RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES and its
REMOTE TESTIMONY and DISCOVERY SUBCOMMITTEES

AMENDING RULE 45: WHY EXPANDING THE REACH AND METHODS OF SERVICE OF SUBPOENAS SHOULD NOT RENDER THE RULE'S WITNESS PROTECTIONS EMPTY WORDS

Reworking the Remote Testimony Standard Will Trigger the Apex Witness Clash the Advisory Committee Avoided with the 2013 Amendment

Three Needed Protections: Privacy, Privilege Logging, and Production Expenses

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Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Rules Suggestion to the Advisory Committee on Civil Rules ("Advisory Committee") and its Remote Testimony and Discovery Subcommittees.

INTRODUCTION

The Advisory Committee is considering three amendments to Federal Rule of Civil Procedure ("FRCP") 45 that are intended to increase the power of courts and litigants over witnesses: expanding the reach of courts in issuing subpoenas for remote testimony, loosening the rules for methods of service of subpoenas, and either delaying or eliminating the tendering of witness fees. Each of these ideas requires caution; any amendment should embody Rule 45's purpose of protecting "a person subject to the subpoena."[2] Moreover, any formal proposal to amend Rule 45 should add three much-needed protections for witnesses: reasonable safeguards for personal

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] FED. R. CIV. P. 45(d).

and confidential information; guidance for avoiding unduly burdensome privilege logging; and reimbursement of expenses required for compliance.

I. AMENDING RULE 45'S PLACE OF ATTENDANCE FOR REMOTE TESTIMONY WOULD SPARK THE SAME CONTROVERSY OVER APEX WITNESSES THE ADVISORY COMMITTEE STUDIOUSLY AVOIDED IN 2011

Amending Rule 45 to change the place of attendance for trial to facilitate remote testimony anywhere within Rule 45(c)(1)'s limits will reopen the very disputes the Advisory Committee was determined to avoid when promulgating the 2013 amendment. Provoking those controversies is unnecessary because the current rules provide the right balance for courts handling disputes over remote testimony, reflect the appropriate and historical preference for in-court testimony, and furnish a well-accepted remedy (deposition testimony) when witnesses are unavailable at trial.[3] At the very least, if any Rule 45 amendment is proposed, it should condition the issuance of subpoenas for remote testimony expressly on a prior ruling under Rule 43 that remote testimony by a specific witness is necessary or appropriate in that case.[4]

A. The Advisory Committee Should Not Reopen Its Decision to Avoid Weaponizing Rule 45 in Fights Over Apex Witnesses

During the development and consideration of the 2013 amendment to Rule 45, the Advisory Committee made the decision to prevent Rule 45 from becoming a tool in excessive satellite litigation over so-called "apex witnesses"—high-ranking corporate or organizational leaders who could conceivably, but usually do not, have any first-hand knowledge of the facts and circumstances of a particular dispute.

In 2011, the Advisory Committee gave careful consideration to an unprecedented 2006 ruling in the *Vioxx* MDL which held that a subpoena may compel a party's officer to appear as a witness at trial regardless of Rule 45(c)(1)'s limits, an expansion of geographic subpoena power via "inverse inference."[5] During the January 2011 meeting of the Committee on Rules of Practice and Procedure ("Standing Committee"), Judge Kravitz, chair of the Advisory Committee, reported the Advisory Committee's view that the 100-mile provision in Rule 45(c)(1) should be retained and enforced because "there is a fear that litigants may demand the presence of high corporate officials at trial, even though they may not have first-hand knowledge of the facts, in order to force a settlement."[6] To vet the question, the Advisory Committee included two mutually exclusive options in the draft rule to be published for public comment in 2011: an amendment that would effectively overrule the *Vioxx* decision by requiring subpoenas to adhere

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[3] Lawyers for Civil Justice, Rules Suggestion, *Don't Touch the Remote: The FRCP Are Providing Appropriate Guidance for Remote Testimony and Should Not Be Amended* (July 25, 2024), https://www.uscourts.gov/sites/default/files/24-cv-n_suggestion_from_lcj_-_rule_43_and_rule_45.pdf.

[4] Rule 43 requires that only for good cause and under compelling circumstances should a trial witness's testimony be permitted via contemporaneous transmission from a different location. FED. R. CIV. P. 43.

[5] *See In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664, 667 (E.D. La. 2006).

[6] Draft Minutes, Standing Committee meeting January 2011, Agenda Book, Committee on Rules of Practice and Procedure (June 2-3, 2011), 40, https://www.uscourts.gov/sites/default/files/fr_import/ST2011-06.pdf.

to the Rule 45(c)(1) limits, and an alternative amendment that would embrace the *Vioxx* ruling by allowing nationwide service of subpoenas to party officers.

After public comments, in June 2012, the Standing Committee unanimously approved the version of the proposed amendment that rejected the *Vioxx* approach. Before it did so, the Advisory Committee explained:

> The Advisory Committee concluded that [the 1991 amendments to Rule 45] were not intended to create the expanded subpoena power recognized in *Vioxx* and its progeny, and decided to restore the original meaning of the rule. The Committee was concerned also that such expanded power could invite tactical use of a subpoena to apply inappropriate pressure to the adverse party. Party officers subject to such subpoenas might often be able to secure protective orders, but the motions would burden the courts and the parties and there might be some *in terrorem* value despite the protective-order route to relief. Moreover, with large organizations it will often be true that the best witnesses are not officers but other employees."[7]

Thus, despite publishing a proposal that would have given "authority for the court to order testimony at trial by parties or party officers in specified circumstances," the "Advisory Committee did not change its view that this authority should not be added to the rule."[8] The Committee Note is clear that the 2013 amendment "resolves the split" by clarifying that "Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts business in person in the state."[9]

This history should inform the Advisory Committee's current consideration of changing the place of attendance for trial to facilitate remote testimony. Even though the specific *Vioxx* issue is not before the Advisory Committee, the current proposal raises an identical predicament—and would lead to the same, since discredited, result. An amendment re-defining the place of attendance to facilitate remote testimony, absent other changes, would allow any issuing party to command trial testimony of any apex witness (and any other witness) without respect to the existence of deposition testimony, the witness' importance to the case, or the availability of other witnesses with similar or greater knowledge. As the Remote Testimony Subcommittee heard at the LCJ Fall Meeting, subpoenas for remote testimony beyond the current Rule 45(c)(1) limits are very unlikely to bring about more remote testimony; rather, they will be a one-sided weapon wielded as a tactic to force more apex witnesses to show up at trial *in person*. Lawyers will advise their clients that appearing remotely is likely to convey a false impression that the trial is not important to the witness. Amending the place of attendance for trial therefore would have the same effect the Advisory Committee thoughtfully rejected in overriding the *Vioxx* ruling in the 2013 amendment.

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[7] Agenda Book, Committee on Rules of Practice and Procedure (June 11-12, 2012), 82, https://www.uscourts.gov/sites/default/files/fr_import/ST2012-06_Revised.pdf.

[8] *Id*.

[9] Fed. R. Civ. P. 45 advisory committee's note to 2013 amendment.

B. Any Amendment to Rule 45's Place of Attendance Must Be Expressly Contingent Upon a Prior Ruling Under Rule 43

If, despite the high risk of the negative unintended consequences, the Advisory Committee chooses to proceed with an amendment to Rule 45's place of attendance for trial, the amendment should condition the service of any subpoena for remote testimony on a prior ruling under Rule 43. Rule 43 requires that remote testimony should be allowed only for good cause and under compelling circumstances.[10] One fundamental reason why judges need discretion over when to permit (or require) remote testimony is that not all witnesses are equally important to the case, let alone necessary or essential. Judicial discretion would be greatly constrained or even eliminated by an amendment to Rule 45 that would allow parties to serve remote testimony subpoenas without a judge's prior ruling that remote testimony by that witness is appropriate. Such an amendment would also interfere with parties' litigation strategies, force some people to testify who otherwise would not, and substitute some witnesses who expect to testify for someone else. The merits and practicalities of remote testimony must be determined in advance of a subpoena.

II. AMENDING RULE 45'S METHODS OF SERVICE OF SUBPOENAS IS UNNECESSARY AND WOULD CAUSE MORE UNCERTAINTY AND LITIGATION

The current methods of serving subpoenas permitted by Rule 45 are working well; the exceptions are rare. Enlarging the menu of options will multiply, not decrease, the opportunities to litigate over methods of service.[11]

A. There Are Few Problems Under the Current Rule

Although the Discovery Subcommittee has identified two recent cases where someone may have been evading service of a subpoena, its report observes that, "it seems that service of subpoenas has not presented great difficulties with frequency."[12] This conclusion is reflected in the Discovery Subcommittee's draft committee note to a potential amendment, which acknowledges that "service of a subpoena usually does not present problems."[13] Nevertheless, the Discovery

[10] FED. R. CIV. P. 43. Rule 43 reflects the historic preference for in-court testimony should remain in place. FED. R. CIV. P. 43 advisory committee's note to 1996 amendment ("The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.").

[11] Significantly, in 2020, the Advisory Committee examined the rules governing service of process in light of the COVID-19 pandemic and concluded that Rule 4 works well enough (although not perfectly) and that it should not be amended to allow a broader range of methods of service absent a "Civil Rules emergency." *See* FED. R. CIV. P. 87.

[12] Draft Minutes, Civil Rules Advisory Committee meeting Oct. 17, 2023, Agenda Book, Civil Rules Advisory Committee (Apr. 9, 2024), 67, https://www.uscourts.gov/sites/default/files/2024-04-09_agenda_book_for_civil_rules_meeting_final_4-9-2024.pdf.

[13] Agenda Book, Civil Rules Advisory Committee (Oct. 17, 2023), 290, https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf.

Subcommittee report seems to conclude that, in addition to the "relatively narrow series of nationally-authorized methods of service" Rule 45 currently provides, courts should also have authority to enter a "case-specific order" to allow more methods.[14]

Importantly, the Discovery Subcommittee recognizes that any case-specific order should issue only if the current methods have failed:

> The general idea is that this should not be first resort, but that it is desirable to empower the court—upon a suitable showing that the authorized methods did not work—to permit additional methods on a case-by-case basis.[15]

The proposed test for a new case-by-case approach is "reasonably calculated to give notice"—a lesser standard than actual notice. The difficulties inherent in a "reasonably calculated" standard are reflected in the Advisory Committee's recent decision to authorize service of process under a "reasonably calculated to give notice" standard *only when* the Judicial Conference declares "a Civil Rules emergency" due to "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court."[16] Although some differences exist between service of process and service of subpoenas, since Rule 45 primarily applies to non-parties,[17] anything that lessens Rule 45's protections should entail heightened caution.

B. Allowing More Methods of Service Will Engender More Litigation, Not Less

One basis offered for amending Rule 45 is to reduce "wasteful litigation activity" caused by "the rule's ambiguity about the service of subpoenas."[18] But expanding the methods of service to include various—but unenumerated—additional means would create an entirely new set of ambiguities that would only proliferate fights about sufficiency. Alternative methods could include "service" via email or social media even when the chance of actually reaching the intended recipient are purely speculative in the absence of any return of service. The broad and ill-defined "reasonably calculated" standard would inevitably invite courts—largely proceeding *ex parte*—to sign off on untested methods with no idea whether they will work. Those methods will be contested.

Caution is especially imperative because Rule 45(g) authorizes contempt sanctions for a person who "fails without adequate excuse to obey the subpoena." The Advisory Committee should avoid increasing the likelihood that people who do not receive subpoenas suffer those penalties. If, despite these risks, the Advisory Committee proceeds, the amendment should include

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[14] *Id*. at 288.

[15] *Id*.

[16] FED. R. CIV. P. 87.

[17] Notes of Discovery Subcommittee Teams meeting (Aug. 19, 2024), Agenda Book, Civil Rules Advisory Committee (Oct. 10, 2024), 294, https://www.uscourts.gov/sites/default/files/2024-10_civil_rules_agenda_book_final_10-6.pdf.

[18] Agenda Book, Civil Rules Advisory Committee (Apr. 9, 2024), 258. *See also* Draft Minutes, Civil Rules Advisory Committee meeting Oct. 17, 2003, Agenda Book, Civil Rules Advisory Committee (Apr. 9, 2024), 68 ("Disputes about whether a subpoena was actually served can be important, and that is the goal to be pursued.").

meaningful safeguards, such as requiring a finding that traditional methods of service are not feasible before a court can permit alternative methods, and requiring traditional service before a court can enforce a subpoena or impose sanctions for a failure to respond.

C. Changing or Deleting the Tendering of Witness Fees Would Significantly Undermine the Rule's Protections for Witnesses

There is scant if any evidence that the rule's language about tendering fees causes any problems in the service of subpoenas.[19] A feeling that "this seems an antiquated requirement"[20] does not justify repealing this well-accepted element that is deeply rooted in the rule's history and purpose of protecting against abuse. Where, as here, nothing is broken, nothing needs to be fixed—and avoiding unintended consequences should be paramount.

If the goal is compliance (and it should be), then delaying or deleting the tendering of witness fees is contraindicated. Rule 45 primarily applies to non-parties who presumably have no stake in the outcome; offsetting their burdens incentivizes compliance. Both the pragmatic purpose—to encourage compliance—and the policy imperative—to protect witnesses from having to bear the burdens of someone else's lawsuit—militate strongly in favor of preserving the historic requirement to tender fees. Moreover, because the rule reflects a statutory requirement for witness fees, [21] and deeply ingrained practice, the act of deleting the rule's reference to those fees would inevitably cause confusion and incite a proliferation of subpoena challenges.

D. If the Advisory Committee Amends the Methods of Service, It Should Add a 14-Day Notice Provision, Include Commercial Carriers, and Limit Any New Additional Methods Only to When Current Methods Have Not Worked

If, despite high risk of negative unintended consequences, the Advisory Committee decides to move forward with drafting a Rule 45 amendment regarding the methods of service, three details under consideration should be included: a 14-day notice requirement; allowing service by commercial carriers; and limiting any authorization of additional methods of service only to circumstances when the methods spelled out in the current rule have been attempted in good faith and have not worked.

III. RULE 45 SHOULD BE AMENDED TO ADD THREE NEW AND MUCH-NEEDED PROTECTIONS

Instead of, or in conjunction with, any (problematic) amendment concerning remote testimony or methods of service, the Advisory Committee should correct three very important deficiencies in Rule 45: the lack of privacy protection; the absence of guidance for privilege logging; and the omission of reimbursement for expenses incurred in producing documents.

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[19] The cases identified by the Discovery Subcommittee, *Susana v. NY Waterway*, 662 F.Supp.3d 477 (S.D.N.Y. 2023), and *Brewer v. Town of Eagle*, 663 F.Supp.3d 939 (E.D. Wis. 2023) are unusual.

[20] Agenda Book, Civil Rules Advisory Committee (Oct. 17, 2023), 288.

[21] 28 U.S.C. § 1821.

A. Rule 45 Should Require "Reasonable Steps" to Protect Private and Confidential Information

Although a central purpose of Rule 45 is to protect "a person subject to the subpoena,"[22] the Rule makes no mention of privacy rights, which are among the most important protections witnesses need in today's litigation environment. The current Rule 45 inappropriately puts the burden on subpoena recipients, who are mostly innocent bystanders to the litigation, affirmatively to move to quash subpoenas that request information that is personal, confidential, or otherwise protected, and also to bear a movant's burden of persuasion. Many subpoena recipients are not in a position to file motions for protective orders—and *a fortiori*, neither are third parties who are not themselves subpoena targets, but whose personal and confidential information is held by a subpoena recipient. Additionally, the current rule seems to require production of such information without requiring the issuer to take reasonable steps to protect third-party personal and confidential information from unauthorized access, use, or disclosure.

Rule 45 should acknowledge that issuers of subpoenas have a duty to exercise due care in the scope of information requests and in the handling of personal and confidential data produced in response to their requests.[23] It is important to consider that "private litigants may have little incentive to incur security costs to protect third-party information."[24] Accordingly, Rule 45 should be amended to clarify that protecting "a person subject to the subpoena" requires the issuer to minimize production of, and take reasonable steps to protect, personal and confidential information. LCJ has proposed specific rule amendment language for the Advisory Committee's consideration.[25]

B. Rule 45 Should Provide Guidance for Privilege Logging

The Advisory Committee's recent work to address the often-outsized burdens of privilege logging procedures via amendments to Rules 16(b)(3)(B)(iv) and 26(f)(3)(D) did not include a change to Rule 45.[26] But non-parties facing the prospect of producing privilege logs pursuant to Rule 45 have an equal, if not greater, need for guidance and protections than parties—and they do not typically participate in pre-trial conferences. The same *de facto* default to "document-by-document" overlogging occurs under Rule 45 as under Rule 26(b)(5)(A), and it requires non-parties to produce costly, burdensome, and often worthless privilege logs. Rule 45 makes clear that non-parties should be entitled to greater, not lesser, protection against undue burdens; it should provide useful guidance to protect non-parties from overly burdensome privilege logging.

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[22] FED. R. CIV. P. 45(d).

[23] *See* MODEL RULES OF PROF'L CONDUCT r. 4.4(a) (AM. BAR ASS'N 1983) ("a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [third parties]."

[24] Babette Boliek, *Prioritizing Privacy in the Courts and Beyond*, 103 Cornell L. Rev. 1101, 1108 (2018).

[25] Lawyers for Civil Justice, Rules Suggestion, *Reasonable Steps: Four Critical FRCP Updates for Managing Privacy and Cyber Security*, 9, (Mar. 3, 2025) (on file with the Secretary of the Committee on Rules of Practice and Procedure).

[26] *See* Memorandum from The Honorable John D. Bates, Chair, Committee on Rules of Practice and Procedure, to Scott S. Harris, Clerk, Supreme Court of the United States, *RE: Summary of Proposed New and Amended Federal Rules of Procedure* (Oct. 17, 2024), https://www.uscourts.gov/sites/default/files/2024_scotus_package_final.pdf.

The Advisory Committee should complete its work on privilege logs by promulgating an amendment to Rule 45 to provide non-parties appropriate guidance and protection.

C. Rule 45 Should Require Reimbursement for Expenses Incurred in the Production of Documents, ESI, and Tangible Things

Rule 45 should require issuers to reimburse uninterested, non-party witnesses for the expenses incurred in complying with subpoenas for documents, electronically stored information, or tangible things. Although the current rule purports to provide protection against undue burden, including the tendering of witness fees, such fees are often dwarfed by document production expenses. The lack of express guidance on reimbursement for production leaves witnesses facing significant financial hardship. Uninterested, non-party witnesses often incur substantial expenses in searching for, collecting, reviewing, and producing responsive materials, including costs for document retrieval, electronic data processing, and legal review. As explained by Professor Brian Fitzpatrick in his rules suggestion,[27] saddling non-parties with these expenses is not only inappropriate, but also inconsistent with the original design of Rule 45. An express reimbursement requirement would help ensure fairness by preventing parties from foisting their discovery costs onto strangers to the litigation, while also incentivizing issuers to make more focused and reasonable document requests.

CONCLUSION

Rule 45 should be amended to provide three much-needed protections: (1) an express statement of the duty to take reasonable steps to protect private and confidential information from unauthorized access or use; (2) guidance for third-parties concerning privilege logging; and (3) reimbursement for document production expenses. In contrast, the three ideas before the Advisory Committee for amending Rule 45 are all intended to increase the power of courts over witnesses: to broaden the reach of courts in serving subpoenas, loosen the rules for methods of service of subpoenas, and either weaken or eliminate the requirement to tender witness fees. Each of these ideas requires great caution; together, and without new safeguards, they could remake the Rule to render its purported protections of witnesses empty promises.

[27] Letter from Brian Fitzpatrick, Milton R. Underwood Chair in Free Enterprise and Professor of Law, Vanderbilt Law School, to Secretary, Committee on Rules of Practice and Procedure (Mar. 5, 2025) (on file with the Secretary of the Committee on Rules of Practice and Procedure).