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Civil Procedure

Subpoenas

Major changes to federal subpoena practice will take effect Dec. 1, 2013, and the author outlines the 10 changes all practicing attorneys need to know, including that a subpoena must be issued in the name of the presiding court, instead of the court in which it is to be served. He also notes two critical aspects of subpoena practice that will not change.

Major Changes in Federal Subpoena Practice

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Effective Dec. 1, 2013, the reach of federal subpoena power, the court in whose name you issue subpoenas, and the court designated to resolve motions to quash will all change. Absent congressional action, which does not seem to be a threat on almost any front, these and other major changes to civil subpoena practice will go into effect in a substantially revamped Federal Rule of Civil Procedure 45. There are 10 major changes you need to know, and two equally critical aspects that have not changed you need to keep in mind.

What Has Changed

1. Issuing Court. Beginning Dec. 1, subpoenas must be issued in the name of the court presiding over the case, not in the name of the court in which the subpoena is served, under amended Rule 45(a)(2). Through Nov. 30, subpoenas for depositions and document production are issued in the name of the court for the district in which the deposition or document production is to take place.

2. Nationwide Service. Under amended Rule 45(b)(2), a subpoena ''may be served any place within the United States.'' Thus, a subpoena issued in the name of the federal court in Minneapolis may be served in New York, Houston or Los Angeles. Any lawyer authorized to practice in the issuing court may issue and sign the subpoena and have it served anywhere in the country. *See* Rule 45(a)(3).

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3. Nonparty Witnesses Subject to 100-Mile Limit, Except for Trial. If the subpoena is for a deposition or a hearing (not a trial), a nonparty witness can be compelled to travel only within 100 miles of where he or she resides, is employed, or regularly transacts business in person. *See* Rule 45(c)(1)(A). If a nonparty is subpoenaed for trial, that person can be compelled to travel anywhere within his or her state of residence, as long as doing so does not entail ''substantial expense.'' Rule 45(c)(1)(B)(ii). If it does, the Advisory Committee Note suggests that the subpoenaing party offer to pay the expenses, and notes that ''the court can condition enforcement of the subpoena on such payment.''

4. Parties and Party Officers Strictly Confined to 100-Miles or Statewide Limit. If the subpoena is for the testimony of a party or party's officer, that person may be compelled to travel anywhere within the 100-mile limit or within his or her state of residence, subject to the same ''substantial expense'' limitation. *See* Rule 45(c)(1)(B). Such a witness *cannot* be required to travel farther than that because Rule 45(c)(1) begins with the proviso that ''[a] subpoena may command a person to attend a trial, hearing, or deposition *only* as follows.''

This amended Rule 45(c)(1)(B) is designed to reverse decisions that have compelled senior corporate officers to travel across the country to testify at trial. Whatever judicial power may currently exist to do this — and the cases are in conflict — it is withdrawn effective Dec. 1.

5. Disputes Presumptively Resolved in Witness's Jurisdiction. The new rule is focused on sparing nonparty witnesses needless burden and expense. That is reflected in its presumption that the court where compliance is required (colloquially, the ''compliance court'') should hear and decide any motion to quash or modify a subpoena, and *not* the issuing court. *See* Rule 45(d)(3)(B).

6. Transfer to Issuing Court Requires Consent or 'Exceptional Circumstances.' The compliance court retains the discretion to transfer the motion to quash or modify back to the issuing court, but only in two circumstances — if the nonparty witness consents or the compliance court finds ''exceptional circumstances.'' *See* Rule 45(f).

''Exceptional circumstances'' is an extremely difficult threshold to cross. Currently, this strict standard appears only four times in the civil rules. It is the showing that must be made:

- by a law firm to escape sanction for misconduct of its lawyers (Rule 11(c)(1));
- to take discovery of a consulting expert (Rule 26(b)(4)(D));
- to use the deposition of an available witness at trial (Rule 32(a)(4)(E));
- to obtain sanctions for a party's loss of electronically stored information as a result of the routine, good faith operation of an electronic information system (Rule 37(e)).

The Advisory Committee Note to new Rule 45(f) declares that it is expected to be ''truly rare'' for a compliance court to transfer a motion to the issuing court and, notwithstanding all conventional wisdom, that ''it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions.'' At the same time, the Note makes it clear that transfer may sometimes be warranted — if, for example, the issues have previously been decided by the issuing court or are likely to arise in many districts.

7. Judges Are Urged to Consult. The Advisory Committee Note encourages the judge in the compliance court ''to consult with the judge in the issuing court . . . while addressing subpoena-related motions.'' This makes a great deal of sense, but it raises issues because the parties and the nonparty witness are not present for this conversation and their positions are not directly being heard by the issuing court judge, who may have substantial influence on the outcome.

Consultation among judges is expressly permitted by the commentary to Canon 3A(4) of the Code of Conduct for United States Judges, and Rule 2.9(a)(3) of the ABA Model Code of Judicial Conduct, the latter making explicit the rather obvious requirement that ''the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.''

While neither of these codes thus mandates it, it would be a welcome practice — and alleviate a great deal of concern — if the compliance court judge were to advise the parties and nonparty witness of any planned consultation with the issuing court judge and, after the fact, inform them as to the substance of the communication prior to deciding the motion.

8. On Transfer, Witness's Lawyer May Be Heard in Issuing Court. If the compliance court finds that exceptional circumstances exist and transfers the quashal motion to the issuing court, the lawyer for the nonparty witness is automatically admitted to the issuing court for the purposes of filing papers and appearing on the motion (*see* Rule 45(f)), obviating any requirement of obtaining local counsel and the associated expense. That, alone, however, does not relieve the nonparty witness of the cost of getting its counsel before the issuing court.

9. On Transfer, Telephonic Hearings Encouraged. Consequently, to address this expense issue and ''minimize the burden a transfer imposes on nonparties,'' the Advisory Committee Note urges that, ''[i]f the motion is transferred, judges are encouraged to permit telecommunications methods.''

10. Contempt of Two Courts. Both the compliance court and, after transfer, the issuing court may hold in contempt a miscreant witness, under Rule 45(g). Under a related change to Rule 37(b)(1), if the issuing court orders compliance and the witness in the compliance jurisdiction is non-compliant, that ''may be treated as contempt of either court.'' The Advisory Committee Note to Rule 45(g) explains that ''disobedience constitutes contempt of both the court where compliance is required . . . and the court where the action is pending.''

What Has Not Changed

1. Parties & Officers Subject to Deposition Without Subpoena. The limitations on subpoenaing parties and officers are relevant only to trial, not to deposition, testimony. The Advisory Committee Note contains the reminder that: ''Depositions of parties, and officers, directors, and managing agents of parties need not involve

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use of a subpoena.'' In light of the sanctions available under Rule 37, a party fails to appear or produce its senior personnel for deposition at its peril.

2. Documents Received Pursuant to Subpoena. Nothing in the new rule, just like nothing in the existing rule, obliges a party to make available to any other party the data it receives in response to a document subpoena. The only requirement is advance notice that a document subpoena is going to be served. *See* Rule 45(a)(4). That means that, upon receipt of a notice, it is incumbent on counsel for all other parties to make arrangements with the lawyer serving the subpoena to obtain access to everything produced. Failing that, serve a document request on that party or a carbon copy of the subpoena. Otherwise, you may never see anything favoring you that is produced because you can count on the fact that it won't appear in your adversary's exhibit list.