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January 20, 2012

Via US Mail

Mr. Peter G. McCabe, Secretary
Advisory Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendments to F.R.Civ.P. 45

Dear Mr. McCabe:

Please see the enclosed reprint of an article which ran in the January 9, 2012 edition of the *National Law Journal* as my public way of responding to the Committee's request for public comment.

Sincerely,

Robert L. Byman

Enclosure

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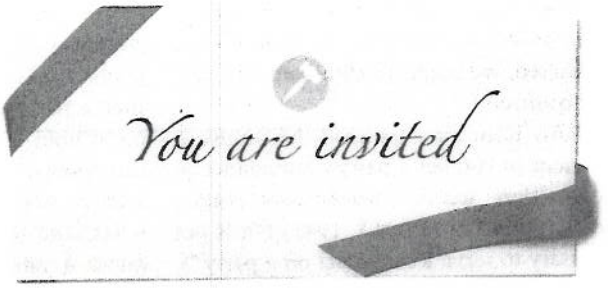
How do you invite a party to your party?

There should be clarity that notice is enough to compel appearance at a deposition— and no subpoena is needed.

BY ROBERT L. BYMAN

It isn't much of a party if no one comes. To get a party to your party you need to invite her—or maybe subpoena her. Subpoena? A party? For a deposition? I had never really thought so—for 40-plus years, when I have wanted to depose an adverse party, I have simply sent out a notice; that always worked. But maybe I have just been blessed with compliant adversaries. And as the old Arabian proverb goes, "No matter how far you travel the wrong path, go back." It may be time to go back and rethink our path—or, better yet, it may be time to clarify the rules so that we may safely continue.



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THE PRACTICE
Commentary and advice on developments in the law

It was my friend Brook Lathram from Bass, Berry & Sims in Memphis, Tenn., who got me thinking. The Civil Rules Advisory Committee has circulated proposed amendments to Fed. R. Civ. P. 45 for public comment by Feb. 15. The proposed amendments are excellent. They greatly eliminate confusion and simplify issues on the issuance, service and compliance with subpoenas. But Brook found something in the proposed amendments he posits could have the unintended consequence of overturning settled case law on the location of party depositions.

OK, let's context up a little hypothetical. Richie Rich, who resides in Chicago, drives his Bentley down Beale Street, looking for Elvis but finding a pothole. He sues the city of Memphis for the substantial damage to his car in the U.S. District Court for the Western District of Tennessee. Brook, representing the city, sends Richie a notice for a deposition to occur in Memphis. Under settled law, Rule 30 governs party depositions, and Rule 30 would compel Richie to come to Memphis, absent some showing of hardship that he and his Bentley are incapable of making the trip. See, e.g., *Karakozova v. University of Pennsylvania*, 2010 U.S. Dist. Lexis 102731 at *4-*5 (E.D. Pa. 2010) ("Under the Federal Rules of Civil Procedure the location of a deposition is first left to the party noticing the deposition. Fed. R. Civ. P. 30(b)(1). Where defendant has requested that plaintiff appear for her deposition within the forum district in which she has chosen to file suit, she must appear for her deposition absent a showing of unreasonable hardship or exceptional circumstances.").

THE PLACE OF COMPLIANCE

But as Brook points out, the proposed amendments to Rule 45 could give Richie an argument that might force Brook to come to Illinois (ugh) for the deposition. As it currently exists, Rule 45 does not directly address the location for compliance with a subpoena—it sets out the geographical limits for service and for quashing or modifying a subpoena, but it doesn't say anything about where a subpoena can command attendance. The Advisory Committee's proposed amendments would add a new provision to Rule 45 to expressly govern location:

"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 is a party or party's officer, or (ii) the person is commanded to attend a trial and would not incur substantial expense."

So here's the rub, as Brook points out. This proposed language would give a party the valid argument that a party must be subpoenaed for deposition—and that the

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subpoena can only require a location within 100 miles or within the state of the deponent's residence.

And as I mulled over Brook's point, it occurred to me that even the existing rules permit the same argument, although it would be a bigger stretch.

We assume that notice suffices to get a party to a deposition, but why exactly is that? Rule 45, even as it currently exists, is in tension with rules 30 and 37. So maybe, as proposed amendments to Rule 45 are considered, we ought to eliminate any possible confusion.

Courts have long assumed that notice is sufficient to compel a party's attendance at a deposition. *Spaeth v. Warner Bros. Pictures Inc.*, 1 F.R.D. 729 (S.D.N.Y. 1941) ("It is not necessary to serve a subpoena on a party."). *Collins v. Wayland*, 139 F.2d 677, 678 (9th Cir. 1944), cert. denied, 322 U.S. 744 ("true, that no subpoena was served on appellant...[but] he was a party, and therefore no subpoena was necessary"). And, let's see a show of hands if anyone disagrees; I have never seen anyone successfully claim that a notice is not sufficient.

Maybe so, but *Spaeth* cited no authority; and *Collins* merely cited *Spaeth*. And Rule 30 doesn't exactly say that notice is sufficient to compel attendance. Rule 30 simply says, "A party who wants to depose a person by oral questions must give reasonable written notice to every other party." That is, you can't make a deposition a private affair by getting a witness to attend without notice to all parties. But the rule doesn't expressly address the method by which you actually compel the witness to attend. It simply says that whether the witness shows up by agreement, by subpoena or perhaps by divine intervention, all parties have to have notice.

Now, Rule 30 and Rule 37 each contemplate sanctions in the event that a noticed deposition, as opposed to a subpoenaed deposition, doesn't go off as planned. Rule 30(g) provides for recovery of the expenses for attending a deposition that doesn't occur because "the noticing party failed to...serve a subpoena on a nonparty deponent, who consequently did not attend." Rule 37 permits sanctions if a party "fails, after being served with proper notice, to appear."

So, clearly, if you can be sanctioned for not complying with proper notice, then notice is all that is needed to compel a party deposition, right? Well, yeah, that seems right. But if that is right, if all you need is notice, then why on earth does Rule 45 contemplate the use of a subpoena for a party deposition?

Current Rule 45(c)(3) states that "the issuing court must quash or modify a subpoena that...requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides." If no subpoena is required for a party, why does the rule need to qualify what kind of person is entitled to seek to quash a subpoena? We are taught to find meaning in all of the language in a rule; the phrase "person who is neither a party nor a party's officer" has no meaning unless a subpoena can be issued to a party. I'm confused.

And at least one federal judge shares my confusion. Although following the mainstream and holding that "a subpoena is not necessary to compel the attendance of a party to a deposition," Judge Robert Potter, in *Howell v. Morven Area Medical Center Inc.*, 138 F.R.D. 70, 71 (W.D.N.C. 1991), was troubled that "the Federal Rules of Civil Procedure are not entirely clear about this point."

ONE FURTHER AMENDMENT NEEDED

And if it is not entirely clear now, the proposed amendments will make it even more not clear. The proposed amendments make it crystal clear that deposition subpoenas may be served on parties without clearing up what that means as to the place of compliance.

Now, Brook limits his concern over the proposed amendments to depositions as opposed to trials. But my personal view is that there is no reason to permit confusion in either context. Here's the point. Parties, being parties, are subject to the jurisdiction of the court. If the rules are clear that notice is enough to compel attendance—at deposition or at trial—then enough is enough. Nonparties are not before the court until they are brought before the court via subpoena. So we need Rule 45 for nonparties, but all we really need for parties is clarity that notice is enough.

Maybe it ain't broke. Maybe Brook and I and Potter are all crazy, maybe there is no lack of clarity. But if others see the same problem, the fix is so easy. All we need is a provision in Rule 45 (or in Rule 30 or anywhere else) that says, "A party's attendance at deposition or trial may be compelled by notice without any requirement for a subpoena." (The Advisory Committee will rightly conclude that the fix isn't quite as simple as that, but I have a word limit here.) If you agree, drop the committee a note by Feb. 15.