Federal Subpoena Rule Gets Some Substantive Amendments

Effective December 1, 2013, Federal Rule of Civil Procedure 45 saw its first substantive changes in more than two decades. The principal amendments are discussed below.

Under Rule 45(a)(2), a subpoena "must issue from the court where the action is pending." This simplifies the previous version of the rule where a subpoena for attendance at trial or hearing had to issue from the court for the district where the hearing or trial was to be held, a subpoena for attendance at a deposition had to issue from the court for the district where the deposition was to be taken, and a subpoena for production or inspection only had to issue from the district where the production or inspection was to be made.

Newly added subsection (a)(4) mandates notice and a copy of the subpoena must be given to all other parties before serving a subpoena for the production of documents, for electronically stored information, or for tangible things or the inspection of premises before trial. This requirement will enable other parties to review the substance of the actual subpoena before it is served on the person to whom it is directed.

Pursuant to Rule 45(b)(2), a subpoena may be served at any place within the United States, eliminating the previous version's so-called "100-mile rule." This now conforms to service of process in federal criminal cases.

New subsection (c) clarifies the place of compliance for each subpoena type. Subpoenas may require attendance at a trial, hearing, or deposition only (1) if within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (2) within the state where the person resides, is employed, or regularly transacts business in person, if the person is a party or a party's officer or if the person is commanded to attend a trial and would not incur substantial expense. For all other subpoenas, production of documents, electronically stored information, or tangible things can be commanded at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person.

Finally, pursuant to subsection (d)(2)(B)(i), the party serving the subpoena may, upon an objection to the subpoena lodged by the person served, move the court for the district where compliance is required for an order compelling production or inspection. Under new subsection (f), when that court, i.e., the court for the district where compliance is required, did not also issue the subpoena, it may transfer the subpoena-related motion to the issuing court, i.e., the court where the action is pending, if the person subject to the subpoena consents or if the court "finds exceptional circumstances." If the attorney for the person subject to the subpoena is authorized to practice in the court where the motion was originally made, i.e., the court for the district where compliance is required, then the attorney may file papers and appear on the motion as an officer of the issuing court, even if not formally a member of that court. To enforce its order, the issuing court may then re-transfer the order to the court where the motion was originally made. In other words, it may transfer the order back to the court for the district where compliance is required. Subsection (g) provides that the court for the district where compliance is required and also, after a motion is transferred, the issuing court may hold in contempt any person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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