

CLIENT ALERT

Coming in December: Changes to Federal Rule 45 Governing Subpoenas

November 19, 2013

On December 1, 2013, significant changes to Rule 45 of the Federal Rules of Civil Procedure will take effect unless Congress intervenes. The amendments aim to clarify and simplify the rule, and to reduce the burden on witnesses subject to subpoenas; in so doing, they raise new considerations for litigants and witnesses alike. This client alert focuses on some significant changes to the rule.

Subpoenas to Issue from the Court Where Litigation Is Pending

The amended rule requires all subpoenas to issue from the court "where the action is pending"—also known as the "issuing court." *See* Rule 45(a)(2). This simplifies the rule, which currently requires a subpoena for trial testimony to issue from the court for the district where the trial is to be held, a subpoena for deposition testimony to issue from the court for the district where the deposition is to be taken, and a subpoena for the production or inspection of documents to issue from the court for the district where production or inspection is to be made. Other important simplifications made by the amendments to Rule 45 include provision for nationwide service of a subpoena under Rule 45(b)(2). Attorneys admitted to practice in the issuing court will be able to issue and sign a subpoena and then have it served "at any place within the United States." *See* Rule 45(a)(3) and (b)(2).

The 100-Mile Rule for Party and Nonparty Witnesses

Under amended Rule 45(c)(1)(A), any person subject to a subpoena can be commanded to attend a trial, hearing, or deposition "within 100 miles of where the person resides, is employed, or regularly transacts business in person."

The amended rule clarifies that a party or party officer is generally subject to the same geographical limitations as other subpoena recipients. However, if the person subject to the subpoena is a party or a party officer, the person may also be required to travel more than 100 miles but only "within the state where the person resides, is employed, or regularly transacts business in person . . ." *See* Rule 45(c)(1)(B). Importantly, the new Rule 45 does not change existing law about properly noticed depositions of a party or a party officer, director, or managing agent, as subpoenas are not needed for such depositions. Therefore, subpoenas for parties or party officers under Rule 45 should be understood in tandem with existing rules on noticing parties.

Nonparty witnesses, too, can be required to travel more than 100 miles if the travel is "within the state where the person resides, is employed, or regularly transacts business in person," but only to attend a trial, and only if the person "would not incur substantial expense." *See* Rule 45(c)(1)(B)(ii). The Advisory Committee Note to the rule observes that the party serving the subpoena may pay the nonparty witness's expense for travel over 100 miles, and that "the court can condition enforcement of the subpoena on such payment."

Subpoena-Related Disputes to Be Heard by the Court Where Subpoena Compliance Is Required

As noted above, under the new Rule 45(a)(2), the court "where the action is pending" must issue the subpoena. However, the court where compliance with the subpoena is required—often called the "compliance court"—should hear and decide any objections, motions to quash, motions to modify, requests for privilege determinations under Rule 45(e)(2)(B), or other applications related to the subpoena. *See* Rule 45(d)(2)(B) and 45(d)(3); *see also* Committee Note for Rule 45.

The rule is intended to help protect the person subject to the subpoena by allowing these disputes to be addressed in a local court and not in the potentially distant or out-of-state issuing court. However, the compliance court may choose to transfer a motion related to the subpoena to the issuing court if (1) "the person subject to the subpoena consents" or (2) "if the court finds exceptional circumstances." *See* Rule 45(f). The Committee Note explains that, absent consent, "the proponent of transfer bears the burden of showing" that exceptional circumstances warrant transfer. As the main concern is to "avoid[] burdens on local nonparties subject to subpoenas," the Committee cautions that "it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions."

According to the Committee Note, possible circumstances that would warrant transfer include where the issuing court "has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts." In other words, the compliance court may be more likely to transfer a subpoena-related motion where there is a risk that inconsistent rulings on identical issues could disrupt the issuing court's management of the ongoing litigation. The judges in the compliance court and in the issuing court may consult with each other to address subpoena-related motions. *See* Committee Note for Rule 45.

To reduce the burden on the person subject to the subpoena, Rule 45(f) provides that when a motion has been transferred, the person's attorney, if admitted to practice in the compliance court, is deemed admitted to practice in the jurisdiction of the issuing court for the purpose of filing papers and appearing on the subpoena-related motion. The Advisory Committee also urges judges to allow telephonic hearings to further reduce the burden on the person subject to the subpoena. After issuing an order on the motion, the issuing court may then transfer the order back to the compliance court for enforcement.

Contempt for Refusal to Comply

A person subject to a subpoena can, in certain circumstances, be held in contempt by both the issuing court and the compliance court for refusing to comply with the subpoena. *See* Rule 45(g). The compliance court can hold in contempt a person who was served with a subpoena but failed to comply with the subpoena or a subpoena-related order without providing an "adequate excuse." If a subpoena-related motion is transferred to the issuing court, the issuing court may also hold that person in contempt for failing to obey the subpoena or a related order.

The text of the proposed amendments to Rule 45 is available [here](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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