11-CV-001

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Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
One Columbus Circle, NE
Washington, D.C. 20544

Re: Federal Rule of Civil Procedure 45

Dear Mr. McCabe:

As part of our Federal Civil Litigation course, our class surveyed the Discovery Subcommittee's proposal to amend Federal Rule of Civil Procedure 45 and we would like to offer our comments. Briefly, we support addressing noncompliance with regard to the notice provision of Rule 45(b)(1), but urge the Rules Committee to further explore the reasons for noncompliance before altering the provision. We also support the Rules Committee's proposed amendment to Rule 45 to reflect changes to 45(c)(2)(B)(iii) and 45(c)(3)(D). With respect to the 100-mile limitation, we support amending the provision to account for the ease of transportation in modern society. Finally, we support the decision not to simplify and shorten Rule 45 by moving the provisions related to subpoenas for documents and electronically stored information to Rules 26-37.

We appreciate your consideration.

Sincerely,

Jody Smith
Tyler Laughinghouse
Jon Burtard
Sabina Thaler

Enclosure

Comment on Proposed Revision of FRCP 45

I. Notice Requirements

A. Background

The notice provision in Rule 45 of the Federal Rules of Civil Procedure[1] requires the noticing party to provide each party with notice of subpoenas that "command[ ] the production of documents, electronically stored information, or tangible things or the inspection of premises before trial." During a Discovery Subcommittee mini-conference on October 4th, 2010, a number of attorneys representing both plaintiffs and defendants expressed concern that attorneys were not adhering to the Rule 45 notice requirements.[2] The concerned attorneys confirmed that "failure to give the required notice is a serious problem."[3] To cure this problem, the Subcommittee has suggested moving the notice provision from its current location in Subsection (b)(1) of Rule 45 to a new Subsection (a)(4) of Rule 45.[4]

The notice provision in Rule 45(b)(1) was initially added as part of the 1991 amendments to address concerns that were raised when, for the first time, subpoenas were authorized to be used to obtain discovery from a nonparty.[5] By allowing the use of subpoenas to obtain discovery materials from a nonparty, this new discovery provision did not require the notice that had previously been required when parties were forced to rely on depositions to obtain such information.[6] To address this concern, the Subcommittee added a "requirement to Rule 45(b)(1) that prior notice of the service of a 'document only' subpoena be given to the other parties."[7] The purpose of this provision was to "afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things."[8] In 2007, Rule 45(b)(1) was again restyled to specify that the noticing party must provide notice to the other parties *before* serving the subpoena on the witness.[9]

As discussed above, the Subcommittee has recommended relocating the notice provision from Subsection (b)(1) to a new Subsection (a)(4) to increase its visibility.[10] Additionally, the proposed Rule 45(a)(4) requires the notice include a copy of the subpoena.[11] This added requirement is intended to allow parties other than the noticing party to monitor the discovery such that non-noticing parties may pursue documents produced.

B. Discussion

Although we agree that requiring notice is important because it provides for greater transparency in the justice system, we are concerned that merely moving the notice provision from Subsection (b)(1) of Rule 45 to a new Subsection (a)(4) of Rule 45 will do little to cure this problem. For example, the

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1 FED. R. CIV. P. 45(b)(1) ("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.").
2 Materials for November 2010 Advisory Committee on Civil Rules Meeting, *Rule 45 Issues*, 88 (Nov. 15–16, 2010).
3 *Id.* at 93.
4 *Id.*
5 *Id.* at 96.
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.* at 97.
11 *Id.*

Subcommittee did not address whether the attorneys who are apparently failing to provide notice are doing so because they do not *know* they are required to provide such notice. In other words, moving the provision to increase visibility will only cure the problem if the problem is that parties do not know they are required to provide notice. If, however, parties know they are required to provide notice but are simply unwilling to do so, moving the provision will probably not alter the willingness of these deviant parties to provide notice. Furthermore, the revisions to the notice provision do not include sanctions for parties who fail to provide such notice. The Subcommittee addressed this omission in a bracketed paragraph, noting that "It is expected that courts will deal appropriately with such problems should they arise . . . Courts have ample remedies to deal with such problems should they arise."[12] Yet, conceivably if attorneys are continuing to complain about the failure of other parties to provide notice, courts must not be effectively sanctioning these deviant attorneys, or the non-noticing parties are not complaining to the court. In short, we are concerned that relying entirely on increasing the visibility of the notice provision will prove an ineffective remedy in the event that parties know about the requirement but are unwilling or unmotivated to adhere.

C. Recommendations

We agree that the failure of litigants to provide notice as required by Rule 45 is a significant issue that deserves the attention of the Rules Committee, but we believe that the Subcommittee should further explore why litigants are not adhering to this provision. If litigants are truly unaware of this requirement, then perhaps moving the provision to a new subsection at the beginning of Rule 45 would serve as an effective remedy. However, if the issue is not knowledge of the requirement, but an unwillingness to comply, moving the provision will probably not motivate litigants to change their behavior. Or, perhaps litigants are not complying because the sanctions for noncompliance are ineffective. We believe that without knowing why litigants are not adhering to the notice requirement, the Rules Committee should not modify the location of the provision. Once the Subcommittee thoroughly explores the causes of noncompliance, we support addressing the notice provision through a remedy that is keyed to the reason for the noncompliance.

II. Issuing Court's Authority to Transfer a Subpoena Motion

Brief Summary of the Proposed Change

The Rules Committee is proposing to amend Rule 45(c), which relates to the enforcement of a subpoena against a non-party to the litigation. Specifically, Rule 45(c) covers both motions by the non-party to quash the subpoena as well as a party's motion to compel enforcement of the subpoena against the non-party.

To subpoena a nonparty, the litigant must go to a court that has jurisdiction over the non-party; this is often a different court in a different part of the country. Then, if the litigant or the non-party challenges the subpoena, the issuing court would hear the challenge. In most instances, local resolution of the challenge is preferred, such as determining the burden of compliance on the non-party. However, in certain circumstances, resolving a challenge to the subpoena implicates issues that weigh heavily on the merits of the underlying litigation.

As a result, the Rules Committee is seeking to change Rule 45 to the allow courts to "transfer" an enforcement dispute to another court. The Rules Committee is seeking to amend the rules to allow the subpoena-issuing court to transfer the dispute to the court that is ruling on the merits of the litigation. In

12 *Id.* at 97.

other words, if a dispute arises with regard to enforcing the subpoena that will also affect the merits of the case, the Rules Committee wants to provide the subpoena-issuing court with the ability to transfer the dispute to the Court that is to rule on the merits.

Specifically, The Rules Committee has suggested amending two sections of Rule 45(c).

1. First, the suggested amendment would add subsection (iii) to 45(c)(2)(B)(iii), which relates to objections to a command to produce materials or permit inspection. Subsection (iii) provides that "if the action is pending in a court different from the issuing court, the issuing court may, in the interests of justice, transfer the motion to the court in which the action is pending."

2. The second amendment would be to add subsection D to 45(c)(3)(D), which relates to motions to quash or modify the subpoena. Subsection D, entitled *Transferring Motion to Court in Which Action Pending*, provides that "if the action is pending in a court different from the issuing court, the issuing court may, in the interests of justice, transfer the motion to the court in which the action is pending."

Evaluation of the Proposal

The Rules Committee should amend Rule 45 to reflect the proposed changes to 45(c)(2)(B)(iii) and 45(c)(3)(D). While there are some issues that the Rules Committee should research further, such as the effect of *pro hac vice* and potential jurisdictional issues of the non-issuing court enforcing the subpoena, the proposed rules strike an appropriate balance between safeguarding burdensome discovery requests on non-parties and ensuring efficient and just resolution on the merits of the underlying suit.

First, the issuing-court will likely find the rule easy to interpret and apply. The proposed amendments will allow courts to use discretion in determining the appropriate balance, as evidenced by "in the interests of justice" language. While this phrase is broad in its language, the phrase will not present much difficulty to the issuing-court, as similar language is found in other rules.[13] As a result, courts are familiar with this language and have already developed an analytic framework to evaluate similar requests in other contexts, which will ease the courts' application in the context of Rule 45.

Second, the effect of the rule on non-parties is likely to be slight. While the provision entrusts courts with discretion, the language of the provision tempers the scope of this discretion. Specifically, the phrase, "in there interests of justice," encompasses a presumption that the discovery dispute should ordinarily be resolved by the issuing-court. In other words, the provision reflects the commonplace assumption that most non-parties want their motion to be resolved close to home. Moreover, the language of the provision signals that the party seeking transfer will carry the burden to prove that transfer is "in the interests of justice." Given this presumptive language and accompanying burden, it is unlikely that the transfer provision will be used with any great frequency. However, when the unique circumstance presents itself, the trial court will have the sound discretion to submit the petition to the court presiding over the merits in order to ensure that the underlying claim is not negatively affected.[14]

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13 *But see generally* COLLOQUIUM, *What Does It Mean to Practice Law "In the Interests of Justice" in the Twenty-First Century*, 70 FORDHAM L. REV. 1775 (2002).

14 Moreover, the practical effect on requiring the non-party to argue its motion to quash in the non-issuing court appears nominal. Given modern technologies, most non-parties will be required to physically appear in the non-issuing court. It is likely that the parties will brief the issue in the issuing-court, which will transfer all documents to the non-issuing court; oral briefing in the non-issuing court is likely unnecessary in most cases.

Third, the interests of the non-party are adequately protected. While the use of the transfer provisions is likely to be infrequent, evaluation of the proposal should focus on the circumstances in which the transfer provision is invoked. First, as already noted, the provision maintains a presumption against transfer; thus, the moving party will maintain the burden of proof. However, more importantly, the determination of whether transfer is appropriate is conducted by the issuing-court. This local court will already be in a position to review the burdens placed on the non-party. As a result, if transferring the motion itself will present an insurmountable burden for the non-party, then the issuing court will likely deny the transfer motion. In other words, the issuing-court will be in the best position to evaluate the "interests of justice," by adequately weighing the burden on non-parties to transfer the motion against the countervailing interests to transfer the motion to the court presiding over the merits. As a result, the non-party has a forum that is prepared to evaluate the total effect of the motion upon both parties.

Fourth, the provision will effectuate the goals of efficient and just resolution of cases on the merits.[15] While the Rules Committee should be cognizant of the effect of the Rules on non-parties, the Rules should also contemplate the importance of information held by non-parties, which is sometimes essential to resolution of the underlying dispute. While this concept is currently encapsulated in Rule 45, the proposed provisions increase the realization of these goals. Specifically, there are instances when the court issuing a subpoena is inadequately situated to rule on a motion to quash such request. As well, there are instances in which the information held by the non-party is so critical to resolution of the underlying merits and the burdens on the non-party are substantial. As a result, there needs to be a mechanism to adequately balance these competing interests. Because the goal of the Rules is ultimately concerned with the resolution on the merits, a court presiding over the merits is in a better position to determine the ultimate effect on the case. While burden to non-parties are a concern for the Rules, there are certain instances when the merits of the case demand the production of such information. As a result, the court that is in the best position to analyze the effects of the motion on the merits should be vested with that discretion.

III. Attendance of Party Witness to Testify at a Hearing or Trial

A. Background

1. 1991 Amendment[16]

In 1991, Rule 45 was amended to clarify the text of the rule. Subdivision (b)(2) included a cross-reference to Rule 45(c)(3)(A)(ii), and the Advisory Committee Notes stated, “Paragraph (b)(2) retains language formerly set forth in subdivision (e) and extends its application to subpoenas for depositions or production.”[17] In addition, the Advisory Committee Notes for Rule 45(c)(3)(A) stated that the “former provisions with respect to the limits of mandatory travel that are set forth in the former paragraphs (d)(2) and (e)(1)” remained unchanged.[18] The only substantive change under this subdivision permitted a court

15 The author does note that this provision might not be the most effective mechanism to resolve the dispute. For example, the party seeking transfer still must argue in the issuing-court for the transfer motion. While this might present a burden to the moving party, it is needed to preserve the protections afforded the non-party. While the burden on arguing the motion in either court is undoubtedly lessened by modern technologies and communications, the issuing-court is in a better position to evaluate the potential burdens on the non-party, making the ultimate determination of whether even transferring the motion would present an insurmountable burden. Thus, the moving party should be required to seek its motion to transfer in this court.

16 FRCP Rule 45, Advisory Committee’s Note (1991).

17 *Id.*

18 *Id.*

to compel a witness to attend trial from any place in the state, irrespective of local state law, provided the witness was not unduly burdened and reasonably compensated.[19]

2. *In re Vioxx* Products Liability Litigation[20]

Vioxx was the bellwether trial in a multi-district proceeding on civil claims for product liability. Plaintiff subpoenaed defendant's corporate officer, Mr. Anstice, a resident of Pennsylvania, to appear and testify at trial in the Eastern District of Louisiana. The district court held that Rule 45(c)(3)(A)(ii) expanded the court's subpoena power under Rule 45(b)(2) to compel the attendance of a "person not a party or officer of the party" at trial outside of the 100-mile limit. The district court based its reasoning on the "plain, unambiguous language" of the rule. From the court's perspective, Rule 45(b)(2) is "subject to" Rule 45(c)(3)(A)(ii) which expressly limits motions to quash subpoenas requiring attendance in excess of 100 miles to non-parties, not parties or party-officers.[21] Given the rule's clear meaning, the court declined to take into account the Advisory Committee's Notes to the 1991 Amendment stating the substance of the rule remained unchanged.

Although the court expressly stated that its holding was based solely on the rule's plain meaning, it chose to further expound upon the history and purpose of the 100-mile rule. The court believed that its holding was "bolstered by the realities of modern life and multi-district litigation"[22] which should no longer be restrained by "a 100 mile colonial leash."[23] The court posited that the initial policy reasons for the 100 mile limit were that it was: (1) impossible to travel great distances in 1793; (2) harassing and economically burdensome to travel further until at least 1964; and (3) required to satisfy notions of fairness[24] The court, with exception to harassment, rebutted each of the policy reasons. From the court's perspective, impossibility was no longer relevant because of modern travel, the economic burdens could be negated through fee-shifting, and notions of fairness were "obsolete" because without expanding the mileage a jury must rely on live testimony's paltry proxy—depositions.

3. *Johnson v. Big Lots Stores*[25]

Big Lots was a collective action brought under the Fair Labor Standards Act, alleging misclassification for non-exempt employees and failure to pay overtime wages. The defendant subpoenaed ten plaintiffs to attend trial in New Orleans. All but one of these plaintiffs resided outside of Louisiana, so plaintiffs moved to quash nine of the subpoenas on the ground that the court's subpoena power did not extend outside of Louisiana and more than 100 miles from New Orleans pursuant to Rule 45(b)(2). Defendant cited *In re Vioxx* and argued that Rule 45(c)(3)(A)(ii) expanded the geographic service limitations in subdivision (b)(2) for parties and party officers.

The district court began by noting that the *Vioxx* interpretation is the majority approach taken in the district courts, but that some districts had declined to follow *Vioxx* and no circuit court had addressed the issue.[26] Moreover, both the majority and minority based their reasoning on the plain and unambiguous text of the rule. The court declined to follow the majority approach because it thought the minority applied the ordinary interpretation for statutory construction. The court reasoned that "[t]he phrase 'subject to' ordinarily operates to limit a power or right, not expand it," and without an affirmative

19 *Id.*
20 428 F.Supp.2d 664 (E.D. La. 2006)
21 *Id.* at 667.
22 *Id.* at 667.
23 *Id.* at 668.
24 *Id.* at 668.
25 251 F.R.D. 213 (E.D. La. 2008).
26 *Id.* at 215–16.

and explicit statement to alter the ordinary construction, the court would not interpret the phrase as expanding the geographic limit.[27] Therefore, only a subpoena properly served in accordance with Rule 45(b)(2) has force.[28]

In dicta, the court discussed *Vioxx*'s and the scholarly commentator's belief that the 100-mile limit is archaic given modern litigation and travel.[29] Although the court hinted that there may be "compelling reasons" for nationwide service or expanding the geographical limitation, the court was bound to apply the rule as written.[30]

4. Discovery Subcommittee Proposals

a) Return to Pre-Vioxx

Based on discussions during the October 2009 and Atlanta meetings, the Subcommittee proposed an amendment redacting the "subject to" provision in Rule 45(b)(2) and adding a cross-reference in Rule (c)(3)(A) that requires a court to quash or modify a subpoena "properly served under Rule 45(b)(2)" if it satisfies one of the four subdivisions. According to the Subcommittee, the proposal will restore the rule's original meaning and clarify that in order to effectuate proper service the geographic limitation must be satisfied.

b) "Sketch" Proposal to Provide Discretionary Power to Order Live Testimony

During the Atlanta meeting, the Subcommittee also discussed whether Rule 45 should be amended to give judges discretion to order live testimony by party witnesses. Thereafter, at the Dallas mini-conference, participants supported a revision that would give judges limited discretion to compel live testimony by party witnesses, and the Subcommittee prepared a "rough initial draft" based on those comments.

The draft allows a judge to compel live testimony at a trial or hearing under the following conditions:

1. A party can show "substantial need" and would be subject to undue hardship without the other party's testimony;
2. Alternative means of testimony are inadequate;
3. The party compelled to attend will be reasonably compensated; and
4. The court may sanction a party under Rule 37(b) for failure to comply with the court's order.

The Subcommittee applied a "substantial need" requirement, but suggested that "good cause" may be sufficient to limit the court's discretionary power. Some participants suggested expanding the subpoena power to include not only a party and a party's officers, but also directors, agents, employees, and persons subject to the legal control of a party. This suggestion was based on the reality that the people with actual knowledge relevant to the suit are not typically the officers or directors, but rather the employees of the organization. In lieu of permitting a party to subpoena a specific party-employee, the Subcommittee suggested employing Rule 30(b)(6)'s party designation, but it noted that a specific employee's testimony may be necessary and the opposing party may not always designate the best person.

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27 *Id.* at 216–17.

28 The court suggested that form may supersede function by positing the procedural gymnastics a party could employ to compel the attendance of a party witness at trial. For example, the court suggested that if the defendant had served the plaintiffs when they attended depositions in New Orleans, then the court would have denied plaintiffs' motion to quash. *Id.* at 219.

29 *Id.* at 221–22.

30 *Id.* at 222 (in addition to modern litigation and travel, the court reiterated the *Vioxx* Court's belief that live testimony is typically preferable to deposition testimony).

B. Discussion

1. Continued Validity 100-Mile Rule

Both *Vioxx* and *Big Lots* suggest the policy reasons justifying the 100-mile rule may no longer be relevant. The courts noted that the concept of a 100-mile rule had been in existence since the Judiciary Act of 1793 and that this arbitrary figure was chosen on the belief that traveling 100 miles did not cause witnesses to incur great expenses. Rule 45 seems to be premised on the same purpose given that "undue burden" is listed as a separate and distinct reason to modify or quash a subpoena,[31] and that a trial subpoena requiring a non-party to travel greater than 100 miles, even if within the state, may be quashed if the witness would "incur substantial expense."[32]

A layman could reasonably deduce that traveling in the 1790s (e.g., via horse, without extensive maps, lodging facilities, etc.) is vastly different than today's traveling conditions. Although the speed a horse can travel depends on various factors (e.g., breed, conditions of terrain, weather, etc.), the average speed a horse can travel in one day is 20–25 miles.[33] Therefore, before the advent of trains, motorcars, and airplanes, Congress did not find 4 to 5 days of travel to be economically burdensome on witnesses. Needless to say, traveling 100 miles by car can be achieved in roughly two hours (less than two percent of the time taken on horseback). If as the saying goes, "time is money," it is difficult to understand how increasing the mileage limitation would impose burdens on a witness beyond those imposed by the 100-mile rule in 1789. For example, requiring a witness to travel from Washington, D.C., to the Federal District Court of California in Los Angeles is approximately 2652 miles. Traveling by car at sixty miles per hour, including ten hours of rest time per day, would take approximately three days, and, by airplane would take approximately eight hours, both of which are still less than the five days it took by horseback in 1789.

Some may argue that witnesses incur more expenses traveling via car or airplane than witnesses incurred via horseback because of the cost of gas, lodging, plane tickets, food, etc. However, under the current rule, witnesses are compensated for attendance, mileage, "common carrier" costs, and given a "subsistence allowance" for food and lodging when attendance requires overnight stay.[34] Therefore, increasing the mileage limitation would not result in witnesses incurring greater expenses since there are statutory provisions providing adequate compensation. Finally, a witness can move to quash or modify a subpoena, regardless of the 100-mile limit, if the subpoena subjects him or her to an undue burden.

2. Who Should Be Subject to Subpoena

Some participants at the Dallas mini-conference suggested expanding "party" to include managers, agents, and employees or persons under the legal control of a party. We believe this may result in increased litigation and expense. First, a party and that party employee's interests are not always aligned. In this circumstance, subjecting the employer to potential sanctions for an employee's refusal to comply with a subpoena would be unfair. In addition, denying these persons the protections granted to non-parties could also be unfair.[35] Second, courts may spend a great deal of time hearing motions challenging whether a person is a party's manager, agent, employee, or someone under the legal control of a party. Finally, as the Subcommittee noted in its comments on the "sketch proposal," judges are quite

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31 FRCP 45(c)(3)(A)(iv).

32 FRCP Rule 45(c)(3)(B)(iii).

33 JOSÉE HERMSEN, THE HORSE ENCYCLOPEDIA (Toronto Firefly Books 1998).

34 *See* 28 U.S.C.A. §§ 1821 & 1920 and 5 U.S.C.A. §§ 5702 and 5704.

35 For example, a party-employee would no longer be able to quash a subpoena under Rule 45(c)(3)(A)(ii) if he or she were properly served under Rule 45(b)(2)(C) in a state that permitted statewide service.

adept at putting pressure on parties to produce witnesses, so this may be an issue in theory but not in practice.

3. Alternatives to Live Testimony

The *Vioxx* and *Big Lots* courts, as well as participants at the Dallas mini-conference, commented that live testimony is preferable deposition testimony, irrespective of whether the deposition is videotaped or written. This reaction is probably due to the perception that live testimony: 1) enables counsel to construct a narrative for the jury; 2) allows the jury to assess the credibility and reliability of a witness; and 3) decreases the likelihood of juror inattention due to fatigue. Some participants at the Dallas mini-conference posited that "Generation X jurors are accustomed to material on video"[36] and that, in criminal trials, there "is a move away from live testimony toward the use of videoconferencing or other alternatives."[37] These assessments may not be factually supported, and appear to be oversimplifications and generalizations of the issue. For example, how likely is it that Generation X is viewing videos or using streaming web conferencing, in order to assess the credibility of a person? In addition, the criminal courts' use of videoconferencing is typically limited to cases involving the testimony of child victims in sexual assault cases. We believe the Subcommittee needs to research the differing effects, if any, between live testimony, deposition testimony (both written and videotaped), and testimony by remote means.

4. Substantial Need vs. Good Cause

Because many participants were amenable to providing judicial discretion, but also expressed reservations about giving judges too much discretion, we believe that the Committee should require the serving party to show a substantial need. A substantial need requirement will reduce the likelihood that the noticing party is using the subpoena power for litigation gamesmanship. We do not believe the text of the rule needs to enumerate the factors a judge should consider in making this determination.

5. Reasonable Compensation

If a revision grants the court authority to compel the attendance in excess of 100 miles, then the court should also require the serving party to compensate the witness for his or her reasonable expenses. In assessing the expenses, the compensation should include both what is provided by statute and what is needed based on the witness's circumstances.

C. Recommendations

Although we agree that the *Vioxx* ruling is not supported by the text of Rule 45, we do not believe the Committee should amend the rule to clarify and reinstate the 100-mile limit. The simplest and best approach is to increase the mileage limitation. This would address not only the archaic nature of the 100 mile rule, but also the concerns some participants had about granting judicial discretion beyond an express limit. In addition, we believe that increasing the mileage limit could resolve, or at least alleviate, the "three-ring circus" problem.[38] In the alternative, we have some suggestions about possible revisions to the "sketch proposal."

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36 *Advisory Committee on Civil Rules* at 121 (Washington, D.C., Nov. 15-16, 2010)

37 *Id.* at 119.

38 Discussed *supra* Section II: Issuing Court's Authority to Transfer a Subpoena Motion.

1. Increase Mileage Limitation from 100 to 500 Miles

We believe the Committee should consider increasing the mile limitation from 100 to 500 miles to reflect the advancements in modern travel. It is inevitable that whatever figure the Committee chooses to use will necessarily be arbitrary, but there are limitations that seem more reasonable than others (e.g. 500 miles versus nationwide). We chose 500 miles because this figure would require approximately 8 hours of travel if driving an automobile traveling 60 mph, or 1.5 hours by plane[39]. Because some people are averse to flying, we wanted to limit the mileage to a figure what would be comparable to one day's travel time.[40] Given that prior to the 1930s, the 100 mile rule probably required witnesses to spend more than one day traveling, we believe it would not be economically burdensome to require a witness to expend, at most, one day traveling. As previously stated, the witness will be compensated for most of the fees incurred pursuant to statutes, and should the witness be subject to undue burden he or she may move to quash the subpoena.

To reduce the likelihood that the statutory provisions are not adequate compensation for non-party witnesses, the Committee could revise Rule 45(c)(3)(B)(iii). For example, this subsection could be altered as follows:

> (iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles ~~to attend trial~~.

By making this small revision, it will: 1) reduce the likelihood that the noticing party is trying to impose an undue burden or substantial expense on a non-party witness; 2) ensure the noticing party has a substantial need for the witnesses' testimony; and 3) provide non-party witness reasonable compensation for expenses the statutes may fail to address.[41] For example, a non-party witness is subpoenaed to testify at trial at 2:00 p.m., at a courthouse located 250 miles from the witness's home, requiring approximately 4 hours of travel time. If the witness testifies on-time and is released after one hour, then the witness will not arrive home until after 7:00 p.m. In addition, this witness is an impoverished single parent, who usually arrives home from work at 5:10 p.m. to relieve the babysitter. Thus, he or she must incur an extra two hours of childcare costs that the witness cannot afford. Under this fact pattern, a court may have been inclined to quash the subpoena, even if the testimony was substantially needed by the serving party, because it imposed an undue burden. However, if the court can resolve the matter by ordering the serving party compensate the witness for the incurred childcare costs, then the substantial expense and undue burden issues are moot.

We do not believe increasing the mileage limit to 500 would require Rule 45(c)(3)(B)(iii) to be extended to either parties or party officers, because statutory compensation is adequate for those with a vested interest in the litigation. The current rule is based on the same principle—limiting motions to quash or modify a subpoena that would result in incurring substantial expense to non-parties, and not recognizing this as a ground for parties even though parties could incur substantial expenses by being required to travel from anywhere within the state to attend trial.[42]

Finally, if the Committee does expand the mileage limitation in Rule 45, it may also be prudent to revise the unavailability provision in Rule 32(a)(4)(A) to correspond with the new mileage.

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39 This example flight calculation is based on a direct flight from Sacramento, CA to San Diego, CA

40 A witness may also choose to travel by train that would result in a travel time comparable to or less than that of an automobile.

41 FRCP Rule 45(c)(3)(C)

42 For example, under the current rule, if a party, a resident of Redding, California, was served within 100 miles of the trial court located in San Diego, the party would be required to travel San Diego despite the substantial expense incurred in traveling over 650 miles.

2. Provide Discretionary Power to Compel Attendance In Excess of 100 Miles

a) Suggested Proposal

Rule 45. Subpoena

* * *

(b) Service.

* * *

(2) ***Service in the United States.*** ~~Subject to Rule 45(c)(3)(A)(ii), a~~ A subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; ~~or~~

(D) that the court authorizes on motion and for good cause, if a federal statute so provides~~.~~ or

(E) subject to Rule 45(c)(3)(C), that the court authorizes on motion.

* * *

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) without leave pursuant to Rule 45(b)(2)(E), requires a person ~~who is neither a party nor a party's officer~~ to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person~~—~~except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

* * *

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(A)(ii) and Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met by using the alternative of a written or audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a) without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

b) Discussion

We believe that requiring a serving party to seek a court order prior to serving a subpoena will reduce a serving party's ability to use this provision for litigation gamesmanship because it will subject them to sanctions under both Rule 11 and Rule 45(c)(1). Although some judges did not want serving parties to seek approval prior to service, we believe that placing the motion requirement in the Rule 45(b)(2) negates the procedural gymnastics and improper service mentioned by the court in *Big Lots*. In addition, it reduces the likelihood courts will continue to follow the rationale expressed in *Vioxx* because the court will now have the discretion to abrogate the archaic 100 mile rule.

Although the Subcommittee's "sketch proposal" may have resolved the issue with respect to court's following *Vioxx*, it did not address the proper service and the 100 mile limit provisions that the *Big Lots* court relied upon to quash the subpoena. Under the "sketch proposal" the court "may" issue an order in excess of 100 miles, however, a party not properly served under Rule 45(b)(2) would be still be subject to Rule 45(c)(3)(A)'s requirement that "the issuing court must quash or modify a subpoena" (emphasis added) not properly served.[43] Because the "sketch proposal" does not address how a party is supposed to seek an order under subsection (4) of the "sketch proposal," the *Big Lot* court's reasoning that improper service requires a court to quash a subpoena would continue to govern. Furthermore, we believe that our proposal to revise Rule 45(c)(3)(A)(ii) may negate the "three-ring circus" by avoiding the transfer issue altogether.[44]

We do not suggest extending Rule 45(c)(3)(B)(iii) to a party incurring a substantial expense because this is not an adequate ground for moving to quash or modify a subpoena for those with a vested interest in the litigation.

As previously stated, we believe the noticing party should bear the burden of showing "substantial need" as opposed to "good cause" because this a higher threshold and limits the court's discretion. A higher burden of proof will reduce the likelihood a party is using the subpoena for nefarious litigation tactics. Because some of the participants expressed concern about giving the court discretionary power, a "substantial need" requirement should provide a sufficient limitation.

A witness required to travel in excess of 100 miles should be reasonably compensated for his or her travel expenses. We believe the Advisory Committee's Notes should expressly state that the court should take into consideration not only what is provided by statute, but also what is needed based on the witness's circumstances.

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43 See Wright and Miller, 9A *Federal Practice* § 2462 at 476 (explaining function of Rule 45(c)(3)(A)(ii)).

44 Discussed *supra* Section II: Issuing Court's Authority to Transfer a Subpoena Motion.

IV. Simplifying and Shortening Rule 45

We support the decision not to simplify and shorten Rule 45 by moving the provisions related to subpoenas for documents and electronically stored information to Rules 26-37. While such an approach would shorten Rule 45 somewhat, it would not appreciably simplify Rule 45. Indeed, it might make Rule 45 more complex. Scattering the relevant provisions throughout the Rules would, if anything, make them less user-friendly.

We also support the decision not to shorten or simplify the rule by removing detail, adding cross-references, and relying more on judicial discretion. Any such change would very likely be interpreted as a substantive change. Such an interpretation would be correct. Removing specific mandatory provisions and replacing them with discretionary judicial choice is a substantive change, because outcomes that are now mandated would no longer be so.

Not only would this amendment work a substantive change, it would do so in a way that would actually increase complexity. It is true that removing provisions would make understanding the meaning of the text of the rule a simpler matter. In that sense such an amendment would indeed simplify the rule. Still, it is not only the meaning of the text of the rule that is important to those that are subject to the rule. It is more important for them to be able to understand the effects of the rule; that is, they must now how the rule is implemented in practice. Removing detailed provisions and relying discretion would make it more difficult to predict what the courts will do. Therefore, removing detail will make for a rule that is less complex in form and more complex in substance.

There is no obvious flaw with the "three-ring circus" approach to simplifying and shortening Rule 45. The "three-ring circus" provisions do appear to be a source of complexity, and the proposal for replacing them with nation-wide service and a restriction on the place of performance does make for a simpler rule.

While this rule change may not have any obvious negative consequences, we are not certain that there is sufficient justification for changing the rule at all. The notes from the November 2010 Advisory Committee Meeting on Civil rules indicate that most attorneys that are familiar with Rule 45 do not find that its complexity makes it difficult to use. Those notes also indicate that the rules are incomprehensible for non-lawyers that are served with subpoenas. It appears then that the purpose of the simplification effort is to make the rule more accessible to the non-lawyer. The notes indicate that an individual served with a subpoena is likely to enlist the services of an attorney, or at least make some contact with one. To the extent that individuals served with subpoenas contact attorneys regarding the subpoena, it is unimportant whether the non-lawyer can comprehend Rule 45 so long as his legal counsel can. Presumably, an individual that is served with a subpoena is less likely to contact an attorney regarding the matter if the rules surrounding the subpoena appear to be easily understandable. Therefore, a less complicated rule will have the effect of discouraging subpoenaed individuals from contacting legal counsel. We think that this might not be a good thing. Individuals that receive subpoenas probably should seek legal assistance. Although the affect that a simpler rule has on the rate at which subpoenaed individuals seek legal assistance might be slight, so is the supposed benefit derived from a simpler rule—increased simplicity for the sake of non-lawyers. In light of the uncertain consequences of amending the rule, the marginal benefit derived from simplification does not justify amendment.

The prospect of the marginal benefits of simplification also appear to be an insufficient basis for removing the mandatory quash provision now in 45(c)(3)(ii). It appears from the draft proposal that an order to quash a subpoena would no longer be mandatory. Such orders might still be granted under the draft proposal if compliance would subject the individual to an undue burden—under what is currently

45(c)(3)(iv). This is a substantive change that is not justified by the perceived need for simplification and is subject to the same criticisms as the proposal to simplify Rule 45 through excision of detail.