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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Recent Rule 45 Developments: Notice and Geographic Limits

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Amendments to Federal Rule of Civil Procedure 45 that went into effect last December were designed to simplify and clarify the scope and mechanics of subpoenas issued under that rule. As several recent decisions from judges of the U.S. District Court for the Southern District of New York make clear, failure to observe even the most technical aspects of that rule can result in a subpoena being quashed, and the more substantive provisions may require parties to make important tactical decisions about how to present evidence at trial.

Nuts and Bolts

Starting in 1991, Rule 45 has required a party serving a pretrial subpoena seeking documents or tangible things to provide notice of the subpoena to all other parties. Since 2007, the rule has required that such notice be provided in advance of the subpoena being served. In practice, however, parties frequently have failed to provide notice of such subpoenas in advance, and sometimes have failed to provide notice at all. In order to highlight this requirement, which is designed to give other parties the opportunity to object to the subpoena or seek additional materials, the 2013 amendments break the notice requirement into a separate subsection, and contain the added requirement that the notice include a copy of the subpoena itself.[1]

Noting that the prior notice rule has "important underpinnings of fairness and efficiency," Judge Robert W. Sweet issued a decision last month in *USOV v. Lazar*,[2] quashing two non-party subpoenas in part because counsel serving the subpoenas had not provided advanced notice to his adversary. The attorney's letter to opposing counsel enclosing the subpoenas stated that he had "already" mailed the subpoenas to the non-party recipients. In connection with the motion, the attorney proffered evidence that he had actually provided notice on the same day that he served the non-party subpoenas. Sweet held that the transmittal letter referring to the subpoenas "already" having been served made the letter "deficient on its face."

He also found that same day notice, which the serving lawyer claimed to have provided, amounted to "little to no notice," and that the party serving the subpoena had not adequately explained how such notice satisfied the advanced notice requirements of Rule 45. Sweet granted the motion to quash the two subpoenas, citing failure to observe the notice requirements as one of several reasons for doing so.[3]

Geographic Limits

The 2013 amendments also made certain changes to the geographic limits imposed by Rule 45. Perhaps most significantly, the rule now makes clear that geographic limits on trial subpoenas apply to parties as well as to non-parties. Slightly different limitations apply to parties and non-parties, and to trial subpoenas and subpoenas seeking testimony in other contexts. Specifically, the general rule now provides that a subpoena may only compel a person to attend a hearing, trial or a deposition within 100 miles of the location where the subpoenaed person resides, is employed, or regularly transacts business in person.[4]

A party or a party's officer may be compelled to testify anywhere within the state where that person resides, is employed, or regularly transacts business, even if beyond the 100-mile boundary. In addition, any person may be compelled to testify at trial within the state where that person resides, is employed, or regularly transacts business, so long as the person would not incur "substantial expense" to attend.[5] Of note, these limitations apply only to Rule 45 subpoenas and do not affect the authority to notice depositions of parties, or their officers, directors and managing agents. As a practical matter then, the only real limit on compelling a party's testimony is Rule 45's limit on trial testimony outside the state where the person resides, is employed, or regularly transacts business.

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Southern District Judge Alison J. Nathan explored some of the implications of the geographic restrictions on trial testimony in an opinion filed in August in *Buchwald v. Renco Group*.[6] In that case, defendants sought an order precluding the plaintiff from compelling trial testimony from five witnesses (four of whom were parties) that the defendants themselves planned to call during their case in chief.

The witnesses all lived and worked outside of New York, and defendants contended that

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Rule 45(c)(1), limiting the reach of a trial subpoena—even as to parties—to 100 miles or the state in which the witness resides, precluded the court from compelling these witnesses to testify at trial. Defendants contended that notwithstanding their own intention to elicit live testimony from these witnesses, the plaintiff was limited to introducing their testimony through deposition and cross-examination.

Nathan rejected that argument out of hand. She observed that since the witnesses were already traveling to New York to testify for the defendants, the "evident purpose" of the defendants' motion was not to save the witnesses expense and inconvenience, but to prevent the plaintiff from making his case as effectively as possible—a strategy she noted other courts have denounced as "gamesmanship."

Following a number of cases from the Southern District and other jurisdictions, Nathan held that to prevent unfairness and to avoid the waste of time from reading deposition testimony into the record, the defendants would have to choose between having their live witnesses testify during the plaintiff's case as well as their own, or limiting themselves to deposition testimony as they sought to limit the plaintiff.[7] She noted a preference for live testimony given the undisputed importance of the witnesses, and expressed her intention if the witnesses did appear in person, to structure the trial so that each witness would have to take the stand only once, at which time both sides would be free to elicit the testimony for their cases in chief.

Nathan rejected the argument that Rule 45(c)(1) imposed any limit on her authority to craft this remedy, despite the fact that the defendants' briefing "relentlessly invoke[d]" the amendment to Rule 45 clarifying that its geographic limits applied to parties as well as non-parties. She stressed that she was not compelling any witness (whether party or non-party) to testify at trial beyond the boundaries prescribed by Rule 45. Rather, she was using her authority to control the testimony of witnesses who will already be present at trial. Summing up the distinction, she explained that "consistent with Rule 45(c)(1), this Court cannot compel the five witnesses in question to testify at trial, but the Court does have the authority under Rule 611(a) to prevent those witnesses from testifying for Defendants if they are not made available to testify for the [plaintiff]."[8]

Video Testimony

In a decision filed in *Lin v. Horan Capital Management*,[9] Judge Louis L. Stanton rebuffed an effort by the plaintiff in a New York-based arbitration to compel the video testimony of a non-party witness, as a creative way to avoid the strictures of Rule 45's geographic limitations. Denying the plaintiff's petition to enforce the arbitral subpoena, Stanton noted that arbitral subpoenas are enforced in the same manner as federal trial subpoenas, and that under Rule 45, the witness, an out-of-state corporation, could not be compelled to attend and testify at an arbitration hearing in New York. He found unavailing the plaintiff's resort to Rule 43(a), which permits the use of trial testimony by "contemporaneous transmission" from a remote location in compelling circumstances. Specifically, Stanton found that Rule 43(a)'s "thrust concerns the reception of evidence in a trial court, and does not operate to extend the range or requirements of a subpoena" where the witness is unwilling to testify.[10]

The rule now provides that all subpoenas are to be issued from the court in which the action is pending (rather than the court in the jurisdiction where compliance is to take place), and authorizes nationwide service of process of a subpoena.

Stanton distinguished *Wultz v. Bank of China Limited*,[11] in which Southern District Judge Shira A. Scheindlin ordered that a non-party could produce a deposition witness by video from Israel. The litigation in *Wultz* concerned efforts by the survivor of a terrorist attack and his family to recover damages from the Bank of China for allegedly providing material support to the responsible terrorist group. The particular motion before Scheindlin was to compel compliance with a deposition notice under Rule 30(b)(6) directed to an Israeli non-party bank. The bank had a New York branch, but the witnesses with knowledge of the subjects identified in the subpoena were all located in Israel.

Scheindlin found that although the bank could not be compelled to bring a witness to New York under Rule 45's geographic limitations, the bank was subject to the court's subpoena power by virtue of its New York branch, and could be compelled to comply with its affirmative duty under Rule 30(b)(6) to prepare a designee for the deposition. She concluded that the bank could meet that burden by educating a New York witness to testify or, alternatively "in the age of videoconferencing," the bank could agree to have an Israeli employee deposed by video.[12] Scheindlin did not order that the bank submit to a video testimony of its employee. In addition, as Stanton pointed out in *Lin*, the Israeli bank in *Wultz* was subject to the court's jurisdiction, whereas the non-party witness in *Lin* was not.

Other Aspects

Although litigation relating to the 2013 amendments to Rule 45 has focused on the notice provisions and geographic limitations, other aspects of the amendments intended to simplify the process of serving and enforcing (or seeking to quash) subpoenas bear note. Specifically, the rule now provides that all subpoenas are to be issued from the court in which the action is pending (rather than the court in the jurisdiction where compliance is to take place), and authorizes nationwide service of process of a subpoena.[13] The court in which compliance is to take place remains the primary jurisdiction for enforcing or challenging a subpoena, in order to minimize the compliance burden on non-parties, but the amendments contemplate that compliance matters can be transferred to the issuing court upon consent or in exceptional circumstances.[14]

Conclusion

The 2013 amendments to Rule 45 are in their early days. Even though the changes to the rule are modest, they are likely to generate additional litigation as litigants and the courts assess their precise impact. Thus far, judges in the Southern District have indicated that they will quash subpoenas that do not comply with the rule, but will not tolerate use of the rule for gamesmanship.

1. Fed. R. Civ. P. 45(a)(4). See also Advisory Committee Notes on Rules—2013 Amendments.
2. 2014 WL 4354691 (S.D.N.Y. Sept. 2, 2014) (quoting *Cootes Drive v. Internet Law Library*, 2002 WL 424647, at *2 (S.D.N.Y. Mar. 19, 2002) (Haight, J.).
3. Id. at *16.
4. Fed. R. Civ. P. 45(c)(1)(A).
5. Fed. R. Civ. P. 45(c)(1)(B).
6. 2014 WL 4207113 (S.D.N.Y. Aug. 25 2014).
7. 2014 WL 4207113, at *1 (citing *R.B. Matthews v. Transam. Transp. Servs.*, 945 F.2d 269, 273 (9th Cir. 1991); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 776 F.Supp. 838, 839 (S.D.N.Y.1991) (Mukasey, J.); *Iorio v. Allianz Life Ins. Co.*, 2009 WL 3415689, at *6 (S.D.Cal. Oct. 21, 2009); *Maran Coal Corp. v. Societe Generate de Surveillance*, 1996 WL 11235 (S.D.N.Y. Jan. 10, 1996) (Cote, J.)).
8. Id. at *2.
9. 2014 WL 3974585 (S.D.N.Y. Aug. 13, 2014).
10. Id. at 1.
11. 298 F.R.D. 91 (S.D.N.Y. 2014) (Scheindlin, J.).
12. Id. at 99.
13. Fed. R. Civ. P. 45(a)(2) & (b)(2).
14. Fed. R. Civ. P. 45(f).