

Nassau Lawyer

APRIL 2014 | VOL. 63 | NO. 8 | WWW.NASSAUBAR.ORG

The Amended FRCP 45: New Rules for Federal Subpoenas

Under former Federal Rule of Civil Procedure 45, attorneys had to consult various provisions scattered throughout the rule and conflicting federal court decisions to determine (i) the court from which a subpoena must issue; (ii) where the subpoena from the court could be served; and (iii) where the subpoena could specify compliance was to take place. On December 1, 2013, however, amendments to FRCP 45 became effective.

The amended FRCP 45, which applies to all federal civil cases pending on or filed after December 1, 2013 with limited exception, introduces several significant changes that, generally speaking, reflect efforts to simplify the process of how and where to issue and litigate subpoenas. This article summarizes the more noteworthy changes for individuals practicing in the Federal courts. The full text of the new rule can be found at www.supremecourt.gov.

Which Court Can Issue a Subpoena?

Prior to December 1, 2013, a subpoena in a federal civil action could issue from a number of courts depending upon the type of subpoena, under former FRCP 45(a)(2)(A)-(C). Indeed, a subpoena for attendance at a hearing or trial issued from the district court where the hearing or trial was to be held, while

a document subpoena issued from the district where the recipient was to produce evidence or allow an inspection.

Now, however, all subpoenas – irrespective of whether they are for depositions, documents, hearings or trial – must issue from the district court where the case is pending (the Issuing Court).



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What Belongs in the Caption?

Because historically a subpoena properly could be issued by a court other than the trial court, under the former FRCP 45(a)(1)(A)(i)-(ii) to be facially sufficient the subpoena was required to identify the court in which the case was pending, as well as the court from which the subpoena issued. Now, however, because only the issuing Court may issue a subpoena in a federal civil action, the caption must bear the same caption as all other pleadings in the case. Under the new FRCP 45(a)(1)(A)(i)-(ii) the subpoena no longer must separately identify the court in which the action is pending.

Who Can Sign the Subpoena?

Under the former FRCP 45(a)(3), a subpoena could be signed by any of: (a) the court clerk; (b) an attorney acting as an officer of any court in which the attorney was authorized to practice; or (c) an attorney acting

as an officer of the court for the district where a deposition was to be taken or production was to be made, if the attorney was authorized to practice in the court where the case was pending.

Under current FRCP 45(a)(3), however, subpoenas must be signed by either the court clerk or an attorney authorized to practice in the issuing court (FRCP 45[a][3]).

What Notice is Required?

Prior to the recent amendments, under FRCP 45(b)(1) the issuing attorney was required to serve notice upon each party to the lawsuit before a pre-trial subpoena could be served upon the intended recipient. In practice, however, counsel would often notify the parties contemporaneously with the service of the subpoena upon the witness, if at all.

Under current Rule 45(a)(4), before a pre-trial subpoena for documents may be served upon the subpoena-recipient, notice and a copy of the subpoena must be served on each party to the lawsuit. Under the amended Rule, this notice provision appears in a separate provision of the Rule and is intended to emphasize counsel's obligation to serve the parties before serving the subpoena-recipient. Additionally, the issuer is also expressly required to include a copy of the subpoena itself with the notice.

Where Can We Serve?

Under former FRCP 45(b)(2)(A)-(D),

service of a subpoena was proper only within specified geographic limits. Rule 45(b)(2) now provides that a subpoena in a federal civil action may be served anywhere within the United States.

Where Can We Require Compliance?

As noted in the Advisory Committee's Notes (2013), under former FRCP 45, geographic restrictions on compliance were scattered across several provisions and tied to where a subpoena could be served. Moreover, it was not clear whether a subpoena could command a party or party officer to appear at a trial outside of the specified geographic limits. Now, however, Rule 45(c) collects all of the geographic restrictions relating to how far a subpoena-recipient can be compelled to travel in order to comply with a subpoena into a single subsection.

Additionally, under current Rule 45(c), a subpoena must be quashed or modified if it requires a recipient to travel to a location outside of the geographic limitations specified in subsection (c). This limitation applies equally to parties, and party officers, who cannot be commanded to appear for trial outside of the geographic restrictions set forth in FRCP 45(c) and (d)(3)(A)(ii).

Where Can We Fight a Subpoena?

Under the amended rule, the primary forum for resolving motions to quash or modify a subpoena, or to compel compliance with a subpoena continues to be the district court for the district where compliance is required ("compliance court"). However, the former rule was silent on whether subpoena-related motions could be transferred, resulting in conflicting decisions across the federal district courts. Under the current Rule, however, the compliance court may transfer a subpoena-related motion to the issuing court if either the subpoena-recipient consents to the transfer or the court finds exceptional circumstances.

After ruling on the motion, however, under FRCP 45(f) the issuing court may transfer its order back to the compliance court for enforcement.

Who Has Jurisdiction Over Contempt Proceedings?

Under the former FRCP 45(e), only the court that issued the subpoena had jurisdiction over contempt proceedings relating to the subpoena. Under the current FRCP 45(g), however, if a subpoena-related motion is transferred from the com-

pliance-court to the issuing court, either court may hold a person in contempt for failing to comply with the subpoena.¹ Rule 45 now provides that the contempt power extends to the failure to obey a court order related to a subpoena or the subpoena itself. As a result, if a court issues an order related to a subpoena, the recipient can be held in contempt for disobeying the order itself. Additionally, the new rule appears to implicitly overturn case law holding that a subpoena recipient cannot be held in contempt if the recipient fails to comply with a subpoena standing alone.²

In light of the many changes resulting from the recent amendment of Rule 45, counsel should carefully review the amended rule before using federal subpoenas or engaging in subpoena-related motion practice.

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1. A conforming change was made to Rule 37 (see FRCP 37[b][1]).

2. The Committee Notes acknowledge, however, that it "would be rare for a court to use contempt sanctions without first ordering compliance with a subpoena ..." See Committee Advisory Notes on subdivision (g).

