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UPDATE
Business Litigation

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You've Been Served:

Important Changes to Rules Governing Corporate Responses to Federal Civil Subpoenas

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Even if your company is not currently a party to a federal civil lawsuit, it is likely that at some point it will be served with a federal subpoena. The subpoena may call for the production of documents, testimony, or both. Subpoenas demand quick and careful responses.

In-house counsel must remain familiar with the modern state of Federal Rule of Civil Procedure 45 (Rule 45), which governs federal civil subpoenas. Recently, the Civil Rules Advisory Committee proposed various amendments to Rule 45. Although the changes would not become effective until December 2013, the proposals highlight some of the important aspects of Rule 45.

WHERE DO WE FIGHT IT? CHANGES TO VENUE RULES

When companies are served with third-party subpoenas, one of the first questions usually is: "Where do we fight it?" Under the current rule, the subpoena must be challenged in the federal court where the testimony or document production is to take place, usually the third party's "home district." For example, if your Connecticut company is served with a subpoena to produce records in Connecticut, the federal court in Connecticut rules on challenges to the subpoena. This is true even if the lawsuit giving rise to the subpoena is pending in California.

Under the proposed changes to Rule 45, however, it will be easier for the plaintiff and the defendant in the underlying lawsuit to move disputes about third-party subpoenas to the federal court where the lawsuit is pending. In the example above, the parties might try to move the dispute to the California federal court, even if the third-party subpoena seeks documents in Connecticut.

Even with the proposed changes, however, transfer would only be possible in limited circumstances: (1) when all the parties to the litigation and the subpoenaed third party consent or (2) under "exceptional circumstances." The amended rule contemplates that such transfers will be rare, but it acknowledges that the judges presiding over the lawsuit are sometimes

better equipped to handle disputes about the scope of third-party subpoenas.

WHERE DO WE HAVE TO TESTIFY? CLARIFYING THE 100-MILE RULE

When corporate officers are served with a subpoena, one of the first questions usually is: "Where will I have to testify?" Under the current rule, a corporate officer of a non-party cannot be compelled to travel more than 100 miles to testify at a deposition or trial.

There is disagreement about whether the 100-mile rule applies when the subpoenaed party is an officer of a corporate party to the lawsuit and the subpoena is for trial testimony. The proposed changes to Rule 45 clarify that officers of corporate parties to a lawsuit can only be compelled to testify at trial (1) within 100 miles of where they reside, are employed, or regularly transact business or (2) within the state where they reside, are employed, or regularly transact business, provided that it does not cause them substantial expense.

CONTACT US

This alert highlights just a few of the important issues that in-house counsel may face in responding to subpoenas. Other changes to Rule 45 have been and may still be proposed. Robinson & Cole will continue to track the status of the amendment approval process and keep you updated.

Our lawyers have extensive experience in preparing clients to respond to subpoenas. If you are, or have been, served a subpoena, seeking advice from your attorney before responding is a step to help protect your best interests.

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