REPORT ON PROPOSED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 45

New York State Bar Association

Commercial and Federal Litigation Section

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I. Introduction

Federal Rule of Civil Procedure 45 ("Rule 45" or the "Rule") concerns the use of a subpoena in a federal action. The Rule was last amended in 1991. The Advisory Committee on Federal Rules of Civil Procedure (the "Advisory Committee") of the Committee on Rules of Practice and Procedure (the "Committee on Rules") of the Judicial Conference of the United States has drafted proposed changes to Rule 45. In August 2011, the Committee on Rules released these proposed changes to the bench, bar, and public, requesting comments. Among the purposes of the proposed changes are to make Rule 45 simpler to follow, and, in one instance, to resolve a dispute among the courts over the jurisdictional reach of subpoenas.

This report contains comments by the Commercial and Federal Litigation Section of the New York State Bar Association (the "Section") to the proposed amendments to Rule 45. Generally, the Section supports the proposed amendments. In certain instances, the Section recommends additional changes.

II. Summary

The Section approves the proposed simplification of the Rule.

We agree with the proposed change to allow nationwide service of subpoenas issued from the trial court. Although we agree with the Advisory Committee that subpoena enforcement should begin in the court of the jurisdiction where compliance will occur, we think the compliance court should be permitted to transfer the matter to the trial court upon "good cause" rather than under the proposed "exceptional circumstances" standard. We also think the trial court should become the arbiter of a subpoena-related dispute when the subpoenaed person requests or consents to a transfer to the trial court.

The Section supports the Advisory Committee's compromise proposal to resolve the jurisprudential split over whether an out-of-state party or officer of a party can be compelled to travel more than 100 miles to testify at trial by prohibiting such compelled testimony absent a showing of good cause, and we recommend additional factors for courts to consider when deciding whether good cause exists.

We also approve the proposal to notify parties of the issuance of a subpoena by requiring the issuing party to serve a copy of the actual subpoena upon all parties, although we recommend that the Rule require service upon the parties simultaneously with issuance rather than before issuance. We would also strengthen the notice requirements to require notice of a party's modification of a subpoena and of its receipt of a document production in response to a subpoena.

III. Analysis of the Proposed Amendments

(1) Proposed Rule 45(c): compliance rules are simplified and consolidated in a single provision.[1]

Currently Rule 45(a)(2) identifies the issuing court, Rule 45(b)(2) determines the place of service, and Rules 45(b)(2) and (c)(3) determine the place of compliance.[2] Consolidating these aspects of the Rule within one subsection, Rule 45(c), is a welcome change. Additionally, the proposed rule eliminates the need for litigants to consult the service rules of the issuing court's state law, which is currently set forth in Rule 45(b)(2)(C). The simplification is to be applauded.[3]

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[1] Proposed Rule 45(c) reads as follows:

(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

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

(ii) the person is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, tangible things, or electronically stored information at a place reasonably convenient for the person who is commanded to produce; and

(B) inspection of premises, at the premises to be inspected.

[2] Rule 45(a)(2), (b)(2) and (c)(3) reads as follows:

(a)(2) ***Issued from Which Court.***

A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

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(b)(2) ***Service in the United States.***

Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(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

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(2) Proposed Rules 45(a)(2), (3): permits nationwide service of subpoenas from the court where the action is pending.[4]

The current version of Rule 45 rule identifies the court in the jurisdiction in which discovery is to take place as the court from which a subpoena is issued. In an effort to circumvent what would otherwise be a jurisdictional hurdle for many practitioners, the current Rule permits lawyers who are not admitted to practice in the issuing court to issue subpoenas on behalf of that court if they are admitted to practice in the jurisdiction in which the action is pending. Many lawyers do not believe it makes intuitive sense for the Federal Rules to require a subpoena to be issued by the court in the jurisdiction in which compliance will occur. The

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(c)(3) ***Quashing or Modifying a Subpoena.***

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

[3] See fn. 2 for text of Rule 45(b)(2)(C).

[4] Proposed Rule 45(a)(2) and (3) read as follows:

(2) ***Issuing Court.*** A subpoena must issue from the court where the action is pending.

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

proposed version of the Rule eliminates this confusion by changing the definition of the "issuing court" so that it is defined as the court where the action is pending. As a result, the proposed amendments strip from Rule 45 that portion of the current Rule that grants practitioners authority to issue subpoenas from foreign district courts. The amendments therefore dispense with the distinction made in the current Rule between discovery subpoenas (issuing court is the court where depositions or document productions will occur) and trial subpoenas (issuing court is the court where trial testimony will be taken). The net effect of these proposed changes is to provide for nationwide service via the court where the action is pending, similar to that provided under Federal Rule of Criminal Procedure 17(e).

The Section recognizes that these proposed changes streamline Rule 45 and make it easier to understand without any perceived drawback.

(3) Proposed Rule 45(f): provides authority to transfer a compliance dispute from the court in the jurisdiction in which compliance is required to the court before which the action is pending.[5]

The court in the jurisdiction in which compliance must occur has jurisdiction over subpoena compliance disputes. However, proposed Rule 45(f) permits the transfer of a compliance dispute if the responding person and the parties to the litigation agree or if the court finds "exceptional circumstances." (In the event of a transfer, the subpoenaed person's lawyer may appear and file papers in the transferee court so long as that lawyer is admitted to practice in

[5] Proposed Rule 45(f) reads as follows:

> **(f) Transferring a Subpoena-Related Motion.** When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the parties and the person subject to the subpoena consent or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

the compliance court.) The Section supports this change and recommends additional changes with respect to both bases for transfer.

Imposing an "exceptional circumstances" standard on transfers that lack the required level of consent seems too stringent. The examples provided in the proposed Advisory Committee Note – "if these issues have already been presented to the issuing court or bear significantly on its management of the underlying action, or if there is a risk of inconsistent rulings on subpoenas served in multiple districts, or if the issues presented by the subpoena-related motion overlap with the merits of the underlying action" – do not appear to rise to the level of "exceptional circumstances," but seem more consistent with a standard of "good cause."[6] The Section therefore recommends modifying the proposed rule to permit transfer of the dispute when consent is lacking upon "good cause," while keeping the same examples in the Advisory Committee Note.

Presumably, the reason for creating a default rule requiring the compliance court to decide compliance disputes is to protect the subpoenaed person, who might be burdened by having to travel to appear before the court where the action is pending. As a result, the Section recommends that the proposed rule be changed to permit transfer based on the request (or consent) of the subpoenaed person, provided that notice is given to all parties prior to the transfer.

[6] Good cause would also likely exist, for example, when the responding person is a party employee, because a party will typically pay for the legal representation of its employee. Hence, the party employee will likely not experience an undue burden if its lawyer is required to appear before the trial court.

(4) Proposed Rule 45(c): upon good cause, permits trial subpoenas upon out-of-state parties and officers of parties that require more than 100 miles of travel.[7]

The current version of Rule 45 sets forth a subpoena's geographic limits in Rule 45(b)(2) and 45(c)(3)(A)(ii).[8] The proposed rule has the beneficial effect of describing the jurisdictional boundaries of a subpoena in a single provision, Rule 45(c). More importantly, the proposed rule resolves a divergence in the case law, sometimes between courts within the same district, over whether the current version of the Rule permits a litigant to compel an out-of-state party or party's officer to travel more than 100 miles. The Advisory Committee concluded that the Rule was not written with the intent to expand subpoena power over parties and officers of parties. The proposed changes are designed to reflect this interpretation clearly, and do so by limiting the

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[7] *See* fn.1 for text of Proposed Ruled 45(c).

[8] Rule 45(b)(2) and (c)(3)(A)(ii) read as follows:

(b) Service.

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(2) Service in the United States.

Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(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

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

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(c) Protecting a Person Subject to a Subpoena.

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(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

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(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held[.]

scope of a subpoena to parties or their officers anywhere within the state in which the subpoena's target lives, works or regularly transacts business. *See* Proposed Rule 45(c)(1)(B)(i).[9]

We have some concern that, pursuant to this proposed rule, a party or its officer can be compelled to undertake extensive and costly intra-state travel. However, the protection provided by proposed Rule 45(d)(1), which requires a party issuing a subpoena to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," appears to be sufficient to protect a responding person who finds lengthy travel to be burdensome.[10,11]

Proposed Rule 45(c)(3) also provides courts with authority to order the testifying person to be "reasonably compensated" for expenses arising from that person's trial attendance, and

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[9] Proposed Rule 45(c)(1)(B)(ii), whose text can be found in fn. 1, offers the same subpoena power over any person when the subpoena concerns attendance at a trial, provided the person to whom the subpoena is directed would not incur "substantial expense." One wonders whether corporate entities will refuse to pay an employee's expenses if they know the employee will be able to obtain reimbursement from the party issuing the subpoena simply by claiming that the travel expenses will be "substantial." Given that any language on the subject might highlight a corporation's freedom to decline to pay its officers' expenses, it seems wisest for the Rule to remain silent on this subject. However, it should be no surprise that the effect of this proposed rule change may be to cause corporate entities to adopt a default policy of refusing to pay an employee's intra-state travel expenses for trial appearances.

[10] It might be suggested that Rule 45 should be amended to grant express permission to a party to subpoena a witness for pre-trial testimony where discovery has closed, the witness was not deposed, and it is now believed the witness will be unavailable for trial. We have concluded that codifying a set of rules to obtain permission in such a scenario would invite an undesired level of gamesmanship. Because the Federal Rules of Civil Procedure provide parties with latitude to move a court for specially-tailored relief based on unanticipated circumstances, a party facing this situation is free to seek relief from the court. The court would then consider whether to grant the request in light of the overall effect it would have on the case. For example, if the testimony to be obtained risks affecting the conclusions of an expert, whose report has been issued prior to the close of discovery, the court could consider whether it should permit the expert an opportunity to revise her report if it were to permit the requested pre-trial testimony.

[11] Proposed Rule 45(d)(1) reads as follows:

(d) Protecting a Person Subject to a Subpoena; Enforcement.

> **(1)** ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required under Rule 45(c) must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

provides courts with the power to impose Rule 37(b) sanctions against a person who does not comply with a court's order to appear and testify at trial.

We support the proposed limitation on a subpoena's scope based merely on the fact that it will resolve a dispute among the courts. Despite our approval of this rule change, the Section recognizes that circumstances can arise in which it would be helpful if the court possessed the power to order an out-of-state party or a party officer to testify at trial. We therefore welcome the addition of Rule 45(c)(3), which the Advisory Committee distributed as an appendix to its proposed changes to Rule 45.[12] The inclusion of Rule 45(c)(3) would permit courts to order the trial appearance and testimony of a party or its officer when such person is beyond the reach of a subpoena (as set forth in proposed Rule 45(c)(1)(A)), provided the court finds "good cause."[13] When considering whether good cause exists, proposed Rule 45(c)(3) directs courts to weigh the alternatives of an audiovisual deposition (consistent with Rule 30) and testimony by "contemporaneous transmission" (consistent with Rule 43). We think that Rule 45(c)(3) should also caution courts, when considering these alternatives, to weigh them against other factors, including the nature of the trial (jury or bench), the expected length of the testimony, and the extent to which the testimony will be contested.

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[12] Proposed 45(c)(3) reads as follows:

> **(3)** ***Order to a Party to Testify at Trial or to Produce an Officer to Testify at Trial.*** Despite Rule 45(c)(1)(A), for good cause the court may order a party to appear and testify at trial, or to produce an officer to appear and testify at trial. In deciding whether to enter such an order, the court must consider the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a), and may order that the party or officer be reasonably compensated for expenses incurred in attending the trial. The court may impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed.

[13] Some Section members would go further and permit subpoenas to require the trial appearance and testimony of a party or its officer, unless extraordinary circumstances can be shown why such an appearance should not be compelled.

Litigants, and even judges, will undoubtedly disagree over what constitutes "good cause." But it is not possible to envision the array of circumstances that could affect a court's inquiry into whether it should compel someone's testimony, and we fear that any attempt at drafting language with greater precision than the additions we have recommended is likely to cause a court to perceive unintended restrictions. Accordingly, we conclude the addition of 45(c)(3), along with our limited supplement of additional factors, would be a helpful advancement.

(5) Proposed Rule 45(a)(4): clarifies and expands subpoena's notice requirement.[14]

The current version of Rule 45 requires service on the parties of a notice before a subpoena is served on its recipient. The proposed change requires service of a notice plus the actual subpoena on all parties before service on the subpoenaed person. The requirement of notice to other parties to the litigation is sound. Requiring service upon all parties of the actual subpoena, in addition to a notice, is not burdensome and will keep the parties apprised of precisely what is being sought. Additionally, the proposed rule wisely eliminates the current requirement of a pre-trial qualification with respect to a subpoena to inspect premises.

Notwithstanding the benefits of the proposed changes, the Section recommends additional changes to Rule 45's notice requirements to further the Rule's goals. The current and proposed versions of the rule require notice "before" a subpoena is served. The rule should be changed to require notice "simultaneous" with service. This change would provide parties with the same opportunity to challenge a subpoena, but it would limit a party's ability to facilitate an evasion of service by the subpoenaed person.

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[14] Proposed Rule 45(a)(4) reads as follows:

> **(4)** ***Notice to Other Parties.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises, a notice and a copy of the subpoena must be served on each party before the subpoena is served on the person to whom it is directed.

The notice requirement should also be enhanced to require notification by any issuing party who negotiates a modification to its subpoena. Similarly, if an issuing party receives documents or electronically stored information in response to its subpoena, the Rule should require the issuing party to notify all parties when it receives that information.

IV. Conclusion

The Section supports the proposed amendments to Rule 45 and the addition of Rule 45(c)(3). Additionally, we recommend (i) revising the Rule to permit transfer of a subpoena compliance dispute to the court where the action is pending upon "good cause" or the request or consent of the subpoenaed person after appropriate notice, (ii) adding factors a court should consider when weighing whether an out-of-state party or its officer should be compelled to testify at trial, (iii) revising notice requirements to permit service upon the parties "simultaneously" with service upon the subpoenaed person, and (iv) supplementing the notice requirements to impose a duty to notify when modifications to a subpoena are negotiated and when documents or electronically stored information responsive to a subpoena are received.

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