KAPLANFOX

05-CV-G

Kaplan Fox & Kilsheimer LLP
805 Third Avenue
New York, NY 10022
phone 212.687.1980
fax 212.687.7714
email mail@kaplanfox.com
www.kaplanfox.com

September 19, 2005

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: Federal Rule of Civil Procedure 68

Dear Mr. McCabe:

I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On September 15, 2005, the Section unanimously approved the enclosed report entitled "Seeking To Require Party Witnesses Located Out-Of-State and Outside 100 Miles To Appear at Trial Is Not a Compelling Request." On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Civil Rules.

If you would like further information or wish to pass along any comments, I would be pleased to hear from you.

Sincerely yours,

Gregory K. Arenson

GKA:sm
Enclosure

cc: Stephen P. Younger, Esq., Chair (w/encl.)
Thomas McGanney, Esq. (w/encl.)
Allan M. Pepper, Esq. (w/encl.)

SEEKING TO REQUIRE PARTY WITNESSES LOCATED OUT-OF-STATE AND OUTSIDE 100 MILES TO APPEAR AT TRIAL IS NOT A COMPELLING REQUEST

Several recent cases have dealt with the issue of whether an individual party or an officer of a party (a "party witness") can be compelled to appear for trial testimony despite residing beyond the subpoena power of the court as defined in Federal Rule of Civil Procedure 45(b)(2). Decisional law under Rule 45 regarding the court's power to compel appearance of party witnesses who reside outside the 100-mile radius from the court and, for trial, outside the state in which the court is located, is split.

A closely related question is the extent to which Federal Rule of Evidence 611, governing the mode and order of interrogating witnesses, provides authority for a court to require a designated non-resident party witness to appear in the other party's case and thereby essentially expand the scope of a subpoena under Rule 45.

SUMMARY OF CONCLUSIONS

Rule 45, as amended in 1991, does not explicitly extend the subpoena power of the Court over party witnesses. Those courts that have concluded that the amended Rule does extend the subpoena power base their conclusion on negative implication from language added in 1991 to Rule 45(c)(3)(A)(ii) relating to standing to move to quash a subpoena. The courts that reach the opposite conclusion base their result on the limitations set forth in Rule 45(b)(2). Courts do not have inherent power to compel a party witness, residing outside the Rule 45 boundaries, to appear at trial as a witness for the opposing party. Similarly, while Rule 611 gives a court power to exclude witnesses, it does not extend the court's subpoena power.

The uncertainty created by the present wording of the Rule is unacceptable. The rule makers should amend Rule 45 to either remove any possible implication that the subpoena power

has been extended or to make explicit any proposed change in the subpoena power in civil actions.

DISCUSSION

A. The Pertinent Rules

Rule 45

Rule 45(b)(2) permits service of a subpoena only (1) within the district of the court by which it is issued, (2) at any place without the district that is within 100 miles of the place of the trial, or (3) at any place within the state where a state statute or rule of court so permits.[1] Rule 45(b)(2) makes no distinction between service on a party witness and a non party witness. The Rule also references the right to subpoena a U.S. national or resident who is in a foreign country, as provided for in 28 U.S.C. § 1783.[2]

Trial subpoenas were originally limited to 100 miles, regardless of state boundaries. Judiciary Act of 1789, 1 Stat. 88 (1789). Concomitantly, the Judiciary Act of 1789 provided for the taking, and use at trial, of a deposition of a witness beyond the 100-mile trial subpoena bulge.

---

[1]Rule 45(b)(2) provides in part: "Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena."

[2]To the degree there is uncertainty as to a court's authority to subpoena party witnesses located within the United States, but more than one hundred miles away, there is little uncertainty regarding a court's authority to subpoena witnesses located in a foreign country. That authority depends upon whether the person is a national or resident of the United States.

Rule 45(b)(2) provides a "subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28 U.S.C. § 1783." Section 1783, in relevant part, states:

> A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country... if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

28 U.S.C. § 1783(a).

Thus, a court's subpoena power over foreign witnesses is described by statute, not Rule 45.

Id. Rule 45(e)(1) of the Federal Rules of Civil Procedure adopted in 1938 carried over the 100-mile bulge limitation on trial subpoenas while permitting service of a trial subpoena anywhere in the district in which the district court sat. The 1991 amendments moved the geographic scope of a trial subpoena to Rule 45(b)(2) and expanded it to include any place within the state in which the district court sat as permitted by a state statute or rule. However, the 1991 amendments simultaneously adopted the protection in Rule 45(c)(3)(A)(ii) to permit a court to quash or modify a trial subpoena to a person, "who is not a party or an officer of party," located more than 100 miles from the court. Clause (c)(3)(A)(iv) additionally required the court to quash or modify a subpoena if it "subjects a person to undue burden."

The Advisory Committee Notes to the 1991 Amendments, which added clause (c)(3)(A)(ii) to Rule 45, do not suggest, much less state, that those amendments were meant to alter the jurisdictional limits of the court's subpoena power, except to the extent that such amendment, as stated above, adopts the state rule. There is no indication in the Advisory Committee Notes that nationwide service on party witnesses is permitted.

The Notes restate without further elaboration the provisions governing a subpoena of a non-party witness. The Advisory Committee Notes mention the provisions of clause (c)(3)(B)(iii) which authorizes a court to condition enforcement of a subpoena compelling a non-party witness to attend trial upon provision for reasonable compensation for the time and effort involved. The Notes also refer to one situation where a court might quash a subpoena on a party witness:

> Clause (c)(3)(A)(iv) requires the court to protect all persons from undue burden imposed by the use of the subpoena power. Illustratively, it might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially so if the adversary would be required to incur substantial travel burdens.

The Rule and the Advisory Committee Notes by distinguishing in two places between party and non-party witnesses can thus be read as assuming that courts have the power to require corporate parties to bring officers to testify at trial. However, this possible assumption and how it is related to the subpoena power as set forth in Rule 45(b)(2) are not discussed. Nor are any limitations on the power articulated, except to the extent that the Notes state that it might be unduly burdensome to compel an adversary who has no knowledge of the matter to incur substantial travel expenses.

Rule 32(a)

Related rules are Federal Rules of Civil Procedure 32(a)(2) and 32(a)(3). Rule 32(a)(2) provides that the deposition (1) of anyone who at the time of taking the deposition was "an officer, director, or managing agent" of a party or (2) of a person designated as a witness under Rules 30(b)(6) or 31(a) "may be used by an adverse party for any purpose."

Rule 32(a)(2) thus provides that an adverse party may introduce such deposition testimony regardless of the person's availability.[3] With the increased use of video-taped testimony, the prejudice suffered by not having a live witness because he or she cannot be subpoenaed has been substantially minimized.

In addition, under Rule 32(a)(3), a deposition of a witness – including employees of a corporate party as well as officers, directors, and managing agents – may be used "by any party" under various circumstances, including if "the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of a witness *was procured* by the party offering the deposition" (emphasis added). In such a

[3]However, the authors of Moore's Federal Practice point out: "A party may introduce the deposition of an adversary's agent regardless of the agent's or the adversary's availability at trial. Though arguably inconsistent with the language of Rule 32(a)(2), many trial judges require that a deposed witness testify live, if available, and precluding a party from reading the deposition testimony of an available adverse party witness is at worst harmless error, and not grounds for reversal." 7 Moore's Federal Practice, § 32.21[2][d] (3d ed. 2005).

case, the party offering the deposition has the burden of proving that the witness lives more than 100 miles from the place of trial or hearing. 7 Moore's Federal Practice at § 32.24[1][a] (3d ed. 2005). But the party offering the deposition – including the employer of the witness – need not do more to satisfy the Rule. "The party offering the deposition is forbidden to procure the deponent's absence (or distance); this is a far cry from requiring the litigant to procure the deponent's presence." *Ueland v. United States*, 291 F.3d 993, 996 (7th Cir. 2002).[4] Under Rule 32(a), video-taped depositions can often be used to overcome any limitation of the subpoena power.

Rule 611

Federal Rule of Evidence 611 confers discretion upon courts to control courtroom proceedings. The Rule provides, in pertinent part: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

Judicial authority under Rule 611 is broad. Specifically, the Advisory Committee Notes to Rule 611(a) explain that "[t]he ultimate responsibility for the effective working of the adversary system rests with the judge . . . . [to decide] the order of calling witnesses and presenting evidence." In addition, federal courts have consistently held that trial judges enjoy wide discretion in courtroom management, and decisions in this area are rarely disturbed on appeal. *See, e.g., Loinaz v. EG&G, Inc.*, 910 F.2d 1, 6 (1st Cir. 1990) ("[d]ecisions regarding the management of the trial calendar and the courtroom proceedings are particularly within the

[4] Compare, however, Federal Rule of Evidence 804(a)(5) which defines "unavailability" for the purpose of a hearsay exception as "absent from the hearing and the proponent of a statement *has been unable to procure* the declarant's attendance . . . by process or other reasonable means." (Emphasis added.) It would seem that using this standard, an employer would almost always be able to procure the testimony of its employees, and thus the employer's attempted use of an employee's deposition would be subject to the hearsay objection.

province of the trial judge, and her determinations will not be disturbed by [a court of appeals] absent a finding that she abused her discretion"); *see also Elgabri v. Lekas*, 964 F.2d 1255, 1260 (1st Cir. 1992) ("[w]e do not disturb decisions regarding courtroom management unless these decisions amount to an abuse of discretion that prejudices appellant's case"). However, there is no indication in the language of Rule 611 that it was intended in any way to affect subpoena power.

B. Policy Issues

In 1964, the Supreme Court commented that the original restriction on the scope of a trial subpoena was "designed not only to protect witnesses from the harassment of long, tiresome trips but also, in line with our national policy, to minimize the costs of litigation." *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 234 (1964). More broadly, these policy issues may be stated as the convenience of the party subpoenaed and the public interest in a fair trial.

Today, these policy considerations are more complex. It is still inconvenient for a trial witness to travel to the court house, but it is probably easier to travel by airplane coast to coast today than it was to travel by horse 90 miles in 1789. Nor are state boundaries an appropriate determinant of the difficulty a witness faces in attending a trial in response to a subpoena. It is probably easier for a witness located in Philadelphia, Pennsylvania to attend court in New York City than for a witness located in Albany, New York. Yet, the latter can be compelled under current Rule 45(b)(2) to attend a trial in the Southern District of New York, while the former cannot. Moreover, with large, multi-national corporations engaged in litigation in the federal courts, there may also be a sense that it is not a great economic imposition for them to pay for their officers to attend a trial in which they are involved.

On the other hand, it has always seemed fairest to allow each side to put on its own case in the manner it sees as best to influence the trier of fact. Thus, if a party did not have control over a witness and the witness was not within the subpoena power, as recognized by the First Congress, the party could read portions of the witness's deposition. However, courts have a strong preference for live testimony to enable the trier of fact to see the witness's demeanor. *See Napier v. Bossard,* 102 F.2d 467, 469 (2d Cir. 1939)(L. Hand, J.) ("[t]he deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand"); *United States v. Int'l Bus. Machs. Corp.*, 90 F.R.D. 377, 381 (S.D.N.Y. 1981). Depositions may have been taken at a point in the case before the questioner had available all information and testimony about which he or she would like to examine – or with which the questioner would like to confront – the witness at the later time when discovery is complete and trial is under way. Moreover, reading a deposition at trial might not be as effective as having the witness appear live, especially if the witness appeared in the other party's case. In addition, if the witness appeared twice, once by deposition read by someone who was not the witness and once live, it could confuse a jury and lead to some duplication of testimony.

Yet, the alternative of requiring a witness to appear live once and permitting the party sponsoring the witness to conduct its examination in the middle of the other party's case can lead to even more confusion and prevent both parties from presenting a logical, persuasive case to the trier of fact. Nonetheless, a video-taped deposition may eliminate many of the concerns with reading a deposition, since the witness's demeanor will be apparent, and the trier of fact is less likely to confuse a deposition reader and the witness who testifies in the other party's case.[5] As

[5] In 1996, Federal Rule of Civil Procedure 43(a) was amended to allow a court, "for good cause shown in compelling circumstances and upon appropriate safeguards, [to] permit presentation of testimony in open court by contemporaneous transmission from a different location." The Advisory Committee Notes caution that this procedure is not to be used if it is merely inconvenient for a witness to attend trial. "Ordinarily depositions,

video-taped depositions become more common, the public interest in a fair trial may now be shifting in favor of not requiring witnesses to attend trial who are beyond the current geographic scope of a trial subpoena, even if they are an officer of an adverse party.

C. Authority Regarding Power Of Federal Courts Over Party-Witness

There are three arguments that the subpoena power should be extended beyond the limits set forth in Rule 45(b)(2). These are based on: (1) the provisions of Rule 45; (2) the inherent power of the federal courts; and (3) Rule 611. None provide persuasive reasons for extending the subpoena power.

1. Case Law Interpreting Rule 45

There is a split in the post-1991 case law on whether Rule 45 confers greater power to subpoena party witnesses than to subpoena non-party witnesses for trial.

The majority view, that amended Rule 45 confers greater authority to subpoena parties relative to non-parties, does not treat Rule 45(b)(2), by itself, as establishing the boundaries of the subpoena power. Rather, a majority of courts read Rule 45(c)(3)(A)(ii) as implicitly conferring additional power to subpoena parties and their officers. For example, in *In re Ames Dep't Stores, Inc.*, No. 01-42217 (REG), 2004 WL 1661983, at *1 (S.D.N.Y. Bankr. June 25, 2004), the court denied a motion to quash a subpoena compelling the defendant's president to appear at trial in New York even though he lived and worked in Florida. In ruling for the plaintiff, the court observed that "[s]ince that provision [Rule 45(c)(3)(A)(ii)] easily could have been drafted, if it had been the rulemaking [sic] intent, to . . . make its provisions applicable to 'a person' generally, the compelling interpretation is that its application is limited to those persons who are particularly described – i.e., to non-parties or their officers." *Id.* In other words,

---

including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena."

because Rule 45(c)(3)(A)(ii) sets out a court's power to quash subpoenas, the fact that such clause addresses only non-parties is interpreted to mean that a court is not empowered to quash or modify subpoenas served on parties more than one hundred miles from the place described in the subpoena. Otherwise, as the court in *Ames* states, the rule makers could have used language applicable to all parties when describing the court's power to quash or modify a subpoena. (As noted above, clause (c)(3)(A)(iv) does seem to apply to parties, but the *Ames* court does not mention that clause.)

This view of Rule 45 has been accepted by several district courts. *See, e.g., Hayes v. Segue Software, Inc.*, No. Civ. A. 301CV1490D, 2001 WL 1464708, at *5 (N.D. Tex. Nov. 14, 2001) (noting that "Segue's officers would be compelled to testify because the court's subpoena power is limited only over persons who are neither parties nor officers"); *see also In re Bennett Funding Group, Inc.*, 259 B.R. 243, 250-51 (N.D.N.Y. 2001) (concluding, in deciding a motion to dismiss for forum *non conveniens*, that "the Court will be able to compel all the party witnesses from California to appear before it" in New York because the court is only required to quash or modify a subpoena compelling the appearance of non-parties); *Ferrell v. IBP, Inc.*, No. C98-4047-MJM, 2000 WL 34032907, at *1 (N.D. Iowa Apr. 28, 2000) (highlighting that *Johnson v. Land O'Lakes, Inc.*, 181 F.R.D. 388 (N.D. Iowa 1998), a case previously decided by the Northern District of Iowa, "does not follow the majority of courts" and denying defendant's motion to quash a subpoena for two of its "high-ranking officers"); *Venzor v. Chavez Gonzalez*, 968 F. Supp. 1258, 1267 (N.D. Ill. 1997) (concluding that the "limitation on a trial subpoena [under Rule 45(c)(3)(A)(ii)] applies only to 'a person who is not a party'"); *Stone v. Morton Int'l, Inc.*, 170 F.R.D. 498, 500 (D. Utah 1997) (concluding that "Rule 45 F.R.C.P. allows a corporate officer of a party to be subpoenaed to appear beyond the 100 mile limitation"); *National*

Property Investors VIII v. Shell Oil Co., 917 F. Supp. 324, 329 (D.N.J. 1995) (noting, in deciding a motion to dismiss for forum *non conveniens*, that "unlike party witnesses . . . non-party witnesses cannot be compelled to testify before this Court"); *M.F. Bank Restoration Co. v. Elliott, Bray & Riley*, Civ. No. 92-0049, 1994 WL 719731, at *8 (E.D. Pa. Dec. 22, 1994) (granting a motion to quash a subpoena in part because "none of these six employees is represented to be an officer of TRC").

Those courts that hold that Rule 45(c)(3)(A)(ii) does not allow the subpoenaing of parties, nor party witnesses, who are outside of the district (and outside the state) and beyond 100 miles of the court treat Rule 45(b)(2) as establishing the boundaries of the subpoena power. For example, in *Johnson v. Land O' Lakes*, the court denied plaintiff's motion *in limine* seeking to compel the trial appearance of one of defendant's vice presidents, relying on the fact the witness lived and worked in excess of 100 miles from the court where the trial was to take place. 181 F.R.D. at 396. In denying the motion, the court emphasized:

> Rule 45(c)(3)(A)(ii) simply does not extend the range of this court's subpoena power, although it does provide that the court may quash a subpoena, otherwise within its power, for a *non-party* witness, under certain circumstances. There simply is no 'negative implication'. . . that Rule 45(c)(3)(A)(ii) subjects to subpoena officers of parties who are more than 100 miles from the place of trial whether or not they are within the range of the subpoena power defined in Rule 45(b)(2).

Id. at 397 (italics in original). Simply put, the minority view holds that an officer who lives and works more than one hundred miles from the court and outside the state where the trial is to occur is beyond the subpoena power of that court as described in Rule 45(b)(2).

Several other federal courts - but a minority - have applied Rule 45 in the same fashion. *See, e.g., Smith v. Chason*, No. CIV. A. 96-10788-PBS, 1997 WL 298254, at *9 n.4 (D. Mass.

Apr. 10, 1997) (noting, in deciding a motion to dismiss for forum *non conveniens*, that "[t]he 100-mile limitation on service of a subpoena applies to parties as well as non-parties"); *Lindloff v. Schenectady Int'l*, 950 F. Supp. 183, 185 (E.D. Tex. 1996) (noting, in deciding a motion to dismiss for forum *non conveniens*, that "any of Defendant's officers or employees who are outside the Eastern District and who might be unwilling to appear at trial would have to be within a 100 mile radius" of the courthouse if the court were to compel their appearance).

In *Jamsports & Entertainment, LLC v. Paradama Prods., Inc.*, No. 02 C 2298, 2005 WL 14917, at *1 (N.D. Ill. Jan. 3, 2005), the court rejected the argument that the long-standing geographic limitations on the reach of a subpoena had been expanded with respect to a person who is a party witness. The court read Rule 45(c)(3)(A)(ii) as providing that, even if service is proper under Rule 45(b)(2) – that is, it is *served* within the geographic limits – it is to be quashed as to persons who are not officers of a party if it requires them to travel more than 100 miles. *Id.* at *2.

It appears that the minority view is better reasoned than the majority view. The subpoena power is clearly set forth in Rule 45(b)(2). Nothing in that section suggests that party witnesses are subject to nationwide service in civil cases. Moreover, the language of Rule 45 sharply contrasts with the provisions of Federal Rule of Criminal Procedure 17, which clearly provides for nationwide service of subpoenas on all witnesses. It does not seem appropriate for the rule makers to have modified Rule 45(b)(2) indirectly by inserting a provision in Rule 45(c)(3)(A) limiting the standing to move to quash a subpoena. Nor is it likely that such a modification occurred or was intended when the Advisory Committee Notes are silent about such a change.

2. Authority Regarding Inherent Power of the Court Over Party Witnesses

Another possible argument for a right to nationwide service of subpoenas would be reference to the inherent power of federal courts. However, this argument is not persuasive as it is well established that the inherent power of the courts does not permit courts to override specific provisions of the Federal Rules.

The inherent powers of the federal courts, according to the Supreme Court, are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962). However, this power is limited to situations that the Federal Rules do not address. *See Shepherd v. American Broadcasting Cos.*, 62 F. 3d 1469, 1474 (D.C. Cir. 1995). The First Circuit has held that "inherent powers cannot be exercised in a manner that contradicts an applicable statute or rule." *In re Atlantic Pipe Corp.*, 304 F.3d 135, 143 (1st Cir. 2002).

Several cases decided prior to 1991 rejected an "inherent powers" theory to override the restrictions of Rule 45. Thus, the Fifth Circuit in *GFI Computer Indus., Inc. v. Fry*, 476 F.2d 1, 5 (5th Cir. 1973), held "the [district] court had no power to force a civil defendant outside its subpoena jurisdiction to appear personally at the trial and there submit to examination." *See In re Air Crash Disaster Detroit Metro. Airport*, 130 F.R.D. 647, 650 (E.D. Mich. 1989); *Standard Metals Corp. v. Tomlin*, No. 80 Civ. 2983, 1982 WL 1300, at *1 (S.D.N.Y. Apr. 14, 1982) (motion denied, where, "[d]espite the clear language of the rule above [Rule 45], plaintiff seeks to have the court use its power to provide for a fair trial to compel witnesses far beyond the 100 mile limit to attend trial in the instant case"); *Jaynes v. Jaynes*, 496 F.2d 9 (2d Cir. 1974) (court has no power to subpoena defendants who lived in Texas to trial in Northern District of New

York, citing Rule 45). The 1991 amendments did not purport to change the results of these cases.

The Manual for Complex Litigation (Fourth) § 12.23 similarly does not support the inherent power theory. It concludes that, while a court "probably" lacks authority to compel a non-resident party witness to appear in its opponent's case, the court only can "encourage cooperation by precluding the uncooperative party from later calling such a witness." Thus, whatever the limitation of the subpoena power in Rule 45, it is not extended through the courts' inherent power.

3. The Effect of Federal Rule of Evidence 611

In light of the broad discretion Rule 611 offers to courts, some have proposed that Rule 611 can be used to compel the appearance of witnesses in situations where Rule 45 is silent or restricts a court's subpoena power. Analysis of the relationship between Rule 611 and Rule 45 reveals that courts have used Rule 611 to prevent gamesmanship in the order and mode of witness production and presentation. But, courts have rejected the notion that Rule 611 expands a court's subpoena power under Rule 45.

a. The Use of Rule 611 To Prevent Gamesmanship

Courts have used their discretion under Rule 611 to prevent gamesmanship tactics in witness appearance and presentation at trial. Specifically, under Rule 611, courts have acted "to preclude parties who refuse to honor a reasonable request for production of a key witness subject to their control, and thereby force an opponent to use a deposition, from calling the witness to testify personally during their presentation of evidence." Manual for Complex Litigation 2d § 22.23 at 127 (1986 ed.).

Two decisions from the Southern District of New York reflect this practice. In *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 776 F. Supp. 838 (S.D.N.Y. 1991), the court held that a party witness could not willfully absent himself during the plaintiff's presentation of evidence and later testify in the defendant's case. Citing Rule 611's conferral of judicial discretion to control the mode and order of witness interrogation, the court concluded that, "[i]f [the party witness] elects to absent himself during plaintiffs' case, he will not testify at all, and plaintiffs will be free to comment upon his absence." *Id.* at 839.

Similarly, in deciding whether to compel defendants to produce two witnesses in the plaintiff's case, the Southern District of New York embraced a fairness approach and assessed the importance of the particular witnesses and their testimony, rather than adhering to the party/non-party and 100 mile distinctions of Rule 45. *See Maran Coal Corp. v. Societe Generale de Surveillance S.A.*, No. 92 Civ. 8728 (DLC), 1996 WL 11230 (S.D.N.Y. Jan. 10, 1996). The court concluded that the live testimony of the witnesses was critical to the jury's understanding of the issues. *Id.* at *1. Relying on Rule 611(a), the court ordered the defendants to produce the witnesses in the plaintiff's case or be precluded from calling those witnesses in their own case. *Id.* at *3.

b. Rule 611 Does Not Expand the Court's Subpoena Power Under Rule 45

Although courts have used Rule 611 to preclude defendants from calling witnesses who were willfully withheld from the plaintiff's case, courts have rejected the argument that Rule 611 expands the subpoena power set forth in Rule 45. For example, in *In re Air Crash Disaster*, 130 F.R.D. at 648,[6] the Eastern District of Michigan rejected the contention that Rule 611 provides sufficient authority to compel the appearance of a non-party witness beyond the 100-mile radius

[6]Although this case was decided prior to the 1991 Amendment to Rule 45, the court's rationale is applicable to amended Rule 45 as well.

of the court's subpoena power. According to the court, Rule 45 explicitly lists the geographic limitations on the authority of federal courts to compel the attendance of non-party witnesses at trial.

The court's decision limiting the power of Rule 611 in the subpoena context appears sound for two reasons. First, if Rule 611 could be used to compel the appearance of witnesses beyond the subpoena power, trial judges would enjoy unfettered discretion, and the limitations of Rule 45 would be rendered meaningless. In addition, the Federal Rules of Civil Procedure contemplate a situation in which a party seeks testimony from a witness outside the court's subpoena power. In such a case, Rule 32(a)(2), dealing with the use of depositions at trial, not Rule 611, dictates the proper course of action.

In sum, Rule 611 confers broad discretion on courts to control the order and mode of witness appearance and presentation at trial. Courts have used Rule 611 to prevent gamesmanship and preclude defendants from calling witnesses who are being willfully withheld from the plaintiff's case. However, Rule 611 does not expand the court's subpoena power under Rule 45. As a result, the court's conclusion concerning its power to control witness attendance at trial is governed by the court's interpretation of Rule 45, not Rule 611.

CONCLUSION

The Section concludes that current Rule 45 should not be read to provide nationwide service of process over officers of corporate defendants. It is desirable for the Advisory Committee on Civil Rules to make the Rule explicit as to whether or not there should be such nationwide service under Rule 45.

September 15, 2005

New York State Bar Association
Commercial and Federal Litigation Section
Committee on Federal Procedure

Gregory K. Arenson, Chair*
Scott A. Barbour
Robert E. Bartkus
Ernest T. Bartol
James A. Beha, II
Leonard Benowich
Howard E. Berger
William J. Brennan
Mark Budoff
Larissa A. Cason
John P. Coll, Jr.
Robert J. Dinerstein
Thomas F. Fleming
Neil P. Forrest
Margaret J. Gillis
Richard E. Hahn
Alan A. Harley
Richard K. Hughes
Martin E. Karlinsky
Madeline Kibrick Kauffman
Patrick A. Klingman
Chaim A. Levin
Mitchell A. Lowenthal
Thomas McGanney*
Michael R. McGee
Charles E. Miller
James F. Parver
Allan M. Pepper*
Sharon M. Porcellio
Shawn Preston Ricardo
Stephen T. Roberts
Michael I. Saltzman
Sarit Shmulevitz
Doreen A. Simmons
Alexander R. Sussman
Elizabeth S. Watson
David H. Wilder
Eric C. Woglom
Scott H. Wyner

*Co-authors of this report