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NYLitigator

A Journal of the Commercial & Federal Litigation Section
of the New York State Bar Association

Also Inside

- History of the United States District Court for the Southern District of New York
- Expert Selection
- Report on Proposed Amendments to Federal Rule of Civil Procedure 45

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Table of Contents

Summer 2012 • Vol. 17, No. 1

Page

A Message from the Outgoing Chair

What a great honor and privilege to have had a turn at the helm of the Section, working closely with Tracee Davis and the other talented and collegial group of officers, committee chairs, and members—often in committees, working groups, and task forces. (And I thought Presbyterians held lots of meetings!) JetBlue and AirTrain became a regular commute from Rochester to New York City but the Section made noteworthy strides in shortening distances by technology. Videoconferencing connected an Executive Committee meeting—hosted in Buffalo—with Rochester, Syracuse, Albany, Binghamton and NYC, and also united three "thruway communities" for an upstate "tri-city" CLE program (linking Syracuse, Rochester and Buffalo courthouses). We got a glimpse of the future as the video and audio connections worked flawlessly and brought Section members together. Such technological advances will allow the Section to project its presence and programming to all four corners of the state, making this preeminent Section of the bar relevant and attractive to commercial litigators everywhere.

An outgoing chair's message naturally is backward-looking. But as I look back on the past twelve months I am struck in equal measure by what has been added to the foundation of the Section for the future. In addition to making a renewed commitment to increasing our membership upstate, the Section is poised to continue two other significant initiatives established over the course of the past year: (1) the work of the faster-cheaper-smarter working group and (2) the minority moot court program to attract undergraduate students of color to law school.

More Faster-Cheaper-Smarter

The mantra of "faster-cheaper-smarter" has been invoked by judges at CLEs and by former State Bar President Steve Younger in the House of Delegates, and is captured in the final report of the FCS Working Group, adopted by the Section on June 12. The report identifies five specific initiatives to reduce the time-line and cost of traditional litigation: (1) aggressive early neutral evaluation; (2) expanded mediation; (3) automatic non-binding arbitration in the Commercial Division for cases under a specified amount; (4) use of an a neutral search facilitator to help with e-discovery; and (5) amendments to the CPLR re e-discovery. The complete report is available on the Section's website at www.nysba.org/ComFed. The "Davis Administration" is exploring how to build upon and advance the FCS agenda and the Chief Judge's Task Force on Commercial Litigation in the 21st Century. The FCS Working Group's efforts dovetailed with the Chief Judge's Task Force and have given voice to client-centered reforms. I am deeply indebted to the FCS Working Group, especially the cadre of exceptional in-house counsel who drove the initiative under the leadership of Chair Mitchell F. Borger, Vice President and Associate General Counsel for Macy's Inc. I look forward to seeing how these ideas may be implemented.

A Pipeline Initiative for the Ages

Diversity and inclusion are woven into the fabric of our Section, with the groundbreaking Smooth Moves program leading the bar. This year saw another groundbreaking event as the Section established a model pipeline program at UB law school: a moot court program aimed at undergraduate students of color. The inaugural competition at UB Law School will provide a template for undergraduate minority moot court programs at other law schools in New York. This pipeline initiative is multi-cultural in design with all minority law student associations participating. We expect competitions to be organized at several other law schools this next year. The goal is to eventually establish this feeder program at each law school in New York, working with the State Bar and its Committee on Diversity and Inclusion. I am deeply indebted to my partner, Sheldon K. Smith, for organizing the UB Law program, and Justice Ariel Belen of the Second Department for promoting the pipeline program downstate.

At the end of the day, the Section's strength is its people. I am extremely grateful to have had the chance to serve the terrifically dedicated members of this Section.

Thank you.

David H. Tennant

A Message from the Incoming Chair

I am honored and privileged to have the rare opportunity to lead what I believe is the most dynamic section of any bar association. The Commercial and Federal Litigation Section has a long and extraordinary history of achieving fundamental changes in the substance and practice of commercial law. From its ground-breaking work in the formation of the New York State Commercial Division to the substantive reform of various state and federal laws, the Section's reputation as a thought leader and instigator of change has only grown, and certainly not by chance. Great legal luminaries, from the Section's founding chair, Bob Haig, to our immediate Past Chair, David Tennant, have tirelessly dedicated their services to our Section and the bar. I am humbled, and at the same time thrilled, to be placed in their company. I am equally excited about the unique and significant opportunities facing us as the practice of commercial litigation undergoes enormous change.

Either as in-house litigators, outside counsel or as members of the judiciary, we face the same universal challenge of resolving commercial disputes quickly and more efficiently while providing quality legal services that our consumers deserve. We have already started responding to this challenge by rethinking how to best resolve commercial disputes. Under former Chair David Tennant's leadership, we promulgated recommendations by our Faster, Cheaper, Smarter Working Group, which was insightfully chaired by Vice President and Associate General Counsel of Macy's Inc., Mitchell Borger, and included several members of our esteemed judiciary. We also participated in crafting the recommendations in the recently released report by Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century (on which I along with several former Section Chairs served as members). We have begun exploring ways to support the new case management techniques being implemented by the Southern District's Pilot Project for Complex Civil Cases.

During my term as Chair, I want to pursue the Working Group's recommendation of examining early mediation as a means of delivering more cost-efficient commercial dispute resolution. Because the same heightened emphasis on mediation can be found in the Southern District's recent initiatives, I want to create a similar working group to develop "best practices" for navigating cases through court-annexed mediation in the Southern and Eastern Districts of New York. By soliciting input from in-house counsel, members of the judiciary and other Section members, all of whom play a crucial role in the process, we can distill those practices that enhance the ability of litigators to successfully handle the Southern and Eastern District's mediation processes. The end result should be a useful guide that assists us in delivering more cost efficient solutions to our clients and other stakeholders. I look forward to consulting with many of you and soliciting your input and ideas in the coming months.

On the state side, I have looked at the Task Force Report on Commercial Litigation in the 21st Century as a useful guide in continuing our tradition of lending ongoing support to New York's Commercial Division. As improvements are on the horizon, we have already begun laying the groundwork. To promote and support the legislative initiatives outlined in the Report, I will recommend that the Executive Committee establish a new standing committee called the Committee on Legislative and Judicial Affairs. The purpose of the Committee is: (a) to work in conjunction with NYSBA's Department of Governmental Relations and Committee on Legislative Policy to identify, monitor and assess legislation or judicial initiatives that may impact substantive commercial litigation; (b) to devise strategies for the Section to lend its support or opposition to any legislation or judicial initiative of interest; (c) to collaborate and coordinate with other Section committees in development of affirmative legislation and judicial proposals. If my recommendation of establishing this new committee is adopted, former Section Chair Vince Syracuse will serve as the inaugural Committee Chair.

In response to a request for our input, we also will review and examine, in conjunction with the official Committee on Pattern Jury Instructions, the pattern instructions for commercial claims. With the assistance of Honorable Andrea Masley, former Section Chair, Lauren J. Wachtler, and the Section's Appellate Practice Committee Co-Chair, Melissa Crane, we will consider the area in which enhancements might be made, and draft proposed revisions for consideration by the Committee on Pattern Jury Instructions of the Association of Supreme Court Justices of the State of New York. It is our goal to present our Section's recommendations to the PJI Committee by January.

As we move into the year of the Section's 25th Anniversary, I believe we should take stock of the Section's numerous contributions to the practice of commercial law by drafting a commemorative Section brochure. The Commercial and Federal Litigation Section offers excellent opportunities to enhance a practitioner's professional skills and knowledge through committees and Section meetings while affording interaction with colleagues throughout the state and even internationally. A Section brochure will be a testament to this tradition, hopefully enticing other

practitioners to join the ranks of our 2,230 members while celebrating the Section's enormous accomplishments.

These are just a few of many exciting projects which the Section will focus on this coming year. I welcome your contributions and support and that of the Section's Committees. The Section's Committees have always been at the forefront of developments in commercial litigation and it is my great fortune of working with a highly talented and motivated team of Section Officers: Chair-Elect, Gregory Arenson, Vice-Chair Paul Sarkozi, Treasurer James Wicks, and Secretary Rebecca Hollis. I am confident that, with their involvement, we will accomplish much this year.

If there are activities, professional reports, or specific CLE programs of interest to you, please do not hesitate to call me or send an email (tdavis@zeklaw.com). I look forward to meeting and working with as many Section members as possible during the months ahead.

Tracee E. Davis

Data Breaches

By Mary Noe

I have fond childhood memories of holding my mother's hand and walking into the enormous Dime Savings Bank in Brooklyn. There were 40-foot high ceilings, marble floors, and glass-topped desk platforms with compartments holding deposit and withdrawal slips. In her other hand, my mother clutched a small, dark, soft covered book with the bank's name. All transactions were documented in the bankbook. That was then. As Tevye said to his wife in *Fiddler on the Roof,* "it's a new world… Golde."

"Just as Willy Sutton robbed banks because that was 'where the money was,' cyber thieves rob customer's information allowing access to bank accounts and credit card information."

The Problem

Today banks serve their customers by electronically storing Personally Identifiable Information (PII) such as name, address, date of birth, social security numbers, and bank account numbers. This information can be analogized to the keys that unlock the bank safe and has created the new source of funds for theft. Just as Willy Sutton robbed banks because that was "where the money was," cyber thieves rob customer's information allowing access to bank accounts and credit card information.

One of the first high profile data breaches occurred in February 2005 at ChoicePoint. ChoicePoint obtains and sells the personal information of consumers, including social security numbers, dates of birth and credit histories to businesses. ChoicePoint acknowledged that more than 163,000 consumer's personal financial records had been compromised. The FTC alleged that ChoicePoint sold information to businesses that lied about their credentials and used commercial mail drops as business addresses. ChoicePoint also violated FTC regulations in using public fax machines to transmit consumer information. ChoicePoint then failed to comply with the proper procedures even after receiving subpoenas from law enforcement in 2001. In January 2006, ChoicePoint settled this data security breach case with the FTC and agreed to pay $10 million in civil penalties and $5 million for consumer protection.[1]

One of the largest known data breaches occurred in 2007 when TJX Companies, (TJ Maxx, Home Goods and Marshalls) filed their report with the Securities and Exchange Commission (SEC) reporting 47.5 million customer records were stolen by hackers.[2] Ultimately, TJX settled with Massachusetts Attorney General and forty states to pay approximately $10 million.[3] It also agreed to pay for credit monitoring to qualified customers, and compensated MasterCard $24 million in losses for fraudulent credit cards transactions.[4] Fifth Third Bank, the processing agent of the credit cards, was fined $1.75 million for violating the payment card industry's self-imposed rules for securing data files.[5]

This article will survey the Federal and New York State laws and regulations addressing data breaches theft and the Federal Court's treatment of these cases.

Federal Response

On November 12, 1999, the Gramm-Leach-Bliley Act was signed into law by President Clinton.[6] Section 501 of the Act titled "Protection of Nonpublic Personal Information" requires Federal agencies to establish guidelines of appropriate standards for the financial institutions relating to the administrative, technical and physical safeguards for customer records and information. The Federal Trade Commission adopted the Safeguards Rule to enforce the Gramm-Leach-Bliley Act for entities and individuals operating in commerce to "…insure the security and confidentiality of customer records and information; protect against any anticipated threats or hazards to the security or integrity of such records; and protect against unauthorized access to or use of such records or information that could result in substantial harm or inconvenience to any customer." The Federal Trade Commission Guidelines created an affirmative duty on the financial institution to protect customers' information against unauthorized access or use. Specifically, a financial institution's management is required to assess the risk to customer information, manage and control the risk and create a security program appropriate to the size and complexity of the institution and the nature and the scope of its activities. The institution's board and management must first approve the institution's written information and security policy and program, and, second, oversee efforts to develop, implement and maintain an effective information security program.[7]

The Safeguards Rule requires each financial institution to "identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, alteration, destruction or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks."[8]

Financial institutions must keep the information secure while in their possession and then comply with the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") for disposal of consumer reports information and records.[9] The Disposal Rule was created by the FTC to implement the FACT Act. Any entity that possesses or maintains consumer information for a business purpose must comply with the Disposal Rule. The Rule does not require destruction of all consumer information, but does require covered entities to take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.[10]

There is one other federal statute of relevance: Identity Theft Red Flags.[11] This program includes financial institutions and creditors to create reasonable policies and procedures for detecting, preventing, and mitigating identity theft. The institution must "red flag" activities for possible identity theft, and respond and update changes in risks from identity theft.

The Securities and Exchange Commission (SEC) addressed identity theft of securities industry customers in Regulation S-P. This is a requirement to adopt security programs similar to that of other financial institutions.[12]

New York State Response

States have enacted laws to protect and/or notify their residents whose data has been lost or stolen. The state laws and regulations are modeled on the existing Federal laws and regulations. New York has enacted the following civil laws and regulations relevant to data breaches: General Business Law (GBL) §380, §889-aa, §399-dd, §399-H and State Technology Law §208.

GBL §380, the Fair Credit Reporting Act, outlines the parameters for a consumer reporting agencies to furnish a consumer report. A breach by an officer or employee of the consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information can be fined not more than five thousand dollars or imprisoned not more than one year, or both.

GBL §399-dd governs any person, firm, partnership, association or corporation. A violation occurs when anyone intentionally makes available individual's social security account number to the general public. This section also prohibits requesting from an individual to transmit his or her social security account number over the Internet, unless the connection is secure or the social security account number is encrypted. The law requires that the responsible parties take reasonable measures to ensure that no officer or employee has access to such number for any purpose other than for a legitimate or necessary purpose related to the conduct of such business. Additionally safeguards are necessary or appropriate to preclude unauthorized access to the social security account number and to protect the confidentiality of such number. In the event of an intentional breach the court may impose a civil penalty of not more than one thousand dollars for a single violation and not more than one hundred thousand dollars for multiple violations resulting from a single act or incident. Multiple violations are punishable by a civil penalty of less than five thousand dollars for a single violation and not more than two hundred fifty thousand dollars for multiple violations resulting from a single act or incident.

GBL §399-H is the law for disposing of records containing personal identifying information. A business, firm, partnership, association, corporation, business person or third party under contract with any of the above must shred, destroy or modify identifying information so that it is unreadable.

State Technology Law §208 requires state agencies and businesses operating in the state to notify consumers when their personal information is compromised. Notification must be in the most expedient method possible such as mail, email or telephone. If more than 5,000 residents are to be notified, consumer reporting agencies must also be notified.

Court Decisions

Data breaches and losses present serious problems for the victims as well as the businesses. Compensation to a consumer who suffers a direct out-of-pocket loss may seem minor compared to the potential exposure to the thousands or millions of consumers who claim a fear of future loss and proceed by class action. Several class actions have been brought seeking the cost of credit monitoring over an extended period of time. A condition of any settlement of such class actions would likely be the payment of attorneys' fees to class counsel. To date, courts entertaining such suits have either found that the plaintiffs do not have standing to pursue the claims or, if they do have standing, there is no claim for liability based on a fear of a future loss.

In the *Caudle v. Towers et al.* case heard in the United States Southern District New York several laptops were stolen from a pension consultant an employer hired. The laptops contained the employees' social security numbers. There was no claim that any would-be class member had suffered an actual loss due to fraud or theft. They only alleged the risk of future harm. Although the Court concluded that there was standing to sue, it eventually decided that "Without more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy."[13]

In 2007, several months after TJX filed the data breach with the SEC, banks issuing MasterCard and Visa brought a class action suit against TJX and TJX's credit card pro-

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cessing bank, Fifth Third Bank. The plaintiffs were seeking to recover their costs due to the fraudulent use of the compromised credit cards. The plaintiffs sued for breach of contract, negligence, negligent misrepresentation, conversion and violation of Massachusetts General Laws. The U.S. District Court in Massachusetts denied class certification and dismissed the actions.[14] The U.S. Court of Appeals, First Circuit affirmed the decisions of the District Court except as to a cause of action for negligent misrepresentation, violation of the Massachusetts statute and transfer to the State Court.[15] Ultimately, the case was settled.

Conclusion

Financial institutions and businesses must comply with both federal and state statutes and regulations that often overlap. Non-compliance can result in not only the financial loss due to identity theft but the penalties imposed by Federal and State Agencies. The laws and regulation continue to change in an attempt to stem the tide of electronic theft. The technology that has made life easy has spurned a new breed of global cyber thieves that costs businesses millions of dollars each year. For now, it is the cost of doing business.

Endnotes

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Retelling the History of the United States District Court for the Southern District of New York

By John D. Winter and Richard Maidman

Introduction

About eighty years ago, Judge Charles Merrill Hough provided a history of the first 130 years of the "Mother Court," the United States District Court for the Southern District of New York. Some years later, Judge John Knox's autobiography[1] added to Judge Hough's description of the Court's development from its inception more than 220 years ago. Since then, distinguished judges have supplemented the record regarding the Southern District's place in the history of our federal judiciary. In the early 1980s, Judges Edward Weinfeld, Eugene Nickerson and Roger Miner delivered lectures on the histories of the Southern District and its progeny: the Northern, Eastern and Western Districts of New York. Because more than a generation of lawyers have begun practicing since Judge Miner delivered his lecture in 1984, we thought the time was right to retell the history of our nation's "Mother Court." In retelling this history, we have drawn heavily from the histories prepared by Judges Hough, Knox, Weinfeld, Nickerson and Miner, as well as work done by H. Paul Burak some fifty years ago.

Beginnings

In its first session following the adoption of the United States Constitution, Congress passed the Judiciary Act of 1789. The Act, amongst other things, created the Supreme Court, as well as the Circuit and District Courts.[2] As this brief history demonstrates, the structure and size of the federal system has changed dramatically over the past 220 years.[3]

On November 3, 1789, the first court organized pursuant to the United States Constitution convened. This court was not the Supreme Court, but rather the District Court for the District of New York, located in Manhattan.[4] Even though the New York District Court was the first federal court to hold session in the United States, its first-in-time status was a happenstance. The New Jersey District Court was scheduled to open on the same day as the court in New York, and, had it not been for the illness of New Jersey's judge, both states would have shared the "Mother Court" distinction.[5] To the extent compensation levels are an indicator of importance or prestige, Congress perceived the New York District Court to be less important than other courts in 1789, because the salary apportioned to the judge in New York amounted to $1,500, as compared to the $1,600 given the federal judge in Pennsylvania or the $1,800 awarded to judges in Virginia and South Carolina.[6]

Congress may not have wrongfully benchmarked the salary of the first judge of the New York District Court, James Duane. Although the New York District Court held sessions four times per year, the Court's first decades were slow-paced, with a high-turnover rate for its judges.[7] At the time of its inception, the primary business of the New York District Court was admiralty cases.[8] However, business was so slow that the first action was not filed in the New York District Court until April 16, 1790—five months after the New York District Court first convened.[9]

The first case argued in the New York District Court was *United States of America v. Three Boxes of Ironmongery, Etc*.[10] The case concerned the issue of how much the federal government was legally permitted to collect through customs, which would be the question in almost seventy-five percent of Judge Duane's cases.[11] In terms of "firsts," of more note for the New York District Court may be that one of the first lawyers admitted to practice before it was Aaron Burr, of dueling fame.[12]

After Judge Duane resigned in 1794 due to poor health, his successor, John Lawrence, served approximately two years before leaving to take a seat in the United States Senate.[13] Judge Lawrence was the first District Court judge to have his conduct reviewed by the Supreme Court. In *United States v. Judge Lawrence*, the Supreme Court upheld Judge Lawrence's denial of a writ of mandamus by the French Vice Consul to apprehend a French sea captain accused of desertion.[14]

Approximately one year after the New York District Court convened, Chief Justice John Jay convened the first Circuit Court[15] in New York, and much like the District Court, the Circuit Court in New York struggled to find its footing.[16] Pursuant to the Judiciary Act of 1789, the Circuit Courts: (a) consisted of any two Justices of the Supreme Court, and the District judges of such Districts, "any two of whom shall constitute a quorum"; (b) had both original and appellate jurisdiction; and were (c) required to convene two times per year.[17]

Because the Circuit Courts required the presence of at least one Supreme Court Justice to hold session, the Justices were constantly traveling throughout their allotted territories.[18] Aside from the inefficiency of long-distance travel at the close of the eighteenth century, the fact that the Circuit Court for the District of New York had only heard forty-six cases in five years did not help the Justices' spirits.[19] Because the stagnancy of its business proved embarrassing and the Supreme Court Justices frequently could not attend, the Circuit Court for the District of New York would meet and then adjourn without transacting any business simply as a means of keeping up appearances.[20]

The Circuit Courts were reorganized with the Judiciary Act of 1801, also known as the "Midnight Judges Act."[21] The 1801 Act doubled the number of Circuits from three to six and created three new judgeships per Circuit. Further, the 1801 Act removed bankruptcy cases from District Court dockets and added them to the Circuit Courts' jurisdiction.[22] Under the 1801 Act, Supreme Court Justices no longer were required to preside at every Circuit Court session.[23] However, this change in judicial structure did not last long.

The Era of Little Things—1800 to 1825

After the controversy of the 1801 Act and the infamous "midnight judges," a more permanent remedy for the Circuit Courts' problems was enacted by Congress by way of the Judiciary Act of 1802. The 1802 Act reassigned a Supreme Court Justice to each Circuit, required the presence of only one Justice to hold a session of Court, and transferred the Circuit Courts' jurisdiction over bankruptcy cases back to the District Courts.[24] Assigned to New York's Circuit, the renamed Second Circuit, was Brockholst Livingston. Justice Livingston dedicated himself to the Circuit Court's business, helping mold the Court into a significant "metropolitan tribunal."[25]

The nineteenth century also brought changes to the New York District Court.[26] Judge John Hobart, who served between 1798 and 1804, ushered in a new era. Judge Hobart is recognized to be "the first judge who regarded his judicial position as the fitting end of a life consistently devoted to legal work."[27] For Judge Hobart, "the court was a permanency, and with him began the line of Judges who, once appointed, found in the judicial work professional occupation and inspiration."[28] In 1805, President Jefferson appointed Matthias Tallmadge as Judge Hobart's successor.[29] The New York District Court's caseload increased under Judge Tallmadge, so much so that Congress passed the Act of April 29, 1812, which required additional terms of the New York District Court to be held in upstate New York. To accommodate these requirements, a second judge, William Peter Van Ness,[30] was appointed.

There has been much debate about the relationship between Judges Van Ness and Tallmadge.[31] No matter where the blame is placed, the animosity between these two judges was a force behind the District of New York being split into separate Southern and Northern Districts in 1815, with Judge Van Ness presiding over the Southern District, and Judge Tallmadge over the Northern District. Three years later, in 1818, the five northernmost counties of the Southern District (Albany, Rensselaer, Schenectady, Schoharie, and Delaware) were transferred to the Northern District.[32]

The First Busy Era—1830 to 1900

It was not until 1827 that the aggregate work of the Second Circuit and its District Courts was sufficient to financially justify the printing of an official reporter.[33] Despite the 30 years of opinions this reporter chronicled, it was still a slim volume, because the New York District Court judges mostly read opinions from the bench, and their reading notes were considered their private property.[34] While a lack of commerce hindered the Court's development prior to 1820, the Southern District could have increased its standing prior to 1825 had its judges been more inclined towards reporting their decisions.[35]

With the opening of the Erie Canal in 1825, more commerce came to New York City. With more trading came more disputes, which turned into litigation. And most of these disputes fell within the Southern District's burgeoning admiralty jurisdiction.[36] Along with the shipping boom in the 1820s and 1830s came population growth in New York City. From 1820 to 1830, New York City's population almost doubled to 200,000 residents—a staggering number when compared to the 30,000 people in the district when Judge Duane was the District Court judge forty years earlier.[37]

The increase in the Southern District Court's admiralty work was presided over by Judge Samuel Rossiter Betts, who became a leading contributor to the field of admiralty law as he took conscious steps to record and modernize it.[38] In 1828, Judge Betts established rules for the "Prize Court," and a decade later, published the first work on American admiralty practice.[39] The Southern District's admiralty practice continued to grow during Judge Betts' 40-year tenure, covering "questions of prize, blockade and contraband, resulting mainly from captures of enemy property by United States vessels in the blockade of Confederate ports."[40]

In addition to its expanding admiralty practice, the Southern District's caseload expanded in the mid-nineteenth century because of perceived procedural advantages of federal court, and a New York bar adept to make the most of them. Procedurally, the federal courts had two distinct advantages over state courts in the mid-nineteenth century. The first was the federal courts' liberal rules for gathering evidence.[41] The second was the federal courts' diversity jurisdiction, allowing a party to elect to bring its claim in federal court, rather than state court, which in contrast, required consent from both parties.[42] These advantages might not have been worth anything were there not attorneys talented enough to use them for their clients' advantage. As Judge Weinfeld put it, the New York bar was nothing less than "illustrious."[43] This reputation attracted litigation to the Southern District, expanding the Court's business in the process.[44]

By the Civil War, the business of the Southern District had grown so great that it was becoming too much for one man to handle, even one of such "extraordinary industry"[45] as Judge Betts. Rather than appoint a second judge for the Southern District, Congress passed the Act of February 7, 1865, which again split the Southern District and created a new Eastern District.[46] The Circuit Courts also were reformed a few years later when Congress passed the Act of April 10, 1869, which created a permanent judgeship in each Circuit, with the authority to hear cases involving original and appellate jurisdiction. And the new judgeship in the Second Circuit was essential to addressing the Circuit's increasing equity workload.[47] These appointed Circuit judges had the authority to hear cases and issue opinions without the presence of a Supreme Court Justice riding Circuit.[48] Despite these changes directed towards increasing the jurisdiction and workload of the Second Circuit, the docket of the Southern District in the second half of the nineteenth century still was overwhelming. The Southern District was so overburdened that Charles Benedict, the first judge of the Eastern District, was given jurisdiction by Congress to hear criminal cases from the Southern District. This action made Judge Benedict essentially the only criminal trial judge in the Southern or Eastern Districts of New York for almost thirty years.[49]

The prominence of the Southern District as the nation's premier admiralty court continued under Judges Samuel Blatchford, William Gardner Choate and Addison Brown after the resignation of Judge Betts. When Congress passed the Bankruptcy Act of 1867, which gave the District Courts original jurisdiction as "courts of bankruptcy," the Southern District took on increased responsibilities.[50] The Bankruptcy Act of 1867 provided for both voluntary and involuntary bankruptcies, and allowed District Court judges to appoint "registers in bankruptcy" "to assist the judge of the district court in performance of his duties."[51] These registers were the predecessors to the referees and bankruptcy judges of today.[52] However, the Bankruptcy Act of 1867 was short-lived; upon its repeal in 1878, Judges Choate and Brown were able to concentrate on admiralty cases once again.[53] But bankruptcy would return as a core competency of the Southern District with the passage of the Bankruptcy Act of 1898.

The 1898 Act transferred jurisdiction over bankruptcy cases back to the District Courts and was revolutionary in its coverage. It provided bankruptcy protection to corporations as well as individuals, and again included the prospect of both voluntary and involuntary bankruptcies.[54] Further, the 1898 Act empowered bankruptcy trustees to unwind preferential and fraudulent transfers to avoid preferencing certain creditors.[55] In 1900, nearly 1,400 bankruptcy cases were initiated in the Southern District, which was more than the combined total of all other new filings in the court that year.[56] Congress responded to the Southern District's increased caseload by creating a second judicial position for the District in 1903.[57]

The end of the nineteenth century also saw changes for the Northern District of New York.[58] In 1900, Congress split the Northern District, creating the District Court for the Western District of New York, and assigned the seventeen western-most counties of the state to the newly formed Western District.[59]

The structure of the Circuit Courts also changed during the second half of the nineteenth century. By the late 1880s, it became clear that the Circuit judge positions created in 1869 were less effective than originally hoped for by Congress. Although business seemed to be running smoothly, the Circuit Court gradually began accumulating a "'Customs Calendar' made up of actions at law to recover from the Collector of Customs illegally exacted import duties."[60] By 1887, it reached the point where processing all of these cases proved too formidable a task for the Circuit judge to handle on his own. That same year, much like what would be done for the Southern District a little over a decade later, Congress appointed a second Circuit judge, E. Henry Lacombe, to dispose of the accumulated customs cases.[61]

In 1891, only five years after the appointment of the second Circuit judge, Congress passed the Circuit Court of Appeals Act, which changed the make-up of the federal courts and served as the first step towards the creation of the federal courts as we know them today. The 1891 Act transferred the appellate jurisdiction of the Circuit Court to the newly formed Circuit Court of Appeals. Cases of original jurisdiction dwindled, and without appellate jurisdiction, there was not much left for the Circuit judges to do.[62] As the Circuit Court faded, the District Courts, including the Southern District, began to unofficially absorb their responsibilities. Finally, in 1912, the Circuit Courts were abolished, and Congress transferred all Circuit Court records and jurisdiction to the District Courts.[63]

The Pre-Modern Era: 1912 to 1958

With the absorption of the Circuit Court's business, the Southern District's workload rapidly increased.[64] At the turn of the century, the New York City economy was booming, as was the population. In addition, expanded federal control over different private and public activities boosted the Southern District's caseload.[65] As the caseload increased, so did the number of District Court judges. In 1906, a third judge was appointed to the Southern District, the first historian of the Court, Judge Hough. In 1909, when Congress felt the need to add a fourth judge, Learned Hand was appointed to the Southern District. Judge Learned Hand would serve fifteen years in the Southern District before moving on to the Second Circuit.[66] In 1914, Learned Hand's cousin, Augustus Hand, was appointed to the Southern District. The Judges Hand would serve together on the District Court, and together again on the Court of Appeals.[67] When Judge Hough was appointed to the Court of Appeals in 1916, he was succeeded by Martin T. Manton, who quickly followed Judge

Hough to the Court of Appeals. Judge Manton was succeeded in 1918 by Judge Knox, who would preside over the Southern District into the 1950s—a thirty-seven year tenure exceeded only by Judge Betts.[68] During Judge Knox's tenure, the number of judges in the Southern District more than tripled. Despite this increase in authorized judgeships, the Southern District judges' caseloads did not diminish for several reasons.

First, between 1920 to 1932, there was an increase in civil and criminal cases in the Southern District, primarily due to the Eighteenth Amendment, which prohibited the sale of "intoxicating liquors."[69] The prohibition took effect in January 1920, and that year, the Southern District court saw four times as many new cases filed in a single year than in the previous decade.[70] Most of the Eighteenth Amendment cases were civil cases brought by the Government, but many criminal liquor cases were filed in the Southern District as well. Crime seemed to go hand-in-hand with prohibition. In fact, from 1927 to 1930, more than 90 percent of criminal cases disposed of by the Southern District, in one way or another, involved liquor.[71]

One of the few Eighteenth Amendment cases to be addressed by the Supreme Court was tried in the Southern District before Judge Knox. In 1923, the Dean Emeritus of the College of Physicians and Surgeons of Columbia University, Dr. Samuel W. Lambert, was not enjoined by Judge Knox from prescribing beer and spirits to sick patients for medicinal purposes.[72] However, three years later, the Supreme Court reversed Judge Knox's ruling in *Lambert v. Yellowley*,[73] holding that the practice of medicine was fully subject to the police power of the government.

At the end of 1933, this period of growth and expansion was briefly subdued when the Twenty-First Amendment was ratified, and the Eighteenth Amendment prohibition on the sale of alcohol was repealed.[74] The reduction in the Southern District's caseload would change with the legal, economic, and political changes that came with the New Deal and the end of World War II.[75]

It was during this "slow period" that some of the most remembered Southern District opinions were written. One of these cases was *Tompkins v. Erie R.R.*, assigned to Judge Samuel Mandelbaum.[76] In *Erie*, the plaintiff, Harry Tompkins, a citizen of Pennsylvania, was walking on a path alongside railroad tracks in Hughestown, PA, when a train operated by the Erie Railroad, a New York company, passed by. An object protruding from one of the cars knocked Tompkins to the ground, and his right arm was run-over by the wheels of the train.[77] Judge Mandelbaum applied federal common law, as necessitated by *Swift v. Tyson*, and required that the plaintiff prove ordinary negligence. Judge Mandelbaum ignored the defendant's argument that Pennsylvania's duty of care was applicable, which would have likely absolved the defendant from liability.[78] *Erie* was affirmed by the Second Circuit, and, as every lawyer knows, the Supreme Court took the case. Justice Brandeis wrote the Court's opinion reversing the decisions of the lower courts. No longer was *Swift v. Tyson* good law; District Courts sitting in diversity were, and still are, required to apply the laws of the states in which they sit.[79] *Erie* would become one of the most-cited cases of all time.[80]

In addition, Judge Francis Caffey presided over the seminal antitrust case *United States v. Aluminum Co. of America* ("*Alcoa*")[81] during this period. In *Alcoa*, the Department of Justice charged the defendants with a laundry list of antitrust violations, including monopolization of the foreign market for aluminum in the United States. Judge Caffey dismissed the case, holding that the Government had failed to show intent to monopolize in violation of the Sherman Act.[82] At the time, the *Alcoa* trial was one of the most time-intensive trials in U.S. history. It took more than five years and almost seven months of trial days to complete. Trial records numbered approximately 58,000 pages, and Judge Caffey's long opinion took nine days to read.[83] Despite Judge Caffey's diligence, his decision was reversed by the Second Circuit. In its decision, authorized by Judge Learned Hand, the Second Circuit found Alcoa guilty of monopolization, because it controlled ninety percent of the virgin aluminum market — such a large market share was evidence enough to hold Alcoa liable.[84] Judge Hand wrote, "[Alcoa] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel."[85] The *Alcoa* opinion is now one of the foundations of United States antitrust law, and has been cited as precedent in over 800 cases.

After World War II ended, there were over 5,800 civil cases pending in the Southern District. In two years, the number of pending cases almost doubled, even though 4,700 cases in the Southern District were terminated in 1947.[86] In 1948, the civil caseload per judge in the Southern District of New York was 614 cases, while the national average was only 271.[87]

In 1950, the amount of litigation involving the federal government began to shrink, but this was offset by an increase in private civil litigation, which proved more difficult and time-consuming for the Southern District judges to address.[88] Due to this increasing workload, there were dynamic changes in store for the Southern District, both in the faces and number of judges on the Court.[89]

Prompted by the high post-war caseloads, four judges, John F. X. McGohey, Irving R. Kaufman, Gregory F. Noonan, and Sydney Sugarman, were appointed to the Southern District bench.[90] However, shortly after these appointments, the Court faced the death of Judge Hulbert and

the resignation of Judge Rifkind.[91] And although Judge Rifkind was succeeded by Judge Weinberg, the Southern District remained undermanned and overwhelmed.

By 1954, civil caseloads were reaching new highs, criminal matters were accumulating, and on top of that, Judges Goddard and Leibell retired.[92] Later that year, those vacancies, along with two new appointments, were filled by Archie O. Dawson, Lawrence E. Walsh, Alexander Bicks and Edmund L. Palmieri.[93] Between 1955 to 1958, the Southern District judges were able to reduce the Court's pending caseload by 2,000 cases.[94]

Thankfully, Congress passed the Jurisdiction Act of 1958, which was intended to reduce the total amount of federal litigation. However, because the 1958 Act deemed "a corporation a citizen not only of the State of its incorporation but also of the State of its principal place of business, and most large corporations, while not incorporated in New York, [had] their principal place of business there,"[95] the Act actually increased the caseload of the Southern District.

The Modern Era: 1959 to the Present

Upon the retirement of Judge Clancy in 1959, the Southern District was reduced to sixteen active and six senior judges. This still was the largest complement of federal judges in any District in the United States. That same year, due to the Southern District's workload, a Judicial Conference recommended six new judges be added to the Southern District.[96] Between 1961 to 1963, the Southern District was expanded with eight nominations made by President John F. Kennedy. These appointments were crucial to the functioning of the Southern District, as its caseload during the early 1960s constituted between eighteen and twenty percent of all pending civil litigation in the entire federal court system.[97]

Over the past fifty years, Southern District judges have conducted trials in many significant cases. For example, in 1961, Judge Lloyd MacMahon presided over the trial of Carmine Galante, boss of the Bonanno crime family, who ultimately was convicted of drug-trafficking.[98] During the trial, Galante and other defendants threw objects and shouted obscenities, which prompted Judge MacMahon to have them handcuffed, shackled, and gagged so the trial could proceed in an orderly fashion.[99] Many view Judge MacMahon's response to these outbursts as the precedent today, which enables federal judges to assert control over unruly courtrooms.[100]

The government scandals of the 1970s led to the highly publicized Mitchell-Stans trial conducted in the Southern District.[101] In a criminal trial before Judge Gagliardi, former Attorney General John Mitchell and former Commerce Secretary Maurice Stans were tried for criminal conspiracy, obstruction of justice and perjury. The Government alleged that the two men had impeded a Securities and Exchange Commission investigation of financier Robert Vesco in return for a secret contribution of $200,000 to President Nixon's 1972 campaign.[102] After a forty-eight day trial, the jury acquitted Mitchell and Stans on all counts, although Mitchell would be found guilty of similar charges one year later, related to his role in the Watergate cover-up.[103]

In the late 1970s, the Southern District asserted itself as a forum for addressing securities law matters, particularly insider trading in violation of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.[104] In 1978, Judge Richard Owen presided over *United States v. Chiarella*,[105] where the defendant, an employee of a financial printer, bought shares of companies he knew were about to be acquired through tender offers prior to public dissemination of the information. At trial, the defendant was found guilty of insider trading.[106] *Chiarella* made its way to the Supreme Court, which reversed the conviction, holding that Section 10(b) liability is "premised upon a duty to disclose…arising from a relationship of trust and confidence between parties to a transaction."[107] In response to the *Chiarella* decision, the SEC promulgated Rule 14e-3, which forbids any trading on the basis of material nonpublic information regarding tender offers by anyone with knowledge that the information originated from an insider.[108]

The 1980s opened with an event at the Southern District worthy of a made-for-television movie.[109] For years, inmates facing trial at the Southern District's 40 Centre Street courthouse were housed nearby at the Metropolitan Correctional Center ("MCC"). The twelve-story complex contained an inmate exercise area on the roof, which was enclosed by a heavy wire screen. One Sunday morning in 1981, a group of inmates, including a convicted narcotics dealer, captured a prison guard and held him hostage on the roof. In the meantime, armed accomplices hijacked a sightseeing helicopter and attempted to land on the roof of the MCC to ferry the convicted drug dealer to safety. However, the helicopter could not break through the MCC's thick wire mesh, and the plan was foiled.[110]

There were many notable trials in the Southern District during the 1980s involving individuals associated with organized crime, politicians, and Wall Street financiers. One of the most famous financiers facing criminal charges in the 1980s was Drexel Burnham executive Michael Milken. Milken was investigated by the FBI and indicted on ninety-eight counts of racketeering, mail fraud, securities fraud and other crimes.[111] However, this case never went to trial because Milken pled guilty to six securities and reporting violations. He was sentenced to ten years imprisonment, of which he served two before his release.[112] In the Milken investigation, law enforcement was aided by Ivan Boesky, a Wall Street arbitrageur, who informed on Milken's activities. Boesky himself was charged with insider trading and accepted a plea bargain for which he received a $100 million fine and three years in prison, of which he served two before his release.[113]

Another famous Rule 10b-5 trial, similar to *Chiarella*, was held in the Southern District in 1985 before Judge Charles Stewart. The government alleged that R. Foster Winans, a *Wall Street Journal* reporter best known for his "Heard on the Street" column, leaked information about the contents of his column before it was published, which allowed his associates to make significant profits.[114] After a bench trial, Judge Stewart found Winans and two co-defendants guilty of violating 15 U.S.C. §§ 78j, 78ff, Rule 10b-5, and federal mail and wire fraud statutes.[115] The conviction was eventually upheld by the Supreme Court in *Carpenter v. United States*,[116] where the Supreme Court split 4-4.

In terms of corruption and organized crime cases in the Southern District, one of the more significant cases was the 1985 "Pizza Connection Trial," before Judge Pierre Leval. The trial focused on drug distribution and money laundering in pizza parlors across the United States. Nineteen defendants were tried in what is still one of the longest trials ever to be held in the Southern District, lasting from October 1985 to March 1987. Nearly all of the defendants were found guilty.[117] Perhaps more notable than the "Pizza Connection Trial" was the "Mafia Commission Trial," held from February 1985 to November 1986. In that case, eight defendants, including heads of New York's "Five Families," were tried on charges including extortion, racketeering, labor payoffs, and loan-sharking. After a jury found all of the defendants guilty, Judge Richard Owen sentenced most of the defendants to 100 years in prison.[118]

Government corruption again was put in the spotlight when Stanley Friedman, the former Bronx Democratic Party chairman, was tried before a Southern District judge for brokering bribes in connection with a lucrative computer contract given by the city Parking Violations Bureau. The trial was supposed to be held in the Foley Square Courthouse, but the location was moved to New Haven, due to the publicity surrounding the case. Judge P. William Knapp made the trek to New Haven to preside over the trial, and Friedman was found guilty of racketeering, conspiracy and mail fraud.[119]

In the 1990s, the caseload of the Southern District continued to include high-profile organized crime cases, as well as securities and financial fraud prosecutions.[120] Regrettably, the Southern District was also tasked with addressing the aftermaths of many of the decade's tragic terror plots. The trial of Ramzi Yousef, who orchestrated the 1993 World Trade Center bombing, was held in the Southern District in 1997. Found guilty, Yousef was sentenced by Judge Kevin Duffy to life in prison without parole.[121] Other terrorism prosecutions conducted in the Southern District in the 1990s included the "Manila Air Conspiracy" and "Blind Sheikh" trials. The trial relating to the 1998 bombings of U.S. embassies in Kenya and Tanzania was held in the Southern District in 2001.[122]

With the construction of the Daniel Patrick Moynihan U.S. Courthouse in 1994, the Southern District was given an additional home to its base at the Thurgood Marshall U.S. Courthouse at 40 Centre Street, where it had held trials since 1936. This new location added to a previous expansion of the Southern District's "physical plant," when the United States Courthouse in White Plains opened in 1983.[123] No matter where the Southern District judges have sat, their contributions to the evolution of legal doctrines in this country have been significant. Between 1980 and 2000, seventy-six rulings from the Southern District were reviewed by the Supreme Court. We are not aware of another District in the country which has had as many of its rulings reviewed by the Supreme Court, in a comparable period.

Moving into the twenty-first century, the Southern District has continued to preside over significant civil and criminal litigation.[124] A number of these cases have been high-profile insider trading affairs. For example, in 2004, media magnate Martha Stewart was found guilty of obstructing justice and lying to investigators about insider trading, in a trial presided over by Judge Miriam Cedarbaum.[125] Most recently, Raj Rajaratnam, the former CEO of the Galleon hedge fund, was found guilty in the Southern District of fourteen counts of securities fraud and conspiracy.[126] Rajaratnam's illicit trading had generated profits/avoided losses of $72 million.[127] The eleven-year sentence administered by Judge Richard Holwell was the longest sentence ever imposed for insider trading to date.[128]

On the antitrust front, the importance of *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*[129] rivals that of *Alcoa*, decided close to fifty years earlier. *Trinko* was a class action where customers of AT&T, which was a new entrant to the New York City local phone services market, sued Bell Atlantic (which would become Verizon) for refusing to allow AT&T to use its existing network and provide retail services at wholesale rates, as required by the Telecommunications Act of 1996.[130] Judge Sidney Stein granted the defendant's motion to dismiss the case, stating that "[e]ven a monopolist, however, has no general duty under the antitrust laws to cooperate with competitors."[131] Judge Stein was reversed by the Second Circuit, which, in turn, was reversed by the Supreme Court. Justice Scalia, writing for the majority, ruled along the same lines as Judge Stein that the Sherman Act does not require a company to cooperate with a competitor. Nor does it restrict a company from exercising "independent discretion as to parties with whom he will deal."[132] The *Trinko* decision has had a significant impact on the "essential facilities" doctrine, as well as more general "refusal to deal" cases.[133]

Of late, bankruptcy proceedings have come to the forefront of the Southern District's docket. In 2002, Worldcom filed for bankruptcy in the Southern District in the largest bankruptcy proceeding ever conducted at that time in the United States.[134] The Worldcom bankruptcy was only the first of several significant bankruptcy cases

brought in the Southern District in the past ten years. On September 15, 2008, Lehman Brothers filed for bankruptcy protection in the Southern District. Bankruptcy Judge James Peck was assigned to the case and faced the daunting task of satisfying over 100,000 creditors and managing Lehman's $639 billion in total assets and $613 billion in total debt.[135] The Lehman bankruptcy eclipsed Worldcom as the largest bankruptcy in U.S. history, and Lehman assets are still being divided to this day.

Nine months after the Lehman filing, General Motors filed for reorganization in the Southern District, in what would be the fourth largest bankruptcy in the country's history. Bankruptcy Judge Robert Gerber supervised an asset sale in which the federal government bought over half of the iconic company.[136] Bankruptcy proceedings for Chrysler soon followed before Bankruptcy Judge Arthur J. Gonzales in the Southern District. Judge Gonzales ordered a sale of assets which the Supreme Court essentially endorsed by choosing not to review it.[137] The management of these bankruptcies is evocative of the Southern District's bankruptcy prowess at the turn of the twentieth century.

For many, the Lehman bankruptcy signaled the legal beginning of the financial crisis that engulfed the United States. Since then, the Southern District has played an important role in determining which actors contributed to the economic troubles and addressing the consequences of risky decision-making by financial institutions. Perhaps the most significant of these cases involved Bernie Madoff's Ponzi scheme, in which investors were defrauded of over $18 billion.[138] Madoff pled guilty to eleven felonies before Judge Denny Chin.[139] At sentencing, Madoff's lawyers requested no more than a twenty-year sentence, taking into account his advanced age and health problems. Describing Madoff's behavior as an "extraordinary evil," Judge Chin sentenced him to 150 years in prison.[140]

One case originating in the Southern District in 2003, *Twombly v. Bell Atlantic Corp.*,[141] has had sweeping effects on all federally filed lawsuits, and is approaching the same significance that *Erie* attained seventy-five years ago. In *Twombly*, the plaintiffs brought a class action lawsuit alleging that the defendants had conspired to prevent competitive entry into the local telephone and Internet services markets in violation of § 1 of the Sherman Act. Judge Gerard Lynch dismissed the suit for failure to state a claim. After the Second Circuit reversed, the Supreme Court reinstated Judge Lynch's decision. Prior to *Twombly*, the notice pleading standard to overcome a motion to dismiss was minimal. As the Supreme Court had written in *Conley v. Gibson*,[142] "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." The *Twombly* Court adopted a stricter "plausibility" standard, stating that "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"[143] Any doubt that the stricter plausibility standard would be confined to antitrust cases was dispelled in *Ashcroft v. Iqbal* (a case from the Eastern District),[144] decided by the Supreme Court two years after *Twombly*.[145]

While the Southern District has maintained its notoriety for handling high-profile trials and proceedings during the last decade, it also has served as an innovator, as it did with admiralty and bankruptcy in the nineteenth century, and securities law and antitrust in the twentieth century. The Southern District is one of fourteen District Courts selected to participate in a ten-year program aimed at increasing judicial experience in patent cases. As part of this program, ten Southern District judges have been designated patent pilot participants. It is the hope that this program will increase judicial capacity and efficiency in this technical field.[146]

Concluding Remarks

Over the past 220 years, the Southern District has evolved from a one-man court led by Judge Duane to a twenty-three seat active bench (with twenty-one senior judges), which has presided over some of the most significant cases in this country's history. Judge Duane waited five months before the first case was filed in his court; now, nearly thirty cases per day are filed on average in the Southern District.[147] The judges of the Southern District continue to be sought-after jurists capable of handling the most complex of cases in our federal system. Those who have had the opportunity to practice in the Southern District, from Aaron Burr to lawyers admitted last month, should consider themselves privileged to appear before such a distinguished bench.

Endnotes

1. John C. Knox, A Judge Comes of Age (1940).
2. Judiciary Act of 1789, ch. 20, 1 Stat 73 (1789).
3. *See, e.g.*, Charles Merrill Hough, The United States District Court for the Southern District of New York (1934).
4. H. Paul Burak, History of the United States District Court for the Southern District of New York, at 1 (1962); Hon. Roger J. Miner, The United States District Court for the Northern District of New York—Its History and Antecedents, Annual Lecture Sponsored by the Federal Bar Council and the Second Circuit Historical Committee, at 9 (April 10, 1984).
5. Burak, *supra* note 4, at 1.
6. Hough, *supra* note 3, at 5.
7. *Id.* at 7-8.
8. *Id.*
9. Burak, *supra* note 4, at 2.
10. *Id.* at 2.
11. Hough, *supra* note 3, at 8-9.
12. Burak, *supra* note 4, at 1.
13. Hough, *supra* note 3, at 10.

14. Burak, *supra* note 4, at 2; *United States v. Judge Lawrence*, 3 U.S. (3 Dall.) 42 (1795).
15. The Judiciary Act of 1789 created three Circuit Courts; Chief Justice Jay presided over the Eastern Circuit, which included New York, New Jersey, and the New England states. The Judiciary Act of 1801 divided up the United States into six Circuits, with New York part of the Second Circuit. Hough, *supra* note 3, at 15.
16. Hon. Edward Weinfeld, The Southern District Court: Its Impact On The Law, Annual Lecture Sponsored by Federal Bar Council and Second Circuit Historical Committee, at 4 (April 6, 1981).
17. The Circuit Courts had "original jurisdiction" over all cases where the amount in controversy exceeded $500, diversity suits, and suits where an alien was a party. The original jurisdiction of the Circuit Courts gradually eroded until it was abolished in 1912. Burak, *supra* note 4, at 9-11.
18. Hough, *supra* note 3, at 7. *See also History of the Federal Judiciary: Supreme Court of the United States*, www.fjc.gov/history (last visited Jan. 5, 2012).
19. Burak, *supra* note 4, at 10.
20. Hough, *supra* note 3, at 14.
21. When the Judiciary Act of 1801 was passed, President Adams was to cede the presidency to Thomas Jefferson in nineteen days. During this time, President Adams filled as many of these new appointments as possible, and was said to still be signing commissions at midnight, just as he was to leave office. Ross E. Davies, *A Certain Mongrel Court: Congress's Past Power and Present Potential to Reinforce the Supreme Court*, 90 Minn. L. Rev 678, 688 (2006).
22. Hough, *supra* note 3, at 15.
23. *Id.*
24. Judiciary Act of 1802, 2 Stat. 156 (1802).
25. Hough, *supra* note 3, at 17.
26. Judge Lawrence resigned in 1796 and was replaced by Judge Robert Troup, who had served as Judge Duane's clerk. Judge Troup was soon succeeded by Judge Hobart in 1798. *Id.* at 11.
27. *Id.* at 11.
28. *Id.* at 11-12.
29. Burak, *supra* note 4, at 3.
30. Hough, *supra* note 3, at 17-18.
31. *See id.* at 18; Miner, *supra* note 4, at 12.
32. Miner, *supra* note 4, at 13.
33. The reporter was titled *Paine's Reports*. Hough, *supra* note 3, at 20-22.
34. *Id.* at 21.
35. *Id.* at 21-22.
36. Weinfeld, *supra* note 16, at 20.
37. Hough, *supra* note 3, at 24.
38. *Id.*
39. Burak, *supra* note 4, at 5.
40. *Id.* at 5.
41. Weinfeld, *supra* note 16, at 27.
42. *Id.* at 25-26.
43. *Id.*
44. *Id.*
45. Hough, *supra* note 3, at 24.
46. *Id.* at 28.
47. *Id.*; Act of April 10, 1869, ch. 22, 16 Stat. 44 (1869).
48. *Id.*
49. Hough, *supra* note 3, at 28.
50. Bankruptcy Act of 1867, 14 Stat. 517 (1867).
51. *Id.*
52. *Id.*; *see also* Ronald Cook, History of the Bankruptcy Court in Erie, Pennsylvania, at 1 (March 2009), *available at* http://www.pawb.uscourts.gov/pdfs/ErieCourtHistory.pdf (citing Charles J. Tabb, *The History of Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 19 (1995)).
53. Burak, *supra* note 4, at 7.
54. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898).
55. *Id.*
56. Burak, *supra* note 4, at 8.
57. Hough, *supra* note 3, at 30.
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The Nuts and Bolts of Expert Selection*

The first in a series of articles on expert witnesses

By Carol E. Heckman and Dan J. Altieri

In today's litigation climate, experts make or break your case. Most litigators have had the unpleasant experience of seeing their experts implode on the witness stand. All too common are experts who are insufficiently prepared, have poor demeanor, are too talkative, speak in jargon or try to outsmart the lawyers. Most of these problems can be avoided on the front end by taking the time necessary to select the right expert. What follows is a step-by-step guide to expert selection.

A. Finding Your Expert

Research the field. Once you have identified the topic or subject matter requiring expert testimony, research the expert's field. This is now easier than ever thanks to the Internet. Many publications are available online free of charge. Even if publications are not free, you can find out what is being published and identify the leading authors or researchers. You can be cost-effective by screening publications to determine which would be the most valuable and worthy of ordering.

After conducting basic Internet research, select articles to read in respected and peer reviewed educational or scientific journals. These may not be available for free online, but they certainly can be located and subscribed to online. In searching for articles, look for specific authors identified in your Internet research and start to consider whether those authors might be appropriate experts.

Utilize local connections. Our area is fortunate to have a number of fine colleges and universities, each of which has faculty directories full of potential experts in many different fields. At the very least, talking with local academies can lead to the identification of well-respected but otherwise relatively unknown experts.

Do not forget to talk to practitioners. For example, if you are looking for an engineer, talk to engineers in the community who might be familiar with the issue and who might know the names of prominent individuals in the field. If your client is a business, one of your client's employees will likely know the identities of the leading experts in the field in question. It is also helpful to talk to local lawyers who have had cases involving similar subjects of expertise. They can often recommend expert witnesses and, perhaps even more importantly, tell you who not to use.

Research case law. Once you have identified and begun to zero in on a potential expert, plug his or her name into a basic Lexis or Westlaw search. This will allow you to see if your potential expert has had any qualification problems and will give you a glimpse as to whether his or her theories have held up in court. While often overlooked, this brief search can serve as an important source of information with respect to which experts should and should not be used.

B. Evaluating the Expert's Credentials

Once you have zoned in on a possible expert, make sure to carefully review that expert's education as well as the credentialing requirements for the particular area of expertise. For example, if your expert witness is an orthopedist, look for a board-certified orthopedist because being board-certified will greatly enhance the doctor's credibility with the trier of fact.

It is also important to evaluate the expert's work experience. If little of the expert's work experience has been devoted to the specific area at issue, he or she will have less credibility than someone actively working in the field. Experts with little experience will also be less likely to convey and defend their opinions readily and in an effective manner. By the same token, if the expert is currently involved in relevant research, he or she will be much more up-to-date than someone who may have received a Ph.D. on the topic thirty years ago but has not since worked or performed research in the field in question.

Find out if the expert has any publications on the topic in question, as well as if he or she has made presentations on the topic. Read every single one of the expert's published papers: you know opposing counsel will! There are few better cross-examination techniques than using the expert's own publications to contradict points made on direct examination.

Determine if the expert is actively involved in professional organizations. If so, find out which ones. Involvement in one's professional community enhances credibility.

Ask the expert if he or she has ever testified in court or at a deposition. If so, track down the transcript. Do not be afraid if your expert has testified many times before. Although many writers will advise you to avoid the courtroom professional, this type of expert can be very effective. Experts who have previously testified are often better at getting their point across, have a more realistic idea of the work involved, and anticipate cross-examination points. In short, like most things in life, there is no one shoe that fits all, and careful judgment must be exercised in each case.

When evaluating an expert, do not hesitate to pass on any candidate with weaknesses in any of the above-mentioned areas. Generally, there is a large pool of possible experts for subject matter requiring expert testimony. Going back to the drawing board is preferable to hiring someone who is not a good fit.

C. Conducting an Interview

It is important that any potential expert witness be thoroughly interviewed in person by the lead trial attorney in the case. This part of the expert selection process is so critical that it should not be delegated. Among other things, make sure to review and verify all of the information in the expert's biography during the interview. It is uncanny how often errors in resumes or biographies become a major subject of cross-examination in the courtroom.

In addition to probing the expert's credentials, make sure that you give the expert a realistic idea of the work involved. It is not helpful to find the perfect expert only to find out that he or she does not have the time or interest needed to do the spade work, to write the reports, to attend the depositions or to provide the courtroom testimony.

Most all of us have had the unfortunate experience of working with a witness who was overly gabby or too confident. This can be death to your case. One interview technique that can be very useful is to practice examining the witness as if he or she was on the stand. You will then get a good idea as to whether the expert is easy to follow, whether he or she conveys ideas effectively as opposed to speaking in jargon, and whether he or she is a good teacher. All of these are important characteristics of a good expert.

Discuss the expert's methodology in detail so that you can assure yourself that the expert can meet the *Frye* standard (if in state court) or the *Daubert* standard (if in federal court). Explore his or her depth of experience and do not accept generalizations without further probing. Taking nothing for granted also entails checking the expert's references. Although time consuming, a lot can be learned through such individuals. Finally, be realistic: any good expert will give away points to the other side.

D. Entering Into a Written Agreement

All expert witnesses should be placed under a written retainer agreement. This applies not only to testifying experts, but also to consulting experts, who are not intended to testify at trial. Topics that should be addressed in the written agreement include fee structure (often broken down by document review, report preparation and trial testimony), billing frequency, ancillary costs and payment terms. Set forth as specifically as possible the scope of the engagement, including the case name, subject matter of expert opinion, preparation of written reports and deposition and/or courtroom testimony. It is important to note in the agreement that the expert's fees are not dependent on the outcome of the case. In a contingency case, note that the fee is the responsibility of the client and that if the deposition is by opposing counsel, you are not responsible for the expert's fee. Be sure to address confidentiality of records and discussions. Finally, approach the relationship with a clear understanding of whether communications between the attorney and the expert are discoverable. Although they are not under state rules, until recently they were discoverable in many federal courts.

Conclusion

If you follow the basic steps outlined above for selecting an expert, and if you exercise good judgment in the selection process, you will find most of your experiences with expert witnesses to be satisfactory. Of course, in the practice of law, no matter how much you prepare, you should always expect the unexpected.

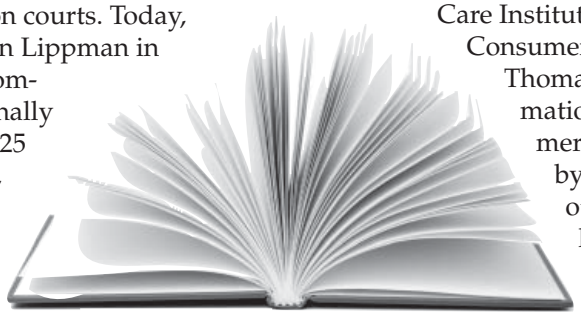
Book Review

Commercial Litigation in New York State Courts, Third Edition (Vols. 2-4D, New York Practice Series)

Robert L. Haig, Esq., Editor-in-Chief, Thomson Reuters, 2010, Last Updated November 2011

Reviewed by Cathi Baglin

The expansive third edition of this comprehensive resource for commercial litigators and judges, *Commercial Litigation in New York State Courts*, reflects the growth and success of the Commercial Division of the New York State Supreme Court. The original three-volume edition was published in 1995 to coincide with the opening of the inaugural Commercial Division courts. Today, as recounted by Chief Judge Jonathan Lippman in Chapter 1 of the third edition, the Commercial Division has become a nationally renowned business court, operating 25 parts in ten counties across the State, including Monroe County and Erie County parts which serve all of the counties in the Seventh and Eighth Judicial Districts. Case management innovations and the development of a broad body of commercial law have been the hallmarks of the success of the Commercial Division. As a result, the third edition of *Commercial Litigation in New York State Courts,* edited by Robert L. Haig, the founder of the Commercial & Federal Litigation Section and co-chair of the 1995 Commercial Courts Task Force which developed the blueprint for the creation of the Commercial Division, has grown to seven volumes, including a soft-cover index and tables of laws, rules, and cases which are updated annually, and a CD-ROM containing jury instructions, forms, and checklists that are also contained in the printed volumes.



The expanded treatise includes 19 new chapters on both procedural and substantive topics of increasing importance in today's New York commercial practice. For example, several new chapters afford strategic help in understanding Commercial Division practice in the context of other proceedings or forums. These include "Comparison with Commercial Litigation in Federal Courts," "Coordination of Litigation Within New York and Between Federal and State Courts" (written by The Hon. Helen Freedman), and "The Interplay Between Commercial Litigation and Criminal Proceedings." There is a chapter devoted to modern "Litigation Technology," including document review and case management software, trial technology, and computer-generated evidence. Other new chapters are devoted to substantive law and practice aids in litigation growth areas such as Employment Restrictive Covenants and Other Post-Employment Restrictions, Not-For-Profit Institution Litigation, Health Care Institution Litigation, Privacy and Security, Consumer Protection (written by the Hon. Thomas Dickerson), E-Commerce, Information Technology Litigation, and Commercial Real Estate Litigation (written by the Hon. Alan Scheinkman and others). The Hon. Victoria Graffeo has contributed a chapter on CPLR Article 78 Challenges to Administrative Determinations to assist commercial practitioners whose clients seek expedited review of governmental rule-making or final administrative decisions that adversely affect a client's business interests or goals.

In addition to the new chapters, the 88 chapters in the second edition have been updated, including nine chapters on the trial of a commercial case originally authored by Stephen Rackow Kaye, who passed away in 2006. His former colleagues at Proskauer Rose LLP revised and updated those important chapters as a tribute to Steve.

The resulting third edition of *Commercial Litigation in New York State Courts* is an unparalleled practice guide that covers, step by step, all aspects of a commercial case. The treatise, which has been cited in at least 45 law reviews, provides in-depth treatment of law, procedure and strategic concerns in commercial cases, as well as forms, checklists, jury charges and other invaluable practice aids. Its 144 principal authors are aptly described by Mr. Haig as a "magnificent team of volunteer litigators and judges." With the skilled efforts and devotion of the Editor-in-Chief, they have created this important work of lasting import. It belongs at-the-ready in the library of every New York commercial litigator.

Report on Proposed Amendments to Federal Rule of Civil Procedure 45

Prepared by the Commercial and Federal Litigation Section Committee on Federal Procedure

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]

(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 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 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.

(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 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 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.

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.

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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Endnotes

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.
>
> * * * *
>
> (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.
>
> * * * *
>
> (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.

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.

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.

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.
> * * * *

(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.

* * * *

(c) Protecting a Person Subject to a Subpoena.

* * * *

(3) Quashing or Modifying a Subpoena.

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

* * * *

(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[.]

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 fee—on a party or attorney who fails to comply.

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.

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.

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