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Amending Rule 45: Clarifying And Changing Subpoena Practices

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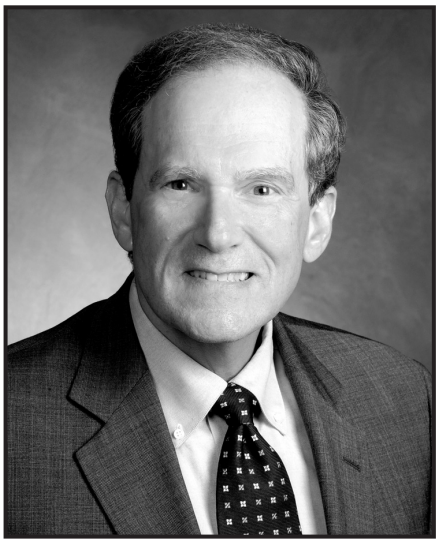
In considering potential changes to the subpoena rule, Rule 45 (the Rule), which had not been changed in 20 years, the Civil Rules Advisory Committee (CRAC) was of the view that there were things that needed to be clarified or changed and that it was very lengthy and at times hard to follow. Therefore CRAC decided to undertake an examination of the Rule.

As a result of that examination, the CRAC published a report dated May 2, 2011 (revised June 16, 2011), which recommended revising the Rule in four areas. In addition, it tried to accomplish what it called simplification by making some fundamental changes in the way subpoenas would be issued in the future.

The CRAC also wished to resolve conflicts in the courts as to whether trial subpoenas with nationwide reach could be issued for corporate officers.



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Another area of concern is whether a court should have authority to transfer subpoena compliance issues to the court where the litigation is pending. Let's suppose I have a litigation in California. If somebody wants to take testimony of a third party in New York, they would issue a subpoena from a federal court in New York. Any attorney admitted to practice in California who is counsel of record in that action in California could issue such a subpoena and put the name of the New York federal court on it.

Under the current Rule, a non-party residing in New York would get a subpoena from a New York court. If that party objected to the subpoena and if there were issues regarding compliance with that subpoena those issues would be resolved by the New York court.

A third party receiving the subpoena would not necessarily be aware of the facts of the case and, if other similar subpoenas were issued throughout the country, the same issues would come up repeatedly. The CRAC felt that the judge who knows most about the litigation would be better equipped to resolve those issues in these limited circumstances. The solution that the CRAC came up with is one that allows a transfer of subpoena compliance issues to the court where the litigation is pending either when all the parties and the non-party recipient consent, or if there are "exceptional circumstances." The ABA Litigation Section through members of its Council and its Federal Practice Task Force sent a letter dated February 23, 2011 (Litigation Section Letter) to CRAC recommending that standard and urging that it should be a difficult standard to meet because otherwise judges in the local district where the subpoena recipient resides would routinely transfer those issues to the court where the litigation is pending. This protects a non-party that is not involved in the litigation from having to hire counsel in California to get a court to decide whether it should have to produce documents in New York pursuant to a subpoena issued in New York. The formulation used by the CRAC probably should be further refined to make clear that even where you have those exceptional circumstances, the court should still be able to protect the third party from undue burden and expense.

In the *Vioxx* case, Judge Fallon ruled that a party could require a senior officer of a company to appear for trial beyond 100 miles from the district where that person lives or works. In the *Big Lots*

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decision, Judge Vance came out the other way. The CRAC has recommended that Rule 45 be clarified to provide that senior officers cannot be required to attend trial beyond the local subpoena power of the court embodied in the 100 mile rule. That is consistent with the Litigation Section Letter.

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There is another set of issues relating to notice. Currently, the Rule requires that before you issue a subpoena to a third party, you must give notice to the parties to the litigation. At least in my view and that expressed in the Litigation Section Letter, two other things need to be added to clarify the obligations of the party issuing the subpoena. One is that the parties should be given notice when a party receives documents pursuant to the subpoena, and they should be made available for inspection and copying. The other is that parties should be notified if the subpoena is modified.

If I issue a subpoena to a third party, let's say it's returnable in 30 days, what invariably happens when I follow the Rule and give notice to the other parties, the attorney for a party will call up and say I think it's a little overbroad, but if you agree to narrow the number of documents requested, I will give you the documents without a fight and by the way, I need another 30 days, and I say okay.

Right now my adversary may also want documents from that party but he or she may not wish to issue multiple subpoenas to the same party. Therefore, it's important to give a heads up to the other side when you actually modify a subpoena and when you receive the documents. The Litigation Section Letter urged that the CRAC adopt that approach. So far they have not done so, and I think the reason is they thought that lawyers really work those things out and that they make them available to other parties.

My experience has been different. There are some people who believe that they don't have an obligation to let another party know when they receive documents pursuant to a subpoena and there are many abuses that can take place. As a result, I feel strongly that the Rule should explicitly recite this existing obligation.

There is an additional issue that I think needs further exploration. The way the Rule is currently drafted you must notify the adversary before you serve a subpoena, but the subpoena can be served simultaneously with such notice. There should be some minimum time prior to service (say, seven days) before a subpoena is served. This would provide an opportunity to address a situation where a subpoena or a series of subpoenas is sent with a malicious intent to disrupt customer relationships of a competitor. Under the existing Rule, you can still move for a protective order before the return date, but the other party would already have damaged valuable customer relationships.

Another problem that needs to be addressed is that under the current Rule, if you want to object to the subpoena, you have to object in the shorter of 14 days or the return date of the subpoena. If the subpoena is not returnable for 30 days, what happens if you've missed the 14-day period to object? Can you object afterwards? Some courts have said no, you've waived your right to object by not objecting in 14 days. That is unfair. This is a real issue because many times the corporate office that actually has the records may not even get the subpoena in 14 days. It may bounce around the company for days trying to find the right person. LCJ said that the 14 days should be expanded to 30 days and the Litigation Section Letter agreed.

Now the last issue I'd like to address is the simplification issue. The CRAC apparently has decided to reverse some of the language in terms of how a subpoena is issued, so right now, as I explained to you earlier, my case is pending in California, and, if I want to subpoena somebody in New York, I, as an attorney admitted in federal court in San Francisco, can issue a subpoena out of the Southern District of New York even if I'm not admitted there and subpoena the company in New York to produce documents. What the CRAC is now proposing is that the subpoena would now be issued by me out of the California court and would be served on that same party in New York, and that the enforcement of that subpoena would take place, as it has before, in the New York court. This may cause confusion as to whether the New York company needs to comply with a subpoena issued in San Francisco.

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The way that amendment of Rules process will work is that after the public comment period closes on February 15, 2012 and public hearings are finished, the CRAC will meet in April to decide whether to make further changes and recommend to the standing committee final changes to expand or modify the proposed amended Rule. It would then go before the Standing Committee in June. If the Standing Committee approves it, it would go to the U.S. Judicial Conference in September.

If it were approved by U.S. Judicial Conference, it would go to the Supreme Court, which would have until May 2013 to decide if it wants to adopt the Rule changes. If so, the Supreme Court would then submit it to Congress, which would then have six months to reject them. If Congress failed to act, by December 2013, the Rule changes would become effective.