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ALERT MEMORANDUM

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Extensive Changes to Federal Subpoena Practice Will Take Effect on December 1

Federal subpoena practice will change in several important respects on December 1, when extensive amendments to Rule 45 of the Federal Rules of Civil Procedure are scheduled to take effect. Rule 45 subpoenas are the vehicle that parties to a civil litigation use to seek deposition testimony and documents from non-parties. Parties may also use Rule 45 subpoenas to require a party witness to testify at trial or a hearing.

The amendments that take effect on December 1 make a number of important changes to Rule 45. First, the process of issuing and serving a subpoena will be simplified: all subpoenas will now issue from the court presiding over the lawsuit for which evidence is sought, rather than the court where the target of the subpoena is located, and parties may effect service anywhere in the United States. Second, a major structural change unifies all place of compliance provisions in Rule 45(c). The substance of those provisions generally remains unchanged, but the place of service no longer has any bearing on the place of compliance. Third, the amendments clarify that a trial subpoena cannot command a party or party officer to travel more than 100 miles from where he or she resides, is employed or regularly conducts business in order to testify at a trial out of state. Fourth, the amendments authorize the transfer of subpoena-related motions from the "compliance court" (the court in the district where compliance is required) to the "issuing court" if the non-party consents or there are exceptional circumstances meriting transfer. Finally, a court may issue contempt sanctions for failure to comply with a subpoena or related order, and if the underlying motion had been transferred to the issuing court, disobedience would be contempt of both the issuing court and the compliance court.

1. Issuing and Serving Rule 45 Subpoenas

The rules for issuing and serving subpoenas will be much simpler under revised Rule 45 than they are today. First, the court in which a case is pending will be the issuing court for any subpoena related to that case. Currently, a subpoena must issue from the court where compliance is required. Second, the revised rule permits service of civil subpoenas anywhere in the United States (aligning the practice with Federal Rule of Criminal Procedure 17(e)). This eliminates the current geographical restrictions on subpoena service in the United States. The other provisions of Rule 45 regarding service remain the same.

Another amendment to Rule 45 highlights the requirement that any party issuing a subpoena seeking only the production of information or documents or an inspection of premises before trial must serve notice of the subpoena on all other parties to the action before serving the subpoena on the intended recipient. This will facilitate the ability of other parties to obtain access to what is produced in response to the subpoena. Although Rule 45 has required this type of notice for over two decades, many practitioners routinely fail to comply. The notice requirement will now appear more prominently in Rule 45(a)(4). Because another purpose of the notice is to allow other parties to the case to object to the subpoena or serve one seeking additional information, a related substantive change requires that the party attach a copy of the actual subpoena to the notice of subpoena. The notice requirement does not apply to subpoenas that also seek deposition testimony, because in that circumstance the goal of providing notice to all other parties will be achieved by means of the notice of deposition required by Rule 30(b).

2. Compliance with Subpoenas

The amended place of compliance provisions remain essentially the same as in the current rule. However, where a subpoena is served is no longer critical to the place of compliance. In addition, a major structural change to the rule consolidates all place-of-compliance provisions in Rule 45(c).

To minimize the burden of compliance on non-parties, the amendments specify that the place for production of documents or electronically stored information must be "within 100 miles of where the person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(2)(A). This provision seeks to ensure that any necessary litigation about compliance will occur at a location convenient for the subpoena recipient. The subpoenaing party and the recipient may, however, make other agreements about the place of production. For example, the recipient may agree to produce electronically stored information by sending it more than 100 miles by mail or electronic means.

3. Limits on Trial Subpoenas for Parties and Party Officers

The amendments clarify that a subpoena cannot command a party or party officer to travel more than 100 miles from where the person resides, is employed or regularly conducts business in order to testify at a trial out of state. Instead, a subpoena may command attendance at trial for a party or party officer within the two geographical ranges that apply to all witnesses: (1) within 100 miles of where the person resides, is employed or regularly transacts business in person, or (2) anywhere within the state where the person resides, is employed or regularly transacts business in person. This change resolves conflicting authority as to whether there should be an exception to this general rule for parties and party officers.

There is one distinction between non-party and party or party officer witnesses in this respect: a subpoena may command a non-party witness to testify at trial anywhere within the state where the person resides, is employed or regularly transacts business in person *if* it does not entail substantial expense. However, if that would impose substantial expense, the subpoenaing party may pay that expense and the court can condition compliance on that payment. While parties and party officers are not protected by the "substantial expense" limitation, they are protected by the general rule that subpoenas should not impose an undue burden.

4. Motions Regarding Subpoenas

A non-party may move for a protective order or to quash or modify the subpoena. Conversely, the party who issued the subpoena may move to compel compliance. Amended Rule 45 remains unchanged in providing that such motions should be made in the district where compliance is required. Thus, the court where the motion is filed (the "compliance court") may be different from the court that issued the subpoena (the "issuing court"). This serves the purpose of avoiding undue burden and expense for the subpoena recipient.

Because of the issuing court's knowledge of the underlying lawsuit, it may sometimes be more efficient to have that court resolve a dispute concerning a subpoena. New Rule 45(f) therefore authorizes the compliance court to transfer subpoena-related motions to the issuing court. The compliance court may transfer a motion, however, only if the non-party consents or the court finds that there are "exceptional circumstances" meriting transfer. The rule does not define "exceptional circumstances," but the Advisory Committee Notes explain that transfer may be appropriate "to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts." To merit a transfer, any exceptional circumstances must outweigh the non-party's interest in local resolution of the motion.

If the motion is transferred, the amended rule minimizes the inconvenience for the non-party by providing that its counsel who is admitted to practice in the compliance court may file papers and appear on the motion in the issuing court, even if such counsel is not already admitted in that court. The Advisory Committee Notes also encourage judges to permit the non-party and its counsel to use telecommunication methods to appear in the issuing court. Finally, the issuing court may transfer its order on the motion to the court where the motion was originally made so as to facilitate enforcement.

5. Contempt Sanctions

Amended Rule 45 allows a court to impose contempt sanctions for failure to obey a subpoena or a related court order. There are also changes related to the new motion transfer provisions. First, if a motion regarding the subpoena is transferred, disobeying the subpoena or the order on the motion can constitute contempt of both the court where compliance is required and the issuing court. Second, if needed to effectively enforce its order on a transferred motion, the issuing court can transfer the order back to the court where compliance is required. In addition, there are conforming changes to Federal Rule of Civil Procedure 37(b) regarding contempt of orders directing a deponent to be sworn or answer a question.

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The amendments to Rule 45 are scheduled to take effect on December 1, 2013. Subpoenas issued on or before November 30, 2013, must comply with the current rule.

If you have any questions, please feel free to contact Lawrence B. Friedman, Mitchell A. Lowenthal, Sheilah M. Kane or any of your regular contacts at the firm. You may also contact any of our partners, counsel and senior attorneys listed under "Litigation and Arbitration" in the "Practices" section of our website at http://www.clearygottlieb.com.

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