



Comments Regarding Revisions to FRCP 45

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11-CV-012

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Attention: Peter G. McCabe, Secretary,
Committee on Rules of Practice and Procedure

Mr. McCabe and Committee Members:

I am writing--as a federal practitioner with 40 years experience--to suggest the Rule 45 be amended to allow subpoenas to be issued (in accordance with the current practice) for the taking of testimony by video conference from a witness outside the jurisdiction of the trial court.

Since I practice in Hawai'i, the problem of absent witnesses is particularly acute because of many cases involve people who have only a transient presence in paradise. However, I suspect the problem is nationwide. Now, with video conference capabilities being available throughout the country and with improved technology, it is possible to have distant witnesses appear at little cost and with high quality video and audio fidelity that was unimaginable when the current rules were drafted.

Taking testimony in this manner--with, of course, the approval of the trial judge with respect to all matters of process and procedure--eliminates both the prejudice suffered by a party who would otherwise have to read deposition excerpts, show choppy fragments of a discovery deposition, or incur (if allowed) the expense and inconvenience of taking a preservation deposition. It would also eliminate the gamesmanship that occurs when

one party has the option to keep witnesses "offshore" when it serves some tactical purpose.

Obviously, the trial court is in the best position to decide whether, when and how video testimony should be taken. When, however, the court determines it is feasible and would serve the interests of justice--as well as the overriding purposes of the Rules, as set forth in FRCP 1--the fact that a witness is located in a different district should not stand as an impediment to obtaining useful and effective testimony, as it does now. [I have tried unsuccessfully to subpoena a witness in the SDNY for video testimony in a multi-million dollar securities fraud case in Hawai'i (with the blessing of the trial court). The SDNY quashed the subpoena, so I know it is not allowed.]

So, in short, I urge the Committee to amend Rule 45(a)(2)(A) to read:

(B) for attendance a hearing or trial, from the court for the district where the hearing or trial is to be held, except when video testimony is sought from a witness outside that district, then, with the permission of the judge before whom the hearing or trial is to be held and under such terms and conditions as may be prescribed by that judge, the subpoena is to be issued by the court for the district where the witness is to appear in person to provide the video testimony.

Thank you for considering this suggestion. I would be happy to discuss my concerns if you wish.

PAUL ALSTON