May 22, 2020

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Amendment to Rule 45(c)(1) Regarding Subpoenas

Dear Mrs. Womeldorf:

We write to respectfully request that the Advisory Committee on Rules of Civil Procedure consider an amendment to Federal Rule of Civil Procedure 45(c)(1) regarding compliance with subpoenas.

Rule 45 governs the federal practice of issuing and responding to subpoenas. Specifically, Rule 45(c)(1) establishes that a subpoena may only compel a person to attend a hearing, trial, or a deposition within 100 miles of the location where the subpoenaed person resides, is employed, or regularly transacts business in person. *See* Fed. R. Civ. P. 45(c)(1). We propose an amendment to reconcile a discrepancy that has arisen since Rule 45 was last amended in 2013. The 2013 Amendment was intended to "collect[ ] the various provisions on where compliance can be required and simplif[y] them." Fed. R. Civ. P. 45 Committee Note. Instead, the 2013 Amendment has led to confusion among federal courts with respect to compliance with nationwide subpoenas as authorized by specific federal statutes, such as the False Claims Act ("FCA"). The amendment proposed herein harmonizes federal statutes with the amended text of Rule 45(c)(1) by re-instituting language from the former Rule 45(b)(2)(D) that existed prior to 2013.

DISCUSSION

I. Proposed Amendment to Rule 45(c)(1)

We respectfully submit the following proposed amendment to Rule 45(c)(1) for the Committee's consideration[1]:

[1] We defer to the Committee to decide the optimal stylistic placement of our proposed amendment, either as a new provision inserted as Rule 45(c)(1)(B) or added to the end as Rule 45(c)(1)(C) as shown.

Rule 45. Subpoena

* * *

(c) Place of Compliance

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense~~,~~; or

(C) at any other place that the court authorizes on motion and for good cause, if a federal statute so provides.

Currently Rule 45(c)(1) establishes that a subpoena may only compel a person to attend a hearing, trial, or a deposition within 100 miles of the location where the subpoenaed person resides, is employed, or regularly transacts business in person. This rule is in conflict with federal statutes that authorize nationwide subpoena compliance—in other words, the authority of a federal court to compel witnesses anywhere in the United States to testify before it.

A simple amendment to Rule 45 would resolve this conflict. We propose amending Rule 45(c)(1) to allow nationwide subpoena compliance as long as 1) authorized by federal statute and 2) good cause exists. Such an amendment would be minimally invasive and return the statute to its original effect prior to the 2013 Amendment. It would also resolve the current disagreement among courts in regards to the proper interaction between federal statutes authorizing nationwide subpoena compliance and Rule 45(c)(1) in its current form. *Compare Guenther v. Novartis Pharm. Corp.*, 297 F.R.D. 659, 660 (M.D. Fla. 2013) (prohibiting enforcement of nationwide subpoenas) *with United States v. Wyeth*, 2015 WL 8024407, at *3 (D. Mass. Dec. 4, 2015) (allowing enforcement of a nationwide subpoena under the FCA).

II. The 2013 Amendment—Intended to Simplify Rule 45—Also Substantively Changed It

The 2013 Amendment to Rule 45—although intended as a stylistic change to simplify and clarify subpoena power[2]—caused an unintended, substantive change to subpoena compliance.

The purpose of the 2013 Amendment was to simplify Rule 45, as established in the Committee Note published alongside the rule. *See* Fed. R. Civ. P. 45 Committee Note ("The goal of the present

[2] *See, e.g.*, Michael P. Daly & David A. Solomon, *Recent Amendments Offer Treats to Those Tired of Rule 45's Tricks*, Faegre Drinker (Oct. 31, 2013) ("Attorneys wishing to serve a federal subpoena have historically had to navigate a complex web of rules regarding issuance, service and compliance that were either confusing or amusing, depending on one's point of view."); Charles S. Fax, *Taking the Fun Out of Rule 45*, ABA (Sept. 8, 2012) ("Rule 45(c)(1) clarifies that a trial subpoena, deposition subpoena, and documents-only subpoena are returnable only within the state or within 100 miles of where the witness lives, works, or regularly does business, even if the witness is a party or a party's officer, or, in the case of a trial subpoena, elsewhere if such witness would not incur "substantial expense.").

amendments is to clarify and simplify the rule."). The Committee explicitly identified where specific, substantive changes were made to the rule. *See id.* ("Rule 45(a)(4) is added to highlight and slightly modify a notice requirement[.]"). Otherwise, the majority of changes were meant to be stylistic. In particular, the Committee noted that Rule 45(c) was created to "collect[] various provisions on where compliance can be required and simplif[y] them." *Id.* Therefore, the purpose of creating Rule 45(c) was to collect in a new subdivision the previously scattered provisions regarding place of compliance. These changes resolved a conflict that arose after the 1991 Amendment about a court's authority to compel a party or party officer to travel long distances to testify at trial. *See id.*

This understanding of the 2013 Amendment is further reinforced by the minutes from the April 11–12, 2013 Civil Rules Advisory Committee meeting, which make one substantive mention of Rule 45: "The first observation was that the pending amendments of Rule 45 raised questions about the distance witnesses should be compelled to travel to attend a hearing or trial. The Committee concluded that the current limits should remain undisturbed, even though the 100-mile rule goes back to the Eighteenth Century." Thus, the 2013 Amendment was not intended to make any substantive changes, but rather reinforce the long-standing "100-mile" rule for determining required compliance to an issued subpoena.

However, the amended version of Rule 45 omitted former Rule 45(b)(2)(D), which authorized service "at any place . . . that the court authorizes on motion and for good cause, *if a federal statute so provides*." Fed. R. Civ. P. 45(b)(2)(D) (2007) (amended 2013) (emphasis added).[3] Although it is not clear from the historical record why this specific provision was dropped, commentators note that the omission was likely an inadvertent error. *See U.S. v. Wyeth*, 2015 WL 8024407, at *3 ("In the 2013 revisions to Federal Rule of Civil Procedure 45, however, textual support in the rule has disappeared. *In what seems to be an oversight of the revisers*, the provision of the Rule which allowed for the operation of statutes that expand a court's subpoena power, like § 3731(a), was dropped from the current Rule.") (emphasis added). The record shows that the Committee never discussed purposefully eliminating the substance contained in former Rule 45(b)(2)(D). *See id.* ("The 2013 revisions to Rule 45 involved wholesale revision of the text of the rule but were not intended substantively to alter the locations where a court's subpoena power could extend.").

III. The 2013 Amendment to Rule 45 Conflicts with Federal Statutes

The amended Rule 45, at least based on a textual reading, prohibits a subpoena from commanding attendance outside of 100 miles from where a witness resides, is employed, or regularly transacts business in person (aside from specific enumerated exceptions). Yet, this puts the rule in direct conflict with many federal statutes that authorize nationwide service and compliance with subpoenas. The most notable example, and the most currently debated in the courts, is the False Claims Act. 31 U.S.C. §§ 3729–3733. The FCA is a federal law that imposes liability on parties who defraud government programs. Under the FCA, whistleblowers have the opportunity to be rewarded for disclosing fraud that results in a financial loss to the federal government. FCA claims often arise in the healthcare space.

[3] See Appendix for comparison of prior Rule 45 and the 2013 Amendments to Rule 45.

Notably, the FCA provides that a subpoena "requiring the attendance of a witness at a trial or hearing being conducted under [the FCA] may be *served at any place in the United States*." 31 U.S.C. § 3731(a) (emphasis added). If Rule 45 is read—as it is currently written—to prohibit compliance with a subpoena outside the 100-mile rule, then Rule 45 effectively neuters the FCA and other federal statutes that authorize nationwide service of subpoenas. These other federal statutes include the Clayton Act (15 U.S.C. 22), the Federal Trade Commission Enforcement Action (15 U.S.C. 53); Securities Act of 1933 (15 U.S.C. 77v(a)), Securities Exchange Act of 1934 (15 U.S.C. 78aa(a)); Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1965(d)), and Employment Retirement Income Security Act of 1974 (29 U.S.C. 1132(e)(2)).[4]

This conflicting interaction between Rule 45 and federal statutes has resulted in differing opinions among federal courts. The majority of courts addressing this issue have ruled that, in contravention of Rule 45(c)(1)'s literal text, a federal statute can still authorize nationwide subpoena service and compliance, reasoning that the removal of former Rule 45(b)(2)(D) was likely "an oversight of the revisers." *See Wyeth*, 2015 WL 8024407, at *3; *see also United States ex rel. Lutz v. Berkeley Heartlab, Inc.*, 2017 WL 5624254, at *3 (D.S.C. Nov. 21, 2017); *Johnson v. Bay Area Rapid Transit Dist.*, 2014 WL 2514542, at *2 (N.D. Cal. June 4, 2014). However, other courts have ruled that Rule 45(c)(1)'s text controls, explicitly disallowing nationwide compliance of subpoenas even when authorized by federal statute. *See Guenther*, 297 F.R.D. at 660; *U.S. ex rel. Thomas v. Siemens AG*, 2009 WL 1657429, at *2 (D.V.I. June 12, 2009).

This confusion is not limited to the courts. Anecdotal evidence confirms that the conflict has also caused confusion among current Assistant U.S. Attorneys practicing in Civil Divisions. This conflict and the ensuing confusion can easily be remedied by amending Rule 45 to include a federal statute exception to the normal subpoena compliance rule.

Furthermore, the Advisory Committee's recent adoption of a similar amendment to Rule 12(a)(1)—arising out of a minor timing conflict with the federal FOIA statute—suggests that our proposed amendment would likely be adopted. *See* Agenda Book, Advisory Committee on Rules of Civil Procedure, page 219 (April 2020).

IV. The Proposed Amendment Resolves Uncertainty and Upholds the Purpose of Rule 45 and Federal Statutes

The proposed amendment would resolve the uncertainty outlined above, explicitly allowing nationwide subpoena service and compliance when authorized by federal statute and where good cause exists. This resolution to the uncertainty upholds both the original purpose of Rule 45 and of the several federal statutes that authorize nationwide subpoena compliance.

The FCA is the federal government's primary tool in combating fraud against the government—and nationwide subpoenas are essential to accomplishing this goal. In his analysis of a False Claims Act

[4] Although the precise formulations vary, these federal statutes generally use language addressing how "process" (or a "summons") may be "served."

case, Judge Woodlock found that "[t]he legislative history of [the FCA] supports the holdings of the majority of district courts that enforcement of a False Claims Act subpoena is not subject to the geographical limitation now found in [Rule 45]." The provision authorizing nationwide subpoenas was added to the FCA under the title "An Act to provide for nationwide service of subpoenas in all suits involving the False Claims Act." Pub. L. No. 95–582, 92 Stat. 2479 (1978). The House Committee report states that the purpose of the legislation was to facilitate the prosecution of FCA cases by ensuring that witnesses from across the country could be brought into court by subpoena. *See* H.R. Rep. No. 95-1447 (1978).

History also illuminates the purpose of nationwide subpoenas. At the end of World War I, the Department of Justice (DOJ) actively prosecuted defense contractors that were defrauding the government. But, the DOJ faced difficulties in ensuring the appearance and testimony of necessary witnesses. *See* James B. Sloan & William T. Gotfryd, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33, 35 (1992). In 1978, DOJ formally asked Congress to give it the authority for nationwide subpoenas, specifically requesting that the FCA's subpoena provision be modeled after the nationwide subpoena authority found in criminal procedure rules. *See* H.R. Rep. No. 95-1447, at 7-8 (1978). This reflects the importance DOJ assigned to securing witnesses for trial to assist the government's prosecution of fraud and the importance of reinstating the regime supported by Rule 45 prior to the 2013 amendments.

As further protection, the proposed amendment also includes a "good cause" requirement. Prior to 2013, former Rule 45(b)(2)(D) would have superimposed such a good cause requirement. Such a requirement provides procedural limits on the situations in which subpoenas may be enforced. The requirement provides protection "to avoid the imposition of undue burden on persons subject to a subpoena." *Wyeth*, 2015 WL 8024407, at *4. Although courts have not aligned on a precise definition of "good cause," *see State Farm Ins. Co. v. Roberts*, 398 P.2d 671, 674 (Ariz. 1965) ("What constitutes 'good cause' depends to a considerable degree upon the particular circumstances of each case and upon considerations of practical convenience"), at least in the context of a witness who is not a party to a lawsuit, "good cause" is interpreted as a requirement to show that a subpoena is not "unreasonable or oppressive," *see* 5 Moore's Fed. Proc. 1722-23 (Rev. Ed. 1964). Leaving the discretion to judges to decide when "good cause" exists to enforce a nationwide subpoena strikes the proper balance between an undue burden and upholding congressional intent manifested in federal statutes.

We recognize that some commentators may argue that Rule 45's 100-mile limitation *should* in fact trump federal nationwide subpoena provisions, in order to ensure consistency and fairness for all subpoenaed witnesses, regardless of the underlying source of the claim. However, history has demonstrated that securing witnesses is critical to the enforcement of certain federal statutes. *See* H.R. Rep. No. 95-1447, at 7-8 (1978). Congress intentionally and explicitly included nationwide subpoena provisions in these statutes out of recognition of the difficulties federal prosecutors faced in ensuring witnesses for trial.

We also recognize that an additional concern with re-instituting the former Rule 45(b)(2)(D) is that, combined with current Rule 45(b)(1), the proposed amendment could impose an undue burden on subpoenaed parties. Rule 45(b)(1) provides that fees for one day's attendance and mileage are to be paid

by the subpoenaing party, but these fees are not mandatory for any subpoena issued "on behalf of the United States." *See* Fed. R. Civ. P. 45(b)(1). This leaves room for potential abuse by federal agencies subpoenaing witnesses from far distances and refusing to cover their associated travel costs. However, the benefits of the proposed amendment outweigh this minor concern, which should ultimately be mitigated by the ability of a federal court to invoke the "good cause" requirement where it finds undue burden on subpoenaed parties.

CONCLUSION

For the foregoing reasons, we urge the Committee to recommend adoption of the proposed amendment to Rule 45(c)(1). Please let us know if we can provide any more information regarding this proposal. We thank the Committee on Rules of Practice and Procedure in advance for its consideration on these matters.

Sincerely,
Phebe Hong, Harvard Law School Class of 2021
[redacted]

Maxwell Hawley, Harvard Law School Class of 2021
[redacted]

Appendix

Comparison of Prior Rule 45 and the 2013 Amendments to Rule 45: Key Provisions

Old Rule 45(b)(2)	Current Rule 45(b)(2)
(b) Service. *(2) Service in the United States.* Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:	*(b) Service.* *(2) Service in the United States.* A subpoena may be served at any place within the United States.
(A) within the district of the issuing court;	[Omitted]
(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;	[Omitted]
(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	[Omitted]
(D) that the court authorizes on motion and for good cause, if a federal statute so provides.	[Omitted]

Old Rule 45(c)	Current Rule 45(c)
[Did not exist]	*(c) Place of Compliance.* *(1) For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense. *(2) For Other Discovery.* A subpoena may command: (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and (B) inspection of premises at the premises to be inspected.