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Via E-Mail and Regular Mail

The Honorable Mark R. Kravitz, Chair
Committee on Rules of Practice and Procedure
c/o Peter G. McCabe, Secretary
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

The Honorable David G. Campbell, Chair
Advisory Committee on Civil Rules
c/o Peter G. McCabe, Secretary
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: **Proposed Amendments to Fed. R. Civ. P. 45**

Your Honors:

We write as individual members of leadership of the Section of Litigation of the American Bar Association to comment on the published proposed revisions

to Rule 45 of the Federal Rules of Civil Procedure.[1] We hope the Standing Committee and Advisory Committee will find these comments helpful.

I. Introduction and Summary.

We applaud the changes reflected in the proposed amendments. In particular, we agree with the Advisory Committee's position that Rule 45, now or as amended, should not be written or construed to permit nationwide service of trial subpoenas requiring parties or party representatives to testify at trial. We also agree with the Advisory Committee's recommendation that inter-court transfers of subpoena motion practice should be permitted, but rarely, and only in "exceptional circumstances" or by agreement of the subpoenaing party and the subpoenaed non-party.

Our strongest single criticism of proposed rewritten Rule 45 goes to its failure to expressly require a party to inform the other parties when he has obtained documents from a subpoenaed non-party, and make them available. This letter also discusses other respects in which a subpoenaing party should notify the other parties as a matter of regular practice.

In addition, we address one presumably unintended consequence of the Advisory Committee's decision to provide that compliance will be in a "reasonably convenient" place and that motion practice involving the subpoena will be in the district court where compliance is demanded. Unless modified a bit, those provisions could increase rather than decrease the burden on non-parties, contrary to the Advisory Committee's intentions.

These and our other suggestions are discussed in detail below.

II. Notice to Other Parties.

Although the proposed amendments would improve Rule 45, we believe that they do not go far enough in the area of notice, and that some modest further amendments would go a long way toward minimizing abuse of the subpoena

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[1] The signers of this letter are officers and members of the Council of the Section of Litigation of the American Bar Association, members of the Section's Federal Practice Task Force and Co-chairs of the Section's Pretrial Practice and Discovery Committee. We submit these comments in our individual capacities because the Section has not asked the ABA to adopt them as ABA policy.

process and reducing the burdens on non-party subpoena recipients, the parties and the courts.

a. **Notice before Service:** In relocating and expanding the existing Rule 45 requirement that a party give notice to the other party "before a subpoena is served," the Advisory Committee acknowledged and addressed a significant problem, *i.e.,* that "parties serving subpoenas frequently fail to give the required notice to the other parties." As noted by the Advisory Committee, one purpose of the amendment is to assure that the other party has an opportunity to object to the proposed subpoena. In practice, however, the "notice," if given, is often simultaneous with service, or so short that there is no practical opportunity for other parties to object or seek court protection before the subpoena is served. Experienced lawyers know that harm can be done to a litigant simply by the issuance of a subpoena to a third party – a key customer or supplier, perhaps – in certain situations. Rarely, but nonetheless too frequently, one encounters the litigant who will use the third-party discovery process as a tool of harassment and oppression rather than as a means to obtain needed discovery. In that situation, the non-initiating party should have an opportunity to seek the aid of the court *before* the subpoena is served.

At the same time, the advance notice period should not be a lengthy one, and the normal, good faith discovery process should not automatically be stalled while pre-subpoena protective order motions are contested by the parties. The solution, we think, is to expressly provide for a seven-day advance notice. Those seven days would give the opposing party a short window in which to seek and obtain a protective order in the rare situation where that extraordinary relief is demonstrably called for. But absent court intervention (or agreement of the parties), the service and discovery would go forward.[2]

We also propose an "exceptional circumstances" safety valve to permit shorter notice or even no notice when, for example, there is a demonstrable risk that advance notice will result in the third party's evading service or destroying documents. The initiating party would not have to seek a court ruling in advance

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[2] Some jurisdictions provide a longer advance notice period and even suspend the subpoena process until the court has ruled on the objections. *See* Pa. R. Civ. P. 4009.21 (Notice of intent to serve subpoena must be given 20 days in advance, and subpoena cannot be served until party objections are adjudicated). We think such an approach errs on the side of delay and too easily enables the non-initiating party to frustrate discovery.

of such expedited service, but it would have to be prepared to prove that truly "exceptional circumstances" existed when called to account.

Finally, as discussed elsewhere in this letter, the notice should be electronic – whether by email or e-filing – in order to avoid the delays or disputes that sometimes attend "snail mail" service.

b. Notice of Objections and Modifications: A second purpose of the advance notice requirement, also noted by the Advisory Committee, is to afford the other parties an opportunity to serve their own subpoenas for materials in addition to those sought by the original subpoenaing party. In practice, parties routinely and properly rely upon subpoenas issued by other parties, rather than burdening the same non-parties with multiple subpoenas (whether identical or not-quite identical). But that salutary end can be frustrated if the subpoenaing party, perhaps in response to the subpoenaed person's objections, changes the scope, return date or other terms of the subpoena without telling the other parties about it. There is no reason for secrecy. The rule should let a party rely on another party's subpoena and also should limit the non-party's need to deal with multiple redundant subpoenas and the importuning of multiple teams of party lawyers. For this reason, the issuing party should notify all other parties when the scope of the subpoena is modified or the return date is altered.

As between the non-party and the subpoenaing party, it is reasonable that the subpoenaing party should be the one that takes on the burden of telling the other parties when the terms of the subpoena have been changed or have been put in play by objections from the non-party. Again, a simple email notice should suffice.

c. Notice of Receipt and an Opportunity to Inspect and Copy: It is self-evident that all parties should have prompt access to documents that one of them has obtained by subpoena. We understand that the Advisory Committee considers it a "best practice" for subpoenaing parties to tell the other-parties when subpoenaed documents are being or have been produced, but the Advisory Committee has declined to make that a Rule 45 requirement on the assumption that lawyers currently engage in this best practice. Sadly, the signers' collective experience is that lawyers do not always engage in best practices. Some of us have encountered opposing counsel who do not make subpoenaed materials available to other parties for inspection and copying, and who do not even tell their opponents that the materials have been received. Indeed, some opposing counsel have pointed to Rule 45 – and the absence from the rule of an

explicit requirement of such notice and availability – as exonerating them from any obligation to make such disclosure.[3]

The problem is real and is not unique to federal court practice. At least some states already address it in their rules. *See, e.g.,* Pa. R. Civ. P. 4009.23(b) (party must notify other parties of receipt of documents pursuant to a subpoena and, upon payment of reasonable cost, copy documents or produce them for inspection); New Jersey Court Rule 4:14-7(c) (documents must be produced at a specifically determined date, time and place, and made available to opponents for inspection and copying).[4] The United States District Court for the Southern District of New York has recently put into effect a Pilot Project Regarding Case Management Techniques for Complex Civil Cases, which provides for prompt availability of subpoenaed material, as follows:

> **Subpoenaed Material.** Unless the Court orders otherwise, whenever documents, electronically stored information, or tangible things are obtained in response to a subpoena issued pursuant to Rule 45 of the Federal Rules of Civil Procedure, the party responsible for issuing and serving the subpoena shall promptly produce them to, or make them available for inspection and copying by, all parties to the action.

Id., §II.G.

The Advisory Committee previously had declined to include the notice provisions discussed above on the theory that such additional requirements would be more likely to produce difficulties than benefits. Respectfully, we do not see

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[3] Ironically, one signer of this letter experienced precisely such conduct by an adversary while we were in the process of drafting this letter. His adversary challenged him to point to the language in Rule 45 that entitled him to notice that the adversary had obtained the documents.

[4] The comment to the New Jersey rule decries "the apparently proliferating practice of some attorneys, wholly unauthorized, to obtain documentary discovery from non-parties, unilaterally and without notice to other parties, by the simple expedient of issuing a subpoena." Pressler & Verniero, Current N.J. Court Rules, Comment R. 4:14-7(c) (Gann 2011).

how spelling out these requirements will cause more problems, or worse problems, than those that currently exist. There is no reason why lawyers should be excused from these simple notice requirements. Such provisions will clarify the required conduct in a rule that likely will not be altered again for many years, eliminate the sharp practices and gamesmanship that some of us have encountered and reduce the burden now faced by parties who seek to determine if and when documents have been produced, whether objections have been received or whether the scope of a subpoena has been modified.

d. Possible Rule Language and Possible Logistics: In these days of e-correspondence and e-filing, it is a simple matter to provide notice of an intention to serve a subpoena, modifications or objections to a subpoena, or compliance with a subpoena. The e-mail notice provisions we suggest would not place logistical burdens on the parties. A simple email to all counsel that a party intends to serve a subpoena (with the subpoena attached), that a subpoena has been modified or objections received, or that documents have been received, would suffice. Indeed, some members of our group have suggested that, with e-filing now the rule far more than the exception, the fair-notice goal of the rule can best be served simply by e-filing the notices we have discussed.[5] By following this practice, either notice by email or e-filing, a record will be made of the timing of these important events, and the parties will all be on a level playing field.

If our proposals were accepted, it would make sense to add the additional notice requirements to Rule 45(a)(4). A revised proposed amended rule might read as follows:

> 45(a)(4) **Notice to Other Parties.** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises:
>
> (A) a copy of the subpoena must be served on each party seven days before the subpoena is served on the person to whom it is directed, except in exceptional circumstances;

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[5] In former times, discovery papers were docketed with the district court. That practice ended when the paper burden on clerks' offices became intolerable. Those concerns would not militate against the electronic filing of Rule 45 notices. We do not, of course, suggest that the subpoenaed documents themselves need be filed of record, either electronically or otherwise.

(B) reasonable notice must be given to each party of any modifications of the subpoena, including any new date and time of inspection or production; and

(C) reasonable notice must be given to each party of the receipt of documents, electronically stored information, or tangible things, and such material must be made available to each party for inspection and copying in a timely manner.

III. Party and Party Officers Subpoenaed for Trial: Reversing the Vioxx Rule.

We strongly support the Committee's decision to reverse the so-called *Vioxx* rule, adopted in *In re Vioxx Products Liability Litigation*, 438 F. Supp. 664 (E.D. La. 2006), and to reject the proposition that nationwide subpoena service can compel parties or party witnesses to testify in person at trial any place in the country. We believe that permitting such subpoenas would invite abuse. This potential abuse includes requiring the most senior officers in a company to appear multiple times, traveling great distances, to testify in successive trials, even when those officers may not be the persons most knowledgeable of the underlying facts. Courts already have sufficient tools available to obtain the testimony of such persons, by video deposition or otherwise, when their testimony is truly relevant.

IV. Transfers of Subpoena-Related Motions.

We applaud the Committee's selection of the "exceptional circumstances" standard; transfer of subpoena-related motions should be the exception rather than the rule or a too-convenient option. Any lesser standard for transfer, such as "good cause" or "interests of justice," would not give sufficient weight to protecting non-parties from undue burden or expense. A lesser standard could quickly make transfer the rule, as judges in the district where the subpoenaed party is located might be inclined to assume, as a routine matter, that the issuing court supervising the litigation is always best suited to resolve all issues regarding compliance with the subpoena. The exceptional circumstances language is designed to communicate the proposition that transfers should be rare.

The Advisory Committee has asked why consent of the parties should be required if the subpoena recipient consents to a transfer of enforcement issues to the issuing court. We agree that consent of the subpoenaed non-party alone should be sufficient for transfer. Such a provision would prevent an issuing party from blocking transfer when that party issues multiple subpoenas in different

jurisdictions to drive up an adversary's costs and the recipients agree that the judge in the issuing court should resolve the issues.

V. Time for Objections.

The current proposal does not change the time for objections by a non-party or address the question whether a failure to object within 14 days to a subpoena returnable in, say, 30 days bars a subpoenaed party from moving to quash that subpoena before the return date. We believe the time to object should be extended to 30 days, not 14 days, unless the subpoena is returnable in less time, in which case an objection should be timely if made before the return date.

The corporate world has become more complex and geographically expanded in the 20 years since Rule 45 was last reviewed. For example, corporate counsel tell us that a subpoena might not even arrive in the correct corporate office location for close to 14 days. Particularly when the discovery involves electronically stored data, the subpoena recipient may not even be able to determine if it has privilege or burdensomeness objections, for more than 14 days. If an outside vendor has to be engaged to manage the search, identification and production from large or widely dispersed sites, the process may take even longer.

We recommend that the time for objections be extended to coincide with the 30-day period that the Rules already give a party to object to document requests. It seems unfair to routinely impose a shorter objection window on a stranger to the litigation than the 30-day period in which parties, who are familiar with the litigation, may object to document requests. This suggestion would thus require objections within the lesser of 30 days or the time for compliance.

Regardless of whether the time for objections is extended, we believe that the rules should not work a forfeiture of rights by precluding a motion to quash before the return date if objections are not made within the time for objections. It will, ordinarily, be easier to object than to move to quash, but such a motion should not be precluded before a subpoena return date because of a failure to object when a party otherwise "timely" acts by moving to quash before the subpoena return date. The issue should be explicitly addressed and a failure to timely object should not be deemed a waiver.

VI. A "Reasonably Convenient" Place for Motion Practice.

The proposed amendment is intended to protect a non-party from having to make discovery in an inconvenient place. But it should also protect her from

having to go to an unreasonably inconvenient forum to seek a protective order or respond to an enforcement motion. Unfortunately, the proposed amendments can actually do just the opposite in some circumstances. By linking the party-dictated place of compliance to the rule-dictated place of court proceedings while permitting issuance of nationwide subpoenas by district courts, the proposed rule can require a non-party to travel great distances and hire additional attorneys if she wants to argue that the place of compliance identified in the subpoena is not "reasonably convenient," and that the subpoena should be quashed.

Under existing Rule 45, consequences flow from the starting point that the subpoena is issued in the name of the court in the district where the discovery is to occur. The non-party can be served only within that district or within 100 miles of the place of the deposition, inspection or discovery. And if the non-party has to seek protection from the court, or if the serving party seeks the aid of the court in enforcing the subpoena, the court proceedings are held in the issuing court. Obviously, then, the non-party will not have to travel terribly far to have her day in court as either movant or respondent.

The Advisory Committee noted that the "place of production" provisions have not been a source of controversy under the existing rule, and that its goal was to make the rule more flexible without imposing on the non-party subpoena recipient:

> . . . Under the current rule, the place of production has not presented difficulties. The [proposed] provisions on the reasonable place for production are intended to be applied with flexibility, keeping in mind the assurance of Rule 45(d)(1) that undue expense or burden must not be imposed on the person subject to the subpoena.
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> Rule 45(d)(3)(A)(ii) directs the court to quash any subpoena that purports to compel compliance beyond the geographical limits specified in Rule 45(c) [the "reasonably convenient" place].

Advisory Committee Report, Comment 45(c) at p.23. In a day and age when so much of document discovery is conducted electronically, focusing on the idea of a convenient place, rather than setting inflexible fencelines, seems an excellent idea.

But while the proposed rule promises that the place of *production* will be reasonably convenient, it does not assure that the place of litigation *about* the place of production will be reasonably convenient. There can be unintended consequences if the responding non-party wants to pursue a protective order or is forced to resist an enforcement motion. Under the proposed rule, the subpoenaing party makes the initial unilateral decision as to the place of compliance. And if a Seattle lawyer with a case in the Western District of Washington thinks his Seattle office is a "reasonably convenient" place of compliance, there is only one court – the United States District Court for the Western District of Washington – that can rule on an objection, a motion for protective order, or a motion to enforce his subpoena. And that is so even if the non-party lives, works and was served in the Southern District of Florida. To be sure, this particular non-party will almost certainly obtain her protective order under the proposed rule. She may even obtain the benefit of a sanctions award, including attorneys' fees. To reach that point, though, she may have to cross the continent, and she will surely have to hire a lawyer in a distant forum.

That could not happen under the existing rule, with its reasonably close geographical connection between the motion-hearing court and the place where the witness lives, works or does business, and it should not happen under an amended rule.

The problem could be avoided by providing, in proposed amended Rule 45(c)(2)(A), that a subpoena may command "production of documents, tangible things, or electronically stored information at a place *within the district where the subpoena was served,* and reasonably convenient for the person who is commanded to produce." If it were feared that locking the document production into the place of service might itself lead to unintended consequences, the rule could simply state that (regardless of the place of compliance) the protective order or enforcement litigation would be sited in the district where service was made.

VII. <u>Explaining the Duty to Comply</u>.

A subpoena rule, in particular, should be understandable by non-lawyers, and we think the switch in the "issuing court" may cause confusion or uncertainty that could be cured by an additional explanation in the standard form of subpoena.

A layperson served in New York with a subpoena issued from a federal court in California may very well question the power of a remote court to require him or her to do anything, or even question the authenticity of the document, and

may not take the document to a lawyer.[6] In contrast, a subpoena from a local court is much more likely to command the attention of the non-party. While some question whether the "issuing court" change is worth making at all, some of the confusion may be avoided by adding further explanatory language on the subpoena form. Currently, the proposal requires the publication on the subpoena form of the entirety of the text of Rule 45(d) and (e). Proposed Rule 45(a)(1)(A)(iv). Some clarifying additional language could be added after the quoted rule, for example:

> **NOTE:** Rule 45 authorizes nationwide service of subpoenas. If this subpoena was issued by a court in a federal district other than the one in which you reside or were served, you must still comply with the subpoena, as described above. Your compliance with the subpoena must be at a location reasonably convenient for you. If you have objections to this subpoena, they should be filed in the United States District Court for the district [where you were served][where compliance is called for].

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[6] In recent times, private "business" enterprises seem to have become increasingly adept at generating documents that look almost "official" and distributing them by mail and electronically. The public has had to learn to be skeptical.

We thank you for the opportunity to offer these comments and hope they will be useful to the Committee in finalizing a proposed new Rule 45 that will balance the interest of parties and non-parties, that does not unduly burden non-party subpoena recipients, and that promotes justice, speed and lowered litigation expense.

Respectfully,

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