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How To Prepare And Serve A Federal Notice Of Deposition Or Subpoena (With Forms)

Henry L. Hecht

There is a right way to do it, and it's all in the Rules.



Henry L. Hecht

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THE FOLLOWING STEP-BY-STEP guide shows how to prepare and serve a Notice of Deposition upon Oral Examination ("Notice"), including a Notice to a party requesting that documents be produced at the deposition, and a Subpoena, including one requesting documents, for a deposition within the United States of a witness subject to the jurisdiction of a United States District Court pursuant to the Federal Rules of Civil Procedure. Effective December 1, 2007, absent Congressional action to the contrary, some of the Rules cited below will be amended, as indicated. The 2007 amendments, intended to be stylistic only, are available at <http://www.uscourts.gov/rules/congress0407.htm>.

Before preparing any Notice or Subpoena, determine:

- When the deposition may be taken;
- Whether a Notice or Subpoena is required to compel a witness's attendance;
- Where a witness can be required to appear;
- How many days in advance of the deponent's required appearance the Notice or Subpoena must be served;
- How the Notice or Subpoena must be served; and

- Whether a stipulation can be used in lieu of a Notice or Subpoena.

To prepare a Notice of Deposition:

- Obtain the name of the witness (or a description of the group to which the person belongs) and the address of the witness and the witness's attorney;
- Describe the matters for examination with reasonable particularity if an organization is to be deposed;
- Determine the date, time, and place of the deposition;
- Secure a room for the deposition, a deposition officer, a stenographic reporter, and a videographer, if required;
- Describe any documents to be produced;
- Prepare, sign, and serve the Notice of Deposition (include a Proof of Service form);
- Prepare a Proof of Service; and
- Diary the date, time, and place of the deposition on your office calendar.

When you depose a nonparty, you need a Subpoena. To prepare a Subpoena:

- Obtain a blank Subpoena and fill it in with the required information, including the name of the court from which it issued and the title of the action; and
- Fill in the name and address of the person being subpoenaed.

PREPARING A DEPOSITION NOTICE: STATUTORY CONSIDERATIONS • Initially, before preparing the notice, carefully review the applicable rules; they will answer the “when-what-who-and-where” questions.

When A Deposition May Be Conducted

A deposition of any person, including a party, may be taken without leave of court except as provided by Federal Rule of Civil Procedure (“Rule”)

30(a)(1) and Rule 30(a)(2). Those Rules provide, among other things, that unless there is a written stipulation, a party must obtain leave of court to take a deposition if the deposition would result in:

- More than 10 depositions being taken by a party;
- A person being examined more than one time; or
- The taking of a deposition before the time specified by a discovery plan under Rule 26(d), except upon certification that the person is about to leave the United States and be unavailable for examination.

Leave of court is required if the person to be examined is confined in prison. Special procedures apply for the taking of a deposition before an action is filed or while an appeal is pending. Rule 27.

Who May Be Deposed: Different Procedures For Parties And Nonparties

Any person, including a party, and an organization's officers, directors, and managing agents, may be required to appear at a deposition pursuant to Notice given with reasonable notice to every party. Rule 30(a) and Rule 30(b). See also Rule 32(a) regarding the use of a deposition against a party who had reasonable notice of taking. A nonparty may only be required to appear pursuant to Subpoena. The Subpoena is issued out of the district designated by the Notice as the district in which the deposition is to be taken. If separate from a Subpoena commanding the attendance of a person, a subpoena for the production, inspection, copying, testing or sampling of designated things shall issue from the court for the district in which the production or inspection is to be made. Rule 30(a) and Rule 45(a)(3). The court from which the Subpoena issues has jurisdiction to enforce the Subpoena. Rule 45(c)(1).

Where The Deposition May Be Conducted

The Notice shall state the time and place for the deposition. See Rule 30(b)(1). A court may impose limitations on the place of the deposition for good cause upon a motion for a protective order. Rule 26(c).

A person who is not a party or an officer of a party may be compelled to appear as provided by Rule 45(b)(2) regarding the place within which service may be made. Permissible locations for the deposition or pretrial production of documents are subject to the limitations of Rule 45(c)(3)(A)(ii). Generally, the Subpoena may require the witness to appear at any place within 100 miles of the witness's residence, place of employment, or place where the witness regularly transacts business in person. But the rules regarding the place of service and the geographical reach of a Federal Subpoena are complex. Be sure to review them. Unless a Subpoena complies with the limitations set by Rule 45(c)(3)(A)(ii), its contempt provisions may not apply. Rule 45(e).

Notice Period And Method Of Service

A party noticing a deposition of any person must give "reasonable notice" in writing to every other party to the action. Rule 30(b)(1). The Rule for the issuance of a Subpoena does not specify a statutory notice period, but the rule does refer to "reasonable time for compliance." See Rule 45(c)(2) and Rule 45(c)(3)(A)(i). See also Rule 32(a)(3) regarding use of a deposition against a party who had at least 11 days' notice. (Effective December 1, 2007, this part of Rule 32(a)(3) becomes part of Rule 32(a)(5).)

If a party is represented by an attorney, serve the Notice on the attorney, unless service upon the party is ordered by the court. See Rule 5(b) regarding methods of service. Serve a Subpoena by delivering a copy to the witness and by tendering one day's witness fees, unless the Subpoena is issued on behalf of the United States or an officer or agency

thereof, in which case the fees and mileage allowed by law need not be tendered. Rule 45(b)(1).

Standards For Discovery

Regardless of a formal right to take a deposition, the attorney for the noticing party must consider whether the request can be made consistent with the standards for discovery codified in the Federal Rules. An attorney, in signing a Notice of Deposition, certifies, among other things, that the request is:

- Made after reasonable inquiry;
- Consistent with these Rules and warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law;
- Not for any improper purpose; and
- Not unreasonable or unduly burdensome or expensive given the needs of the case.

If the certification violates these standards, the Rules provide for sanctions for discovery abuses. Rule 26(g)(2). (Effective December 1, 2007, this part of Rule 26(g)(2) becomes part of Rule 26(g)(1) and Rule 26(g)(2).) See also Rule 26(b) regarding scope and limits of discovery and Rule 45(c) regarding protection of persons subject to Subpoenas.

PREPARING A NOTICE OF DEPOSITION: A PROCEDURAL CHECKLIST

• Prepare a Notice of Deposition whether or not the witness who is to appear is a party to the litigation. Do the following in preparing a Notice of Deposition.

Obtain The Name And Address Of The Witness

If the name and address of the deponent are not known, the Notice shall include "a general description sufficient to identify the person or the particular class or group to which the person belongs." Rule 30(b)(1). In a Notice to an organization, you may describe with "reasonable particularity the matters on which examination is requested" and

the responding organization will then be required to designate the person(s) to testify on its behalf. Rule 30(b)(6). If the witness is a party, obtain the address of the party's attorney for service of the Notice upon that attorney.

As noted above, include in the Notice, if possible, the address of the witness and the person to be served. Whenever possible, obtain a street address rather than a post office box, particularly if personal service of a Subpoena will be required, to ensure that the person to be served can be located.

When trying to learn the identity of a witness, remember your ethical obligation not to communicate with a person you know to be represented by another attorney in the matter, unless you have the consent of the other attorney or you are authorized to do so by law or a court order. American Bar Association (ABA) Model Rule of Professional Conduct 4.2.

Determine The Date, Time, And Place Of The Deposition

Check that the required statutory notice period has been considered and the distance the witness must travel to the deposition site is permitted by statute.

When faced with difficulties, remember that parties may stipulate to waive statutory discovery requirements. Rule 29. Stipulations may require the court's approval if a discovery order has already been signed or a local rule requires the court's approval. In addition, remember that before scheduling any discovery, attorneys are required to have met and conferred about a discovery plan. Rule 26(d) and Rule 26(f).

Secure A Room For The Deposition

Be sure the deposition room is large enough to accommodate the number of people who will be attending the deposition. If the deposition is to be taken by telephone or other remote electronic means, upon written stipulation or upon a court

order after a motion, special arrangements may be required. Rule 30(b)(7). (Effective December 1, 2007, Rule 30(b)(7) no longer exists and becomes part of Rule 30(b)(4).) Similarly, videotaped depositions require special arrangements. Rule 30(b)(2). (Effective December 1, 2007, this part of Rule 30(b)(2) becomes part of Rule 30(b)(3).)

State The Method Of Recordation And Secure A Deposition Officer And Reporter If Required

A deposition must be taken before an officer authorized to administer oaths and take testimony. Rule 28(a). The officer shall not be a relative or employee or attorney or counsel of any of the parties or their attorneys or counsel or have a financial interest in the action. Rule 28(c). Normally the officer is the same person as the person who records the testimony; if not the same person, the recordation is made under the direction of the officer and you must retain a separate stenographic reporter. Rule 30(c).

The noticing party shall state the method by which the testimony shall be recorded by sound, sound-and-visual, or stenographic means, at its expense. Any party may arrange, at their expense unless the court orders otherwise, for a transcription to be made from the recording taken by nonstenographic means. Rule 30(b)(2). (Effective December 1, 2007, this part of Rule 30(b)(2) becomes part of Rule 30(b)(3).)

With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified in the Notice at its expense unless the court orders otherwise. Rule 30(b)(3).

When the services of a stenographic reporter are retained, the party requesting the transcript should specify if "daily," "rush," or other special transcription services are required, as the reporter may need to make special arrangements to provide those services. A transcript shall be made at the expense of the requesting party unless the court

orders otherwise. Rule 30(b)(3). See also Rule 30(f) regarding the furnishing of copies.

Describe Any Documents To Be Produced

A Notice to a party deponent may include a request for the production of documents and tangible things at the taking of the deposition. Rule 30(b)(5). (Effective December 1, 2007, Rule 30(b)(5) is amended and becomes part of Rule 30(b)(2).) The Federal Rules specify that the procedures of Rule 34 concerning the production of documents apply when documents are requested to be produced at a deposition. Rule 34 states that the responding party shall serve a written response within 30 days after service of a request.

Describe The Documents To Be Produced With Reasonable Particularity

In the description of documents to be produced, set forth the items individually or by category, describing them with “reasonable particularity.” If the request for documents is lengthy, it is usually attached to the Notice in the form of a separate Schedule of Documents. If you attach a Schedule, edit the language of the typical Notice, which usually only states that the appearance of a witness is required, to reflect that documents also are to be produced. See the sample Notice of Deposition and Request for Production of Documents at Appendix 1, and the sample Schedule of Documents to Be Produced at Appendix 2, which reflects the amendments to the Federal Rules regarding discovery of electronically stored information (“ESI”).

Address Nonparty Witness Issues

If the witness is a nonparty, a Subpoena will be required and different procedures, described below, apply. See Rule 45. But note that the designation of documents to be produced pursuant to a Subpoena shall also be attached to or included in the Notice served on the parties. Rule 30(b)(1). (Effective De-

ember 1, 2007, this part of Rule 30(b)(1) becomes part of Rule 30(b)(2).)

Prepare The Notice Of Deposition

Be sure to include the witness’s name and address, if known, as well as the time, date, and place of the deposition.

Sign The Notice

The Clerk of the Court is not involved in the issuance of a Notice. As discussed above, in signing the Notice, you certify that the standards for a discovery request have been met. If the request is not signed, the court shall strike it unless promptly signed; and, until it is signed, the responding party shall have no obligation to take any action with respect to it. Rule 26(g). See also Rule 26(b) regarding scope and limits on discovery.

Serve The Notice

Serve the Notice upon the party by mail or delivery unless otherwise ordered by the court. Rule 5(b). Be sure that the Proof of Service conforms with the actual method of service to be used. The text of the Notice or the Proof of Service should list all parties or their attorneys on whom the Notice is served. See sample Proof of Service at Appendix 3.

Assemble The Documents

Staple together, in this order:

- Notice of Deposition;
- Schedule of Documents to Be Produced, if applicable; and
- Proof of Service.

File The Notice And Proof Of Service When Permitted

Notices of depositions, Requests for Documents To Be Produced, and Proofs of Service shall not be filed until they are used in the proceedings or the court orders filing. Rule 5(d). See also Rule

5(e) regarding how and with whom to file. (Effective December 1, 2007, Rule 5(e) no longer exists, and is incorporated into Rule 5(d).)

Diary The Date, Time, And Place Of The Deposition

Diary the deposition on both your personal calendar and any office master calendar or docket. If the party noticing the deposition fails to attend and another party after receiving a Notice attends, the court may order the noticing party to pay reasonable expenses incurred in attending, including reasonable attorneys' fees. Rule 30(g)(1).

NOTICING A DEPOSITION OF A NON-PARTY: THE NEED FOR A SUBPOENA

As discussed above, a Subpoena is required to compel the attendance of a nonparty at a deposition. In addition to the Subpoena served upon the nonparty, prepare and serve a Notice of Deposition upon all parties to the action or their attorneys. Although a Subpoena is not required to depose a party (a proper Notice served on the parties directly or on the attorneys for all of the parties is sufficient), in certain circumstances, the noticing party may choose to use a Subpoena in order to require the attendance of a party at a deposition. Rule 30(a)(1); Rule 30(b)(6); and Rule 45(a).

When both an appearance of a witness and the production of documents are requested from a nonparty, in addition to the Notice of Deposition, include in the Subpoena a demand for documents. It is then a Subpoena Duces Tecum, rather than a testimonial Subpoena or Subpoena Ad Testificandum.

As discussed below, the Federal Rules permit the use of a subpoena to compel production of records from a nonparty without the appearance of a witness. Rule 45(a) and Rule 34(c).

PREPARING A DEPOSITION SUBPOENA: A PROCEDURAL CHECKLIST

• To prepare a

Subpoena for a deposition in a civil case, follow the steps outlined below.

Obtain A Blank Subpoena

The Clerk of the Court will "issue" a Subpoena signed, but otherwise in blank, to a party requesting it, who shall complete it before service. Rule 45(a)(3). See also below, regarding when an attorney may issue and sign a Subpoena.

Federal courts use one form of Subpoena in a civil case. See United States District Court Subpoena in a Civil Case form at Appendix 4.

Fill Out The Subpoena

On the blank Subpoena, be sure to fill in:

- The name of the court from which the Subpoena is issued;
- The title of the action;
- The name of the court in which the action is pending; and
- The civil action number.

A Subpoena for attendance at a deposition shall issue from the court for the district designated by the Notice of Deposition as the district in which the deposition is to be taken. Thus, when the deposition is to be taken in the district where the action is pending, the court and the docket number will be the same as that of the pending case. When the Subpoena commands appearance beyond the geographical range of the district in which the action is pending, the Subpoena shall issue from the district court in which the deposition or production is sought.

If separate from a Subpoena commanding the attendance of a person, a Subpoena for production or inspection shall issue from the court for the district in which production or inspection will be made. Rule 45(a)(2)(C). The requirements of the Subpoena shall avoid undue burden or expense on the person subject to the Subpoena. Rule 45(c)(1).

Fill In Name And Address Of The Subpoenaed Person

The Notice and Subpoena may name an organization and request it to designate a person or persons to testify on matters described with reasonable particularity. The Subpoena shall advise a nonparty organization of its duty to make such a designation. Rule 30(b)(6). The Federal Subpoena form includes such an admonition. See Appendix 3.

Fill In The “Command” To The Witness

Indicate whether the command is to:

- Appear in court for trial testimony;
- Appear for deposition testimony;
- Produce and permit inspection and copying of documents or tangible things; or
- Permit inspection of premises.

A command to produce evidence or to permit inspection may be joined with a command to appear at a deposition, or may be issued separately. If production only is demanded, a deposition of a nonparty witness is not required. Rule 45(a)(1). See also Rule 45(c)(2)(A) regarding no need for the person producing documents to be at the place of production unless commanded to appear for a deposition.

Determine The Date, Time, And Place Of Performance And Secure A Deposition Officer And Reporter If Required

As with any deposition, secure a room of adequate size, a deposition officer, who usually serves as the stenographic reporter if transcription is required, and a videographer if needed. Be sure that the Subpoena requires the witness’s appearance on the same date as the date for appearance used in the Notice of Deposition.

Confirm that the location for the witness’s appearance is one permitted by the Rules. Rule 45(c)(3)(A)(ii).

Describe Any Documents To Be Produced

Identify the documents requested on the face of the Subpoena form or indicate the use of an attached Schedule of Documents to Be Produced. Remember that the designation of the documents to be produced shall also have been included in the Notice of Deposition or attached to it, which Notice must be served on all parties before the service of the Subpoena. Rule 30(b)(1); Rule 45(b)(1). (Effective December 1, 2007, the aforementioned part of Rule 30(b)(1) becomes part of Rule 30(b)(2).)

Include The Required Text Of The Federal Rule On Subpoenas For Responding Witnesses

The Subpoena must contain the text of Rule 45(c) on the protection of persons subject to Subpoenas and Rule 45(d) on duties in responding to a Subpoena. Rule 45(a)(1)(D). The Federal Subpoena form includes the required text. See Appendix 4. (Effective December 1, 2007, Rule 45(a)(1)(D) becomes Rule 45(a)(1)(A)(iv) and a revised form will need to be used.)

Sign And Date The Subpoena

Have the issuing officer sign the Subpoena, indicate his or her title (that is, if attorney for the plaintiff or defendant), the manner of service, and the date of execution.

An attorney as officer of the court may issue and sign a Subpoena on behalf of a court in the district in which the action is pending and in which the attorney is authorized to practice (even if only pro hac vice), or in the name of the court for a district in which a deposition is compelled by the Subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice. Rule 45(a)(3).

Complete And Serve The Notice And Subpoena

Fill in the issuing officer's name, address, and telephone number; then serve copies of the Notice of Deposition on all parties. Rule 30(b)(1). (Effective December 1, 2007, this part of Rule 30(b)(1) becomes part of Rule 30(b)(1) and Rule 30(b)(2).)

Serve prior Notice of any commanded production of documents and things or inspection of premises before trial, without a testimonial deposition, on each party in the manner prescribed by Rule 5(b). Rule 45(b)(1). (Effective December 1, 2007, Rule 45(b)(1) omits any reference to Rule 5(b).)

Attach A Check For Witness Fees

Attach a check for witness fees to the service copy of the Subpoena. A copy of the Subpoena will be served on the witness. As noted above, witnesses appearing pursuant to Subpoena are entitled to the tender of one day's witness fee and the mileage allowed by law unless the Subpoena is issued on behalf of the United States or an officer or agency thereof. Rule 45(b). Because statutory witness fees change over time, check with the Clerk of the Court in the jurisdiction where the deposition is to be taken to confirm current witness fee requirements.

Serve The Subpoena

A subpoena may be served by anyone not less than 18 years of age and not a party to the litigation. Rule 45(b)(1).

Provide the following to the process server:

- Original Subpoena, with a separate Schedule of Documents to Be Produced, if used to command the production of documents (to be shown to the witness);
- Copy of the Subpoena with the witness fee check attached (for service upon the witness); and
- Detailed instructions on service, including where to find the witness, how to complete the Proof of Service, and where to return it.

Have The Process Server Return An Executed Original Subpoena And Proof Of Service

After the witness has been served a copy of the Subpoena, the original executed Subpoena should be returned to the noticing party. Be certain that the process server has accurately completed the Proof of Service and Declaration of Server found on the obverse of the Federal Subpoena form and has executed the original. See Appendix 4. If the process server has prepared a separate Proof of Service from the one included in the court issued Subpoena, confirm that it includes a statement of the date, manner, and names of the persons served, certified by the person who made service. See Rule 45(b)(3). (Effective December 1, 2007, Rule 45(b)(3) becomes part of Rule 45(b)(4).)

File The Original Subpoena And Proof Of Service When Necessary

File the Proof of Service when necessary with the Clerk of the Court in the jurisdiction from which the Subpoena is issued. Rule 45(b)(3). (Effective December 1, 2007, Rule 45(b)(3) becomes part of Rule 45(b)(4).) See also Rule 5(d).

Diary The Date, Time, And Place Of The Deposition

Diary the deposition on both your personal calendar and on any office master calendar or docket. If a party noticing the deposition of a witness fails to serve a Subpoena upon the witness, and therefore the witness does not attend and another party after receiving a Notice of Deposition attends, the court may order the noticing party to pay reasonable expenses incurred in attending, including reasonable attorneys' fees. Rule 30(g)(2). (Effective December 1, 2007, Rule 30(g)(2) should be cited as Rule 30(g).)

Appendix 1

Sample Notice Of Deposition And Request For Production Of Documents

[Caption]

PLAINTIFF LESLIE ROBERTS, dba SCOOPS, NOTICE OF DEPOSITION AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT BUSINESS-AIDE, INC. AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to Rule 30 of the Federal Rules of Civil Procedure, Plaintiff Leslie Roberts, dba Scoops, will take the deposition of the Custodian of Records of Defendant Business-Aide, Inc. This deposition will take place at the law offices of the Curtis Law Corporation, One Central Plaza, Boston, MA 02109, commencing at 9:00 a.m., on _____, unless the parties mutually agree to hold the deposition on a different date or time and/or at a different location.

This deposition will be taken by stenographic and video means before an officer authorized to administer oaths and will continue from day to day until completed. The deposition will be taken for the purposes of discovery, for use at trial in this matter, and for any other purpose permitted under the Federal Rules of Civil Procedure.

PLEASE TAKE FURTHER NOTICE that pursuant to Rules 30 and 34 of the Federal Rules of Civil Procedure, the deponent is to produce at the deposition the documents identified in Exhibit __ attached to this Notice.

Dated: _____

CURTIS LAW CORPORATION
One Central Plaza
Boston, MA 02109
Telephone: (617) 555-5221

By: _____
Mary D. Curtis

ATTORNEYS FOR PLAINTIFF
LESLIE ROBERTS, dba SCOOPS

Appendix 2

Sample Schedule Of Documents To Be Produced

Definitions

A. The term "PERSON" includes without limitation any natural person, firm, association, partnership, corporation, or any other form of legal entity.

B. The terms “YOU” and “YOUR” mean Defendant Business-Aide, Inc., including each of its current and former agents, employees, attorneys, consultants, investigators, accountants, and all other persons acting on its behalf.

C. The term “PLAINTIFF” means Plaintiff Leslie Roberts, dba Scoops, including each of her current and former agents, employees, attorneys, consultants, investigators, accountants, and all other persons acting on its behalf.

D. The term “COMMUNICATION” or “COMMUNICATIONS” means any transmission of information from one person to another, including without limitation by personal meeting, telephone, letter, telegraph, electronic mail (“e-mail”), electronic bulletin boards, electronic “chat rooms,” and other similar forms of electronic correspondences, teleconference, facsimile, or telex.

E. The term “DOCUMENT” or “DOCUMENTS” shall, consistent with Rule 34(a) of the Federal Rules of Civil Procedure, mean all physical or “hard copy” documents, including, but not limited to, writings, drawings, graphs, charts, photographs, letters, files, memoranda, calendars, and reports.

F. The term “ELECTRONICALLY STORED INFORMATION” shall mean native files (including all embedded files and metadata) of electronic data stored in any medium, including, but not limited to, electronic mail (“e-mail”), voicemail, word processing documents and spreadsheets, audio and video recordings, and any other electronically stored files regardless of the storage medium in which it resides, including, but not limited to, computer hard drives (for example, laptops, desktops, and servers), removable storage media (for example, tapes, disks, cards, and flash memory devices), PDAs, networked drives and optical storage devices such as CDs and DVDs. This definition includes information contained on backup tapes and all other recovery and archival systems. To the extent that YOU possess data in non-standard formats (including legacy data), YOU shall translate such information into a reasonably usable format and produce both the source non-translated data and the translated version.

G. The term “RELATING TO” or “RELATE TO” means constituting, comprising, pertaining to, referring to, recording, evidencing, containing, setting forth, reflecting, showing, disclosing, describing, explaining, summarizing, supporting, contradicting, refuting, or concerning, whether directly or indirectly.

H. The term “LAWSUIT” means the above-captioned action.

Instructions

A. Unless otherwise specified, the time period covered by each document request is from _____ to the present.

B. Each request contained herein extends to all documents in YOUR possession, custody, or control.

C. These requests specifically require the production of all responsive documents, including all responsive information that is stored electronically regardless of the data storage medium or system on which the electronic data resides. These requests thus should be understood to encompass, and the responses should include, ELECTRONICALLY STORED INFORMATION.

D. All ELECTRONICALLY STORED INFORMATION that does not exist in a standard file format shall be translated by YOU into a reasonably usable format. For example, legacy data that can only be read by using obsolete hardware systems and software shall be translated into contemporary formats.

E. To the extent that YOU contend that YOU need not provide discovery of certain responsive ELECTRONICALLY STORED INFORMATION on the ground that the information is not readily accessible, YOU shall identify with particularity: (i) the information that is not reasonably accessible; (ii) the reasons

why the information is not reasonably accessible; and (iii) the precise burden and cost associated with production of the information.

F. YOU must identify, by category or type, any sources containing potentially responsive ELECTRONICALLY STORED INFORMATION that YOU are not searching. This identification should provide enough detail to enable PLAINTIFF to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

G. If YOU claim for any reason that certain electronic data sources need not be searched or that data from certain sources need not be produced, YOU shall make reasonable data samples available to PLAINTIFF'S counsel and provide access to the data sources for testing and analysis at a time and in a manner that is convenient for the parties.

H. The identification obligations contained in Instructions M and N below do not relieve YOU of any common law or statutory duty to preserve evidence in this LAWSUIT. YOU should preserve all relevant and potentially relevant information regardless of the source of that information.

I. YOU shall take measures to ensure that any processes by which potentially relevant information could be automatically deleted or overwritten shall be suspended until such time as the parties have come to agreements regarding the treatment of such automatic computer processes.

J. YOU must not remove or degrade the ability of ELECTRONICALLY STORED INFORMATION to be searched and must provide native text-searchable copies of documents in the event that certain documents exist in both searchable and non-searchable formats.

K. If documents exist in both electronic and non-electronic form or if multiple copies of the same document exist in the same form, YOU shall produce all copies and may not selectively choose which format or version will be produced.

L. To the extent that YOU contend that potentially relevant documents might reside on dynamic databases or other non-static computer systems, YOU shall identify all such databases or systems with specificity and identify the types of potentially relevant documents that might reside on such databases or systems.

M. If YOU assert any privilege in responding to any request, describe in detail in each instance the type of privilege asserted, the basis for the assertion, all facts relied upon in support of the claim of privilege or related thereto, and identify, to the fullest extent short of waiver, all information as to which YOU claim a privilege.

N. If privileged or protected information stored in electronic data is inadvertently produced, YOU may by timely notice assert the privilege or protection and YOU may obtain return of the materials without waiver. For this reason, YOU may not avoid or delay production obligations based on blanket, non-specific assertions of privilege or other protection.

O. If, after making your initial production and inspection, YOU obtain or become aware of any further DOCUMENTS or ELECTRONICALLY STORED INFORMATION responsive to these requests, YOU are required to produce such additional documents to PLAINTIFF'S counsel in this LAWSUIT pursuant to Rule 26(e) of the Federal Rules of Civil Procedure.

P. In construing any Request, the singular form of a word shall be interpreted as plural and plural as singular as necessary to bring within the scope of the Request any information or documents which might otherwise be construed to be outside its scope.

Q. In construing any Request, whenever appropriate, "and" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the Request any information which

might otherwise be construed to be outside its scope; and “all” shall mean “any and all,” unless the context requires otherwise.

R. Each Request shall be construed independently and not with reference to any other Request herein for purposes of limitation, unless a Request so specifies.

Documents To Be Produced For Inspection And Copying

A. All DOCUMENTS and ELECTRONICALLY STORED INFORMATION between PLAINTIFF Leslie Roberts, dba Scoops, and DEFENDANT Business-Aide, Inc.

B. All DOCUMENTS and ELECTRONICALLY STORED INFORMATION discussing, referring to, or relating to any oral communications, including but not limited to telephone conversations, between PLAINTIFF Leslie Roberts, dba Scoops, and DEFENDANT Business-Aide, Inc.

C. All DOCUMENTS and ELECTRONICALLY STORED INFORMATION constituting, discussing, referring to, or relating to, any business transactions between PLAINTIFF Leslie Roberts, dba Scoops, and DEFENDANT Business-Aide, Inc., including but not limited to a purchase by PLAINTIFF Leslie Roberts, dba Scoops, of computer hardware and/or software from DEFENDANT Business-Aide, Inc.

(The author wishes to express his thanks to Gregory L. Watts of Wilson Sonsini Goodrich & Rosati, P.C. for his valuable assistance in drafting this Sample Schedule of Documents To Be Produced.)

Appendix 3

Sample Proof Of Service

Proof Of Service

I hereby certify that on this 1ST day of _____, a true and correct copy of Plaintiff’s Notice of Deposition of, and Request for Production of Documents by, the Custodian of Records of Defendant Business-Aide, Inc., has been served by First Class U.S. Mail, addressed to:

Emily B. Carter
Straus & Carter
1 Prescott Street
Cambridge, MA 02138
Telephone: (617) 555-1787

ATTORNEYS FOR DEFENDANT BUSINESS-AIDE, INC.

By: _____

Appendix 4
Sample Federal Subpoena In A Civil Case

(Note: The following sample Federal Subpoena in a Civil Case will be revised to reflect the amendments to the Federal Rules, effective December 1, 2007, absent Congressional action to the contrary.)

AO88 (Rev. 12/06) Subpoena in a Civil Case

Issued by the
UNITED STATES DISTRICT COURT

DISTRICT OF _____

SUBPOENA IN A CIVIL CASE

V. _____

Case Number:¹ _____

TO:

- YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

- YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
---------------------	---------------

- YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME
-------	---------------

- YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
----------	---------------

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
---	------

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

(See Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), on next page)

¹ If action is pending in district other than district of issuance, state district under case number.

AO88 (Rev. 12/06) Subpoena in a Civil Case

PROOF OF SERVICE

DATE

PLACE

SERVED

SERVED ON (PRINT NAME)

MANNER OF SERVICE

SERVED BY (PRINT NAME)

TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on

DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2006:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises — or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject

to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

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

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena 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 to quash, the person from whom discovery is sought must show that the information sought 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, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that 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 and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) CONTEMPT. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).