Comments on proposed Rule 45 FRCiv.P
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11-CV-011

1 Attachment

Letter re Revisions to Rule 45.pdf

Please see attached letter of comments.

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11-CV-011

January 13, 2012

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Secretary McCabe:

I write to comment on the proposed revisions to Rule 45 of the Federal Rules of Civil Procedure. I have 45 years' experience in litigation in federal courts and was an Advisor to the Federal Courts Study Committee. In recent years, I have also served as an arbitrator in domestic and international cases. While I am a partner in a large law firm, I make these comments in my personal capacity.

1. Subsection (f) and Committee Note

I believe that it would be a serious mistake to limit to "extraordinary circumstances" the transfer of compliance motions to the court in which the action is pending. From the perspectives of efficient use of judicial resources and of quality of decision, the court in which the action is pending is in much the better position to determine the merits of a compliance motion. Indeed, the Committee Note recites several of the reasons for this. However, the Committee Note's classification of a dispute "focused on the burden or expense on the local non-party" as one which should not be transferred is incorrect. Burden is always relative; the court with responsibility for the underlying action is in a far better position to weigh burden against the importance of the information to the case. Any burden on a third party is too much if the information is not relevant or is available from the parties or public sources, while core evidence may justify imposition of considerable burden and inconvenience. Every day, compliance motions are referred to the court with responsibility for the action for compelling practical reasons. These are not, and should not be, as the Committee Note would have it, "truly rare events."

Indeed, the only reason for not referring all compliance motions to the court where the action is pending is unfairness to the distant witness, who understandably wishes to avoid travel and prefers to be represented by locally-based counsel. Given electronic filing of papers, the universal availability of inexpensive conference telephone facilities, and the increasing availability of videoconference facilities, we are not far from the day if we have not already reached it where the distant witness can have her objections considered and resolved by the court in which the case is pending without the need for travel. I suggest that subsection (f) be redrafted to authorize the court in whose jurisdiction the witness is located to transfer compliance disputes to the court where the action is pending where transfer would promote efficiency and not unduly prejudice the witness.

2. Impact on Arbitration

Rule 45 applies not only to lawsuits but also apparently governs the geographical scope and place of enforcement of subpoenas issued by arbitrators pursuant to Section 7 of the Federal Arbitration Act. The proposed changes to Rule 45 appear to strengthen the ability of an arbitration tribunal to obtain the testimony of a distant third party witness -- if the tribunal is prepared to travel to the witness -- but continue an arguable conflict with Section 7 as to the court in which enforcement of a subpoena should be sought.

Section 7 provides in relevant part that "The arbitrators . . . or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him . . . any book, record, document, or paper which may be deemed material as evidence in the case . . . . Said summons shall . . . be signed by the arbitrators, or a majority of them . . . and shall be served in the same manner as subpoenas to testify before the court; if any person . . . so summoned . . . shall refuse or neglect to obey such summons, . . . the United States district court for the district court in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person . . . or punish said person . . . for contempt in the same manner provided by law for securing the attendance of witnesses . . . in the courts of the United States."

While a district court and an arbitration tribunal are subject to the same geographical limit on power to compel appearance at a hearing, which I will refer to somewhat imprecisely as the "100 mile rule," district court litigants have means to get around the limit not available to parties to arbitrations. Under present Rule 45, a party to a litigation may obtain the testimony of a distant witness by issuing a subpoena out of the district court in which the witness resides or works. The party may then take a videotaped deposition and show the tape at trial. The Federal Arbitration Act, a pre-Federal Rules statute, however, gives subpoena power only to the arbitrators, and appears to restrict their geographical powers to that of the district court in which they are sitting. Dynergy Midstream Services v. Trammochers, 451 F.3d 89 (2d Cir. 2006); Legion Ins. Co. v. John Hancock Mut. Life Ins. Co. 33 Fed Appx. 26, 27 (3d Cir. 2002); but see In re Sec. Life Ins. Co., 228 F.3d 865, 872 (8th Cir. 2000). The description in Section 7 of the subpoena power as one to compel the witness to "attend before" the arbitrators has led the Second and Third Circuits to rule that Section 7 does not permit arbitrators to subpoena witnesses for depositions. Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008); Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004).

Some arbitration panels under present Rule 45 have sought to compel third-party testimony by travelling to the witness. (While arbitrators typically are seated in a particular jurisdiction by contract, it is well established that the arbitration panel may nevertheless schedule hearings elsewhere.). While traveling to the witness is cumbersome and expensive, the threat to do it may lead to a more efficient resolution such as an agreement by the witness to testify by video conference. A more important problem is that the interplay of present Rule 45 and Section 7 only awkwardly supports this strategy, if at all. Present Rule 45 provides that the subpoenaing court and the enforcement court is the court where the witness is located. Under Section 7, the enforcement court is the court where the arbitrators "are sitting." But in the case of a distant

witness who refuses to attend, the court where the witness is located is the court in whose jurisdiction the arbitrators would have sat only if the witness had been willing to show up, not their usual seat. While Section 7 is not explicit as to the location of "the court" whose rules given the service of subpoenas, it is certainly arguable that the drafters of Section 7 were not contemplating a peripatetic tribunal and had in mind the district court in the tribunal's usual seat, which under present Rule 45 is without power to summon a distant witness. The strategy of relocating the arbitration panel has been upheld on occasion, see National Financial Partners Corp. v. Corry, 2009 Dist. LEXIS 3440 (E.D. Pa. April 21, 2009); Amgen Inc. v. Kidney Center, 879 F. Supp. 878, 882-83 (N.D. Ill. 1995), dismissed for lack of subject matter jurisdiction, 1996 U.S. App. LEXIS 28250 (7th Cir. Oct. 28, 1996), but the weight of authority is that it does not work. Alliance Health Care Services v. Argonaut Private Equity, LLC, Case No. 11 Civ. C3275, slip op. (N.D. Ill. Aug. 9, 2011); Dynergy Midstream Services, supra.

Proposed Rule 45 would clear up any issues with respect to service of subpoenas, since the court in the arbitration tribunal's seat, and hence the tribunal itself, could serve subpoenas nationwide. The apparent tension between Section 7 and Rule 45 as to enforcement would remain, as proposed Rule 45 would continue enforcement in the court where the witness is found, absent "exceptional circumstances." This creates the prospect of there being no court capable of enforcing a validly issued subpoena. Unless (a) the court where the arbitrators "are sitting" under Section 7 is construed to be the court in which they are seeking to sit for purposes of hearing the subpoenaed witness or (b) Rule 45 is drafted to make the court in the arbitration tribunal's seat the enforcement court of a compliance motion, this gap will exist.

3. Relationship to Rule 43(a)

However grudgingly, Rule 43(a) provides that testimony may taken by videoconference from a courthouse or other location in another district,

> "For good cause shown in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."

As I read proposed Rule 45(c)(1), a witness could be summoned to a place within 100 miles of his residence for testimony by video conference in a trial taking place farther away, but it would be helpful at least in a Note to make this explicit.

I look forward to the day in which Rule 43(a) is liberalized to make compelled remote testimony freely available in court trials and available to arbitration tribunals as well.

Respectfully submitted,

George A. Davidson

GAD/mfr