Comment on proposed amendments to Fed. R. Civ. P. 45
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11-CV-022

1 Attachment

dpny-23602595-v2-letter to Fed. Judicial Center re proposed amendments to Fed. R. Civ. P. 45.DOC

Dear Madam/Sir:

On behalf of the Managing Attorneys' and Clerks' Association, I hereby submit our comments on proposed amendment of Fed. R. Civ. P. 45. Please forward the attached to the Secretary of the Committee on Rules of Practice and Procedure.

Thank you.

Respectfully submitted,

Timothy K. Beeken
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11-CV-022

The Managing Attorneys' and Clerks' Association

February 15, 2012

Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Proposed Amendment of Fed. R. Civ. P. 45

Dear Mr. McCabe:

On behalf of the Managing Attorneys' and Clerks' Association ("MACA"), we, the Executive Committee,[1] write to comment on the proposed amendment of Fed. R. Civ. P. 45. We welcome this opportunity and thank the judiciary for soliciting the views of the bar on this important subject.

MACA is comprised of over 100 large, litigation-based law firms and corporate legal departments in New York City. Its members' positions within their respective firms and companies and concomitant responsibilities afford them a breadth of understanding of the day to day operations of the various state and federal court systems. In particular, our members have extensive experience with the interplay between court rules and practice, and play a central role in their respective firms' understanding of and compliance with the federal rules and the rules of our local federal courts and amendments thereto, as well as rules governing practice in the courts of the State of New York and other states in which their firms litigate.

MACA members support efforts to improve court rules generally and the proposed amendment of Rule 45 in particular, including making the issuing court the same as the court in which the underlying action is pending and measures intended to

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[1] The members of the Executive Committee of the Managing Attorneys' and Clerks' Association are: Henry Kennedy, Esq., Willkie Farr and Gallagher LLP; Richard V. Conza, Esq., Cleary Gottlieb Steen & Hamilton LLP; Judith L. Strigaro, Dewey & LeBoeuf LLP; Maura McLoughlin, Esq., Cahill Gordon & Reindel LLP; Ira E. Wiener, Esq., Shearman & Sterling LLP; Poppy Quattlebaum, Esq., Cadwalader, Wickersham & Taft LLP; Dennis Murphy, Carter Ledyard & Milburn LLP; John Bové, Dickstein Shapiro LLP; David Liebov, Esq., Sullivan & Cromwell; Timothy K. Beeken, Esq., Debevoise & Plimpton LLP.

consolidate and simplify provisions on place of service and compliance. We offer the following suggestions on several specific aspects of the proposed amendment.

Place of Compliance Should Be Territorially Limited for All Discovery

Proposed Rule 45(c)(2)'s "reasonably convenient" standard for where a subpoena can command compliance would afford undue discretion to the subpoenaing party to dictate the place of compliance and, as a result, the court in which disputes about the subpoena are to be heard. In our experience, too much discretion leads to abuses, which in turn lead to motion practice. Specifically, we expect under the proposed rule that in a significant proportion of cases the issuing parties and subpoenaed persons would differ as to where it is reasonably convenient for documents and/or data to be produced. By contrast, we have not observed problems in the operation of the current rule on place of compliance for document and data productions; accordingly, we urge that proposed subsection (c)(2) be dropped and that proposed subsection (c)(1) govern the place of compliance for all subpoenas.

Where a Motion to Quash or Modify May Be Made

Proposed Rule 45(d)(3)(A) would place exclusive jurisdiction to rule on a motion to quash or modify in the district where compliance is required, subject to that court's authority to transfer the dispute to the court in which the underlying action is pending pursuant to new Rule 45(f). In contrast, Fed. R. Civ. P. 30(d)(3)(A) allows either the court for the district in which a deposition is being taken or the court in which the underlying action is pending to rule on disputes that arise in the course of a deposition. It is inefficient to have a requirement as to which district can hear disputes about a subpoena that is different from the requirement as to which districts can hear disputes about the conduct of a deposition taken pursuant to such subpoenas. Rule 45 should allow litigants the same flexibility in selecting where a motion to quash or modify should be heard as they enjoy under Rule 30.

Where Must Lawyers Involved in a Subpoena-Related Dispute Be Admitted?

The proposed amendment of Rule 45 does not address the existing problem of forcing subpoenaed persons who are commanded to respond in a jurisdiction other than where they live or work to retain unfamiliar counsel to represent them. Under the existing 100-mile rule, a resident of New York City can be required to respond to a subpoena in any of the following districts, each of which have at least some territory within 100 miles of New York City: S.D.N.Y., E.D.N.Y., N.D.N.Y., D. Mass., D. Conn., D.N.J., E.D. Pa. and M.D. Pa. Similarly, a resident of Cape Girardeau, Missouri can be required to respond to a subpoena in the E.D. Mo., S.D. Ill., W.D. Ky., W.D. Tenn., M.D. Tenn. and the E.D. Ark. These examples of places where residents can be compelled to respond to a subpoena in a state other than which they live or work are not isolated. In the event of a dispute, or even simply for representation at a deposition, the person who is

subpoenaed to respond out of state cannot simply rely on usual counsel, but rather has to identify and retain a lawyer in an unfamiliar legal market and try to get them up to speed, all within the time frame provided by the subpoenaing party and the rules. This burden on persons who are involved not for their own sake but merely because one of the parties thinks they have relevant information is not merely economic: even paying their usual counsel to shadow local counsel is unlikely to achieve representation that is as effective as the client's familiar, chosen counsel handling the dispute directly.

Proposed Rule 45 does nothing to alleviate this problem. As drafted, only proposed Rule 45(f) touches on the issue, in its requirement that the lawyer for the subpoenaed person be admitted in the issuing court in order to be able to represent his or her client after a subpoena-related motion is transferred to the issuing court. The proposed rule thus defaults to ordinary requirements for being admitted to the bar of a specific court in order to represent a client there—even the lawyer who issued the subpoena cannot move to compel in the court where compliance is required unless admitted to practice in that court.

The increased cost to litigants of having to retain local counsel in connection with out-of-state subpoenas, and the additional burden on subpoenaed persons of impeding their choice of familiar counsel to represent them in connection with such subpoenas, are unnecessary to the point of being unfair. This weakness in federal subpoena practice could be eliminated with simple provision for the issuing lawyer to litigate subpoena-related disputes in another federal district court without being admitted to its bar, and likewise to allow a person subject to a subpoena to retain that person's preferred counsel (provided the lawyer is a member of the bar of a federal district court) rather than forcing the retention of unknown local counsel.

Similar provision for lawyers to appear in courts in which they are not admitted already exists in Rule 2.1(c) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. That rule allows an ECF-registered member in good standing of the bar of any federal district court to practice before an MDL panel, and further authorizes lawyers in transferred actions to continue to represent their clients in the transferee court without retaining local counsel. If counsel can litigate entire complex cases that have undergone MDL transfer without admission to the local district court bar, surely Rule 45 can be amended to allow counsel to litigate a subpoena-related dispute without local bar admission as well.

Notice to Other Parties

Proposed Rule 45(a)(4) continues the practice under current Rule 45(b)(1) of requiring service of a copy of a document subpoena on other parties before it is served on the person from whom production is commanded. The proposed rule should be altered in two ways: (i) the requirement should be service on the other parties within three days after service on the person commanded to produce documents, or at least one day prior to

the date the documents are commanded to be produced if four days or less after service of the subpoena; and (ii) the subpoenaing party also should be required to give notice again within five days after records are produced in response to the subpoena.

Service of notice of a subpoena before service on the other parties to the action is unnecessary and imposes what can be an onerous requirement when time is of the essence for service of a subpoena, such as when (with or without a tip from a friendly party in the underlying action) a person to be subpoenaed is elusive. The procedures for moving to quash and for written objections are adequate to protect the person subpoenaed, moreover, such that there is no purpose served by advance notice to the parties. Parties ordinarily are able to serve notice of their subpoenas more or less contemporaneously with service of the subpoena itself; allowing up to three days after service of the subpoena should accommodate unusual circumstances that could prevent giving notice simultaneous with service of the subpoena.

A frequent point of confusion we observe among practitioners concerns the entitlement of other parties to documents produced in response to a subpoena, for which no provision is made in the current rules or the proposed amendments. Practice is varied, with some parties issuing formal document requests for copies of documents produced in response to subpoenas, others arguing about it or negotiating their own terms for such productions—but almost always involving time for which clients must pay their lawyers to address the issue. In our local state court practice, the adoption several years ago of New York Civil Practice Law and Rules 3120(3), which requires the subpoenaing party to notify the other parties within five days of compliance that the subpoenaed records are available for inspection and copying, has introduced a cost-effective routine and dispelled similar confusion. A similar provision in Rule 45 likewise would simplify matters by reducing the treatment of subpoena productions among parties to an efficient routine.

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Again, we are grateful for the opportunity to comment on the proposed amendment of Rule 45, and look forward to helping achieve successful implementation of the final version of the amendment. Should you have questions or would like further elaboration on any of the foregoing, please contact Timothy Beeken, Counsel and Managing Attorney at Debevoise & Plimpton LLP, at tkbeeken@debevoise.com.

Respectfully submitted,

The Executive Committee of the
Managing Attorneys' and Clerks'
Association