

ALERT

Subpoena Procedures Amended by Recent Changes to the Federal Rules of Civil Procedure

December 11, 2013

In an effort to simplify and streamline the process for issuing subpoenas, Federal Rule of Civil Procedure 45 has been amended. A conforming amendment was also made to Rule 37. The amended Rules, which took effect on December 1, 2013, and apply to all cases either commenced after that date or pending on that date “insofar as just and practicable,” make five changes to the previous subpoena process.

First, all subpoenas now “must issue from the court where the action is pending” and can be served nationwide. Fed. R. Civ. P. 45(a)(2). Under the old rule, the issuing court varied depending upon the subpoena’s purpose—a subpoena for attendance at a hearing or trial was issued from the district court where the proceeding was to be held, a deposition subpoena was issued from the district where the deposition was to occur, and a document subpoena was issued from the district where the recipient would produce evidence or allow an inspection. The amended Rule makes it unnecessary for parties to consult state law on subpoena service or to obtain different subpoena forms for each district where witnesses or documents are located.

Second, amended Rule 45 includes revisions to ensure that, notwithstanding the change to allow the issuance of a subpoena from a distant location, the subpoenaed party is not substantially inconvenienced in performing the subpoena. Rule 45(c)(1) provides that a subpoena may only require a person to testify for a trial, hearing, or deposition (a) within 100 miles from their residence, workplace, or where they regularly do business; or (b) anywhere

Authors

Stephen J. Obermeier
Partner
202.719.7465
sobermeier@wiley.law

Practice Areas

Litigation

within the state where a person resides, is employed, or regularly transacts business in person if the person is a party or a party's officer, or is being subpoenaed for trial and would not incur "substantial expense" to attend. With respect to document subpoenas, the subpoena can only require "production" of the documents at a place within 100 miles of where the subpoena recipient resides, is employed, or regularly transacts business in person. Fed. R. Civ. P. 45(c)(2).

Third, while Rule 45(c) retains the requirement that subpoena-related disputes are subject to the jurisdiction of the court in the district where compliance is required, Rule 45(f) was added to allow the transfer of subpoena-related disputes from the compliance location court to the issuing court. The transfer may occur with the consent of the person subpoenaed, or in "exceptional circumstances," without her consent.

Fourth, the amended rule clarifies that either the court for the district where compliance is required, or—following a transfer—the issuing court, may hold a subpoena recipient in contempt for failure to obey the subpoena. Fed. R. Civ. P. 45(g). Rule 37 was amended to conform to this change: if a deponent defies a court order to be sworn in or answer a question, he may be held in contempt of either the court "where the discovery is taken or the court where the action is pending." Fed. R. Civ. P. 37(b)(1).

Finally, the notice provision for "documents only" subpoenas in Rule 45(b)(1) was moved to a more prominent place—Rule 45(a)(4)—and amended to require that the party issuing the subpoena provide notice and a copy of the subpoena to the other parties before serving the subpoena. This change was made in response to the concern that parties serving subpoenas frequently fail to give the required notice to the other parties, and was intended to emphasize the notice requirement, in part to reduce the chance of "surprise" documents appearing at trial and assist parties to better protect their rights and interests.

As a practical matter, while the amendments are significant in that they fundamentally change the process for serving subpoenas, they do not substantially affect subpoena responses. Although the issuing court may no longer be the local court, performance of the subpoena is still subject to reasonable geographic restrictions. In fact, in some instances, the amendments make responding to a subpoena even easier—the amendments overrule cases that had held that a district court may compel a party or a party's officers to travel more than 100 miles, or to another state, to testify at trial. *See, e.g., In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664 (E. D. La. 2006).