December 2013 Amendments to Federal Civil Rules

By Mark W. McInerney and Thaddeus E. Morgan

Unless Congress intervenes (which is not anticipated), amendments to the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Evidence—approved by the Supreme Court in April 2013—will take effect on December 1, 2013.

The most significant of the amendments are revisions to Civil Procedure Rule 45 dealing with subpoena practices, particularly with respect to out-of-state, nonparty witnesses. This article summarizes the 2013 amendments with emphasis on Rule 45.

Amendments to the Federal Rules of Civil Procedure

Rule 45

The amendments to Rule 45[1] arose from the Advisory Committee's desire to eliminate what it called a "three-ring circus" of challenges for lawyers seeking to use a subpoena in actions featuring parties or witnesses in more than one state. The rings were identified as uncertainty regarding which court should issue a subpoena, uncertainty concerning where and how to accomplish service, and which of several alternative provisions of Rule 45 governed compliance issues. The amendments also clarify the interaction of another form of subpoena triad: the trial court, the subpoena-issuing court, and the subpoena-enforcement court. The amendments contain five main provisions addressing the three rings of the circus identified by the Advisory Committee as well as several other issues:

First, revised Rule 45(a)(2) provides that subpoenas are issued by the court in which the action is pending and not, as has generally been the case, by the court where compliance is sought. Thus, the trial court will always be the issuing court, and it is no longer necessary to locate, print, and serve different form subpoenas for the district in which the witnesses or documents are located. The provision allowing an attorney licensed to practice in the issuing court to issue the subpoena remains in place.

Second, revised Rule 45(b)(2) eliminates the current complex service rules by providing that a subpoena may be served anywhere in the United States. 28 USC 1783 continues to govern service of a subpoena upon a U.S. resident or national outside the United States.

Third, under revised Rule 45(d)(3), motions to quash or enforce a subpoena are generally to be brought in the district where compliance is required—the enforcement court—and not in the district in which the action is pending and from which the subpoena has been issued. The goal is to make it easier for a person who is the target of the subpoena to protect his or her rights.

This is consistent with the current version, which does not allow for a trial court to also be an enforcement court for purposes of out-of-district witnesses or documents. However, new Rule 45(f) authorizes the enforcement court where compliance is required to transfer a motion to quash or enforce a subpoena back to the trial court that issued the subpoena in two limited instances: if the person subject to the subpoena consents to the transfer, or if the court finds "exceptional circumstances." The term "exceptional circumstances" is not defined, but the committee note suggests the standard to allow a transfer will be a rigorous one. The note points out that the burden of showing such circumstances rests on the party proposing transfer, adding that the prime concern should be avoiding burdens on local nonparties, and therefore, "it should not be assumed that the issuing [trial] court is in a superior position" to decide motions pertaining to subpoenas.[2] The committee suggests transfer might be appropriate, for example, to avoid disrupting the issuing court's management of the underlying litigation, such as where the issuing court has already ruled on the matter presented or where the same matters are likely to arise in several districts. Transfer of such motions is not favored, and the committee indicates that transfer is appropriate when matters favoring decision by the issuing court "outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion."[3]

In an interesting comment, the committee note observes that a judge considering a subpoena-related motion in a court where compliance is to take place may find it "helpful" to "consult" (apparently off the record) with the judge in the issuing court about the underlying case.

Fourth, the new rule seeks to resolve confusion regarding where a person served with a subpoena may be compelled to comply with that subpoena. Unlike with the current rule, the place where service occurs is not determinative.

Revised Rule 45(c)(1) addresses a subpoena for attendance at trial, a hearing, or a deposition. Such a subpoena may require attendance within 100 miles of where the witness lives, works, or regularly transacts business in person. If the subpoenaed witness is a party or a party's officer or is subpoenaed for trial and would not incur "substantial expense," the witness may be compelled to attend anywhere within the state where the witness lives, works, or transacts business in person. Note, however, that subpoenas remain unnecessary to compel the attendance at deposition of a party or an officer, director, or managing agent of a party; for those witnesses, a notice of deposition is all that is required.[4] For parties or

officers, directors, or managing agents of parties, the revised rule effectively applies only to the trial situation. That provision resolves a split among federal courts since some courts have held that geographical limits did not apply to a trial subpoena to a party or an officer, director, or managing agent of a party, while other courts applied the geographical limitations. Under revised Rule 45(c)(1), the party or officer, director, or managing agent may only be compelled to testify within 100 miles of where, or within the state in which, the witness lives, works, or regularly transacts business in person.

For subpoenas for other types of discovery, revised Rule 45(c) provides for a place of compliance, mandating that production of documents, electronically stored information, or tangible things may be required only within 100 miles of where the person lives, works, or regularly transacts business in person, without regard to where the documents are maintained. This change renders moot the recurring and often-litigated question of whether the issuing and enforcement court should be where the custodian resides or where the records are kept, and it should limit other technology-based subpoena issues posed by advances such as cloud computing. Parties often agree to transmit documents or electronically stored information electronically, and nothing in the new rules limits parties' ability to make such an agreement.

Fifth, Rule 45(a)(4) clarifies the issue of whether and when "documents-only" subpoenas must be served on other parties, an issue that arose after the creation of documents-only subpoenas in a 1991 amendment of Rule 45. The committee note observes that the rule is not being changed, but is featured more prominently (since some litigants seem to have been ignoring it). The rule now specifies that a notice and a copy of a subpoena commanding the production before trial of documents, electronically stored information, or tangible things must be served on all other parties before the subpoena is served on the person to whom it is directed.[5] Despite the committee's receipt of comments in favor of a change, the new rule, like its predecessor, does not address the rights of other parties to copies of information produced in response to such a subpoena, thus leaving it to those parties to follow up with the witnesses or the party serving the subpoena to obtain copies.

Rule 37

Consistent with the provision in Rule 45(f) permitting the transfer of a subpoena-related motion from the court where compliance is sought to the court in which the underlying action is pending, Rule 37(b)(1)[6] is revised to provide that the failure of a deponent to comply with an order to be sworn or to answer a question may be treated as contempt of either the court where compliance is to occur or the court in which the action is pending (but presumably not both courts).

Other Amendments

Rules of Appellate Procedure

Amendments to Rules 13, 14, and 24 relate to appeals from the United States Tax Court.[7] Rules 13 and 14 are revised to recognize that appeals to the Tax Court may be by right under Rules 3 and 4 or by permission under Rule 5. Rule 24(b) is amended to provide for appeals to the Tax Court on an *in forma pauperis* basis.

Appellate Rules 28 and 28.1 contain amendments to the list of required provisions in appellate briefs.[8] Currently, Rules 28(a)(6) and (7) require an appellant's brief to contain both "a statement of the case" and "a statement of facts." Revised Rule 28(a)(6) consolidates those requirements into a single requirement of a "concise statement of the case," to include relevant facts, the procedural history of the case, and an identification of the rulings presented for review. Conforming revisions appear in Rule 28(b) for an appellee's brief and Rule 28.1(c) for cross-appeals.

Rules of Criminal Procedure

An amendment to Rule 11[9] will require that, in accepting a plea agreement by a defendant who is not a citizen, a court must advise the defendant that the conviction may result in the defendant's removal from the United States, the denial of citizenship, and the denial of admission to the United States in the future.

Rules of Evidence

An amendment to Evidence Rule 803(10),[10] one of the hearsay exceptions, cures a constitutional confrontation problem identified by the Supreme Court in *Melendez-Diaz v Massachusetts*.[11] Under the revision, if the prosecutor in a criminal case proposes to file a certification under Rule 902[12] that a particular public record does not exist, he or she must file notice at least 14 days before trial. The certification may then be admitted if the defendant does not object in writing within seven days after receiving the notice. The new rule has no application in civil litigation. ■

Mark W. McInerney of Clark Hill PLC in Detroit and Thaddeus E. Morgan of Fraser Trebilcock in Lansing are members of the State Bar of Michigan's Standing Committee on United States Courts. Among the committee's missions is to study, recommend, and report on changes in the rules, practices, and procedures in the federal courts applicable to Michigan practice.

ENDNOTES

1. FR Civ P 45.
2. FR Civ P 45, 2013 Amendment Advisory Committee Note, Subdivision (f).
3. *Id.*
4. See FR Civ P 37(d)(1)(A)(i).
5. Under an earlier version of new Rule 45(a)(4), the "before trial" language did not appear, thus requiring service upon other parties of trial subpoenas before service on witnesses. "Before trial" is included in the final draft at the request of the Department of Justice, which was concerned that without that language its ability to seize assets would be compromised. By implication, then, copies of trial subpoenas need not be served upon the other parties to a case.
6. See FR Civ P 37(b)(1).
7. See FR App P 13; FR App P 14; FR App P 24.
8. See FR App P 28; FR App P 28.1.
9. FR Crim P 11.
10. FRE 803(10).
11. *Melendez-Diaz v Mass*, 557 US 305; 129 S Ct 2527; 174 L Ed 2d 314 (2009).
12. FRE 902.