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Revisions to Federal Non-Party Subpoena Power (Rule 45): Streamlining and Simplifying Outdated Procedures, Effective December 1, 2013

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For the first time since 1991, substantive changes have been made to the Federal Rule of Civil Procedure governing subpoenas effective December 1, 2013. There are five major revisions which were made in an attempt to streamline the process and prevent technical disputes which could invalidate the subpoena. What exactly are these changes and how does it impact the issuance and response procedure and timing?

1. Issuing Court (45(a)(2))

The first revision simplifies the process for issuing subpoenas in multi-jurisdictional cases. Previously the rule required that a subpoena be issued from the court where the deposition was to occur or where the document production was to be made. Now under Rule 45(a)(2) all subpoenas must be issued from the court where the action is pending. Objections will still be made in the district where the place of compliance is specified.

2. Notice Before Service (45(a)(4))

The next clarification is directed at highlighting and slightly modifying advance notice requirements. 45(a)(4) requires that a party serve all document subpoenas on each party in the case "before the subpoena is served on the person to whom it is directed." Previously Rule 45(b)(1) required notice be given to all parties prior to service, however, in practice this frequently did not occur. The Rule was amended to move the notice requirement in 45(b)(1) to a new 45(a)(4) to highlight the advance notice requirement and to require that the notice include a copy of the subpoena.

3. Nationwide Process (45(b)(2))

Another major revision that greatly simplifies the process is that service can now be made nationwide under Rule 45(b)(2). This is consistent with the Federal Rules for Criminal Procedure.

4. Testimony of Non-Parties, Parties and Party Officers (45(c)(1))

Subdivision (c) is new and dictates and simplifies where compliance can be required. Under 45(c)(1)(A) a non-party may be required to comply within 100 miles where the person resides, is employed or regularly does business. Additionally, a non-party may be compelled to travel more than 100 miles to testify in the state where they reside,

work or do business only if he or she would not incur "substantial expense."

In regards to party and party officer, compliance may be required anywhere within the state where the party or party officer resides, is employed or regularly does business. A party or party officer cannot be compelled to travel more than 100 miles for trial unless the party or party officer lives in, is employed or regularly does business in the state.

Of note, however, is that this modification does not apply to the depositions of parties or officers, directors or agents of parties as a subpoena is not necessary to take a party deposition. The changes to Rule 45 do not change the existing law and a court may impose sanctions under Rule 37(b), where a party fails to attend a deposition where he or she was properly noticed.

A court will quash any subpoena that requires compliance beyond the geographical limitations in Rule 45(c).

5. Transfer of Enforcement Motions (45(f))

Finally, Rule (45)(f) was revised to enable the court in the jurisdiction where compliance is required to transfer a related motion to the court where the matter is pending. Therefore, if the matter is pending in Virginia but the person who is subpoenaed is located in Minnesota, the Minnesota court can transfer any related motions to Virginia. The transfer is subject to the consent of the party subject to the subpoena [in this example, the person residing in Minnesota] or in exceptional circumstances which the person seeking the transfer bears the burden to show.

Conclusion

In summary, the changes to the non-party subpoena rules should make the process of issuing subpoenas much easier and less likely for parties to make technical mistakes that under the prior rule would have invalidated the subpoena as a matter of law. For instance, under the prior version of the rule issuing a subpoena out of a location other than where the place of production was required was a jurisdictional defect that would invalidate the subpoena on its face. *See Doe I v. Walnuts*, 2008 U.S. Dist. LEXIS 70986 (W.D. Va. Sept. 19, 2008) (holding a subpoena was void where it is issued out of the Western District of Virginia and required production in the Eastern District). Attorneys often raised these technical defects as a way to negotiate the items being subpoenaed. The new rules should hopefully remove any gamesmanship and streamline the process.