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**Professional Land Surveyors Workshop**  
**August 6-7, 2020**  
**Lake of the Ozarks**

**Index of Lecture Outline**

1. Should a New Surveyor Form an Entity to Operate the New Business?
2. Making the Right Entity Choice for Your New or Old Survey Business
3. Holding Yourself Out as an LLC (or Corporation)
4. Articles of Organization for LLC
5. Operating Agreement for LLC
6. Assignment of Interest in LLC Upon Transfer by Death
7. Terms of Employment for Surveyor Assistant
8. Employment Agreement for Surveyor Assistant
9. Benefit and Retirement Plans for Employees and Business Entities
10. Advantages to Employer and Self Employed Plans
11. ESOP (Employee Benefit Plan)
12. Being Subpoenaed for Deposition or Trial - How Does the Surveyor get Paid?
13. How to Honor a Trial Subpoenas Duces Tecum
14. Subpoena Power Over Expert Witness
15. Subpoena to Non-Party for Production of Documents and Things

## **1. SHOULD A NEW SURVEYOR FORM AN ENTITY TO OPERATE THE NEW BUSINESS?**

If a new Surveyor “hangs out a shingle”, what entity should be formed: Sole Proprietorship, Partnership, Limited Liability Company or Corporation?

What form of entity is the least hassle to operate as far as paperwork and administrative cost.

How should the entity be taxed: Proprietorship, Partnership or Corporate rates?

Do I need a CPA or a bookkeeper?

What assets should be owned by the entity chosen to operate the business?

What assets should be owned by the surveyor and leased to the entity?

How can probate be avoided on death of the Surveyor controlling the entity?

What is the easiest entity to sell your practice?

## **2. MAKING THE RIGHT ENTITY CHOICE FOR YOUR NEW OR OLD SURVEY BUSINESS**

The business entity that you choose for your Company can make a huge difference in the taxes that you pay, the cost of doing business, and the amount of paperwork and red tape that you will have to operate your business successfully.

### **I. SOLE PROPRIETORSHIP**

A sole proprietorship is owned and operated by one individual. It is the least complicated and usually the least expensive way to set up and operate a business.

The business income is taxed to the owner on what is called Schedule C of his or her personal income tax return. Payroll taxes apply to any employees of the business. The sole proprietor pays self-employment tax rather than social security tax (and gets a tax deduction for 50% of the tax paid).

One of the major disadvantages to a sole proprietorship is unlimited liability, not only for debts of the business, but for any lawsuits brought against the business. Liability extends to the proprietor’s personal, as well as business assets.

The ability to raise capital to purchase a commercial building, business equipment, computers, office furniture, trucks and survey equipment is limited to the amount the individual can secure personally. Since under-capitalization is a major cause of business failure, this factor can be significant.

The deductibility of fringe benefits is very limited in a sole proprietorship.

## **II. PARTNERSHIP**

A partnership can have two or more partners. Partners bring into a business more creativity, skills, capital base and experience than any one person is likely to have in a proprietorship.

A partnership files an information tax return (Form 1065) but pays no income tax itself. The income or losses are passed through to the partners, who report them on their individual tax returns in the shares or percentages agreed upon by the partners – not necessarily equally.

Partners, like sole proprietors, pay self-employment tax on net income. The major disadvantage to a partnership is that liability is unlimited. In fact, all partners can be held fully liable for the actions of any one partner.

Partners have similar options in the area of fringe benefits and retirement plans as those available to sole proprietors.

Having a written partnership agreement must cover what happens if a given partner dies, retires or leaves the partnership.

If there is no formal written partnership agreement, then Missouri Statutes govern the partnership operations.

## **III. REGULAR CORPORATION**

A corporation, the most complex of the business structures, is a distinct legal entity separate and apart from the shareholders who own it.

Formed under the requirements of the State in which it will do business, a corporation limits its owners' liability to their investment in the company. Thus, personal assets of the shareholders are not generally at risk.

However, the corporate form does not provide complete protection where personal services are involved.

If you set up a corporation and are employed by that corporation, the corporation must withhold and pay payroll taxes on your wages.

A corporation files its own income tax return (Form 1120) and pays its own income tax. Therein lies the major drawback to the corporate form: Business profits may be taxed twice – once at the corporate level and again at the shareholder level when paid out as dividends or a liquidating distribution.

The corporate form allows for more fringe benefits, deductible by the corporation and tax free to employees (including shareholder-employees).

Another drawback to the corporate form is the complexity of rules and regulations governing corporate operations (including the tax laws).

Personal service corporations (PSCs) have the added drawback of being taxed at a flat rate (the top corporate rate) rather than at the graduated rates available to other corporations.

The corporate hierarchy: Shareholders who own the business entity elect Directors and Directors appoint the President, Vice President and Secretary and Treasurer.

The 51% Shareholder controls the Board of Directors.

#### **IV. S CORPORATION** (Formerly called Subchapter S)

A corporation is allowed to elect "S" status only if it meets certain qualifications. S status was originally designated as "Chapter S corporation". An S corporation generally does not pay its own income tax.

The S corporation files Form 1120S and distributes K-1s to shareholders.

Shareholders then report their pro-rata share of income, losses and credits on their individual income tax returns. The double taxation that regular corporations face is thereby avoided with an S corporation.

The big advantage of S status is that it combines the limited liability of a regular corporation with tax treatment similar to that of a partnership. A disadvantage is that S corporations have some fringe benefit restrictions for owner-employees.

#### **V. LIMITED LIABILITY COMPANY**

The Limited Liability Company (LLC) combines the general flexibility and income tax treatment of a partnership with the limited liability of a corporation.

The LLC can operate through members or managers or a combination of both.

There is no stock but membership interest certificate.

Paper work is minimal.

Reporting requirements to Secretary of State is minimal.

Inexpensive to form and set up.

You can set up as officers for President, Vice President, Secretary and Treasurer.

You can have a one member LLC or large number of members.

### **3. HOLDING YOURSELF OUT AS AN LLC (or CORPORATION)**

1. Your LLC may register a fictitious name.
2. You can register a fictitious name prior to your formation of your LLC to lock that name in for future use.

3. You can go on a government website and secure your Tax ID number.
4. It may required to transfer your Surveyor license into the name of the LLC.
5. Your LLC may operate through members or managers or a combination.
6. Avoid having your spouse as a member or manager of the LLC.
7. There is no need to issue shares or a certificate of ownership.
8. The name of your company must have some reference to an LLC and it must be stated on all of your letterhead, business cards, billing, advertisement, contract, etc.
9. The name of the LLC must be on the bank account, any titled vehicles, such as truck or car, checks written out of the bank account.
10. Caveat: If you have 5 or more full or part time employees, it may trigger mandatory worker's compensation insurance coverage.
11. LLC may operate through a Resolution in writing similar to Corporate Resolutions.
12. Caveat: The Surveyor involved in a work related accident or work related negligence may be joined as a Party Defendant in that lawsuit.
13. Caveat: When you procure comprehensive liability insurance for the LLC, make certain it covers all members, managers and employees.
14. The LLC should have an Operating Agreement which sets forth the basic management principles and is typically required by a lending institution or title company.
15. The Operating Agreement must have a specific buyout formula to prevent litigation.
16. Obtain substantial vehicle insurance coverage and purchase UIM, under insured motorist coverage of \$300,000 minimum.

4. STATE OF MISSOURI . . . OFFICE OF SECRETARY OF STATE  
JOHN R. ASHCROFT, Secretary of State

ARTICLES OF ORGANIZATION  
OF ALL ABOUT SURVEYING, LLC

HONORABLE JOHN R. ASHCROFT  
SECRETARY OF STATE  
STATE OF MISSOURI  
JEFFERSON CITY, MO 65101

The undersigned natural person(s) of the age of eighteen years or more for the purpose of forming a limited liability company under The Missouri Limited Liability Company Act adopt the following Articles of Organization:

ARTICLE ONE

The name of the limited liability company is: **ALL ABOUT SURVEYING, LLC**

ARTICLE TWO

The purposes of the limited liability company are as follows:

- (a) To engage or transact any lawful business for which a limited liability company may be organized under the Missouri Limited Liability Company Act; and
- (b) Without limiting the generality of the foregoing to provide for all forms of land surveying services.

ARTICLE THREE

The address of the limited liability company's registered office in the State of Missouri is: \_\_\_\_\_, \_\_\_\_\_, **Missouri** \_\_\_\_\_, and the name of its registered agent at such address is: \_\_\_\_\_.

ARTICLE FOUR

Management of the limited liability company is vested in one or more managers.  
[or one or more members]

ARTICLE FIVE

The latest date on which the limited liability company is to dissolve is: perpetual.

ARTICLE SIX

Upon the withdrawal of a member, a majority in interest of the remaining members has the right to continue the business and affairs of the limited liability company within ninety days of such withdrawal.

ARTICLE SEVEN

The names and addresses of each organizer are as follows:

<u>Name</u>	<u>Address</u>
_____	_____ _____

ARTICLE EIGHT

For the tax purposes, the limited liability company will be operating as a proprietorship.  
[or corporation] [or partnership]

ARTICLE NINE

The effective date of this document is the date it is filed by the Secretary of State of Missouri.

ARTICLE TEN

The Limited Liability Company reserves the right to amend, alter, change or repeal any provision contained in these Articles of Organization, in the manner now or hereafter prescribed by the Missouri Limited Liability Company Act and provided for in the Operating Agreement.

IN WITNESS WHEREOF, I have hereunto set my hand this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
\_\_\_\_\_  
Organizer

STATE OF MISSOURI,                    )  
  ) SS.  
COUNTY OF \_\_\_\_\_          )

I, \_\_\_\_\_, a notary public, do hereby certify that on the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, personally appeared before me, \_\_\_\_\_, who being by me duly sworn, declare that he is the person who signed the foregoing document as organizer, and that the statements therein contained are true.

My commission expires:  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
- Notary Public  
State of Missouri, \_\_\_\_\_ County

**5. OPERATING AGREEMENT  
FOR ALL ABOUT SURVEYING, LLC**

ARTICLE I

GENERALLY

**Section 1. Adoption and Declaration.**

This Operating Agreement (the "Agreement") of **ALL ABOUT SURVEYING, LLC** (the "Company") is hereby adopted on this \_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by \_\_\_\_\_ (the "Member"). The Member is the sole member of the Company on the date hereof. This Agreement constitutes Member's declaration of an "operating agreement" as defined in Section 347.015(13) of the Missouri Limited Liability Company Act, Sections 347.010 to 347.187 of the Revised Statutes of Missouri (the "Act") and is being adopted as required by Section 347.081 of the Act. It is the express intention of the Member that the Agreement is the operating agreement relating to the Company and shall govern, even when lawfully different than, the provisions of the Act or any other law or rule. To the extent any provision of the Agreement is prohibited or ineffective under the Act, the Agreement shall be considered amended to the least degree possible in order to make the Agreement effective under the Act. In the event the Act is subsequently amended or interpreted in such a way to make any provision of the Agreement that was formerly invalid valid, such provision shall be considered to be valid from the effective date of such interpretation or amendment.

**Section 2. Name.**

The name of the Company is **ALL ABOUT SURVEYING, LLC**, and all business of the Company shall be conducted under that name to the extent permitted by applicable law.

**Section 3. Effective Date.**

The Agreement shall become effective upon the filing and acceptance of the Company's Articles of Organization with the Secretary of State of Missouri.

**Section 4. Term.**

The duration of the Company shall be perpetual, unless the Company shall be dissolved and its affairs wound up in accordance with the Act or Agreement (the "Term").

**Section 5. Registered Agent and Office.**

The registered agent for the service of process and the registered office shall be that person and location reflected in the Articles of Organization as filed in the office of the Secretary of State. The Manager may, from time to time, change the registered agent or office through appropriate filings with the Secretary of State. In the event the registered agent ceases to act as such for any reason or the registered office shall change, the Manager shall promptly designate a replacement registered agent or file a notice of change of address, as the case may be, and otherwise comply with the Act in this regard.



**Section 6. Company Property.**

All the rights, title, interests, and properties of any nature whatsoever, tangible and intangible, owned or hereafter acquired or received by the Company are herein the "Property," and such Property is and shall be held in the name of the Company.

**Section 7. Member's Authority.**

Except as otherwise provided in this Agreement, Member shall have no authority to act for, or assume any obligations or responsibility on behalf of, the Company.

**Section 8. Principal Place of Business.**

The principal place of business of the Company shall be \_\_\_\_\_, \_\_\_\_\_, Missouri \_\_\_\_\_, or such other place or places as the Manager shall designate in writing.

ARTICLE II

MANAGEMENT

**Section 1. Manager.**

There shall at all times be one (1) manager (the "Manager") of the Company selected by the Member. The initial Manager of the Company is \_\_\_\_\_.

**Section 2. Management of the Company.**

(a) The Manager shall be responsible for and shall have authority for conducting the ordinary and usual business and affairs of the Company unless limited or otherwise provided by this Agreement.

(b) Notwithstanding the provisions of paragraph (a) of this Section, the Member (and not the Manager) shall determine the compensation of Manager and have exclusive authority with respect to the merger, consolidation, conversion, or sale of substantially all the assets of the Company and the admission and expulsion of members.

ARTICLE III

CAPITAL

**Section 1. Contributions to Capital.**

The capital contributions of the Member on the books of the Company shall bear no interest except as otherwise provided herein or required by the Act and shall reflect the fair market value of all property contributed by the Member.

**Section 2. Capital Accounts.**

To the extent required, a capital account shall be established for the Member, and shall be maintained and adjusted in accordance with applicable tax or accounting principles.

## ARTICLE IV

### ALLOCATIONS, ACCOUNTING

#### **Section 1. Allocations.**

All profits, gains, losses, income, deductions, and credits shall be allocated to the Member.

#### **Section 2. Accounting.**

- (a) The fiscal year of the Company shall be the calendar year.
- (b) Books of account of the Company shall be kept and maintained at all times at the principal place of business of the Company.

## ARTICLE V

### DISSOLUTION AND WINDING UP

#### **Section 1. Dissolution.**

The Company shall be dissolved and its affairs wound up upon the first to occur of the following events (which, unless the Member agrees to continue the business, shall constitute dissolution events):

- (a) The written consent of the Member; or
- (b) Upon the death of the Member.

#### **Section 2. Effect of Dissolution.**

Upon dissolution, the Company shall cease carrying on (as distinguished from the winding up of) the Company business, but the Company shall not be terminated, but shall continue until the winding up of the affairs of the Company is completed and articles of termination have been filed with the Secretary of State.

#### **Section 3. Winding Up and Certificate of Dissolution.**

The winding up of the Company shall be completed when all debts, liabilities, and obligations of the Company have been paid and discharged or reasonably adequate provision therefor has been made, and all of the remaining Property has been distributed. Upon the completion of winding up of the Company, articles of termination shall be delivered to the Secretary of State, which shall set forth the information required by the Act.

## ARTICLE VI

### DISTRIBUTION ON LIQUIDATION

In the event of the sale or other disposition of all or substantially all of the Property or the dissolution and termination of the Company for any other reason, the Company shall be dissolved and

liquidated, and all of the Property shall be distributed as follows and in the following order of priority:

(a) All of the Property, if any, other than cash, shall be sold or collected and turned into cash as expeditiously as possible.

(b) All of the Company's debts, liabilities, and obligations (excluding any loans or advances by the Member) shall be paid in full or reserves therefor shall be set aside.

(c) All of the Company's debts, liabilities, and obligations to the Member shall be paid, but if the amount available therefor shall be insufficient, then pro rata on account thereof.

(d) Any amount remaining shall be distributed to the Member.

ARTICLE VII  
GENERAL

**Section 1. Governing Law.**

This Agreement and the rights and obligations of the Member and the Member's successors and assigns hereunder shall be interpreted, construed, and enforced in accordance with the laws of the State of Missouri.

**Section 2. Entire Agreement.**

This Agreement contains the entire operating agreement with respect to the Company. No variations, modifications, or changes herein or hereof shall be binding unless set forth in a document duly executed by or on behalf of the Member.

**Section 3. Binding Agreement.**

Subject to the restrictions on transfers and encumbrances set forth herein, this Agreement shall inure to the benefit of and be binding upon the Member and the Member's personal representative, successors, and assigns.

**Section 4. Rights of Creditors and Third Parties Under Company Agreement.**

This Agreement is adopted and declared by the Member for the exclusive benefit of the Member, and the Member's personal representative, successors, and assigns. This Agreement is expressly not intended for the benefit of any creditor of the Company or any other person. Except and only to the extent provided by applicable statute, no such creditor or third party shall have any rights under this Agreement or any agreement between the Company and the Member with respect to any capital contribution or otherwise.

**IN WITNESS WHEREOF**, this Agreement is executed, adopted, and declared effective as of the date first above written.

**Member:**

By: \_\_\_\_\_  
\_\_\_\_\_

**6. ASSIGNMENT OF INTEREST IN LLC  
UPON TRANSFER BY DEATH**

THIS AGREEMENT AND ASSIGNMENT UPON DEATH, made this \_\_\_\_ day of \_\_\_\_\_, 2020, by and between       (Father)       (Assignor) and       (Son)       (Assignee).

1. The name of the Limited Liability Company is All About Surveying, LLC.
2. The Operating Agreement authorizes an assignment of the interest of a member.
3. Upon the death of Assignor,       (Father)      , the ownership and all Assignor's interest in the LLC shall be transferred, conveyed, assigned and set over to       (Son)      .

IN WITNESS WHEREOF, I have hereunto set my hand this \_\_\_\_ day of \_\_\_\_\_, 2020.

\_\_\_\_\_  
\_\_\_\_\_, Assignor

STATE OF MISSOURI,    )  
  ) SS.  
COUNTY OF ST. FRANCOIS.                                    )

On this \_\_\_\_ day of \_\_\_\_\_, 2020, before me personally appeared \_\_\_\_\_, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year first above written.

My Commission Expires:  
11/23/2020

\_\_\_\_\_  
Eric. C. Harris - Notary Public

**7. TERMS OF EMPLOYMENT**  
**SURVEYOR ASSISTANT**  
**EMPLOYMENT CONSIDERATIONS**

1. Employer shall pay to Employee \$\_\_\_\_\_ per hour [or gross wage of \$\_\_\_\_\_ per week for 40 hours].
2. Employee shall work a 40 hour week; time of arrival and lunch time established only by Employer;
3. Employer may terminate the Employment Agreement at any time with or without cause.
4. Employee is a probationary employee for 90 [120] days.
5. Employee shall report to crew chief for orders and directions.
6. Employer does not provide medical or hospitalization insurance.
7. Employer does not provide retirement or pension programs.
8. Employer does not provide worker's compensation insurance for Employer does not have 5 or more full or part time employees.
9. Employee cannot represent the Employer in any manner and cannot transact any business on behalf of Employer.
10. Employee shall use due diligence and care to protect Employer's equipment.
11. Employee shall have access to office only during regular business hours and is not entitled to have a key or access to the office.
12. After 12 months of continuous employment, Employee shall earn one week of non-paid vacation.
13. After 2 years, 2 weeks of non-paid vacation.
14. Employee is not paid for any holidays or time off from work for any reason.
15. Employer establishes dress code for Employee and Employer shall furnish work t-shirt or shirt with Employer's logo.
16. Employer controls use of Employee's cell phone, ipad and personal computer and Employee is prohibited from using cell phone during any work hours, except for work related matters.
17. Employee shall not work for or assist any competitor at any time during the employment.
18. All information obtained by Employee by working for Employer is strictly confidential and shall not be disseminated in any manner to any other third person.

19. Employee shall not compete against Employer in any manner for a term of one year after employment relationship is terminated for any reason.
20. Employer shall maintain full insurance coverage on all vehicles that Employer owns and will allow Employee to operate or drive for only business matters.
21. All equipment of Employer used by Employee shall remain on Employer's premises.
22. The employment is an "at will" – employment relationship.
23. Either party may terminate at any time except that Employee shall give to Employer 2-weeks' advanced written notice of termination of employment.
24. If Employer pays for any schooling or training of Employee, and Employee leaves employment within 1 year of employment, Employee shall repay Employer for the cost of the training. The Employee shall sign a Promissory Note to cover cost of the schooling.
25. If Employer files suit to enforce any condition or term of employment, Employee shall pay all of Employer's attorney's fees and costs of litigation. Venue remains in county where Employer is located. Parties waive jury trial on all issues.
26. Employee acknowledges Employer does not provide group life insurance or any form of retirement plan.

**8. EMPLOYMENT AGREEMENT**  
(Surveyor Assistant)

THIS AGREEMENT made as of the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_, between (name of Employer) a corporation (limited liability company) incorporated under the laws of Missouri and having its principal place of business at \_\_\_\_\_ (the "Employer"); and (name of Employee), of the City of \_\_\_\_\_ (the "Employee").

WHEREAS, the Employer desires to obtain the benefit of the services of the Employee, and the Employee desires to render such services on the terms and conditions set forth.

IN CONSIDERATION of the mutual promises and other good and valuable consideration the sufficiency and receipt of which are hereby acknowledged, the parties agree as follows:

1. Employment

The Employee agrees that he will at all times faithfully, industriously, and to the best of his skill, ability, experience and talents, perform all of the duties required of his position. In carrying out these duties and responsibilities, the Employee shall comply with all Employer policies, procedures, rules and regulations, both written and oral, as are announced by the Employer from time to time. It is also understood and agreed to by the Employee that his assignment, duties and responsibilities and reporting arrangements may be changed by the Employer in its sole discretion without causing termination of this agreement.

2. Position Title

As a \_\_\_\_\_, the Employee is required to perform the following duties and undertake the following responsibilities in a professional manner:

- (a)
- (b)
- (c)
- (d)
- (e) Other duties as may arise from time to time and as may be assigned to the Employee

3. Compensation

- (a) As full compensation for all services provided the Employee shall be paid at the rate of \$\_\_\_\_\_ per hour. Such payments shall be subject to such normal statutory deductions by the Employer.
- (b) *(may wish to include bonus calculations or omit in order to exercise discretion).*
- (c) The compensation mentioned in paragraph (1)(a) shall be reviewed on an annual basis.
- (d) All reasonable expenses arising out of employment shall be reimbursed assuming same have been authorized prior to being incurred and with the provision of appropriate receipts.

4. Vacation

The Employee shall be entitled to vacations in the amount of \_\_\_\_ [days] weeks per annum. Employee must work a full 12 calendar months before being allowed a non-paid vacation.

5. Benefits

The Employer shall at its expense provide the Employee with the Health Plan that is currently in place or as may be in place from time to time.

6. Probation Period

It is understood and agreed that the first ninety days of employment shall constitute a probationary period during which period the Employer may, in its absolute discretion, terminate the Employee's employment, for any reason without notice or cause.

7. Performance Reviews

The Employee will be provided with a written performance appraisal at least once per year and said appraisal will be reviewed at which time all aspects of the assessment can be fully discussed.

8. Termination

- (a) The Employee may at any time terminate this agreement and his employment by giving not less than two weeks written notice to the Employer.
- (b) The Employer may terminate this Agreement and the Employee's employment at any time, without notice or payment in lieu of notice, for sufficient cause.
- (c) The Employee agrees to return any property of Employer at the time of termination.

9. Non-Competition

- 1. It is further acknowledged and agreed that following termination of the Employee's employment with Employer for any reason the Employee shall not hire or attempt to hire any current Employees of Employer.
- 2. It is further acknowledged and agreed that following termination of the Employee's employment with Employer for any reason the Employee shall not solicit business from current clients who have retained Employer in the 6 month period immediately preceding the Employee's termination.

10. Laws

This agreement shall be governed by the laws of the State of Missouri.

11. Independent Legal Advice

The Employee acknowledges that the Employer has provided the Employee with a reasonable opportunity to obtain independent legal advice with respect to this agreement, and that either:

- (a) The Employee has had such independent legal advice prior to executing this agreement; or
- (b) The Employee has willingly chosen not to obtain such advice and to execute this agreement without having obtained such advice.



12. Venue and Attorney's Fees

In the event Employer files suit against Employee to enforce this Agreement, Employee shall pay all of Employer's legal fees and court costs. Employee waives jury trial on all issues. Employee submits to the jurisdiction of the Circuit Court in the County of the Employer's principal business location.

13. Entire Agreement

This agreement contains the entire agreement between the parties, superseding in all respects any and all prior oral or written agreements or understandings pertaining to the employment of the Employee by the Employer and shall be amended or modified only by written instrument signed by both of the parties hereto.

14. Severability

The parties hereto agree that in the event any article or part thereof of this agreement is held to be unenforceable or invalid then said article or part shall be struck and all remaining provision shall remain in full force and effect.

IN WITNESS WHEREOF the Employer has caused this Agreement to be executed by its duly authorized officers and the Employee has set his hand as of the date first above written.

SIGNED, SEALED AND DELIVERED in the presence of:

\_\_\_\_\_  
[Name of Employee]

\_\_\_\_\_  
[Signature of Employee]

\_\_\_\_\_  
[Name of Employer Rep]

\_\_\_\_\_  
[Signature of Employer Rep]  
[Title]

**9. BENEFIT AND RETIREMENT PLANS FOR EMPLOYEES  
AND BUSINESS ENTITIES**

**EMPLOYER AND SELF-EMPLOYED RETIREMENT PLAN OPTIONS**

1. SEP IRA (Self-Employed)
2. SEP IRA (Employee)
3. Simple IRA
4. Defined Benefit
5. Defined-Contribution (Profit Sharing)
6. 401(k) Plan
7. ESOP (Employee Stock Ownership Plan)

### 2019 Employer and Self-Employed Retirement Plan Chart

	SEP IRA (Self-Employed)	SEP IRA (Employee)	SIMPLE IRA
Who can establish?	Anyone (regardless of age) with self-employment (SE) income.	Any employer.	Employers with 100 or fewer employees (including self-employed individuals) that do not maintain another retirement plan.
Eligible employees <sup>1</sup>	N/A. But, if contributions are made for self-employed, they must also be made for eligible employees.	Employees at least age 21 who worked for the employer during at least three of the last five years and received at least \$600 in compensation from employer in 2019.	Employees who have earned at least \$5,000 from employer in any prior two years, and are reasonably expected to do so in the current year.
Maximum Contributions Allowed	20% of net SE income after SE tax deduction up to a maximum contribution of \$56,000. SARSEPs established before 1997 follow 401(k) contribution limit rules.	25% of wages up to maximum contribution of \$56,000. SARSEPs established before 1997 follow 401(k) contribution limit rules.	Employee elective deferrals limited to \$13,000 (additional \$3,000 if age 50 or older at end of the year). The employer can either: 1) Match employee elective deferrals dollar for dollar up to 3% of wages (can be reduced to as low as 1% in any two out of five years) or 2) Contribute 2% of wages (up to \$280,000) for all employees (including nonparticipants).
Penalties for Early Withdrawal (Before Age 59½)	10% of distribution. (See <i>Exceptions to 10% Withdrawal Penalty Before Age 59½</i> on Page 14-3.)		10% of distribution, or 25% if withdrawn within two years from the date first participated in plan. (See <i>Exceptions to 10% Withdrawal Penalty Before Age 59½</i> on Page 14-3.)
When Withdrawals Must Begin	By April 1 of the year following the year the account owner turns age 70½. Note: Contributions can still be made to the account after age 70½ if the individual has earned income.		
Date to Establish Plan and Make Contributions	Return due date, including extensions, for the year the plan is to be effective.		<ul style="list-style-type: none"> <li>• Establish plan by October 1, 2019 for new plans first in effect for 2019.<sup>2</sup></li> <li>• Make employer contributions by the return due date, including extensions.<sup>3</sup></li> </ul>
Employer Contributions Required?	No	No	Yes
Borrowing Permitted?	No	No	No
Rollover Allowed?	Yes	Yes	Yes
Penalty for Excess Contributions? <sup>4</sup>	8% excise tax for both self-employed individuals and employees if excess contribution (plus earnings) is not withdrawn by return due date (including extensions). Employers are subject to a 10% excise tax on nondeductible (excess) contributions, unless an exception applies.		

<sup>1</sup> Plans can set less restrictive participation requirements, but not more restrictive ones.

<sup>2</sup> New employers that come into existence after October 1 may establish a plan as soon as administratively possible.

<sup>3</sup> Employee and self-employed elective deferrals must be deposited as soon as reasonably possible, but no later than 30 days after the end of the month in which the amounts would otherwise have been payable to the employee in cash. A self-employed taxpayer's elective deferral must be deposited by January 30 of the following year (January 30, 2020 for 2019 amounts).

<sup>4</sup> Excess contribution penalties are cumulative each year until corrected. The penalty is reported on IRS Form 5330 (Return of Excise Taxes Related to Employee Benefit Plans).

### 2019 Employer and Self-Employed Retirement Plan Chart

Defined-Benefit	Defined-Contribution (Profit-Sharing)	401(k)	403(b)
Any employer.			Tax-exempt religious, charitable or educational organizations.
Employees at least age 21 with one year of service (1,000 hours).			Employees <sup>5</sup> who work 20 or more hours per week, do not participate in another 401(k), 457 or 403(b) plan and will contribute more than \$200 per year.
Actuarially determined contribution. Maximum benefit payout limited to 100% of average compensation for the three consecutive years of highest compensation (limited to \$280,000), but not to exceed \$225,000. <sup>6</sup>	Contributions per participant up to lesser of 100% of compensation or \$56,000. Employer deduction limited to 25% of aggregate compensation (limited to \$280,000 per employee) for all participants (20% of net SE income after SE tax deduction for self-employed). <sup>6</sup>	Employee elective deferrals limited to \$19,000 (additional \$6,000 if age 50 or older at end of the year). Employer deduction limited to 25% of combined wages of all employees (elective deferrals do not reduce wages for the 25% limit). Combined employer contributions and employee elective deferrals per employee limited to lesser of 100% of wages or \$56,000 (additional \$6,000 for employees age 50 or older by year-end). <sup>6</sup>	Employee elective deferrals limited to \$19,000 (additional \$6,000 if age 50 or older at end of the year). Special formula applies to additional employer contributions based on years of service. Combined employer contributions and employee elective deferrals per employee limited to lesser of 100% of wages or \$56,000 (additional \$6,000 for employees age 50 or older by year-end). <sup>6</sup>
10% of distribution. (See <i>Exceptions to 10% Withdrawal Penalty Before Age 59½</i> on Page 14-3.)			
For self-employed and >5% owners, by April 1 of the year following the year the account owner turns age 70½. For all other employees, April 1 of the year following the year the account owner turns age 70½ or retires, whichever is later.			
December 31, to establish plan. Return due date, including extensions for profit-sharing plan contributions. 8½ months after year-end for defined benefit plan contributions.		December 31 to establish plan. For employer contributions, return due date including extensions. <sup>7</sup>	
Yes	No	Generally no.	
Yes, if plan permits. Must pay back in five years (unless used to buy a principal residence).			
Yes	Yes	Yes	Yes
Employers are subject to a 10% excise tax on nondeductible (excess) contributions, unless an exception applies.		<p><i>Employee's elective deferral:</i> No penalty or tax if 2019 excess is withdrawn by April 15, 2020 (but allocable earnings are taxable in year withdrawn). If not withdrawn by April 15, 2020, excess is taxed twice—once in the year of excess contribution and again when distributed because no cost basis is allowed for excess contribution.</p> <p><i>Employer's contribution:</i> 10% penalty on excess contributions (resulting from plan failing average deferral percentage test) unless distributed (with earnings) to highly compensated employee(s) within 2½ months after the close of the plan year (taxable to employee in year of deferral). Failure to distribute excess within 12 months after close of plan year results in plan failing to qualify for that plan year and all subsequent plan years for which the excess contributions remain uncorrected.</p>	
<p><sup>5</sup> Includes self-employed ministers.</p> <p><sup>6</sup> Nondiscrimination rules may affect contributions/deferrals for certain employees.</p> <p><sup>7</sup> The Tax Code does not specify when the employer is required to deposit employee elective deferrals into the employee's account. However, under ERISA regulations, employee elective deferrals must be contributed to the employee's 401(k) plan account as soon as reasonably can be segregated from the employer's general assets, but not later than the 15th business day of the month immediately after the month in which the contributions either were withheld or received by the employer.</p>			

## **10. ADVANTAGES TO EMPLOYER AND SELF-EMPLOYED PLANS**

### 1. Qualified Plans, SEPs and Simple IRAs

Contributions are generally tax deductible by the Contributor (Employer) and tax deferred for the Plan Participant (Employee). Earnings on contributions are tax deferred until withdrawn

2. Maximum Contributions (including SEPs and Simple IRAs) are generally greater than IRAs
3. Deductible Contributions allowed after age 70½

### **SEPs AND SIMPLE IRAs**

1. Easy to set up and maintain
2. Allow Plan Participant to choose how funds are invested as opposed to a Plan Administrator through Employer
3. Participant is always 100% vested in the Plan

### **SEPs**

1. No annual reporting requirements; easy to administer
2. Do not require recurring or fixed contributions per year

### **SIMPLE IRAs**

1. Similar to 401(k) Employee elective deferral and Employer matching, without complex non-discrimination and “top-heavy” rules

### **401(k) PLAN (Defined Contribution Plan)**

1. Employers allowed to match Employee contributions
2. Employee is generally fully vested sooner than with other qualified plans
3. Plan is managed by professionals
4. Easy for Employees – contributions made through payroll deductions
5. Certain tax free borrowing from Plan is permitted
6. Early withdrawal: 10% tax penalty and 20% tax due (i.e. charged at your personal tax rate)

7. 2 Forms: Traditional and Roth
8. 2020 limit is \$19,500/year for Employees under age 50; \$26,000/year for 50+
9. Employer contributions can only go into Traditional, not Roth
10. Age 59½ for withdrawals
11. After age 72, subject to Required Minimum Distribution based upon life expectancy

## **11. ESOPs: THE BASICS AND THE BENEFITS**

An ESOP is an Employee Benefit Plan designed with enough flexibility to be used to motivate Employees through equity ownership. Therefore, according to theory, ESOPs implicitly enhance productivity and profitability and create a market for stock. This enhances shareholder liquidity and provides a vehicle for the transfer of ownership, which can assist in the transition from an owner/management group to an employee-owned management group to an employee-owned management team.

Although ESOPs have been in use for a number of years – and with each new tax law undergo some changes – their basic structure and benefits have stood the test of time.

### **AN ESOP DEFINED**

An ESOP is an Employee Benefit Plan which qualifies for certain tax-favored advantages under the IRS Code. In order to take advantage of these tax benefits, it must comply with various participation, vesting, distribution, reporting and disclosure requirements set forth by the code. These requirements are designed to protect the interests of the employee owner. ESOPs are also subject to the regulations set forth in the Employee Retirement and Income Security Act (ERISA) which essentially created a formal legal status for ESOPs and must meet the Employee Benefit Plan requirements of the Department of Labor.

### **HOW AN ESOP WORKS**

A company establishes an Employee Stock Ownership Trust and makes yearly contributions to the Trust.

These contributions are either in new or treasury stock, cash to buy existing shareholder's stock or pay-down debt used to acquire company stock. Regardless of the form, the contributions are tax deductible.

Employees or ESOP participants have accounts within the ESOP to which stock is allocated. Typically, the participant's stock is acquired by contributions from the company – the employees do not buy the stock with payroll deductions or make personal contribution to acquire the stock.

Plan participants generally accumulate account balances and begin the vesting process after one year of full time service.

Contributions, either in cash or stock, accumulate in the ESOP until an employee quits, dies, is terminated or retires.

Distributions may be made in a lump sum or installments and may be immediate or deferred.

ESOPs are of two varieties: Leveraged and Non-leveraged. Each of the ESOPs has different characteristics.

### **BENEFITS OF AN ESOP**

The advantages and benefits of an ESOP are numerous and varied, depending on whether you are the employee/participant, an existing shareholder, or an employer.

**THE BENEFITS TO EMPLOYEES.** An ESOP can provide an employee with significant retirement assets if the employee is employed by the company for a significant period of time and the employer stock has appreciated over the years to retirement. The ESOP is generally designed to benefit employees who remain with the employer the longest and contribute most of the employer's success. Since stock is allocated to each employee's account based on a contribution by the company, the employee bears no cost for this benefit.

Employees are not taxed on amounts contributed by the employer to the ESOP, or income earned in that account, until the employee actually receives distributions. Even then, "rollovers" into an IRA or special averaging methods involved in the income calculation can reduce or defer the income tax consequences of distribution.

When the employee's participation in the ESOP ends, they are entitled to their share of the "vested" benefit according to a schedule incorporated into the ESOP document. Distributions may be made in stock or cash. However, a "put" option, which requires the plan or the company to acquire stock distributed to participants, may provide cash for their shares. This is especially valuable to participants in privately held companies where there is no market for the company stock.

### **THE BENEFITS TO SHAREHOLDERS**

An ESOP can create a market for the stock of a privately held company. The ESOP provides a ready, current market for the stock of outside shareholders providing liquidity not otherwise available. This feature may be used by participants, beneficiaries, major shareholders or estates of deceased shareholders.

The ESOP leveraging provides a way for a selling shareholder to receive cash, rather than incur the risk of a deferred payment arrangement.

Subject to certain conditions and regulations, the IRS code makes provision for special tax incentives for certain sales of stock to an ESOP. This would enable a shareholder of a closely held company to sell stock to an ESOP, reinvest the proceeds in other qualified securities and defer taxation on any gain resulting from the sale.

## **BENEFITS TO THE EMPLOYER**

An ESOP is mandated by law to invest contributions primarily in employer stock. It is also the only qualified employee benefit plan which is permitted to borrow funds on employer credit in order to acquire employer stock. These differences provide a significant flexibility for a company using an ESOP as a corporate finance tool and make possible the accomplishment of corporate objectives not available through other methods.

As a corporate finance technique, the ESOP can be used to raise new equity to refinance outstanding debt or to acquire assets, or outstanding stock, through leveraging with third party lenders. Since contributions to an ESOP are fully tax deductible, an employer can fund both the principal and the interest payments on an ESOP's service obligations with pre-tax dollars. Dividends which are used to repay a loan may also be deductible.

## **CONCLUSION**

An ESOP is an attractive employee benefit and corporate financing tools; its structure can range from simple to complex. Its feasibility should be considered by a competent tax lawyer, accountant and administrators to ensure tax deductibility compliance with the IRS regulations and to meet all Employee Benefit Plan requirements set by the Department of Labor.

## **12. BEING SUBPOENAED FOR DEPOSITION AND/OR TRIAL - HOW DOES THE SURVEYOR GET PAID?**

A Surveyor can be one of four types of witnesses: (1) retained expert, (2) a non-retained expert, (3) a specially employed expert witness, or (4) a fact witness.

A Surveyor may be subpoenaed to appear for a deposition or for a trial in a civil case or in a criminal case.

The Missouri discovery rule states as follows:

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Rule 56.01(b)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

- (a) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial by providing such expert's name, address, occupation, place of employment and qualifications to give an opinion, or if such information is available on the expert's curriculum vitae, such curriculum vitae may be attached to the interrogatory answers as a full response to such interrogatory, and to state the general nature of the subject matter on which the expert is expected to testify, and the expert's hourly deposition fee.
- (b) A party may discover by deposition the facts and opinions to which the expert is expected to testify. Unless manifest injustice would result, the court shall require that the parties



seeking discovery from an expert pay the expert a reasonable hourly fee for the time such expert is deposed.

(5) *Trial Preparation: Non-Retained Experts.* A party, through interrogatories, may require any other party to identify each non-retained expert witness, including a party, whom the other party expects to call at trial, who may provide expert witness opinion testimony by providing the expert's name, address, and field of expertise. For the purposes of this Rule 56.01(b)(5), an expert witness is a witness qualified as an expert by knowledge, experience, training or education giving testimony relative to scientific, technical or other specialized knowledge that will assist the trier of fact (judge or jury) to understand the evidence. Discovery of the facts known and opinions held by such an expert shall be discoverable in the same manner as for lay witnesses.

If you are a "fact" witness, you will be paid mileage of only 10¢ per mile for the distance from your office to the courthouse or place of deposition. Your witness fee for trial is set by statute to be \$25.00. A Surveyor can be subpoenaed at any time in advance of a scheduled deposition or a trial. Mileage must be tendered by check at the time the subpoena is served. A subpoena is an Order of the trial judge. A subpoena *duces tecum* simply means you are to bring forth records or tangible objects as described in the subpoena. In the event the deposition date and/or trial date conflict with your schedule, you must engage an attorney to timely file a Motion to Quash the subpoena.

If you violate a subpoena and do not appear for a scheduled deposition or a trial, the Judge can issue a "warrant for your arrest" which is commonly referred to as a "body attachment".

For your willful failure to appear at a deposition or trial, you can be assessed attorney's fees by the party moving to produce you for testimony at a deposition and/or trial.

In your employment contract with your client, or with your client's attorney, you must add the provision that if and when you are subpoenaed by any party for any reason, your client will pay for all reasonable survey fees for:

1. Preparation time;
2. Time of travel;
3. Time waiting for trial in courthouse;
4. Actual trial testimony time;
5. Cost of documents produced;

6. Mileage at .545¢ per mile to and from courthouse from your office; and
7. Lodging, if overnight stay required.

It is best to have a subpoena served personally on the given Surveyor rather than a member of the office staff.

In most litigation, the parties to the lawsuit send out an interrogatory (question) that is answered under oath and is as follows:

@. At trial, do you intend to call any person as an expert witness? If so, with respect to each person whom you expect to call as an expert witness, state the following:

- (a) The name, current address and telephone number of each such person;
- (b) The subject matter on which each person is expected to testify as an expert;
- (c) The hourly charge for deposition and trial appearance;
- (d) Attach a curriculum vitae for each expert.

**ANSWER:**

If you are not an endorsed witness or disclosed through proper interrogatory answer, you may not be allowed to testify for your client unless your client disclosed you as an expert or witness in this lawsuit.

Your subpoena *duces tecum* may direct for you to bring your entire file.

Preparation for a jury trial is far more demanding than preparation for trial in a judge tried case.

You will asked at trial, who retained you and who is paying you.

Your standard for testifying as to a survey opinion as an expert is as follows: “Based upon a reasonable degree of surveying certainty, do you have an opinion as to .....” Before your deposition or before trial prepare a detailed timesheet to prove what time has been expended to prepare for the given deposition or trial. Be sure to know what records you actually reviewed prior to your trial or deposition.

You may be asked by the adversary if you reviewed or studied certain named documents. Would your opinion change in any manner had you reviewed a certain document?

You are entitled to bill for preparation fee, gathering records, court appearances, etc.

Either side can call you as a witness whether it be a fact witness or an expert witness.

Typically you are called to testify by the attorney for the Plaintiff or the Defendant or other party in the lawsuit, called a Third party defendant.

Either side can call you to the stand to testify at any time. If you are called by the adverse party, you are designated legally as a “hostile” witness and you may be cross-examined immediately by the attorney.

A trial litigant may call an adverse party or person as a witness. RSMo. §491.030. That section in a civil case permits the calling of any adverse party for direct examination. Examination of an adverse party in such a direct exam may be conducted under the rules that apply to cross-examination of witnesses generally.

Where a litigant calls an adverse party as his witness pursuant to RSMo. §491.030, that litigant is not bound by the testimony given of the adverse witness unless it is the only testimony in the case on that point. Frank v. Wabash R. Co., 295 S.W.2d. 16 (Mo. 1956). However, a party cannot directly impeach the credibility of his own witness even though he is the other party to the lawsuit.

More importantly, the court may allow such witness’s own counsel to cross examine him and may allow his own counsel to ask leading questions. Wilcox v. Erwin, 49 S.W.2d. 677 (Mo. App. 1932).

In a deposition, you are entitled to send a statement of allowable charges to the attorney or person that is causing you to be deposed. As a condition of you appearing, you can stipulate that you must receive your fees and costs in advance of the deposition and/or trial.

In a case where a Judge orders a survey on his own Motion (called *Sua Sponte*) your fees are covered by a court order and are taxed as costs in the lawsuit.

In summary, to get paid, cover all aspects of your involvement in your employment contract or letter of engagement. You should make sure you are paid in advance of your deposition or court appearance.

### **13. TRIAL SUBPOENAS DUCES TECUM**

Like deposition subpoenas, trial subpoenas can command the person to whom it is directed to produce objects, books, papers, or documents clearly designated in the subpoena. RSMo. §491.100.3. Such a subpoena is referred to as a subpoena *duces tecum*. Trial subpoenas *duces tecum* which are unreasonable and oppressive are subject to motions to quash. RSMo. §491.100.3. Furthermore, if the subpoena fails to adequately describe the documents and information sought, it will not be enforced. State ex rel. Burke v. Scott, 262 S.W. 2d. 614 (1953). The court may condition denial of a motion to quash a trial subpoena *duces tecum* upon the advancement by the person on whose behalf the subpoena is issued of the reasonable cost of producing the objects, books, papers or documents. RSMo. §491.100.3.

### **14. SUBPOENA POWER OVER EXPERT WITNESSES**

Expert witnesses may be subpoenaed in the same manner as other witnesses. If defense counsel expects to get State funds in a criminal case to pay for an expert, State v. Tokar, 918 S.W. 2d. 753 (Mo. banc. 1996), counsel should make an adequate record of the Defendant's indigency, and that likely will involve filing an Affidavit under RSMo. §600.086.3; State v. Williams, 134 S.W. 3<sup>rd</sup>. 766 (Mo. App. 2004). In addition to compelling an expert to attend trial for the purpose of testifying about matters directly within their first-hand knowledge, such as a psychiatric examination or valuation of examined property, they may also be asked to answer appropriate hypothetical questions once the expert has been shown to be properly qualified by his training and experience to competently answer such questions. State v Bell, 111 S.W. 24 (1908). As with lay witnesses, experts are entitled to the normal witness fees granted by the statutes. Klepper v. Klepper, 199 Mo. App. 294, 300-301, 202 S.W. 593, 595 (1918); Burnett v. Freeman, 134 Mo. App. 709, 115 S.W. 488 (1909). A contract to pay an expert a witness fee larger than that allowed by law may be void as against public policy. Barnes v. Boatman's National Bank of St. Louis, 156 S.W. 2d. 597 (1941), but a party may,

pay an expert reasonable compensation for the use of his or her skills in preparing testimony, gathering necessary information upon which to base his expert opinion, discussing the case with counsel, and for being available for trial.

**15. RULE 58.02 - SUBPOENA TO NON-PARTY FOR PRODUCTION OF DOCUMENTS AND THINGS**

As to scope of the subpoena, a party may serve a subpoena on a non-party to produce and permit inspection and copying of any designated documents or permit inspection, copy testing or sampling of any tangible things that constitute or contain matters within the scope of Rule 56.01(b) and that are in the possession, custody or control of the non-party.

As to time, a subpoena to a non-party shall be served not fewer than ten (10) days before the time specified for the compliance. Advance notice applies to your deposition and your trial appearance.

As to notice of all parties in the lawsuit, the parties serving a subpoena on a non-party pursuant to Rule 58.02(a) shall provide a copy of the subpoena to every party as if it were a pleading. A party objecting to the subpoena may seek a protective order under Rule 56.0(c).

As to a formal response, with the agreement of all parties, the non-party may be excused from appearance at the location specified for document production and may produce the subpoenaed items to the party responsible for issuance and service of the subpoena, who shall then offer to all other parties the opportunity to inspect or copy the subpoenaed items. The party responsible for issuance and service of the subpoena is responsible for obtaining the agreement of all parties and advising the non-party in writing of the agreement, with a copy to all attorneys of record and self represented parties. Absent such an agreement, the subpoenaed items shall only be produced at the place, date and time specified by the subpoena for all parties to inspect or copy. Upon request by any party, the non-party shall also produce with the subpoenaed items a business records affidavit of the custodian of records.

As to protection of the non-party, a party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a non-party subject to the subpoena.

As to objection by a non-party subpoenaed to bring forth records, the non-party may serve the party who issued and served the subpoena with a written objection to inspection and copying of any or all of the designated items. The objection shall state specific reasons why the subpoena should be quashed or modified. The objection shall be served on all parties to the action within ten (10) days after service of the subpoena or before the time specified for compliance, whichever is earlier.

If a timely and specific objection is made, the party who issued and served the subpoena shall not be entitled to inspect or copy the subpoenaed items except pursuant to an order of the court.

As to willful violation of the subpoena and contempt, any person, who without adequate excuse fails to obey a subpoena served upon the person, may be held in contempt of the court in which the civil action is pending. The Judge can issue a body attachment and the Sheriff's deputy will transport you to the court room. If you willfully violate a subpoena you are in "indirect" civil contempt of the Judge's Order.