Searching for Procedural Clues

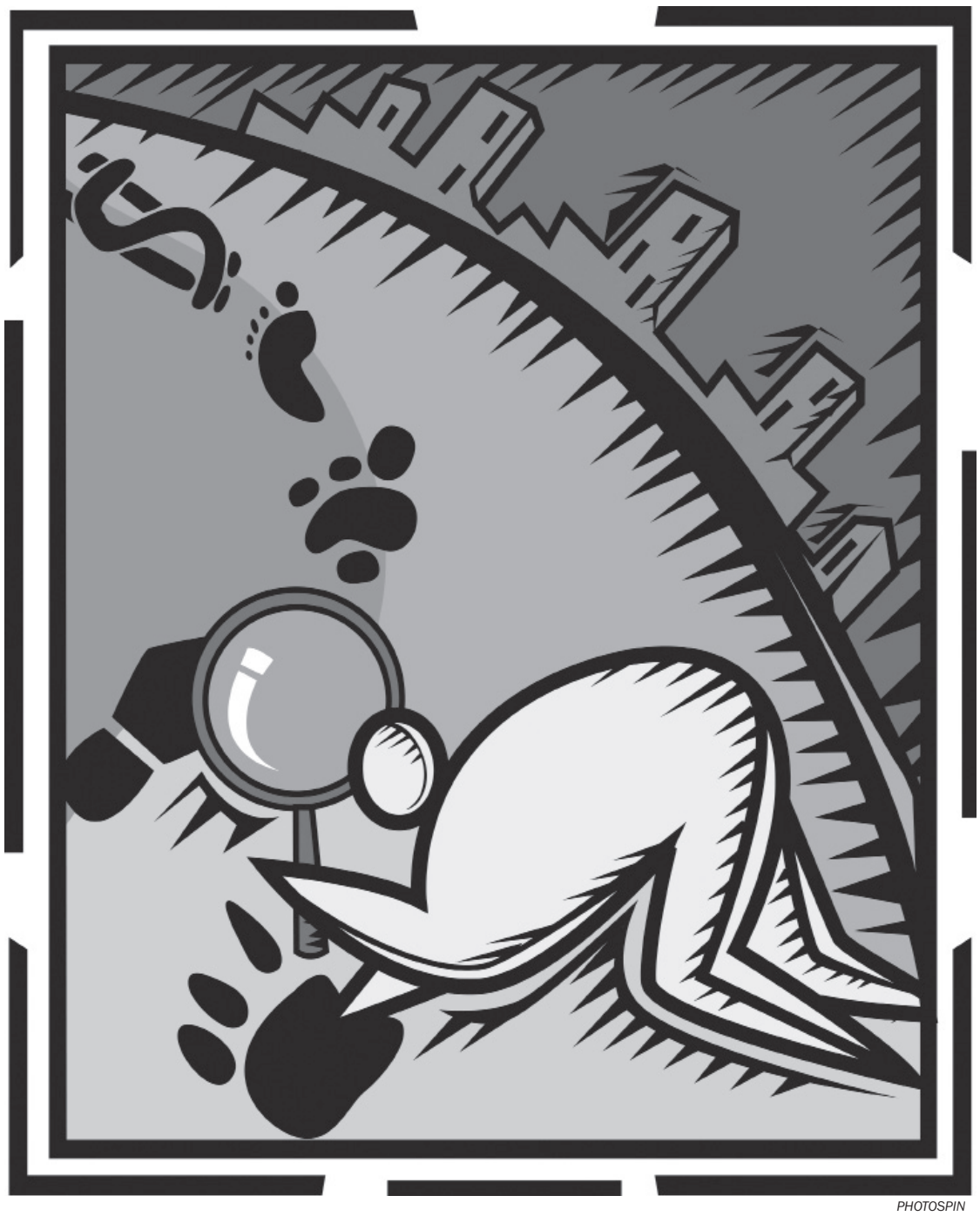
It may be unwritten, but there is a procedure for handling Northern District subpoenas related to extra-district actions

By Nathaniel Bruno

Any attorney more than two weeks out of law school has likely realized that, despite the intellectual calisthenics our educational institutions provide, any number of practical litigation skills must be learned by doing as opposed to reading. At some point in their careers, attorneys will hopefully discover that the Rutter Practice Guides are one excellent way to, ironically, read about how to do things. But a task will inevitably arise for which there is simply no local rule, or standing order, or Rutter Guide chapter explaining what must be done to accomplish the objective. Sometimes there is just no substitute for a little intuition, a few phone calls to the courthouse and some plain old trial and error. (No pun intended with the use of the word "trial," of course.)

Litigation

One such unwritten procedure involves how to enforce or quash a subpoena that is issued from the Northern District of California but relates to an action pending in another federal district. Generally speaking, if an action is pending in any other federal district (e.g., the Southern District of New York), and a party to that action wants to subpoena a third party located in the Northern District of California for documents and/or a deposition, Federal Rule of Civil Procedure 45 requires (with certain exceptions) that the subpoena must issue from and be served within the Northern District. So Bay Area lawyers often act as local counsel assisting their clients, other firms, or even affiliated offices of their own firms to handle such subpoenas.



PHOTOSPIN

Often the subpoenaed third party will comply with the subpoena or work out a compromise. But what happens when the subpoenaed third party wants to quash the subpoena or the subpoenaing party feels a motion to enforce is necessary? There is no published Federal Rule of Civil Procedure, local rule of the Northern District, or any other regulation explaining the exact procedural steps necessary to obtain an order from a Northern District judge either quashing or enforcing the subpoena.

If the underlying action were pending in the Northern District, it would be easy enough to file a motion before the assigned judge. But when the action is pending in another district, and the relevant subpoena was issued from this district, it is this local district under Federal Rule of Civil Procedure 45 that has jurisdiction over the subpoena even though there is no action pending here. The problem is that there simply is not a written procedure for figuring out how to get a judge from this district to exercise that jurisdiction, given the absence of a pending action within this district.

So what is the proper procedure? Of course, the best place to start with any subpoena-related dispute is by attempting to informally resolve the dispute with opposing counsel. But sometimes parties aren't able to find a middle ground, and the court will need to get involved. Based on a scouring of the local rules, numerous calls to the clerk's office and actual filings and hearings in the midst of real case work, there is at least one method demonstrated to be appropriate in the Northern District of California for quashing or enforcing a subpoena.

So what is the proper procedure? Of course, the best place to start with any subpoena-related dispute is by attempting to informally resolve the dispute with opposing counsel. But sometimes parties aren't able to find a middle ground, and the court will need to get involved.

First, the party seeking relief must file a miscellaneous action in the Northern District. Miscellaneous actions are vaguely referred to in General Order 44(K.), which deals with the Northern District general duty judge, but the procedure for bringing a miscellaneous action is not expounded. In practice, a motion to quash or enforce a subpoena may be filed in this district as a miscellaneous action in and of itself. Take as an example a petition for an order to show cause why the subpoenaed party should not be held in contempt for failure to comply with the subpoena. The party desiring to enforce its subpoena may prepare the petition with all supporting arguments and documentation, then file the petition by hand with the Northern District clerk in the same manner as if it were a complaint. The case number and any hearing dates requested may be left blank, and the document may be styled something similar to: "Miscellaneous Action: Petition For Order To Show Cause *Re* Contempt." It may also be helpful to include a note elsewhere on the caption page indicating the petition is being filed as a miscellaneous action that relates to action "XYZ" pending in another district. All other local requirements for preparing an appropriate petition or motion

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SUBPOENA

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should be followed.

When the miscellaneous action petition is filed by hand, the clerk will give it a new case number that includes the letters "mc" and will assign it to the general duty judge described in General Order 44(K.). In the Northern District of California, the district judges take turns sitting as general duty judge on a rotating basis. One of the general duty judge's responsibilities is to handle miscellaneous actions, so the miscellaneous action petition will be assigned to the district judge serving in that capacity at the time. The moving party should of course take care to serve the miscellaneous action petition and all supporting documents on all appropriate parties.

Once the sitting general duty judge has the miscellaneous action petition, he or she may, in practice, refer the petition to a magistrate judge given the discovery-related nature of the issues. But in any event, after filing, the parties will have a specific district judge or magistrate judge assigned to resolve the issues regarding the relevant subpoena.

From that point forward, it is the standing orders and any specific orders of the assigned judge that will dictate the procedure for resolving the petition or motion. To complete the example of a petition for an order to show cause, the judge assigned to the miscellaneous action may very well issue an order setting a hearing date for deciding whether the subpoenaed party should be held in contempt for failing to comply, and setting a prior date by which the subpoenaed party may file papers explaining its position and showing cause why it should not be held in contempt. The judge would then consider the filings and any oral arguments at the hearing, and issue an order.

Of course, the exact procedure may vary by judge, and it is important to follow the specific orders and instructions provided by the assigned judge. But the method set forth above describes at least one way of making sure to get the petition or motion into the Northern District of California's case system and actually assigned to a judge so that relief can be granted.

So now there is at least one written explanation of a way to obtain court relief regarding subpoenas issued in the Northern District of California that relate to extra-district cases. Sorry if it ruins the fun of sleuthing out the details regarding the filing procedures for the ever-elusive miscellaneous action. But there are surely more unwritten rules just waiting to be discovered.

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GUIDELINES

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A vague date played the key role in Justice's eventually losing the Stolt case. Justice argued that Stolt continued its antitrust activities for months past the date when the company said it had stopped; the court ruled that it didn't matter because amnesty was granted up to the date of the amnesty letter. Gidley says the policy rewording is the antitrust division's attempt to shift the timing burden of proof to the amnesty applicant.

In Gidley's opinion, the new language could be counterproductive for the government. It could put "more onus on corporations than they may be able to achieve, even in the exercise of the utmost of good faith," he says.

Justice's Hammond, however, sees it differently. The new documents, he says, are meant to be helpful to companies by providing "applicants with additional guidance and transparency in addressing issues relating to the implementation of the division's voluntary disclosure programs."

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