(iii) permit inspection of premises under the control of the person.

Comment:

The Uniform Interstate Depositions and Discovery Act (the Act) has been adopted as Rule 45(j) of the Idaho Rules of Civil Procedure to enable an attorney prosecuting or defending a lawsuit outside the jurisdiction of Idaho to conduct discovery within Idaho. The rule does not apply to discovery arising out of litigation originating in foreign countries.

The term 'Subpoena' includes a subpoena duces tecum. The description of a subpoena is based on the language of Rule 45 of the FRCP.

The term 'Subpoena' does not include a subpoena for the inspection of a person (subsection 45(j)(2)(E)(iii) is limited to inspection of premises). Medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (the corresponding State rule is Rule 35 of the IRCP).

The term 'Court of Record' was chosen to exclude non-court of record proceedings from the ambit of the rule. A 'Court of Record' includes anyone who is authorized to issue a subpoena under the laws of that state, which may include an attorney of record for a party in the proceeding.

(3) *Issuance of Subpoena for Interstate Depositions and Discovery.*

(A) To request issuance of a subpoena under this rule, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this rule does not constitute an appearance in the courts of this state. It does create the necessary jurisdiction in the



State of Idaho to:

- (i) enforce the subpoena;
  - (ii) quash or modify the subpoena;
  - (iii) issue any protective order or resolve any other dispute relating to the subpoena;
  - (iv) impose sanctions on the attorney requesting the issuance of the subpoena for any action which would constitute a violation of the Idaho Rules of Civil Procedure.
- (B) When a party submits a foreign subpoena to a clerk of court in this state, the clerk shall promptly issue a subpoena for service upon the person to whom the foreign subpoena is directed.
- (C) A subpoena under subsection (B) must:
- (i) conform to the requirements of the Idaho Rules of Civil Procedure, including Rule 45, and conform substantially to the form provided in 45(c) but may otherwise incorporate the terms used in the foreign subpoena so long as they conform to the Idaho Rules of Civil Procedure;
  - (ii) advise the person to whom the subpoena is directed that such a person has a right to petition the Idaho court to quash or modify the subpoena under Rule 45(j)(6); and
  - (iii) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

Comment:

Submitting a subpoena to the clerk of court in Idaho, so that a subpoena is then issued in the name of Idaho, is the necessary act that invokes the jurisdiction of Idaho, which in turn makes the newly issued subpoena both enforceable and challengeable in Idaho.



The standard procedure under this section will become as follows, using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives in Idaho (the discovery state):

A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). The lawyer will then prepare an Idaho subpoena so that it conforms to the requirements of the Idaho Rules of Civil Procedure and may also incorporate the same terms of the Kansas subpoena so long as they conform to the Idaho Rules of Civil Procedure. The lawyer will then hire a process server (or local counsel) in Idaho, who will take the completed and executed Kansas subpoena and the completed but not yet executed Idaho subpoena to the clerk's office in Idaho. In addition, the lawyer might prepare a short transmittal letter to accompany the Kansas subpoena, advising the clerk that an Idaho subpoena is being sought pursuant to Idaho Rule 45(j)(3). The clerk of court, upon being given the Kansas subpoena, will then issue the Idaho subpoena ('issue' includes signing and stamping). The process server (or other agent of the party) will then serve the Idaho subpoena on the deponent in accordance with Idaho law (which includes any applicable local rules).

The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of Idaho over the deponent. The only documents that need to be presented to the clerk of court in Idaho are the subpoena issued in the trial state and the draft subpoena of Idaho. There is no requirement to hire local counsel to have the subpoena issued in Idaho, and there is no need to present the matter to a judge in Idaho before the subpoena can be issued. However, the rule requires that the Idaho subpoena 'conform to the requirements of the Idaho Rules of Civil Procedure, including Rule 45, and conform substantially to the form provided in Rule 45(c) . . . .' In effect, the clerk of court in Idaho issues the new subpoena which is then served on the deponent in accordance with the laws of Idaho. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in Idaho. The rule requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. This requirement imposes no significant burden on the lawyer obtaining the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits to Idaho, by contrast, are substantial. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service).

(4) *Service of Subpoena for Interstate Depositions and Discovery.* A subpoena issued by a clerk of court under subdivision 45(j)(3) of this rule must be served in compliance with Rule 45(e)(2), except that the officer or individual responsible for service shall not return a certificate of service or affidavit to the court that issued the subpoena under subdivision 45(j)(3). In issuing the subpoena, the clerk shall not create a file, and shall not collect a fee. Instead, the officer or individual responsible for service shall deliver a certificate of service or affidavit to the attorney who requested the subpoena. That attorney must retain the certificate of service or affidavit and furnish a copy to any party or to the deponent upon request.

Comment:

The Idaho court clerk will not create a file when discovery is initiated nor collect a fee. This rule places the obligation of retaining the original subpoena and the proof of service on the lawyer initiating the discovery. A file will be created if a





motion is brought to enforce, quash, or modify the subpoena.

(5) *Deposition, Production, Inspection, Witness Fees, Expenses, Place of Examination, Attendance Where Required.* Rules 45(a), 45(b), 45(e)(1), 45(f)(1) and 45(f)(2) shall also apply to subpoenas issued under subdivision 45(j)(3) of this rule.

(6) *Application to Court.* An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under subdivision 45(j)(3) of this rule must comply with the rules or laws of Idaho and be submitted to the court in the county in which discovery is to be conducted or the deponent resides, is employed or transacts business.

(A) *Action to Enforce a Subpoena.* An action to enforce a subpoena under this rule shall be brought in accordance with any applicable rule or law of Idaho.

(B) *Action to Quash or Modify a Subpoena.* An action to quash or modify a subpoena under this rule shall be instituted by the filing of a petition. The petition shall be made promptly, at or before the time for compliance specified in the subpoena. The court may:

(i) quash or modify the subpoena if it is unreasonable, oppressive, fails to allow time for compliance, requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden; or

(ii) condition compliance with the subpoena upon the advancement of the reasonable cost of producing the books, papers, documents, electronically stored information or tangible things by the person in whose behalf the subpoena is issued; and

(iii) impose sanctions.

Comment:

The rule requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or for any other dispute relating to discovery under this rule, must comply with the law of Idaho. Those laws include Idaho's procedural, evidentiary, and conflict of laws rules. Idaho has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of Idaho. This protects the deponent by requiring that all applications to the court that directly affect the deponent must be made in Idaho.



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(7) *Uniformity of Application and Construction.* In applying and construing this rule, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that have implemented the Uniform Interstate Depositions and Discovery Act.

(8) *Application to Pending Action.* This rule applies to requests for discovery in cases pending on the effective date of this rule, July 1, 2009.

([Adopted March 1, 2016, effective July 1, 2016](#) [1].)

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### Links

[1] <https://isc.idaho.gov/rules/IRCP/03012016-Adoption-Newly-Formatted.pdf>