Litigation Department

Changes to Federal Rule of Civil Procedure 45 Effective December 1, 2013

Promise To Simplify Federal Subpoena Practice

By Christopher Tompkins and Ethan E. Kent

Significant changes to Federal Rule of Civil Procedure 45 governing civil subpoenas will become effective next month, on December 1, 2013. The amendments make five changes to Rule 45 in an attempt to simplify current federal practice for issuing and responding to subpoenas. The current version of Rule 45 requires attorneys to consult various provisions scattered throughout the rule to determine (i) the court from which a subpoena must be issued, (ii) where a subpoena from that court can be served, and (iii) where the subpoena can specify that compliance should take place. The goal of the amendments is to reduce confusion and eliminate hyper-technical disputes that can turn subpoena practice into a game of "gotcha." A copy of the revised rule can be found at http://www.supremecourt.gov/orders/courtorders/frcv13_d18e.pdf.

1. Subpoenas are now issued from the court where the action is pending and can be served nationwide.

The current rule provides that discovery subpoenas must be issued from the district court for the district where compliance will take place. Fed. R. Civ. P. 45(a)(2). A subpoena for attendance at a hearing of trial is issued from the district court where the hearing or trial is to be held, a deposition subpoena is issued from the district court for the district where the deposition will take place, and a document subpoena is issued from the district where the recipient will produce evidence or allow an inspection. *Id.* 45(a)(2). The current rule has given rise to confusion and disputes both because courts have interpreted the provisions in different ways, and because different provisions impose geographic limitations the *service* of subpoenas.

To eliminate confusion and simplify subpoena practice, the amended rule provides that all subpoenas are now to be issued from the district court where the action is pending. *See* Amend. Fed. R. Civ. P. 45(a)(2). In a related change, the amendments eliminate geographic limits on service of a subpoena, permitting service "at any place within the United States." *Id*. 45(b)(2).

2. Geographic limits intended to protect subpoena recipients are now exclusively based on the location where compliance can be required.

While the amended rule simplifies the requirements to serve a subpoena, it continues to protect subpoena recipients by imposing geographic limits on the place for compliance with the subpoena.

Under amended Rule 45(c)(1), a subpoena may only compel a person to attend a hearing, trial or a deposition within 100 miles of the location where the subpoenaed person resides, is employed, or regularly transacts business in person. Amend. Fed. R. Civ. P. 45(c)(1)(A). A subpoena may also require compliance anywhere within the state where a person resides, is employed, or regularly transacts business in person if the person (i) is a party or a party's officer, or (ii) is being subpoenaed for trial and would not incur "substantial expense" to attend. *Id.* 45(c)(1)(B). The amendment overrules cases decided under current Rule 45 that hold that a district court may compel a party or a party's officers to travel more than 100 miles, or to another state, to testify at trial. *See, e.g., In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664 (E.D. La. 2006). As the advisory committee notes indicate, however, litigants can continue to pursue depositions of parties, officers, directors

and managing agents of parties simply by issuing a notice of deposition under Fed. R. Civ. P. 30. Amend. Fed. R. Civ. P. 45 note on subdivision (c).

In the case of subpoenas requesting documents or tangible things, the subpoena may only command "production" of documents, ESI, or tangible things at a place within 100 miles of where the subpoena recipient resides, is employed or regularly transacts business in person. Amend. Fed. R. Civ. P. 45(c)(2)(A). Of course, inspection of a premises must occur at the premises to be inspected. *Id.* 45(c)(2)(B). As the advisory committee notes, however, parties often reach agreement to produce documents electronically and nothing in the amended rule prevents them from doing so. Amend. Fed. R. Civ. P. 45 note on subdivision (c).

3. The primary forum for resolving subpoena disputes continues to be the court for the district where compliance is required, but in limited circumstances, the rule now expressly permits transfers to the court where the matter is pending.

Under the amended rule, the primary forum for resolving motions to quash or modify a subpoena, or to compel compliance with a subpoena continues to be the district court for the district where compliance is required. However, the amended rule also resolves conflicting interpretation of the current rule by expressly providing two circumstances under which motions can be transferred to the issuing court (always the court where the action is pending under the amended rule). First, the issuer and recipient can consent to a transfer. Second, a district court may transfer to the issuing court if it finds "exceptional circumstances." The Advisory Committee's commentary indicates that district court's primary aim should be to avoid imposing compliance burdens on nonparties. A transfer is permitted only if other interests – such as an interest in having the issuing court deal with an issue that will arise in multiple districts – outweigh the burden imposed on the subpoena recipient by forcing them to litigate the validity or scope of a subpoena in a distant court. Amend. Fed. R. Civ. P. 45 note on subdivision (f).

4. The amended rule emphasizes the existing notice-of-service requirement.

The current rule requires a party issuing a document subpoena to provide notice to all other parties before serving the subpoena – a provision often ignored under the current rule. Fed. R. Civ. P. 45(b)(1). The amendments seek to reinforce the requirement by moving the notice requirement to its own subdivision, where it will be more conspicuous to practitioners. Amend. Fed. R. Civ. P. 45(a)(4). The issuer is also expressly required to include a copy of the subpoena itself with the notice. *Id.*

5. Changes to contempt provisions.

A final change was made to the contempt provision in order to make clear that either the court for the district where compliance is required, or – in the case of a transfer, the issuing court – may hold a subpoena recipient in contempt for failure to obey the subpoena. Amend. Fed. R. Civ. P. 45(g). A conforming change was also made to Rule 37. Amend. Fed. R. Civ. P. 37(b)(1). The rule also provides that the contempt power extends to the failure to obey a court order related to a subpoena or the subpoena itself. This revision clarifies two points. First, it establishes that if a court issues an order related to a subpoena, the recipient can be held in contempt for disobeying the order itself (even if the recipient's conduct would not have violated the original subpoena). Second, the revision appears implicitly to overturn several cases holding that a subpoena recipient cannot be punished for contempt if the recipient fails to comply with a subpoena standing alone. The Committee Notes do acknowledge, however, that "it would be rare for a court to use contempt sanctions without first ordering compliance with a subpoena . . . ." Amend. Fed. R. Civ. P. 45 note on subdivision (g).

CONTACT US

Christopher Tompkins, Partner, Jenner & Block

Phone: 312 840-8686 Email: ctompkins@jenner.com Download V-Card

Practice Group: Complex Commercial Litigation, Litigation, Technology Litigation

Ethan E. Kent, Associate, Jenner & Block

Phone: 312 840-8675 Email: ekent@jenner.com Download V-Card

Practice Group: Litigation