

FRCP Changes Will Have Major Impact On 3rd-Party Discovery

Law360, New York (May 02, 2013, 12:33 PM ET) -- The U.S. Supreme Court recently transmitted to Congress amendments to Rule 45 of the Federal Rules of Civil Procedure that will have a significant impact on third-party discovery in federal court. Absent congressional action, the amendments will take effect Dec. 1.

Among other changes, the amended rule will require all third-party subpoenas to issue from the court where the litigation is pending. The rule will allow a subpoena to be served anywhere in the United States. This change will greatly simplify 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.

But the amendment does not go as far as some would have liked in centralizing third-party discovery disputes to the court where the litigation is pending. Rather, to enforce a third-party subpoena, litigants will still usually need to go to a federal court within 100 miles of where the subject of the subpoena resides, is employed or regularly transacts business. In a significant departure from the current rule, however, the amended rule has an important exception allowing the court within 100 miles to transfer any subpoena-related motion to the issuing court. Specifically, under the amended rule, the court for the district where compliance is required may transfer a subpoena-related motion to the issuing court if (1) the person subject to the subpoena consents, or (2) the court finds exceptional circumstances.

The rule does not define "exceptional circumstances," but the Judicial Conference Committee note explains that, absent consent of the subject of the subpoena, "transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts."

Although the practical effect of the amendment remains to be seen, the "exceptional circumstances" standard may make transfer a rarity. The Judicial Conference Committee note states, "Transfer is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion." The proponent of the transfer will bear the burden of showing that exceptional circumstances exist. During the rulemaking process, the committee rejected the suggestion from some commenters that the rule incorporate a "good cause" standard instead. On the other hand, it also rejected the suggestion that transfer be allowed only where the subject of the subpoena consents. It also ultimately declined to adopt a version of the note that stated, "The rule

contemplates that transfers will be truly rare events."

To protect nonparties in situations where exceptional circumstances are found, the committee note "encourage[s]" judges "to permit telecommunications methods to minimize the burden a transfer imposes on nonparties, if it is necessary for attorneys admitted in the court where the motion is made to appear in the court in which the action is pending." Further, if the motion is transferred, and the trial court orders further discovery, the motion may be transferred back to the court where compliance is required to enforce the trial court's decision. Under the amended rule, both the court where compliance is required and the trial court will have jurisdiction to hold in contempt a person who fails to comply with a subpoena or an order relating to it.

The transfer provision applies to all motions under Rule 45, including applications for privilege determinations. The Judicial Conference Committee states in the note accompanying the rule that the prime concern in deciding whether to transfer a dispute to the issuing court "should be avoiding burdens on local nonparties subject to subpoenas." The Advisory Committee on Civil Rules previously rejected a proposed requirement that the parties consent to the transfer, concluding that the focus should be on the person subject to the subpoena.

The amended rule also includes two additional changes. First, it clarifies that a party or party officer is generally subject to the same limitation as other subpoena recipients: In most circumstances, she can only be commanded to attend a trial, hearing or deposition within 100 miles of her residence, place of employment, or a place where she regularly transacts business. She may be commanded to attend trial more than 100 miles from any of these places if the trial is within a state where she resides, is employed, or regularly transacts business and she would not incur substantial expense in attending. This amendment is intended to resolve the interpretive split created by *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006), in which the court required a party officer to travel more than 100 miles to attend trial. Second, the amendments attempt to highlight the already-existing requirement that a party must give notice to the other parties prior to serving a subpoena for the production of documents.

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