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The DefenseLine
05.2014

Charleston Litigation Member Robert Sumner and Litigation Associate Lesley Firestone were published in the Spring 2014 issue of the South Carolina Defense Trial Attorneys' Association's (SCDTAA) publication *The DefenseLine.* Their article, "2013 Amendments to Rule 45: Significant Changes to Subpoena Practice," focuses on the extensive amendments to Rule 45 of the Federal Rules of Civil Procedure, which went into effect on December 1, 2013. The article can be seen in its entirety below.

The DefenseLine is a publication that addresses issues affecting lawyers, and the defense bar in particular. *The DefenseLine* is circulated to the SCDTAA membership and to the members of South Carolina's judiciary. It features articles written by its members on a variety of topics specifically tailored to interests of the civil defense bar. It also includes member news, judicial profiles, case notes of important opinions and verdict reports.

2013 Amendments to Rule 45: Significant Changes to Subpoena Practice

Rule 45 of the Federal Rules of Civil Procedure governs the form, issuance, service, place of compliance, and enforcement of a subpoena in federal court. Since its adoption in 1938, Rule 45 has been amended eleven times. The most recent and significant amendments to Rule 45 went into effect on December 1, 2013. Prior to the 2013 amendments, Rule 45 had not been substantively amended since 1991.[3]

The Civil Rules Advisory Committee (the "Committee") proposed amendments to Rule 45 following a multi-year study and period of public comment.[4] The study, which included a review of relevant literature and consultation of various bar groups, was aimed at identifying problems with the rule that warranted modification. In addition to addressing specific complications with Rule 45, the Committee focused on ways to simplify the rule because many practitioners found it lengthy and complex. The Committee's study of Rule 45 produced seventeen potential revisions, which were narrowed down to four specific amendments.

The Committee designed the amendments to Rule 45 to abrogate what they referred to as the "three-ring circus" of challenges for lawyers seeking to use subpoenas.[5] The Committee identified the three rings as: (i) uncertainty regarding the "issuing court;" (ii) uncertainty regarding how and where service should be accomplished; and (iii) uncertainty regarding where compliance could be required, which was complicated by the various provisions scattered throughout the rule governing the place of compliance.[6] To eliminate the three-ring circus, the amendments designate the court where the action is pending as the issuing court, permit service of subpoenas anywhere in the United States, and combine all provisions regarding the place of

compliance into one section. This article provides an in-depth examination of the amendments to Rule 45.

Issuing and Serving Subpoenas

The amended rule simplifies the practice of issuing and serving a subpoena. Under Rule 45(a)(2), a subpoena must now issue from the district court in which the action is pending. Prior to the amendments, a subpoena for attendance at a deposition or production of documents was typically issued from the district court where the witnesses or documents were located. Pursuant to the changes to Rule 45(a)(2), the issuing court will always be the court where the action is pending. Additionally, Rule 45(b)(2) now permits service of a subpoena anywhere in the United States. Therefore, lawyers will no longer need to consult foreign state laws on service of subpoenas or obtain different subpoena forms for the district court in which the witnesses or documents are located.

Notice of Service of Documents-Only Subpoena

Pursuant to the 1991 amendments, parties serving a document-only subpoena were required to give notice of service of such subpoena to other parties prior to serving the subpoena on the intended recipient.[7] The 2007 amendments clarified the requirement in the 1991 amendments that notice was to be given prior to serving the witness with the subpoena.[8] During its study of Rule 45, the Committee was informed that practitioners frequently ignored this requirement in the rules and obtained documents pursuant to subpoenas without notice to the other parties.[9] This practice created problems because the parties were often surprised by new documents at or before trial. This practice also led to disputes over the documents' admissibility and the need for additional discovery.

In an attempt to garner broader compliance with the notice requirement, the amendments make it more prominent by moving it to its own subsection, Rule 45(a)(4), and adding the heading "Notice to Other Parties Before Service." The relocated provision also makes a minor change to the rule in that it now requires an actual copy of the subpoena be sent to other parties in addition to notice. The purpose of this modification is to make the parties aware of the exact scope of the request and allow them to better determine whether they have any objections to the materials being sought or need to conduct additional discovery of their own.[10]

The amended rule still does not address the parties' rights to obtain copies of the information produced in response to a subpoena. The Committee Notes (the "Notes") indicate that a party desiring documents produced in response to a subpoena must follow up with the subpoenaing party or the subpoena recipient in order to obtain the information.[11] Rule 45(a)(4), as amended, does not limit the district court's ability to order notice of the receipt of produced materials or access to the produced materials. Further, the Notes state that the subpoenaing party is expected to provide reasonable and prompt access to the materials that are produced.[12]

Subpoena-Related Motions

Amended Rules 45(d)(2)(B), (d)(3), and (e)(2)(B) require that subpoena-related motions must be brought in the court where compliance is required. Subpoena-related motions include motions to quash a subpoena, to compel production or inspection from a person subject to a subpoena, and to determine a claim of privilege as to information produced in response to a subpoena. Under the old rule, subpoena-related motions were

brought in the issuing court. Because the issuing court will now always be the court where the action is pending, this change in terminology retains the previous practice of hearing such matters in the court where compliance is required.

The amendments recognize that the issuing court may be the more appropriate court to entertain subpoena-related motions. Therefore, the amended rule includes a new subsection, Rule 45(f), which permits the transfer of a motion from the compliance court to the issuing court in certain instances. There are two instances in which a compliance court may transfer a motion under this rule: (i) if the person subject to the subpoena consents; and (ii) if the court finds "exceptional circumstances."

The rule does not define "exceptional circumstances;" however, the Notes indicate that the standard for transferring a motion will be rigorous.[13] The Notes emphasize that the prime concern should be avoiding undue burdens on non-parties who are subject to subpoenas.[14] While the standard for a transfer may be exacting, the Notes acknowledge that there are certain instances in which a transfer may be warranted.[15] A transfer may be desirable when the issuing court has knowledge of the underlying lawsuit and has already ruled on issues raised by the motion or if the same discovery disputes are likely to arise in different districts. To obtain a transfer, the proponent of the transfer must show that the benefits from transferring the motion outweigh the non-party's interest in local resolution of the motion.[16] Additionally, the Notes offer that it may be helpful for the judge of the compliance court to consult with the judge of the issuing court when considering subpoena-related motions.[17]

If a motion is indeed transferred, Rule 45(f) seeks to minimize the burden to the non-party by permitting the non-party's attorney who is admitted in the compliance court to appear and file papers in the issuing court, even if the attorney is not admitted in that court. Following along the same lines, the Notes encourage judges to permit non-parties and their counsel to utilize telecommunication methods to appear in the issuing court.[18] Finally, to enforce an order on the motion, the issuing court may transfer the order back to the compliance court.

Place of Compliance

The revised place of compliance provisions remain essentially the same as in the previous version of the rule. Unlike the old rule, however, the place where service occurs is no longer determinative of where compliance can be required.[19] Additionally, the amended rule combines the various provisions governing place of compliance into one subsection, Rule 45(c), in an effort to simplify compliance.

Rule 45(c)(1) governs subpoenas for attendance at trials, hearings, and depositions. Like the old rule, the amended rule provides that a non-party may be commanded to attend a trial, hearing, or deposition within 100 miles of where the person resides, is employed, or regularly conducts business in person.[20] Additionally, as in the old rule, non-party witnesses may be required to travel more than 100 miles within the state where they reside, are employed, or transact business if they would not incur "substantial expense" in doing so.[21] In the event a non-party witness would incur substantial expense, the subpoenaing party may pay for such travel, and the court can make compliance contingent on that payment.[22]

Importantly, the amendments resolve a split of authority that arose in the U.S. District Court for the Eastern District of Louisiana regarding trial subpoenas for distant parties and party officers. In one instance, the District Court interpreted Rule 45 to mean that the geographical limits that applied to other witnesses did not apply to parties or party officers.[23] Conversely, in another instance, the District Court held that the rule's geographical limitations applied to all trial witnesses, including parties and party officers.[24] Amended Rule 45 (c) clearly establishes that parties or party officers may not be required to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts business in person in the state. Further, the Notes also clarify that a subpoena is not necessary to compel parties, and officers, directors, and managing agents of parties to appear at a deposition, and for those witnesses only notice of the deposition is required pursuant to the terms of Rule 30.[25]

Rule 45(c)(2) provides that inspection will occur at the premises to be inspected and that production of documents, electronically stored information, or tangible things may be commanded to take place within 100 miles of where the subpoena recipient resides, is employed, or regularly transacts business in person. The Notes recognize that parties frequently agree to transmit documents, especially electronically-stored information, electronically.[26] The Notes make it clear that nothing in the amendments should be read to limit the parties' abilities to make these types of arrangements.[27]

Changes to Contempt Provisions

The word subpoena derives from the Latin words *sub poena*, meaning "under penalty," which signifies that disobedience of a subpoena may result in penalty.[28] Rule 45(g), as amended, retains the rule's authority to punish disobedience of subpoenas as contempt and permits a court to impose contempt sanctions for disobedience of a subpoena or a subpoena-related court order. The contempt provision was slightly modified to clarify that in the event of a transfer of a subpoena-related motion, a person who fails to comply with a subpoena can be held in contempt of both the compliance court and the issuing court.[29] As discussed above, amended Rule 45(f) permits the transfer of an order from the issuing court back to the compliance court if needed to effectively enforce its order. A conforming change to Rule 37(b)(1), regarding contempt of orders directing a deponent to be sworn or to answer a question, was also made.[30]

Conclusion

The 2013 amendments to Rule 45 bring welcomed changes that clarify and simplify the rule. Importantly, the amendments eliminate many common challenges that lawyers faced under the old rule. The amendments to Rule 45 are intended to provide more definite guidance, which should reduce the time and costs related to the issuance of a subpoena in federal court.

Table of Amendments can be seen here.