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Don't be fooled when serving notice of nonparty (third party) subpoenas

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Given our proximity to April Fools' Day, I think it's fitting to discuss at least one distinction between federal and state practice that could fool an unwitting practitioner into committing sanctionable conduct — the differing requirements in state and federal practice regarding notice upon opposing counsel of the service of nonparty (or third party) subpoenas.

There are, of course, numerous differences in the procedures for disclosure under the CPLR and discovery under the Federal Rules of Civil Procedure. Many practitioners are familiar with the contrast in the somewhat open-ended disclosure process of our state courts and the more tightly controlled, scheduling order-driven discovery procedures in federal court.

Broader differences aside, one little known distinction centers around the procedures used to serve nonparty subpoenas and the methods for notifying opposing counsel of such service. Of course, the CPLR provides a mechanism for the service of a subpoena *duces tecum* upon a nonparty witness.

Just to keep us all on our toes, the complete procedure for proper service upon a nonparty and opposing counsel is derived from reference to several provisions within the CPLR. Section 3101(a)(4) sets the foundation for a nonparty subpoena by permitting discovery upon "any other person, upon notice stating the circumstances or reasons such disclosure is sought or required."

Section 3120(1) allows service upon a party "or on any other person a subpoena *duces tecum*."

The method for service of the subpoena itself is found in Section 2303(a), which provides the full compliment of service options, including substitute service. Service upon opposing counsel is governed by CPLR 3120(3), which states that "[t]he party issuing a subpoena *duces tecum* ... shall at the same time serve a copy of the subpoena upon all other parties."

Section 2303(a) requires this service to be effected so "it is received by such parties promptly after service on the witness and before the production of books, papers or other things."

Methods of service upon an attorney are dictated by CPLR 2103(b) and include service of the nonparty subpoena by mail.

Given the modern realities of subpoena service, many institutions now accept electronic service. It also is possible that an anxious practitioner could choose to hand deliver a subpoena to a nonparty. Meanwhile, notice to opposing counsel may be moving via snail-mail to its destination. It is possible, therefore, for an attorney to receive and review the fruits of a nonparty subpoena before opposing counsel has an opportunity to object to disclosure.

In comparison, requirements for the issuance of notice to counsel of nonparty subpoenas under the Federal Rules seem deceptively straight forward. Rule 45 provides for the use of a subpoena to compel production of documents or things [see FRCP 45(a)(1)(C)], but also requires that "[p]rior notice of any commanded production of documents and things ... shall be served on each party in the manner prescribed by Rule 5(b)," [FRCP 45(b)(1)]. Eerily reminiscent of the CPLR, Rule 5(b)(2)(b) allows for service of papers upon an attorney by mail.

Do not be fooled by similarities between state and federal rules. Rule 45(b)(1) specifically requires prior notice, and therein lies a crucial distinction.

Lest you think the term "prior" is without definition, the seemingly clear Federal Rules require reference to the accompanying Advisory Committee notes to reveal the provision's true intent: "The purpose of such notice is to afford other parties an opportunity to object to the production or inspection," [Advisory Committee note to 1991 Amendment, subdivision (b)].

In our district, "[t]he requirement of prior notice has been interpreted to require that notice be given prior to the

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issuance of the subpoena, not prior to its return date," *see Murphy v. Board of Educ. of Rochester City School Dist.*, 196 F.R.D. 220, 222-223 (WDNY 2000) (citing *Schweizer v. Mulvehill*, 93 FSupp2d 376, 411 [SDNY 2000]).

In *Murphy*, the failure of the plaintiff's attorney to provide prior notice of nonparty subpoena was deemed sanctionable. The facts of the case involved the service of numerous nonparty subpoenas and resulted in the disclosure of information to the plaintiff's counsel without notice of the existence of the pending nonparty subpoenas to defendants' counsel. Arguably, this is an extreme example; however, district courts in the Second Circuit continue to hold that the service of notice of a nonparty subpoena upon opposing counsel on the same day as service upon the nonparty of the subpoena itself will not satisfy the requirements of Rule 45, *see Fox Industries, Inc. v. Gurovich*, 2006 WL 2882580, at *11 (EDNY Oct. 6, 2006).

A notable and final distinction between federal and state practice can be found in examining the method of service upon the nonparty. The Federal Rules provide that service of a subpoena "shall be made by delivering a copy thereof to such person," [FRCP 45(b)(1)]. When interpreting this language, some district courts have held that only personal service of the nonparty subpoena is acceptable. In contrast, the CPLR generally provides the same myriad of service options available upon service of a summons [CPLR 2303(a)]. Substitute service of a nonparty subpoena, therefore, is acceptable under the CPLR.

While failure to notify opposing counsel of the service of a nonparty subpoena can amount to sanctionable conduct in state and federal litigation, ultimately the federal requirement of prior notice — versus the contemporaneous notice provision found in the CPLR — can surprise a practitioner accustomed to state practice. A practitioner seeking to avoid the expense or delay of unnecessary discovery motions will ensure that a nonparty subpoena is properly served. Thus, when engaging in discovery in federal court, practitioners must make certain that notice of a nonparty subpoena is served upon opposing counsel prior to service of the nonparty subpoena itself.

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