U.S. Department of Justice

Civil Division

11-CV-021

Assistant Attorney General

Washington, D.C. 20530

February 15, 2012

Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

The United States Department of Justice appreciates this opportunity to comment on proposed amendments to the Federal Rules of Civil Procedure. As the nation's principal litigator in the federal courts, the Department has a strong and long-standing interest in participating in the rules amendment process, and in sharing with the Committee its experiences with the Rules and describing how its practice could be affected by the proposed amendments.

This letter addresses the Civil Rules Advisory Committee's proposed amendments to Rules 45 and 37.

Proposed Amendments to Rule 45

The Committee has proposed several amendments to this Rule. First, Rule 45 would be amended by making the forum court the "issuing court" for the issuance and service of subpoenas and providing nationwide service of subpoenas from that court. Enforcement of subpoenas would remain in the district of compliance. The new rule would allow an attorney to issue and sign a subpoena so long as the attorney is authorized to practice in the issuing court.

Second, the Committee proposes to clarify Rule 45(c) in order to incorporate specific geographic limits on service of subpoenas on parties and party witnesses that, many courts have held, are already within the Rule, and which parallel the restrictions on subpoenas on non-parties and non-party witnesses. The Committee's proposed amendment rejects the *Vioxx* line of cases that have held that there are no such limits on the service of such subpoenas on parties and party officials.[1]

Third, the Committee proposes the addition of a new Rule 45(f) which would provide

[1] *Compare In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006), *with Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (respectively holding that the Rule authorizes, and does not authorize, such a subpoena).

authority for the court in which a subpoena-related motion is filed to transfer the matter to the forum court. In addition, absent "exceptional circumstances," party consent would be necessary for the transfer of a subpoena dispute to the forum court in addition to the consent of the person to whom the subpoena is directed. The proposed Rule would allow the attorney for the person subject to a subpoena to file documents and appear on the motion as an officer of the issuing court as long as the attorney is authorized to practice in the court where the motion was made.

Finally, the Committee proposes that Rule 45(a)(4) provide a more prominent "notice" provision under which a party intending to issue a subpoena would be required to provide advanced notice to the other parties.

Proposed Amendments to Rule 37

The Committee has proposed that the sanctions provisions of Rule 37 be amended in order to conform with the proposed amendments to Rule 45. Rule 37(b)(1) would state that, if a deposition-related motion is transferred to the forum court, and a deponent fails to obey an order from that court, the "failure may be treated as contempt" of either the court in which the action is pending or where the discovery is taken.

Department of Justice's Comments on Proposed Amendments

1. The Department supports amending Rule 45 by making the forum court the "issuing court" for the issuance and service of subpoenas and by providing for the nationwide service of subpoenas from that court. As explained below, the Department believes that this amendment also will provide appropriate protections for non-party witnesses.

2. The Department supports the addition of a new Rule 45(f) in order to provide greater protections to those persons or entities who might become subject to burdensome subpoenas. The Department supports the proposal insofar as it would require the consent of the non-party or "exceptional circumstances" for the transfer of a subpoena dispute to the forum court.

The Committee has specifically requested comment on whether the transfer of a subpoena dispute should depend on the consent of the parties in addition to the person subject to the subpoena. The Department concludes that the consent of the person subject to the subpoena should be sufficient to permit the transfer. In the ordinary case, one would assume that the party issuing the subpoena would have no particular interest in having the court in the place of compliance resolving the dispute, as opposed to the forum court resolving the dispute. Nor would it appear that any of the other parties would have an interest in a court other than the forum court resolving the dispute. But permitting other parties to "veto" what otherwise would be a consensual transfer of the dispute to the forum court could create delay or frustrate the purpose of the amendment. Accordingly, unless some practical reason is offered to support the "party consent" provision, the Department does not believe there is a justification for it. The "exceptional circumstances" provision should be adequate to address any such situation in which

a party objects to transfer.

The Department also notes that, in situations in which the court where compliance is required did not issue the subpoena, that court may transfer the motion to the issuing court. Rule 45(f) would specifically state that, "if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court." The Department agrees with the provision and recommends that either the Rule or Committee Note specifically explain that this provision supersedes any contrary local rules of a district court.

3. The Department generally supports the Committee's recommendation that there should be a more prominent "notice" provision for the issuance of subpoenas for discovery and trial. Rule 45(b)(2) now provides that, "if the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party." In contrast, proposed Rule 45(a)(4) contains most of the above-quoted language, but eliminates the words "before trial," presumably in order to clarify that pre-trial and trial subpoenas are subject to the "prior notice" requirement.

The elimination of the words "before trial," however, raises what appears to be an unanticipated effect, *i.e.*, whether the "prior notice" requirement also would apply to the issuance of post-judgment subpoenas. Because post-judgment discovery, including subpoenas, is covered in Rule 69(a)(2), the proposed amendment inadvertently eliminates the distinction between pre-judgment and post-judgment discovery. The concerns that relate to fairness and avoiding surprise at trial support prior notice to parties of third-party subpoenas. Any such concerns in the post-judgment context would be outweighed by the potential for dissipation of assets by a judgment debtor who receives notice of post-judgment asset discovery in the form of third-party subpoenas. Accordingly, the words "before judgment" should be inserted after "premises" in the revised rule and a brief explanation should be provided in the Committee Note to confirm that prior notice need not be given for post-judgment subpoenas.

The Committee has asked for comment on whether, beyond the initial notice, there should be additional notice requirements imposed in the rule, *e.g.*, for modifications to the subpoena's terms or other matters. The Department is not convinced that a need has been shown for any such requirements

4. The Department has evaluated the Committee's proposal to amend Rule 45(c) in order to incorporate specific geographic limits on service of trial subpoenas on parties and party witnesses. The Department recognizes that the amendment is intended to provide protection to party witnesses who may be subjected to the burden or inconvenience of being compelled to testify at distant trials. At the same time, the Department acknowledges the views of some litigants that, in appropriate circumstances, there could be situations in which a court might order a party's witness to travel longer distances than other witnesses to testify at trial for "good

cause." Ultimately, the Department has decided to remain neutral on this issue.

5. The Department has examined the proposed amendments to Rule 45(g) and Rule 37(b). The Department is concerned that the amendments inadvertently may be interpreted to permit simultaneous contempt jurisdiction in both the forum court and the compliance court. Proposed Rule 45(g) states that "the court for the district where compliance is required under Rule 45(c) – and also, after a motion is transferred, the issuing court" may hold a person in contempt. The words "and also" create that ambiguity, which we assume the Committee did not intend, possibly because it contemplates that there could be a re-transfer of the dispute. To alleviate due process concerns, the Committee should state in the Note more explicitly its understanding that the forum court and the compliance court will exercise their enforcement and contempt powers consistently with due process considerations and with due regard for the interests of the non-party.

We thank the Committee for this opportunity to share our views. If you have any further questions, or if there is anything the Department can do to assist the Committee in its important work, please do not hesitate to contact me.

Sincerely,

Tony West
Assistant Attorney General