

February 6, 2012

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Mr. Jonathan Rose, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

**Re: Proposed Amendments to Rule 45 of the Federal Rules of Civil
Procedure**

Dear Secretary Rose:

This letter is submitted to the Committee in response to the request for public comment concerning the proposed amendment to Rule 45 of the Federal Rules of Civil Procedure. The public hearing scheduled to take place on January 27, 2012 in Chicago, Illinois was canceled, and this letter is submitted in lieu of the testimony I would have provided at that hearing.

I am a partner with Hinshaw & Culbertson LLP and have an active federal practice. I also serve as deputy general counsel to our firm, which has approximately 500 lawyers in thirteen different states. Our firm has experienced Rule 45's application throughout the country. I serve on DRI's Board of Directors, and I am a Fellow of the American Bar Foundation. While the thoughts and opinions expressed below are mine alone, they are informed by my experiences and by the experiences of our firm's attorneys.

I. Trial Subpoenas for Parties and Their Officers

The proposed amendment confirming that parties and their officers are encompassed by Rule 45's 100 mile radius is a welcome clarification to the existing Rule. While modern modes of transportation have reduced travel time, they have not eliminated the inconvenience and burden of attending trial at a distant location which led to the Rule's original enactment. The time that senior officers spend traveling to testify at trial imposes an opportunity cost on his or her company and is one of the hidden costs of litigation. Moreover, it multiplies the cost associated with the officer providing deposition testimony. Thus, the amendment is consistent with Rule 1's mandate. It eliminates the potential for harassment and provides parties and their counsel with a clear nationally uniform guideline to follow. With the availability of videotaped depositions, the amendment will not negatively impact a jury's truth-seeking function. Through videotaped testimony, jurors can evaluate the demeanor and credibility of a witness as well as if the witness had appeared before them in person.

II. Notice to Other Parties

The proposed amendment requiring that each party be served with notice and a copy of any subpoena before it is served on the person to whom the subpoena is directed (Rule 45(a)(4)), is another welcome improvement to the existing Rule. It will enhance a party's ability to object to a subpoena or to seek additional information from the subpoenaed person.

However, the proposed amendment would theoretically allow a party to issue a subpoena immediately after issuing the required notice. The Committee should consider a minimum time requirement between issuance of the notice to all parties and when the subpoena may be mailed or served on the person to whom it is directed. Such a timing requirement would allow parties the opportunity to assess whether to challenge a subpoena before it is served.

III. Additional Notices

The Committee seeks comment on whether "additional notices should be required concerning the production of subpoenaed materials." The Committee should consider notice and service requirements in two related circumstances - when an objection is made to a subpoena or when an agreement to modify the timing or scope of a subpoena is entered into between the person on whom it is directed and the party issuing the subpoena. While courtesy, common sense and the application of reasonably good practices would individually or collectively suggest that attorneys notify other counsel whenever they object or agree to modify the scope of a subpoena, we have experienced instances where that has not occurred. Requiring notice of an objection be provided by the party making that objection is not burdensome and will allow other parties to join in the objection or in efforts to resolve the objection prior to any court intervention. Agreements to modify the scope of a subpoena are happening with greater frequency with subpoenas that seek the production of electronically stored information. Requiring the party issuing a subpoena to promptly provide notice of an agreement to amend the timing or scope of a subpoena is not burdensome and would provide other interested parties the opportunity to determine if they will accept the revised scope of the subpoena or seek additional documents without the need for issuing an additional subpoena.

IV. Standard for Transferring Subpoena-Related Motions

Finally, the Committee requested comment on the standard applicable to the transfer of subpoena-related motions. The proposed standard, which in the absence of party consent requires that exceptional circumstances exist before a subpoena-related motion may be transferred, sets the appropriate threshold to apply in light of the Committee's goal of reducing the burdens of Rule 45 on nonparties. It should be the rare case where such a motion is transferred over the objection of the person who received the subpoena. The exceptional circumstances standard is not overly restrictive and the examples provided in the Committee Notes are illustrative of how that standard should be applied in practice.

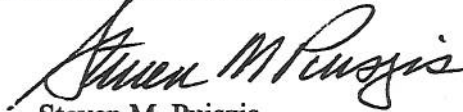
In conclusion, the proposed amendments achieve the Committee's goals of adding clarity and simplicity to the existing rule and will help to ease the burdens associated with the

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application of Rule 45's subpoena power. Thank you for providing me with the opportunity to submit these comments to the Committee.

Very truly yours,

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